

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Volume 33

2006

Number 1

ARTICLES

Design Professional Contract Risk Allocation: The Impact of Waivers of Consequential Damages and Other Limitations of Liabilities on Traditional Owner Rights and Remedies

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Design professionals seek reallocation of contractual risks with exculpatory provisions that waive consequential damages, provide exclusive remedies, and limit liability. This article discusses risk allocation principles in the owner-design professional relationship and examines the history and enforceability of exculpatory provisions in such contracts. A hypothetical scenario emphasizes the practical effect and risks of such provisions. The goal of this article is to heighten owners' awareness that these provisions significantly impact traditional contract rights and remedies.

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DESIGN PROFESSIONAL CONTRACT RISK ALLOCATION: THE IMPACT OF WAIVERS OF CONSEQUENTIAL DAMAGES AND OTHER LIMITATIONS OF LIABILITIES ON TRADITIONAL OWNER RIGHTS AND REMEDIES

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I. INTRODUCTION AND OVERVIEW

Design professional contracts typically contain provisions that include design responsibilities, inspections of the work, and review of the contractor's payment applications. These provisions are vital to risk allocation and protection of the owner's rights and remedies. With increasing frequency, design professionals seek to reallocate their risks with contract provisions that waive consequential damages, include exclusive remedies, and limit liability. Such provisions can have a significant, and sometimes unexpected, negative impact on traditional owner rights and remedies.

This article will discuss common examples of design professional contract provisions that waive consequential damages, create an exclusive remedy, and limit liability. The article begins with observations of risk allocation principles in the owner-design professional relationship. The historical development, nature, and enforceability of limitation of liability provisions in construction-related contracts will be discussed. This article will illustrate a scenario and analyze the limited case law to emphasize the practical effect, and consequent risks, of such provisions. The focus is from the owner's perspective but with explanation and discussion of the arguments and rationales of design professionals for seeking waivers of consequential damages, creating exclusive remedies, and limiting liability. The goal of this article is to heighten awareness of the growing phenomenon and provide insight and guidance concerning owners' consideration of risk allocation when confronted with these provisions during contract drafting and negotiation.

II. RISK ALLOCATION FUNDAMENTALS

The risks of bad things happening as the result of inadvertent or other improper acts and omissions by the design professional are many. An inadequate design may not be discovered until the structure nears completion, or even later, resulting in extensive and costly demolition and rework. Delay in design, redesign, approving shop drawings, and responding to the contractor's legitimate questions may spawn a contractor claim for delay damages. Ineffective periodic project site visits followed by the design professional's payment certifications to the owner can lead to the owner's overpayment of contract funds and significant loss to the owner.¹

The list of things that can, and do, go wrong is long. The significance of their

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1. By way of example, only, a surety on a bonded project may contend that the owner's overpayment to the contractor releases the surety's obligations under the performance bond, at least to the extent of the overpayment. *See Transamerica Ins. Co. v. Hous. Auth.*, 669 S.W.2d 818, 822 (Tex. Ct. App. 1984) ("It is well settled that a surety on a performance bond is entitled to rely on the architect's Certificate of Completion as the final discharge of its duty on the bond because the architect is the agent or representative of the owner, and his representation is the representation of the owner.").

occurrence is undeniable. *Someone* must, and *someone* will, pay for the resulting loss. However, the questions remain: (a) who *should* bear the loss when bad things happen as the result of the acts and omissions of the design professional; (b) who *can* bear such loss; and (c) who *will* bear such loss?

A. Which party *should* bear the risk of loss?

All construction-related risks, of every kind and in every amount, are allocated to someone, either by contract or by applicable law—no exceptions exist.² If the contract does not expressly, or by legally cognizable inference, allocate each risk among and between the parties, the risk will be allocated by law.³

Absent contract language to the contrary, the law generally allocates risk to the party whose act or omission caused the loss.⁴ The parties consciously may have never contemplated the specific act or omission that led to loss, yet the law provides the framework to allocate the risk of loss.⁵ Embedded in fundamental jurisprudence is the notion that right can be separated from wrong and that the party at fault for causing a loss should compensate the innocent party.⁶ Stated differently, the innocent party ultimately should not suffer the loss caused by the wrongdoer while the latter party suffers no loss.

Thus, in the abstract, the first question posed above in the owner-design professional context will likely be answered objectively by most along the lines just stated: the design professional generally *should* be expected to bear the losses caused by his or her acts and omissions.

B. Which party *can* bear the risk of loss?

The next question is whether, as a practical matter, the design professional *can* effectively shoulder this allocation of risk without limitation. The corollary question that necessarily follows a negative answer to the “*can*” question is whether, as an equally practical matter, the owner is in position to effectively

2. See *Robinson v. United States*, 330 F. Supp. 2d 261, 287 (W.D.N.Y. 2004) (“[T]he common law of torts is, at its foundation, a means of apportioning risks and allocating the burden of loss.” (quoting *Waters v. N.Y. City Hous. Auth.*, 505 N.E.2d 922, 923 (N.Y. 1987))); *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1137 (E.D. Cal. 2001) (“[I]f no other method can adequately interpret the contractual provision in question, the court allocates the risk of the unforeseeable loss to the more efficient risk bearer.”); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002) (“[T]he general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss . . .”). See also 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.4–1.10 (2d ed. 1990) [hereinafter 1 FARNSWORTH]; 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.1 (2d ed. 1990) [hereinafter 2 FARNSWORTH]; JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 1-1-1-7 (3d ed. 1987).

3. See *supra* note 2 and all sources cited therein.

4. See *supra* note 2 and all sources cited therein.

5. See *supra* note 2 and all sources cited therein. See also ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 200–03 (3d ed. 2000); Ian Ayers & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

6. See *supra* note 2 and all sources cited therein.

shoulder the reallocation of this risk.

Most design professionals do not possess sufficient independent wealth to pay all losses that may be occasioned by their acts or omissions and, without insurance coverage, each project could turn into a “bet the business” risk. However, for some of the same reasons that individuals routinely carry personal liability, automobile, and homeowners’ insurance coverage, design professionals have available professional liability insurance coverage to protect them from significant loss in the event that their acts and omissions cause damage to their project owners. As with personal liability insurance, the premiums will vary with the limits of coverage, deductibles, and risk history.⁷

Accordingly, the design professional *can* effectively accept the allocation of risk for loss without “betting the business” in the process and without seeking a waiver of consequential damages, an unreasonably low cap on such damages, or a limitation of the available remedies. The insurance is routinely available, and the coverage includes consequential damages to the limits of the policy. The cost of the insurance coverage is not unreasonable, especially considering that the cost (i.e., insurance premiums) will be borne by ultimate consumers of design professional services—the owners.

C. Which party *will* bear the risk of loss?

The most important question posed is, in the context presented, to whom *will* the risk of loss be allocated? For a number of compelling reasons (*e.g.*, the design professional is in the best position to control the risk; the party at fault should be responsible; the innocent party should not be made to suffer while the wrongdoer does not; insurance is readily available to cover the risk and eliminate the potential for economic ruin to the design professional), the risk of the owner’s damages arising from the design professional’s acts and omissions *should* and *can* remain where the law otherwise places it—with the design professional. Despite this conclusion, the question remains whether some compelling reason exists to contractually shift the risk of loss to the owner.

Perhaps the most forthright response of the design professional community to the issue is two-fold. The current economics of the design profession require that most design professional firms (1) cut costs wherever possible and (2) maximize profits wherever they can be found. Over time, the elimination, or significant reduction, of liability (whether by waving consequential damages, by limiting the available remedies, by capping the liability, or some combination thereof) may be expected to significantly reduce the cost of professional liability insurance,

7. Professional liability premiums are typically based upon the design professional’s gross billings. The higher the gross billings, the more the premium will be, at least in absolute dollars. In two recent observed instances, the premiums were 1.18% and 1.79% of gross billings for \$1 million and \$3 million limits of coverage, respectively. The professional liability policy routinely covers both direct and consequential damages arising out of the design professional’s acts and omissions. However, it does not cover intentional acts of wrongdoing or fraudulent acts. Information contained in this footnote is based on observations made by the authors throughout their years of legal experience.

resulting in a corresponding increase in profit for the design professional. Moreover, reduction or elimination of risk will better ensure that the design professional's net profits will not be consumed or exceeded by the owner's offsetting claims. This obviously desirable result for the design professional creates a correspondingly undesirable result for the owner, as illustrated in Part III.

III. THE SCENARIO

A. The project.

The new \$50 million multi-use stadium is seventy percent complete. In eight months, the seats will all be filled for the football team's home opener. After that, more football, soccer, lacrosse, and outdoor concerts are scheduled. This project, unlike most, will generate profits for the school.

B. The problem, the investigation, and the fix.

While walking the project site, the owner's project manager notices horizontal cracking in one of the concrete support columns. Upon a closer look, the cracks are apparent in six of the forty support structures. The project is suspended for investigation.

An investigation by structural engineers reveals that the stadium is sinking under its own weight at these six locations. Six support columns must be demolished to the footings, retrofitted, re-poured, and replaced. The remedial design, demolition, and reconstruction will take at least three months. The demolition and repair costs are expected to exceed \$4 million.

C. The fault and the fallout.

The forensic investigations conclusively determine that the footings for the failed structural support columns were not designed for the soil conditions at those locations. The architect had designed the footings and structural support columns, and the architect had inspected and approved the excavation and soil before the contractor poured any concrete. The architect also had certified the contractor's pay applications for this work.

In addition to the increase to the contract price for the repair costs, the contractor asserts that the suspension of the project for the forensic investigation and redesign delayed the scheduled work and caused impact damages. The contractor seeks an additional \$1 million in compensation from the owner, including loss of home office productivity and unabsorbed overhead, all incurred while the project was suspended for investigation and remedial design.

The architect's original design and contract administration fee was six percent of the \$50 million construction cost, or \$3 million. The owner had already paid the architect \$2 million. The architect, a large international firm, asserted that the remedial design fee would be approximately \$100,000. The architect, however, acknowledged fault and offered to provide the remedial design at no cost, with one

condition: the owner's written assurance that the \$1 million balance of the architect's fee would be paid.

The owner's analysis indicates that, in addition to the extra \$4 million in repair costs and the contractor's \$1 million claim, over \$2 million in profits projected to be generated by the stadium will be lost because of the delay. The forensic engineers' investigation cost \$200,000. Additional interest will increase the project cost by over \$800,000. Moreover, the setback will have a chilling effect on the millions of dollars in pledged, but unremitted, private contributions for the project. Time to call the lawyers.

D. The plight of the owner's counsel.

The owner's counsel begins her work by meeting with the construction team members and reviewing the architect's, contractor's, and forensic engineers' relevant correspondence and reports. After gaining an understanding of the issues, counsel reviews the architect's contract, which is the most important document concerning the legal relationship with the owner. The contract will determine whether the owner or the architect assumed the risk for the structural failures that will cost her client over \$8 million.

E. The Architect's Contract.

Counsel's review revealed that the architect's contract was American Institute of Architects (AIA) Document B141-1997, the Standard Form of Agreement Between Owner and Architect (the Architect's Contract). The Architect's Contract contained section 1.3.6 from the standard form, Claims for Consequential Damages: "The Architect and the Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement."⁸

In addition, the architect modified the standard form to include two additional provisions. The first provision, section 2.9.1.1, Exclusive Remedy, states:

In the event that any of the services of the Architect performed under this Agreement are adjudged to fail to meet the standard of ordinary care applicable to the architecture profession in this state, such services shall be deemed "Defective Services." The Architect shall re-perform all such "Defective Services" at the Architect's sole cost and expense, and such re-performance shall be the Owner's sole and exclusive remedy for such "Defective Services."

The second provision, section 2.9.1.2, Limitation of Liability, states:

Subject to Sections 1.3.6 and 2.9.1.1, which shall supersede and prevail, the extent of the Architect's liability to the Owner for any and all claims and damages recoverable under the terms of this Agreement is limited to the fee actually paid by the Owner to the Architect under this

8. *AIA Document B141-1997: Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services*, in THE AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE § 1.3.6 (13th ed. 2001) [hereinafter AIA Document B141-1997] (included on CD-ROM accompanying the handbook).

Agreement.

Counsel also noted that the Architect's Contract did not (1) contain any detailed design duties or (2) require professional liability insurance.⁹ The owner signed the Architect's Contract without any modifications other than those discussed.

Counsel is troubled and concerned by the waiver of consequential damages, the exclusive remedy, and the limitation of liability in the Architect's Contract. She wonders whether the architect carried professional liability insurance and how much, and whether insurance even matters given these limitations of liability. Why didn't the client obtain counsel's review before signing the contract? Why would any owner agree to include these provisions in any design professional contract? Are such provisions enforceable? If so, what is the effect of these provisions on the client's statutory, common law, and fundamental contract rights to seek over \$8 million in damages from an architect that candidly admits fault? The analytical journey begins.

IV. THE GENESIS AND NATURE OF DAMAGES WAIVERS, EXCLUSIVE REMEDIES,
AND LIMITATIONS OF LIABILITY

A. The UCC made limitations of liability fashionable and generally enforceable.

Contractual limitations of liability have existed for centuries in various forms.¹⁰ These provisions were introduced into construction-related contracts mostly during the last quarter-century, perhaps the result of the adoption and enactment of some version of Article 2 of the Uniform Commercial Code (UCC) in forty-nine states by 1967.¹¹ Each state to adopt the UCC gave imprimatur to such provisions as commercially reasonable in contracts for the sale of goods.¹²

Historically, the courts utilized basic principles of contract law to determine

9. AIA Document B141-1997 contains few express design professional duties but does provide "[t]he Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work." AIA Document B141-1997, *supra* note 8, § 2.6.2.2. AIA Document B141-1997 does not require that the architect carry professional malpractice or errors and omissions insurance.

10. 3 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.18, at 936 (2d ed. 1998) [*hereinafter* 3 FARNSWORTH] (stating that prior to the "latter part of the seventeenth century," courts enforced "penal bonds" for the "sum fixed in the bond, regardless of the amount of the loss caused"). See *Hart v. Pa. R.R. Co.*, 112 U.S. 331 (1884) (noting a limitation of liability in a contract for carriage of livestock).

11. CALAMARI & PERILLO, *supra* note 2, § 1-7, at 15. Louisiana is the only state that has not enacted some version of Article 2 of the UCC. *Id.*

12. See U.C.C. § 2-719 (2003) (enabling parties to limit or exclude remedies, limit or alter the measure of damages, or limit or exclude consequential damages); 1 FARNSWORTH, *supra* note 2, § 1.9, at 29-32; CALAMARI & PERILLO, *supra* note 2, § 1-7, at 15-17. See also *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977).

whether a particular waiver or limitation was enforceable.¹³ Following the widespread adoption of the UCC, the decisions continued to apply fundamental principles of contract law; however, the courts buttressed their decisions by reference to, or adoption of, the rules codified by the UCC.¹⁴ Regardless of whether the courts applied the common law of contracts or the doctrines developed by the UCC, the results concerning enforceability of these provisions were generally consistent.¹⁵

Virtually every jurisdiction to have decided the question permits enforcement of consequential damages waivers, exclusive remedies, and limitations of liability in construction-related contracts.¹⁶ Particularly in the context of sophisticated parties in a commercial setting,¹⁷ the courts generally conclude that so long as the provisions are not (1) unconscionable,¹⁸ (2) against public policy,¹⁹ or (3) prohibited by statute,²⁰ the parties have a right to bargain for their own contractual rights, remedies, and liabilities.²¹

B. The AIA introduced a waiver of consequential damages into standard

13. See 1 FARNSWORTH, *supra* note 2, § 1.10, at 32–37; CALAMARI & PERILLO, *supra* note 2, § 1-7, at 15–17.

14. See *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195 (3d Cir. 1994) (referring to UCC for guidance regarding limitation of liability in an architectural service contract); *Wausau Paper Mills Co. v. Chas. T. Main, Inc.*, 789 F. Supp. 968 (W.D. Wis. 1992) (applying UCC unconscionability principles to the exclusive remedy provision of an engineering services contract); *Lincoln Pulp & Paper Co.*, 436 F. Supp. at 275–78 (concluding that UCC did not control engineering and design contract limitation of liability but analyzing issues with reference to UCC); *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159 (N.J. Super. Ct. Law Div. 1996) (evaluating limitation of liability clause in an architectural services agreement with reference to the UCC).

15. See *supra* note 14 and all sources cited therein.

16. See *supra* note 14 and all sources cited therein. See also Michael S. Zetlin & Francine M. Chillemi, *Building a Safe Haven: Clauses Imposing Monetary Limits on Designer Liability*, CONSTRUCTION LAW., Jan. 2000, at 5; Lynn R. Axelroth, *Mutual Waiver of Consequential Damages—The Owner’s Perspective*, CONSTRUCTION LAWYER, Jan. 1998, at 11.

17. 1 FARNSWORTH, *supra* note 2, § 4.28, at 331–39.

18. See *Hume v. United States*, 132 U.S. 406 (1889); *Civic Ctr. Drive Apartments Ltd. P’ship v. Sw. Bell Video Servs.*, 295 F. Supp. 2d 1091 (N.D. Cal. 2003); *Mistry Prabhudas Manji Eng’g Pvt., Ltd. v. Raytheon Eng’rs & Constructors, Inc.*, 213 F. Supp. 2d 20 (D. Mass. 2002). See also RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1979).

19. See *Valhal Corp.*, 44 F.3d 195; *Marbro, Inc.*, 688 A.2d 159.

20. See *Sear-Brown Group v. Jay Builders, Inc.*, 665 N.Y.S.2d 162 (N.Y. App. Div. 1997) (applying statutory prohibition only “where a party seeks to protect itself from claims for personal injury and physical damage to property,” not to economic losses); *Bohn Heat Transfer v. Gen. Elec. Co.*, 574 N.E.2d 898, 901 (Ill. App. Ct. 1991) (explaining that while “the limit on GE’s liability is rendered invalid to the extent it attempts to protect GE from liability due to its negligence,” the statute stipulates “exemptions from liability for economic losses are not rendered void or unenforceable” (quoting *Long Island Lighting Co. v. IMO Delaval, Inc.*, 668 F. Supp. 237, 244 (S.D.N.Y. 1987))).

21. See *Valhal Corp.*, 44 F.3d at 204 (“It is a reasonable allocation of risk between two sophisticated parties . . .”); *Wausau Paper Mills Co.*, 789 F. Supp. at 975 (stating that waiver of consequential damages “is a by-product of risk allocation”); *Marbro, Inc.*, 688 A.2d at 162 (“A court should ordinarily ‘enforce contracts as made by the parties.’” (citations omitted)).

form contracts.

In 1997, the bona-fide transition of such provisions into construction-related contracts drew industry-wide attention when the AIA introduced a mutual waiver of consequential damages in its standard forms of owner-architect and owner-contractor agreements.²² The AIA's adoption of a mutual waiver of consequential damages in its standard forms of contract was a bellwether event because the AIA forms are the "benchmark" and "most influential documents" in the construction industry.²³ However, relatively little case law exists concerning the interpretation and treatment of consequential damages waivers, exclusive remedies, and limitations of liability provisions in purely construction-related contracts.²⁴

C. Limitations of liability.

Limitations of liability can take many forms and may generally include exclusive remedies and damages waivers.²⁵ Limitations of liability also may provide a specific dollar limit, or "cap," on the exposure of one party for the damages of another.²⁶ Various methodologies are utilized to arrive at a cap. Common approaches including limiting liability to the party's fee, the contract price, available insurance, or some other amount presumptively reflective of the agreeable risk allocation between the parties.²⁷ Liability caps generally are enforceable unless "the cap is so minimal compared with the expected compensation, that the concern for the consequences of a breach is drastically

22. AIA Document B141-1997, *supra* note 8, § 1.3.6; *AIA Document A201-1997: General Conditions of the Contract for Construction*, in THE AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE, § 4.3.10 [hereinafter AIA Document A201-1997] (included on CD-ROM accompanying the handbook). The current draft 2007 editions of the architect and contractor agreements retain the mutual waiver of consequential damages. See Axelroth, *supra* note 16.

23. The American Institute of Architects, History of Contract Documents, http://www.aia.org/docs_history (last visited Oct. 20, 2006).

24. The AIA forms of contract contain mandatory arbitration provisions. AIA Document B141-1997, *supra* note 8, § 1.3.5; AIA Document A201-1997, *supra* note 22, § 4.6. Consequently, most of the disputes relating to the AIA waiver of a consequential damages provision can never be substantively evaluated by the courts. *But see Valhal Corp.*, 44 F.3d at 198 (liability cap in architectural firm's proposal); *Wausau Paper Mills Co.*, 789 F. Supp. at 970 (waiver of consequential damages in an engineering services contract); *Marbro, Inc.*, 688 A.2d at 163 (exclusive remedy clause in an architectural services agreement).

25. Zetlin & Chillemi, *supra* note 16.

26. See *Valhal Corp.*, 44 F.3d at 202; *Mistry Prabhudas Manji Eng'g Pvt., Ltd.*, 213 F. Supp. 2d at 25-26; *Sear-Brown Group*, 665 N.Y.S.2d at 163; *Estey v. MacKenzie Eng'g, Inc.*, 927 P.2d 86, 89 (Or. 1996); *Marbro, Inc.*, 688 A.2d at 162-63.

27. See *Valhal Corp.*, 44 F.3d at 198 (liability not to exceed \$50,000 or the fee); *Mistry Prabhudas Manji Eng'g Pvt., Ltd.*, 213 F. Supp. 2d at 22 (liability limited to 10% of amount engineer paid); *Estey*, 927 P.2d 86 (liability limited to "the Contract Sum"). See also Zetlin & Chillemi, *supra* note 16; James D. Weier, Seth D. Lamden & Ric D. Glover, *Preserving Consequential Damages Through Limited Waivers and Insurance Coverage*, CONSTRUCTION LAWYER, Summer 2002 (proposing that consequential damages waivers should be limited to uninsured consequential damages).

minimized.”²⁸

Liability caps typically establish explicit, measurable, bargained-for amounts or limits on one party’s maximum exposure to, and the other party’s maximum recovery of, damages. Liability caps are perhaps the most straightforward form of limitation of liability for an owner to evaluate in the context of risk allocation analysis. An owner, certainly with assistance of competent counsel, should be able to anticipate the project’s major financial risks and evaluate whether the design professional’s maximum monetary contribution for a loss will be sufficient to reasonably offset the risk that the owner is unwilling, or unable, to absorb. In the Scenario, for example, the architect’s exposure to damages is capped at its fee, six percent of the \$50 million project cost, or \$3 million.²⁹ At a minimum, the owner has a definite, hard dollar maximum recovery amount to evaluate against typical losses that might be caused by the architect.

D. Exclusive remedies.

An exclusive remedy is a type of limitation of liability.³⁰ The UCC warranty provisions popularized exclusive remedies by permitting the seller to identify and agree to provide a specific remedy in response to a breach of contract related to the sale of goods.³¹ Exclusive remedies have extended beyond the UCC to contracts where the sale of goods is mixed with services³² and to pure services contracts.³³ The commonality between exclusive remedies is that these provisions recite a specific contracted-for remedy in lieu of other contract, statutory, or common law remedies.³⁴ Typically, exclusive remedies substitute some repair or performance obligation for dollar damages.³⁵

28. *Marbro, Inc.*, 688 A.2d at 162. *See also Valhal Corp.*, 44 F.3d at 204.

29. *See supra* Parts III.C, III.E.

30. *See Wausau Paper Mills Co.*, 789 F. Supp. at 975 (ordering reperformance of engineering services that failed to meet the standard of care); *Bohn Heat Transfer*, 574 N.E.2d at 899 (stating that the “exclusive remedy for defective repair was for GE to re-perform the service, or replace defective parts”); *N.Y. State Elec. & Gas Corp. v. Westinghouse Elec. Corp.*, 564 A.2d 919, 930 (Pa. Super. Ct. 1989) (limiting remedy to repair or replacement); *Koppers Co. v. Inland Steel Co.*, 498 N.E.2d 1247, 1256 (Ind. Ct. App. 1986) (limiting remedy to correction of engineering drawings without charge).

31. U.C.C. § 2-719 (2004).

32. *See Bohn Heat Transfer*, 574 N.E.2d at 901 (limiting the remedy to contractual provisions for breach of contract and breach of implied warranty for services performed for goods sold); *N.Y. State Elec. & Gas Corp.*, 564 A.2d at 924–25 (holding the exclusive remedy for improper performance of services and defective materials was provided in the contract for sale of two turbine generators).

33. *See Wausau Paper Mills Co.*, 789 F. Supp. at 975 (enforcing the exclusive remedy provided in the contract for design engineering services); *Koppers Co.*, 498 N.E.2d at 1251 (recognizing that service contracts can provide limitations on damages, but must have “great particularity and clear, direct and unmistakable language”).

34. *See Wausau Paper Mills Co.*, 789 F. Supp. at 970 (prohibiting consequential damages in any way and providing free repair for faulty service); *Koppers Co.*, 498 N.E.2d at 1249 (limiting damages for breach of contract to free repair).

35. *See Wausau Paper Mills Co.*, 789 F. Supp. at 970 (stating that the client’s exclusive remedies are provided for in the contract); *Koppers Co.*, 498 N.E.2d at 1249 (providing that if the

An exclusive remedy may be difficult for an owner to fully appreciate and evaluate against the panoply of known or potential risks. The primary difficulty manifests in (1) anticipating, in advance, the types or elements of losses likely to result from a breach and (2) evaluating whether the exclusive remedy adequately substitutes for those potential losses. An owner must recognize that a repair or replacement exclusive remedy likely will preclude recovery, or limit the amount, of money damages.³⁶

The difficulty in evaluating an exclusive remedy is exacerbated if the exclusive remedy is in conjunction with another limitation of liability, such as a liability cap.³⁷ An owner and counsel first must clearly understand the basic definition of the common, but legally significant, word “exclusive” placed before the less common yet more legally significant word “remedy.” “Exclusive” means “sole” or “shutting out.”³⁸ “Remedy” means “[t]he means of enforcing a right or preventing or redressing a wrong.”³⁹ The case law suggests that dollar damages become applicable only if the exclusive remedy fails its essential purpose,⁴⁰ has an application clearly separate from the exclusive remedy such as an indemnity provision,⁴¹ or merely establishes a measure of damages.⁴²

In the Scenario, the “exclusive remedy” for “Defective Services,” a contractually defined phrase, is “re-performance.”⁴³ Whether “re-performance of the Defective Services” will be a sufficient “sole” remedy should be dependant upon the value of “re-performance” of the “Defective Services” weighed against potential losses resulting from “Defective Services.” Loss resulting from “Defective Services” will always include the expense of correcting the services (i.e. the redesign), which is covered by the exclusive remedy. Potential losses include the expense to remedy work installed based upon the “Defective Services” (i.e. the installed concrete support columns) and other expenses (i.e. loss of use, lost profits, forensic investigation, etc.), *none* of which are covered by the exclusive remedy.

cost to compete exceeded the unpaid balance of the contract, the architect is liable and may pay the difference).

36. See *Koppers Co.*, 498 N.E.2d at 1251 (noting that the exclusive remedy provision sets “the measure of damages, [but does] not preclude them”).

37. See *Wausau Paper Mills Co.*, 789 F. Supp. at 975 (“The warranty clause makes reperformance plaintiff’s exclusive remedy, with the cost of the remedial services not to exceed an aggregate amount equal to the amount paid by plaintiff under the contract.”).

38. BLACK’S LAW DICTIONARY 352 (5th ed. 1979).

39. BLACK’S LAW DICTIONARY 1320 (8th ed. 2004).

40. See *N.Y. State Elec. & Gas Corp.*, 564 A.2d 919 (stating that the exclusive remedy did not fail in its essential purpose). See also *Wausau Paper Mills Co.*, 789 F. Supp. at 974 (noting that the parties were sophisticated and capable of understanding the contractual provisions limiting liability).

41. See *Valhal Corp.*, 44 F.3d at 202–03 (distinguishing indemnity provisions from other limitations of liability); *Bohn Heat Transfer*, 574 N.E.2d at 901 (arguing that the limit on liability may be invalid to the extent it attempts to protect from liability resulting from negligence).

42. See *Bohn Heat Transfer*, 574 N.E.2d at 901; *Koppers Co.*, 498 N.E.2d at 1251 (stating that Pennsylvania courts have interpreted exclusive remedy provisions as “setting the measure of damages, not as precluding them” (citations omitted)).

43. See *supra* Part III.E.

E. Waivers of consequential damages.

A waiver of consequential damages also is a form of limitation of liability.⁴⁴ Upon a breach of contract,⁴⁵ two types of damages may be recovered: direct, or general, damages; and indirect, or consequential, damages.⁴⁶ Direct damages “follow naturally from the type of wrong complained of” and are “reasonably expected.”⁴⁷ Consequential damages are “[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.”⁴⁸ Thus, waivers of consequential damages are intended to insulate a party from damages that do not “arise naturally or ordinarily from breach of contract” and damages that are not normally “expected to result from breach.” Like other limitations of liability, waivers of consequential damages became popularized by the UCC before evolving into pure services contracts.⁴⁹

Waivers of consequential damages may be very appropriate for various contracts, including pure services contracts. Waivers of consequential damages, however, are unique from liability caps and exclusive remedies. Based on well-developed case law, owners and counsel can obtain helpful guidance on the meaning, effect, and enforceability of liability caps and exclusive remedies.⁵⁰ A distinct and disturbing uniqueness of a waiver of consequential damages in the context of the case law is (1) a lack of clarity and certainty as to the types or elements of losses that are consequential damages; (2) whether certain types or elements of losses are consequential damages may be an issue of fact; and (3) the types or elements of losses that are consequential damages may actually change, depending upon the relationship of the parties.

A common definition of “waiver” is the “intentional or voluntary relinquishment of a *known* right.”⁵¹ The “right” waived is access to consequential damages, whatever are those types or elements of losses.⁵² Case law indicates that consequential damages are sometimes *unknown*, and arguably *unknowable*, until after the loss is sustained and the dispute is adjudicated.⁵³ Thus, the prospect of

44. See Zetlin & Chillemi, *supra* note 16; Axelroth, *supra* note 16.

45. CALAMARI & PERILLO, *supra* note 2, § 14-5, at 595.

46. *Id.* at 593–96.

47. BLACK’S LAW DICTIONARY 417 (8th ed. 2004).

48. *Id.* at 416.

49. U.C.C. § 2-719 (2005) (stating that parties may limit or exclude consequential damages). See also 1 FARNSWORTH, *supra* note 2, § 4.28, at 335–39.

50. See *supra* notes 26–28, 30 and accompanying text.

51. BLACK’S LAW DICTIONARY 1417 (5th ed. 1979) (emphasis added). A subsequent edition of BLACK’S LAW DICTIONARY defines waiver as “[t]he voluntary relinquishment or abandonment — express or implied — of a legal right or advantage.” See BLACK’S LAW DICTIONARY 1611 (8th ed. 2004).

52. *Wausau Paper Mills Co.*, 789 F. Supp. at 975 (“That plaintiff’s losses went beyond what can be remedied by reperformance is a by-product of risk allocation . . .”).

53. *Mead Corp. v. McNally-Pittsburgh Mfg. Corp.*, 654 F.2d 1197 (6th Cir. 1981) (affirming the trial court’s judgment to award damages to defendant construction company because defendant could not demonstrate that the damages awarded were improperly assessed); *Niagara Mohawk Power Corp. v. Stone & Webster Eng’g Corp.*, No. 88-CV-819, 1992 WL 121726 (N.D.N.Y. May 23, 1992) (denying defendant’s motion for summary judgment to dismiss

waiving consequential damages compels the owner to confront the *unknown*, and sometimes the *unknowable*, as a predicate to risk allocation decisions.

V. THE ABYSS OF CONSEQUENTIAL DAMAGES

An owner should ask counsel, “What are consequential damages?” Counsel’s short, truthful answer should be that no one knows what consequential damages are or may be, at least not with predictability or uniformity.⁵⁴ At best, an owner can understand what consequential damages *may* include and that the final answer could remain unknown until a dispute is ultimately resolved. Perhaps because of the tri-partite relationship between an owner, the architect, and the contractor, waivers of consequential damages provisions in design professional contracts, in particular, may present unanticipated, even illogical, problems for owners. Owner’s counsel must realize that the ability to memorize and recite the legal definitions of direct and consequential damages is only the first step toward understanding and advice concerning the practical effect of a waiver of consequential damages.

A. Consequential, or “indirect,” damages compared with direct damages.

The phrase “consequential damages” is used with great frequency in law schools, legal textbooks, and contracts. Often, the phrase “indirect damages” is used as a synonym for consequential damages because courts have sought to distinguish consequential, or indirect, damages from direct, or general, damages.⁵⁵ The need for the distinction finds its genesis in 1854 with the case of *Hadley v. Baxendale*.⁵⁶

In *Hadley*, the court divided contract damages into two categories.⁵⁷ The first category is damages “as may fairly and reasonably be considered . . . arising naturally, i.e., according to the usual course of things, from such breach of contract itself.”⁵⁸ Category one damages are known as general, or direct, damages.⁵⁹ The

all claims for consequential damages on grounds that they are contractually barred); Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F. Supp. 1442 (S.D.N.Y. 1986) (concluding that whether the parties’ contractual limitation on consequential damages should be given effect is reserved for trial); Portland Gen. Elec. Co. v. Bechtel Corp., Civil No. 79-103, 1980 U.S. Dist. LEXIS 9712 (D. Or. June 4, 1980) (holding that pursuant to the release provision in the agreement between parties, builders were not liable for any consequential damages arising from the shut down of owners’ nuclear power plant); Am. Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D.N.Y. 1976) (finding the precise demarcation between direct and consequential damages is a question of fact to be resolved at trial). *But see* Axelroth, *supra* note 16, at 12 (demonstrating that courts often fail to classify damages as compensatory or consequential).

54. Axelroth, *supra* note 16, at 15.

55. Supervalu Operations, Inc. v. Ctr. Design, Inc., 524 S.E.2d 666, 671 (W. Va. 1999) (“For direct damages ‘there is no requirement that the parties must have actually anticipated them because they are a natural consequence of the breach.’” (quoting Desco Corp. v. Harry W. Trushel Constr. Co., 413 S.E.2d 85, 87 (W. Va. 1991))).

56. 156 Eng. Rep. 145 (Ex. Ch. 1854).

57. *Id.* at 151.

58. *Id.*

second category is “such [damages] as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”⁶⁰ Category two damages are known as consequential, or indirect, damages.⁶¹

A determination of whether certain breach of contract damages are direct or consequential is not harnessed by an exact formula or a bright-line test.⁶² Some categories of damages appear to fit neatly in the consequential damages bucket, but the case law is inconsistent.⁶³ Damages such as lost future profits, loss of use, financing, business and reputation, loss of management or employee productivity, and home office overhead specifically are identified by the AIA in AIA Document A201-1997 as consequential damages.⁶⁴ The AIA’s definition of these categories of consequential damages can be supported by some, but not all, case law;⁶⁵ however, owners must understand that (1) the courts are confused by consequential damages, and (2) the definition of consequential damages may change depending upon the type of loss and the relationship between the parties.

B. An insurmountable problem for owners and counsel lies in defining consequential damages in the shadow of judicial conflict and confusion.

The general rule is that the owner’s measure of damages for breach of contract is the cost of repair or the diminution in value.⁶⁶ Subject to certain exceptions, the principle that the owner’s costs of repair are direct damages if sought against a contractor or an architect is well-accepted and uniform throughout the country and among legal scholars.⁶⁷ In addition to direct damages, the owner may be entitled to recover “consequential damages.”⁶⁸ These general, common law rules appear simple enough, but in application the determination as to whether specific losses are direct damages or consequential damages varies by jurisdiction, judicial philosophy, and interpretation.

59. CALAMARI & PERILLO, *supra* note 2, § 14-5, at 594–95.

60. 156 Eng. Rep. at 151.

61. CALAMARI & PERILLO, *supra* note 2, § 14-5, at 594–95.

62. Axelroth, *supra* note 16, at 11.

63. Compare *Fairfax County Redevelopment & Hous. Auth. v. Hurst & Assocs. Consulting Eng’rs, Inc.*, 343 S.E.2d 294 (Va. 1986) (stating that owner’s extended financing costs are “direct,” not consequential, damages), with *Stamtec, Inc. v. Anson Stamping Co.*, 346 F.3d 651, 658 (6th Cir. 2003) (“[I]nterest costs are consequential damages . . .”), and *Bill v. Thiessen*, 417 N.W.2d 197, No. 87-0056, 1987 WL 29663, at *2 (Wis. Ct. App. Oct. 13, 1987) (“[I]nterest payments are consequential damages because the interest represents the value of the use of money lost . . .” (citations omitted)).

64. AIA Document A201-1997, *supra* note 22, § 4.3.10.

65. *Id.* See also Axelroth, *supra* note 16.

66. CALAMARI & PERILLO, *supra* note 2, § 14-29, at 633.

67. See *id.*; 11 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1089 (interim ed. 2002); CHARLES T. MCCORMACK, HANDBOOK ON THE LAW OF DAMAGES § 168 (1935); 11 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 1363 (3rd ed. 1970). See also 2 ROBERT F. CUSHMAN & JAMES J. MYERS, CONSTRUCTION LAW HANDBOOK § 30.01[B][3][b][ii] (1999).

68. CALAMARI & PERILLO, *supra* note 2, § 14-29, at 633–37.

1. The judge does not know—let the jury decide.

The jurisprudential reality is that the technical definitions of, and legal distinctions between, direct and consequential damages breakdown upon application of particular facts. Learned judges cannot easily or consistently demarcate the differences or draw distinction between direct and consequential damages, yielding lack of uniformity and leaving counsel with little guidance or predictability. Some courts have expressly acknowledged the difficulty in differentiating between direct and consequential damages. In *Mead Corp. v. McNalley-Pittsburgh Manufacturing Corp.*,⁶⁹ the court candidly admitted, “the matter . . . is not so simple. We first note the difficulty in drawing a clear distinction between ‘consequential damages’ and damages recoverable under the general remedy provisions”⁷⁰ Other courts have left the issue to the jury.⁷¹ In *Niagara Mohawk Corp. v. Stone & Webster Engineering Corp.*,⁷² the court recited the standard definitions, but abdicated the issue to the fact-finder, stating, “[C]onsequential damages are recoverable only when they are both foreseeable and within the contemplation of the parties at the time the contract was made. Generally, whether the damages are direct or consequential is an issue of fact that must be reserved for trial.”⁷³ Similarly, in *McNally Wellman Co. v. New York State Electric & Gas Corp.*,⁷⁴ the court opined that “ordinarily the precise demarcation between direct damages and incidental or consequential damages is an issue of fact.”⁷⁵

These decisions highlight a fundamental problem with waivers of consequential damages. Counsel’s advice should be based on a degree of reliable predictability, usually based on the case law. Without the reliable predictability of case law guidance as to the elements and types of losses that a jurisdiction considers consequential damages, counsel may wish to consider advising an owner against the waiver of the unknown.

69. *Mead Corp.*, 654 F.2d 1197.

70. *Id.* at 1207. See *Portland Gen. Elec. Co.*, 1980 U.S. Dist. LEXIS 9712, *3 n.3 (“[T]he only issue before the court, however, is whether Bechtel is liable for consequential damages; it is not necessary at this stage to determine the nature of the damages involved in this case”).

71. Axelroth, *supra* note 16 (discussing the difficulty and confusion in attempting to define “consequential damages”).

72. 1992 WL 121726.

73. *Id.* at *28. See *Long Island Lighting Co.*, 646 F. Supp. at 1459 n.30 (“We reserve for trial the question of whether the plaintiff’s claimed damages would be characterized as direct, incidental, or consequential”); *Am. Elec. Power Co.*, 418 F. Supp. at 459 (“[T]he precise demarcation between direct and consequential damages is a question of fact . . .”).

74. 63 F.3d 1188 (2d Cir. 1995). See *Niagara Mohawk Power Corp.*, 1992 WL 121726, *28 (stating “whether damages are direct or consequential is an issue of fact which must be reserved for trial” (citations omitted)).

75. *McNally Wellman Co.*, 63 F.3d. at 1195.

2. Consequential damages and the relationship analysis: claims against the contractor or design-builder versus claims against the design professional.

Some case law suggests that the relationship of the parties may dictate whether certain damages are consequential or direct. The state that has heightened the importance of a relationship analysis, though indirectly, is Virginia because of the one-year statute of limitations for “non-direct” damages.⁷⁶

a. *Claims against the contractor.*

In the seminal Virginia case, *Richmond Redevelopment & Housing Authority v. Laburnum Construction Corp.*,⁷⁷ the owner sued a contractor, and the court distinguished between the owner’s direct and “non-direct” damages.⁷⁸ The owner sought damages from a contractor for a housing unit destroyed by an explosion resulting from a defective gas pipe joint.⁷⁹ The primary issue before the court was whether the state’s one-year statute of limitations for “non-direct damages” barred the owner’s claims for damages caused by the explosion.⁸⁰ The court observed:

In the case under consideration the gravamen of the plaintiff’s claim . . . was that it had been induced to part with its money on account of a breach of warranty Thus *the parting with the money under the alleged circumstances was the direct damage* suffered by plaintiff and *the damage caused by the explosion for which recovery is here sought was an indirect or consequential result of the initial or direct wrong with which the defendant is charged.*⁸¹

The court analyzed the series of events resulting in the explosion:

In order for the damage here complained of to be produced it was necessary, first, that the allegedly defective union break; second, that the gas escaping from the break proceed along the pipeline beneath the building rather than to the surface of the soil; third, the gas be confined under the building rather than escape through the various vents in the walls; and fourth, that the gas be ignited by a flame or spark from some foreign source, thus causing the explosion.⁸²

The court held that “[t]he resultant damage thus caused cannot be classed as direct damage, for had the allegedly faulty joint (the direct damage) not broken, permitting gas to escape, etc., the indirect or consequential damage here sued for would not have occurred.”⁸³

Thus, the owner’s direct damages against the contractor was the “parting with

76. VA. CODE ANN. § 8-24 (1950).

77. 80 S.E.2d 574 (Va. 1954).

78. *Id.* at 576.

79. *Id.* at 576–77.

80. *Id.* at 576–78.

81. *Id.* at 579 (emphasis added).

82. *Id.* at 579.

83. *Id.* at 579–80.

the money” and the “faulty joint.” The explosion was an indirect result of the faulty joint, and the destroyed building was a consequential, or indirect, damage. Presumptively, the owner could recover the cost to repair the faulty joint from the contractor as direct damages.⁸⁴

b. *Claims against the design professional.*

The *Laburnum* court’s decision is well reasoned and logical, especially considering the chain of events that had to occur to cause the ultimate “explosion.” *Laburnum*, however, involved an owner’s claim against a contractor. Two decades later, the Virginia courts would have opportunities to apply and extend the reasoning and logic of *Laburnum* to claims against design professionals. While the *Laburnum* court concluded that an “explosion” was an indirect event, the irony of the decision is that owner claims against the architect for the costs of repair may be the real *consequential* damage, at least in Virginia.

In *McCloskey & Co. v. Wright*,⁸⁵ the court applied the *Laburnum* reasoning in a case by a builder against an architect. In *McCloskey*, the builder sought roof repair damages allegedly resulting from the architect’s defective design or negligent construction supervision.⁸⁶ As in *Laburnum*, the issue was whether the roof repair costs were “non-direct” damages barred by the statute of limitations.⁸⁷ The federal district court relied on *Laburnum*, finding that “*the leaking roof is at most a consequential damage of what is here alleged to be the negligent act, i.e. faulty design.*”⁸⁸

In *Federal Reserve Bank of Richmond v. Wright*,⁸⁹ the architect had agreed to provide architectural, engineering, and supervisory services for the design and construction of a communications and records center in the Federal Reserve Bank.⁹⁰ The owner sued the architect for costs to correct structural deficiencies resulting from the contractor’s implementation of defective plans.⁹¹ Again, the court analyzed whether the owner’s structural repair costs were “non-direct” damages barred by the statute of limitations.⁹² Citing *Laburnum*, the court observed that “[i]f the action is one for indirect damages, it does not survive and the one year statute applies.”⁹³ The court found, “Plaintiff herein seeks damages in

84. For cases discussing the owner’s measure of damages against a design professional, see *Bus. Men’s Assurance Co. of Am. v. Graham*, 891 S.W.2d 438 (Mo. Ct. App. 1995); *City of Charlotte v. Skidmore, Owings & Merrill*, 407 S.E.2d 571 (N.C. Ct. App. 1991); *Bd. of Educ. of the Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley*, 539 N.Y.S.2d 814 (N.Y. App. Div. 1989).

85. 363 F. Supp. 223 (E.D. Va. 1973).

86. *Id.* at 225–26, 229–30.

87. *Id.* at 229–30.

88. *Id.* at 230 (emphasis added).

89. 392 F. Supp. 1126 (E.D. Va. 1975) (same defendant as in *McCloskey & Co.*, 363 F. Supp. 223).

90. *Id.* at 1127–28.

91. *Id.* at 1131.

92. *Id.* at 1128–30.

93. *Id.* at 1131.

the amount necessary to *correct the various structural deficiencies which allegedly resulted from defective plans*. Under *Laburnum*, these would *clearly be indirect damages flowing from the primary breach*.”⁹⁴ Importantly for owners’ awareness, the court emphasized: “*damages arising from the implementation of deficient plans are indirect consequences of such primary breach*.”⁹⁵

c. Claims against design-builders.

These cases above illustrate that, as to the design professional under Virginia law, the costs to correct or repair the work resulting from design professional acts or omissions are consequential damages, at least in Virginia. The Virginia rules change with a claim by an owner against a design-builder, where even the owner’s “extended financing costs” are direct damages.

In *Roanoke Hospital Ass’n v. Doyle & Russell, Inc.*,⁹⁶ another Virginia case following *Laburnum*, the differences and distinctions become obvious. In *Roanoke Hospital*, a contractor agreed to build a fourteen-story building.⁹⁷ The owner had obtained a letter of commitment on a loan at 6 3/8% interest contingent upon a specific loan closing date.⁹⁸ The owner testified that, when the bids were opened, he told the contractor’s representatives that the building must be completed by the date specified in the construction contract or else financial arrangements would have to be redone or rearranged and would cost the owner a higher rate of interest.⁹⁹

The contractor allegedly caused a delay of the construction of the project.¹⁰⁰ The issue before the court was whether the owner was entitled to damages for added interest costs resulting from the delay to the project.¹⁰¹ While the UCC, some case law, and the AIA consider added interest costs consequential damages,¹⁰² the court drew some notable distinctions arising in the owner-contractor relationship:

Here, the damages claimed by the owner involve three types of interest costs: (1) added interest costs (including expenditures on borrowed funds and interest revenue lost on the invested funds) during the construction period arising from the longer term of borrowing necessitated by the contractor’s unexcused delay (hereinafter, “extended financing cost”); (2) added interest costs during the construction period attributable to higher interest rates during the extended term (hereinafter, “incremental construction interest cost”); and (3) added

94. *Id.* (emphasis added).

95. *Id.* at 1134 (emphasis added).

96. 214 S.E.2d 155 (Va. 1975).

97. *Id.* at 156–57.

98. *Id.*

99. *Id.*

100. *Id.* at 158.

101. *Id.* at 159–61.

102. See 3 FARNSWORTH, *supra* note 2, § 12.9, at 880–81 & n.3 (regarding UCC and cases cited therein). See also AIA Document A201-1997, *supra* note 22, § 4.3.10.

interest costs for the permanent loan attributable to higher interest rates (hereinafter, “incremental permanent interest costs”).

The owner argues that all three types of interest costs are direct damages and that [the jury] instruction . . . insofar as it classifies the latter two types as consequential damages, was erroneous. The contractor argues that all three types are consequential damages. We agree with the owner and the trial court that the *extended financing costs are direct damages*. Customarily, construction contracts, particularly large contracts, require third-party financing. Ordinarily, delay in completion requires an extension of the term of construction financing. *The interest costs incurred and the interest revenue lost during such an extended term are predictable results of the delay and are, therefore, compensable direct damages.*

We agree with the trial court that the damages resulting from increased interest rates are not direct damages. Increases in the interest rates are not caused by delays in completion of construction contracts. Rather, they are caused by variable pressures . . . affecting supply and demand in the money market. . . . For that reason, increases in interest rates are “special circumstances”, and damages resulting therefrom are consequential and not compensable unless such circumstances were within the contemplation of the parties.¹⁰³

“Extended financing costs” are considered by some respected courts to be consequential damages.¹⁰⁴ AIA A201-1997 specifically includes “financing” as one of the potential losses that the owner waives as a consequential damage.¹⁰⁵ In Virginia, an owner’s “extended financing costs” were determined to be a direct damage against a design-builder because, as the court explained, the *“interest costs incurred and the interest revenue lost during such an extended term are predictable results of the delay.”*¹⁰⁶

Logically, an even more “predictable result” of a defective design is the cost to repair work put in place based on the defective design. Yet, the *Wright* cases

103. *Roanoke Hospital*, 214 S.E.2d at 160–61 (emphasis added). See *Lincoln Pulp & Paper Co.*, 436 F. Supp. 262 (offering no distinction of damages caused by defective design from damages caused by defective construction where defendant was both the designer and the builder); *Wright Schuchart, Inc. v. Cooper Indus., Inc.*, 40 F.3d 427, No. 93-35778, 1994 WL 621889, at *3 (9th Cir. Nov. 8, 1994) (“We agree with [the owner], however, that any costs incurred by directly contributing to the repair of defective . . . equipment are recoverable as direct damages” against the design-builder). See also John P. Ludington, Annotation, *Modern Status of Rule as to Whether Cost of Correction or Difference in Value of Structures is Proper Measure of Damages for Breach of Construction Contract*, 41 A.L.R. 4TH 131, § 4 & n.19 (1985) (concerning damages for breach of construction contract and citing *Roanoke Hospital* for a discussion of the difference between direct and consequential damages).

104. See, e.g., *Stamtec, Inc.*, 346 F.3d at 658 (stating that interest costs are consequential damages); *Bill v. Thiessen*, 1987 WL 29663, at *2 (“[I]nterest payments are consequential damages because the interest represents the value of the use of money lost” (citations omitted)).

105. AIA Document A201-1997, *supra* note 22, § 4.3.10.

106. *Roanoke Hospital*, 214 S.E.2d at 161 (emphasis added).

indicate that such logic is *wrong*.¹⁰⁷ The conclusion yields that the owner's damages against the contractor or design-builder may be direct when the same damages against the architect may be consequential, notwithstanding well-established rules regarding the *measure* of damages.¹⁰⁸

- C. Contractual waivers of consequential damages may yield inconsistencies between the parties' respective waived claims—the AIA's "mutual" waivers of consequential damages.

The confusion, uncertainty, and inconsistency of the case law suggests that if the parties choose to waive consequential damages, the waiver should be based upon a well-drafted contract provision that establishes understood and "known" definitions that provide a certain framework for risk allocation. The AIA contracts provide a backdrop for analysis.

The AIA did not define or list types of "consequential damages" that are waived in the standard form of owner-architect agreement, perhaps satisfied with the declaration that the waiver is "mutual."¹⁰⁹ The AIA's "mutual waiver," however, may not be completely "mutual."¹¹⁰

An owner will suffer at least two elements of damages if work is installed based on defective plans: (1) the cost of the redesign and (2) the cost to repair or replace the defective, in-place, work.¹¹¹ As illustrated by the Scenario, the owner's losses also may include lost profits resulting from the delayed opening of the stadium, and other possible consequential damages (i.e., interest costs, forensic engineering costs).¹¹² If the owner's lost profits are consequential damages, the owner has waived this element of damages under all circumstances.¹¹³

107. See *supra* notes 85–95 and accompanying text.

108. See *supra* note 84 and accompanying text.

109. AIA Document B141-1997, *supra* note 8, § 1.3.6.

110. Axelroth, *supra* note 16. See William R. Wildman, *Making AIA Contracts Work for You*, RETAIL TRAFFIC, May 1, 2000, http://www.retailtrafficmag.com/mag/retail_making_aia_contracts/index.html ("[T]he owner gives up just about every claim [it] might have against the contractor or architect if the project is delayed, while the contractor and the architect give up very little in return.").

111. See *supra* notes 85–95 and accompanying text.

112. *Interstate Brands Corp. v. Lily Transp. Corp.*, 256 F. Supp. 2d 58, 62–63 (D. Mass. 2003) (determining jury had already been instructed to award interest); *Hale v. Ruff*, No. CA98-1373, 1999 WL 436281, at *4 (Ark. Ct. App. June 23, 1999) (awarding damages for lost profits); *Perini Corp. v. Grete Bay Hotel & Casino, Inc.*, 610 A.2d 364, 373–74 (N.J. 1992) (upholding damages for lost profits based on evidence that damages were reasonably foreseeable); *Naegeli Transp., v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 739 (Tex. Ct. App. 1993) (finding that party pleading lost profits as an element of consequential damages was not in error); *R.K. Chevrolet, Inc. v. Hayden*, 480 S.E.2d 477, 481 (Va. 1997) (allowing expert testimony to present his opinion as to the amount of damage suffered). See *Calbag Metals Co. v. Guy F. Atkinson Co.*, 770 P.2d 600, 602 (Or. Ct. App. 1989) (stating that lost profits are consequential damages under the UCC). *But see* *Imaging Sys. Int'l, Inc. v. Magnetic Resonance Plus, Inc.*, 490 S.E.2d 124, 127 (Ga. Ct. App. 1997) ("[T]here are two types of lost profits: (1) lost profits which are direct damages and represent the benefit of the bargain . . . and (2) lost profits which are indirect or consequential damages . . .").

113. See *Perini Corp.*, 610 A.2d at 373–74 (stating that owner's lost profits are consequential

The architect's lost profits, however, are not waived under some circumstances. Assume that the owner in the Scenario, having lost all confidence in the architect, wrongfully refuses to pay the balance of the architect's fee, \$1 million. The architect then terminates the contract and seeks damages from the owner.¹¹⁴ The architect's sole loss from an owner's alleged breach is usually the balance of profit remaining in its fee, or net lost profit.¹¹⁵ To the extent that the architect's lost profits (like the owner's lost profits) may be consequential damages,¹¹⁶ the AIA exempts the architect's lost profit from the consequential damages waiver under different sections:

§ 1.3.8.6 “[T]he Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Section 1.3.8.7.”¹¹⁷

§ 1.3.8.7 “Termination Expenses are in addition to compensation for the services of the Agreement and include expenses directly attributable to termination for which the Architect is not otherwise compensated, *plus an amount for the Architect's anticipated profit on the value of the*

damages and may be recovered in an action for breach of contract). *See, e.g., Stamtec, Inc.*, 346 F.3d at 658 (“interest costs are consequential damages”); *Bill v. Thiessen*, 1987 WL 29663, at *2 (“[I]nterest payments are consequential damages because the interest represents the value of the use of money lost . . .” (citations omitted)); *Old River Terminal Co-Op v. Davco Corp. of Tenn.*, 431 So.2d 1068, 1071 (La. Ct. App. 1983) (stating that fees of consulting engineers are consequential damages).

114. The Architect's Contract contemplates that the architect may perform “Defective Services” and provides a remedy of re-performance. *See supra* Part II.E. Thus, the architect may perform “Defective Services” without breaching the contract. If the architect is willing to abide by the contract and provide the agreed remedy of re-performance, the owner has no argument that the architect breached the contract. The owner's non-payment of the balance of funds owed to the architect, however, would constitute a breach entitling the architect to terminate the contract. AIA Document B141-1997, *supra* note 8, § 1.3.8.1.

115. *S. Land, Timber & Pulp Corp. v. Davis & Floyd Eng'rs Inc.*, 135 S.E.2d 454, 459 (Ga. Ct. App. 1964); *Pallardy v. Link's Landing, Inc.*, 536 S.W.2d 512, 515 (Mo. Ct. App. 1976); *Gunter Hotel of San Antonio, Inc. v. Buck*, 775 S.W.2d 689, 697 (Tex. Ct. App. 1989); *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 691 (Utah Ct. App. 1990). *See* 3 FARNSWORTH, *supra* note 10, § 12.9–12.10, at 880–91. *See also* AIA Document B141-1997, *supra* note 8, §§ 1.3.6, 1.3.8.6 & 1.3.8.7.

116. As emphasized in this Article, a major problem with waivers of consequential damages is the lack of uniformity in judicial interpretation. Some cases suggest that all lost profits are consequential damages, while others draw distinctions between different types of lost profits: “(1) lost profits which are direct damages and represent the benefit of the bargain . . . and (2) lost profits which are indirect or consequential damages.” *Imaging Systems Int'l, Inc.*, 490 S.E.2d at 127 (five judges concurred in the decision with two judges dissenting, reflecting a lack of unanimity of judicial interpretation within a single court). *See supra* note 112 and all sources cited therein. The definitional distinctions of the court in *Imaging Systems* are the most logical in a benefit of the bargain analysis to breach of contract damages; however, if “lost profits . . . are direct damages and represent the benefit of the bargain,” *Imaging Systems Int'l, Inc.*, 490 S.E.2d at 127, then the AIA need not include lost profits separately as an element of the architect's recoverable damage since those damages would not be covered by the waiver. Perhaps wisely for its constituency, the AIA may have effectively withdrawn the issue of the architect's lost profits (under certain circumstances) from judicial interpretation.

117. AIA Document B141-1997, *supra* note 8, § 1.3.8.6.

services not performed by the Architect."¹¹⁸

The AIA owner-architect agreement, therefore, clearly obligates the owner to pay the architect's lost profits under certain circumstances while the owner may waive lost profits under all circumstances.¹¹⁹

The AIA did define *some* "consequential damages" of the "mutual" waiver in the owner-contractor contract.¹²⁰ The definitions serve to emphasize and make clear that the types of losses waived by the owner and the contractor are not the same, or mutual:

§ 4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This *mutual waiver includes*:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.¹²¹

While § 4.3.10 may not list every type or element of consequential damage waived, a comparison of the items listed, and the lack of "mutuality," is striking.

The consequential damages that the owner waives specifically include "rental expenses, . . . losses of use, income, profit, . . . and for loss of management or employee productivity or of the services of such persons."¹²² By comparison, the contractor does not expressly waive any of those items except anticipated lost profits that do not arise "directly from the Work."¹²³ As in the owner-architect contract, the owner waives all lost profits as consequential damages, but the contractor, under a separate section of AIA A201-1997, may recover its lost profits under the contract in the event of a termination for convenience.¹²⁴ In other words, the contractor *is not expressly* precluded from recovering items that the owner *is*

118. *Id.* § 1.3.8.7 (emphasis added).

119. *Id.* See *supra* note 112 and all sources cited therein.

120. AIA Document A201-1997, *supra* note 22, § 4.3.10.

121. *Id.* (emphasis added).

122. *Id.* § 4.3.10.1.

123. *Id.* § 4.3.10.1.

124. *Id.* § 14.4.3.

expressly precluded from recovering, such as “rental expenses, . . . losses of use, income, profit, . . . and for loss of management or employee productivity or of the services of such persons.”¹²⁵

The AIA provides that the “mutual waiver” does not “preclude an award of *liquidated direct damages* [to the owner], when applicable, in accordance with the requirements of the Contract Documents.”¹²⁶ “Liquidated damages” are typically agreed to as an amount that will compensate the owner for an unexcused contractor delay because actual damages are difficult to prove.¹²⁷ Liquidated damages are generally considered a contractually agreed upon replacement for damages that might otherwise be considered “consequential,” like extended financing, lost profits, and loss of use.¹²⁸ The AIA’s use of the phrase “liquidated *direct* damages” therefore brings more uncertainty to the owner for fear that the “liquidated *direct* damages” are a subset of “liquidated damages” comprised of some undefined “direct” damages, if anything at all.¹²⁹

The lesson for owners is that even contractual definitions and persuasive words like “mutual” may be a trap for the unwary. The “mutuality” of the waiver is not nearly as important as the specific items or elements of potential losses that are actually waived. One cannot assume that the word “mutual” automatically means that the consequential damages of the owner, the architect, or the contractor are the same types or elements of losses.

VI. RATIONALES FOR INCLUDING WAIVERS OF CONSEQUENTIAL DAMAGES, EXCLUSIVE REMEDIES, AND LIMITATIONS OF LIABILITY IN CONSTRUCTION-RELATED CONTRACTS

Several rationales, or arguments, have been advanced to justify the various limitations of liability. Some rationales are logical and persuasive. In the context of a high value construction project, the negotiated agreement should always account for which party is best positioned to minimize or eliminate, and therefore bear, the risk.

A. Rationale number one: The waiver of consequential damages is mutual.

One rationale is reflected in the AIA standard form of architect-owner contract specifically for waiver of consequential damages.¹³⁰ As discussed above, the AIA

125. *Id.* §§ 4.3.10.1, 14.4.3. See *City of Milford v. Coppola Constr. Co.*, 891 A.2d 31, 39 (Conn. App. Ct. 2006) (stating that contractor’s costs of “idle equipment” and “stockpiled material” constitute direct damages under AIA Document A201 general conditions, not precluded by mutual waiver of consequential damages).

126. AIA Document A201-1997, *supra* note 22, § 4.3.10 (emphasis added).

127. See 3 FARNSWORTH, *supra* note 10, § 12.9–12.18, at 935–45. See also 2 CUSHMAN & MYERS, *supra* note 67, § 32.01–32.06 (many cases cited therein).

128. 2 CUSHMAN & MYERS, *supra* note 67, § 32.06.

129. Axelroth, *supra* note 16, at 15. The current draft of AIA Document A201-2007, scheduled for publication in 2007, eliminates the word “direct,” leaving only the phrase “direct damages.” The new draft of AIA Document A201-2007 will not be published until 2007.

130. AIA Document B141-1997, *supra* note 8, § 1.3.6. See also AIA Document A201-1997,

introduced the concept as a “mutual waiver.”¹³¹ This “mutual waiver” is contended to be a *quid pro quo* and, as such, inherently fair. While “fairness” is subjective and debatable, the AIA documents simply do not reflect a complete “mutual” waiver of consequential damages. Mutuality connotes fairness and equality of treatment or result. The only consequential damages of significance that are waived are those that are sustained, and waived, by the owner.¹³² The resulting benefit to the architect is undeniable. The *quid pro quo* received in return by the owner cannot be found.

The same lack of mutuality can be found in contract clauses that cap liability or limit the owner’s remedy for loss to the design professional’s re-performance of its defective service without further cost to the owner. While ultimately not as serious, the re-performance at no cost remedy is somewhat analogous to the surgeon’s offer to remove the diseased lung at no additional cost after erroneously removing the healthy one. Little mutuality is readily apparent.

A real “mutual” waiver of consequential damages is achievable. If achieved, the question remains: What types or elements of losses are consequential damages? A thorough listing of the specific types or elements of losses that are consequential damages may militate toward the clarity and predictability required for a true “knowing and voluntary” waiver.¹³³ Absent such definitional clarity, real “mutuality” cannot be achieved, and the right to recover potential losses that might be consequential damages cannot not be waived without accepting some risk of the unknown.

B. Rationale number two: A lower cost project.

A second rationale applicable to all limitations of liability is that the owner will receive the benefit of a lower fee from the design professional.¹³⁴ The theory is that an elimination or reduction of risk by capping damages, agreeing to a remedy, or waiving consequential damages permits the design professional to factor out of the design fee some, or all, risk of financial exposure.¹³⁵ With risk of financial exposure reduced or eliminated, the owner gets the project at a lower fee and lower overall cost.¹³⁶

The theory supporting this rationale has been embraced in New York for purposes of limiting liability for “injuries to person or property caused by or resulting from . . . negligence.”¹³⁷ Under a specific statute, one may limit liability for negligence if “there is a voluntary choice of obtaining full or limited liability by

supra note 22, § 4.3.10.

131. See AIA Document B141-1997, *supra* note 8, § 1.3.6.

132. See *supra* note 110 and accompanying text.

133. See *supra* note 51 and accompanying text.

134. Zetlin & Chillemi, *supra* note 16. See Weier, Lamden & Glover, *supra* note 27 (proposing that consequential damages waivers should be limited to uninsured consequential damages).

135. See *supra* note 134 and all sources cited therein.

136. See *supra* note 134 and all sources cited therein.

137. N.Y. GEN. OBLIG. LAW § 5-323 (McKinney 1989).

paying under a graduated scale of rates proportioned to the responsibility in . . . service rendered.”¹³⁸ The New York statute requires that “[a]n option must be offered to the other party to pay an increased amount for the services rendered, in order to receive the increased coverage for . . . negligence” for a valid limitation of liability.¹³⁹ Absent such “option,” the limitation of liability is void as an impermissible “exemption” from liability.¹⁴⁰ Importantly, the New York statute prohibits limitations of liability only as to negligence, not for economic losses for breach of contract or warranty.¹⁴¹

The New York requirement of “a graduated scale of rates proportioned to the responsibility” is critical to support this rationale.¹⁴² Without a rate comparison, the cost savings received by the owner in exchange for increased risk assumption cannot be evaluated critically. Accordingly, an owner confronted with the rationale that a limitation of liability will reduce the design professional’s fee should demand comparison pricing and, preferably, comparison pricing from multiple competitors for the same services. Only with an actual pricing analysis can an owner truly determine whether the fee is lower for the reduced risk and whether the owner would prefer to pay less, or more, to allocate the risk differently.

C. Rationale number three: The small fee, or profit margin, does not support the risk.

A third rationale is that the relatively low design fee does not justify the design professional’s assumption of significant risk for the project.¹⁴³ In the Scenario, the architect’s fee is only \$3 million, including overhead, while the overall project cost is \$50 million. Design professionals contend that the profit margins are so small that it would be incongruent for them to assume comparative exponential risk. In sum, the design professionals’ position is that it will not bet the design firm against the risks of the project.

138. *Melodee Lane Lingerie Co. v. Am. Dist. Tel. Co.*, 218 N.E.2d 661, 667 (N.Y. 1966). See *Bohn Heat Transfer*, 574 N.E.2d at 901 (“[T]he limit on GE’s liability is rendered invalid to the extent it attempts to protect GE from liability due to its negligence” however, “[e]xemptions from liability for economic losses are not rendered void or unenforceable . . .”).

139. *Bohn Heat Transfer*, 574 N.E.2d at 901.

140. *Id.*

141. *Id.* See *Sear-Brown Group*, 665 N.Y.S.2d at 163 (N.Y. App. Div. 1997) (stating that prohibition only applies “where a party seeks to protect itself from claims for personal injury and physical damage to property,” not to economic losses).

142. New York law does not apply this standard to limitations of liability for economic losses resulting from a breach of contract. The reasoning, however, applies equally that “[a]n option [could] be offered to the other party to pay an increased amount for the services rendered in order to receive the increased coverage for” a breach of contract. *Melodee Lane Lingerie Co.*, 218 N.E.2d at 667; *Bohn Heat Transfer*, 574 N.E.2d at 901. This standard reflects a baseline against which an owner may evaluate the reallocation of risk, and, if established, emphasizes that the limitation of liability is, in fact, part of the negotiated bargain.

143. *Zetlin & Chillemi*, *supra* note 16. See *Weier, Lamden & Glover*, *supra* note 27 (proposing that consequential damages waivers should be limited to uninsured consequential damages).

An owner entertaining this rationale has cause for alarm. If an owner could self-perform the design and construction of its own structure, the owner would assume all of the risk. Owners, generally, cannot design and build. Owners bring one fundamental asset to the table: the money to pay professionals to deliver the project. Thus, the owner engages a “professional” designer and contractor to provide the deliverables of design and construction of the structure. Likewise, without the owner’s need for a project and the money to pay for its delivery, design professionals and contractors would avoid all risk other than bankruptcy for lack of work to generate a fee.

Most states’ laws identify architects and engineers as “professionals.”¹⁴⁴ A “professional” is defined as “[a] person who belongs to a learned profession or whose occupation requires a high level of training or proficiency.”¹⁴⁵ Design professionals hold themselves out as reliable, dependable, knowledgeable, and experienced—the right fit for the project. Owners must, and do, rely on the design professional’s “high level of training or proficiency” to complete tasks that the owner is unable to self-perform, but for which the owner is willing to pay. Thus, an owner is justifiably concerned when a design professional’s marketing presentation represents superior qualifications to service the project but contract negotiations indicate the lack of willingness to accept ultimate responsibility for the compensated professional task. If a design professional is reluctant to place his or her financial resources at risk against the project, an owner should consider whether to place its financial resources at risk while utilizing an architect that is unwilling to accept ultimate responsibility.

D. Rationale number four: The insurance excuses.

A fourth rationale, or argument, is that the design professional (1) cannot obtain insurance for some risks, or (2) does not have, or cannot afford, insurance to cover some risks. Design professionals often take the position that their insurer “requires” a waiver of consequential damages from the owner.

First, an owner should exercise great caution before engaging a design professional that does not maintain professional liability insurance with limits of coverage adequate for the relative significance of the project. Second, no case law has been found to support the position that professional liability coverage will not, or does not, cover consequential damages. Of course, insurers might support, and even encourage, the rationale to avoid exposure to consequential damages.¹⁴⁶ An owner’s skepticism is encouraged. An owner confronted by this rationale should demand that a copy of the policy, or the applicable provisions or exclusions, be produced for counsel’s review.

144. See, e.g., GA. CODE ANN. § 43-4-1-43-4-37 (2006).

145. BLACK’S LAW DICTIONARY 1246 (8th ed. 2004).

146. See J. KENT HOLLAND JR. & CATHA PAVLOFF, INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC., RISK MANAGEMENT AND INSURANCE FOR DESIGN PROFESSIONALS (2003), <http://www.irmi.com/Conferences/Crc/Handouts/Crc23/Workshops/RmAndInsuranceForDesignProfessionals.pdf> (proposing that design professionals seek limitations of liability in contracts with owners, including proposed language for waiver of consequential damages).

E. Rationale number five: Inability to compete.

Large design professional firms argue that they cannot be competitive without one or more limitations of liability. The reason stated is that smaller design firms are not really at risk because they do not have significant financial resources or deep pockets. Thus, the argument goes, the owner will not waste its money seeking damages against small firms because the owner knows a judgment cannot be collected. Larger firms, on the other hand, actually become exposed to a higher risk because they may have assets or financial resources to satisfy claims or judgments.

A diligent owner requiring that the design professional obtain and maintain professional liability insurance appropriate to cover the project's design services' risks should not be persuaded by this rationale. A large design firm becomes large by success, results, and profits. A small firm may be small for reasons having nothing to do with success, results, and profits. Either, and both, should be able to obtain adequate professional liability insurance to satisfy the owner's reasonable needs for risk allocation. The owner must be willing to pay, as part of the fee or otherwise,¹⁴⁷ for adequate professional liability insurance coverage. If so, this rationale has no validity in the risk allocation calculus. If not, the owner should receive a tangible benefit of a verifiable lower fee reflective of professional liability insurance cost savings. In exchange for the verifiable lower cost service, the owner is simply electing to assume the reallocated risk.

VII. ANALYSIS OF THE SCENARIO, THE LAW, AND THE OWNER'S TRADITIONAL RIGHTS AND REMEDIES

A. The owner.

1. The owner's damages.

The owner's potential damages are: (1) the extra \$4 million in remedial cost; (2) over \$2 million in lost future profits; (3) \$200,000 for the forensic engineers' investigation; (4) over \$800,000 in financing costs; (5) \$1 million for the contractor's delay claims; and (6) an unknown amount in private contributions pledged to the project. The owner's damages may exceed \$8 million.

2. The owner's traditional rights and remedies.

Neither the owner nor the contractor caused, or contributed to, the project's

147. AIA Document B141-1997 contemplates that the owner shall reimburse the architect for certain "Reimbursable Expenses" which "are in addition to compensation for the Architect's services and include expenses incurred by the Architect and Architect's employees and consultants directly related to the Project," specifically listing the "expense of professional liability insurance dedicated exclusively to this Project or the expense of additional insurance coverage or limits requested by the Owner in excess of that normally carried by the Architect and the Architect's consultants." AIA Document B141-1997, *supra* note 8, §§ 1.3.9.2, 1.3.9.2.6.

structural failures. The project's structural failures and resulting losses are traced solely to the acts or omissions of the architect. All of the owner's damages flow, directly or indirectly, from the acts or omissions of the architect.

The owner has a strong case that the architect breached the contract or negligently failed to meet the professional standard of skill and care, or both.¹⁴⁸ Absent the contractual waiver of consequential damages, exclusive remedy, and limitation of liability, the owner could seek all of its damages from the architect.¹⁴⁹ Unhampered by limitations of liability, the owner has access to a full complement of contractual, tort, and perhaps other, remedies recognized and supported by the state's laws. The owner would have the right to seek all of its \$8 million-plus in damages. The owner's greatest contractual hurdle is to prove its damages and show that all of the damages were "foreseeable" under the *Hadley* rule.¹⁵⁰ The owner could offer its evidence and rest relatively assured of a substantial award and judgment against the architect.

The owner would enjoy a high likelihood of a prompt settlement with the architect, especially if the architect is insured. However, an architect's maintenance of insurance coverage with limits sufficient to cover \$8 million may be unusual unless the owner has the foresight to require, and pay for, higher limits of coverage. Without sufficient insurance coverage, an owner must rely upon the architect's financial ability to satisfy any shortfall between coverage limits and damages. An architect likely will part with its own money much more reluctantly than with insurance proceeds. This realization highlights that the owner must factor into its risk allocation analysis adequate insurance requirements; else, the value of traditional rights and remedies may be limited even without contractual limitations of liability.

3. The impact of the waiver of consequential damages, exclusive remedy, and limitation of liability on the owner's traditional rights and remedies.

- a. *The mutual waiver of consequential damages.*

The owner has waived *all* of its consequential damages. The question then becomes: Which of the owner's losses are consequential damages? The cases indicate that the answer will depend on the law in that particular jurisdiction. In the Scenario, the owner would be fortunate to benefit from a jurisdiction where consequential damages are a question of fact—owner's counsel could avoid summary judgment and argue to the fact finder that all of the owner's damages are direct. While the ultimate outcome may remain unknown, the value of having the argument should enhance the settlement value prior to award and judgment.

148. See *supra* note 9 and accompanying text.

149. *Bus. Men's Assurance Co.*, 891 S.W.2d 438; *Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assoc.*, 692 N.E.2d 551 (N.Y. 1998); *Sargent, Webster, Crenshaw & Folley*, 539 N.Y.S.2d 814 (N.Y. App. Div. 1989); *Skidmore, Owings & Merrill*, 407 S.E.2d 571. See CALAMARI & PERILLO, *supra* note 2, § 14-29, at 633-39.

150. See *supra* notes 56-60 and accompanying text.

Aside from jurisdictions that leave the issue of consequential damages to the fact-finder, many of the owner's losses are traditionally considered consequential damages. The \$2 million in *lost future profits* because use of the stadium will be delayed are losses that are considered to be consequential damages in some jurisdictions.¹⁵¹ Likewise, the \$800,000 incurred because of increased *interest rates* resulting from the delay is a consequential damage in some jurisdictions.¹⁵² The \$200,000 cost of the forensic engineers also may be a consequential damage.¹⁵³

The contractor's delay claim is comprised of unabsorbed home office overhead and loss of productivity, both of which likely are consequential damages. The unabsorbed home office overhead and loss of productivity parts of a claim are examples of consequential damages between the owner and the contractor as defined in the AIA A201-1997 General Conditions.¹⁵⁴ If these claims are consequential damages between the owner and the contractor, then logic suggests that these same losses are also consequential damages when passed from the owner to the architect. Finally, the impact of lost private contributions, even if capable of measurement, are likely to be consequential damages.

The extra \$4 million in remedial costs are certainly foreseeable consequences of the defective design. Most owners, their counsel, and the courts would reason that but for the defective design, all of the remedial costs would have been avoided. The textbook and case law definitions of direct and indirect damages seem to support such a conclusion. The general rules indicate that the owner's measure of direct damages may be the cost of repair. At the time of negotiating the Architect's Contract, the assumption and conclusion might follow that the costs necessary to repair and replace elements of the project damaged because of a defective design would clearly be direct, not consequential, damages.

As a matter of practice and reality, however, the reasoning and analysis of the Virginia cases is strikingly contrary. Under *Laburnum* and the *Wright* cases, the \$4 million remedial costs would "*clearly be indirect damages flowing from the primary breach*,"¹⁵⁵ because "*damages arising from the implementation of deficient plans are indirect consequences of such primary breach*."¹⁵⁶ In fact, the project owner's only direct damages would be the fee that the owner had paid to the architect for the design, at most only \$2 million and perhaps only the portion thereof directly attributable to defective structural support design. Moreover, if the jurisdictional rule is that consequential damages are a question of fact, then the

151. *Perini Corp.*, 610 A.2d at 373–75 (stating that lost profits are consequential damages).

152. *Stamtec, Inc.*, 346 F.3d at 658 (“[I]nterest costs are consequential damages”); *Bill v. Thiessen*, 1987 WL 29663, at *2 (“[I]nterest payments are consequential damages because the interest represents the value of the use of money lost” (citations omitted)).

153. *Old River Terminal Co-Op*, 431 So.2d 1068 (stating that fees of consulting engineers are consequential damages).

154. See AIA Document A201-1997, *supra* note 22.

155. *Wright*, 392 F. Supp. at 1131 (emphasis added). See also *Richmond Redevelopment & Housing Auth. v. Laburnum Constr. Corp.*, 80 S.E.2d 574 (Va. 1954).

156. *Wright*, 392 F. Supp. at 1134 (emphasis added). See also *Laburnum Constr. Corp.*, 80 S.E.2d 574.

architect may enjoy the option of arguing that even these costs of repair are consequential damages.

b. The limitation of liability provision.

The owner's counsel reasons that the waiver of consequential damages only applies to a claim for breach of contract. Thus, a tort claim for professional negligence, or malpractice, will circumvent the waiver. While clever, that idea encounters at least three impediments. First, the state's economic loss rule may prohibit recovery for purely economic losses under a tort theory.¹⁵⁷ Second, even if counsel can navigate around the economic loss rule, the Architect's Contract provides "the extent of the Architect's liability to the Owner for any and all claims and damages recoverable under the terms of this Agreement is limited to the fee *actually* paid by the Owner to the Architect under this Agreement."¹⁵⁸ The owner has only paid the architect \$2 million of the \$3 million design fee. The liability cap, therefore, would limit to no more than \$2 million the damages that the owner could obtain from the architect. The owner may have a \$6 million shortfall. The good news is that the owner is still holding the \$1 million design fee balance, but the architect has sought written assurance that the owner will pay the balance in exchange for a free remedial design. The bad news is the third impediment: the owner's tort claim for professional negligence may be supplanted by the exclusive remedy.

c. The exclusive remedy provision.

The Architect's Contract provided for a "sole and exclusive remedy." The architect is required only to re-perform its defective services but only if the services "are adjudged to fail to meet the standard of ordinary care applicable to the architecture profession."¹⁵⁹ The reference to "the standard of ordinary care" suggests that this exclusive remedy is applicable to a tort claim for professional negligence, not a breach of contract claim. Moreover, before the remedy "kicks in" the architect's services must be "adjudged" to be defective. If a formal "adjudication" is required, the owner may have to sue, or arbitrate against, the architect before the remedy is realized. Perhaps the architect's acknowledgement of fault is more welcomed than first believed; however, the offer to prepare the remedial design at its own expense is simply an agreement to provide what the architect, and the owner, had agreed the architect would provide. Counsel might consider an argument that the architect's conditional offer of a free redesign in exchange for the owner's written assurance of payment of the balance of the fee is a breach of the exclusive remedy.

Given the architect's estimate that the redesign value is \$100,000, the architect is not likely to risk the protection of the exclusive remedy against the condition of

157. See 5 PHILIP L. BRUNER & PATRICK J. O'CONNOR, CONSTRUCTION LAW § 17:90 (2006) (cases cited therein).

158. See *supra* Part III.E.

159. See *supra* Part III.E.

payment. The architect likely would perform the redesign even without the owner's assurance of payment. The reason is that if the architect performs the obligation to redesign for free, it fulfills its contractual obligation and does not breach the contract. Then, if the owner fails to pay the \$1 million balance, the architect may terminate the contract and seek its "*anticipated profit on the value of the services not performed.*" The architect maintains the right to be made completely whole, less its actual cost of performing the redesign. Consequently, the architect bears an estimated \$100,000 risk while the owner potentially bears in excess of \$7.9 million in losses, exclusive of the costs to be paid by the owner to a new architect to complete the design professional's services.

VIII. CONCLUSION

From the perspective of the owner, traditional statutory and common law notions of fairness, responsibility, and liability typically should remain in place. Usually, owners cannot effectively control the risk of design professional errors or omissions. Usually, owners are not at fault for the design professional's mistakes. Most of the risk of loss is placed on the design professional by applicable law absent a contractual reallocation of the risk. Design professionals can obtain insurance to cover these risks. Owners will, and should, pay for adequate design professional insurance coverage. If this risk of loss nevertheless is to be reversed, owners must explicitly recognize the reversal and plan to absorb the reallocated risk.

THE “QUIET REVOLUTION” IN EMPLOYMENT LAW & ITS IMPLICATIONS FOR COLLEGES AND UNIVERSITIES[†]

D. FRANK VINIK, ELLEN M. BABBITT & DAVID M. FRIEBUS*

INTRODUCTION

Since the initial passage of the Civil Rights Act of 1964, courts and Congress have consistently expanded the reach of liability for workplace harassment and other discrimination. Until recently, however, most employment discrimination laws—and the court decisions interpreting them—remained simply prohibitive, outlawing discrimination without specifying how to eliminate it.

Over the last eight years, a “quiet revolution” has been taking place in the law of employment discrimination. Federal courts have been providing increasingly explicit guidelines for how employers may avoid or minimize exposure to costly

[†] Portions of this article build upon a session and outline presented at the 2005 Stetson Conference on Law and Higher Education. *See* Ellen Babbitt, Lucy Singer & Thomas Santoro, Counseling Human Resources Management: Law, Policy, and Best Practices, Presentation Before the Stetson Conference on Law and Higher Education (2005). The authors wish to thank NACUA colleagues Lucy Singer and Thomas Santoro for their help in developing the concepts discussed in this article.

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lawsuits and damages. In simplest terms, federal courts seem to have adopted an incentive approach that rewards employers for implementing effective compliance programs and penalizes those that decline to do so. This judicial “revolution” has garnered little attention in most part because it has been patched together from an extensive array of case law rather than enacted amid much fanfare and commentary like its legislative counterparts.

The revolution started in 1998 with the Supreme Court’s twin decisions in *Burlington Industries, Inc. v. Ellerth*¹ and *Faragher v. City of Boca Raton*.² In these cases, the Court first recognized the existence of a limited affirmative defense available in sexual harassment cases, referred to in this article as the “effective compliance” defense. According to the Court in *Faragher* and *Ellerth*, this defense allowed an employer to protect itself from vicarious liability for sexual harassment in a discrete class of cases.³ As later amplified by the Court, this defense also allowed an employer to avoid punitive damages where the employer had adopted and implemented effective policies and procedures to address complaints of workplace harassment and discrimination.⁴

This article explores the evolution of the original “effective compliance” defense from a limited shield to a powerful affirmative duty that employers now ignore at their peril. Since 1998, this defense has been quietly and painstakingly expanded by the lower courts. A review of the developing case law not only illustrates the often-overlooked elements and benefits of an effective compliance program but also dramatizes the increasingly serious risk of declining to comply. Further, state law trends that codify the requirements of an effective anti-harassment and discrimination program suggest that employers who fail to implement effective compliance programs may soon find themselves not only deprived of defenses but also facing enhanced federal or common law liability. Judging from recent cases and legislative initiatives, there is little doubt that effective compliance programs are no longer discretionary, but rather now constitute essential “best practices” in civil rights compliance.

Colleges and universities have much to gain from the effective compliance defense. Given the large number of individuals they generally employ and the personal nature of the relationships on campus, educational institutions often face harassment and discrimination lawsuits. At a time when many can ill-afford costly litigation, colleges and universities can derive significant risk management benefits from developing internal compliance mechanisms that may forestall lawsuits and external agency investigations.

Colleges and universities are also uniquely suited to take advantage of the effective compliance defense. Unlike their counterparts in the corporate world, colleges and universities have ready access to the educational resources necessary to teach employees about their responsibilities under the law. They also serve constituencies that are primed to learn. Perceptive educators view the obligation to

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1. 524 U.S. 742 (1998).
 2. 524 U.S. 775 (1998).
 3. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 806–07.
 4. *See Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 544 (1999).

comply as an important “teachable moment” on campus and identify the eradication of discrimination as fundamental to their educational mission. Other educational institutions, however, have failed to take advantage of this opportunity, adopting high-minded policies but declining to use available educational resources to implement effective training procedures.

Such lapses are particularly unfortunate because the ultimate benefit of effective compliance is one that is critical to every college and university’s educational mission—the eradication of improper and disrespectful conduct. Discrimination and harassment are odious; they corrupt the workplace, strain campus communities, demoralize good employees, and generate negative publicity. Elimination of harassment and discrimination is crucial to any institution’s mission of providing a safe and nurturing environment where people can learn and work. In discussing the effective compliance defense, courts have made it clear—and educators should never forget—that addressing discrimination is not only a legal imperative, but a moral one as well.

I. THE GENESIS OF THE “EFFECTIVE COMPLIANCE” DEFENSE

A. The Proliferation of Employment Litigation: A Crisis in the Courts

The Supreme Court articulated the effective compliance defense at a time when it was besieged with employment discrimination cases. During 1970, only 350 employment discrimination cases were filed throughout the federal court system.⁵ During the next twenty years, however, the number of employment discrimination cases expanded by over 2,000%—an astonishing figure compared with a relatively meager 125% increase in the number of civil filings overall.⁶

An already-crowded docket grew even more congested after Congress passed the Americans with Disabilities Act (ADA)⁷ in 1990, the Civil Rights Act of 1991,⁸ and the Family and Medical Leave Act of 1993 (FMLA).⁹ Around the same time as the passage of these milestone laws, the 1991 confirmation hearings for Justice Clarence Thomas focused nationwide attention on the issue of sexual harassment. These events had a cumulative and near-instantaneous impact on the amount of employment discrimination litigation. The number of sexual harassment charges filed with the Equal Employment Opportunity Commission (“EEOC”) increased from 6,883 in 1991¹⁰ to 10,532 in 1992;¹¹ by 1998, filings had

5. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

6. *Id.*

7. 42 U.S.C. §§ 12101 *et seq.* (2000 & Supp. III 2003).

8. 42 U.S.C. §§ 1981, 1981a, 1988, 2000e, 12111, 12112 (2000 & Supp. III 2003).

9. 29 U.S.C. §§ 2601 *et seq.* (2000 & Supp. III 2003).

10. UNIV. OF NEW MEXICO, UNIV. BUSINESS POLICIES AND PROCEDURES MANUAL, POLICY # 3780 — SEXUAL HARASSMENT POLICY, available at http://www.unm.edu/~hrinfo/Civilrights/step2_2.htm (last visited Oct. 29, 2006).

11. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, SEXUAL HARASSMENT CHARGES, EEOC & FEPAS COMBINED: FY 1992–FY 2005 (Jan. 27, 2006),

increased to more than 15,000.¹² But this was only a preview of the deluge waiting for the federal courts: in 1998, there were 23,299 federal employment discrimination cases filed in the courts—almost triple the number of annual filings from ten years prior.¹³ At that point, employment discrimination cases comprised nearly 10% of the federal civil caseload.¹⁴

B. *Faragher* and *Ellerth*: Affirmative Defense to Liability

Against this backdrop, the Supreme Court decided two cases that addressed the circumstances in which an employer may be liable for its employees' sexual harassment. In *Ellerth*, a salesperson alleged that her supervisor constantly harassed her.¹⁵ The Court was asked to decide whether the actions of the supervisor, who was a "midlevel manager,"¹⁶ subjected the employer to vicarious liability.¹⁷

Resolving a split among the circuit courts of appeal,¹⁸ the Court held that an employer could be vicariously liable for a supervisory employee's harassing conduct.¹⁹ The Court found that liability should attach regardless of whether the harassing conduct merely created a "hostile work environment" or resulted in a full-fledged "tangible employment action" that directly injured an employee.²⁰ The Court defined a tangible employment action as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."²¹

Notwithstanding its broad liability ruling, however, the Court also held that an affirmative defense to liability would be available in certain cases in which the employee's conduct did not result in a tangible employment action.²² In crafting this defense, the Court emphasized Title VII's deterrent purpose. It observed that Title VII was "designed [by Congress] to encourage the creation of anti-harassment policies and effective grievance mechanisms."²³ The Court reasoned that if liability depended "in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context."²⁴ Moreover, "[t]o the extent limiting employer liability

<http://www.eeoc.gov/stats/harass.html>.

12. *Id.*

13. Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workplace and the Unfulfilled Promise That Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 664 (Spring 2005).

14. Donohue & Siegelman, *supra* note 5, at 985.

15. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

16. *Id.*

17. *Id.* at 753.

18. *Id.* at 749–51.

19. *Id.* at 766.

20. *Id.* at 765.

21. *Id.* at 761.

22. *Id.* at 765.

23. *Id.* at 764.

24. *Id.* (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984)).

could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."²⁵

Therefore, the Court held that in cases not involving a tangible employment action, the employer would have a complete affirmative defense if, and only if: "(a) . . . the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."²⁶

The Supreme Court reinforced this ruling in *Faragher, Ellerth's* companion decision. Addressing the case of a lifeguard subjected to a hostile environment by fellow beach employees,²⁷ the Court again took up the challenge of crafting "manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees."²⁸ Just as in *Ellerth*, the Court once again "recogniz[ed] the employer's affirmative obligation to prevent violations and g[ave] credit here to employers who made reasonable efforts to discharge their duty."²⁹

The Court re-emphasized the employee's own duty under Title VII to minimize damages. The Court again warned that if an employer has a "proven, effective mechanism for reporting and resolving complaints of sexual harassment available to the employee without undue risk or expense," and an employee "unreasonably fail[s] to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so."³⁰ Having said this, the Court went on to confirm its holding in *Ellerth* that, if no tangible employment action had been taken, an employer may avoid vicarious liability for the misconduct of its employees if it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer."³¹

C. *Kolstad*: Bar to Punitive Damages

A year after deciding *Faragher* and *Ellerth*, the Supreme Court shifted its focus from liability to circumstances in which an employer could limit its damages for harassment. In *Kolstad v. American Dental Association*,³² a jury found that a female employee of a professional association was denied a promotion because of her gender in violation of Title VII.³³ The case reached the Supreme Court on the question of whether the district court properly denied the jury an opportunity to

25. *Id.* (citing *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995)).

26. *Id.* at 765.

27. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

28. *Id.* at 785–86.

29. *Id.* at 806.

30. *Id.* at 806–07.

31. *Id.* at 807.

32. 527 U.S. 526 (1999).

33. *Id.* at 531–32.

assess punitive damages, which are available under Title VII only where a defendant acts with “malice” or “reckless indifference.”³⁴ The Court was asked to weigh whether an employer’s strong commitment to training and other compliance programs should be relevant to the assessment of its intent in a particular case.³⁵

Continuing its stated commitment to encouraging private compliance, the Supreme Court concluded that an effective compliance program could potentially bar punitive damages in a Title VII case. As a policy matter, imposing punitive damages without regard to whether an employer has engaged in substantial education or compliance efforts would “penalize[] those employers who educate themselves and their employees on Title VII’s prohibitions.”³⁶ Certainly, “[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.”³⁷ Therefore, “to avoid undermining the objectives underlying Title VII,”³⁸ and consistent with its approach in *Faragher* and *Ellerth*, the Court held that, “in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s good faith efforts to comply with Title VII.”³⁹ The Court declined to elaborate upon what might constitute a “good faith effort.”⁴⁰

Having held in general terms that an effective anti-harassment and discrimination program may bar not only liability but also punitive damages, the Supreme Court in *Kolstad* left unanswered many questions about the parameters of what is now called the *Faragher/Ellerth* defense. The task was left to the lower courts to determine what might constitute reasonable care by the employer or unreasonable failure by the employee to take advantage of an employer’s anti-harassment programs.

34. *Id.* at 532–33.

35. *Id.* at 544.

36. *Id.*

37. *Id.* at 545.

38. *Id.*

39. *Id.* (quotations omitted).

40. *Kolstad* was hailed by employers and criticized by plaintiffs’ attorneys. For example, the General Counsel of an employer’s association noted that “[*Kolstad*] creates a safe harbor for employers who use a good faith effort to comply with the law.” Jan Crawford Greenburg, *Top Court Creates Standard for Discrimination Damages*, CHICAGO TRIB., June 23, 1999, at 6. Another advocate of employee training calls the *Faragher* and *Ellerth* decisions “a gift” and *Kolstad* “another gift.” See CAROL M. MERCHASIN, MINDY H. CHAPMAN & JEFF POLISKY, *CASE DISMISSED: TAKING YOUR HARASSMENT PREVENTION TRAINING TO TRIAL* 5, 7 (2d ed. 2005). In contrast, a noted plaintiff’s attorney who specializes in employment cases called *Kolstad* “judicial legislation run amok.” See Debra S. Katz, *Judicial Legislation Run Amok: New Limits On Punitive Damages Imposed*, LEGAL TIMES, July 12, 1999, at S31. She argued that “while paying lip service to expanding the rights of the aggrieved, the Court dredged safe harbors found nowhere in either of the laws at issue . . . [the] majority is unwilling to accept Congress’ considered judgment that punitive damages are necessary to strengthen employee rights and aggressively deter employer violations.” *Id.*

II. "BEST PRACTICES" IDENTIFIED BY THE COURTS

In the years since *Faragher*, *Ellerth*, and *Kolstad* were decided, lower courts have gone far in adding substance to the Supreme Court's very general statements regarding anti-harassment programs. They have also expanded the *Faragher/Ellerth* defense from sexual harassment cases under Title VII to other Equal Employment Opportunity ("EEO") actions, such as those arising under the ADA, the Age Discrimination in Employment Act ("ADEA"),⁴¹ Title IX,⁴² 42 U.S.C. § 1983, and state anti-harassment and anti-discrimination statutes.⁴³ In construing *Faragher*, *Ellerth*, and *Kolstad*, lower courts have consistently identified certain practices as essential to effective compliance.⁴⁴ Just as consistently, lower courts have disapproved insufficient or illusory procedures that fail to discourage violations of EEO laws or address violations that do occur. Although no single decision purports to define the "best practice" in compliance procedures, the following case law clarifies the factors that courts have found critical in approving or criticizing compliance programs.

The elements of an effective EEO compliance program as derived from relevant case law divide into three main categories: (1) development, implementation, and publication of comprehensive anti-harassment and discrimination policies and procedures; (2) development, implementation, and publication of effective complaint, investigation, and appeal procedures; and (3) effective training of all employees with respect to these policies and procedures. Only by fully addressing all three of these elements can a college or university gain confidence that it has implemented an effective EEO compliance program and taken full advantage of the holdings in *Faragher*, *Ellerth*, and *Kolstad*.

Most, if not all, of these elements should be familiar to school administrators. Years ago the Department of Education's Office for Civil Rights ("OCR") promulgated regulations under Title IX and the ADA requiring institutions that receive federal funds to publish policies of non-discrimination and designate employees to coordinate efforts.⁴⁵ These regulations also require that institutions

41. 29 U.S.C. § 621 (2005).

42. 20 U.S.C. § 1681 (2006).

43. See, e.g., *Williams v. Admin. Review Bd.*, 376 F.3d 471, 478 (5th Cir. 2004) (applying *Faragher/Ellerth* to a hostile work environment claim brought under the whistleblowing provisions of the Energy Reorganization Act of 1974); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 (4th Cir. 2001) (allowing liability standards developed for sexual harassment to apply to all forms of harassment); *Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 411-12 (6th Cir. 1999) (finding a racial harassment claim can be proven with evidence of an abusive or offensive work environment); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998) (applying the same agency principles of vicarious liability under the Civil Rights Act to acts of racial discrimination by supervisors); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (finding no difference in employer-liability standards for race and sex-based discrimination); *Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 687-88 (8th Cir. 1998) (assuming, without deciding, that an ADA claim caused by a hostile work environment is to be modeled after a similar claim under Title VII).

44. This article will refer to compliance with Title VII and other laws prohibiting harassment and discrimination as "EEO compliance."

45. See Title IX, 34 C.F.R. § 106.9 (2003); Age Discrimination Act, 34 C.F.R. § 110.25

adopt and publish grievance procedures to resolve complaints.⁴⁶ Thus, an effective EEO program is essential not only to preserving the *Faragher/Ellerth* defense, but also to comply with statutory and regulatory requirements that have existed for some time.

A. Broad Policy Prohibiting Discrimination, Harassment, and Retaliation

Lower courts have expanded upon *Faragher* and *Ellerth* in clarifying that the first, essential element of a comprehensive compliance program is a strong policy statement against the offending conduct. The school must define the prohibited behavior and state unequivocally that the conduct violates its policies and will not be tolerated. This gives the campus community fair warning and also sets a standard against which future conduct can be evaluated.

Decisions subsequent to *Faragher* and *Ellerth* also clarify that such policies should encompass the full array of forms of discrimination. Although nearly all employers have now adopted some form of EEO compliance policy, a surprising number still limit their policies to sexual harassment and fail to mention other categories of discrimination, harassment, or retaliation. This is a mistake. The case law clarifies that an incomplete policy may seriously jeopardize the institution's ability to mount a defense or forestall punitive damages.

For example, in *Molnar v. Booth*,⁴⁷ the court found that a general policy barring discrimination on the basis of "race, color, or sex" was insufficient because it did not define "sexual harassment" or give guidance to employees on how to deal with such harassment.⁴⁸ In *Golson v. Green Tree Financial Servicing Corp.*,⁴⁹ the court criticized the employer's failure to mention pregnancy discrimination in its general policy prohibiting discrimination: "no matter how effectively the policy in the

(1975).

46. See Title IX, 34 C.F.R. § 106.8 (2003); Age Discrimination Act, 34 C.F.R. § 110.25 (1975). See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 305 n.15 (1998) ("The school district must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of discrimination. The district also must inform students and their parents of Title IX's antidiscrimination requirement.") (citations and internal quotation marks omitted); *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1225 n.4 (7th Cir. 1997) ("Under federal law, all education programs receiving federal financial assistance must designate at least one responsible employee to investigate complaints of sexual harassment and must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of harassment.") (internal quotation marks omitted); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 408 (5th Cir. 1996) ("Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination."); *Frederick v. Simpson Coll.*, 160 F. Supp. 2d 1033, 1036 (S.D. Iowa 2001) ("When OCR receives a complaint, it inspects: whether the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures; whether the school investigated or otherwise responded to allegations of sexual harassment; and whether the school has taken immediate and effective corrective action responsive to the harassment.").

47. 229 F.3d 593 (7th Cir. 2000).

48. *Id.* at 601.

49. 26 F. App'x 209 (4th Cir. 2002).

handbook was disseminated, [the employer] failed to notify its employees that discrimination on the basis of pregnancy violates Title VII.”⁵⁰ On this basis, the court found that the employer’s conduct constituted “reckless indifference” and justified an award of punitive damages.⁵¹ Similarly, in *EEOC v. Preferred Management Corp.*,⁵² the court affirmed an award of punitive damages, noting that the employer’s anti-harassment policy failed to include religious discrimination, its managers had received no training on the issue, and it had no procedure for handling complaints of religious discrimination.⁵³

The EEOC’s *Enforcement Guidance*⁵⁴ underscores the importance of a comprehensive EEO policy that addresses more than just sexual harassment. At a minimum, the EEOC recommends that a policy include: (1) a clear definition of the prohibited conduct; (2) a clear statement prohibiting retaliation for making a complaint or for providing information regarding a complaint; (3) a complaint process with accessible avenues for complaints; (4) an assurance of confidentiality, to the extent possible; (5) a complaint process that is prompt, thorough and provides an impartial investigation; and (6) assurance that immediate and effective corrective action will be taken if it is determined that discrimination occurred.⁵⁵ Courts have confirmed the importance of these elements as well.⁵⁶

The EEOC’s *Enforcement Guidance* also specifies that an effective policy “should make clear that [the employer] will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints” and warns that a “policy and complaint procedure will not be effective without such an assurance.”⁵⁷ Courts have consistently ruled in favor of employers that adopt such a provision and punished those that do not. For example, in *Garone v. United Parcel Service, Inc.*,⁵⁸ the court granted the employer’s *Faragher/Ellerth* defense, in part because it was “undisputed that [the employer] maintained and published to its employees policies that not only prohibited sexual

50. *Id.* at 214.

51. *Id.* at 213–14.

52. 226 F. Supp. 2d 957 (S.D. Ind. 2002).

53. *Id.* at 963.

54. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC NOTICE NO. 915.002 (June 18, 1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html> [hereinafter EEOC’S ENFORCEMENT GUIDANCE].

55. *Id.*

56. *See* *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349–50 (6th Cir. 2005) (concluding that while no one definitive formula for a sexual harassment policy is necessary, “an effective policy should at least: (1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint and (4) and provide for training regarding the policy.”); *Montero v. Agco Corp.*, 192 F.3d 856, 862 (9th Cir. 1999) (finding an employer’s sexual harassment policy was adequate where it “(1) provide[d] a definition of sexual harassment, (2) identifie[d] who[] employees should contact if they are subjected to sexual harassment, (3) describe[d] the disciplinary measures that the company may use in a harassment case, and (4) provide[d] a statement that retaliation will not be tolerated.”).

57. EEOC’S ENFORCEMENT GUIDANCE, *supra* note 54.

58. 436 F. Supp. 2d 448 (E.D.N.Y. 2006).

harassment, but protected individuals from retaliation for reporting harassment and pledged to investigate and take action upon both anonymous and attributed complaints.”⁵⁹ Conversely, in *Reed v. Cracker Barrel Old Country Store*,⁶⁰ the court found a policy inadequate because it contained no mention of retaliation for “reporting or objecting to sexual harassment,” the employer’s managers had not received any training on retaliation, and that no “specific efforts were used to prevent or to address complaints of retaliation.”⁶¹

From the standpoint of effective management, an improperly limited policy sends the wrong message to employees, suggesting that the institution takes some categories of discrimination or harassment less seriously than others. This undermines respect within the workplace. To be effective, a policy should include a clear, broad prohibition against *all* forms of discrimination, harassment, and retaliation.

B. Effective Publication of Policies and Procedures

Lower courts building upon *Faragher* and *Ellerth* have also emphasized that an institution must not only adopt but also distribute and publicize its anti-discrimination policies to everyone within the institution or campus community. The Supreme Court focused upon this omission in *Faragher*. Although the defendant in *Faragher* had adopted a policy against sexual harassment, it had “entirely failed to disseminate its policy against sexual harassment among the beach employees and . . . its officials made no attempt to keep track of the conduct of supervisors.”⁶² In addition, the policy did not allow the plaintiff to bypass her immediate supervisors even though she sought to complain about those supervisors personally.⁶³ Under these circumstances, the Court held as a matter of law that the employer had failed to exercise reasonable care.⁶⁴

The Supreme Court’s words should resonate with any university administrator overseeing a large campus or one with multiple locations. The *Faragher* decision warned that the defendant “could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.”⁶⁵

Numerous lower courts have since agreed that effective distribution of a formally adopted policy is essential to showing reasonable care in maintaining an effective compliance program.⁶⁶ The Fourth Circuit Court of Appeals has held that

59. *Id.* at 472.

60. 171 F. Supp. 2d 741 (M.D. Tenn. 2001).

61. *Id.* at 749–50.

62. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

63. *Id.*

64. *Id.* at 809.

65. *Id.* at 808–09.

66. *See, e.g., Hertzberg v. SRAM Corp.*, 261 F.3d 651, 664 (7th Cir. 2001) (finding a jury could conclude that employer did not make a good faith effort to implement anti-harassment policy based on evidence in the record that employer did not provide employees with ready

distribution of an anti-harassment policy is “compelling proof” that an employer exercised reasonable care in preventing and correcting harassment,⁶⁷ which may be rebutted only by showing “that the employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional.”⁶⁸ Although no other circuit has adopted this “compelling proof” standard, the importance of distributing an effective EEO policy cannot be overstated.

Courts have approved many methods that an employer may use to effectively publish its anti-harassment policies. These include training employees, putting up posters in the workplace,⁶⁹ referencing the policy in a union contract,⁷⁰ or explaining the policy in a newsletter⁷¹ or the institution’s internal, monthly magazine.⁷² One employer even reproduced its anti-harassment policy on the back of its employees’ pay stubs.⁷³ At the very least, each college and university will want to include the relevant policy in its employee handbook and post the policy on the institutional website.⁷⁴ In addition, the institution should distribute any modifications of its policy to all of its employees and also distribute the policy to new employees. A common, court-approved mechanism is to re-distribute such materials on a yearly basis and obtain signatures memorializing each employee’s receipt of the policy.⁷⁵ Many colleges and universities also send an annual e-mail

access to anti-harassment policy); *Romano v. U-Haul Int’l*, 233 F.3d 655, 670 (1st Cir. 2000) (“[A] written statement, without more, is insufficient to insulate an employer from punitive damages liability.”); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (ruling against an affirmative defense because employer did not distribute harassment policy to employees).

67. See, e.g., *White v. BFI Waste Serv., LLC*, 375 F.3d 288, 299 (4th Cir. 2004); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001).

68. *Barrett*, 240 F.3d at 266 (internal quotation marks omitted).

69. See, e.g., *Taylor v. CSX Transp.*, 418 F. Supp. 2d 1284, 1304 (M.D. Ala. 2006) (concluding employer effectively published anti-harassment policy by posting it in a “crew room” where plaintiff was present on a regular basis); *Simmons v. Mobile Infirmiry Med. Ctr.*, 391 F. Supp. 2d 1124, 1134 (S.D. Ala. 2005) (finding an anti-harassment policy was effectively distributed when reviewed in training and placed on bulletin boards).

70. Cf. *Austin v. Norfolk S. Corp.*, 158 F. App’x 374 (3d Cir. 2005). In reversing the denial of judgment as a matter of law for the employer, the court found it laudatory that the employer “even went so far as to contact [the plaintiff’s] local union representative and ask him to address the subject of [harassing conduct] with the union’s members.” *Id.* at 378.

71. See, e.g., *Andrews v. Lockheed Martin Energy Sys., Inc.*, No. 3:06-CU-42, 2006 WL 2711818, at *9 (E.D. Tenn. Sept. 21, 2006) (publishing anti-harassment policies in newsletters, handbooks, and “other publications” is evidence that employer implemented policies to create a workplace free from discrimination); *Montero v. Agco Corp.*, 192 F.3d 856, 862 (holding that the employee’s receipt of a copy of the policy in a handbook, a separate memorandum explaining the policy, and two additional pamphlets regarding the policy during her employment demonstrated reasonable care by employer to prevent sexual harassment).

72. See, e.g., *Swingle v. Henderson*, 142 F. Supp. 2d 625, 634–37 (D.N.J. 2001).

73. *Bryant v. Sch. Bd. of Miami Dade County*, 142 F. App’x 382, 385 (11th Cir. 2005).

74. See, e.g., *Taylor*, 418 F. Supp. 2d at 1304 (posting employer’s anti-harassment policy on company’s intranet satisfied the publishing requirement).

75. See, e.g., *Harper v. City of Jackson Mun. School Dist.*, 414 F. Supp. 2d 595, 605 (S.D. Miss. 2005) (requiring employees to sign an annual employment contract that explicitly made

to all employees reminding them of the harassment policy and providing a link to the policy on the institution's website. No signature is necessary if the e-mail records are retained because most systems will show whether employees received the e-mail.

In the years since *Faragher* and *Ellerth*, lower courts have clarified that, although no one mechanism is required, some effective dissemination of anti-harassment and discrimination policies is essential. An employer must now make efforts to "implement its anti-discrimination policy, through education of its employees and active enforcement of its mandate."⁷⁶

C. Complaint, Investigation, and Appeal Procedures

The emerging case law also clarifies that adopting and publicizing an anti-harassment policy is not enough; the institution must also have an effective strategy for implementing and enforcing that policy or else risk forfeiting the affirmative defense.⁷⁷ As one court applying *Faragher* and *Ellerth* stressed, "[e]very court to have addressed this issue thus far has concluded that [simply adopting] a written or formal anti-discrimination policy is . . . not sufficient in and of itself to insulate an employer from a punitive damages award."⁷⁸ Otherwise, "employers would have an incentive to adopt formal policies . . . but they would have no incentive to enforce those policies."⁷⁹

To be truly effective, an EEO compliance program must include specific and workable complaint, investigation, and appeal procedures.⁸⁰ Courts have stressed that a compliance program should be explicit in delineating how to make a complaint, to whom one complains, and the process for investigation and resolution of complaints.⁸¹ An effective compliance program must also include an

employment subject to school district's anti-harassment policy); *Talamantes v. Berkeley County Sch. Dist.*, 340 F. Supp. 2d 684, 697 (D. S.C. 2004) (distributing anti-harassment policy to school employees when hired and at annual training); *McDaniel v. Merlin Corp.*, No. Civ. A.1:01CV2992JEC, 2003 WL 21685622, at *10 (N.D. Ga. June 26, 2003) (satisfying publication requirements of *Faragher/Ellerth* defense by showing that employees signed acknowledgement form accepting responsibility for reviewing handbook that contained anti-harassment policy and procedures).

76. *Romano v. U-Haul Int'l*, 233 F.3d 655, 670 (1st Cir. 2000).

77. *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172, 176 (4th Cir. 1998).

78. *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001).

79. *Id.* (citing *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 517 (9th Cir. 2000) ("[The] purpose of Title VII . . . would be undermined if [anti-discrimination] policies were not implemented, and were allowed instead to serve only as a device to allow employers to escape punitive damages.")).

80. EEOC ENFORCEMENT GUIDANCE, *supra* note 54. See also *Gentry v. Export Packaging Co.*, 238 F.3d 842, 847 (7th Cir. 2001) ("[A] sexual harassment policy must provide for 'effective grievance mechanisms' and therefore the mere creation of a sexual harassment policy will not shield a company from its responsibility to actively prevent sexual harassment in the workplace.").

81. See, e.g., *Madison v. IBP, Inc.*, 257 F.3d 780, 795 (8th Cir. 2001), *overruled on other grounds* by *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (discussing corporate policy prohibiting racial and sexual discrimination and harassment, maintaining affirmative action plan, and conducting annual two-hour training session for plant managers, which were held

“assurance that the harassing supervisors could be bypassed in registering complaints.”⁸² This standard “best practice” requires that if the complaining employee is lodging a complaint against her own supervisor, or should she feel for any reason that she cannot complain to the designated person, she may complain to another identified, alternative supervisory employee.

The decision in *Stuart v. General Motors Corp.*⁸³ provides a good example of effective complaint and investigation procedures. In *Stuart*, the court noted that, upon receipt of a complaint, the employer had (1) immediately removed harassing material from the employee’s workplace, (2) completed a thorough investigation within nine days after the complaint, (3) spent a week interviewing thirty people as to their knowledge of the harassment, (4) reiterated its sexual harassment policy by sending a letter to all its employees explaining its policy along with a copy of its employee handbook, and (5) offered the aggrieved employee a transfer to a different department.⁸⁴ Under these circumstances, the court concluded, no rational jury could have found the employer’s EEO compliance program inadequate.⁸⁵ This level of commitment is appropriate to promote compliance and also protect the institution’s *Faragher/Ellerth* defense.

D. Employee and Supervisor Training

Finally, the importance of training has been strongly affirmed by courts interpreting *Faragher*, *Ellerth*, and *Kolstad*. Lower courts appear to be placing increasingly heavy emphasis upon an employer’s attempts to train employees—at both the staff and supervisory levels—about the operation of the employer’s anti-discrimination policies.

In *Bryant v. Aiken Regional Medical Centers, Inc.*,⁸⁶ the employer’s “extensively implemented organization-wide” EEO policy included “formal training classes and group exercises for hospital employees.”⁸⁷ In conjunction with the employer’s grievance policy, this was sufficient evidence of “widespread

insufficient when such policies were not carried out at the worksite at issue); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (stating that the jury properly rejected *Faragher/Ellerth* defense where employer did not investigate or take action on employee’s complaint); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000) (deciding that the existence of a complaint procedure was insufficient where the employees testified that they feared retaliation if the procedures were used); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999) (finding that simply encouraging employees to contact higher management with grievances insufficient to show good faith effort required to avoid punitive damages); *but see Daniel v. Spectrum Stores, Inc.*, 381 F. Supp. 2d 1368, 1375 (M.D. Ga. 2005) (finding that employer satisfied first prong of *Faragher/Ellerth* defense where its anti-harassment policy contained adequate complaint procedures and employer also maintained an “Alertline,” where employees could report harassment anonymously).

82. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

83. 217 F.3d 621 (8th Cir. 2000).

84. *Id.* at 633.

85. *Id.* at 633–34.

86. 333 F.3d 536 (4th Cir. 2003). See discussion *infra* Part III.B for details on this case.

87. *Id.* at 548–49.

anti-discrimination efforts” to justify reversal of the punitive damages award.⁸⁸ Similarly, in another case the employer regularly conducted training sessions and distributed to each employee an anti-harassment policy that included “multiple mechanisms for detecting and correcting harassment.”⁸⁹ The court held that these efforts established that the employer had exercised reasonable care sufficient to obtain summary judgment on an employee’s claim of sexual harassment.⁹⁰ Another sound practice, which has been repeatedly approved by courts, is to train all employees when they begin work and before incidents arise.⁹¹

Conversely, courts have not hesitated to penalize employers where training efforts were nonexistent.⁹² Inadequate training is also a serious risk.⁹³ For example, one court rejected an employer’s attempts to avoid punitive damages where the employer only provided limited training in “equal opportunity.”⁹⁴ Another court upheld an award of punitive damages where the employer had not provided its employees with any EEO training and had merely placed an EEOC “Sexual Harassment” poster in one area of its facility.⁹⁵

Many courts have stressed that appropriate training involves not only the general training of employees but also the more comprehensive training of supervisors and managers who play many different roles in the compliance process.⁹⁶ For example, in *Soto v. John Morrell & Co.*,⁹⁷ the district court identified training for company supervisors as an important element of an effective policy and noted that the absence of such training raised a jury question of the effectiveness of that employer’s policy.⁹⁸

88. *Id.* at 549.

89. *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999).

90. *Id.* at 812.

91. *See Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002) (stating that punitive damages were unavailable where employer trained all employees, including new employees).

92. *See, e.g., Gordon v. Southern Bells, Inc.*, 67 F. Supp. 2d 966, 982–83 (S.D. Ind. 1999); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747–48. These two cases permitted assessment of punitive damages because of employer’s failure to train.

93. *Baty v. Willamette Industries*, 172 F.3d 1232, 1238–39 (10th Cir. 1999) (affirming an award of damages against employer that only conducted two, 45-minute prevention sessions for selected employees, and only after the plaintiff’s complaint was received). *See discussion infra* Part IV.A.1 for details on this case.

94. *Zimmermann v. Assoc. First Capital Corp.*, 251 F.3d 376, 385–86 (2d Cir. 2001).

95. *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 461 (4th Cir. 2002).

96. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998) (“Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim’s employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.”); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999) (finding that Wal-Mart’s failure to train supervisors precluded defense to punitive damages).

97. 285 F. Supp. 2d 1146 (N.D. Iowa 2003).

98. *Id.* at 1164–66. *See also Romano v. U-Haul Int’l*, 233 F.3d 655, 670 (1st Cir. 2000) (upholding award of punitive damages where employer did not train supervisors to recognize harassment).

The importance of training supervisors cannot be overemphasized. Supervisors need to know how to refrain from harassment, prevent it among the employees they manage, and respond to complaints that are brought to them. Supervisors must also be trained to recognize retaliation and intervene immediately if retaliation occurs. Courts have correctly observed that, because supervisory employees are on the front line of preventing and responding to harassment and discrimination, supervisors need to be especially well-educated in the institution's policy and enforcement procedures.

III. BENEFITS OF AN EFFECTIVE COMPLIANCE PROGRAM

The developing case law has not only identified the critical elements of an effective compliance program but has also consistently stressed the risk management benefits to adopting and implementing an effective compliance program. Those benefits include: (1) an affirmative defense to liability in the majority of cases, including cases involving claims other than sexual harassment; and (2) an opportunity to bar an award of punitive damages even in cases involving significant liability. Although an institution's ultimate goal should be to prevent misconduct, these risk management benefits offer an additional, powerful incentive for colleges and universities to adopt and implement an effective compliance program.

A. Affirmative Defense to Liability

The most obvious, litigation-related benefit of a comprehensive compliance program is the prospect of mounting a successful *Faragher/Ellerth* defense. This defense promises to be a complete bar to many hostile environment claims. Courts have been quick to rule in favor of employers that have instituted strong compliance programs. Indeed, numerous courts have entered summary judgment in favor of an employer purely on the basis of a *Faragher/Ellerth* defense, thus allowing employers to avert the risk of trial.⁹⁹

For example, in *Swingle v. Henderson*,¹⁰⁰ summary judgment was granted in favor of the employer in a hostile environment case on the basis of a *Faragher/Ellerth* defense.¹⁰¹ The employer in *Swingle* had: (1) provided training upon orientation; (2) posted notices instructing employees about how and where to complain; (3) reminded employees on a weekly basis about the policy; and (4) made sexual harassment the cover story on the company's internal magazine.¹⁰² Likewise, in *Newsome v. Administrative Office of the Courts of New Jersey*,¹⁰³

99. See, e.g., *Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001); *Cooke v. County of Suffolk*, 16 F. App'x 35, 37 (2d Cir. 2001); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811–814 (7th Cir. 1999); *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971–72 (5th Cir. 1999); *Dudik v. Mesquite Rodeo*, No. 03-178, 2004 WL 524947, at *6 (N.D. Tex. March 12, 2004); *Schoiber v. Emro Mktg. Co.*, No. 95-5726, 1999 WL 825275 (N.D. Ill. Sept. 21, 1999).

100. 142 F. Supp. 2d 625 (D.N.J. 2001).

101. *Id.* at 634–637.

102. *Id.*

103. 103 F. Supp. 2d 807 (D.N.J. 2000).

summary judgment was granted on the basis of the *Faragher/Ellerth* defense where the employer had disseminated a strong policy to all employees, regularly conducted harassment awareness sessions and, most significantly, acted immediately and effectively to stop the offensive conduct once the plaintiff complained.¹⁰⁴

In addition, courts have not hesitated to grant summary judgment on the basis of this defense where the plaintiff unreasonably failed to make use of an internal complaint process bolstered by a strong anti-harassment policy. For example, summary judgment in one case was granted in favor of the employer because the plaintiff failed to take advantage of a procedure for facilitating employee complaints and did not complain of the alleged harassment until after he resigned following fifteen alleged incidents.¹⁰⁵ Courts have also rejected many plaintiffs' attempts to explain away unreasonable delays. For instance, an employee's subjective fears of retaliation do not justify his or her failure to complain.¹⁰⁶ Nor are a plaintiff's unsupported concerns about coworker reaction legitimate reasons to refrain from filing an internal complaint.¹⁰⁷

B. Elimination of Punitive Damages

Trial courts have also enthusiastically embraced the *Kolstad* holding that an effective EEO compliance program may shield an employer from the additional imposition of punitive damages. A leading case, *Bryant v. Aiken Regional Medical Centers, Inc.*,¹⁰⁸ demonstrates the extent of most courts' willingness to look favorably upon an employer's sincere, good faith attempts to address discrimination and harassment problems.

In *Bryant*, a surgical technician prevailed at trial in establishing race discrimination and retaliation under Title VII and 42 U.S.C. § 1981. The jury awarded the plaintiff \$40,000 in compensatory damages, \$50,000 in emotional distress damages, and \$210,000 in punitive damages.¹⁰⁹ On appeal, the Fourth Circuit Court of Appeals upheld the award of \$90,000 in actual damages but struck down the larger punitive damage award.¹¹⁰ The court relied upon the employer's

104. *Id.* at 819–820. *See also* Hooker v. Wentz, 77 F. Supp. 2d 753, 757 (S.D. W. Va. 1999) (granting summary judgment in favor of employer where policy widely disseminated, managers trained, and action taken promptly upon receipt of plaintiff's internal complaint).

105. Casiano v. AT&T Corp., 213 F.3d 278, 286–87 (5th Cir. 2000).

106. *See* Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1290–91 (11th Cir. 2003) (stating that plaintiff's unsupported concerns about retaliation did not justify failure to complain); Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001) (affirming dismissal of claim because employee's failure to report the harassment to a supervisor allowed employer to raise a *Faragher/Ellerth* affirmative defense); Leopold v. Baccarat, Inc., 239 F.3d 243, 246 (2d Cir. 2001) (affirming judgment against employee who failed to take advantage of employer's anti-harassment policy).

107. Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000).

108. 333 F.3d 536 (4th Cir. 2003).

109. *Id.* at 543.

110. *Id.* at 540.

training and prevention efforts, citing the employer's strong policy, ongoing attempts to publicize its policy and train its employees, and voluntary monitoring of departmental demographics in an attempt to "keep the employee base reflective of the pool of potential employees in the area."¹¹¹ The employer's "widespread anti-discrimination efforts, the existence of which [the plaintiff did] not dispute, preclude[d] the award of punitive damages in this case."¹¹²

Similarly, other courts have denied plaintiffs the opportunity to seek or retain punitive damages because of comprehensive and ongoing compliance attempts by the employer.¹¹³ In *Woodward v. Ameritech Mobile Communications*,¹¹⁴ the court granted summary judgment on behalf of the employer with respect to the availability of punitive damages.¹¹⁵ The court emphasized the employer's strong anti-harassment policy, which included (1) two different complaint mechanisms; (2) two-day training sessions for all employees; and (3) requirement that all employees, including the plaintiff, sign a form indicating their receipt and review of the policy.¹¹⁶ Under these circumstances, there was no triable issue as to whether the employer made a good faith effort to comply with Title VII, and thus punitive damages were unavailable as a matter of law.¹¹⁷

It is fair to say that courts have enthusiastically embraced the Supreme Court's holdings in *Faragher*, *Ellerth*, and *Kolstad* in a significant number of hostile environment cases. The courts could not have signaled any more strongly that comprehensive attempts to address EEO issues may significantly benefit an employer in litigation.

IV. THE RECOGNIZED LEGAL RISKS OF NON-COMPLIANCE

Perhaps even more significant than the decisions that reward employers for strong compliance programs are those decisions that penalize employers for failing to implement a strong compliance initiative. The danger is not simply that a college or university will be forced to go to trial rather than prevail on summary judgment. The more serious danger is that courts or juries will draw a strong, adverse inference from an institution's unwillingness to adopt what are increasingly considered standard practices in EEO compliance. Not only do the school and its individual employees risk findings of liability, but they also risk the

111. *Id.* at 548-49.

112. *Id.* at 549.

113. *See, e.g.,* *Green v. Admin. of Tulane Educ. Fund*, 284 F.3d 642, 654 (5th Cir. 2002) (stating that employer was entitled to judgment as a matter of law on punitive damages claim where employer acted in good faith by placing complainant on paid leave, holding meetings, and restating employee's job duties).

114. No. 98-0744, 2000 WL 680415 (S.D. Ind. March 20, 2000).

115. *Id.* at *16.

116. *Id.* at *14.

117. *Id.* at *16. *See also* *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (disallowing punitive damages where employer publicized anti-harassment policy, trained all new employees, maintained effective grievance procedure, and promptly investigated plaintiff's complaints); *Fuller v. Caterpillar, Inc.*, 124 F. Supp. 2d 610, 618 (N.D. Ill. 2000) (disallowing punitive damages where employer extensively publicized policy and trained all employees).

imposition of significant, potentially uninsurable punitive damages. Recent case law demonstrates that this risk is not abstract but very real, very serious, and only becoming more so.

A. Forfeiture of the Institution's Affirmative Defense

The Supreme Court warned in *Ellerth* that an employer would have a defense to liability only if the employer could demonstrate the exercise of "reasonable care to prevent and correct promptly any sexually harassing behavior."¹¹⁸ This has proven all too true. While many courts have rewarded employers for serious attempts to comply with the EEO laws, many other decisions find the affirmative defense entirely inapplicable (or deny summary judgment on this basis) where a compliance program is arguably insufficient.

A useful, cautionary example is the decision in *Miller v. Woodharbor Molding & Millworks, Inc.*,¹¹⁹ in which the employer sought to assert the defense because it had adopted an anti-harassment policy.¹²⁰ The court, however, observed that the plaintiff's supervisors were unfamiliar with the policy, had never received training on how to implement the policy, and had never been informed about the employer's procedures for reporting sexual harassment.¹²¹ The court noted that the policy itself was incomplete in that it failed to prohibit retaliation and that it did not provide a formal complaint procedure.¹²² Mere encouragement to complain was not enough because the employer did not even identify to whom a complaint should be made.¹²³ The court thus concluded that the *Faragher/Ellerth* defense was unavailable.¹²⁴

Miller is not the only decision to have laid particular emphasis upon inadequate training in determining that the *Faragher/Ellerth* defense has been forfeited. For instance, in *Baty v. Willamette Industries, Inc.*,¹²⁵ a jury awarded more than \$1 million in damages in a sexual harassment and retaliation case.¹²⁶ On appeal, the employer argued that it was entitled to a *Faragher/Ellerth* defense because it responded promptly to the complaint and, after the complaint was received, conducted two forty five-minute sexual harassment prevention sessions that included discussion and a video.¹²⁷ However, the court found that the employer's investigation concluding that no harassment had occurred was a sham, given the pervasiveness of harassment in the workplace and the fact that "management

118. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

119. 80 F. Supp. 2d 1026 (N.D. Iowa 2000).

120. *Id.* at 1030.

121. *Id.* at 1030–31.

122. *Id.* at 1031.

123. *Id.*

124. *Id.* at 1032. *See also* *Gordon v. Southern Bells, Inc.*, 67 F. Supp. 2d 966, 982–83 (stating that employer forfeited defense because it failed to distribute policy or conduct any training); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747–48 (stating that employer forfeited defense because it failed to train managers or distribute policy).

125. 985 F. Supp. 987 (D. Kan. 1997).

126. *Id.* at 991–998 (reducing the award to \$300,000 pursuant to the Title VII statutory cap).

127. *Baty v. Willamette Indus. Inc.*, 172 F.3d 1232, 1245–46 (10th Cir. 1999).

condoned and even encouraged the creation of a hostile work environment for plaintiff.”¹²⁸ Moreover, one of the principal harassers testified at trial that even after the training sessions, he did not understand what constituted sexual harassment. Accordingly, the Tenth Circuit Court of Appeals rejected the *Faragher/Ellerth* defense, finding that the “jury could reasonably have concluded that the small amount of training given the employees was inadequate in light of the severity of the problem.”¹²⁹

A significant line of decisions also rejects the *Faragher/Ellerth* defense where a policy appears adequate as drafted but, when tested, utterly fails to address serious complaints. For instance, in *Smith v. First Union National Bank*,¹³⁰ a female employee complained of sexual harassment by her supervisor.¹³¹ While the company had a serviceable policy against harassment, the ensuing investigation focused solely on the supervisor’s management style and the supervisor was never even asked about the accuser’s specific allegations.¹³² These facts raised a jury question as to the adequacy of the employer’s compliance efforts.¹³³ The court noted that this employer’s compliance program, while technically accurate, was ineffective in promptly addressing and eliminating the challenged conduct, thus calling into question the availability of the *Faragher/Ellerth* defense.¹³⁴ Such cases underscore the need to adopt not only a formal policy but also workable and effective compliance procedures, which then must be applied rigorously and fairly even in the most sensitive cases.¹³⁵

B. Increased Risk of Individual Liability

Failure to take sufficient measures to prevent harassment and discrimination not only deprives the educational institution of an affirmative defense but also places faculty and supervisors at increased risk of personal liability. Although individuals cannot be sued personally under Title VII, individuals remain highly vulnerable to suit by common law or state statutory claims. Failure to promote a compliant

128. *Id.* at 1242.

129. *Id.* See also *Miller v. D.F. Zee’s, Inc.*, 31 F. Supp. 2d 792, 803 (D. Or. 1998) (finding the affirmative defense unavailable because of lack of training).

130. 202 F.3d 234 (4th Cir. 2000).

131. *Id.* at 239–40.

132. *Id.* at 245–46.

133. *Id.* See also *O’Rourke v. City of Providence*, 235 F.3d 713, 736–38 (1st Cir. 2001) (finding that plaintiff’s internal complaints about hostile environment having largely been ignored, no *Faragher/Ellerth* defense was available and plaintiff recovered \$275,000, plus significant attorneys’ fees and costs, after jury trial); *White v. New Hampshire Dep’t of Corr.*, 221 F.3d 254, 261–62 (1st Cir. 2000) (finding that insufficient, untimely investigation blocked the affirmative defense and supported large jury verdict on behalf of female employee alleging hostile work environment); *Hafford v. Seidner*, 183 F.3d 506, 513–14 (6th Cir. 1999) (finding that plaintiff raised a jury question of harassment where employer’s alleged response to complaints about racial harassment was not to investigate but to reprimand complainant).

134. *Smith v. First Union Nat’l Bank*, 202 F.3d at 245–46.

135. See *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1288–89 (rejecting plaintiff’s challenge to adequacy of investigation of her complaint, inasmuch as the investigation resulted in termination of the employee against whom she complained).

workplace only increases this risk.

In a number of cases, faculty and supervisors have been held individually liable for harassing or discriminatory conduct on various theories and ordered to pay significant damages. For example, in *Pociute v. West Chester University*,¹³⁶ a student alleged that the head of the chemistry department tried to touch and kiss her in his office with the door closed and offered to trade sex for better grades.¹³⁷ Fearing that no one would believe her story, the student concealed a tiny video camera in her notebook and returned to the professor's office. At trial, the student played a video showing the professor's hand moving towards her breast.¹³⁸ Although the jury eventually absolved the university of liability, it awarded the student \$120,000 in her suit against the professor.¹³⁹

Similarly, a graduate teaching assistant at the Harvard University Extension School alleged that a professor harassed her by sending her emails of a personal and sexual nature.¹⁴⁰ The student filed a charge against both the university and the professor with the Massachusetts Commission Against Discrimination (MCAD), alleging violations of the state's human rights law. Although the complainant later dismissed her charge against the university, the MCAD held the professor individually liable for sexual harassment and ordered that he pay \$25,000 in emotional distress damages.¹⁴¹

In some situations, both the institution and individual employees face potential liability under statutes other than the federal civil rights laws. In another MCAD case, the only female carpenter at Smith College contended that she was subjected to a hostile work environment because of her gender and sexual orientation.¹⁴² She alleged that her supervisor did nothing to stop the harassment and gave her the least desirable work assignments.¹⁴³ One of her co-workers further alleged that the supervisor retaliated against him when he complained on behalf of the complainant.¹⁴⁴ The college and a number of other defendants settled, leaving the

136. *Pociute v. West Chester Univ.*, 117 F. App'x 832 (E.D. Pa. 2004) (affirming district court's judgment in favor of the plaintiff under Title IX of the Civil Rights Act of 1964, as amended, 20 U.S.C. § 1681 and the Pennsylvania Human Relations Act. 43 PA. CONS. STAT. § 951).

137. *Id.* at 833. See also Jim Smith, *Jury Finds West Chester Prof Liable for Harassing Student*, PHILADELPHIA DAILY NEWS, Nov. 21, 2003, at 8; Sharon Walsh, *Videotape Persuades Jury to Find Professor Liable for Sexual Harassment*, CHRON. HIGHER EDUC., Dec. 5, 2003, at A8.

138. Walsh, *supra* note 137.

139. Smith, *supra* note 137.

140. John O. Cunningham, *Professor Personally Liable for Harassment*, MASSACHUSETTS LAWYERS WEEKLY, June 11, 2001, available at <http://www.masslaw.com/signup/archives.cfm?page=/archives/ma/01/611012.htm>. See also MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, ANNUAL REPORT 2001: DECISIONS, available at <http://www.mass.gov/mcad/decisions5.html>.

141. See sources cited *supra* note 140.

142. Mass. Comm'n Against Discrimination v. Faust, Docket Nos. 91-SEM-3095, 91-SEM-3097 (April 29, 2004) (unpublished opinion, on file with author).

143. *Id.* at 3, 10–11.

144. *Id.* at 12–13.

supervisor as the only defendant before the MCAD.¹⁴⁵ The MCAD ordered that the supervisor pay the complainant \$100,000 and her co-worker \$50,000 in emotional distress damages.¹⁴⁶

42 U.S.C. § 1983 provides yet another means by which a plaintiff may bypass the civil rights laws and seek to hold faculty and staff at public colleges and universities individually liable for harassment.¹⁴⁷ In *Delgado v. Stegall*,¹⁴⁸ a student alleged that she had been sexually harassed by her professor.¹⁴⁹ She filed suit against the university under Title IX and against the professor under § 1983.¹⁵⁰ The district court ruled that the university could not be held liable under Title IX because it had no actual knowledge of the harassment, and because Title IX provided the exclusive remedy for students alleging sexual harassment, the court also found that the student was barred from suing her professor.¹⁵¹ The Seventh Circuit Court of Appeals reversed in part, holding that the student could still pursue her claim against the professor under § 1983 even though the university had been dismissed.¹⁵² The court reasoned that “[t]he legislators who enacted Title IX would be startled to discover that by doing so they had killed all federal remedies for sex discrimination by teachers of which the school lacked actual knowledge.”¹⁵³

In sum, colleges and universities—and their faculty and staff—need to be aware of the possibility of individual liability for supervisory employees of the institution. Effective training and prevention efforts can help moderate questionable conduct and minimize liability, protecting not only the institution’s welfare but also its employees’ personal interests. Conversely, failure to train or implement a comprehensive compliance program not only risks liability to the school through loss of the *Faragher/Ellerth* defense but also creates the potential for serious personal liability on the part of individuals.

C. Assessment of Punitive Damages

Exposure to liability—both institutional and personal—is not the only risk. Now that compliance programs are so common that courts and juries expect them to be implemented, employers also run a serious risk of being seen as “reckless” or “indifferent,” and thus incurring punitive damages, if EEO compliance programs are absent or inadequate. Even public institutions are more at risk of significant punitive damages than may be commonly acknowledged, and many institutions potentially face the nightmare that an assessment of punitive damages proves.

145. *Id.* at 2.

146. *Id.* at 28.

147. 42 U.S.C. § 1983 (2000).

148. 367 F.3d 668 (7th Cir. 2004).

149. *Id.* at 670.

150. *Id.*

151. *Id.*

152. *Id.* at 674–75.

153. *Id.*

1. Inadequate Compliance as a Basis for Punitive Damages

Perhaps the most noteworthy imposition of punitive damages is found in *EEOC v. Board of Regents of the University of Wisconsin System*.¹⁵⁴ After the university laid off four employees between the ages of forty-six to fifty-six, the terminated employees sued under the Age Discrimination in Employment Act (ADEA).¹⁵⁵ A jury found that the employer had discriminated willfully and it awarded both compensatory and “liquidated” damages, which is the form of punitive damages available under the ADEA.¹⁵⁶

On appeal, the Seventh Circuit Court of Appeals excoriated the university for failing to train its decision-makers in the basics of the age discrimination laws. The two primary decision-makers had not “been given any employment law training and neither man seemed to know the age at which the protections of the Act arose.”¹⁵⁷ The campus layoff expert did not “look at the terminations to see if age discrimination might have been involved.”¹⁵⁸ Indeed, neither the Dean nor the Associate Dean who reviewed the terminations even knew “that the floor age of protection under the ADEA was 40.”¹⁵⁹ The court of appeals therefore affirmed the liquidated damage award, stressing that “leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake from which a jury can infer reckless indifference.”¹⁶⁰

The Seventh Circuit’s decision, though rhetorically dramatic, is not an aberration. Numerous courts have affirmed punitive damage awards because of perceived deficiencies in compliance programs, citing defects ranging from inadequate policies to insufficient training. For example, one punitive damage award was upheld because the employer lacked a separate policy on discrimination and limited its training of hiring personnel to “a ten-minute video” and handouts giving examples of permissible and prohibited questions.¹⁶¹ The court concluded that the “jury could have found this level of training and information to be insufficient and therefore reprehensible.”¹⁶² In another case, the employer’s failure even to mention pregnancy discrimination in its policy or to train managers and supervisors on the issue was held to justify an award of punitive damages.¹⁶³ In

154. 288 F.3d 296 (7th Cir. 2002).

155. *Id.* at 299.

156. *Id.* While liquidated damages were not specifically mentioned in the court’s decision, they are the only form of penalty available under the ADEA and were referred to in the EEOC’s press release. See Press Release, The U.S. Equal Employment Opportunity Commission, EEOC Wins Age Discrimination Suit Against University of Wisconsin Press (May 10, 2001) available at <http://www.eeoc.gov/press/5-10-01-a.html>.

157. *EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d at 304.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Wagner v. Dillard Dept. Stores*, No. 1:98CV499, 2000 WL 1229648, at *9 (M.D.N.C. July 20, 2000), *aff’d in relevant part, vacated in part, reversed in part*, 17 F. App’x 141 (4th Cir. 2001).

162. *Wagner*, at *9.

163. *Golson v. Green Tree Fin. Servicing Corp.*, 26 F. App’x 209, 214 (4th Cir. 2002).

still another case, a court concluded that an employer could be held liable for punitive damages where it failed to educate its supervisors about the requirements of the ADA.¹⁶⁴

In short, “every court to have addressed this issue thus far has concluded that” simply adopting an anti-harassment policy is not enough to avoid punitive damages.¹⁶⁵ It is abundantly clear that colleges and universities must both adopt and implement effective anti-discrimination policies to avoid this risk.¹⁶⁶

2. Seriousness of the Risk of Punitive Damages

Although the specter of punitive damages alone should present enough motivation to implement an effective compliance program, institutions must also be aware of even greater challenges posed by the following circumstances: (1) the prospect that a plaintiff may circumvent the damage caps set forth in Title VII; (2) the high permissible ratio of punitive to compensatory damages; and (3) the potential unavailability of insurance for punitive damages.

a. Circumvention of the Title VII Damage Caps

One of the greatest risks that institutions face in employment suits is circumvention of the damage caps set forth in Title VII. The Civil Rights Act of 1991 established the following caps on the compensatory and punitive damage awards in employment discrimination cases depending on the size of the employer:

<u>Number of Employees</u>	<u>Damage Caps</u>
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
501+	\$300,000 ¹⁶⁷

If a jury awards damages under Title VII in excess of the statutory cap, the trial

164. EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1249 (10th Cir. 1999).

165. Bruso v. United Airlines, Inc., 239 F.3d 848, 858 (7th Cir. 2001).

166. See, e.g., MacGregor v. Mallinckrodt, Inc., 373 F.3d 923, 932 (8th Cir. 2004) (“The company’s lax anti-discrimination policies were insufficient to keep the issue of punitive damages from the jury.”); Anderson v. G.D.C., Inc., 281 F.3d 452, 461 (4th Cir. 2002) (stating that jury could find sufficient evidence to support new trial on punitive damages where employer never adopted an anti-discrimination policy or provided training; placement of EEOC poster regarding discrimination “simply does not constitute a good faith effort to forestall potential discrimination or to remedy any that might occur”); Zimmermann v. Assocs. First Capital Corp., 251 F.3d 376, 385–86 (2nd Cir. 2001) (allowing punitive damages where employer provided only limited training in “equal opportunity”); Romano v. U-Haul, Int’l, 233 F.3d 655 (1st Cir. 2000) (affirming award of punitive damage because employer failed to train supervisors on prevention of discrimination); Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210 (10th Cir. 2000) (allowing punitive damages because employer did not make good faith effort to educate employees); but see Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 517 (9th Cir. 2000) (vacating the trial court’s award of punitive damages and remanding the case for a determination of whether the plaintiff was entitled to punitive damages).

167. See 42 U.S.C. § 1981a(b)(3).

court must reduce the award to the cap amount pursuant to the statute.¹⁶⁸

Well-informed counsel, however, have found effective ways to circumvent these caps. A common method is to file suit under both Title VII and a state or local jurisdiction's non-discrimination statute.¹⁶⁹ Federal courts agree that if a jury awards damages under both Title VII and a local non-discrimination statute, the court may allocate the award "so as to *maximize* the plaintiff's recovery while adhering to the Title VII cap."¹⁷⁰

For example, in *Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.*,¹⁷¹ the plaintiff filed suit under both Title VII and a Puerto Rican statute alleging that her employment was terminated because of her age and gender.¹⁷² The jury awarded plaintiff \$250,000 in damages for emotional distress and \$105,000 in backpay, without specifying whether those damages were awarded under Title VII or the local statute.¹⁷³ In addition, the jury awarded \$250,000 in punitive damages under Title VII.¹⁷⁴ The defendant argued that Title VII limited plaintiff's total recovery to \$200,000, the maximum award under the damage cap against an employer of its size.¹⁷⁵ The trial court disagreed.¹⁷⁶ To comply with the Title VII cap, the trial court allocated \$249,999 of the emotional distress award to the Puerto Rican law claims and \$1 of the emotional distress award to the Title VII claim.¹⁷⁷ It then awarded plaintiff \$199,999 in punitive damages under Title VII.¹⁷⁸ Altogether, because the Puerto Rican law mandated doubling of the emotional distress award, the final judgment in favor of plaintiff totaled \$804,998.¹⁷⁹

The court of appeals held that the trial court acted properly. The court noted that all courts having "addressed the problem of allocating damages where the jury provides one damage award for parallel state and federal discrimination claims but the award exceeds the applicable federal cap" have "consider[ed] the unspecified

168. *Id.*

169. Note that this strategy is not effective in the few states whose non-discrimination statutes impose the same damages caps as Title VII. See, for example, ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(8)(e)(iv).

170. *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 66 (1st Cir. 2005) (emphasis added). See also *Hall v. Consolidated Freightways Corp.*, 337 F.3d 669, 679–80 (6th Cir. 2003) (reversing reduction in damages by district court, stating that "where the jury was instructed in such a fashion sufficient to support punitive damage awards under both the federal as well as the state statute, Plaintiff should be entitled to the balance of the award in excess of the federal \$300,000 cap under state law."); *Martini v. Fed. Nat. Mort. Ass'n*, 178 F.3d 1336, 1349–50 (D.C. Cir. 1999) (reinstating \$3 million punitive damage award, stating that, "[t]o be sure, only \$300,000 of that amount may be awarded under Title VII. But we see no reason why Martini should not be entitled to the balance under the D.C. Human Rights Act, since the local law contains the same standards of liability as Title VII but imposes no cap on damages.").

171. 399 F.3d 52 (1st Cir. 2005).

172. *Id.* at 55–56.

173. *Id.* at 55.

174. *Id.*

175. *Id.* at 56.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

award as fungible between the state and federal claims and allocating the award so as to *maximize* the plaintiff's recovery while adhering to the Title VII cap.¹⁸⁰ The First Circuit Court of Appeals joined other circuits in allowing individual plaintiffs to recover multi-million dollar awards in lawsuits brought under both federal and state or local non-discrimination statutes.¹⁸¹

Moreover, nothing precludes a plaintiff from filing exclusively in state court under a state's non-discrimination statutes, thereby avoiding Title VII's damage caps altogether.¹⁸² Even when a state does not provide a strong anti-discrimination statute, plaintiffs can still add state tort claims to federal non-discrimination claims in order to circumvent the federal caps.

For example, the plaintiff in *Chavez v. Thomas & Betts Corp.*¹⁸³ alleged sexual harassment by a supervisor.¹⁸⁴ She filed suit under Title VII and the New Mexico Human Rights Act against her employer and added tort claims of negligent supervision and negligent retention of her supervisor.¹⁸⁵ In addition, she filed assault and battery claims against her supervisor for unwanted touching.¹⁸⁶ The jury awarded plaintiff a total of \$145,625 in compensatory damages and \$354,375 in punitive damages against her employer, and \$20,750 in compensatory damages and \$3,250 in punitive damages against her supervisor.¹⁸⁷ The Tenth Circuit Court of Appeals affirmed the damage award for a total recovery of \$524,000 plus more than \$164,000 in attorneys' fees.¹⁸⁸

Yet another technique for circumventing damage caps set forth in Title VII is to file suit under 42 U.S.C. § 1981 in cases involving racial discrimination or harassment.¹⁸⁹ Although as a technical matter § 1981 addresses discrimination in the formation of contracts, it provides the same rights and remedies as Title VII in

180. *Id.* at 66 (emphasis added). The First Circuit cited the following cases in support of its position: *Hall v. Consolidate Freightways, Corp.*, 337 F.3d 669, 678–79 (6th Cir. 2003) (regarding racial harassment and retaliation claims brought under Title VII and Ohio civil rights laws); *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 570–71 (3d Cir. 2002) (regarding disability discrimination alleged in violation of the ADA and Pennsylvania Human Rights Act); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 509–10 (9th Cir. 2001) (regarding gender discrimination and retaliation claims brought under Title VII and Washington Law Against Discrimination); *Martini v. Fed. Nat. Mort. Ass'n*, 178 F.3d 1336, 1349–50 (D.C. Cir. 1999) (regarding sexual harassment and retaliation claims brought under Title VII and District of Columbia Human Rights Act); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir. 1997) (regarding sexual harassment suit brought under Title VII and Missouri Human Rights Act).

181. *See, e.g., Gagliardo*, 311 F.3d at 568 (affirming a \$2.3 million recovery); *Martini*, 178 F.3d at 1349–50 (affirming a \$3 million recovery).

182. *See, e.g., McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269 (N.Y. App. Div. 1998) (allowing \$1.5 million punitive damage award in harassment and retaliation case brought under New York State law).

183. 396 F.3d 1088 (10th Cir. 2005).

184. *Id.* at 1093.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1102–1105.

189. 42 U.S.C. § 1982 (2000).

the employment context without being subject to the damage caps.¹⁹⁰ For example, in *Swinton v. Potomac Corp.*,¹⁹¹ the plaintiff filed suit in state court alleging racial harassment in violation of § 1981 and the Washington Law Against Discrimination.¹⁹² After the case was removed to federal court, a jury returned awards of \$5,612 in backpay, \$30,000 for emotional distress, and \$1 million in punitive damages.¹⁹³ The Ninth Circuit Court of Appeals upheld both the compensatory and punitive damage awards on appeal.¹⁹⁴

Likewise, as the Eighth Circuit Court of Appeals noted in another case, “we have applied similar standards to claims for intentional discrimination under both Title VII and § 1981. . . . The two statutes have substantially identical legal theories of recovery and the standard for punitive damages is the same under each.”¹⁹⁵ The obvious difference, that § 1981 does not cap punitive damages, adds urgency to the need to address harassment and discrimination before misconduct matures into litigation.

b. High Ratios of Punitive to Compensatory Damages

Colleges and universities must also be wary of punitive damage awards that are significant multiples of a compensatory damages award. Although the Supreme Court has held that punitive damages 500 times greater than the economic harm suffered were grossly excessive,¹⁹⁶ federal courts of appeal often allow punitive damage awards twenty to seventy times greater than compensatory damage awards. This can have catastrophic results for any employer, let alone colleges and universities, which typically operate on tight budgets and cannot allocate excess profits to pay for large jury verdicts.

For example, in *Jeffries v. Wal-Mart Stores, Inc.*,¹⁹⁷ a jury awarded an employee \$8,500 in compensatory damages and \$425,000 in punitive damages for race discrimination and retaliation under both federal and state statutes.¹⁹⁸ On appeal, WalMart argued that a 50:1 ratio of punitive to compensatory damages violated its constitutional right to due process.¹⁹⁹ The Sixth Circuit Court of Appeals upheld the verdict, however, reasoning that the Supreme Court had not established any bright-line mathematical formula and that a 50:1 ratio was reasonable given WalMart’s egregious conduct.²⁰⁰ Similarly, in another case, a jury awarded the plaintiff only \$35,612 in back pay and emotional distress

190. See *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067 (8th Cir. 1997) (“[T]he Title VII statutory cap does not apply to limit the recovery under 42 U.S.C. § 1981.”).

191. 270 F.3d 794 (9th Cir. 2001).

192. *Id.* at 801.

193. *Id.* at 798.

194. *Id.* at 820.

195. *Madison v. IBP, Inc.*, 330 F.3d 1051, 1061–62 (citations omitted).

196. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

197. 15 F. App’x 252 (6th Cir. 2001).

198. *Id.* at 255.

199. *Id.* at 266.

200. *Id.*

damages but fined the employer \$1 million in punitive damages.²⁰¹ On appeal, the Ninth Circuit Court of Appeals noted that a 28:1 ratio of punitive to compensatory damages is not inconsistent with rulings in other circuits.²⁰²

The lesson of these decisions is that courts have been deferential to juries in the ratios allowed to stand in discrimination cases. An institution squandering its opportunity under *Kolstad* may face extremely significant punitive damages in a difficult case.

c. *Uninsurable Punitive Damages*

Large punitive damage awards should be of particular concern to colleges and universities located in states in which directly-assessed punitive damages are not insurable. All states except New York and Utah allow insurance for vicariously assessed punitive damages.²⁰³ However, sixteen states prohibit insurance of directly assessed punitive damages on public policy grounds.²⁰⁴

This exception is likely to become significant in any harassment case involving inadequate training or compliance. If a jury finds malice or indifference in such circumstances, any resulting punitive damages would likely be assessed directly against the employer. Colleges and universities in those states should therefore be especially cautious about the need to ensure compliance, so as to eliminate the risk of potentially huge exposure that cannot be limited through the purchase of insurance.

d. *Limited Protection from the Eleventh Amendment*

It is also important to recognize that even public universities, ostensibly immune from some damages actions, still face a risk of damages for failure to establish effective compliance programs. Several recent Supreme Court decisions

201. *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001).

202. *Id.* at 819–20. *See also Mathias v. Accord Econ. Lodging*, 347 F.3d 672 (7th Cir. 2003) (upholding a punitive damage award of 38 times compensatory damages in a consumer fraud case); *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000) (upholding punitive damages award 19 times of compensatory damages in sex discrimination case); *EEOC v. W & O, Inc.*, 213 F.3d 600, 616 (11th Cir. 2000) (upholding punitive damages of 26 and 16 times compensatory damages in pregnancy discrimination case); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262 (10th Cir. 2000) (upholding a punitive damage award 58 times compensatory damages in a sexual harassment case).

203. In Utah, Utah Code Ann. § 31A-20-101 prohibits an insurer from insuring against punitive damages. In New York, *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1070 (N.Y. 1994) held that public policy prohibits insurance of vicarious punitive damages.

204. The sixteen states are California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, and Utah. For an excellent summary of the law in this area with cases for each state and a summary chart see McCullough, Campbell & Lane, LLP, *The Insurability of Punitive Damages* (2004), http://www.mcandl.com/puni_frame.html. *See also* Stephanie L. Grassia, *The Insurability of Punitive Damages in Washington: Should Insureds Who Engage in Intentional Misconduct Reap The Benefit of Their "Bargains?"*, 26 SEATTLE U. L. REV. 627 (2003) (including a state by state comparison).

have held public institutions immune under the Eleventh Amendment²⁰⁵ from age and disability discrimination damages suits. In *Kimel v. Florida Board of Regents*,²⁰⁶ the Court held that the Eleventh Amendment provides state universities with immunity from suits for money damages under the ADEA.²⁰⁷ The following year, the Court held in *Board of Trustees of the University of Alabama v. Garrett*²⁰⁸ that public universities could not be sued in private actions for money damages under Title I of the ADA.²⁰⁹ But public institutions should not develop a complacent attitude toward compliance programs. Although these decisions appear to provide significant protection to public institutions from private damages suits alleging discrimination, the shield that is actually available is relatively limited.

First, the Supreme Court's decisions do not presently provide immunity from federal suits alleging discrimination or harassment on the basis of race or gender—the two most common types of charges received by the EEOC.²¹⁰ Nor do these decisions protect institutions from suits brought under state anti-discrimination statutes. In *Kimel*, the Supreme Court warned that “[o]ur decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”²¹¹ Most states have statutes that prohibit discrimination, and some of those statutes are more favorable to employees than comparable federal laws.²¹²

Moreover, even when individuals are precluded by the Eleventh Amendment from bringing suit against a state entity, the EEOC may still sue on their behalf. For example, in *University of Wisconsin*, the Seventh Circuit Court of Appeals rejected the University's claim that the Eleventh Amendment barred the EEOC from bringing ADEA lawsuits on behalf of terminated employees.²¹³ In such circumstances, the court observed, Eleventh Amendment immunity may be a

205. The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” See U.S. CONST. amend. XI.

206. 528 U.S. 62 (2000).

207. *Id.* at 91.

208. 531 U.S. 356 (2001).

209. *Id.* at 360.

210. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS: FY 1992 THROUGH FY 2005 (Jan. 27, 2006), <http://www.eeoc.gov/stats/charges.html>.

211. *Kimel*, 528 U.S. at 91 (listing age discrimination statutes from more than 40 states).

212. For example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court held that an individual is not considered disabled under the ADA if he can function normally through the use of mitigating measures or corrective devices. In contrast, the Supreme Judicial Court of Massachusetts has elected not to follow the analysis in *Sutton* and has since held that an individual who could achieve normal hearing through the use of hearing aids may still be considered “disabled” within the meaning of the Massachusetts disability statute. *Dahill v. Police Dept. of Boston*, 748 N.E.2d 956 (Mass. 2001).

213. *EEOC v. Bd. of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 299–301.

mixed blessing. Because the EEOC rarely brings suit, states tend to experience fewer claims. However, once the agency decides to bring a case, it brings the resources of the federal government, rather than those of an individual plaintiff, to bear on the matter.²¹⁴

Moreover, emerging case law suggests that plaintiffs who are barred by the Eleventh Amendment from filing suit under the ADA may still file suit for money damages under Section 504 of the Rehabilitation Act of 1973, which prohibits disability discrimination at educational institutions that receive federal funds and which offers remedies virtually identical to the ADA.²¹⁵ In *Garrett*, the plaintiffs argued that they could still sue under § 504 even if their claims under the ADA were barred.²¹⁶ The Eleventh Circuit Court of Appeals agreed, holding that federal law “unambiguously conditions the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under § 504 of the Rehabilitation Act.”²¹⁷

This reasoning has been followed by a number of other circuits.²¹⁸ It suggests that Eleventh Amendment immunity may continue to be limited by the federal courts in a manner that offers a state institution only minimal relief from potentially significant damage assessments. The threat of significant punitive damages assessments remains, even for public institutions. This continues to lend urgency to the need for an effective EEO compliance program that not only eliminates or minimizes the effects of actionable misconduct but also underscores the institution’s commitment to doing so.

V. EMERGING AREAS OF RISK

Finally, it is worth noting that, as effective compliance programs become standard across the corporate world and in higher education, institutions that still fail to adopt them will run the risk of being seen not only as short-sighted but as negligent or perhaps even intentionally discriminatory. As courts increasingly come to describe an effective EEO compliance program as a “duty,” rather than simply as a good employment practice, colleges and universities that fail to comply with that duty risk being found to have departed from the industry standard of care. The implications of failing to comply are not only legal, but also financial, reputational, and in some circumstances, moral. No institution of higher learning should court these risks.

The trend toward attributing discriminatory intent to an employer with a

214. *Id.* at 300 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)).

215. 29 U.S.C. § 794(d) (2000) (stating that section 504 uses the same standards for determining employment discrimination as Title I of the ADA).

216. *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 344 F.3d 1288 (11th Cir. 2003).

217. *Id.* at 1293.

218. *See, e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005); *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1164 (D.C. Cir. 2004). *But see* *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001) (holding that a state could not knowingly waive its Eleventh Amendment immunity to claims under section 504 of the Rehabilitation Act because the state would believe that Congress had already abrogated its immunity to claims under the ADA).

substandard compliance program can already be seen in some of the decisions in which punitive damage awards were upheld. In *Wagner v. Dillard Department Stores Inc.*,²¹⁹ the court termed the employer's deficient program not just insufficient but "reprehensible."²²⁰ In the *University of Wisconsin* case, the court termed the absence of training an "extraordinary mistake" from which a jury could infer "reckless indifference."²²¹ There is every reason to believe that as effective compliance programs become more common, any college or university lacking one will have this omission used against it as alleged evidence of discriminatory intent.

This risk has only increased now that at least three states have passed laws imposing a duty upon employers to conduct anti-harassment training.²²² Failure to comply with these statutory requirements could well be cited as evidence of discriminatory intent or, at least, "reckless indifference" to the requirements of the law. Indeed, given the trend toward statutory training requirements, it is not outlandish to predict that employers could eventually be accused of negligence for failing to implement effective compliance programs. Each of the state statutes that require training could, if disregarded, conceivably supply the "breach of duty" component in a negligence action alleging that sexual harassment resulted in injury to an employee.²²³ Significantly, the term used by the Supreme Court in *Ellerth*—

219. No. 1:98CV499, 2000 WL 1229648 (M.D. N.C. July 20, 2000).

220. *Id.* at *9.

221. *EEOC v. Bd. of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 304 (7th Cir. 2002).

222. Maine requires that employers with fifteen or more employees:

[C]onduct an education and training program for all new employees . . . that includes, as a minimum, the following information: the illegality of sexual harassment; the definition of sexual harassment under state and federal laws and federal regulations, including the Maine Human Rights Act and the Civil Rights Act of 1964 . . . ; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation as provided [by statute].

ME. REV. STAT. ANN. tit. 26, § 807 (Supp. 2005). The statute also mandates follow-up training for supervisory and managerial employees. *Id.*

Similarly, Connecticut requires employers with fifty or more employees to provide two hours of training and education to all supervisory employees within one year of enactment of the statute and to provide such training to all new supervisory employees within six months of their assumption of a supervisory position. CONN. GEN. STAT. § 46a-54(15)–(16). *See also* CONN. AGENCIES REGS. § 46a-54-204 (establishing requirements provided by statute). Like the Maine law, the Connecticut law specifies the information to be included in such training. *Id.*

Finally, California requires employers with fifty or more employees to "provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position" (with ongoing training required for supervisory employees). CAL. GOV'T CODE § 12950.1 (2005). The statute specifies the subjects to be addressed in training, including "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation." *Id.*

223. In some states, failure to comply with a duty imposed by statute can form the basis for a negligence action. *See, e.g.*, *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E. 2d 1193, 1198 (Ill. App. Ct. 1987) (fraternity's violation of state law against hazing was sufficient

“reasonable care”—borrows from the language of common-law negligence. Just as conduct falling below the standard of reasonable care often forms the basis for state law negligence awards, so courts may also begin to conclude that a failure to implement effective compliance programs constitutes an actionable breach of duty.

VI. CONCLUSION

The revolution in employment discrimination law may have been quiet but its effect has been profound. Courts have turned an affirmative defense into a broad, affirmative duty. When viewed as a whole, judicial applications of *Faragher*, *Ellerth*, and *Kolstad* leave little doubt that effective compliance programs are no longer optional but are now essential “best practices” in human resources and civil rights compliance. Courts have repeatedly emphasized the value of an effective compliance policy and articulated the components of an effective compliance program. In decision after decision, they have offered useful guidance about how to structure a program that will give the college or university the best chance to prevent and control misconduct and place it in the best position to defend itself in court. In the process, courts have greatly encouraged any institution remaining in doubt about the value of effective, comprehensive compliance from a risk management standpoint.

The Supreme Court’s decisions in *Faragher*, *Ellerth*, and *Kolstad* offer educational institutions an opportunity that should not be overlooked. The primary focus of the effective compliance defense is upon a good faith commitment to educate employees in doing the right thing—something that colleges and universities should be uniquely suited and motivated to do. Educational institutions should view the need to implement and publicize compliance programs as another opportunity to educate, and they should use their considerable resources to develop appropriate programs and publicize them throughout the campus community. Doing so will yield numerous benefits. Failing to do so will expose an institution to multiple levels of risk.

Simply put, there is no longer any room for colleges and universities to claim ignorance of the law. Courts have grown increasingly hostile toward employers who fail to implement effective EEO compliance programs, and they do not hesitate to impose severe penalties by way of litigation costs and punitive damages. This risk will only increase as more institutions awake to the importance of implementing effective policies and procedures. Those colleges and universities that remain unwilling to invest time and resources in achieving compliance will find themselves branded as reckless, indifferent, negligent, or even “reprehensible.” If nothing else, courts have made it clear that this “quiet revolution” in employment law can no longer be ignored.

RESEARCH MISCONDUCT AND PLAGIARISM

DEBRA M. PARRISH*

INTRODUCTION¹

The 1995 article *Scientific Misconduct and the Plagiarism Cases* presented an analysis of the cases decided by the Public Health Service's ("PHS") Office of Research Integrity ("ORI") and the National Science Foundation ("NSF"), which involved allegations of plagiarism.² The article examined how the responsible federal agencies defined plagiarism in scientific misconduct cases,³ discussed responses to plagiarism,⁴ and highlighted the differential treatment depending on the federal agency processing the case and whether the federal agency analyzed the allegations as, or distinguished them from, a copyright violation.⁵

Several developments have prompted the author to revisit the concepts and substance of that article. First, the White House Office of Science and Technology Policy ("OSTP") promulgated a new definition of plagiarism, which may affect how federal agencies approach such allegations.⁶ Second, federal agencies have decided additional cases that provide further insight into how they interpret scientific misconduct regulations and guidelines when evaluating an allegation of plagiarism.⁷ Third, ORI explicitly refocused its efforts to be more educational,⁸ had some of its investigatory powers transferred to another entity,⁹ and changed its

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1. All Freedom of Information Act (FOIA) references/materials cited herein are on file with the author.

2. Debra Parrish, *Scientific Misconduct and the Plagiarism Cases*, 21 J.C. & U.L. 517 (1995).

3. *Id.* at 518–25.

4. *Id.* at 530–44.

5. *Id.* at 526–30, 544–52.

6. See Office of Science and Technology Policy, 65 Fed. Reg. 76,260 (Dec. 6, 2000).

7. See *infra* Parts III.A–B.

8. See OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., REPORT OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES REVIEW GROUP ON RESEARCH MISCONDUCT AND RESEARCH INTEGRITY (1999), available at http://ori.dhhs.gov/documents/report_review_group.pdf [hereinafter HHS REVIEW GROUP REPORT]; JOHN D. MAHONEY, NAT'L INSTS. HEALTH, NIH INITIATIVE TO REDUCE REGULATORY BURDEN: IDENTIFICATION OF ISSUES AND POTENTIAL SOLUTIONS (1999), <http://grants.nih.gov/grants/policy/regulatoryburden/index.htm>.

9. See Press Release, U.S. Dep't Health & Hum. Servs., HHS Announces Plans to Improve Research Integrity and Prevent Research Misconduct (Oct. 22, 1999), available at

approach to the resolution of cases.¹⁰ Fourth, a number of cases have been decided outside of ORI and NSF jurisdiction that highlight some of the disparities in the resolution of cases.¹¹ Fifth, the role of professional associations in responding to allegations of plagiarism has developed substantially during the past decade.¹² Finally, the uses of plagiarism detection software programs on the Internet and elsewhere have raised issues of equity when investigating allegations against students versus those against faculty, as well as allegations of copyright infringement, in the discovery and prosecution of plagiarism.¹³

I. THE EVOLVING DEFINITION OF RESEARCH MISCONDUCT AND PLAGIARISM

A. The Early Definitions of Research Misconduct

In the late 1980s, in reaction to a series of high profile cases involving allegations of scientific misconduct and congressional pressure,¹⁴ PHS and NSF issued regulations defining “misconduct in science.”¹⁵ PHS defined scientific misconduct as “fabrication, falsification, plagiarism, or other practices that seriously deviate from those that are commonly accepted within the scientific community for proposing, conducting, or reporting research. It does not include honest error or honest differences in interpretations or judgments of data.”¹⁶ NSF defined misconduct as:

- (1) Fabrication, falsification, plagiarism, or other serious deviation from

<http://www.hhs.gov/news/press/1999pres/991022.html>.

10. *Id.*

11. *See, e.g.,* Thomas Bartlett & Scott Smallwood, *Four Academic Plagiarists You've Never Heard of: How Many More Are Out There?*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A8 (discussing the cases of Stephen Ambrose, Doris Kearns Goodwin, and Lawrence Tribe).

12. *See, e.g.,* COMMITTEE ON PUB. ETHICS, THE COPE REPORT 2005 5–8 (2005) available at <http://www.publicationethics.org.uk/reports/2005/cope2005.pdf>; Press Release, Am. Hist. Ass'n, AHA Announces Changes in Efforts Relating to Professional Misconduct (May 5, 2003), http://www.historians.org/press/PR_Adjudication.htm.

13. *See* Daniel H. Sharphorn & Kathryn Bender, Copyright and Plagiarism in the Digital World; Plagiarism by Faculty; Challenges and Issues, NACUA CLE Workshop (Nov. 10, 2005) (on file with author).

14. These cases include those involving William Summerlin (also known as “The Painted Mouse Case,” because Summerlin claimed to be able to transplant skin on a mouse when he simply had colored the skin with a magic marker), Elias Alsabti (who engaged in massive plagiarism and simply moved from institution to institution, avoiding significant consequences) and John Darsee (the case involving a prominent Harvard cardiology researcher who fabricated most of his data). *See* WILLIAM BROAD & NICHOLAS WADE, BETRAYERS OF THE TRUTH (1982).

15. *See* Responsibilities of Awardee and Applicant Institutions for Dealing with and Reporting Possible Misconduct in Science, 54 Fed. Reg. 32,446 (Aug. 8, 1989) (to be codified at 42 C.F.R. § 50) (giving PHS regulations); Misconduct in Science and Engineering, 56 Fed. Reg. 22,286 (May 14, 1991) (to be codified at 45 C.F.R. § 689) (giving NSF regulations). The term originally used in the regulations was “misconduct in science” or “scientific misconduct,” but in the 1993 NIH Revitalization Act, the term “scientific misconduct” was changed to “research misconduct.” *See* 42 U.S.C. § 289b(a)(3) (2000). The terms “scientific misconduct” and “research misconduct” are used interchangeably herein, as they are in the relevant literature.

16. 42 C.F.R. § 50.102 (1994).

accepted practices in proposing, carrying out, or reporting results from activities funded by the NSF; or (2) Retaliation of any kind against a person who reported or provided information about suspected or alleged misconduct and who has not acted in bad faith.¹⁷

B. Discrepancies in Misconduct Definitions

Although the PHS and NSF definitions were similar in wording, they proved to be significantly different in interpretation and application.¹⁸ Other federal agencies adopted similar definitions, but the PHS and NSF definitions assumed the greatest importance because the PHS and NSF provide funding to a majority of the research institutions.¹⁹ Federal regulations, including those promulgated by PHS and NSF, require institutions receiving funding from an agency to adopt policies and procedures for responding to allegations of misconduct.²⁰ Although most institutions adopted either the PHS or NSF definition as their own definition of research misconduct, some institutions adopted broader and conflicting definitions.²¹ This multiplicity of definitions among the agencies and academic institutions created confusion within the research community, since an action may or may not constitute scientific misconduct depending on which definition is applied and which body interprets the definition.²² Further, the same action may

17. 45 C.F.R. § 689.1 (1994).

18. NSF interpreted its definition more broadly and did not focus on categorizing the cases specifically as falsification, fabrication, or plagiarism, but evaluated almost all cases under the “serious deviation” rubric. *See* 45 C.F.R. § 689.1 (1994). Further, NSF did not require a finding of intent. *Id.* Accordingly, NSF found misconduct in a broader range of cases, including cases involving sexual harassment when the purpose of the grant was to encourage women to enter the sciences. The case of Dr. Dennis Rasmussen, NSF Case 89110010 (on file with author), in which he repeatedly sexually assaulted female undergraduate students and teaching assistants in Mexico while conducting studies as part of the NSF Research Experiences for Undergraduates program, which emphasized the inclusion of women proves this point. NSF found misconduct because Rasmussen used the educational opportunities provided by the grants to sexually assault students. PHS/ORI, however, attempted to categorize all allegations as either falsification, fabrication, plagiarism or “other practice,” and generally required intent to make a finding of misconduct. *See* 42 C.F.R. § 50.102 (1994).

19. *See* FRANCIS MACRINA, SCIENTIFIC INTEGRITY: AN INTRODUCTORY TEXT WITH CASES 3 (2000).

20. *See* 42 C.F.R. § 93.102 (2005); 45 C.F.R. § 689.4 (2005); 45 C.F.R. § 689.4 (1988).

21. *See, e.g.*, Off. Vice Provost, Tufts U., Misconduct in Scientific Research and Scholarship, <http://www.tufts.edu/central/research/Misconduct.htm> (last visited Nov. 15, 2006) (including as misconduct violation of statutes and regulations applicable to scientific research). *See also* CENTER FOR HEALTHY POL’Y STUD. CONSULTING, FINAL REPORT, ANALYSIS OF INSTITUTIONAL POLICIES FOR RESPONDING TO ALLEGATIONS OF SCIENTIFIC MISCONDUCT § 2 (2000) (indicating that over half of the policies reviewed had a definition that was beyond the definition of misconduct used by ORI).

22. *See* OFF. RES. INTEGRITY, U.S. DEP’T HEALTH & HUM. SERVS., OFFICE OF RESEARCH INTEGRITY ANNUAL REPORT 2005 65 (2006), *available at* http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_2005.pdf (concluding that a postdoctoral fellow falsified a figure published online prior to print in a journal, and though ORI accepted many of the institution’s factual findings, ORI did not find misconduct. The figure had been corrected prior to print in a journal) [hereinafter ORI ANNUAL REPORT 2005].

constitute misconduct at the institutional level, but not at the federal agency review level.²³

C. Difficulties Applying Existing Definitions

Regardless of the overall scope of the definitions of misconduct, aspects of these definitions created problems. First, despite the proclivity for adopting one of the federal agency definitions, the scientific and academic communities complained that the serious deviation prong of the definition was too vague and too difficult to apply.²⁴ Second, none of the agencies adopted formal definitions for “falsification,” “fabrication,” or “plagiarism.”²⁵ Although ORI did not adopt a formal definition of plagiarism, it published a “working definition” in its December 1994 newsletter:

ORI considers plagiarism to include both the theft or misappropriation of intellectual property and the substantial unattributed textual copying of another’s work. It does not include authorship or credit disputes.

The theft or misappropriation of intellectual property includes the unauthorized use of ideas or unique methods obtained by a privileged communication, such as a grant or manuscript review.

Substantial unattributed textual copying of another’s work means the unattributed verbatim or nearly verbatim copying of sentences and paragraphs which materially mislead the ordinary reader regarding the contributions of the author. ORI generally does not pursue the limited use of identical or nearly-identical phrases which describe a commonly-used methodology or previous research because ORI does not consider such use as substantially misleading to the reader or of great significance.

Many allegations of plagiarism involve disputes among former collaborators who participated jointly in the development or conduct of a research project, but who subsequently went their separate ways and made independent use of the jointly developed concepts, methods, descriptive language, or other product of the joint effort. The ownership of the intellectual property in many such situations is seldom

23. If federal agency funding is involved or sought for the research, the institution must report its finding to that federal agency. *See* 45 C.F.R. § 689.4(b)(5) (2005); 42 C.F.R. § 93.315 (1989); 45 C.F.R. § 689.4(b)(5) (1988). The federal agency will then review the case to determine whether a finding of misconduct is necessary and whether the institution complied with the applicable regulations and conducted a thorough, unbiased investigation with appropriate expertise. 42 C.F.R. § 93.403 (2005); 45 C.F.R. § 689.9(a) (2005).

24. COMM’N ON RES. INTEGRITY, U.S. DEP’T HEALTH & HUM. SERVS., INTEGRITY AND MISCONDUCT IN RESEARCH 10 (1995), *available at* http://ori.dhhs.gov/documents/report_commission.pdf [hereinafter COMMISSION REPORT]. Specifically, the “other practices that seriously deviate” clause, apart from the vagueness complaint, was criticized by some based on the idea that the clause might be utilized to “punish creative or novel science.” *Id.*

25. *See* 42 C.F.R. § 50.102 (2003); 45 C.F.R. § 689.1 (2005).

clear, and the collaborative history among the scientists often supports a presumption of implied consent to use the products of the collaboration by any of the former collaborators.

For this reason, ORI considers many such disputes to be authorship or credit disputes rather than plagiarism. Such disputes are referred to PHS agencies and extramural institutions for resolution.²⁶

Despite ORI's broad informal definition of plagiarism, ORI has not found plagiarism in any form other than verbatim copying of text, i.e., "verbatim plagiarism."²⁷ Similarly, NSF has received allegations of intellectual property theft, but such allegations have not resulted in findings of misconduct.²⁸ Further, although the ORI working definition does not explicitly state that intent is required to demonstrate misconduct, ORI appears to have incorporated the concept of intent when evaluating cases.²⁹ In contrast, NSF has not required intent and has made findings based on negligent conduct.³⁰

D. Entities Seek to Clarify "Research Misconduct"

In 1993, the Secretary of the Department of Health and Human Services ("HHS") established the Commission on Research Integrity to make recommendations regarding research misconduct and integrity, including a proposal for a new definition for research misconduct.³¹ In 1995, the Commission—known as the Ryan Commission for its chair, Kenneth Ryan of Harvard University—delivered its report to the Secretary and made thirty-three recommendations.³² The Ryan Commission recommended that "research misconduct" be defined as:

26. *ORI Provides Working Definition of Plagiarism*, ORI NEWSL. (Off. Res. Integrity, U.S. Dep't Health & Hum. Servs., Rockville, Md.), Dec. 1994, at 5–6, available at http://ori.dhhs.gov/documents/newsletters/vol3_no1.pdf.

27. Although ORI has not found plagiarism when verbatim plagiarism was absent, in the case of Yahya Abdulahi, ORI also found the respondent plagiarized concepts. Findings of Scientific Misconduct, 61 Fed. Reg. 39,461 (Dep't Health & Hum. Servs. July 29, 1996). ORI has also found misconduct with respect to figures and photographs. See 69 Fed. Reg. 43,420–21 (July 20, 2004): Tirunelveli Ramalingam plagiarized two figures previously published by a different author in a 1997 article in the *Journal of Biological Chemistry*. 68 Fed. Reg. 61,811 (October 30, 2003): Dr. Ilya Koltover plagiarized a scanning micrograph from a graduate student. 66 Fed. Reg. 35,982–83 (July 10, 2001): Dr. David Jacoby plagiarized a Southern blot analysis of genomic DNA that had originally been a figure in a 1997 article written by different authors in the *Journal of Virology* and included the plagiarized material in various presentations and grant applications.

28. As of December 31, 2004, NSF had opened 185 cases involving allegations of intellectual theft. See Response to FOIA request of Jan. 14, 2005 (on file with author).

29. See, e.g., Case of Dr. Lonnie Mitchell, ORI Case No. 87-01 (available through FOIA from ORI) (finding that plagiarism had not occurred, based on the lack of a specific intent to deceive).

30. See, e.g., NSF Case No. 02-07 (available through FOIA from NSF).

31. Off. Res. Integrity, About ORI—History, <http://ori.dhhs.gov/about/history.shtml> (last visited Nov. 21, 2006).

32. COMMISSION REPORT, *supra* note 24, at 33.

significant misbehavior that improperly appropriates the intellectual property or contributions of others, that intentionally impedes the progress of research, or that risks corrupting the scientific record or compromising the integrity of scientific practices

Examples of research misconduct include but are not limited to the following:

Misappropriation: An investigator or reviewer shall not intentionally or recklessly

- a. plagiarize, which shall be understood to mean the presentation of the documented words or ideas of another as his or her own, without attribution appropriate for the medium of presentation.³³

The Ryan Commission also recommended a uniform federal research misconduct definition across federal granting agencies.³⁴ Although the concept for a uniform definition received PHS/ORI community support, the Commission's proposed definition did not.³⁵ Moreover, despite an HHS intra-departmental implementation group recommendation that a notice of proposed rulemaking be published to elicit comment, HHS did not publish the proposed definition for comment.³⁶

Instead, in August 1996 the Secretary created the HHS Review Group on Research Misconduct and Research Integrity ("Review Group") to review the PHS and ORI policies and procedures. In July 1999, this Review Group issued its report, making fourteen recommendations.³⁷ Among other things, the Review Group suggested that ORI define "research misconduct" as:

fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

. . . .

Plagiarism is the appropriation of another person's ideas, processes, results, or words without appropriate credit, including those obtained through confidential review of others' research manuscripts.

Research misconduct does not include honest error or honest differences of opinion.³⁸

Meanwhile, OSTP, through the Committee on Fundamental Science of the

33. *Id.* at 15.

34. *Id.* at 30.

35. See Billy Goodman, *Scientists are Split Over Finds of Research Integrity Commission*, THE SCIENTIST, Jan. 22, 1996, at 8.

36. See FED'N AM. SOC'YS FOR EXPERIMENTAL BIOLOGY, IMPLEMENTATION PROPOSAL ON RECOMMENDATIONS BY THE COMMISSION ON RESEARCH INTEGRITY 8-9 (1996), available at <http://opa.faseb.org/pdf/raub.pdf>.

37. The Secretary accepted the Review Group's recommendations in October 1999. Press Release, *supra* note 9. Independent of the Review Group, in March of that year, the National Institutes of Health had issued a report with various recommendations relating to research integrity. MAHONEY, *supra* note 8.

38. HHS REVIEW GROUP REPORT, *supra* note 8, at 4.

National Science and Technology Council, established a working group to develop a government-wide policy on research misconduct, including a definition. As a result, on December 6, 2000, OSTP published a new definition of research misconduct and urged federal agencies to implement this new definition through the promulgation of agency regulations.³⁹ The OSTP definition specifically defined plagiarism as “the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.”⁴⁰

E. Federal Agencies Revise Misconduct Definitions

In response to OSTP policy, NSF amended its definition through a final rule that went into effect in April, 2002.⁴¹ The new NSF regulations state in relevant part for conduct occurring on or after the effective date:

(a) *Research misconduct* means fabrication, falsification, or plagiarism in proposing or performing research funded by NSF, reviewing research proposal submitted to NSF, or in reporting research results funded by NSF.

....

(3) *Plagiarism* means the appropriation of another person’s ideas, processes, results or words without giving appropriate credit.

....

(b) *Research misconduct* does not include honest error or differences of opinion.⁴²

Thus, for conduct within NSF’s jurisdiction occurring on or after April 2002, the new NSF definition applies, and for conduct occurring before that date, the prior definition applies.

In April, 2004, PHS published a notice of proposed rulemaking and solicited comments on its new definition.⁴³ In May, 2005, PHS published a final rule which defined research misconduct in substantially the same terms as NSF.⁴⁴ The rule defines “research misconduct” as “fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. . . . (c) Plagiarism is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit. (d) Research misconduct does not include honest error or differences of opinion.”⁴⁵

39. See 65 Fed. Reg. 76,260 (Dec. 6, 2000). The regulations had been proposed in October 1999. 64 Fed. Reg. 55,722 (Oct. 14, 1999).

40. Federal Policy on Research Misconduct, 65 Fed. Reg. at 76,262.

41. See Research Misconduct, 67 Fed. Reg. 11,936 (Mar. 18, 2002) (to be codified at 45 C.F.R. § 689).

42. Misconduct in Science and Engineering, 45 C.F.R. § 689.1 (1994).

43. See Public Health Service Policies on Research Misconduct, 69 Fed. Reg. 20,778 (Apr. 16, 2004).

44. See Public Health Service Policies on Research Misconduct, 70 Fed. Reg. 28,370 (May 17, 2005) (to be codified at 42 C.F.R. § 93).

45. 42 C.F.R. § 93.103 (2005).

Importantly, PHS/ORI has signaled that it will no longer require intent to make a formal finding of research misconduct.⁴⁶ ORI will also expand its jurisdiction to include cases involving plagiarism of PHS-supported research.⁴⁷ In other words, plagiarism for ORI purposes will include plagiarism of PHS-sponsored research by PHS-recipient reviewers, not just plagiarism in PHS-sponsored research.⁴⁸ Although the proposed rule indicated that ORI would not consider authorship disputes as plagiarism allegations,⁴⁹ the final rule stopped short of that explicit exclusion.⁵⁰ Other agencies have indicated they intend to adopt the OSTP definition,⁵¹ but few have taken concrete steps to do so.⁵² In sum, although both ORI and NSF will have nearly identical definitions, whether the interpretation of those definitions will continue to vary by agency remains an open question.

II. THE EVOLVING AGENCY AND THIRD PARTY ROLES

A. ORI Process and Changes Thereto

1. ORI and Institutional Investigations

Institutions retain primary responsibility for making formal findings of misconduct. Institutions have a sixty-day period, commencing with receipt of an allegation of research misconduct, to conduct an inquiry to determine if there is

46. See Audio Tape: Comments of Alan Price, National Association of College and University Attorneys (NACUA) Annual Meeting (June 2005) (on file with NACUA).

47. See Public Health Service Policies on Research Misconduct, 70 Fed. Reg. at 28,371. In the past, as noted above, PHS would not have asserted jurisdiction over the case if the plagiarizer was not PHS-supported or had not sought PHS support for the research.

48. See *id.* However, PHS “jurisdiction does not attach . . . where there is no PHS support for the research record . . .” *Id.*

49. See Public Health Services Policies on Research Misconduct, 69 Fed. Reg. 20,778, 20,781 (Apr. 16, 2004).

50. See Public Health Services Policies on Research Misconduct, 70 Fed. Reg. at 28,377.

51. See Public Health Services Policies on Research Misconduct, 42 C.F.R. § 93.103 (2005). See also Office of Research Integrity, U.S. Dep’t of Health and Human Services, Policies—Federal Policies, http://ori.dhhs.gov/policies/federal_policies.shtml (last visited Nov. 15, 2006) (indicating that the Department of Agriculture, Commerce, Education, Interior, and Justice have drafted their policies but they are undergoing internal review) [hereinafter Federal Policies].

52. See Public Health Service Policies on Research Misconduct, 69 Fed. Reg. 42,102–07 (July 14, 2005) (adopting misconduct regulations for the National Aeronautics and Space Administration). NASA research is broadly defined as any involving the use of NASA facilities, equipment or personnel. *Id.* at 42,204. The possible sanctions in the current regulations are grouped in classes similar to NSF’s grouping of sanctions. *Id.* at 42,106. See also Nat’l Endowment for Human., Research Misconduct Policy (2001), <http://neh.gov/grants/guidelines/researchmisconduct.html>. According to the ORI website, the following other agencies have formalized their misconduct policies: the Department of Energy, the Department of Defense, the Department of Labor, the Department of Transportation, the Department of Veteran Affairs, the Environmental Protection Agency, and the Smithsonian Institute. See Federal Policies, *supra* note 51.

sufficient evidence to warrant an investigation.⁵³ If there is sufficient evidence, they have thirty days to commence the investigation and 120 days to complete it.⁵⁴ Institutions frequently request extensions of these deadlines, and ORI frequently grants their requests.⁵⁵ An institution must report its investigation findings to ORI for review and ORI may then make a federal determination of misconduct.⁵⁶

As noted above, in March 1999, the HHS Review Group made fourteen recommendations to improve the PHS misconduct policies and procedures.⁵⁷ The Secretary of HHS accepted these recommendations in July 1999, and she approved the necessary organizational changes in May, 2000.⁵⁸ Pursuant to these changes, ORI officially ceased to have authority to conduct investigations.

The responsibility for conducting investigations was transferred to the HHS Office of the Inspector General (“OIG”).⁵⁹ This change may signal the effective end of such HHS investigations because OIG typically investigates Medicare fraud cases that result in very large recoveries and enhance the prestige of that office, while little public support can be gleaned from investigations with no prospect of monetary recovery.⁶⁰ Despite ORI’s apparent loss of the ability to conduct formal investigations, its review of an institutional finding of misconduct has many of the same attributes as an investigation. During such a review, ORI contacts and interviews potential witnesses—including parties who did not participate in the institutional inquiry—and develops new evidence beyond that identified by the reporting institution.⁶¹ Thus, the primary effect of the change in ORI investigatory power is that it cannot take over an institutional investigation the way it could have in the past.

53. 42 C.F.R. § 93.307 (2005).

54. *Id.*

55. 42 C.F.R. § 93.314 (2005).

56. *See* 42 C.F.R. § 93.403 (2005).

57. MAHONEY, *supra* note 8, at Part IV.

58. *See* HHS REVIEW GROUP REPORT, *supra* note 8.

59. *See* 69 Fed. Reg. 20,778 (Apr. 16, 2004); *id.* at 20,782.

60. Although ORI worked with OIG in cases prior to May 2000, OIG appears to have played only a minor role and did not recommend criminal sanctions or civil penalties in those cases unless a qui tam action had been filed. *See* OFF. RES. INTEGRITY, U.S. DEP’T HEALTH & HUM. SERVS., ANNUAL REPORTS, http://ori.dhhs.gov/publications/annual_reports.shtml (listing ORI Annual Reports by year, with each year indicating the number of referrals to the HHS Office of Inspector General) [hereinafter ORI ANNUAL REPORTS]. *But see* OFF. INSPECTOR GEN., U.S. DEP’T HEALTH & HUMAN SERVS., WORK PLAN 44 (2006), *available at* <http://oig.hhs.gov/reading/workplan/2006/WorkPlanFY2006.pdf> (indicating a focus on Integrity of Research Involving Human Subjects); *id.* at 52 (indicating that the OIG will continue to work with the Department of Justice to develop and pursue cases involving false claims from institutions receiving PHS funds). Although the public is interested in safety in clinical trials of new drugs and devices, those cases typically fall under the purview of the FDA, not ORI, because the research typically is not sponsored by PHS but the commercial entity that is submitting the information to the FDA for approvals. *See id.* at 46–47.

61. *See* 42 C.F.R. § 93.403 (2005).

2. PHS and Institutional Misconduct Findings

The HHS Review Group found that, prior to 2000, the PHS and ORI accepted institutional findings approximately ninety to ninety-five percent of the time and initiated its own investigations only five percent of the time.⁶² Since 2000, ORI has not recommended a federal finding of misconduct against an individual without an institutional finding of misconduct.⁶³ Conversely, up through December, 2004, ORI rejected eighteen institutional findings of misconduct as a basis for a federal finding of misconduct.⁶⁴ All but one of these rejections occurred after 2000.⁶⁵ Further, it is important to note that these are cases in which ORI opened a case file believing that the alleged misconduct might fit within the federal definition of misconduct. Cases in which ORI knows *a priori* that the conduct will not satisfy the federal definition of misconduct or in which it will not have jurisdiction are never accorded case status within the ORI system.⁶⁶ Accordingly, there may be many more institutional findings of research misconduct that do not result in a federal finding.

3. PHS Misconduct Hearings

Since 1992, under an interim policy, ORI has offered hearings to those

62. See 69 Fed. Reg. 20,781 (2004).

63. This is based on reading all the cases where ORI made a finding of misconduct.

64. See FOIA response from Darlene Christian, Freedom of Information Officer, Dep't of Health & Human Servs., to author (Jan. 13, 2005) (on file with author). Two of these cases involved rejecting an institutional finding of plagiarism. See ORI Case No. 1996-16; ORI Case No. 2001-20 (available through FOIA from ORI). See Feb. 18, 2005 response from PHS to Parrish (on file with author).

65. In fact, before 2000, ORI only rejected one institutional finding of misconduct. See Letter from Office of Public Health and Science to author (Feb. 18, 2005) (on file with author). In 2000, ORI closed one case. See OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., HIGHLIGHTS OF 2000 ORI ANNUAL REPORT (2001), available at http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_2000.pdf [hereinafter ORI ANNUAL REPORT 2000]. In 2001, ORI closed three cases. See OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., ANNUAL REPORT 2001 (2002), available at http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_2001.pdf [hereinafter ORI ANNUAL REPORT 2001]. In 2002, ORI closed four cases. See OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., ANNUAL REPORT 2002 (2003), available at http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_2002.pdf [hereinafter ORI ANNUAL REPORT 2002]. In 2003, ORI closed six cases. See OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., ANNUAL REPORT 2003 (2004), available at http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_2003.pdf [hereinafter ORI ANNUAL REPORT 2003]. Finally, in 2004, ORI closed three cases. See OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., ANNUAL REPORT 2004 (2005), http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_2004.pdf [hereinafter ORI ANNUAL REPORT 2004].

66. See ORI ANNUAL REPORT 2005, *supra* note 22. The report claims that for allegations to become cases, they need to meet the definition of scientific misconduct established by PHS regulations. The ORI determines whether the incident reported (if found to be true), constitutes "fabrication, falsification or plagiarism." The allegations cannot become cases if, for example, the allegations represent questions of "honest differences in interpretations or judgments of data," which are expressly excluded from the PHS definition of scientific misconduct.

individuals who dispute a proposed finding of misconduct.⁶⁷ Hearings are conducted before a panel of three members of the HHS Departmental Appeals Board (“DAB”), which is generally staffed by lawyers.⁶⁸ The interim policy provides for the inclusion of up to two scientists on a panel.⁶⁹ That being said, no case has ever included two scientists on a panel, and many panels involved none.⁷⁰ However, as discussed more fully below, recently ORI has been more selective about cases in which it will allow a hearing and has settled the vast majority of the cases by agreement.⁷¹ Since 1992, the hearing process has commenced for twelve cases,⁷² but only six cases have completed the entire hearing process.⁷³ As a function of the current emphasis on settlement, ORI has not participated in a research misconduct hearing since October, 2000.⁷⁴

The new regulations change the current hearing process from one before a three-member panel, which may include up to two scientists, to one before a single Administrative Law Judge (“ALJ”) appointed by the DAB.⁷⁵ The ALJ may engage an expert in the type of science at issue in the case if either party requests that one be appointed, or if the ALJ determines that one is necessary, but that expert does not have decision-making authority.⁷⁶

67. See 42 C.F.R. §§ 93.400, 93.501 (2005).

68. Off. Res. Integrity, U.S. Dep’t Health & Hum. Servs., Handling Misconduct—Hearings, <http://ori.hhs.gov/misconduct/appeals.shtml> (last visited Nov. 15, 2006).

69. *Id.*

70. See *infra* note 75 and accompanying text.

71. Although the accused scientist is the party who is entitled to request a hearing, ORI may choose not to recommend a finding of misconduct if the respondent contests the finding and requests a hearing, and ORI does not believe that the evidence will support a finding of misconduct by the DAB.

72. See Robert C. Gallo, DAB Case No. A-93-91; Mikulas Popovic, DAB Case No. A-93-100; Evan Dreyer, DAB Docket No. A-2000-72 (2000); Rameshwar Sharma, DAB Docket No. A-93-50 (1993); Theresa Imanishi-Kari, DAB No. 1582 (1996); Catherine Kerr, DAB Docket No. A-95-123 (1995); Paul Langlois, DAB No. 1409 (1993); John Hiserodt, DAB No. 1466 (1995); Margit Hamosh, DAB Case No. A-93-56; Raphael Stricker, DAB Case No. A-93-91; Kimon Angelides, DAB No. 1677 (1999). Three misconduct cases were appealed to the DAB prior to the creation of ORI. See C. David Bridges, DAB No. 1232 (1991); Michael Sherer, DAB Case No. 89-24; Michael Trulson, DAB Case No. 91-106.

73. Margit Hamosh, Raphael Stricker, Maie Elkassaby, Evan Dreyer and Catherine Kerr withdrew their appeals after initiating the process. See DAB Docket Nos. A-93-56, A-93-31, A-93-168, A-97-2000 and A-95-123 respectively. ORI withdrew its case against Robert Gallo. See DAB Docket No. A-93-91, Ltr to C. Ford from C. Pascal (Nov. 12, 1993).

74. During the period 1996–2000, ORI made fifty-nine findings of misconduct. See ORI ANNUAL REPORTS, *supra* note 60 (listing links to the ORI Annual Reports for 1996, 1997, 1998, 1999, and 2000). From 2001 to December 15, 2005, ORI made fifty-two findings of misconduct. See *id.* (listing links to the ORI Annual Reports for 2001, 2002, 2003, 2004, and 2005). See also LAWRENCE J. RHOADES, OFF. RES. INTEGRITY, ORI CLOSED INVESTIGATIONS INTO MISCONDUCT ALLEGATIONS INVOLVING RESEARCH SUPPORTED BY THE PUBLIC HEALTH SERVICE: 1994–2003 (2004), available at <http://www.ori.dhhs.gov/documents/Investigations1994-2003-2.pdf>. Thus, the lack of hearings does not appear to be related to the number of misconduct findings made by ORI.

75. See 42 C.F.R. § 93.502 (2005).

76. See *id.* However, even if a party requests an expert, the ALJ is not required to appoint one. *Id.*

B. NSF Process and Changes Thereto

NSF has always offered a hearing if a proposed sanction against a respondent includes the possibility of being disbarred. When NSF revised its regulations in April, 2002, NSF indicated that in “structuring procedures in individual cases, NSF may take into account procedures already followed by other entities investigating or adjudicating the same allegation of research misconduct.”⁷⁷ To date, no individual has had a hearing afforded by NSF.⁷⁸

C. Associations

The role of associations in investigating and sanctioning members found guilty of misconduct is still evolving, but it appears that most professional societies have decided not to use their limited resources to pursue these cases.⁷⁹ The American Historical Association (“AHA”) has come full-circle on whether it should have any role in these cases. The AHA began inviting and adjudicating complaints beginning in 1986. Relevant AHA policies were articulated in statements issued in May, 1987,⁸⁰ and were subsequently amended several times, most recently in January, 2003.⁸¹ After investigating—or attempting to investigate, as in the case of Stephen Oates—a series of high profile cases,⁸² in May, 2003 the AHA announced that it would no longer investigate allegations of plagiarism or fraud against historians, but would devote its efforts to education.⁸³

In making this change, the AHA stated that (1) because its investigations were confidential, they had not been successful in making an impact on the profession,⁸⁴ (2) because only formal complaints were considered, obvious plagiarism and professional misconduct were not addressed, (3) the investigation process was complicated and time-consuming, and (4) it had no ability to impose sanctions for misconduct.⁸⁵ The president also noted that the AHA can only expel someone

77. 45 C.F.R. § 689.2(d) (2005).

78. See generally NSF OIG reports (on file with author).

79. See, e.g., Press Release, *supra* note 12.

80. There is no record online of the original statement of the AHA’s policies, only the most recent version is available online. Am. Hist. Ass’n, Statement of Standards of Professional Conduct (Jan. 6, 2005), available at <http://www.historians.org/pubs/Free/ProfessionalStandards.cfm>. AHA claims that the Statement on Standards of Professional Conduct is “[w]holly revised from an earlier statement adopted May 1987; amended May 1990, May 1995, June 1996, January and May 1999, May 2000, June 2001, and January 2003.” *Id.*

81. *Id.* The most recent amendment was adopted on January 6, 2005. The original policies were also amended in May 1990, May 1995, June 1996, January and May 1999, May 2000, and June 2001. *Id.* These amendments were briefly mentioned at the beginning of the current Statement on Standards of Professional Conduct. *Id.*

82. See Bartlett & Smallwood, *supra* note 11 (discussing the high-profile cases of Doris Kearns Goodwin and Stephen F. Ambrose).

83. See Press Release, *supra* note 12.

84. For example, in 2002, Dr. Judy Wu complained to the AHA that she had been plagiarized, and the AHA ruled in her favor but did not announce the disposition of the case on its website or otherwise publicize it. See Bartlett & Smallwood, *supra* note 11, at A10.

85. See Press Release, *supra* note 12.

from its organization—while others can apply more meaningful sanctions—and that such a limitation on the disposition of cases is a poor allocation of the association’s resources.⁸⁶ He added that a majority of scholarly societies in the humanities and social sciences have made the same decision not to use their limited resources to investigate allegations of misconduct.⁸⁷ Mark Frankel, the director of the Scientific Freedom, Responsibility, and the Law program at the American Association for the Advancement of Science, has suggested that associations investigate misconduct only if they have broad membership support and considerable resources with which to defend themselves in subsequent litigation.⁸⁸

Societies and associations that have sanctioned members for academic misconduct have been threatened by the members they sanctioned. For example, the American Philological Association (“APA”) found that member Martin Miller had plagiarized another member’s article, including a hand drawing of the original author, and publicly censured him.⁸⁹ The APA further notified the relevant journal that the article should be deleted from its listing because it was not an original work.⁹⁰ The journal, however, declined to retract the article, and the accused researcher threatened to sue the APA for defamation for publishing the finding in its newsletter.⁹¹ Shortly thereafter, the APA began requiring its fellows to sign a document acknowledging their obligation to comply with APA and National Endowment for the Humanities (“NEH”) regulations concerning research misconduct and releasing the APA from any liability for compliance with these procedures.⁹²

Nonetheless, associations and professional societies may have a constructive role in keeping the entities primarily responsible for investigations honest in their assessments. For example, in a case involving a Boston College (“BC”) theology professor accused of plagiarism in a book on ethics, the accuser notified the relevant publisher, State University of New York (“SUNY”) Press, and BC of the

86. *Id.*

87. See Thomas Bartlett & Scott Smallwood, *Mentor vs. Protégé*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A14. Cf. Joey F. George et al., *Report of the Ad Hoc Committee on Member Misconduct to the AIS Council*, 11 COMM. ASS’N INFO. SYS. 54, 56 (2003). To see the guidelines for handling misconduct established by the AIS Research Conduct Committee, see AIS Research Conduct Committee—Process Guidelines (October 8, 2003) available at http://www.aisnet.org/conduct/Committee_Guidelines.htm.

88. See Bartlett & Smallwood, *supra* note 87, at A14–A15. See also Ned Kock, *A Case of Academic Plagiarism*, 42 COMMS. OF ASS’N FOR COMP. MACH., July 1999, at 96, 103 (discussing how an individual who was plagiarized was informed that academic and research associations lacked budgets to defend against an action brought by the accused plagiarizer).

89. See *Notice of Censure*, AMER. PHILOLOGICAL ASS’N NEWSL. (Amer. Philological Ass’n, Phila., Pa.), Apr. 2003, at 4, available at <http://www.apaclassics.org/Newsletter/2003newsletter/403news.pdf>.

90. *Id.* at 5.

91. *Id.* at 4.

92. See *Professional Matters*, AMER. PHILOLOGICAL ASS’N NEWSL. (Amer. Philological Ass’n, Phila., Pa.), Oct. 2004, at 7, available at <http://www.apaclassics.org/Newsletter/2004newsletter/1004news.pdf>.

allegations.⁹³ SUNY Press declined to take action, stating that the errors were “inadvertent and minor.”⁹⁴ However, after the Boston Psychoanalytic Society conducted an investigation and determined that plagiarism had occurred, and the plagiarized individual asked that the book be withdrawn, SUNY Press agreed to examine the charges again.⁹⁵

Editors and publishers, however, seem to be taking a larger role in these cases. The Committee on Publication Ethics (“COPE”) and the Council of Science Editors (“CSE”), in particular, have provided a forum for editors to seek guidance from other editors on how to handle cases involving allegations of misconduct.⁹⁶ The CSE editorial policy committee developed a white paper to provide guidance to its members on how to handle such cases.⁹⁷ Moreover, during an informal survey of the Council of Editors of Learned Journals, twelve editors indicated that they would be prepared to remove a plagiarizing article from an electronic database, publish a notice of explanation regarding the issue, and indicate that the plagiarizer was not eligible to submit further articles.⁹⁸

III. RECENT CASES

A. ORI cases

From 1989 through January, 1995, ORI and its predecessor agencies, the Office of Scientific Integrity (“OSI”) and the Office of Scientific Integrity Review (“OSIR”), closed ten cases in which it found misconduct.⁹⁹ From 1995 to the close of 2004, ORI closed an additional fourteen such cases.¹⁰⁰ Thus, ORI and its two

93. See Thomas Bartlett, *Theology Professor Is Accused of Plagiarism in His Book on Ethics*, CHRON. HIGHER EDUC., Jan. 21, 2005, at A10.

94. *Id.*

95. See *id.* BC also initiated an inquiry into the allegations. *Id.*

96. COPE and CSE act as a forum, not as in an actual online forum.

97. COUNCIL OF SCI. EDITORS, CSE’S WHITE PAPER ON PROMOTING INTEGRITY IN SCIENTIFIC JOURNAL PUBLICATIONS (2006), available at http://www.councilscienceeditors.org/editorial_policies/whitepaper/entire_whitepaper.pdf. See also *Committee Roundup*, 28 SCI. EDITOR 66 (2005), available at <http://www.councilscienceeditors.org/members/securedDocuments/v28n2p050.pdf>.

98. See Thomas Bartlett & Scott Smallwood, *Professor Copycat*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A8.

99. See the cases of David Bridges, Lonnie Mitchell, James Freisheim, Leo Paquette, Mark Kowalski, L. Cass Terry, Jin Tong Wang, David Van Thiel, Herbert K. Naito and Gerald August (on file with author). A March 2005 FOIA response indicated that PHS plagiarism findings were also made in the following cases that predated the formation of ORI: Bhalla, OSI Case No. 113 (available through FOIA from ORI) (Univ. of Iowa); Everley, OSI Case No. 89-10 (available through FOIA from ORI) (Univ. of Pittsburgh); Cassell, OSI Case No. 89-20 (available through FOIA from ORI) (Univ. of Alabama); and Elmaleh, OSI Case No. 90-39 (available through FOIA from ORI) (Harvard found plagiarism in a grant application). See Parrish, *supra* note 2.

100. See Abdulahi, Yahya, 61 Fed. Reg. 39,461 (July 29, 1996) [hereinafter Abdulahi]; Farooqui, Jamal, 61 Fed. Reg. 16,803 (Apr. 17, 1996) [hereinafter Farooqui]; Landay, Alan, 60 Fed. Reg. 47,390 (Sept. 12, 1995) [hereinafter Landay]; Imam, S. Ashraf, 62 Fed. Reg. 66,372 (Dec. 18, 1997) [hereinafter Imam]; Rosales, Oscar, 60 Fed. Reg. 44,358 (Aug. 25, 1995)

predecessors have evaluated approximately 123 allegations of plagiarism over the years and determined that misconduct had occurred in twenty-four of them.¹⁰¹ Approximately ten percent of all those cases involving formal findings of research misconduct involved plagiarism.¹⁰²

In 1994, all the ORI plagiarism cases that were reported involved plagiarized material appearing in a grant application or a publication.¹⁰³ Since then, ORI has not limited plagiarism findings to those in grant applications and publications, but has also found the presentation of plagiarized material to a research group and to a mentor to constitute misconduct.¹⁰⁴ Further, ORI has made formal findings of plagiarism with respect to figures,¹⁰⁵ micrographs,¹⁰⁶ and DNA sequences.¹⁰⁷

As was the case in 1994, most of the allegations of plagiarism ORI has examined have involved plagiarized materials in grant applications.¹⁰⁸ Allegations of plagiarized material appearing in grant applications can derive from another grant application, including those obtained during the peer review process and those submitted by others in the same research group.¹⁰⁹ Allegations may also

[hereinafter Rosales]; Jacoby, David R., 66 Fed. Reg. 35,982 (July 10, 2001) [hereinafter Jacoby]; Karunakaran, Thonthi, 68 Fed. Reg. 46,642 (Aug. 6, 2003) [hereinafter Karunakaran]; Koltover, Ilya, 68 Fed. Reg. 61,811 (Oct. 30, 2003) [hereinafter Koltover]; Padgett, David A., 66 Fed. Reg. 54,012 (Oct. 25, 2001) [hereinafter Padgett]; Pandurangi, Raghoottama, 66 Fed. Reg. 40,288 (Aug. 2, 2001) [hereinafter Pandurangi]; Qian, Jin, 65 Fed. Reg. 41,468 (July 5, 2000) [hereinafter Qian]; Xiong, Momiao, 66 Fed. Reg. 63,709, (Dec. 10, 2001) [hereinafter Xiong]; Ramalingam, Tirunelveli, 69 Fed. Reg. 43,420 (July 20, 2004) [hereinafter Ramalingam]; Sultan, Ali, 69 Fed. Reg. 67,737 (Nov. 19, 2004) [hereinafter Sultan]. Note that a September 2004 ORI report identified eleven cases of plagiarism during those years. See RHOADES, *supra* note 74, at 7–8. However, that report characterized the Lupu case as a plagiarism case when the reported findings state the case involved fabrication, and the report does not include the Koltover and Kaunakaran cases which were publicly reported as formal findings of plagiarism. *Id.*

101. See ORI ANNUAL REPORTS, *supra* note 60 (listing links to the ORI Annual Reports from 1992 to 2004). A March 7, 2005 FOIA response reporting the number of plagiarism allegations and indicating that findings were made in the cases of Bhalla, Everley, Cassell and Elmaleh, although such findings were not announced in the Federal Register. See FOIA Request Number PHS 2K5-183, at 1 (on file with author).

102. See RHOADES, *supra* note 74 (analyzing ten years of the ORI between 1994–2003 and finding 6% of cases involved plagiarism and 4% involved falsification and plagiarism).

103. See Parrish, *supra* note 2.

104. See Koltover, *supra* note 100.

105. See Ramalingham, *supra* note 100; Sultan, *supra* note 100; Qian, *supra* note 100; Pandurangi, *supra* note 100.

106. See, e.g., Koltover, *supra* note 100; Sultan, *supra* note 100; Pandurangi, *supra* note 100.

107. See Karunakaren, *supra* note 100.

108. See Parrish, *supra* note 2.

109. See OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., OFFICE OF RESEARCH INTEGRITY 1996 HIGHLIGHTS 44 (1997), available at http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_1996.pdf [hereinafter ORI ANNUAL REPORT 1996]. Farooqui plagiarized materials in a PHS grant application from a grant application a different researcher had submitted to NSF. *Id.* Farooqui obtained the other researcher's application from a colleague while the application was undergoing confidential peer review. *Id.* See also OFF. RES. INTEGRITY, U.S. DEP'T HEALTH & HUM. SERVS., SCIENTIFIC MISCONDUCT 28 (1998), available at http://ori.dhhs.gov/documents/annual_reports/ori_annual_report_1997.pdf [hereinafter ANNUAL

include plagiarism of a publication or an unpublished paper, or use of data by someone not listed on the grant application or excluding a co-investigator.¹¹⁰ Since 1994, ORI has made formal findings of misconduct in twelve cases involving plagiarized material in a grant application.¹¹¹

Only one of the more recent ORI cases involved plagiarized material in a publication: the case of Alan Landay.¹¹² There, the accused researcher was found to have committed plagiarism at least five times over a five-year period.¹¹³ The instances comprised a half-paragraph to three pages in review papers and one page in the literature section of a paper.¹¹⁴ The university found a pattern of plagiarism.¹¹⁵ Despite the admission and finding of a pattern, ORI found Landay guilty of only two instances of plagiarism—which were, interestingly, those involving PHS support—and he was simply required to certify the originality or proper attribution of publications or grants for a period of two years.¹¹⁶

B. NSF Cases

From 1989 through December, 2000, NSF closed approximately 110 cases that involved allegations of verbatim plagiarism, sixteen of which resulted in findings of misconduct.¹¹⁷ As of December, 2004, NSF had closed thirty-four cases with findings of misconduct based on plagiarism or intellectual theft.¹¹⁸ NSF has noted

REPORT 1997]. Imam plagiarized material in a grant application from a different researcher's independent grant application that he obtained from a colleague. *Id.*

110. *See, e.g.,* ORI ANNUAL REPORT 2002, *supra* note 65, at 73. The respondent allegedly plagiarized ideas and words from a publication by another investigator, and then included the material in a grant application. *Id.* *See also* ORI ANNUAL REPORT 2004, *supra* note 65, at 55. The case involved allegations that the respondent plagiarized a potential research idea from a colleague in his department and included the idea in a grant application, though no misconduct was found. *Id.*

111. *See* Abdulahi, *supra* note 100 (publication); Xiong, *supra* note 100 (confidential proposal); Sultan, *supra* note 100 (multiple publications); Farooqui, *supra* note 100 (confidential grant application); Imam, *supra* note 100 (confidential proposal obtained during review); Jacoby, *supra* note 100 (publication); Koltover, *supra* note 100 (plagiarized a graduate student); Pandurangi, *supra* note 100 (publication); Padgett, *supra* note 100 (unpublished experiments by another researcher); Rosales, *supra* note 98 (published articles); Qian, *supra* note 98 (published text); Ramalingam, *supra* note 100 (publication).

112. *See* Landay, *supra* note 100.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* Letter from Darlene Christian, Freedom of Info. Officer, Dep't of Health & Human Servs., to author (Jan. 14, 2005) (on file with author). More recent years are not included in this statistic because only a limited number of cases are available for those years through the Freedom of Information Act, presumably because the cases had not closed when the most recent FOIA request of November 29, 2005 was submitted. To provide a parallel with the statistics previously provided on ORI cases, between 1989 and December 1994, the NSF closed four cases with a misconduct finding. *Id.* Between January 1995 and December 21, 2004, NSF closed thirty cases with a misconduct finding. *Id.*

118. These statistics are calculated from observations the author has made throughout her legal experience.

that approximately seventeen percent of the allegations received by their offices involve allegations of verbatim plagiarism and twenty-three percent involve allegations of intellectual theft.¹¹⁹ In 1994, all four of NSF's findings of plagiarism involved grant applications.¹²⁰ A review of all of NSF's closed cases indicates that, in addition to examining or inferring the intent of an individual, NSF has conducted a quantitative¹²¹ and qualitative analysis of the text that was copied and whether a pattern of copying exists.¹²²

A review of all the cases in which misconduct was found and premised on verbatim plagiarism reveals that NSF based its findings on the fact that the plagiarism was "extensive," either because of the quantity of material plagiarized or because the plagiarism spanned multiple proposals or papers.¹²³ The smallest amount of copying that supported a finding of misconduct premised on verbatim plagiarism was twenty-two lines.¹²⁴ In one case, the twenty-two lines appeared in the "Experimental Design and Methods" section, which the institution viewed to be substantial and which added a new analytical method to the proposal.¹²⁵ Moreover, the same material had appeared in another proposal submitted to the National Institutes of Health ("NIH").¹²⁶ In a second case involving twenty-two lines, the accused researcher copied from a confidential grant proposal.¹²⁷

The cases in which NSF did not find misconduct, despite the author's and submitting scholar's certification of originality and the existence of verbatim text

119. OFF. OF INSPECTOR GENERAL, NAT'L SCI. FOUND., SEMIANNUAL REPORT TO THE CONGRESS 40 (Sept. 2002), *available at* <http://www.nsf.gov/pubs/2002/oigseptember2002/pdfversions/oigsept2002.pdf> [hereinafter FALL 2002 OIG REPORT].

120. *See* OFF. OF INSPECTOR GENERAL, NAT'L SCI. FOUND., SEMIANNUAL REPORT TO THE CONGRESS (Sept. 1994), *available at* <http://www.nsf.gov/pubs/stis1995/oig11/oig11.txt> [hereinafter FALL 1994 OIG REPORT].

121. The quantitative analysis includes an analysis of how many of the lines were copied and its proportion in regard to the plagiarized work and the original work. *See, e.g.*, OFF. OF INSPECTOR GENERAL, NAT'L SCI. FOUND., CONFIDENTIAL INVESTIGATION REPORT, CASE A02020007 (on file with author). The exact number of lines of plagiarized text, figures, and references were counted to arrive at a total amount of plagiarized material.

122. *Id.*

123. *See, e.g.*, OIG Case No. 98-02 (on file with author) (90% taken from un-attributed sources); 92-07 (on file with author) (2/3 of proposal copied); OIG Case No. 91-04 (on file with author) (250 lines copied in one proposal; 200 lines copied in another proposal); OIG Case No. 95-29 (on file with author) (majority copied); OIG Case No. 02-50 (on file with author) (267 lines copied from a proposal). *Cf.* OIG Case No. 02-47 (on file with author) (finding plagiarism of text and figures in two proposals by the university to be misconduct; NSF declined to make a finding noting that the university's sanctions sufficiently protected the NSF's interests).

124. *See* OFF. OF INSPECTOR GENERAL, NAT'L SCI. FOUND., SEMIANNUAL REPORT TO THE CONGRESS 18 (Sept. 1999), *available at* <http://www.nsf.gov/pubs/2000/oigseptember1999/oigseptember1999.pdf> (reporting OIG Case No. 98-10) [hereinafter FALL 1999 OIG REPORT].

125. *Id.*

126. *Id.*

127. *See* OIG Case No. 02-07 (on file with author). The respondent contested, stating that only fifteen lines were copied. *See also* OFF. OF INSPECTOR GENERAL, NAT'L SCI. FOUND., INVESTIGATION REPORT A0202007, at n.32 (Feb. 6, 2004) (on file with author).

overlaps, suggest that NSF will not find misconduct when the amount copied is not qualitatively or quantitatively significant.¹²⁸

C. U.S. Non-ORI/NSF Cases

There have been a series of allegations involving non-ORI and non-NSF funded researchers. In contrast to the plagiarism occurring in grant applications, most of these cases involved plagiarism in a publication.¹²⁹ The cases of Stephen Ambrose, Doris Kearns Godwin, George Carney, Laurence Tribe, and Charles Olgletree, Jr. all involved plagiarism of a prior author's publication.¹³⁰ A Trinity International University law dean was dismissed for plagiarizing parts of an article that was published in the school's law review.¹³¹ An editor at History News Networks gets so many tips about purported plagiarism that he investigates only well-known authors.¹³²

Further, some allegations of plagiarism cases that are not under PHS or NSF jurisdiction are not investigated or are investigated only informally. For example, after Ned Kock learned that his work had been plagiarized, he contacted the journal that published the article.¹³³ Kock noted that neither the journal nor the institution conducted an investigation.¹³⁴ Eventually, the institution learned that the issue had been discussed at a professional meeting and, according to Kock, forced the plagiarizing individual to resign; however, it is unclear whether it ever conducted a formal misconduct investigation.¹³⁵

128. See, e.g., OFF. OF INSPECTOR GENERAL, *supra* note 124, at 25 (finding that "it was questionable whether the subject's alleged misappropriation [less than one page of background material], given the amount and character of the material involved, was sufficiently serious to be misconduct in science"); OIG Case No. 99-50 (available through FOIA from NSF) (regarding verbatim sentences in the background of a proposal, concluding "although this is a deviation from accepted practices, it does not rise to the level of misconduct in science according to NSF's definition"); OIG Case No. 98-25 (available through FOIA from NSF) (finding five lines of verbatim sentences in the background of the proposal, but "OIG concluded that the amount of material that the subject used without proper attribution, the background function of this material in the subject's proposal, and the inclusion of a citation to the article, taken together, made this matter insufficiently serious to be misconduct in science"); OIG Case No. 98-05 (available through FOIA from NSF) (finding eighteen lines of text copied in the background section was not misconduct); OIG Case No. 97-46 (available through FOIA from NSF) (finding two paragraphs and a mathematical formula copied, but that the "deviation was not sufficiently serious to proceed to an investigation"); OIG Case No. 97-23 (available through FOIA from NSF) (finding an entire paragraph of non-sequential text copied in the background, but concluding that given the "small amount, the nature of the PI's use of that text" although a deviation, was not a serious deviation).

129. Bartlett & Smallwood, *supra* note 11.

130. *Id.*

131. Ana Marie Cox & Richard Monastersky, *Trinity International Dismisses Law Dean Over Plagiarism Charges*, CHRON. OF HIGHER EDUC., Sept. 7, 2001, at A17.

132. Bartlett & Smallwood, *supra* note 11.

133. Kock, *supra* note 88, at 96-97.

134. *Id.* at 104.

135. *Id.*

D. International Cases

Although the United States has provided the most extensive collection of reported cases of misconduct, other countries have begun establishing processes and policies for responding to allegations of misconduct, and a few of those cases have attracted significant attention.

Poland faced its first major misconduct case in 1997.¹³⁶ The case involved plagiarism of an article from the *Danish Medical Bulletin* in the Polish journal *Przegląd Lekarski*.¹³⁷ It eventually led to the discovery of over thirty plagiarized papers by the same individual, Andrzej Jendryczko.¹³⁸ Jendryczko admitted to the plagiarism and apologized.¹³⁹ Unfortunately, however, the case raised questions within the scientific community as to whether Poland has an adequate process for responding to allegations of misconduct.

Similarly, a senior Indian university official and a graduate student were found guilty of plagiarizing an article published six years earlier by a Stanford University professor.¹⁴⁰ The Committee on Publication Ethics (“COPE”), a volunteer committee of editors generally from the United Kingdom and European countries, has reported twelve cases involving allegations of plagiarism that it has examined.¹⁴¹ There have been nineteen findings of misconduct by individuals at institutions of higher learning in the United Kingdom.¹⁴²

There also have been a number of cases involving Chinese¹⁴³ and Japanese¹⁴⁴ authors who have plagiarized sections of articles. In 2002, Beijing University issued a policy for responding to allegations of research misconduct when a faculty member was accused of plagiarizing an American textbook on anthropology.¹⁴⁵ Most of these cases have been discovered by journal editors who became suspicious when the English fluency of the writing varied significantly from

136. Zibigniew Zawadzki & Kamran Abbasi, *Polish plagiarism scandal unearthed*, *BMI.COM*, Feb. 28, 1998, <http://bmj.bmjournals.com/cgi/content/full/316/7132/645/i>.

137. *Id.*

138. *Id.*

139. *Id.*

140. Pallava Bagla, *India: Panel Finds Plagiarism by University Leader*, 299 *SCIENCE* 800 (2003), available at <http://www.sciencemag.org/cgi/reprint/299/5608/800b.pdf>. See also Shabnam Miwalla, *These Scientists Just Cut, Paste, and Submit*, *TIMES INDIA*, Oct. 7, 2002, available at <http://timesofindia.indiatimes.com/cms.dll/articleshow?artid=24498714>.

141. See Plagiarism, Committee on Publication Ethics, <http://publicationethics.org.uk/cases/onezeronine> (last visited Nov. 16, 2006) (listing hypertext links to information about twelve cases).

142. *Id.*

143. From 1990 to 2005, the National Science Foundation of China found misconduct in sixty cases, thirty-four percent of which involved plagiarism. See Gong Yidong, *China Science Foundation Takes Action Against 60 Grantees*, 309 *SCIENCE* 1798, 1798–99 (2005), available at <http://www.sciencemag.org/cgi/reprint/309/5742/1798a.pdf>.

144. See *Science Council of Japan Addresses Misconduct*, *ORI NEWSL.* (Off. Res. Integrity, U.S. Dep’t Health & Hum. Servs., Rockville, Md.), Sept. 2003, at 6, available at http://ori.dhhs.gov/documents/newsletters/vol11_no4.pdf.

145. See Ding Yimin, *Scientific Misconduct: Beijing U. Issues First-Ever Rules*, 296 *SCIENCE* 448 (2002), available at <http://www.sciencemag.org/cgi/reprint/296/5567/448.pdf>.

paragraph to paragraph.¹⁴⁶

E. Sanctions and Conclusions

1. ORI

The sanctions imposed by ORI for a finding of plagiarism typically have been a three-year exclusion from both seeking federal funds and serving on a PHS advisory committee.¹⁴⁷ Other sanctions include a plan for supervision,¹⁴⁸ certification of originality,¹⁴⁹ and certification of originality endorsed by an institutional official.¹⁵⁰ The longest sanction imposed for plagiarism was the five-year exclusion in the *Jacoby* case.¹⁵¹

Sanctions imposed by institutions have included a formal apology,¹⁵² exclusion from being a principal investigator,¹⁵³ exclusion from being a reviewer,¹⁵⁴ certification that an application does not contain plagiarized material,¹⁵⁵ monitoring,¹⁵⁶ supervisor certification that publication and applications do not contain plagiarized materials,¹⁵⁷ attending an ethics course,¹⁵⁸ serving as a co-

146. Letter from Marty Blume, Editor-In-Chief, Am. Physical Soc'y, to author (Jan. 27, 2005) (on file with author).

147. See Ramalingam, *supra* note 100 (barring Ramalingam from seeking federal funds or advising on any Public Health Service Board for three years); Sultan, *supra* note 100 (barring Sultan from seeking federal funds or advising on any Public Health Service Board for three years); Findings of Scientific Misconduct, 61 Fed. Reg. 39,461 (Dep't Health & Hum. Servs. July 29, 1996) (barring Yahya Abdulahi from seeking federal funds or advising on any Public Health Service Board for three years).

PHS has imposed a broader range of sanctions for findings of misconduct for cases not involving plagiarism. Such sanctions have included recovery of grant monies, restriction of activities under an award, suspending or terminating an award, and letters of apology, correction or retraction. See Off. Res. Integrity, Dep't Health & Hum. Servs., Handling Misconduct—Administrative Actions (2006), available at http://ori.dhhs.gov/misconduct/admin_actions.shtml.

148. See PHS Administrative Action Detail Listing, <http://silk.nih.gov/public/CBZ1BJE.@WWW.ORIDTLS.HTML> (requiring supervision for three years, among other sanctions, for Ilya Koltover) (last visited Nov. 20, 2006); Findings of Scientific Misconduct, 66 Fed. Reg. 40,288 (Dep't Health & Hum. Servs. Aug. 2, 2001) (requiring supervision for three years of Raghootama S. Pandurangi).

149. See Koltover, *supra* note 100; Padgett, *supra* note 100; Xiong, *supra* note 100.

150. See Landay, *supra* note 100; Padgett, *supra* note 100; Xiong, *supra* note 100.

151. *Jacoby*, *supra* note 100. He was found guilty of fifteen instances of plagiarism, falsification of an image during the investigation, and forging an institutional official's signature after the investigation. *Id.*

152. See Xiong, *supra* note 100.

153. *Id.*; see also Farooqui, *supra* note 100.

154. See Farooqui, *supra* note 100.

155. See Xiong, *supra* note 100.

156. See Rosales, *supra* note 100.

157. *Id.*

158. See Xiong, *supra* note 100.

instructor on breakout groups for ethics discussions,¹⁵⁹ and writing a formal essay on plagiarism.¹⁶⁰ One physician was reprimanded and fined by the relevant state medical board in connection with a finding that he was guilty of plagiarism.¹⁶¹

Nonetheless, more recent settlement agreements, including the *Sultan* settlement,¹⁶² suggest several aspects of these agreements that have evolved since the mid-1990s. In the *Sultan* case, Ali Sultan, an assistant professor of immunology at Harvard School of Public Health, plagiarized text and three figures—results of an immunofluorescence assay, a phosphor image, and a Northern blot analysis—from published papers.¹⁶³ He also falsified experimental results and fabricated portions of an e-mail from a post-doctoral student to implicate the student in the plagiarism.¹⁶⁴ Sultan resigned from Harvard shortly after the conclusion of the inquiry and his admission of wrongdoing.¹⁶⁵

The *Sultan* settlement highlights several new features in concluding a misconduct case. First, neither ORI nor the institution conducted an investigation because the accused researcher not only admitted to committing plagiarism, but he also admitted that the plagiarism constituted scientific misconduct.¹⁶⁶ In the past, ORI would have compelled the institution to conduct an investigation regardless of whether there was an admission.¹⁶⁷

Second, ORI required the institution to enter the settlement agreement with ORI and Sultan.¹⁶⁸ In the past, ORI and the respondent, and perhaps respondent's counsel, constituted the parties to the agreement.¹⁶⁹ However, it appears that when an institution foregoes an investigation, the institution must execute the settlement

159. *Id.*

160. *Id.*

161. See Michael Lasalandra, *State Board Reprimands, Fines Doc for Plagiarism*, BOSTON HERALD, April 7, 1998, at 23 (reporting that Mark M. Kowalski was fined \$5,000 and reprimanded for plagiarism and false statements regarding the disciplinary charges against him).

162. See Sultan, *supra* note 100.

163. *Id.*

164. *Id.*

165. See Sultan, *supra* note 100 (describing the three-party Voluntary Exclusion Agreement of October 19, 2004).

166. A number of cases included admissions during the inquiry phase not only of the plagiarism, but also that the plagiarism constituted misconduct. See, e.g., Xiong, *supra* note 100; Sultan, *supra* note 100.

167. See, e.g., Yao, Zhenhai, 67 Fed. Reg. 57,239 (Dep't Health & Hum. Servs. Sept. 9, 2002) (showing that for there to be a settlement based on an admission, ORI conducts the following analysis: (1) Is the signed admission a confession of all the allegations brought against the respondent?; (2) Is there evidence of wrongdoing beyond the scope of the allegations brought forward and therefore beyond the scope of the confession?; (3) Does the confession acknowledge that the respondent engaged in misconduct knowingly, and with intent to deceive the funding community, the institution on behalf of whom the grant was submitted and the scientific community?; (4) Does the respondent understand that a confession may make him liable to governmental sanctions as well as sanctions from the University?).

168. See Sultan, *supra* note 100.

169. See, e.g., Yao, *supra* note 167; Ruggiero, Karen M., 66 Fed. Reg. 64,266 (Dep't Health & Hum. Servs. Dec. 12, 2001) (indicating that, in fact, there have only been six Voluntary Exclusion Agreements in which the institution was also a signatory).

agreement.¹⁷⁰ Third, although Dr. Sultan fabricated documents during the inquiry and attempted to defer blame to another party, he received the standard three-year exclusion.¹⁷¹

Finally, in the past, when a physician was found guilty of misconduct, the settlement agreement always indicated that the exclusion from contracting or subcontracting and non-procurement programs did not preclude reimbursement by the federal government for medical services provided.¹⁷² Dr. Sultan's settlement agreement did not provide for this exclusion, so it is unclear whether Harvard, or any other employer, can continue to receive reimbursement for his medical services.¹⁷³

2. NSF

Although NSF does not require intent for a finding of misconduct,¹⁷⁴ NSF does consider intent in assessing sanctions.¹⁷⁵ In 2002, NSF specified the types of possible consequences attached to a finding of misconduct, with the minimum restrictions categorized as Group I actions and the most severe penalties included in Group III actions.¹⁷⁶ Group I sanctions include a letter of reprimand, a certification requirement of compliance with particular policies, a requirement of special approval, and institutional official representative certification of the accuracy of reports or certification of compliance.¹⁷⁷ Group II sanctions include suspension or restriction of awards, prohibition of serving as a reviewer, and correction of the research record.¹⁷⁸ Group III sanctions include termination of an award, debarment, or exclusion from providing services to NSF.¹⁷⁹ In the plagiarism cases assessed under the post-April 2002 definition, Group I and Group III sanctions have been imposed.¹⁸⁰

170. See, e.g., Sultan, *supra* note 100 (executing a three-party Voluntary Exclusion Agreement). See also Yao, *supra* note 167 (executing a Voluntary Exclusion Agreement).

171. See Sultan, *supra* note 100.

172. See, e.g., Voluntary Exclusion Agreement and Settlement Between Mitchell H. Rosner and ORI (May 5, 1993) (available through FOIA from ORI).

173. See Sultan, *supra* note 100.

174. See 45 C.F.R. § 689.2(c) (2006) (stating that a finding of research misconduct requires that the misconduct be committed "intentionally, knowingly, or recklessly").

175. See e.g., NSF Closeout Memoranda (available through FOIA from NSF, OIG) (citing cases in which there was a finding of scientific misconduct).

176. See 45 C.F.R. § 689.3 (2006).

177. See, e.g., OIG Case No. 99-41 (available through FOIA from NSF); OIG Case No. 99-38 (available through FOIA from NSF); OIG Case No. 99-33 (available through FOIA from NSF).

178. See, e.g., OIG Case No. 98-10 (available through FOIA from NSF).

179. See, e.g., OIG Case No. 01-37 (available through FOIA from NSF) (proposing an eighteen-month voluntary exclusion reached by settlement after three year debarment).

180. See, e.g., OIG Case No. 02-07 (available through FOIA from NSF) (group I), OIG Case No. 02-19 (available through FOIA from NSF) (debarred for a year).

3. Non-PHS/NSF Cases

In contrast, when the plagiarism does not occur in PHS- or NSF-funded research, the sanctions imposed by institutions appear to have been relatively modest. Although some of the plagiarizers have been fired and others demoted,¹⁸¹ most appear to have continued at their institutions.¹⁸²

F. Litigation—False Claims, Theft of Intellectual Property, and Copyright Infringement

A series of litigated cases has involved allegations of plagiarism. Often the cases present a variety of legal theories that involve a combination of False Claims Act issues (if the plagiarism was in a grant application), copyright infringement (if the case involved a publication), and theft of intellectual property.¹⁸³ Further, individuals have been known to bring suit while making allegations of plagiarism,¹⁸⁴ file claims stating that they were unfairly sanctioned after a finding of plagiarism,¹⁸⁵ and sue for false accusations of plagiarism.¹⁸⁶

1. Civil Lawsuits Alleging Plagiarism

In *United States ex rel. Berge v. University of Alabama*,¹⁸⁷ Pamela Berge filed a *qui tam* action asserting false statements in grant applications premised on the University of Alabama-Birmingham's ("UAB") theft of her intellectual property, because it did not disclose her work as the true origin of the work they cited.¹⁸⁸ Berge had been a visiting graduate student at UAB and had used UAB's database on cytomegavirus ("CMV"). After she left UAB and returned to Cornell, she attempted to publish her study results, but was rejected by various journals.¹⁸⁹ At a meeting of the Society for Epidemiological Research, Berge heard a presentation by another graduate student, Karen Fowler, who had been working with the UAB database, and believed that her work had been plagiarized.¹⁹⁰ UAB conducted two investigations and concluded that no plagiarism had occurred.¹⁹¹ Berge then initiated the *qui tam* action, which included a pendant state law claim.¹⁹² After a

181. Scott Smallwood, *The Fallout*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A12 (discussing, among others, the case of Brian Van DeMark of the US Naval Academy, who was demoted and lost \$10,000 in salary but was not fired).

182. *Id.*

183. See False Claims Act, 31 U.S.C. § 3729 (2000).

184. See, e.g., *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453 (4th Cir. 1997). See also *infra* Section F.1 (discussing lawsuits alleging plagiarism).

185. See *infra* Section F.2.

186. See *infra* Section F.3.

187. *Berge*, 104 F.3d 1453.

188. *Id.* at 1456.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1455 (reversing the verdict for a state law claim of conversion of intellectual property).

jury trial, Berge was awarded \$1.66 million.¹⁹³ UAB appealed, and the Fourth Circuit, finding that the purported misrepresentations did not occur or were not material, reversed the trial court's ruling.¹⁹⁴ Further, the Fourth Circuit concluded there was no conversion of intellectual property under Alabama law, which was pre-empted by U.S. Copyright law.¹⁹⁵

In *Phinney v. Perlmutter*,¹⁹⁶ Dr. Carolyn Phinney was invited to consult on a project with Dr. Marion Perlmutter.¹⁹⁷ Dr. Phinney subsequently made allegations that Dr. Perlmutter plagiarized her work by taking credit for her research materials, used it in a federal grant without giving her appropriate credit, and also frustrated Dr. Phinney's ability to publish her work and get it funded.¹⁹⁸ Dr. Phinney further alleged that she was retaliated against when she brought forward the allegations.¹⁹⁹ In 1993, a jury found in her favor and awarded her \$1.1 million on the counts of fraud and whistleblower retaliation.²⁰⁰ The University of Michigan appealed, but the verdict was upheld.²⁰¹ The case was settled for \$1.67 million.²⁰²

In *Dookeran v. Mercy Hospital*,²⁰³ Dr. Dookeran was the director of clinical oncology trials and research for the Mercy Cancer Institute ("MCI").²⁰⁴ The director of MCI, Dr. Zaren, asked Dr. Dookeran to write and submit a grant application for the National Surgical Adjuvant Breast and Bowel Project ("NSABP").²⁰⁵ However, Dr. Zaren and Dr. Dookeran refused to submit the application because they did not believe that Mercy Hospital ("Mercy") had committed appropriate resources to ensure the safety of patients.²⁰⁶ Mercy administrators ordered them to submit the application, but both refused.²⁰⁷ While Dr. Dookeran was on vacation, Mercy representatives obtained the grant application, removed Dr. Dookeran's name, and inserted that of another principal investigator.²⁰⁸ When Dr. Dookeran asserted a charge of scientific misconduct, ORI and Mercy declined to make a formal finding of misconduct.²⁰⁹ ORI noted that the grant sought information about institutional capabilities and did not seek original research ideas from an investigator, and an institution has authority, before

193. *Id.* at 1455.

194. *Id.* at 1459–62.

195. *Id.* at 1462–65.

196. 564 N.W.2d 532 (Mich. Ct. App. 1997).

197. *Id.* at 540.

198. *Id.* at 541.

199. *Id.*

200. *Id.*

201. *Id.*

202. Philip J. Hilts, *University Forced to Pay \$1.6 Million to Researcher*, N.Y. TIMES, Aug. 10, 1997, § 1, at 13.

203. 281 F.3d 105 (3d Cir. 2002).

204. *Id.* at 107.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

and after the submission of an award, to name or substitute an appropriately qualified investigator.²¹⁰ Consequently, Dr. Dookeran brought an action alleging breach of contract, defamation, tortious interference, and theft of intellectual property.²¹¹ In response, Mercy terminated Dr. Dookeran and he filed a retaliation claim.²¹² Dr. Dookeran's claim of retaliation under the False Claims Act failed because the application was for a grant from the NSABP and not an application for a grant of federal funds.²¹³

In *Kauffman v. University of Michigan*,²¹⁴ C.W. Kauffman, an engineering professor, alleged that an administrator, David Hyland, stole his intellectual property when Hyland plagiarized an educational grant proposal that he had written.²¹⁵ Kauffman claimed that the administrator had submitted the application without including him in the project.²¹⁶ The application was later funded, and Kauffman alleged that he was excluded from use of the resulting resources.²¹⁷ In 2000, Kauffman filed suit alleging theft of intellectual property, plagiarism, fraud, denial of due process, and whistleblower retaliation.²¹⁸ The court dismissed all but the whistleblower claim, and Kauffman voluntarily withdrew the claim, while appealing the dismissal of the other claims.²¹⁹ The case is still pending.

In *Demas v. Levitsky*,²²⁰ a graduate student at Cornell University sued a member of her Ph.D. committee and Cornell University on numerous allegations, including fraud, misappropriation of her ideas, breach of contract, negligence, and defamation.²²¹ Demas claimed that Levitsky, a Cornell faculty member, submitted a grant application based on her Ph.D. dissertation and did not include her on the application.²²² Cornell did not find that plagiarism or misconduct had occurred.²²³ In February 2002, the state appellate court dismissed several of the claims, stating that Cornell could not be held vicariously liable for actions by Levitsky that were unrelated to the furtherance of Cornell's business.²²⁴ The case is still pending.

210. Compare with the case of Mark Kowalski, *supra* note 99, who plagiarized a grant application for an AIDS study even though he did not participate in the research. ORI and the institution both made findings of misconduct.

211. *See Dookeran*, 281 F.3d at 106.

212. *Id.* at 107.

213. *Id.* at 109. The district court granted summary judgment to defendants on the ground that Dookeran was not engaged in protected conduct under the FCA, and declined to exercise supplemental jurisdiction to decide the pendent state law claims.

214. *Kauffman v. Univ. of Mich. Regents*, No. 257711, 2006 WL 1084330 (Mich. Ct. App. Apr. 25, 2006).

215. *Id.* at *1.

216. *See id.*

217. *See id.*

218. *See id.* at *1–*4.

219. This information is based on the author's observations.

220. 738 N.Y.S.2d 402 (N.Y. App. Div. 2002).

221. *Id.* at 407.

222. *Id.* at 405–06.

223. *See* Scott Smallwood, *After a Professor Took Credit for a Graduate Student's Research, Cornell Found Little Amiss*, CHRON. HIGHER EDUC., Apr. 12, 2002, at A10.

224. *Demas*, 738 N.Y.S.2d at 409–10. *See also* Smallwood, *supra* note 223, at A11.

Plagiarism, on its own, typically is not a basis for legal action, but copyright infringement is.²²⁵ Copyright law protects “original works of authorship fixed in any tangible medium of expression,”²²⁶ but does not protect “any idea, procedure, process, system, method of operation, concept, principle, or discovery. . . .”²²⁷ Thus, three distinctions emerge between copyright infringement and plagiarism.

First, copyright infringement operates on a standard of strict liability, so a copier’s intent is usually not a factor.²²⁸ Second, copyright protection only extends to the expression, not the ideas behind the words used.²²⁹ Lastly, providing appropriate attribution to the original source, even if it is the same original author who has simply assigned the copyright to a third party, does not vitiate a finding of copyright infringement.²³⁰ Thus, even if a researcher cited the source from which he copied, such copying can still constitute copyright infringement.²³¹

Several cases have explored the relationship between copyright infringement and plagiarism. In *Weissman v. Freeman*,²³² a researcher and his assistant employed a practice of recycling a syllabus they used to teach a course.²³³ When the instructors had a disagreement, the assistant revised the syllabus and filed for copyright protection.²³⁴ When the researcher recycled the syllabus consistent with their prior practice, the assistant filed a complaint alleging copyright infringement of the revisions.²³⁵ Reversing the District Court’s findings, the Second Circuit found that the researcher was not a coauthor and had therefore infringed the work.²³⁶ Montefiore Medical Center, however, noting the prior practice and implied consent, declined to institute a formal finding of plagiarism.²³⁷

Although few cases involving allegations of plagiarism result in a successful monetary recovery based on copyright infringement, the potential exposure of such claims has publishers taking an active role in response to such allegations. Thus,

225. See, e.g., *Weissman v. Freeman*, 684 F. Supp. 1248 (S.D.N.Y. 1988), *aff’d in part, rev’d in part*, 868 F.2d 1313 (2d Cir. 1989).

226. 17 U.S.C. § 102(a) (2000).

227. 17 U.S.C. § 102(b) (2000).

228. 17 U.S.C. § 501(a) (2000). The one instance where intent is a factor is for allegations of “willful infringement.” 17 U.S.C. § 506(a)(2) (2000).

229. 17 U.S.C. § 102(b) (2000).

230. See, e.g., *Soc’y of Survivors of the Riga Ghetto, Inc. v. Huttenbach*, 535 N.Y.S.2d 670 (N.Y. Sup. Ct. 1988).

231. For example, Dr. Sabit Adanur published a textbook that incorporated ninety-three pages of text from a handbook written thirty years earlier by Ernest Kaswell. Herbert Pratt, *Book Review, CHEMIST*, Sept./Oct. 1996, at 17, 18. Dr. Adanur acknowledged that the textbook relied on Kaswell’s handbook “to a certain extent.” *Id.* Nevertheless, Kaswell sued Dr. Adanur. This information is based on the author’s observations.

232. *Weissman*, 684 F. Supp. 1248.

233. *Id.* at 1254–55.

234. *Id.* at 1251.

235. *Id.*

236. *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989). See also Scott Jaschik, *Critics Charge Yeshiva U. Tried to Get a Former Professor to Alter Testimony to Congress on Academic Misconduct*, *CHRON. OF HIGHER EDUC.*, May 9, 1990, at A20.

237. See Montefiore Medical Center Investigation Panel, *In the Matter of Leonard Freeman*, ORI Case No. 90-08 (available through FOIA from ORI).

when the University of California Press discovered that an author had plagiarized one of its books into a volume published by British Press, the British publisher withdrew the book.²³⁸ Similarly, when another author complained to his publishing journal that his article had been plagiarized, the journal wrote to the plagiarizing individual, referred to the statutory damages for copyright infringement under U.S. Copyright law,²³⁹ and the plagiarizer signed a letter admitting and apologizing for what he had done.²⁴⁰

Further, as previously noted, duplicative publication is not scientific misconduct although it may be copyright infringement.²⁴¹ Respondents typically are required to provide notice to editors when they are found to have engaged in duplicative publication of the same writing in different published forums.²⁴² In NSF Case Number 97-21, an author had published at least five sets of essentially duplicative research papers in different journals.²⁴³ The university determined that republishing material in conference proceedings that had previously been published in a refereed archived journal, was “the fringe area of acceptable practice,” but was not misconduct.²⁴⁴ With respect to the republishing of material in two separate, first-tier journals, the university found that “it goes way beyond the acceptable standards of scientific practice within [the respondent’s] field,” but because it did not have significant negative consequences and it was an isolated lapse in judgment, the university found it did not constitute misconduct.²⁴⁵ Nonetheless, the author published apologies in both journals.²⁴⁶

2. Individuals Contesting Plagiarism Sanctions

A number of individuals have sued or appealed, which indicates that they were unfairly sanctioned after a finding of plagiarism was made.²⁴⁷ In the case of Mary Zey, Zey accused a former assistant professor and associate professor of plagiarizing her data in a 1998 paper.²⁴⁸ The investigation panel, however, determined that Zey was guilty of plagiarism because she did not include the assistant as a co-author and had thus plagiarized his work.²⁴⁹ Texas A&M’s provost announced Zey was being fired for “flagrant and serious scientific

238. See Peter Monaghan, *Hot Type*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A23.

239. See Kock, *supra* note 88, at 103.

240. *Id.*

241. Parrish, *supra* note 2.

242. *Id.*

243. See NSF Case No. 97-21 (available through FOIA from NSF).

244. *Id.*

245. *Id.*

246. *Id.*

247. See *infra* notes 248–258 and accompanying text. See also March 13, 1993 request for Hearing on Sanctions imposed in Freisheim (on file with author). See OIG Case No. 02-07 (available through FOIA from NSF).

248. See Scott Smallwood, *Professor Accused of Plagiarism Gets to Keep Her Job*, CHRON. HIGHER EDUC., May 17, 2002, at A14.

249. *Id.*

misconduct.”²⁵⁰ Zey appealed claiming that her due process rights had been violated because the University had not followed its own procedures and she was being retaliated against for being the party who first raised the plagiarism charges.²⁵¹ A different faculty subcommittee found Dr. Zey not guilty of plagiarism and found she should not be fired.²⁵² The university president reversed the termination sanction and allowed her to keep her job.²⁵³ In another case, the University of Arizona fired a tenured professor for alleged scientific misconduct.²⁵⁴ A faculty panel had found Marguerite Kay guilty of the misconduct charges and the university president concurred with its findings.²⁵⁵ Kay filed suit alleging denial of her property interest, breach of contract, back pay and compensatory and punitive damages.²⁵⁶ The case was dismissed and Dr. Kay appealed.²⁵⁷ The Ninth Circuit affirmed the dismissal.²⁵⁸

3. Individuals Suing for Unfounded Allegations of Plagiarism

In *Grigorenko v. Pauls*,²⁵⁹ an associate professor at Yale claimed that two other members of her research team had falsely accused her of plagiarism and had misrepresented the evidence regarding their allegations.²⁶⁰ The district court dismissed the state law claim, stating that the allegedly false information had not been “published” under the state law definition, despite its circulation to twelve individuals.²⁶¹

Finally, two math professors at Columbia College in Chicago brought a lawsuit alleging defamation against two professors who had accused them of plagiarizing an article.²⁶² The accusers had circulated a report alleging the plagiarism to thirty

250. *Id.*

251. Elizabeth Taylor, *A&M Professor Fired Amid Charges of Plagiarism*, DAILY TEXAN, July 18, 2001, available at http://tspweb02.tsp.utexas.edu/webarchive/07-18-01/PF2001071801_s01_Zey.html.

252. See Smallwood, *supra* note 248, at A14.

253. *Id.* See Scott Smallwood, *The Fallout: What Happened to Six Scholars accused of Plagiarism*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A12, reporting the case of Jamil Hanafi at Northern Illinois University where he was discovered to have plagiarized portions of his dissertation. He resigned, then sued, but lost. Roger Shepherd sued New York Parson’s school of Design stating he was wrongly terminated for plagiarism. *Id.* See also the 1999 case regarding a materials scientist who sued the University of Dayton when he was fired for plagiarism. David Glenn, *Judge or Judge Not?*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A16. Klinge of Ithaca College sued when he was demoted and his salary cut for plagiarism. *Id.*

254. See Courtney Leatherman, *Judge Says U. of Arizona Was ‘Arbitrary and Capricious’ in Firing a Tenured Professor*, CHRON. HIGHER EDUC., June 11, 1999, at A18.

255. *Id.*

256. *Id.*

257. See *id.*; *Kay v. Likins*, 160 F. App’x 605 (9th Cir. 2005).

258. *Id.*

259. 297 F. Supp. 2d 446 (D. Conn. 2003).

260. *Id.* at 448.

261. *Id.*

262. See Ryan Adair, *Columbia Professors Awarded \$250,000 in Plagiarism Lawsuit*, COLUM. CHRON., Apr. 30, 2001, available at

members of Columbia's faculty and staff.²⁶³ The report stated that the accused scientists had "submitted papers for publication in which they misrepresented these ideas as their own, and without proper credit to the originators of these methods."²⁶⁴ Although an institutional investigation did not find that there had been misconduct, Columbia's insurance company settled the suit for \$250,000.²⁶⁵

IV. PLAGIARISM DETECTION SOFTWARE

The use of computer programs to detect plagiarism in the context of scientific misconduct has been well-known to those in the field, starting with Feder and Stewart's Plagiarism Detection Machine,²⁶⁶ which was used to bring an allegation of misconduct against historian Stephen Oates.²⁶⁷ Since then, a variety of programs have been used to detect plagiarism among students,²⁶⁸ which is believed to be more common with the expansion of the Internet,²⁶⁹ and which has raised concerns regarding copyright infringement and invasion of the student's privacy rights.²⁷⁰

Plagiarism screening tools may be either online services or stand-alone computer programs. Turnitin.com, EduTie.com, MyDropBox.com, and Glatt Plagiarism Services are examples of externally hosted services.²⁷¹ EVE2,

http://www.columbiachronicle.com/back/2001_spring/2001-04-30/campus1.html.

263. *Id.*

264. *Id.*

265. *Id.*

266. See Franklin Hoke, *Science Community Divided on Stewart-Feder Shutdown*, SCIENTIST, May 17, 1993, at 1. The program looked for thirty-character strings that were identical between sources.

267. Other historians, including Stephen Ambrose and Doris Kearns Goodwin, have since been accused of plagiarism. See Bartlett & Smallwood, *supra* note 11.

268. See, e.g., Glatt Plagiarism Services, <http://www.plagiarism.com> (last visited Nov. 20, 2006) (using an algorithm for detection based on the Cloze procedure wherein every fifth word is removed and the author is asked to supply the word, a task plagiarists have difficulty doing); Plagiarism.org, <http://www.plagiarism.org> (last visited Nov. 20, 2006) (detecting similarity by analyzing the structure and content of papers; Plagiarism.org is an affiliate of TurnItIn.com); TurnItIn, <http://www.turnitin.com> (last visited Nov. 20, 2006) (identifying plagiarism by comparing submitted papers to current and archived internet content, and comparing to previously submitted papers stored in a proprietary database); Copycatch, <http://www.copycatchgold.com> (last visited Nov. 20, 2006) (identifying copied portions of papers by using entire documents as a search item in an index of potentially related documents); and Eve2 Essay Verification Engine, <http://www.canexus.com/eve/index3.shtml> (last visited Nov. 20, 2006) (finding plagiarism by searching the internet using phrases from submitted papers).

269. See, e.g., OurWorld, <http://ourworld.compuserve.com> (last visited Nov. 20, 2006); Paper Store, <http://www.paperstore.net> (last visited Nov. 20, 2006); School Sucks, <http://www.schoolsucks.com> (last visited Nov. 20, 2006).

270. See Andrea Foster, *Plagiarism-Detection Tool Creates Legal Quandary*, CHRON. HIGHER EDUC., May 17, 2002, at A37 (discussing the copyright and privacy implications of submitting papers to plagiarism-detecting websites; vendors suggesting that students submit their work directly to the websites to circumvent copyright issues).

271. See, e.g., TurnItIn, <http://www.turnitin.com/static/home.html> (last visited Nov. 20, 2006); EduTie.com, <http://edutie.com/> (last visited Nov. 20, 2006); MyDropBox.com, <http://www.mydropbox.com/> (last visited Nov. 20, 2006); and Plagiarism.org,

CopyCatch Gold and Wcopyfind are examples of stand-alone services.²⁷² The legal issues involved in using this type of service include whether the submitted paper is an educational record which cannot be disclosed to a third party because of Federal Education Records Privacy Act (“FERPA”) requirements, and whether the use violates copyright law.²⁷³ One approach to resolve these concerns is to (1) ask the student to consent to the submission of the work to a service or (2) have the student submit the work directly to avoid FERPA concerns.

Plagiarism detection software also has raised issues regarding the existence of disparate standards for students and faculty in terms of what constitutes plagiarism.²⁷⁴ The number of students caught by these programs,²⁷⁵ and the punishments meted out to them, have grabbed headlines,²⁷⁶ and a number of studies have attested to the widespread problem among students.²⁷⁷

In contrast to their heavy use in cases involving students, these computer programs typically are not used to evaluate the work of faculty members suspected of plagiarism. Some opine that the programs simply identify suspect cases of plagiarism in published works and most research misconduct cases do not involve such allegations.²⁷⁸ Others note that some universities use this software only in the context of honor code violations.²⁷⁹ Recall that most research misconduct policies

<http://www.plagiarism.org> (last visited Nov. 20, 2006).

272. See e.g., Eve2 Essay Verification System, <http://www.canexus.com/eve/abouteve.shtml> (last visited Nov. 20, 2006); CopyCatchGold, <http://www.copycatchgold.com/copycatchesreview.htm> (last visited Nov. 20, 2006); and Louis A. Bloomfield, Software to Detect Plagiarism: Wcopyfind (July 20, 2005), <http://plagiarism.phys.virginia.edu/Wsoftware.html>.

273. See 20 U.S.C.A. § 1232g (West 2000 & Supp. 2006); 34 C.F.R. § 99 (2006).

274. See Scott Smallwood, *supra* note 248, at A14 (discussing the case of Mary A. Zey who was found by the Texas A&M University Provost, Ronald Douglas, to have committed scientific misconduct by plagiarizing a colleague’s work).

275. See Amy Argetsinger, *Technology Snares Cheaters at U-Va.; Physics Professor’s Computer Search Triggers Investigation of 122 Students*, WASH. POST, May 9, 2001, at A01. A University of Virginia physics professor, Louis Bloomfield, wrote a program to detect a six-word match between papers, and asked students to submit their papers electronically with the intention of running them through his own anti-plagiarism computer program. *Id.* It resulted in 122 students facing expulsion charges. *Id.*

276. See Richard Jerome & Pam Grout, *Cheat Wave*, PEOPLE WKLY., June 17, 2002, at 83. A high school teacher, Christine Pelton, failed twenty-eight students after they submitted plagiarized material. *Id.* at 83–84. When the school board reduced the percent of the course grade that the project would count for, the teacher and nine of her colleagues resigned in protest. *Id.*

277. See Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, *Cheating in Academic Institutions: A Decade of Research*, 11 ETHICS & BEHAV. 219 (2001) (finding that more than half of high school students admitted to using sentences from the Internet and fifteen percent turned in papers copied entirely from the Internet, while ten percent of college students admitted they borrowed fragments and five percent admitted large passages or entire papers).

278. Kathryn Bender, *Copyright and Plagiarism in the Digital World: Those Cunning Students X* (Nov. 2005) (unpublished manuscript, available from the National Association of College and University Attorneys’ Annual Meeting Binder).

279. *Id.*

would apply to students.²⁸⁰ Nonetheless, it would be an interesting exercise to submit grant applications to such software to determine the level of recycling. It should be noted that colleges and universities use software only in some allegations of plagiarism and not others; they use it against students and not faculty.²⁸¹ Finally, sanctions are imposed against students quickly and they may include dismissal from the institution or failure in the relevant course. In contrast, faculty members found guilty of plagiarism typically are not dismissed from the institution.

CONCLUSION

The definition of plagiarism as a form of research misconduct continues to evolve and cases considered by federal agencies continue to define its contours. It is unclear whether the new definitions of research misconduct and plagiarism adopted by ORI and NSF will change the outcome of pending and future cases. Further, the roles of the agencies, professional associations, and journals continue to evolve, with each appearing unsure of its role in the process. Some professional associations are taking a more active role, while others have given up the prosecutorial role to focus on education. Finally, it appears that individuals, frustrated with the lack of institutional or agency response to their allegations, are pursuing more cases through formal litigation.

280. See ORI ANNUAL REPORTS, *supra* note 60. See also Debra M. Parrish, *Scientific Misconduct and Findings Against Graduate and Medical Students*, 10 SCI. & ENGINEERING ETHICS 483 (2004); Bender, *supra* note 278.

281. Bender, *supra* note 278.

A COMPREHENSIVE ACADEMIC HONOR POLICY FOR STUDENTS: ENSURING DUE PROCESS, PROMOTING ACADEMIC INTEGRITY, AND INVOLVING FACULTY

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I. INTRODUCTION

In recent years, there has been increased discussion of academic integrity on college campuses.¹ Extensive research conducted by Donald McCabe and others has contributed to a shared understanding that student cheating is a pervasive problem and must be actively combated by institutions of higher education.² In

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1. See Robin Wilson, *Colleges Urged to Better Define Academic Integrity and to Stress its Importance*, CHRON. HIGHER EDUC., Oct. 15, 1999, at A18; Sally Cole & Donald L. McCabe, *Issues in Academic Integrity*, NEW DIRECTIONS FOR STUDENT SERVICES, Spring 1996, at 67-73.

2. Donald L. McCabe, *It Takes a Village: Academic Dishonesty & Educational Opportunity*, 91 LIBERAL EDUC. 26 (2005) [hereinafter McCabe, *It Takes a Village*]; Donald L.

fact, McCabe's study comparing Bowers' seminal work in 1963 to data collected in 1993 revealed reported increases in the following behaviors: copying from another student's test increased from 26% to 52%, helping another student cheat increased from 23% to 37%, using crib notes increased from 16% to 27%, and unauthorized collaboration on assignments increased from 11% to 49%.³ Several measures related to plagiarism remained relatively stable from 1963 to 1993, with 54% of McCabe's student respondents reporting having copied information without a reference and 29% reporting having falsified a bibliography.⁴ McCabe reports that his recent web surveys continue to confirm that approximately 51% of student respondents have engaged in serious academic misconduct involving written work.⁵

In this environment, colleges and universities must be prepared to deal with the range of academic, student-related, and legal issues associated with academic dishonesty, including the assumption that some of its cases might eventually be challenged in the courts. Thus, an institution's best interests are served when its policies on academic dishonesty are as current and as comprehensive as possible. Recently, McCabe has stated, "I'm even more convinced that any campus that has not reviewed its integrity policies for some time is derelict in its responsibilities to students and likely has some degree of discontent among its faculty."⁶

Unlike nonacademic student conduct problems, which have long been managed exclusively by student affairs at most colleges and universities, conduct involving academic dishonesty is, by its very nature, integral to the learning process and thus should be a central concern of faculty. This unique mix of conduct and academic issues poses an interesting challenge and presents the opportunity to shape a policy requiring an optimum level of involvement for each major constituent group within the institution as well as providing both procedural and substantive due process for its students.

II. TRADITIONAL PRACTICE

Some colleges and universities embed their academic integrity rules in their general student conduct system, addressing academic violations through existing conduct procedures.⁷ This practice ensures that college and university judicial officers, who have experience with the legal issues inherent in student disciplinary

McCabe & Linda K. Trevino, *Academic Dishonesty: Honor Codes and Other Contextual Influences*, 64 J. HIGHER EDUC. 522 (1993) [hereinafter McCabe & Trevino, *Academic Dishonesty*]; Donald L. McCabe & Gary Pavela, *The Effect of Institutional Policies and Procedures on Academic Integrity*, in ACADEMIC INTEGRITY MATTERS (Dana Burnett, Lynn Rudolph & Karen Clifford eds., 1998) [hereinafter McCabe & Pavela, *Academic Integrity*].

3. *Id.*

4. Donald L. McCabe & Linda K. Trevino, *What We Know About Cheating in College: Longitudinal Trends and Recent Developments*, CHANGE, Jan./Feb. 1996, at 31.

5. McCabe, *It Takes a Village*, *supra* note 2, at 28.

6. *Id.* at 31.

7. See, e.g., OFFICE OF STUDENT JUDICIAL SERVS., WRIGHT STATE UNIV., CODE OF STUDENT CONDUCT, available at <http://www.wright.edu/students/judicial/policies.html> (last visited Nov. 4, 2006).

processes, manage the implementation of the policy and the adjudication of cases. Other colleges and universities emphasize student involvement and give students the responsibility of implementing the code and adjudicating cases, sometimes without a great deal of oversight from administrators.⁸ In fact, the advice prevalent in the current academic integrity literature for improving an institution's response to dishonesty is to "create a culture of academic integrity"⁹ among students and to implement true honor codes¹⁰ where possible, or modified honor codes that are designed to foster student involvement in the process but lack some of the attributes of true honor codes.¹¹

Although some research has shown that students at schools with true honor codes report less frequent cheating than those without honor codes,¹² and the University of Maryland modified honor code model has shown promise in larger schools where a true honor code is not feasible to implement,¹³ neither movement has paid much attention to the issue of faculty involvement in the process. As the heated discussions regarding lack of faculty involvement with the honor code that have occurred at the University of Virginia (UVA) illustrate, honor code systems can run the risk of alienating faculty, which may result in low rates of reporting violations.¹⁴ Despite some evidence that many students at UVA are not willing to report one another for cheating,¹⁵ serious concerns about the effects of the "single sanction" of expulsion for every student found guilty,¹⁶ and concerns about racial

8. See, e.g., Univ. of Virginia Honor Committee Website, <http://www.virginia.edu/honor> (last visited Nov. 5, 2006).

9. See, e.g., Jon C. Dalton, *Creating a Campus Climate for Academic Integrity*, in ACADEMIC INTEGRITY MATTERS 1–12 (Dana Burnett, Lynn Rudolph & Karen Clifford eds., 1998).

10. Donald McCabe, *New Research on Academic Integrity: The Success of "Modified" Honor Codes*, SYNFAK WKLY. REP., May 15, 2000, at 975 (defining "true" honor codes as having at least two of the following features: un-proctored exams, an honor pledge, hearings with all or a majority of student members, and a requirement to report the violations of others).

11. See McCabe & Trevino, *Academic Dishonesty*, *supra* note 2; McCabe & Pavela, *Academic Integrity*, *supra* note 2. Pavela developed a modified honor code at the University of Maryland–College Park that has been imitated widely by other colleges and universities. See also Univ. of Maryland Student Honor Council, <http://www.studenthonorcouncil.umd.edu> (last visited Nov. 5, 2006); Kansas State Univ. Honor System, <http://www.k-state.edu/honor/honorsystem/index.htm> (last visited Nov. 5, 2006).

12. McCabe & Trevino, *Academic Dishonesty*, *supra* note 2, at 530.

13. Donald L. McCabe & Gary Pavela, *Some Good News About Academic Integrity*, CHANGE, Sept./Oct. 2000, at 32.

14. See, e.g., Gregory Pavela, *The Honor of Mediocrity?*, CAVALIER DAILY, Sept. 15, 2005, at Letters to Editor, available at <http://www.cavalierdaily.com/CVArticle.asp?ID=24157&pid=1328>; Lauren T. Pappa & Sarah R. Gatsos, *Committee, Faculty Reach Out For Change*, CAVALIER DAILY, Apr. 9, 2004, available at <http://www.cavalierdaily.com/CVArticle.asp?ID=19701&pid=1149>; Elizabeth Managan, *Student-run System Fails to Honor Faculty Input*, CAVALIER DAILY, Nov. 28, 2000, at OPINION, available at <http://www.cavalierdaily.com/CVArticle.asp?ID=6689&pid=659>.

15. Daniel Colbert, *Looking at Honor's Numbers*, CAVALIER DAILY, May 2, 2006, at OPINION, available at http://www.cavalierdaily.com/CVArticle_print.asp?ID=26607&pid1425.

16. Patrick Harvey, *A Dying Sanction*, CAVALIER DAILY, 2004/2005 available at <http://www.cavalierdaily.com/features/TheFuture/index.aspx?page=f>.

bias,¹⁷ the ongoing discussion at UVA does not appear to include serious consideration of expanding the faculty's formal role in the honor code system. Currently, that role is limited to providing information and reporting violations to the Honor Committee, an action that faculty have not always had the right to take.¹⁸

In 1993, McCabe confirmed the results of prior research revealing that faculty members tend to underutilize official resolution processes and prefer to deal with students on an informal basis.¹⁹ Patrick Drinan, former president of the Center for Academic Integrity, placed this issue in a legal context: "Many faculty resist accountability to broader institutional policies and procedures even when they know that not enforcing them may place the faculty member in some jeopardy, legal and otherwise."²⁰ A *Chronicle of Higher Education* article in 1999 highlighted faculty members' increasing frustration with college and university judicial panels and the lack of support for faculty in the adjudication processes at their institutions.²¹ More recently, McCabe stated that some institutions have gone overboard in their efforts to provide procedural due process and have created policies and procedures that faculty find legalistic and difficult to employ.²²

Yet, just as faculty are central to the academic enterprise, they are also central to the culture of academic integrity on a campus, and policies that inhibit faculty involvement can weaken that culture. Research has shown that if institutional representatives, especially faculty, communicate clear expectations regarding integrity, levels of cheating can be reduced.²³ This is especially true in the ambiguous area of unauthorized collaboration, which is a form of academic dishonesty that rose dramatically from 1963 to 1993.²⁴ This issue develops even greater salience as the level of group work in college and university courses increases.²⁵ Clifford's research found that "respect for professor" was a factor that

17. Eric Hoover, *Honor for Honor's Sake?*, CHRON. HIGHER EDUC., May 3, 2002, at 5.

18. See, e.g., Dan Heuchert, *Restoring Honor*, UNIV. OF VIRGINIA MAG., Fall 2006, at 3, available at <http://www.uvamagazine.org/site/c.esJNK1PIJrH/b.1601199/apps/s/content.asp?ct=2346093>; Josh Hess, *Appraising Honor*, CAVALIER DAILY, May 2, 2006, at OPINION, available at <http://www.cavalierdaily.com/CVArticle.asp?ID=26484&pid=1421>; Steven Parsley, *Reviving the Community of Trust*, CAVALIER DAILY, May 2, 2006, available at <http://www.cavalierdaily.com/CVarticle.asp?ID=26509&pid=1422>.

19. Donald L. McCabe, *Faculty Responses to Academic Dishonesty: The Influence of Student Honor Codes*, 34 RES. IN HIGHER EDUC. 647, 658 (1993).

20. Patrick Drinan, *Loyalty, Learning, and Academic Integrity*, 85 LIBERAL EDUC. 28, 31 (1999).

21. Alison Schneider, *Why Professors Don't Do More to Stop Students Who Cheat*, CHRON. HIGHER EDUC., Jan. 2, 1999, at A8.

22. McCabe, *It Takes a Village*, *supra* note 2, at 28.

23. *Id.* at 29. See also Wanda Kaplan & Phyllis Mable, *Students' Perceptions of Academic Integrity: Curtailing Violations*, in ACADEMIC INTEGRITY MATTERS (Dana Burnett, Lynn Rudolph & Karen Clifford eds., 1998).

24. McCabe & Pavela, *Academic Integrity*, *supra* note 2. See also McCabe & Trevino, *Academic Dishonesty*, *supra* note 2, at 31 (reporting that students' admissions of "collaborating on assignments requiring individual work" rose from 11% in 1963 to 49% in 1993).

25. Donald L. McCabe & Sally Cole, *Student Collaboration: Not Always What the Instructor Wants*, 48 AM. ASS'N FOR HIGHER EDUC. BULL. 3-6 (1995).

can influence students not to cheat, a finding that supports faculty involvement in the adjudication process.²⁶ Moreover, McCabe reports that 96% of faculty at non-code institutions believe that they ought to have some level of involvement in the process used to resolve academic integrity cases.²⁷

Thus, institutions should heed McCabe and his colleagues' calls to encourage faculty engagement with the academic integrity process²⁸ in the framework of a policy providing due process in a manner that avoids cumbersome, overly legalistic procedures.

III. DUE PROCESS STANDARDS

The interests of a properly admitted student in completing his or her education, as well as avoiding unfair or mistaken exclusion from the institution and the accompanying stigma that may be associated with suspension or expulsion are among the interests that the Due Process Clause of the Fourteenth Amendment is intended to protect.²⁹ In the disciplinary due process context, the Fourteenth Amendment requires that public higher education institutions provide students with notice and a hearing that includes an opportunity for the student to be heard.³⁰ However, the degree of due process extended to the student depends upon the nature of the interest affected and the circumstances of the specific case.³¹

One test applied to determine the extent of required due process, delineated by the Supreme Court in *Mathews v. Eldridge*,³² requires the application of a balance between three factors:

First, the private interest that will be affected by the official action;

26. Karen O. Clifford, *Academic Integrity and Campus Climate at Small Colleges*, in ACADEMIC INTEGRITY MATTERS, 109 (Dana Burnett, Lynn Rudolph & Karen Clifford eds., 1998).

27. McCabe, *supra* note 19, at 655.

28. Donald L. McCabe, Kenneth D. Butterfield & Linda K. Trevino, *Faculty and Academic Integrity: The Influence of Current Honor Codes and Past Honor Code Experiences*, 44 RES. IN HIGHER EDUC. 367, 383 (2003).

29. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574–75 (1975) (holding that students subject to long-term suspension or expulsion from a public school are entitled to essential elements of due process in order to protect liberty and property); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (ruling that students at a publicly supported state college were entitled to fundamental due process when an expulsion or long-term suspension was implicated).

30. Writing for the majority in *Goss*, Justice White emphasized, “[a]t the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.” *Goss*, 419 U.S. at 579.

31. In the private university setting, contractual and associational rights rather than constitutional safeguards may protect students from expulsion or suspension. See, e.g., *Schaer v. Brandeis Univ.*, 716 N.E.2d 1055 (Mass. App. Ct. 1999), *rev'd in part*, 739 N.E.2d 1107 (Mass. 2000) (holding that a private college must comply with the procedures they establish in the student conduct code to ensure fundamental fairness to students); *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1306 (N.Y. 1980) (holding that because the private college's guidelines required a hearing, the student was entitled to a hearing before the board and the president before she could be suspended).

32. 424 U.S. 319 (1976).

second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³³

Notice and hearing, to be fair in the disciplinary due process sense, requires that the student be adequately informed of the charges, afforded the opportunity to respond to the charges, to explain his or her conduct, and to defend against the allegations of misconduct.³⁴ Beyond these elements, public colleges and universities retain reasonable flexibility in the application of student due process standards. Judges have recognized that institutions need not require the cross-examination of witnesses and a full adversarial proceeding if basic fairness is preserved.³⁵ As a consequence, heightened procedural protections such as a right to counsel may be restricted in student disciplinary proceedings.³⁶ Provided there is substantial compliance with standards of notice and hearing, institutions may even "cure" defects in the process when procedural errors occur and can be rectified before a penalty is imposed.³⁷

In the context of academic suspensions or expulsions, public colleges and universities enjoy an even greater degree of flexibility in the provision of due

33. *Id.* at 335.

34. *See* *Butler v. Rector and Bd. of Visitors of the Coll. of William and Mary*, 121 F. App'x 515 (4th Cir. 2005) (expelling a student from a counseling program following instances of unprofessional and deceptive conduct in an internship). In holding that the institution provided the requisite constitutional procedural due process, the federal appeals court weighed the student's interest in remaining in graduate school against the institution's interest in controlling the integrity of its graduate programs, invoking the second *Mathews* factor: "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id.* at 520 (quoting *Eldridge*, 424 U.S. at 335).

35. *See, e.g.,* *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961). *See also* *Blanton v. State Univ. of New York*, 489 F.2d 377, 385 (2d Cir. 1973); *Jaksa v. Regents of the Univ. of Michigan*, 597 F. Supp. 1245, 1252-53 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986). *But see* *Winnick v. Manning*, 460 F.2d 545, 549-50 (2d Cir. 1972) (finding the cross-examination of witnesses might be essential to a fair hearing if credibility is at issue in a university's suspension of a student).

36. *See, e.g.,* *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding that a student may have a right to consult with counsel, but that right does not extend to active participation by counsel in a hearing); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 13-14 (1st Cir. 1988) (rejecting a right to representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question); *Henson v. Honor Comm. of the Univ. of Virginia*, 719 F.2d 69 (4th Cir. 1983) (holding that a student's claim that he was denied the right to have experienced legal counsel conduct his defense and cross-examine witnesses in an honor court hearing was not a violation of due process).

37. *See, e.g.,* *Tigrett v. Rector and Visitors of the Univ. of Virginia*, 290 F.3d 620 (4th Cir. 2002) (holding that the institution cured deficiencies in due process by ultimately providing students with a full evidentiary hearing in disciplinary proceedings although they were not entitled to appear in an appeal to the university's president).

process. In *Board of Curators of the University of Missouri v. Horowitz*,³⁸ the Court characterized academic dismissal as one involving “expert evaluation”³⁹ and “historic judgment of educators”⁴⁰ and “bearing little resemblance to . . . judicial and administrative fact-finding proceedings.”⁴¹ The Court concluded that great deference must be given to a public institution’s academic decisions and held that procedural due process does not require any form of hearing before a decision-making body, either before or after the termination decision is made.⁴² In a purely academic dismissal, it is sufficient that the student was informed of the nature of the faculty’s dissatisfaction and that the ultimate decision to dismiss involved a careful and deliberate decision of professional educators.⁴³ The *Horowitz* Court reasoned that the relevant factors involving due process in such cases include the “evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations,” and concluded that, given the role of faculty in evaluating the student’s performance, “a hearing is not required by the Due Process Clause of the Fourteenth Amendment.”⁴⁴

The Supreme Court reiterated its judicial deference to academic decision-making in *University of Michigan v. Ewing*,⁴⁵ which involved a medical student’s dismissal due to poor academic performance and a low score on medical board exams. In holding for the university, the Supreme Court emphasized that truly academic decision-making is uniquely the province of the faculty’s professional judgment. Cautioning that judges should show great respect for this judgment, a unanimous Court held that the student’s dismissal should not be overridden “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional

38. 435 U.S. 78 (1978).

39. *Id.* at 90.

40. *Id.*

41. *Id.* at 89.

42. *Id.* at 91 (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

43. *Id.* at 85 (indicating that hearings in academic due process cases are not required, and providing the student with an opportunity to appear and explain behavior has been acknowledged as an act of good faith reflecting the institution’s effort to ensure fundamental fairness). See *Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003), in which a medical school student placed on leave of absence due to unsatisfactory performance did not have an opportunity to appear before the faculty committee making the initial recommendation, but was allowed to appeal the decision to a faculty review panel and the panel heard his response to the recommendation. The federal appeals court held the medical school’s decision to place a student on leave and to require remediation of identified deficiencies before readmission to the program did not violate the student’s academic due process rights. The court reasoned that when the student is fully informed of faculty dissatisfaction with progress and the decision to dismiss is careful and deliberate, the Fourteenth Amendment due process requirement is met. See also *Shaboon v. Duncan*, 252 F.3d 722 (5th Cir. 2001) (stating that a medical student subject to dismissal was provided with opportunities to explain her side of events, which included having an attorney present).

44. *Bd. of Curators of Univ. of Missouri*, 435 U.S. at 86.

45. 474 U.S. 214 (1985).

judgment.”⁴⁶

Cases involving the violation of academic codes of conduct are not the same as suspension or dismissal based upon a student’s failure to make satisfactory academic progress⁴⁷ or complete academic program requirements.⁴⁸ In these latter instances, the determination of academic qualification remains a judgment that academics must make using appropriate professional expertise.⁴⁹ For example, in *Brown v. Li*,⁵⁰ a faculty committee’s decision not to confer a student’s degree until the student complied with academic requirements related to changes in the acknowledgments section of his thesis did not require a formal hearing.⁵¹ However, cases involving academic misconduct, including cheating on tests and plagiarism, implicate factual disputes, and are more likely to be judicially characterized as involving disciplinary policies.⁵²

Although courts have not been uniform in adopting a presumption that cheating constitutes a disciplinary matter,⁵³ academic misconduct implicates the full range

46. *Id.* at 225.

47. *See, e.g.*, *Wilkenfield v. Powell*, 577 F. Supp. 579 (W.D. Tex. 1983) (holding that a graduate student’s dismissal for failure to attain academic standards would not be reversed absent evidence the decision was motivated by bad faith or ill will unrelated to academic performance, or was based on arbitrary and capricious factors not reasonably considered to be academic criteria).

48. *See Mauriello v. Univ. of Med. & Dentistry*, 781 F.2d 46 (3d Cir. 1986) (concluding student dismissed for flawed research was the result of academic failings and not for arbitrary reasons and did not violate student’s due process rights); *Paoli v. Univ. of Delaware*, 695 F. Supp. 171 (D. Del. 1988) (finding university did not treat a student differently by refusing a course it had always refused to students who failed the prerequisite); *Amelunxen v. Univ. of Puerto Rico*, 637 F. Supp. 426 (D.P.R. 1986) (failing to find student was arbitrarily dismissed or that university departed from academic norms in failing student’s oral defense of thesis); *Ross v. Pennsylvania State Univ.*, 445 F. Supp. 147 (M.D. Pa. 1978) (affording student a hearing to explain his poor performance but reserving the decision to terminate with the university).

49. One authority has suggested that it is time to recognize not only that the academic-disciplinary due process distinction has proven unworkable, but also that a unified theory should control the resolution of both academic and disciplinary cases. Fernand N. Dutille, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619 (2003).

50. 308 F.3d 939 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003).

51. *Id.*

52. *See, e.g.*, *Wheeler v. Miller*, 168 F.3d 241 (5th Cir. 1999) (dismissing doctoral student for undisputed failure to comply with course requirements could not be found to be a disciplinary action); *Nash v. Auburn Univ.*, 812 F.2d 655 (11th Cir. 1987) (requiring a notice and hearing procedure in a case of academic misconduct); *Cobb v. Rector and Visitors of the Univ. of Virginia*, 84 F. Supp. 2d 740 (W.D. Va. 2000) (affirming the due process requirement of notice and opportunity to be heard in a student discipline hearing). *See also* *Univ. of Texas Med. Sch. v. Than*, 901 S.W.2d 926 (Tex. 1995) (regarding the university’s argument that a student’s dismissal for cheating constituted an academic decision as specious and taking the position that disciplinary due process standards applied).

53. *See Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984) (reviewing a private university’s contractual obligation to a student and determining that cheating on an examination could be characterized as an academic offense rather than disciplinary); *Jaksa v. Regents of the Univ. of Michigan*, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984) (regarding cheating as “an offense which cannot neatly be characterized as either ‘academic’ or ‘disciplinary,’” but

of due process protections available to students in public colleges and universities because the stigma associated with dishonesty and the potential loss of academic standing implicate liberty and property interests under the Fourteenth Amendment.⁵⁴ However, faculty have a unique role to play in cases of academic misconduct because the professorate's special expertise is often required or implicated. For example, academic judgments could substantially influence a determination of plagiarism, since faculty expertise would be instrumental in determining, consistent with the standards of that area of inquiry, that a submission both closely resembles books, articles, or other writings and reflects insufficient attribution to those sources. The same would be true for instances of fabricating the results of research, since faculty researchers are uniquely qualified to evaluate the methodology applicable to data collection and analysis.⁵⁵ Even in the context of alleged cheating on an examination, faculty expertise could be influential in assessing the testimony of observers or the weight to be attributed to a statistical analysis of the probability students would have similar correct and incorrect answers.⁵⁶

The application of due process and the role of faculty participation in cases of academic misconduct were addressed in *Crook v. Baker*,⁵⁷ in which the Sixth Circuit determined that the University of Michigan had satisfied due process requirements in revoking an academic degree. Degree revocation was based on a faculty panel's conclusion that a graduate had procured a degree by fraud based on a determination that the student had fabricated data for his master's thesis. The university appointed an ad hoc hearing panel of professors who scheduled a hearing and notified the former student of the allegations and the potential disciplinary penalties. The former student appeared with his legal counsel and was

ultimately concluding the offense disciplinary, reasoning that cheating implicates a factual dispute that seldom requires the exercise of a subjective, professional judgment); *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982) (characterizing plagiarism as an academic offense, on grounds that it involved academic standards and not the violation of rules of conduct).

54. See *Than v. Univ. of Texas Med. Sch. at Houston*, 188 F.3d 633, 635 n.2 (5th Cir. 1999) (alleging violation of federal due process rights resulting from disciplinary hearing); *Crook v. Baker*, 813 F.2d 88, 97 (6th Cir. 1987) (alleging university's rescinding of degree for fraud occurred without due process); *Nash v. Auburn Univ.*, 812 F.2d 655, 660-61 (11th Cir. 1987) (bringing action for injunctive relief and damages for constitutional rights violations resulting from suspension). Cf. *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 308-09 (6th Cir. 1984) (addressing the rescission of a previously awarded master's degree on a charge of academic dishonesty).

55. See *Pugel v. Bd. of Trs. of the Univ. of Illinois*, 378 F.3d 659 (7th Cir. 2004), in which the university employed both an inquiry team and an investigation panel to evaluate charges of fabricated data and improper research presentation by a graduate student.

56. See *Than*, 188 F.3d at 634-35 (holding that the accused student was not deprived of due process when he received notice of charges and evidence and a hearing before a faculty member from a different medical school who was both knowledgeable and impartial). But see *Nash*, 812 F.2d at 667-68 (holding that a student panel properly assured due process to students in instances of cheating on examinations when it heard testimony from faculty and the accused students were permitted to appeal to a review panel of faculty under the administrative process provided by the institution).

57. 813 F.2d 88 (6th Cir. 1987).

allowed to review and respond to the evidence of fraud. However, the panel precluded the student's counsel from directly examining or cross-examining witnesses at the disciplinary hearing.⁵⁸ The panel found that the former student was guilty of fraud but made no specific recommendation for revocation of degree. That decision was approved and administrative authorities recommended that the student's degree be revoked. The Sixth Circuit first determined that the university was authorized to rescind a degree,⁵⁹ then went on to assess the degree of procedural due process required in degree revocation cases. Emphasizing that the hearing process was informal, but the range of protections afforded to the former student was extensive, the appeals court stated:

With respect to Crook's opportunity to be heard, it is without dispute that, in addition to the abundant notice we have just described, he had counsel from the beginning who dealt with the University, he had the opportunity to and did file a response to the charges that was supplemented after the hearing, he had the opportunity to present witnesses and to have an expert with him at the hearing, he and his counsel both made opening statements at the hearing and his counsel was free to advise him, and he made statements and asked questions of the other witnesses. Moreover, Crook filed exceptions to the Committee's findings and his attorney argued his case before the Regents.⁶⁰

The Sixth Circuit also reversed the lower court's determination that the former student's right to substantive due process was denied.⁶¹ The appeals court reviewed an extensive transcript of the eight-hour proceedings, together with materials submitted to an ad hoc faculty panel by the parties prior to its hearing and concluded that the panel report finding the thesis data to be fabricated was neither arbitrary nor capricious.⁶² The court went on to emphasize that the decision to revoke the degree was supported by a rational basis test, and the finding of fraud by the faculty hearing panel was accompanied by clear and convincing evidence.⁶³

Appropriate due process procedures in academic misconduct cases often involve due process more extensive than those suggested solely by notice and hearing. In such cases, faculty involvement is warranted to insure the integrity of the process and contribute the necessary expertise that will guide adjudication. In *Pugel v. Board of Trustees of the University of Illinois*,⁶⁴ charges against the

58. *See id.* at 98 (discussing how the role of counsel was limited to that of an advisor who was prohibited from taking an active role in the former student's defense).

59. *Id.* at 91. *See also* *Waliga v. Bd. of Trs. of Kent State Univ.*, 488 N.E.2d 850 (Ohio 1986) (holding that a public institution's authority to revoke a degree may be express in state statute law or implied based on a reasonable relationship to the express duties of the institution's governing board).

60. *Crook*, 813 F.2d at 97-98.

61. *Id.* at 90.

62. *Id.* at 94-97.

63. *Id.* at 100.

64. 378 F.3d 659 (7th Cir. 2004).

student arose from allegations that she had fabricated data and presented that data at a professional conference and in a manuscript submitted to a prominent research journal. The federal appeals court assumed that dismissal on charges of academic dishonesty would entitle a student to “extensive” notice and hearing procedures,⁶⁵ but the court noted with approval that two separate faculty panels had been engaged: one to review the allegations of misconduct and determine if sufficient evidence existed to warrant a full investigation and the other to continue the investigation and hold hearings on the charges that stemmed from the investigation.⁶⁶ The student had notice of the investigation with each instance of the university’s convening of a faculty panel⁶⁷ and had the opportunity to present witnesses and evidence on her behalf.⁶⁸ Before the sanction of dismissal was implemented, the student was extended an administrative appeal that included a third review by a faculty panel convened to consider the severity of the sanction.⁶⁹ Noting that the former student’s own complaint detailed the extensive due process provided by the faculty review panels, the appeals court ruled the former student failed to state a claim for a violation of due process.⁷⁰

A prominent role for faculty in deliberations and hearings involving academic misconduct will contribute to conscientious fact-finding and reliance on expert judgment, two factors that heighten judicial deference and help insulate the college or university from judicial intervention. Furthermore, the participation of faculty in hearings involving allegations of academic misconduct underscores the institution’s commitment to the integrity of its educational mission. Judges, mindful of the *Ewing* Court’s admonition that courts are not the appropriate forum to “evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions,”⁷¹ are more likely to abstain from reviewing academic misconduct cases when faculty contribute to a careful and deliberate process. Finally, the student may perceive the role of faculty as incorporating academic expertise and mature judgment, contributing to a sense of fair treatment and reducing the risk of an erroneous deprivation of rights.

IV. BEST-PRACTICE: A FACULTY-FRIENDLY ACADEMIC HONOR POLICY

A committee of faculty, students, attorneys, and administrators at Florida State University (FSU) crafted the Academic Honor Policy⁷² in a way that fulfills these due process requirements established by the courts and that gives faculty members

65. *Id.* at 664.

66. *Id.* at 664–66.

67. *Id.* at 665.

68. *Id.* at 666.

69. *Id.* at 661.

70. *Id.* at 666–67.

71. *Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985).

72. *See infra* Part VI. *See also* Center for Academic Integrity, The Academic Integrity Assessment Guide, <http://www.academicintegrity.org/assessGuide.asp> (last visited Nov. 5, 2006). The FSU committee utilized the Center for Academic Integrity’s Assessment Guide and consultation throughout the process and participated in Donald McCabe’s survey process before revising the policy.

a central role at each phase of the process. Development of the modified honor code took several years and was informed by discussions at the 2001 president's retreat, which featured a talk by Dr. Daisy Waryold, the former director of the Center for Academic Integrity (CAI).⁷³ The Honor System Committee followed up by utilizing the CAI's Assessment Guide and participating in the academic integrity survey conducted by Donald McCabe. The results of the survey became available in July of 2003⁷⁴ and were used to help structure the new policy. For example, after plagiarism and cheating, many of the charges appear in the order of frequency that students reported engaging in those behaviors. The drafting process began in earnest in the Fall of 2003 and involved reviewing the literature on academic integrity as well as existing codes,⁷⁵ conducting student focus groups, obtaining feedback from faculty and administrators, and reviewing drafts by the Honor System Committee.

The final version of the policy represents a negotiation, based on the final draft, between the FSU Faculty Senate and the FSU Student Senate. Although at least one innovation was lost in that process,⁷⁶ the new policy appears to have been quickly and easily adopted by both students and faculty.⁷⁷ Overall, it appears that the committee accomplished its goal of instituting a new policy that would be perceived by faculty members as valuing their judgment and by students as protecting their rights.

As outlined in Part III, the first basic element of due process in student disciplinary decisions is notice. The FSU policy is written in everyday language, making its meaning accessible to students and faculty alike. It contains a clear, comprehensive set of potential violations that include examples illustrating the types of behavior that can result in charges.⁷⁸ One noteworthy violation states that

73. Center for Academic Integrity, <http://www.academicintegrity.org> (last visited Nov. 13, 2006).

74. FLORIDA STATE UNIVERSITY ACADEMIC INTEGRITY SURVEY—SPRING 2003 (2003), <http://dof.fsu.edu/forms/integritysurvey.pdf>.

75. Several members of the code revision committee were familiar with Edward Stoner's model code as a standard for incorporating student due process rights into appropriate disciplinary procedures. See Edward N. Stoner & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004); Edward N. Stoner & Kathy Cerminara, *Harnessing the "Spirit of Insubordination: A Model Student Conduct Code*, 17 J.C. & U.L. 89 (1990). These fundamental principles were incorporated in the context of a separate code that applies exclusively to academic misconduct.

76. See McCabe & Pavela, *Academic Integrity*, *supra* note 2, at 103. The committee proposed incorporating the "XF" sanction first implemented by the University of Maryland but the proposal was dropped based on strong negative student reaction.

77. There is evidence of increased activity since the policy was implemented in the fall of 2006. See Florida State Univ. Academic Honor Policy, <http://fsu.edu/~dof/honorpolicy.htm>, for a report on the number of cases resolved. In addition, the Dean of Students said staff members responsible for assisting students report having to spend less time explaining procedural issues, and thus, are able to spend more time discussing substantive ethical issues with students.

78. The authors are indebted to the University of North Carolina at Charlotte for permission to adapt some of the charges contained in their code, Policy Statement #105, Office of the General Counsel, <http://www.legal.uncc.edu/policies/ps-105.html> (last visited Nov. 5, 2006).

submitting one's own work more than once for academic credit without instructor permission is a violation of the policy.⁷⁹ In relation to this charge, the policy requires that instructors make clear their parameters for students' incorporating prior work into current assignments. The issue of unauthorized collaboration, which has been highlighted by McCabe as the fastest-growing type of academic dishonesty,⁸⁰ is also addressed directly in the "unauthorized group work" violation,⁸¹ and again, instructors are directed to clarify their specific expectations regarding collaboration in each course.⁸² The fact that this policy clearly outlines each of these charges, especially within these ambiguous areas, enhances the level of notice provided to students, even before they face potential allegations of academic dishonesty.

The second basic element of due process that has been established is some sort of a hearing. Again, the FSU policy has some unique elements that involve faculty in meaningful ways, that bolster the amount of substantive due process afforded to students, and that capitalize on the well-established faculty preference for resolving allegations of academic dishonesty directly with students.⁸³ The FSU policy provides for a face-to-face meeting between instructor and student to discuss the matter. After this informal "hearing," the student and the faculty member may agree on a resolution, which is then documented as a student record.⁸⁴ This gives the faculty member discretion over academic sanctions, yet only with students who do not have records of previous violations, because the policy requires instructors to check the student's prior record before initiating this Step 1 process. If a student admits to a first violation in Step 1 but does not agree with the instructor's sanction, an efficient paper-only review by an academic administrator is triggered.

When the facts are disputed, the student has a prior record, or the alleged violation is egregious, a full hearing is provided to the student. Instead of adversarial proceedings in which students "prosecute" and "defend" the student who is charged with an offense, these hearings focus on the facts as presented by the instructor and the student within the specific context of the academic course.⁸⁵ In addition, the hearing panel is composed of two students and two faculty members, one of whom is appointed from the department in which the case arose. This ensures that at least one decision-maker has specialized knowledge about the relevant academic department, including its literature, its assignments, and its instructional objectives. Throughout the hearing and during deliberations, this specific knowledge helps the hearing panel grasp the facts of the case more completely, enhancing the element of substantive due process. Finally, having a colleague participate as a decision-maker can help the faculty member who

79. See FLORIDA STATE UNIVERSITY ACADEMIC HONOR POLICY 2, <http://fsu.edu/~dof/forms/honorpolicy.pdf> (last visited Nov. 6, 2006).

80. Cole & McCabe, *supra* note 1, at 4.

81. See FLORIDA STATE UNIVERSITY ACADEMIC HONOR POLICY, *supra* note 79, at 2.

82. See *id.* at 1.

83. McCabe, *supra* note 19, at 648.

84. See FLORIDA STATE UNIVERSITY ACADEMIC HONOR POLICY, *supra* note 79, at 2.

85. See *id.* at 5.

brought forward the charges maintain confidence in the policy when the student is found “not responsible” for those charges. Both student and faculty appointees are screened to prevent the perception of bias; if a student challenges the objectivity of any panel member, that person is removed or replaced. Note that all standard procedures ensuring student due process through clear and complete notice and a fair hearing as outlined in Stoner and Lowery’s model code⁸⁶ are also adhered to, especially at the Step 2 hearing level, because the student has not admitted to the violation.

Other notable aspects of the FSU Academic Honor Policy include its explicit listing of students’ due process rights and their delineation from additional courtesies typically extended to students, which can help to discourage appeals that are not based on substantial violations of due process rights. It separates the functions of student affairs and academic affairs administrators in a clear and consistent manner, allowing student affairs staff to interact with students in a helpful manner without the conflicts created by involvement in the decision-making process. The Dean of the Faculties Office assists faculty members with the process, providing guidance that helps to protect them from personal liability and encourages their participation. The policy also contains a wide range of educational sanctions at both levels of the resolution process. Finally, the user-friendly format of the policy, including a website containing all forms and other resources,⁸⁷ reinforces the structural elements that encourage faculty participation in the process.

V. CONCLUSION

Although the common wisdom to this point has been that increased student participation is the key to enhancing adherence to an academic integrity policy,⁸⁸ level of faculty support for the university’s efforts is overlooked at a cost. Thus, it is recommended that institutions consider building a structure, such as the FSU Academic Honor Policy, that involves both students and faculty in a manner that emphasizes the centrality of academic judgment and that protects students’ due process rights.⁸⁹

VI. APPENDIX: FLORIDA STATE UNIVERSITY ACADEMIC HONOR POLICY

Introduction

The statement on *Values and Moral Standards at FSU* says: “The moral norm which guides conduct and informs policy at Florida State

86. See Stoner & Lowery, *supra* note 75, at 2.

87. See FLORIDA STATE UNIVERSITY ACADEMIC HONOR POLICY, *supra* note 79, at 2.

88. See Gary Pavela, *Applying the Power of Association on Campus: A Model Code of Academic Integrity*, 24 J.C. & U.L. 97, 103 (1997).

89. The authors recommend that institutional representatives utilize the resources of the Center for Academic Integrity at <http://www.academicintegrity.org/index.asp> in the code revision process.

University is responsible freedom. Freedom is an important experience that the University, one of the freest of institutions, provides for all of its citizens—faculty, students, administrators, and staff. Freedom is responsibly exercised when it is directed by ethical standards.” (*Values and [M]oral [S]tandards at FSU* retrieved from the current General Bulletin located at <http://registrar.fsu.edu/>)

The statement also addresses academic integrity: “The University aspires to excellence in its core activities of teaching, research, creative expression, and public service and is committed to the integrity of the academic process. The [Academic Honor Policy] is a specific manifestation of this commitment. Truthfulness in one’s claims and representations and honesty in one’s activities are essential in life and vocation, and the realization of truthfulness and honesty is an intrinsic part of the educational process.” (*Values and [M]oral [S]tandards at FSU* retrieved from the current General Bulletin located at <http://registrar.fsu.edu/>)

Guided by these principles, this Academic Honor Policy outlines the University’s expectations for students’ academic work, the procedures for resolving alleged violations of those expectations, and the rights and responsibilities of students and faculty throughout the process.

FSU Academic Honor Pledge

I affirm my commitment to the concept of responsible freedom. I will be honest and truthful and will strive for personal and institutional integrity at Florida State University. I will abide by the Academic Honor Policy at all times.

Academic Honor Violations

Note: Instructors are responsible for reinforcing the importance of the Academic Honor Policy in their courses and for clarifying their expectations regarding collaboration and multiple submission of academic work. Examples have been provided for the purpose of illustration and are not intended to be all-inclusive.

1. **PLAGIARISM.** Intentionally presenting the work of another as one’s own (i.e., without proper acknowledgement of the source).

Typical Examples Include: Using another’s work from print, web, or other sources without acknowledging the source; quoting from a source without citation; using facts, figures, graphs, charts or information without acknowledgement of the source.

2. CHEATING. Improper application of any information or material that is used in evaluating academic work.

Typical Examples Include: Copying from another student's paper or receiving unauthorized assistance during a quiz, test or examination; using books, notes or other devices (e.g., calculators, cell phones, or computers) when these are not authorized; procuring without authorization a copy of or information about an examination before the scheduled exercise; unauthorized collaboration on exams.

3. UNAUTHORIZED GROUP WORK. Unauthorized collaborating with others.

Typical Examples Include: Working with another person or persons on any activity that is intended to be individual work, where such collaboration has not been specifically authorized by the instructor.

4. FABRICATION, FALSIFICATION, AND MISREPRESENTATION. Intentional and unauthorized altering or inventing of any information or citation that is used in assessing academic work.

Typical Examples Include: Inventing or counterfeiting data or information; falsely citing the source of information; altering the record of or reporting false information about practicum or clinical experiences; altering grade reports or other academic records; submitting a false excuse for absence or tardiness in a scheduled academic exercise; lying to an instructor to increase a grade.

5. MULTIPLE SUBMISSION. Submitting the same academic work (including oral presentations) for credit more than once without instructor permission. It is each instructor's responsibility to make expectations regarding incorporation of existing academic work into new assignments clear to the student in writing by the time assignments are given.

Typical Examples Include: Submitting the same paper for credit in two courses without instructor permission; making minor revisions in a credited paper or report (including oral presentations) and submitting it again as if it were new work.

6. ABUSE OF ACADEMIC MATERIALS. Intentionally damaging, destroying, stealing, or making inaccessible library or other academic resource material.

Typical Examples Include: Stealing or destroying library or reference materials needed for common academic purposes; hiding resource materials so others may not use them; destroying computer programs or files needed in academic

work; stealing, altering, or intentionally damaging another student's notes or laboratory experiments. (*This refers only to abuse as related to an academic issue.*)

7. **COMPLICITY IN ACADEMIC DISHONESTY.** Intentionally helping another to commit an act of academic dishonesty.

Typical Examples Include: Knowingly allowing another to copy from one's paper during an examination or test; distributing test questions or substantive information about the material to be tested before a scheduled exercise; deliberately furnishing false information.

8. **ATTEMPTING** to commit any offense as outlined above.

Student Rights

Students have the following important due process rights, which may have an impact on the appellate process:

1. to be informed of all alleged violation(s), receive the complaint in writing (except in a Step 1 agreement, described in the Procedures Section, where the signed agreement serves as notice) and be given access to all relevant materials pertaining to the case.
2. to receive an impartial hearing in a timely manner where they will be given a full opportunity to present information pertaining to the case.

Students are also accorded the following prerogatives:

1. when possible, to discuss the allegations with the instructor.
2. privacy, confidentiality, and personal security.
3. to be assisted by an advisor who may accompany the student throughout the process but may not speak on the student's behalf.
4. to choose not to answer any question that might be incriminating.
5. to contest the sanctions of a first-level agreement and to appeal both the decision and sanctions of an Academic Honor Hearing.

The student has the right to continue in the course in question during the entire process. Once a student has received notice that he/she is being charged with an alleged violation of the Academic Honor Policy, the student is not permitted to withdraw or drop the course unless the final outcome of the process dictates that no academic penalty will be imposed. Should no final determination be made before the end of the term, the grade of "Incomplete" will be assigned until a decision is made.

Students should contact the Dean of Students Department for further information regarding their rights.

Procedures for Resolving Cases

Step 1. Throughout the Step 1 process, the instructor has the responsibility to address academic honor allegations in a timely manner, and the student has the responsibility to respond to those allegations in a timely manner. For assistance with the Academic Honor Policy, students should consult the Dean of Students Department and instructors should consult the Office of the Dean of the Faculties.

If a student observes a violation of the Academic Honor Policy, he or she should report the incident to the instructor of the course. When an instructor believes that a student has violated the Academic Honor Policy in one of the instructor's classes, the instructor must first contact the Office of the Dean of the Faculties to report the alleged violation to determine whether to proceed with a Step 1 agreement. The instructor must also inform the department chair or dean. (Teaching assistants must seek guidance from their supervising faculty member.) However, faculty members or others who do not have administrative authority for enforcing the Academic Integrity Policy should not be informed of the allegation, unless they have established a legitimate need to know. If pursuing a Step 1 agreement is determined to be possible, the instructor shall discuss the evidence of academic dishonesty with the student and explore the possibility of a Step 1 agreement. Four possible outcomes of this discussion may occur:

1. If the charge appears unsubstantiated, the instructor will drop the charge, and all documents created in investigating the allegation will be destroyed. The instructor should make this decision using the "preponderance of the evidence" standard and should inform the Office of the Dean of the Faculties.
2. The student may accept responsibility for the violation and accept the academic sanction proposed by the instructor. In this case, any agreement involving an academic penalty must be put in writing and signed by both parties on the "Academic Honor Policy Step 1 Agreement" form, which must then be sent to the Dean of Students Department. This agreement becomes a confidential student record of academic dishonesty and will be removed from the student's file five years from the date of the final decision in the case.
3. The student may accept the responsibility for the violation, but contest the proposed academic sanction. In this circumstance, the student must submit the "Academic Honor Policy Referral to Contest Sanction" form along with supporting documentation to the Office of the Dean of the Faculties. The Dean of the

Faculties (or designee) will review the submitted documentation to determine whether the instructor has imposed a sanction that is disproportionate to the offense. The Dean of the Faculties may affirm or modify the sanction as appropriate. The decision that results from this review is final.

4. The student may deny responsibility. In this circumstance, the instructor submits the “Academic Honor Policy Hearing Referral” form along with supporting documentation to the Dean of the Faculties Office for an Academic Honor Policy Hearing. The student is issued a letter detailing the charges within ten class days of the receipt of the referral, and the schedule for the hearing will be set as soon as possible and within 90 days from the date of the letter. These timelines may be modified in unusual circumstances. Unless all parties agree, the hearing will not be held any sooner than 7 class days from the student’s receipt of the charge letter. The process then proceeds to Step 2.

If the student is found to have a prior record of academic dishonesty or the serious nature of the allegations merits a formal hearing, the instructor must refer the matter to Step 2 for an Academic Honor Policy Hearing by submitting the “Academic Honor Policy Hearing Referral” form to the Office of the Dean of the Faculties.

Step 2. Academic Honor Policy Hearing. A panel consisting of five members shall hear the case. The panel shall include: one faculty member appointed by the dean from the unit in which the course is taught; one faculty member appointed by the Dean of the Faculties who is not from that unit; and two students appointed through procedures established by the Dean of Students Department. The panel shall be chaired by the Dean of the Faculties (or designee), who is a non-voting member of the committee.

The hearing will be conducted in a non-adversarial manner with a clear focus on finding the facts within the academic context of the course. The student is presumed innocent going into the proceeding. After hearing all available and relevant information, the panel determines whether or not to find the student responsible for the alleged violation using the “preponderance of the evidence” standard. If the student is found responsible for the violation, the panel is informed about any prior record of academic honor policy violations and determines an academic sanction (and disciplinary sanction, if appropriate). In some cases, a Step 1 sanction may have been appropriately proposed prior to the convening of an Academic Honor Hearing. If the student is found responsible in these cases, the panel typically will impose a sanction no more severe than that which was proposed by the faculty member. The panel is required to provide a clear written justification for imposing a sanction more severe than the sanction proposed in Step 1.

The chair of the Academic Honor Policy hearing panel will report the decision to the student, the instructor, and the Dean of Students Department. The Dean of Students Department will report the decision to the University Registrar, if appropriate. If the student is found “responsible,” this outcome will be recorded with the Dean of Students Department and becomes a confidential student record of an Academic Honor Policy violation. Records in which suspension or a less severe sanction (including all academic sanctions) is imposed will be removed five years from the date of the final decision in the case. Records involving dismissal and expulsion will be retained permanently, except in cases where a dismissed student is readmitted. Those records will be removed five years from the date of the student’s readmission.

Sanctions

Step 1. This Step 1 procedure is implemented with first-offense allegations that do not involve egregious violations. The decision regarding whether an allegation is egregious is made by the Dean of the Faculties (or designee) and the instructor. The criteria used by the instructor to determine the proposed academic penalty should include the seriousness and the frequency of the alleged violation. The following sanctions are available in the Step 1 procedure.

1. additional academic work
2. a reduced grade (including “0” or “F”) for the assignment
3. a reduced grade (including “F”) for the course

Step 2. An Academic Honor Policy Hearing is held for all second offenses, for all first offenses that involve egregious violations of the Academic Honor Policy, for all offenses that involve simultaneous violations of the Student Conduct Code, and in all cases where the student denies responsibility for the alleged violation. The decision regarding whether an allegation is egregious is made by the Dean of the Faculties (or designee) and the instructor. In some cases, a Step 1 sanction may have been appropriately proposed prior to the convening of an Academic Honor Policy Hearing. If the student is found responsible in these cases, the panel typically will impose a sanction no more severe than that which was proposed by the faculty member. The panel is required to provide a clear written justification for imposing a sanction more severe than the sanction proposed in Step 1. Students will not be penalized solely for exercising their right to request a Step 2 hearing. The following sanctions are available in Step 2 (see the Procedures section) and may be imposed singly or in combination:

1. additional academic work
2. a reduced grade (including “0” or “F”) for the assignment
3. a reduced grade (including “F”) for the course

4. Reprimand (written or verbal)
5. Educational Activities—attendance at educational programs, interviews with appropriate officials, planning and implementing educational programs, or other educational activities. Fees may be charged to cover the cost of educational activities.
6. Restitution
7. Conduct Probation—a period of time during which any further violation of the Academic Honor Policy may result in more serious sanctions being imposed. Some of the restrictions that may be placed on the student during the probationary period include, but are not limited to: participation in student activities or representation of the University on athletic teams or in other leadership positions.
8. Disciplinary Probation—a period of time during which any further violation of the Academic Honor Policy puts the student’s status with the University in jeopardy. If the student is found “responsible” for another violation during the period of Disciplinary Probation, serious consideration will be given to imposing a sanction of Suspension, Dismissal, or Expulsion. The restrictions that may be placed on the student during this time period are the same as those under Conduct Probation.
9. Suspension—Separation from the University for a specified period, not to exceed two years.
10. Dismissal—Separation from the University for an indefinite period of time. Readmission is possible but not guaranteed and will only be considered after two years from the effective date of the dismissal, based on meeting all admission criteria and obtaining clearance from the Dean of Students or designee.
11. Expulsion—Separation from the University without the possibility of readmission.
12. Withholding of diplomas, transcripts, or other records for a specified period of time.
13. Revocation of degree, in cases where an egregious offense is discovered after graduation.

Appeals

Decisions of the Academic Honor Policy Hearing Panel may be appealed to the Academic Honor Policy Appeal Committee, a standing four-member committee composed of two faculty appointed by the President and two students appointed by the Vice President for Student Affairs. The chair will be appointed annually by the President, and members will serve two-year renewable terms. In case of a tie vote

regarding a case, the committee will submit a written report to the Provost, who will then make the final determination.

On appeal, the burden of proof shifts to the student to prove that an error has occurred. The only recognized grounds for appeal are:

1. Due process errors involving violations of a student's rights that substantially affected the outcome of the initial hearing.
2. Demonstrated prejudice against the charged student by any panel member. Such prejudice must be evidenced by a conflict of interest, bias, pressure, or influence that precluded a fair and impartial hearing.
3. New information that was not available at the time of the original hearing.
4. A sanction that is extraordinarily disproportionate to the offense committed.
5. The preponderance of the evidence presented at the hearing does not support a finding of responsible. Appeals based on this consideration will be limited to a review of the record of the initial hearing.

The procedures followed during the appeals process are:

1. The student should file a written letter of appeal to the Office of the Dean of the Faculties within 10 class days after being notified of the Academic Honor Policy Hearing Panel decision. This letter should outline the grounds for the appeal (see 1-5 above) and should provide supporting facts and relevant documentation.
2. The Academic Honor Policy Appeal Committee will review this letter of appeal and will hear the student and any witnesses called by the student, except in appeals based on consideration #5 above. The committee may also gather any additional information it deems necessary to make a determination in the case.
3. The Appeals Committee may affirm, modify, or reverse the initial panel decision, or it may order a new hearing to be held. This decision becomes final agency action when it is approved by the Provost. In cases where the student is found responsible, the decision becomes a confidential student record of academic dishonesty.
4. Appellate decisions are communicated in writing to the student, the instructor, the Office of the Dean of the Faculties, and the Dean of Students Department within 30 class days of the appellate hearing.

Academic Honor Policy Committee

An Academic Honor Policy Committee shall be appointed by the University President. The Committee will include: three faculty members, selected from a list of six names provided by the Faculty Senate Steering Committee and three students, selected from a list of six names provided by the Student Senate. The Dean of the Faculties or designee and the Dean of Students or designee shall serve *ex officio*. Faculty members will serve three-year staggered terms, and students will serve one-year terms. The committee will meet at least once a semester. It will monitor the operation and effectiveness of the Academic Honor Policy, work with the Faculty Senate and the Student Senate to educate all members of the community regarding academic integrity, and make recommendations for changes to the policy.

Amendment Procedures

Amendments to the Academic Honor Policy may be initiated by the Academic Honor Policy Committee, the Faculty Senate, the Student Senate, and/or the Vice President for Academic Affairs. Amendments to the policy must be approved by both the Faculty Senate and the Student Senate.

TITLE IX, THE NCAA, AND INTERCOLLEGIATE ATHLETICS

SUE ANN MOTA*

I. INTRODUCTION

A very important issue in intercollegiate athletics is gender equity. The number of women on varsity teams has risen, as have women's teams' budgets.¹ Gender equity remains an important issue in intercollegiate athletics, and colleges and universities that receive federal funds must comply with the mandates of Title IX.² Additionally, NCAA Division I schools must face certification and recertification, which requires examination of gender issues.³

The National Collegiate Athletic Association was founded in 1906, and celebrates a century of accomplishments in 2006.⁴ The NCAA began administering women's athletics programs in 1980.⁵ The purpose of the NCAA is "to govern competition in a fair, safe, *equitable*, and sportsmanlike manner."⁶

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by any educational program or activity receiving federal assistance.⁷ A Policy Interpretation issued in 1979, derived from a 1975 implementing regulation,⁸ clarified areas to be considered when determining equal opportunities

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1. Welch Suggs, *Female Athletes Thrive, but Budget Pressures Loom*, 47 CHRON. HIGHER EDUC., May 18, 2001, at A45.

2. 20 U.S.C. § 1681(a) (2000).

3. 2006–07 NCAA Division I Athletics Certification Handbook 10, http://www.ncaa.org/library/membership/d1_athletics_cert_handbook/2006-07/2006-07_athletics_certification_handbook.pdf (last visited Oct. 8, 2006) [hereinafter *NCAA Certification Handbook*]. In Division I certification, it is the responsibility of each institution to implement the Association's principle of gender equity. *Id.*

4. About the NCAA: The History of NCAA, http://web1.ncaa.org/cent/about_History.jsp (last visited Oct. 8, 2006).

5. *Id.*

6. The Online Resource for the National Collegiate Athletic Association, <http://www.ncaa.org/wps/portal> (follow "About the NCAA" hyperlink; then follow "Overview" hyperlink; then follow "Our Mission" hyperlink) (last visited Oct. 8, 2006) (emphasis added).

7. 20 U.S.C. § 1681(a) (2000).

8. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and

in intercollegiate athletics: athletic scholarships; other program areas; and effective accommodation of interests and abilities.⁹ Title IX and the Policy Interpretation have been the subject of extensive litigation.¹⁰ Colleges and universities have made progress towards compliance with Title IX;¹¹ further progress, however, is still needed.¹²

The NCAA does not evaluate Title IX compliance for its member institutions;¹³ the Office for Civil Rights in the Department of Education is charged with Title IX compliance oversight.¹⁴ The NCAA does, however, facilitate compliance in some ways, such as having the required gender equity plans in the Division I recertification self-study instrument¹⁵ include the areas covered by the 1979 Policy Interpretation.¹⁶

First, this article will briefly examine the history of the NCAA and Title IX, specifically discussing their overlap in gender equity. Second, this article will discuss how the NCAA can further assist its more than 1,250 member institutions¹⁷ to achieve the NCAA's purpose of competition in a fair, safe, equitable, and sportsmanlike manner,¹⁸ and to continue to move towards compliance with Title IX.¹⁹ Finally, this article will conclude with recommendations for colleges and universities concerning Title IX and Division I member recertification with the NCAA.

A. Title IX — A Brief History

Title IX of the Education Amendments of 1972 was enacted by Congress to prohibit discrimination on the basis of sex in any education program or activity receiving federal funds.²⁰ In 1975, an implementing regulation was promulgated

Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

9. *Id.* at 71,415.

10. *See* sources cited *infra* notes 76–84 and accompanying text.

11. *See* Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 611 (Winter 2003).

12. *Id.*

13. *NCAA Certification Handbook*, *supra* note 3. In the certification process, neither the NCAA nor the peer reviewers will evaluate whether an institution is legally compliant with Title IX. *Id.*

14. Valerie M. Bonnette, Title IX Basics 3 (Jan. 16, 1996), http://www.ncaa.org/library/general_achieving_gender_equity/title_ix_basics.pdf.

15. 2006–07 NCAA Division I Athletics Certification Self-Study Instrument 27 (2006), http://www.ncaa.org/library/membership/d1_self-study_instr/2006-07/2006-07_self-study_instrument.pdf.

16. *See infra* note 44.

17. *See supra* note 6.

18. *Id.*

19. 20 U.S.C. § 1681(a) (2000).

20. *Id.* (“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 . . .”).

which specifically addressed discrimination on the basis of sex in athletics, including intercollegiate athletics.²¹

In 1979, a Policy Interpretation was issued by the Department of Health, Education, and Welfare specifically for intercollegiate athletics, to provide guidance on what constitutes compliance with Title IX.²² This Policy Interpretation will be examined, as it is the basis for challenging an alleged lack of gender equity in intercollegiate athletics.²³ The Policy Interpretation also sets the template for the required gender equity plan for NCAA recertification of Division I members.²⁴

One area that colleges and universities receiving federal funds must consider when determining equal opportunity in athletics is financial assistance. Institutions receiving federal funds must provide reasonable opportunities for the award of athletic financial assistance for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.²⁵

Under the Policy Interpretation, a number of other athletic program benefits and opportunities must also be equal for members of both sexes. These athletic program benefits and opportunities include equipment and supplies (such as uniforms and apparel); sports-specific and general equipment and supplies; instructional devices; and conditioning and weight training equipment.²⁶ The

21. 34 C.F.R. § 106.41(a)–(c) (2005).

“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”

Id. at § 106.41(a). Separate teams are allowed if “selection for the teams is based upon competitive skill or if the activity is a contact sport.” *Id.* at § 106.41(b). If there is no team for the members of the other sex, however, then a try-out for the team must be allowed unless it is a contact sport, including boxing, wrestling, rugby, ice hockey, football, or basketball. *Id.* Equal opportunity must be provided based upon the following factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Id. at § 106.41(c).

22. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413. *See also* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (holding that Title IX provides for a private right of action). This case involved admission into medical school and was not an intercollegiate athletics case. However, it is also applicable to athletics.

23. *See* sources cited *infra* notes 78–93 and accompanying text.

24. *NCAA Certification Handbook*, *supra* note 3.

25. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415. Proportionally equal amounts of financial assistance are to be available to men’s and women’s programs. *Id.*

26. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and

scheduling of games and practice times,²⁷ travel and per diem allowances,²⁸ and the opportunity to receive coaching²⁹ and academic tutoring³⁰ must also be equivalent for members of both sexes. Other areas of equivalence must include: locker rooms and practice and competitive facilities;³¹ the provision of medical and training facilities and services;³² housing and dining facilities and services;³³ publicity;³⁴ recruitment of student athletes;³⁵ and the provision of support

Intercollegiate Athletics, 44 Fed. Reg. at 71,416. Compliance is assessed by examining the equivalence of: the quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies. *Id.*

27. *Id.* Compliance is assessed by examining: the number of competitive events per sport; the number and length of practice opportunities; the time of day competitive events are scheduled; the time of day practice opportunities are scheduled; and the opportunities to engage in available pre-season and post-season competition. *Id.*

28. *Id.* Compliance is assessed by examining: modes of transportation; housing furnished during travel; length of stay before and after competitive events; per diem allowances; and dining arrangements. *Id.*

29. *Id.* Factors relevant to evaluating compliance in coaching include, *inter alia*: relative availability of full-time coaches; relative availability of part-time and assistant coaches; and relative availability of graduate assistants. *Id.* The Policy Interpretation further states that there are nondiscriminatory factors which may affect the compensation of coaches. *Id.* The range and nature of the coach's duties, the coach's experience, the number of student athletes coached, and the number of assistants should be considered along with the level of compensation. *Id.* When assigning coaches, the training, experience, and professional qualifications and standing should be assessed. *Id.* Compliance in compensation of coaches should be assessed for equivalence in: rate of compensation (per sport, per season); duration of contracts; conditions relating to contract renewal; experience; nature of coaching duties performed; working conditions; and other terms and conditions of employment. *Id.*

30. *Id.* When examining compliance, the availability of, procedures for, and criteria for obtaining tutorial assistance must be equivalent. *Id.* Evaluating compliance in tutor assignments requires assessing the equivalence of tutor qualifications, training, experience, and other qualifications. *Id.* Additionally, to determine whether the tutors' compensation is equivalent, evaluators must assess the hourly wage by nature subjects tutored, pupil loads per tutoring season, tutor qualifications, experience, and the terms and conditions of employment. *Id.* *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069 (9th Cir. 1999), involved a suit brought by a head women's basketball coach under Title IX, the Equal Pay Act, and state law. The university paid the head coach of the women's team less than the head coach of the men's basketball team, but did not violate the law because the men's team coach had substantially higher qualifications and more responsibilities. *Stanley*, 178 F.3d at 1076-77.

31. Title IX of the Education Amendments of 1972, a Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417. The following are assessed: quality and availability of the facilities provided for practice and competitive events; exclusivity of use of facilities provided for practice and competitive events; availability of locker rooms; quality of locker rooms; maintenance of practice and competitive facilities; and preparation of facilities for practice and competitive events. *Id.*

32. *Id.* The following must be equivalent for men and women: availability of medical personnel and assistance; health, accident and injury insurance coverage; availability and quality of weight and training facilities; availability and quality of conditioning facilities; and availability and qualifications of athletic trainers. *Id.*

33. *Id.* The housing provided, as well as special services as part of the housing arrangement, must be equivalent. *Id.*

34. *Id.* Compliance is assessed by examining equivalence of: availability and quality of sports information personnel; access to other publicity resources for men's and women's

services.³⁶

The Policy Interpretation calls for the effective accommodation of student interests and abilities,³⁷ by providing both participation opportunities for individuals of each sex in intercollegiate athletics and competitive team schedules that equally reflect the abilities of athletes of each sex. Compliance in the area of effective accommodation of interests and abilities is assessed in any one of three ways: (1) proportionality; (2) responsiveness to the interests and abilities of the underrepresented sex by a history and continuing practice of program expansion; or (3) accommodation of the interests and abilities of the underrepresented sex.³⁸

In 1980, the Department of Education was created. The Department of Education's Office for Civil Rights enforces Title IX.³⁹ In 1984, the Supreme Court held that Title IX applied only to the college and university programs that receive federal funds.⁴⁰ Congress, by the Civil Rights Restoration Act of 1987,

programs; and quantity and quality of publications and other promotional devices featuring men's and women's programs. *Id.*

35. *Id.* Recruitment practices must be examined including: whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit; whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex. *Id.*

36. *Id.* There must be equivalence in administrative, secretarial, and clerical assistance to men's and women's teams. *Id.*

37. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417-18.

38. *Id.* at 71,418. The three-prong test states that compliance is assessed by one of the following: (1) whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. *Id.* For a discussion of prong one, see Tshaka C. Randall, *A (Not So) Safe Harbor: Substantial Proportionality as a Measure of Effective Accommodation*, 5 TEX. REV. ENT. & SPORTS L. 79 (2003); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003) (assessing the level of competition for compliance by examining: (1) whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or (2) whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.).

39. 20 U.S.C. § 3441(a)(3) (2000). See generally Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331 (1999).

40. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

restored institution-wide application of Title IX if any part of the institution receives federal funds.⁴¹

In 1992, the Supreme Court held that monetary damages, including punitive damages, are available in a Title IX case.⁴² The Equity in Athletics Disclosure Act in 1994 required that, starting in 1996, coeducational institutions of higher education that participate in federal student financial aid programs and have intercollegiate athletics must file annual disclosure reports.⁴³ Also in 1996, the Department of Education's Office for Civil Rights issued a clarification of the three-prong test for effective accommodation of interests and abilities.⁴⁴ This clarification reiterated that only one prong needs to be satisfied and gave specific factors for analysis of each prong.⁴⁵

The twenty-fifth anniversary of Title IX occurred in 1997.⁴⁶ To celebrate that anniversary, the National Women's Law Center filed twenty-five complaints concerning athletic scholarship inequalities with the Office for Civil Rights.⁴⁷ As a result, the Office for Civil Rights stated in a letter that exact proportionality down to the dollar is not required; rather, any nondiscriminatory factors will be considered, and if any unexplained disparity is less than one percent of the entire budget for athletics scholarships, then there is a strong presumption that this disparity is reasonable.⁴⁸

In 2002, the Secretary of Education formed a Commission on Opportunity in Athletics to collect information and analyze issues to improve the standards for Title IX. A report, *Open to All, Title IX at Thirty*, was issued in 2003.⁴⁹ One

41. 20 U.S.C. § 1687 (West 2000 & Supp. 2006).

42. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). This was not an athletic case; it involved sexual harassment by a teacher and coach. See generally Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and Its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373 (1993).

43. Pub. L. 103-382, § 360B(c), 108 Stat. 3969 (1994).

44. U.S. Dep't of Educ., Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>. The OCR concluded that it recognizes that institutions face challenges in providing nondiscriminatory participation opportunities and will continue to assist institutions in ways to meet these challenges. *Id.*

45. *Id.*

46. See generally Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORTS & ENT. L. 391 (1997).

47. This author's institution was one of the twenty-five sued.

48. Letter from Dr. Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, U.S. Dep't of Educ., Office for Civil Rights, to Nancy Footer, Gen. Counsel, Bowling Green State Univ. (July 23, 1998), available at <http://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>. Ms. Footer's letter to the OCR led to this guidance letter. Ms. Footer, former general counsel at Bowling Green, is extremely knowledgeable on Title IX issues. See generally B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273 (1999).

49. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *OPEN TO ALL: TITLE IX AT THIRTY* (Feb. 23, 2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>. See generally Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003); Suzanne Eckes, *The Thirtieth Anniversary of Title IX: Women Have Not*

recommendation was that the Department of Education should reaffirm its strong commitment to equal opportunity. Another suggested that any substantive adjustments should be developed through the normal federal rulemaking process.⁵⁰ Two other key themes were that the OCR should provide clear written guidelines and ensure that they are understood,⁵¹ and that the OCR should educate colleges and universities about rules concerning private funding of particular sports to prevent these sports from being dropped or other specific sports from being added.⁵²

In 2003, the Assistant Secretary for Civil Rights issued a Further Clarification of Intercollegiate Athletics Guidance Regarding Title IX Compliance.⁵³ The memorandum stated that eliminating teams is not favored. That policy was reemphasized in a later report from the Office for Civil Rights, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three*.⁵⁴ The Office for Civil Rights complemented the report with a User's Guide⁵⁵ and a Model Survey,⁵⁶ which could be used for assessment of the third prong to fully and effectively accommodate the athletic interests and abilities of the under-represented sex. Also in 2005, the U.S. Supreme Court decided *Jackson v. Birmingham Board of Education*,⁵⁷ holding that Title IX's private right of action encompasses claims of retaliation against an individual who complained about sex discrimination.

The number of women playing college sports has surged from nearly 30,000 in 1971–72 to over 155,000 in 2001–02.⁵⁸ Full equality between men and women has

Reached the Finish Line, 13 S. CAL. REV. L. & WOMEN'S STUD. 3 (2003); Elizabeth A. Heuben, *Revolution, Numbers, IX*, 71 UMKC L. REV. 659 (2003); William C. Duncan, *Title IX at Thirty: Unanswered Questions*, 3 MARGINS 211 (2003); Apiyo F. Oloyo, *Athletics*, 4 GEO. J. GENDER & L. 377, 378–79 (2002).

50. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OPEN TO ALL: TITLE IX AT THIRTY (Feb. 23, 2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

51. *Id.*

52. *Id.*

53. Gerald Reynolds, Assistant Secretary of Civil Rights, U.S. Department of Education, Further Clarification of Intercollegiate Athletics Guidance Regarding Title IX Compliance (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

54. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE POLICY: THREE-PART TEST—PART THREE (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *Additional Clarification*].

55. U.S. DEP'T OF EDUC., INSTITUTE OF EDUCATION SCIENCES, USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX (2005), <http://nces.ed.gov/pubs2005/2005173.PDF>.

56. See sources cited *infra* notes 94–106 and accompanying text.

57. 544 U.S. 167 (2005); see generally Sue Ann Mota, *Title IX After Thirty-Four Years—Retaliation Is Not Allowed According to the Supreme Court in Jackson v. Birmingham Board of Education*, 13 VILL. SPORTS & ENT. L.J. 245 (2006).

58. See generally KAREN BLUMENTHAL, LET ME PLAY: THE STORY OF THE TITLE IX, THE LAW THAT CHANGED THE FUTURE OF GIRLS IN AMERICA (2005), excerpted in Karen Blumenthal, *Title IX's Next Hurdle*, WALL ST. J., July 6, 2005, at 31 (using data supplied by the NCAA, and showing that during the same time, the number of men playing college sports rose

not been reached and there remains room for improvement.⁵⁹ This article will discuss how the NCAA can assist member institutions in achieving Title IX compliance.

B. National Collegiate Athletic Association and Women's Sports—A Brief History

What is now called the NCAA was started as the Intercollegiate Athletic Association of the United States in 1906; the institution took its current name in 1910.⁶⁰ Initially, the institution focused on football.⁶¹ In 1976, the NCAA sued the Secretary of the Department of Health, Education, and Welfare, seeking declarative and injunctive relief to invalidate Title IX's Implementing Regulation.⁶² A federal district court in 1978 ruled that it lacked jurisdiction over the NCAA's challenge because the NCAA lacked standing both in its own right and as a representative of its member institutions.⁶³ On appeal, the Court of Appeals for the Tenth Circuit in 1980 in *National Collegiate Athletic Association v. Califano* reversed and held that the NCAA did have standing to sue on behalf of its members on the single claim in the amended complaint that the regulation would injure the NCAA and its members.⁶⁴ There is no recorded decision on the merits after the standing issue was resolved.

In 1988, the Supreme Court held, in *National Collegiate Athletics Association v. Tarkanian*, that the NCAA was not a state actor and therefore not subject to suit on due process allegations.⁶⁵ The Supreme Court later cited *Tarkanian* in 1999 when it unanimously held in *National Collegiate Athletics Association v. Smith* that receiving dues payments from its members was not sufficient—without more—to subject the NCAA to suit under Title IX.⁶⁶

from over 170,000 to over 212,000).

59. Gayle I. Horwitz, *Athletics*, 5 GEO. J. GENDER & L. 311, 328 (2004).

60. NCAA, The History of the NCAA, <http://www.ncaa.org/about/history.html> (last visited Nov. 8, 2006).

61. *Id.* See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000) (stating that the NCAA began administering women's athletics programs in 1980).

62. *NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980); *NCAA v. Califano*, 444 F. Supp. 425 (C.D. Kan. 1978).

63. 444 F. Supp. at 425.

64. 622 F.2d at 1383.

65. 488 U.S. 179 (1988).

66. 525 U.S. 459, 462 (1999). Smith sued the NCAA and included a Title IX claim, alleging that the organization discriminated against her on the basis of sex for refusing to waive a bylaw restricting post baccalaureate participation. Smith alleged that more waivers were granted for male student athletes than female student athletes. The district court granted the NCAA's motion to dismiss the Title IX claim because of Smith's failure to allege that the NCAA was a recipient of federal funds, and if it were assumed that the dues-paying members were recipients of federal funds, this was too far removed to subject the NCAA to the mandates of Title IX. *Smith v. NCAA*, 978 F. Supp. 213 (W.D. Pa. 1997). The Court of Appeals for the Third Circuit reversed, holding that the dues from member institutions which received federal funds would be sufficient to bring the NCAA under Title IX. *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998).

Even though the NCAA itself is not subject to Title IX, and does not evaluate whether its member institutions are in compliance with Title IX,⁶⁷ gender issues are one area that colleges and universities are required to address in the certification process for Division I schools, as approved at the 1993 NCAA Convention. Schools are required to have an approved written gender equity plan.⁶⁸ The second cycle of recertification of Division I schools began in 1999. In 2004 a revised certification process was approved. It includes an operating principle requiring that the approved prior gender equity plan has been implemented and that the institution has demonstrated a commitment to, and progress toward, fair and equitable treatment of both male and female student-athletes and athletic department personnel. The institution must also formally adopt a written gender equity plan that extends five years into the future.⁶⁹

In 1991, the NCAA surveyed its members concerning expenditures on women's and men's athletics to provide data relevant to gender issues, but not to measure Title IX compliance.⁷⁰ After this first survey, a gender equity task force was formed and charged with, among other things, subsequent surveys. The 2002–03 report showed few changes over the 2001–02 report, claiming slow change over twelve years.⁷¹

John Roberts argued the case before the Supreme Court on behalf of the NCAA. The Court cited *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988), on the issue that NCAA rules govern its members' intercollegiate athletics programs. *Smith*, 525 U.S. at 462–63. The dues paid by these members, however, are not sufficient by themselves to subject the NCAA itself to Title IX. *Smith*, 525 U.S. at 470. The Court did not address the issues of whether the NCAA directly or indirectly receiving federal financial assistance through the National Youth Sports Program subjects it to Title IX, or whether a recipient of federal funds that cedes controlling authority to another entity subjects that entity to Title IX. See Mathew R. Hammer, *Bump, Set, Spiked: Determining Whether the National Collegiate Athletic Association Is a Recipient of Federal Funds Under Title IX National Collegiate Athletic Ass'n v. Smith*, 65 MO. L. REV. 773 (2000); Thomas M. Rowland, *Level the Playing Field: The NCAA Should Be Subject to Title IX*, 7 SPORTS L.J. 173 (2000). On remand the Court of Appeals for the Third Circuit reversed the district court's denial of Smith's motion to amend her complaint to include the two grounds not addressed in the Supreme Court's decision. *Smith v. NCAA*, 266 F.3d 152, 163 (3d Cir. 2001). Ms. Smith was allowed to amend her Title IX complaint against the NCAA on the indirect receipt of federal funding from the National Youth Sports Program, but not on the ceded controlling authority grounds. *Id.*

67. *NCAA Certification Handbook*, *supra* note 3.

68. *Id.* The first cycle of certification had operating principles in four basic areas: governance and commitment to rules compliance; academic integrity; fiscal integrity; and equity, welfare, and sportsmanship. *Id.*

69. NCAA Athletics Certification Self-Study Instrument 27 (2004). The program areas to be reviewed for gender issues are the areas under the 1979 Policy Interpretation. *Id.* at 36.

70. 2002–03 NCAA GENDER EQUITY REPORT 8 (2004). This report is the most recent gender equity report released by the NCAA at the time of this publication.

71. *Id.* at 11. In most categories, women's athletics did not gain, and where there was a gain, it was minimal. *Id.* In every division except Division III, the total dollars spent on women's athletics grew, but total dollars spent on men's athletics grew just as much, or more. *Id.*

C. The NCAA, Its Members, and Title IX

Colleges and universities that receive federal funds and offer intercollegiate athletics must comply with Title IX⁷² as well as with the Policy Interpretation in the areas of the three-prong test for effective accommodation,⁷³ athletics scholarships,⁷⁴ and other athletic benefits and opportunities.⁷⁵ The NCAA has over 1,250 members, and its Division I members must go through a certification process that involves examining the areas covered by the Policy Interpretation and developing an institutional plan involving all of those areas, discussed next.

II. THE THREE-PRONG TEST FOR EFFECTIVE ACCOMMODATION

There have been several appellate court decisions involving the three-prong test, including a fairly recent unsuccessful challenge of the test. It is essential that colleges and universities are knowledgeable about and comply with the three-prong test. In *Cohen v. Brown University*, Brown University dropped four teams, two men's teams and two women's teams.⁷⁶ Members of the two dropped women's teams—volleyball and gymnastics—brought a class action alleging a Title IX violation.⁷⁷ The Court of Appeals for the First Circuit upheld the district court's finding that Brown violated Title IX and that the Policy Interpretation was consistent with the Title IX statute.⁷⁸ Similarly, when Colorado State University cut varsity fast-pitch softball, students and former members of the team sued under Title IX.⁷⁹ The Tenth Circuit, in *Roberts v. Colorado State Board of Agriculture*, found that none of the three-prongs were met.⁸⁰ In *Favia v. Indiana University of Pennsylvania*, after Indiana University of Pennsylvania announced plans to discontinue two men's and two women's teams, a class action was brought on behalf of female athletic program participants and all present and future IUP female students or potential students who were participating in, or who would seek to participate in, intercollegiate athletics.⁸¹ The Third Circuit upheld a preliminary injunction requiring the reinstatement of women's varsity field hockey and gymnastics.⁸² In *Pederson v. Louisiana State University*, female students at

72. 20 U.S.C. §1681(a) (2000).

73. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417–18. See *supra* text accompanying notes 37–38.

74. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415. See *supra* text accompanying note 25.

75. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416. See *supra* text accompanying notes 26–30.

76. 991 F.2d 888 (1st Cir. 1993).

77. *Id.* at 892–93.

78. *Id.* at 906. See Sue Mota, *Title IX and Intercollegiate Athletics — The First Circuit Holds Brown University Not in Compliance*, 14 ENT. & SPORTS L. REV. 152 (1997).

79. *Roberts v. Colo. State Bd. of Agric.*, 998 F. 2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993).

80. *Id.* at 832.

81. *Favia v. Ind. Univ. of Pa.*, 7 F. 3d 332 (3d Cir. 1993).

82. *Id.* at 344.

Louisiana State University filed a Title IX complaint requesting an injunction ordering the university to field intercollegiate varsity women's fast pitch softball and soccer.⁸³ The Court of Appeals for the Fifth Circuit held that none of the three prongs were satisfied, stating that the Policy Interpretation is the proper analytical framework to assess Title IX compliance.⁸⁴

The elimination or capping of rosters on men's teams, and specifically on wrestling teams, has caused litigation over the three-prong test.⁸⁵ In 1999, the wrestling team at California State University in Bakersfield challenged squad size targets and requested declaratory and injunctive relief.⁸⁶ The university chose downsizing of the men's teams rather than elimination of any of the men's teams.⁸⁷ In *Neal v. Board of Trustees of California State Universities*, the Court of Appeals for the Ninth Circuit held that capping the roster of the wrestling team did not violate the Constitution or Title IX.⁸⁸ A challenge to dropping wrestling was also unsuccessful in *Chalenor v. University of North Dakota*.⁸⁹ The issue in *Chalenor* was whether Title IX prohibits a public college or university from eliminating a men's athletic team to reduce inequality in athletic participation between males and females.⁹⁰ The University of North Dakota cited both budgetary and gender equity reasons for cutting the men's wrestling team, and members sued, alleging a Title IX violation.⁹¹ The district court granted summary judgment for the University of North Dakota, and the appeals court affirmed.⁹² Most recently, in *National Wrestling Coaches Association v. Department of Education*, the Court of Appeals for the District of Columbia Circuit held that plaintiffs including the National Wrestling Association, the Committee to Save Bucknell, the Marquette Wrestling Club, the Yale Wrestling Association, and the College Sports Council lacked standing to challenge the Policy Interpretation's three-prong test and the 1996 clarification.⁹³

The OCR's Further Clarification in 2003 said that the three-prong test has worked well by offering colleges and universities flexibility in selecting a prong that best fits an institution's circumstances.⁹⁴ Reducing men's teams is not a

83. *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000).

84. *Id.* at 879.

85. *Kelley v. Board of Trustees* involved dropping a men's team while retaining a women's team was not a Title IX violation. 35 F.3d 265, 272-73 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). In *Boulahanis v. Board of Regents*, the appellate court upheld the cropping of men's sports to move towards proportionality. 198 F.3d 633, 641 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000).

86. *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 771, 773 (9th Cir. 1999).

87. *Id.* at 765.

88. *Id.* at 772-73.

89. 291 F.3d 1042, 1047-48, 1050 (8th Cir. 2002).

90. *Id.* at 1043.

91. *Id.* at 1048.

92. *Id.* at 1044.

93. 366 F.3d 930, 958-59 (D.C. Cir. 2004), *cert. denied*, 126 S. Ct. 12 (2005). The court held that there was no standing, and even if there was, the availability of a private course of action directly against the universities would bar this case. *Id.* at 945.

94. *See Additional Clarification*, *supra* note 54 and accompanying text.

avored way of achieving compliance with the three-part test, according to the Further Clarification.⁹⁵ The OCR stated that while it will aggressively enforce Title IX, it will also work with colleges and universities to avoid sanctions.⁹⁶ Private sponsorship of athletics teams will continue to be allowed, according to the Further Clarification, but this does not change or diminish the academic institution's Title IX obligations.⁹⁷ Finally, the OCR will not allow variations in enforcement in different regions of the United States.⁹⁸

Of the 130 colleges and universities that the Office for Civil Rights investigated in the decade from 1992 to 2002, about two-thirds achieved compliance under part three of the three-prong test.⁹⁹ Because of the perceived uncertainty concerning this prong, the OCR issued in 2005 an Additional Clarification of the Three-Part Test, along with a web-based Model Survey that schools may use to assess student interest in sustaining a varsity team.¹⁰⁰ The Additional Clarification recommends that the Model Survey be conducted as a census of all undergraduate students or of undergraduate students of the underrepresented sex to avoid sample survey problems such as selection of the sample size, calculation of sampling error, and selection of the sampling mechanism.¹⁰¹ Further, the Model Survey must be administered periodically.¹⁰²

The OCR has been commended by one author for acknowledging that there is a problem with institutional compliance under the three-part test and for issuing the Additional Clarification.¹⁰³ The NCAA, however, does not favor the use of the Model Survey¹⁰⁴ and has issued a resolution urging the Department of Education to rescind the Additional Clarification.¹⁰⁵ The NCAA resolution urges its

95. *Id.* at 5.

96. *Id.* at 3.

97. *Id.*

98. *Id.* at 24.

99. See *Additional Clarification*, *supra* note 54, at 2; see also C. Peter Goplerud III, *Title IX: Part Three Could be the Key*, 14 MARQ. SPORTS L. REV. 123 (2003).

100. *Additional Clarification*, *supra* note 54, at 5.

101. *Additional Clarification*, *supra* note 54, at 5–6. The institution may require students to complete the Model Survey (census), or provide it in a context in which students must encounter it, such as in the registration process. *Id.* It could also be sent via e-mail, and the OCR will interpret no response by a student as lack of interest. *Id.* The census must include the full list of sports in the Model Survey, which includes all varsity sports, including emerging sports, recognized by the NCAA, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. *Id.* at 7.

102. *Id.* at 6.

103. Robin M. Preussel, *Successful Challenge Ruling Reversed: Why the Office for Civil Rights' Survey Proposal May Be Well-Intentioned but Misguided*, 13 SPORTS LAW. J. 79, 118 (2006).

104. Press Release, National Collegiate Athletic Association, *In Honor of Title IX Anniversary, NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law* (June 22, 2005), available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/june/20050622_titleixanniv.html.

105. *Id.*

members to decline to use the procedures in the Additional Clarification.¹⁰⁶ The resolution itself provided no further guidance, other than the guidance issued by the OCR in the 1996 Clarification.¹⁰⁷ Nonetheless, two commentators have suggested that regardless of whether a college's administrators agree or not, it would be a "serious mistake" to overlook the usefulness of the Additional Clarification as part of the institution's Title IX compliance efforts.¹⁰⁸

III. ATHLETICS SCHOLARSHIPS

The Implementing Regulation requires that, if a college or university awards athletic scholarships, scholarship dollars be awarded in proportion to the number of each sex participating in intercollegiate athletics.¹⁰⁹ The Policy Interpretation requires that the total amount of scholarship aid made available to men and women be substantially proportionate to their overall participation rates at that institution.¹¹⁰ This rule is different from the proportionality prong of the three-prong test, which looks at proportionality to the student body as a whole.¹¹¹ An analysis of athletic scholarships requires examining the scholarship amounts and levels of participation.¹¹² This rule is independent of any NCAA or other athletic association rule that limits scholarships.

The Policy Interpretation states that the Department of Education's Office for Civil Rights will determine whether an institution is compliant by dividing the amounts of financial aid available for the members of each sex by the numbers of male or female participants in the athletics program.¹¹³ An institution may be in

106. *Id.*

107. This author respectfully suggests that the NCAA could then provide some additional clarification to its members, perhaps compiling "best practices" of its members to achieve compliance.

108. John J. Almond & Daniel A. Cohen, *Navigating Into the New "Safe Harbor": Model Interest Surveys as a New Tool for Title IX Compliance programs*, 8 VAND. J. ENT. & TECH. L. 1, 2 (2005).

109. 34 C.F.R. § 106.37(c) (2006). For example, if fifty-five percent of student-athletes are female, then fifty-five percent of the scholarship funds must go to female student-athletes. *Id.*

110. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415. *See supra* text accompanying note 25. Under the Policy Interpretation, participants are those student athletes: (a) who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and (b) who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and (c) who are listed on the eligibility or squad lists maintained for each sport; or (d) who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

111. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418. *See supra* text accompanying note 38.

112. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

113. *Id.* at 71,418. The amount of athletics scholarships awarded to women divided by the number of female participants will be compared to the amount of athletics scholarships awarded

compliance if the comparison results in substantially equal amounts, or if a resulting disparity may be explained by other factors such as out-of-state scholarships at a public institution or reasonable decisions on program development.¹¹⁴ It is important to note that the Policy Interpretation only looks at the amount spent on male versus female student-athletes, not at proportionate numbers of scholarships for men or women or individual scholarships of equal dollar value.¹¹⁵

In a 1998 Policy Guidance for Athletic Scholarships, the Office for Civil Rights further clarified that the relevant disparity in awards is the difference between the annual aggregate amount of money athletes of one sex received and the amount they would have received if their share of the entire annual budget for athletic scholarships had been awarded in proportion to gender participation rates.¹¹⁶ For example, if there is a million dollar budget for athletic scholarships and males are fifty-five percent of athletics participants, then female student-athletes should receive four hundred fifty thousand dollars in athletic financial assistance; anything significantly less is disparate treatment. The Office for Civil Rights recognized that there was confusion in the past on the issue of Title IX compliance standards for athletic scholarships,¹¹⁷ and while proportionality does not need to be exact, there is a high threshold test for determining substantial proportionality of scholarship amounts.¹¹⁸

The Office for Civil Rights will decide whether institutions are compliant on a case-by-case basis.¹¹⁹ Some disparities may be explained by justifications that the Policy Interpretation allows, such as out-of-state scholarships or program development. Other justifications include legitimate efforts to comply with Title IX, such as participation requirements.¹²⁰ There may be unexpected fluctuations due to an athlete deciding to attend another institution. Once legitimate disparities are taken into account, if any unexplained disparity in scholarship dollars up to one percent of the entire budget for athletic scholarships, the OCR presumes that the disparity is reasonable and based on legitimate nondiscriminatory factors.¹²¹

to men divided by the number of male participants. *Id.*

114. *Id.*

115. *Id.*

116. U.S. Dep't of Educ., Office for Civil Rights, Norma V. Cantú, Assistant Secretary, Dear Colleague Letter: Bowling Green State University (July 23, 1998), *available at* <http://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

117. *Id.* (citing the OCR's 1990 Athletics Investigator's Manual, which stated that statistical tests may, in some cases, result in compliance despite a disparity as large as three to five percent). The 1998 Policy Guidance for Athletic Scholarships clarified that statistical tests are not appropriate with regard to athletic scholarships as they are in other discrimination contexts because a college or university directly controls its allocation of financial aid to men's and women's teams and the allocation affects only one sex. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* (citing *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995)).

121. *Id.* The 1998 Policy Guidance reinforces that the evaluation will still be done on a case-by-case basis. The Policy Guidance first gives the example of a school where one percent of the entire athletic scholarship budget is less than one full scholarship, then the disparity of up to the

NCAA members that award athletic scholarships must be careful to comply with Title IX in this area. With a variance of only one percent, colleges and universities must carefully calculate each year the exact scholarship dollars and the accurate participation numbers. It is better to err on the side of awarding athletic assistance to the underrepresented sex. The Implementing Regulation permits institutions to award a disproportionately higher aggregate of scholarships to the underrepresented sex.¹²²

The NCAA bylaws allow colleges and universities to award either scholarships or grants-in-aid to student athletes.¹²³ The NCAA defines financial aid as all institutional and other financial aid such as scholarships, grants, tuition waivers, employee dependent tuition benefits, and loans.¹²⁴ Other financial aid, such as aid through an outside program or non-athletics aid, is also included in the definition of financial aid.¹²⁵ The NCAA limits the value of financial aid awards that an institution may provide in any given year in women's and men's sports.¹²⁶ While it is beyond the scope of this article, the NCAA and other researchers should study the effect of the existing scholarship limits, gender equity, and compliance with Title IX to see if the limits could be adjusted to help member institutions.

For the calculation of athletic scholarships, some students are not counted, including fifth year student athletes who have exhausted eligibility, academically ineligible students, and male athletes who scrimmage on women's teams.¹²⁷ The tangential issue of male practice players thus is not a factor for calculating the proportionality of scholarships, and these male students may not receive financial assistance. This issue does, however, raise concerns for member institutions. Opponents argue that using male practice players conflicts with providing equitable opportunities for female student athletes, who may be on the bench, and using male practice squads may increase female athletes' injuries.¹²⁸ Proponents argue that it makes the female teams more competitive.¹²⁹ While not a Title IX

value of one full scholarship is equitable and nondiscriminatory. *Id.* If there is direct evidence of discriminatory intent, however, then even less than a one percent disparity could rebut the presumption of compliance. *Id.*

122. 45 C.F.R. § 106.3(b) (1980).

123. NCAA, 2006-07 NCAA DIVISION I MANUAL, BYLAW 15.01.1 (2006), available at http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

124. *Id.* at BYLAW 15.02.4.

125. *Id.* Elements of financial aid include tuition and fees, room and board, books, and other expenses related to attendance. *Id.* at BYLAW 15.2.

126. *Id.* at BYLAW 15.5.3. Perhaps the NCAA could evaluate whether even more adjustment of the scholarship awards would be helpful to more member institutions toward Title IX Compliance. Division III student-athletes do not receive athletics-related aid. *Id.* at BYLAW 15.01.3.

127. *See id.* at BYLAW 15.5.1.8 (discussing fifth year student athletes who have exhausted eligibility); *id.* at BYLAW 15.5.1.7 (discussing academically ineligible students); Michelle Hosick, *Male Practice or Malpractice*, THE NCAA NEWS, May 8, 2006 (discussing male athletes who scrimmage on women's teams).

128. *See generally* Hosick, *supra* note 127 (stating that male practice players must be academically eligible).

129. *Id.*

issue, this issue is one for the NCAA to grapple with.

IV. ATHLETIC PROGRAM BENEFITS AND OPPORTUNITIES

The academic institution must maintain equivalent athletic program benefits and opportunities, including equipment and supplies, travel and per diem allowances, and the opportunity to receive coaching and academic tutoring. Further, locker rooms and practice and competitive facilities must also be equivalent. The educational institution must equitably provide medical and training facilities and services, housing and dining facilities and services, and publicity. Finally, recruitment and support services must also be equitable.¹³⁰ In the 2002–03 NCAA Gender-Equity Report, the proportion of money spent on women’s athletics showed slight increases that were approximately equal to or smaller than increases in men’s athletics.¹³¹ Consequently, many member institutions need to do more work to achieve equivalence.¹³²

In Division I recertification, which requires broad campus participation, institutions must develop gender equity plans that cover each area of the Policy Interpretation.¹³³ This helps Division I members minimally address the program areas, but the gender-equity plan committee should take a comprehensive and exhaustive look at each of the program areas in light of the Policy Interpretation.¹³⁴ Each member of the institution’s gender-equity planning committee should be familiar with the Policy Interpretation and the committee must thoroughly and methodically evaluate each program area to move the institution towards compliance with Title IX. It is the institution’s obligation to comply with Title IX; the NCAA does not monitor Title IX compliance.¹³⁵

Institutions must have equivalent equipment and supplies, including uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.¹³⁶

130. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416. *See supra* text accompanying notes 26–30.

131. NCAA, 2002–03 GENDER-EQUITY REPORT 11 (2004). In 2001–02, men’s sports total expenses were 66% of the total, and women’s were 34%. *Id.* at 23. The percentages remained the same in 2002–03, although women’s expenses went up \$305,000 from \$3,135,200 to \$3,440,200, while men’s expenditures went up from \$5,995,200 to \$6,550,400. *Id.* at 23.

132. NCAA v. Smith, 525 U.S. 459, 462 (1999). *See supra* text accompanying note 66.

133. The program areas to be reviewed for gender issues are the areas from the Policy Interpretation of Athletics. These areas are scholarships, accommodation of interests and abilities, and the eleven program areas. NCAA, 2005–06 DIVISION I ATHLETICS CERTIFICATION SELF-STUDY INSTRUMENT (2005), http://www.ncaa.org/library/membership/d1_self-study_instr/2005-06/2005-06_d1_cert_self_study_instr.pdf.

134. This author recommends that the focus remains on compliance with the Policy Interpretation. *See* Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413.

135. *See* Bonnette, *supra* note 14 and accompanying text. Additional resources may assist the gender equity planning team. *See, e.g.*, VALERIE MCMURTIE BONNETTE & MARY VON EULER, TITLE IX AND INTERCOLLEGIATE ATHLETICS: HOW IT ALL WORKS—IN PLAIN ENGLISH (2004).

136. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and

Colleges and universities must assess equipment and supplies for quality, amount, suitability, maintenance and replacement, and availability. Considering the amount of equipment and supplies even a small athletics program uses, this could seem a daunting task. However, even though the systematic assessment is difficult, it is necessary for numerous factors, including varying preferences in all of these areas by different sports, coaches, and athletes. The gender equity plan should remedy any lack of equivalence.

Assessing the scheduling of games and practice times may seem to be more straightforward than assessing other program areas; the Policy Interpretation requires that the number of competitive events per sport, the number and length of practice opportunities, the time of day competitive events are scheduled, and the opportunities to engage in available pre- and post-season competition all be assessed for equivalence.¹³⁷ Coaches and student-athletes' preferences may cause some variation here as well, but variances must be equitable. Some post-season opportunities may arise for different teams in different years. Some problems, such as the time of day practices are scheduled for teams practicing in the same facility during the same season can be remedied by alternating teams' practice schedules, perhaps on an annual basis due to student-athletes' class schedules. Even seemingly minor issues, such as one team staying on the court or field into another team's practice schedule, similar to a faculty member staying in a classroom past class time, can rise above an annoyance and become an equity issue but can easily be resolved by the coaches and teams respecting the schedule or requiring that the team leave the field or court if the behavior is repeated. A systematic assessment of the entire area of scheduling of games and practice times, for issues that are large or seemingly small, must also be performed, and institutions must address any lack of equivalence.

For the issue of travel and per diem allowances, institutions can assess their compliance with gender equity by examining modes of transportation, housing during travel, length of stay before and after competitive events, per diem allowances, and dining arrangements.¹³⁸ Equivalence for many of the factors does not necessarily mean spending the same amount of money; rather, the quality issues must be assessed. The modes of transportation for same-sized men's and women's teams traveling the same distance need to be equivalent. The type of housing, including the number of student-athletes per room and their length of stay, also needs to be equivalent. The quality of dining arrangements provided and per diem allowances must also be assessed for equivalence. The gender equity plan should address any lack of equivalence.

The opportunity for athletes to receive coaching and tutoring and the compensation that those coaches and tutors receive must be equivalent.¹³⁹ The

Intercollegiate Athletics, 44 Fed. Reg. at 71,416.

137. *Id.*

138. Even the issue of whether the coach makes the travel and dining arrangements for some teams and other teams have an athletics department administrator to handle this could be an issue. *Id.*

139. *Id.* at 71,416.

Policy Interpretation states that the opportunity to receive coaching includes the relative availability of full-time, assistant, and part-time assistant coaches, as well as graduate assistants. Training, experience, professional standing, and other professional qualifications must be equivalent. Coaches' compensation must be equivalent in the rate of compensation per sport. Issues such as duration of contracts, conditions relating to contract renewal, experience, the nature of coaching duties and working conditions, and other terms and conditions of employment such as pre-season commitments are to be considered.¹⁴⁰ Further, the Policy Interpretation recognizes that other nondiscriminatory factors, such as the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistants supervised, and the level of competition, may represent differences in skill, effort, responsibility, or working conditions, which justify differences in compensation in certain circumstances. The Implementing Regulation additionally prohibits discrimination on the basis of sex in employment in education programs and activities.¹⁴¹ In 1997, the Equal Employment Opportunity Commission issued an Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions.¹⁴² In *Stanley v. University of Southern California*,¹⁴³ Stanley, the former head coach of USC's women's basketball team, claimed violations of Title IX and the Equal Pay Act, along with wrongful discharge under state law. The Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the University of Southern California.¹⁴⁴

Some key issues to be aware of in the assessment of coaching equivalence include having the same number of coaches with the same duration of contract (for example, one year as opposed to nine months) in men's and women's teams in the same sports, within NCAA limitations.¹⁴⁵ The duration of the contracts and rate of compensation, factoring in the non-discriminatory factors listed above, must also be evaluated for equivalence.

Tutoring must also be assessed for equivalence, including the availability, procedures, and criteria for obtaining tutoring.¹⁴⁶ Thus, tutoring and other support services must be afforded to all student athletes equally, regardless of gender.

140. *Id.*

141. 34 C.F.R. § 106.51 (2006).

142. The U.S. Equal Employment Opportunity Commission, EEOC Notice No. 915.002, Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (Oct. 29, 1997), available at <http://www.eeoc.gov/policy/docs/coaches.html>. This guidance analyzes Equal Pay Act and Title VII claims which could be an issue for coaches. The EEOC concluded that there is widespread disparity in coaches' pay and that it will analyze such cases carefully. *Id.*

143. *Stanley v. Univ. of S. Cal.*, 178 F.2d 1069, 1074 (9th Cir. 1999).

144. *Id.* at 1079. See generally Andrea M. Giampetro-Meyer, *Recognizing and Remediating Individual and Institutional Gender-Based Wage Discrimination in Sport*, 37 AM. BUS. L.J. 343, 365-68 (2000).

145. See NCAA DIVISION I MANUAL, Limitations on the Number and Duties of Coaches, Bylaw 11.7.

146. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416.

Tutor qualification, training, and experience must be equivalent.¹⁴⁷ Tutor compensation must be equivalent for men's and women's tutors based on factors, such as rate of pay by nature of the subject tutored, the number of student athletes tutored in a season, and tutor qualifications and experience.¹⁴⁸ If tutoring assistance is provided, then women's and men's teams should have equal access to equivalently qualified tutors.

Institutions must provide equivalent locker rooms, practice, and competitive facilities. Factors such as the quality, availability, and exclusive use of facilities for practice and competitive events, the availability and quality of locker rooms, and the maintenance and preparation of facilities for practice and competitions must be assessed.¹⁴⁹ All members of the committee should view each locker room and facility, or at least by the same members, for continuity in assessment. The college or university may have to reallocate, renovate, or even build locker rooms and facilities to achieve equity. The gender equity plan could offer different options to achieve equity.

Medical and training facilities and services must also be equivalent. Institutions should address the following relevant factors: the availability of medical personnel and assistance, insurance, and availability and quality of weight and training and conditioning facilities and qualifications of the athletic trainers.¹⁵⁰ This area is especially important for the health and safety of student-athletes. For training rooms, one option is that all student-athletes may use the facilities equally, or sports could be alternated in the facilities equitably. The gender equity plan should ensure that medical training facilities are available equitably.

Housing and dining services must be equivalent, including special services such as laundry facilities, parking spaces, and housekeeping services.¹⁵¹ Student athletes' individual and team tastes may vary in these areas, but these services as well must be provided equivalently. One potential area of difficulty is the housing of certain teams in hotels before home matches. This can become an equity issue if such housing is provided for men's teams, and women's teams also want, but are not afforded, this benefit.

Publicity must be equivalent and institutions must assess the availability and quality of sports information personnel, access to other publicity resources, and quantity and quality of publications and other promotional devices.¹⁵² Printed materials and publicity staff may need to be added or shifted to achieve equity. It is not, however, an equity issue if both men's and women's teams lack, or have low quality, publications.

If equal athletic opportunities are not available for both male and female students, then the recruitment practices for teams for both sexes will be evaluated. The assessment must examine whether coaches or other athletic personnel are

147. *Id.*

148. *Id.* at 71,617.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

provided with substantially equal opportunities to recruit, whether the financial and other resources for recruitment are adequately equivalent, and whether the differences afforded to prospective student athletes have a disproportionately limiting effect on the recruitment of students of either sex.¹⁵³ Thus, there must be equivalent opportunities to recruit prospective student athletes by coaches of men's and women's teams. In addition to budgets and the ability to recruit students from other states and distant locales, courtesy cars may be an issue here. Courtesy cars must be assigned equitably, and some cars may need to be leased to achieve equity in this area. The gender equity plan should address any lack of equivalence.

Finally, support services such as administrative and clerical support must be equivalent, based on an assessment of factors such as the amount of administrative, clerical, and secretarial assistance provided to men's and women's programs.¹⁵⁴ Additionally, the office space, equipment, and supplies should be evaluated under this area.¹⁵⁵ It is important for the same committee members to see the office facilities to determine if the offices and equipment are equitably assigned. As in other areas, staff and space may have to be reassigned to achieve equity under the plan.

Thus, a systematic and thorough assessment of all factors of all the program areas must be conducted to determine equivalency. This may be done in the context of NCAA recertification by a well-trained committee with broad campus representation. Committee members must be willing and available to spend the time and effort required to complete this large task, and be willing to ask difficult questions and without accepting the dismissive response that it has always been done that way. Committee members must not merely conduct "random samples," or only evaluate women's sports. Committee members should obtain information from student athletes and coaches by questionnaires and interviews. Members on the gender equity committee must not be those with an "ax to grind" or be on the committee merely to favor the member's favorite sport. The committee members must be willing to recommend what is necessary to achieve equity. Committee members also should be aware that the plan must include what is necessary to achieve equity, and not simply give underrepresented teams what is ideal for the team; men's and women's teams may both be equivalent, but have less than what players, coaches, parents, or boosters want for the teams. Finally, it is essential that the plan move colleges and universities towards compliance with Title IX; consequences for lack of compliance mandate this.

V. CONCLUSION

The National Collegiate Athletics Association is committed to gender equity for student-athletes.¹⁵⁶ For example, the NCAA offers Title IX seminars for its

153. *Id.*

154. *Id.*

155. VALERIE BONNETTE & LAMAR DANIEL, OFFICE FOR CIVIL RIGHTS, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990), available at <http://eric.ed.gov> (search in "ERIC #" for search terms "ED400763").

156. *Supra* note 6 and accompanying text.

members.¹⁵⁷ Any organization, however, has room to improve, and the NCAA could further assist its members in a number of ways. In addition to gathering data, the NCAA could also collect “best practices” of its members in the area of gender equity. Specifically in the area of recertification, gender equity plans which have moved members towards Title IX compliance could be shared with member institutions developing plans.¹⁵⁸ The NCAA could require that the Division I member institutions not only have a gender equity plan, but also require that the plan moves the member towards compliance with Title IX.¹⁵⁹

The NCAA could also review roster and scholarship limits¹⁶⁰ to see if these could be adjusted to help member institutions in the area of financial assistance, keeping in mind that Title IX addresses total dollars spent and not numbers of participants who receive the scholarship dollars.

NCAA Division I members should use the recertification period as a time to involve and educate the entire campus community on the importance of gender equity in athletics as well as the requirements of the Policy Interpretation. If done properly, the gender equity plan, a required part of Division I certification, will require a great deal of time and effort to systematically assess all areas of the Policy Interpretation. Colleges and universities should view this as an opportunity to involve many planning committee members from all parts of campus who are willing to make a substantial time commitment for reaching two very important goals—becoming or staying compliant with Title IX and becoming recertified.¹⁶¹ Even though the NCAA does not currently require it, the gender equity plan should bring the institution into, or at least move the institution well towards, compliance with Title IX. NCAA members should, if at all financially feasible, avoid cutting men’s sports to achieve compliance with Title IX. Adding new athletic opportunities for women is the preferred route.¹⁶² Colleges and universities should

157. See NCAA, 2005 Gender Equity and Issues Forum on Title IX, http://www2.ncaa.org/portal/media_and_events/press_room/2005/april/agenda.pdf (last visited Oct. 18, 2006). If any university counsel or athletics department staff are not already conversant with Title IX requirements, such training could be very beneficial, especially if the institution will be facing NCAA recertification.

158. These could be made available to the NCAA Peer Review Teams, as well. This author’s institution had an outstanding, knowledgeable, and helpful peer review team led by an enormously capable chair. These “best practices” documents could be given to future peer review teams before site visits.

159. See Jay Larson, Note, *All Sports Are Not Created Equal: College Football and a Proposal to Amend the Title IX Proportionality Prong*, 88 MINN. L. REV. 1598 (June 2004). It has been proposed also that football and men’s basketball expenditures be capped, but this could raise antitrust concerns. Darryl C. Wilson, *Title IX’s Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA*, 31 J. MARSHALL L. REV. 1303, 1316 (1998).

160. Sara A. Elliot & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1, 12 (2001).

161. Stated more negatively, this process shouldn’t become an opportunity to try to advance one’s own personal agenda or favorite sport if there aren’t compliance issues involving that sport, at the expense of teams that actually need resources or attention for equity issues.

162. Deborah Brake, *Revisiting Title IX’s Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U.J. GENDER SOC. POL’Y & L. 453, 466 (2004). The co-chair of the National Wrestling Coach’s Association stated that 350 men’s college athletics programs were eliminated

continue to enhance promotions and marketing for women's sports as these teams continue to draw spectators who have grown up with women's sports.¹⁶³

In conclusion, the NCAA, its members, and all colleges and universities receiving federal funds must work together, to achieve compliance with Title IX and provide equitable treatment and opportunities for all student athletes.

in a decade. David Klinker, *Why Conforming With Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORT L. 73 (2003). *But see* Daniel R. Marburger & Nancy Hogshead-Makoi, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 MARQ. SPORTS L.J. 65 (2003). *See also* Suzanne Sangree, *The Secretary's Commission on Opportunity in Athletics Squandered Its Opportunity to Understand Commercial Collegiate Sports: Why They Eliminate Minor Men's Sports and Prevent Title IX from Achieving Full Gender Equality*, 3 MARGINS 257 (2003).

163. Welch Suggs, *Tragedy and Triumph in Title IX*, 7 VAND. J. ENT. L. & PRAC. 421, 435 (2005).

JUSTICE SCALIA’S EQUITABLE CONSTITUTION

GREGORY BASSHAM*

For twenty years, Justice Antonin Scalia has been the Supreme Court’s most influential and outspoken conservative. Witty, passionate, and often acerbic, Scalia has consistently defended an approach to judging that emphasizes judicial restraint, majoritarian values, an “original meaning” jurisprudence, and a “textualist” approach to statutory interpretation that highlights the importance of clear, determinate legal rules. In a recent book,¹ Ralph Rossum argues that Scalia employs a similar textualist approach in constitutional adjudication. Scalia himself has claimed that “[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”² In this article, I argue that Scalia is not in fact a constitutional “textualist.” Although Scalia does adopt a clear and basically consistent textualist approach in statutory interpretation, his approach to deciding constitutional cases is very different.

This article is organized in the following way. In Part I, I explain the fundamental elements of Scalia’s purportedly textualist approach. In Part II, I examine Scalia’s justification for this approach. Part III explains why, *pace* Rossum and Scalia himself, Scalia is not in fact a true constitutional textualist. In Part IV, I argue that Scalia’s *de facto* approach to constitutional adjudication is a form of traditional “equitable interpretation” that Scalia claims to reject. Finally, in Part V, I argue that Scalia’s version of equitable interpretation is flawed and often fails to respect the core judicial values he claims to prize.

I. SCALIA’S CONSTITUTIONAL TEXTUALISM

As we have seen, Scalia describes himself as a “textualist” in matters of both constitutional and statutory interpretation. Textualism, as Rossum characterizes it, is an

“original meaning” approach that accords primacy to the text and tradition of the document being interpreted and that declares that the

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1. RALPH A. ROSSUM, *ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION* (2006).

2. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997) [hereinafter *Scalia Essay*].

duty of the judge is to apply the textual language of the Constitution or statute when it is clear and to apply the specific legal tradition flowing from the text (i.e., what it meant to the society that adopted it) when it is not.³

Several clarifications of this description are in order. First, Scalia claims that he looks for the “original meaning” of constitutional and statutory language, not the original “intentions” of those who wrote, ratified, or voted for the law.⁴ By “original meaning,” Scalia means “a sort of ‘objectified’ intent,” the intent that reasonable, informed people at the time would have gathered “from the text of the law, placed alongside the remainder of the *corpus juris*.”⁵ If the language is clear in context, judges must apply that clear conventional meaning, even if that reading conflicts with the probable intentions or general purposes of the lawmakers.⁶ If the language is ambiguous or otherwise unclear in context, judges must seek to discover and enforce what Scalia calls the original “import” of the language—how a hypothetical reasonable citizen would have understood the words at the time of the law’s enactment. Often, as Scalia notes, this original import will be expressed by means of what Ronald Dworkin calls a “clarifying translation”—an alternate statement of the law that expresses more precisely how the law was originally publicly understood.⁷ For example, Scalia argues, historical research shows that the Eighth Amendment’s prohibition of “cruel and unusual punishments” was originally understood to prohibit only “punishments *generally thought cruel* at the time”⁸ the Amendment was ratified (1791). This clearer and more precise principle expresses what Scalia regards as the “original meaning” of the clause.⁹ And it is this original meaning, he argues, that is the touchstone of correct constitutional interpretation today.¹⁰

Second, Scalia is careful to distinguish his preferred form of textualism from “strict constructionism” and other excessively literalistic approaches to interpretation, such as the old “plain-meaning rule” of statutory interpretation, which failed to recognize the crucial role of context in determining meaning.¹¹ In

3. ROSSUM, *supra* note 1, at 2. It should be noted that this usage of “textualism” may be somewhat broader than normal. In recent legal scholarship, “textualism” is often viewed solely as a theory of *statutory* interpretation. See, e.g., Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347–48 (2005); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3–4 (2001); Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2063 (2005); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3–5 (2006).

4. *Scalia Essay*, *supra* note 2, at 16.

5. *Id.* at 17.

6. *Id.*

7. Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 117 (Amy Gutmann ed., 1997).

8. Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 145 (Amy Gutmann ed., 1997) (emphasis added) [hereinafter *Scalia Response*].

9. *Id.*

10. *Id.*

11. *Scalia Essay*, *supra* note 2, at 23.

Scalia's view, a "text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."¹² In fact, as we shall see, Scalia often reads constitutional provisions in distinctly non-literal ways.¹³

Finally, Scalia qualifies his textualism in one important respect. Although, like all originalists, Scalia holds that in general "no tradition can supersede the Constitution,"¹⁴ he does acknowledge that in some instances well-established precedent will override even clear textual meaning.¹⁵ One prominent example is the Due Process Clause of the Fourteenth Amendment. Scalia claims that "[b]y its inescapable terms,"¹⁶ the Clause guarantees only process. Yet Scalia accepts the long-established "incorporationist" view that the Clause makes binding on the States most provisions of the Bill of Rights, and thus has a clear substantive import.¹⁷

To illustrate this purported textualist approach, let us look at how Scalia applies it to three extensively adjudicated Clauses: the Free Speech Clause, the Free Exercise Clause, and the Equal Protection Clause.

The First Amendment Free Speech Clause declares that "Congress shall make no law . . . abridging the freedom of speech."¹⁸ How, as a self-professed "textualist," does Scalia interpret the Clause?

First, Scalia claims, a threshold question must be asked: is the Clause "clear in context"¹⁹—that is, such that it admits of only one plausible interpretation in the social, linguistic, and legal context in which it was enacted?²⁰ If so, then that reading must be adopted.

Scalia readily admits that the Free Speech Clause is *not* clear in context: there was considerable controversy in, and immediately after, the founding period about

12. *Id.*

13. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 116 (2005).

14. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990).

15. *Scalia Response*, *supra* note 8, at 138–40; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989) [hereinafter *Lesser Evil*].

16. *Scalia Essay*, *supra* note 2, at 24.

17. *Albright v. Oliver*, 510 U.S. 266, 275 (1994).

18. U.S. CONST. amend. I.

19. *Scalia Essay*, *supra* note 2, at 17.

20. The phrasing here is deliberately vague, because Scalia nowhere explains when precisely a law is "clear in context." One prominent textualist, John F. Manning, contends that "[w]hen most of the relevant community would agree on the meaning of a text as applied to a particular fact situation, that text is considered clear in context." Manning, *supra* note 3, at 17. This condition, however, is plainly too weak. Is a school rule prohibiting "revealing" clothing "clear in context" if 51% of the school community would consider sleeveless T-shirts "revealing"? Elsewhere, Manning has said that a constitutional text is "clear and precise" if "almost any reader familiar with the linguistic and cultural conventions of the society that adopted the text would recognize the precise judgment in question after reading the text in context." John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1708 (2004) [hereinafter *Eleventh Amendment*].

how the Clause should be interpreted.²¹ The Clause is thus “ambiguous” rather than “clear.” This means that we must move to the second level of textualist analysis, the level of what Scalia calls “objectified intent.”²² Here we ask how a typical informed American would have interpreted the Clause in 1791. Did he, for instance, understand it as an absolute prohibition of any congressional regulation of speech (Madison’s view)?²³ Or did he understand it as enacting the traditional common-law conception of “freedom of speech,” which prohibited government from instituting any system of licensing or prior restraint, but did not bar subsequent prosecution for speech considered harmful or dangerous (John Marshall’s view)?²⁴ In short, what “clarifying translation” would a typical informed American of the time have provided of the Clause, if he had been asked?

Scalia concedes that historical inquiries of this sort are often difficult, especially for busy judges, who may not have either the time or training to do the job very competently.²⁵ Indeed, Scalia admits that this is the “greatest defect” of textualism and other forms of originalist jurisprudence.²⁶ Yet this is a price that must be paid, Scalia argues, for all other theories of constitutional adjudication have even more serious defects.

Although Scalia has never provided a precise statement of the “original meaning” of the Free Speech Clause, he has claimed that the “bedrock principle” of the Clause is that “government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”²⁷ As he sees it, the Clause does not bar general laws regulating conduct that are not specifically directed at expression, such as laws that outlaw destruction of draft cards.²⁸ Scalia thus rejects the whole “incidental impact” track of modern free-speech analysis, claiming that original meaning ordinarily trumps precedent when they conflict. Moreover, because the First Amendment by its words applies only to “speech,” Scalia generally rejects modern cases suggesting that the Amendment protects “expressive conduct” as well as speech.²⁹ The only exception he makes involves laws that prohibit expressive conduct (e.g., flag-burning³⁰ or cross-burning³¹) precisely because of its communicative attributes.

Scalia adopts a similar approach in interpreting the Free Exercise Clause of the First Amendment, although his departure from textual language here is more striking. The Free Exercise Clause declares: “Congress shall make no law . . .

21. See generally LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

22. *Scalia Essay*, *supra* note 2, at 17.

23. James Madison, *Report on the Virginia Resolutions*, reprinted in 5 THE FOUNDERS’ CONSTITUTION 143 (Philip B. Kurland & Ralph Lerner eds., 1987).

24. John Marshall, *Report on the Minority on the Virginia Resolutions*, reprinted in 5 THE FOUNDERS’ CONSTITUTION 138 (Philip B. Kurland & Ralph Lerner eds., 1987).

25. *Lesser Evil*, *supra* note 15, at 856–57.

26. *Id.* at 856.

27. *McIntyre v. Ohio Elections Comm’n.*, 514 U.S. 334, 378 (1995).

28. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576–77 (1991) (Scalia, J., concurring).

29. *Id.*

30. *Texas v. Johnson*, 491 U.S. 397 (1989); *Barnes*, 501 U.S. at 577.

31. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

prohibiting the free exercise” of religion.³² Finding that this language is “ambiguous” rather than “clear,” Scalia asks what import the Clause would have had to a reasonable and well-informed citizen at the time it was ratified.³³ Recognizing, perhaps, how hotly debated this issue is among constitutional historians,³⁴ Scalia offers no complete clarifying translation, but does suggest that the Clause “means, first and foremost, the right to believe and profess whatsoever religious doctrine one desires.”³⁵ More controversially, Scalia also claims that the Clause, as a matter of original meaning, does not prohibit government from enforcing generally applicable laws that conflict with individuals’ religious beliefs or practices.³⁶ This is another illustration of Scalia’s view that original meaning generally overrides precedent, since the Supreme Court has occasionally upheld religion-based exemptions from otherwise generally applicable laws.³⁷ Since the Free Exercise Clause speaks explicitly of the free *exercise* of religion (as opposed to mere belief), it also provides a clear example of Scalia’s willingness to drift far afield from the apparent textual meaning of constitutional language he considers to be “ambiguous.”

Scalia’s treatment of the Fourteenth Amendment Equal Protection Clause differs markedly from his treatment of the Free Speech and Free Exercise Clauses. On the face of it, the Equal Protection Clause would seem to be a paradigmatic example of a law that is *not* “clear in context.” Not only is the language broad and expansive, but entire forests have been felled by historians arguing for sometimes radically divergent views of the Equal Protection Clause’s original understanding.³⁸ Curiously, however, Scalia declares that the Equal Protection Clause is *not* ambiguous, but speaks in clear, express terms.³⁹ According to

32. U.S. CONST. amend. I.

33. *Kiryas Joel v. Grumet*, 512 U.S. 687, 751 (1994) (arguing that “fidelity to the longstanding traditions of our people” should be the foremost principle of Free Exercise and Establishment Clause jurisprudence).

34. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005).

35. *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part).

36. *Smith*, 494 U.S. at 877.

37. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

38. See, e.g., JACOBUS TENBROECK, *EQUAL UNDER LAW* 222 (1965) (arguing that the Equal Protection Clause was intended to guarantee equality with respect to all fundamental or natural rights, including some but not all rights enumerated in the Bill of Rights); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 169–92 (1977) (arguing that the Equal Protection Clause was intended only to prevent statutory discrimination with respect to the relatively narrow class of civil rights enumerated in the 1866 Civil Rights Act); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 117–20 (1986) (contending that the Equal Protection Clause was meant to guarantee equal treatment with respect to all fundamental rights of United States citizens, including all rights enumerated in the Bill of Rights).

39. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990).

Rossum, for Scalia, the clear meaning of the Clause is that State “laws that treat people differently because of their race are invalid.”⁴⁰ On this reading, the Clause prohibits only state-sponsored *racial* discrimination, and does not apply at all to classifications based on gender, sexual orientation, age, marital status, and so forth. This understanding of Scalia, however, is a mistake. What Scalia says is that in his view, “the Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.”⁴¹ This is to say that the Equal Protection Clause prohibits racial discrimination, not that it prohibits *only* racial discrimination. In fact, Scalia has made clear in a variety of contexts that he does *not* believe that the Clause applies only to race.⁴² So far as I can determine, Scalia has never explicitly stated what he considers to be the “unambiguous” original meaning of the Equal Protection Clause, and obviously it would be very difficult to do so given the generality of the language and the many competing interpretations of the Clause, both at the time of its enactment and more recently. By declaring the Clause to be “clear,” Scalia is able to avoid awkward inquiries into the original public understanding of the Clause, which may well have been narrow.

To summarize, the key elements of Scalia’s constitutional textualism may be stated as follows:

1. In deciding constitutional cases, judges should seek to discover and apply the “original meaning” of the relevant provisions (except when this meaning is overridden by controlling or effectively irreversible precedent).
2. The “original meaning” of a constitutional provision is its original textual or conventional meaning, understood in context.⁴³
3. If the language of a provision is clear in context, no further inquiries are needed; the language must be applied in its ordinary or conventional meaning.
4. If the language of a provision is unclear in context, judges should seek to determine and apply the “objectified” public meaning of the

40. ROSSUM, *supra* note 1, at 157.

41. *Rutan*, 497 U.S. at 95 n.1.

42. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 567–69 (1996) (acknowledging that the Equal Protection Clause prohibits certain kinds of State discrimination against women); *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (acknowledging that the Equal Protection Clause prohibits discrimination against homosexuals absent a rational basis). *See also Scalia Response*, *supra* note 8, at 148 (“I certainly do not assert that [the Equal Protection Clause] permits discrimination on the basis of age, property, sex, ‘sexual orientation,’ or for that matter even blue eyes and nose rings.”).

43. Scalia acknowledges that legal terms of art—“Bill of Attainder,” “ex post facto law,” “life and limb”—should be understood in their technical sense, not their “ordinary meaning” if this diverges from their established legal meaning. *See Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (making a similar point about legal terms of art in statutory interpretation).

provision. This objectified meaning is determined by asking what clarifying translation a reasonable, appropriately informed citizen of the time, if asked, would have provided for the provision.

Now that we have a clear picture of the main features of Justice Scalia's constitutional textualism, let us see how he seeks to justify it.

II. SCALIA'S DEFENSE OF CONSTITUTIONAL TEXTUALISM

Scalia defends his textualist approach at two levels. First, because he claims that it is the *original* textual meaning of the Constitution that is binding, he offers a general defense of an originalist approach to constitutional interpretation.⁴⁴ Second, because he holds that it is the original *textual meaning* of the Constitution that is controlling, he defends this textualist form of originalism against "intentionalists" or "purposivists" who give greater weight to the specific intentions or general purposes of constitutional drafters, framers, ratifiers, citizens, voters, or supporters.⁴⁵

Scalia argues for originalism on several grounds. First, he contends, it is the only theory that is consistent with the American practice of judicial review.⁴⁶ In a constitutional democracy, judicial review by unelected judges is acceptable only if the judges are clearly applying *law*, rather than their own subjective judgments or personal policy preferences.⁴⁷ But an alleged legal standard is truly law only if it is "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."⁴⁸ And the only way the Constitution can be "law" in this robust sense, Scalia claims, is if the original meaning is regarded as fixed and authoritative.⁴⁹

Second, Scalia argues that originalism is the only theory that is consistent with the basic purpose of a constitution—namely to prevent change by future generations.⁵⁰ By constitutionalizing various rights and liberties, the Framers sought to insulate them from the ordinary vicissitudes of politics. Only originalism, he argues, guarantees that future generations will not contract the scope of cherished liberties with the endorsement of activist judges.⁵¹

Finally, Scalia argues that originalism is superior to all nonoriginalist theories, because there is no agreement, and no prospect of agreement, about *which* version

44. *Scalia Essay*, *supra* note 2, at 38–47.

45. For discussions of competing theories of "intention-voting" in originalist theory, see GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 34–36 (1992); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 192–95 (1999).

46. *Lesser Evil*, *supra* note 15, at 854.

47. *Id.*

48. *Id.* Cf. *Scalia Response*, *supra* note 8, at 136, 147.

49. *Id.* For a similar argument, see ROBERT BORK, THE TEMPTING OF AMERICA 145–46 (1990).

50. *Scalia Essay*, *supra* note 2, at 40; *Scalia Response*, *supra* note 8, at 135–36.

51. *Lesser Evil*, *supra* note 15, at 855–56; *Scalia Essay*, *supra* note 2, at 40; *Scalia Response*, *supra* note 8, at 135–36.

of nonoriginalism should be adopted in its place.⁵² Over the past few decades, a host of nonoriginalist theories have enjoyed their brief day in the sun,⁵³ but none has been widely accepted. Only originalism, he argues, provides a clear, fixed standard upon which agreement is ultimately possible.⁵⁴

In addition to his general defense of originalism, Scalia offers a number of arguments for his claim that it is the original *textual meaning* that is binding in constitutional adjudication. Several of Scalia's arguments for textualism apply mainly or exclusively to statutory interpretation, but some are relevant in constitutional law as well.

For starters, Scalia argues, sticking to publicly available textual meaning is fairer than appealing to unenacted extra-textual intentions or purposes.⁵⁵ By appealing to publicly accessible conventional meaning, textualism respects the requirement, often said to be an ingredient in the ideal of the rule of law,⁵⁶ that persons subject to the coercive power of the State be given fair notice when that power is likely to be employed.⁵⁷

Moreover, adhering closely to textual meaning reduces the risk of arbitrary judicial discretion by politically unaccountable judges.⁵⁸ In constitutional matters, evidence of extra-textual "intentions" is often exiguous or unclear, and "purposes" can often be defined at various levels of abstractness.⁵⁹ As a result, permitting judges to override textual meaning by appealing to extra-textual intentions or purposes serves as an open invitation to judicial subjectivity and policymaking.⁶⁰

Furthermore, the very notion of collective framers' (or legislative) intent is largely a myth, Scalia argues.⁶¹ In the vast majority of cases that come before courts, the relevant lawmakers were "blissfully unaware of the *existence*"⁶² of the relevant interpretive issue, and so had no specific intent on how it should be resolved. And even in cases where lawmakers did have specific intentions or relevant general purposes, there are notorious problems in aggregating such intentions or purposes where they diverge or only partially overlap.⁶³

52. *Lesser Evil*, *supra* note 15, at 855; *Scalia Essay*, *supra* note 2, at 44–45.

53. See generally BORK, *supra* note 49, at 187–221 (discussing the nonoriginalist theories of Alexander Bickel, Laurence Tribe, John Hart Ely, Ronald Dworkin, Michael Perry, David A.J. Richards, Paul Brest, Duncan Kennedy, and William Brennan, among others).

54. *Scalia Essay*, *supra* note 2, at 44–46; *Lesser Evil*, *supra* note 15, at 855.

55. *Scalia Essay*, *supra* note 2, at 17.

56. See, e.g., LON FULLER, *THE MORALITY OF THE LAW* 63–65 (rev. ed. 1969); ANDREW ALTMAN, *ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 5 (2d ed. 2001).

57. See, e.g., *McBoyle v. United States*, 283 U.S. 25, 27 (1931); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 258 (1981).

58. *Scalia Response*, *supra* note 8, at 132.

59. *Lesser Evil*, *supra* note 15, at 856–57.

60. *Scalia Response*, *supra* note 8, at 132.

61. *Scalia Essay*, *supra* note 2, at 32–34; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

62. *Scalia Essay*, *supra* note 2, at 32 (emphasis in original).

63. See BASSHAM, *supra* note 45, at 82–90; WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 216–17 (2000).

These are Scalia's main arguments for according privilege to textual meaning in constitutional adjudication. As noted above, Scalia offers a number of additional arguments for a textualist approach in *statutory* interpretation. Most notably, Scalia argues that courts have a constitutional duty to construe Federal statutes textually, because only the statutory text survived the constitutionally prescribed processes of bicameralism and presentment,⁶⁴ and that textualism saves time and expense by largely excluding excursions into legislative history.⁶⁵ To some extent, analogous arguments might be offered in support of constitutional textualism.⁶⁶ But because Scalia himself has never advanced such arguments, I shall not consider them here.

III. SCALIA'S *ERSATZ* TEXTUALISM

Scalia claims to be a "textualist" in constitutional adjudication, and Rossum, while noting occasional inconsistencies,⁶⁷ takes him at his word. There is no doubt that Scalia is the "real McCoy" in statutory interpretation. In interpreting statutes, he consistently sticks closely to ordinary meaning (frequently citing dictionaries for that purpose⁶⁸) and rarely appeals to legislative history. In constitutional law, however, Scalia's approach is markedly different⁶⁹—so different, in fact, that it is not truly textualist at all.

The term "textualism" is used in a variety of senses outside the law. In religion, it refers to a mode of theologizing that adheres strictly to, and bases its doctrine upon, the text of Scripture.⁷⁰ In literary theory, it refers to the poststructuralist view that language and culture constitute or construct the world, and consequently,

64. *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring); *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment).

65. *Scalia Essay*, *supra* note 2, at 36–37.

66. Clearly, no non-question-begging argument can be made that the Constitution itself requires judges to be constitutional textualists, for no such conclusion is fairly inferable from the Constitution's text. Even if it were, it would be question-begging to assume the validity of a textualist approach as a way of proving its validity. Scalia, however, might argue that the Constitution requires the *amendments* to be interpreted textually, because Article V, on any plausible reading, textualist or otherwise, does prescribe a procedure (in fact, two) by which proposed amendments can become law. Scalia might argue that only validly proposed and ratified words, not unenacted intents or purposes, can survive this procedure. For a similar argument, see *Eleventh Amendment*, *supra* note 20, at 1701–02.

67. These are most notable in Scalia's acceptance of Court doctrine on incorporationism, state sovereign immunity, Congress's enforcement power under § 5 of the Fourteenth Amendment, and expressive conduct. See ROSSUM, *supra* note 1, at 32–33, 125.

68. For a list of cases in which Scalia has cited dictionaries, see ROSSUM, *supra* note 1, at 209–12.

69. I am not alone in noting this discontinuity. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1515–22 (1998) (book review); Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 686–87 (1990).

70. See 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3274 (Oxford Univ. Press 1971).

as the slogan goes, “there are only texts.”⁷¹ As Caleb Nelson has documented, there is a smattering of uses of the term “textualism” in legal sources prior to the last quarter of the twentieth century,⁷² but it was Stanford Law School Professor Paul Brest who popularized the term in his classic article, *The Misconceived Quest for the Original Understanding* (1980).⁷³ Brest there distinguishes two forms of textualism, both of which are varieties of constitutional “originalism” (a term he coined in that article).⁷⁴ “Strict textualists” are wooden literalists who purport “to construe words and phrases very narrowly and precisely”⁷⁵ and largely without regard to their social or linguistic context. “Moderate textualists” are quasi-literalists who take “account of the open-textured quality of language and read[] the language of provisions in their social and linguistic contexts.”⁷⁶ In practice, Brest notes, moderate textualism may produce outcomes very similar to those that emerge from nonoriginalist approaches.⁷⁷ The key difference, he claims, lies in how the two theories deal with precedent.⁷⁸ For moderate textualists, the text is decisive when it speaks clearly and cannot be overridden by any amount of conflicting precedent, no matter how well entrenched that precedent may be.⁷⁹ Nonoriginalists, in contrast, treat the constitutional text as “presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking.”⁸⁰ In the final analysis, Brest concludes, no form of textualism is defensible, because modern constitutional doctrine has strayed so far from the constitutional text that returning to a textualist approach would effectively gut all modern “fundamental values” and “representation-reinforcing” caselaw—an outcome he regards as a *reductio ad absurdum*.⁸¹

Although Brest cited no contemporary examples of actual flesh-and-blood textualists, the distinctions he drew were reasonably clear and helpful. Shortly thereafter, however, things got murkier. In 1975, Thomas Grey introduced the term “interpretivism” as a label for the type of constitutional theorizing practiced by Justice Hugo Black (and occasionally by Justice White).⁸² “Interpretivists” like Black, said Grey, believe that “the only norms used in constitutional adjudication must be those inferable from the text—that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers.”⁸³ Since Black had stressed the priority of

71. See RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 139–59 (1982).

72. Nelson, *supra* note 3, at 347 n.3.

73. 60 B.U. L. REV. 204 (1980).

74. *Id.* at 204.

75. *Id.*

76. *Id.* at 223.

77. *Id.* at 237.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 238.

82. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975).

83. *Id.* at 706 n.9.

the text in constitutional decisionmaking, it became common in the 1980's to equate "interpretivism" with "textualism."⁸⁴ Unfortunately, it also became common in that decade to equate Grey's "interpretivism" with Brest's "originalism."⁸⁵ This tended to blur Brest's nice color-coded distinctions, inasmuch as textualism, as Brest had made clear, is at most a sub-variety of originalism and not identifiable with it.

The debate over textualism took a new turn in 1990 when William N. Eskridge, Jr. published his influential article, *The New Textualism*.⁸⁶ Eskridge's article focused on the text-centered approach to statutory interpretation defended by Scalia, Judge Frank Easterbrook, and other so-called "new textualists." Eskridge's work (often done in collaboration with Philip P. Frickey) sparked an outpouring of high-quality scholarship on the intellectual premises of statutory interpretation.⁸⁷ Largely as a result of Eskridge's work, "textualism" came to be regarded primarily, if not exclusively, as a theory of statutory interpretation, rather than as a theory of constitutional adjudication as had previously been the case.⁸⁸

As the scholarly debate over "the new textualism" has proceeded over the past decade and a half, the line between textualism and rival approaches to statutory interpretation, notably purposivism and intentionalism,⁸⁹ has become fuzzier. Defenders of the new textualism have stressed that it is not committed to "literalism" or "strict constructionism;"⁹⁰ that language is meaningful only in context;⁹¹ that textualism does not categorically preclude resorting to legislative

84. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* 25–38 (1982); LESLIE FRIEDMAN GOLDSTEIN, *IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY* 41–66 (1991).

85. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, chs. 1, 2 (1980); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 10–11 (1982); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 445–46 (1984). For a very different use of "textualism," see Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 683 (1985).

86. William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

87. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* (3d ed. 2001); KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* (1999).

88. See *supra* note 3 and all sources cited therein.

89. Roughly speaking, purposivists hold that statutes should be interpreted so as to fulfill their broad purposes, whereas intentionalists hold that they should be interpreted so as to fulfill the legislature's actual or hypothetical specific intentions on the interpretive matter at issue. See generally ESKRIDGE, FRICKEY & GARRETT, *supra* note 63, at 213–22; LIEF H. CARTER & THOMAS F. BURKE, *REASON IN LAW* 78–91 (7th ed. 2005).

90. *Scalia Essay*, *supra* note 2, at 23; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005).

91. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006); Nelson, *supra* note 3, at 348; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1028 (1998); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994).

history or other extra-textual sources;⁹² and that textualism recognizes the legitimacy of appeals to legislative “purposes” when statutory language is ambiguous.⁹³ As a consequence, some legal scholars have questioned whether there is any longer a meaningful difference between textualism and its main rivals. One theorist, in fact, has declared that “we are all textualists in an important sense.”⁹⁴

In any important debate, whenever one side declares “We are all *x* now,” it is a pretty safe bet that the debate has taken a wrong turn—or that someone is trying to pull a fast one. As it was in the 1990s when “We are all originalists now”⁹⁵ became the rallying cry of many long-time liberal critics of originalism, so it is now with the debate over textualism. Defenders of textualism are surely correct that there can be “moderate” forms of textualism that are not committed to any narrow or crabbed literalism. They are correct that textualists can (within limits) consistently take account of context, purpose, interpretive canons, and even legislative history. But there are conceptual and linguistic constraints on what can properly count as a “textualist” theory. One obvious constraint is *stare decisis*. If a judge claims to be a textualist but routinely subordinates text to precedent, that judge is *eo ipso* not a practicing textualist. Another limit is imposed by language. If a judge professes to be a textualist but routinely claims to discover “meanings” that diverge widely from anything the text actually *says*, that judge is also not a genuine textualist. Both kinds of constraints come into play with respect to Justice Scalia’s constitutional jurisprudence.

Space does not permit more than a cursory discussion of the point about precedent, so let me just pose the issue as a homework assignment for Scalia fans. Scalia, as we have seen,⁹⁶ readily acknowledges that in constitutional cases he sometimes follows precedent rather than original meaning. As Cass Sunstein has argued, a fully consistent application of

an originalist approach of the sort favored by Justice Scalia would have very dramatic consequences. . . . Such an approach may well, for example, mean that *Brown v. Board of Education*, the cornerstone of modern equal protection doctrine, is wrong; that *New York Times Co. v.*

92. See, e.g., Nelson, *supra* note 3, at 360; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 448 (1990) (conceding that “[i]ntelligent, modest use” of legislative history “can do much to bring the execution [of the statute] into line with the plan”).

93. See, e.g., John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 693 (1999) (noting that modern textualists “routinely use purpose to resolve ambiguity”); Nelson, *supra* note 3, at 355; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003).

94. Molot, *supra* note 3, at 43. Cf. Siegel, *supra* note 91, at 1057 (“In a significant sense, we are all textualists now.”).

95. Laurence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 67 (Amy Gutmann ed., 1997) (quoting Ronald Dworkin). Cf. Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 558 (1997) (arguing that “[f]or most participants in the continuing debates, the question is emphatically not whether the original understanding is controlling; it is how the original understanding is best understood”).

96. See *supra* note 15 and accompanying text.

Sullivan, the cornerstone of modern free speech doctrine, is also wrong; that the Establishment Clause does not apply to the states; that affirmative action raises no serious issue; that the federal government can discriminate on the basis of race and sex however it wishes; that nearly all sex discrimination by the states is acceptable; that, in short, most of modern constitutional law, . . . now taken as symbolic of our nation's commitment to liberty under law, and, for the last decade in particular an inspiration for constitution-making and constitution-building all over the globe, is illegitimate and fatally undemocratic.⁹⁷

Scalia avoids such unhappy consequences by “adulterat[ing]” his strong originalist brew with a generous admixture of *stare decisis*.⁹⁸ No workable theory of adjudication, he claims, can hope to “remake the world anew”⁹⁹ or ignore the value of stability. This is not to say that Scalia is notable for his respect for precedent—in fact, quite the opposite. It remains true, however, that in a very high proportion of constitutional cases, Scalia's starting point is a doctrine based on precedent rather than on any plausible original meaning.¹⁰⁰ Often, Scalia will try to roll back some precedent-based doctrine to something *closer* to the original understanding,¹⁰¹ but only infrequently does he argue that the Court should return all the way. He defends this strategy by noting that “*stare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it.”¹⁰² Nevertheless, it remains true that in a *very high proportion* of cases, Scalia's starting point is a doctrine based on precedent rather than text. My homework assignment for Scalia defenders is simply this: can one be a genuine “textualist” if one's starting point is only rarely the text?

It is the second kind of constraint—that imposed by language—that I want to stress here. As Scalia claims, textualists need not be literalists, for words have determinate meaning only in context, and texts can be used for many purposes (e.g., allegory, metaphor, or irony) other than to convey literal information. A Biblical “textualist” need not hold that Jesus was speaking literally when he said to his disciples, “I am the vine, you are the branches” (John 15:5). But textualists cannot accept readings that depart widely from textual meaning—that is, from

97. Sunstein, *supra* note 95, at 563–64.

98. *Lesser Evil*, *supra* note 15, at 861.

99. *Scalia Response*, *supra* note 8, at 139.

100. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (accepting the incorporationist doctrine that the First Amendment applies to the states); *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (accepting the established substantive due process analysis for analyzing alleged fundamental liberty interests); *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (accepting, with qualifications, the established intermediate scrutiny test for analyzing claims of alleged governmental gender discrimination).

101. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (arguing for a reversal of prior cases holding that the Eighth Amendment includes a proportionality guarantee); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (abandoning the compelling state interest test for religion-based exemptions). *Cf. Lesser Evil*, *supra* note 15, at 861 (accepting the current view that the Eighth Amendment prohibits public lashing, while conceding that such a practice is consistent with the Amendment's original meaning).

102. *Scalia Response*, *supra* note 8, at 140.

anything the text actually *says*. A textualist must give primacy to the text and stick close to its actual words, rather than reading into it things not fairly expressed or implied. When a text is ambiguous, vague, general, or otherwise unclear, a textualist can certainly seek to clarify its import by considering context, purpose, and so forth. He can offer a “clarifying translation” that makes the meaning of the text more precise. But these clarifications must be genuine *translations*, not wholesale substitutions of one text by another. As I have argued elsewhere,¹⁰³ textualists can allow *modest* departures from a text’s “letter” to achieve a closer approximation to its apparently intended or understood meaning. They can even, to a degree, allow *major* departures from textual meaning to avoid inconsistency, absurdity, or obvious slips of expression. But the gravitational force of the words, so to speak, will always impose limits on how far from a text’s words a textualist can stray. An example from a non-legal context may help make this clear.

Suppose Scalia wished to apply his “textualist” approach to Jesus’s challenging admonition to “resist not evil” (Matt. 5:39). How would he proceed?¹⁰⁴

Assuming that he would find the saying to be “ambiguous” rather than “clear in context,” Scalia would seek to determine the “objectified” public meaning of Jesus’s words. To do this conscientiously, he would need to immerse himself in an enormous mass of historical and exegetical literature.¹⁰⁵ Suppose he does this, and concludes that, among Jesus’s disciples and other hearers, there were three leading “clarifying translations” of the saying:

R1: All violence and forcible opposition to evil is wrong, regardless of the costs or reasons.

R2: Never use force without need (e.g., self-defense, protection of the innocent, lawful punishment of the guilty, or participation in a just war), and never in ways inconsistent with fundamental Gospel values.

R3: If you would be perfect, be prepared when abused to suffer hardship, indignity, injury, and even death rather than to respond with violence or vengeance.¹⁰⁶

103. BASSHAM, *supra* note 45, at 26–27.

104. I do not claim that Scalia does or would apply his textualist methodology in this or other non-legal contexts. My purpose is to show that Scalia’s allegedly textualist approach is not, in fact, textualist at all. Examples from non-legal contexts make it easier to see why.

105. *Cf. Lesser Evil*, *supra* note 15, at 856–57.

Properly done, the task [of originalist interpretation] requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.

Id. Note how different this is from Scalia’s virtually four-corner’s approach to statutory interpretation!

106. For a discussion of these and other leading interpretations, see Gregory Bassham &

Suppose, further, that Scalia decides that a slight majority of Jesus's disciples favored R2. It follows on his "textualist" approach that R2 presumptively expresses the "original meaning" of Jesus's saying.

Clearly, something has gone wrong here. What Scalia has identified is, at best, the original *public or audiencial* understanding of Jesus's saying, not its "textual" or "ordinary" or "conventional" meaning. And now it is clear where Scalia's approach runs off the textualist rails—namely, in its treatment of "ambiguous" texts. For Scalia, once a text is pronounced "ambiguous," the words largely drop out of sight and any "clarifying translation," no matter how different from, or even at variance with, the text may count as its "objectified meaning." A true textualist would not treat words so discourteously. Even when texts are ambiguous, textualists feel the gravitational force of the words and resist readings that depart dramatically from anything the text fairly says or implies.

IV. SCALIA'S EQUITABLE CONSTITUTION

If Scalia is not a *bona fide* constitutional textualist, is there any recognized interpretive methodology he does employ? The answer, surprisingly, is that Scalia appears to practice a form of old-style equitable interpretation. Because equitable interpretation has long been out of fashion, it may be helpful to explain what it is.¹⁰⁷

The sources of equitable interpretation lie in medieval casuistry and the Civil Law tradition rooted in Roman Law. The leading ideas, indeed, go back to Aristotle, who distinguished "equity" (*epieikeia*) from "legal justice" by noting that:

[A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality.¹⁰⁸

Medieval jurists generally followed Aristotle in limiting equitable interpretation, in the strict sense, to what later came to be called restrictive equitable interpretation: the "correction" of a law, judged to be deficient by reason

David Baggett, *Resist Not Evil! Jesus and Nonviolence*, in MEL GIBSON'S *PASSION AND PHILOSOPHY: THE CROSS, THE QUESTIONS, THE CONTROVERSY* 247–52 (Jorge J. E. Gracia ed., 2004). The first reading is roughly Tolstoy's, the second a standard mainline Protestant reading, and the third the traditional Catholic interpretation.

107. See generally BASSHAM, *supra* note 45, at 2–4.

108. ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 935, 1020 (Richard McKeon ed., Random House 1941).

of the generality or universality of its wording, on the presumption that the lawmaker did not intend the law to extend to the case at hand.¹⁰⁹ A classic example of such equitable restriction (due ultimately to Plato) is provided by Aquinas:

[T]he law requires deposits to be restored, because in the majority of cases this is just. Yet it happens sometimes to be injurious—for instance, if a madman were to put his sword in deposit, and demand its delivery while in a state of madness, or if a man were to seek the return of his deposit in order to fight against his country. In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good.¹¹⁰

In the early modern era, this classical and medieval conception of equity as a *correctio legis generaliter latae qua parte deficit* was broadened to include cases in which a law is deficient, not because of its universality, but because of its excessive particularity.¹¹¹ Such cases were thought to call for extensive equitable interpretation: the extension of a legal rule to encompass fact-situations not within the letter of the rule, but believed to be within the *ratio* or “mischief” that motivated the lawmaker to enact it. A well-known example from American law occurs in *Baker v. Jacobs*,¹¹² where the court supported its decision that cigars were “victuals or drink” for purposes of a law barring successful litigants from regaling jurors with these amenities by quoting the following passage from an unnamed “old book” (Matthew Bacon’s *A New Abridgment of the Law*, 1736):

In some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law maker present, and that you have asked him this question: Did you intend to comprehend the case? Then you must give yourself such answer as you imagine he being an upright and reasonable man would have given.¹¹³

109. See LAWRENCE J. RILEY, *THE HISTORY, NATURE, AND USE OF EPIKEIA IN MORAL THEOLOGY* 137 (1948). Extensive interpretation was recognized and practiced by medieval civilians and canonists but was not generally recognized as a form of equitable interpretation (*epikeia*). See JOHN ROGG SCHMIDT, *THE PRINCIPLES OF AUTHENTIC INTERPRETATION IN CANON 17 OF THE CODE OF CANON LAW: A COMMENTARY* 201–21 (1941).

110. THOMAS AQUINAS, *SUMMA THEOLOGICA* 1695 (Fathers of the English Dominican Province trans., Benziger Bros. Inc. 1947).

111. *Eyston v. Studd*, 2 Plowd. 459, 467, Eng. Rep. 688, 699 (1574).

112. 23 A. 588 (1891).

113. *Id.* at 588 (quoting *Ryegate v. Wardsboro*, 30 Vt. 746 (1858)). A notable example of extensive equitable interpretation in American constitutional law is the construction of the Eleventh Amendment in *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny. Although by its terms the Eleventh Amendment extends state sovereign immunity only to federal lawsuits filed by citizens of other states and citizens or subjects of foreign nations, courts have extended this immunity to suits in federal or state courts filed by a state’s own citizens, federal corporations, tribal sovereigns, and foreign nations. Courts have justified this dramatic expansion by claiming

While leading early-modern Continental jurists such as Hugo Grotius and Samuel Pufendorf discarded or significantly reshaped many features of medieval jurisprudence, they retained the basic assumptions of equitable interpretation.¹¹⁴ These Continental authorities heavily influenced eighteenth-century English legal commentators, including Matthew Bacon, Thomas Rutherforth, and William Blackstone, the leading authorities on legal hermeneutics for American jurists in the founding era.¹¹⁵ Long before the eighteenth century, however, the basic principles of medieval equity jurisprudence had taken root in the common law through the writings of English jurists such as Christopher St. Germain and Edmund Plowden, who were much influenced by medieval Continental jurisprudence.¹¹⁶ By the middle of the eighteenth century, it was well-established in English law “that the most universal and effective way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it.”¹¹⁷

William Eskridge has argued convincingly that equitable interpretation was widely accepted by American jurists in the founding era.¹¹⁸ James Wilson taught his law students that “[t]he first and governing maxim in the interpretation of a statute, is to discover the meaning of those who made it,” and that “[e]quity is synonymous with true and sound construction.”¹¹⁹ Alexander Hamilton argued in an important early case that “many things within the letter of a statute are not within its equity and vice-versa.”¹²⁰ In fact, a number of anti-Federalist opponents

that although the language of the amendment was relatively specific, its *ratio* was general: to overturn the Supreme Court's deeply unpopular decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), and reaffirm commitment to a doctrine of broad sovereign immunity. See generally *Eleventh Amendment*, *supra* note 20, at 1665–67.

114. See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 190–91 (A. C. Campbell trans., M. Walter Dunne 1901) (1625); SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 30 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673).

115. WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 364 (1953).

116. See C. K. ALLEN, *LAW IN THE MAKING* 389–93 (6th ed. 1958). For an overview of the influence of Continental equity jurisprudence on English law, see Stephen A. Siegel, *The Aristotelian Basis of English Law, 1450–1800*, 56 N.Y.U. L. REV. 18 (1981).

117. Eskridge, *supra* note 69, at 1523 (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *59–*62, *91). As Manning notes, equitable interpretation was not limited to particular fact-situations which a lawmaker did not or could not foresee, but permitted judges (within limits) to contract or expand legal language when there was no relevant actual intent and even, in some strands of the equitable tradition, when justice or reason demanded it. Manning, *supra* note 3, at 34–35.

118. Eskridge, *supra* note 69, at 1523–26. John Manning challenges Eskridge's argument, contending that equitable interpretation “never gained a secure foothold in the federal courts.” Manning, *supra* note 3, at 9. However, nearly all the sources Manning cites date from considerably after the founding period.

119. JAMES WILSON, *Lectures on the Law*, in 1 *THE WORKS OF JAMES WILSON* 69, 75 (Robert McCloskey ed., 1967).

120. 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 357 (Julius Goebel, Jr. et. al. eds., 1964). The case was *Rutgers v. Waddington* (N.Y. Mayor's Ct. 1784) (unreported).

of the Constitution voiced concern that federal judges would employ standard principles of equitable interpretation to expand the power of the national government, provoking Hamilton's famous defense of judicial review in *Federalist No. 78*.¹²¹

Beginning in the early nineteenth century, equitable interpretation gradually fell out of favor in American law, replaced by more literalistic "plain meaning" approaches.¹²² There is little doubt, however, that at the time of the founding it was widely assumed that, in interpreting the Constitution's broad guarantees, courts would and should give primacy to their "spirit" or "equity," rather than to their literal meaning.

Today, the spirit of equitable interpretation is carried on by its close cousin, "purposivism".¹²³ Like practitioners of equitable interpretation, purposivists believe that the letter (literal or sentence meaning) of a law should yield to its purpose ("spirit") if the two conflict. Law professors who encourage their students to question whether roller skates and electric wheelchairs are "vehicles" within the meaning of an ordinance banning "all vehicles" from a park, are, in effect, teaching principles of equitable interpretation.¹²⁴

In many contexts, it makes perfect sense to interpret texts in accordance with their spirit or purpose, rather than their letter. We say, "Drop everything and come here immediately!," without bothering to add, "Unless you're holding a baby over a bathtub, or have some other good and sufficient reason not to do as I ask."¹²⁵ When our doctor cautions us about operating "machinery" while taking a pain medication, we do not imagine this includes electric toothbrushes and pencil sharpeners. Ordinary communication would be unbearably tedious, if not impossible, if we felt we had to spell out all implicit exceptions to our general statements.

In law, of course, a higher standard of precision is generally expected than is the case in ordinary discourse. Nevertheless, for reasons that are familiar to all first-year law students, appeals to the properly controlling "spirit" or "purpose" of a law are all but inevitable in legal hermeneutics. Laws are regularly expressed in vague or general language, and often for good reasons. Lawmakers realize that there are limits to human foresight, so they write constitutions conferring power to make all laws that are "necessary and proper"¹²⁶ for carrying into execution enumerated powers. They understand the limitations of their own (and their generations')

121. Manning, *supra* note 3, at 80.

122. *Id.* at 55–56, 100–04; BASSHAM, *supra* note 45, at 6–7.

123. There are arguably slight differences between purposivism and classical equitable interpretation. For example, many contemporary purposivists would question whether specific interpretive questions should be answered by imagining a hypothetical dialogue with perhaps long-dead lawmakers.

124. *Cf.* H.L.A. HART, *THE CONCEPT OF LAW* 124–25 (1961).

125. Adapted from ESKRIDGE, FRICKEY & GARRETT, *supra* note 63, at 225. *Cf.* Wittgenstein's famous example: "Someone says to me: 'Shew [*sic*] the children a game.' I teach them gaming with dice, and the other says, 'I didn't mean that sort of game.'" LUDWIG WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 33 (G.E.M. Anscombe trans., 3d ed. 1958).

126. U.S. CONST. art. I, § 8, cl. 18.

knowledge, so they write laws banning simply “toxic” substances without attempting to provide an exhaustive list of substances that count as “toxic.”¹²⁷ They realize that it is often better, for educational and other purposes, to state rules at a high level of generality, so they simply say, “Remember to keep the Sabbath holy,” leaving it to another to remind the textualists of his day that this does not preclude feeding hungry people¹²⁸ or rescuing stranded farm animals¹²⁹ on the Sabbath. They understand that it would be tedious and pedantic to try to spell out every meritorious implicit exception to general rules, so they enact rules such as “At the time set for beginning the game the umpire shall call ‘Play,’”¹³⁰ without bothering to mention imminent tornadoes, floods, bubonic plague outbreaks, and the like. They understand that it is not always possible for legislators to agree on highly detailed formulations, so they compromise on general language like “excessive bail,”¹³¹ “good behavior,”¹³² and “equal protection of the law.”¹³³

Fine and good, you may say, but what, pray, does any of this have to do with Justice Scalia? Does he not condemn purposivism root and branch? Does he not take particular delight in skewering *Church of the Holy Trinity v. United States*,¹³⁴ the *locus classicus* of anti-textualist equitable interpretation?¹³⁵

In fact, Scalia himself endorses a form of equitable interpretation in constitutional adjudication. This emerges clearly in his responses to Laurence Tribe and Ronald Dworkin in the published version of Scalia’s 1995 Tanner Lectures, *A Matter of Interpretation*.¹³⁶

In his comment on Scalia’s lectures, Dworkin had noted an obvious discrepancy in Scalia’s approach to constitutional interpretation. Scalia claims that the constitutional text is the law, not any unenacted intentions or purposes of the framers or ratifiers.¹³⁷ Yet constitutional language is often broad and abstract. It speaks in “majestic generalities” of “equal protection of the laws,” “due process,” “just compensation,” “freedom of speech,” “free exercise” of religion, “unreasonable” searches and seizures, “cruel and unusual punishments,” “excessive fines,” and “privileges or immunities of citizens of the United States,” to cite but a few prominent examples. The language is broad, yet Scalia, as he

127. Cf. David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFFAIRS 105, 123–24 (1988).

128. *Matthew* 12:1–8.

129. *Matthew* 12:11.

130. *Official Regulations and Playing Rules of Little League Baseball*, Rule 5.01.

131. U.S. CONST. amend. VIII.

132. U.S. CONST. art. III, § 1 (providing that federal judges “shall hold their Offices during good Behavior”).

133. U.S. CONST. amend. XIV, § 1.

134. 143 U.S. 457 (1892). The case involved an 1885 statute prohibiting anyone from contracting with an alien to pay his transportation to the United States “to perform labor or service of any kind.” *Id.* at 458. Using classical principles of equitable interpretation, the Court ruled that the law did not prohibit a church from importing a pastor from England. *Id.* at 472.

135. *Scalia Essay*, *supra* note 2, at 18–23.

136. See generally *Scalia Response*, *supra* note 8, at 133–43, 144–49.

137. *Scalia Essay*, *supra* note 2, at 38.

acknowledges, consistently reads the language *narrowly*.¹³⁸ In Scalia's view, for example, "free speech" only protects speech that the *founding generation* considered worthy of protection;¹³⁹ "free exercise" does not protect religious exercise at all against generally applicable laws; the Equal Protection Clause provides only minimal protection against government-sponsored discrimination outside the sphere of racial discrimination; and the Eighth Amendment prohibits only punishments that the founding generation would have considered as "cruel and unusual." How can a self-professed "textualist" consistently read *broad* language *narrowly*?

Scalia offers three arguments for his restrictive readings. First, he appeals to context. The Constitution's allegedly abstract clauses are often interspersed with many concrete and specific clauses. By the familiar canon of construction *noscitur a sociis* ("known by its companions"), words are given meaning by those around them.¹⁴⁰ This suggests, Scalia argues, that all constitutional guarantees were originally understood narrowly.¹⁴¹

Second, Scalia appeals to the Framers' general purpose. The "whole purpose" of a Constitution, he maintains, "is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."¹⁴² Reading the Constitution's abstract and general provisions as broad "aspirational" guarantees would invite change rather than inhibit it. The Framers' evident purpose was "to nail down current rights, rather than aspire after future ones."¹⁴³ They sought to embed "in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought."¹⁴⁴

Finally, Scalia argues, reading the Constitution's generally-phrased guarantees broadly would defeat another evident purpose of the Framers—their desire to implement a system of judicial review that is consistent with democratic theory.¹⁴⁵ Reading the Constitution's general and abstract terms aspirationally would permit unelected and life-tenured judges to act as a continuing constitutional convention and legislate their personal visions of society from the bench. There is no evidence, Scalia claims, that the Framers wished to confer such awesome undemocratic power on judges.¹⁴⁶

In these responses, we see clearly the elements of equitable interpretation. The Constitution, he believes, contains many clauses that are "deficient" because of their universality or abstractness. On its face, for instance, the Eighth Amendment

138. *Scalia Response*, *supra* note 8, at 135–36.

139. *Id.* at 135.

140. For example, an airline regulation prohibiting passengers from transporting "gasoline, kerosene, lighter fluid, or other flammable substances" in carry-on luggage should not be construed as applying to twenty-year-old single-malt scotch in a wrapped and unopened box. Airlines, take note.

141. *Scalia Response*, *supra* note 8, at 135–36, 146.

142. *Scalia Essay*, *supra* note 2, at 40.

143. *Scalia Response*, *supra* note 8, at 135.

144. *Id.* at 146.

145. *Id.* at 136.

146. *Id.*

seems to prohibit all punishments that are, in reality, both cruel and unusual. But the Framers could not have really meant what they said, Scalia believes, because this would conflict with their general background purpose of limiting judicial power and freezing their own values into place. Therefore, the law must be “corrected” by reading it more narrowly (restrictively) than its words suggest. So, Scalia reads the Eighth Amendment as prohibiting only punishments that the Framers’ generation *considered* cruel and unusual. And since the Framers’ generation did not consider, for example, imposition of the death penalty on children¹⁴⁷ or the retarded¹⁴⁸ to be either “cruel” or “unusual,” the Amendment should not be construed as prohibiting those practices today. Scalia is here appealing to the Framers’ general purposes—the “spirit” of the Constitution as a whole—to “correct” provisions that are “deficient” by reason of their generality or universality. This is not “textualism.” It is classic, old-time equitable interpretation.

V. WHY THE CONSTITUTION DOES NOT NEED CORRECTING

Let me conclude by responding briefly to Scalia’s three arguments for his narrow reading of facially abstract constitutional provisions.

His first argument—his appeal to the *noscitur* canon of construction—is extremely weak. The *noscitur* canon (“words take meaning from those with which they are associated”) is a judicially crafted common-sense rule of thumb for clarifying ambiguous statutory texts. If I say, “John made a large withdrawal from the bank,” it is possible, but unlikely given the surrounding words, that the withdrawal was from a sperm bank. The canon cannot be applied in any mechanical way, for even in ordinary discourse it is commonplace to juxtapose specific and general language (“Pick up soda, beer, and anything else you would like to bring”) in which the general terms are not meant to be understood specifically. It is even more problematic to woodenly apply the canon to constitutional provisions, where a word’s “companions” are often located in entirely separate provisions or Articles. In addition, as Ronald Dworkin points out, virtually every State or national constitution features a similar pattern of intermingled concrete and abstract language (for readily understandable reasons).¹⁴⁹ Yet it beggars belief that the abstract and general terms in *all* these constitutions were intended to be interpreted narrowly. Thus, the *noscitur* argument is wholly unpersuasive.

Scalia’s second argument—the appeal to what he terms “the whole antievolutionary purpose of a constitution”¹⁵⁰—clearly has some force, because constitutions are plainly intended to achieve a kind of fixity and stability. Scalia, however, goes well beyond this obvious truism when he claims that the “whole

147. See *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (surveying the historical evidence).

148. See *Atkins v. Virginia*, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting).

149. Dworkin, *supra* note 7, at 124.

150. *Scalia Essay*, *supra* note 2, at 44.

purpose¹⁵¹ of a constitution is to prevent change. Constitutions may be created for many purposes, among them “to establish justice, insure domestic tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty”¹⁵² for the Constitution’s makers and their posterity. Among the plausible purposes of *our* Constitution’s makers was a desire to create a strong central government,¹⁵³ to protect fundamental rights (i.e., rights that really are fundamental, not just regarded as such by a given generation), and to create a frame of government with sufficient elasticity to “endure for ages to come.”¹⁵⁴ As Dworkin notes, as enlightened statesmen, the Framers knew perfectly well that their views, or those prevalent in their day, were not “the last word in moral progress.”¹⁵⁵ It does them no honor to suggest that they intended to fast-freeze those views permanently in place.

Scalia’s final argument for his narrow reading is that this is the only interpretive approach that is consistent with the Framers’ purpose to create a system of judicial review that can be squared with democratic theory. This argument raises many thorny issues that cannot be addressed here: *Was* judicial review intended by the Framers? What is “democracy,” in the most defensible analysis? Did the Framers see majority rule as the *grundnorm* of the American political system, as Scalia clearly does?¹⁵⁶ Did the Framers intend to closely cabin judicial discretion? If the Framers did have any or all of the foregoing extra-textual intentions and purposes, are we bound by them now?

This last question raises squarely the issue of originalism. Elsewhere, I have argued that originalism, despite its real attractions, is not a defensible theory of constitutional adjudication.¹⁵⁷ I shall not repeat those arguments here, but I do wish to comment briefly on Scalia’s arguments for originalism before turning to the issue of judicial “subjectivity.” Because I have already addressed one of

151. *Id.* at 40.

152. U.S. CONST. pmb.

153. As Keith Whittington has recently argued, *a* central, if not *the* central, purpose of the Philadelphia Framers was “state-building”; that is, “constituting, reallocating, and expanding government power, not limiting it.” Keith E. Whittington, *Recovering “From the State of Imbecility”*, 84 TEX. L. REV. 1567, 1577, 1586 (2006) (book review). This purpose clearly jars with some elements of Scalia’s constitutional jurisprudence, particularly his opposition to the Court’s “negative” Commerce Clause jurisprudence. *See generally* ROSSUM, *supra* note 1, at 91–98.

154. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

155. Dworkin, *supra* note 7, at 124 (noting that the Framers were accomplished legal draftsmen, and if they “really were worried that future generations would protect rights less vigorously than they themselves did, . . . they would have taken *special* care to write concrete, dated clauses” (emphasis in original)). *Id.*

156. In a 1996 speech at the Gregorian University in Rome, Scalia declared:

[I]t just seems to me incompatible with democratic theory that it’s good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. . . . [T]he whole theory of democracy . . . is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minority positions that deserve protection.

ROSSUM, *supra* note 1, at 36.

157. BASSHAM, *supra* note 45, at 91–107.

Scalia's three arguments for originalism (his contention that only originalism is consistent with the basic "antievolutionary" purpose of a constitution), I shall focus on the other two arguments.

Like fellow originalist Robert Bork,¹⁵⁸ Scalia argues that only originalism is compatible with the Constitution being "law."¹⁵⁹ Nothing properly counts as "law" unless it is binding,¹⁶⁰ and to be binding, law must be substantially fixed, clear, and determinate. A malleable text that can be twisted and molded to suit a judge's fancy is not law. Only originalist readings, Scalia and Bork argue, can give general and abstract constitutional provisions sufficient fixity and determinateness for them to be truly binding law.

This argument is rooted in legal positivist assumptions about law that are highly debatable. According to many legal positivists, whenever law "speaks with an uncertain voice"¹⁶¹ (e.g., because the law is vague, ambiguous, open-textured, overly-general, or abstract), it is not strictly "law." Judges who, in deciding cases, take imprecise terms (e.g., "vehicle") and make them more precise are making law rather than applying it.¹⁶² Thus, all true law is clear law.

This positivist view of law is now widely rejected and fits poorly with the way both working judges and legal theorists think of the practice of legal reasoning.¹⁶³ If it were true that all law is clear law, precious little of what the Supreme Court does would count as law—including Scalia's own debatable exercises in originalist history and creative remodelings of precedent. But there is a deeper problem with Scalia's appeal to clear law—it is self-refuting.

Scalia claims that judicial review is legitimate only if judges apply *law* in striking down acts of the democratic branches.¹⁶⁴ Something counts as law only if it is substantially clear, fixed, and determinate. That is, only clear law is truly law. Yet Scalia's own "textualist" interpretive methodology is not clear law. On the contrary, it is deeply controversial and widely rejected. Most contemporary legal scholars would deny that judges have a legal duty to employ Scalia's textualist approach. Therefore, Scalia's textualism is not "law." Judges, Scalia claims, may employ only law in striking down laws. Textualism is not law. So, judges may not employ textualist premises in striking down laws. Scalia's argument refutes itself.

Scalia's second argument for originalism fares no better. If we reject originalism, he asks, what are we going to replace it with? "'You can't beat somebody with nobody.'" It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to

158. See BORK, *supra* note 49, at 145–46.

159. *Lesser Evil*, *supra* note 15, at 854.

160. Aquinas points out that "law" (*lex*) is derived from *ligare*, to bind. AQUINAS, *supra* note 110, at 993.

161. JOSEPH RAZ, *THE AUTHORITY OF LAW* 77 (1979).

162. See, e.g., HART, *supra* note 124, at 124–32.

163. See generally RONALD DWORKIN, *LAW'S EMPIRE* 8–9, 37–39 (1986).

164. *Lesser Evil*, *supra* note 15, at 854; *Scalia Response*, *supra* note 8, at 136.

replace him.”¹⁶⁵ There are endless debates among nonoriginalists and absolutely no prospect of achieving agreement anytime soon. Only originalism can provide the “consistency and predictability”¹⁶⁶ the law needs.

Several things may be said in response here. First, there is absolutely no prospect that judges will agree anytime soon on *originalism* as the best interpretative methodology. Despite Republican control of the White House for eighteen of the last twenty-six years, originalism remains very much a minority view on the federal bench.¹⁶⁷ Second, there are significant disagreements among originalists themselves.¹⁶⁸ Originalists argue passionately over such as issues as: Who are the “framers”? Which should have priority—text or intent? Whose intentions ultimately should matter? Which intentions should matter? (e.g., specific? general? semantic? hypothetical? extratextual?) Do collective bodies have coherent intentions? If so, how can they be “aggregated”? How much weight should be given to counter-originalist precedent? And so forth.

Finally, it is a mistake to compare the originalism versus nonoriginalism issue to a political race. In many important intellectual debates, you can “beat somebody with nobody.” In the past half-century, for example, ethicists have successfully dethroned utilitarianism as the reigning ethical theory.¹⁶⁹ This was altogether for the good, for utilitarianism was a flawed and simplistic theory. There is no agreement, and no prospect of agreement, on which theory should replace utilitarianism. Does this mean that utilitarianism should never have been rejected? No. Though a thousand ethical flowers now bloom, ethical discourse and theorizing can proceed quite fruitfully without agreement on ultimate premises. (Case in point: the highly productive work that has been done in applied ethics over the past thirty years.) In law, it is true, there is greater need for overlapping consensus. But there have always been substantial theoretical and methodological disagreements in American law, and the ship of law has sailed on—leaky at times, full of clamorous voices on occasion, but on the whole proudly and pragmatically.

Scalia’s real concern about nonoriginalism is not so much the sheer profusion of diverse nonoriginalist theories, but the risk of judicial subjectivity he sees in these approaches. In defending originalism, Scalia consistently poses a false dichotomy: either originalism (which involves very little risk of judicial subjectivity) or nonoriginalism (which in all its multifarious forms invites arbitrary and untrammelled judicial discretion). In a review of Scalia’s *A Matter of Interpretation*, Cass Sunstein has effectively addressed the second horn of this

165. *Lesser Evil*, *supra* note 15, at 855.

166. *Id.*

167. Scalia has recently characterized originalists as a “small but hardy band” of judges and legal thinkers. *How Appealing Extra*, <http://pda-appellateblog.blogspot.com/> (Feb. 13, 2003). For informative discussions of recent developments in the originalism/nonoriginalism debate, see DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005); JONATHAN G. O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

168. See generally BASSHAM, *supra* note 45, at 17–37.

169. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* 62–66 (2d ed. 1984).

proposed dilemma, arguing that Scalia fails to come to terms with “the existence of reasonable, alternative, nonformalist approaches to interpretation, designed to limit judicial discretion, promote stability, and enhance democratic self-government.”¹⁷⁰ In closing, let me speak briefly to the first horn of Scalia’s dilemma—his claim that originalism leaves little room for judicial subjectivity.

Now that we have seen why Scalia’s purportedly “textualist” approach to constitutional adjudication is not authentically textualist at all, we can also see why this claim is misleading. Scalia’s theory, in fact, invites judicial subjectivity at many points: in determining when a constitutional provision is “clear in context”; in drawing shaky historical conclusions about “original meanings”; in determining how to “aggregate” variant original understandings in order to arrive at that *one* reading that was (or would have been) adopted by a “typical, informed citizen of the day”; in making judgments about the broad extra-textual “purposes” of the Framers (and which purposes to prioritize when they conflict); in deciding how general constitutional principles, once their “original meaning” has been determined, should apply to circumstances that may be very different from any contemplated by the Framers; in deciding what weight should be given to canons of constructions, such as *noscitur a sociis*, and how to resolve conflicts between such canons when they occur; and in making principled judgments about when, and how far, precedent should be rolled back to make constitutional doctrine more faithful to original meaning.¹⁷¹

In all these ways, Justice Scalia’s constitutional jurisprudence leaves the door wide open to judicial discretion and subjectivity. It is a textbook example of the old legal realist adage—what a judge is actually doing may be very different from what he says he is doing.

170. Sunstein, *supra* note 95, at 538–57.

171. *Cf.* BREYER, *supra* note 13, at 123–24 (making some similar points about how textualism invites judicial subjectivity in statutory interpretation).

LIMITING JUDGES:
A REVIEW OF RALPH A. ROSSUM'S
ANTONIN SCALIA'S JURISPRUDENCE

BY WILLIAM E. THRO*

Ralph A. Rossum's monumental work, *Antonin Scalia's Jurisprudence: Text and Tradition*,¹ is "an attempt to articulate the contours of Justice Antonin Scalia's understanding of constitutional and statutory interpretation and the role of the Court."² Rossum, the Henry Salvatori Professor of American Constitutionalism at Claremont McKenna College, seeks to "understand Scalia as he understands himself"³ by focusing on "his arguments and words."⁴ To that end, he has reviewed approximately 600 majority, concurring, and dissenting opinions that Scalia wrote between the 1986 Term and the 2004 Term in order to gain a sense of how Scalia approaches the judicial craft.⁵ The result is a comprehensive analysis of the jurisprudence of the "most outspoken, intellectually interesting, high profile and colorful member" of the Court.⁶ Underlying the entire work is the ultimate objective of Scalia's jurisprudence—limiting the power of judges.⁷

This is not a biography. Scalia's life and legal work prior to joining the bench receive a total of three pages.⁸ Unlike *Becoming Justice Blackmun*⁹ or *Sandra Day O'Connor*,¹⁰ there is no attempt to explain how or why Scalia has evolved on the bench or even any suggestion that he has evolved on the bench.¹¹ Unlike Justice

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1. RALPH A. ROSSUM, *ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION* (2006).

2. *Id.* at ix.

3. *Id.*

4. *Id.*

5. *Id.*

6. ROSSUM, *supra* note 1, at 1.

7. *See infra* notes 72–76 and accompanying text (discussing this ultimate objective).

8. ROSSUM, *supra* note 1, at 3–5.

9. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005).

10. JOAN BIPSOKIC, *SANDRA DAY O'CONNOR* (2005).

11. To the contrary, throughout the book, Rossum emphasizes that Scalia has been unchanging in his jurisprudence.

Breyer's *Active Liberty*,¹² this is not a broad discussion of some jurisprudential theme.¹³ Although he relies on other sources, notably Scalia's provocative work, *A Matter of Interpretation*,¹⁴ and opinions written when Scalia served on the United States Court of Appeals for the District of Columbia Circuit,¹⁵ this is primarily a comprehensive, almost encyclopedic, review of Scalia's opinions.¹⁶ With the exception of the first two chapters, it is more of a reference work than a light read for an airplane trip or the end of the day.¹⁷ However, it is essential reference work. Any Supreme Court advocate should consult it before writing a brief and certainly before presenting oral argument. Any law professor who seeks to explain Scalia or who seeks to criticize his jurisprudence must read and understand Rossum's work. Indeed, both the bar and the academy should yearn for similar books on the other eight justices.

Rossum's approach to this Herculean task is systematic. After a quick introductory chapter dealing with Scalia's pre-judicial life, his service on the District of Columbia Circuit, and a comprehensive review of the Supreme Court confirmation hearing,¹⁸ Rossum—in Chapter 2—offers a general overview of Scalia's jurisprudence—which he calls “text and tradition.”¹⁹ Having offered an overview, Rossum then goes into a comprehensive description of Scalia's jurisprudence in the areas of the separation of powers,²⁰ federalism,²¹ substantive rights,²² and procedural rights²³ before offering a short conclusion on Scalia's impact.²⁴ His text is followed by an appendix listing every opinion in which Scalia has relied on a dictionary,²⁵ and perhaps most impressively,²⁶ sixty-seven pages of two-column law-review-style endnotes.²⁷

Ultimately, Rossum, who readily and candidly acknowledges that his work is sympathetic to Scalia's jurisprudence,²⁸ argues that Scalia is the most influential of

12. STEPHEN BREYER, *ACTIVE LIBERTY* (2005).

13. For a review of Justice Breyer's book, see William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 J.C. & U.L. 491 (2006).

14. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

15. ROSSUM, *supra* note 1, at 5–18.

16. *Id.* at ix–x.

17. This is not meant as a criticism. Rossum writes well and this book is quite accessible.

18. ROSSUM, *supra* note 1, at 1–26.

19. *Id.* at 27–51.

20. *Id.* at 52–89.

21. *Id.* at 90–126.

22. *Id.* at 127–65.

23. *Id.* at 166–97.

24. *Id.* at 198–208.

25. *Id.* at 209–12.

26. Indeed, because of the smaller font and two-column printing, the total length of the endnotes may well exceed the length of the text.

27. ROSSUM, *supra* note 1, at 213–79.

28. *Id.* at x.

any of the current or recently retired justices.²⁹ Although Rossum makes a persuasive argument that Scalia's "textualist critique of the use of legislative history has produced a major change in [the Court's] decision-making,"³⁰ he acknowledges that Scalia's colleagues have not embraced his jurisprudence.³¹ Nevertheless, Rossum argued that it is "simply not possible" for Scalia or anyone else who believes in judicial restraint to persuade the other "conservative" justices on a regular basis.³² Just as Justice O'Connor did not, Justice Kennedy will not follow Scalia "on any issue important to them because it will prevent them from doing what they consider the right thing."³³ Even the late Chief Justice Rehnquist was reluctant to follow Scalia's reasoning to its logical conclusion.³⁴ Moreover, Rossum offers a compelling argument that Scalia has had a more significant impact on the broader legal community than his colleagues.³⁵ He notes that Scalia's opinions are more likely to be highlighted in law school textbooks³⁶ and his reasoning is more likely to be the subject of law review commentary.³⁷ In sum, Scalia has "framed the debate" on a variety of constitutional issues.³⁸

Underlying Rossum's systematic review of Scalia's opinions is the ultimate objective of Scalia's jurisprudence. Despite the subtitle, Scalia's jurisprudence is not about text and tradition. Nor is it about structuralism, an element which is missing from Rossum's subtitle but which explains away the inconsistency that Rossum sees with respect to Justice Scalia's dual-sovereignty decisions.³⁹ Rather, as Rossum's book implicitly, and at times, explicitly demonstrates, text, tradition, and structuralism are merely elements or "means" to the ultimate "end" for Scalia.

Scalia, perhaps more than any other person who has served on the Supreme Court, recognizes the "myth of the legal profession's omnicompetence"⁴⁰ and understands the anti-democratic nature of judicial review.⁴¹ Because every political question becomes a judicial one⁴² and because the judiciary has the final

29. *Id.* at 198–208.

30. *Id.* at 37–44, 198.

31. *Id.* at 198–203.

32. *Id.* at 204.

33. *Id.*

34. *Id.* at 204–05.

35. *Id.* at 205–07.

36. *Id.* at 205–06.

37. *Id.* at 206–07.

38. *Id.* at 207.

39. *Id.* at 125.

40. *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 536 (7th Cir. 1997).

41. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–5 (1980). To explain, the elected members of Congress or a State Legislature, thinking that they are acting in accordance with the Constitution, pass a law that has the overwhelming support of the people who elected them. The elected President or Governor, thinking that the bill presented is constitutional, signs the proposal into law. Then, the unelected Supreme Court can invalidate the law simply because it interprets the Constitution differently than the elected legislature or elected executive.

42. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 126 (Richard Hefner ed., Mentor Books 1984) (1835).

word on constitutional interpretation,⁴³ it is quite easy for the Supreme Court to become a “bevy of Platonic Guardians” who constantly substitute their judgment for the policy choices of elected officials.⁴⁴ As Scalia himself—responding to a question from Senator Metzenbaum (D-Ohio) during his confirmation hearings—observed:

[A] constitution has to have ultimately majoritarian underpinnings. To be sure a constitution is a document that protects against future democratic excesses. But when it is adopted, it is adopted by democratic process. That is what legitimates it. . . . [I]f the majority that adopted it did not believe this unspecified right, which is not reflected clearly in the language, if their laws at the time do not reflect that that right existed, nor do the laws at the present date reflect that the society believes that right exists, I worry about my deciding that it exists. I worry that I am not reflecting the most fundamental, deeply felt beliefs of our society, which is what a constitution means, but rather, I am reflecting the most deeply felt beliefs of Scalia, which is not what I want to impose on the society.⁴⁵

Put another way, all aspects of Scalia’s jurisprudence are designed to prevent judges—including Scalia—from substituting their views for those of the elected officials, and thus, imposing their views on society. Consequently, rule by democratic institutions—the legislative and executive branches—is preserved.⁴⁶

By seeking to limit the power of judges, Scalia does not abandon the vigorous enforcement of the Constitution’s limits on the power of government. To the contrary, by strict adherence to the principles of separation of powers and dual sovereignty, which necessarily includes sovereign immunity,⁴⁷ Scalia seeks to limit both each branch of the National Government, and both the National Government

43. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

44. See *Griswold v. Connecticut*, 381 U.S. 479, 526-27 (1965) (Black, J., dissenting) (quoting *LEARNED HAND, THE BILL OF RIGHTS* 70 (1958)).

45. ROSSUM, *supra* note 1, at 26–27 (quoting *Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States*, 99th Cong. 89 (1986) (statement of Antonin Scalia)).

46. See generally William E. Thro & Charles J. Russo, *Judges and the Rule of Law: Reflections for School Business Officials*, 72 SCH. BUS. AFFAIRS 40 (May 2006).

47. Rossum argues that the Court’s sovereign immunity jurisprudence, which is generally thought to be based on Chief Justice Rehnquist’s opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), is actually based on Scalia’s opinion in *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991). See ROSSUM, *supra* note 1, at 34. Although I think Rossum is correct that Scalia’s opinions are the basis for the Court’s contemporary sovereign immunity jurisprudence, I would place the foundation not in *Blatchford*, but in his dissent in *Pennsylvania v. Union Gas*, 491 U.S. 1, 29 (1989) (Scalia, J., joined by Rehnquist, C.J., O’Connor, J. & Kennedy, J., dissenting). In any event, it is clear that Scalia, not Rehnquist or Kennedy, is the true intellectual architect for what I have called the “sovereign immunity revolution.” For a more detailed discussion of the “sovereign immunity revolution,” see generally William E. Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts*, 25 J.C. & U.L. 501 (1999); Brian A. Snow & William E. Thro, *The Significance of Blackstone’s Understanding of Sovereign Immunity for America’s Public Institutions of Higher Education*, 28 J.C. & U.L. 97 (2001).

and the States.⁴⁸ Indeed, although Scalia is a devout Roman Catholic, his attitudes toward separation of powers and dual sovereignty issues are similar to the views espoused by the Protestant Theologian Abraham Kuyper in *Sphere Sovereignty*.⁴⁹ Moreover, although Scalia's approach to the Constitution's textual limits is "reading text and discerning our society's traditional understanding of that text,"⁵⁰ this frequently results in pro-individual rights.⁵¹ In other words, the Constitution's limits—both structural and textual—are enforced, but the enforcement is done in a way that also limits the power of judges to interfere with the democratic process. Several examples illustrate the point.

First, Scalia insists "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁵² As Scalia noted in his monumental essay describing his jurisprudence:

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts [C]onstitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.⁵³

By refusing to seek what Justice Breyer calls "an interpretation of a statute that tends to implement the legislator's will,"⁵⁴ Scalia limits the discretion of judges and preserves the prerogatives of the democratic branches. If the Court's interpretation of the plain text of the statute is contrary to what the legislature wished, then the legislature may amend the statute so that its desires are present in

48. Scalia's separation of powers and federalism jurisprudence, which are among his most significant contributions, are discussed in Chapters 3 and 4 of Rossum's book. ROSSUM, *supra* note 1, at 52–126. For a short explanation of the principles of dual sovereignty as understood by Scalia and the other conservative justices, see generally William E. Thro, *A Question of Sovereignty: A Review of John T. Noonan, Jr.'s Narrowing the Nation's Power: The Supreme Court Sides with the States*, 29 J.C. & U.L. 745 (2003); William E. Thro, *That Those Limits May Not Be Forgotten: An Explanation of Dual Sovereignty*, 12 WIDENER L.J. 567 (2003).

49. See ABRAHAM KUYPER, *Sphere Sovereignty*, in ABRAHAM KUYPER: A CENTENNIAL READER 488 (James D. Bratt ed., 1998) (1880).

50. *Planned Parenthood v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., dissenting).

51. ROSSUM, *supra* note 1, at 29–32, 127–65.

52. *Oncle v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Over a century and a half ago, the Supreme Court explained:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).

53. Scalia, *supra* note 14, at 17.

54. BREYER, *supra* note 12, at 99.

the text.

Second, Scalia rejects judicial balancing tests⁵⁵ “because they have a way of turning into vehicles for the implementation of individual judges’ policy preferences.”⁵⁶ Indeed, Scalia insists that the “the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”⁵⁷ Instead, Scalia urges the Court to avoid second-guessing the elected branches—at either the state or national level. As he explained in a dissent:

As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test (“congruence and proportionality”) that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.⁵⁸

In other words, balancing tests should be replaced with bright-line rules that provide clear guidance to the legislature, and more importantly, eliminate judicial discretion.⁵⁹

55. See, e.g., *Ewing v. California*, 538 U.S. 11, 31–32 (2003) (Scalia, J., concurring in judgment) (declining to apply a “proportionality” test to the Eighth Amendment’s ban on cruel and unusual punishment); *Stenberg v. Carhart*, 530 U.S. 914, 954–56 (2000) (Scalia, J., dissenting) (declining to apply the “undue burden” standard of *Planned Parenthood v. Casey*); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (declining to apply a “reasonableness” test to punitive damages under the Due Process Clause).

56. *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting).

57. *Bendix Autolite Corp. v. Midwesco*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

58. *Lane*, 541 U.S. at 558 (Scalia, J., dissenting).

59. For example, Scalia has suggested that the “congruence and proportionality” test—used to determine whether Congress has properly exercised its power to enforce the Fourteenth Amendment—should be abandoned and replaced with:

[O]ne that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power “to enforce, by appropriate legislation,” the other provisions of the Fourteenth Amendment. . . . *Morgan* notwithstanding, one does not, within any normal meaning of the term, “enforce” a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, “enforce” a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not “enforce” the right of access to the courts at issue in this case, by requiring that disabled persons be provided access to *all* of the “services, programs, or activities” furnished or conducted by the State. That is simply not what the power to enforce means—or ever meant. The 1860 edition of Noah Webster’s American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined “enforce” as: “To put in execution; to cause to take effect; as, to *enforce* the laws.” Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or “remedy” conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called “prophylactic legislation” is reinforcement rather than enforcement.

Id. at 558–59 (Scalia, J., dissenting) (citations omitted). For an expansion of Justice Scalia’s

Third, Scalia does “not accept the proposition that [the Due Process Clause of the Fourteenth Amendment] is the secret repository of all sorts of . . . unenumerated, substantive rights . . .”⁶⁰ As Scalia explained in a dissent:

In my view, a right of parents to direct the upbringing of their children is among the “unalienable Rights” with which the Declaration of Independence proclaims “all men . . . are endowed by their Creator.” And in my view that right is also among the “othe[r] [rights] retained by the people” which the Ninth Amendment says the Constitution’s enumeration of rights “shall not be construed to deny or disparage.” The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution’s refusal to “deny or disparage” other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has no power to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny any legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.⁶¹

In essence, Scalia’s approach acknowledges the existence of “natural rights,” but leaves enforcement of such rights to the political process. If there is a right to contract, to privacy, or to abortion, then its enforcement is left to the political process. Judges may not recognize such rights or enforce them.⁶²

Fourth, Scalia rejects the idea “that American law should conform to the rest of the world.”⁶³ Although the law of other countries may endeavor to “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom,”⁶⁴ Scalia correctly recognizes that most nations do not have the

suggestion in the context of sovereign immunity, see generally William E. Thro, *Toward A Simpler Standard for Abrogating Sovereign Immunity*, 6 ENGAGE: J. FEDERALIST SOCIETY’S PRACTICE GROUPS 65 (Oct. 2005).

60. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993). See also ROSSUM, *supra* note 1, at 170–74. Rossum notes numerous other instances where Scalia has articulated the same idea, including *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (opinion of the Court) and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring).

61. *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (parentheticals in original).

62. Of course, in America’s dual sovereignty system, the State Constitutions may include “rights” that are not present in the federal Constitution. Where such state constitutional rights exist, it is appropriate for state judges to enforce them vigorously. See A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

63. *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting). See also ROSSUM, *supra* note 1, at 50.

64. S. AFR. CONST. 1996 s.39(1)(a). For an analysis of how the South African Constitutional

exclusionary rule, broad free speech protections, broad abortion rights, or the disestablishment of religion.⁶⁵ In essence, foreign law is based on very different assumptions.⁶⁶ By refusing to consider foreign law, Scalia removes a possible basis for invalidating an American democratic decision. His approach assures that American judicial decisions are based upon the premises that underlie American law.

Finally, Scalia believes that the Court should *never* invalidate statutes on their face. To explain, a facial challenge is “a claim that [a] law is ‘invalid *in toto*—and therefore incapable of any valid application.’”⁶⁷ Although the Court generally requires that “the challenger must establish that no set of circumstances exists under which the Act would be valid,”⁶⁸ in the First Amendment context,⁶⁹ the Court—utilizing the overbreadth doctrine—will invalidate a law on its face because it is unconstitutional in *many*, but not all, of its applications.⁷⁰ Scalia, however, believes that invalidating statutes *in toto* is incompatible with the democratic process. In a dissent, he observed:

It seems to me fundamentally incompatible with [the constitutional] system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that

Court has interpreted this command, see I. J. RAUTENBACH & E. F. J. MALHERBIE, *CONSTITUTIONAL LAW* (4th ed. 2004).

65. *Roper*, 543 U.S. at 625–26 (Scalia, J., dissenting).

66. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

67. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982).

68. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

69. To date, the Court has never allowed facial challenges alleging overbreadth outside of the First Amendment context. Of course, the Court recently suggested that it had allowed facial challenges alleging overbreadth in contexts other than the First Amendment. See *Sabri v. United States*, 541 U.S. 600, 609–10 (2004) (“[W]e have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence.”). However, a careful examination of the cases listed in *Sabri* indicates that they did not involve “overbreadth” in the traditional sense, but instead involved statutes that were invalid in all of their applications under the relevant standards for evaluating the *merits* of the underlying constitutional claims.

70. As Scalia, writing for the Court, explained:

The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a “substantial” amount of protected speech, “judged in relation to the statute’s plainly legitimate sweep,” suffices to invalidate *all* enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression”

Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (citations omitted). See also *Virginia v. Black*, 538 U.S. 343, 375 (2003) (Scalia, J., joined by Thomas, J., dissenting) (providing a similar explanation of overbreadth in the First Amendment context). The Supreme Court has created “this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.” *Hicks*, 539 U.S. at 119 (citations omitted).

point seems to me no more than an advisory opinion—which a federal court should never issue at all, and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions. I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?⁷¹

Put another way, Scalia would entertain only as applied challenges.⁷² By limiting constitutional challenges to the facts before the Court—thereby effectively abolishing the First Amendment's overbreadth doctrine—Scalia would severely curtail the ability of the federal judiciary to invalidate state or federal laws.⁷³

“What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle.”⁷⁴ In order to avoid judicial dictatorship, Scalia has rejected:

[I]ntellectual fads and novel theories of interpretation that have the invariable effect of transferring power from the popular branches to the judges. He has sought to constrain judicial discretion and has fought with all the considerable intellectual tools at his disposal the tendency of judges to substitute their beliefs for society's. In so doing, he has reminded his colleagues of the most important right of a people in a democracy—the right to govern themselves as they see fit and not be overruled in their governance unless the clear text or traditional understanding of the Constitution they have adopted demands it.⁷⁵

If Scalia reminds us that we must avoid judicial dictatorship, then Rossum's *Antonin Scalia's Jurisprudence* reminds us how we can avoid judicial

71. *City of Chicago v. Morales*, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting) (citations omitted).

72. Although his colleagues have never endorsed this view, Scalia has persuaded them to allow the States to reject overbreadth challenges. As Scalia, writing for an unanimous Court, explained:

The problem with [Virginia's and the United States' proposal to limit overbreadth standing to individuals who have engaged in expressive conduct] is that we are reviewing here the decision of a *State* Supreme Court; our standing rules limit only the *federal* courts' jurisdiction over certain claims. “State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law.” Whether Virginia's courts should have *entertained* this overbreadth challenge is entirely a matter of state law.

Hicks, 539 U.S. at 120 (citations omitted).

73. For example, a statute that banned all abortions under all circumstances would be constitutional as applied to a woman in the early stages of full term labor. Therefore, it could not be invalidated on its face.

74. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

75. ROSSUM, *supra* note 1, at 207–08.

dictatorship.⁷⁶

76. Of course, the death of Chief Justice Rehnquist and the retirement of Justice O'Connor have altered the dynamic of the Court. With the addition of Chief Justice Roberts and Justice Alito, it is, perhaps, more likely that the Court will embrace the objectives of Justice Scalia's jurisprudence. There are indications that this is already happening. For example, in *Ayotte v. Planned Parenthood*, decided before Justice Alito joined the Court, the Court declared that when a federal court is confronted with a statute that is constitutional in some circumstances, but not in others, federal courts should not choose "the most blunt remedy—permanently enjoining the enforcement of [the statute] and thereby invalidating it entirely." *Ayotte v. Planned Parenthood*, 126 S. Ct. 961, 969 (2006). Rather, federal courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force," or "sever its problematic portions while leaving the remainder intact." *Id.* at 967. See also *United States v. Booker*, 543 U.S. 220, 227–29 (2005) (mandating severability); *United States v. Raines*, 362 U.S. 17, 20–22 (1960) (enjoining unconstitutional applications). Such a result is fully consistent with Scalia's idea of refusing to invalidate statutes on their face. Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights*, decided without Justice Alito's participation, the Court declared that if the Constitution prohibits Congress from achieving an objective directly, it may not use the Spending Clause of the U.S. Constitution, article I, section 8, clause 1, to achieve the objective indirectly. *Rumsfeld v. Forum for Academic & Institutional Rights*, 126 S. Ct. 1297, 1306–07 (2006). This recognition of a structural limitation on the power of Congress and the announcement of a bright-line rule is fully consistent with Scalia's jurisprudence. For an examination of the implications of *Rumsfeld*, see generally William E. Thro, *The Spending Clause Implications Of Rumsfeld v. Forum For Academic And Individual Rights*, 7 ENGAGE: J. FEDERALIST SOCIETY'S PRAC. GROUPS (forthcoming 2006); William E. Thro, *The Constitutionality of the Solomon Amendment*, 4 NACUA NOTES (forthcoming 2006). Finally, in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), which was decided with Justice Alito participating, the Court rejected the notion that the United States should follow the International Court of Justice's interpretation of treaties and emphasized the unique nature of the American legal system. Such a result is fully consistent with Scalia's rejection of foreign law in interpreting the American Constitution and statutes. Moreover, the Court's adoption of bright-line rules—a treaty violation will never result in the suppression of evidence and will never result in the setting aside of state procedural default rules—constrains lower court judges and allows democratic institutions the widest latitude.

UNDER THE INTERNATIONAL TRAFFIC IN ARMS REGULATIONS, FUNDAMENTAL RESEARCH OVERRIDES DEFENSE SERVICES

MITCHELL A. GOODKIN*

For several years, particularly since September 11, 2001, government and corporate sponsors regularly have been telling colleges and universities that their research projects are “ITAR controlled” and that they must therefore restrict the participation of foreign nationals.¹ The University of Michigan received an official opinion from the Department of State on a space project that contradicts many such assertions.

In 2003, the University of Michigan (Michigan) had a student-run research project to evaluate field emitter array (FEA) cathode technology for charge stabilization in a spacecraft environment (the project). The project was to include designing and building various devices to test in a space environment and the necessary equipment to perform the tests. Michigan faculty and staff would assist the students. Among others, students from the People’s Republic of China, India, Mexico, Singapore, Thailand, and the United Arab Emirates were involved in the project.

The project was part of a larger program (the program) sponsored by a United States Government agency (the agency). That program included projects from a number of colleges and universities. After the project was underway, the agency program manager sent a notice to the participating organizations that restrictions applied to who may participate in the program depending on their nationality. In what was described as an officially blessed set of guidelines prepared by members of the agency, there were two lists of countries. One list was of “Exempted Countries” for which no license would be required for participants; a second list was of “Prohibited Countries” for which participation was prohibited. The guidelines also said that a license from the Department of State would be required

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1. See 22 C.F.R. § 120.1 (2006).

for participation of nationals of countries not on one of the two lists.

The agency was effectively telling the participating colleges and universities that the activities under the program were controlled under the International Traffic in Arms Regulations (ITAR) as “defense services.” “Defense services” as defined in ITAR include the provision of certain assistance, the provision of controlled technical information, or the provision of certain military training.² Under ITAR, permission is required from the Department of State to provide defense services to certain foreign nationals.³ Technical data does not include information that is in the public domain.⁴ Information that arises out of, or results from, fundamental research, is considered to be in the public domain; therefore, such information would not be considered technical data.⁵ Overwhelmingly, research activities at colleges and universities meet the requirements to be considered fundamental research under ITAR. There did not appear to be any question that the activities under the project would be considered fundamental research. Nevertheless, from a literal reading of ITAR, Department of State approval might still be required for certain assistance to foreign nationals even though the information provided in

2. 22 C.F.R. § 120.9(a) (2006). For the express language of this provision, see *infra* Part II.

3. 22 C.F.R. § 124.1(a) (2006). This provision states:

The approval of the Office of Defense Trade Controls must be obtained before the defense services described in § 120.9(a) of this subchapter may be furnished. In order to obtain such approval, the U.S. person must submit a proposed agreement to the Office of Defense Trade Controls. Such agreements are generally characterized as either Manufacturing license agreements, technical assistance agreements, distribution agreements or off-shore procurement agreements, and may not enter into force without the prior written approval of the Office of Defense Trade Controls.

Id.

4. 22 C.F.R. § 120.10(a)(5) (2006). This provision states: “This definition [of technical data for purposes of ITAR] does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in § 120.11.” *Id.*

5. 22 C.F.R. § 120.11(a) (2006). This provision states:

Public domain means information which is published and which is generally accessible or available to the public:

...

(8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:

(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or

(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

Id.

providing the assistance is in the public domain.⁶ The approval by the Department of State, if required, would be provided by approval of a Technical Assistance Agreement (TAA) executed by the U.S. nationals providing the defense services and the foreign nationals that would receive the defense services.⁷

The issue effectively raised by the agency's guidelines was whether the Department of State needed to approve the participation of certain foreign nationals in the program's research projects as being activities that would be considered defense services, even though those activities otherwise met the conditions under ITAR to be considered fundamental research.

According to the agency's guidelines, the current students on the project from China were prohibited from participating, and licenses from the Department of State would be required for the participation of the current students from the other aforementioned countries. Given that the project had already started, there was also an issue as to whether or not Michigan needed to give notice to the Department of State that a potential ITAR violation had occurred.

With the assistance of outside counsel,⁸ on December 15, 2003, Michigan filed with the Department of State a Request for Opinion as to whether approval was needed for the foreign students to participate in the project. Michigan assumed that the form needed for such approval would be a TAA. A draft TAA and a preliminary notice of a potential ITAR violation were filed with the Request for Opinion.

The Department of State issued an opinion dated April 8, 2004, stating that the activity was fundamental research, no license was required, and no violation of ITAR had occurred.

Based on a detailed analysis of the facts presented to the Department of State and the opinion received, and consistent with informal feedback received by outside counsel from the Department of State, it is clear that if an activity meets the requirements under ITAR to be considered fundamental research, no license (including an approved TAA) is required from the Department of State to include foreign nationals from any country in the activity, even though the project activity might also fit the definition of a "defense service."⁹

It is not clear which specific provisions of ITAR the Department of State interpreted in arriving at this opinion, which was quite brief and devoid of

6. 22 C.F.R. § 124.1(a) (2006). This provision states:

The requirements of this section [to obtain approval of a technical assistance agreement] apply whether or not [controlled] technical data is to be disclosed or used in the performance of the defense services described in § 120.9(a) of this subchapter (e.g., all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from the licensing requirements of this subchapter pursuant to § 125.4 of this subchapter).

Id.

7. For details on the requirements for technical assistance agreements, see 22 C.F.R. § 124 (2006) regarding agreements, off-shore procurement, and other defense services.

8. Steve Brotherton and Richard Pettler of the law firm of Fragomen, Del Rey, Bernsen & Loewy, LLP.

9. Although the activities and opinion discussed in this paper occurred in 2003 and 2004, there have been no subsequent revisions to ITAR that would affect the result.

explanation. The opinion could mean that if an activity is fundamental research then it would not be considered a “defense service”; or, it could mean that if an activity were fundamental research, no license would be required even though the activity would also be considered a “defense service.”

Nevertheless, the reader should be cautioned. Although there were strong indications during and subsequent to the review by the Department of State that were consistent with the conclusion presented in this essay, the Request for Opinion was for a specific set of facts and the opinion received by Michigan was quite brief and vague. The Department of State could hold differently under other circumstances.

For potential future export issues, as usual, other government regulations should also be considered, particularly the Export Administration Regulations (EAR) under the Commerce Department, and the various regulations administered by the Office of Foreign Assets Control (OFAC) in the Treasury Department.

I. BACKGROUND DETAILS

A. Opinion from the Department of State

The following excerpt from the Department of State’s opinion, regarding Michigan, dated April 8, 2004, was received from Patricia Slygh, Chief Compliance and Registration Division, Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, U.S. Department of State (DTC Case VD04-110): “The decision was that the activity as described in your request would be considered fundamental research not subject to licensing by the Department of State. Thus no violation occurred requiring the filing of a disclosure to my office.”¹⁰

On its face, this opinion can reasonably be interpreted to have a broad meaning that, in general, no license from the Department of State would be required for any foreign nationals to participate in any activity that meets the ITAR requirements to be considered fundamental research.

Nevertheless, the opinion from the Department of State was quite brief. To

10. *Opinion from Department of State* (on file with author). The following is the full contents of the letter to the University of Michigan dated April 8, 2004, from Patricia Slygh, Chief Compliance and Registration Division, Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, U.S. Department of State (DTC Case VD04-110):

The Office of Defense Trade Controls Licensing, within the Directorate of Defense Trade Controls, has advised our Compliance & Registration Division that a determination was reached regarding the University of Michigan’s advisory opinion request (Case No. GC-1199-03). The decision was that the activity described in your request would be considered fundamental research not subject to licensing by the Department of State. Thus, no violation occurred requiring the filing of a disclosure with my office. Our case is therefore being closed and we will proceed no further in this matter.

If you have any questions or comments regarding this issue, please direct them to Mr. Paul Lacombe of the Compliance & Registration Division at (202) 663-2855.

Id.

address the issue that the opinion might be limited by some specific facts in the subject case, a detailed analysis of the opinion received from, and the facts presented to, the Department of State is given below.

B. Request for Opinion

The opinion request sent to the Department of State was as follows:

For purposes of the federally funded project, will UM require a Technical Assistance Agreement prior to furnishing defense services to certain foreign person students when all of the underlying information is considered “fundamental research” as defined by ITAR Part 120.11(8)?

Without addressing the availability of the Category XV(e) exemption found in Part 125.4(d)(1), the threshold question is whether the Department of State intended Part 124.1 to apply to unclassified federally-funded student projects involving public domain information developed through fundamental research at an accredited institution of higher learning in the U.S.¹¹

C. Facts Presented on Behalf of the University of Michigan in the Request for Opinion

The opinion request document included the following statement of facts:

The project activity was at the University of Michigan.

Implied: the University of Michigan is an accredited institution of higher education in the United States.

The project is student-run and educational.

The project was federally funded.

The project will help evaluate a new kind of electronic emission technology, Field Emitter Array (“FEA”) cathode technology, for spacecraft charge stabilization in a spacecraft environment.

The FEA technology is an enabling technology for certain advanced space applications, including spacecraft charge control, low-power electronic propulsion thrusters, and propellantless electrodynamic tether propulsion systems.

11. *Request for Opinion* and accompanying documents (on file with author). 22 CFR § 121 (2006) describes the articles in The United States Munitions List (USML), which are the articles to which ITAR applies. The articles are enumerated by categories in § 121.1. The articles, including technical data, relevant to the subject opinion from the Department of State, would be in Category XV—Spacecraft Systems and Associated Equipment. § 125 describes licenses required for the export of technical data controlled under ITAR. § 125.4 provides for exemptions of general applicability to the licenses defined in § 125. § 123 describes licenses required for the export of defense articles controlled under ITAR. § 123.16 provides for exemptions of general applicability to the licenses defined under § 123. § 123.16(b)(10) provides for certain exemptions specific to export activities of accredited U.S. institutions of higher learning related to articles in the USML Category XV.

The primary FEA technology has been developed over the past 20 years for display applications similar to LCD displays.

UM's experiment will demonstrate the use of FEAs in space.

The team includes faculty and student principal investigators, engineering mentors and a lead engineer. UM faculty as well as U.S. students will engage in technical interactions with the foreign students on the project, including without limitation those necessary to design, develop, engineer, manufacture, produce, assemble and test the system.

Foreign students are participating from China, India, Mexico, Singapore and Thailand. In the draft TAA, a student from United Arab Emirates was also listed. Thailand was not addressed in the draft Technical Assistance Agreement, since that country became eligible for an exemption while the documents were being prepared.¹²

D. Additional Facts Presented in Attachment 1 to the Request for Opinion

The following additional facts were included in Attachment 1 to the opinion request document and were incorporated by reference into the request:

The experiment payload has two primary goals: (1) demonstrate the ability of the FEAs to operate in the space environment in the ionosphere and in the presence of shuttle outgassing and effluents; and (2) demonstrate the ability of the FEAs to move charge away from a spacecraft into the ionosphere.

The mission is designed with the knowledge that the FEAs being flown are experimental.

The power supplies for the project will be designed and built by students and University of Michigan engineers.

Faculty and professional engineers from the University of Michigan Space Physics Research Laboratory will act as additional mentoring resources.¹³

E. Additional Information Presented in the Draft TAA, Enclosed with the Request for Opinion

The draft TAA that was enclosed with the opinion request document included the following additional facts:

The responsibilities of the student from China include reliability analysis and support of documentation for the command and data handling subsystem. This student is from Guangzhou, Guangdong, China.

The responsibilities of the students from India include software design

12. *Request for Opinion* and accompanying documents (on file with author).

13. *Id.*

for control, support testing of payload components and design of payload mounting stand.

The responsibility of the student from Mexico is project management.

The responsibility of the student from Singapore is support on Finite Element Analysis of Main Structure.

A student is listed as being from the United Arab Emirates, with responsibility for software design for control.¹⁴

F. Legal Interpretations Made on Behalf of the University of Michigan in the Request for Opinion

The following legal interpretations were asserted in the opinion request document:

The project meets the criterion for, and qualifies as, “fundamental research” as defined by ITAR Part 120.11(8).

The hardware and related technical data, including certain unproven design data, are listed on the U.S. Munitions List under Categories XV(e) and (f).

The technical interaction of the Michigan faculty and U.S. Students with the foreign students would qualify as defense services.

Part 124.1 should be read and interpreted as not requiring a Technical Assistance Agreement during the conduct of fundamental research (as defined in 120.11(8)) in science, technology and engineering at accredited institutions of higher learning.

A positive opinion on this request would leave in place necessary controls in other settings, including, without limitation, other public domain conduct and information not arising from fundamental research, as well as a host of other situations not “four square” within the express language of NSDD 189.¹⁵

14. *Id.*

15. *Id.* The following is the express language of Nat’l Sec. Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical and Engineering Information (Sept. 21, 1985), available at <http://www.fas.org/irp/offdocs/nsdd/nsdd-189.htm>.

I. PURPOSE

This directive establishes national policy for controlling the flow of science, technology, and engineering information produced in federally-funded fundamental research at colleges, universities, and laboratories. Fundamental research is defined as follows:

“‘Fundamental research’ means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.”

II. BACKGROUND

II. ANALYSIS OF SCOPE OF OPINION FROM DEPARTMENT OF STATE

The provisions in ITAR that specify requirements for a license from the Department of State are at § 123.1 for defense articles (“defense articles” as defined at § 120.6 includes both items and technical data); § 125.2 for unclassified technical data; and § 124.1 for providing defense services as described in § 120.9(a).

A license from the Department of State under ITAR is never required unless the object or technical data to be exported or the service to be performed involves an item on the United States Munitions List (USML).¹⁶

Given the facts provided to the Department of State in the Request for Opinion and accompanying documents, the items for which all of the relevant foreign students would participate in the development, and the technical data related to

The acquisition of advanced technology from the United States by Eastern Bloc nations for the purpose of enhancing their military capabilities poses a significant threat to our national security. Intelligence studies indicate a small but significant target of the Eastern Bloc intelligence gathering effort is science and engineering research performed at universities and federal laboratories. At the same time, our leadership position in science and technology is an essential element in our economic and physical security. The strength of American science requires a research environment conducive to creativity, an environment in which the free exchange of ideas is a vital component.

In 1982, the Department of Defense and National Science Foundation sponsored a National Academy of Sciences study of the need for controls on scientific information. This study was chaired by Dr. Dale Corson, President Emeritus of Cornell University. It concluded that, while there has been a significant transfer of U.S. technology to the Soviet Union, the transfer has occurred through many routes with universities and open scientific communication of fundamental research being a minor contributor. Yet as the emerging government-university-industry partnership in research activities continues to grow, a more significant problem may well develop.

III. POLICY

It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification. Each federal government agency is responsible for: a) determining whether classification is appropriate prior to the award of a research grant, contract, or cooperative agreement and, if so, controlling the research results through standard classification procedures; b) periodically reviewing all research grants, contracts, or cooperative agreements for potential classification. No restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes.

Id. Condoleezza Rice confirmed President Reagan’s directive by stating that NSDD 189 continues to be the policy of the administration of President George W. Bush. See Letter from Condoleezza Rice, Assistant to the President for Nat’l Sec. Affairs, to Dr. Harold Brown, Co-Chairman, Ctr. for Strategic & Int’l Studies (Nov. 1, 2001), available at <http://www.aau.edu/research/Rice11.1.01.html>.

16. 22 C.F.R. § 121.1 (2006).

those items, would be included in the USML under Categories XV(e) and XV(f). Therefore, the opinion from the Department of State that a license is not required was based on an assumption that the subject matter of the project is on the USML and that this assumption is also true for the subject matter of the activities of all of the relevant foreign participants.

There is no suggestion in the facts presented to the Department of State that any physical items would be transferred to any of the participants in the project. This, therefore, was not an issue.

The only activities that might be controlled under ITAR would be those that seem to provide defense services to foreign participants, or that might be considered the export of technical data outside of the United States, or deemed exports due to the provision of information to the foreign participants in the United States.¹⁷

According to the Department of State Opinion, the activities of the project would be considered fundamental research under ITAR. There is no question that the information resulting from the project would ordinarily be published and shared broadly in the scientific community. The resulting information would, therefore, be public domain pursuant to ITAR § 120.11(a)(8).

Public domain information, including information resulting from fundamental research, is excluded under § 120.10(a)(5) from the definition of technical data in § 120.10(a), and therefore is not controlled under ITAR. This exclusion is confirmed and emphasized in ITAR § 125.1(a): “Information which is in the public domain (see Section 120.11 of this subchapter and 125.4(b)(13)) is not subject to the controls of this subchapter.”¹⁸ The reference to “subchapter” is to Subchapter M—International Traffic in Arms Regulations. In other words, information resulting from the project, and from fundamental research in general, is not controlled by ITAR.

For each of the provisions that specify the need for a license, exemptions exist under which no license would be needed.¹⁹

There do not appear to be any exemptions applicable for the project for the relevant foreign students. It is immediately obvious for most potential exemptions. For a potential exemption for Category XV, a closer look is needed. For items controlled by Categories XV(a) and XV(e), there is an exemption described in § 125.4(d) for defense services; but, that exemption applies only to certain countries and does not apply to people who are from the countries relevant to the opinion. Therefore, the opinion from the Department of State that no license is required

17. See 22 C.F.R. § 120.9(a)(2) (2006) (indicating that technical data controlled under ITAR to foreign persons in the United States is deemed to be an export).

18. 22 C.F.R. § 125.1(a) (2006).

19. Under ITAR, approval from the Department of State is required in order to export certain items or technical information, or to provide technical services to foreign nationals. Each of the categories of activities has a limited number of exemptions from the requirements to obtain approval from the Department of State. See §§ 123.16–123.20 for the exemptions relevant to approvals for licenses to export defense articles; §§ 124.2–124.3 for exemption related to technical assistance and other agreements; and §§ 124.4–124.5 for exemptions related to the export of technical data and classified information.

would not be based on that, or any other, exemption.

No license is ever required under ITAR §§ 123.1 or 125.2 for the export, including deemed export, of information that results from fundamental research as that term is defined in ITAR, since such information is not subject to control by ITAR. It is necessary, though, to further consider the license requirements under § 124.1 for providing defense services—which is the primary issue raised in the Request for Opinion.

Under ITAR § 124.1(a), approval of the Office of Defense Trade Controls must be obtained before the defense services described in ITAR § 120.9(a) may be furnished.

§ 124.1(a) specifies that in order to obtain approval from the Office of Defense Trade Controls for a defense service, a U.S. person must submit a proposed agreement. The agreement must be executed by the college or university and the participants, and approved by the Office of Defense Trade Controls—such approval being a form of license. Such agreements are generally characterized as one of the following: manufacturing license agreements, TAAs, distribution agreements, or off-shore procurement agreements. Among these types of agreements, the only one that might apply to a project that is solely fundamental research is the TAA.

According to ITAR § 120.9(a), a “defense service” means:

- (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
- (2) The furnishing to foreign persons of any technical data controlled under ITAR (see Section 120.10), whether in the United States or abroad; or
- (3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or informational publications and media of all kinds, training aid, orientation, training exercise, and military advice (see also Section 124.1).

As discussed above, technical data that results from fundamental research is not controlled by ITAR. Given the opinion from the Department of State that the project would be considered fundamental research, § 120.9(a)(2) would not apply. This would be true for all data resulting from any activity appropriately considered fundamental research.

The project clearly would not involve military training of any sort, so § 120.9(a)(3) would not apply. This also would be true for any project that did not involve military training.

The project and the activities of the relevant students would involve design, development, engineering, and possibly other activities described in § 120.9(a)(1). Therefore, that subsection might apply to the project; and, if it did apply, then there

would be a requirement for approval in the form of a license by the Department of State under § 124.1. But the opinion from the Department of State says that no license is required for the project activity.

As discussed above, there do not appear to be any relevant license exemptions for the project with regard to the relevant foreign students.

The opinion from the Department of State, therefore, must effectively be an opinion that either: (1) even if activities that were appropriately considered fundamental research also were considered to be defense services, no approval from the State Department would ever be required under § 124.1(a); or (2) any activity that met the requirements to be considered fundamental research would never be considered a defense service under ITAR.

In case some issue arises in which it would matter which interpretation is correct, a further look at the second interpretation seems desirable. The opinion from the Department of State presumably is a clarification of the regulations as written; as such, it would be clarifying certain wording in the ITAR regulations.

There does not appear to be any wording in § 125.4 amenable to such clarification that would lead to the resulting opinion from the Department of State. There is a clear requirement for approval to perform activities that meet the definition of defense services in § 120.9(a)(1), and none of the exceptions in § 125.4 would apply. Such approval would be required even if all of the data used in the activity were in the public domain.

ITAR § 124.1(a) also specifies that the requirements of that section apply regardless of whether technical data is to be disclosed or used in the performance of the defense services described in ITAR § 120.9(a).²⁰ It would not matter if the data resulted from fundamental research and was therefore considered public domain; the license requirement of § 124.1(a) would still apply.

The definition of defense services at § 120.9(a), specifically the definition of the assistance in § 120.9(a)(1), seems open to interpretation. The opinion from the Department of State could reasonably be interpreted to mean that fundamental research activities would not be considered assistance of the type described or contemplated in § 120.9(a)(1).

III. SUMMARY: GENERALITY OF THE OPINION FROM THE DEPARTMENT OF STATE

The project clearly involved technologies on the USML. There were no special ITAR rules or exceptions for the project that would exempt it from the requirements of approval to provide a defense service, other than that it was considered to be fundamental research.

Based on the above analysis of the opinion received from the Department of State, and consistent with informal feedback received by outside counsel from the Department of State, it is clear that if an activity meets the requirements under ITAR to be considered fundamental research, no license (including a TAA) is required from the Department of State to include foreign nationals from any country in the activity.

20. For the express language of this provision, see *supra* note 6.

It is not clear what specific provisions of ITAR were being interpreted by the Department of State in arriving at its opinion. The opinion could mean that if an activity is fundamental research, then: (1) it would not be considered to be a defense service; or (2) if an activity were fundamental research, no license would be required even though the activity also would be considered a defense service. There is a reasonable legal argument that the first, potentially broader interpretation, should apply.

For potential future export issues, as usual, other government regulations should also be considered, particularly the Export Administration Regulations (EAR) under the Commerce Department and the various regulations administered by the Office of Foreign Assets Control (OFAC) in the Treasury Department.

SEX, DRUGS, AND FEDERALISM'S ROLE: REGULATION OF THE MORNING AFTER PILL ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

KATHERINE D. SPITZ*

In March of 2005, students at the University of Wisconsin opened their student newspapers and found an unusual advertisement inside. The ad pictured a beaming college student on the beach next to a graphic that included the text “Spring Break Tip #1- Be Prepared.”¹ The advertisement encouraged women to prepare for their vacation getaways by calling the University’s health center, which would provide a dose of the morning after pill² in advance of their trips “without an appointment.”³ Although the health center’s director claimed that student fees, not tax dollars, funded the advertisement,⁴ the outcry that followed led to a failed attempt to ban the advertisement, sale, and distribution of the morning after pill on Wisconsin’s public college and university campuses.

This Note addresses attempts by the state legislatures in Virginia and Wisconsin to impose absolute bans on the morning after pill for their public college and university campuses. Although both measures failed to become law, it is important to consider the constitutional repercussions if another state passes a statute similar to those Virginia and Wisconsin recently attempted to enact. Virginia’s bill passed

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1. Nahal Toosi, *UW Ad Angers Abortion Critics*, MILWAUKEE JOURNAL-SENTINEL, March 12, 2005, at B1; UW Ad, *available at* <http://www.jsonline.com/news/state/mar05/308921.asp> (click on “enlarge ad”) (last visited Oct. 20, 2006).

2. The morning after pill is known by many names, including Plan B and emergency contraception. Because the question of whether the morning after pill is a contraceptive or a chemical abortifacient is disputed by some, this Note will simply refer to the drug as the morning after pill. An abortifacient is “a drug, article, or other thing designed or intended to produce an abortion.” BLACK’S LAW DICTIONARY 6 (8th ed. 2004).

3. UW Ad, *supra* note 1.

4. Toosi, *supra* note 1, at B1.

its assembly and is currently in committee in the state senate; the senate has taken no action since early 2004, indicating that the bill will not be revived.⁵ Wisconsin's statute passed the state assembly and was tabled in the state senate.⁶ On August 24, 2006, the Food and Drug Administration (FDA) made the morning after pill available without a prescription to individuals eighteen years of age and older.⁷ Given the controversial nature of the drug, a future administration may decide to reverse the FDA's determination of over-the-counter status if more or different information became available in studies over the next several years.⁸ With this in mind, it is not inconceivable that other states could take action on the morning after pill in the future.⁹ The morning after pill raises many controversial issues concerning when life begins and the right of access to and funding of contraception and abortion.¹⁰ Due to the sensitive nature of these topics, this Note will not address whether laws such as those proposed in these two states *should* have been enacted but whether they constitutionally *could* have been enforced. The Note will first give background on the legal history surrounding contraception and abortion, information necessary to understanding why the statutes in question are so controversial. Next, the Note will address the morning after pill, how it functions, and why pro-life and pro-choice individuals have such strong sentiments about its availability both on college campuses and to the public generally. Next, the proposed state statutes will be examined in order to determine what they do and do not prohibit. After examining the statutes, the constitutionality of the Virginia and Wisconsin measures will be assessed. Finally, this Note will discuss the FDA's recent decision to put the morning after pill over the counter, the role of the states in the regulation of public health, and the continuing relevance of the

5. See discussion *infra* Part III.A.

6. See discussion *infra* Part III.B.

7. Food and Drug Administration, Prvt. Ltr. Ruling No. 21-0145/S-011 (Oct. 20, 2006), available at <http://www.fda.gov/cder/foi/appletter/2006/021045s011ltr.pdf> [hereinafter "FDA Approval Letter"].

8. This possibility and the continuing importance of the national debate over this drug will be more thoroughly described in Part V.

9. Recent debates on whether the Food and Drug Administration (FDA) should make the morning after pill available over the counter also contribute to the importance of this type of legislation. In 2004, the FDA denied applications to put the morning after pill over the counter, and some critics suspect that the decision was the product of political interference. See UNITED STATES GOVT. ACCOUNTABILITY OFFICE, FOOD AND DRUG ADMINISTRATION: DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF THE EMERGENCY CONTRACEPTIVE DRUG PLAN B WAS UNUSUAL (Nov. 2005), available at <http://www.gao.gov/new.items/d06109.pdf> [hereinafter GAO REPORT]; see also discussion *infra* notes 262–69 and accompanying text. On August 24, 2006, the FDA changed course and put Plan B over the counter for individuals eighteen and older while keeping it prescription for those seventeen and younger. FDA Approval Letter, *supra* note 7.

10. Unless otherwise indicated, the term "abortion" will refer to an induced abortion but for which a live birth would have been likely to take place. Spontaneous abortion, or miscarriage, may take place in about 20% of pregnancies, but will not be addressed here. See Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 281 (Sept. 1997). A therapeutic abortion is one performed to save the life or health of the mother. BLACK'S LAW DICTIONARY 6 (8th ed. 2004).

controversy surrounding this issue.

I. THE LEGAL HISTORY OF CONTRACEPTION, ABORTION, AND SEXUAL PRIVACY

Whether viewed as deriving from judicial legislating or from a constitutional right, the Supreme Court's decisions on matters concerning contraception and abortion invoke passionate opinions from all individuals involved.¹¹ The controversies surrounding contraception and abortion are important to the debate on the morning after pill because those who are pro-life and those who are pro-choice see the pill differently.¹²

A. "A Dirty, Filthy Book" and Contraception in the Nineteenth Century

The modern history of contraception dates back to a pamphlet by a self-taught American physician named Charles Knowlton,¹³ who published his *Fruits of Philosophy: The Private Companion of Young Married People, by a Physician* in 1832.¹⁴ The pamphlet advocated the use of a piece of sponge during intercourse¹⁵ or the injection of a chemical mixture into the woman immediately thereafter to prevent conception.¹⁶ Knowlton intended that impoverished couples have access to his information, lamenting that "the overcrowded poor injure each other morally, mentally, and physically."¹⁷ Upon the pamphlet's publication, a Massachusetts court fined Knowlton fifty dollars plus costs and accused him of "making the world's oldest profession easy and devoid of its 'inconveniences and

11. See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (May 2003) (stating that "[*Planned Parenthood v. Casey* is Public Enemy Number One on the list of the Supreme Court's crimes against the Constitution and against humanity") and Kelly Sue Henry, Note, *Planned Parenthood of Southeastern Pennsylvania v. Casey: The Reaffirmation of Roe or the Beginning of the End?*, 32 U. LOUISVILLE J. FAM. L. 93, 93 (Winter 1993-94) (stating that "a woman's right to an abortion is still under attack" following the *Casey* decision). See also Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 33 (Nov. 1992) (stating that pro-choice groups believed the *Casey* opinion left *Roe* "an empty shell"); see also RONALD DWORKIN, LIFE'S DOMINION 13 (Alfred A. Knopf 1993) (stating that the "scalding rhetoric of the 'pro-life' movement seems to presuppose the derivative claim that a fetus is . . . a full moral person with rights and interests But very few people . . . actually believe that, whatever they say"), but cf. Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 341 (1993) (reviewing both Dworkin and the Supreme Court's abortion jurisprudence and finding that "[a] deep prejudice against the unborn . . . underwrites *Roe*"). Despite Dworkin's apparent belief that "a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect, is indeed available," such a resolution seems anything but inevitable. DWORKIN, *supra* note 11, at 10-11.

12. Pro-life individuals often regard the morning after pill as an abortifacient, while pro-choice individuals regard it as an emergency contraceptive.

13. S. CHANDRASEKHAR, "A DIRTY, FILTHY BOOK" 21 (Univ. of California Press, 1981).

14. *Id.* at 23.

15. CHARLES KNOWLTON, THE FRUITS OF PHILOSOPHY: THE PRIVATE COMPANION OF YOUNG MARRIED PEOPLE, BY A PHYSICIAN, reprinted in CHANDRASEKHAR, *supra* note 13, at 137.

16. KNOWLTON, *supra* note 15, at 137-38.

17. *Id.* at 169.

dangers.”¹⁸ Later that year, Knowlton was sentenced to three months of hard labor for distributing his pamphlet.¹⁹

Over forty years later, an Englishwoman by the name of Annie Besant revived Knowlton’s pamphlet for publication in England with the help of her friend and colleague, Charles Bradlaugh.²⁰ The two published the book with the intention of being arrested in order to bring the birth control issue before a judge.²¹ The trial took place in 1877 before an elderly gentleman who had already made a “dubious ruling” in a prior obscenity case.²² At trial, Besant and Bradlaugh contended that Knowlton’s pamphlet was not obscene and pointed out that no statutory definition of the word “obscene” could be found.²³ Besant, in particular, argued that a difference of opinion on the question of contraception could not be taken as proof of obscenity,²⁴ and further commented that she published Knowlton’s pamphlet not out of agreement with his views or his methods, but to ensure that his voice was heard in public debate.²⁵ She echoed Knowlton’s concern for the poor, pointing out that children as young as three watched over younger babies at night due to England’s population explosion.²⁶ Besant concluded that a verdict against her and Bradlaugh would mean “it will not be safe for medical men, or for political economists, to discuss the question of population at all.”²⁷ Sir Hardinge Gifford, arguing for the prosecution, observed that Knowlton’s pamphlet was “a dirty, filthy book”²⁸ and commented that “no decently educated English husband would allow even his wife to have it.”²⁹

The trial lasted five days in all;³⁰ the jury returned a verdict that the pamphlet was “calculated to deprave public morals”³¹ but nonetheless acquitted the defendants of any corrupt motive in publishing it.³² The judge demanded of Besant and Bradlaugh that they refrain from publishing the book, but the two refused.³³ In response, the judge sentenced both to six months in prison and heavy

18. CHANDRASEKHAR, *supra* note 13, at 24 (internal quotation marks omitted); *see also* notes 309–14 and accompanying text.

19. *Id.* at 25.

20. *Id.* at 26.

21. *Id.* at 36. Besant and Bradlaugh were so surprised that they were not arrested within a few days of first selling the pamphlet that they “felt constrained to inquire why the police had not arrived to take them.” ROGER MANVELL, *THE TRIAL OF ANNIE BESANT* 48 (Horizon Press 1976).

22. MANVELL, *supra* note 21, at 52.

23. *Id.* at 74.

24. *Id.* at 79.

25. *Id.* at 84.

26. *See id.* at 98 (discussing what Annie Besant referred to as the “baby-farming” problem).

27. MANVELL, *supra* note 21, at 93.

28. CHANDRASEKHAR, *supra* note 13, at 39.

29. *Id.*

30. *Id.* at 38.

31. *Id.* at 40.

32. *Id.*

33. CHANDRASEKHAR, *supra* note 13, at 40.

finer.³⁴ The trial gave Knowlton's work enormous publicity,³⁵ and Besant went on to publish more controversial material³⁶ before her death in 1933.³⁷

B. An Uncommonly Silly Law

The debate over contraception and eventually abortion made its way to the Supreme Court in the mid-twentieth century. Although students and scholars commonly refer to *Griswold v. Connecticut*³⁸ as the first case establishing a constitutional right to privacy, the decision in that case was not handed down without some prior foundation. In *Poe v. Ullman*,³⁹ Pauline Poe⁴⁰ had given birth to three children with congenital defects who all died shortly after birth, and her doctor offered contraceptive options to prevent the psychological pain of becoming pregnant and losing another child.⁴¹ Poe sued Ullman, the State's Attorney, asking for a declaratory judgment that Connecticut's statute forbidding the use of contraceptive devices was unconstitutional.⁴² Ullman advanced a demurrer, pointing out that the statutes had been construed and sustained by the Supreme Court of Errors of Connecticut. The court granted Ullman's demurrer, securing Ullman's victory in the trial court.⁴³ Poe appealed,⁴⁴ and the Supreme Court of the United States noted probable jurisdiction.⁴⁵ Justice Frankfurter, speaking for a majority of the Supreme Court, declined for reasons of standing to reach the merits of Poe's claim.⁴⁶ The Court determined that the threat of criminal prosecution did not suffice to create an injury in fact that would confer standing because the mere existence of a criminal statute, especially one not enforced for the previous eighty years, did not compel the Court to decide the case.⁴⁷

Although the Court did not decide the constitutionality of the provision in *Poe*, Justice Douglas wrote a vigorous dissent that foreshadowed the statute's eventual invalidation and the reasons for that nullification. He pointed out that the law was not a dead letter and said that the Connecticut legislature had reenacted the law outlawing contraceptive use as part of general statutory revisions since 1940.⁴⁸ Further, he said that because the statute made the use of contraceptives a crime, and not merely their sale or manufacture, the statute invaded the privacy of the

34. *Id.* The sentence was later quashed on a technical ground. *Id.* at 40–41.

35. *Id.* at 45.

36. See MANVELL, *supra* note 21, at 157 (noting Besant's later pamphlet, *Is the Bible Indictable?*, which questioned whether the Bible came within the definition of obscene literature).

37. MANVELL, *supra* note 21, at 180.

38. 381 U.S. 479 (1965).

39. 367 U.S. 497 (1961).

40. This name is a pseudonym. *Id.* at 498 n.1.

41. *Id.* at 499.

42. *Id.* at 499–500.

43. *Id.* at 500.

44. *Poe v. Ullman*, 362 U.S. 987 (1960).

45. *Poe*, 367 U.S. at 501.

46. *Id.* at 501.

47. *Id.*

48. *Poe*, 367 U.S. at 512 (Douglas, J., dissenting).

marital home.⁴⁹ Justice Douglas concluded that a right of privacy should be recognized as emanating from “the totality of the constitutional scheme under which we live.”⁵⁰

Justice Harlan also dissented in *Poe*, criticizing the majority for “do[ing] violence to established concepts of ‘justiciability’”⁵¹ and leaving *Poe* “under the threat of unconstitutional prosecution.”⁵² Justice Harlan said that the cause of action was ripe because the absence of a prosecution was not enough to make the case too remote for adjudication.⁵³ Further, Justice Harlan pointed out that *Poe*’s case was not “feigned, hypothetical, friendly, or colorable”⁵⁴ and that it was unfair to characterize the plaintiff as one not deterred by the threat of prosecution.⁵⁵ After discussing these standing issues, Justice Harlan analyzed the Connecticut law under the Due Process Clause of the Fourteenth Amendment. He began by acknowledging that the concern for marital privacy that he invoked could not be found from explicit constitutional language⁵⁶ and that the history of the Fourteenth Amendment was also unavailing.⁵⁷ Justice Harlan said, however, that because

[A]n identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government . . . due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions [of the text of the Fourteenth Amendment].⁵⁸

Further, Justice Harlan said that although due process could not be reduced to any particular formula, the Court had consistently sought to strike a balance between the liberty of the individual and the demands of society.⁵⁹ The balance continued to evolve, Justice Harlan argued, and the scope of liberty could not be found in or limited to “the precise terms of the specific guarantees elsewhere provided in the Constitution.”⁶⁰ Therefore, every new claim for constitutional protection had to be considered in the context of constitutional purposes “as they have been rationally perceived and historically developed.”⁶¹ Applying this reasoning, Justice Harlan said that Connecticut’s law regulated the area of sexual morality, an area which had “little or no direct impact on others.”⁶² Further, he said, the Connecticut

49. *Id.* at 520–21.

50. *Id.* at 521.

51. *Id.* at 522–23 (Harlan, J., dissenting).

52. *Id.* at 523.

53. *Id.* at 528.

54. *Id.*

55. *Id.* at 529.

56. *Id.* at 539 (Harlan, J., dissenting).

57. *Id.* at 540.

58. *Id.* at 542.

59. *Id.*

60. *Id.* at 543.

61. *Id.* at 544.

62. *Id.* at 546 (Harlan, J., dissenting).

statute affected “the privacy of the home in its most basic sense.”⁶³ Justice Harlan then said that the privacy interest embodied in the Fourth Amendment’s ban on unreasonable searches and seizures was part of the ordered liberty assured against state action by the Fourteenth Amendment.⁶⁴ By analogy, Justice Harlan concluded, the Court’s decisions protected the privacy of the home against “all unreasonable intrusion of whatever character.”⁶⁵ He concluded his dissent by noting that the Connecticut statute was unique from many others in that it made the use of contraceptives, and not their sale or manufacture, a crime.⁶⁶

Four years later, Estelle Griswold⁶⁷ was convicted as an accessory to the use of a contraceptive device, the same Connecticut law at issue in *Poe*.⁶⁸ After the appellate and supreme courts of that state affirmed the judgment against her,⁶⁹ Griswold sought certiorari, claiming a violation of the Due Process Clause of the Fourteenth Amendment,⁷⁰ and the Supreme Court granted Griswold’s petition.⁷¹ The Court overturned her conviction,⁷² but the decision to do so generated three concurring opinions and two dissenting opinions, leaving open questions regarding the status of one’s right to personal and marital privacy.

Justice Douglas, speaking for the majority in *Griswold*, began by acknowledging that the Court was “met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment.”⁷³ He then said that “specific guarantees in the Bill of Rights have penumbras,⁷⁴ formed by emanations from those guarantees that help give them life and substance.”⁷⁵ He cited prior opinions concerning penumbral rights of the First, Third, Fourth, Fifth, and Ninth Amendments.⁷⁶ Justice Douglas pointed out that in forbidding the use of contraceptives, rather than regulating their manufacture or sale, Connecticut sought to achieve its goal by means having a maximum destructive impact upon

63. *Id.* at 548.

64. *Id.* at 549.

65. *Id.* at 550.

66. *Id.* at 554.

67. Estelle Griswold was the executive director of the Planned Parenthood League of Connecticut. *Griswold v. Conn.*, 381 U.S. 470, 480 (1965). Her codefendant, Dr. C. Lee Huxton, was the New Haven Planned Parenthood clinic’s co-founder and a professor at the Yale School of Medicine. Wikipedia, *Griswold v. Connecticut*, http://en.wikipedia.org/wiki/Griswold_v._Connecticut (last visited Sept. 27, 2006).

68. *Griswold*, 381 U.S. at 480.

69. *Id.*

70. *Id.* at 481.

71. *Id.*

72. *Id.* at 486.

73. *Id.* at 481.

74. A penumbra is “a surrounding area or periphery of uncertain extent. In constitutional law, the Supreme Court has ruled that the specific guarantees in the Bill of Rights have penumbras containing implied rights, esp[ecially] the right of privacy.” BLACK’S LAW DICTIONARY 1170–71 (8th ed. 2004).

75. *Griswold*, 381 U.S. at 484.

76. *See id.* at 482–85.

marriage as a private relationship.⁷⁷ The Court overturned Griswold's conviction and concluded that the statute "concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees,"⁷⁸ but did not rest its holding on any single provision of the Constitution.

Justice Goldberg, joined by Chief Justice Warren and Justice Brennan,⁷⁹ joined Justice Douglas's majority opinion but added different reasoning to the majority's privacy analysis. The concurring justices stated that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."⁸⁰ Rather, they said, the text and language of the Ninth Amendment⁸¹ protects additional fundamental rights from government invasion, rights that were not mentioned in the first eight constitutional amendments.⁸² Justice Goldberg did not believe that the use of this rarely-invoked constitutional provision⁸³ would create an independent source of rights and therefore denied that the Court would exploit his reasoning in *Griswold* to arrogate enormous power to itself.⁸⁴ Instead, Justice Goldberg, using language previously employed by Justice Sutherland, laid out a standard to determine whether a right was one deeply rooted in history or tradition and thus protected under the Ninth Amendment: "whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."⁸⁵ Justice Goldberg concluded his analysis by stating that the right of privacy in marriage was a fundamental and basic right protected by the Ninth Amendment.⁸⁶

Justice Harlan and Justice White offered separate concurring opinions. For Justice Harlan, the majority's analysis of the privacy right was overly broad because the Due Process Clause of the Fourteenth Amendment stood "on its own bottom."⁸⁷ The proper constitutional inquiry was "whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values implicit in the concept of ordered liberty,"⁸⁸ and the Court did not need to look further than the Fourteenth Amendment to determine that, in this case, the law violated the right of privacy, a "basic value[]

77. *Id.* at 485.

78. *Id.*

79. *Id.* at 486 (Goldberg, J., concurring).

80. *Id.*

81. The Ninth Amendment provides that, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

82. *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring).

83. See generally BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY* (1955).

84. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

85. *Id.* at 493 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

86. *Id.* at 499.

87. *Id.* at 500 (Harlan, J., concurring).

88. *Id.*

that underlie[s] our society.”⁸⁹ Justice White, on the other hand, stated that the Connecticut statute would violate the Fourteenth Amendment if it was not reasonably necessary for the effectuation of a legitimate and substantial state interest or arbitrary and capricious in its application.⁹⁰ According to Justice White, Connecticut’s ban on the use of contraceptives could not further the state’s goal of preventing illicit sexual relationships, and the law should be invalidated under the Due Process Clause for that reason.⁹¹ He also pointed out that the state’s policy denied those Connecticut citizens who did not have enough money to attend private counseling the right to make an informed decision about modern methods of birth control.⁹²

Justice Black and Justice Stewart dissented from the judgment of the Court, and each supported the other in his separate dissent. Justice Black stated that although the law was “every bit as offensive”⁹³ to him as it was to the justices in the majority, the statute withstood constitutional scrutiny. He did not agree with the majority’s contention that a right of privacy could be found in the Constitution, the Bill of Rights, or the penumbras of the first ten constitutional amendments.⁹⁴ Justice Black feared that the reasoning from those in the majority, whether through the Due Process Clause or through the Ninth Amendment, would “claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive,”⁹⁵ a judgment that the Constitution reserves for the legislative branch.⁹⁶ Justice Black concluded that Connecticut’s law did not offend any provision of the federal Constitution.⁹⁷

Justice Stewart also dissented, stating that Connecticut’s “uncommonly silly law”⁹⁸ was unenforceable as a practical matter but nonetheless constitutionally valid.⁹⁹ He observed that the Court referred to six constitutional amendments in its opinion: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth.¹⁰⁰ Of these six, however, the Court did not indicate which of the Amendments were infringed by the Connecticut law,¹⁰¹ and Justice Stewart could not find a violation of any of the provisions in question. He also expressly disclaimed a general right of privacy in the Bill of Rights, the remainder of the Constitution, and any prior decisions of the Supreme Court.¹⁰²

The opinions in *Griswold* did not answer all questions concerning

89. *Id.* at 501 (Harlan, J., concurring).

90. *See id.* at 504 (White, J., concurring).

91. *Id.* at 505.

92. *Id.* at 503.

93. *Id.* at 507 (Black, J., dissenting).

94. *See Griswold*, 381 U.S. at 508 (Black, J., dissenting).

95. *Id.* at 511.

96. *See id.* at 521 (discussing the separation of governmental powers).

97. *Id.* at 527.

98. *Id.* (Stewart, J., dissenting).

99. *Id.* at 527 (Stewart, J., dissenting).

100. *Id.*

101. *Id.* at 528.

102. *Id.* at 530.

contraception. Seven years after the decision, the Court handed down another decision invalidating a contraception law, this time in Massachusetts. In *Eisenstadt v. Baird*,¹⁰³ William Baird was arrested, convicted, and jailed after delivering a lecture at Boston University during which he exhibited contraceptives in direct violation of a Massachusetts statute¹⁰⁴ and handed out a package of vaginal contraceptive foam to a woman in attendance.¹⁰⁵ The law barred the distribution of contraceptives except by a qualified physician or pharmacist and limited the distribution or prescription of contraceptives to married couples.¹⁰⁶ Baird appealed his conviction under the statute to the Massachusetts Supreme Judicial Court, which set aside the conviction for exhibiting the contraceptives, but upheld the conviction for distributing the foam.¹⁰⁷ Baird filed a petition for a federal writ of habeas corpus in the District Court for the District of Massachusetts, which was dismissed.¹⁰⁸ The Court of Appeals for the First Circuit reversed the dismissal with an order to discharge Baird from prison,¹⁰⁹ and the Sheriff of Suffolk County, which includes the city of Boston, appealed to the Supreme Court from the order demanding Baird's release.¹¹⁰

The Supreme Court, speaking through Justice Brennan, invalidated the law under the Equal Protection Clause of the Fourteenth Amendment.¹¹¹ The Court first determined that William Baird could sue on behalf of unmarried individuals who were denied contraceptives, noting that he "plainly ha[d] an adequate incentive" to do so.¹¹² Justice Brennan then analyzed the potential reasons behind the state legislature's decision to enact the law and decided that the deterrence of premarital sex could not reasonably be regarded as the purpose of the statute's distinction between single individuals and married couples,¹¹³ in part because Massachusetts did not "attempt to deter married persons from engaging in illicit sexual relations with unmarried persons."¹¹⁴ The Court then extended its *Griswold* ruling to unmarried people, saying that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."¹¹⁵ Justice Brennan acknowledged the difference between the statute at issue in *Griswold* and the law addressed in *Eisenstadt* with the following:

It is true that in *Griswold* the right of privacy in question inhered in the

103. 405 U.S. 438 (1972).

104. MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1920). The statute provides that "whoever . . . exhibits . . . an instrument or other article . . . for the prevention of conception . . . shall be punished by imprisonment . . ." *Id.*

105. *Eisenstadt*, 405 U.S. at 440.

106. *See id.* at 440–41.

107. *Id.* at 440.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 443.

112. *Id.* at 446.

113. *Id.* at 448.

114. *Id.* at 449.

115. *Id.* at 453.

marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹¹⁶

The Court concluded that “nothing opens the door to arbitrary action so effectively as to allow [state] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected”¹¹⁷ and held that the Massachusetts statute violated the Equal Protection Clause.¹¹⁸ Given that *Eisenstadt* expands the privacy penumbra from married couples to individuals, it is remarkable that the case has seen little independent scholarship compared to *Griswold* and *Roe*.¹¹⁹

C. From Contraception to Abortion: *Roe* and *Doe*

In the term following the *Eisenstadt* decision, the Supreme Court decided *Roe v. Wade*.¹²⁰ The Supreme Court first heard oral argument in *Roe* during the same term in which *Eisenstadt* was heard and decided.¹²¹ *Roe* was heard for a second time in October of 1972.¹²² The Texas abortion statute at issue was typical of many states at the time,¹²³ in that the statute made it a crime to procure an abortion or to attempt an abortion, except for the purpose of saving the life of the mother.¹²⁴ Jane Roe,¹²⁵ a pregnant woman, challenged the statute as unconstitutional on its face and sought both a declaratory judgment to that effect and an injunction against

116. *Id.*

117. *Id.* at 454 (quoting *Ry. Express Agency v. N.Y.*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

118. *Id.* at 454–55.

119. A few scholars do recognize the *Eisenstadt* decision’s importance to the debate over contraception, abortion, and privacy generally. See generally JOHN T. NOONAN, JR., *A PRIVATE CHOICE* (1979); see also Jim Chen, *Midnight in the Courtroom of Good and Evil*, 16 CONST. COMMENT. 499, 500 (1999) (stating that “*Eisenstadt*, truth be told, could have and arguably should have confined *Griswold v. Connecticut* to contraceptive use by married couples” and that the case “thus reimagined would have dictated the opposite outcome in *Roe*”) (internal citation omitted); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1521 (1994) (arguing that the *Eisenstadt* decision is “singularly important” to changes in the American family); Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman’s Womb is Not a Man’s Castle*, 55 BROOK. L. REV. 1359, 1394 n.173 (1990) (defending *Eisenstadt* as an important application of *Griswold* for giving more rights to individuals).

120. 410 U.S. 113 (1973).

121. *Id.* at 113 (argued for the first time on December 13, 1971); *Eisenstadt*, 405 U.S. at 438 (argued on November 17 and 18, 1971).

122. *Id.*

123. *Id.* at 116.

124. *Id.* at 117–18.

125. Jane Roe is a pseudonym. *Id.* at 120 n.4. Roe’s real name is Norma McCorvey.

its enforcement.¹²⁶ She alleged that the Texas statute violated the right to personal privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.¹²⁷ The federal district court for the Northern District of Texas found that the “essence of the interest sought to be protected here [was] the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals”¹²⁸ and held that the statutes constituted an overbroad infringement of her Ninth Amendment rights.¹²⁹ The court, however, denied injunctive relief¹³⁰ because the Texas abortion statutes did not involve freedom of expression and because Roe did not allege that the statute had been deliberately applied to discourage a protected activity, two areas of the law in which the federal courts’ reluctance to interfere in state criminal procedure did not apply.¹³¹ Roe appealed from the denial of the injunction.¹³²

On appeal, the Supreme Court began its analysis with an overview of ancient Greek and Roman medicinal practices and the history of abortion in the United States,¹³³ acknowledging that “the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage.”¹³⁴ Speaking for the majority, Justice Blackmun said that the ancient Greeks and Romans accorded little protection to the unborn,¹³⁵ in spite of the existence of the Hippocratic Oath, which explicitly prohibited abortion.¹³⁶ The Court referred to a theory that the Oath originated in a group representing only a small segment of Greek opinion¹³⁷ and therefore should be accepted in that limited historical context. At common law, abortion prior to “quickening”¹³⁸ was not considered a criminal offense,¹³⁹ a position that American courts adopted.¹⁴⁰ Justice Blackmun then reviewed the opinions of early legal scholars of the common law, including Bracton, Blackstone, and Coke,¹⁴¹ and found that of the three, only Bracton believed abortion to

126. *Id.* at 120.

127. *Id.*

128. *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).

129. *Id.*

130. *Id.* at 1225.

131. *Id.* at 1224.

132. *Roe v. Wade*, 410 U.S. 113, 122 (1973).

133. *Id.* at 129–40.

134. *Id.* at 129.

135. *Id.* at 130.

136. Hippocrates (460–377 B.C.) composed the famous oath that bears his name. It provides, in part, “I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion.” See BERNARD S. MALLOY, M.D., *THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS* 291–92 (2d ed. 1951).

137. *Roe*, 410 U.S. at 132.

138. Quickening is the first motion the mother feels from the fetus in the womb, typically around the middle of the pregnancy. See *BLACK’S LAW DICTIONARY* 1282 (8th ed. 2004).

139. *Roe*, 410 U.S. at 132.

140. See *id.* at 134.

141. *Id.* at 134–35.

constitute homicide.¹⁴² The opinion went on to discuss the earliest American abortion statutes, the first of which was enacted in Connecticut in 1821.¹⁴³ Abortion prior to quickening was first made a crime in 1860, also in Connecticut.¹⁴⁴ After the Civil War, legislation began to replace the common law,¹⁴⁵ and over time the quickening distinction disappeared.¹⁴⁶ By the end of the 1950s, abortion was banned in a large majority of states in all cases except to save the life of the mother.¹⁴⁷ The Court thus concluded that “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.”¹⁴⁸

Justice Blackmun’s majority opinion then proceeded to say, as Justice Goldberg’s concurrence had in *Griswold* before it, that the “Constitution does not explicitly mention any right of privacy.”¹⁴⁹ The opinion noted that a series of decisions “recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”¹⁵⁰ The Court observed that these situations included rights secured in the First Amendment,¹⁵¹ the Fourth and Fifth Amendments,¹⁵² the Ninth Amendment,¹⁵³ the penumbras of the Bill of Rights generally,¹⁵⁴ and the “first section of the Fourteenth Amendment.”¹⁵⁵ Following this analysis, the Court went on to say that:

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.¹⁵⁶

Justice Blackmun then explained the legitimate interests of the state and the pregnant woman in the abortion decision,¹⁵⁷ concluding that “the right of personal

142. *Id.*

143. *Id.* at 138.

144. *Id.*

145. *Id.* at 139.

146. *Id.*

147. *Id.*

148. *Id.* at 140.

149. *Id.* at 152.

150. *Id.*

151. *Stanley v. Ga.*, 394 U.S. 557, 564 (1969) (prohibiting a state from making the possession of obscene material in one’s own home a crime).

152. *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) (limiting law enforcement searches in traffic stops).

153. *Griswold v. Conn.*, 381 U.S. at 486 (Goldberg, J., concurring) (striking down a law banning use of contraceptives between married couples).

154. *Id.* at 484–85.

155. *Roe*, 410 U.S. at 152 (citing *Meyer v. Neb.*, 262 U.S. 390, 399 (1923)) (striking down a state law demanding that all school subjects be taught in English).

156. *Id.* at 153.

157. Justice Blackmun’s opinion notes that “additional offspring, may force upon the woman

privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation.”¹⁵⁸ The Court conceded that the State may regulate abortions so that they are performed “under circumstances that insure maximum safety for the patient.”¹⁵⁹ According to the Court, the State’s interest in protecting potential human life could not save the statute because a person, as defined by the Fourteenth Amendment, does not include an unborn child.¹⁶⁰

The Court then set up a trimester framework to determine the appropriate points at which to balance the interests of the woman seeking an abortion and of the state in protecting prenatal life and the health of the pregnant woman. The majority opinion noted that the state’s interest “grows in substantiality as the woman approaches term and, at a point during pregnancy, each [interest] becomes compelling.”¹⁶¹ The framework that the Court established provided that during the first trimester, the abortion decision is left to the “medical judgment of the pregnant woman’s attending physician.”¹⁶² From the end of the first trimester until the point of viability,¹⁶³ the state may regulate abortion in ways that are “reasonably related to maternal health.”¹⁶⁴ Finally, the Court held that after viability the state may “regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹⁶⁵ The Court’s holding splits the interests of the woman and the state into three relatively concrete, time-determined categories and resembles a statutory construction.¹⁶⁶ Justice Blackmun then concluded that “the Texas abortion statutes, as a unit, must fall.”¹⁶⁷

The same day that the Supreme Court decided *Roe v. Wade*, it also handed down its opinion in *Doe v. Bolton*.¹⁶⁸ Mary Doe¹⁶⁹ sued for declaratory relief and an injunction against the enforcement of Georgia’s abortion statute,¹⁷⁰ which was modeled on the American Law Institute’s Model Penal Code.¹⁷¹ In her complaint,

a distressful life and future.” *Id.* at 153. At the same time, the state’s interest in protecting life and health and ensuring proper procedures for that purpose should be considered. *See id.* at 150.

158. *Id.* at 154.

159. *Id.* at 150.

160. *Id.* at 158.

161. *Id.* at 162–63 (internal quotation marks omitted).

162. *Id.* at 164.

163. A child is viable if it is “capable of living, esp[ecially] outside the womb.” BLACK’S LAW DICTIONARY 1597 (8th ed. 2004).

164. *Roe*, 410 U.S. at 164.

165. *Id.* at 165. The emphasis on viability surprised one scholar, who noted that the “modern trend . . . has been to reject the viability distinction.” David W. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 241 (1969).

166. *See* Paulsen, *supra* note 11, at 1008; *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926 (1973).

167. *Roe*, 410 U.S. at 166.

168. 410 U.S. 179 (1973).

169. This name, like Jane Roe and Pauline Poe, is a pseudonym. *Doe*, 410 U.S. at 184 n.6.

170. *Id.* at 185.

171. *Id.* at 182.

Mary Doe alleged that she was an impoverished former mental patient who had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she carried.¹⁷² She contended that the state's abortion statute violated her rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution, as well as her right to privacy and liberty in matters relating to childbearing.¹⁷³ The particular provisions challenged included the limitation of abortions to specific situations enumerated in the statute, a rape certification requirement, the requirement that abortions be performed in accredited hospitals, the requirement of approval by a hospital abortion committee, the need for the opinion of two independent physicians, and the requirement that the woman be a Georgia resident.¹⁷⁴ In the district court, a three-judge panel granted declaratory relief and struck down the limitation of abortion to the three situations enumerated in the statute¹⁷⁵ and invalidated the rape certification requirement, but permitted the remainder of the statute to stand and denied the request for an injunction.¹⁷⁶

Mary Doe took a direct appeal to the Supreme Court.¹⁷⁷ Justice Blackmun wrote the majority opinion reversing the denial of the injunction, saying that the "hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment."¹⁷⁸ The Court referred to its decision in *Roe* for much of the background on the abortion right¹⁷⁹ and proceeded to strike down four statutory provisions. First, the Court held that a hospitalization requirement must fall because the state had not proven that only the full resources of a licensed hospital would satisfy the health concerns surrounding the abortion procedure and because the law failed to exclude the first trimester of pregnancy from its scope.¹⁸⁰ Second, the Court invalidated the requirement of approval from an abortion committee before the procedure was to take place because imposing this requirement substantially limited a woman's right to receive medical care in accordance with her physician's best judgment.¹⁸¹ Third, the majority opinion struck down the requirement that two doctors concur in the decision of the woman's physician that an abortion was in her best interest.¹⁸² Justice Blackmun noted that the state had cited "no other voluntary medical or

172. *Id.* at 185.

173. *Doe*, 410 U.S. at 185–86.

174. *Id.* at 202–05.

175. *Id.* at 186.

176. *Id.* at 186–87. The district court did not expressly acknowledge which constitutional provisions, if any, that the statute violated in addition to the right of privacy discussed in *Griswold*. See *Doe v. Bolton*, 319 F. Supp. 1048, 1054–55 (N.D. Ga. 1970).

177. *Doe*, 410 U.S. at 187.

178. *Id.* at 201.

179. See *supra* text accompanying notes 120–167. The Court also took care of jurisdictional issues such as standing with references to the *Roe* opinion. See *Doe*, 410 U.S. at 187–88.

180. *Doe*, 410 U.S. at 195.

181. *Id.* at 197.

182. *Id.* at 199.

surgical procedure for which Georgia requires confirmation by two other physicians” to the Court.¹⁸³ Fourth, the Court stated that the residency requirement in the statute could not withstand scrutiny because it was “not based on any policy of preserving state-supported facilities for Georgia residents” in its application to private as well as public hospitals.¹⁸⁴ Additionally, the Court stated that upholding this requirement meant “that a State could limit to its own residents the general medical care available within its borders.”¹⁸⁵ Consequently, the Supreme Court modified the district court’s judgment on the basis of the Fourteenth Amendment.¹⁸⁶ The Court did, however, retain the district court’s broad definition of “health,” which it said could include any combination of mental, physical, emotional, and psychological factors and that these factors should leave the physician the “room he needs to make his best medical judgment.”¹⁸⁷

The *Roe* and *Doe* decisions initiated political and social reaction, but they also created an important new topic for scholars in the academic community to debate. In particular, Professor John Hart Ely criticized the Court’s decision in *Roe* in a 1973 article.¹⁸⁸ Although he said that he would vote in a legislative capacity for a statute like the one the Court outlined in *Roe*,¹⁸⁹ Ely nonetheless said that *Roe* was “a very bad decision.”¹⁹⁰ He noted that the Court ordinarily did not second-guess legislative judgments when a constitutional provision did not mandate special protection for one of the values in conflict over the other.¹⁹¹ The Court could not simply conclude that personal privacy was the beginning and the end of the issue, according to Ely, because abortion affects more than the woman making the choice.¹⁹² He further stated that even if one does not consider a fetus to be a child, “it is certainly not nothing,”¹⁹³ and the Supreme Court’s response to the argument that more than the woman’s interest is involved in the abortion decision was simply inadequate.¹⁹⁴ When the Court balanced interests in the past, it had been the Court’s policy to side with a group that is litigating to secure more rights than it can obtain politically, such as racial minorities;¹⁹⁵ in the abortion context, the group seeking to secure rights would be the unborn.¹⁹⁶ In so stating, Ely referred to the famous footnote from *United States v. Carolene Products Company*,¹⁹⁷

183. *Id.*

184. *Id.* at 200.

185. *Id.*

186. *Id.* at 201.

187. *Id.* at 192.

188. See generally Ely, *supra* note 166.

189. *Id.* at 926.

190. *Id.* at 947.

191. *Id.* at 923.

192. *Id.* at 924.

193. Ely, *supra* note 166, at 931.

194. *Id.* at 924.

195. *Id.* at 934.

196. As Ely himself states, “no fetuses sit in our legislature.” *Id.* at 933 (emphasis in original).

197. 304 U.S. 144 (1938).

where Justice Stone implied that the protection of certain “discrete and insular minorities”¹⁹⁸ could require a more searching judicial inquiry than would be otherwise necessary.¹⁹⁹ The question of whether the Court should lend special support to the unborn as a discrete and insular minority would not even be at issue if the Court had not interfered with “a question the Constitution has not made the Court’s business,”²⁰⁰ Ely said. Ely was not disenchanted with the *Roe* Court because he disagreed with the result, but rather because “this super-protected right [to an abortion] is not inferable from the language of the Constitution”²⁰¹ and he thus believed that the decision was bad “because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”²⁰²

Other scholars, such as Donald H. Regan, fully supported the Supreme Court’s involvement and decision in *Roe* but offered different reasoning.²⁰³ Regan viewed abortion legalization through the lens of the Equal Protection Clause of the Fourteenth Amendment,²⁰⁴ but did not take the approach that abortion regulations treated pregnant women in a way different from another class of individuals.²⁰⁵ Rather, Regan saw an unexpected or unwanted pregnancy as a problem in samaritanism law.²⁰⁶ Regan gave a history of the law of samaritanism²⁰⁷ in the United States²⁰⁸ and concluded that American law generally does not require an individual to volunteer aid to another individual who is in danger or in need of assistance.²⁰⁹ According to Regan, abortion regulations put a greater burden on pregnant women than any other “good Samaritan” laws.²¹⁰ As a result, Regan says that the burden, combined with the fact that these statutes affect women as a class,²¹¹ mandates that abortion regulations be struck down.²¹² Regan offers a

198. *Id.* at 153 n.4.

199. *Id.*

200. Ely, *supra* note 166, at 943.

201. *Id.* at 935.

202. *Id.* at 947 (emphasis in original).

203. See generally Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1978) (suggesting an approach to abortion legalization using the Equal Protection Clause instead of the Due Process Clause). See also Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

204. See U.S. CONST. amend. XIV (providing that “No State shall . . . deny to any person within its jurisdiction the equal protection of its laws”).

205. Regan, *supra* note 203, at 1570.

206. *Id.* at 1569. Regan defines the law of samaritanism as the law concerning obligations imposed on individuals to give aid to others. *Id.*

207. Regan refers to the Biblical parable of the Good Samaritan. See *Luke* 10:25–37 (King James) (describing how a member of a despised group in society took affirmative steps to help a stranger in need when others failed to do so).

208. See Regan, *supra* note 203, at 1570–79.

209. *Id.* at 1569.

210. See *id.* at 1572 (stating that “[t]here is *no* other potential samaritan on whom burdens are imposed which are as extensive and as physically invasive as the burdens of pregnancy and childbirth”).

211. See *id.* at 1631 (acknowledging that the persons “singled out for specially burdensome treatment” by abortion statutes “given human physiology, [must] be female”).

212. *Id.* at 1632 (urging heightened scrutiny of abortion regulations under the Equal

different approach to the Supreme Court's chosen path, but it has never been adopted.²¹³

D. After *Roe* and *Doe*

Following *Roe* and *Doe*, the Court further limited the power of the states to regulate abortion. In 1983, the Court invalidated an Ohio abortion regulation in *City of Akron v. Akron Center for Reproductive Health*.²¹⁴ Corporations that operated abortion clinics and a physician at one such clinic challenged in federal district court the city's regulations that required all second-trimester abortions to be performed in hospitals, parental consent to an unmarried minor's abortion, informed consent of the patient, a twenty-four hour waiting period before abortions, and the disposal of fetal remains in a respectful manner.²¹⁵ The district court invalidated the parental consent, informed consent, and disposal provisions while upholding the hospitalization requirement, the disclosure of particular risks of abortion, and the waiting period.²¹⁶ On appeal, the Sixth Circuit affirmed in part and reversed in part, upholding the hospitalization requirement while striking down the disclosure of abortion risks and the waiting period as unconstitutional.²¹⁷ The Supreme Court granted certiorari to both the abortion clinic and the city of Akron.²¹⁸

Speaking for the majority of the Court, Justice Powell's opinion noted that the *Roe* Court had recognized two state interests, the "legitimate interest in protecting the potentiality of human life" and a "legitimate concern with the health of women who undergo abortions."²¹⁹ For the hospitalization requirement, the Court reaffirmed "that a State's interest in health regulation becomes compelling at approximately the end of the first trimester,"²²⁰ but insisted that "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered."²²¹ Justice Powell said that the hospitalization requirement placed "a significant obstacle in the path of women seeking an abortion,"²²² because of the added financial

Protection Clause because women "have suffered from a history of discrimination in our society").

213. Regan himself is unsure that his analysis is an "adequate constitutional justification of the result in *Roe*." Regan, *supra* note 203, at 1646. His main dissatisfaction with his the Equal Protection argument is that abortion must be treated as an omission, not an act, in order for his argument to carry the day. *Id.*

214. 462 U.S. 416 (1983).

215. *Id.* at 422-25.

216. *Id.* at 425.

217. *Id.* at 426.

218. *Id.*

219. *Id.* at 428.

220. *Id.* at 434.

221. *Id.* The Court concluded that the second trimester hospitalization requirement "places a significant obstacle in the path of women seeking an abortion." *Id.* Although the state has a legitimate interest in protecting the health of the mother, requirements must be narrowly tailored to achieve this interest. *See id.*

222. *Id.* at 434.

burden.²²³ The Court therefore reversed the Sixth Circuit decision upholding the hospitalization requirement but affirmed the decision to strike down the parental consent provision, the informed consent provision, the requirement for a waiting period, and the requirement for respectful disposal of fetal remains.²²⁴

The Court affirmed the invalidation of the remaining statutory requirements in *Akron* for several reasons. Justice Powell did not strike down the parental notification provision because notification in the case of minors is invalid under the Constitution or *Roe*,²²⁵ but rather because the Akron ordinance did not provide for a judicial alternative to parental consent.²²⁶ Additionally, the Court struck down the ordinance's informed consent provision, which mandated that no abortion could be performed before the woman received information from her physician of the risks attendant to the procedure and the current status of her pregnancy.²²⁷ Justice Powell said that a state does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion"²²⁸ and that the ordinance at issue was "designed not to inform the woman's consent but rather to persuade her to withhold it altogether,"²²⁹ an impermissible goal of any abortion statute.²³⁰ Next, the Court struck down the twenty-four hour waiting period provision because Akron could produce "no evidence suggesting that the abortion procedure [would] be performed more safely" with the introduction of a waiting period.²³¹ Therefore, Justice Powell said, the regulation was not reasonably related to any legitimate state interest in protecting the health of the woman and the provision could not withstand judicial scrutiny.²³² Finally, the Court invalidated the ordinance's requirement that fetal remains be disposed of in a "humane and sanitary manner"²³³ as unconstitutionally vague because the word "humane" could be construed in a number of ways.²³⁴ The statute carried criminal liability, thereby entitling the public to notice of what specific conduct it prohibited,²³⁵ so the Court concluded its opinion by striking down the disposal provision.²³⁶

The abortion right reached its apex when the Supreme Court decided

223. *Id.* at 434–35.

224. *Id.* at 426.

225. *See id.* at 439 (stating that in a prior case "a majority of the Court indicated that a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial").

226. *Id.* at 439–40.

227. *Id.* at 442.

228. *Id.* at 443.

229. *Id.* at 444.

230. *Id.* at 443–44.

231. *Id.* at 450.

232. *Id.*

233. *Id.* at 451.

234. *Id.*

235. *Id.*

236. *Id.* at 452.

*Thornburgh v. American College of Obstetricians and Gynecologists*²³⁷ in 1986. The statute in question was the Pennsylvania Abortion Control Act, which the Court invalidated by a 5-4 vote.²³⁸ The six provisions at issue were the informed consent provision, a printed materials provision requiring distribution of a form stating that there were agencies available to assist the mother in carrying the child to term, reporting requirements, the determination of viability, the degree of care required in post-viability abortions, and a requirement that a second physician be present if the point of viability may have passed.²³⁹ Justice Blackmun, the author of *Roe* and *Doe*, also wrote the majority opinion in *Thornburgh*.²⁴⁰ The opinion invalidated all of the statutory provisions, basing much of its analysis on its earlier holding in the *Akron* case.²⁴¹ The Court concluded its opinion striking the challenged statutory provisions by stating that a “woman’s right to make th[e] choice [whether to have an abortion] freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”²⁴² Justice Blackmun acknowledged that “controversy over the meaning of our Nation’s most majestic guarantees frequently has been turbulent.”²⁴³ Four justices dissented, including Chief Justice Burger, who feared the Court “may have lured judges into ‘roaming at large in the constitutional field’”²⁴⁴ with its earlier rulings regarding “constitutional infirmities in state regulations of abortion.”²⁴⁵ The Chief Justice was concerned that the majority’s ruling meant a state could “not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks” of the procedure.²⁴⁶ Justice White, who dissented in *Roe*,²⁴⁷ wrote a separate dissent criticizing the Court for “engag[ing] not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.”²⁴⁸

The Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁴⁹ confirmed the Court’s chosen path in *Roe* but limited its

237. 476 U.S. 747 (1986).

238. *Id.* at 749.

239. *Id.* at 747–48.

240. *Id.* at 749.

241. *See id.* at 759–66, 772 (striking provisions concerning determination of fetal viability and informed consent through printed materials with specific references to *Akron*, 462 U.S. 416).

242. *Thornburgh*, 476 U.S. at 772.

243. *Id.* at 771.

244. *Id.* at 785 (Burger, C.J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (Harlan, J., concurring)).

245. *Thornburgh*, 476 U.S. at 785 (Burger, C.J., dissenting). It should be noted that Chief Justice Burger joined the Court’s original opinion in *Roe v. Wade*. *Roe v. Wade*, 410 U.S. 113, 115 (1973).

246. *Thornburgh*, 476 U.S. at 783. The Chief Justice further pointed out that doctors routinely give similar information to patients undergoing less hazardous procedures and risk malpractice lawsuits if they fail to do so. *Id.*

247. *Roe*, 410 U.S. at 115 (White, J., dissenting).

248. *Thornburgh*, 476 U.S. at 794 (White, J., dissenting).

249. 505 U.S. 833 (1992).

decisions in *Akron* and *Thornburgh*.²⁵⁰ Five abortion clinics and one physician challenged provisions of a Pennsylvania statute requiring the woman's informed consent before an abortion, requiring the distribution of information twenty-four hours before the procedure, requiring minors to obtain parental consent or a judicial bypass, and requiring spousal consent to an abortion if the pregnant woman is married.²⁵¹ The plaintiffs sought declaratory and injunctive relief, and the District Court for the Eastern District of Pennsylvania held all of the provisions facially unconstitutional.²⁵² The Court of Appeals for the Third Circuit affirmed in part and reversed in part, deciding that all of the regulations except for the spousal notification requirement passed scrutiny.²⁵³

Justice O'Connor's opinion for the Supreme Court²⁵⁴ famously opens, "Liberty finds no refuge in a jurisprudence of doubt."²⁵⁵ The Court reaffirmed *Roe* as a decision deriving from the Due Process Clause of the Fourteenth Amendment,²⁵⁶ stating that neither "the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."²⁵⁷ Justice O'Connor acknowledged that "[s]ome of us as individuals find abortion offensive to our most basic principles of morality,"²⁵⁸ but that the "destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."²⁵⁹ The plurality opinion then stated that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with

250. *Id.* at 870 (stating that the Court "must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn"). Specifically, the Court acknowledged that the two cases "go too far" in their prohibition of the dissemination of truthful information. *Id.* at 882.

251. *Id.* at 833. The statute exempts compliance with these requirements in the event of a medical emergency. *Id.*

252. *Id.* at 845.

253. *Id.*

254. The *Casey* decision consists of four separate opinions. Justice O'Connor delivered the opinion of the Court with respect to parts I–III (reaffirming the essential holding of *Roe*, describing the development of abortion jurisprudence since *Roe*, and determining that *stare decisis* demands the retention of *Roe*), V–A (upholding medical emergency exception as sufficiently broad), V–C (invalidating spousal notification requirement), and VI (conclusion). Justice Stevens and Justice Blackmun joined Justices O'Connor, Kennedy, and Souter to create a five-justice majority for these portions of the opinion. Parts IV, V–B, and V–D, which limited some post-*Roe* cases such as *Akron* and *Thornburgh*, received the support of those in favor of overturning *Roe* but did not result in their joining the O'Connor opinion. See generally *Casey*, 505 U.S. at 944–79 (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at 979–1002 (Scalia, J., concurring in part and dissenting in part). Both the Rehnquist and Scalia opinions, each receiving four votes, would have upheld the Pennsylvania statute in its entirety. *Id.*

255. *Casey*, 505 U.S. at 844 (majority opinion).

256. *Id.* at 846.

257. *Id.* at 848.

258. *Id.* at 850.

259. *Id.* at 852.

the force of *stare decisis*.”²⁶⁰ Justice O’Connor recognized that *Roe* was far from a unanimous statement of public opinion, but would not reexamine the decision because it “ha[d] in no sense proven ‘unworkable’”²⁶¹ and because “for two decades of economic and social developments”²⁶² afforded women the “ability to control their reproductive lives.”²⁶³

The *Casey* decision further noted that advances in medicine had negated some of *Roe*’s factual underpinnings.²⁶⁴ Therefore, Justice O’Connor’s plurality opinion upheld the central holding of *Roe* as “a rule of law and a component of liberty we cannot renounce,”²⁶⁵ but discarded the trimester framework that characterized *Roe*, *Doe*, and the decisions that followed those two cases.²⁶⁶ Justice O’Connor’s replacement standard provided that “[o]nly where state regulation imposes an undue burden on a woman’s ability to make [the abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”²⁶⁷ Justice O’Connor said that unless a regulation “has that effect on [a woman’s] right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”²⁶⁸ She then applied the undue burden standard to the statutory provisions at issue and determined that the information distribution requirement was constitutional, even if the material distributed concerning the consequences to the fetus have no direct relation to the woman’s health.²⁶⁹ Justice O’Connor also upheld the informed consent provision of the statute, in spite of the Court’s earlier holding in *Akron*,²⁷⁰ because there was no evidence that requiring a doctor to give the woman information prior to her consent to the abortion procedure would cause an undue burden to the woman in exercising her right of choice.²⁷¹ The opinion also stated that the *Akron* Court’s conclusion that the twenty-four hour waiting period had no substantial bearing on the woman’s health was “wrong,”²⁷² saying instead that “important decisions will be more informed and deliberate if they follow some period of reflection.”²⁷³ Next, the opinion turned to the spousal notification requirement and determined that it was “likely to prevent a significant number of

260. *Casey*, 505 U.S. at 853.

261. *Id.* at 855 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

262. *Casey*, 505 U.S. at 856.

263. *Id.*

264. *Id.* at 860 (noting that abortions can take place safely at a later point in pregnancy than was safe in 1973 and that the point of viability is earlier than that recognized in 1973).

265. *Id.* at 871.

266. *Id.* at 872. The plurality stated that a trimester framework “of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State’s permissible exercise of its powers.” *Id.*

267. *Id.* at 874.

268. *Id.* at 878.

269. *Id.* at 882.

270. *See supra* notes 214–35 and accompanying text.

271. *Casey*, 505 U.S. at 884–85.

272. *Id.* at 885.

273. *Id.*

women from obtaining an abortion.”²⁷⁴ Justice O’Connor said that “state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s”²⁷⁵ and that because “a husband has no enforceable right to require a wife to advise him before she exercises her personal choices,”²⁷⁶ the requirement could not stand without giving him unwarranted power over his wife. Finally, the Court reaffirmed its prior holdings concerning parental notification requirements; Justice O’Connor said that “a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.”²⁷⁷ Pennsylvania provided adequate procedures in its statute, and therefore the plurality upheld the notification provision.²⁷⁸ Justice O’Connor concluded the *Casey* opinion with a reminder of the Court’s “responsibility not to retreat from interpreting the full meaning of the covenant [of the Constitution] in light of all of [its] precedents.”²⁷⁹

The *Casey* opinion did not settle the abortion question because the case reflected a deep split in the Supreme Court. Few justices on either side of the abortion issue were satisfied with the joint opinion. For example, Justice Blackmun concurred in part and dissented in part. Although he believed the joint opinion to be “an act of personal courage and constitutional principle,”²⁸⁰ he said that he could not “remain on this Court forever,”²⁸¹ apparently fearing the end of abortion rights for women upon his death. On the other side of the spectrum, Chief Justice Rehnquist wrote an opinion joined by justices Scalia, White, and Thomas stating that *Roe* “can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”²⁸² The *Casey* opinion has been discussed as a setback for both pro-life and pro-choice groups.²⁸³

The Supreme Court’s decision in *Lawrence v. Texas*²⁸⁴ examined another aspect of the sexual privacy debate: homosexual conduct. In *Lawrence*, the Court struck down a criminal statute that made deviate homosexual intercourse a misdemeanor.²⁸⁵ In *Lawrence*, Houston police had entered the home of John

274. *Id.* at 893.

275. *Id.* at 896.

276. *Casey*, 505 U.S. at 898.

277. *Id.* at 899.

278. *Id.*

279. *Id.* at 901.

280. *Casey*, 505 U.S. at 923 (Blackmun, J., concurring in part and dissenting in part).

281. *Id.* at 943.

282. *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting).

283. See Kathleen A. Cassidy Goodman, *The Mutation of Choice*, 28 ST. MARY’S L.J. 635, 645 (1997) (stating that “*Casey* has largely been viewed as a setback for pro-choice advocates”); *but cf.* Paulsen, *supra* note 11 (decrying the *Casey* decision as the worst of all time, including *Roe*). See also Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 295 n.4 (1995) (stating that “pro-choice and pro-life leaders viewed the *Casey* decision as a loss for their side”).

284. 539 U.S. 558 (2003).

285. *Id.* at 563.

Geddes Lawrence after a report of a weapons violation on the property; inside, they found Lawrence and another man, Tyron Garner, engaging in a sexual act.²⁸⁶ The police arrested the two men and charged them with deviate sexual intercourse with a member of the same sex.²⁸⁷ After their conviction before a magistrate, the two requested a trial *de novo*.²⁸⁸ Lawrence and Garner challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and the corresponding equal protection provision of the Texas constitution,²⁸⁹ but this argument did not succeed in the trial court, where the two men were each fined \$200 plus costs.²⁹⁰ The Court of Appeals for the Texas Fourteenth District then considered Lawrence's equal protection argument and considered whether the statute violated the Due Process Clause of the Fourteenth Amendment, but affirmed the convictions.²⁹¹ Lawrence and Garner sought certiorari, which the Supreme Court granted.²⁹²

The Court, in an opinion by Justice Kennedy, held 6-3 that the Texas statute was unconstitutional and that an earlier decision of the Court, *Bowers v. Hardwick*,²⁹³ should be overruled. Justice Kennedy phrased the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."²⁹⁴ The majority opinion began its analysis in a manner similar to the Court's opinion in *Roe v. Wade*; namely, Justice Kennedy traced the modern history of substantive due process, this time beginning with *Griswold*, in order to determine the scope of the liberty guaranteed by the Fourteenth Amendment's Due Process Clause.²⁹⁵ As in *Roe*, the Court said that states did not have a long history of regulating or prohibiting homosexual conduct as a distinct matter.²⁹⁶ The Court further said that punishing sexual acts was not often discussed in early legal literature, and "infer[red] that one reason for this was the very private nature of the conduct."²⁹⁷ Justice Kennedy concluded his historical analysis by saying that the "historical premises [for forbidding homosexual acts] are not without doubt and, at the very least, are overstated."²⁹⁸

The majority then turned to the Court's earlier decision in *Bowers* and, while acknowledging that "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family"²⁹⁹ are important to many people,

286. *Id.*

287. *Id.*; TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

288. *Lawrence*, 539 U.S. at 563.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 564; *Lawrence v. Texas*, 537 U.S. 1044 (2002).

293. 478 U.S. 186 (1986) (finding laws criminalizing sodomy constitutional).

294. *Lawrence*, 539 U.S. at 564.

295. *Id.* at 564-71.

296. *Id.* at 568.

297. *Id.* at 570.

298. *Id.* at 571.

299. *Id.*

the Court's obligation is "to define the liberty of all, not to mandate [its] own moral code."³⁰⁰ The *Bowers* decision upheld a Georgia statute criminalizing homosexual conduct and traced the history of homosexuality in Western civilization while taking account of Judeo-Christian moral and ethical standards³⁰¹; the majority in *Lawrence* rejected the earlier analysis and found that the "laws and traditions in the past half century [we]re of most relevance" to the *Lawrence* case.³⁰² The majority pointed that recent laws gave "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."³⁰³ Justice Kennedy then looked to the laws of European countries, which had dropped their prohibitions on sodomy and homosexual activity.³⁰⁴ Relying on the Court's analysis in *Casey*, Justice Kennedy said that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."³⁰⁵ The *Lawrence* majority concluded that *Bowers* "demeans the lives of homosexual persons"³⁰⁶ and should be overruled. Justice Kennedy concluded that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."³⁰⁷

Justice O'Connor wrote a concurring opinion in which she found that the Texas statute banning same-sex sodomy violated the Equal Protection Clause, but that *Bowers* should not be overruled.³⁰⁸ She said that the sodomy law "brand[ed] all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."³⁰⁹ Justice O'Connor said that the issue in *Lawrence* was different than that in *Bowers* because the latter treated only the question of whether the prohibition on homosexual sodomy violated the Due Process Clause.³¹⁰ She concluded that while Texas's law violated the Equal Protection Clause, that determination did "not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review."³¹¹

Three justices dissented from the *Lawrence* decision with two opinions. First, Justice Scalia accused the majority of manipulation in its decision to adhere to *stare decisis* in *Casey* but failing to do so in *Lawrence*.³¹² He pointed out that the

300. *Id.* (quoting *Casey*, 505 U.S. at 850).

301. *Lawrence*, 539 U.S. at 559.

302. *Id.* at 571–72.

303. *Id.* at 572.

304. *See id.* at 572–73 (examining England's decision to repeal laws punishing homosexual conduct and a 1981 decision from Northern Ireland invalidating similar laws under the European Convention on Human Rights).

305. *Id.* at 574 (citing *Casey*, 505 U.S. at 551).

306. *Lawrence*, 539 U.S. at 575.

307. *Id.* at 579.

308. *Id.* (O'Connor, J., concurring).

309. *Id.* at 581.

310. *Id.* at 582.

311. *Id.* at 585.

312. *See id.* at 586–87 (Scalia, J., dissenting) (stating that Scalia does not "believe in rigid

majority's analysis in *Lawrence* was inconsistent with its analysis of *Roe* in the *Casey* case less than a decade earlier; while the criticism of *Roe* had served as a reason for the Court to uphold abortion as a legal right in *Casey*, Justice Scalia said, similar criticism of the *Bowers* decision now gave the Court a reason to overturn its precedent.³¹³ He then said that the Texas law undoubtedly constrained liberty, but that laws prohibiting prostitution, heroin use, or working more than sixty hours in a bakery did as well.³¹⁴ The Due Process Clause, Justice Scalia said, prohibits state interference with fundamental liberty interests, defined by the Court in *Washington v. Glucksberg*³¹⁵ as those which are "deeply rooted in this Nation's history and tradition,"³¹⁶ of which homosexual sodomy is not one.³¹⁷

Justice Scalia further accused the majority of creating an opinion that "is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda."³¹⁸ He then said that he had "nothing against homosexuals, or any other group, promoting their agenda through normal democratic means"³¹⁹ but that decisions imposed upon the population in the absence of a democratic majority were unacceptable.³²⁰ Justice Scalia concluded by saying that the opinion "dismantle[d] the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as marriage is concerned."³²¹ Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissent, and Justice Thomas wrote separately to decry the Texas statute as "uncommonly silly"³²² and noting that he would vote to repeal it.³²³ Justice Thomas concluded that he could not join the majority opinion because the problem

adherence to *stare decisis* in constitutional cases" but does believe that the Court "should be consistent rather than manipulative in invoking the doctrine").

313. See *id.* at 587 (noting that "when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it Today, however, the widespread opposition to *Bowers* . . . is offered as a reason in favor of *overruling* it.").

314. *Id.* at 592. Justice Scalia's mention of the hours limitation is a reference to *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court found that the Fourteenth Amendment's Due Process Clause prevented the state from interfering with an employee's right to contract with his employer through laws limiting the number of hours an individual could work. The decision was widely criticized and eventually overruled, signaling the end of substantive due process until the *Griswold* decision in 1965 with few exceptions. See, e.g., *Meyer v. Neb.*, 262 U.S. 390, 399 (1923) (striking down requirement that teachers only use English in schools because the Due Process Clause of the Fourteenth Amendment guarantees, among other things, the right to "establish a home and bring up children"). The *Meyer* decision was not overturned when *Lochner* was. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Meyer* in support of decision).

315. 521 U.S. 702 (1997).

316. *Id.* at 721.

317. *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting).

318. *Id.* at 602.

319. *Id.* at 603.

320. *Id.*

321. *Id.* at 604.

322. *Id.* at 605 (Thomas, J., dissenting) (quoting *Griswold v. Conn.*, 381 U.S. 527 (1965)).

323. *Id.* at 605.

should be solved by the democratic process instead of by the Court's order.³²⁴

II. THE MORNING AFTER PILL: WHAT IT IS, WHAT IT DOES, AND WHY THE SEXUAL PRIVACY DEBATE IS RELEVANT TO ITS USE

The legal history of sexual privacy is necessary to this discussion because of the nature of the morning after pill. Whether one categorizes the morning after pill as an abortifacient or a contraceptive depends heavily upon the point at which one believes life begins. The divide also makes the issue of the morning after pill's availability more controversial than the availability of ordinary forms of contraception,³²⁵ such as condoms or the standard birth control pill.

The morning after pill is a combination of hormones that prevents a fertilized embryo from implanting in the uterus, or that causes the uterine wall to deteriorate if the embryo is already implanted there.³²⁶ The morning after pill is essentially a large, post-coital dose of birth-control hormones; the most common combination during the first decades of availability was diethylstilbestrol, or DES.³²⁷ The principal hormone in DES was estrogen, heavy amounts of which can cause severe nausea and vomiting in those women that take it.³²⁸ Between 1948 and 1971, doctors prescribed DES to women who were believed to need more estrogen during the terms of their pregnancies.³²⁹ The use of DES during pregnancy led to a birth defect causing a rare form of vaginal cancer later in life for daughters exposed to the drug while in the womb.³³⁰ The FDA changed the labeling on the drug in 1971 to warn women not to take DES during pregnancy.³³¹ Other possible combinations, tested in other countries but not earning FDA approval in the United States, use less estrogen and instead focus on blocking progesterone. This process, in turn, causes the uterine wall to deteriorate and either expels the embryo or prevents it from implanting so that it will be expelled.³³²

As of August 2006, two combinations of medications have been approved by the FDA for use as morning after pills, Preven and Plan B.³³³ Preven, which is not

324. See *id.* (noting that "as a member of this Court [Justice Thomas was] not empowered to help petitioners and others similarly situated").

325. Individuals that oppose contraception altogether would not see the morning after pill as any more controversial than typical methods of contraception. See, e.g., William F. Colliton, Jr., M.D., *Contraception and Abortion: Is There a Connection?*, 13 ST. LOUIS U. PUB. L. REV. 315, 316 (1993) (stating that "the only logical mind-set for positing a contraceptive is anti-life"). Colliton's position represents one endpoint of a spectrum of viewpoints concerning the availability of contraception and abortion.

326. Mindy J. Lees, Note, *I Want a New Drug: RU-486 and the Right to Choose*, 63 S. CAL. L. REV. 1113, 1117 (May 1990).

327. Dr. Sheldon Segal, *Contraceptive Update*, 23 N.Y.U. REV. L. & SOC. CHANGE 457, 463 (1997).

328. *Id.* See also Lees, *supra* note 326, at 1119.

329. FDA Milestones in Women's Health: Looking Back as We Move Into the New Millennium, available at <http://www.fda.gov/womens/milesbro.html> (last visited Oct. 23, 2006).

330. *Id.*

331. *Id.*

332. Segal, *supra* note 327, at 464; Lees, *supra* note 326, at 1116-17.

333. GAO REPORT, *supra* note 9, at 11. Plan B is the first drug in its class to go through the

under consideration for over-the-counter status,³³⁴ is a “dedicated . . . ECP [emergency contraceptive]” containing estrogen and progestin.³³⁵ A dedicated emergency contraceptive is a device intended for the use as an emergency contraceptive after intercourse.³³⁶ Estrogen is responsible for cyclical changes in the female reproductive system and progestin is a hormone that prepares the endometrium for implantation of a fertilized egg.³³⁷ The combination of these two hormones suppresses ovulation,³³⁸ making conception less likely. Plan B is also a dedicated emergency contraceptive containing only levonorgestrel,³³⁹ a synthetic form of progestin.³⁴⁰ Levonorgestrel-only formulations tend to reduce the side effects of taking the morning after pill, including nausea and vomiting.³⁴¹ Plan B’s packaging says that the pills work “mainly by preventing ovulation (egg release).”³⁴² Alternatively, Plan B “may also prevent fertilization of a released egg (joining of sperm and egg) or attachment of a fertilized egg to the uterus (implantation).”³⁴³ The pills will “not do anything to a fertilized egg already attached to the uterus. The pregnancy will continue.”³⁴⁴

It is clear from the descriptions of the function of the morning after pill that an individual who believes that life begins at fertilization, or someone who is against contraception altogether, will look upon the question of availability of the morning after pill differently from someone who believes that life begins at implantation, at the point of viability, or after the child has exited the birth canal. The pill’s function of preventing pregnancy by blocking implantation makes this a close call for individuals without a strong stance for, or against, abortion.³⁴⁵ There is a significant difference between the French drug RU-486, designed to stop the pregnancy at any time up to nine weeks after conception, and the morning after pill, typically taken within 72 hours of intercourse.³⁴⁶

review process for over-the-counter status. *Id.*

334. Preven is no longer on the market, but was approved for sale as an emergency contraceptive with a prescription. See Tom Strode, *FDA Approves ‘Morning-After Pill’ Without Prescription*, BAPTIST PRESS, Aug. 24, 2006, available at <http://www.bpnews.net/bpnews.asp?ID=23845>.

335. GAO REPORT, *supra* note 9, at 11 n.23.

336. *Id.*

337. *Id.* at 11 n.24.

338. *Id.*

339. *Id.* at 12.

340. *Id.* at 11 n.23.

341. *Id.* at 12.

342. DURAMED PHARMACEUTICALS, LABELS FOR PLAN B EMERGENCY CONTRACEPTIVE 1 (Aug. 2006), available at <http://www.fda.gov/cder/foi/label/2006/021045s011lbl.pdf> [hereinafter Plan B Labels].

343. *Id.*

344. *Id.* at 5.

345. See Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 25 (2005) (claiming that the morning after pill “does not cause the destruction of a developing embryo, but prevents a fertilized egg from becoming an embryo in the first place” and therefore does not cause an abortion).

346. See Lees, *supra* note 326, at 1117; see also Segal, *supra* note 327, at 463–64.

A recent, contentious issue relating to the morning after pill has been whether the FDA should approve the morning after pill for over-the-counter use. Prior to the FDA's recent decision to do so, at least one state had already moved in this direction.³⁴⁷ In February of 1997, an FDA panel approved the conclusion that use of large amounts of contraceptives after intercourse is "both safe and effective,"³⁴⁸ but the approval of drugs for such a purpose has been described as costly, both monetarily and politically. The estimated cost of approving an already-existing drug is at least six million dollars, and costs go up from there.³⁴⁹ Conflict over whether a medication like the morning after pill is an abortifacient adds to the cost of approvals³⁵⁰ because some consumers and medical professionals have strong beliefs on the abortion issue that could reduce market potential for the product or endanger its approval. Although about one in four pregnancies in the United States each year ends in an induced abortion, offering "a potentially enormous market for the drug,"³⁵¹ there are concerns that women may become more careless in their sexual behavior or choose to use abortion as a method of birth control.³⁵² Additionally, certain contraceptives and the morning after pill can cause significant health problems.³⁵³ The concern over women's safety and the use of contraception is not limited to a politicized sect of American medical professionals.³⁵⁴

347. See Scott S. Greenberger, *Eyes on Romney as Morning-After Pill OK'd: House Approves Bill Increasing Access*, BOSTON GLOBE, July 7, 2005, at A1, B8 (discussing Massachusetts's effort to make the morning after pill available over the counter).

348. Segal, *supra* note 327, at 464 n.43.

349. Lees, *supra* note 326, at 1120. The cost of obtaining approval for a new drug is about \$50 million. *Id.* The morning after pill falls into the prior category because it consists of a larger dose of previously approved contraceptives. A drug never before introduced in this country falls into the latter category.

350. *Id.*

351. *Id.*

352. *Id.* at 1115. See also BRIT. MED. J., IMPACT ON CONTRACEPTIVE PRACTICE OF MAKING EMERGENCY HORMONAL CONTRACEPTION AVAILABLE OVER THE COUNTER IN GREAT BRITAIN: REPEATED CROSS SECTIONAL SURVEYS 1 (July 2005) [hereinafter BMJ STUDY] (acknowledging that "opponents [of making the morning after pill available over the counter in the United States] say that over the counter availability will encourage unprotected sex"), available at <http://bmj.bmjournals.com/cgi/reprint/331/7511/271>.

353. See Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. LOUISVILLE J. FAM. L. 311, 332-33 (1995-96) (listing, among other side effects of the Norplant birth control device, irregular or prolonged bleeding, skin disease, and depression for women generally and an increased chance of diabetes, hypertension, and kidney disease for African American women already at higher risk for these ailments); see also AMERICAN LIFE LEAGUE, EMERGENCY CONTRACEPTION: THE MORNING AFTER PILL, <http://www.all.org/article.php?id=10130> (last visited Sept. 15, 2006) (describing side effects including vomiting, nausea, blood clots, and ectopic pregnancy). An ectopic pregnancy occurs when a zygote develops outside of the uterus, typically in the fallopian tube. Michael J. Brooks, Comment, *RU 486: Politics of Abortion and Science*, 2 J. PHARMACY & L. 261, 275 (1994).

354. See Carmel Williams, *New Zealand Doctors Resist Emergency Contraception*, BRIT. MED. J., Feb. 24, 1996, at 463 (stating that the New Zealand Medical Association had "serious reservations about emergency contraception . . . being freely available [over the counter]" while noting that the morning after pill generally "could reduce abortions").

In addition to the problems faced in obtaining approval from the FDA, pharmaceutical companies that choose to manufacture and market the morning after pill could face boycotts from individuals and associations that oppose Plan B's availability. These boycotts often add to the costs the drug companies incur in obtaining approvals because customers may boycott *all* of the company's products in order to make their opposition heard.³⁵⁵ Proponents of the pill claim that its opponents' attempts to boycott drug companies unfairly add to the costs of approval while offering fewer options to pregnant women.³⁵⁶ Boycotts, however, may not be the only reason that drug companies have chosen not to market the morning after pill more aggressively; concerns over potential tort liability and political considerations can be factors as well.³⁵⁷

Despite the high cost of drug approvals, Dr. Joseph Carrado³⁵⁸ made two supplemental new drug applications to the FDA in 2003 to make the morning after pill available over the counter for women sixteen years of age and older and to make the morning after pill available without a prescription to anyone, regardless of age.³⁵⁹ In May of 2004, the FDA denied both applications, leading to outcry among the morning after pill's supporters.³⁶⁰ The Government Accountability

355. See Lees, *supra* note 326, at 1122–24. On one occasion, a two-year boycott of Upjohn, a pharmaceutical company marketing drugs to induce abortion, included all of its products, including the commonly-used Nuprin and Motrin lines. *Id.* at 1122. Upjohn eventually stopped marketing and research on abortifacients, though it claimed that its decision was not influenced by the boycott. *Id.*

356. See *id.* at 1115 (characterizing the pro-life opponents of drugs such as RU-486 as a “highly vocal minority [that] should not be mistaken for the voice of the nation”).

357. See Sylvia A. Law, *Tort Liability and the Availability of Contraceptive Drugs and Devices in the United States*, 23 N.Y.U. REV. L. & SOC. CHANGE 339, 392 (1997) (stating that “the risks of liability are too great” for pharmaceutical companies if they advocate the use of traditional birth control hormones for post-coital use); see also ANNA GLASIER, M.D. & DAVID BAIRD, D.SC., THE EFFECTS OF SELF-ADMINISTERING EMERGENCY CONTRACEPTION I (July 2, 1998), available at <http://content.nejm.org/cgi/content/abstract/339/1/1> [hereinafter GLASIER & BAIRD] (stating that “[p]harmaceutical companies worry about litigation”). Sylvia Law does not discount the influence of politics; she states that “the key development occurred when the conservative wing of the Republican Party perceived that support for ‘traditional family values’ and opposition to abortion provided a politically attractive centerpiece for political action.” Law, *supra* note 357, at 403.

358. Joseph Carrado is the Senior Director of Regulatory Affairs for Barr Research, Inc. See FDA Priv. Ltr. Rul. NDA 21–045/S–011 (Oct. 23, 2004), available at http://www.fda.gov/cder/drug/infopage/planB/planB_NALetter.pdf [hereinafter “FDA Denial Letter”]. He joined Barr as the Senior Director for Clinical Regulatory Affairs and had previous experience in pharmaceutical regulation at Aventis Pharmaceuticals. Barr Pharmaceuticals, Biography, <http://phx.corporate-ir.net/phoenix.zhtml?c=60908&p=irol-govBio&ID=146396> (last visited Oct. 23, 2006).

359. FDA Denial Letter, *supra* note 358. The FDA Denial Letter indicated that before Dr. Carrado's supplementary application requesting over-the-counter status for Plan B for women over sixteen years of age and a prescription-only status for the drug for those women under sixteen, could be approved, he “would have to provide data demonstrating that Plan B can be used safely by women under 16 years of age without the professional supervision of a practitioner licensed by law to administer the drug.” *Id.* at 2.

360. See, e.g., Kristen Lombardi, *If the Morning After Never Comes: The Bush Administration is Set to Keep Emergency Contraception Out of Reach*, THE VILLAGE VOICE,

Office acknowledged in a report that the FDA's decision process regarding the morning after pill was unusual.³⁶¹ Assuming the correctness of the GAO report, it does not follow that Steven Galson, the Acting Director, violated law or procedure because federal law gives him discretion to approve or not approve medications for over the counter use.³⁶²

In 2004, the FDA said that it had not approved the switch from prescription-only to over-the-counter status for the morning after pill in 2004 for two reasons: the possibility of moral hazard³⁶³ and the lack of empirical data for certain age groups.³⁶⁴ The moral hazard argument states that if society relaxes its laws to permit an activity that reduces some, but not all, of the attendant risks of another activity, more people may engage in the second activity due to the increased risk. As an example, X may avoid skydiving because of the risks involved. If Y Insurance Company sells a policy covering injuries or death resulting from skydiving for \$100, X may purchase the policy and attempt skydiving. Although X will not bear the cost in hospital bills if he is injured, the insurance policy does not actually prevent any injury and therefore some of risks of skydiving not covered in the policy remain. Relaxing the laws does not eliminate all of the risks of the second activity, and therefore the increase in the second activity is a harm to society. As another example, society could relax its laws to permit the use of certain drugs that are currently illegal. Doing so would eliminate some of the risk involved in illegal drug use (namely, fines or prison time). Changing the law, however, would not eliminate the health risks involved for the drug user, including the potential for addiction or overdose. Therefore, legalizing drugs creates a moral hazard because while the risk of punishment for drug use would be eliminated, more people may turn to drugs and cause themselves and society harm. In much the same way, both abortion and the morning after pill may be seen as moral hazards. The availability of either eliminates the risk of unwanted pregnancy

Dec. 6, 2005, at 2 (accusing the FDA under President George W. Bush of "play[ing] politics with women's reproductive health").

361. GAO REPORT, *supra* note 9, at 1.

362. See 21 U.S.C.A. § 353(b)(3) (West Supp. 2006) (stating that the Secretary of Health and Human Services "may by regulation remove drugs subject to section 355 of this title from the requirements of paragraph (1) [covering drugs available by prescription only]" (emphasis added)) and 21 U.S.C. § 355(g)(2) (2000) (providing that "[n]othing in this subsection shall prevent the Secretary [of Health and Human Services] from using any agency resources of the Food and Drug Administration necessary to ensure adequate review of the safety . . . of an article"). The Secretary of Health and Human Services delegates this authority to the Commissioner of the Food and Drug Administration, who in turn delegates the approval authority to lower levels within the agency. This system "allows decisions to be made at lower levels within the agency but assumes that management agrees with these decisions." GAO REPORT, *supra* note 9, at 11.

363. A moral hazard is one that "has its inception in mental attitudes." BLACK'S LAW DICTIONARY 736 (8th ed. 2004). See also RICHARD A. IPPOLITO, ECONOMICS FOR LAWYERS, 350-54 (Princeton Univ. Press 2005) (explaining moral hazard and its effect on behavior).

364. See GAO REPORT, *supra* note 9. Studies completed on the behavioral effects, if any, of the morning after pill have not included samples of women younger than sixteen years of age. See, e.g., GLASIER & BAIRD, *supra* note 357, at 1 (women studied were between sixteen and forty-four years of age).

associated with unprotected sexual activity. As a result, more women may engage in unprotected sexual activity, take sexual risks that they would not otherwise take, and obtain more abortions.³⁶⁵ Yet, the availability of abortion and the morning after pill does not eliminate the possibility that men and women will contract sexually transmitted diseases from unprotected sexual activity, and so the availability of abortion and the morning after pill could increase the frequency of these conditions.³⁶⁶

Medical researchers spanning several countries have examined different aspects of the morning after pill's safety and efficacy, along with the correlation with other related behavior, including having an abortion or taking more sexual risks.³⁶⁷ Although most health experts do not doubt the morning after pill's safety,³⁶⁸ its effects on the health and behavior of women under sixteen years of age have not been tested.³⁶⁹ The requirement that a pharmaceutical company present evidence

365. See Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 118 n.170 (2005) (noting that the decline in births following *Roe* did not decline in the same proportion as the number of abortions, suggesting that the number of conceptions increased substantially with the wider availability of abortion). See also CENTER FOR DISEASE CONTROL, ABORTION SURVEILLANCE (Nov. 25, 2005), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5407a1.htm> (noting that the national legal induced abortion rate nearly doubled between 1970 and 1980).

366. See Forsythe & Presser, *supra* note 365 (discussing a 2003 study that noted an increase in sexually transmitted diseases such as Chlamydia and pelvic inflammatory disease and observing "that the availability of abortion might be seen to provide 'insurance' against unwanted pregnancy"); see also Jonathan Klick & Thomas Stratmann, *Abortion Access and Risky Sex Among Teens: Parental Involvement Laws and Sexually Transmitted Diseases* (Oct. 3, 2005) (indicating that parental involvement laws would increase the cost of obtaining abortions, making teenagers less likely to engage in risky sexual behavior or at least encouraging teenagers to use standard methods of birth control), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=819304. See also K. Edgardh, *Adolescent Sexual Health in Sweden*, 78 SEXUALLY TRANSMITTED INFECTIONS 352, 354 (2002) (finding that abortions are on the rise in Sweden despite the wide availability of emergency contraception).

367. See generally Anna Glasier et al., *Advanced Provision of Emergency Contraception Does Not Reduce Abortion Rates*, 69 CONTRACEPTION 361 (2004) [hereinafter *Scotland Study*] (studying the morning after pill and its effect on abortion rates in Scotland); GLASIER & BAIRD, *supra* note 357 (studying women's behavior in the United Kingdom when given a supply of the morning after pill prior to unprotected intercourse); David Paton, *Random Behaviour or Rational Choice? Family Planning, Teenage Pregnancy, and STIs*, 6 SEX ED. 281 (Aug. 2006) (finding a link between increases in availability of youth family planning clinics and sexually transmitted diseases in England). See also K. Edgardh, *supra* note 366, at 354.

368. See GAO REPORT, *supra* note 9, at 26 (stating that "members of the [FDA] joint advisory committee voted 27 to 1 that the actual use study demonstrated that consumers could properly use Plan B as recommended by the label").

369. Several of the studies acknowledge that few or no adolescents participated in the clinical trials. See, e.g., *Scotland Study*, *supra* note 367, at 362 (women in the study were aged sixteen through twenty-nine); BMJ STUDY, *supra* note 352, at 3-4 (conceding that "the sample of teenage women is relatively small" and listing the fact that no women under sixteen were assessed in the study as a "weakness"). Although some are skeptical of this reasoning for denying over-the-counter status for the morning after pill in the United States, see GAO REPORT, *supra* note 9, at 6 (stating that "the Acting Director's rationale for denying the application was novel and did not follow FDA's traditional practices"), the minutes of the FDA's meeting indicate that there was concern that "counseling by a learned intermediary might be beneficial

of the drug's effects on women under the age of sixteen to the FDA to obtain approval exposes a moral quandary; some studies offer, in addition to counseling about the drug, doses of the morning after pill in advance of sexual intercourse.³⁷⁰ The same individuals who oppose the morning after pill on moral hazard grounds would likely oppose such a study of women under the age of sixteen.

One of the primary applications for the morning after pill for women of all age groups is its use to prevent unwanted pregnancies following rape.³⁷¹ Indeed, at least one commentator believes that the morning after pill's availability to rape victims in emergency rooms across the country, including private and religious hospitals, should be mandated by statute for this purpose.³⁷² Rape is a crime that carries psychological as well as physical scars,³⁷³ and women on college and university campuses experience its effects acutely. Victims often fear reporting rape or attempted rape to the police.³⁷⁴ Although there may be upsides of making the morning after pill available over-the-counter as a "quick and private decision"³⁷⁵ for rape victims, such as preventing the trauma of undergoing an abortion later in term if the victim becomes pregnant, it is also possible that making the pill available over the counter could lead to victims who are even less inclined to report their assaults to the police. Statistics for rape, like many crimes,

[for users of the morning after pill], particularly for adolescents." GAO REPORT, *supra* note 9, at 18.

370. See, e.g., GLASIER & BAIRD, *supra* note 357, at 2 (stating that participants in the treatment group of the study "were given one packet of emergency hormonal contraceptive tablets to keep at home").

371. Rape on college and university campuses is a complex problem too broad for the scope of this Note. For more information on this problem, see Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1011–12 (2004) (discussing the problem of required reporting and the image of colleges and universities); Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 395 (2005) (indicating that women in colleges and universities "face a rate of sexual assault that is significantly higher than the general population").

372. See generally Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in the Bipartisan Abortion Politics in the United States*, 29 RUTGERS L. REV. 1 (2005).

373. Statistics vary as to how many women are victims of rape and attempted rape each year, and as to how many of these crimes are reported. Some studies set the rate of rape and attempted rape at as high as forty-four percent of women. See Neil Gilbert, *Advocacy Research and Social Policy*, 22 CRIME & JUST. 101, 120 (discussing study conducted in San Francisco by Diana Russell). However, analysis of such studies indicates that flaws may inflate that figure. See *id.* at 121–22 (stating that the "fact that only 31 percent of the women in Russell's sample were married compared to a 63 percent marital rate nationally is one of many reasons that this national estimate . . . is not simply highly speculative but scientifically groundless"). Analysis like Gilbert's does not require that scholars dismiss the studies, however. See Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1339 (1994) (stating that "[r]ape statistics vary tremendously, but that does not necessarily mean that they contradict each other or should be dismissed altogether").

374. See, e.g., Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 40 (1991) (author "did not report [her] attempted rape to the police because [she] was afraid that too many people would believe common misconceptions, and not [her]").

375. Schaper, *supra* note 372, at 13.

may be flawed due to gaps in reporting.³⁷⁶ Easy access to the morning after pill, while potentially easing some of the stress and shame from rape victimization, may also lead to fewer reports and fewer convictions for those who committed the crime in the first place.³⁷⁷

On August 24, 2006, the FDA approved Plan B for over-the-counter status for women aged eighteen and over.³⁷⁸ The FDA said that Duramed, the maker of the drug, must engage in “a rigorous labeling, packaging, education, distribution and monitoring program” for the drug and that Plan B would remain a prescription-only drug for women aged seventeen and younger.³⁷⁹ Reaction from interest groups following the FDA’s decision was mixed.³⁸⁰ Even given the FDA’s recent decision, the controversy surrounding the morning after pill is far from over, and if the FDA should ever reverse its decision to make Plan B available over-the-counter, states could once again regulate in the area.

III. RECENT LEGISLATIVE EFFORTS TO BAN THE MORNING AFTER PILL ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

Two states, Virginia and Wisconsin, recently debated legislation that would have banned the advertisement, distribution, and sale of the morning after pill on their public college and university campuses.³⁸¹ Before analyzing whether either scheme would have been constitutional if enacted, it is important to note the content and context of the two statutes. Although the FDA’s decision to put the morning after pill over-the-counter effectively preempts either of the attempts at

376. See, e.g., Kathleen F. Cairney, *Recognizing Acquaintance Rape in Potentially Consensual Situations: A Reexamination of Thomas Hardy’s Tess of the D’Urbervilles*, 3 AM. U. J. GENDER & L. 301, 317 n.128 (Spring 1995) (stating that of acquaintance rapes in 1987, only five percent were reported to the police); *but cf.* REPORTED DECREASE IN RAPE PROMPTS DEBATE, UNITED PRESS INTERNATIONAL (June 18, 2006) (reporting an eighty-five percent decrease in rapes since the 1970s while other violent crimes have been on the rise). Rape, much like assault, robbery, and other violent crimes, may go underreported, making all such statistics somewhat suspect.

377. See Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 LAW & SOC’Y REV. 343, 345–46 (1992) (stating that deterrence theory “would predict, much like other offenses, the motivation to commit sexual assault is affected by the perceived costs of the crime”). If deterrence theory is followed to its logical conclusion, the costs to the rapist of a possible pregnancy as a consequence of his actions would be reduced by introduction of the morning after pill as an easily obtainable measure, thereby decreasing the rapist’s overall cost of committing the crime and the corresponding chance that the rapist will avoid committing it.

378. Press Release, U.S. Food and Drug Administration, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older (Aug. 24, 2006), available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>.

379. *Id.*

380. See, e.g., Amanda Gardner, “Morning-After” Pill Approval Prompts Mixed Reactions, <http://www.medicinenet.com/script/main/art.asp?articlekey=63744> (last visited Nov. 10, 2006) (noting Planned Parenthood’s opposition to the age restriction and Concerned Women for America’s opposition to Plan B’s over the counter availability).

381. The Virginia statute does not ban the advertisement of the morning after pill on its campuses. See *infra* note 383.

state regulation for the time being, the proposed statutes raise important questions regarding the role of states today in the regulation of public health, particularly with respect to the most hotly contested issues.³⁸²

A. The Virginia Statute

In February of 2004, the lower house of the Virginia legislature passed a statute entitled “Prohibition on the morning-after pill,” which provides that “No public institution of higher education in the Commonwealth shall, in its delivery of health care services to students, in any way sell, give or otherwise dispense to students any hormonal medication or combination of medications, administered only after intercourse for the post-coital control of fertility.”³⁸³ This formulation is the second version of the bill that Representative Robert G. Marshall presented to the state house. The first version also required parental consent for minors for receiving the morning after pill and provided a mechanism for minors whose parents or guardians were unavailable or out of state to obtain consent for certain medical and surgical procedures.³⁸⁴ A consent provision in the bill required the prescribing pharmacist “to give notice of intent” to prescribe the morning after pill and further compelled the prescribing doctor to indicate that “it may inhibit implantation of a live human embryo” and to describe the potential side effects of taking the drug.³⁸⁵ This more detailed bill was replaced instead with the simple ban on the morning after pill (also referred to as “Plan B”).³⁸⁶ The ban passed through committee and won approval in the state house by a vote of 52 to 47.³⁸⁷ It has since been passed by indefinitely in the state senate’s committee on education and health. No action has been taken on the bill since February 26, 2004.³⁸⁸

As written, the Virginia statute places a blanket ban on dispensing or prescribing any sort of morning after pill on the state’s college campuses. The statute would affect the University of Virginia, where over 20,000 students are currently enrolled,³⁸⁹ and fifteen other public colleges and universities in the

382. See *infra* Part V.

383. H.R. 1414, 2004 Gen. Assem., Reg. Sess. (Va. 2004) [hereinafter Proposed Virginia Statute].

384. H.R. 1403, 2004 Gen. Assem., Reg. Sess. (Va. 2004).

385. VA. DEPT. OF PLANNING & BUDGET, 2004 FISCAL IMPACT STATEMENT FOR HOUSE BILL 1403 at 1, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+oth+HB1403F122+PDF> (last visited Nov. 10, 2006). The provision requiring the instruction regarding a live human embryo vaguely resembles the requirement to inform the pregnant woman of the status of her pregnancy and the development of the fetus that the Supreme Court invalidated in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 442.

386. LIS > Bill Tracking > HB 1414 > 2004 Session, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=041&typ=bil&val=hb1414> (last viewed Nov. 10, 2006) [hereinafter Virginia Legislative History].

387. *Id.*

388. *Id.*

389. University of Virginia, Enrollment: U. Va. Facts at a Glance, http://www.virginia.edu/Facts/Glance_Enrollment.htm (last visited Oct. 23, 2006).

state.³⁹⁰ It prevents the university's health care program from administering the morning after pill to students, though it makes no mention of whether a private chain located on or near university property could dispense it.³⁹¹ The proposed Virginia statute does not prohibit advertising of the morning after pill,³⁹² and is in this regard a narrower ban than the proposed Wisconsin statute.

B. The Wisconsin Statute

Advertisements appeared in the student papers for the University of Wisconsin during early spring of 2005 encouraging women going on spring break to pack the morning after pill.³⁹³ The University's health clinic offered the morning after pill as a medication to have on hand and did not require a prescription or a doctor's appointment to obtain a dose.³⁹⁴ The University's health clinic sponsored an advertisement that promised a dose of the morning after pill over the phone without an appointment to see a doctor or nurse.³⁹⁵ When word of this development reached members of the state assembly, Representative Dan LeMathieu presented the proposed Wisconsin statute.³⁹⁶ Despite the fear of one representative that the bill would "drag some of us kicking and screaming back to the 1960s,"³⁹⁷ before *Griswold* and *Roe* were decided, and the fear expressed by one editorialist that the bill would "embarrass[]" Wisconsin by "discriminat[ing] against women,"³⁹⁸ the bill passed the state assembly by a vote of 49-41.³⁹⁹ It was then referred to the state senate's committee on health, children, and families, where no further action was taken.⁴⁰⁰ Democratic governor James Doyle vowed to veto the measure if it reached his desk.⁴⁰¹

Wisconsin's proposed statute provides that employees of the University of Wisconsin, including its health care department, may not advertise, fill prescriptions for, or distribute the morning after pill on the University's

390. See JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, SPECIAL REPORT: TENURE AND POST-TENURE REVIEW POLICIES AT VIRGINIA PUBLIC COLLEGES AND UNIVERSITIES, 1 (July 12, 2004), available at <http://jlarc.state.va.us/Meetings/July04/tenure.pdf>.

391. For example, the statute does not address whether a private, national pharmacy chain such as Walgreen's or Osco could set up shop on the university's campus and sell or distribute the morning after pill.

392. See Proposed Virginia Statute, *supra* note 383.

393. UW Ad, *supra* note 1.

394. Stacy Forster, *Pill Ban at UW Moves Ahead*, MILWAUKEE JOURNAL-SENTINEL, June 17, 2005, at B1.

395. *Id.*

396. *Id.*

397. *Id.* (quoting Representative Sondy Pope-Roberts).

398. Lois Moore, *Protect Women's Reproductive Rights*, MILWAUKEE JOURNAL-SENTINEL, July 2, 2005, at A15.

399. *Wisconsin Lawmakers Vote to Ban Morning-After Pill at State Universities*, June 17, 2005, http://news.minnesota.publicradio.org/features/2005/06/17_ap_contraceptiveban/.

400. 2005 Regular Session Assembly Bills, available at http://www.legis.state.wi.us/2005/data/ab_list.html (last visited Nov. 20, 2006).

401. Forster, *supra* note 3954, at B1.

campuses.⁴⁰² The proposed Wisconsin statute is considerably broader than the proposed Virginia statute in what it prohibits. The ban on advertising of the morning after pill does not appear in the proposed Virginia statute,⁴⁰³ and the extension of the prohibition on advertising, prescribing, and dispensing the morning after pill to parties employed by the board or “with whom the board contracts”⁴⁰⁴ indicates that the proposed Wisconsin prohibition is tougher on the morning after pill than its Virginia counterpart.⁴⁰⁵ The University of Wisconsin system, when all campuses are taken into account, includes 160,895 students who would feel the impact of a ban on the morning after pill.⁴⁰⁶

Both the proposed statutes are narrow with regard to the panoply of birth control devices they could address. Traditional methods such as the standard birth control pill, condoms, diaphragms, and other devices are not covered by the statutes. Standard abortion procedures, whether early or late in term, are not covered in these statutes either. With these facts in mind, I now turn to the constitutionality of statutes of this type.

IV. FEDERAL CONSTITUTIONAL QUESTIONS ARISING FROM THE PROPOSED VIRGINIA AND WISCONSIN STATUTES

The decisions in *Griswold* and *Roe* and their progeny made the debate surrounding laws limiting contraception and abortion into a federal constitutional debate. However, if any state had chosen to enter the fray with statutory attempts to limit access to the morning after pill, it would be wrong to assume that federal statutes and Supreme Court cases are the only authorities to consider. The Supreme Court recognized in *Dalton v. Little Rock Family Planning Services*⁴⁰⁷

402. ASSEMB. B. 343, 2005 WIS. SESS. LAWS 343 [hereinafter PROPOSED WISCONSIN STATUTE]. The statute’s language provides:

(b) No person whom the board [of regents of the University of Wisconsin] employs or with whom the board contracts to provide health care services to students registered in the system may advertise the availability of, transmit a prescription order for, or dispense a hormonal medication or combination of medications that is administered only after sexual intercourse for the postcoital control of fertility to a registered student or to any other person entitled to receive university health care services.

(c) In addition to the prohibition under par. (b), no person may advertise, prescribe, or dispense a hormonal medication or combination of medications that is administered only after sexual intercourse for the postcoital control of fertility on [University of Wisconsin] system property, except for property leased under s. 233.04(7).

Id. The property referred to at the close of paragraph (c) is any property that the University of Wisconsin Board of Regents owns but leases to other parties.

403. See Proposed Virginia Statute, *supra* note 383.

404. PROPOSED WISCONSIN STATUTE, *supra* note 402.

405. The construction of the statute is somewhat confusing in this regard. Although the law provides an exception to the prohibition for parties to whom the Board leases its land or facilities, it would seem that the prohibition on distribution still applies because the lessee is a party “with whom the Board contracts.” *Id.*

406. University of Wisconsin, Learn About the University of Wisconsin System, <http://www.wisconsin.edu/quick/aboutuw.htm> (last visited Oct. 23, 2006).

407. 516 U.S. 474, 476 (1996) (per curiam). The respondents in *Dalton* challenged an Arkansas state constitutional provision that prohibited public funding for abortions, except those

that a state law will be preempted by federal law “only to the extent that it actually conflicts with federal law.”⁴⁰⁸ Further, in *Gonzales v. Oregon*,⁴⁰⁹ the Supreme Court recognized that Congress does not have exclusive control over the regulation of health and wellness in the United States. Therefore, it is important in examining statutes like those proposed in Wisconsin and Virginia to determine whether there is any Supreme Court precedent directly on point and whether other sources of law could be a factor. Where there is a Supreme Court precedent directly on point, the determination is easy and the state cannot preempt the federal law. Where there is not such a clear connection, the facial constitutionality of the statute in question becomes more difficult to determine. Because neither of the proposed statutes was passed, courts did not have the opportunity to review their constitutionality. Consequently, the following analysis is somewhat tentative.

A. Advertising Provision and the First Amendment

The issue of whether a state may constitutionally ban advertising of the morning after pill is unique to the proposed Wisconsin statute.⁴¹⁰ The statute prohibits the advertisement of any combination of medications that is to be used to prevent pregnancy after intercourse.⁴¹¹ Presumably, the advertisements described at the outset of this Note triggered the proposed publicity restriction; advertisements in the student paper promised the morning after pill to any of its students at the University of Wisconsin health center without a prescription or a doctor’s appointment.⁴¹²

A blanket ban on advertisement of certain products raises serious First Amendment concerns.⁴¹³ Although phrased in absolute terms, the First Amendment’s free speech protections are not unlimited.⁴¹⁴ The Supreme Court has always accorded a higher level of protection to political speech than it has to commercial speech,⁴¹⁵ but there is nonetheless legitimate concern over a content-

necessary to save the mother’s life. *Id.* The Court overturned a preliminary injunction and allowed the provision to stand. *Id.*

408. *Id.* at 476 (internal quotation marks omitted). The Court further stated that “the rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.” *Id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)).

409. 126 S. Ct. 904 (2006).

410. Virginia’s statute does not include such a provision, most likely because its creation did not come as a result of such advertising. See Proposed Virginia Statute, *supra* note 383.

411. PROPOSED WISCONSIN STATUTE, *supra* note 402.

412. See text accompanying *supra* note 1.

413. The First Amendment to the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I. An analysis of the Supreme Court’s free speech jurisprudence is beyond the scope of this Note.

414. See, e.g., *Dennis v. United States*, 341 U.S. 494, 503 (1951) (stating that speech is “not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations”).

415. See, e.g., *Nixon v. Shrink Mo. Gov’t. PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (stating that “protection [of political speech] lies at the heart of the First Amendment”); cf. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433 (1993) (describing a line of cases that accorded commercial speech an “intermediate amount of

based ban on the advertisement of a device that is not illegal.⁴¹⁶ As long as the information concerns a lawful activity and is not misleading, commercial speech should generally be permitted.⁴¹⁷ The information in the Wisconsin advertisements certainly made some individuals angry, but since it was true and referred to obtaining a legal medication, the advertisements should not, as a matter of constitutional principle, be banned.

The Supreme Court of the United States has answered the advertising question in a case with a substantially similar factual basis. In *Carey v. Population Services International*,⁴¹⁸ distributors of contraceptives challenged a New York statute that prohibited the advertisement and display of contraceptives.⁴¹⁹ A mail-order retailer of “nonmedical contraceptive devices,” was advised that its activities violated the law,⁴²⁰ so the retailer sued Hugh L. Carey, the governor of New York, for injunctive relief. A three-judge panel for the Southern District of New York struck down the statute as a violation of the First and Fourteenth Amendments to the Constitution as it applied to nonprescription contraceptives.⁴²¹ The state appealed, and the Supreme Court accepted the case. Justice Brennan’s majority opinion affirmed the decision to strike down the statute’s ban on advertising, stating that a state “may not completely suppress the dissemination of concededly truthful information about entirely lawful activity, even when that information could be categorized as commercial speech.”⁴²² Additionally, the Court noted that the “information suppressed by this statute related to activity with which, at least in some respects, the State could not interfere.”⁴²³

This Supreme Court mandate conflicted somewhat with Wisconsin law during the mid-1970’s, when the *Carey* case was handed down. The year before the *Carey* decision, the Wisconsin Supreme Court upheld a state statute prohibiting the public exhibition and display of contraception and abortion devices.⁴²⁴ In order to save the statute, as is a reviewing court’s obligation when the question of a

constitutional protection,” but not because it was “of less constitutional moment than other forms of speech”) (internal quotation marks omitted).

416. See *United States v. Playboy Entm’t Group*, 529 U.S. 803, 818 (2000) (stating that it “is rare that a regulation restricting speech because of its content will ever be permissible”).

417. See, e.g., *This That and the Other Gift & Tobacco, Inc. v. Cobb County*, 285 F.3d 1319, 1323 (11th Cir. 2002) (challenging a ban on advertising sexual devices as violating First Amendment because information was legal and not misleading and the government had made the ban on the devices overly broad).

418. 431 U.S. 678 (1977).

419. The statute required that pharmacists keep contraceptives behind the counter instead of on display in the drug store and forbade their advertisement. *Id.* at 681 n.1.

420. *Id.* at 682. The law prohibited the sale of contraceptives to individuals under sixteen years of age, but “[n]either the advertisements nor the order forms accompanying them limit availability of [the plaintiff’s] products to persons of any particular age.” *Id.*

421. *Id.* at 681–82. It should be noted that prescription contraceptives, including items such as the traditional birth control pill, were not included in the decision to enjoin enforcement of the statute.

422. *Id.* at 700 (internal quotation marks and citations omitted).

423. *Id.* at 701 (internal quotation marks and citation omitted).

424. *Baird v. La Follette*, 239 N.W.2d 536 (Wis. 1976).

statute's repugnancy to the Constitution is unclear,⁴²⁵ the court employed the doctrine of constitutional doubt.⁴²⁶ The court interpreted the statute as prohibiting only purely commercial displays of the devices.⁴²⁷ It held that educational displays of information regarding abortions and contraception options were permissible and permitted the statute to stand on that interpretation.⁴²⁸

Whether the two cases are directly on point with one another, or more importantly whether either is directly on point with the proposed statute banning the morning after pill, seems a relatively simple question to answer. Justice Brennan's opinion in *Carey* acknowledged that the statute in question was content-based, specifically prohibiting displays and advertisements of contraceptives, and did not address time, place, or manner restrictions on the advertising.⁴²⁹ Therefore, if the Wisconsin statute banning advertisement of the morning after pill is a content-based restriction, the *Carey* case applies. If, on the other hand, it is a time, place, or manner restriction, the *Carey* case does not directly apply. If the statute is both a content restriction and a time, place, or manner restriction, a reviewing court would scrutinize the regulation to determine whether an otherwise permissible time, place, or manner restriction is based on the content or the subject matter of the speech;⁴³⁰ if the court finds that the statute's restrictions are based on the content, the statute would be held unconstitutional.

Arguments exist that the Wisconsin statute regulates content (because the statute specifically mentions medication or a combination of medications that prevent pregnancy after sexual intercourse), that it is a place restriction (because the regulations only apply to advertising of such medications on the public campuses of the University of Wisconsin system), or that the statute is a hybrid of the two types of regulations. Although all three interpretations are plausible, the

425. *Id.* at 538 (stating that “[w]here there is serious doubt of constitutionality, we must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question”). The Supreme Court of the United States has applied the doctrine of constitutional doubt to “effectuate . . . congressional intent [] by giving ambiguous provisions a meaning that will avoid constitutional peril.” *INS v. St. Cyr*, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) (emphasis omitted).

426. The doctrine of constitutional doubt can be traced back to at least 1819, when the Supreme Court decided *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). The doctrine is based upon the belief that the question of whether a law is unconstitutional “is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.” *Id.* at 606.

427. *Baird*, 239 N.W.2d at 539.

428. The court noted, “A good-faith educational presentation of general information regarding contraception and abortion cannot constitutionally be banned, even if it is ‘mixed’ with commercial information.” *Id.* at 539 (citation omitted).

429. *Carey*, 431 U.S. at 702 n.29 (acknowledging that the Court did “not have before [it], and therefore express[ed] no view on, state regulation of the time, place, or manner of such commercial advertising based on these or other state interests”).

430. See *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 536 (1980) (permitting controversial public policy inserts in monthly utility bills under the First and Fourteenth Amendments because government regulation based on the content of the speech “slips from the neutrality of time, place, and circumstance into a concern about content” (internal quotation marks omitted)).

context from which the bill was generated indicates that the state wanted to ban the advertisement of the morning after pill in particular.⁴³¹ The bill does not prohibit *all* advertising on campus property to a similar degree.⁴³²

For these reasons, a court would likely find that the proposed Wisconsin statute is a content-based restriction of the type prohibited by the Supreme Court in *Carey*. Therefore, it is highly unlikely that Wisconsin, or any other state, can constitutionally prohibit all advertisement of the morning after pill's availability on its college campuses. This is not to say that the state has to fund such advertising; there is a "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."⁴³³ Wisconsin could, for example, choose to fund with public monies advertisements promoting *any* or none of the following family planning policies: abstinence, traditional birth control methods such as condoms, the morning after pill, abortion, or carrying the child to term.⁴³⁴ The Supreme Court has stated that the government can "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."⁴³⁵ In its current form, however, Wisconsin's statute banning the advertisement of the morning after pill on the state's public college and university campuses would probably not withstand judicial scrutiny.

B. Equal Protection Analysis

A common attribute of the Virginia and the Wisconsin statutes is their ban on access to the morning after pill from campus health clinics. Both states propose to ban the prescription, sale, and distribution of the morning after pill completely on their public college and university campuses, effectively eliminating the medication from student life unless the students choose to obtain it from a family physician or other off-campus source. A reasonable place to begin when challenging statutes such as those proposed in Virginia and Wisconsin is with an analysis under the Equal Protection Clause. The first determination that must be made under such an analysis is whether there is "some ground of difference that

431. See *supra* Part III.B and the introduction to this Note.

432. See PROPOSED WISCONSIN STATUTE, *supra* note 402.

433. *Maier v. Roe*, 432 U.S. 464, 475 (1977).

434. See *id.* at 474 (stating that an indigent woman does not suffer a disadvantage if Connecticut funds childbirth but not elective abortion). The advertisements would probably not be specific to college and university campuses because Wisconsin law gives the board of regents of the university system the authority to create a budget for each public college or university. See WIS. STAT. § 36.09(3)(h) (West 2006).

435. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Chief Justice Rehnquist bases this statement on the Court's prior statement that "abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy." *Maier*, 432 U.S. at 468 (quoting *Roe v. Norton*, 408 F. Supp. 660, 663 n.3 (D. Conn. 1975)). In much the same way, funding childbirth over abortion and funding neither are two ways of dealing with the same issue.

rationally explains the different treatment.”⁴³⁶ Statutes that are subject to suspicion under the Equal Protection Clause include regulations that apportion benefits or penalties to groups that have been “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁴³⁷ A challenge by a plaintiff representing women as a class would present the most successful case against the statutes at issue for the purposes of the Equal Protection Clause. Other potential groups that could claim unequal treatment under the proposed statutes are pregnant women, university students, and sexually active individuals. However, none of these classifications are likely to be recognized as a suspect class for the purposes of equal protection, as women are.⁴³⁸

As a starting point, it is important to recognize that there is no right of access to contraceptives, in spite of the decisions in *Griswold*, *Eisenstadt*, and *Roe*,⁴³⁹ meaning that individuals or groups seeking to challenge regulations like those proposed in Wisconsin or Virginia cannot rely solely on these Supreme Court decisions. States may regulate the business of manufacturing and selling contraceptives, even to the point of burdening women’s reproductive choice, provided that the government can make the difficult showing that it has a compelling state interest in doing so.⁴⁴⁰ Although the rights the Supreme Court has delineated in the areas of contraception and abortions are broad for the individual and narrow for the state, it does not follow that a state may never regulate the use or distribution of contraceptives or the procedural requirements of abortion, such as requiring that a licensed physician perform the procedure.⁴⁴¹

The most important factor in evaluating whether a statute violates the Equal Protection Clause is the scrutiny a reviewing court must apply to the legislation. Prior to 1996, classifications based on gender were subject to intermediate scrutiny, requiring that the government show a substantial governmental interest and that the government prove that the state’s prohibition or regulation be reasonably related to that substantial government interest.⁴⁴² In 1996, the Supreme Court applied a more stringent standard to state action in its *United States v.*

436. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

437. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

438. See *infra* notes 435–54 and accompanying text.

439. See *Carey v. Population Serv. Int’l*, 431 U.S. 678, 688–89 (1977) (striking down the regulation “not because there is an independent fundamental ‘right of access to contraceptives,’ but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing”). Thus, while the Supreme Court has stated that laws in cases such as *Griswold* and *Carey* violated the Constitution, the Court did not do so because states have no right to regulate in the area. Rather, the statutes at issue did not address a sufficiently compelling governmental interest in preserving women’s health or were not tailored to accomplish their purpose without undue burden to women. *Id.*

440. *Id.* at 685–86 (stating that “the constitutionally protected right of privacy extends to an individual’s liberty to make choices regarding contraception [but] does not . . . automatically invalidate every state regulation in this area”). See also *Roe v. Wade*, 410 U.S. 113, 150 (1973).

441. *Carey*, 431 U.S. at 685–86.

442. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

Virginia decision.⁴⁴³ In that case, a female high school student sought admission to the all-male Virginia Military Institute (VMI), was denied admission because she was a woman, and filed a complaint with the Attorney General of the United States alleging that the school's single-sex admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁴⁴ VMI required rigorous physical and mental discipline of its male cadets,⁴⁴⁵ and Virginia argued that admitting women would lead to changes in the school because "the adversative environment could not survive unmodified" with the presence of both sexes.⁴⁴⁶ The district court agreed, acknowledging that some women would attend the school if they had the opportunity, but rejecting the equal protection challenge.⁴⁴⁷ Although the court agreed that women were denied the benefits of attending VMI, the court concluded that the single-gender environment "yield[ed] substantial benefits" and should be preserved.⁴⁴⁸ The Fourth Circuit disagreed and vacated the district court's judgment, saying that Virginia did not have a reason to deny VMI's benefits to men and not to women.⁴⁴⁹

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women known as the Virginia Women's Institute for Leadership (VWIL).⁴⁵⁰ The VWIL program would not have a military format, but would instead use "a cooperative method which reinforces self-esteem."⁴⁵¹ Virginia returned to the district court for approval of the parallel plan, and the district court permitted the program, saying that the guiding legal principles did not require Virginia to provide a mirror image of VMI for women.⁴⁵² The Fourth Circuit affirmed the district court's judgment, approving single-gender education generally and examining the program to determine whether the men at VMI and the women at VWIL would obtain comparable benefits at their respective institutions.⁴⁵³ The court determined that the two schools were sufficiently comparable while acknowledging that the VWIL degree lacked the historical prestige of a VMI degree.⁴⁵⁴ The United States sought certiorari, which the Court granted to determine whether VMI's exclusion of women violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁵⁵

Justice Ginsburg's majority opinion noted that the United States and individual

443. 518 U.S. 515 (1996).

444. *Id.* at 523.

445. *Id.* at 522 (describing the "adversative model" that defines a VMI education, including life in "[S]partan barracks where surveillance is constant and privacy nonexistent" and a "stringently enforced" honor code).

446. *Id.* at 524.

447. *Id.* at 523.

448. *Id.* at 524.

449. *Id.* at 524–25.

450. *Id.* at 526.

451. *Id.* at 527.

452. *Id.* at 528.

453. *Id.* at 528–29.

454. *Id.* at 529.

455. *Id.* at 515.

states had a long history of denying women legal, educational, and economic opportunities solely on account on their gender.⁴⁵⁶ The Court then held that courts must determine whether the government's justification for its gender classification "is 'exceedingly persuasive.' The burden is demanding and it rests entirely on the State."⁴⁵⁷ Justice Ginsburg noted that this heightened scrutiny "does not make sex a proscribed classification" in all instances.⁴⁵⁸ As applied to the VMI, the Court decided that state actors "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"⁴⁵⁹ Consequently, the majority held by a margin of seven to one⁴⁶⁰ that "the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords."⁴⁶¹

Applying the Court's standard in *VMI*, a plaintiff alleging a violation of the Equal Protection Clause based on sex shifts the burden of proof to the state government to supply an exceedingly persuasive justification for its ban on the morning after pill. As Justice Ginsburg acknowledged in *VMI*, the burden is a heavy one.⁴⁶² The state's justifications would probably include concern for the health of the state's women, the regulation of the distribution of medications, and the concern that rape victims, who often seek use of the morning after pill,⁴⁶³ will be even less inclined to report the crime to authorities if it is readily available. Given the standard in *VMI*, a reviewing court would probably not find the reasoning "exceedingly persuasive" and would strike down a ban on the sale, distribution, or advertisement of the morning after pill on public college and university campuses as a violation of the Equal Protection Clause of the Fourteenth Amendment.

C. Due Process

Finally, the most obvious legal challenge to the proposed bans on the morning after pill on Wisconsin's and Virginia's public college and university campuses is based on the right of privacy. In cases including *Griswold*, *Eisenstadt*, *Roe*, *Casey*, and *Lawrence*,⁴⁶⁴ the Supreme Court has stated that the right of privacy derives

456. See *id.* at 531–32 (noting that *United States v. Virginia* "responds to volumes of history" and describing the "prevailing doctrine" of the Supreme Court in earlier days when both federal and state governments "could withhold from women opportunities accorded men so long as any basis in reason could be conceived for the discrimination" (internal quotation marks omitted)).

457. *Id.* at 532 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The *Hogan* case concerned admission of men to a nursing program at a single-sex college for women. *Id.*

458. *Id.* at 533.

459. *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

460. Justice Thomas did not participate in the consideration or decision of the case; Justice Scalia wrote the lone dissent. *Id.* at 518.

461. *Id.* at 519.

462. *Id.* at 532.

463. See generally Schaper, *supra* note 372 (supporting the passage of a federal bill to make emergency contraception available in all hospital emergency rooms for rape victims).

464. See *supra* Part I.

from the Fourteenth Amendment to the Constitution.⁴⁶⁵ In its earliest form, Justice Douglas's majority in *Griswold* also alluded to the privacy right's derivability from the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution, taken together.⁴⁶⁶

The joint opinion in *Casey* held that only "where state regulation imposes an undue burden on a woman's ability to make [the abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."⁴⁶⁷ Thus, if a law "serves a valid purpose, one not designed to strike at the right itself, [but] has the incidental effect of making it more difficult or more expensive" to get an abortion, the Supreme Court would not necessarily invalidate it.⁴⁶⁸ Known as the undue burden test,⁴⁶⁹ this new standard replaced the rigid trimester framework in *Roe*.⁴⁷⁰ As regards contraception, the basis of the due process argument is that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly."⁴⁷¹ Thus, the argument goes that no state may impose its power on the women who attend public colleges and universities in it so as to prevent them from obtaining the morning after pill, because doing so invades the privacy of those women.⁴⁷² This argument does not, however, preclude reasonable regulation of pharmaceuticals such as the conventional birth control pill or the morning after pill.

D. The Current Proposed Bans on the Morning After Pill Were Likely to Face Invalidation by Courts if Enacted Elsewhere, Even If the FDA Had Not Put Plan B Over the Counter for Individuals Over Seventeen Years of Age

The statutes proposed in Wisconsin and Virginia may address contraception and not abortion,⁴⁷³ but this distinction is unlikely to matter to a court. In either case, the statutes forbid a doctor from using his or her professional medical judgment in

465. See *supra* notes 244–79 (discussing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

466. See *Griswold v. Conn.*, 381 U.S. 479, 484–85 (1965) (describing past cases involving the right of "privacy and repose" and concluding that the law banning contraceptives "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"); see also discussion of the majority opinion in *Griswold*, *supra* notes 69–74.

467. *Casey*, 505 U.S. at 874.

468. *Id.*

469. See, e.g., Pacer, *supra* note 283.

470. See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (summarizing the Court's holding as it relates to trimesters).

471. *Griswold*, 381 U.S. at 485 (quoting *NAACP v. Ala.*, 377 U.S. 288, 307 (1964)).

472. *Id.* at 485–86 (stating that the "very idea" that the government could enforce the law banning contraceptives by hunting through a married couple's bedroom "is repulsive to the notions of privacy" surrounding the intimacies of married life). See *supra* notes 103–119 discussing *Eisenstadt v. Baird*, 405 U.S. 438 (1972) in which the Court held that the Equal Protection Clause demanded that the same opportunities and restrictions on contraceptives be applied to married and unmarried couples.

473. See *supra* note 12 and accompanying text.

the care of his or her patients. The Supreme Court stated in *Roe* that, at least prior to the second trimester of pregnancy, the decision whether or not to terminate the pregnancy is within the physician's discretion.⁴⁷⁴ Under the standards laid out in *Roe* and *Casey*, if a doctor determines that the morning after pill is in the best interest of a certain patient, the legislature cannot summarily replace his or her judgment with that of lawmakers removed from the circumstances of the case. This argument strikes at the Virginia statute in particular when one considers that Virginia did not have the same context as Wisconsin did in enacting its bill. While Wisconsin would not negate a doctor's judgment through its statute,⁴⁷⁵ Virginia almost certainly would do so with the passage of its law.

No state may constitutionally place an absolute ban on the distribution, sale, and prescription of the morning after pill at their public universities. There are other approaches that states may take to regulate the medication, but these alternatives must be more limited in scope than the bans currently proposed.

V. FEDERALISM CONCERNS AND THE MORNING AFTER PILL

The FDA's recent decision to put the morning after pill over the counter raises questions about the role of federal and state government in the regulation of public health and safety. The remainder of this Note will discuss the implications of this development; the FDA's decision to make Plan B available over the counter to women eighteen and older, including the college-age population, does not mean that the states have no role in health regulation.

A. The *Glucksberg* and *Gonzales* Decisions

Two recent Supreme Court cases addressing state policies regarding physician-assisted suicide illustrate the Court's decision to allow states to determine their own public health policies in this area. In *Washington v. Glucksberg*,⁴⁷⁶ the Supreme Court addressed a physician's challenge to Washington's ban on physician-assisted suicide. In *Glucksberg*, Chief Justice Rehnquist, speaking for a five-justice majority, upheld the state's ban on the practice. He acknowledged that some states, such as California, had rejected referenda to legalize physician-assisted suicide,⁴⁷⁷ while Oregon had chosen to legalize the practice in 1994.⁴⁷⁸ The physicians claimed that the ban violated an individual's liberty under the Due Process Clause of the Fourteenth Amendment.⁴⁷⁹ The Court rejected this claim,⁴⁸⁰

474. *Roe*, 410 U.S. at 163 ("for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State" whether an abortion is necessary or in the best interests of the patient) (emphasis added).

475. According to the advertisements that spurred the proposed Wisconsin statute, students did not have to receive a doctor's advice or prescription to obtain the morning after pill. See UW Ad, *supra* note 1.

476. 521 U.S. 702 (1997).

477. *Id.* at 717.

478. *Id.*

479. *Id.* at 705-06.

finding that a right to physician-assisted suicide is not a fundamental right “deeply rooted in history in this Nation’s history and tradition”⁴⁸¹ and therefore not entitled to protection from state regulation under the Fourteenth Amendment. The Court sought to “rein in the subjective elements that are necessarily present in due-process judicial review”⁴⁸² before requiring more than a reasonable relation to a legitimate state interest to justify legislative action.⁴⁸³ Because the state has an interest in preserving life,⁴⁸⁴ in protecting individuals in vulnerable groups,⁴⁸⁵ in protecting the integrity of the medical profession,⁴⁸⁶ and preventing involuntary euthanasia,⁴⁸⁷ Chief Justice Rehnquist said that Washington’s ban on assisted suicide was “at least reasonably related to” these interests and therefore permissible.⁴⁸⁸

The Supreme Court’s recent decision in *Gonzales v. Oregon*⁴⁸⁹ further illustrates the current balance between federal and state power in health care and drug regulation. Oregon became the first state to legalize assisted suicide by referendum in 1994.⁴⁹⁰ In *Gonzales*, the State of Oregon, along with a physician, a pharmacist, and a number of terminally ill patients challenged in federal court Attorney General John Ashcroft’s⁴⁹¹ 2001 Interpretive Rule, which said that assisting suicide could not be a legitimate medical purpose within the meaning of the Controlled Substances Act (CSA).⁴⁹² The district court entered a permanent injunction against the enforcement of the Interpretive Rule.⁴⁹³ After granting a petition for review, the Court of Appeals for the Ninth Circuit affirmed; the court reasoned that criminalizing a medical procedure authorized under Oregon law tampered with the federal-state balance.⁴⁹⁴ The United States government petitioned for certiorari, which the Supreme Court granted.⁴⁹⁵

480. *Id.* at 706.

481. *Id.* at 721 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

482. *Id.* at 722.

483. *Id.*

484. *Id.* at 728.

485. *See id.* at 729 (noting that individuals who attempt suicide “often suffer from depression or other mental disorders”); *see also id.* at 731 (citing the “the poor, the elderly, and disabled persons” as potential targets for “abuse, neglect, and mistakes”).

486. *Id.* at 731.

487. *Id.* at 732.

488. *Id.* at 735.

489. 126 S. Ct. 904 (2006).

490. *Id.* at 911.

491. John Ashcroft stepped down as Attorney General in 2005. Alberto Gonzales succeeded him in that position and was substituted as a party.

492. *Gonzales*, 126 S. Ct. at 913–14. Congress first enacted the CSA in 1970, creating a “comprehensive, closed regulatory regime” criminalizing the manufacture, distribution, dispensing, and possession of controlled substances. Congress placed controlled substances into one of five categories. The drugs that doctors prescribed to terminally ill patients fell under Category II as generally available only by a one-time written prescription. *Id.* at 911–12.

493. *Id.* at 914.

494. *Id.*

495. *Id.*

Justice Kennedy, writing for the six-justice majority, first examined the possible levels of deference that the Attorney General was entitled to in his interpretation of the CSA. The Court noted that an “administrative rule may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation”⁴⁹⁶ and that an “interpretation of an ambiguous statute may also receive substantial deference”⁴⁹⁷ from courts. Justice Kennedy, however, elected not to defer to the Attorney General’s interpretation, reasoning that an agency “does not acquire special authority to interpret its own words when instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”⁴⁹⁸ Thus, while Congress did delegate power to the Attorney General to formulate rules under the CSA,⁴⁹⁹ Congress delegated only limited powers to “promulgate rules and regulations and to charge reasonable fees relating to the registration and control of . . . controlled substances and to listed chemicals”⁵⁰⁰ and to “promulgate and enforce any rules, regulations, and procedures which he [sic] may deem necessary and appropriate for the efficient execution of his [sic] functions under this subchapter.”⁵⁰¹ Justice Kennedy noted that “Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA.”⁵⁰² He further stated that the Attorney General could not define the substantive standards of medical practice as part of his responsibilities under the CSA because doing so would put the statute “in considerable tension with the narrowly defined delegation concerning control and registration”⁵⁰³ of controlled substances; the CSA, he said, envisioned an expansive role for states in the regulation of controlled substances.⁵⁰⁴

After determining that the Attorney General had exceeded his authority under the CSA, the Court examined whether the CSA could be read to prohibit physician-assisted suicide.⁵⁰⁵ Justice Kennedy said that Congress regulates the medical profession to the extent that it bars doctors from engaging in illicit drug trafficking, but that Congress had not expressed an intent to regulate medicine generally.⁵⁰⁶ Rather, the “structure and limitations of federalism”⁵⁰⁷ enable the states to retain control over the medical community through the police power. Had Congress sought to regulate or ban physician-assisted suicide, it would have done

496. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997)).

497. *Id.* at 914 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

498. *Id.* at 916.

499. *See id.* (acknowledging that the Attorney General “has rulemaking power to fulfill his duties under the CSA”).

500. *Id.* (quoting 21 U.S.C.A. § 821 (Supp. 2005)).

501. *Id.* at 917 (quoting 21 U.S.C.A. § 871(b) (2000)).

502. *Id.* at 917.

503. *Id.* at 920.

504. *See id.* at 912 (noting that the CSA “explicitly contemplates a role for the States in regulating controlled substances”).

505. *Id.* at 922.

506. *Id.* at 923.

507. *Id.*

so by explicit language in the CSA, he said.⁵⁰⁸ The structure of the CSA, which contemplates a broad role for the states, “belie[s] the notion” that Congress would grant the Attorney General authority “to regulate areas traditionally supervised by the States’ police power.”⁵⁰⁹ The majority concluded that “the text and structure of the CSA show that Congress did not have . . . [the] intent to alter the federal-state balance and the congressional role in maintaining it”⁵¹⁰ and affirmed the judgment of the Ninth Circuit.⁵¹¹

Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented. First, Justice Scalia said, the majority failed to properly defer to the Attorney General’s interpretation because “the [Interpretive Rule] purported to interpret the language of the Regulation”⁵¹² and therefore the case “call[ed] for the straightforward application of [the Court’s] rule that an agency’s interpretation of its own regulations is ‘controlling unless plainly erroneous or inconsistent with the regulation.’”⁵¹³ Justice Scalia rejected the majority’s conclusion that the Attorney General had merely parroted statutory language because the regulation interpreted the word “prescription” as used in the CSA.⁵¹⁴ The dissenting justices then said that the justices in the majority erred when they determined that the Attorney General’s duty of registration and control did not encompass control over the processes of manufacture, distribution, and dispensing of controlled substances,⁵¹⁵ including the establishment of what constitutes a valid medical purpose for prescriptions. Thus, Justice Scalia said, the Attorney General’s decision not to interpret physician-assisted suicide as a legitimate medical purpose was “perfectly valid.”⁵¹⁶ Furthermore, Justice Scalia said that even if the Court afforded the Attorney General no deference, “[v]irtually every relevant source of authoritative meaning”⁵¹⁷ confirms the Attorney General’s directive that assisting suicide is not a legitimate medical purpose. Finally, Justice Scalia said that the statute explicitly granted the Attorney General the power to register and deregister physicians, and that he may choose to do so when the physician engages in conduct that threatens the public interest;⁵¹⁸ the Attorney General’s interpretations of what is done for the public health and safety are, Justice Scalia said, subject to *Chevron* deference.⁵¹⁹

508. *Id.* at 924.

509. *Id.* at 925.

510. *Id.*

511. *Id.* at 926.

512. *Id.* at 927 (Scalia, J., dissenting). The regulation at issue was the Attorney General’s interpretation of what constituted a “legitimate medical purpose.” See 21 C.F.R. § 1306.04 (2005).

513. *Gonzales*, 126 S. Ct. at 927 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

514. *Id.* at 927 (Scalia, J., dissenting).

515. *Id.* at 929–30.

516. *Id.* at 931 (reasoning that the Court should defer to the Attorney General’s interpretation because, under *Bowers v. Seminole Rock & Sand Company*, 325 U.S. 410 (1945), the Attorney General’s construction is not plainly erroneous or inconsistent with the regulation, and under *Chevron*, 467 U.S. 837 (1984), it is “not beyond the scope of ambiguity in the statute”).

517. *Id.*

518. *Id.* at 935–36.

519. *Id.* at 938. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467

Justice Thomas also dissented, reasoning that the majority improperly applied its earlier decision in *Gonzales v. Raich*,⁵²⁰ in which the Court had also examined the CSA. He said that in *Raich* the majority had interpreted the CSA broadly when it determined that the CSA applied to the intrastate possession of marijuana for medical purposes.⁵²¹ Justice Thomas also indicated that while he agreed with the interpretation of the CSA “in a manner consistent with the principles of federalism and our constitutional structure,”⁵²² the Court had already struck that balance in *Raich* and considering the federal-state balance at this stage was “water over the dam.”⁵²³ He concluded that the majority’s decision to rely on principles it had rejected only months earlier was “perplexing to say the least.”⁵²⁴

B. *Glucksberg, Gonzales, and the Decision to Put the Morning After Pill Over the Counter*

The application of the *Gonzales* decision to the FDA’s recent decision to put the morning after pill over the counter is relatively straightforward from a strictly legal standpoint. The FDA came into being with the passage of the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA).⁵²⁵ As the federal agency charged with ensuring the safety of food and pharmaceuticals, the FDA has discretion in deciding whether or not to approve a drug for prescription or over the counter use. Unlike the Attorney General’s Interpretive Rule in *Gonzales*, where the official’s capacity to make the decision was subject to doubt, the FDA was undoubtedly within its province when it approved “OTC availability of Plan B for consumers 18 years and older” on August 24, 2006.⁵²⁶ By the terms of the federal statute, an application for new drug approval should be approved if none of seven conditions for refusal are met.⁵²⁷ Accordingly, the application for Plan B was approved

U.S. 837, 842-43 (1984)). Commonly known as *Chevron* deference, this low standard of judicial review for government agency regulations has come under scrutiny in recent years. See, e.g., Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 209 (Spring 2004) (stating that some statutory interpretations by agencies “raise substantial questions about whether it is appropriate to apply the principle of *Chevron* deference to a self-interested agency interpretation”). The Supreme Court has narrowed the application of *Chevron* in certain contexts in an effort to cut back on the breadth of the *Chevron* doctrine. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that not all federal agencies are entitled to *Chevron* deference).

520. 545 U.S. 1 (2005) (holding that application of the CSA to the purely intrastate activity of growing marijuana for medicinal purposes was a valid exercise of the commerce power).

521. *Gonzales*, 126 S. Ct. at 940 (Thomas, J., dissenting).

522. *Id.* at 941.

523. *Id.*

524. *Id.*

525. See 21 U.S.C.A. §§ 301–399 (West 2000 & Supp. 2006) (requiring, among other things, the registration of pharmaceutical manufacturers, an approval process for new drugs, and penalties for the misbranding or adulteration of drugs).

526. FDA Approval Letter, *supra* note 7, at 2.

527. 21 U.S.C. § 355(d) (2000). The seven grounds for dismissal are inadequate testing of the product, test results indicative that the product is unsafe, inadequate or impure manufacturing methods, insufficient information on the drug’s safety in certain conditions, lack of substantial evidence that the drug will have the purported effect, failure of the application to contain relevant

pursuant to certain conditions, including the evaluation of possible correlation between its use and any increase in sexually transmitted diseases and the creation of an anonymous shopper program to ensure that the product is not sold over the counter to individuals under eighteen years of age.⁵²⁸ In its decision to put the morning after pill over the counter, the FDA followed its own procedures, including having a public comment period⁵²⁹ and meeting with the drug's manufacturer to discuss enforcement of the age restriction required by the final order,⁵³⁰ before it made its decision.

The FDA's decision to put Plan B over the counter has some positive effect on women enrolled in colleges and universities. Rape victims who may otherwise become pregnant through no fault of their own may be spared the trauma of later obtaining an abortion or choosing to have a child alone because Plan B is now available without having to obtain a prescription.⁵³¹ Individuals whose efforts to practice safe sex fail, as might happen if a condom breaks during sex, will have a further method of protection against an unplanned pregnancy. Young women who make an imprudent choice may avoid the life-altering possibility of pregnancy through Plan B.

Along with these benefits, however, come concerns with the role of the states in regulating public health and safety. Writing for the majority in *Gonzales*, Justice Kennedy emphasized the "great latitude [that the states have under their] police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"⁵³² and stressed that the federal-state balance that Congress struck in the original CSA should not be disturbed.⁵³³ The question of the extent to which federal law and federal regulations should preempt efforts at state regulation through statutes and the development of common law is highly debated one.⁵³⁴

patent information, and false or misleading product labeling.

528. FDA Approval Letter, *supra* note 7, at 2.

529. *See id.* at 1 (noting that the comment period closed in November of 2005 after the agency received about 47,000 comments from the public).

530. *Id.* at 2.

531. *See supra* notes 371–377 and accompanying text.

532. *Gonzales v. Oregon*, 126 S. Ct. 904, 923 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)) (internal quotation marks omitted).

533. *See id.* at 925 (noting that the statute is structured with "careful allocation of decisionmaking powers" in mind and doubting that "Congress would use such an obscure grant of authority [to the Attorney General] to regulate areas traditionally supervised by the States' police power").

534. *See generally* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763 (2006) (concluding that values attributed to federalism, such as preventing tyranny and preserving the states as laboratories, have nothing to do with the Rehnquist Court's decisions in this area); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (noting that claims of state sovereignty can pose risks to other states in the form of externalities and tracing the development of federal standards as a response to the need for uniform control of a national market); Marilyn P. Westerfield, Comment, *Federal Preemption and the FDA: What Does Congress Want?*, 58 U. CIN. L. REV. 263 (1989) (finding preemption case law inconsistent but concluding that the FDA's complete preemption of state law in the area of drug labeling and regulation is undesirable because it would grant pharmaceutical companies immunity from suit if in compliance with the FDA's requirements).

The Supreme Court has experimented with various formulations of the federal-state balance over the last century,⁵³⁵ with its interpretation of the CSA in *Gonzales* only the latest.

Although the Court's federalism jurisprudence has changed as much as, or more often than, the Court's composition over the years, no decision has seriously suggested that there is no longer a viable role for the states in the American system. However, the FDA's recent action prevents any serious form of state regulation of the morning after pill, even setting aside the proposed campus-wide bans of Plan B. Given the intense debate surrounding the drug, states should be given more opportunity to legislate in the area due to the consequences of a federal decision.

One potential consequence of the FDA's decision to put the morning after pill over the counter while the standard birth control pill remains prescription only is that the pharmaceutical company producing Plan B may have to meet only the FDA's minimal standards for packaging and labeling to avoid tort liability. States that wish to permit causes of actions against the drug company on a theory of products liability will likely see such causes of action preempted by the FDA's decision, which could shield the company from liability if Plan B is later found to be unsafe.⁵³⁶ The federal regulation could immunize the manufacturer from liability in that any state law imposing additional obligations on the manufacturer would be nullified.⁵³⁷ If states had been given the opportunity to regulate in this

535. See, e.g., *United States v. Lopez*, 514 U.S. 549, 576 (1995) (striking down federal statute prohibiting possession of a firearm within 1,000 feet of a school as outside the scope of the commerce power and stating that "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (overruling *National League of Cities* and finding that the states have authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government"); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (finding that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority . . . but because the Constitution prohibits it from exercising the authority in that manner"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

536. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding state common law tort action based on absence of driver's side airbag preempted by Department of Transportation's order demanding installation of airbags in some, but not all, 1987 automobiles); *Bravman v. Bayer Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994) (noting state law tort claim for FDA-approved heart valve was preempted "when the Food and Drug Administration has established specific counterpart regulations or there are other specific requirements applicable . . . making any existing divergent State or local requirements applicable to the device different from, or in addition to, the specific Food and Drug Administration requirements").

537. Westerfield, *supra* note 534, at 280; see also Wilfred P. Coronato et al., *The Fracture That Will Not Heal: The Landscape of Federal Preemption in the Fields of Medical Devices, Prescription and Over-the-Counter Drugs Ten Years After Medtronic, Inc. v. Lohr*, SL038 A.L.I.-A.B.A. 365, 380-82 (Aug. 2005) (tracing several cases in which federal regulation preempted state law claims); Issacharoff & Sharkey, *supra* note 534, at 1372-73 (raising and challenging the argument that "preemption is simply a tool to disable regulation and give potential tortfeasors a

area, more effective safety measures could have been put in place, more studies could have been conducted, and the democratic process could have provided a number of different solutions, as in the assisted suicide debate. For example, the majority of states ban physician-assisted suicide in order to avoid concerns with exploitation of certain groups and to avoid damaging the integrity of the medical profession.⁵³⁸ Oregon chose, however, to alleviate those concerns in another way while permitting the practice; the state's regulations of physician-assisted suicide contain features that address these problems without requiring a ban on physician-assisted suicide.⁵³⁹ The country is "engaged in an earnest and profound debate about the morality, legality, and practicality"⁵⁴⁰ of the morning after pill, just as it continues to debate the merits of physician-assisted suicide.

VI. CONCLUSION

The FDA's decision mandates a uniform national policy, but it does not end the debate over Plan B's merits, particularly in situations like the one found on the University of Wisconsin's campus in 2005.⁵⁴¹ Presumably, even the manufacturer of Plan B would discourage its distribution as a form of "preparation"⁵⁴² for unprotected sex.⁵⁴³ Given the wide range of college experiences across the states, states might have developed innovative policies to provide better education on the proper use of Plan B to students and the public generally and better training to pharmacists who are required to enforce the age restriction. As it currently stands, Plan B's manufacturer has agreed to participate in an anonymous shopper program to ensure compliance with the age restriction,⁵⁴⁴ but there are no other safeguards in place and any state's attempts to buttress enforcement are preempted by the terms of the FDA's decision. The FDA's decision to put the morning after pill over the counter has sacrificed a range of possible actions for educating young women and protecting their health in favor of a policy that gives all college-aged

wider berth in which to act").

538. See *Washington v. Glucksberg*, 521 U.S. 701, 710 n.8 (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 847 (9th Cir. 1996)) (noting that forty-four states and the District of Columbia have outlawed or condemned assisted suicide).

539. See, e.g., OR. REV. STAT. ANN. § 127.520 (West 2006) (prohibiting attending physician from serving as attorney-in-fact for patient); OR. REV. STAT. ANN. § 127.085 (West 2006) (requiring residency in the state of Oregon and a voluntary expression of the desire to die); OR. REV. STAT. ANN. § 127.810 (West 2006) (permitting physician-assisted suicide only if at least two witnesses "attest that to the best of their knowledge and belief the patient is capable, acting voluntarily, and is not being coerced to sign the request").

540. *Glucksberg*, 521 U.S. at 735.

541. See *supra* Introduction.

542. See *UW Ad*, *supra* note 1.

543. Duramed's proposed packaging for Plan B notes that the drug should not be used for regular birth control. DURAMED PHARMACEUTICALS, LABELS FOR PLAN B 5 (Aug. 2006), available at <http://www.fda.gov/cder/foi/label/2006/021045s011lbl.pdf>. The company's labels also recommend that women "use routine pregnancy protection" rather than relying on Plan B. *Id.* at 14. Furthermore, the company warns that its product will not protect women who have unprotected sex from sexually transmitted diseases. *Id.* at 10.

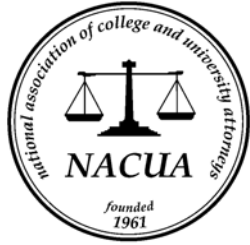
544. See FDA APPROVAL LETTER, *supra* note 7, at 2-3.

women over-the-counter access to a stronger dose of birth control than is currently available only by prescription. Although the proposed statutes in Wisconsin and Virginia would not have withstood constitutional scrutiny, the current national debate over Plan B's availability indicates that the issue should have been left to state regulation, as in *Glucksberg* and *Gonzales*.

The contentious debate over the morning after pill's availability and the likelihood of future studies concerning issues of moral hazard and the morning after pill's affect, if any, on the rate of abortion, indicates that a reversal of the decision is possible. If such a reversal occurs, the issues imputed by the proposed Wisconsin and Virginia statutes will once again be at the forefront of the national debate and public colleges and universities could once again be of special concern for state legislators.

To the Subscribers of the *Journal of College and University Law*:

Regarding Lynn Daggett's article, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, published in the last issue of the *Journal of College and University Law*, 32-3, the author had requested changes to her article prior to publication that were inadvertently left out of the print version. We have included those changes in the online version, which also will be available on Westlaw. Please accept our apologies for this inconvenience.



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