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## ARTICLES

### **The Teach Act: Recognizing Its Challenges and Overcoming Its Limitations**

Stephana I. Colbert & Oren R. Griffin 499

Technological advancements centered on the Internet, distance education, and digitally transmitted information have created tremendous opportunities for educational institutions. Congress enacted the Technology, Education, and Copyright Harmonization Act (TEACH Act) to exploit these opportunities and provide educators with an important tool to take advantage of the information super-highway. While the Congressional intent of the Act has merit, its provisions arguably create troubling obligations and potential liability for colleges and universities. This article discusses challenges presented by the TEACH Act and proposes modifications intended to address some of the most troubling aspects of the Act.

### **Intramural and Club Sports: The Impact of Title IX**

Sarah K. Fields 521

Title IX, which prohibits gender discrimination, applies to not just intercollegiate athletics but also to intramural and club sports programs. This article examines several institutions' policies on access to these sports programs as well as their policies for financial support. It warns colleges and universities to be aware of the need for gender equity when it comes to providing and funding these programs and to be wary of making decisions based on history or tradition.

## ESSAY

### **Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance**

Melissa Hart 547

The disparate impact theory of discrimination, which permits challenges to policies that are facially neutral but have discriminatory effects, has been controversial since its creation. It has not had the kind of success as a litigation tool that those who first conceived it had hoped it might have. The insight behind the disparate impact theory that even policies that appear neutral may not be neutral in operation can provide considerable guidance in employer efforts to comply with antidiscrimination mandates.

## BOOK REVIEWS

### **Aim Higher: Challenging Farrington and Palfreyman's *The Law of Higher Education***

Timothy S. Kaye 559

In *The Law of Higher Education* Dennis Farrington and David Palfreyman present a wealth of material about higher education in the United Kingdom. It is argued, however, that their work is significantly flawed because it is colored by a 'consumerist' perspective which views education as a 'product' of 'corporate enterprise'. This review article attempts to redress the balance and provide a more objective basis of analysis.

### **Review of William A. Kaplin and Barbara A. Lee's *The Law of Higher Education***

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Much expanded from earlier versions, the Fourth Edition of this standard treatise aims to provide college and university lawyers and administrators with comprehensive guidance on law that bears on legal risk-management at their institutions. This valuable publication addresses a great many questions, but does not supersede the lawyer's role, nor does it claim to do so.

### **Higher Education Law Scholarship and the Key to All Mythologies**

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The major treatise in college law, Kaplin and Lee's *The Law of Higher Education* has been revised and is in its fourth edition, in two volumes. Professor Olivas reviews the newest edition, and chronicles the many changes to the project over time. In addition, he offers advice on the maintenance of supplements, and critiques its value as a teaching tool.

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### **The Fourth Amendment and Dormitory Searches**

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The drafting and enforcement of contracts for students living in public college and university dormitories pose numerous challenges. This note addresses the Fourth Amendment and its effect on searches of student dormitory rooms. It attempts to reconcile contemporary search and seizure jurisprudence to the security needs of colleges and universities. Reviewing the development of the law, the note considers the constitutional protection of privacy. Additionally, it analyzes students' reasonable expectations of privacy, the applicability of waivers in housing contracts, and the argument for desirable learning environments. The note particularly responds to the recent Supreme Court case, *Randolph v. Georgia*, and recommends how colleges and universities can reconcile their dormitory search policies with constitutional imperatives.

### **Harsh Reality: The Prior Restraint Doctrine and the Free Speech Rights of Employees of Public Colleges and Universities**

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### **College and University Liability for the Dangerous Yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics**

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Colleges and universities must take responsibility for the hazing occurring on their campuses in both the fraternity and student-athlete context. This Note discusses why liability should be imposed on colleges and universities for hazing and what limits should be placed on that liability. Consistent with the historical evolution of tort law, a college or university should be held liable for any injuries to students resulting from foreseeable hazing incidents.

**An Alternative to Prescriptive Standards in Hazardous Waste Regulation: Subpart K and Performance-Based Standards for Academic Labs**

Jeffrey L. Vercauteren 681

Since the enactment of the Resource Conservation and Recovery Act in 1976, academic labs have been subject to the same regulations as other generators of hazardous waste. However, these labs have faced difficulty meeting requirements designed for industrial settings. Subpart K is intended to ease the burden on academic labs by allowing for the adoption of flexible, performance-based standards in research lab settings. This article analyzes the suitability of such standards in hazardous waste regulation.

# THE TEACH ACT: RECOGNIZING ITS CHALLENGES AND OVERCOMING ITS LIMITATIONS

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## I. INTRODUCTION

America's geo-political and economic stature as a world super-power has been achieved, at least in part, due to the tremendous contribution that educational institutions, particularly institutions of higher education, have made to the nation. Whether one considers the Morrill Act of 1890,<sup>1</sup> which paved the way for land grant institutions across the country, the 1944 GI Bill,<sup>2</sup> authorizing post-secondary education assistance to millions of American veterans, or the National Defense Education Act passed in 1958<sup>3</sup>—which, in response to the Soviet Union's launch of Sputnik, prompted federal support for student loans, graduate fellowships, and efforts to improve science, mathematics, and foreign language education—it is apparent that Congress has regarded the country's educational capacity as a vital governmental interest.

The latter part of the twentieth century may be regarded as the era which ushered in the information age, offering challenges and opportunities for educational institutions across the country. Moreover, the information age has signaled the need for the nation's colleges and universities to thoughtfully examine the approaches used to exploit technological advancements in the interest of achieving continued success in education at every level.

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1. Morrill Act of 1890, ch. 841, 26 Stat. 417 (1890).
2. Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights), ch. 268, 58 Stat. 284 (1944).
3. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).

One such technological advancement is the Internet. This paper examines the scope of concerns that confront implementation of the Technology, Education, and Copyright Harmonization Act of 2002 (TEACH Act)<sup>4</sup>—a legislative effort both to expand the permissible uses of copyrighted information over the Internet and to regulate the use of those materials on the Internet to protect the interests of copyright owners. While much has already been written setting forth the directives of the TEACH Act,<sup>5</sup> we seek to review the obstacles and challenges of the Act and then determine whether it is possible and advisable to develop a universal set of “best practices” or guidelines that will facilitate the use of copyrighted material via the Internet.

## II. CONGRESS INTERVENES

While the classroom setting is the traditional place where learning occurs, today we see the propagation of distance education through the use of digital technologies<sup>6</sup> as an equally viable vehicle in the pursuit of a more educated population. Because distance education has far-reaching implications for every segment of the population in the United States, the capabilities of digital technologies have captured the attention of both the educational community and the general public.<sup>7</sup> While the Copyright Act of 1976<sup>8</sup> was a welcome update for users of copyrighted information in the traditional classroom, § 110(2) of the Act did not accommodate the demands of distance education.

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4. Technology, Education, and Copyright Harmonization Act, Pub. L. No. 107-273, § 13301, 116 Stat. 1910 (2002) (codified as 17 U.S.C. § 110(2), 112(f) (2005)) [hereinafter *TEACH Act of 2002*].

5. KENNETH D. CREWS, *NEW COPYRIGHT LAW FOR DISTANCE EDUCATION: THE MEANING AND IMPORTANCE OF THE TEACH ACT* (2002), <http://www.ala.org/ala/washoff/WOissues/copyrightb/federallegislation/distanced/teachsummary.pdf>; North Carolina State University’s TEACH Toolkit: An Online Resource for Understanding Copyright and Distance Education, <http://www.lib.ncsu.edu/scc/legislative/teachkit> (last visited Apr. 10, 2007); GEORGIA HARPER, *THE TEACH ACT FINALLY BECOMES LAW* (2002), <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>; LAURA N. GASAWAY, *TEACH ACT COMPARISON: SECTIONS 110(1)-(2)* (2002), <http://www.unc.edu/~unclng/TEACH.htm>; ANN SPRINGER, *AAUP: COPYRIGHTS & WRONGS* (2006), <http://www.aaup.org/AAUP/protectrights/legal/topics/copy.htm>; David T. Drooz, North Carolina State University, Address at NACUA Continuing Legal Education Workshop: Copyright Update: TEACH Act Implementation and Downstream Controls (Nov. 10, 2005).

6. U.S. COPYRIGHT OFFICE, *REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION* (1999), [http://www.copyright.gov/reports/de\\_rprt.pdf](http://www.copyright.gov/reports/de_rprt.pdf) (noting that “distance education is a form of education in which students are separated from their instructors by time and/or space.” *Id.* at 10. Also, the report noted “the term ‘distance education’ appears to focus most clearly on the delivery of instruction with a teacher active in determining pace and content . . .”).

7. *Promoting Technology and Education: Turbo-Charging the School Buses on the Information Highway: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Hearings of March 13, 2001*].

8. An Act for the general revision of the Copyright Law, Title 17 of the United States Code, and for other purposes (Copyright Act of 1976), Pub. L. No. 94-553, 90 Stat. 2541 (1974) (codified as 17 U.S.C. § 101 (2005)).

Whether the use of digital technologies in distance education required lawmakers to revisit the scope of copyright law was debated prior to passage of the 1998 Digital Millennium Copyright Act (DMCA).<sup>9</sup> Unable to resolve the concern, in § 403 of the DMCA, the Copyright Office was directed to consult with various stakeholders, including non-profit educational institutions, copyright owners, non-profit libraries, and archives to develop recommendations to submit to Congress regarding the promotion of distance education through digital technologies.<sup>10</sup> The result would be a study codified in the 1999 Report on Copyright and Digital Distance Education, which would serve as the basis for Senate Bill 487.<sup>11</sup>

The Report of the House of Representatives, which accompanied the House version of Senate Bill 487, stated that “[t]he technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery methods for instruction.”<sup>12</sup> The reports from both chambers of Congress on this issue noted that amendment of the Copyright Act was necessary to exploit the new educational opportunities presented by digital transmission technologies, which would provide interactive educational experiences to students unable to attend classes at an institution’s physical location.<sup>13</sup> Likewise, an amendment of the Copyright Act of 1976 was arguably necessary to respond to the new risks for owners of copyrighted work precipitated by the potential rapid dissemination of digital transmission technologies, i.e., transmission of copyrighted materials via the Internet.<sup>14</sup>

Senate Bill 487—the TEACH Act—therefore emerged as a seemingly worthy amendment to the Copyright Act of 1976. The TEACH Act extended the distance education exemption to cover mediated instructional activities transmitted by digital networks—distance education—by amending §§ 110(2) and 112 of the Copyright Act.<sup>15</sup>

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9. S. REP. NO. 107-31, at 5 (2001); H.R. REP. NO. 107-687, at 3 (2002).

10. *Id.*

11. *Technology, Education, and Copyright Harmonization Act of 2001: Hearing on S. 487 Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. of the Judiciary*, 107th Cong. 7 (2001) [hereinafter *Hearings of June 27, 2001*] (statement of Marybeth Peters, Register of Copyright, Copyright Office of the United States, Library of Congress), available at <http://judiciary.house.gov/media/pdfs/printers/107th/73473.pdf>. According to the testimony of Ms. Peters, the Copyright Office and representatives of the constituent groups were charged “to submit to Congress a report on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users.” *Id.* at 14.

12. H.R. REP. NO. 107-687, at 3 (2002).

13. *Id.*

14. *Id.*

15. *Hearings of June 27, 2001, supra* note 11, at 16. As stated in Ms. Peters’ testimony, “Mediated Instructional Activities” is “intended to convey activity where there is a teacher or an instructor at the center and students that may be other places.” *Id.* Moreover, the statute defines the phrase “Mediated Instructional Activities” as “activities that use such [permitted] work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting.” 17 U.S.C. § 110(10) (2005).

More specifically, the purpose of the TEACH Act as set forth in the June 5, 2001, Senate Judiciary Committee Report 107-31 and the September 25, 2002, House Committee on the Judiciary Report 107-687, is to allow the deployment of advanced digital transmission of technologies for the improvement of student education, while introducing safeguards to limit the risks to copyright owners relative to the dissemination of works in digital form.<sup>16</sup> The deployment of digital transmission technologies, like the Internet, has positive implications for distance education and the advancement of education in general, because instructional transmissions between student and teacher separated in place, and perhaps time, is possible.<sup>17</sup> However, the introduction of safeguards to protect the interests of copyright owners deserves additional review in order to examine whether such safeguards undermine the viability and effectiveness of the TEACH Act, particularly because TEACH Act requirements remain difficult to pinpoint and implement.<sup>18</sup>

The safeguards presented by the TEACH Act begin by requiring that transmission be limited to either students officially enrolled in the course for which the transmission is made, or governmental employees as part of their official duties or employment.<sup>19</sup> Institutions using digital technologies under the TEACH Act's expanded exemption must institute policies regarding copyrights and provide information to students, faculty, and relevant staff members that describe and promote compliance with the law.<sup>20</sup> Also, § 110(2)(D) of the Act requires institutions involved in digital transmissions to implement "technological measures" to prevent: (i) retention of the copyrighted work in accessible form by recipients to which the work is sent for longer than the class session; and (ii) unauthorized further dissemination of the work in accessible form by such recipients.<sup>21</sup> Finally, the institution must not "engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination."<sup>22</sup>

Questions raised at the March 13, 2001, Senate Judiciary Hearing<sup>23</sup> prior to passage of the TEACH Act offer some insight into the impact that application of the "safeguards" may have on colleges and universities. Vermont Senator Patrick Leahy asked, *inter alia*: what "technological measures" reasonably could be

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16. H.R. REP. NO. 107-687, at 2 (2002).

17. H.R. REP. NO. 107-687, at 2-3 (2002).

18. See ASS'N OF RESEARCH LIBRARIES, KNOW YOUR COPYRIGHTS: USING WORKS IN YOUR TEACHING—WHAT YOU CAN DO: TIPS FOR FACULTY & TEACHING ASSISTANTS IN HIGHER EDUCATION 4 (2007), <http://www.knowyourcopyrights.org/bm~doc/kycrbrochurebw.pdf> ("Although a specific copyright exemption known as the TEACH Act may apply, its rigorous requirements have prompted most instructors to rely primarily on fair use to display or perform works in distance education (e.g., online or over cable TV).").

19. 17 U.S.C. § 110(2)(C) (Supp. IV 2004). The TEACH Act effectively expanded the locations at which transmission could be received beyond classrooms and places devoted to instruction. S. REP. NO. 107-31, at 4 (2001).

20. 17 U.S.C. § 110(2)(D)(i) (Supp. IV 2004).

21. 17 U.S.C. § 110(2)(D)(ii)(I) (Supp. IV 2004).

22. 17 U.S.C. § 110(2)(D)(ii)(II) (Supp. IV 2004).

23. *Hearings of March 13, 2001, supra* note 7.



expected to prevent unauthorized downstream use of copyrighted works;<sup>24</sup> what obligation educational institutions had to prevent students from freely downloading materials transmitted;<sup>25</sup> and what degree of protection would be a “reasonable” effort to prevent unauthorized access under the TEACH Act.<sup>26</sup> Questions from South Carolina Senator Strom Thurmond centered on: a) what costs educational institutions would incur to comply with the required protective measures;<sup>27</sup> b) whether educational institutions would be confronted with litigation over whether their technological measures were reasonable;<sup>28</sup> and c) whether options are available to address choice of law problems that may result from disputes related to the transmission of digital technology abroad.<sup>29</sup> These questions reflect the challenges that colleges and universities may face in implementing safeguards that limit the risks of retention and dissemination of digitally formatted works of copyright owners, while at the same time attempting to enhance the viability of distance education and assist faculty in utilizing the latest technology as teaching tools. Hence, lawyers and administrators representing the interests of educational institutions should carefully examine the obligations and challenges of the TEACH Act and beware if they choose to adopt and embrace its requirements.<sup>30</sup>

### III. CHALLENGES AND OBLIGATIONS

Like most legislation, the TEACH Act is not the most readable document proffered by Congress. Although the actual amendment is relatively short when compared with other legislative enactments, the Act’s twists, turns, and various nuances make it difficult to grasp for lay persons, lawyers, and lawmakers.<sup>31</sup>

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24. *Id.* at 45.

25. *Id.* at 49.

26. *Id.*

27. *Id.* at 61.

28. *Id.* at 63.

29. *Id.*

30. See COPYRIGHT CLEARANCE CTR., THE TEACH ACT: NEW ROLES, RULES AND RESPONSIBILITIES FOR ACADEMIC INSTITUTIONS (2005), <http://www.copyright.com/media/pdfs/CR-Teach-Act.pdf>.

Ultimately, it is up to each academic institution to decide whether to take advantage of the new copyright exemptions under the TEACH Act. This decision should consider both the extent of the institution’s distance education programs and its ability to meet the education, compliance and technological requirements of the TEACH Act.

*Id.*

31. See Kristine H. Hutchinson, *The TEACH Act: Copyright Law and Online Education*, 78 N.Y.U. L. REV. 2204, 2204 (“[T]he Act is fraught with requirements and vague terminology, which have caused confusion amongst educational institutions and have resulted in the failure to take advantage of the Act”); KENNETH D. CREWS, NEW COPYRIGHT LAW FOR DISTANCE EDUCATION: THE MEANING AND IMPORTANCE OF THE TEACH ACT 9 (2002), <http://www.ala.org/ala/washoff/WOissues/copyright/distanceed/teachsummary.pdf> (describing the “convoluted language of the bill”); GEORGIA HARPER, THE TEACH ACT FINALLY BECOMES LAW (2002), <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm#top> (“This disparity [between what the statute authorizes for face-to-face teaching and for distance education], coupled with the considerable number of additional limits and conditions imposed by the statute, may lead some educators to conclude that it’s more trouble than it’s worth to rely on Section

There are, however, those who have ferreted through the legalese and legislative jargon to interpret, and bring some semblance of clarity to the amended § 110(2) of the Copyright Act.<sup>32</sup> Despite these helpful efforts at clarification, and presumed knowledge of the Act by a broad cross-section of colleges and universities, the question remains whether the clarifications suffice to convince college and university attorneys and administrators that implementation of the Act is viable, reasonable, and useful, i.e., that the challenges and obligations are not overwhelming.

The “slow start” of colleges and universities in their efforts at interpreting and implementing the TEACH Act suggested even to proponents of the law that determining the meaning of the law’s provisions would be quite a task, requiring a collective effort from lawyers and copyright experts.<sup>33</sup> Some college and university attorneys have indicated that while they were familiar with the Act, and had in some instances started to incorporate the Act’s requirements into their overall copyright policies,<sup>34</sup> they too were beleaguered by the Act’s lack of clarity.<sup>35</sup>

In adapting to the arguably stringent oversight provisions of the TEACH Act, academic administrators have to be concerned about finding and striking the delicate balance between the need to monitor instructors’ use of copyrighted material to ensure compliance with the Act, juxtaposed against questions of academic freedom and the faculties’ likely resistance to “jump[ing] through all the hoops that are required for TEACH Act compliance.”<sup>36</sup>

Mirroring Senator Leahy’s concerns,<sup>37</sup> some college and university counsel have pointed to the costs and uncertainty of developing strategies to address the requirement that academic institutions implement “technological measures” that “reasonably prevent” students from retaining the works beyond the class session and further distributing them;<sup>38</sup> suggesting that in practice, such measures are often simply not available, too costly in light of the uncertainty of the mandate,<sup>39</sup> and

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110(2).”)

32. See sources cited *supra* note 5. See also Dan Carnevale, *Slow Start for Long-Awaited Easing of Copyright Restriction: A Copyright Checklist for Online Courses*, CHRON. HIGHER EDUC., Mar. 28, 2003, at A29.

33. See *id.*

34. Information compiled from responses of college and university counsel to an informal survey of NACUA member institutions [hereinafter *Informal Survey*] (on file with authors).

35. *Id.*

36. *Id.* See also CREWS, *supra* note 5, at 3 (“[T]hese circumstances will probably motivate institutions to become more involved with oversight of educational programs and the selection and use of educational materials. This substantive oversight may raise sensitive and important issues of academic freedom.”).

37. *Hearings of March 13, 2001*, *supra* note 7, at 104.

38. 17 U.S.C. § 110(2)(D)(ii)(I) (2000 & Supp. IV 2004).

39. Some experts believe that using password protection should suffice. Some college and university administrators think institutions will have to invest in technology that can track what students do with the copyrighted material after they download it—technology that may not exist yet. See Carnevale, *supra* note 32. But see Hutchinson, *supra* note 31, at 2211–12 (arguing that the TEACH Act is an effective way to combat the high costs of “securing the rights to use

place an inequitably higher burden on institutions,<sup>40</sup> as the lion's share of the benefits from the Act's mandates are those going to copyright owners.<sup>41</sup>

Finally, it is clear that the TEACH Act is not the panacea. It does not provide all of the answers to use of copyrighted material via the Internet, and the concomitant protection of the interests of the owners of that material. In fact, one commentator aptly advises us that there "is still a considerable gap between what the statute authorized for face-to-face teaching and for distance education."<sup>42</sup> For instance, while a professor may perform any works related to the curriculum in face-to-face classroom teaching—including still images, music, and movies—without permission or limitations, the same is not true for transmission over the Internet, which limits display of audiovisual works and dramatic musical works to "reasonable and limited portions,"<sup>43</sup> i.e., clips.<sup>44</sup>

With these obstacles and concerns reverberating throughout the academy, and considering the number of public and private academic institutions that both utilize the Internet and offer distance education courses<sup>45</sup>—numbers that will likely continue to increase<sup>46</sup>—there remains a real question about whether the TEACH Act can address the concerns of users and owners of digital and/or electronic copyrighted materials. Does the Act clearly set forth the steps that need to be taken for compliance? Will the broad protections afforded copyright owners overshadow the Act's viability such that fair use,<sup>47</sup> licensing, permission requests, and other known solutions are both preferred and more reasonable?<sup>48</sup> What about

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copyrighted materials").

40. See Hutchinson, *supra* note 31, at 2222–23. See also HARPER, *supra* note 5 (emphasizing "the 22(!) prerequisites" of the TEACH Act).

41. *But see* Hutchinson, *supra* note 31, at 2207 (stating that "the TEACH Act is likely the most educator-friendly legislation that Congress will produce in the near future").

42. HARPER, *supra* note 5.

43. 17 U.S.C. § 110(2) (2000 & Supp. IV 2004).

44. HARPER, *supra* note 5.

45. BERNARD R. GREENE, DISTANCE EDUCATION AT DEGREE-GRANTING POSTSECONDARY INSTITUTIONS: 2000–2001 (2003), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003017>.

46. "[The] AAUP has addressed the issue, recognizing that the existence of distance education is not a future possibility, but a current reality where growth potential is virtually unlimited." AM. ASS'N OF UNIV. PROFESSORS, AAUP: SAMPLE DISTANCE EDUCATION POLICY & CONTRACT LANGUAGE, <http://www.aaup.org/AAUP/issued/DE/sampleDE.htm> (last visited Apr. 10, 2007).

47. 17 U.S.C. § 107 (2000 & West Supp. 2005). *Cf.* HARPER, *supra* note 5 (suggesting that the limitations of the TEACH Act will not suffice in most situations, and that educators still have recourse to fair use when utilizing the copyrighted materials of others, as "the four factor fair use test seems, well, simple and elegant"). See also Christopher L. Ashley, *The TEACH Act: Higher Education Challenges for Compliance*, EDUCAUSE CTR. FOR APPLIED RESEARCH BULLETIN, June 22, 2004, at 1, available at <http://www.educause.edu/ir/library/pdf/ERB0413.pdf>. *But see* SPRINGER, *supra* note 5. Springer suggests that "the [fair use] doctrine is 'so flexible as virtually to defy definition.'" *Id.* (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968)). See also Brendan T. Kehoe, *The TEACH Act's Eligibility Requirements: Good Policy or A Bad Compromise?*, 71 BROOK. L. REV. 1029, 1044 (2005) (stating that "[f]air use is an equitable defense that is inexact by definition.>").

48. See HARPER, *supra* note 5.

the costs? And in any event, based upon the historic paucity of copyright litigation against the academy<sup>49</sup>, is there a genuine reason for colleges and universities to be concerned about compliance with this new amendment to the Copyright Act, i.e., are there substantive penalties or the real threat of liability for failure to comply that provide the needed incentive to academic administrators as well as educators?<sup>50</sup>

Standing alone, the Act contains complicated language. Thus, absent some effort to clarify the Act for institutions and their faculty and students, frustration rather than implementation will likely prevail. In such a case, the “slow start” experienced by many colleges and universities in embracing the TEACH Act will likely continue.

A key issue for many institutions is that the TEACH Act does not define “reasonable.”<sup>51</sup> Moreover, “technological measures”—another undefined term—must be developed and/or employed by institutions that “reasonably” prevent recipients of the material (i.e., students) from retaining the works beyond the class session and further distributing them.<sup>52</sup> Absent guidance as to how this “vague terminology”<sup>53</sup> is contextually defined, neither the Act’s viability, nor the likelihood that institutions will readily invest the time<sup>54</sup> and resources<sup>55</sup> necessary to implement the requirements of the Act in their institutions, can be assured.

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49. See Stephana I. Colbert & Oren R. Griffin, *The Impact of “Fair Use” in the Higher Education Community: A Necessary Exception?*, 62 ALB. L. REV. 437 (1998). See also Dan Carnevale, *Colleges Are Unconcerned by Online Author’s \$2.6-Billion Copyright Lawsuit*, CHRON. HIGHER EDUC., Mar. 22, 2002, at A36. But see, Ann Springer, *AAUP: Copyrights & Wrongs* (2006), <http://www.aaup.org/AAUP/protectrights/legal/topics/copy.htm?PF=1> (citing Carnevale, *supra* note 49; Mitchell v. AOL Time Warner Inc., 2002 U.S. App. LEXIS 26313 (9th Cir. Dec. 13, 2002)) (suggesting that while colleges and universities providing servers may not be liable for the copyright infringement of their faculty and others within their academic communities, because “they are only involved as owners of the servers, not controllers of the individual websites . . . the faculty or other members of the university community . . . could be liable for copyright infringement”). Absent a policy and practice that advises faculty, staff, and students of their copyright obligations and responsibilities, will institutions find themselves indemnifying their faculty for acting within the scope of their employment? See discussion in Part III.

50. Cf. Carnevale, *supra* note 32. In this article, John Vaughn, executive vice president of the Association of American Universities, seems to suggest that academic institutions “are too concerned about liability,” and Allan Robert Adler, vice president for legal and governmental affairs at the Association of American Publishers, likewise seems to suggest that “most publishers are unlikely to sue the moment colleges begin testing the law—unless the publishers find flagrant violations.” *Id.* at A29.

51. 17 U.S.C. § 110(2)(D) (2005).

52. 17 U.S.C. § 110(2)(D)(ii)(I) (Supp. IV 2004).

53. See Hutchinson, *supra* note 31, at 2204. See also Ashley, *supra* note 47, at 8 (“What is reasonable today may not be reasonable in the future as technology evolves.”).

54. *Informal Survey*, *supra* note 34 (“[T]he only significant barrier that I am aware of is finding the time to address the steps needed to put this in place on our campus.”).

55. *Id.*; see also Carnevale, *supra* note 32 at A29 (“Some college administrators think institutions will have to invest in technology that can track what students do with the copyrighted material after they download it—technology that may not exist yet.”).

Further, while the TEACH Act is a clear acknowledgement that § 110 of the Copyright Act did not anticipate the use of copyrighted materials on the Internet, the Act's long list of requirements<sup>56</sup> is at best a significant challenge and at worst so cumbersome that institutions and instructors will simply ignore it.<sup>57</sup> The Act provides a seemingly endless list of tasks to go around, starting with the requirement that in order to simply qualify to take advantage of the Act's benefits, the institution must be a nonprofit accredited academic institution or governmental agency.<sup>58</sup> There are responsibilities that must be borne by the institution,<sup>59</sup> as well as technology officials,<sup>60</sup> and instructors.<sup>61</sup> Somehow, this long list of dos and don'ts must be made manageable so that all players willingly assume their relevant tasks. While the threat of punitive action—lawsuits and/or some form of discipline for violation—may have some effect,<sup>62</sup> it is unlikely to produce the desired result. In fact, even if there is a viable threat of liability, many within the academy may determine that the easier, albeit far less desirable decision, is to forego the use of copyrighted materials in their classrooms.

Although the choice to forego the use of copyrighted materials when utilizing the Internet may be an unlikely extreme, the groundswell of opinion seems to be that at the very least, the current language of the TEACH Act dictates initial, serious consideration of alternatives such as fair use,<sup>63</sup> permissions, and licensing,<sup>64</sup> either in conjunction with, or before turning to, the TEACH Act.

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56. See SPRINGER, *supra* note 5.

57. See *Informal Survey*, *supra* note 34 (“The benefit of the TEACH Act over a fair use analysis is, I would say, marginal”; “Copyright remains a handicap for online teaching and the TEACH Act is no solution because it requires too much work for compliance.”).

58. 17 U.S.C. § 110(2) (2000 & Supp. IV 2004). See generally Kehoe, *supra* note 47, at 1054–63.

59. See CREWS, *supra* note 5, at 6. For instance, fashioning a copyright policy which provides “informational materials” regarding copyright, and providing notice to students that materials used in a course may be subject to copyright protection.

60. *Id.* at 7 (creating a system that permits access only by students registered for a specific course; and identifying and applying “technological measures” to prevent the retention or further dissemination of works by those to whom the works are transmitted).

61. *Id.* at 8–10 (stating that instructors select course content within the parameters of the Act, oversee the planning and conduct of the distance education program, ensure that the materials being used are an “integral part of the class experience,” and that analog works are only digitized under certain conditions).

62. See *infra* Part IV.

63. 17 U.S.C. § 107 (2000 & West Supp. 2005). This provision states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

While likely unintentional, the Act's difficulties remain; and the result is that the interests of the copyright owners appear to be paramount to, and in fact "trump," the interests of users of the copyrighted information.<sup>65</sup> Where the use of copyrighted material is for commercial benefit, such a result is justified, as those who want to exploit the works of copyright owners for financial gain should pay for that right. However, if the furtherance of the country's educational mission is a legitimate goal and objective—a "vital governmental interest"<sup>66</sup> as we first suggested—it is surprising that the interest of educating our citizens so that we might maintain our position as a world super-power would take a back seat to the financial interests of copyright owners.

These difficulties of compliance may be compounded by the costs. For some institutions, the costs of implementing the directives of the Act can be as much of an impediment as the lack of clarity.<sup>67</sup> Most academic institutions—small, private, community college, large research university, or Ivy League institution—utilize the Internet either in distance education or as a teaching tool<sup>68</sup> in regular classroom activity. All institutions must therefore have a method by which to determine what the costs of implementing the Act will be, and whether or not the benefits of compliance with the Act justify the costs. Institutions with large operating budgets for such purposes may have the money and resources to effect compliance. However, without fashioning a way to share the expense of compliance with others, for some institutions—small, public, and community colleges—the costs could be significant and in some instances prohibitive.<sup>69</sup>

The cost factor related to compliance with the TEACH Act may be exacerbated by the rapid changes in technology that have become almost commonplace. At the March 13, 2001 hearing before the U.S. Senate Judiciary Committee which focused on promoting technology in education, questions were raised as to the TEACH Act's requirement that educational institutions impose safeguards, and what actual technological measures minimize the risk of unauthorized downstream use.<sup>70</sup> While it was suggested that numerous "Digital Rights Management" (DRM) solutions were available to fight copyright piracy, there was no discussion

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(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

*Id.*

64. See sources cited *supra* note 47.

65. *But see* Hutchinson, *supra* note 31, at 2207 (stating that "the TEACH Act is likely the most educator-friendly legislation that Congress will produce in the near future").

66. See *supra* Part I.

67. *Hearings of March 13, 2001, supra* note 7, at 54 (statement of Gerald A. Heeger, President, University of Maryland University College, College Park, Maryland, indicating that one could imagine the development of technological protections that were so prohibitively expensive that they are out of reach of all institutions).

68. See GREENE, *supra* note 45.

69. See Ashley, *supra*, note 47, at 5 ("Positioning an institution to benefit from the TEACH Act requires significant investment of time and resources.").

70. *Hearings of March 13, 2001, supra* note 7, at 52.

regarding cost—and particularly the virtual reality that developing “technological measures” will be more than a fixed, one-time cost. It is more likely, in fact, as technology continues to develop and grow in complexity, that upgrades will be required, necessitating an increase in costs.

Thus, in creating the TEACH Act, lawmakers may have trivialized the impact of cost on implementation of the Act. Even if DRM solutions or other technologies are available safeguards that comply with the TEACH Act, it is unknown whether these measures will be accessible to all colleges and universities, including those institutions already struggling to provide their students and faculty with quality computing resources; an additional unknown is whether these will be the only measures required to comply with the Act.<sup>71</sup> Arguably, the Act does not require upgrades of “technological measures” but simply that such measures be in place. However, if new and more sophisticated technology exists, should all colleges and universities taking advantage of the Act be required to upgrade to that technology? Certainly, those institutions that can afford to will likely do so. However, the costs may cause those institutions with fewer resources to forego such upgrades—can they do so and remain compliant with the Act, or does the decision not to upgrade create greater risk of challenge from copyright owners? Because the Act is so unclear in this regard, any answer is only speculative.

From a more positive perspective, perhaps the North Carolina State University (NCSU) model will prevail, with institutions freely sharing the technology with other institutions, including any upgrades.<sup>72</sup> Alternatively, if costs ultimately prohibit such generous sharing, a more global approach<sup>73</sup> might be in order: a consortium of schools, collectively providing funding to a representative subset of the group, charged with the responsibility of developing the appropriate software, monitoring its effectiveness for the purpose of compliance, and recommending and implementing upgrades as required.

These issues highlight the fact that a cost/benefits analysis is essential:

The analysis should address the role of distance education in the institution’s overall delivery of instruction; the likelihood of success in marshalling the necessary coordination of effort among faculty, administration, and IT staff, including whether existing organizational resources (for example, the campus library) and institutional procedures (for example, institutional copyright policies) can be built upon to meet TEACH Act requirements; and the feasibility of implementing the necessary technological controls.<sup>74</sup>

Ultimately, this analysis could determine which institutions of higher learning are prohibited by costs from offering their students learning opportunities utilizing the latest technological advancements.

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71. *Id.*

72. *See* North Carolina State University’s TEACH Toolkit, *supra* note 5.

73. *See infra* Part V.A. (discussing collective efforts by colleges and universities to develop solutions for compliance with the TEACH Act).

74. *Id.* at 6.

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IV. WHAT POTENTIAL LIABILITY AWAITS INSTITUTIONS FAILING TO MEET THE DEMANDS OF THE TEACH ACT

As noted earlier, at the March 13, 2001 Hearing before the Committee on the Judiciary for the United States Senate, committee members had the opportunity to propound written questions to witnesses who appeared and gave testimony.<sup>75</sup> Senator Strom Thurmond raised questions as to whether educational institutions would be hauled into court to litigate the “reasonableness” of technological measures implemented to satisfy the conditions of eligibility for the TEACH Act’s exemption.<sup>76</sup> In response, the Senator was advised that excessive litigation was unlikely because most educational institutions would make a good faith effort to institute effective technological measures to prevent unauthorized access and dissemination.<sup>77</sup> However, what will constitute a “good faith effort” is not defined by the Act.

Senator Thurmond’s questions raise concerns about the legal challenges copyright owners might pursue in the event that efforts to prevent unauthorized retention and dissemination fail to meet the standard of reasonableness as contemplated by copyright owners. On its face, the TEACH Act obligates educational institutions to prevent unauthorized retention and dissemination, or, put another way, protect the interests of copyright owners from infringement. Thus, it is critical that educational institutions examine the obligations that the TEACH Act imposes through the advent of technological measures as set forth in 17 U.S.C.A. § 110(2) (West Supp. 2003). More importantly, colleges and universities should understand the types of legal challenges that may result if copyright owners believe that the educational institution’s technological measures are woefully ineffective, or that the educational institution or one acting with expressed or implied authority of the institution (i.e., faculty, support staff, or students) has not acted reasonably given the apparent affirmative duty imposed by the TEACH Act.<sup>78</sup> Plausible allegations that could be brought against educational institutions include claims of direct infringement, contributory infringement, or vicarious liability.

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75. *Hearings of March 13, 2001*, *supra* note 7, at 43–54.

76. *Id.*

77. *Id.* Specifically, the TEACH Act requires that an educational institution, in the case of digital transmissions:

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipient to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination.

*TEACH Act of 2002*, *supra* note 4, at 1911.

78. Hutchinson, *supra* note 31, at 2222.



The potential liability for colleges or universities under the TEACH Act may be illustrated under facts similar to those set forth in *Kepner-Tregoe, Inc. v. Vroom*.<sup>79</sup> In that case, a Yale University professor was found to have violated copyright law when he used copyrighted materials from his class in another venue.<sup>80</sup> Like many colleges and universities across the country, Yale University hosted management training seminars that were conducted by Professor Vroom using executive leadership training materials.<sup>81</sup> However, the training materials used in the seminars overlapped with a software program that was subject to a licensing agreement that granted plaintiff Kepner-Tregoe (K-T) exclusive use of the licensed material.<sup>82</sup> While Professor Vroom argued that his use of the copyrighted material was permissible because he used the material in his own teaching and consulting work, the district court disagreed and the appellate court affirmed.<sup>83</sup> The court indicated that Dr. Vroom was allowed to use the material to teach enrolled graduate and undergraduate students, not for the executive training seminars.<sup>84</sup> According to the court, “Dr. Vroom willfully infringed the copyrighted material licensed to K-T and breached his contract with K-T when he taught the exclusively licensed materials to large groups of executive in the university setting.”<sup>85</sup>

The facts in *Vroom* provide an example where it may be difficult to prevent the retention or dissemination of electronic materials consistent with the protections provided by the TEACH Act. It is foreseeable that college and university instructors and faculty members may use electronic teaching materials for other instructional activities and purposes. Could an institution that sponsors professional seminars and conferences violate the TEACH Act when a faculty presenter relies on electronic copyrighted materials routinely used in instructional lectures to convey the subject matter to students? If so, has the institution knowingly engaged in copyright infringement? In *Vroom*, the professor involved argued that he had broad and unlimited rights to use the licensed material in teaching executives in the University setting, despite the court’s interpretation of the teaching clause which limited Dr. Vroom’s teaching to bona fide enrolled undergraduate and graduate students.<sup>86</sup> Thus, Dr. Vroom’s use of the material for his executive training seminars resulted in a willful act of copyright infringement.

Although the plaintiff in *Vroom* did not name the University as a defendant—pursuing its action against the University’s professor instead—it is plausible under the TEACH Act that an institution could face claims of copyright infringement for the actions of faculty, or at least be required to defend and indemnify any actions against the faculty member who will undoubtedly argue that he was acting within the scope of his employment at the time of the alleged infringement. Dissemination of copyright protected materials through venues outside the

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79. 186 F.3d 283 (2d Cir. 1999).

80. *Id.* at 288–89.

81. *Id.* at 285.

82. *Id.*

83. *Id.* at 285–89.

84. *Id.* at 287.

85. *Id.* at 286.

86. *Id.* at 287.

traditional classroom or distance learning setting appears to be the type of dissemination the TEACH Act is designed to prevent. However, college and university settings often host a wide range of events, some even for profit, which offer the opportunity for the institution or its faculty to run afoul of the TEACH Act's safeguards.

While the TEACH Act requires educational institutions to implement policies and distribute informational materials intended to promote compliance with copyright law, it is foreseeable that faculty, students, or staff personnel could independently engage in conduct that results in undermining the TEACH Act's protective measures. While it may appear unlikely that an educational institution would engage in conduct that might constitute direct infringement, the inherent nature of faculty and student life on college and university campuses could expose institutions to liability under the doctrines of contributory infringement and vicarious liability.<sup>87</sup> Contributory infringement stems from "the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor."<sup>88</sup> Specifically, contributory infringement is established by showing: (1) direct infringement by a primary infringer; (2) knowledge of the infringement; and (3) material contribution to the infringement.<sup>89</sup>

Whether members of a college or university community may be capable of exposing an institution to potential liability under the TEACH Act for contributory infringement may be understood by considering the facts presented in *Online Policy Group v. Diebold, Incorporated*.<sup>90</sup> In *Online Policy Group*, two students from Swarthmore College gained access to certain sensitive information about Diebold, Inc. using Internet access provided by the College.<sup>91</sup> Diebold produces electronic voting machines, the reliability of which have been the subject of public scrutiny.<sup>92</sup> Discussions regarding problems with the machines were exchanged between employees through the company's internal email system.<sup>93</sup> In particular, Diebold's email archive included information about the company's proprietary computerized election systems, trade secret information, as well as employees' personal information.<sup>94</sup> The students posted the email archive on various websites including an online newspaper.<sup>95</sup> In response, Diebold issued a cease and desist

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87. *Religious Tech. Ctr. v. Netcom On-Line Communic'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (stating that to be liable for direct infringement, one must actively engage and directly cause the alleged infringement).

88. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966). *See also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

89. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004).

90. 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

91. *Id.* at 1197.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1197-98.

letter to the College pursuant to the safe harbor provisions of the DMCA, demanding that the students remove the email archive from the school's website.<sup>96</sup> While Diebold objected to the students' conduct, which revealed information critical to concerns about Diebold's electronic voting machines, the students were found not to have violated copyright law.<sup>97</sup> Addressing the students' activity, the court indicated that the "activity might have reduced Diebold's profits because it helped inform potential customers of problems with the machines. However, copyright law is not designed to prevent such an outcome. Rather, the goal of copyright law is to protect creative works in order to promote their creation."<sup>98</sup>

The facts in this case demonstrate how difficult it may be to police the activities of students regarding the use of institutional computing resources. What consequences might flow from such conduct under the TEACH Act? Arguably, an institution may contend that a contributory infringement claim may be defeated because it likely had no *knowledge* of the infringing activity. However, assume an employee of the college or university knew that students were using a computer in an on-campus computer lab contrary to institutional policy, but assumed that the students' actions were harmless. Due to the decentralized structure of many campuses and routine access students have to the Internet, the contributory infringement claim may pose a threat for institutions trying to comply with provisions of the TEACH Act that are intended to safeguard the interests of copyright owners. Certainly, preventing retention and dissemination of electronic and/or digital information under the TEACH Act may well prove to be challenging under facts as those presented in *Online Policy Group*. However, when faced with allegations of infringement under the Act, the academy could use the court's ruling in *Online Policy Group* to argue that, just as in determining fair use<sup>99</sup> there is more than one consideration, i.e., perhaps the court is saying that protection of rights of copyright owners is not the only consideration despite the significant protections afforded them under the Act.

Another cause of action that may be encountered by colleges and universities seeking to use copyrighted digital material under the TEACH Act is the vicarious liability claim. While vicarious liability stems from the common law doctrine of respondeat superior, in the context of copyright law, the doctrine does not depend on the employer-employee relationship.<sup>100</sup> To prevail on a vicarious copyright liability claim a defendant must establish two elements: the defendant must have (1) the right and ability to supervise the infringing activity; and (2) an obvious and direct financial interest in exploitation of the copyrighted material.<sup>101</sup> In *Roy Export Co. Establishment v. Columbia University*,<sup>102</sup> a bootleg copy of the film "Modern Times" starring Charlie Chaplin was shown on the Columbia University

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96. *Id.* at 1198.

97. *Id.* at 1203.

98. *Id.* (citation omitted).

99. 17 U.S.C. § 107 (2000 & West Supp. 2005).

100. *Lowery's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 745 (D. Md. 2003).

101. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 12.04[A][2], at 12-77 (2006).

102. 344 F. Supp. 1350 (S.D.N.Y. 1972).

campus by a student organization which infringed on the rights of the copyright owner and licensee to distribute and exhibit the motion picture.<sup>103</sup> The Plaintiffs sought, inter alia, damages for the alleged infringement, asserting that the University was liable as a vicarious infringer because it controlled the premises where the film was shown and provided the room and projection equipment that allowed for the unlawful showing.<sup>104</sup> The court clarified that liability for vicarious infringement requires a demonstration that one has a “right and ability to supervise the infringing activities, as well as a direct financial interest in those activities.”<sup>105</sup> In its defense, the University argued that it could not control the student organization, and that the act of providing a room and projection equipment for the showing was merely a ministerial function.<sup>106</sup> Interestingly, the University argued that it does not inquire as to what use will be made of the room and equipment it assigns.<sup>107</sup> The court rejected the University’s contention that it did not have the right or ability to have supervised the infringing activity.<sup>108</sup> Specifically, the court noted that the University subsequently was able to prevent the student organization from showing the film.<sup>109</sup> However, because the Plaintiffs presented no evidence that the University received any financial benefit from showing the bootleg film, they could not prevail on the vicarious infringement claim against the University.<sup>110</sup>

The TEACH Act places colleges and universities in the position of implementing preventive measures to avoid unauthorized distribution and retention of digital transmissions; but if those efforts fail, it is likely that plaintiffs will be able to satisfy the first element of the vicarious infringement claim. The second element, which examines whether the alleged infringer had a direct financial interest in the unlawful activity, may provide colleges and universities with an avenue to separate itself from the acts of students, student organizations, and faculty who may engage in copyright infringement.<sup>111</sup> However, it is critical to recognize that while early cases may have strongly required that the benefit from the copyright infringement be obvious and direct, that standard has relaxed in recent years. In *A&M Records v. Napster*,<sup>112</sup> the Ninth Circuit agreed with a lower court finding that the Plaintiffs would likely succeed in establishing that Napster has a direct financial interest in the infringing activity. Relying on the district

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103. *Id.* at 1352.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1352–53.

108. *Id.* at 1353.

109. *Id.*

110. *Id.*

111. It is important to remember that vicarious liability stems from the master-servant, employer-employee doctrines which suggest that the faculty, as employees, may be able to place a college or university at risk for vicarious copyright infringement due to their relationship with the institution. This is in contrast to students who have a relationship that is neither akin to that of an employer-employee, nor governed by the in loco parentis doctrine.

112. 239 F.3d 1004, 1023 (9th Cir. 2001).

court's reasoning, the Ninth Circuit indicated that "[f]inancial benefit exists where the availability of infringing material 'acts as a "draw" for customers.'"<sup>113</sup> Therefore, it appears reasonable to conclude that the law has evolved such that the second element of the vicarious copyright infringement claim may be shown by evidence that a defendant had an obvious and direct financial interest or an indirect interest.

## V. SOLUTIONS

If lack of clarity, uncertainty of costs, academic freedom, and potential liability are all legitimate concerns for academic institutions pondering whether to implement the TEACH Act, en masse institutional participation in, and support for, the TEACH Act will require formulation of strategies and solutions that will facilitate this process.

In discussing issues surrounding the proliferation of distance education in the academy and the related obligations and responsibilities attendant to the use of copyrighted materials, Ann Springer, counsel for the American Association of University Professors, laments the fact that "we all continue to attempt to put the round peg of academic work into the square hole of copyright law."<sup>114</sup> Springer raises the question of whether attempts to work through the obvious problems with the TEACH Act are in fact futile.<sup>115</sup> The already-identified frustrations with the requirements of the TEACH Act may cause some colleges and universities to ignore the Act, relying instead on fair use, licensing, permissions, and the public domain, unless the Act is seen as a viable—perhaps preferred—alternative. One possible remedy is a set of universally-applicable regulations, drafted to help all colleges and universities implement the Act.

### A. Need For Regulations

The need for regulation is directly related to the lack of clarity and guidance contained within the Act. While we can glean some insight into what is required from those who have sought to apprise us of what is required by the Act,<sup>116</sup> either separately or collectively, academic institutions which utilize the Internet and/or engage in the provision of distance education courses have to be able to understand the Act, i.e., define and clarify vague terms, identify and develop "technological measures" to avoid retention and further dissemination of copyrighted works outside the classroom, and educate and train faculty, staff, and students about transmission and receipt of copyrighted information over the Internet.

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113. *Id.* See also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263–64 (9th Cir. 1996) (supporting the contention that financial benefit may be shown where infringing activity enhances the attractiveness of a venue).

114. SPRINGER, *supra* note 5.

115. *Id.*

116. CREWS, *supra* note 5.

Based upon commentaries, opinion, and all that has been written about the TEACH Act,<sup>117</sup> it becomes abundantly clear that efforts at developing strategies to comply with the TEACH Act are underwhelming. There are certainly some institutions that have accepted the challenge to fashion policies and procedures and develop the “technological measures”<sup>118</sup> required by the Act to protect the rights of copyright owners. But what about the rest of us? It is unlikely that the majority of us will ever find the time and resources to individually approach this issue and adequately address the utility of the TEACH Act in its current form. Nonetheless, the correct prescription might be a collectively developed set of policies and procedures, i.e., guidelines,<sup>119</sup> that can be modified to allow for institutional idiosyncrasies. These guidelines would direct us in best practices for Internet use of copyrighted materials, for distance education as an additional teaching tool to face-to-face teaching, and for utilizing course management systems like Blackboard or WebCT.<sup>120</sup>

Certainly, each institution can make its own concentrated effort to involve all faculty and staff participating in any form of distance education in the development of policies and procedures necessary to effectively implement the TEACH Act at that institution.<sup>121</sup> However, rather than each institution having a committee, it may be preferable for representatives of a cross-section of institutions, and of course, copyright owners, to convene for the purpose of clarifying, defining, simplifying, and developing strategies, software, and guidelines for the implementation of the TEACH Act. Such an approach would have a greater impact on a larger segment of the academic community.

#### B. Model: The Classroom Guidelines<sup>122</sup>

Many have criticized the specificity with which the Classroom Guidelines dictated how much and what was permissible use of copyright works in classroom teaching environments.<sup>123</sup> However, the comfort with the Guidelines was that they

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117. See *supra* notes 5, 8, 30, 31, 34, 47 and 50 and accompanying text.

118. See, e.g., North Carolina State University’s TEACH Toolkit, *supra* note 5; MIT Office of Intellectual Property Counsel website, <http://web.mit.edu/ipcounsel/teach.html> (last visited Apr. 10, 2007). The University of Texas and Indiana University-Purdue University Indianapolis have similar policies.

119. Any suggestion that such guidelines might clarify the TEACH Act must be considered in the context of recent amendments to the regulatory process set forth in Executive Order 12866, which will impact guidance documents. Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1.

120. See Ashley, *supra* note 47. Cf. Hillel J. Hoffman, *SCT Prof. Wins Grant to Explore Copyright*, TEMPLE TIMES, Feb. 22, 2007 at 1, 5 (discussing a professor in Temple University School of Communications and Theater who has received a \$600,000 grant to “develop and distribute a ‘code of best practices’ that reflects the emerging consensus among educators concerning the application of fair use and copyright clearance to media literacy education”).

121. See AM. ASS’N OF UNIV. PROFESSORS, *supra* note 46.

122. U.S. COPYRIGHT OFFICE, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS (1995), <http://www.copyright.gov/circs/circ21.pdf>.

123. DANIEL LEE, FAIR USE AND GUIDELINES, <http://www.ala.org/ala/washoff/WOissues/copyrightb/copyrightarticle/whatfairuse.htm> (last

represented “minimum standards”<sup>124</sup> to guide the use of copyrighted materials in the classroom. Educators certainly had the discretion to do the extra work necessary to determine whether additional use was permitted; however, there was a “safe harbor”<sup>125</sup> which provided a clear benchmark for use of such material. While there were definitions<sup>126</sup> and limitations,<sup>127</sup> all non-profit academic institutions could consult the guidelines to know the least of what was permissible. If a professor or instructor adhered to the specifics of the Guidelines, he or she and his or her respective institution was less likely to be, and therefore less concerned about being, subject to any informal or formal allegations of infringement.

The development of guideposts for the TEACH Act obviously leads to questions regarding whether the Act’s requirement of “technological measures” is conducive to the type of specificity with which the Classroom Guidelines were developed. Arguably, the language is purposely vague and subject to a more general set of principles than specific technical standards in order to give institutions the flexibility to factor in costs and other concerns when identifying the technological measures that each will employ to comply with the Act’s prerequisites. Conversely, however, the absence of specificity in the language of the TEACH Act leaves institutions without any guidance and with the potential for better or worse resolutions that have neither congruence nor logic. Perhaps too much specificity or precision is not the answer—however, neither certainly is the absence of any guidance. A balance between setting specific technical standards and a more general set of principles may be preferable.

The TEACH Act seems well-suited to such guidelines. Moreover, work has already been done: several schools have developed their own guidelines and software,<sup>128</sup> which can serve as a starting point for developing a set of universally acceptable guidelines. Such “guidelines” would arguably make the TEACH Act a more useful tool to guide infringement-free education of students—in both distance education and in the traditional classroom as an assistive teaching tool.

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visited Apr. 10, 2007).

[T]he Classroom Guidelines purport “to state the minimum and not the maximum standards of educational fair use under Section 107.” Put into practice, however, these limits become upper bounds on uses that are regarded as legitimate, as courts often look to common practice to set standards. In cases involving commercial copy centers that create course packs, the courts have interpreted these Guidelines as defining ceilings to support findings of infringement.

*Id.*

124. H.R. REP. NO. 94-1476, at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681 (stating that “[t]he purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2233”).

125. Mary Levering, *What’s Right About Fair-Use Guidelines for the Academic Community?*, J. AM. SOC’Y FOR INFO. SCI., Dec. 1999, at 1313.

126. *E.g.*, “brevity,” “spontaneity,” and “cumulative effect.” See U.S. COPYRIGHT OFFICE, *supra* note 122, at 8.

127. *E.g.*, “[a] chapter from a book” or “(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.” *Id.*

128. See, *e.g.*, sources cited *supra* note 118.

Initially, a number of the Act's most important terms need better definitions and greater clarification. A major portion of the Act that is designed to protect the interests of copyright owners requires institutions in the case of digital transmissions to "appl[y] technological measures that reasonably prevent retention of the work in accessible form by recipients of the transmission"<sup>129</sup> A working definition of "technological measures"—not necessarily with a finite lid, but with examples sufficient to guide colleges and universities irrespective of size of either the student body or its endowments—would provide clarity and make costs more certain. As mentioned, NCSU has developed software designed to address the "technological measures" requirement of the Act.<sup>130</sup> A Classroom Guidelines group could adopt such software as a model and/or offer it as a reference by which other institutions are guided.

Similarly, definitions or language that provide a better understanding of terms such as "reasonably prevent" will be helpful. If "reasonably prevent" means a "good faith effort" the guidelines should so state and offer examples wherever possible. One of the more difficult tasks for any administrator, attorney, software specialist, or instructor, is to be able to identify exactly what needs to be done in order to comply with the Act. A list of such requirements—in clear and simple terms—would suffice.

To properly develop these guidelines, there undoubtedly has to be a concentrated effort to involve all faculty and staff participating in any form of Internet-related education in developing the policies and procedures necessary to effectively implement the important elements of the TEACH Act.<sup>131</sup> According to the Act itself, the responsibility is a shared one<sup>132</sup> under which faculty, staff, and the institution must collectively commit to taking the necessary steps to implement the applicable provisions. Therefore, representatives of each of these constituencies should participate in developing these proposed guidelines. While the interests of copyright owners must also be represented in any forum where guidelines are developed and crafted, the end result cannot be guidelines with an inequitable leaning in favor of copyright owners.<sup>133</sup> While copyright owners should certainly be at the table to help craft any guidelines associated with the TEACH Act, balance among all interested parties must be achieved.

The referenced NCSU Guidelines<sup>134</sup> provide an excellent example of the type of guidelines that a consortium might develop for universal use. Initially, the "TEACH Toolkit," as the website is labeled, identifies three broad areas that are important to accomplishing compliance with the Act: Education, Implementation,

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129. 17 U.S.C. § 110(2)(D)(ii)(I)(aa) (2005).

130. North Carolina State already provides a license to the software to "accredited non-profit higher education institutions" to copy, distribute, and make derivative works of the source code for their software. North Carolina State University's TEACH Toolkit: Copyright Notice and License Terms for the "TEACH Act Downstream Control" Program, <http://www.lib.ncsu.edu/scc/legislative/teachkit/teachnotice.html> (last visited Apr. 10, 2007).

131. Cf. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 46.

132. 17 U.S.C. §110(2) (2006). See also CREWS, *supra* note 5; *supra* Part III.

133. See *supra* Part IV; *infra* Part VI.

134. North Carolina State University's TEACH Toolkit, *supra* note 5.



and Best Practices.<sup>135</sup> The Education components provide faculty, staff, and students with everything each needs to know—a mini copyright crash course, the basic requirements of the Act, a glossary of terms, the actual language of the Act, and legislative history—to understand the Act and its purpose.<sup>136</sup> The documents in the Implementation section are a “what to do” guide—there are checklists, copyright notice requirements and directions, a permissions guide (which is more specific to NCSU), and even a PowerPoint presentation on the Act that summarizes it all.<sup>137</sup> Finally, there is a section on Best Practices that covers authentication, downstream controls, and digitization of copyrighted works.<sup>138</sup> The Toolkit also includes a section on matters related to the TEACH Act, e.g., fair use and licensing at NCSU, and concludes with a “More Help” section, for difficult situations or when someone just does not “get it.”<sup>139</sup> These latter two sections have greater applicability to NCSU, and represent the way in which universal guidelines can be “tweaked” to meet the individual needs of colleges and universities, after providing guidance on education, implementation, and best practices.

The TEACH Act with a set of guidelines, much like those developed by NCSU, and other available mechanisms regarding the use of copyrighted material, including fair use, permissions, and licensing where necessary, should provide the greatest opportunity to take advantage of digital transmission. Collectively, these efforts have the potential to refocus the United States as a preeminently educated society, both traditionally and in the high-tech world which continues to evolve.

## VI. CONCLUSION

The United States has historically been a world leader in educational attainment, but international comparative data suggests that the United States has fallen behind countries in Europe and Asia in this regard. Specifically, the United States is producing fewer college and university graduates (ages twenty-five through thirty-four) as a percentage of the population than Japan, Canada, Ireland, and Korea.<sup>140</sup> Given this troubling reality, it is increasingly important that U.S. educational institutions have the freedom to expand distance learning opportunities and take full advantage of digital technologies in the interest of educational advancement.

While the TEACH Act was intended to expand educational offerings for Americans throughout the country, the Act’s inherent complexity and safeguards, designed to protect the interests of copyright owners, has undermined its effectiveness and has resulted in a level of priority given to the interests of copyright owners that may in this instance be excessive. Are the safeguards

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EDUCATION AT A GLANCE 2006 (2006).

provided to protect the interests of copyright owners reasonable, or do the safeguards unreasonably transfer the obligation for prevention of unauthorized retention and dissemination of digital copyrighted materials to colleges and universities? Absent any guidelines to direct institutional efforts to translate and understand those obligations, the unreasonableness of the Act's prescriptions is heightened.

Our nation's higher education system is a tremendous resource that must have the freedom to exploit the use of digital technology. Certainly, the interests of copyright owners pale in comparison. If colleges and universities are to make substantial contributions in the future, the TEACH Act and its safeguards require reconsideration.

# INTRAMURAL AND CLUB SPORTS: THE IMPACT OF TITLE IX

SARAH K. FIELDS\*

## I. INTRODUCTION

In 1972, the United States Congress enacted Title IX of the Education Amendments of 1972, which prohibited gender discrimination in federally funded educational settings.<sup>1</sup> The key provision of the law was relatively brief and simple: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>2</sup> The law itself makes no mention of athletics or of sport, but Title IX would be credited with changing the face of America’s sporting landscape by including women and girls.<sup>3</sup> Prior to the enactment of Title IX, sport in America was a predominantly male affair with women’s presence on the fields discouraged if not flat out prohibited. After 1972, women and girls entered the athletic arena in remarkable numbers.<sup>4</sup> The law, its enforcement regulations, and the various letters of

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1. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–09, 86 Stat. 235 (codified at 20 U.S.C. §§ 1681–88 (2007)) [hereinafter Title IX].

2. 20 U.S.C. § 1681(a).

3. When the United States (U.S.) women’s soccer team won the Women’s World Cup in 1999, journalists linked their victory to Title IX: “World Cup Fever seemed to signal that 27 years after Title IX legislation mandated equal financing for girls’ athletics, women’s team sports have truly arrived.” Marc Starr & Martha Brant, *It Went Down to the Wire and Thrilled Us All*, NEWSWEEK, July 19, 1999, at 50.

4. In 1971, 294,015 females participated in high school sports; they accounted for about 5% of all high school athletes. In 1978, 2,083,040 girls participated in high school sports, accounting for about 32% of all high school athletes. LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 168 (2005). In 2005–2006, 2,953,355 girls competed in high school sports, accounting for just over 41% of high school athletes. Press Release, National Federation of State High School Associations, Participation in High School Sports Increases Again; Confirms NFHS Commitment to Stronger Leadership (Sept. 18, 2006), available at [http://www.nfhs.org/web/2006/09/participation\\_in\\_high\\_school\\_sports\\_increases\\_again\\_confirm\\_s\\_nf.aspx](http://www.nfhs.org/web/2006/09/participation_in_high_school_sports_increases_again_confirm_s_nf.aspx). In 1972, an estimated 30,000 women competed in intercollegiate varsity sport, comprising approximately 15% of collegiate athletes. CARPENTER & ACOSTA, *supra*, at 171. In 2004–2005, 164,998 women, approximately 43% of all athletes, competed in varsity sports under the auspices of the National Collegiate Athletic Association (NCAA). NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, FACT SHEET (2006), [http://www.ncaa.org/about/fact\\_sheet.pdf](http://www.ncaa.org/about/fact_sheet.pdf). Other women compete in varsity sports under the auspices of other organizations but these NCAA

clarification and policy interpretations apply equally to all levels of sport in all federally funded schools and educational programs. Although most legal and public attention has focused on the law's impact on intercollegiate (varsity) sport, Title IX also applies to intramural and club sports in colleges and universities which receive any federal funding.<sup>5</sup>

Using several different collegiate policies as case samples, this article will examine the mechanisms that some institutions utilize to create participation and funding opportunities for their students in non-varsity sports and to evaluate if those mechanisms keep the school's intramural and club sports<sup>6</sup> in compliance with Title IX. The first section will introduce the legal and social history of the law, as well as describe the initial enforcement regulations. The next section will discuss some of the clarification letters and policies and the lawsuits that have helped to define those enforcement mechanisms. The third section will examine, via various institutional case studies, the participation opportunities for men and women in intramural and club sports and the funding mechanisms for the club sports, to determine if these policies would forestall Title IX complaints. This section will also consider some hypothetical situations which might involve Title IX violations at the club and intramural sport level. The conclusion will argue that, although many schools have policies for intramural and club sports that on their face are gender equitable, institutions need to continue to monitor these programs and to be aware of possible violations from disparate impact of a legacy of male domination of sport<sup>7</sup> at all levels of skill in the college and university system.

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figures provide an example of the increase. Intramural and club sports also saw an increase between 1971 and 1976 from 276,167 to 576,167 and 31,852 to 64,375, respectively. CARPENTER & ACOSTA, *supra*, at 171.

5. 34 C.F.R. § 106.41(a) (2007). "No person shall, on the basis of sex . . . be discriminated against in any interscholastic, intercollegiate, club or intramural athletics . . ." *Id.*

6. For the purposes of this article, intramural sports are defined as those offered by the institution for students, faculty, and/or staff, and other approved members of the college or university community. These competitions are usually in league or tournament play in which the teams or individuals compete against other members of the same college or university community. Intramural sport excludes inter-school competition and can also be distinguished from recreational classes that hold no element of competition. Thus, institution or recreation department classes designed to instruct in the finer points of a sport or activity are excluded as are those courses designed simply for exercise, like a spinning class. Club sports occupy the middle ground between institutionally sponsored varsity sports (which receive greater funding and support) and intramural sports. Club sport teams may choose to participate in inter-college competition or in competition with other organizations. Club sports are organized entirely by students, and they are often funded and governed through recreational sports programs as opposed to varsity sports which are usually funded and governed through an athletic department. This article relies on the institution's self-designation of a sport as being club or intramural as defined on the institution's website.

7. See Eric Dunning, *Sport as a Male Preserve: Notes on the Social Sources of Masculine Identity and its Transformation*, in *WOMEN, SPORT, AND CULTURE* 163 (Susan Birrell & Cheryl L. Cole eds., 1994) (articulating the commonly held position of sports as a male preserve and describing that theory's history and sociological origins).

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## II. HISTORY OF TITLE IX

Throughout most of America's past, sport was a male prerogative.<sup>8</sup> Although some women and girls competed in sport, they were the exception rather than the rule.<sup>9</sup> Most Americans in the early twentieth century accepted conventional wisdom and unsubstantiated medical belief that excessive exercise would physically harm females, especially female reproductive organs, and that too much competition would make the women less feminine and ladylike.<sup>10</sup>

As the twentieth century progressed, however, and the women's rights movement grew, American attitudes towards women began to change. World War II served as a catalyst for America's social justice movements. While American men were overseas fighting the war, women at home had been encouraged to take a more active public role, joining the previously male dominated worlds of work and of sport, which resulted in a vast increase in women in production jobs and the creation of the All-American Girls Professional Baseball League.<sup>11</sup> After the war's end, these women and the men of color who had fought overseas were not comfortable returning to the pre-war status quo.<sup>12</sup> The rise of the Civil Rights

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8. *Id.*

9. See, e.g., NANCY STRUNA, *PEOPLE OF PROWESS: SPORT, LEISURE, AND LABOR IN EARLY ANGLO-AMERICA* (1996) (describing some of the female athletes in Colonial America); ALLEN GUTTMANN, *WOMEN'S SPORTS: A HISTORY* (1991) (providing a broad overview of the history of women's sport from Ancient Egyptians through the nineteenth century and describing some of the exceptional female athletes through the ages); REET HOWELL ED., *HER STORY IN SPORT: A HISTORICAL ANTHOLOGY OF WOMEN IN SPORTS* (1982) (focusing on American women's participation in sport in the nineteenth and early twentieth centuries).

10. See SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH CENTURY WOMEN'S SPORT* (1994) (describing the history of women's sport in the twentieth century and the arguments that women who competed in sport were more masculine and at risk of becoming lesbians); PATRICIA VERTINSKY, *THE ETERNALLY WOUNDED WOMAN: WOMEN, DOCTORS, AND EXERCISE IN THE LATE NINETEENTH CENTURY* (Univ. of Ill. 1994) (1989) (discussing the legal and medical histories of women's exclusion from sport); HELEN LENSKEYJ, *OUT OF BOUNDS: WOMEN, SPORT, AND SEXUALITY* (1986) (arguing that until doctors realized that exercise led to healthy women who gave birth to healthy babies, middle and upper class women were discouraged from exercising at all; even towards the beginning of the twentieth century when doctors began to encourage mild exercise for health, they continued to discourage exercise during menstruation).

11. For example, before July, 1942, at Ford Motor Company's massive River Rouge plant, women accounted for no more than 45 of the 80,000 hourly employees each month. By July, 1944, women accounted for 16% of all those employed, but by December, 1946, after the end of the war, women constituted less than 1% of the hourly employees. Sherri A. Kossoudj & Laura J. Dresser, *The End of a Riveting Experience: Occupational Shifts at Ford after World War II*, 82 AM. ECON. REV. 519 (1992). See also W.C. MADDEN, *THE WOMEN OF THE ALL-AMERICAN GIRLS PROFESSIONAL BASEBALL LEAGUE: A BIOGRAPHICAL DICTIONARY* (1997) (describing the history of the league); BARBARA GREGORICH, *WOMEN AT PLAY: THE STORY OF WOMEN IN BASEBALL* (1993) (describing women's history in baseball); WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* (2d ed. 1991) (thoroughly analyzing the history of the U.S. since the 1940s).

12. Some African-American soldiers found they were treated better by foreigners abroad than they were by their own military. In 1943 in Brisbane, Australia, a brawl occurred when U.S. military police arrested an African-American soldier at a tavern which the military had declared off-limits to black soldiers, although the pub welcomed them as patrons. CHARLES E.

movement was closely linked with the resurgence of the women's movement, and one of the targeted areas for change was the law. The 1964 Civil Rights Act included Title VI, prohibiting discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance, and Title VII, which prohibited employment discrimination on the basis of sex as well as race.<sup>13</sup> In 1972, Title IX would fill the gap in Title VI, which had failed to include gender as a protected class.<sup>14</sup> Title IX was the result of the social, political, and legal upheaval of the 1960s, and the law on its face seemed to promise gender equity for all women and girls in educational settings.

In 1972, President Richard M. Nixon signed Title IX into law and sent it to the Department of Health, Education, and Welfare (HEW) to begin the complicated endeavor of promulgating enforcement regulations. Although the law's literal language was quite broad, Congress and the public had complicated understandings of what aspects of education the law would affect. At the time of Congressional debate on the bill, Title IX's implications for sport were not a major concern for most legislators; most members of Congress seemed to assume that the law was designed to open physics classes to girls and to allow all students equal access to financial assistance. The only mention of sport came briefly when the bill's co-sponsor, Senator Birch Bayh, stated on the Senate floor that the law would not mandate the desegregation of the football field or the men's locker room.<sup>15</sup>

Soon after the law's enactment, however, athletics took center stage. In 1973, *Sports Illustrated* reported that HEW was trying to decide whether it was better for the enforcement regulations to open all collegiate sports and all collegiate teams to all, or to order an equal division of facilities and funding by gender.<sup>16</sup> *Sports Illustrated*, a popular sports periodical of the day, supported the second choice, arguing that a unisex team would simply be a male team because the long history of male sport made women and girls less prepared to compete against males for an open slot on even a unisex team.<sup>17</sup> The magazine endorsed a kind of separate but

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SILBERMAN, CRISIS IN BLACK AND WHITE 62-63 (1964). See also Phillip McGuire, *Desegregation of the Armed Forces: Black Leadership, Protest, and World War II*, 68 J. NEGRO HIST. 147 (1983) (describing the racism in the U.S. military and the struggle to desegregate the U.S. armed forces).

13. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-17 (codified at 42 U.S.C. § 2000 (2007)) [hereinafter Civil Rights Act]. See also Carl E. Brody, Jr., *A Historical Review of Affirmative Action and Its Interpretation of Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 304-06 (1996).

14. See WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX (2005) (discussing the legislative history of the law); Bernice R. Sadler, *Too Strong for a Woman: The Five Words that Created Title IX*, ABOUT WOMEN ON CAMPUS, Spring 1997, at 1 (describing the political motivation behind the law).

15. 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh). See also SUGGS, *supra* note 14, at 32-44 (giving a detailed legislative history of Title IX and its subsequent enforcement regulations).

16. Bill Gilbert & Nancy Williamson, *Programmed to Be Losers*, SPORTS ILLUSTRATED, June 11, 1973, at 65.

17. *Id.*

equal program for gender and sports.

HEW's rule-making process was complicated by the fact that, after Congress enacted Title IX, it began trying to limit the law's power over sport. An amendment was proposed to exempt revenue-producing sports from the law. After its defeat, the 1975 Javits Amendment was adopted to instruct HEW to consider the importance of intercollegiate sport and to take into account "the nature of the particular sports" when drafting Title IX's enforcement regulations.<sup>18</sup> Not only did Congress have mixed feelings about the potential impact of the law, but the leaders of intercollegiate sport in the country also felt compelled to comment after HEW published a set of proposed regulations. The Association for Intercollegiate Athletics for Women (the only organization offering women's collegiate sport championships) feared that the regulations were too lax and allowed for continued gender discrimination in sport, and therefore, that organization wanted more stringent regulations developed.<sup>19</sup> On the other hand, the leaders of the National Collegiate Athletic Association (NCAA), which sponsored only men's sports at the time, feared that the regulations would cause an influx of female athletes and destroy men's college sports.<sup>20</sup>

Finally, in 1975, HEW presented its final version of the enforcement regulations for Title IX. After President Gerald R. Ford signed the regulations, Congress failed to disapprove of them within forty-five days and the regulations became law.<sup>21</sup> The enforcement regulations narrowed Title IX's power over athletics considerably by exempting contact sports from the access to sport provisions of Title IX, thus reflecting the political and social concerns about the law's impact on traditionally male sports like football and baseball.<sup>22</sup> The regulations also specified that if athletic scholarships were offered to one gender, they must also be

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18. Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391, 395 (1997) (describing the history of both amendments and analyzing the Javits Amendment in detail).

19. Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 413-14 (2000) (describing the legislative history of the enforcement regulations).

20. *Id.*

21. *Id.* at 416.

22. 34 C.F.R. § 106.41(b) (2007). The regulation specifically says:

[W]here a recipient [of federal funding] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

*Id.* Contact sport is defined later in that same section as "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involved bodily contact." *Id.* See also SARAH K. FIELDS, *FEMALE GLADIATORS: GENDER, LAW, AND CONTACT SPORT IN AMERICA* (2005) (arguing that although the Equal Rights Clause of the 14th Amendment of the U.S. Constitution fills the gap that the contact sport exemption creates and allows females to try-out for contact sport teams if no comparable female team is offered, social control still limits female access to sport, especially contact sport).

offered to the other gender,<sup>23</sup> and they described means to measure whether or not members of both genders were being offered equal opportunities.<sup>24</sup> Just because Congress had passed Title IX and HEW had promulgated enforcement regulations, however, did not mean that Title IX would quickly become embraced by athletic programs across the country.<sup>25</sup>

### III. IMPLEMENTING TITLE IX

After the enforcement regulations were announced in 1975, schools were given a grace period until 1978 to comply with the law.<sup>26</sup> In reality, they were given much longer because of the series of lawsuits filed to define the practical application and definitions of Title IX. Although the enforcement regulations required each institution to have an in-house Title IX specialist to monitor how the school would proceed with compliance and investigate any complaints about non-compliance<sup>27</sup> and the U.S. Department of Education Office of Civil Rights (“OCR”) had been charged with monitoring and enforcing Title IX,<sup>28</sup> the regulations did not specify if an individual had a private right of action. In 1979, in *Cannon v. University of Chicago*,<sup>29</sup> the U.S. Supreme Court held that individuals had private rights of action under Title IX and that the right could be exercised without exhausting the administrative remedies first.<sup>30</sup>

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23. 34 C.F.R. § 106.37(c) (2007).

24. 34 C.F.R. § 106.41(c) (2007). The equal opportunity list includes:

- (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

Unequal aggregate expenditures . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

*Id.*

25. See Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545 (1997) (arguing that the legal decisions involving Title IX were inconsistent in part because of the lack of legislative history and the breadth and vagueness of the law itself).

26. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 53 (1996) (discussing the history of Title IX in great detail).

27. 34 C.F.R. § 106.8(a) (2007).

28. CARPENTER & ACOSTA, *supra* note 4, at 19–24.

29. 441 U.S. 677 (1979).

30. *Id.* at 708–09 (holding that a private right of action exists for (1) a person discriminated against on the basis of sex; (2) a private remedy is fully consistent with the enforcement of the



That same year, OCR released a policy interpretation explaining that if a school could satisfy one of three components of what it called “the three prong test,” the school would be compliant with the requirement that it must accommodate the interests and abilities of its students. The language read:

- (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 interests and abilities 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 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.<sup>31</sup>

The challenge of determining compliance for varsity sports has been a point of concern following the initial release of the policy interpretation.<sup>32</sup> The policy interpretation and the finding that individuals had a private right of action, however, did not end the litigation attempting to clarify Title IX.

The scope of the law would be narrowed and then expanded in the mid-1980s. In 1984, the U.S. Supreme Court in *Grove City College v. Bell*<sup>33</sup> essentially removed collegiate athletics from the scope of Title IX by holding that departments

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law; and (3) the subject matter is essentially about invidious discrimination that is not a matter of concern to the state as a whole).

31. Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (Dec. 11, 1979).

32. In 2002, the Secretary of Education formed a commission on Title IX to address questions of whether the law should be changed or adapted. One of the primary charges of the commission was to examine the impact Title IX has had on men’s minor intercollegiate sports. See RITA J. SIMON, ED., *SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER* (2005) (contains transcripts of the report and various essays in favor of and opposed to the commission’s comments). The only substantive change to have resulted from the report was an additional letter of clarification from the Office of Civil Rights in March, 2005. The letter encouraged schools to meet the interest and ability prong via a Model Survey done on the internet. U.S. DEP’T OF EDUC., *ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE* (Mar. 17, 2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf>. The letter of clarification was met with immediate skepticism from Title IX advocates who questioned whether the survey really captured issues of interest. Myles Brand, President of the NCAA, argued that it did nothing to promote interest in sport. Press Release, National Collegiate Athletic Association, Statement from NCAA President Myles Brand Regarding Department of Education Title IX Clarification (Mar. 22, 2005), available at <http://www.ncaa.org> (follow “Media & Events” hyperlink, then follow “Press Room” hyperlink, then follow “News Releases” hyperlink).

33. 465 U.S. 555 (1984).

and divisions of educational institutions needed to be direct recipients of federal funding in order to be subject to the law.<sup>34</sup> As almost no athletic departments receive direct federal funding, Title IX no longer applied to athletics. In 1988, however, Congress overrode President Ronald Reagan's veto<sup>35</sup> to pass the Civil Rights Restoration Act of 1987 (1988 Amendments), which re-expanded Title IX and applied the law to all subsets of any institution that received any federal money.<sup>36</sup>

In 1992, in *Franklin v. Gwinnett County Public Schools*,<sup>37</sup> Title IX would gain power when the Supreme Court held that punitive damages were available to plaintiffs under Title IX.<sup>38</sup> Although the facts of the case did not involve sports, the holding included the entirety of Title IX and was not fact specific, thus including those lawsuits filed on behalf of student athletes.

Throughout this time period, courts published a variety of decisions addressing essentially four areas: access to existing sports teams at the high school level,<sup>39</sup> clarification of acceptable ways of applying Title IX to different groups of plaintiffs,<sup>40</sup> clarification that Title IX did not protect men's teams,<sup>41</sup> and requests to elevate certain women's club sports to varsity status to comply with the law.<sup>42</sup>

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34. *Id.* at 574–75. See also Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 32 (1992) (discussing the impact of *Grove City* on Title IX).

35. Irvin Molotsky, *House and Senate Vote to Override Regan on Rights*, N.Y. TIMES, Mar. 23, 1988, at A1.

36. Civil Rights Restoration Act of 1987 (1988 Amendments), 28 Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (2007)).

37. 503 U.S. 60 (1992).

38. *Id.* at 76.

39. Countless access cases have been filed regarding both high school and college and university varsity sports. For a description of many of them, see Heckman, *supra* note 25, and Tracy J. Johnson, Comment, *Throwing Like a Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575 (1998).

40. See *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993) (holding that a court could reinstate a specific sport and that the second prong of compliance (history of expansion) required a consistent and continuing pattern of expansion); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa. 1992) (holding that institutions cannot cut women's varsity sports teams even for non-discriminatory reasons, like budget, unless cuts do not result in a Title IX violation). See also Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992–93: Defining the "Equal Opportunity" Standard*, 1994 DET. C.L. REV. 953 (1994) (describing these and other cases in detail).

41. See *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763 (9th Cir. 1999) (holding that Title IX did not prevent universities from cutting men's teams in order to comply with the law); *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154 (D. N.D. 2000) (holding that schools could cut men's sports rather than adding women's sports in order to meet the proportionality prong even if funding for the men's sport was secure). See also 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 (2003) (exploring more recent Title IX cases).

42. In *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F. 2d 17 (2d Cir. 1993), the Colgate women's ice hockey club wanted to be elevated to varsity status as the school was not in compliance with Title IX. Eventually the case was vacated as moot when the plaintiffs filing the case graduated and hence lost standing. After this case, female students and

*Cohen v. Brown University*<sup>43</sup> was, however, the most significant case regarding the enforcement of Title IX. The First Circuit Court of Appeals concluded that the first question about compliance dealt with how many participants were involved in sports and not how many teams an institution offered.<sup>44</sup> The court also concluded that OCR's three prong compliance test was an appropriate means to determine compliance with Title IX.<sup>45</sup> The court was most supportive of the proportionality prong, and it was skeptical of Brown University's attempt to use the interest prong, writing, "interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience."<sup>46</sup>

#### IV. TITLE IX, INTRAMURALS, AND CLUB SPORTS

Although an estimated 5.5 million students currently participate in intramural and recreational sports programs,<sup>47</sup> compared to the approximately 487,000 varsity athletes who compete annually in various athletic associations,<sup>48</sup> Title IX lawsuits have focused overwhelmingly on collegiate varsity sports.<sup>49</sup> Litigators and legal scholars alike have paid little attention to the connection between Title IX and intramural and club sports offered by recreation programs at colleges and universities across the country. This lack of attention is despite the fact that Title IX applies to

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teams charging Title IX violations tended to file class action suits.

43. 101 F.3d 155 (1st Cir. 1996).

44. *Id.* at 173.

45. *Id.* at 166–67.

46. *Id.* at 179.

47. National Intramural-Recreational Sports Association, About NIRSA, <http://www.nirsa.org/about/Default.aspx> (last visited Apr. 20, 2007).

48. In 2004–2005, 384,742 varsity athletes competed in NCAA sponsored events. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 4. Additionally, roughly 50,000 student athletes compete in varsity college sports through the National Association of Intercollegiate Athletics (NAIA), but this number includes students from some Canadian colleges as well as U.S. colleges. National Association of Intercollegiate Athletics, About the NAIA, <http://naia.cstv.com/member-services/about/> (last visited Apr. 20, 2007). Another 13,000 compete in the National Christian College Athletic Association (NCCAA). NATIONAL CHRISTIAN COLLEGE ATHLETIC ASSOCIATION, 2006–07 MEMBERSHIP DIRECTORY (2006), <http://www.thenccaa.org/Downloads/2006-07%20Member%20Directory.pdf>. Another 49,000 (approximately) compete in two-year colleges via the National Junior College Athletic Association (NJCAA). E-mail from Mary Ellen Leicht, Associate Director, NJCAA, to Sarah K. Fields, Assistant Professor, Sport, Exercise, and Humanities Program, The Ohio State University (Mar. 15, 2007, 13:10 EDT) (on file with author).

49. An increasing number of Title IX lawsuits are challenging high schools and high school athletic associations. See Lynne Tatum, Comment, *Girls in Sports: Love of the Game Must Begin at an Early Age to Achieve Equality*, 12 SETON HALL J. SPORT L. 281 (2002) (arguing that in order to see increased numbers of participants at the collegiate level, Title IX must be enforced at the high school level); Ray Yasser & Samuel J. Schiller, *Gender Equity in Interscholastic Sports: The Final Saga: The Fight for Attorneys' Fees*, 34 TULSA L.J. 85 (1998) (describing part three of a Title IX lawsuit against a high school); Ray Yasser & Samuel J. Schiller, *Gender Equity in Interscholastic Sports: A Case Study*, 33 TULSA L.J. 273 (1997) (describing part two of the same Title IX lawsuit); Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371 (1997) (describing part one of the same Title IX lawsuit).

all sports at all educational settings receiving federal funding: the enforcement regulations specifically state that “[n]o person shall, on the basis of sex, be excluded from . . . or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient . . . .”<sup>50</sup>

The lack of published legal scholarship on the matter should not be taken as a sign that intramural and club sport programs are inherently less likely to have Title IX problems than their varsity counterparts; nor does the dearth of scholarship and published legal decisions mean the topic is unworthy of study.<sup>51</sup> The lack of scholarship is reflected in a level of confusion on campuses about the law and its implication for intramural and club sports; one student newspaper blamed Title IX because the women’s club soccer team was not a varsity sport.<sup>52</sup> Because Title IX and its enforcement regulations specifically place intramural and club sports with varsity interscholastic programs, the varsity sport rules and cases provide an accurate analogy for how to address issues of access and equal opportunity within intramural and club sports.<sup>53</sup>

Intramural and club sports are popular college activities and their purpose and scope differ from each other.<sup>54</sup> Intramural sports are organized largely by the institution, which provides officials, facilities, leagues, and schedules. Intramurals are usually limited to competition between students at the same school. Ohio State University (OSU), for instance, prides itself on its intramural program in its comprehensive handbook describing the program:

In 1914, Ohio State, along with the University of Michigan, became the first universities to formally organize and manage an intramural sports program for students on their respective campus. We have come a long way since then, but our goal is still the same: To provide the OSU community with opportunities to engage and interact in a fair, safe, recreational sports program at a wide range of skill levels. The Intramural Program offers over 40 different individual/dual and team

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50. 34 C.F.R. § 106.41(a) (2007). The same phrasing is used to discuss issues of opportunity. 34 C.F.R. § 106.41(c) (2007).

51. See Roger I. Abrams, *Sports Law Issues Just Over the Horizon*, 3 VA. SPORTS & ENT. L.J. 49 (2003) (arguing that only examining sports law cases after they happen is shortsighted and encouraging scholars to anticipate and address potential areas of litigation).

52. Abby Brownback, *Tilting the Playing Field: Title IX Leaves Students Unsatisfied in Pursuit of Athletic Equality in Numbers, Funding*, KAN. STATE COLLEGIAN, Jan. 27, 2007, available at <http://media.www.kstatecollegian.com/media/storage/paper1022/news/2007/01/23/News/Tilting.The.Playing.Field-2683735.shtml> (last visited Apr. 20, 2007).

53. The OCR policy interpretations include the word intercollegiate in the title. Policy Interpretation: Title IX and Intercollegiate Athletics, *supra* note 31. However, the scope of the application begins: “This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.” *Id.*

54. Information for this section came primarily from college and university websites. Because websites and policies can change quickly and without notice, be aware that all websites were accessed in April, 2007. These examples are simply that and do not suggest that they are the norm for institutions offering intramural and club sports.

sport activities throughout the academic year with approximately 25,000 participants annually. The intramural sports department is also very committed to promoting the development of leadership qualities in students. Student employment opportunities include officiating, supervising, scorekeeping, equipment managing, and office administrating. Over 300 students are hired each school year . . . . Our ability to offer a diverse program affords students the opportunity to understand different sport cultures and styles of competition. It is the hope of the intramural sports staff that their dedication to the overall development of students will assist in fostering the student's commitment to recreation and pave the way for a healthy lifestyle long after their time at Ohio State.<sup>55</sup>

Washington State University in Pullman, Washington, similarly characterizes its intramural program: "Participation in the program is voluntary and determined by interest. Participation can provide one with opportunities to have fun, learn new sports, meet people from other cultures, test one's physical ability, as well as offer a break from routine."<sup>56</sup> Some intramural programs are provided for students at no additional cost<sup>57</sup> and others charge a fee for participation.<sup>58</sup>

Club sports at most schools are student-run organizations that receive some funding or support (in terms of facilities, supervision, or guidance) from the recreation program or department of the institution,<sup>59</sup> the athletic department,<sup>60</sup> or from the school's general student organization funds as a whole.<sup>61</sup> Some colleges and universities allow their club sports to use the institutions' logos and emblems,<sup>62</sup> and others do not.<sup>63</sup> Many club sports provide the opportunity to

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55. OHIO STATE RECREATIONAL SPORTS, INTRAMURAL HANDBOOK 1 (2006), <http://recsports.osu.edu/uploads/2006-07%20IM%20Handbook.pdf>.

56. WASHINGTON STATE UNIVERSITY RECREATION, 2005-06 HANDBOOK 3 (2005), [http://urec.wsu.edu/urec/im/handbook/handbook\\_05.pdf](http://urec.wsu.edu/urec/im/handbook/handbook_05.pdf).

57. Email from John Kearney, Statistician, Webmaster, and Head Secretary, Yale College Intramurals, to Sarah K. Fields, Assistant Professor Sport, Exercise, and Humanities Program, Ohio State University (Mar. 16, 2007, 15:52 EDT) (on file with author).

58. WASHINGTON STATE UNIVERSITY RECREATION, *supra* note 56, at 8.

59. Ohio State Recreational Sports: Sport Clubs, <http://recsports.osu.edu/clubs.asp> (last visited Apr. 20, 2007) (reporting that the Ohio State University recreational sports program as a whole is a member of the Office of Student Affairs).

60. Yale University Bulldogs Official Athletic Site, Club Sports Overview, [http://yalebulldogs.cstv.com/links/club\\_sports.html](http://yalebulldogs.cstv.com/links/club_sports.html) (last visited Apr. 20, 2007).

61. Sport Club Federation, <http://scf.wustl.edu/> (last visited Apr. 20, 2007). This is the club sport umbrella program at Washington University in St. Louis.

62. Ohio State University allows clubs to use logos and emblems provided they first fill out required forms with the university's trademark and licensing departments. Ohio State Recreational Sports: Sport Clubs: Marketing/Sponsorship, [http://recsports.osu.edu/clubs\\_marketing.asp](http://recsports.osu.edu/clubs_marketing.asp) (last visited Apr. 20, 2007).

63. See Eric Lukas, *Club Sports: The Long Road to Recognition*, COLUMBIA DAILY SPECTATOR, April 5, 2006, LEXIS, News Library, UWIRE file. Columbia University's men's ice hockey club said they sent gift baskets to the President and the Athletic Director to celebrate a successful season, and the letter with the baskets was on stationary with the Columbia athletics logo. That letter got the team in trouble for using a logo limited to varsity sports. Columbia said

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compete against other clubs from other colleges and universities and/or community-based club organizations.

The missions of the clubs often seem to involve promoting personal growth, providing recreation opportunities, and providing competitive opportunities, potentially against club teams from other schools or organizations. For example, Ohio State University offers a sweeping description of its goals for club sports on its website:

The Sport Club program is designed to serve individual interests in different sports and recreational activities. Participation in the program enhances and promotes the element of good sportsmanship, the development of skills, the well-being derived from physical activity, and the social aspect within each sport. If competition is desired, opportunities exist in varying degrees within individual clubs.<sup>64</sup>

Yale University, on the other hand, focuses more on the competitive nature of their club sport program, posting on their website: “Although some clubs remain solely recreational, most are highly competitive. National collegiate championships have been won by croquet, fishing, polo pony, rugby, sailing, and skeet shooting. Additionally, numerous individual national collegiate championships have been won by a variety of club athletes.”<sup>65</sup> Later on that same website, however, the focus on competition is toned down in the statement of purpose: “1) To fill the need for uniquely structured sport activities that may be competitive, recreational, or instructional in nature. 2) To provide a learning experience through student involvement in fund raising, organization, administration, budgeting, leadership, and scheduling- in addition to athletic skill in a favorite sport.”<sup>66</sup>

#### A. Equal Access

Determining equal access to an intramural or club program is a challenge. Institutions are subject to the three prong test under Title IX and can establish compliance by meeting the proportionality prong, showing a history of expansion of opportunities, or establishing that the interests and the abilities of the students are being met.<sup>67</sup> Each institution will have its own evidence regarding their history of expansion and its own evidence of meeting the interests and abilities of its students, and that evidence will likely be unique to that institution; therefore, this section will attempt to evaluate if institutions can meet the proportionality prong of the Title IX test. Failure to meet this prong’s requirement does not mean the institution is in violation of Title IX, provided they can meet one of the other two prongs’ requirements.

With respect to varsity sports, courts have clearly stated that the issue is not the

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they limited use of the logo because of increasing emphasis on marketing and on protecting the University’s intellectual property. *Id.*

64. Ohio State Recreational Sports: Sport Clubs, *supra* note 59.

65. Yale University Bulldogs Official Athletic Site, *supra* note 60.

66. *Id.*

67. Policy Interpretation: Title IX and Intercollegiate Athletics, *supra* note 31.

number of teams offered, but the number of participation slots available on those teams that determines whether or not Title IX is being satisfied.<sup>68</sup> Intramural and club sports differ from varsity sports in that often no prescribed number of slots exist: in many intramural programs, any student who can find a team can play, and many club sports have a no-cut policy. Additionally the number of teams and, consequently, the number of participants in any one sport (in both intramural and club sports) will likely vary from year to year as student interest and engagement varies. On the one hand, this suggests that colleges and universities that offer open-enrollment intramural or club sports program can argue that they are, in fact, meeting the interests of the students of both genders. On the other hand, intramural and club sports programs are not actually open-enrollment if the college or university determines, especially for intramural sports, what leagues or teams will be offered for men and women. The number of available leagues and teams dictate the number of participation or actual playing slots for men and women.

### 1. Intramural Sports

Colleges and universities that offer intramural sports for their students usually have one of two different organizational systems to determine leagues. Some, like Yale University, rely on existing organizational structures outside of the athletic program. Every undergraduate at Yale is automatically assigned to a residential college where they can live and eat during their time at the school.<sup>69</sup> The intramural program is designed around the residential college. The school decides what sports and what leagues will be offered, and each residential college automatically has one team enrolled in each league.<sup>70</sup> The students in the college recruit and build teams, and although the intramural program requires a minimum number of athletes on the team to avoid a forfeit, no maximum exists.<sup>71</sup> In theory, each team can accommodate as many students who want to participate. As a practical matter, the number of playing slots is limited by the rules of the game and the number of leagues for each sport offered.<sup>72</sup> In this system, the playing slots can be counted.<sup>73</sup>

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68. *Cohen v. Brown Univ.*, 101 F.3d 155, 163–64 (1st Cir. 1996). The purpose of counting slots and not teams is simple: some teams have significantly larger rosters than others, and the law is not meant to say that if a school offers football (a large roster sport) for males, offering golf (a small roster sport) for females is acceptable. Further, the roster spots must be real participation slots and not just appear so on paper. *See also* *Choike v. Slippery Rock Univ. of Pa.*, No. 06-622, 2006 WL 2060576, at \*20–23 (W.D. Pa. July 21, 2006).

69. Yale University, The Residential Colleges, [http://www.yale.edu/yalecollege/publications/ycps/chapter\\_i/colleges.html](http://www.yale.edu/yalecollege/publications/ycps/chapter_i/colleges.html) (last visited Apr. 20, 2007).

70. Email from John Kearney, Statistician, Webmaster, and Head Secretary, Yale College Intramurals, to Sarah K. Fields, Assistant Professor Sport, Exercise, and Humanities Program, Ohio State University (May 1, 2007, 15:12 EST) (on file with author).

71. *Id.*

72. *Id.*

73. The 1996 Clarification Letter (Guidance on Participation and Proportionality) from Norma Cantu (January 19, 1996) specifically states that varsity athletes who are on the team but do not play receive numerous benefits from their role on the team, such as coaching, tutoring, and other “important non-tangible benefits derived from being a member of an intercollegiate athletic

Like many schools, Yale intramural sports tend to be in one of three categories: co-ed, men's, and women's sport.<sup>74</sup> Usually, if a sport is offered as a single-gender sport, parallel opportunities exist for the other gender, for example men's and women's soccer.<sup>75</sup> Golf and bowling are open to any undergraduate but one team participant must be female; however, the rules do not require that one male be on the team, thus allowing an all female team.<sup>76</sup> Yale also offers several sports that, although traditionally deemed men's sports, are open to any eligible student regardless of gender—for example, baseball and ice hockey.<sup>77</sup> Unlike designated co-ed sports, these sports have no minimum gender participation requirements, meaning that theoretically an all-male team could face an all-female team. However, this open-sport approach does not apply to field hockey, a traditionally female sport. Field hockey at Yale is limited to eligible female athletes only.<sup>78</sup>

In two sports, Yale offers more leagues and thus more teams and thus more playing slots for men than for women. In touch football, Yale offers a men's league and a co-ed league but no women's league.<sup>79</sup> While women have the opportunity to play football in the co-ed league, fewer spots on the playing field are open to women. The men's league has six players per team on the field at a

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team.” CARPENTER & ACOSTA, *supra* note 4, at 229–30. However, that discussion is about varsity athletes who receive many more benefits from just being on a team than do members of an intramural team. The Office of Civil Rights has not investigated the benefits of being on an intramural team without playing. Therefore, arguably the only benefits to intramural participation are actually playing in a game and social interaction with others on the team. As players on intramural teams spend less time together playing and practicing than do varsity athletes, this section focuses on the benefits of actually playing the game.

74. YALE INTRAMURALS, INTRAMURAL ELIGIBILITY, <http://www.yale.edu/intramurals/rules/eligibility.doc> (last visited Apr. 20, 2007).

75. YALE INTRAMURALS, MEN'S SOCCER, <http://www.yale.edu/intramurals/rules/soccerrules.doc> (last visited Apr. 20, 2007); YALE INTRAMURALS, WOMEN'S SOCCER, <http://www.yale.edu/intramurals/rules/soccerrules.doc> (last visited Apr. 20, 2007).

76. YALE INTRAMURALS, COED GOLF, <http://www.yale.edu/intramurals/rules/coedgolfrules.doc> (last visited Apr. 20, 2007); YALE INTRAMURALS, COED BOWLING, <http://www.yale.edu/intramurals/rules/bowlingrules.doc> (last visited Apr. 20, 2007).

77. YALE INTRAMURALS, BASEBALL, <http://www.yale.edu/intramurals/rules/baseballrules.doc> (last visited Apr. 20, 2007); YALE INTRAMURALS, ICE HOCKEY, <http://www.yale.edu/intramurals/rules/coedicehockeyrules.doc> (last visited Apr. 20, 2007).

78. YALE INTRAMURALS, FIELD HOCKEY, <http://www.yale.edu/intramurals/rules/fieldhockeyrules.doc> (last visited Apr. 20, 2007). Yale's position that field hockey is a female-only sport matches the decisions of several law suits involving high school sport. *See Williams v. Sch. Dist. of Bethlehem*, 799 F. Supp. 513 (E.D. Pa. 1992), *rev'd*, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); *Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F. Supp. 951 (D. R.I. 1991); *B.C. v. Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987). Each case in the end denied a high school boy the right to compete on his high school field hockey team. *See also* FIELDS, *supra* note 22, at 132–53 (discussing the cases and their social context in greater detail). Yale, however, has had a policy of female only intramural field hockey that pre-dates the court cases (the author played intramural field hockey in 1987 at Yale) so that while their policy is parallel to the court decisions, the decisions did not inspire the policy.

79. YALE INTRAMURALS, FOOTBALL, <http://www.yale.edu/intramurals/rules/footballrules.doc> (last visited Apr. 20, 2007).



time.<sup>80</sup> The co-ed league also has six players per team on the field but no more than three players can be one gender.<sup>81</sup> Therefore while the teams can be as large as the students want them to be, the men of each residential college share time for nine playing positions and the women share time for three. Similarly, intramural basketball for men is offered at three league levels (designated “A,” “B,” and “C”), while only one league is offered for women.<sup>82</sup> Again, the difference is fifteen playing spots (five players on three teams) for men versus five playing spots (five players on one team) for women. Additionally in squash, Yale intramurals offer five competitive slots for men and only three for women.<sup>83</sup>

Given that roughly 49% of Yale’s undergraduate population is female,<sup>84</sup> in order to comply with the proportionality prong of Title IX, Yale would need to provide a roughly even number of playing slots in intramurals to both men and women. Men, however, have an extra eighteen playing slots from the extra teams in football, basketball, and the extra slots in squash. Women have an extra seven playing slots from field hockey, and they have three reserved slots in bowling and both spring and fall golf (one of the four slots on each team must be occupied by a woman). Totaling all available sports, Yale offers undergraduates 208 playing slots.<sup>85</sup> Because a number of co-ed teams vary on the number of one gender allowed to play at one time,<sup>86</sup> determining the total percentage of slots for women is impossible since it will fluctuate. However, women are guaranteed seventy-four of the total 208 slots and men are guaranteed eighty-two of those slots. Women have about 47.4% of the guaranteed slots and men about 52.6%.<sup>87</sup> An additional twenty-one slots are open to both genders with the remaining varying based on the rules of the specific game. Thus compliance with the proportionality prong of Title IX would be determined if a court felt the intramural numbers substantially mirrored the enrollment numbers.<sup>88</sup>

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80. *Id.*

81. *Id.*

82. YALE INTRAMURALS, HOOPS, <http://www.yale.edu/intramurals/rules/hoopsrules.doc> (last visited Apr. 20, 2007).

83. YALE INTRAMURALS, SQUASH, <http://www.yale.edu/intramurals/rules/squashrules.doc> (last visited Apr. 20, 2007).

84. Yale University, Yale Facts, <http://www.yale.edu/admit/visit/facts.html> (last visited Apr. 20, 2007).

85. Number comes from totaling number of individuals allowed on the field or in competition at one time. For swimming, table tennis, and tennis which had various events with the possibility of one competitor competing in multiple events, the total number of events was tallied as if a single competitor entered just one event. For cross-country, which had no limit on the number of participants, the total number of scoring positions was selected. Yale Intramurals, General Rules and Information, <http://www.yale.edu/intramurals/rules.htm> (last visited Apr. 20, 2007) (clicking on hyperlinks for specific sport to see rules).

86. Golf (both spring and fall) and bowling guarantee one slot for women but allow up to four slots each for women. Ultimate requires at least one member of each gender on the field but allows up to five members of the seven person team to be of one gender. Co-ed soccer similarly requires two members of each gender on the field, but allows a maximum of six members of the eleven players on the field to be one gender. *Id.*

87. *Id.* Total numbers were based on rule and eligibility requirements.

88. “An institution satisfies prong one provided that the gender balance of its intercollegiate

Other schools, like Ohio State University, allow students to organize as many intramural teams as they like and then the intramural program creates a schedule to accommodate all available teams.<sup>89</sup> Students unable to find a team on their own are encouraged to register as something like free agents and the intramural program organizers help them find a team.<sup>90</sup> Team rosters are capped at sixteen.<sup>91</sup> Like Yale, most OSU intramurals are offered as either co-ed teams or single-gender teams with leagues for both men and women, for example, male and female flag football leagues.<sup>92</sup> Like Yale, on occasion more leagues are offered for men than for women. For example, in outdoor soccer, a man may participate in up to three leagues (men's, fraternity, or co-recreational),<sup>93</sup> while a woman can compete in only two leagues (women's or co-recreational).<sup>94</sup> Just as for Yale, the lesser number of leagues results in a lesser number of playing slots available to female students compared to male students. Similarly the three men's leagues in basketball, flag-football, and softball play twice weekly; however, OSU only schedules the other leagues (including women's leagues) to play only once a week.<sup>95</sup> Determining compliance under Title IX's proportionality prong is based on the entire program, but because of the annual variation in the intramural structure at OSU, examining the number of playing slots and games available to men and women help indicate proportionality.

However, OSU has factored gender equity into its intramural program. Two sports' rules (sand volleyball and outdoor soccer) specifically note that each men's team may have one female on the roster. No men are allowed on the women's team rosters.<sup>96</sup> Additionally, the rules of flag football and basketball contain

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athletic program substantially mirrors the gender balance of its student enrollment." *Cohen v. Brown Univ.*, 101 F.3d 155, 200 (1st Cir. 1996). Additionally, Yale has an uneasy history with Title IX. In 1976, the Yale Varsity Women's Crew team (which included several future Olympian rowers) entered the Senior Women's Administrator's office and stripped, exposing the phrase "Title IX" written on their bodies, and reading a statement protesting the lack of a women's boathouse. The incident received national attention. *Yale Women Strip to Protest a Lack of Crew's Showers*, N.Y. TIMES, Mar. 4, 1976, at 33. See also A HERO FOR DAISY (50 Eggs Productions 1999) (describing the incident and the context in detail).

89. Ohio State Recreational Sports, Intramural F.A.Q.s, [http://recsports.osu.edu/intra\\_faqs.asp](http://recsports.osu.edu/intra_faqs.asp) (last visited Apr. 20, 2007).

90. *Id.*

91. *Id.*

92. The one exception appears to be indoor cricket, which is listed on the program website as a men's league. Ohio State Recreational Sports, Programs/Fees, [http://recsports.osu.edu/intra\\_programsfees.asp](http://recsports.osu.edu/intra_programsfees.asp) (last visited Apr. 20, 2007). Interestingly, the indoor cricket rule sheet makes no gender specification requirements. OHIO STATE RECREATIONAL SPORTS, INDOOR CRICKET RULES, <http://recsports.osu.edu/uploads/Indoor%20Cricket.pdf> (last visited Apr. 20, 2007).

93. Co-ed (short for co-educational) and co-rec (short for co-recreational) are different names for the same mixed gender idea. The word choice in the essay mimics the institution's word choice.

94. OHIO STATE RECREATIONAL SPORTS, OUTDOOR SOCCER RULES, <http://recsports.osu.edu/uploads/Outdoor%20Soccer.pdf> (last visited Apr. 20, 2007).

95. Ohio State Recreational Sports, Programs/Fees, *supra* note 92. No written explanation is given on the university website as to why the men's leagues play more often.

96. OHIO STATE RECREATIONAL SPORTS, SAND VOLLEYBALL RULES,

identical language not found in other rules:

In activities with separate divisions for men's and women's competition, no person may participate in a division of the opposite sex without first obtaining permission from the Assistant Director. When an activity is not offered to both men and women (in separate divisions) or there is not enough of one sex to form a league, that sex will have the opportunity to compete with the opposite sex.<sup>97</sup>

This same language is included verbatim in the Intramural Handbook, meaning that it, in fact, applies to all sports and all leagues, even those that have commonly been dominated by one gender (usually men in the case of the most competitive twice-weekly competitive men's leagues).<sup>98</sup> Those schools that rely purely on student-organized intramural programs may be in a better position to argue that they are accommodating students' interests and abilities better than those schools that have predetermined teams with differing numbers of leagues by gender. OSU's decision to offer more games for some men's leagues, however, could be a Title IX violation because it offers more participation opportunities for men unless the institution could establish that women did not want to play as often as men.

## 2. Club Sports

Access to club sports is completely voluntary. Schools generally run club sports programs in a similar manner to any other student club: if the students are interested enough to organize the club and run it, and if they can find sufficient participation, then they can be a club. Washington University in St. Louis and OSU have similar approaches to creating club sports. Washington University requires that proposed clubs submit a written constitution "justifying the organization's existence" and a list of student signatures indicating "significant interest on campus." The sport is then approved by a two-thirds vote of the student-run Sports Club Federation.<sup>99</sup>

Ohio State is more proactive about recruiting new clubs; its website announces:

Can't find a sport club that you want to join? Do you want to form your own sport club? It's easy! Just follow these steps:

- Must have at minimum eight people interested in joining the club
- Complete the Sport Club Application, Code of Conduct, and Emergency Contact information attached on the side of this page

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<http://recsports.osu.edu/uploads/Sand%20Volleyball.pdf> (last visited Apr. 20, 2007); OHIO STATE RECREATIONAL SPORTS, OUTDOOR SOCCER RULES, *supra* note 94.

97. OHIO STATE RECREATIONAL SPORTS, FLAG FOOTBALL RULES, <http://recsports.osu.edu/uploads/Flag%20Football.pdf> (last visited Apr. 20, 2007); OHIO STATE RECREATIONAL SPORTS, BASKETBALL RULES, <http://recsports.osu.edu/uploads/Basketball.pdf> (last visited Apr. 20, 2007)

98. OHIO STATE RECREATIONAL SPORTS, 2006-07 INTRAMURAL HANDBOOK 3 (2006), <http://recsports.osu.edu/uploads/2006-07%20IM%20Handbook.pdf>.

99. SPORTS CLUB FEDERATION CONSTITUTION, <http://scf.wustl.edu/private/files/SCFConstitution.doc> (last visited Apr. 20, 2007).

- Come before the Appeal and Review Board<sup>100</sup>

The Code of Conduct form (which must be signed by each club member) focuses mostly on the behavior requirements of the members both on and off-campus and warns that the University might impose sanctions, such as withholding funding or limiting access to University facilities, if the members do not behave appropriately.<sup>101</sup> It also carries a liability waiver.<sup>102</sup> The application form, however, is a bit more complicated. OSU requires that each club create a mission statement—the application says such a statement serves as advertising for the club—and a constitution.<sup>103</sup> Those clubs that post constitutions on their team websites frequently mention the University Non-Discrimination Policy, which includes prohibiting gender discrimination.<sup>104</sup> Interestingly, even the Ohio State All-Girl Cheer Team says that any OSU student is eligible to participate but that their main focus is to compete in All-Girl divisions at national competitions.<sup>105</sup> The men's rugby club similarly includes a non-discrimination policy but photos suggest that only men, in fact, participate.<sup>106</sup> Given the emphasis on non-discrimination and consistency of the application policy for forming club sports, Title IX violations for access are unlikely, provided the procedures and standards for approving applications for club teams are gender neutral and that the results

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100. Ohio State Recreational Sports, Form a Club, [http://recsports.osu.edu/clubs\\_formaclub.asp](http://recsports.osu.edu/clubs_formaclub.asp) (last visited Apr. 20, 2007).

101. OHIO STATE RECREATIONAL SPORTS, 2005–2006 SPORT CLUBS APPLICATION, CODE OF CONDUCT/EMERGENCY MEDICAL RELEASE FORM (2005), <http://recsports.osu.edu/uploads/Code%20of%20Conduct%20and%20Emergency.pdf>. OSU clubs have a history of less than ideal public behavior which would explain the emphasis on good behavior. In November, 1999, the OSU women's rugby club garnered unwanted national media attention when a photo of some of the players posing topless in front of the Lincoln Memorial in Washington, D.C., ran in the Columbus newspaper. Other papers picked up the story and the Midwest Rugby Union (the regional government body for the sport) banned the team from competition for the rest of the season. Emily Kimball, *Feminism on the Field: Athletes, Coaches Ponder the Politics of Shirt Removal*, BROWN DAILY HERALD, Nov. 19, 1999, LEXIS, News Library, UWIRE File.

102. OHIO STATE RECREATIONAL SPORTS, 2005–2006 SPORT CLUBS APPLICATION, CODE OF CONDUCT/EMERGENCY MEDICAL RELEASE FORM, *supra* note 101.

103. OHIO STATE RECREATION SPORTS, 2005–2006 SPORT CLUB APPLICATION (2005), <http://recsports.osu.edu/uploads/Sport%20Clubs%20Application%20v.1.1.1.pdf>.

104. *See, e.g.*, BUCKEYE MASTERS SWIM CONSTITUTION, <http://bmsc.org.ohio-state.edu/> (last visited Apr. 20, 2007); CONSTITUTION OF THE AIKIDO YOSHOKAI AT THE OHIO STATE, [http://www.cse.ohio-state.edu/~egnot/Aikido/\\_private/aikido\\_constitution.pdf](http://www.cse.ohio-state.edu/~egnot/Aikido/_private/aikido_constitution.pdf) (last visited Apr. 20, 2007). The Ohio State University Student Activities Office (with whom Club Sports are affiliated via the Recreational Sports program) offers a sample constitution on its website and requires that each club include a non-discrimination policy at least as broad as that of the University. Their recommended language is: "This organization and its members shall not discriminate against any individual(s) for reasons of age, color, disability, gender identity or expression, national origin, race, religion, sex, sexual orientation, or veteran status." CONSTITUTION AND BY-LAWS GUIDELINES FOR STUDENT ORGANIZATIONS, <http://ohiounion.osu.edu/posts/documents/Sampleconstitution.pdf> (last visited Apr. 20, 2007).

105. The Ohio State All Girl Cheer Team, Team Member Contract, <http://www.osuagc.com/RulesConstitution.htm> (last visited Apr. 20, 2007).

106. OHIO STATE RUGBY, OSURFC CONSTITUTION (2002), <http://www.osurugby.com/Constitution.doc>.

show no gender bias.

### B. Equal Opportunities

Determining whether or not an intramural or club sport program violates the equal opportunity component of Title IX is in one respect simple, yet in another sense quite complicated. The simple part is looking at the list of components that the enforcement regulations suggest be used to determine equal opportunity. The list includes:

- (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.

Unequal aggregate expenditures . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.<sup>107</sup>

The first component, interest and ability, has been addressed in the previous section. Several of the subsequent components specifically do not apply to intramural programs (travel, coaching, compensation of coaches, provision of locker rooms, and housing), thus leaving only a few components to consider for intramural sports. Club sports are usually funded to some small degree by the institution, and thus, while the student members of the clubs themselves generally decide how to spend their funding, the question of how funding is awarded by the institution is relevant to Title IX.

#### 1. Intramural Sports

Intramural sports by nature have fewer financial benefits and perks than varsity or even club sports, and thus the laundry list of equal-opportunity requirements for intramural programs is relatively short. Several, however, still apply: “the provision of equipment and supplies,” “scheduling of games and practice time” (if practice time is supplied for any intramural team), “provision of facilities,” and

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107. 34 C.F.R. § 106.41(c) (2007).

“publicity.”<sup>108</sup>

Many colleges and universities approach all four of these categories in a facially gender-neutral way. OSU, for example, provides some equipment and officials by sport, and on paper, at least, no gender differences appear. In roller hockey, for instance, the players are required to wear a helmet with face guard, hockey gloves, skates, and shin guards.<sup>109</sup> Players must furnish their own sticks and skates, but the intramural department will provide goalie equipment, helmets, hockey gloves, and shin guards.<sup>110</sup> Yale has a similar policy for ice hockey, supplying helmets to all along with all goalie equipment (including the stick), but requiring participants to provide their own additional equipment.<sup>111</sup> For other sports with fewer equipment needs, equipment (like basketballs) can be checked out from the recreational services desk on a University ID card as needed.<sup>112</sup> Title IX violations with regard to equipment would only occur if, through intent or neglect, the equipment furnished to women was consistently of inferior quality than that furnished to men, or if access to equipment was unevenly granted.

Similarly, game scheduling, provision of facilities, and publicity generally are gender equitable. OSU, for example, makes no distinction in its announcement of scheduling games—preferring to make these determinations by sport rather than gender.<sup>113</sup> The games themselves, at OSU, are usually played on comparable if not identical fields and courts.<sup>114</sup> OSU and Washington University in St. Louis publicize men’s and women’s intramurals in the same manner, usually on the same posters and websites.<sup>115</sup> Should a school, however, fail to publicize intramurals comparably, a Title IX violation would be likely.

Inequitable provision of facilities and game scheduling would be a Title IX violation. If an institution consistently provided better facilities to men’s intramurals than to women’s, it would be problematic. For example, perhaps the intramural program consistently has the men’s basketball leagues playing on the varsity basketball competition court while the women’s basketball leagues play on practice courts. Qualities of outdoor fields can also vary, and if men’s games were scheduled on better groomed and maintained fields than women’s games, this could be a violation as well. Even if the decisions were made based on tradition or

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108. *Id.*

109. OHIO STATE RECREATIONAL SPORTS, ROLLER HOCKEY RULES, <http://recsports.osu.edu/uploads/Roller%20Hockey.pdf> (last visited Apr. 20, 2007).

110. *Id.*

111. YALE INTRAMURALS, ICE HOCKEY, <http://www.yale.edu/intramurals/rules/coedicehockeyrules.doc> (last visited Apr. 20, 2007).

112. OHIO STATE RECREATIONAL SPORTS, RPAC FACT SHEET, <http://recsports.osu.edu/uploads/RPAC%20fact%20sheet.pdf> (last visited Apr. 20, 2007).

113. OHIO STATE RECREATIONAL SPORTS, SPRING QUARTER SCHEDULE, <http://recsports.osu.edu/uploads/Spring%20Quarter%20Schedule-2007.pdf> (last visited Apr. 20, 2007).

114. *See, e.g.*, Ohio State Recreational Sports, Softball FR-07 Schedule/Brackets, [http://recsports.osu.edu/intra\\_view\\_schedule.asp?ID=1627](http://recsports.osu.edu/intra_view_schedule.asp?ID=1627) (last visited Apr. 20, 2007).

115. OHIO STATE RECREATIONAL SPORTS, SPRING QUARTER SCHEDULE, *supra* note 113; WASHINGTON UNIV., INTRAMURAL SPORTS 2006–2007 INTRAMURAL SPORTS CALENDAR, <http://www.rescomp.wustl.edu/~im/forms/06-07/Schedule.doc> (last visited Apr. 20, 2007).

past scheduling—for example, men’s top level intramurals have usually played on the best courts—this does not absolve the institution from its Title IX responsibilities.

Game scheduling has similar potential for problems unless a concerted effort is made to be certain that the scheduling is equitable. For example, some intramural times are more likely to promote participation than others: game times that conflict with classes are obviously problematic in drawing participants, as are game times that are extremely late at night or early on weekend mornings. Sometimes, because of the lack of field and court space, only inopportune times are available. As long as men’s and women’s intramural programs share those times, no Title IX violation is likely.<sup>116</sup>

## 2. Club Sports

The same laundry list from the enforcement regulations spelling out how to determine if the women’s sports programs are receiving equal benefits apply to club sports as well. Because the students who run the club sports make their own decisions about how to allocate their resources, the Title IX issues for club sports likely center on how the institution determines the allocation of facilities and funding. This is particularly difficult to determine as many of these decisions occur behind closed doors. The sample institutions used in this article have posted some of their policies publicly, yet, as is often the case at institutions, the policies sometimes change faster than the publications do.<sup>117</sup> Thus, these sample policies are used only as case studies and broad examples.

Like intramural sports, access to facilities and equipment must be comparable for men’s and women’s club sports. If any benefits are offered to men, then they must also be offered to women. For example, if the college or university provides tape to the men’s club soccer team, then it must do so for the women’s club team as well. If the institution provides facilities to club sports, the decisions regarding that allocation must be equitable and cannot be based on past history. Scheduling the men’s rugby club games and practices on the best field simply because of tradition is a violation of Title IX if the women’s teams are not afforded the same or similar access.

An easy and gender neutral way to make facility decisions is based on who turns in requests in a timely manner.<sup>118</sup> Club teams that fail to attend mandatory

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116. Different seasons for male and female teams in the same sport have been held to be a Title IX violation. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220 (W.D. Mich. Aug. 1, 2002) (holding that scheduling girls’ teams to play in non-traditional seasons was a Title IX violation). However, this holding would be unlikely to carry over to intramural or club sports as it was based in part on an argument that girls competing in a non-traditional season had fewer collegiate scholarship opportunities.

117. Email from Klajdi Rrumbullaku, Sport Club Budget Committee Coordinator at Ohio State University, to Sarah K. Fields, Assistant Professor, Sport, Exercise, and Humanities Program, Ohio State University (Mar. 13, 2007, 14:30 EDT) (on file with author) (describing how OSU was trying a new allocation approach in 2007 and would decide later in the school year which system—the old one posted on the website or the new trial one—to use in the future).

118. *See, e.g., Ohio State Recreational Sports, Facility Request,*

meetings of the Sport Club Federation (the governing body of club sports) at Washington University in St. Louis risk funding or facility privileges, subject to a vote of the primarily student-composed committee.<sup>119</sup> Some institutions have the recreation staff decide how best to allocate facilities based on club sport and other requests.<sup>120</sup>

Typically, club sports fund themselves via membership dues, fundraising events, private/corporate donations or sponsorships, and allocations from the institution.<sup>121</sup> In essence, schools tend to have either staff or student committees making budgeting decisions. The University of Iowa has each club sport submit a budget, and then the Sport Club Staff of the Division of Recreational Services makes allocations and announces the decisions at a fall meeting to club representatives.<sup>122</sup> This type of funding, which is mostly discretionary, holds the greatest risk of Title IX violations if the staff relies significantly on history or tradition, which could result in greater funding for men's clubs.<sup>123</sup>

Ohio State University uses a tier-system approach to help determine facilities and resource allocation.<sup>124</sup> The allocations are made by student-run committees.<sup>125</sup> The system used in 2006–2007 created five divisions (development, semi-collegiate, collegiate, intercollegiate, and martial arts).<sup>126</sup> The clubs are placed in a division based on a combination of number of participants, levels of competition, and years of being a club.<sup>127</sup> The goal is to allocate resources and facilities as fairly as possible.<sup>128</sup> However, given the longer history of men's sport at all levels, some men's clubs have been in existence longer than women's club sports, which gives the men's teams an advantage under the tier system.<sup>129</sup> Additionally in order

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<http://recsports.osu.edu.facilityrequest.asp> (last visited Apr. 20, 2007) (warning that clubs that do not submit requests by the deadline will be placed on the low end of the priority list).

119. SPORT CLUB FEDERATION CONSTITUTION, *supra* note 99.

120. UNIVERSITY OF IOWA RECREATIONAL SERVICES, SPORTS CLUBS MANUAL 11–12, [http://www.recserv.uiowa.edu/programs/clubs/master\\_copy.pdf](http://www.recserv.uiowa.edu/programs/clubs/master_copy.pdf) (last visited Apr. 20, 2007).

121. Ohio State Recreational Sports, Sport Clubs, FAQs, How Are Clubs Funded?, [http://recsports.osu.edu/clubs\\_faqs.asp](http://recsports.osu.edu/clubs_faqs.asp) (last visited Apr. 20, 2007).

122. UNIVERSITY OF IOWA RECREATIONAL SERVICES, *supra* note 120, at 11–12.

123. See *Pederson v. La. State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), *rev'd* in part and *aff'd* in part, 213 F.3d 858 (5th Cir. 2000). The women's lawsuit accused Louisiana State University of violating Title IX and the appellate court found that the institution did just that, writing, a "review of the record convinces us that an intent to discriminate, albeit one motivated by chauvinist notions as opposed to one fueled by enmity, drove LSU's decisions regarding athletic opportunities for its female students." 213 F.3d at 882. Chauvinism, thus, is not an excuse.

124. Email, Klajdi Rrumbullaku, *supra* note 117.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. For example, the OSU men's rugby club was founded in 1966. Ohio State Buckeyes Rugby, Club History, <http://www.osurugby.com/history.asp> (last visited Apr. 20, 2007). The women's rugby club was founded in 1999. Ohio State Women's Rugby, About the Team, <http://www.osuwrfc.com/about.cfm> (last visited Apr. 20, 2007). This may not be completely accurate as OSU women had a rugby club in 1999 that got in trouble, *supra* note 101, so the team



to remedy past discrimination, women's club sports arguably should be elevated in the tier system to allow them to rise to the same level as men's sport. For example, the women's club sport might need more funding to make up for a lower level of alumni support (if a women's club team has not been in existence as long, they have fewer alumni) or the club might need funding for coaches to teach the sport to women not offered the opportunity to have learned the sport in the past.<sup>130</sup>

Club sports at Washington University in St. Louis follow a written procedure whereby members request funding from a committee composed of their peers. Clubs present a written budget with a justification and an explanation, which the Allocation Committee (composed of five undergraduate students who are members of recognized club sports) reviews.<sup>131</sup> The Committee may make additional requests for information and may request a brief presentation from a club member.<sup>132</sup> The budget proposal must be broken out by travel, equipment, instruction, facilities, and other needs.<sup>133</sup> Each category needs to be fully explained and designed with a certain frugality, like combining multiple games in one road trip.<sup>134</sup> All clubs are required to fundraise an additional 30% beyond the budget the Committee allocates to them. Various fines exist for missed deadlines and failure to fundraise.<sup>135</sup>

This type of procedure is, on its face, gender neutral. If, however, the Allocation Committee was gender biased and consistently allocated more money to men's clubs, a Title IX violation would exist. At Washington University in St. Louis, though, a search of the spring 2004 budgets revealed that comparable men's and women's club teams received comparable allocations.<sup>136</sup> That University also provides an appeal system for any team that feels the allocation was unfair; giving credence to the argument that funding at Washington University is in compliance with Title IX.<sup>137</sup>

Funding of club sports at the Utah Valley State College (UVSC), however, has

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may have re-formed after that experience. Regardless, the length of club history might effect current funding.

130. See CARPENTER & ACOSTA, *supra* note 4, at 60, 84–85 (arguing that Title IX prohibits schools from accepting donations for men's sports without matching the benefits the donations bought for the women's sports). See also *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048–49 (8th Cir. 2002) (concluding a school cannot bypass Title IX requirements by providing one sex a more than proportionate opportunity through the guise of outside funding).

131. SPORT CLUB FEDERATION CONSTITUTION, *supra* note 99.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Sports Club Federation, Index of Private Budgets, <http://scf.wustl.edu/private/budgets/spring04/> (click on team name hyperlink) (last visited Apr. 20, 2007). Men's rugby received \$1,862 and women's rugby received \$1,430; men's soccer received \$1,678 and women's soccer received \$1,819; men's lacrosse received \$1,967 and women's lacrosse received \$2,277. *Id.*

137. WASHINGTON UNIVERSITY IN ST. LOUIS, STUDENT UNION, HOW THINGS WORK: A GUIDE TO STUDENT UNION 48–52 (2005), <http://su.wustl.edu/forms/copyappeal.php> (click on Student Group Resources and then How Things Work hyperlink).

already caused concern and raised the suggestion that Title IX might be violated. UVSC moved from the National Junior College Athletic Association to the NCAA in 2003. At that time, sixteen sports were given varsity status, and the remainder was divided into two groups.<sup>138</sup> One group, extramural clubs, consisted of clubs that were sponsored and supported by the athletic department in 2003.<sup>139</sup> Other club sports were operated under the Office of Student Life.<sup>140</sup> The funding of these two groups was dissimilar even when the sports the clubs played were the same.<sup>141</sup> In 2005, the faculty advisor to both the men's and the women's rugby teams realized that the women's team received less funding (the men's team was funded by athletics and the women's via the Office of Student Life), and he complained to the school's Title IX compliance officer.<sup>142</sup> The school increased the women's funding for that year by \$3,400, and the following year, UVSC changed its policy so that all clubs (be they club sports or the chess club) were funded exactly same.<sup>143</sup> In 2006–2007, each club received about \$250 per semester.<sup>144</sup> An assistant state attorney representative saw no discrimination under the old tier system, but the school changed its policy anyway.<sup>145</sup>

#### V. CONCLUSION

Often when Title IX is linked to club or intramural sports, the public discourse has focused on how Title IX prevents men's club teams from achieving varsity status<sup>146</sup> or how the law results in the promotion of women's club teams to varsity level.<sup>147</sup> Some men's clubs have actually linked themselves to women's clubs in the hopes that if and when the institution promotes the women's club to varsity

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138. Jordan Burke, *UVSC Club Funding Fair?*, DESERET MORNING NEWS (Salt Lake City), Dec. 5, 2006, LEXIS, News Library, UWIRE file.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See Jeremy Reynolds, *Texas Tech Hockey Left Skating in Shadows of Title IX*, DAILY TOREADOR, Oct. 4, 2006, LEXIS, News Library, UWIRE file (arguing that only Title IX requirements kept the men's ice hockey club from becoming a varsity sport); Jeremy Reynolds, *Title IX Leaves Some Texas Tech Athletes with No Choice*, DAILY TOREADOR, Nov. 17, 2005, LEXIS, News Library, UWIRE file (claiming men's varsity sports like swimming, diving, gymnastics, and soccer were reduced to club status because of Title IX requirements); Jeff Johnson, *Syracuse Continues to Lack an NCAA Hockey Team*, DAILY ORANGE, Sept. 25, 2005, LEXIS, News Library, UWIRE file (suggesting that the men's club team could not be elevated without adding women's ice hockey as a varsity sport which would be too expensive).

147. Joseph Person, *U.S.C. Equestrian Team Wins National Championship*, THE STATE, April 28, 2005, LEXIS, News Library, UWIRE file (noting that the University of South Carolina team won the title eight years after being promoted from a club to varsity to comply with Title IX); Alex P. Kellogg, *Following Title IX Probe, UCLA Reinstates Women's Rowing as Varsity Sport*, CHRON. OF HIGHER EDUC., Mar. 21, 2001, at 44 (noting that rowing had been a club sport for ten years prior to the decision).

status, the men's club will be carried along.<sup>148</sup>

Club sports are expensive propositions. The dream for many club teams of becoming a varsity sport includes the dream of full financial support and full use of the institution's facilities.<sup>149</sup> Brigham Young University (BYU) took a novel approach in 2003 when, instead of elevating its men's club soccer team to varsity, the University went even further and made the team a professional minor league soccer team, competing in the Premier Development League.<sup>150</sup> At the time of the move, the University was in some danger of a Title IX violation with varsity sports, so elevating the men's club to varsity would have been impossible. One reporter at the time warned that BYU's gender disparity in club sports, like varsity sports, was problematic and suggested that an inquiry from OCR or a lawsuit was possible.<sup>151</sup>

In fact, all colleges and universities should be aware of potential Title IX violations when it comes to intramural and club sports.<sup>152</sup> Institutions need to be aware of the requirements to provide equal access and equal opportunity in terms of funding and facilities to intramural and club sports. Institutions should be responsive to their students' interests and abilities and be sure that they are providing adequate intramural leagues with comparable scheduling and equipment provision. They should be acutely aware of the need to be equitable when it comes to funding club sports and not to inadvertently fund on the basis of history or other traditions that might result in inequitable funding for women's club sport. Institutions should be particularly wary of relying on history or tradition in scheduling sports because consistently awarding men's teams better field space or

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148. Marianne E. Graham, *Women's Ice Hockey Coming to Pitt*, THE PITT NEWS, Sept. 23, 1998, LEXIS, News Library, UWIRE file. As of 2007, Pitt had not promoted men's or women's ice hockey to varsity status. University of Pittsburgh, Official Athletic Site, <http://pittsburghpanthers.cstv.com/> (click on hyperlinks to men's and women's sports, noting neither team is listed) (last visited Apr. 20, 2007). Only occasionally will a men's club indicate that they prefer to compete on the club rather than varsity level. See Larry Porter, *Club Status Works Best for Creighton Men*, OMAHA WORLD HERALD, Sept. 22, 1996, at 4C (noting that as a varsity sport the men's crew team had to travel further and spend more to compete against other varsity men's teams as opposed to competing against more regional club crew teams).

149. See Ben Roberts, *Cool Cats Frozen Out of Big Money: Fund Themselves*, KENTUCKY KERNAL, Sept. 16, 2003, LEXIS, News Library, UWIRE file (noting the men's ice hockey club has a \$55,000 budget and only \$1,000 of university support); Sarah-Jane Wilson, *Colorado Baseball Team Not Safe at Home*, COLORADO DAILY, May 8, 2003, LEXIS, News Library, UWIRE File (bemoaning the loss of the baseball club's university field space which was to become the practice field for the women's varsity soccer team).

150. Patrick Kinahan, *Cougs Score in Jump from Club to PDL*, SALT LAKE TRIB., Feb. 26, 2003, at C1.

151. Welch Suggs, *Brigham Young U. Enters Semipro Soccer League*, CHRON. OF HIGHER EDUC., Mar. 21, 2003, at 39.

152. When the University of Notre Dame drafted a new Title IX grievance procedure in 2006, a University representative specifically mentioned that if a student was concerned about a student club, for example, being limited by gender, the student could activate the grievance procedure. Eileen Duffy, *Notre Dame Strengthens Sexual Discrimination Policy*, THE OBSERVER, Oct. 25, 2006, LEXIS, News Library, UWIRE file. Although the representative said nothing specifically about club sports, the reasoning behind the policy in general suggests that institutions are aware of and concerned about gender discrimination and club sports.

more desirable practice or game times would be a violation of Title IX. In 1994, legal scholars Diane M. Henson and Boyce C. Cabaniss wrote that “universities now ignore Title IX only at their peril.”<sup>153</sup> While that statement may have been a bit strong at the time, colleges and universities today should be aware of Title IX and its implications for club and intramural sports in order to avoid future lawsuits.

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153. Diane M. Henson & Boyce C. Cabaniss, *It's Not Whether You Win or Lose but Whether You Get to Play: Title IX Finally Expands Participation Opportunities for Female Athletes in the 1990s*, 13 REV. LITIG. 495, 528 (1994).

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# DISPARATE IMPACT DISCRIMINATION: THE LIMITS OF LITIGATION, THE POSSIBILITIES FOR INTERNAL COMPLIANCE

MELISSA HART\*

## INTRODUCTION

Since the theory was first proposed by a group of creative litigators and adopted by the Supreme Court in *Griggs v. Duke Power Co.*,<sup>1</sup> disparate impact has been a flashpoint for the hopes and the anxieties of those struggling with the goal of equal employment opportunity. From the earliest days of the operation of Title VII of the Civil Rights Act of 1964,<sup>2</sup> it was evident that an antidiscrimination mandate would only be effective if plaintiffs were able to challenge not only blatantly racist or sexist conduct but also practices and policies that may be neutral in appearance but whose effects are anything but neutral. Disparate impact enables challenges to policies that, while facially neutral, place a disproportionate burden on members of a protected class, and thus the theory seemed to carry the potential for removing the “built-in headwinds” that blocked progress for minorities and women.<sup>3</sup> The hope was that “the disparate impact theory would reach discrimination that was otherwise out of reach for claims of intentional discrimination.”<sup>4</sup>

It remains a matter of considerable debate whether disparate impact has lived up to the aspirations of those who conceived it. And even among those who laud its early successes, there are many who question its potential as a litigation tool for the future. The available evidence suggests that these skeptics are correct that disparate impact litigation is unlikely to play a vital role in the future of employment discrimination litigation. Furthermore, the bifurcation of antidiscrimination law into two discrete theories—one addressed to intentional discrimination and one addressed to neutral policies with discriminatory effects—has had negative consequences for employment discrimination litigation. But the limits of litigation, however frustrating for potential plaintiffs, should not be seen

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1. 401 U.S. 424 (1971).
2. 42 U.S.C. § 2000e to e-15 (2000).
3. *Griggs*, 401 U.S. at 432.
4. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006).

as identical with the limits of the law. While litigation is essential for enforcement of legal mandates, voluntary compliance is similarly important. Disparate impact theory significantly changed the contours of compliance and its conceptual framework continues to influence “best practices” for the many employers who are themselves trying to further Title VII’s goal—“[t]he elimination of discrimination in the workplace.”<sup>5</sup>

One setting where both the limits of litigation and the potential for internal compliance are particularly apparent is the academic workplace. On the one hand, courts have taken an especially deferential approach to faculty hiring and promotion decisions, such that successful litigation challenges to tenure and other employment decisions are rare. At the same time, the interest in compliance in the university setting, together with the relatively strong worker voice in academic employment, create potential for regular examination and innovation in approaches to compliance with antidiscrimination goals.

This essay will consider the current state of the disparate impact theory from each of these angles. First, I will examine the limitations of disparate impact theory as a litigation tool. Second, I will consider how these limitations are part of a larger problem in the way employment discrimination litigation has been framed by the courts. Third, I will discuss the positive impact that disparate impact has had on compliance efforts and the significance of compliance as a tool in efforts to eliminate workplace discrimination. Here, I will focus particularly, though not exclusively, on the university setting. A number of scholars have concluded that success in furthering equality in campus employment is most likely to come through internal change. Thus, compliance options take on particular significance in the academic arena.

#### THE LIMITATIONS OF DISPARATE IMPACT

*Griggs* has been heralded as one of the most important civil rights cases in United States legal history.<sup>6</sup> In one of its first cases to interpret Title VII, the Supreme Court in *Griggs* accepted the idea that a facially neutral policy could violate federal law if its effects were discriminatory and the employer could not articulate a business necessity for the policy.<sup>7</sup> The case involved a challenge to the Duke Power Company’s requirements that all employees in certain previously segregated lines of employment have the equivalent of a high school diploma and a satisfactory test result on a professionally prepared aptitude test.<sup>8</sup> The Court did not consider the evidence of intentional discriminatory treatment sufficient in the case as presented, but it concluded that “tests neutral on their face, and even

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5. *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)).

6. See, e.g., Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005); Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 1–2 (1987).

7. *Griggs*, 401 U.S. at 436.

8. *Id.* at 427–28.

neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>9</sup>

While the Court’s articulation of its new standard seemed to embrace an expansive view of discrimination and a commitment to its elimination, disparate impact has never really lived up to its potential. In theory, it still could. Indeed, less than two years ago, the Supreme Court concluded that disparate impact claims were viable under the Age Discrimination in Employment Act,<sup>10</sup> and thus certainly affirmed the viability of the theory more generally. But despite this recent affirmation, it is fair to say that disparate impact litigation is struggling for life.

Part of this struggle is simply a result of the very low success rate plaintiffs have in disparate impact challenges. In his recent article on disparate impact, Michael Selmi presented the results of an empirical analysis of lower courts’ handling of disparate impact cases that shows that plaintiffs have fared very poorly with these claims.<sup>11</sup> In the district courts, plaintiffs are successful in about 25 percent of disparate impact cases; in the courts of appeals, plaintiffs fare even worse, winning about 19 percent of the time on their disparate impact arguments.<sup>12</sup> Moreover, among those cases, one third of appellate victories for plaintiffs and one half of the district court victories also presented successful disparate treatment claims involving intentional discrimination, raising a serious question about the significance of the disparate impact claim to the outcome of the litigation.<sup>13</sup>

The reasons for these numbers are varied. Defendant employers have become more sophisticated in the kinds of workplace tests they adopt, so most tests that might cause some impact can nonetheless survive a challenge because they can be justified by business necessity.<sup>14</sup> While employers in the early days of Title VII might not have analyzed how their job requirements were tied to measuring job performance, employers are now aware that employment tests must be validated as job related and justifiable as consistent with business necessity.<sup>15</sup> Selmi’s study also concludes that courts are less likely to find a disparate impact at all than they were in the immediate aftermath of Title VII’s enactment.<sup>16</sup> And independent of these fairly low statistical success rates, disparate impact claims have simply never made much headway beyond the context of the theory’s initial conception—the written tests at issue in *Griggs* and other early objective standards.<sup>17</sup>

More generally, the history of disparate impact law reflects a deep judicial and

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9. *Id.* at 430.

10. *Smith v. City of Jackson*, 544 U.S. 228 (2005).

11. Selmi, *supra* note 4, at 738–43.

12. *Id.* at 738–40. This is lower than the plaintiff success rate of about 35 percent in employment discrimination cases more generally. *Id.* at 739–40.

13. *Id.* at 740–41.

14. *Id.* at 741.

15. See Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598–99 (2004). The fact that employers do this more careful evaluation is unquestionably one of the successes of *Griggs*. But it also creates limitations on the theory’s future significance.

16. Selmi, *supra* note 4, at 741.

17. *Id.* at 749–53.

public ambivalence about the theory. Even those moments of victory in the history of disparate impact law have lacked the glory of true wins. For example, though many scholars and advocates looked hopefully to the Civil Rights Act of 1991 as a revitalizing moment for the theory, its reality was very mixed. The 1991 law was passed in response to a series of 1989 Supreme Court interpretations of federal antidiscrimination laws.<sup>18</sup> Among those Supreme Court cases, one of the most criticized was *Wards Cove Packing Company v. Atonio*,<sup>19</sup> which was viewed by many as drastically redefining—or even, as Robert Belton has put it, “dismantling”—disparate impact.<sup>20</sup> *Wards Cove* held that a disparate impact plaintiff had to identify specifically which employer practice was causing the complained of effects, that the plaintiff, rather than the defendant, carried the ultimate burden of demonstrating that the practice was not a business necessity, and that any proposed alternative practice had to be equally as effective and no more costly.<sup>21</sup> In the wake of this decision, there was a widespread call for a legislative fix to the Court’s narrowing redefinition of standards for litigating disparate impact claims.

The legislature did indeed respond to *Wards Cove* with legislation, but its response was hardly a radical one. In the 1991 Civil Rights Act, Congress largely retained the first of the Court’s requirements, obliging disparate impact plaintiffs in most instances to identify the challenged practices specifically.<sup>22</sup> The new law included a rarely applicable exception for circumstances where plaintiffs can show that employer practices cannot be separated for purposes of analyzing their impact.<sup>23</sup> The legislature did reverse the Court and return the burden of proving business necessity to the employer.<sup>24</sup> As to the standard for showing a less discriminatory alternative practice, Congress stated that the standard would be what it had been the day before *Wards Cove* was handed down.<sup>25</sup> Since there had been uncertainty in the courts as to the appropriate standard for a less discriminatory alternative prior to *Wards Cove*, this legislative action effectively reinstated the previous uncertainty. Further, the 1991 Act made clear that a plaintiff can succeed in disparate impact litigation only if she shows not simply that a less discriminatory alternative practice exists, but also that the employer “refuses to adopt such alternative employment practice.”<sup>26</sup>

So, while the 1991 Civil Rights Act was heralded as a victory for disparate impact plaintiffs,<sup>27</sup> the changes Congress made have had limited effect.

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18. See 42 U.S.C. § 1981 note (2000) (Purposes of 1991 Amendment) (listing as a purpose of the Act “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”).

19. 490 U.S. 642 (1989).

20. Belton, *supra* note 6, at 463–64.

21. *Wards Cove*, 490 U.S. at 657–61.

22. See 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

23. *Id.*

24. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

25. 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (k)(1)(C) (2000).

26. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

27. See, e.g., Belton, *supra* note 6, at 467–68.



Defendants retain the burden of showing business necessity, but this has not proven to be a difficult burden to meet. The exception to the requirement that a challenged practice be identified specifically has been applied extremely rarely. And the “less discriminatory alternative practice” standard is basically insurmountable. In the years since 1991, plaintiffs have been less successful in disparate impact claims than they were in years preceding the law’s enactment.<sup>28</sup> Moreover, another provision of that Act—the addition of compensatory and punitive damages potential exclusively for claims of intentional discrimination—has made disparate impact a less attractive option for plaintiffs.<sup>29</sup>

The Supreme Court’s decision in *Watson v. Fort Worth Bank & Trust*<sup>30</sup> offers another example of a legal event that could have been a victory for disparate impact plaintiffs, but that ultimately offered little to celebrate. In *Watson*, the Court held that disparate impact analysis could be applied to subjective hiring practices as well as to objective practices like the written tests at issue in *Griggs*.<sup>31</sup> At the same time, however, Justice Sandra Day O’Connor’s plurality opinion suggested that a plaintiff’s burden to prove disparate impact claims should be significant, while a defendant should have the legal tools to fairly easily defend against these claims.<sup>32</sup> Thus, the Supreme Court began in *Watson* the limitation of the disparate impact theory that would lead to the decision in *Wards Cove*. Moreover, very few cases have successfully challenged subjective practices on the disparate impact theory in the lower courts. Indeed, despite *Watson*, courts have generally been extremely resistant to recognizing the application of subjective judgment as a “neutral” employer policy.<sup>33</sup> For the moment at least, as a practical matter, disparate impact remains primarily applicable to objective tests, and only successful in those very rare cases in which an employer uses an objective test for which it cannot come up with a “business necessity” justification.

#### THE PROBLEM WITH CREATING CATEGORIES OF DISCRIMINATION

Proving discrimination is not always, or even often, an easy task. An extraordinary amount of time and energy has been devoted to the development of proof structures for Title VII litigation, and the consequence has often been more rather than less confusion. Regrettably these complications in proof structures have bled across into the substantive definitions of discrimination. As Charles Sullivan has cogently put it, “[o]ne of the antidiscrimination project’s pervasive problems has been the continuing conflation of two separate tasks, that is, defining discrimination and proving its existence.”<sup>34</sup>

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28. See Selmi, *supra* note 4, at 738–40.

29. See, e.g., Shoben, *supra* note 15, at 598.

30. 487 U.S. 977 (1988).

31. *Id.* at 991.

32. *Id.* at 993–99.

33. See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 783–84 (2005).

34. Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 913 (2005).

This error has been most evident in the context of disparate treatment law, where debate continues about the difference between “single-motive” and “mixed-motive” cases and the appropriateness of employing different statutory and judicially created proof structures in particular contexts.<sup>35</sup> But the divide between disparate treatment and disparate impact law is another area in which concerns about how to prove the existence of discrimination have led to substantive developments that undercut the effectiveness of the law. The notion that employer policies and practices must be either intentional, and thus subject to disparate treatment analysis, or neutral, and thus subject to disparate impact analysis, reflects a flawed understanding of the way the world actually operates. More seriously, it risks placing a great deal of workplace conduct and policy outside the reach of antidiscrimination law.

When I teach *Griggs* to my employment discrimination class, it never takes more than a few minutes for a student to raise her or his hand and say, “Doesn’t it seem like what was actually going on here was intentional discrimination?” That instinct seems to me to be correct, and it is an instinct shared by many. As one court has expressed it, “[i]n essence, disparate impact theory is a doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden behind facially-neutral policies or practices.”<sup>36</sup> And even the Supreme Court, in famously declining to extend the disparate impact theory to challenges under the Equal Protection Clause, observed that “[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”<sup>37</sup>

In fact, in many disparate impact cases, the notion that the policy at issue is “neutral” is simply disingenuous. Certainly this was the case in early disparate impact litigation like *Griggs*. When employers faced with Title VII held on to seniority systems that preserved previously explicitly segregated lines of employment,<sup>38</sup> or applied testing standards unrelated to the jobs at issue but certain to make upward mobility impossible for African-Americans educated in second-class schools,<sup>39</sup> these decisions were discriminatory. The notion that the same supervisors who were intentionally discriminating in 1964 simply stopped doing so on the effective date of Title VII is contrary to anything sociologists and psychologists have taught about human behavior.

These cases may initially seem easy to cabin as representing the “present effects of past discrimination” that were common in the early days of Title VII.<sup>40</sup> But even years later, when the Supreme Court considered the arrangements of Alaskan fisheries in *Wards Cove*, the stark segregation of sleeping, eating and working

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35. See Hart, *supra* note 33, at 758–66.

36. EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000).

37. Washington v. Davis, 426 U.S. 229, 242 (1976).

38. See, e.g., Local 189, United Papermakers v. United States, 416 F.2d 980, 982–83 (5th Cir. 1969).

39. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971).

40. See, e.g., Belton, *supra* note 6, at 443–45 (discussing the relationship between the development of disparate impact theory and the notion of “present effects of past discrimination”).

arrangements—which Justice Stevens, dissenting in that case, accurately described as disturbingly like that of the plantation economy<sup>41</sup>—suggested something much different from “neutral” policies that simply happened to have racial effects. Moreover, many of the “neutral” policies that almost certainly have a negative effect on opportunities for women and minorities—policies like word-of-mouth hiring, nepotism, cronyism or any other employment practice that avoids public posting or advertising for positions—will consistently reinforce the existing representation in a workforce. The effects are easy to see, and employers are certainly aware of them. At what point does the use of these practices cease to be “neutral” and instead become intentional discrimination?

The difficulties with separating disparate impact from disparate treatment are perhaps most famously exemplified in the strange history of *EEOC v. Joe’s Stone Crab, Inc.*, an Eleventh Circuit case that was seen as a disparate impact case by the district court, but reversed on those grounds and remanded for consideration as a disparate treatment case by the court of appeals.<sup>42</sup> Joe’s Stone Crab is a Miami Beach restaurant that had a long history of hiring almost exclusively male food servers.<sup>43</sup> The restaurant hired its new food servers annually through a “roll call” that included both an application and an interview process.<sup>44</sup> Almost no female food servers appeared at the annual roll call, and local food service employees testified that the restaurant had a well-known reputation for hiring only men as servers.<sup>45</sup> The restaurant’s maitre d’ was responsible for hiring servers, and the maitre d’ responsible for hiring during most of the years involved in the litigation explained that he relied on his “gut feeling,” taking account of applicants’ appearance, articulation, attitude and experience.<sup>46</sup> The company had no written or verbal hiring policy, and the decisions of the maitre d’ were not reviewed by anyone else in the company. There was no formal restaurant policy mandating the hiring of male servers, but testimony suggested a general acceptance of this result and the district court summarized the evidence as demonstrating that Joe’s “sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu.”<sup>47</sup>

Reviewing this evidence, the district court found that it was insufficient to make out a disparate treatment claim, but that on these facts the EEOC could challenge Joe’s facially neutral policy of “undirected and undisciplined delegation of hiring authority to subordinate staff.”<sup>48</sup> The Eleventh Circuit took an entirely different view. The appellate court saw no causal link between a facially neutral policy and the disparately low numbers of women in the ranks of food servers. Instead, the court opined that the factual findings “suggest that Joe’s hiring system was not in

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41. See *Wards Cove*, 490 U.S. at 663 n.4 (1989) (Stevens, J., dissenting).

42. See *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000); *EEOC v. Joe’s Stone Crab, Inc.*, 969 F. Supp.727 (S.D. Fla. 1997).

43. *Joe’s Stone Crab*, 969 F. Supp. at 731–33.

44. *Id.* at 733.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 738.

practice *facially-neutral*, but rather was *facially-discriminatory* on the basis of gender.”<sup>49</sup> The divergent views of these two courts reviewing the same factual record reflect the significant overlap between disparate impact and disparate treatment in employment discrimination law.

In fact, the proof structure in a disparate impact case itself demonstrates the difficulty of separating this theory from intentional discrimination. In an impact case, a plaintiff first identifies a policy that has a disproportionate negative impact on a protected class of employees.<sup>50</sup> The defendant must then demonstrate that the test is job related and consistent with business necessity.<sup>51</sup> If the defendant makes that showing, the plaintiff may still prevail if he can identify an alternative practice that is as effective for the employer’s business needs but would have a less discriminatory impact on the protected class and if the employer refuses to adopt that alternative practice.<sup>52</sup> For a plaintiff to prevail then, the court must conclude either that the defendant had no business justification for the practice or that the same business need could have been met with a less discriminatory alternative practice. If an employer maintains a policy under either of these circumstances, the neutrality of that policy is at best suspect.

And yet, despite the blurred line between policies that are “neutral” and those that are not, courts maintain the legal separation with little or no flexibility. Only a few years ago, the Supreme Court reversed a lower court finding of discrimination on the grounds that the court of appeals had impermissibly applied disparate impact standards in a disparate treatment case.<sup>53</sup> Given this continued dichotomy, it seems entirely possible that some kinds of employer practices will fall between these doctrinal cracks and will, despite their disparate impact on protected classes of workers, escape legal challenge. Thus, for example, in a number of cases challenging an employer’s reliance on excessive, unguided subjectivity in decisionmaking, courts have been unwilling to view the practice as either neutral or intentionally discriminatory and have rejected challenges as inappropriate under either theory.<sup>54</sup> Similarly, word-of-mouth hiring policies have struck some courts as facially neutral, others as intentionally discriminatory, and still others as impossible to categorize.<sup>55</sup> These are precisely the kinds of employer practices

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49. *Joe’s Stone Crab*, 220 F.3d at 1282.

50. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

51. *Id.*

52. 42 U.S.C. § 2000e-2(K)(1)(A)(ii) (2000).

53. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003).

54. *See Hart, supra* note 33, at 778–88 (discussing judicial response to subjective decisionmaking claims).

55. *See, e.g., EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991) (reversing a district court finding of disparate impact discrimination with the conclusion that word of mouth hiring was passive conduct by the employer and thus did not constitute a “practice” that could be challenged under federal law as either disparate impact or disparate treatment); *EEOC v. Consolidated Serv. Sys.*, 989 F.2d 233, 238 (7th Cir. 1993) (affirming a district court finding that use of a word-of-mouth policy was not intentional discrimination); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1435–36 (9th Cir. 1984) (affirming a district court application of disparate impact theory, but noting that on the particular facts disparate treatment might have been the more appropriate theory); *NAACP v. City of Evergreen*, 693 F.2d

that are most likely to freeze existing patterns of representation in the workforce and to block meaningful access for women and minority candidates. To the extent that current legal doctrine allows these and similar practices to escape challenge, it presents a limit to the utility of litigation as a tool for change.

#### THE CONTINUING IMPORTANCE OF IMPACT IN COMPLIANCE EFFORTS

In light of these limitations to disparate impact litigation, there may be some significant value to shifting the focus of the discussion from litigation strategy to strategies and goals for compliance. Of course, litigation is absolutely essential because discrimination is prevalent and destructive and litigation should provide remedies for acts of discrimination that do occur. Litigation also provides the best incentive to employers to take action to avoid future discrimination, and many employers are working hard not to discriminate. So determining what the governing litigation standards mean for compliance obligations and opportunities is essential. What do the available theories under Title VII tell us about the purpose of this antidiscrimination law and the obligations it imposes? After all, the remedial aspects of the statute are intended to spur employers “to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges” of discrimination.<sup>56</sup>

This focus on compliance is part of a larger scholarly trend that acknowledges the role that well-intentioned employers, among others, must play in giving true meaning and life to civil rights laws.<sup>57</sup> As Susan Sturm, whose work has been central in turning attention to the role that non-litigation enforcement mechanisms play in achieving workplace equality, recently wrote, “[t]hose on the front line must figure out how to achieve inclusive institutions when the problems causing racial and gender under-participation are structural, and they must do this under conditions of considerable legal ambiguity.”<sup>58</sup> With a growing recognition that litigation must be only one part of a broader agenda for changing workplace dynamics, many scholars and advocates are turning their eye to internal mechanisms for accountability and change.

The scholarship that has focused attention on employment in higher education—and in particular on the presence of women and minorities in the faculty ranks—has generally concluded that in this field, as much if not more than in others, the best chance for real change will likely come from within. As Martha

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1367, 1369 (11th Cir. 1982) (reviewing a district court’s class certification decision in a case asserting disparate treatment discrimination in part based on a word-of-mouth hiring policy). See also Matthew Noll, Comment, *Can there be Harmony?: Word of Mouth Hiring Practices after September 11, 2001*, 4 HOUS. BUS. & TAX L.J. 151, 166–71 (2004) (discussing word of mouth cases in several circuits).

56. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

57. See, e.g., Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2006 UTAH L. REV. (forthcoming); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 249 (2006).

58. Sturm, *supra* note 35, at 249.

West, who has done some of the most detailed and sustained research into representation of women in the academy, said over a decade ago, “[t]o make real progress against discrimination, we must pursue change within the universities themselves.”<sup>59</sup> Courts have taken such an extremely deferential approach to academic hiring decisions that litigation often seems unlikely to force reforms in areas where they are needed.<sup>60</sup> There is, however, some evidence that internal compliance mechanisms can lead to substantive reform and a more inclusive academic workplace.

It may be in this context that *Griggs* and the disparate impact theory will ultimately be recognized as most important. In the wake of *Griggs*, many employers either chose or were forced to eliminate testing that was unrelated to job performance. Perhaps even more significantly, as both critics and proponents have recognized, the disparate impact theory opened the door for affirmative action policies.<sup>61</sup> Disparate impact theory “recognizes the role that institutional choices, even those that are neutral in design and in application, can play in perpetuating stratification in the workplace.”<sup>62</sup> By focusing attention on the discriminatory effect that institutional structures can have, and shifting the focus from individual animus, impact theory opens the door for structural change.

The best hope for employment equality lies in this kind of structural change and the institutional commitment it requires. The kinds of compliance mechanisms most likely to foster a more inclusive workplace are, in many instances, focused on identifying and altering some of the very policies that disparate impact litigation could in theory target. For example, experts recommend that employers carefully examine their recruitment procedures to prevent screening women and minority candidates out of the applicant pool;<sup>63</sup> require written performance evaluations with specific examples to minimize the operation of stereotyping;<sup>64</sup> and advertise or post all positions and promotions, instead of relying on tap-on-the-shoulder or other informal mechanisms.<sup>65</sup> Each of these recommendations targets a policy or practice that, while appearing neutral, in fact operates as a “built-in headwind” to progress for women and minorities in the workplace.

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59. Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 68, 70 (1994).

60. See, e.g., Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 2 (2006).

61. See, e.g., Belton, *supra* note 5, at 469; Blumrosen, *supra* note 5, at 4–7; Richard A. Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 234–36 (1992).

62. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 137 (2003).

63. See West, *supra* note 59, at 157.

64. See JOCELYN LARKIN & CHRISTINE E. WEBBER, AM. BAR ASSOC., CHALLENGING SUBJECTIVE CRITERIA IN EMPLOYMENT CLASS ACTIONS (2005), available at <http://www.impactfund.org/pdfs/Subjective%20Criteria.pdf>.

65. See William T. Bielby, *Can I Get a Witness?: Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 377 (2003).

In addition to monitoring these kinds of practices, employer efforts to ensure employment equality can and should include systemic reform efforts. As the federal Glass Ceiling Commission noted in 1995, the most successful programs for increasing the representation of women and minorities in the workplace—and particularly in the higher ranks—involve strong central commitment and clear channels of accountability.<sup>66</sup> Diversity must become a core institutional value if it is to be an institutional reality. In a recent article, Professor Sturm described the transformation wrought at the University of Michigan through efforts by “university change agents” working together with the National Science Foundation (NSF) through an ADVANCE Institutional Transformation Award.<sup>67</sup> These efforts engaged key administrative personnel in surveying the climate at the University, targeting areas that needed change and developing initiatives that responded directly to perceived barriers. The barriers identified included disproportionate service obligations without corresponding authority for women, lack of openness regarding policies and procedures, continued operation of an “old boy network” and a failure of University policy to take account of “differences in household structure that placed greater demands on women.”<sup>68</sup> Through this grant, the University of Michigan successfully removed a number of barriers to women’s full “inclusion and advancement” in science and engineering departments at the school.<sup>69</sup> The process of reaching the measurable outcomes that this program achieved was one of program-wide exploration and conversation, which actively involved leaders within the University community in a careful evaluation of the impediments to advancement and the potential for removing those impediments.<sup>70</sup>

Ultimately, if internal compliance efforts are to achieve some part of what litigation has not yet done, they will require this kind of voluntary commitment and cooperation. As Sturm put it in describing the Michigan program, “[w]orkplace equality is achieved by connecting inclusiveness to core institutional values and practices. This is a process of ongoing institutional change. It involves identifying the barriers to full participation and the pivot points for removing those barriers and increasing participation.”<sup>71</sup> These kinds of efforts require active, conscious movement toward a more inclusive workplace. They may not be possible in all employment contexts; in particular these internal reforms may be effective primarily in workplaces—like universities—which enjoy a relatively high degree of worker voice. While it is important to recognize this and other limitations to internal compliance as a force in efforts toward equal employment opportunity, academic and similar workplaces may also serve as models of the possible that can be transported to other contexts.

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66. DEPARTMENT OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL, A FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION (1995), available at <http://www.dol.gov/oasam/programs/history/reich/reports/ceiling.pdf>.

67. Sturm, *supra* note 57.

68. *Id.* at 283–85.

69. *Id.* at 252–53.

70. *Id.* at 287–300.

71. *Id.* at 249.

## CONCLUSION

Those who conceived the disparate impact theory understood decades ago that equal employment opportunity for minorities and women could not be achieved through litigation targeting only the individual, intentional acts of discrimination that were the most obvious impediments to full participation. Deeper barriers existed then, and continue to exist today. The question of how best to unsettle the institutional structures that limit opportunities for women and minorities at work remains a subject of debate. Litigation must play a role in this effort, as the threat of liability remains the greatest impetus for change. Disparate impact claims will no doubt continue to be part of the litigation picture. But given the limitations of disparate impact as a litigation tool, internal employer efforts at institutional transformation may hold out greater potential for the kinds of structural change that the disparate impact theory has helped to reveal as necessary to true employment equality. The University employment setting reveals both the limits of litigation and the possibilities of internal compliance efforts in ways that may prove instructive for employees and employers more generally.



# AIM HIGHER: CHALLENGING FARRINGTON AND PALFREYMAN'S *THE LAW OF HIGHER EDUCATION*

TIMOTHY S. KAYE\*

## DESCRIPTION OR ARGUMENT?

By their own admission, Dennis Farrington and David Palfreyman's *The Law of Higher Education*<sup>1</sup> represents an attempt to do for higher education law in the United Kingdom what Professors Kaplin and Lee have so admirably accomplished by their treatise of the same name with respect to higher education law in the United States. Kaplin and Lee's work, now in its fourth edition, runs to two volumes, and has become a classic in the field.<sup>2</sup> A glance through the list of contents of Farrington and Palfreyman's book suggests a work of comparable breadth, because the topics range from the legal status of higher education institutions (HEIs) to the impact of European Union (EU) law, governance and management, student unions, the student-HEI relationship, academic freedom, property management, health and safety, and risk assessment. There is even a section on comparative studies which includes a brief look at issues in the United States. Nevertheless, readers familiar with Kaplin and Lee's work will find that Farrington and Palfreyman's *The Law of Higher Education* is actually very different both in style and in substance.

Kaplin and Lee's book is, first and foremost, essentially a reference work which provides in painstaking detail a description of the law of higher education throughout the United States. Thus, the discussion of each new issue commences with a summary of the relevant case law, often accompanied with significant quotations from court judgments. Only then do the authors offer some commentary of their own. Yet, given the context which they themselves have provided, Kaplin and Lee make it possible for readers to form their own independent views (and to see where and why they differ—if they do differ—from those of Kaplin and Lee). By contrast, Farrington and Palfreyman hardly ever provide the factual context for any case they cite, and they rarely quote the judgments given in court. Their work is thus less of a description of the law of higher education than an extended argument as to what they think the law should be.

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1. DENNIS J. FARRINGTON & DAVID PALFREYMAN, *THE LAW OF HIGHER EDUCATION* (2006).

2. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (4th ed. 2006).

There is, of course, nothing wrong with writing such a book, provided that it is clear that that is the authors' intention. However, such methodology does dramatically reduce the book's usefulness since, unless the reader is already very familiar with the material, s/he is often left unable either to follow the argument being made or to judge the extent to which it has any merit. Additionally, the approach does create a temptation for the authors to skew their analysis of the law to suit their own views. Unfortunately, it is this reviewer's opinion that the authors frequently succumb—sometimes stretching their analysis too far and as a result providing a somewhat misleading account of the true legal position. In the end, while there is a considerable amount of useful information contained in their book, any reader not already familiar with the law in this area will struggle to know when s/he is being presented with a reliable, objective account, and when what is being written is effectively a form of pleading of a case on behalf of certain types of institutions.

An instance on point is the analysis of *Phelps v. Hillingdon London Borough Council*,<sup>3</sup> in which for the first time the House of Lords—the highest court in the United Kingdom—formally recognized a tort of educational malpractice. Yet the discussion of this case (between paras. 13.48 and 13.55 inclusive) fails to quote or paraphrase any of the speeches given by their Lordships. The analysis (at para. 13.55) is simply in the form of quotations from three other books. Ironically, however, there is (at para. 13.54) a long quote from the American case of *Ross v. Creighton University*<sup>4</sup> and an even longer one from an article on the American approach to educational malpractice which was published in this very law journal.<sup>5</sup> There is much to be gained by a comparative approach—otherwise this very review article would itself be redundant—but a comparative approach requires something with which to compare. The lack of real analysis of *Phelps* makes this impossible. Similarly, subsequent English cases, which explain and refine the House of Lords' ruling in *Phelps*, are ignored.<sup>6</sup> Just as importantly, the opportunity to explain how *Phelps* fits in with pre-existing education case law, such as *X (minors) v. Bedfordshire County Council*,<sup>7</sup> or with the general law on breach of statutory duty in an educational context, is missed. This means that the implications for an institution's significant obligations under disability discrimination law<sup>8</sup> are overlooked, as are the ramifications regarding extra safeguards which HEIs are expected to put in place when they admit (as they increasingly do) students who are under the age of eighteen.

*Phelps* is a seminal case by anyone's standards. It was decided very recently by

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3. [2001] 2 A.C. 619 (H.L.).

4. 740 F. Supp. 1319 (N.D. Ill. 1982).

5. Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

6. See, e.g., *Robinson v. St. Helen's Metro. Borough Council*, [2002] EWCA (Civ) 1099; *DN v. London Borough of Greenwich*, [2004] EWCA (Civ) 1659.

7. [1995] 2 A.C. 633 (H.L.). See also *Osman v. United Kingdom*, 29 Eur. H.R. Rep. (1998), [1999] 1 F.L.R. 193, [1999] Fam. Law 86.

8. See Disability Discrimination Act, 1995, as amended by the Special Educational Needs and Disability Act, 2001.

the highest court in the United Kingdom and created a novel doctrine that is almost unique in the common law world. The problem is that Farrington and Palfreyman do not like it, and so give it short shrift. Yet within the same chapter, they allocate to *Buckingham v. Rycotewood College*<sup>9</sup>—a case decided in the lowest court in the land and so unimportant under the doctrine of *stare decisis* as not even to be accorded a conventional or online law report—a full three and a half pages. Indeed, were it not for the fact that *Buckingham* was decided in a court situated in the same town as the authors, it is unlikely that it would ever have been plucked from the legal obscurity in which it arguably belongs. As was explained earlier, hardly any other case in the book is discussed at such length.

#### THE SPECTRE OF CONSUMERISM

Farrington and Palfreyman's dislike of *Phelps* is a good example of the argument which underlies so much of this book. They seem to view the fledgling tort of educational malpractice as inviting courts to engage in unwarranted interferences in the autonomy of HEIs. Their more general perception is that the increased readiness both of central government and of the courts to involve themselves in higher education implies a "consumerist" mentality<sup>10</sup> which has led to an unwarranted interference in institutional autonomy. While I have myself warned of the "spectre of consumerism" haunting higher education,<sup>11</sup> I believe that Farrington and Palfreyman have misidentified the source of the problem. In our paper, Professors Bickel, Birtwistle, and I argued that consumerism in higher education is gaining ground not because of the courts, but because of attitudes and expectations of students which HEIs have themselves been guilty of fostering.<sup>12</sup> Unfortunately, much of Farrington and Palfreyman's book seems to be symptomatic of what, in my view, many HEIs have been doing wrong.

A clue appears on the very first page. Farrington and Palfreyman argue that there is a "tendency to switch the burden of financing post-secondary education onto its 'consumers.'"<sup>13</sup> Two pages later they talk of the "aims of the principal 'customers' of higher education."<sup>14</sup> Another two pages on and they have dropped the quotation marks: "Higher education is increasingly seen as a commodity which is supplied to the State by a group of contractors, the higher education providers which are established as legally separate corporations in a variety of ways."<sup>15</sup>

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9. OX004741/OX 004342 (Oxford County Ct. Mar. 2, 2002).

10. See Tim Kaye et al., *Criticizing the Image of the Student as Consumer: Examining Legal Trends and Administrative Responses in the US and UK*, 18 EDUC. & L. 85 (2006).

11. See TIM KAYE, CTR. FOR EXCELLENCE IN HIGHER EDUC. LAW AND POLICY, COMMENTARY: EDUCATION, RIGHTS AND THE SPECTRE OF CONSUMERISM, <http://www.law.stetson.edu/excellence/HigherEd/CommentariesKaye1.pdf> (last visited Apr. 22, 2007).

12. Kaye et al., *supra* note 10.

13. FARRINGTON & PALFREYMAN, *supra* note 1, para. 1.01.

14. *Id.* para. 1.06.

15. *Id.* para. 1.09.

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To which the only reaction is to ask by whom it is “increasingly” seen as a commodity. It seems to this reviewer that it is certainly seen that way by Farrington and Palfreyman. Any possibility otherwise is abandoned by page 28, where (at para. 2.18) they openly refer to higher education as a product. In chapter 5, they go so far as to say that, “[g]overnance in the higher education sector is essentially the process whereby *independent corporate enterprises* which conduct teaching and research take collective decisions.”<sup>16</sup>

Because this “consumerist” approach does not reflect that of the courts (or of legislation), it tends to distort the analysis of the law. The authors thus split the relationship between an HEI and a student into two contracts: an initial contract to admit, followed by a subsequent contract to educate. This device allows the obligations of either party to be reduced more easily to the form of a commodity. In the contract to admit, the emphasis is on the student’s right to be admitted; in the contract to educate, the emphasis is on the student’s right to a qualification or diploma. Yet, such a contrivance actually makes little sense in terms of the law of contract because it entirely fails to explain in a manner consistent with standard legal doctrine how the fulfillment of the first contract automatically creates the second contract. At the same time, it strips out of the relationship the “non-commodifiable” elements that make higher education such a unique and cooperative learning experience. No conceptual space is allotted, for example, to the pastoral side of the student-HEI relationship, yet it is clear that students expect to receive (and institutions expect to give) a wide range of advice both before and after admission. That is why students in the United Kingdom are allotted personal tutors, and why HEIs employ student counselors and careers advisers. A depiction of the legal relationship between student and institution which cannot easily account for such an important aspect of the student-HEI relationship is almost certainly flawed.

A more plausible view is that expressed by Simon Arrowsmith and Nicola Hart (ironically in a book part-edited by David Palfreyman), which sees the student-institution relationship as being somewhat analogous to the contract of employment because, “[It takes] the form of a rolling contract which matures and changes shape in the course of its life, with both parties apprehending from the start the prospect of the introduction of new terms as the contractual relationship develops.”<sup>17</sup> Such complexity is anathema to a view of higher education as a “product” to be “consumed.” But it does provide an accurate picture of the law.

#### THE VIEWS OF COURTS AND LEGISLATORS

Farrington and Palfreyman are, of course, right to seek out some explanation for the greater preparedness of the courts—and indeed, of legislators—to get involved in higher education. But, so far as this reviewer can see, consumerism is not the

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16. *Id.* para. 5.03 (emphasis added).

17. Simon Arrowsmith & Nicola Hart, *Higher Education Institution-Student Contract*, in *HIGHER EDUCATION AND THE LAW: A GUIDE FOR MANAGERS* 68, 80 (David Palfreyman & David Warner eds., 1998).

motivation. For example, although the Unfair Terms in Consumer Contracts Regulations 1999<sup>18</sup> (discussed at paras. 14.10–14.12 inclusive) undoubtedly apply to higher education, and although their name might seem to give weight to a theory of creeping consumerism in higher education law, a closer look at the substance of the Regulations shows otherwise. For while they are designed to regulate any unfair term in a standard-form contract between a supplier and an individual who is not engaged in his or her profession or business,<sup>19</sup> they expressly do not apply to “the definition of the main subject matter of the contract”—or to the price—unless those terms are drafted in an unintelligible form.<sup>20</sup> The Regulations are thus not about consumerism at all, for else there would be some strictures as to the quality of the final “product” or as to its utility or fitness for purpose.<sup>21</sup> Instead, the Regulations are evidently designed to prevent *abuses of power*. That is a very different enemy. So too with the (admittedly misleadingly titled) Unfair Contract Terms Act 1977<sup>22</sup> (discussed at para. 14.09), which actually deals only with disclaimers and whose applicability to the student-HEI relationship is largely restricted to ensuring that HEIs cannot make misleading claims about themselves or their programs. In no way does it attempt to lay down what an HEI or a program should look like (as a consumerist view would imply); it simply holds an HEI to whatever claims it chooses of its own volition to make—and thus prevents an abuse of power.

The problem with HEIs—especially the pre-1992 chartered institutions<sup>23</sup>—is that for many years they remained divorced from the communities which they claimed to serve, aloof in practice and—as we shall shortly see—immune in law from the consequences of many of their decisions, even if those decisions went well beyond matters of academic judgment.<sup>24</sup> Now, however, they are being increasingly obliged to justify what they do, whether in relation to admissions procedures, quality of teaching and research, or propriety in managing public funds. This is not about consumerism; it is about accountability. In fact, as Professors Bickel, Birtwistle, and I have shown, the courts—just like the legislators—have been keen to avoid becoming embroiled in matters within the sole expertise of the academy.<sup>25</sup> We suggested that the reality of the commodification of the right to higher education—on both sides of the Atlantic—has been largely a vision imposed by HEIs on themselves. The danger is that, with extensive repetition, it may become a self-fulfilling prophecy. This review will therefore challenge some of the arguments which Farrington and Palfreyman make, while attempting to provide some additional background information which

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18. Unfair Terms in Consumer Contracts Regulations, 1999, S.I. 1999/2083.

19. *Id.* art. 4, ¶ 1.

20. *Id.* art. 6, ¶ 2.

21. *Cf., e.g.*, the language of the Sale of Goods Act, 1979, § 12–15 (as amended), which is not applicable to the student-HEI relationship.

22. Unfair Contract Terms Act, 1977.

23. *See infra* notes 32–40 and accompanying text.

24. *See* Tim Kaye, *Academic Judgment, the University Visitor and the Human Rights Act 1998*, 11 *EDUC. & L.* 165 (1999).

25. *See* Kaye et al., *supra* note 10.

will enable the reader both to understand the nature of my disagreement with Farrington and Palfreyman, and to form his or her own views.

#### LACK OF LITIGATION

One difference between higher education law in the United Kingdom as opposed to that in the United States is reflected in the fact that Farrington and Palfreyman's book is less than half the length of that of Kaplin and Lee. There has been much less case law on higher education in the United Kingdom than in the United States. Leaving aside the alleged greater propensity of Americans to sue, several explanations are worth exploring. First, as readers will know, primary responsibility for education in the United States rests with the states rather than with the federal government or local governments. This means that American HEIs are essentially subject to state law unless the Federal Constitution or a specific federal statute, such as the Clery Act,<sup>26</sup> is implicated. But since there are fifty states, it follows that there are fifty different legal jurisdictions, and so fifty different bodies of case law. The United Kingdom, by contrast, does not have a federal system of law. This means that the whole of England, Wales, and Northern Ireland is essentially subject to one body of national (i.e., English) law, albeit that there are sometimes some refinements which apply only in Wales (e.g., concerning use of the Welsh language) or Northern Ireland (e.g., concerning religion). It is only Scotland which has a different legal system and, even there, if the law reflects a requirement of the European Union or of the European Convention on Human Rights, it will actually be much the same as in England. (For ease of understanding, the rest of this article will refer only to English law unless otherwise indicated.) A national body of law means a unified system of precedent or *stare decisis* and so, once a doctrine has been established by an appellate court, it applies to trial courts throughout the country. Thus, any book on English higher education law really has to take account only of one body of law, and even though Farrington and Palfreyman do make some observations of the position in Scotland, that is a far cry from having to address fifty systems of law.

Secondly, although jury trials originated in England, they have now largely been abolished there except where a serious criminal offence is alleged. Almost every civil case—whether for breach of contract or a tort (such as negligence, malpractice, or premises liability)<sup>27</sup>—is thus heard before a judge sitting alone.<sup>28</sup> Most commentators would agree that judges are likely to make lower awards of compensation than juries, thereby reducing the incentive to bring suit. But another effect of the abolition of juries is that a trial judge's decision-making powers are more closely circumscribed than would be the case with an American jury, since *stare decisis* applies to almost everything s/he does.<sup>29</sup> In a typical American

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26. 20 U.S.C. 1092(f) (2000).

27. Premises liability is called occupiers' liability in English law. See Occupiers' Liability Act, 1957 and Occupiers' Liability Act, 1984.

28. Cases of alleged defamation are still sometimes heard by juries, but it is becoming more common even for these cases to be heard by a judge sitting alone.

29. See Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, in

negligence suit, for example, it is for the judge to determine whether the defendant owed a duty, but the questions of whether any such duty was breached and whether, if so, it caused harm for which compensation is payable are essentially matters for the jury,<sup>30</sup> which is not bound by precedent. Under English law, *all* these questions are for the judge. The fact that precedent applies to every element makes the outcome of cases in England much easier to predict than in the United States. As a result, there is less incentive to sue, since both plaintiff<sup>31</sup> and defendant will have a much clearer idea of the likely outcome of any case, whether that implies that the plaintiff should drop the action altogether, or that the defendant should make an offer of settlement.

Thirdly, until very recently, a large number of British institutions were effectively immune from legal challenge in the courts. This was because of their status as corporations created by Royal Charter. They comprised virtually all the HEIs founded before 1992, including the individual colleges at Oxford and Cambridge but excluding the universities of Oxford and Cambridge themselves, whose corporate status was established by statute.<sup>32</sup> Incorporation by Royal Charter instituted an arcane process whereby the final resolution of any internal dispute was within the exclusive jurisdiction of an officer called a Visitor,<sup>33</sup> whose decisions were also almost completely immune from legal challenge.<sup>34</sup> It was therefore impossible for aggrieved students or faculty to sue such an institution.<sup>35</sup> Essentially, only HEIs created from 1992 onwards, together with the universities of Oxford and Cambridge themselves (as distinguished from the individual colleges therein),<sup>36</sup> ran such a risk because they were not created by charter.<sup>37</sup> Oxford, Cambridge, and the post-1992 HEIs were created by statute;<sup>38</sup> smaller HEIs were formed either as limited companies or as charitable associations and were thus also subject to the normal law. The exclusive jurisdiction of the Visitor over matters of employment in chartered HEIs was, however, removed by the Education Reform Act 1988,<sup>39</sup> so that faculty and staff can now seek remedies in the ordinary courts (or in specialist employment tribunals) in the same way as employees of any other employer.<sup>40</sup>

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EXPLORING TORT LAW 262 (M. Stuart Madden ed., 2005).

30. Unless decided on summary judgment as a matter of law.

31. A plaintiff in England is now officially called a "claimant".

32. Universities of Oxford and Cambridge Act, 1571.

33. *See Thorne v. Univ. of London*, [1966] 2 Q.B. 237 (C.A.).

34. *R v. Lord President of the Privy Council*, *ex parte Page* [1993] 3 W.L.R. 1112.

35. *Thorne*, [1966] 2 Q.B. 237; *Thomas v. Univ. of Bradford*, [1987] 1 A.C. 795 (H.L.).

36. *R v. Univ. of Cambridge ex parte Evans*, [1998] E.L.R. 515.

37. *See, e.g., R v. Manchester Metro. Univ. ex parte Nolan*, [1994] E.L.R. 380.

38. In the case of the universities of Oxford and Cambridge, by the Universities of Oxford and Cambridge Act, 1571; in the case of most of the rest, by the Further and Higher Education Act, 1992.

39. Education Reform Act, 1988, § 206.

40. The ordinary civil courts have jurisdiction over employment matters in the same way as American courts, but the common law offers little protection for most employees. Like the rest of the members of the European Union, however, the United Kingdom has enacted a number of statutory measures which grant employees significantly more rights. Employment tribunals have

So far as the Visitor's remaining functions were concerned, the decision effectively to incorporate the European Convention on Human Rights and Fundamental Freedoms into domestic U.K. law by means of the Human Rights Act 1998 (HRA) made the status of the Visitor untenable for reasons that would take too long to recite here.<sup>41</sup> As a result, while the position of the Visitor has still not been formally abolished, the Higher Education Act 2004 (HEA)<sup>42</sup> made two substantive changes to this area of the law. It removed from the Visitor's jurisdiction any dispute concerning an application for admission by a prospective student, so that such matters can now be adjudicated in court.<sup>43</sup> In addition, HEA requires all other disputes with current or former students<sup>44</sup> (except those relating to matters of academic judgment)<sup>45</sup> to be handled by a new, independent body called the Office of Independent Adjudication (OIA).<sup>46</sup> Since the OIA is a creature of statute, there is no doubt that its decisions can be challenged in court. But its very existence continues to reduce significantly the chance of cases coming to court, especially since it has the power to award compensation. The fact that, like the Local Government Ombudsman—who has jurisdiction over the English equivalent of K-12 matters in the public sector—the OIA can only make recommendations and does not have the power to compel HEIs to comply with its decisions<sup>47</sup> does mean, however, that some students will prefer to go straight to the courts, especially where the matter involved is urgent, such as an impending closure of a department. Nevertheless, it continues to be unlikely that there will be anything like the same volume of litigation in the English courts on matters relating to higher education as there is in the United States.

#### PUBLIC-PRIVATE DISTINCTION

This anachronistic history of the chartered HEIs is essential to an understanding of the distinction between public and private HEIs, which is itself an important issue since—as in the United States—public HEIs in England and Wales operate within a much more restrictive set of rules than do private HEIs. In chapter 1, Farrington and Palfreyman provide a “Historical Note and Definitions,” and then go on in chapter 2 to discuss the “Legal Status of Higher Education Institutions.” Unfortunately, however, these chapters are insufficient in themselves to enable the reader to appreciate either the nature of the public-private distinction in England and Wales or its practical ramifications. This reviewer therefore recommends that

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exclusive jurisdiction over claims deriving from these statutes (in particular over claims of “unfair dismissal”). An appeal from an employment tribunal will be heard by another specialist body, the Employment Appeal Tribunal, which is headed by a High Court judge. From there, appeal lies (as with ordinary civil claims) to the Court of Appeal and, finally, the House of Lords.

41. For a fuller account, see Kaye, *supra* note 24.

42. Higher Education Act, 2004.

43. *Id.* § 20.

44. *Id.* § 12(1).

45. *Id.* § 12(2).

46. *Id.* § 15 (where the OIA is referred to as “the designated operator”).

47. *Id.* sch. 2, § 6-7.



the reader turn next to chapter 15, which tackles “The Role of Judicial Review in the Statutory HEIs.” This is made even more desirable because Farrington and Palfreyman refer to a number of cases of “judicial review” in chapters 3 to 14 inclusive and, without reading chapter 15 first, the reader is liable to misunderstand the legal significance of the cases with which s/he is being presented. This is especially so when it is remembered that in chapter 5 they go so far as to say that “[g]overnance in the higher education sector is essentially the process whereby *independent corporate enterprises* which conduct teaching and research take collective decisions.”<sup>48</sup>

The problem is that Farrington and Palfreyman are so keen to limit the extent to which the law can impinge on institutional autonomy that they either seek to draw the public-private distinction at a point for which there is virtually no legal authority, or else blur the distinction as if it is of little or no importance. Thus chapter 5 (on “Governance Structures”) glosses over this issue by prefacing its remarks on financial accountability by declaring: “Whatever the strict legal position . . . .”<sup>49</sup> And in chapter 2 the reader is plunged into the complexities of EU law without any explanation of the underlying concepts or their practical ramifications: “The question of whether HEIs are ‘emanations of the state’ for the purpose of the direct applicability of European Directives has been discussed . . . by the European Court of Justice (ECJ) in the sex discrimination case *Foster v British Gas plc* . . . .”<sup>50</sup>

Only a specialist is likely to know what this means. The phrases “emanation of the state” and “direct applicability of European Directives” are legal terms of art, but are not explained. The problem is compounded by paragraph 2.03, where it is stated that “[t]he European Commission had suggested various criteria that might bring a public body within the concept of ‘the state.’”<sup>51</sup> But this is to put things backwards: in actual fact, EU law will only treat a body as public if it is an “emanation of the state.” Indeed, the very significance of *Foster v. British Gas plc* is that the ECJ held that an ostensibly *private* company was nevertheless an “emanation of the state” and thus subject to challenge under European public law.<sup>52</sup> It is therefore worth taking some time here to explain how courts in England draw the line between a public and a private institution.

#### “EMANATIONS OF THE STATE”

As Farrington and Palfreyman themselves recognize (at para. 2.02), the approach to the public-private distinction differs according to whether the law involved is domestic English law, EU law, or (it might be added) is derived from the jurisprudence of the European Court of Human Rights.<sup>53</sup> Thus *Foster* only

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48. FARRINGTON & PALFREYMAN, *supra* note 1, para. 5.03 (emphasis added).

49. *Id.* para. 5.06.

50. *Id.* para. 2.02.

51. *Id.* para. 2.03.

52. Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, 2 C.M.L.R. 833 (1990), [1990] 3 All E.R. 897.

53. This is quite distinct from the law of the European Union, with which it is often

addresses the question of what is a public body for the purposes of EU law. So let us start there. In that case, the ECJ, whose decisions create binding precedent throughout the European Union, strove to identify what made an organization a public body. However, it also had to bear in mind a technical issue, which is that when a law is agreed upon within the European Union, it cannot be passed into law directly. The European Parliament, for example, has no legislative power. Instead, Directives are issued which direct the governments of Member States to implement within a certain timeframe the rules indicated. Each government must then choose how to do this effectively in a manner which sits well with its country's own legal traditions. The problem for the courts is what remedy can there be for a person who suffers some loss because a Member State fails to make such a law within the given time limit. To hold a private individual or organization liable for breaching a Directive which had not been implemented in that person's own country would be contrary to the rule of law, since that person would have been acting in accordance with his or her country's own domestic law. But to provide no remedy at all would encourage widespread disregard of EU Directives among the governments of Member States. Yet, to provide a remedy only if the potential defendant is a government department or other obviously public body would simply encourage outsourcing of government functions, making both governments and the private contractors judgment-proof and thwarting the very purpose underlying the Directive.

The ECJ thus developed a more creative solution. Mindful of the need to ensure that Member States should not profit from their own failure to implement EU Directives, it developed the concept of an "emanation of the state." Any body which is such an "emanation" is treated as a public body against which an EU Directive is directly enforceable, whether the Member State has failed to implement a Directive or failed to implement it effectively. The test for an "emanation of the state" was held by the ECJ in *Foster v. British Gas plc* to be a:

body, *whatever its legal form*, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.<sup>54</sup>

Thus, as Lord Justice Schiemann has since noted in the Court of Appeal: "the undoubted fact [is] that the . . . case law indicates that a body may be an emanation of the State although it is not under the control of central government."<sup>55</sup> Indeed, according to the ECJ's test, both chartered and statutory HEIs must be emanations of the state for the purposes of EU law. They have special powers granted to them by their charters or by legislation; they provide a public service; and they discharge certain public functions, such as the charging of student fees,<sup>56</sup> under the

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confused.

54. *Foster*, 2 C.M.L.R. at 857, [1990] 3 All E.R. at 922 (emphasis added).

55. *Nat'l Union of Teachers v. Governing Body of St. Mary's Church of Eng. (Aided) Junior Sch.*, [1997] I.R.L.R. 242, 248 (C.A.).

56. Teaching and Higher Education Act, 1998, § 26.

supervision of the Higher Education Funding Councils. The precise legal form of the HEIs is immaterial. They meet every element of the ECJ's test. Despite Farrington and Palfreyman's evident reluctance to accept the inevitable, HEIs in the United Kingdom are undoubtedly public bodies so far as EU law is concerned.

#### STATE FUNCTIONS

As was explained above, there are three methods by which the courts in the United Kingdom can determine whether a body is public or private, depending on the type of law which they are seeking to uphold. Standing distinct from EU law but operating within a very similar tradition is European human rights law, which is concerned with the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>57</sup> Article 2 of the First Protocol to this Convention states, albeit in a somewhat circuitous fashion, that everyone has a right to education.<sup>58</sup> By signing the Convention, the United Kingdom took it upon itself to ensure that no such right is denied within its jurisdiction. On this basis the European Court of Human Rights (ECtHR) held in *Costello-Roberts v. United Kingdom*<sup>59</sup> that an ostensibly private school, which charged tuition fees to every pupil, was nevertheless carrying out a State function bringing it within the ambit of the Convention because it constituted part of the means whereby the United Kingdom discharged its Convention obligation to fulfil every child's right to education under Article 2 of the First Protocol.<sup>60</sup>

The European Convention has become even more important in the United Kingdom quite recently because the Convention and its Protocols were effectively incorporated into domestic U.K. law by the Human Rights Act 1998 to the extent that, under section 6(1): "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."<sup>61</sup> It is therefore a legal requirement that no public authority act in a way which denies (among other rights) the right to education. Under *Costello-Roberts v. United Kingdom* it clearly follows that an HEI—no matter what its legal form or from where it receives its funding—is also carrying out a public function when it provides education. The fact that an HEI supplies higher education rather than primary or secondary education is irrelevant: the ECtHR has held that the meaning of "education" in Article 2 is to be determined according to "economic and social circumstances" and that, in a "highly developed country" (which presumably includes the United Kingdom), the right to education includes "entry to nursery, primary, secondary and higher education" (although access to higher education could properly be restricted to

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57. Nov. 4, 1950, CETS No.: 005, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>.

58. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 3, 1952, CETS No.: 009, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/009.doc>.

59. 19 Eur. H.R. Rep. 112 (1993).

60. *Id.* at 132.

61. Human Rights Act, 1998, § 6(1).

those sufficiently able or qualified to benefit from it).<sup>62</sup>

Farrington and Palfreyman would agree with this analysis of the “state functions” approach under the European Convention on Human Rights. The contentious issue revolves around section 6(3)(b) and section 6(5) of the Human Rights Act 1998, which together state that: “‘public authority’ includes . . . any person certain of whose functions are functions of a public nature,” but that “a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.”<sup>63</sup> The significance of this is as follows. If the only “function of a public nature” (or “State function”) which is performed by an HEI is the provision of education, then it is essentially private and will be subject to the Convention only with respect to the one or more State or public functions that it carries out from time to time. It will then be what has come to be referred to as a “hybrid” institution, whose private functions are beyond the scope of the Convention. However, if an HEI is deemed to be a “true” public authority, then all aspects of its conduct will be subject to the Convention, even when they have little or nothing to do with the provision of education (such as a matter of employment law). This will oblige it to respect, for example, the right to privacy,<sup>64</sup> freedom of expression,<sup>65</sup> freedom of assembly,<sup>66</sup> and freedom of religion.<sup>67</sup> So a student or employee would then be able to bring suit against an HEI which unjustifiably tapped telephone calls or intercepted emails, since it has clearly been held that a person has a right to a certain degree of privacy even when at work.<sup>68</sup> By contrast, if an HEI is held only to be a hybrid body, then no right to privacy could be enforced against it except in the unlikely instance that a specific term was inserted into the contract with the individual involved.

Unfortunately, although it is clearly a matter of the greatest significance on which there has yet to be a definitive ruling, this issue is never discussed by Farrington and Palfreyman. Instead, they just assert that “[i]n terms of the Human Rights Act (HRA) [HEIs] are considered as ‘hybrid’ institutions in that only in the exercise of their public functions are they subject to it.”<sup>69</sup> This highly contentious assertion is supported by the citation of absolutely no authority, and no further discussion is forthcoming anywhere in the book. It can therefore clearly be seen that this is an expression of the authors’ opinion, not an authoritative statement of legal fact. Indeed, since HEIs are—contrary to what Farrington and Palfreyman

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62. Belgian Linguistic Case (No. 2), 1 Eur. H.R. Rep. 252, 271–72 (1968).

63. Human Rights Act, 1998, §§ 6(3)(b) & 6(5).

64. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, CETS No.: 005, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>.

65. *Id.* art. 10.

66. *Id.* art. 11.

67. *Id.* art. 9.

68. *Halford v. United Kingdom*, 24 Eur. H.R. Rep. 523 (1997), where the European Court of Human Rights found that: “In the Court’s view, it is clear from its case law that telephone calls made from business premises as well as from the home may be covered by the notions of ‘private life’ and ‘correspondence’ within the meaning of Article 8(1).” *Id.* at 543.

69. FARRINGTON & PALFREYMAN, *supra* note 1, para. 2.01.

assert—undoubtedly public bodies under both EU law (discussed above) and domestic English law (discussed below) there would seem to be good reason for holding them to be true public authorities for the purposes of the Human Rights Act too.

#### THE “JUDICIAL REVIEW” APPROACH

The “judicial review” approach is the only one of the three tests for demarcating the public-private divide which is originally “home-grown.” It was developed by the English courts as they developed a coherent body of administrative law, under which the form of legal action is known as “judicial review.” It is commonly acknowledged that it was Lord Chief Justice Parker in *R v. Criminal Injuries Compensation Board, ex parte Lain*<sup>70</sup> who originally laid down the essential criterion for deciding whether or not an institution is a “public body” amenable to judicial review. He said that a body which gains its authority through a private contract with another party cannot be subject to administrative law.<sup>71</sup> Thus, private clubs, like the Football Association of Wales,<sup>72</sup> have been held to act outside administrative law. Farrington and Palfreyman clearly wish to see chartered HEIs at least held to be equivalent to private clubs. But their approach is simply out of date. The more modern approach, arguably strongly influenced by the functionalist approach of both European Union and European Convention law, was summarized by Lord Justice Lloyd in *R v. Panel on Take-Overs and Mergers, ex parte Datafin Plc.*:

[I]t is helpful to look not just at the source of power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may . . . be sufficient to bring the body within the reach of [administrative law]. It may be said that to refer to “public law” in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.<sup>73</sup>

Indeed, Lord Donaldson said explicitly in the Court of Appeal that: “There is no serious dispute, but that the universities of this country have a sufficiently public character to bring decisions by them within the scope of [judicial review].”<sup>74</sup> Similarly, Mr Justice Sedley (as he then was) held in *R v. University College London ex parte Riniker*<sup>75</sup> that “a justiciable abuse of power by the public body, which University College London undoubtedly is” would form the basis of

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70. [1967] 2 Q.B. 864.

71. *Id.* at 882.

72. *R v. Football Ass’n of Wales ex parte Flint Town United Football Club*, CO/1033/90 (July 11, 1990).

73. [1987] 1 Q.B. 815, 847 (C.A.).

74. *R v. Hull Univ. Visitor, ex parte Page*, [1991] 4 All E.R. 747, 751 (C.A.).

75. [1995] E.L.R. 213.

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an administrative law case.<sup>76</sup> (University College London is a chartered HEI not entirely dissimilar from New College, Oxford at which both Farrington and Palfreyman are based.) Since deciding *Riniker*, Mr Justice Sedley has been promoted to a Lord Justice of Appeal (sitting in the Court of Appeal) and is now widely acknowledged as the leading judge on education law in the United Kingdom. Ironically, Farrington and Palfreyman actually cite his judgment (at para. 2.24) but apparently wish to ignore it by talking of institutions performing private functions which cannot be susceptible to review under administrative law. But this completely overlooks the point that *Riniker* was actually concerned with an employment matter which, as Mr Justice Sedley himself acknowledged, is normally a matter of private contract law. His reasons for rejecting the argument that University College London is a private body are simple. No one denies that public bodies perform private functions alongside their public ones. Every institution of government must employ staff, for example, and many control real estate. These are clearly matters of private law. But to suggest that this moves an institution from the public into the private sector is to completely misunderstand that distinction, for it would mean that there could then never be true public bodies.

Take, for example, the (chartered) University of Birmingham: it is situated in the second-largest city in the United Kingdom, where the only organization with more employees is Birmingham City Council. In fact, the City Council is the largest organ of local government anywhere in Western Europe. Like the University, the City Council is constituted not by legislation, but by Royal Charter. Yet, no one would seriously suggest that it is a private organization except when it performs a public function, for it is self-evidently public. It is difficult to see why the University of Birmingham should be treated any differently. Indeed, Professor Fridman, who was both a British QC and Professor of Law at the University of Western Ontario in Canada, argued over twenty years ago that, since HEIs were almost completely financed by the public purse and provide a public service (just like local authorities), they must be *de facto* public bodies.<sup>77</sup>

Farrington and Palfreyman essentially base their view of the legal status of chartered HEIs on the form of their incorporation. Chapter 5 on “Governance Structures” is thus largely an argument that the different means of incorporation of chartered, as opposed to statutory, HEIs puts them on different sides of the public-private distinction. They attempt to buttress their views with an exegesis on the venerable law of corporations, going back to the writings of Baron Coke in 1612. Insofar as they discuss the legal status of an HEI’s relationship with the outside world, they are prepared to accept that much of what they mention “arose before the modern approach to issues of public law”<sup>78</sup> which, as we have seen, looks more at substance than at form. Strangely, though, they seem unable to countenance the same “new-fangled” approach when considering whether a chartered HEI is open to a challenge under administrative law from one of its members. They argue

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76. *Id.* at 216.

77. G.H.L. Fridman, *Judicial Intervention into University Affairs*, 21 CHITTY’S L.J. 181, 181–82 (1973).

78. FARRINGTON & PALFREYMAN, *supra* note 1, para. 5.16.

instead that incorporation by charter is a process which creates a private legal person rather than a “governmental authority.”<sup>79</sup> But even on its own terms their argument fails. As company law expert Professor Len Sealy has explained:

the City of Birmingham or the University of Cambridge—or my own ancient institution, Gonville and Caius College<sup>80</sup> . . . would have come to his [Coke’s] mind as the typical corporation . . . . Even the great trading corporations operating under Royal Charter, like the Hudson Bay Company and the East India Company, which we might regard in some ways as forerunners of the modern commercial company, were not at all numerous . . . . But, more significantly, they bore very little resemblance to their modern counterparts. In many respects these large corporations were instruments of government as much as vehicles for trade. Some of them had powers to annex and cede territory, to conclude treaties, make war and peace, exact reprisals, create municipal corporations, establish mints, and erect courts having powers of arrest and punishment, even the power of life and death. They had the power to enact legislation, in the form of by-laws, which were binding on strangers coming within the jurisdiction conferred by their charters.<sup>81</sup>

So, contrary to the assertion of Farrington and Palfreyman, a chartered institution was indeed an “instrument of government” or “governmental authority.” Indeed, a chartered HEI could—and did—enact its own bylaws which were binding on members and strangers alike<sup>82</sup> and set up its own courts (which sometimes did order barbaric punishments). No wonder then that they were immune from review by the courts. As instruments of government, chartered HEIs had effectively been delegated many of the powers of the Crown. Under the doctrine of sovereign immunity, it would have made no sense for the courts to get involved. But there was never any doubt as to whether or not they were public bodies with public powers. The only issue was whether they could be held legally

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79. See *id.* para. 13.72. For their argument, Farrington and Palfreyman rely on a student textbook by Wade and Forsyth. See WILLIAM WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* (9th ed. 2004). Yet this contradicts not only the views of Mr Justice Sedley in *Riniker*, but also those of Oliver Hyams (chair of the English Education Law Association and, ironically, a member of Farrington and Palfreyman’s advisory panel), Richard McManus (author of the leading work on judicial review in education cases, *EDUCATION LAW AND THE COURTS* (1998)) and Clive Lewis, a leading barrister in the area who was formerly a professor of administrative law. See FARRINGTON & PALFREYMAN, *supra* note 1, at 292 n.96.

80. Which enjoys exactly the same legal status as New College, except that it is thirty-one years older and is a constituent college of the University of Cambridge, instead of the University of Oxford.

81. L. Sealy, *Perception and Policy in Company Law Reform*, in *CORPORATE AND COMMERCIAL LAW: MODERN DEVELOPMENTS 15* (Robert R. Pennington, David Feldman & Franklin Meisel eds., 1995).

82. As late as 1995, the courts were still prepared to hold that a complaint from a student applicant (who could not be a member of the chartered HEI in question because he had not yet passed the relevant examinations) was held to be within the exclusive province of the Visitor whose decision could not be subjected to judicial review. See *Bankole v. Chartered Ass’n of Chartered Accountants* (Transcript: John Larkin) (C.A. Nov. 15, 1995).

accountable for their actions in the courts. Today it is obvious that they can, especially since sovereign immunity was effectively abolished in 1947.<sup>83</sup> As public bodies, such accountability will often be effected according to the principles of administrative law, even if the fact that the institutions' powers have slowly been reduced means that the opportunities for abusing them have already been significantly curtailed.

#### JUDICIAL REVIEW

Thus far this discussion of the public-private distinction has talked in fairly general terms about the more stringent legal regime imposed on public institutions as compared to their private counterparts. It is now time to explain the ramifications of the distinction with much greater specificity. In fact, the public-private distinction dictates whether any legal action must be brought under public (administrative) law or under private law. A suit in contract or tort (such as negligence) is—as in the United States—a private law action which enables a person who claims to have suffered some loss or injury to seek monetary compensation against the person or organization responsible. An application for judicial review, by contrast, is an administrative (or public) law action which enables a person to challenge the decisions or actions of a public body or organization. This is the practical reason why it is so important to understand English law's variant of the public-private distinction.

But such a summary overlooks the fact that judicial review has a number of advantages—and commensurate disadvantages—over actions in contract and tort. The advantages start with the fact that the initial application can be filed at very little cost—certainly, at a fraction of what it might take to bring an action to court for a tort or breach of contract—and, moreover, a court hearing can be expedited so that it may be possible for an applicant to go before a judge within a week of filing the application. In some cases it will even be possible to have an initial hearing on the very same day that the application is filed, whereas it may take two years or more for many private law cases to come before a court. This speed is part of the essence of judicial review, since it enables an applicant to challenge a decision before it is put into effect. For the same reason, failure to bring an application for judicial review expeditiously—and within a maximum of three months in any event—is fatal to any chance of an applicant's success. Other restrictions include the fact that courts do not award damages in such cases; the only remedies available are orders quashing a decision,<sup>84</sup> prohibiting a form of conduct,<sup>85</sup> or ordering that a decision be taken or action carried out.<sup>86</sup> Of course, the most obvious point—bearing in mind that an application for judicial review is a public law action—is that it can be brought only against a public body.

The distinction between judicial review and private law actions is therefore not

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83. Crown Proceedings Act, 1947.

84. Called a "quashing order": Civil Procedure Rule (CPR) 54.1(d).

85. "Prohibiting order": CPR 54.1(c).

86. "Mandatory order": CPR 54.1(b).



a matter of legal technicalities. Indeed, it has two other enormously significant practical ramifications. First, an application for judicial review is essentially a *proactive* challenge to a decision which, if successful, will lead to the quashing of the decision taken and so *prevent* the occurrence of harm. Often it will also effectively mean that the institution in question will have to reconvene to reconsider the matter afresh so as to decide on a new course of action. By contrast, a suit for breach of contract or a tort (say, negligence) is a *reactive* measure which often has to treat the institution's decision as a *fait accompli*, so that any remedy will normally lie only in damages for any harm already sustained.

Secondly, judicial review is not a forum for challenging the substance of any decision taken. Instead, it focuses on the *process* by which the decision came to be made, requiring that: (a) the decision was not motivated by bias or the consideration of irrelevant factors, but did take into account all relevant factors; and (b) the decision-making procedure tracked that which the organization is supposed to follow. Traditionally, there has also been a third requirement that the decision must not be perverse—sometimes referred to as the “taken leave of one’s senses” test—although it is arguable that this is now being displaced by a stricter “disproportionality” test imported from European law, whereby the effects of any decision taken must be proportionate to the goal which it is intended to achieve. Actions in contract and tort, on the other hand, allow a plaintiff to challenge the *substance* of any decision, which effectively subjects it to a standard of reasonableness. This has always been a stricter standard than the “perversity” test and, even now, allows the merits of alternative policies to be led in evidence in a manner which even the “disproportionality” test does not permit.

Bearing all this in mind, it is clear that Farrington and Palfreyman are again putting forward their own point of view rather than describing the current legal position when they suggest that “the student-chartered HEI dispute under the contract to educate is a private law matter for which adequate remedies exist within the law of contract and hence judicial review is not an appropriate way forward.”<sup>87</sup>

Many other commentators—including this reviewer—would not agree. Since the balance of legal authority weighs heavily in favor of chartered HEIs being public bodies, let us imagine the scenario of a final-year chemistry student—let us call him George—at such an institution who discovers that the school’s Vice-Chancellor (the equivalent of the President at a U.S. institution) has decided to close the chemistry department at the end of the current academic year. However, the institution’s own rules preclude the Vice-Chancellor from making any such decision without the approval of certain other school bodies which have not been informed. (This is, unfortunately, an example which is not wholly hypothetical.) George will have no remedy in a breach of contract action since the department will continue in existence for the remainder of his student days, and he will therefore receive the instruction for which he has contracted. But George will almost certainly have standing, on the grounds that his degree will be devalued by the closure of the department, to bring an application for judicial review of the

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87. FARRINGTON & PALFREYMAN, *supra* note 1, para. 13.06.

Vice-Chancellor's decision on the grounds that the decision-making process was flawed.

Now let us vary the scenario a little to consider the position of a first or second-year chemistry student—let us call her Anita—who discovers that the department will be closed immediately after she graduates. She is concerned not so much about the effect on the *cachet* of her degree, but more as to whether high-quality faculty will leave before she completes her course, so that she will be left with an ever-dwindling number of electives from which to choose, taught by the weakest faculty. It is possible that she might have an action for breach of contract, but that will require some speculative assessment as to both: (a) which faculty will leave and which will stay; and (b) the effect that any such changes in personnel might have on the quality of educational provision. This will almost certainly require the calling of expert evidence from other academics and interested bodies such as the Royal Academy. The outcome of the case would be a judgment call for the court and thus would be exceedingly difficult to predict in advance. On this basis it is difficult to see how Anita could expect to obtain an injunction to stop the closure, so contract law would leave her only with the possibility of seeking compensation after graduation for any loss of education she experienced during her degree program. If she did experience such a loss, the law's subsequent intervention would be very much a case of "too little, too late." Moreover, the amount of compensation to be awarded in such a situation is notoriously difficult to assess. On the other hand, an application for judicial review would enable Anita to have the case expedited at little expense (and certainly without the need for expert evidence), and the breach of the institution's own procedures would mean that the decision to close the department would be quashed before any harm is done.

Not only are Farrington and Palfreyman too dogmatic in their assertion that "adequate remedies exist within the law of contract," Anita's case ironically illustrates that it is also in the interests of the HEI to have the case dealt with under judicial review rather than as an action for breach of contract. An application for judicial review involves a two-part procedure, whose first stage is simply an application for permission to proceed based purely on the filed paperwork. Where such permission is granted, the HEI is immediately put on notice that the applicant has an arguable case, and so it may very well take the opportunity to reconsider its decision before a full court hearing is scheduled. Yet at this stage, court proceedings have cost the HEI little or nothing at all, since it does not have to file a defense to an application for permission (and any defense that it does file can be—and often is—quite cursory). Moreover, because the application for permission does not involve a hearing, it is effectively private and so minimizes any prospect of bad publicity for the institution. Finally, should the application get as far as a full hearing, it is surely in everyone's interest—student and institution alike—to have the matter resolved as quickly as possible rather than to have the prospect of litigation lingering over several years, as might well be the case with an action for breach of contract. Even if the HEI is unlikely to be required to pay a large sum in compensation to any one individual, the total compensation payable if the number of students in the program is relatively large, would be considerable—as would be the expense of defending any such lawsuits. Although some of these expenses

would probably be met through insurance, the HEI would still find its future premiums increasing dramatically as a result. A judicial review hearing, by contrast, is not about compensation at all and is much cheaper to defend. Moreover, if the HEI actually wins a judicial review hearing, it will in practice have significantly strengthened its chances of having any subsequent student lawsuit for breach of contract struck out by the courts as a breach of process. Ironically, therefore, the approach of Farrington and Palfreyman, which seeks to limit the degree to which courts will involve themselves in the affairs of HEIs, would—if implemented—run the risk of doing such institutions more harm than good.

#### STUDENT ADMISSIONS

A little public accountability at an early stage can facilitate good governance rather than impede it. It certainly does not imply a descent into consumerism. Yet, insisting that students should always seek to remedy any grievances through the law of contract rather than by means of an application for judicial review does indeed imply a consumerist mindset. Sometimes this can create a tendency to see problems where none exist. Thus, Farrington and Palfreyman seek to warn of the problems in which HEIs may find themselves embroiled if they seek to recruit students from outside the United Kingdom. They suggest that this may lead to “doubts both about the applicable law and about which courts would have jurisdiction over any dispute about the contract of admission.”<sup>88</sup> This may lead, they say, to questions of “private international law or conflict of laws.”<sup>89</sup> It is difficult to see how this could do anything other than strike fear into senior administrators and, in particular, into those responsible for admissions. But then it becomes clear that the authors have made a fundamental mistake about basic contract law. They assert, “[a]n offer of admission by an HEI domiciled in England made to and accepted by a student domiciled in Scotland constitutes a contract formed on acceptance and is prima facie subject to the jurisdiction of the Scottish courts.”<sup>90</sup>

In almost every case this assertion is simply wrong. As every 1L law student knows, an acceptance is effective *not* when the offeree decides to agree to the terms of the offer but when his or her acceptance is actually *communicated* to the offeror. This means that the domicile of any student to whom an offer of admission is made is irrelevant; what matters is the location of the HEI itself. In the authors’ own example, therefore, a contract will only exist when a student’s acceptance is communicated to the HEI, whereupon the relevant jurisdiction will be England. So the anxiety caused to administrators and admissions tutors by mention of “private international law or conflict of laws” turns out to be utterly groundless.

Now some readers may object that the authors may have had in mind the one

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88. *Id.* para. 13.13.

89. *Id.* para. 13.14.

90. *Id.*

exception to the “effective only upon communication” rule, namely the postal acceptance or “mailbox” rule. The authors do not mention it but, in any event, it is irrelevant here in virtually every case. The mailbox rule states that an acceptance is effective when posted rather than when received, but it is nowadays of increasingly limited application. First, it applies only when the public postal service is used, not when a private carrier like FedEx or UPS is used.<sup>91</sup> Secondly, it must be reasonable in the circumstances to send the acceptance by public post.<sup>92</sup> Thirdly, and rather logically, the postal rule does not apply to so-called “instantaneous methods of communication” (which have been held by the courts to include what today might actually be seen to be rather slow modes of communication, such as telex).<sup>93</sup> Finally, the postal rule cannot apply, even where use of the public post is reasonable, if its application has been explicitly or implicitly ousted by the terms of the offer.<sup>94</sup>

If the authors had clearly explained the process by which British HEIs admit their students, they would have seen that the postal acceptance rule could almost never be applicable. The system for admitting undergraduates is very different from that in the United States since it is highly centralized and allows a student to apply initially to no more than six institutions. This much Farrington and Palfreyman do explain (at para. 13.12). What they do not say is that, for the vast majority of students, the entire process—including initial application, and the making and giving of offers (or rejections) and acceptances—is now carried out online, through a process known as UCAS Apply.<sup>95</sup> The possible application of the postal acceptance rule is thus immediately eliminated.<sup>96</sup> Moreover, even where the post is still used, students are bound under the terms of the centralized agency which handles the application process (UCAS) to ensure that they *communicate* any acceptance of an offer of admission by a stipulated date in May. The fact that actual communication is required implicitly ousts the postal rule.<sup>97</sup> Thus the only students who might feasibly be able to accept the offer of a place outside the United Kingdom in a legally effective manner will be students not admitted to a first degree program (principally postgraduates) who received the offer by means of a letter, which did not specify a date by which the student had to communicate his or her decision. So the authors’ warning turns out to be almost completely unwarranted. Yet if Farrington and Palfreyman had provided an account of the admissions process, they would have been forced to confront an issue where a major legal problem really does reside.

Apart from its centralized nature, one of the distinctive—and most

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91. *In re London & N. Bank. Ex parte Jones*, [1900] 1 Ch. 220.

92. *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Manchester Diocesan Council for Educ. v. Commercial & Gen. Inv., Ltd.*, [1970] 1 W.L.R. 241.

93. *Entores Ltd. v. Miles Far E. Corp.*, [1955] 2 Q.B. 327 (C.A.).

94. *Holwell Sec., Ltd. v. Hughes*, [1974] 1 W.L.R. 155 (C.A.).

95. See UCAS.com Apply, <http://www.ucas.ac.uk/apply/index.html#> (last visited Apr. 22, 2007).

96. See *Entores*, [1955] 2 Q.B. 327.

97. *Holwell Sec., Ltd.*, [1970] 1 W.L.R. 155.

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controversial—features of the undergraduate recruitment process in the United Kingdom is that students typically apply well before (actually, up to a year before) they obtain the equivalent of a GPA from high school. This means that the system depends significantly on schools' predicting the grades of their students. Since these grades are awarded not by the schools themselves as in the United States, but by independent bodies who set national examinations and projects,<sup>98</sup> these predictions are frequently inaccurate. So HEIs typically make what are called "conditional offers" to applicants. Unfortunately, all Farrington and Palfreyman have to say on the matter is this: "It is established that the legal relationship between an individual prospective student, or applicant, and an HEI is formed when a contract is entered into between legally competent parties (the HEI and the applicant) for the admission of the applicant either unconditionally or on satisfaction of certain conditions . . . ."<sup>99</sup> But this glosses over two fundamental issues.

Let us first take the case of a student who has, in accordance with UCAS rules, decided to reject all but two offers of admission. UCAS requires that she now rank these choices as Firm (first choice) and Insurance (second choice). Merely explaining the exact legal status of the relationship between the student and the Insurance institution presents something of a conundrum. It appears to be a contract with two conditions precedent: one that the student will obtain the grades specified by the Insurance HEI, another that the student will *not* obtain the grades specified by the Firm HEI (for otherwise she would have a binding contract with the latter in which the condition precedent has been fulfilled). The practical difficulties that this arrangement presents are numerous. What if, for example, a student is asked to obtain grades of BBB<sup>100</sup> by the HEI she chooses as Firm, and of BBC by the HEI she chooses as Insurance, and subsequently the student actually obtains grades of BBC? It may be thought that the answer is obvious: she has a binding contract with the Insurance HEI. However, in practice the Firm institution is likely to have some spare capacity on its courses and may not wish to lose this student, so it may decide to offer her a place notwithstanding that she has dropped a grade. What is the legal position then? On the other hand, what if the student did obtain grades of BBB but has changed her mind and now wishes to attend her Insurance, rather than Firm, institution? Or what if the student actually obtained grades of AAD or ABD: are such grades better than, equivalent to, or worse than either BBB or BBC?<sup>101</sup> These questions crop up literally thousands of times in every application round and cause no end of heartache and soul-searching among

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98. These are typically essay-based. So-called "standardized tests" using multiple-choice or "short answer" formats are relatively uncommon in the United Kingdom.

99. FARRINGTON & PALFREYMAN, *supra* note 1, para. 13.07.

100. Students applying for admission to a HEI typically study three subjects at so-called "Advanced Level" (normally referred to as A-Levels). Each of these subjects is graded on a national seven-point scale where the highest grade is an "A". A student will be required to obtain specified grades in each of his or her three subjects, so that conditional offers may be made anywhere between AAA and EE (where failure in the third subject will be deemed immaterial).

101. Some HEIs have changed to a points-scoring system which avoids the equivalence issue but, again, Farrington and Palfreyman do not mention it.

students, staff, and faculty alike. It would have been helpful if Farrington and Palfreyman had addressed them.

#### DIVERSITY IN ADMISSIONS

The second issue I wish to address here is of even greater consequence. It concerns the weight to be given to schools' predictions of high school grades.<sup>102</sup> The problem is that a relatively low prediction for an applicant will effectively deny him a chance of being made a conditional offer by the most prestigious HEIs. Yet as explained above, such predictions are often inaccurate.<sup>103</sup> This can have the effect that someone who actually achieves grades of AAA (for most students the highest possible) might have received no offers from top HEIs because his high school predicted grades of (say) BBC. He will now be faced with the choice of waiting an extra year before attending an HEI or, more likely, will decide to cut his losses and go to a lower-ranked institution.

Yet someone who actually obtained grades of BBB might well be holding Firm and Insurance offers from more prestigious HEIs because her high school over-inflated her predicted grades, so that she was made a conditional offer. She will now find herself in one of two positions. She may be able to enter a good HEI because she has fulfilled the conditions of an offer (or has come sufficiently close for the HEI to decide to admit her anyway), which creates the perverse effect that a student with grades of BBB has been treated better than a student with grades of AAA. Or she may find that her grades are good enough for neither her Firm nor her Insurance institution, in which case the over-inflation of her predicted grades will have had the effect of denying her a place at an HEI unless she can be "rescued" by UCAS's "safety-net" system known as Clearing. This scandal has hardly been out of the news in the United Kingdom for the last five years, and the government even appointed a university Vice-Chancellor, Professor Steven Schwartz from Brunel University, to head a Steering Group on Admissions to Higher Education to inquire into the problem. Its final report was published in September 2004.<sup>104</sup> Its apparently simple recommendation that the admissions process should be changed so that all offers of admission should be based on grades already obtained (known as post-qualification applications or PQA) was, however, greeted with skepticism by admissions tutors,<sup>105</sup> whose warning that the recommendation was naïve and simplistic seems to have been borne out by further

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102. Technically, these are actually called Advanced Level qualifications or, more normally, A-Levels. They typically involve two year courses, the first of which leads to an "AS" assessment, and the second to an "A2" assessment.

103. It has been estimated that only around half of all predictions are accurate "although the accuracy of predictions varies by school/college and by subject." See ADMISSIONS TO HIGHER EDUC., FAIR ADMISSIONS TO HIGHER EDUCATION: RECOMMENDATIONS FOR GOOD PRACTICE para. B25 (2004), <http://www.admissions-review.org.uk/downloads/finalreport.pdf>.

104. See *id.*

105. See, e.g., Katherine Sellgren, *Changes Worry Admissions Tutors*, BBC ONLINE, Sept. 14, 2004, <http://news.bbc.co.uk/1/hi/education/3651660.stm>.

investigation. As yet however, no other viable solution has been proposed.<sup>106</sup> Again, it would have been helpful if Farrington and Palfreyman had addressed this issue.

Although it may not appear so at first glance, in many ways the problems involved in the UCAS application system involving reliance on predicted grades raise issues not dissimilar from those in the seminal U.S. cases of *Grutter v. Bollinger*<sup>107</sup> and *Gratz v. Bollinger*.<sup>108</sup> The issue with admissions to HEIs in the United Kingdom has been that it is the private and selective public high schools<sup>109</sup> with a history of sending their students to prestigious HEIs which have been particularly prone to over-inflating predicted grades. On the other hand, schools in poorer areas of the country are more likely to lack such self-confidence in prediction, and so may well under-predict their students' grades. Students from wealthier backgrounds are therefore more likely to be admitted to the prestigious HEIs irrespective of merit or grades actually obtained. This is potentially a form of discrimination constituting a breach of Article 14 of the European Convention on Human Rights, actionable under the Human Rights Act 1988. Indeed, so-called "disparate impact"<sup>110</sup> cases are normally just as actionable in the United Kingdom as "disparate treatment"<sup>111</sup> cases (and are far more common). Thus, as might be expected, while the United States' main pre-occupation in terms of trying to admit a more diverse range of students is predominantly about race, in the United Kingdom what is known as "widening participation" revolves mainly around social class.

Any discussion of widening participation in British HEIs would undoubtedly benefit from a consideration of *Grutter* and *Gratz* because so many of the relevant debates are really much the same. A comparative perspective on the desirability, effectiveness, and legality of so-called affirmative action policies would be particularly useful to scholars, practitioners, and administrators on both sides of the Atlantic. In fact, the final part of Farrington and Palfreyman's book<sup>112</sup> comprises three chapters which purport to take a comparative approach. Indeed, they state that "[w]e concentrate on areas in which the experience of other countries can assist the development of good practice in UK."<sup>113</sup> In reality, however, these studies are not comparative at all, but simply give an exceptionally brief summary of certain aspects of the law in the United States and elsewhere. Thus, both *Grutter* and *Gratz* do receive mention on a couple of occasions, but the first time is as authority for continued judicial deference to academic freedom, and the second is simply in order to support the assertion that there are "increasing challenges

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106. See, e.g., *Plans to Change University Entry*, BBC ONLINE, May 22, 2006, <http://news.bbc.co.uk/1/hi/education/5003366.stm>.

107. 539 U.S. 306 (2003).

108. 539 U.S. 244 (2003).

109. Known in the United Kingdom as "grammar schools".

110. Known in the United Kingdom as "indirect discrimination".

111. Known in the United Kingdom as "direct discrimination".

112. FARRINGTON & PALFREYMAN, *supra* note 1, Part VIII.

113. *Id.* para. 28.01.

from white applicants to . . . admissions policies.”<sup>114</sup> The fact that petitioners were successful in *Gratz* but unsuccessful in *Grutter* is never mentioned, let alone explained. Suffice it to say that such a truncated account of these two seminal U.S. cases provides no meaningful basis for any sort of comparative study. Like so much of this book, it means that a big opportunity is wasted.<sup>115</sup>

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114. *Id.* para. 29.09.

115. The paucity of in-house counsel in the United Kingdom as compared to the United States is also never remarked upon.



REVIEW OF WILLIAM A. KAPLIN AND  
BARBARA A. LEE'S  
*THE LAW OF HIGHER EDUCATION*

MARTIN MICHAELSON\*

The first edition of the Encyclopedia Britannica (1768–71),<sup>1</sup> consisting of three volumes, declared California to be “a large country of the West Indies. It is uncertain whether it be a peninsula or an island.”<sup>2</sup> Over ensuing editions and centuries, the Britannica’s accuracy, reputation, and size—now 32 volumes<sup>3</sup>—grew and improved, such that today it is generally regarded as the most reliable and useful reference work of its kind in the English language.<sup>4</sup>

If there were analogous flaws in the first edition of Professor William Kaplin’s *The Law of Higher Education*,<sup>5</sup> they appear to have been neither contemporaneously nor subsequently identified; and given the large number of serious users of the work, a safe assumption is that there were not. This Journal’s reviewer of the first edition, D. Brock Hornby (now a federal district court judge), called Professor Kaplin’s book “the best treatment I have seen of the internal legal structure of colleges and universities, moving logically into liability questions. . . . I expect Kaplin will receive an enthusiastic reception in the academic market.”<sup>6</sup>

A second edition came out in 1985,<sup>7</sup> and a third, co-authored by Professor Barbara Lee, appeared in 1995.<sup>8</sup> Now we have the fourth edition.<sup>9</sup> Judge

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1. ENCYCLOPEDIA BRITANNICA (1st ed. 1768).
2. See ENCYCLOPEDIA BRITANNICA (1st ed. 1768), available at <http://store.britannica.com/jump.jsp?itemType=PRODUCT&itemID=529> (last visited Apr. 15, 2007).
3. See The Britannica Store, 2007 Encyclopedia Britannica Print Set Suite, <http://store.britannica.com/jump.jsp?itemID=822&itemType=PRODUCT> (last visited Apr. 15, 2007).
4. See, e.g., THE OPEN SOURCE DEVELOPMENT AND DOCUMENTATION PROJECT, ENCYCLOPEDIAS: THE NEW WAY TO RESEARCH 3 (2005), [http://osddp.org/files/issues/H\\_pu.data\\_Desktop\\_Wikipedia\\_first%20draft%20of%20dreamweaver.pdf](http://osddp.org/files/issues/H_pu.data_Desktop_Wikipedia_first%20draft%20of%20dreamweaver.pdf).
5. WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING (1st ed. 1978).
6. D. Brock Hornby, *Book Review*, 7 J.C. & U.L. 181, 183–84 (1980) (reviewing WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING (1st ed. 1978)).
7. WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION (2d ed. 1985).
8. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION (3d ed. 1995).
9. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION (4th ed. 2006).

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Hornby's appraisal has been validated and then some. This standard treatise is regularly consulted by, among others, college and university lawyers throughout the country. Likely few university law offices lack a well-thumbed copy of *The Law of Higher Education*. Indeed, the college or university lawyer must be hermitic or dense who does not immediately know what is denoted by these unmistakable catchwords in our increasingly trespassed corner of the legal world: "Kaplin and Lee."

The first edition of *The Law of Higher Education* was a big work—twenty-seven pages of prefatory material followed by 500 pages of text.<sup>10</sup> The fourth edition is a huge work—thirty-nine pages of prefatory material followed by 1,726 pages of text.<sup>11</sup> The Statute Index alone is twenty-one pages of tiny print. The Case Index is twenty-four pages of about ninety cases per page. The two volumes of this treatise together weigh as much as a holiday-size roast beef. Professors Kaplin and Lee have been at hard labor. *Res ipsa loquitur*.

Historians, pundits, and members of the National Association of College and University Attorneys may, with sound basis, shudder when they reflect on the apparently interminable thunderstorm of law—represented by the more than three-fold expansion of this treatise—that has poured down on higher education institutions over the past quarter-century. Whether on balance the consequences of this law storm have been bad or good—a catastrophic flood or benign irrigation—for colleges, universities, their constituents, and the nation is a question meaty enough to warrant more than one major study. Let us hope such studies are forthcoming, for they are needed. Pending publication of such studies, most practitioners in the field would agree that this legal inundation, which sometimes destabilizes the institutions and costs them a ton, has been a daunting mix of bad and good.

Appraisal of a scholarly product as influential and relied upon as is this treatise entails large questions. Of these, perhaps the largest is, does *The Law of Higher Education* fulfill its purpose? The purpose is encapsulated by the work's subtitle, "A Comprehensive Guide to Legal Implications of Administrative Decision Making" at colleges and universities. The promise of that subtitle is larger than that made by the subtitle of the first edition of the treatise, "Legal Implications of Administrative Decision Making." Some readers will quibble and contend, but "comprehensive" and "guide" describe at the least a claim that, although self-congratulatory, could withstand a well-crafted Rule 12(b)(6) motion. For one thing, "guide" is a concept that tolerates considerable latitude. And "comprehensive" is a term that permits some tailoring. A treatise on this subject would not fail, for instance, to be comprehensive merely because a lawyer who advises a college or university on novel sophisticated alternative investments, or a lawyer who needs to learn legal mores of the United Arab Emirates to give advice on an American university's initiative there, will not find a citation in Kaplin and Lee to the arcane pertinent official pronouncements.

A claim of comprehensiveness in this field is not to be compared to, say, a

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10. KAPLIN, *supra* note 5.

11. KAPLIN & LEE, *supra* note 9.

claim that the telephone book is comprehensive. To articulate, especially with such clear prose and impressive concision, even close to a comprehensive legal guidance in today's higher education field is an admirable achievement, verging on stupefying. To expect a law treatise to do more—such as provide *every* answer to the college or university administrator's or lawyer's question, "What, dear God, should I do about THIS?"—would be unreasonable.

Insightful, accessible organization is a *sine qua non* of usefulness in a law treatise. The organization of this treatise is commendable if necessarily imperfect. The platonic form of organization of the messy hodgepodge of current law that bears on today's colleges and universities is inconceivable.

Efficient organization of the legal questions that occupy a field as diffuse as contemporary higher education must be evaluated in context. With more than fifteen million students now enrolled, many billions of dollars in tuition, endowments and research funds, an elaborate array of several thousand private (not-for-profit or for-profit), government-run, and hybrid institutions, massive facilities, a staggering web of relations throughout society, and an unsurpassed burden of expectations to bear, twenty-first century American higher education confronts an unprecedented range of legal risks and claims. Traditional cozy conceptions of the higher education institution in this country have been superseded by a clamorous cacophony of demands upon it. The good old days of collegiate education—which were good for the lucky few who could attend—are no more. Whereas Daniel Webster is said to have brought Chief Justice John Marshall to tears in the oral argument of *Trustees of Dartmouth College v. Woodward*<sup>12</sup> by describing the College as small but beloved, today's Supreme Court would take the point with unsentimental emotion and skepticism. Overall, higher education, although its tug on the hearts of alumni (such as at football home games) remains strong, now is more seen as utilitarian, along the lines of prescription medicine. Higher education is now thought to be prophylaxis against socioeconomic shortfall, and therapy for much of what ails America and the world. No satisfying taxonomy of its resulting legal problems is obvious.

*The Law of Higher Education* is composed of six main parts, each of them consisting of chapters and followed by an excellent annotated bibliography. Part One, "Perspectives and Foundations," is an overview of the scope and sources of higher education law, internal and external: the nature and types of liability, litigation, and alternative dispute resolution; provision of legal services; and institutional management of legal risk. Part One will be of greatest interest to non-lawyers and lawyers new to the field.

Part Two, "The College and its Governing Board, Personnel, and Agents," treats such matters as trustees' and administrators' liability, institutional tort liability, exposures of captive organizations, types of employment contracts, collective bargaining, the sundry federal statutory rights of employees (most extensively, the rights against invidious discrimination), performance-management reviews, and affirmative action in employment.

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12. 17 U.S. (4 Wheat.) 518 (1819).

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In Part Three, Kaplin and Lee dissect “The College and Its Faculty.” Here they treat many of the touchiest issues that regularly pertain to faculty employment contracts, nondiscrimination laws that apply to faculty employment decisions, processes for making those decisions (as, for instance, decisions related to non-renewal and tenure denial), closure and merger of programs, reductions in the academic workforce, and academic freedom in teaching, research, and publication.

Parts One through Three consume 722 pages and would, if untethered to the rest of the treatise, be in themselves a valuable published analysis of these vexing areas of law.

“The Student-Institution Relationship” is the subject of Part Four, where the treatise addresses students’ legal status, admissions, financial aid, housing, campus computer networks, campus security, and such other student support services as health care, disability accommodation, and foreign student assistance. Also treated are student discipline, speech codes, student organizations’ rights, and issues germane to fraternities, sororities, student publications, and athletics.

In Part Five, “The College and Local, State, and Federal Government,” another host of sensitive questions figures having to do with, for instance, zoning and land use, community access to campuses, local taxation, state licensure, open-meeting and public-records laws, the constitutional roots of federal authority over institutions, and the robust assertion of that authority in various complex legal spheres, including immigration, research regulation, national security investigations, intellectual property, antitrust, environmental, computer use, tax, and civil rights.

The sixth and concluding part of the treatise, titled “The College and External Private Entities,” discusses the roles and major aims of the principal higher education associations, as well as many of the legal issues connected to accreditation, athletics groups, vendors to and purchasers from the institutions, and research collaborations.

Undoubtedly the authors considered various alternative ways of organizing this gigantic load of knowledge. One organizational method they might have considered would have been to track the subject headings set out in a general legal encyclopedia, and to address those headings that pertain to higher education. Whether, had they adopted that approach, they would have been irresistibly tempted to cover even more subjects, and whether Kaplin and Lee would have been thereby required to delve less into some of the topics their treatise considers, we do not know for sure. Likely, they would have had to limit their depth of treatment. Almost certainly any approach to material as far-ranging and unwieldy as this would have involved a certain irreducible amount of overlap. To note, for instance, that discrimination law is significantly addressed in Parts Two, Three, Four, and Five of *The Law of Higher Education* is not to fault the organization of the treatise.

In adopting a thematic, rather than, say, merely alphabetical approach to the arrangement of their work, Kaplin and Lee are implicitly asserting that the title, *The Law of Higher Education*, represents a sound claim, to wit, that there is such a thing as higher education law. Other experienced lawyers or law professors might agree or disagree with that claim. The claim is consequential and warrants

consideration.

If higher education law is a field—a specialized field—some propositions seem to follow. For one, legal services should be arrayed that are specific to that field. Also, presumably, colleges and universities' chief legal officers should be experts in that field. Law school curricula should respond to that field. And, at least, a critical mass of issues in that field should differ from issues in other fields.

Whether those conditions, except for the last, are met is questionable. For instance, most private practitioners who are engaged by colleges and universities do not exclusively, or in many cases even primarily, represent such institutions. Some of the most impressive general counsel of universities had no or almost no experience in the higher education legal field before assuming that post. A large part of the law the treatise addresses is taught in law school courses neither specific to, nor even nominally aimed at, issues in the higher education sector. And no law firm that is capable of representing higher education institutions in all of the areas here addressed—of which very few, at most, law firms are—does so through a group of lawyers who serve only higher education clients. Of course the same may be said of service to oil companies or broadcasters, and there is undoubted consensus that oil and gas law, as well as communications law, are legal fields.

The issue, then, is one of extent. Whether the trend of events in higher education and their legal sequelae signify that higher education law is a more or less coherent and homogeneous field than it was when the first edition of *The Law of Higher Education* came out is to this reviewer uncertain. Probably both sides of the question have merit.

One factor on the less-coherent side of the ledger is that the legal issues higher education organizations face vary enormously among the organizations, and likely more now than ever before. This treatise is said to cover

all of postsecondary education—from the large state university to the small private liberal arts college, from the graduate and professional school to the community college and vocational and technical institutions, and from the traditional campus-based program to the innovative off-campus or multi-state program, and now to distance learning as well.<sup>13</sup>

Surely Columbia University or the University of California must face certain legal questions also faced by the Georgia-based International Academy of Pet Design (IAPD), whose mission is to prepare students for a career in pet grooming. However, with respect to legal exposures, might Columbia have more in common with hospitals, foundations, and big New York-based companies than with the IAPD? And might the public University of California have more law-issue congruence with the city government of Dubuque, Iowa, or with a laundromat in Berkeley, than with the IAPD?

In addition, no small amount of learning in *The Law of Higher Education* would be usefully instructive to a hospital lawyer or a city government lawyer or even a lawyer for the laundromat. That is not a defect in the work. And even though

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13. KAPLIN & LEE, *supra* note 9, at xxv.

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college and university lawyers must often dig into legal topics far afield from what is generally claimed to be higher education law that does not render this treatise less of a resource for them.

There is, however, some risk for the non-lawyers in higher education organizations to whom Professors Kaplin and Lee also aim this publication. The treatise states that it is intended for, among others,

deans and department chairs; risk managers; business managers and grants and contracts managers; technology transfer, intellectual property, and sponsored research administrators; athletics directors . . . directors of campus security . . . officers and staff at higher education associations, [and] executives and project officers of foundations serving academia, education policy officers in state and federal governments.<sup>14</sup>

Such persons can benefit greatly from the treatise, to the extent they comprehend the legal context of certain recurrent problems. They will not, however, be readied by it to perform the legal function, nor does the treatise claim otherwise. Non-lawyers who use the treatise to act when they should consult a lawyer are likely to cause trouble.

A lawyer who day-in and day-out handles legal matters for a college or university and who has done so for many years may ask himself, “How does this treatise help me do my work?” Undoubtedly, when the lawyer encounters many questions of law or legal process with which he is unfamiliar, recourse to this treatise can often give him his bearings and enable him to avoid making a fool of himself in initial discussions with the client. But, as with even the Old Testament, he will not find in Kaplin and Lee a developed answer to every question that arises in the practice. That reflects the nature of law practice, and not a failure by Kaplin and Lee. Many questions with which we grapple have no indisputably correct answer, and many of the questions we must address have no clearly or even highly probable correct answer. Indeed, many of the questions put to us are unsusceptible of substantial illumination in positive law or decisional precedent. Many of the questions we face in representation of higher education institutions—sometimes, it seems, nearly all of the most consequential questions college and university lawyers confront these days—oblige the practitioner to analyze and prioritize multiple risk-management considerations that are in fraught tension with each other.

So, yes, there are definitely limits to the usefulness of *The Law of Higher Education* or of any other treatise that might be written about law that affects higher education. On the other hand, to read this extraordinarily rich work—and in doing so to have the luxury of voicing to oneself time and again along the way that the law for higher education is a ponderous, overly complicated, commonly frustrating, sometimes liberating, too unresolved, flawed, unduly expensive, inexorably evolving, and endlessly engrossing thing—was one of the best educational experiences this practitioner has had. Kaplin and Lee’s treatise whets

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14. *Id.*

and does not sate the appetite for the work.





# HIGHER EDUCATION LAW SCHOLARSHIP AND THE KEY TO ALL MYTHOLOGIES

MICHAEL A. OLIVAS\*

William A. Kaplin and Barbara A. Lee's *The Law of Higher Education* is now in its fourth edition,<sup>1</sup> and, like John Updike's *Rabbit* novel series,<sup>2</sup> is too big to contain itself in one actual book. Kaplin and Lee's two-volume work delights and educates, and is an indispensable work to anyone who is serious about the field of higher education law. Like the field itself, Kaplin and Lee's work has expanded and developed into a sprawling resource. However, unlike Updike's fourth novel in the series,<sup>3</sup> which none of us anticipated or waited for, Kaplin and Lee's enterprise raises serious questions about the efficacy of such treatise projects and their place in the traditional marketplace of today. Their users, once hooked, need to be able to rely upon a timely and reasonable service. The only question I have is whether or not this series can live up to this expectation in its current format. I will return to this question, after commenting upon the treatise itself.

When reviewing the third edition in *The Journal of Higher Education*, I wrote of the whole project, "Kaplin's work stands out because it represents an extraordinary undertaking of sheer hard work, enormous synthetic power, and an obvious love of his subject matter. No one of these traits suffices, and we are grateful to Kaplin for this important labor."<sup>4</sup> I still believe this, perhaps even more so now that the material is so vast and so complex. My own institution had one lawyer on staff in 1982, when I joined the faculty, and now we have about a dozen, not counting the various outside counsel who advise us on superconductivity licensing overseas and other technical specializations, and the staff of the Texas Attorney General's office, who undertake the first chair in most of our litigation. Of course, the field has grown, especially in the evident commercialization of campuses, so of course, its resources have grown. The listservs, publications, and convening activities of the National Association of College and University Attorneys (NACUA) have grown exponentially, and other national and regional groups vie for the same college and university customers. Kaplin and Lee's book has grown accordingly (and accordion-ally), reflecting the field's many facets. It

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1. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (4th ed. 2006).

2. JOHN UPDIKE, *RABBIT REMEMBERED* (2001); JOHN UPDIKE, *RABBIT AT REST* (1990); JOHN UPDIKE, *RABBIT IS RICH* (1981); JOHN UPDIKE, *RABBIT REDUX* (1971); JOHN UPDIKE, *RABBIT, RUN* (1960).

3. UPDIKE, *RABBIT REMEMBERED*, *supra* note 2.

4. Michael A. Olivas, *Review: The Law of Higher Education*, 67 J. HIGHER EDUC. 365 (1996) (reviewing WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (3d ed. 1995)).

could hardly be otherwise.

I will use a few examples to show just how good this resource is. First, I would point to the extraordinarily-detailed table of contents to show the detail and embedded nature of their material. Readers (especially students) often overlook the value of a good table of contents, but for authors, it is the spine of the book—any such book. Not only does their table indicate the broad range of subjects, it also shows how deeply they go into each topic. And this arithmetic formula of how broad and how deep to go is really the measure of the edition's coverage, as each is well written, superbly annotated, and useful. For such a valuable treatise, one would expect no less.

But apart from the sheer size issues, this is great stuff. Pick a section and dig in, and a reader can be assured of a number of carefully-selected cases summarized for their core meaning, very fair and unbiased summaries, with huge doses of statutory, regulatory, and scholarly references. I dipped into some of the large rivers (faculty litigation and student rights), and fished in some of the smaller rivulets and streams (undocumented college students, residency requirements, and accreditation). If I had to make one editing suggestion, it would be to trim the number of references overall, some of which are old and probably not helpful. I also think that some of the areas could usefully be reduced and probably relegated to more practice manuals. Chapter Thirteen—The College and the Federal Government—would be my first candidate, as it covers over 200 pages, and is both too much (some of the statutes are just not essential reading for most college counsel) and too little (the copyright part is very good, but the overall intellectual property coverage will likely not suffice for research institution counsel).

But once the book exploded beyond its one volume to two volumes with over 1,700 pages, it has become clear that there were almost no tradeoffs for length consideration. Here, it is useful to recall how this enterprise has experienced enormous growth. The original, with Kaplin as sole author, appeared in a single 1978 volume,<sup>5</sup> with 500 pages. In 1980, he added a single 184-page supplement, entitled *The Law of Higher Education 1980*.<sup>6</sup> The 1985 second edition<sup>7</sup> totaled 621 pages, fewer than the first edition and its supplement. By this time, he had added the estimable Lee as his collaborator, and they produced a 1985–1990 update,<sup>8</sup> including 364 pages, which was actually published as a paperback. When I reviewed the update project, I described it as an “error” and a “failure,” both for its format and for its unevenness.<sup>9</sup> Their excellent 1995 third edition<sup>10</sup> was up to 1,023 pages. Two years later, to reach instructional and practice markets for student affairs graduate students and professionals, they carved out a 642-page

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5. WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION* (1st ed. 1978).

6. WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION 1980* (Jossey-Bass 1980).

7. WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION* (Jossey-Bass 2d ed. 1985).

8. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (2d ed. Supp. 1990).

9. Olivas, *supra* note 4, at 366.

10. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (Jossey-Bass 3d ed. 1995).

hardback version entitled *A Legal Guide for Student Affairs Professionals*,<sup>11</sup> which was intended to stand on its own and re-package the parts of the 1995 third edition. The same year, they also published the 1997 Supplement, at 378 pages, with NACUA.<sup>12</sup> In 2000, they published a 725-page paperback entitled *Year 2000 Cumulative Supplement*<sup>13</sup> to the third edition. Along the way, they prepared instructional supplements, with edited cases and instructional materials, maintained by NACUA for purchase by students and teachers, predominantly in education school markets. At some points, the volumes or reprints were out-of-print during the interim periods—an unsatisfactory state of affairs. I had almost forgotten just how many permutations have appeared, all of them quite useful and valuable in their own way, even with the large gaps and stutter-steps.

This enterprise has been truly enterprising, with Jossey-Bass—who published the first three editions—being acquired by John Wiley & Sons, and the newest version is a “Wiley Imprint.” The volumes under review retail for \$250, and there was an early-bird special for 20% if they were ordered by October 15, 2006—approximately the first two months of their availability. And there is a separate, NACUA-maintained electronic-version of “Cases, Problems, and Materials” for teachers who wish to use either the two volume version or a planned student edition; it is a little confusing, but there appears to be a site license for teachers who adopt either of these texts, with some materials that are assignable to students and some of which are not. A printed version is available for \$150, and the electronic-version has the qualities of a teacher’s manual as well.<sup>14</sup>

When evaluating the materials for their instructional, classroom value, I confess a clear conflict of interest with the existence of my own *The Law and Higher Education: Cases and Materials on Colleges in Court*,<sup>15</sup> now in a 2006 third edition. Rather than emphasize the cost differential (the Wiley 20% discount is no longer available, but presumably there are multi-purchase discounts for bookstores who stock the volumes), I only note that teaching materials keyed to a two-volume treatise, and printing costs, will render such materials quite expensive and hard to use as a teaching resource. The prospects of hundreds of education graduate students schlepping the 1,700 pages as well as printouts of cases and additional materials to class will certainly draw the attraction of lawyers who practice carpal tunnel syndrome law.

In my preparation, I noted some of the differences between Kaplin’s first volume of almost thirty years ago and the most recent version by Kaplin and Lee. These differences capture the way the field has changed, and how life as a college

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11. WILLIAM A. KAPLIN & BARBARA A. LEE, *A LEGAL GUIDE FOR STUDENT AFFAIRS PROFESSIONALS* (1997).

12. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (3d ed. Supp. 1997).

13. WILLIAM A. KAPLIN & BARBARA A. LEE, *YEAR 2000 CUMULATIVE SUPPLEMENT TO THE LAW OF HIGHER EDUCATION* (NACUA 2000).

14. All of these purchase details are spelled out with accompanying links on the NACUA website at <http://www.nacua.org/publications/lohe/index.asp> (last visited Mar. 1, 2007).

15. MICHAEL A. OLIVAS, *THE LAW OF HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT* (Carolina Academic Press 3d ed. 2006).

attorney has changed. Virtually no college or university can get along with one attorney, the way the University of Houston did only twenty-five years ago. Such is the rise of the industrial state and today's regulated institution. The different versions themselves accurately represent the history of higher education, unknowingly and unwittingly. I urge a doctoral student to mine the history of these volumes for a wonderful dissertation project, to offer their insight into the field and into the efficacy of an intellectual project whose provenance and pedigree are so endowed. Now that Lawrence Tribe has given up his own unfinished American Constitutional Law treatise series after only volume one of the third edition,<sup>16</sup> I wonder the extent to which any single author or even talented co-authors can get their arms around a single comprehensive field. Middlemarch's Rev. Causabon and his "Key to All Mythologies" comes to mind.<sup>17</sup>

After giving such praise, and after professing my respect and awe at their achievement, I now ask the difficult question: can this enterprise continue as it has, with periodic updates, long delays, and an uneven history of spinoffs and versions? My difficult conclusion is that it cannot do so, at least not on this uneven trajectory. Readers and users today require more regularly updated and more readily available texts than this project has become. Even the typesetting is probably rendering it late and impossible to update. In my view, no treatise can afford to go so long without revisions, and the shelf-life of the Jossey-Bass/Wiley version is questionable. No counsel can afford to wait almost a dozen years between editions, and over six years between supplements, at least not one who wants to have the most updated entries and references.

In addition, internal references and my own queries show that this volume was delayed for some time during the editing and final negotiations stage, so that it aged while waiting to see the light of day; some of this is undoubtedly due to the corporate acquisition of Jossey-Bass by John Wiley, but some was also due to the sheer size of the project and authors' commitments to a variety of publishing projects. One wonders whether Jossey-Bass or Wiley is the best home for such a project, as such a treatise is not within the usual range of legal or editorial projects for either publisher. And it is extremely unusual for a professional organization to maintain, publish, and distribute supplements and corollary materials for a commercially-published book. Indeed, it is without precedent in my experience.

Thus: whither Kaplin and Lee, or more properly, their magnificent treatise project? I believe that in the world where this project resides, one needs either a mainstream legal publisher (Lexis/Nexis/Bender comes to mind, with its *Immigration Law and Procedure: Desk Edition* by Stanley Mailman, with regular updates one can insert into a multi-ring binder), or other legal reporter services, such as BNA, CCH, Thomson/West, and others. Of course, this genre is often inordinately expensive, similarly-slow to revise, and difficult to update adequately

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16. Joshua Glenn, *No Time for Treatises*, BOSTON GLOBE, May 29, 2005, § IDEAS, at D.

17. In *Middlemarch*, George Eliot's 1871 work, the author portrays nineteenth-century intellectuals as victims of enormous ambitions, including a character named Reverend Causabon, a theologian striving to codify the "Key to All Mythologies." See GEORGE ELIOT, *MIDDLEMARCH* (Oxford Univ. 1998) (1871).

(and immigration law or, say, tax law, change even more rapidly than does college and university law), and the publishers are the poster boys for why there should be fewer mergers and acquisitions in publishing. NACUA, for all its excellent membership services to college and university lawyers and institutional loyalty to Kaplin over the years, is just not situated to undertake a project of this sort, and I cannot believe that over the long haul, Wiley will accede to letting someone else publish the lucrative supplements and add-ons.

I believe that the time has come for Kaplin and Lee to sit down and decide what they can do for the fifth edition, for it may be—and I say this very carefully—that they presently have the worst of all worlds: too much time between editions and supplements, and a slow, traditional print publisher that inherited the project from the book's original slow, traditional print publisher after a merger. On the sidelines, it has a loyal and supportive national association of users, but NACUA is not the right venue either. I do not have the right answer, but after all these efforts, it is time to discuss the various print and electronic options available to the authors. I can say this, as I am a longtime user, cheerleader, and even flack for the book, and both Kaplin and Lee are friends and colleagues, so I do not believe that I must establish my bona fides. I actually love both these authors, and believe we are all lucky to have found such excellent scholars devoted to the project. All of us who read the *Journal of College and University Law* (with which Kaplin and Lee have been involved over the years, with Kaplin having been a faculty editor at the *Journal's* important early stages) have been beneficiaries. I also question the instructional adaptation plans, both on efficacy and cost grounds, having conceded my own interests in this regard. Whatever the authors and their various advisors do, they should begin by shrinking the thickness of the paper. When my own casebook went from the second edition (with a supplement) to its recent third edition, my publisher actually produced a slimmer version by shrinking the thickness of the paper, rendering the 1,056-page version smaller than the earlier ones. No one has complained, and no one is the wiser.

But it is time to look hard at this wonderful project, so that it does not bog down in its overweight new look and format. Having been overweight virtually all my life, let me just employ the perfect metaphor: it needs a diet or a skillful surgeon, or it will find itself with unacceptably high blood sugar and lipid levels. Like so many others with adult-onset diabetes or flabbiness, it needs an intervention from those who love it.

I will end by circling back to my own earlier take, and hope to hit the right note: “As with our favorite novelists, they never seem to produce their next work soon enough. I, for one, await Kaplin’s [and Lee’s] next masterpiece.’ Well, I am pleased to announce that it is here, in fine bookstores everywhere.”<sup>18</sup>

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18. Olivas, *supra* note 4, at 366.

# THE FOURTH AMENDMENT AND DORMITORY SEARCHES

ELIZABETH O. JONES\*

## INTRODUCTION

Despite being animated by several notable cases, contemporary search and seizure jurisprudence is hazy. In addition, the Supreme Court's recent decision in *Randolph v. Georgia*<sup>1</sup> further complicated the matter. In *Randolph*, the Court ruled that a third party's consent to a search could not supersede the refusal of the search's target if both parties are present and possess authority over the premises. The opinion attempted to clarify the extent of co-inhabitants' authority over shared property. The *Randolph* holding impacts public colleges and universities, where disciplinary policies routinely allow searches and seizures of dormitories and other forms of campus housing, often without, or even against, student consent.<sup>2</sup> Before *Randolph*, courts justified nonconsensual searches in three ways, emphasizing the relationship between the student and college or university, the importance of favorable learning environments, or the existence of emergency conditions. *Randolph*, however, calls into question these justifications by expanding the notion of reasonable expectations of privacy.

This note, focusing on public colleges and universities, applies timely search and seizure jurisprudence to the security needs of colleges and universities. It examines the history of search and seizure law, emphasizing the constitutional protection of privacy embodied in the Fourth Amendment. This note also analyzes public colleges' and universities' disciplinary power and policies in light of student rights; reviews students' reasonable expectations of privacy, personal dominion, and desirable learning environments; and concludes with policy recommendations, suggesting how colleges and universities can reconcile their on-campus housing policies with constitutional imperatives.

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1. 547 U.S. 103 (2006).

2. *See id.*

## AN OVERVIEW OF SEARCH AND SEIZURE JURISPRUDENCE

The Fourth Amendment to the United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>3</sup> The Amendment guards citizens’ privacy rights. In furtherance of these rights, United States courts traditionally demonstrate a preference for searches performed with a warrant, but there are recognized exceptions to the warrant requirement.<sup>4</sup>

The Federal Rules of Criminal Procedure authorize warrants to search for contraband, fruits or instrumentalities of crime, or “property that constitutes evidence of the commission of a criminal offense.”<sup>5</sup> The Supreme Court stated, “[I]t has always been assumed that one’s house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.”<sup>6</sup> Therefore, the warrant requirement is “independent of, rather than ancillary to, arrest and arraignment.”<sup>7</sup> Courts consider searches performed incident to arrest valid, but searches preceding arrest require a judge or magistrate’s objective approval based on adequate proof. Warrants must identify the property and name or describe the person to be searched.<sup>8</sup> Furthermore,

Probable cause for the warrant must be presented but there is nothing in the [law] indicating that the officers must be entitled to arrest the owner of the “place” to be searched before a search warrant may issue and the “property” may be searched for and seized. The Rule deals with warrants to search, and is unrelated to arrests.<sup>9</sup>

In criminal practice, warrants sustain this constitutional protection by requiring judges or magistrates to make a finding on the existence of probable cause that supports the authorization of a police search.<sup>10</sup> Accordingly, warrant requirements apply to public college and university dormitory rooms, which serve as personal dwelling-places. When college and university officials abide by formal criminal procedures, especially the procurement of warrants, the searches that they execute will be constitutionally valid.

The Supreme Court has clearly stated that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to few specifically

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3. U.S. CONST. amend. IV. The protections incorporated into this amendment apply to the states through the Due Process clause of the Fourteenth Amendment. *See, Ker v. California*, 374 U.S. 23, 33 (1963).

4. *Katz v. United States*, 389 U.S. 347, 357 (1967).

5. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 558 (1978) (*quoting* *United States v. Ventresca*, 380 U.S. 102, 105 n.1 (1965)).

6. *Agnello v. United States*, 269 U.S. 20, 32 (1925).

7. *Zurcher*, 436 U.S. at 559 (1978) (*quoting* ALI, *A Model Code of Pre-Arrest Procedure*, Commentary 491 (Proposed Off. Draft 1975)).

8. *Id.* at 557.

9. *Id.* at 558.

10. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983).

established and well-delineated exceptions.”<sup>11</sup> Because the “[o]mission of [a magistrate’s] authorization ‘bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment,’”<sup>12</sup> the threshold for exigent circumstances is high. The applicable test considers “whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.”<sup>13</sup> Specifically, one court stated, “[T]o establish exigent circumstances due to the possible destruction of evidence, the state must demonstrate probable cause to suspect that [said] evidence [is] present at [defendant’s] residence.”<sup>14</sup> As such, to qualify as exigent circumstances, the situation must be notably dangerous or grave.

One primary exception to the warrant requirement is the existence of exigent circumstances;<sup>15</sup> yet, searches are not readily performed pursuant to such circumstances because the risk of undermining well-established judicial safeguards is great. Courts have failed to articulate a clear definition of exigent circumstances, but the Supreme Court defines exigent circumstances as conditions which so gravely endanger lives that police officers can avoid the delay of obtaining a warrant.<sup>16</sup> Police must reasonably believe danger to themselves or others is imminent.<sup>17</sup> Additionally, if an officer believes an individual requires immediate aid, he is allowed to enter under the emergency aid doctrine.<sup>18</sup> The existence of exigent circumstances rests on a variety of factors, including the “gravity of the underlying offense,”<sup>19</sup> the potential for harm to property,<sup>20</sup> the threat to life or the threat of serious injury,<sup>21</sup> or the belief that a crime is in progress.<sup>22</sup> However, imminent destruction of evidence is not characterized as an exigent circumstance.<sup>23</sup>

Another delineated exception, in addition to the exigent circumstances exception to the warrant requirement, is a search conducted pursuant to consent.<sup>24</sup> In *United States v. Matlock*, the Supreme Court held that any individual who has common authority over the premises or effects can consent to a search.<sup>25</sup> In

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11. *Katz v. United States*, 389 U.S. 347, 357 (1967).

12. *Id.* at 358 (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)).

13. *United States v. Almonte*, 952 F.2d 20, 22 (1st Cir. 1991) (quoting *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980)).

14. *United States v. Impink*, 728 F.2d 1228, 1231 (9th Cir. 1984).

15. *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980).

16. *Warden v. Hayden*, 387 U.S. 294 (1967).

17. *Id.*

18. *See State v. Frankel*, 847 A.2d 561 (2004), *cert. denied*, 543 U.S. 876 (2004).

19. *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

20. *See People v. Smith*, 525 N.Y.S.2d 244 (N.Y. App. Div. 1988).

21. *See United States v. Chipps*, 410 F.3d 438 (8th Cir. 2005).

22. *See Barcio v. State*, 158 S.W.3d 498 (Tex. Crim. App. 2005).

23. *Welsh*, 466 U.S. at 754.

24. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

25. *United States v. Matlock*, 415 U.S. 164, 170 (1974).



*Matlock*, the respondent was arrested in the front yard of his house and was not asked whether he would consent to a search of his leased home.<sup>26</sup> While officers detained the respondent in their police car, his co-tenant, who was not his wife, allowed the police officers to search their bedroom.<sup>27</sup> The officers found money that was tendered by the prosecution in respondent's trial.<sup>28</sup> The district court suppressed the evidence because the government failed to prove that the police officers had reason to believe the supposed co-tenant had authority to permit the search.<sup>29</sup> The Court of Appeals affirmed the district court's ruling because "a vicarious consent is sustained only when actual authority to consent is shown to have existed," and the burden of proving authority rested on the government.<sup>30</sup>

Disagreeing with both the district court and the Seventh Circuit, the Supreme Court ruled in favor of the government, saying that "the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared."<sup>31</sup> In doing so, the Court established the assumption of the risk doctrine, which upholds third party consent if the defendant is "held to have assumed the risk that [the third party sharing property with defendant] would allow someone else to look inside."<sup>32</sup> *Matlock* thus provided that "the authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes."<sup>33</sup> Accordingly, the right to consent to a search depends on mutual use of and joint access to the premises, both of which enable either party to admit people freely into the home or to limit the other's right of entry or use. Such considerations speak to the existence of apparent shared authority and, thus, the applicability of the assumption of the risk doctrine.

Building on *Matlock's* assumption of the risk doctrine, the Supreme Court's decision in *Illinois v. Rodriguez* narrowed the applicability of the common authority argument.<sup>34</sup> In *Rodriguez*, after the respondent was arrested for drug possession, Gail Fischer, his former roommate, gave police permission to search his apartment even though she no longer lived there.<sup>35</sup> The police found a cocaine substance, but the trial court suppressed this evidence because it found Fischer was not a frequent visitor to the apartment or a usual resident.<sup>36</sup> The court also denied the government's contention that, even if Fischer lacked common authority, as long as police reasonably believed that she did have authority to consent then there was no Fourth Amendment violation.<sup>37</sup> The appellate court affirmed the lower

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26. *Id.* at 166.

27. *Id.*

28. *Id.*

29. *See id.* at 167-68.

30. *United States v. Matlock*, 476 F.2d 1083, 1087 (7th Cir. 1973).

31. *United States v. Matlock*, 415 U.S. 164, 170 (1974).

32. *Id.* at 171.

33. *Id.* at 171 n.7.

34. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

35. *Id.* at 179-80.

36. *Id.* at 180.

37. *Id.* at 184-85.

court's ruling, and the Supreme Court of Illinois denied the government's petition for leave to appeal.<sup>38</sup> The Supreme Court of the United States then granted certiorari to consider the extent of common authority and the assumption of the risk doctrine.<sup>39</sup>

Writing for the majority, Justice Scalia reversed the appellate court, holding that a reasonable belief held by law enforcement officials could validate a search, even if that belief later proved erroneous.<sup>40</sup> The Court said the objective standard test for reasonableness is whether “the facts available . . . at the moment . . . warrant a [person] of reasonable caution in the belief” that the consenting party had authority.<sup>41</sup> Under the analysis used in *Rodriguez*, a judge must decide whether a police officer's acceptance of a third party's consent to a search improperly vests the third party with apparent authority over another's property.<sup>42</sup> In doing so, courts must pay special attention to particular expectations of privacy as well as to what was factually reasonable at the time.<sup>43</sup>

The Supreme Court revisited the reasonableness inquiry in *Georgia v. Randolph*.<sup>44</sup> Hearing the case thirty-two years after *Matlock* and sixteen years after *Rodriguez*, the Court held that, in the context of a warrantless search and seizure, the consent of one individual with common authority cannot override the refusal of the other who is present.<sup>45</sup> The case involved Scott Randolph's conviction for cocaine possession. Police found cocaine in his home during a warrantless search to which Randolph's wife consented but Randolph did not.<sup>46</sup> The Georgia Court of Appeals reversed the trial court's conviction of Randolph,<sup>47</sup> and the Georgia Supreme Court sustained the appellate court on the ground that “the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.”<sup>48</sup> Subsequently, the Supreme Court granted certiorari to resolve the split in authority on the issue of “whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search.”<sup>49</sup>

In its holding, which invalidated the alleged third-party consent, the Supreme Court emphasized the reasonableness standard explicit in the Fourth

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38. *Id.* at 180.

39. *Id.* at 181.

40. *Id.* at 189.

41. *Id.* at 188 (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)).

42. *Id.*

43. *See People v. Fry*, 76 Cal. Rptr. 718 (Cal. Ct. App. 1969) (holding that a wife's consent was invalid because the defendant, who was not present at the time consent was sought, earlier advised his wife to refuse any search).

44. 126 S. Ct. 1515 (2006).

45. *Id.* at 1527.

46. *Id.* at 1519.

47. *Randolph v. State*, 590 S.E.2d 834 (Ga. Ct. App. 2003).

48. *State v. Randolph*, 604 S.E.2d 835, 836 (Ga. 2004).

49. *Randolph*, 126 S.Ct. at 1520.

Amendment.<sup>50</sup> By stressing whether “customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant’s objection,” the Court put the focus of search and seizure jurisprudence on rational community expectations.<sup>51</sup> The majority carefully avoided overruling *Matlock* by integrating its assumption of the risk theory into its own holding: “the ‘right’ to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances.”<sup>52</sup> Recognizing that it was drawing a “fine line” among *Randolph*, *Matlock*, and *Rodriguez*, the Court in *Randolph* pointed out, “if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.”<sup>53</sup> The holding further emphasized that police could not remove a potential objector from the home in order to obtain consent, but they did not have to take affirmative steps to ensure the authority of the consenting party.<sup>54</sup>

Because of this fine line, *Randolph*’s impact on contemporary search and seizure jurisprudence is somewhat vague. The Supreme Court’s repeated emphasis on reasonableness and social norms vests a great deal of discretion in law enforcement and the judiciary to settle what is “reasonable” or equitable under particular circumstances. Thus, while *Randolph* stands for the proposition that one party’s consent to an on-site search cannot trump another party’s refusal, the case also represents an upsurge in respect for Fourth Amendment rights as well as a sensible and evenhanded application of these rights. The Court focused on the “great significance given to widely shared social expectations”<sup>55</sup> and, thus, implicitly recognized the decisiveness of varying circumstances such that popular belief restrains the potential range of judicial and law enforcement activity. Therefore, the public’s shared view of privacy should influence the discussion of protected Fourth Amendment rights.

*Randolph*’s turn to situated practicality and fairness should influence searches performed on college and university campuses, particularly in student dormitories because what is reasonable to students may be at odds with what is reasonable to administrators. In other words, expectations of privacy and notions of common authority are hazy in on-campus living situations, and, accordingly, the case law reflects such discord.

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50. *Id.* at 1527.

51. *Id.*

52. *Id.*

53. *Id.* See *infra* p. 120.

54. *Id.*

55. *Id.* at 1521.

In fact, few cases address the constitutionality of searches of dormitory rooms.<sup>56</sup> A California court of appeals, considering the legality of a dormitory search, stated that it uncovered only twenty-nine relevant cases, with fewer than half decided within the past twenty years.<sup>57</sup> The court's research appears accurate; the vast majority of cases involving a college or university and constitutional rights concern the First Amendment or the Equal Protection Clause.<sup>58</sup>

The few dormitory search cases are further divided by whether they entail searches performed by college and university officials or by state police. The relevant case law suggests that college and university authorities possess more leeway to perform nonconsensual searches than law enforcement officers. According to *Duarte v. Commonwealth*, "fourth amendment [sic] protections against unreasonable searches and seizures are 'wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.'"<sup>59</sup> Thus, controversy over the implication of the Fourth Amendment surrounds the degree to which a college or university official functions as a government official or involves the government, specifically law enforcement. The *Duarte* court concluded that "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'"<sup>60</sup>

#### SEARCH AND SEIZURE POLICIES IN PUBLIC COLLEGES AND UNIVERSITIES

Public colleges and universities, as state actors, are bounded by the United States' Constitution, including the Fourth Amendment, but they also possess discretionary power to enforce rules furthering their educational objectives. Many courts confront cases in which students or student groups allege that a college or university entity deprived them of their First Amendment rights to free

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56. See Alexander C. Black, Annotation, *Search Conducted by School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision*, 31 A.L.R. 5th 229, 296-300 (1995).

57. *People v. Superior Court*, 49 Cal. Rptr. 3d 831, 844 n.10 (Cal. Ct. App. 2006).

58. See e.g., *Healy v. James*, 408 U.S. 169 (1972); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435 (3d Cir. 2000); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York*, 443 F.Supp.2d 374 (E.D.N.Y. 2006).

59. *Duarte v. Commonwealth*, 407 S.E.2d 41, 42 (Va.App. 1991) (quoting *United States v. Jacobson*, 466 U.S. 109, 113 (1984)). *Duarte* involved a private school, Averett College, but the Virginia appellate court's decision is nevertheless valuable because it discusses the differences between private parties and agents or instruments of the government for Fourth Amendment purposes. See also *State v. Kappes*, 550 P.2d 121 (Ariz. 1976) (holding that a dormitory room search by college officials done as private persons did not implicate the Fourth Amendment and the evidence of drug possession).

60. *Duarte*, 407 S.E.2d at 42 (quoting *Skinner v. Railway Labor Exec. Ass'n.*, 489 U.S. 602, 614-615 (1989)).

expression.<sup>61</sup> The Supreme Court, in *Healy v. James*, said that a school's refusal to grant a student group official campus recognition without justification, despite the group's conformity with the school's requirements, violated the students' associational rights protected by the First Amendment.<sup>62</sup> The Court stressed that "[a]t the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment."<sup>63</sup> The Court continued, "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."<sup>64</sup>

While *Healy* and its progeny focus on freedom of expression, the Court's protection of First Amendment rights parallels its protection of other constitutional rights, including the Fourth Amendment. The extent to which the Fourth Amendment's prohibition of unreasonable searches protects a student's interest in a dormitory room at a public college or university is, like university speech protections,<sup>65</sup> controversial. For example, in *People v. Kelly*, a student at the California Institute of Technology, a public university, who was found guilty of burglary, contended that damaging evidence in his trial was obtained by an unlawful search of his dormitory room.<sup>66</sup> The court, upholding the conviction, maintained that the Dean was master of the residence halls, and, as such, his position involved "upholding the high disciplinary standards and integrity of the school" and, therefore, the right to enter student rooms in an emergency, even to perform a search.<sup>67</sup>

The *Kelly* case noted the relationship between a student resident and a college or university dean, or other official responsible for the housing facilities, differs from the relationship between a landlord and tenant.<sup>68</sup> In traditional landlord-tenant jurisprudence, the lessor does not have the right to permit police officers into rented premises.<sup>69</sup> Thus, consent from the landlord does not render a search constitutional: "The right of a landlord to inspect the leased premises does not include the right to 'permit' third persons, not shown to be his agents, to come and go over the premises on business other than the owner's."<sup>70</sup> Even hotel proprietors and employees lack the right to consent to the search of an absent guest's hotel room because such a search would violate the guest's constitutionally protected

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61. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that a school's refusal to allow students to wear arm bands that demonstrated their disapproval of Vietnam hostilities was unconstitutional because the students had a constitutional right to express their opinions).

62. *Healy v. James*, 408 U.S. 169, 181 (1972).

63. *Id.* at 180.

64. *Id.*

65. *Id.*

66. 195 Cal.App.2d 669, 680 (1961).

67. *Id.* at 678.

68. *Id.* at 678.

69. *Chapman v. United States*, 365 U.S. 610 (1910). See also *Klee v. United States*, 53 F.2d 58, 61 (9th Cir. 1931).

70. *Klee*, 53 F.2d at 61.

right to be free from unreasonable searches and seizures.<sup>71</sup> The traditional law gives preference to tenant constitutional rights over the unfettered will of landlords and proprietors.

When considering college and university housing facilities, however, courts accord less protection to student “tenants.” In a college or university setting, the need for an orderly learning environment, as well as safe premises, confers upon the administration an amount of authority and discretion sufficient to maintain and enforce disciplinary standards.<sup>72</sup> According to an Alabama district court, a public institution “has an ‘affirmative obligation’ to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process.”<sup>73</sup> A New Hampshire district court assumed a similar position but on narrower grounds. The court held that a search of a student’s dormitory room is unreasonable unless:

[It] furthers [the college’s or university’s] functioning as an educational institution. The search must further an interest that is separate and distinct from that served by New Hampshire’s criminal law. Obviously, administrative checks of the rooms for health hazards are permissible pursuant to the school’s interest in the maintenance of its plant and the health of its students.<sup>74</sup>

Thus, much of the case law suggests that a college’s or university’s status as an educational facility enables its officials to take affirmative action to maintain an orderly and safe learning environment.

Some courts, however, are apt to condemn on-campus searches as exceeding college and university educational authority and find they are an encroachment upon student’s constitutional rights. For example, a New York court suppressed evidence obtained during a warrantless search of a dormitory room because the search was not made pursuant to a lawful arrest.<sup>75</sup> The court said:

It seems self-evident that the dormitory room of a college student is not open for entry at all times for all purposes . . . . University students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure. To suggest that a student who lives off campus in a boarding house is protected but that one who occupies a dormitory room waives his Constitutional liberties is at war with reason, logic and law.<sup>76</sup>

In other words, the court leaned towards traditional landlord-tenant law and, therefore, diminished the right of the college or university administration to conduct nonconsensual searches pursuant to its regulatory and advisory power.

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71. *Stoner v. California*, 376 U.S. 483, 488 (1964).

72. *See Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F.Supp. 725, 729–30 (M.D.Ala. 1968).

73. *Id.*

74. *Morale v. Grigel*, 422 F.Supp 988, 998 (D. N.H. 1976).

75. *People v. Cohen*, 292 N.Y.S.2d 706, 709 (N.Y.App. Term 1968).

76. *Id.* at 713.

Thus, even a brief review of relevant cases shows that courts assume a variety of postures toward school-sanctioned searches of individual dormitory rooms. Regardless of its ultimate conclusion, each court acknowledges the college's or university's claim, or purported responsibility, to preserve a healthy, structured, and safe learning environment. However, the value judges place on safeguarding unabridged constitutional rights varies. The ultimate validity of a particular dormitory search amounts to an undefined balancing test weighing the student's right to privacy against the college's or university's right to maintain a desired campus environment.

#### DO STUDENTS WAIVE THEIR FOURTH AMENDMENT RIGHTS?

The applicability of traditional search and seizure law to students living in college and university dormitories often involves the question of whether students waived, set aside, or contracted away their Fourth Amendment rights.<sup>77</sup> Colleges and universities often require students living in dormitories to sign waivers, but the general belief is that such waivers do not independently determine whether a search was valid.<sup>78</sup> The relevant case law does not focus on the legality or significance of student housing waivers.<sup>79</sup> In *Moore v. Student Affairs Committee of Troy State University*, the Alabama district court decisively held:

The validity of the regulation authorizing search of dormitories thus does not depend on whether a student "waives" his right to Fourth Amendment protection or on whether he has "contracted" it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty.<sup>80</sup>

The court further asserted that "a tax-supported public college may not compel a 'waiver' of [the Fourth Amendment] right as a condition precedent to admission."<sup>81</sup> Therefore, a public college or university may not require students to relinquish their Fourth Amendment protections, and, thus, the contractual relationship between a student and the administration should not be premised upon a constrained, and likely school-compelled, sacrifice of one's right to be free from unreasonable searches and seizures.<sup>82</sup>

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77. See *Moore*, 284 F.Supp. at 729–30; *State v. Hunter*, 831 P.2d 1033, 1035 (Utah Ct.App. 1992).

78. See Joseph M. Smith & John L. Strobe, *The Fourth Amendment: Dormitory Searches in Public Universities*, 97 WEST EDUC. L.R. 985, 987 (1995).

79. *Id.*

80. *Moore*, 284 F. Supp at 729.

81. *Id.*

82. The Fourth Amendment only limits governmental activity, and evidence obtained by a warrantless or nonconsensual search performed by a *private person*, "perhaps by illegal means," is not obligatorily excluded from evidence in a criminal trial. *State v. Burroughs*, 926 S.W.2d 243, 245 (Tenn. 1996). See also *Burdeau v. McDowell*, 256 U.S. 465 (1921) (holding that the Fourth Amendment limits actions of government agents); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981) (considering who or what is a governmental agent or instrument). Thus, searches performed in private college or university dormitories are most likely valid.

Nevertheless, many cases involving the validity of searches of dormitory rooms conducted without a warrant or the consent of a physically present student affirm the disciplinary policies of the college or university and thus uphold the search.<sup>83</sup> The courts' rationales for their rulings vary. Some courts emphasize the relationship or implicit agreements between the student and the school,<sup>84</sup> others stress the right of the school to take affirmative steps to provide appropriate learning environments,<sup>85</sup> and still others focus on the school's privileges in emergency situations.<sup>86</sup>

#### COLLEGE AND UNIVERSITY RIGHTS IN AN 'EMERGENCY' SITUATION

The first justification for upholding college- or university-sanctioned search and seizures relies upon the existence of an "emergency" situation. For example, in *People v. Kelly*, school officials suspected a student of stealing property, and the University master permitted the police to search the student's dormitory room. The student protested his arrest and the search, but the court permitted it. The *Kelly* court first found that the pre-search evidence constituted an adequate foundation for the arrest of the student.<sup>87</sup> Because both the officers and the University master believed the situation was an emergency, the court found that the police officers believed in good faith that the University master possessed authority to enter the student's room.<sup>88</sup> The court categorized the situation as an emergency because "the master might reasonably have concluded that any delay in ascertaining the facts regarding the use of the room would indicate condonation of wrongful acts and would reflect discredit on the school, and therefore the circumstances called for immediate action."<sup>89</sup> Significantly, the court rested its finding upon the goal of preserving the University's reputation. To give full credence to the court's reasoning, the holding is ostensibly contingent upon the good faith of the law enforcement officers as well as the college or university official.<sup>90</sup>

However, the court's discussion of an emergency appears to defer heavily to disciplinary policy and thus is quick to excuse the repudiation of student constitutional protections.<sup>91</sup> The *Kelly* court said, "A dictionary definition of emergency is 'an unforeseen combination of circumstances that calls for immediate action.' Of course, such a situation as that which confronted the master with respect to a student harboring stolen property in the room was an unexpected

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83. See, e.g., *People v. Kelly*, 195 Cal.App. 669 (Cal. Ct. App. 1961); *Moore*, 284 F.Supp. at 725.

84. See *Moore*, 284 F.Supp. at 729.

85. *State v. Hunter*, 831 P.2d 1033, 1036-37 (Utah Ct.App. 1992).

86. *Kelly*, 195 Cal.App.2d at 679-80.

87. *Id.*

88. *Id.*

89. *Id.* at 183-84.

90. *Id.*

91. See *id.* at 183.



or unforeseen combination of circumstances.”<sup>92</sup> This holding raises the question of whether the existence of evidence pointing to student burglary in fact constituted an emergency condition. The court never discussed whether destruction of the evidence was likely or why the officers did not utilize judicial safeguards and procure a warrant. Nevertheless, the court easily found the search reasonable, and, thus, the case loosely construes probable cause and urgent conditions.

SPECIAL RELATIONSHIPS BETWEEN THE STUDENT AND THE COLLEGE OR  
UNIVERSITY

*Moore v. Student Affairs Committee of Troy State University* represents the second justification for college- or university-sanctioned searches and seizures. This justification relies upon the “special relationship” between the college or university and the student’s implicit endorsement of school or police action.<sup>93</sup> In a frequently cited passage, the court stated:

[The school–student relationship] does not depend on either a general theory of the right of privacy or on traditional property concepts. The college does not stand, strictly speaking, *in loco parentis* to its students, nor is their relationship purely contractual in the traditional sense. The relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student. A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a ‘waiver’ of that right as a condition precedent to admission. The college, on the other hand, has an ‘affirmative obligation’ to promulgate and to enforce reasonable regulations . . . if the regulation—or, in the absence of a regulation, the action of the college authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an educational atmosphere, then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students.<sup>94</sup>

In this regard, the *Moore* case furthers the *Kelly* precedent of upholding college and university regulatory conduct. However, the *Moore* court did not attempt to fashion the circumstances as an emergency; the court simply established a presumption in favor of college or university-sanctioned searches.<sup>95</sup>

Courts that affirm this special relationship often point to waivers, housing contracts, or other school policies that establish particular entitlements of the administration. For example, the University of Illinois undergraduate dormitory contract says:

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92. *Id.*

93. *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F.Supp. 725, 729 (M.D.Ala. 1968).

94. *Id.*

95. *Id.*

The Student shall be responsible for maintaining her/his room in a reasonable condition at all times and to correct any abuse called to the Student's attention by University representatives. Room furnishings shall not be removed from student rooms without approval, and public area or lounge furnishings shall not be moved into the Student's room. The Student shall be responsible for all damage to University property in the Student's room during the term of occupancy. The Residence Hall staff reserve the right to enter the Student's room during the academic year, including vacation periods, for routine maintenance or for emergency purposes.<sup>96</sup>

This housing contract is similar to those of other public colleges and universities.<sup>97</sup> Additionally, the contract requires the student to obey University policies outlined in the student handbook and all state laws. Upon refusal to comply with the rules, the University can terminate the contract.<sup>98</sup> These contracts are considerably vague, but they allow nonconsensual and warrantless searches when performed in furtherance of maintenance, health, and safety reasons. Such searches are likely constitutional because colleges and universities are responsible for their students and the students allow the college or university to assume responsibility. As a result, courts should find that such searches are not unreasonable *per se*.

On the other hand, the applicability of such contractual provisions becomes hazier when college or university officials are allowed entry for "emergency purposes" or when they, while acting with authorization, seek police involvement. For example, in *Commonwealth v. Neilson*,<sup>99</sup> a maintenance worker heard a cat in a dormitory.<sup>100</sup> School officials, after giving notice to the students, searched rooms in the dormitory.<sup>101</sup> During the search of one room, officials found marijuana

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96. Undergraduate Residence Halls Contract—Academic Year 2006–2007, University of Illinois, [http://www.housing.uiuc.edu/online/fineprint/current\\_under.pdf](http://www.housing.uiuc.edu/online/fineprint/current_under.pdf) (last visited Apr. 16, 2007).

97. See also Indiana University Residence Hall 2007–08 Contract Terms and Conditions, University of Indiana, [http://www.rps.indiana.edu/documents/2007\\_08RHContract.pdf](http://www.rps.indiana.edu/documents/2007_08RHContract.pdf) (last visited Jan. 25, 2007) (noting a "Room Entry" provision, "IU reserves the right to enter your unit according to the procedures set forth in Your Neighborhood from A to Z at <http://www.rps.indiana.edu/> for law enforcement purposes, as well as for custodial services, safety inspections, unit repair and maintenance, pest control, and emergency situations. In general, in non-law enforcement and non-emergency situations, twenty-four (24) hour notice will be given prior to entry"); Guide to Residence Living—Housing Contract Information, Florida State University, <http://www.housing.fsu.edu/housing/guide06/contract.html> (stating that "[a]uthorized university personnel may enter student rooms for regular health and safety inspections and for maintenance purposes. Staff may also enter rooms when a reasonable belief exists that the room is being used for an illegal purpose or for a purpose that would interfere with discipline and/or personal safety").

98. Undergraduate Residence Halls Contract—Academic Year 2006–2007, University of Illinois, [http://www.housing.uiuc.edu/online/fineprint/current\\_under.pdf](http://www.housing.uiuc.edu/online/fineprint/current_under.pdf) (last visited May 15, 2007).

99. 666 N.E. 2d 984 (Mass. 1996).

100. *Id.*

101. *Id.*

plants in the closet and contacted campus police.<sup>102</sup> Police entered the room without a warrant and, shortly thereafter, removed evidence without the absentee student's consent.<sup>103</sup> The Massachusetts Supreme Court found the first search conducted by school officials valid because the student "consented to reasonable searches to enforce the college's health and safety regulations when he signed the residence contract."<sup>104</sup> However, the police entered "without a warrant, consent, or exigent circumstances," and their subsequent search was thus unreasonable and violated the student's Fourth Amendment rights.<sup>105</sup>

This suggests that a student's consent to a search by a college or university official in furtherance of health and safety concerns does not create consent for a subsequent search by law enforcement, even if illegal material was in plain view of the school officials. The court held that when police enter a room for the sole purpose of seizing contraband, their objective is not protected.<sup>106</sup> A warrant is required in such a situation.<sup>107</sup> The dicta in *Neilson* indicate that college and university housing officials may conduct warrantless and nonconsensual searches for health and safety purposes consistent with the terms of a housing contract, but law enforcement officials cannot engage in a subsequent search for illicit materials. As a result, if a college or university suspects illegal activity, it could presumably conduct a valid search and seizure for health and safety purposes within the terms of the housing contract. However, if illegal evidence emerges, the college or university should contact police, who must obtain a warrant or student consent before searching the room, absent an emergency.

Furthermore, in *People v. Kelly*,<sup>108</sup> the California appellate court found that a student's use of his dormitory room was conditional upon his acceptance of the school's housing regulations—specifically that it was "conditional upon his accepting the responsibility of practicing the school's traditional principle of personal honor and upon his agreeing to abide by the house rules."<sup>109</sup> The court examined the University's rules regarding general student conduct, not rules specifically involving the entry and search of dormitory rooms. The court concluded that "[i]t is implicit in the rules that the appellant had agreed that the master, in the performance of his duties in upholding the high disciplinary standards and integrity of the school, might enter the room."<sup>110</sup> By pointing to the implied authority of administrators, the court, in effect, rewrote the housing contract to enlarge the power of school officials.<sup>111</sup> By such reasoning, the college or university acquires vast freedom to perform dormitory searches when it

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102. *Id.*

103. *Id.*

104. *Id.* at 987.

105. *Id.*

106. *Id.*

107. *Id.*

108. 195 Cal. App. 2d 669 (Cal. Ct. App. 1961).

109. *Id.* at 677.

110. *Id.* at 677–78.

111. *See id.* at 678.

suspects, even vaguely, that a student violated the rules or sacrificed the reputation of the institution.

However, in *People v. Superior Court*,<sup>112</sup> the most recent case addressing the search of a public university student's dormitory room, a California appellate court subtly overruled *Kelly*. In the case, a Santa Clara University campus safety service officer observed the defendant smoking marijuana.<sup>113</sup> After the officer approached him, the student admitted using marijuana but claimed the use was for legal medicinal purposes.<sup>114</sup> The student then took the officer into his dormitory room and showed him a small amount of marijuana and marijuana paraphernalia.<sup>115</sup> The officer asked if this was all that he had, and the student said that there was no more.<sup>116</sup> However, the officer then checked the student's drawers and closet where he found a cooler filled with plastic bags containing marijuana and \$18,000 in cash.<sup>117</sup> Two Santa Clara police department officers then arrived, continued searching the room, and found more marijuana.<sup>118</sup> The student moved to suppress any physical evidence, statements, or observations that were obtained as a result of any officer's, including campus security's, entry into his dormitory room because such evidence was the product of a warrantless and unreasonable search and seizure.<sup>119</sup> The court ultimately admitted the evidence under the inevitable discovery doctrine,<sup>120</sup> but significantly noted that the dormitory room was protected under the Fourth Amendment.<sup>121</sup> The court also said that the housing contract did not waive the student's constitutional rights,<sup>122</sup> and the safety officer did not have authority to consent to the search of the student's room.<sup>123</sup>

The court first pointed to the California Legislature's enactment of § 626.11,<sup>124</sup> which "gave express recognition to the constitutional rights of college students, including the right of privacy and the right to be free from unreasonable searches

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112. 49 Cal.Rptr.3d 831 (6th Cir. 2006).

113. *Id.* at 836.

114. *Id.* at 837.

115. *Id.*

116. *Id.*

117. *Id.*

118. *People v. Superior Court*, 49 Cal. Rptr. 3d 831, 837 (2006).

119. *Id.* at 835.

120. *Id.* at 857. The inevitable discovery doctrine states:

[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. *Nix v. Williams*, 467 U.S. 431, 447 (1984).

121. *Id.* at 849.

122. *Id.* at 849–50.

123. *Id.* at 850.

124. CAL. EDUC. CODE § 626.11 (1975).

and seizures.”<sup>125</sup> However, it then questioned whether “*Kelly’s* reasoning—including its seemingly antiquated view that the college student had impliedly agreed that the house master could search the dorm room to uphold the disciplinary standards and integrity of the institution—would pass constitutional muster today.”<sup>126</sup> Thus, the most contemporary case law on dormitory search and seizure moves away from a broad understanding of college and university administrative and disciplinary powers to a position much more sympathetic to student rights. As a result of this emphasis on constitutional protections, it is reasonable to assume courts will be less likely to expand the language of student-housing contracts and increase the authority of college and university administrators. Under *People v. Superior Court*, courts should not ‘read in’ what is implied in a housing contract but should instead focus on the plain language of the agreement.

#### THE RIGHT TO MAINTAIN AN APPROPRIATE LEARNING ENVIRONMENT

The third justification for college- or university-sanctioned dormitory searches corresponds with the other two but differs by heightening the responsibility of a college or university to maintain a safe and appropriate learning environment. According to this justification, the school’s duty to promulgate and enforce reasonable regulations allows it to enact rules and regulations, even those which may abridge a student’s rights, in order to preserve the welfare of the community as a whole.<sup>127</sup> As such, warrantless and nonconsensual searches and seizures may be permissible if they serve to sustain a suitable educational setting.<sup>128</sup> What constitutes a suitable educational setting or safe learning environment, however, is ambiguous. Also, it is difficult to distinguish between a violation of constitutional rights and an acceptable reduction in privileges for the good of the community.

The United States Supreme Court has noted the interests of colleges and universities in regulating student conduct: “This Court has long recognized ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’”<sup>129</sup> Following the Supreme Court’s line of reasoning, the Utah Court of Appeals pointed to this affirmation of school authority in *State v. Hunter*.<sup>130</sup> The *Hunter* court concluded that:

[Students] require and are entitled to an atmosphere that is conducive to educational pursuits. In a dormitory situation, it is the university that accepts the responsibility of providing this atmosphere. Thus, it is incumbent upon the university to take whatever reasonable measures are necessary to provide a clean, safe, well-disciplined environment.<sup>131</sup>

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125. *People v. Superior Court*, 49 Cal. Rptr. 3d 831, 852 (2006).

126. *Id.* at 852–53.

127. *See, e.g., State v. Hunter*, 831 P.2d 1033 (Utah. App. 1992)

128. *Id.*

129. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

130. *Hunter*, 831 P.2d at 1036.

131. *Id.*

The court went on to suggest that by signing the housing contract the student “agreed to the university’s right of reasonable inspection and waived any Fourth Amendment objections to the university’s exercise of that right.”<sup>132</sup> Nevertheless, the court suggested its ruling could be based on the school’s general power to take affirmative measures that uphold a favorable learning environment.<sup>133</sup> Such a ruling, in the *Hunter* court’s eyes, adhered to the Supreme Court’s recognition of a college or university official’s precarious role in preserving constitutional safeguards while ensuring an appropriate culture of learning.<sup>134</sup>

Although *State v. Hunter* permits infringement of student freedom for the sake of upholding an ideal learning environment, this case differs factually from most other dormitory search cases. The fact that school officials did not take “action at the behest of or as part of a joint investigation with the police” distinguishes *Hunter*.<sup>135</sup> Officials received multiple reports of vandalism in the dormitory, and the Director of Housing and Food Services accordingly conducted room-to-room searches without law enforcement or campus-police involvement.<sup>136</sup> A campus police officer was present during the search, but only to “provid[e] assistance in the event that [the Director] discovered any problems that he was not able to handle on his own.”<sup>137</sup> While it is common for college or university administrators to attempt to delegate their powers to police, this was not the case in *Hunter*.<sup>138</sup> The case is factually distinct from circumstances in which a college or university readily involves law enforcement in the search and seizure. Nevertheless, *Hunter* epitomizes the importance of college and university officials’ role in preserving a healthy and safe learning environment.

Despite the Supreme Court’s affirmation of the need for colleges and universities to maintain a fit culture of learning, most courts deny that college and university officials possess boundless discretion when it comes to performing dormitory searches and seizures. In *Smyth v. Lubbers*,<sup>139</sup> two students sued school officials who were responsible for a nonconsensual and unwarranted search of their dormitory room that led to their expulsion based on marijuana possession.<sup>140</sup> The students asked the court to hold the search unconstitutional and to enjoin their expulsion.<sup>141</sup> The Michigan district court agreed with the students and reasoned that a dormitory room, for practical purposes, was a student’s home that should be accorded full constitutional protections.<sup>142</sup> Accordingly, students possess a reasonable expectation of privacy akin to that which an adult expects in his

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132. *Id.* at 1037.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1035.

138. *Id.* at 1037.

139. 398 F.Supp 777 (W.D. Mich. 1975).

140. *Id.* at 781.

141. *Id.*

142. *Id.* at 786.

residence.<sup>143</sup> The court specifically said that colleges and universities' need for order and discipline did not diminish the students' reasonable expectation of privacy.<sup>144</sup> The court further assumed the converse position of *Hunter*:

This Court rejects the theory that College officials acting pursuant to regulations may infringe on the outer limits of an adult's constitutional rights . . . . The basic question is the extent of the College's supervisory power in relation to the Fourth Amendment. Conclusory statements about the College's need for order and discipline are not enough. There is no challenge to the substantive drug regulation; the issue is the means of enforcement. There are a variety of means, but each actually used must be consistent with constitutional limitations. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."<sup>145</sup>

Noting that the Fourth Amendment was directed at situations exactly like the one at issue, the *Smyth* court stressed the importance of acquiring a warrant and refused to exempt colleges and universities from the prudence inherent in such a requirement.<sup>146</sup>

Furthermore, in *Piazzola v. Watkins*,<sup>147</sup> the Fifth Circuit found that the Fourth Amendment unconditionally extends to students residing in dormitories.<sup>148</sup> The court noted that while the school "retains broad supervisory powers," its rules should never serve to "give consent to a search for evidence for the primary purpose of a criminal prosecution. Otherwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room."<sup>149</sup> The court went on to hold that "[c]learly the University had no authority to consent to or join in a police search for evidence of a crime."<sup>150</sup> Thus, the Fifth Circuit agreed with the *Smyth* court that a college or university's interest in maintaining a safe, productive, and healthy learning environment does not overcome a student's Fourth Amendment rights.

The bulk of cases require colleges and universities to follow standard search procedures including securing a warrant based on adequate probable cause. The courts, while acknowledging the distinguishable characteristics of a college or university community, tend to err on the side of upholding constitutional rights as opposed to enlarging the authority of college and university administrators. However, courts assume a wide variety of postures on the permissibility of dormitory searches and thereby fail to reach total agreement.

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143. *Id.*

144. *Id.* at 789.

145. *Id.* (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511(1969)).

146. *Id.* at 790.

147. 442 F.2d 284, 289 (5th Cir. 1971).

148. *Id.*

149. *Id.*

150. *Id.* at 290.

The remainder of this note addresses whether uniformity in this field is possible, or even desirable, and suggests what public colleges and universities might do in order to ensure an orderly learning environment without compromising the constitutional rights of their students. Because a great deal of search and seizure jurisprudence focuses on expectations of privacy and notions of reasonableness, the note especially considers what students believe about their own privacy.

#### PROCEEDING TOWARDS AGREEMENT

Students, police, and college and university administrators lack a judicial consensus of what constitutes valid warrantless entries and searches under the Fourth Amendment. When courts analyze the constitutionality of searches based on their reasonableness or accordance with popular understandings of privacy, the ambiguity increases. Courts, including the United States Supreme Court in *Georgia v. Randolph*,<sup>151</sup> recognize that one of the hallmarks of the Fourth Amendment is its reasonableness requirement.<sup>152</sup> Social norms and expectations necessarily contribute to any assessment of reasonableness.<sup>153</sup> Accordingly, the Supreme Court stated:

[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.<sup>154</sup>

Therefore particular social customs and habits create an understanding of reasonableness based upon the existence of particular facts and situations.

Because Fourth Amendment jurisprudence involving searches of college and university dormitories lacks significant common agreement, the process of determining reasonableness appears inevitably subjective due to a lack of social consensus of acceptable invasions of privacy. To avoid the imposition of wholly arbitrary rulings, courts should strive to establish a compelling and widely applicable precedent that will not only simplify search and seizure cases but also will produce, as well as be the product of, a popular understanding of a student's reasonable expectation of privacy. Uniformity in college and university law is attractive because it would facilitate a more equitable application of the reasonableness standard.

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151. 126 S.Ct. 1515 (2006).

152. See *United States v. Knights*, 534 U.S. 112, 118 (2001).

153. See *id.* at 112–13.

154. *Randolph*, 126 S.Ct. at 1522–23.



Some critics, however, believe that uniformity in Fourth Amendment jurisprudence burdens the courts. One writer points out:

The social gains from seizing a murder weapon, for example, far outweigh those from seizing a few ounces of marijuana. One would think, then—given the balance—that the Fourth Amendment’s standards would be easier to satisfy in the murder case. But this is not so: the standard is identical regardless of the crime.<sup>155</sup>

The author argues that the law is “transsubstantive” and thus “encourages the Court to condone for all investigations tactics necessary only for some.”<sup>156</sup> In other words, acceptable invasions of privacy should vary according to the seriousness of the crime and, perhaps, the necessity of the investigative or evidence-gathering technique. In regard to dormitory searches, it would follow that the acceptability of police and administrative conduct should depend on the severity of the suspected crime, as well as the necessity of immediate action. However, such changeability and indeterminacy bestows judges with excessive authority to decide the applicability of the Constitution. This not only detracts from the legitimacy of the judiciary’s decisions, but it also prevents colleges and universities from creating consistent search policies and ensuring the protection of students’ Fourth Amendment rights.

#### USING *RANDOLPH* AS A MEANS OF REACHING UNIFORMITY IN DORMITORY SEARCH JURISPRUDENCE

Fourth Amendment interpretation in light of the particularities of colleges and universities remains vague. *Georgia v. Randolph*, decided by the Supreme Court in 2006, provides an adequate means of simplifying the issues presented by this constitutional question. *Randolph* advocates three tangible rules. First, “if a potential defendant with self-interest in objecting [to a search] is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.”<sup>157</sup> In other words, if two parties exercising authority over the premises are both present and one consents while the other, the likely target of the search, refuses, the refusal, not the consent, “wins.” Second, police do not have to “take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, . . . [since such action] would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field.”<sup>158</sup> Third, as the *Matlock* rule states: “a solitary co-habitant may sometimes consent to a search of shared premises” and “the reasonableness of such a search is in significant part a function of commonly held understanding about the authority

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155. Note, “*Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*,” 119 HARV. L.REV. 2530, 2537 (2006).

156. *Id.* at 2538.

157. *Randolph*, 126 S.Ct. at 1527. See *supra* p. 105-06.

158. *Randolph*, 126 S.Ct. at 1527–28.

that co-inhabitants may exercise in ways that affect each other's interests."<sup>159</sup>

At first glance, these rules alone do not appear to have a fundamental bearing on the constitutionality of dormitory searches, but *Randolph* provides an ideal paradigm for viewing such cases. If police want to search a student's dormitory room without a warrant, the college or university administration functions as the relevant third party, whose authority is uncertain, and notions of reasonableness govern the legality of the search. The relevant considerations include the student's physical presence and ability to object, the third party's authority over the premises, and the justifications for the actions and beliefs of the police. Under the *Randolph* paradigm, courts should not ask whether a dormitory room is a constitutionally protected space;<sup>160</sup> rather they should ask whether a particular search is in accord with existing expectations of privacy. In *Jones v. United States*,<sup>161</sup> Justice Frankfurter, speaking for the majority, clearly stated that the Fourth Amendment does not protect "arcane property interests," but protects the right of privacy.<sup>162</sup> In *Jones*, the Supreme Court upheld the right of an apartment guest to challenge an unlawful search and seizure.<sup>163</sup> The Court reasoned that the petitioner's legitimate presence in the apartment gave him a reasonable expectation of privacy.<sup>164</sup> Therefore, the emphasis on privacy, as opposed to property, expands the scope of Fourth Amendment protections. This expansion benefits the student residents of college and university dormitories. A student's right to be free from searches and seizures does not derive from his or her ownership or leasing of premises, but it proceeds from his or her legitimate expectation of privacy in a particular setting.

The reasonableness of a student's expectation of privacy depends not only on the setting but on the worth or significance of the privacy right. Accordingly, legal scholars repeatedly conclude that "what privacy legitimately protects will vary."<sup>165</sup> In this light, college and university administrators will likely argue that the expectation of privacy is necessarily reduced in a dormitory setting.<sup>166</sup> The student, however, will argue that his or her privacy right remains complete while living on campus. If courts accept these arguments at face value, the college or university mandate to maintain a favorable learning environment automatically trumps a student's desire for freedom from intrusion. If the analysis goes only far enough to consider safety considerations without a more thorough reflection on what is at the heart of the Fourth Amendment, then what constitutes a reasonable search is inevitably more inclusive. Thus, because society values safety as well as opportunities for education, college and university campuses should reduce a

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159. *Id.* at 1521.

160. *See Katz v. United States*, 389 U.S. 347, 361 (1967).

161. 362 U.S. 257 (1960).

162. *Id.* at 261.

163. *Id.* at 262.

164. *Id.* at 266.

165. *See FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM* 113 (1992).

166. *See, e.g., State v. Hunter*, 831 P.2d 1033, 1037 (Utah Ct. App. 1992); *People v. Superior Court*, 49 Cal. Rptr. 3d at 848-49; *People v. Kelly*, 195 Cal.App.2d 669, 677 (Cal. Ct. App. 1961).

student's zone of privacy. However, this reduction appears reasonable only if society as a whole values the specific goals of colleges and universities over a desire for individual autonomy.

The social value of individual autonomy, including student autonomy, ultimately depends on the function of the autonomy, and, in this case, privacy. If privacy serves only to allow a student to conduct illegal activities or to prevent him or her from being captured by police, then the social value of privacy is low, even though the criminal student highly values it. However, privacy's purpose does not include concealment and suppression of illegality. For example, "one important function of privacy is to help maintain the integrity of different spheres of life. Privacy helps maintain both the integrity of intimate spheres as against more public spheres and the integrity of various public spheres in relation to one another."<sup>167</sup> Social organization fundamentally depends on "practices that presumptively preclude access" to other individuals' ideas, property, and living environments,<sup>168</sup> which are particularly apt in college and university situations. To conceptualize the idea of property, Charles Reich suggested that ownership forms "a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his action, and show his authority. Within, he is master, and the state must explain and justify any interference."<sup>169</sup> Radhika Rao, quoting this passage, said that Reich's explanation of property could extend to the right of privacy.<sup>170</sup> She contends that privacy connotes a decision-making power that allows its holder to navigate "the fragile boundary between individual autonomy and government authority."<sup>171</sup>

While many people value the right to privacy because it conveys a sense of autonomy and self-sovereignty against government intervention, privacy, in and of itself, is valuable because it empowers the individual to make personal, self-determining decisions. Because *Randolph v. Georgia* exposes the importance of carefully considering what is 'reasonable,' or widely accepted by most people, the implications of social customs and norms are significant. The subsequent section will examine various ways individuals understand their privacy and right to be free from unreasonable searches.

#### WHAT REALLY IS REASONABLE?

According to the Supreme Court, reasonableness, "the touchstone of the Fourth Amendment," requires "assessing, on the one hand, the degree to which it intrudes on an individual's privacy and, on the other, the degree to which it is needed for legitimate governmental interests."<sup>172</sup> *United States v. Knights* involved a drug

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167. SCHOEMAN, *supra* note 165, at 157.

168. *Id.*

169. Charles Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

170. Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359, 421-26 (2000).

171. *Id.* at 426.

172. *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v.*

offender released on the condition that he submit to a search at any time with or without a warrant, arrest, or other reasonable cause.<sup>173</sup> A law enforcement agent accordingly searched the respondent's apartment based on reasonable suspicion and found incriminating materials later used to indict respondent for conspiracy to commit arson, possession of an unregistered destructive device, and felony possession of ammunition.<sup>174</sup> The trial court, which the Ninth Circuit affirmed, suppressed this evidence because the judge believed that the search was conducted for investigatory purposes, as opposed to probationary purposes.<sup>175</sup> Since nothing in respondent's probation agreement limited searches to those with probationary purposes, the Supreme Court granted certiorari to decide whether the Fourth Amendment itself imposed a limitation on the types of searches that could be performed.<sup>176</sup> The Court concluded that the search was "reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance."<sup>177</sup>

The Supreme Court explained probation as a form of criminal punishment which necessarily "curtails an offender's freedoms" such that he does not enjoy the same liberties as the general citizenry.<sup>178</sup> In other words, *Knights'* criminal status validated the warrantless search of his apartment. This argument suggested that criminal standing is a unique circumstance, unlike any other categorization, that allows the state to deprive an individual of specific freedoms.<sup>179</sup> The Supreme Court said that *Knights'* probationary status diminished his reasonable expectation of privacy because anyone on probation, or even previously punished through the criminal law, will more likely engage in criminal conduct than an ordinary member of the community.<sup>180</sup> Significantly, any other categorization, such as that of being a student living in a dormitory, would not impute such restrictions on liberty. The relevant circumstance that weighed in favor of allowing the warrantless search in *Knights* was the respondent's own past criminal actions that placed him on probation. Accordingly, the government never took affirmative steps to strip him of his full constitutional rights until he agreed to a probation agreement that purposefully reduced his expectation of privacy. Thus, the reasonableness test hinged on what the respondent himself did to cause a decreased realm of privacy and not on the authority of any other institution, including the government, to strip him of Fourth Amendment protections.

*Knights* applies to dormitory searches because it suggests that the power to reduce privacy rights does not stem from the broad power of an entity, whether it

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Houghton, 526 U.S. 295, 300 (1999)).

173. *Id.* at 114.

174. *Id.* at 116.

175. *Id.*

176. *Id.* at 116–17.

177. *Id.* at 118 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

178. *Id.* at 119.

179. *Id.*

180. *Id.* at 119–20, 121.

be a college, university, or the government, to establish rules that are more conducive to maintaining order and protecting the public. Instead, courts allow privacy infringements because of something that an individual did to acquire a state-sanctioned criminal status. The Fourth Amendment cannot be minimized merely because an authority believes such action would be reasonable. The reasonableness balancing test rather underscores a strong presumption in favor of an individual's reasonable expectation of privacy that cannot be haphazardly expanded and contracted.

When colleges and universities establish policies that affect students' expectations of privacy and then inform students of these policies, such notification does not automatically sanction their validity. For example, "if the Government announced that all telephone lines would henceforth be tapped, it is apparent that, nevertheless, the public would not lose its expectation of privacy in using the telephone."<sup>181</sup> Analogously, if a college or university administrator announced to students that he would authorize a police search of their dormitory rooms, the very existence of the announcement does not make the searches legitimate. The prior warning does not make the searches, even if mandatory for all students living in the dormitories, any more reasonable.<sup>182</sup> The Fourth Amendment serves to prevent blanket invasions of the privacy of individuals,<sup>183</sup> and, thus, some degree of specificity is desired when performing searches. An announced, widespread campus search contradicts the very basis of the Fourth Amendment and, as such, cannot be regarded as reasonable or circumstantially valid. Thus, all-encompassing, broadcast, and indiscriminate searches are not reasonable *per se*, and the existence of such factors rather point to unconstitutionality.

Furthermore, existing public policies show that the reasonableness of searches often depends on law enforcement officials possessing a concrete basis for subjecting a particular person to a search. For instance, the Supreme Court has long held that police may not stop and search every individual present at a certain location because of a broad suspicion that someone may possess illegal materials.<sup>184</sup> Additionally, even in regard to border patrols, searches performed by moving patrols without tangible evidence of wrongdoing are unreasonable.<sup>185</sup> Indeed in *United States v. Knights*, the Supreme Court noted that the existence of a probation condition authorizing law enforcement officials to perform warrantless searches did not completely eliminate the individual's reasonable expectation of privacy "without any individualized suspicion" on the part of the law enforcement.<sup>186</sup> In other words, the Fourth Amendment requires some distinct

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181. *Jones v. Latexo Indep. Sch. Dist.*, 499 F.Supp. 223, 234 (D. Tex. 1980).

182. *See id.*

183. *See David v. Mississippi.*, 394 U.S. 721, 726 (1969).

184. *See Carroll v. United States*, 267 U.S. 132, 153-54 (1925).

185. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The Court did allow brief stops of all vehicles passing through border checkpoints. This allowance was only because the Court found the need compelling, the intrusion minimal, and no other realistic way of inspection. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1975).

186. *See United States v. Knights*, 534 U.S. 112, 120 n.6 (2001).

form of suspicion for a warrantless and nonconsensual search to be valid, even if the subject of the search is on probation. The emphasis on material suspicion informs the principle that warrantless searches are unreasonable *per se*, absent few well recognized exceptions. Thus, for a search to be deemed reasonable it must have an adequate foundation; law enforcement's suspicion must be reasonable and adequate if the Fourth Amendment constitutes a substantive safeguard on privacy rights.

In light of these considerations, two express guidelines for colleges and universities to ensure the preservation of students' Fourth Amendment rights while accounting for the unique obligations and conditions of even a large, multifaceted learning institution should be implemented. First, college and university officials may perform dormitory examinations and searches explicitly for maintenance and safety. The critical factor in this recommendation is that the un-consented entry to the room be perceptibly premised on a matter involving room upkeep, repair, and avoidance of physical risks and hazards. For example, maintenance workers may enter in order to remove a forbidden animal or other objectionable property such as candles and electronic appliances or to repair broken window screens or other school property. Additionally, college and university officials possess the right to inspect rooms for violations of institutional rules designed to ensure adequate physical safety. This right of entry, however, does not translate into an ability of the college or university to consent to police searches on the part of the student.

College and university administrators enjoy limited access to students' dormitory rooms because such access does not immediately challenge students' reasonable expectations of privacy. A student living on college or university property likely assumes that the housing conditions will be in good repair and adequately suited to safety and maintenance needs.<sup>187</sup> This expectation parallels what an ordinary tenant would expect from a landlord: the assurance of safe conditions.<sup>188</sup> Due to the large number of student tenants and the relatively small spaces allotted to each, the need for occasional safety inspections as well as regular maintenance increases. Furthermore, the prospects of tort liability are high for colleges and universities.<sup>189</sup> Such legal responsibilities further the argument for

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187. See *Bell v. N.Y. State Dormitory Auth.*, 584 N.Y.S.2d 3 (N.Y. Sup. Ct. 1992). See also Kelly W. Bhirdo, Note, *The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students*, 16 J.C. & U.L. 119, 123-30 (1989).

188. "The bare minimum standard for an implied warranty of habitability should require a landlord to provide a reasonably safe premises at the inception of a lease, and to exercise reasonable care to repair dangerous defective conditions *upon notice of their existence by the tenant.*" *Dulin v. Sowell*, 919 So.2d 1010, 1012 (Miss. App. Ct. 2005) (quoting, *O'Cain v. Harvey Freeman and Sons, Inc.*, 603 So.2d 824, 833 (Miss. 1991)).

189. See *Grover v. San Mateo Junior Coll.* Dist. 303 P.2d 602 (Cal. App. 1956) (involving a junior college student injured in airplane crash in connection with course in aeronautics); *Nero v. Kansas State Univ.*, 861 P.2d 768 (Kan. 1993) (holding a university liable for a student's sexual assault); *Lloyd v. Alpha Phi Alpha Fraternity*, 1999 WL 47153 (N.D.N.Y. 1999) (holding university responsible for fraternity hazing); *Waugh v. Univ. of Hawaii*, 621 P.2d 957 (Haw. Ct. App. 1980) (holding the university liable for damage to professor's research materials); *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105 (La. Ct. App. 2d Cir. 1999) (holding a state university liable for hazing of student); *Knoll v. Bd. of Regents of Univ. of Nebraska*, 601

allowing nonconsensual searches, inspections, or other entries of dormitory rooms. Constitutional concerns limit the maintenance privilege so that college and university officials may not veil disciplinary or otherwise punitive reasons for entry by incorrectly identifying its true reasons as “health and safety concerns.” Therefore, *Piazzola v. Watkins* accurately likened a dormitory room to an apartment or hotel room and said that “[a]s in most rental situations, the lessor, [the college or university], reserved the right to check the room for damages, wear and unauthorized appliances. Such right of the lessor, however, does not mean [the student] was not entitled to have a ‘reasonable expectation of freedom from governmental intrusion.’”<sup>190</sup> Accordingly, the appropriate test for college and university officers determining whether to proceed with a nonconsensual search of a room mimics that of a hotel clerk or apartment landlord while considering the uniqueness of a college or university environment. The relevant questions involve whether the planned entry truly functions to correct maintenance or safety problems and if such access would generally be accepted in other rental situations.

Stemming from this limited allowance, the second guideline maintains that if a college or university official uncovers, or even suspects, illegal or otherwise incriminating material in the dormitory room, the college or university does *not* have the authority to invoke law enforcement to perform their own search to seize contraband. The college or university should not waive the student’s ability to refuse the search, nor should it input its consent in the place of the student. Courts emphasize that voluntary consent must be proven by clear and positive evidence.<sup>191</sup> Moreover, they traditionally agree that if doubt surrounds the validity of a warrantless search, officers should resolve such doubt in favor of the petitioner whose property was searched.<sup>192</sup> As such, courts should accept student objections to warrantless searches and deny the notion that colleges and universities have the capacity to consent to a search of the student’s property and dormitory room. Such deference holds college and university officials as well as law enforcement officers accountable for their actions while sustaining constitutional safeguards. Nothing in a college or university’s broad supervisory powers should be construed to give consent to a search whose primary purpose is a criminal investigation.

College and university officials who suspect the existence of or even come across criminal contraband should inform the proper police authorities, who then should use the college or university official’s testimony to obtain a lawful search warrant. To do otherwise, especially over the student’s explicit objection, would epitomize blunt disregard for the Fourth Amendment’s protections. As repeatedly emphasized by the Supreme Court, “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable

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N.W.2d 757, (Neb. 1999) (holding that the university could have foreseen student fraternity hazing); *Heminway v. State University of New York*, 665 N.Y.S.2d 493 (N.Y. Sup. Ct. 1997) (saying that a student injured while sledding on school property could sue the state university).

190. *Piazzola v. Watkins*, 442 F.2d 284, 288 (5th Cir. 1971) (quoting *Commonwealth v. McCloskey*, 272 A.2d 271, 273 (1970)).

191. *United States v. Smith*, 308 F.2d 657, 663 (2d Cir. 1962).

192. *Miller v. State*, 13 So.2d 21, 25 (Fla. 1962).

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under the Fourth Amendment.”<sup>193</sup> Failing to validly secure a warrant “bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the search, [which is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.”<sup>194</sup> Colleges and universities should affirm the importance of obeying judicial mandates, particularly in acquiring magistrate approval of a search, because it prevents an over-expansion of their supervisory and authoritative powers.

#### CONCLUSION

If public colleges and universities only allow warrantless searches consistent with regulatory maintenance, extreme emergency conditions, or explicit student consent, then they will likely maintain a favorable learning environment while complying with Fourth Amendment imperatives. Courts should not construe the Constitution to safeguard the reasonable privacy rights of all citizens except students. While students may sign housing contracts, these contracts cannot, and should not, expect students to waive their constitutional entitlement to privacy. Search and seizure jurisprudence is reconcilable with the needs of college and university security. A legitimate judicial warrant facilitates an effective and lawful police search even in a college or university setting, without intruding upon the reasonable expectation of privacy embodied in the Fourth Amendment.

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193. *Katz v. United States*, 389 U.S. 347, 357 (1967).

194. *Id.* at 358.





# HARSH REALITY: THE PRIOR RESTRAINT DOCTRINE AND THE FREE SPEECH RIGHTS OF EMPLOYEES OF PUBLIC COLLEGES AND UNIVERSITIES

TIMOTHY M. KEEGAN\*

## INTRODUCTION

Our nation's public colleges and universities are no strangers to First Amendment issues.<sup>1</sup> While continuing to emphasize the importance of free speech rights in academic settings,<sup>2</sup> United States courts have used two different standards for assessing free speech claims at public colleges and universities; one standard applies to students while a different standard applies to faculty.<sup>3</sup> The courts accord public college and university students the same First Amendment free speech rights as those of any other public citizen.<sup>4</sup> With respect to alleged violations of the free speech rights of public college and university faculty, however, the courts have applied the same standard that is applied to other government employees.<sup>5</sup>

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1. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that a professor had a cause of action against his college for the non-renewal of his contract when there was a question of fact as to whether the professor's right to free speech was violated); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (holding that New York statutory provisions making treasonable or seditious words or acts grounds for removal from state employment were in violation of the First Amendment); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (holding state Attorney General's questioning of a college professor pursuant to authorization of state Legislature concerning the content of professor's lectures and the subsequent contempt conviction of the professor for refusal to answer was an invasion of the professor's liberties in the areas of academic freedom and political expression).

2. "The First Amendment itself, of course, makes no mention of academic freedom. But in *Keyishian*, the Supreme Court not only characterized academic freedom as 'a special concern of the First Amendment;' it also implied that it is one of the 'constitutional freedom[s].'" Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 35-36 (2002) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

3. See, e.g., *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004). See *infra* Parts I, III.

4. See *Healy v. James*, 408 U.S. 169, 187-88 (1972) (holding a public college or university, acting as instrumentality of the state, "may not restrict speech or association simply because it finds the views expressed by any [student] group to be abhorrent"); *Crue v. Aiken*, 137 F. Supp. 2d 1076 (C.D. Ill. 2001).

5. See *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996) (holding that the balancing test derived from *Pickering v. Board of Education* applied to a public university professor's in-class speech); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004) (holding that the balancing test derived from *NTEU* applied to prior restraint on speech of public university

Depending on the nature of the action taken by a public college or university against a faculty member for troublesome speech, one of two balancing tests will apply. If the action is retaliatory in nature and aimed at a specific instance of speech, the courts will apply the classic balancing test set forth in *Pickering v. Board of Education*<sup>6</sup> and *Connick v. Myers*.<sup>7</sup> When, however, the action taken by the college or university creates a prior restraint on the free speech rights of college and university employees, the courts will apply the more demanding balancing test set forth in *United States v. National Treasury Employees Union (NTEU)*.<sup>8</sup>

This note will examine the two different standards that can apply in a case of an alleged free speech violation of a public college or university employee in the context of the Seventh Circuit case of *Crue v. Aiken*.<sup>9</sup> Part I of this note will examine, in relative detail, the facts underlying *Crue*. Part II will set forth the two standards applied to free speech restrictions imposed by the government on its employees. Subsection A will focus on the traditional standard balancing test applied by the courts to cases in which an alleged free speech violation has occurred in the context of government employment. The primary focus of this part will be a brief examination of the facts underlying the two seminal cases that define the balancing test. Subsection B will be devoted to an examination of the modified balancing test that courts have recently applied in cases in which an alleged prior restraint of free speech has occurred in the context of government employment. In so doing, this subsection will briefly set forth the origins of the prior restraint doctrine and then show how that doctrine supplements the *Pickering/Connick* test in the *NTEU* case and its progeny to create a modified balancing test applicable in circumstances not originally contemplated by *Pickering*. Part III will then revisit the facts of *Crue* illustrating the contrast in the

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professors). At least one author has argued that “[t]he general public employee speech rules provide no methodical way to incorporate academic freedom analysis, professors are not employees of the university in the traditional sense . . . and the ‘public concern’ requirement produces questionable results when applied to teaching choices and the intramural speech of professors.” Alisa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search For a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 965 (2001).

6. 391 U.S. 563 (1968) (holding that in a case of an alleged violation of government employee speech, the court should “arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”) See *infra* Part II.A, for a discussion of *Pickering*.

7. 461 U.S. 138 (1983) (elaborating on the test in *Pickering* holding that “[w]hether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement.”) See *infra* Part II.A, for a discussion of *Connick*.

8. 513 U.S. 454, 468 (1995) (holding that when the government’s action constitutes a prior restraint on the free speech of public employees such that it “chills potential speech before it happens,” the government’s burden is greater than in the case of a *post hoc* disciplinary action as in *Pickering*. In the case of a prior restraint on speech in the context of government employment, “[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.”) *Id.* (citing *Pickering*, 391 U.S. 571). See *infra* Part II.B.

9. 370 F.3d 668 (7th Cir. 2004).

two approaches. Finally, Part IV will conclude by emphasizing the potential harshness of the *NTEU* standard in the context of public college and university employment in which employees have many opportunities to engage in constitutionally protected free speech. This part will serve to put public colleges and universities on notice of the high bar they face when attempting to restrain or even deter the speech of employees prior to such speech taking place.

#### I. *CRUE V. AIKEN*

The plaintiffs in *Crue v. Aiken* were students and faculty members at the University of Illinois who publicly opposed the use of “Chief Illiniwek” as the mascot for the University.<sup>10</sup> According to the plaintiffs, the use of the mascot created a “hostile environment for Native American students, promote[d] the acceptance of inaccurate information in an educational setting, increase[d] the difficulty of recruiting Native American students, and contribute[d] to the development of cultural biases and stereotypes.”<sup>11</sup> The plaintiffs had employed various tactics in an effort to express their opposition to the use of the mascot.<sup>12</sup> Included among these efforts were: “public speaking in various forums, writing letters, meeting with student groups, submitting newspaper articles for publication, and attending protests.”<sup>13</sup> The University of Illinois made no attempt to interfere with such efforts by the plaintiffs.<sup>14</sup> However, the plaintiffs then sought to directly contact prospective student athletes “to make them aware that the University and its athletic program utilize a symbol that [was], in their opinion, degrading to the Native American race.”<sup>15</sup>

The University foresaw a distinct problem with the plaintiffs contacting prospective student athletes. The National Collegiate Athletics Association (NCAA) strictly regulates the “timing, nature and frequency of contacts between any University employee and prospective athletes.”<sup>16</sup> On March 2, 2001, Chancellor Michael Aiken, sent an e-mail message to all faculty, staff, and students, briefly explaining the NCAA regulations and declaring, “No contacts are permitted with prospective student athletes, including high school and junior college students, by University students, employees or others associated with the University without express authorization of the Director of Athletics.”<sup>17</sup> Aiken then explained that “[t]he University faces potentially serious sanctions for violation of NCAA . . . rules.”<sup>18</sup> The policy requiring the authorization of the Director of Athletics was referred to in the record as the “Preclearance

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10. *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1078 (C.D. Ill. 2001).

11. *Id.*

12. *Id.* at 1079.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

Directive.”<sup>19</sup>

After being contacted by a faculty member who wanted to make contact with prospective student athletes, the Assistant Athletic Director, Vince Ille, asked the NCAA in writing for guidance as to exactly what circumstances invoke NCAA regulations.<sup>20</sup> The NCAA replied saying:

[I]f an institution either identifies and contacts a group of prospective students based on their athletics ability or contacts prospective students to discuss their athletics participation those contacts are subject to NCAA regulations. Therefore . . . if an institutional staff member makes a telephone contact, an in-person off-campus contact or sends written correspondence to a prospective student to discuss his or her athletics ability or possible participation in intercollegiate athletics such contacts would be considered recruiting contacts and would be subject to NCAA regulations. . . . [I]f an institutional staff member makes a telephone contact or sends written correspondence to prospective students who have been identified based on their athletics ability such contacts would be considered recruiting contacts regardless of the content of the message and thus would also be subject to NCAA regulations.<sup>21</sup>

Chancellor Aiken later addressed the faculty senate regarding inquiries he had received regarding First Amendment free speech matters.<sup>22</sup> The Chancellor explained, “The University values and defends the principles of free speech and academic freedom for members of the University community. The University does not seek to interfere with the expression of views regarding matters of public concern.”<sup>23</sup> The Chancellor went on to explain the reasons for the Preclearance Directive:

[T]here are numerous and detailed NCAA rules regarding contacts by faculty and other University representatives with prospective student-athletes. The NCAA Division I Manual itself is 480 pages long. That is why my e-mail advised that any such contacts should occur only with the express authorization of the Director of Athletics or his designee, who have experience in these issues.<sup>24</sup>

Finally, Chancellor Aiken noted the alternative avenues available for the faculty and students to use in order to express their viewpoints on the University’s use of

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19. *Id.*

20. *Crue v. Aiken*, 370 F.3d 668, 675 (7th Cir. 2004).

21. *Id.* at 675–76. Mr. Ille informed the faculty member that the NCAA rules, and therefore the Preclearance Directive:

[A]pply in four situations: [I]f the prospective students contacted are identified for contact based upon their participation in athletics, if the contact is made for the purpose of addressing any issue related to athletics, if the contact is made for the purpose of addressing the prospective student’s possible participation in intercollegiate athletics, or if the contact is made at the request of a Division of Intercollegiate Athletics staff member.” *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1079–80 (C.D. Ill. 2001).

22. *Crue*, 137 F. Supp. 2d. at 1080.

23. *Id.*

24. *Id.*

the mascot. “Numerous such opportunities abound, including letters to the editor, press releases, radio/TV interviews[,] leafleting, and public speeches.”<sup>25</sup>

The plaintiffs initially filed a Motion for a Temporary Restraining Order (TRO) in the United States District Court for the Central District of Illinois.<sup>26</sup> The plaintiffs sought to enjoin the University from “requiring preclearance of communications with prospective student athletes [by the plaintiffs].”<sup>27</sup> The District Court granted the plaintiffs’ motion and issued the TRO, enjoining the defendant from enforcing the portion of the Preclearance Directive that required the preclearance of communications to student athletes “by University faculty who do not represent the athletic interests of the University and who do not intend [sic] and will not recruit prospective student athletes.”<sup>28</sup>

Then on June 5, 2001—days after entry of the Temporary Restraining Order—Chancellor Aiken sent another e-mail to all faculty, staff, and students at the University.<sup>29</sup> The e-mail referred to the prior correspondence which was the basis for the plaintiffs seeking the TRO and then went on to say, “in light of [the] order . . . and more recent testimony by representatives of the National Collegiate Athletic Association (NCAA), I have concluded that express authorization of the Director of Athletics or his designee should not be required.”<sup>30</sup> As a result the TRO was dissolved as moot.<sup>31</sup> In response to a later inquiry, the NCAA informed the plaintiffs that they could send letters informing prospective athletic recruits about the Chief Illiniwek controversy and that the NCAA would not impose sanctions on the University as a result of such contacts.<sup>32</sup>

The District Court then, in a new proceeding, took up the issue of the plaintiffs’ request for declaratory judgment “that the Preclearance Directive violated their First Amendment rights.”<sup>33</sup> The University argued that the *Pickering/Connick* standard applied to the Preclearance Directive.<sup>34</sup> Determining that the

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25. *Id.*

26. *Id.* at 1076.

27. *Id.* at 1078.

28. *Id.* at 1091.

29. *Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004).

30. *Id.*

31. *Id.* Although the e-mail was retracted and thus the requests for injunctive relief became moot, the Seventh Circuit noted that, “the requests for declaratory relief and for damages remain. When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive.” *Id.* (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974)).

32. *Id.* at 680. The majority opinion from the Seventh Circuit is quick to point out that, “were we faced with a situation in which the university would in some way be sanctioned based on the plaintiffs’ activities, it does not necessarily follow that the university’s interest in preventing a sanction would outweigh a legitimate interest in protesting allegedly racially offensive behavior.” *Id.*

33. *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1137 (C.D. Ill. 2002).

34. *Id.* at 1142. “Under *Pickering/Connick*, the proper analysis requires ‘a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” *Crue v. Aiken*, 370 F.3d 668, 685 (7th Cir. 2004) (Manion, J., dissenting) (quoting *Connick v. Myers*, 461 U.S. 138, 140 (1983)). See *infra* Part II.A.

Preclearance Directive constituted a “content-based prior restraint” on speech, the District Court instead applied the higher standard set forth in *NTEU*.<sup>35</sup> The District Court ruled in favor of the plaintiffs on their motion for summary judgment holding that “the University . . . failed to sufficiently justify its conduct under the standard set forth in *NTEU*.”<sup>36</sup>

The University appealed the District Court’s decision to the United States Circuit Court of Appeals for the Seventh Circuit.<sup>37</sup> A three judge panel on the Court of Appeals affirmed the District Court’s ruling.<sup>38</sup> Judge Manion dissented, arguing that the majority applied the incorrect standard to the action in question.<sup>39</sup> He argued that instead of the higher standard *NTEU* test, the more relaxed standard of *Pickering/Connick* should have applied.<sup>40</sup>

## II. THE TWO STANDARDS APPLIED TO FREE SPEECH RESTRICTIONS IMPOSED BY THE GOVERNMENT ON ITS EMPLOYEES: *PICKERING/CONNICK* AND *NTEU*

This part of the Note will be devoted to a more in-depth analysis of the *Pickering/Connick* and *NTEU* tests and their progeny. While the Seventh Circuit in *Crue* ultimately applied the *NTEU* test,<sup>41</sup> a brief exploration of the *Pickering/Connick* line of cases will serve a number of useful purposes. First, understanding the *Pickering/Connick* approach will enable public college and university officials to avoid the potentially harsh ramifications of the application of the *NTEU* test. Second, both the *Pickering/Connick* and the *NTEU* tests require as a prerequisite that the speech in question involve a matter of public concern.<sup>42</sup> The cases that follow *Pickering*, namely *Connick v. Myers*<sup>43</sup> and the recently decided

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35. *Crue*, 204 F. Supp. 2d at 1143. The standard set forth in *United States v. National Treasury Employees Union* states that where a ban “chills potential speech before it happens . . . [t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s necessary impact on the actual operation of government.” *United States v. NTEU*, 513 U.S. 454, 468 (1995). See *infra* Part II.B. The University argued that the Preclearance Directive was a “content neutral time, place, and manner restriction” to which the less stringent standard in *Pickering* should apply. *Crue*, 204 F. Supp. 2d at 1142–43.

36. *Crue*, 204 F. Supp. 2d at 1146.

37. *Crue*, 370 F.3d 668.

38. *Id.* at 680. Judge Evans wrote for the majority in the two to one decision. At the beginning of his recitation of the facts of the case, he engaged in a very entertaining survey of nicknames for college mascots across the country. The University of Notre Dame Fighting Irish, Purdue University Boilermakers, and University of Wisconsin Badgers are some nicknames that the Judge considered “pretty cool.” *Id.* at 671. He then pointed out a number of common nicknames for college mascots including: Tigers, Bulldogs, Wildcats, Lions, and Cougars. He further noted other colleges and universities, such as Marquette University and Stanford University, which have changed their mascots from Warriors and Indians to Golden Eagles and Cardinal respectively. *Id.*

39. *Id.* at 681.

40. *Id.* at 685 (Manion, J., dissenting).

41. *Id.* at 679.

42. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *United States v. NTEU*, 513 U.S. 454, 466 (1995).

43. 461 U.S. 138 (1983).

*Garcetti v. Ceballos*<sup>44</sup>, clarify what constitutes speech on a matter of public concern. Whether the speech constituted a matter of public concern was not an issue in *Crue v. Aiken*.<sup>45</sup> It will, however, be useful for public college and university officials to be keenly aware of the limits the Supreme Court has placed on what speech constitutes a matter of public concern for purposes of the First Amendment.

A. The *Pickering/Connick* Test

The United States Supreme Court dealt with the issue of restriction of free speech rights in the context of government employment in the seminal case of *Pickering v. Board of Education* in 1968.<sup>46</sup> Marvin Pickering was a high school teacher in Will County, Illinois.<sup>47</sup> He had written a letter to a local newspaper regarding a proposed tax increase in which he was critical of the way the county Board of Education and the superintendent of schools had handled past proposals to raise revenue for the school system.<sup>48</sup> As a result of the letter, Pickering was dismissed from his teaching position by the county Board of Education.<sup>49</sup> Articles attributed to a local teachers' organization and a letter from the superintendent appeared in the local paper urging the passage of the tax increase and arguing that a failure to pass the increase "would result in a decline in the quality of education."<sup>50</sup> In response to those letters, Pickering submitted his letter to the editor of the local paper.<sup>51</sup> The substance of his letter attacked the School Board's handling of a bond issue proposal and its allocation of financial resources between the schools' educational and athletics programs.<sup>52</sup> It further accused the superintendent of attempting to prevent teachers "from opposing or criticizing the proposed bond issue."<sup>53</sup> The School Board then held a hearing pursuant to Illinois law which resulted in Pickering's dismissal.<sup>54</sup> The Board determined that "the publication of the letter was 'detrimental to the efficient operation and administration of the schools of the district' and hence under the relevant Illinois statute, . . . 'interests of the school require[d] [his dismissal].'"<sup>55</sup> The Illinois courts rejected Pickering's claims that he could not constitutionally be dismissed from his teaching position as a result of writing the letter.<sup>56</sup> Pickering then petitioned for writ of certiorari to the Supreme Court of the United States which

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44. 126 S. Ct. 1951 (2006).

45. 370 F.3d 668, 678 (7th Cir. 2004).

46. 391 U.S. 563 (1968).

47. *Id.* at 564.

48. *Id.*

49. *Id.*

50. *Id.* at 566.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 564–65 (citing 122 ILL. COMP. STAT. 10–22.4 (1963)).

56. *Id.* at 567–68.



granted his petition.<sup>57</sup>

The Court began its discussion by stating the general principle that, “[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”<sup>58</sup> The Court went on to point out, however, that the state does have interests “as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”<sup>59</sup> In light of these two competing principles, the Court in *Pickering* arrived at a balancing test which served to “balance . . . the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>60</sup>

The Supreme Court wisely declined the opportunity to define any bright line standard for judging claims of First Amendment violations in the context of government employment.<sup>61</sup> The Court added, “However, . . . in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.”<sup>62</sup> Importantly, the Supreme Court found that “the question whether a school system requires additional funds [was] a matter of legitimate public concern.”<sup>63</sup> The Court then emphasized the importance of the role of “free and open debate” in the informed decision-making process by the public.<sup>64</sup> In the context of *Pickering*, the Court noted that “[t]eachers are, as a class, the members of a community most likely to have informed and definite

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57. *Id.* at 566.

58. *Id.* at 568 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

59. *Id.*

60. *Id.* See Matthew M. Killen, Note, *Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases*, 81 NOTRE DAME L. REV. 1629, 1630 (2006) (discussing what constitutes adverse employment action under *Pickering/Connick*, noting that “[s]ome courts choose to limit adjudicative relief to those claims involving major employment decisions, like hiring, firing, promotion, and wage increases . . . [while] [o]ther courts, . . . are open to any adverse action that chills speech”).

61. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968). The Court stated:

Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

*Id.*

62. *Id.*

63. *Id.* at 571.

64. *Id.* at 571–72. Later in the opinion the Court stated:

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity.

*Id.* at 573 (citations omitted).

opinions as to how funds allotted to the operation of the schools should be spent.”<sup>65</sup> The Court pointed out that the threat of dismissal, while having a different impact on the exercise of the right of free speech from criminal sanctions or damages, could still pose a “potent means of inhibiting speech.”<sup>66</sup> The Court concluded that “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment,” absent proof of false statements knowingly or recklessly made by the teacher.<sup>67</sup> This was because “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public.”<sup>68</sup>

Fifteen years after the Supreme Court decided *Pickering v. Board of Education*, the Court had occasion to further develop the law with respect to alleged free speech restrictions placed on government employees by their employer. The case of *Connick v. Myers* involved an Assistant District Attorney in New Orleans who was informed by her superior that she would be transferred to prosecute cases in a different section of the criminal court.<sup>69</sup> Sheila Myers, who had worked for the District Attorney’s Office for five and a half years, “was strongly opposed to the transfer and expressed her view to several of her supervisors.”<sup>70</sup> In response to the proposed transfer, Myers prepared a questionnaire addressed to fellow staff members “concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.”<sup>71</sup> Myers met with Harry Connick, her supervisor, who urged her to accept the proposed transfer.<sup>72</sup> At the time of the meeting; however, Connick was unaware of the questionnaire that Myers had distributed earlier.<sup>73</sup> After learning of the questionnaire, Connick contacted Myers and told her “that she was being terminated because of her refusal to accept the transfer . . . [and] [s]he was told that her distribution of the questionnaire was considered an act of insubordination.”<sup>74</sup> Myers sued alleging that she was wrongfully terminated “because she had exercised her constitutionally protected right of free speech.”<sup>75</sup> The District Court ordered that Myers be reinstated, finding that Myers was not terminated as a result of failing to accept the transfer,

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65. *Id.* at 572.

66. *Id.* at 574.

67. *Id.*

68. *Id.* at 573.

69. 461 U.S. 138, 140 (1983).

70. *Id.* (citation omitted).

71. *Id.* at 141 (citation omitted).

72. *Id.*

73. *Id.*

74. *Id.* “Connick particularly objected to the question which inquired whether employees ‘had confidence in and would rely on the word’ of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.” *Id.*

75. *Id.*

but rather that the questionnaire itself was the reason for her termination.<sup>76</sup> The District Court's ruling was affirmed on appeal by the Fifth Circuit Court of Appeals.<sup>77</sup>

The United States Supreme Court reversed the Fifth Circuit's ruling.<sup>78</sup> After restating the *Pickering* test replacing the word "teacher" with "employee,"<sup>79</sup> the Court said that the District Court erred in its finding that the issues presented in Myers' questionnaire were "matters of public importance and concern."<sup>80</sup> The Court concluded, based on "*Pickering*, its antecedents, and its progeny,"<sup>81</sup> that Myers' questionnaire could not be characterized as constituting speech on a matter of public concern.<sup>82</sup> The Court continued, "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."<sup>83</sup> According to the Court, when a public employee speaks as an employee on matters of personal interest—as opposed to public interest—a federal court is typically not the "appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."<sup>84</sup>

As in *Pickering*, the *Myers* Court declared that the inquiry as to whether a government employee's speech is protected by the First Amendment should be a

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76. *Id.* at 142 (citation omitted).

77. *Id.*

78. *Id.* at 154.

79. *Id.* at 142. "Our task, as we defined it in *Pickering*, is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* Thus, the Supreme Court made it clear that the *Pickering* test applies to all levels of government employees, not simply to the facts specific to *Pickering*.

80. *Id.* at 143 (quoting *Myers v. Connick*, 507 F. Supp. 752, 758 (E.D.L.A. 1981)).

81. *Id.* at 146. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (stating that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values.") (quoting *Carey v. Brown*, 447 U.S. 455 (1980)); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (stating that "speech concerning public affairs is more than self-expression; it is the essence of self-government."); *Roth v. United States*, 354 U.S. 476, 484 (1957) (stating that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). See also *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (holding that a teacher's statements concerning the school's allegedly racial discriminatory policies involved a matter of public concern even though she communicated privately with her employer rather than expressing her views publicly); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977) (holding that a public school teacher's speech relaying to a radio station a memorandum regarding teacher dress and appearance that had been circulated by the school principle, constituted speech as a matter of public concern); *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that a state college teacher who had testified before committees of the state legislature and was involved in public disagreement over whether the college should be elevated to four year status, was protected by the First Amendment as her speech constituted a matter of public concern).

82. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

83. *Id.*

84. *Id.* at 147.

fact specific inquiry: “[w]hether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”<sup>85</sup> The Court in *Connick* viewed Myers’ questions regarding trust in various supervisors, office morale, and the need for a grievance committee as “mere extensions of Myers’ dispute over her transfer,” not falling under the rubric of matters of public concern.<sup>86</sup> The Court further remarked that, “[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.”<sup>87</sup>

The Court did, however, find that the question in Myers’ questionnaire dealing with whether employees felt pressured to work in political campaigns of specific candidates involved a matter of public concern.<sup>88</sup> The Court then moved on to the next element of the *Pickering* analysis—determining whether Connick was justified in terminating Myers.<sup>89</sup> Noting that “[t]he *Pickering* balance requires full consideration of the government’s interest in the effective and efficient fulfillment of its responsibilities to the public,”<sup>90</sup> the Court concluded that “[t]he limited First Amendment interest involved . . . [did] not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.”<sup>91</sup>

The recent Supreme Court case of *Garcetti v. Ceballos* further clarified the *Pickering/Connick* test, specifically adding clarity to what speech may or may not be characterized as speech as a matter of public concern.<sup>92</sup> Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney’s Office.<sup>93</sup> A defense attorney contacted Ceballos regarding a pending case in February 2000.<sup>94</sup> The defense attorney claimed there were inaccuracies in an affidavit used to obtain a search warrant in the case.<sup>95</sup> Ceballos examined the affidavit and visited the

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85. *Id.* at 147–48 (citation omitted). *See also* *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion) (ruling that a public employer did not violate the First Amendment when it fired an employee for what the employer reasonably believed was speech on a matter of private concern, even when the belief turned out to have been mistaken); *Rankin v. McPherson*, 483 U.S. 378 (1987) (holding that a clerical employee in a county constable’s office could not be discharged for remarking “[i]f they go for him again, I hope they get him,” in reference to the attempted assassination of President Reagan, because the speech in question constituted speech on a matter of public concern and that the firing violated the First Amendment).

86. *Connick*, 461 U.S. at 148–49.

87. *Id.* at 149. The Court further added that “the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.” *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 150.

91. *Id.* at 154.

92. 126 S. Ct. 1951 (2006).

93. *Id.* at 1955.

94. *Id.*

95. *Id.*

location it described.<sup>96</sup> Ceballos came to the conclusion that the affidavit did, in fact, contain “serious misrepresentations.”<sup>97</sup> After relaying his findings to his supervisors, Ceballos subsequently prepared a “disposition memorandum” which explained his concerns and recommended dismissal of the case.<sup>98</sup> Despite Ceballos’ recommendation, his supervisor, Frank Sundstedt, decided to proceed with the prosecution of the case.<sup>99</sup> Ceballos was called as a witness at a hearing on the defendant’s motion to traverse the warrant in the case.<sup>100</sup> The trial court rejected the challenge to the warrant.<sup>101</sup> Ceballos claimed that in the aftermath of these events he was “subjected to a series of retaliatory employment actions,”<sup>102</sup> including “reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.”<sup>103</sup> Ceballos initiated an employment grievance that was subsequently denied based on a finding that he had suffered no retaliation.<sup>104</sup>

Ceballos filed suit against the District Attorney’s office in the United States District Court for the Central District of California claiming his employer violated the First and Fourteenth Amendments by retaliating against him based on the disposition memorandum.<sup>105</sup> The District Attorney’s office subsequently filed a motion for summary judgment claiming that no retaliatory action was taken and that all the actions of which Ceballos complained could be legitimately explained.<sup>106</sup> The District Court granted the motion for summary judgment against Ceballos.<sup>107</sup> Ceballos then appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the District Court’s grant of summary judgment, holding “Ceballos’[] allegations of wrongdoing in the memorandum constitute[d] protected speech under the First Amendment.”<sup>108</sup> The District Attorney’s office petitioned for writ of certiorari to the United States Supreme Court, which granted the petition.<sup>109</sup>

The Supreme Court began its analysis by summarizing the inquiry under *Pickering*.<sup>110</sup> “*Pickering* . . . identifi[ed] two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public

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96. *Id.*

97. *Id.*

98. *Id.* at 1955–56.

99. *Id.* at 1956.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004).

109. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1957 (2006).

110. *Id.* at 1958.

concern.”<sup>111</sup> The Court stated that the employee has no First Amendment cause of action if this first inquiry is answered in the negative.<sup>112</sup> If, however, the answer to the first inquiry is yes, the question then “becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”<sup>113</sup> The Court summarized the *Pickering/Connick* balancing test by stating, “The Court’s decisions . . . have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.”<sup>114</sup>

The fact that “Ceballos expressed his views inside his office, rather than publicly, [was] not dispositive” for the Court.<sup>115</sup> The Court also noted that the fact that “the memo concerned the subject matter of Ceballos’ employment . . . [was] nondispositive.”<sup>116</sup> The Court found the fact that Ceballos’ expressions “were made *pursuant to his duties* as a . . . deputy [district attorney]” to be the controlling factor.<sup>117</sup> “[T]he fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishe[d] Ceballos’ case from those in which the First Amendment provides protection against discipline.”<sup>118</sup> The Supreme Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>119</sup> According to the Court, Ceballos “did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.”<sup>120</sup> The Court noted, “[t]he fact that [Ceballos’] duties sometimes required him to speak or write [did] not mean his supervisors were prohibited from evaluating his performance.”<sup>121</sup> Summarizing the *Pickering/Connick* test in light of the Court’s present interpretation the Court stated:

When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.

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111. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

112. *Id.*

113. *Id.*

114. *Id.* at 1959 (citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

115. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959 (2006) (“Employees in some cases may receive First Amendment protection for expressions made at work.”). *See, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

116. *Garcetti*, 126 S. Ct. at 1959 (“The First Amendment protects some expressions related to the speaker’s job.”). *See, e.g.*, *Givhan*, 439 U.S. at 414; *Pickering v. Bd. of Educ.* 391 U.S. 563 (1968).

117. *Garcetti*, 126 S. Ct. at 1959–60 (emphasis added).

118. *Id.* at 1960.

119. *Id.*

120. *Id.*

121. *Id.*

When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.<sup>122</sup>

In summary, the *Pickering/Connick* test seeks to balance the interests of the government employee in commenting on matters of public concern against the interests of the state as an employer “in promoting the efficiency of the public services it performs through its employees.”<sup>123</sup> Further, as the Court stated in *Connick*, “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”<sup>124</sup> In situations such as in *Connick*, where the employee’s First Amendment interest is “limited,” such interest will be outweighed by a strong interest on the part of the state.<sup>125</sup> Finally, when a government employee speaks “pursuant to his duties” as a government employee, he or she does not speak on a matter of public concern for purposes of First Amendment protection.<sup>126</sup>

#### B. *United States v. National Treasury Employees Union* and its Progeny

Both the District Court and the Seventh Circuit in *Crue*<sup>127</sup> applied the high scrutiny standard set forth in *United States v. National Treasury Employees Union (NTEU)*.<sup>128</sup> Because *NTEU* involved a prior restraint on the free speech rights of government employees,<sup>129</sup> it will be useful here to briefly introduce the doctrine of prior restraints which was originally articulated by the Supreme Court in the case of *Near v. Minnesota*.<sup>130</sup>

*Near* involved a Minnesota state statute enacted in 1925 that called for any person who produced “an obscene, lewd and lascivious newspaper, magazine, or other periodical, or a malicious, scandalous and defamatory newspaper, magazine

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122. *Id.* at 1961. In his dissent, Justice Souter warned of the potential ramifications of the Court’s holding on the constitutional value of academic freedom. *Id.* at 1969–70 (Souter, J., dissenting) (warning that the Court’s holding “is spacious enough to include even the teaching of a public university professor”). Souter declared, “I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’” *Id.* at 1969 (citing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

123. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

124. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

125. *Id.* at 154.

126. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). Once again, the question remains how the Court’s holding in *Garcetti* will be squared with the constitutional value of academic freedom as pointed out by Justice Souter in his dissent. *Id.* at 1969–70 (Souter, J., dissenting). One can fairly anticipate this issue to be debated in the scholarly literature and perhaps in the courts very soon.

127. *Crue v. Aiken*, 370 F.3d 668, 679 (7th Cir. 2004). *See also* *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1142 (C.D. Ill. 2002).

128. 513 U.S. 454 (1995).

129. *Id.* at 466–68.

130. 283 U.S. 697 (1931).

or other periodical,” to be guilty of a nuisance and to be enjoined from such action.<sup>131</sup> J.M. Near, who was at that time a publisher of a Minneapolis periodical known as the Saturday Press, published and circulated editions of the periodical that were “largely devoted to malicious, scandalous and defamatory articles”<sup>132</sup> that in substance charged “that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties.”<sup>133</sup> Minnesota prosecuted Near under the statute in question, and the trial court enjoined Near from “producing, editing, publishing, circulating, having in . . . possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper.”<sup>134</sup> Near appealed to the Supreme Court of Minnesota where the decision of the lower court was affirmed.<sup>135</sup> Near appealed the matter to the United States Supreme Court.<sup>136</sup> In holding the Minnesota state statute unconstitutional, the Court declared that, “it has been generally, if not universally, considered that it is the chief purpose of the [free speech] guaranty to prevent previous restraints upon publication.”<sup>137</sup> Since *Near*, the prior restraint doctrine has been a hurdle over which it has been nearly impossible for a proponent of a law or regulation to clear.<sup>138</sup>

*United States v. National Treasury Employees Union* involved an alleged prior restraint of free speech in the context of federal government employment.<sup>139</sup> A federal statute enacted by Congress in 1989<sup>140</sup> “broadly prohibit[ed] federal employees from accepting any compensation for making speeches or writing

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131. *Id.* at 702 (quoting MINN. STAT §§ 10121–1 to 10123–3 (Mason 1927)).

132. *Id.* at 703.

133. *Id.* at 704.

134. *Id.* at 706.

135. *Id.*

136. *Id.* at 707.

137. *Id.* at 713. The Court quoted William Blackstone on the matter: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.” *Id.* at 713.

138. See, e.g., *Se. Promotions v. Conrad*, 420 U.S. 546, 558 (1975) (“Labeling respondents’ action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional *per se*. . . . Any system of prior restraint, however, ‘comes to this Court bearing a heavy presumption against its constitutional validity.’” (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963))). See also *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

139. *United States v. NTEU*, 513 U.S. 454 (1995).

140. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 4 § 501(b) (2000)). The text of the provision read, “An individual may not receive any honorarium while that individual is a Member, officer or employee” of the federal government. “Section 505 of the Ethics Reform Act defined ‘officer or employee’ to ‘include nearly all employees of the Federal Government’ and ‘Member’ to include any Representative, Delegate, or Resident Commissioner to Congress.” *NTEU*, 513 U.S. at 459 (quoting Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 4 § 505(1)–(2) (2000))). Further, the statute defined “honorarium” as “a payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee.” Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at U.S.C. app. 4 § 505(3) (2000)).



articles.”<sup>141</sup> Subsequently, “[t]wo unions and several career civil servants employed full time by various Executive departments and agencies filed suit in the United States District Court for the District of Columbia to challenge the constitutionality of the honoraria ban.”<sup>142</sup> The District Court granted the plaintiff’s motion for summary judgment, holding the statute unconstitutional “insofar as it applies to Executive Branch employees of the United States government,” and enjoined the government from enforcing the statute against such persons.<sup>143</sup> Importantly, the District Court characterized the restriction in the statute as a “content-neutral restriction on the speech of ‘government employees.’”<sup>144</sup> The Court of Appeals subsequently affirmed the District Court’s ruling.<sup>145</sup> The Supreme Court of the United States granted certiorari.<sup>146</sup>

The Supreme Court noted that “[w]ith few exceptions, the content of respondents’ messages ha[d] nothing to do with their jobs and d[id] not even arguably have any adverse impact on the efficiency of the offices in which they work[ed].”<sup>147</sup> The Court discussed *Pickering*, noting, “[W]e have applied *Pickering*’s balancing test only when the employee spoke ‘as a citizen on matters of public concern’ rather than ‘as an employee upon matters only of personal interest.’”<sup>148</sup> The Court easily determined, as did the majority in *Crue*,<sup>149</sup> that the conduct in question involved a matter of public concern.<sup>150</sup> The Court further pointed out that when “the speech does involve a matter of public concern, the government bears the burden of justifying its adverse employment action.”<sup>151</sup>

Unlike *Pickering* and its progeny, however, “this case [did] not involve a *post hoc* analysis of one employee’s speech and its impact on that employee’s public responsibilities.”<sup>152</sup> Thus, the Court distinguished the facts in *NTEU* from those to

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141. *NTEU*, 513 U.S. at 457.

142. *Id.* at 461.

143. *Id.* at 462 (quoting *United States v. Nat’l Treasury Employees Union*, 788 F. Supp. 4, 13–14 (D.D.C. 1992)).

144. *NTEU*, 788 F. Supp. at 10.

145. *NTEU v. United States*, 990 F.2d 1271 (D.C. Cir. 1993).

146. *United States v. NTEU*, 513 U.S. 454, 464 (1995).

147. *Id.* at 465. Each of the respondents alleged that he or she had in the past received honorarium for speaking or writing on various topics in full compliance with ethics regulations. Examples of the respondents’ work include: a postal employee in Arlington, Virginia had given lectures on the Quaker religion for which he had received small payments; a government aerospace engineer that had lectured on black history for \$100 per lecture; a microbiologist at the FDA who had made nearly \$3,000 per year writing articles and making radio and TV appearances reviewing dance performances; and a tax examiner for the IRS who had received comparable pay for articles about the environment. *Id.* at 461–62.

148. *Id.* at 465 (quoting *Connick v. Myers*, 461 U.S. 138 (1983)).

149. “There is no doubt that the speech involved here concerns a matter of public concern.” *Crue v. Aiken*, 370 F.3d 668, 678 (7th Cir. 2004).

150. “Respondents’ expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace.” *NTEU*, 513 U.S. at 466.

151. *Id.* at 466 (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

152. *Id.* at 466–67.

which the *Pickering* analysis would be applied.<sup>153</sup> Rather than a *post hoc* analysis of an employee's speech, the law in question in *NTEU* served as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers."<sup>154</sup> The Court further emphasized the distinction by adding, "[U]nlike an adverse action taken in response to actual speech, this ban chill[ed] potential speech before it happen[ed]."<sup>155</sup> The Court said that in cases such as *NTEU*, "the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action."<sup>156</sup> The Court then declared a new standard to be applied in such cases; "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."<sup>157</sup> Of great significance to the Court's analysis was the fact that the statutory prohibition in *NTEU* was broad in reach, potentially stifling the free speech rights of a "massive number of potential speakers."<sup>158</sup> According to the Court, the "large-scale disincentive to Government employees' expression" imposed by the honoraria ban constituted "the kind of burden that abridges speech under the First Amendment."<sup>159</sup> Regarding the government's burden, the Court stated,

[W]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.<sup>160</sup>

In a footnote, the Court added, "We have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."<sup>161</sup> The Supreme Court held that the honoraria ban violated the First Amendment.<sup>162</sup>

The Seventh Circuit applied the *NTEU* test in the case of *Milwaukee Police*

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153. *Id.* The Court also noted that in the past it had applied the *Pickering* balancing test in a case involving a statutory restriction on employee speech. The fact that *NTEU* involved a statutory restriction did not cause the Court to depart from *Pickering* to establish a different standard. *Id.* at 467 (citing *United States Civil Serv. Comm'n v. Nat'l. Ass'n. of Letter Carriers*, 413 U.S. 548, 564 (1973)).

154. *Id.* at 467.

155. *Id.* at 468.

156. *Id.*

157. *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968)).

158. *Id.* at 467.

159. *Id.* at 470.

160. *Id.* at 475 (quoting *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994)).

161. *Id.* at 475, n.21 (citing *Waters v. Churchill*, 511 U.S. 661 (1994)).

162. *Id.* at 480.

*Ass'n v. Jones*.<sup>163</sup> In *Jones*, the Milwaukee Chief of Police issued a directive to officers of the Milwaukee Police department regarding the procedure for making a verbal or written complaint against another police officer.<sup>164</sup> The directive provided:

If a Department employee makes a verbal or written complaint against another member, they are to be immediately informed that the complaint is [confidential] and considered an internal investigation. They are to be ordered not to discuss the matter with *anyone* (including their Labor Union). Their reports are [not] to be duplicated, and the only statements they can make are to duly authorized Department members.<sup>165</sup>

The Milwaukee Police Association—a union representing non-supervisory police officers of the Milwaukee Police Department—brought suit in state court against the Chief of Police under 42 U.S.C. § 1983, alleging “that the directives infringed its members’ rights of free speech and association.”<sup>166</sup> The Police Chief removed the action to federal district court.<sup>167</sup> The District Court denied the Association’s request for preliminary injunction, and the Association appealed.<sup>168</sup> The Court of Appeals noted that it “must determine the proper test that the district court should apply in analyzing the constitutional challenge.”<sup>169</sup> In discussing whether to apply the *Pickering/Connick* test or the *NTEU* test, the court noted that “[t]he *Pickering* test, . . . was crafted to balance the interests of the government as employer and the employee as citizen in the context of speech *that has already occurred*.”<sup>170</sup> The court further explained:

In addressing such a situation of *post hoc* discipline, the government action is more closely contained to the individual or individuals involved, and a court can readily ascertain the effect of the speech on the workplace. The *Pickering* test on its face cannot be easily applied to a situation of a preemptive ban on certain speech.<sup>171</sup>

The court then noted that “*NTEU* entailed a ban on a broad category of expression by a large number of potential speakers . . . as opposed to a *post hoc*

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163. 192 F.3d 742 (7th Cir. 1999). Both the majority and the dissent in the Seventh Circuit’s opinion in *Crue v. Aiken* rely on *Jones* as precedent. *Crue v. Aiken*, 370 F.3d 668, 679, 682–83 (7th Cir. 2004). Of further note, Justice Bauer and Justice Evans, the two judges in the majority in the Seventh Circuit’s opinion in *Crue*, also joined the majority opinion in *Jones*.

164. *Jones*, 192 F.3d at 744.

165. *Id.* (emphasis added). Following the issuance of the directive, questions arose regarding the directive’s scope. Since Chief Jones was on vacation at the time, his subordinates issued further clarification regarding the directive. The clarification stated, “[c]omplaining members are instructed that they cannot talk to *anybody* regarding the matter under investigation; this includes their lawyer and/or union representative.” *Id.* at 745.

166. *Id.* at 745.

167. *Id.*

168. *Id.*

169. *Id.* at 749.

170. *Id.* (emphasis added).

171. *Id.*

disciplinary decision.”<sup>172</sup> The court in *Jones* also pointed out that “[w]ith a prior restraint, the impact is more widespread than any single supervisory decision would be, and the action chills potential speech instead of merely punishing actual speech already communicated.”<sup>173</sup> Finally, the court noted that when dealing with a prior restraint on expression, the government’s burden is greater than it would have been in a situation in which isolated disciplinary action is involved.<sup>174</sup>

In determining that the *NTEU* test was the proper standard for the case, the court pointed out that “[s]imilar to *NTEU*, the directives that [were] challenged ban[ned] speech generally and thus [the court] [was] not presented with an isolated disciplinary response to speech that ha[d] already occurred.”<sup>175</sup> The court went on to explain that it did not “have the opportunity to consider the actual nature of the speech that was communicated and the impact it had on the workplace; instead [the court was] presented with a general prohibition against speech rather than an isolated communication that already occurred.”<sup>176</sup>

The District Court in *Crue* cited as persuasive authority, the Second Circuit case of *Harman v. City of New York*.<sup>177</sup> At issue in *Harman* were executive orders issued by the City of New York, which governed contacts between the media and employees of the City’s social service agencies.<sup>178</sup> The Executive Order in question provided, “All media inquiries and requests for interviews must be referred to the HRA [Human Resources Administration] Media Relations Office.”<sup>179</sup> The order went on to state, “It is *not* appropriate to indicate willingness to speak with a reporter until the conversation is cleared through Media Relations.”<sup>180</sup> Shortly after the executive order was promulgated, the ABC news program, *World News Tonight*, contacted the plaintiff, Rosalie Harman.<sup>181</sup> At the time, Harman was a supervisor at one of the City’s social service agencies.<sup>182</sup> ABC was interested in speaking with Harman regarding the death of a six-year-old child, about whom the social service agency had received numerous reports prior to the child’s death.<sup>183</sup> Harman agreed to the interview request and was subsequently interviewed during her lunch hour at a location away from her employer’s premises.<sup>184</sup> The ABC television news program later broadcast its

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172. *Id.* at 749–50.

173. *Id.* at 750 (citing *United States v. NTEU*, 513 U.S. 454 (1995)).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1144 (C.D. Ill. 2002). The District Court also cited *Harman v. City of New York* in its ruling on the motion for a Temporary Restraining Order. *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1086 (C.D. Ill. 2001) (citing *Harman v. City of New York*, 140 F.3d 111, 115 (2d Cir. 1998)).

178. *Harman*, 140 F.3d at 115.

179. *Id.* at 116 n.2 (emphasis added).

180. *Id.*

181. *Id.* at 116.

182. *Id.*

183. *Id.*

184. *Id.*

report and included footage of the interview with Harman.<sup>185</sup> Although the program did not identify Harman by name, the program showed Harman making the statement: “The workers who are considered the best workers are the ones who seem to be able to move cases out quickly . . . . There are lots of fatalities the press doesn’t know anything about.”<sup>186</sup> Harman was subsequently suspended based on violation of the executive order.<sup>187</sup> Harman brought suit in the Federal District Court for the Southern District of New York, alleging, *inter alia*, that the city had retaliated against her for constitutionally protected speech on a matter of public concern.<sup>188</sup> The District Court held the executive orders unconstitutional insofar as they required agency employees to obtain approval prior to speaking to the press.<sup>189</sup> The City subsequently appealed.<sup>190</sup>

As an initial matter, the appellate court in *Harman* concluded that the speech dealt with a matter of public concern.<sup>191</sup> The court pointed out that “[t]he Supreme Court has noted that ‘[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.’”<sup>192</sup> The Second Circuit went on to note that “there is an ongoing public debate about the effectiveness of the City’s child welfare agency. Experienced case-management supervisors such as Harman . . . can contribute valuable insights to the discussion . . . . The public has a significant interest in hearing [her] comments.”<sup>193</sup>

In applying the *NTEU* standard, the Second Circuit concluded that the policies involved in *Harman* were even broader than the honoraria ban which was struck down in *NTEU*.<sup>194</sup> “Whereas that regulation placed a burden on employee speech by denying compensation, the press policies here directly regulate[d] speech.”<sup>195</sup> The court also found persuasive the notion that “a preclearance requirement may have a broad inhibiting effect on all employees, even those who might ultimately receive permission to speak.”<sup>196</sup> “Employees who are critical of the agency will naturally hesitate to voice their concerns if they must first ask permission from the very people whose judgments they call into question.”<sup>197</sup> Finding that the executive order could have the potential for censorship, the court point[ed] out that “[i]n the context of the *Pickering/NTEU* balance, courts have found that the

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Harman v. City of New York*, 945 F. Supp. 750, 767–68 (S.D.N.Y. 1996).

190. *Harman v. City of New York*, 140 F.3d 111, 117 (2d Cir. 1998).

191. *Id.* at 118. “This speech, concerning the priorities and effectiveness of the [agency], is obviously of interest to the public whom the agency serves.” *Id.*

192. *Id.* at 119 (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)).

193. *Id.* at 119.

194. *Id.*

195. *Id.*

196. *Id.* at 120 (citing *Weaver v. United States Info. Agency*, 87 F.3d 1429, 1444 (D.C. Cir. 1996) (Wald, J., dissenting)).

197. *Id.* There may be disagreement regarding the application of this principle to tenured faculty members at public colleges and universities.

potential for censorship in a regulation ‘justifies an additional thumb on the employees’ side of [the] scales.’”<sup>198</sup> The court concluded that the press policies in question allowed for suppression of speech before it took place, and the administrators may have prevented speech that would not actually have had a disruptive effect.<sup>199</sup>

The Second Circuit noted that the Supreme Court had upheld a prepublication review in the past.<sup>200</sup> The case cited by the court, however, involved materials that were “essential to the security of the United States and, in a sense, the free world.”<sup>201</sup> The court found that, while the City’s interest in keeping information the agencies dealt with confidential was significant, that interest did not present as compelling a justification for the suppression of important First Amendment interests as in a case involving national security.<sup>202</sup> The Second Circuit also added that “the City [had] not demonstrated that the asserted harms [were] real, rather than conjectural.”<sup>203</sup> Additionally, the court pointed out that “the City [had] not shown that the executive orders [were] designed to address the asserted harm in a ‘direct and material way.’”<sup>204</sup> As a final note, the court found that the City’s asserted interest in the need to promote the efficient and effective operation of the agencies did not justify the requirement of prior approval of employee speech.<sup>205</sup> The Second Circuit affirmed the District Court’s ruling that the executive orders were unconstitutional infringements on the rights of city employees.<sup>206</sup>

The decision in *Harman* can be contrasted with the D.C. Circuit case of *Weaver v. United States Information Agency*.<sup>207</sup> In *Weaver*, the appellate court applied the *NTEU* test and ruled in favor of the government agency that was alleged to have violated an employees First Amendment right of free speech.<sup>208</sup> According to an internal regulation, employees of the State Department, the United States Information Agency (USIA), and the Agency for International Development (AID) were required to submit all speaking, writing, and teaching materials on matters of “official concern” to their employers “for review prior to publication.”<sup>209</sup> Under

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198. *Id.* (quoting *Sanjour v. EPA*, 56 F.3d 85, 97 (D.C. Cir. 1995)).

199. *Id.* at 120–21.

200. *Id.* at 122.

201. *Id.* (citing *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam)). In *Snepp* the Court upheld the CIA’s right to review employee writing material which related to intelligence activities regardless of whether the materials contained classified information. *Snepp*, 444 U.S. 507 (1980).

202. *Harman*, 140 F.3d at 123.

203. *Id.*

204. *Id.*

205. *Id.* at 124.

206. *Id.*

207. 87 F.3d 1429 (D.C. Cir. 1996).

208. *Id.*

209. *Id.* at 1431 (citing 3 Foreign Affairs Manual (“FAM”) § 628.2). The relevant provision of the prepublication review scheme reads in subsection (a), “All speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities . . . of any employees agency or to current U.S. foreign policies, . . . are of official concern and shall be submitted . . . for clearance by the employee’s agency.” The next subsection reads, “(b) No

the policy, the term “official concern” was broadly construed to include “any material related to the employee’s agency or U.S. foreign policy, as well as any material that ‘reasonably may be expected to affect the foreign relations of the United States.’”<sup>210</sup> At that time, Carolyn Weaver was a part-time employee of the Voice of America, a unit of USIA.<sup>211</sup> She published an article in the *Columbia Journalism Review* without submitting it to her employer for prepublication review.<sup>212</sup> The article was entitled: “When the Voice of America ignores its charter—An insider reports on a pattern of abuses.”<sup>213</sup> In substance, the article attacked the Voice of America on a number of issues, “from allegations that it communicated ‘coded signals’ to Solidarity activists . . . to more conventional assertions of politicization.”<sup>214</sup> The appellant conceded that the article constituted material of “official concern” within the meaning of the USIA policy.<sup>215</sup> Even prior to receiving admonishment for publishing the article, Weaver filed suit challenging the review procedure, alleging violation of the First Amendment and seeking declaratory and injunctive relief.<sup>216</sup> The District Court found that the review requirement did not violate the First Amendment.<sup>217</sup>

In applying the recently decided *NTEU* test to the regulation,<sup>218</sup> the D.C. Circuit found that all the regulation required was that employees submit to a process of prepublication review.<sup>219</sup> “No speech [was] forbidden.”<sup>220</sup> According to the court, the regulation in question “clearly pass[ed] muster.”<sup>221</sup> The court found that, “[t]he primary burden on employees from the regulation [was] simply the delay associated with submitting to the review process prior to publication.”<sup>222</sup> The court further stated that “the delay and discouragement effects . . . seem[ed] a considerably milder deterrent to speech than *NTEU*’s ban on honoraria . . . .”<sup>223</sup> The D.C. Circuit pointed out that “[t]here is certainly no logical reason to think that the existence of some element of prior restraint should remove a restriction on employee speech from the usual *Pickering* approach.”<sup>224</sup> Crucial for the court was the fact that employees to whom the regulation applied, while lacking direct access to confidential information, could inadvertently come into contact with

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employee shall publish any material of official concern under paragraph (a) until it has been cleared.” 3 FAM § 628.2.

210. *Weaver*, 87 F.3d at 1431–32 (quoting 3 FAM § 628.2).

211. *Id.* at 1432.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* The District of Columbia Circuit in this case referred to what this Note calls the *NTEU* test, as “the test of *Pickering* and *NTEU*.” *Id.*

219. *Id.* at 1440.

220. *Id.*

221. *Id.*

222. *Id.* at 1441.

223. *Id.*

224. *Id.* at 1440.

confidential information.<sup>225</sup>

Finally, in addressing whether the restraint was reasonably necessary to protect the efficiency of the government's services, the court found that "the advance nature of the review [was] at a minimum 'reasonably necessary' to protect the government's interests."<sup>226</sup> In the court's view, with respect to classified information, "advance review is plainly essential to preventing dissemination of the information."<sup>227</sup> With respect to other "sensitive material," the court noted, "review before publication enables the government to take preemptive rather than merely reactive steps in response."<sup>228</sup> The District of Columbia Circuit ruled that the prepublication review was not a violation of Weaver's First Amendment free speech rights.<sup>229</sup>

While at first blush it would seem that the D.C. Circuit's opinion in *Weaver* is inconsistent with *Jones* and *Harman*, its facts are unique and can be distinguished from those cases. In *Harman*, the Second Circuit was dealing with a restrictive executive order in the context of a city social service agency. In sharp contrast, the regulation in question in *Weaver* dealt with sensitive material that was "reasonably . . . expected to affect the foreign relations of the United States."<sup>230</sup> While the information that could potentially be released to the media in an interview by an agency employee in *Harman* could arguably be very sensitive, it did not rise to the same level of importance as the information in *Weaver*. The information that was the subject of the television interview in *Harman*, while highly important and sensitive to the city agency, could hardly be said to rise to the same level as the confidential information about which the court in *Weaver* was concerned.

*Jones* involved facts much more closely related to those in *Weaver*. While *Harman* involved restricted speech in the context of a city social service agency, *Jones* involved restricted speech in the context of law enforcement. The subject matter of the restricted information in *Jones*, however, did not involve any confidential or potentially confidential information such as was found to be the case in *Weaver*. One could certainly make an argument that the inner-workings of a city police department, including complaints issued by police officers against fellow officers, is sensitive material. Such material, however, did not rise to the same level of sensitivity as the material in *Weaver*.

In sum, the *NTEU* test requires that "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."<sup>231</sup> Based on the cases discussed above, it appears that the

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225. *Id.* at 1441.

226. *Id.* at 1442 (citing *United States v. NTEU*, 513 U.S. 454, 474 (1995)).

227. *Id.*

228. *Id.* It almost seems as though the District Court is missing the point here. There could be a strong argument according to the aforementioned case law that the restraint is a violation of the First Amendment because it takes "preemptive" steps to curb government employee speech.

229. *Id.* at 1443.

230. *Id.* at 1431–32.

231. *Id.* at 468.



government has significant leeway when the information being restrained is of such a nature as to be at least potentially confidential. According to the D.C. Circuit in *Weaver*, the significantly more government-friendly *Pickering/Connick* test will apply to such cases.<sup>232</sup> If, however, the government is found to have restrained speech that did involve a matter of public concern yet did not involve potentially confidential information, the higher scrutiny *NTEU* test will apply.<sup>233</sup> *Weaver* appears to be somewhat of an outlier. Absent the exception illustrated by *Weaver*, it seems that the government faces a nearly impossibly high hurdle to overcome when attempting to impose a prior restraint on the speech of its employees.

### III. *CRUE V. AIKEN* REVISITED

As an initial matter, for either *Pickering/Connick* or *NTEU* to apply, the speech in question has to be speech on a matter of public concern. The distinction between public and private concern is one that ought to be familiar to any government employer. To be challenged as unconstitutional, action taken by a public college or university with respect to employee speech—whether in the form a retaliatory action such as that in *Pickering* and *Connick* or in the form of a prior restraint as in *NTEU*, *Jones*, and *Harman*—has to involve speech as a matter of public as opposed to private concern.<sup>234</sup> Neither party in *Crue* disputed that the speech dealt with a matter of public concern, and the Seventh Circuit quickly dismissed it as a non-relevant issue.<sup>235</sup>

The initial legal question decided by the Seventh Circuit in *Crue* was whether to apply the *Pickering/Connick* test to the action taken by the University or to apply the higher standard set forth in *NTEU*.<sup>236</sup> The court's determination that the *NTEU* test applied effectively put the nail in the coffin of the University and Chancellor Aiken in the case. With the higher standard of *NTEU* on their side, the balance tipped easily in favor of the plaintiffs. Had the court decided to apply *Pickering/Connick*, the outcome may have been a much closer call. The court's analysis of the issue of which standard ought to apply was admittedly "oversimplif[ied]."<sup>237</sup> Oversimplified or not, the court's majority opinion made clear that any time a prior restraint on speech is involved, regardless of the degree and surrounding circumstances, *NTEU* would apply.<sup>238</sup>

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232. *Weaver v. United States Info. Agency*, 87 F.3d 1429, 1443 (D.C. Cir. 1996).

233. *Id.*

234. *See Garcetti v. Ceballos*, 126 S.Ct 1951, 1960 (2006) (discussing what constitutes speech as a matter of public concern and stating that speech of a public employee "pursuant to his duties" does not constitute speech as a matter of public concern).

235. *Crue v. Aiken*, 370 F.3d 668, 678 (7th Cir. 2004). "There is no doubt that the speech involved here concerns a matter of public concern." *Id.* Even Judge Manion in his dissent stated, "the speech clearly involves a matter of public concern . . ." *Id.* at 684.

236. *Id.* at 678.

237. *Id.*

238. The majority did not cite the exception carved out for the government in situations involving matters of national security or the foreign relations of the United States as applied by the D.C. Circuit in *Weaver*. Thus, for the majority, the determination that a prior restraint was

The Preclearance Directive in *Crue* arguably differed greatly from the actions taken by the government against the public employees in *NTEU*, *Jones*, and *Harman*. *NTEU* involved a federal statute that the Supreme Court found to be a “large-scale disincentive” to free speech rights of government employees.<sup>239</sup> Further, the Court in *NTEU* noted that nearly two million employees could be potentially affected by the ban.<sup>240</sup> In contrast, the preclearance directive in *Crue* “did not purport to limit the plaintiffs’ right to give speeches concerning the Chief controversy, to write letters to the editor, participate in demonstrations, etc.”<sup>241</sup> In fact, as the dissent in *Crue* noted, “[t]he [preclearance directive] left open a wide variety of unfettered speech opportunities for the plaintiffs, which the plaintiffs frequently used.”<sup>242</sup>

The directive involved in *Jones* constituted a total ban on speech insofar as police officers were required to keep any complaints against other employees confidential.<sup>243</sup> Employees in *Jones* were not even permitted to reveal the contents of a complaint to the representatives of their labor union.<sup>244</sup> Unlike the plaintiffs in *Crue*, the police officers in *Jones* did not have alternate avenues available in which they could voice their complaints.

The city’s executive order in *Harman* did not constitute a total ban on speech such as that in *Jones*. In *Harman*, the prior restraint of speech was in the form of a deterrent to employee free speech by requiring the city agency employees to clear all media interview requests with the public relations office prior to accepting the interview.<sup>245</sup> The underlying facts of *Harman* are much more akin to those of *Crue* insofar as the prior restraint in *Harman* did not completely ban speech. Further, like the employees in *Crue*, the city agency employees in *Harman* were not precluded from speaking publicly about the city agency’s policies or from writing letters to a local newspaper. The employees in *Harman* were not even completely banned from giving media interviews, but, rather, were simply required to refer interview requests to the agency media relations office. Similarly, the employees in *Crue* were not completely prohibited from writing letters to prospective athletic recruits but were simply required to submit such requests to the athletic director’s office for prior approval.<sup>246</sup> Despite the fact, however, that the plaintiffs in both cases had alternate avenues available in which to freely express their views and the fact that the plaintiffs in each case were not completely banned from engaging in the speech in question, the circuit courts in each case

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involved was a threshold question. Judge Manion in the dissent cites *Weaver*, noting that, “courts have uniformly assessed prior restraints in the setting of government employment by standards less demanding than those used for traditional prior restraints.” *Id.* at 682 (Manion, J., dissenting) (quoting *Weaver v. United States Info. Agency*, 87 F.3d 1429, 1443 (D.C. Cir. 1996)).

239. *United States v. NTEU*, 513 U.S. 454, 472 (1995).

240. *Id.* at 481–82 (O’Connor, J., concurring).

241. *Crue v. Aiken*, 370 F.3d 668, 684 (7th Cir. 2004) (Manion, J., dissenting).

242. *Id.*

243. *Milwaukee Police Ass’n v. Jones*, 192 F.3d 742, 744 (7th Cir. 1999).

244. *Id.*

245. *Harman v. City of New York*, 140 F.3d 111, 117 (2d Cir. 1998).

246. *Crue*, 370 F.3d at 676–77.

found the question of whether a prior restraint was involved to be one of threshold importance. In each case, once it was determined that a prior restraint was involved, the courts found little difficulty applying the *NTEU* test as opposed to the more government friendly *Pickering/Connick* test.

While the speech of the employees in *Crue* was not completely banned, the restraint in *Crue* differed for the action taken by the government in *Pickering*, *Connick*, and *Garcetti* in one crucial respect. In *Pickering*, the action taken by the government occurred subsequent to the plaintiff's writing a letter to the local newspaper criticizing school officials.<sup>247</sup> In contrast, the plaintiffs in *Crue* had merely expressed their interest in contacting prospective student athletes when the University issued the preclearance directive.<sup>248</sup> The action taken by the University in *Crue*, therefore, was not in response to action already taken by the plaintiff-employees. Despite the fact that the restriction on employee speech under the preclearance directive was arguably much less harsh than the action taken by the government in *Pickering*, the fact that the directive in *Crue* constituted a prior restraint of speech caused the higher scrutiny *NTEU* test to apply.<sup>249</sup>

The action taken by the government in *Connick* and *Garcetti* similarly differed from the University's action in *Crue*. In *Connick* and *Garcetti*, the government's action was taken in response to the speech of the plaintiff-employee, as opposed to action taken preemptively, such as that in *Crue*. Because the University in *Crue* took action preemptively, restraining (or deterring) speech before it occurred, its action was bound to be subject to the higher scrutiny *NTEU* standard.

#### IV. CONCLUSION: PUBLIC COLLEGES AND UNIVERSITIES PAY HEED

The Seventh Circuit's opinion in *Crue v. Aiken* can serve as notice to the nation's public colleges and universities. If a public college or university takes action that restrains or even deters speech prior to the speech occurring, the school's action will be subject to the standard set forth in *NTEU*—the college or university must demonstrate that “the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expressions' necessary impact on the actual operation of the [college or university].”<sup>250</sup> According to the Seventh Circuit in *Crue*, the unique situation faced by public colleges and universities—that employees have a multitude of avenues in which to express freely their views and in which such values are further supported by the constitutional value of academic freedom—does not exempt them from the high standard applied to prior restraints

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247. *Pickering v. Bd. of Educ.*, 319 U.S. 563, 564 (1968).

248. *Crue*, 370 F.3d at 674.

249. The plaintiff in *Pickering* was dismissed from his teaching position as a result of the government's responsive action to his writing of the letter to the local paper. In contrast, the restriction in *Crue* merely deterred one avenue of potential free speech of the plaintiffs. The government in *Pickering*, however, received the benefit of the lower scrutiny standard because the action was in response to speech as opposed to restraining—or chilling—speech before it occurred. Despite the benefit of the more relaxed standard, the government in *Pickering* was still found to have violated the free speech rights of the plaintiff. *Pickering*, 319 U.S. at 574.

250. *Crue*, 370 F.3d at 678.

of speech of government employees set forth in *NTEU*. The nation's public colleges and universities can expect an uphill—or nearly vertical—climb when imposing any form of prior restraint on the free speech rights of their employees. Further, the Seventh Circuit's opinion in *Crue* illustrates that the high scrutiny *NTEU* standard will apply even when the school's action constitutes merely a deterrent to employee speech, as opposed to a total ban on such speech. Given the nature of the academy with its contrasting viewpoints and often contentious debates, one can expect a situation similar to *Crue* to arise again in the near future. A public college or university that restrains the speech of its employees in a way similar to that in *Crue* will find itself subject to a standard under which it is nearly impossible to prevail.<sup>251</sup>

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251. See, e.g., Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 5 (1989) (stating that “prior restraints are so strongly disfavored that labeling a law as a prior restraint on speech is tantamount to a declaration that the law is unconstitutional.”).



# COLLEGE AND UNIVERSITY LIABILITY FOR THE DANGEROUS YET TIME-HONORED TRADITION OF HAZING IN FRATERNITIES AND STUDENT ATHLETICS

NICOLE SOMERS\*

## INTRODUCTION

In November of 1993 at the University of Nebraska at Lincoln, Jeffrey Knoll, a 19-year-old student seeking membership in the Phi Gamma Delta fraternity, was handcuffed to a radiator and forced to consume large quantities of alcohol.<sup>1</sup> When he became severely intoxicated, he was left alone handcuffed to a toilet pipe in the restroom. Knoll broke loose from the handcuffs and attempted to escape through a third-floor window and slide down a drainpipe. He fell to the ground and suffered severe injuries. Knoll had a blood alcohol content of .209.<sup>2</sup>

Six years later at an October team party called “The Big Night,” University of Vermont hockey teammates required freshmen to wear women’s underwear, drink hard liquor and warm beer, and parade in a line while holding each other’s genitals.<sup>3</sup> In January 2000, the University of Vermont cancelled its men’s ice hockey season “in the wake of freshman walk-on Corey Latulippe’s suit alleging that he was hazed during [the October] team initiation.”<sup>4</sup>

These two cases are emblematic of the fact that throughout history, some form of hazing has occurred in organizations varying from American Indian tribes to military groups to college and university sports and Greek life.<sup>5</sup> In fact, hazing rituals occurred as far back as the Middle Ages in Europe.<sup>6</sup> “However, according

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1. Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb. 1999). “Over the course of approximately 2½ hours, Knoll consumed 15 shots of brandy and whiskey and 3 to 6 cans of beer.” *Id.* at 760.

2. *Id.*

3. *College Hazing Under Fire*, CBS NEWS, Apr. 2, 2000, <http://www.cbsnews.com/stories/2000/04/02/national/main179106.shtml>.

4. Clark Thiemann, *Men’s Hockey Rival Vermont Cancels Season after Hazing Cover-up*, DAILY PRINCETONIAN (Feb. 3, 2000), available at <http://www.dailyprincetonian.com/archives/2000/02/03/sports/57.shtml>.

5. A. Catherine Kendrick, Note, Ex Parte Barran: *In Search of Standard Legislation for Fraternity Hazing Liability*, 24 AM. J. TRIAL ADVOC. 407, 440 n.4 (2000); Michael John James Kuzmich, Comment, *In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths*, 31 MCGEORGE L. REV. 1087, 1094 (2000).

6. Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scorned . . . And Injured:*

to one scholar, the form and degree of violence involved in hazing practices is unique to the United States.”<sup>7</sup> This is not surprising since hazing has grown to become a serious problem at colleges and universities across the nation, as it “capitalizes on the dangerous intersection of vulnerability and daring that is characteristic of college-aged men and women.”<sup>8</sup> While Greek organizations and athletic teams are usually popular and make positive contributions to campus life through service and social activities,<sup>9</sup> when it comes to hazing, such organizations are often criticized as being dangerous to students’ health and well-being. Hundreds of men and women have been emotionally disgraced, physically injured, or even killed in ridiculous stunts to gain acceptance in various groups.<sup>10</sup> Fraternities justify these practices by stating that a pledge proves his worth by withstanding the hazing, thus reinforcing “unity among the pledges.”<sup>11</sup> Through such justification, hazing continues unabated and has become an unfortunate “rite of passage to which prospective members of organizations are subjected.”<sup>12</sup>

Hazing is not confined to Greek organizations on campus, but also extends to intercollegiate athletes. For example, an Alfred University survey of NCAA athletes found that over eighty percent of the over 325,000 athletes surveyed were subjected to some form of hazing to join a college or university team,<sup>13</sup> and twenty percent of those surveyed reported hazing that “crossed the line between youthful hijinks and significant danger.”<sup>14</sup> Only one in five participated in exclusively positive initiations, such as ropes courses or team trips.<sup>15</sup> Hazing was most likely

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*Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 369 (1998).

7. *Id.* (citing Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L. J. 111, 112 n.4 (1991)).

8. Jamie Ball, *This Will Go Down on Your Permanent Record (But We’ll Never Tell): How the Federal Educational Rights and Privacy Act May Help Colleges and Universities Keep Hazing a Secret*, 33 SW. U. L. REV. 477, 481 (2004).

9. For example, at Ohio Wesleyan University, “[t]he collective contribution by members of the Greek community is significant and is evidenced through their many service and philanthropic programs and activities both on and off campus during the year.” Ohio Wesleyan University Online, Greek Life, <http://greek.owu.edu/> (last visited Apr. 13, 2007). Nevertheless, while “[m]any [fraternities] were originally founded on dedication to principles such as community service, sound learning, and leadership qualities . . . some have become purely ‘social.’” *13th Annual Ministry Conference This Week Goes Greek*, MISSION NETWORK NEWS, Feb. 14, 2007, <http://mnnonline.org/article/9592>.

10. There is an understanding that “youthful college students may be willing to submit to physical and psychological pain, ridicule and humiliation in exchange for social acceptance which comes with membership in a fraternity.” *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1115 (La. Ct. App. 1999) (establishing a precedent that colleges and universities could be held to nearly a standard of strict liability, as the court apportioned thirty-three percent liability to Louisiana Tech despite its clear anti-hazing policy and rules).

11. Rutledge, *supra* note 6, at 369.

12. Ball, *supra* note 8, at 478.

13. Joshua A. Sussberg, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1426–27 (2003); Nadine C. Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams*, Alfred University (Aug. 30, 1999), available at [http://www.alfred.edu/sports\\_hazing/docs/hazing.pdf](http://www.alfred.edu/sports_hazing/docs/hazing.pdf).

14. *McKenzie v. State*, 748 A.2d 67, 80 n.11 (Md. Ct. Spec. App. 2000).

15. Hoover, *supra* note 13, at 6.

to occur in southern or eastern states with no anti-hazing laws.<sup>16</sup>

Such hazing includes physical beatings, forced consumption of excessive amounts of alcohol, and performance of sexual and humiliating activities in front of others. For example, in New York in 1997, a fraternity pledge named Binaya Oja died after consuming excessive amounts of alcohol as part of a hazing ritual at a fraternity house.<sup>17</sup> At Louisiana Tech in 1994, the president of the Kappa Alpha Psi fraternity physically beat Kendrick Morrison, a freshman pledge, during a gathering in a dorm room. Morrison was later taken to the hospital with serious injuries to his neck and head.<sup>18</sup> At the University of Michigan in 1999, students physically beat pledges and shot one in the groin with a BB gun at a fraternity initiation.<sup>19</sup> At Cornell University in 1994, students beat, tortured, and embarrassed Sylvester Lloyd after rushing to join the local Alpha Phi Alpha Fraternity.<sup>20</sup> Then in May 2006, pictures surfaced on the Internet of hazing in Northwestern University's women's soccer team. These pictures depicted the women engaged in underage drinking, forced exercise, and obligatory activities including simulating sex acts while wearing blindfolds and having their hands bound behind their backs.<sup>21</sup>

Hazing has not been discriminatory, as it can occur at various colleges and universities nationwide. One student commented in the Alfred University study:

I do believe hazing occurs at each and every college campus. It is not exclusive to certain sports, to gender or to skill level. Does this mean it is OK? Do we accept it as the norm based on the fact that virtually every student-athlete has experienced it in some form? Is there any possible way to regulate such behavior? These are questions I often ask myself when presented with this topic . . . I honestly don't see any possible or realistic method in which to limit, let alone eliminate, this type of behavior.<sup>22</sup>

Due to the widespread nature of this problem, colleges and universities have responded by making significant changes to their policies against hazing. After all, "[f]rom a liability standpoint, fraternities no longer can afford their Animal House antics."<sup>23</sup> State colleges and universities must create preventative policies due to the fact that these schools cannot completely prohibit fraternities from being on campus, because these restrictions could violate the constitutionally-protected

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16. *Id.*

17. *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344, 345 (N.Y. App. Div. 1999).

18. *Morrison*, 738 So. 2d at 1110.

19. Jodi S. Cohen, *U-M Probes 2nd Hazing*, DETROIT NEWS, Jan. 7, 2000, at C1.

20. *Lloyd v. Alpha Phi Alpha Fraternity*, No. 96-CV-348, 1999 WL 47153, at \*1 (N.D.N.Y. 1999).

21. *Northwestern Women's Soccer Team Suspended After Photos of Alleged Hazing Are Publicized*, USA TODAY (May 16, 2006), available at [http://www.usatoday.com/sports/college/soccer/2006-05-15-northwestern-suspension\\_x.htm](http://www.usatoday.com/sports/college/soccer/2006-05-15-northwestern-suspension_x.htm).

22. Sussberg, *supra* note 13, at 1431 n.45.

23. Jenna MacLachlan, *Dangerous Traditions: Hazing Rituals on Campus and University Liability*, 26 J.C. & U.L. 511, 532 (2000) (citation omitted).



freedom to associate.<sup>24</sup> Consequently, many states have passed anti-hazing statutes that criminalize hazing.<sup>25</sup> Some colleges and universities have attempted to reduce the incidence of hazing by creating “Hazing Hotlines,” where students can report incidents of hazing, and other colleges and universities have taken the extreme step of eliminating Greek life altogether.<sup>26</sup> However, these measures have not been enough in most cases.<sup>27</sup> Consequently, colleges and universities across the country have found themselves “under siege” due to hazing liability, as courts have held colleges and universities can be liable for students’ hazing activities under several tort law principles.<sup>28</sup> Despite the occurrence of hazing in both fraternities and college and university athletic teams, significant attempts to hold colleges and universities liable for hazing have occurred only in the fraternity context. Still, colleges and universities should be aware that they can be held liable in the student-athlete context as well.

This note will examine the liability of colleges and universities in both the fraternity and student-athlete context, reasons for liability, and what limits should be placed on college and university liability. Part I will provide the history of college and university liability from both a statutory perspective as well as state and federal court jurisprudence. Part II will focus on liability in the fraternity context. Part III will compare fraternity liability to the student-athlete context, and discuss the disparity between the number of hazing cases involving fraternities and student-athletes. Part IV will then discuss when liability should be imposed in both the fraternity and student-athlete contexts and whether different rules should be applied in the two contexts. The note will conclude that colleges and universities should be liable in both the fraternity and student-athlete contexts for foreseeable physical injuries from hazing incidents. More specifically, if colleges and universities are aware of hazing occurring on their campuses and have not taken appropriate action to prevent it, then they must be held accountable or else hazing will continue. However, there should be limits to college and university liability; colleges and universities should not be held liable if the hazing incident was an isolated event and the institution had no prior knowledge of hazing incidents in a particular fraternity or athletic team.

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24. Kendrick, *supra* note 5, at 437. Courts have held that a state would need to meet a “heavy burden” if it did not recognize a student group. *Healy v. James*, 408 U.S. 169, 184 (1972).

25. See *infra* note 30. See also Dara Aquila Govan, Note, “Hazing Out” the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679, 682 (2001).

26. The University of Oregon uses “Hazing Hotlines” while Amherst, Colby, and Franklin & Marshall colleges have banned fraternities altogether. Govan, *supra* note 25, at 682–83 n.20, 22.

27. See Ball, *supra* note 8, at 482; R. Brian Crow & Scott R. Rosner, *Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports*, 76 ST. JOHN’S L. REV. 87, 113 (2002).

28. Govan, *supra* note 25, at 681–82 (citing *Furek v. Univ. of Del.*, 594 A.2d 506, 520–28 (Del. 1991) (discussing the principles of tort law that impose duties on colleges and universities to protect students from injury)).

## I. LEGISLATIVE AND JUDICIAL HISTORY

## A. State Statutes and the Definition of Hazing

Hazing has been a chronic problem in United States' educational institutions at least since 1874 when Congress passed the first hazing statute to prevent hazing at the Naval Academy in Annapolis, Maryland.<sup>29</sup> Over the years, forty-four states have enacted anti-hazing laws,<sup>30</sup> but many have struggled to define hazing. Thus, several definitions exist not only for states but also for colleges and universities as well as fraternities and sororities, which make it difficult to determine what sort of activities can be considered hazing when imposing liability. Some statutes and policies provide brief definitions while others are lengthier. For example, hazing has been characterized as:

any activity expected of someone joining a group that humiliates, degrades, abuses, or endangers, regardless of the person's willingness to participate. This does not include activities such as rookies carrying the balls, team parties with community games, or going out with your teammates, unless an atmosphere of humiliation, degradation, abuse or danger arises.<sup>31</sup>

However, many states have limited their definition to either eliminate the humiliation element or simply do not cover athlete hazing.<sup>32</sup> States also differ on whether consent of the person hazed is included in the definition.<sup>33</sup> Other more

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29. Act of June 23, 1874, ch. 453, 18 Stat. 203 (1874). See Kendrick, *supra* note 5, at 409.

30. See ALA. CODE § 16-1-23 (2001); ARK. CODE ANN. § 6-5-201 (West 1999); ARIZ. REV. STAT. ANN. § 15-2301 (2001); CAL. EDUC. CODE § 32051 (West 2002); COLO. REV. STAT. § 18-9-124 (West 2004); CONN. GEN. STAT. ANN. § 53-23a (West 2001); DEL. CODE ANN. tit. 14, §§ 9301-9304 (1999); FLA. STAT. § 240.262 (1998); GA. CODE ANN. § 16-5-61 (West 2003); IDAHO CODE § 18-917 (1997); 720 ILL. COMP. STAT. ANN. 120/5 (West 2003); IND. CODE ANN. § 35-42-2-2 (West 2004); IOWA CODE § 708.10 (West 2003); KAN. STAT. ANN. § 21-3434 (West 1995); KY. REV. STAT. ANN. § 164.375 (West 2006); LA. REV. STAT. ANN. § 17:1801 (2001); ME. REV. STAT. ANN. tit. 20, § 10004 (West 1993); MD. CODE ANN., CRIMINAL LAW, § 3-607 (West 2002); MASS. ANN. LAWS ch. 269, § 17 (LexisNexis 1992); MICH. COMP. LAWS ANN. § 750.411t (West 2004); MINN. STAT. ANN. § 121A.69 (West Supp. 2007); MISS. CODE ANN. § 97-3-105 (West 2005); MO. ANN. STAT. § 578.360 (West 2003); NEB. REV. STAT. § 28-311.06 (1995); NEV. REV. STAT. ANN. § 200.605 (LexisNexis 2006); N.H. REV. STAT. ANN. § 631:7 (1996); N.J. STAT. ANN. § 2C:40-3 (2005); N.Y. PENAL LAW § 120.16 (McKinney 1998); N.C. GEN. STAT. § 14-35 (2005); N.D. CENT. CODE § 12.1-17-10 (1997); OHIO REV. CODE ANN. § 2903.31 (West 2006); OKLA. STAT. ANN. tit. 21, § 1190 (West 2002); OR. REV. STAT. § 163.197 (2005); 24 PA. CONS. STAT. § 5353 (West 2006); R.I. GEN. LAWS § 11-21-1 (2002); S.C. CODE ANN. § 16-3-510 (West Supp. 2006); TENN. CODE ANN. § 49-7-123 (2002); TEX. EDUC. CODE ANN. § 37.152 (West 2006); UTAH CODE ANN. § 76-5-107.5 (2003); VT. STAT. ANN. tit. 16, § 140b (2004); VA. CODE ANN. § 18.2-56 (West 2005); WASH. REV. CODE ANN. § 28B.10.901 (West 1997); W. VA. CODE § 18-16-3 (2003); WIS. STAT. ANN. § 948.51 (West 2005). The only states that do not have an anti-hazing law are Alaska, Hawaii, Montana, New Mexico, South Dakota, and Wyoming. StopHazing.org, *State Anti-Hazing Laws*, <http://www.stophazing.org/laws.html> (last visited Apr. 13, 2007).

31. Hoover, *supra* note 13, at 8.

32. *Id.*

33. *Id.*

simple definitions state: “any activity that might reasonably be expected to bring physical harm to the individual.”<sup>34</sup> Most hazing violations constitute misdemeanor offenses,<sup>35</sup> but in some states, such as Utah, a hazing violation is classified as a felony.<sup>36</sup>

The 2006 mistrial involving the hazing of five Florida A&M University fraternity members demonstrated the importance of hazing-definition specificity. In that case, the jury said “it was perplexed by an undefined legal term and unable to reach a verdict.”<sup>37</sup> This would have been the first trial to test a new Florida state law that made hazing a felony if it resulted in death or “serious bodily injury,” but the statute did not define what constituted serious bodily injury.<sup>38</sup> Defense lawyer Chuck Hobbs stated: “That is a very serious legal term and it has been defined in other statutes and yet for whatever reason it’s not defined in this one.”<sup>39</sup> The circuit judge merely instructed the jury that it meant neither slight nor moderate.<sup>40</sup> Thus, the four Kappa Alpha Psi brothers were not sentenced for using their fists, boxing gloves, and canes to beat Marcus Jones, who suffered a broken ear drum and needed surgery on his buttocks due to the severity of the beatings over the four nights of initiation.<sup>41</sup> Nonetheless, Florida A&M suspended the defendants pending the outcome of the criminal case, and also suspended the fraternity until 2013.<sup>42</sup>

While many states maintain definitions of hazing that may seem vague,<sup>43</sup> state

34. *Rocha v. Faltys*, 69 S.W.3d 315, 324 (Tex. App. 2002).

35. *See, e.g.*, ALA. CODE § 16-1-23 (2001); ARK. CODE ANN. § 16-5-201 to 203 (1999); CAL. EDUC. CODE §§ 32050–32051 (West 2002); COLO. REV. STAT. ANN. § 18-9-124 (West 2004); DEL. CODE ANN. tit. 14, §§ 9301–9304 (1999); GA. CODE ANN. § 16-5-61 (2003); IDAHO CODE ANN. § 18-917 (1997); IOWA CODE ANN. § 708.10 (West 2003); KAN. STAT. ANN. § 21-3434 (West 1995); MO. ANN. STAT. §§ 578.360, 578.363 & 578.365 (2005); NEB. REV. STAT. §§ 28-311.06 & 28-311.07 (1995); N.H. REV. STAT. ANN. § 631:7 (1996); N.Y. PENAL LAW §§ 120.16 & 120.17 (McKinney 1998); N.C. GEN. STAT. §§ 14-35, 14-36 & 14-38 (2005); N.D. CENT. CODE § 12.1-17-10 (1997); OHIO REV. CODE ANN. § 2903.31 (West 2006); OKLA. STAT. ANN. tit. 21, § 1190 (West 2002); 24 PA. STAT. ANN. §§ 5352–5354 (West 2006); R.I. GEN. LAWS §§ 11-21-1 (2002); WASH. REV. CODE ANN. §§ 28B.10.900–902 (West 1997).

36. UTAH CODE ANN. § 76-5-107.5 (2003) (hazing is a felony if it involves a dangerous weapon or bodily injury). *See also* 720 ILL. COMP. STAT. ANN. 120/10 (West 2003) (hazing is a misdemeanor unless it results in “death or great bodily harm” and then it is a felony); IND. CODE ANN. § 35-42-2-2 (West 2004) (imposes both misdemeanor and felony penalties depending on severity); TEX EDUC. CODE ANN. § 37.152 (West 2006) (hazing may rise to a felony only if death results); VA. CODE ANN. § 18.2-56 (West 2003) (hazing is a “Class 1 misdemeanor”); W. VA. CODE § 18-16-3 (2003) (misdemeanor unless acts constitute a felony); WIS. STAT. ANN. § 948.51 (West 2005) (misdemeanor unless the “act results in great bodily harm to another”).

37. Bill Kaczor, *Mistrial in Florida A&M Hazing Case*, BOSTON GLOBE (Oct. 9, 2006), available at [http://www.boston.com/news/nation/articles/2006/10/09/mistrial\\_in\\_florida\\_am\\_hazing\\_case/?rss\\_id=Boston.com+%2F+News](http://www.boston.com/news/nation/articles/2006/10/09/mistrial_in_florida_am_hazing_case/?rss_id=Boston.com+%2F+News).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. “For example, Louisiana [sic] and Kansas’s statutes prohibit behavior that could

supreme courts across the nation have upheld hazing statutes. For example, in *Haben v. Anderson*,<sup>44</sup> the Illinois Supreme Court held that the Illinois hazing statute did not promote arbitrary enforcement and was not unconstitutionally vague.<sup>45</sup> The Missouri Supreme Court in *State v. Allen*<sup>46</sup> held that Missouri's statute was neither vague (because it clearly defined the reach of the words based on common understanding) nor overly broad.<sup>47</sup> In *McKenzie v. State*,<sup>48</sup> an intermediate court in Maryland found that an anti-hazing statute defining hazing as "activities and situations . . . that i) recklessly or intentionally ii) subject a student to the risk of serious bodily injury iii) for the purpose of initiation into a student organization" was not void for vagueness under the Due Process Clause.<sup>49</sup>

Beyond determining whether a state statute's definition of hazing is vague, other courts have also limited the scope of liability imposed by the statutes. For example, in *Perkins v. Commonwealth*,<sup>50</sup> an intermediate appellate court in Massachusetts held that the Massachusetts hazing statute's criminal prohibition of "brutal treatment or forced physical activity" is directed at student organizations and not at the educational institutions themselves.<sup>51</sup> Still, this distinction does not answer the question of when colleges and universities may be held liable for the hazing of their students.

#### B. State and Federal Court Jurisprudence

Amidst this lack of uniformity in the definition of hazing is a similar lack of uniformity in courts' imposition of liability on colleges and universities for the hazing done by students. The primary theory that students rely on is negligence. In order to recover under any claim of negligence against a college or university, a student must prove four elements: (1) the college or university had a legal duty of care to protect the student from unreasonable risks; (2) breach of this duty of care by the college or university; (3) actual and proximate causation; and (4) injury to the plaintiff.<sup>52</sup> Historically, there have been three theories that plaintiffs have relied on to establish the presence of the duty of care: (1) the doctrine of *in loco*

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'reasonably be expected to result in great bodily harm.'" Jacinda Boucher, *Hazing and Higher Education: State Laws, Liability, and Institutional Implications*, STOPHAZING.ORG, [http://www.stophazing.org/devtheory\\_files/devtheory7.htm](http://www.stophazing.org/devtheory_files/devtheory7.htm) (last visited Apr. 13, 2007) (citation omitted). See, e.g., KAN. STAT. ANN. § 21-3434 (1995).

44. 597 N.E.2d 655 (Ill. App. Ct. 1987) (involving several members of the Western Illinois University Lacrosse Club who were charged under the state's anti-hazing statute).

45. *Id.*

46. 905 S.W.2d 874 (Mo. 1995).

47. *Id.* at 877-78.

48. 748 A.2d 67 (Md. Ct. Spec. App. 2000).

49. *Id.* at 74.

50. 752 N.E.2d 761 (Mass. App. Ct. 2001).

51. *Id.* at 765.

52. Crow & Rosner, *supra* note 27, at 92-93; Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001) (holding that the University owed a duty of care to the cheerleader because there was a special relationship and it voluntarily assumed a duty of care to the cheerleader); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105 (La. Ct. App. 1999).

*parentis*, (2) the landowner-invitee theory, and (3) a special relationship between the students and the college or university.<sup>53</sup> There have been three separate eras of liability for colleges and universities: (1) *in loco parentis* holding colleges and universities to a high duty of care, (2) the “no duty” rule following the demise of the *in loco parentis* standard, and (3) the exceptions to the “no duty” rule commenced by *Furek v. University of Delaware*.<sup>54</sup> These three eras of college and university liability will be discussed in turn.

### 1. *In Loco Parentis*

Until the 1960s and 1970s, colleges and universities stood *in loco parentis* to their students, or “in place of the parents.”<sup>55</sup> Under this doctrine, colleges and universities are responsible for the welfare of students in their care. In *Gott v. Berea College*, the Kentucky Supreme Court used the *in loco parentis* doctrine to sustain a school’s claim of authority over its students.<sup>56</sup> The demise of this doctrine began in the 1960s when society began to view college and university students as adults who do not need extra attention,<sup>57</sup> and by the 1970s “courts began to hold that colleges had no duty to protect their students.”<sup>58</sup>

### 2. “No Duty” Rule

The “no duty” rule states that “the relationship between the college and the student is simply one that provides education only. The university is under no obligation or duty to control or govern the students’ behavior.”<sup>59</sup> For example, in *Beach v. University of Utah*,<sup>60</sup> the Utah Supreme Court rejected the claim that a special relationship existed between the student and the school, thus accepting the notion that college and university students are adults and do not require extra protection beyond what they can provide themselves.<sup>61</sup> Colleges and universities enjoyed immunity from liability during this period. However, this veil of immunity was breached by *Furek v. University of Delaware*.

### 3. Exceptions to the “No Duty” Rule

While the demise of the *in loco parentis* doctrine led to decreased liability for colleges and universities, *Furek* demonstrated that courts will impose a duty on

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53. Crow & Rosner, *supra* note 27, at 93.

54. See MacLachlan, *supra* note 23, at 522; Kerri Mumford, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL’Y 737, 746–53 (2001).

55. Crow & Rosner, *supra* note 27, at 93. See MacLachlan, *supra* note 23, at 513–15.

56. 161 S.W. 204 (Ky. 1913). See MacLachlan, *supra* note 23, at 513–14; ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* (1999).

57. See MacLachlan, *supra* note 23, at 513–15.

58. Crow & Rosner, *supra* note 27, at 93. See Mumford, *supra* note 54, at 740–41.

59. Mumford, *supra* note 54, at 738 (citation omitted).

60. 726 P.2d 413 (Utah 1986).

61. MacLachlan, *supra* note 23, at 520.

colleges and universities to protect their students in certain situations—particularly foreseeable, dangerous activities by students that occur on college or university property.<sup>62</sup> *Furek* was the first major case to hold an institution liable for the injuries to a student caused by a third party. In *Furek*, the Delaware Supreme Court focused on Section 323 of the Restatement of Torts<sup>63</sup> and the rejection of the *in loco parentis* standard.<sup>64</sup> The next section will discuss the question of when to impose liability on colleges and universities for the hazing at fraternities.

## II. COLLEGE AND UNIVERSITY LIABILITY FOR HAZING AT FRATERNITIES

Over the decades, there has been an escalated interest in Greek organizations across the country at various colleges and universities. For example,

[i]n the first one-half of the 1980s, membership in Greek organizations grew by one hundred and fifty thousand. By 1988, four hundred thousand students were active in Greek organizations in the six thousand or so chapters nationwide, one hundred thousand of which were replacing graduates each year. Thus, about one million students proceed through the Greek system each decade, with approximately eighty percent of all Greek chapters nationally affiliated.<sup>65</sup>

Moreover, even though fraternities are founded on the basis of brotherhood, “[t]he stereotypical image of fraternities includes students participating in binge drinking, partying, hazing, drug use and sexual freedom.”<sup>66</sup> Unfortunately, this behavior has resulted in sexual assaults, alcohol-related deaths and injuries, and hazing-related injuries and deaths.<sup>67</sup>

This increased popularity, coupled with increased injuries in fraternities, has led to a similar escalation in litigation involving fraternities. Since the early 1980s, “[s]ubpoenas and depositions [have been] replacing beer cans and pledge paddles as icons on fraternity row.”<sup>68</sup> Due to public outcry, courts have increasingly held fraternities and the affiliated colleges and universities liable for hazing injuries to students. Liability was usually imposed on colleges and universities when a fraternity was located on the campus and the college or university had exerted authority by imposing hazing regulations on the fraternities.<sup>69</sup> The following two cases illustrate the increased imposition of liability on colleges and universities.

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62. *Id.* at 528–29.

63. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

64. Mumford, *supra* note 54, at 748.

65. Rutledge, *supra* note 6, at 365–66 (citation omitted).

66. Mumford, *supra* note 54, at 743.

67. *Id.* See also Christopher T. Pierson & Lelia B. Helms, *Liquor and Lawsuits: Forty Years of Litigation Over Alcohol On Campus*, 142 EDUC. L. REP. 609, 616 (2000).

68. Mumford, *supra* note 54, at 743–44 (quoting Gary Taylor, *Increasingly Vulnerable: Fraternities Face (Legal) Facts*, NAT’L L.J., Dec. 31, 1990, at 26).

69. *Id.* at 743.

A. *Furek v. University of Delaware*

*Furek* initiated a major transformation in court jurisprudence on school liability for hazing by paving the way to imposing liability on colleges and universities for fraternity hazing in certain instances.<sup>70</sup> The case originated at the University of Delaware, where several football players encouraged Jeffrey Furek, who had received a full football scholarship, to join the local chapter of Sigma Epsilon. During initiation, fraternity members ordered Furek to crawl on his hands and knees while being sprayed by a fire extinguisher, and then they paddled him, compelled him to do calisthenics, and forced him to eat food out of a toilet.<sup>71</sup> Furek received the worst injuries when a fraternity member poured a container of lye-based liquid oven cleaner over Furek's back and neck from which he received first and second degree chemical burns.<sup>72</sup> Furek sought damages in the Delaware Superior Court against the University of Delaware, among others.<sup>73</sup>

While rejecting the *in loco parentis* doctrine, the Delaware Supreme Court held that based on Section 323 of the Restatement of Torts, the University assumed a "direct responsibility for the safety" of its students, and "[i]f one 'takes charge and control of [a] situation, he is regarded as entering into a relation which is attenuated with responsibility.'" <sup>74</sup> Moreover, the court stated that

[t]he evidence in this record . . . strongly suggests that the University not only was knowledgeable of the dangers of hazing but, in repeated communications to students in general and fraternities in particular, emphasized the University policy of discipline for hazing infractions. The University's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students.'<sup>75</sup>

The court held that due to the University's anti-hazing regulations, it had exercised control and authority over hazing activities. This "constituted an assumed duty,"<sup>76</sup> demonstrating that the University had knowledge of hazing on its campus.<sup>77</sup> The University, the court said, had a duty to protect Furek from injury, and thus the injuries Furek sustained constituted a breach of that duty. The court stated: "While we agree that the University's duty is a limited one, we are not persuaded that none

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70. See, e.g., MacLachlan, *supra* note 23, at 522; Crow & Rosner, *supra* note 27, at 94; Govan, *supra* note 25, at 692-94. However, not all state courts have followed *Furek's* precedent. For example, in *Bash v. Clark University*, a Massachusetts Superior Court recently found no special relationship existed between the student and the University, and therefore the court held that Clark University owed no duty to protect Bash from voluntary use of drugs and alcohol. *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297 (Mass. Sup. Ct. Nov. 20, 2006).

71. *Furek v. Univ. of Del.*, 594 A.2d 506, 509 (Del. 1991).

72. *Id.* at 510.

73. *Id.* at 509.

74. *Id.* at 520 (citation omitted).

75. *Id.* (quoting *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983)).

76. *Id.*

77. Mumford, *supra* note 54, at 750.

exists.”<sup>78</sup> The court also questioned the claims in *Beach* that the “adult status of college students made university intrusion into alcohol-related activities inappropriate.”<sup>79</sup>

In holding the University liable for Furek’s injuries, the court also recognized liability based on Furek’s status as an invitee on the University’s property.<sup>80</sup> The court stated that “[a] landowner who knows or should know of an unreasonably dangerous condition or use of his property has a duty to invitees to safeguard the invitee against such hazards including the conduct of third parties.”<sup>81</sup> The court relied on Section 344 of the Restatement of Torts which states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.<sup>82</sup>

The Court determined that the University’s duty to protect Furek under Section 344 was not absolute, and that foreseeability is the “determining factor” for whether the duty exists.<sup>83</sup> Thus, a college or university can be held liable as a landowner if it had prior knowledge of a hazardous condition and did not protect students from that hazard.<sup>84</sup> The Court held that

because at the time of the incident the [U]niversity was aware of past hazing incidents, had made attempts to control fraternity hazing, and was aware that the practice was on-going, there was sufficient evidence for a jury to have determined that the hazing that caused Furek’s injuries was foreseeable.<sup>85</sup>

Thus, the *Furek* court based University liability for Furek’s injuries on two premises: (1) the duty of a service provider to render the necessary service to protect another, and (2) the University’s duty as a landowner to protect the plaintiff as an invitee against any foreseeable and dangerous conditions on the University

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78. *Furek*, 594 A.2d at 517.

79. MacLachlan, *supra* note 23, at 525.

80. *See id.* at 528; Mumford, *supra* note 54, at 760–61.

81. *Furek*, 594 A.2d at 520. *See also* Miller v. Int’l Sigma Pi Fraternity, No. 1837 Civil 1995, 1999 WL 1098201 (Pa. Com. Pl. Jan. 25, 1999) (demonstrating the importance of knowledge in invitee relationships, as the court held that the University was not liable as a social host for injuries because it was not demonstrated that the University had actual knowledge of the party at which the plaintiff was injured).

82. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

83. MacLachlan, *supra* note 23, at 528.

84. *See* Crow & Rosner, *supra* note 27, at 94.

85. MacLachlan, *supra* note 23, at 529. *See also* Ostrander v. Duggan, 341 F.3d 745 (8th Cir. 2003) (holding that liability should not be imposed due to the absence of the foreseeability of injury).



property.<sup>86</sup> Since the second basis is more frequently relied upon than the first, it will be the focus of this section. “A majority of jurisdictions hold that landowners have a duty to protect invitees from foreseeable attacks.”<sup>87</sup> Similarly, “[a] university owes student tenants the same duty to exercise reasonable care as a private landowner.”<sup>88</sup> With regard to the foreseeability component of the landowner-invitee theory, courts have used four tests to ascertain if the conduct was foreseeable:<sup>89</sup> the specific harm test,<sup>90</sup> the prior similar incidents test,<sup>91</sup> the balancing test,<sup>92</sup> and the totality of the circumstances test.<sup>93</sup> By contrast, “other courts have rejected the notion that a landlord has a duty to protect a tenant from harm caused by intentional or criminal acts of third persons.”<sup>94</sup>

Despite the significant change in jurisprudence with the *Furek* decision, some courts have been reluctant to employ its analysis.<sup>95</sup> “Even though universities have taken active steps to enforce their drinking or hazing policies, courts have continually held that a social policy prohibiting underage drinking does not create a special relationship and a duty for the university to protect students.”<sup>96</sup> For example, in *Booker v. Lehigh University*,<sup>97</sup> a federal district court in Pennsylvania held that if a college or university’s policies regarding protection of students created a special relationship, then there would be an unwarranted return to the *in loco parentis* standard.<sup>98</sup> Instead, the court held that the policies merely constituted instructions for students on how to behave like adults and drink

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86. Govan, *supra* note 25, at 696.

87. Mumford, *supra* note 54, at 761 (citing *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968, 973–74 (Ind. 1999) (holding that the chapter of the fraternity as landowner owed a duty of care to protect the student as invitee from foreseeable sexual assaults at the chapter)).

88. *Id.* (citing *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984) (holding that the community college district had a duty to exercise care to protect students from reasonably foreseeable assaults on campus)).

89. *Delta Tau Delta*, 712 N.E.2d at 971; Mumford, *supra* note 54, at 761. See generally *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405 (Wyo. 1997); *McClung v. Delta Square Ltd. P’ship*, 937 S.W.2d 891, 899–901 (Tenn. 1996); *Boren v. Worthen Nat’l Bank of Ark.*, 921 S.W.2d 934, 940–41 (Ark. 1996); *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 215–16 (Cal. 1993).

90. “Under the specific harm test, a landowner owes no duty unless the owner knew or should have known that the specific harm was occurring or was about to occur.” *Delta Tau Delta*, 712 N.E.2d at 971 (citation omitted).

91. “Under the prior similar incidents (PSI) test, a landowner may owe a duty of reasonable care if evidence of prior similar incidents of crime on or near the landowner’s property shows that the crime in question was foreseeable.” *Id.* at 972 (citation omitted).

92. “Under . . . the balancing test, a court balances ‘the degree of foreseeability of harm against the burden of the duty to be imposed.’” *Id.* (quoting *McClung*, 937 S.W.2d at 901).

93. “Under the totality of the circumstances test, a court considers all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable.” *Id.* (citation omitted).

94. Mumford, *supra* note 54, at 761 (citation omitted).

95. *Id.* at 751.

96. *Id.*

97. 800 F. Supp. 234 (E.D. Pa. 1992).

98. Mumford, *supra* note 54, at 752.

responsibly, and thus the University did not assume a duty to protect the students.<sup>99</sup>

Nonetheless, the refusal of some courts to follow the *Furek* analysis does not mean that a college or university should escape liability when it tries and fails to protect students from hazing or excessive drinking merely because it is an educational institution and has no duty to protect its students from injury.<sup>100</sup> Moreover, colleges and universities should be held liable based on the landowner-invitee standard when they own the property where fraternity-related injuries occur.<sup>101</sup> Nonetheless, liability largely depends upon the facts of each case—for example, a college or university should be liable if it has exercised control over a fraternity and its members and it has knowledge that its hazing policies have not been followed.<sup>102</sup> While some courts have refused to follow *Furek*, other courts have held colleges and universities liable for hazing incidents. One such court is the *Morrison* court.

#### B. *Morrison v. Kappa Alpha Psi Fraternity*

In *Morrison v. Kappa Alpha Psi Fraternity*, which occurred a little over eight years after *Furek*, an intermediate appellate court in Louisiana held a school thirty-three percent liable because “social policy justifies a special relationship between the University and its students in this particular instance.”<sup>103</sup> In *Morrison*, a student and his parents brought an action against Louisiana Tech, among others, arising out of a fraternity hazing incident at the University on April 10, 1994.<sup>104</sup> Kendrick Morrison, a freshman interested in membership in Kappa Alpha Psi, suffered injuries to his head and neck after the president of the Tech Kappa chapter physically beat him at a gathering in the president’s dorm room. Morrison received treatment at the Lincoln General Hospital, and reported the incident to campus police.<sup>105</sup> In the litigation that ensued, Morrison sought loss of earning capacity based on an expert’s testimony that Kendrick’s lifelong dream of becoming a physical therapist would most likely no longer be achievable due to Kendrick’s injuries from the hazing incident.<sup>106</sup>

The appellate court imposed liability on Louisiana Tech on the theory of negligence because the University breached a duty owed to Morrison and that breach was the legal cause of his injuries. The court determined that the University had a special relationship with Morrison, and that special relationship created a duty on the part of the University to Morrison. This duty was based on the circumstances of this case in which a school that allows and regulates fraternal organizations has a “duty toward their students to act within reasonable bounds to

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99. *Booker*, 800 F. Supp. at 241.

100. *See Mumford*, *supra* note 54, at 753.

101. *Id.* at 762.

102. *Id.* at 762–63, 767.

103. *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1115 (La. Ct. App. 1999).

104. *Id.* at 1110.

105. *Id.*

106. *Id.* at 1111.

protect against illegal and proscribed hazing.”<sup>107</sup> In order to ascertain whether a breach occurred, the court determined whether the University failed to exercise reasonable care in protecting those students at risk of injury due to hazing activities. The court found “that a university with known and documented history of hazing by a fraternal organization” is obligated “to monitor such further behavior by the fraternity.”<sup>108</sup> In determining whether to impose a duty, the court gave great weight to the fact that the Assistant Dean of Student Life had received complaints about the fraternity’s hazing on campus and did not adequately respond to those reports, which occurred only one year prior to Morrison’s beating.<sup>109</sup> The University was “under a duty to monitor and prevent any further prohibited hazing activity by Kappa.”<sup>110</sup> The court held that since the “[U]niversity’s response to and investigation of reports of Kappa hazing in 1993, the year prior to the incident involving Kendrick, were inadequate,” the University breached its duty to protect Morrison.<sup>111</sup> Lastly, in order to prove causation, the court determined that the “[U]niversity’s failure was a precipitating or contributing factor which made it possible for Kendrick to be physically hazed by the president.”<sup>112</sup> In that sense, the court said that the University had caused Kendrick’s injury. The University’s breach of duty was also the legal cause of injury since “[t]he risk that a student might be injured as a result of physical hazing is clearly within the scope of protection contemplated by imposition of such a duty.”<sup>113</sup>

The court’s decision in *Morrison* established “a precedent that colleges and universities may be held near a standard of strict liability, providing all the more incentive for administrators to be more aggressive in their efforts to address hazing.”<sup>114</sup> Although courts have not taken a uniform approach in determining when to impose liability on colleges and universities, it is safe to say that they are most likely to do so when officials knew of hazing activities, when the institution has issued anti-hazing regulations, and when it ultimately failed to prevent hazing.<sup>115</sup>

### C. College and University Attempts to Limit Liability

Due to the increase in liability initiated by *Furek* and *Morrison*, colleges and universities nationwide have employed various methods, including creating and

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107. *Id.* at 1115.

108. *Id.*

109. *Id.* at 1114–15.

110. *Id.* at 1115.

111. *Id.* at 1117. “[W]hen universities fail to prevent the hazing of pledges, and a pledge is injured, courts may find that the universities have breached their duty to protect the students because these institutions have attempted to control and regulate hazing activities by having anti-hazing rules.” Kendrick, *supra* note 5, at 437.

112. *Morrison*, 738 So. 2d at 1117.

113. *Id.*

114. Ball, *supra* note 8, at 492.

115. Kendrick, *supra* note 5, at 437. Moreover, “[w]here the universities had particular knowledge of hazing activities and then attempted to regulate and supervise the fraternities with anti-hazing regulations, the courts have determined that a duty of care to the students exists.” *Id.*

enforcing stricter policies against hazing and alcohol consumption, with the hope of limiting their liability and protecting themselves from fraternity hazing liability.<sup>116</sup> For example, some have banned alcohol from fraternity premises while others notify parents of high-risk behavior.<sup>117</sup> Some colleges and universities require that only students of legal drinking age are permitted to consume alcoholic beverages on fraternity premises, and third parties must provide those beverages.<sup>118</sup> Other options to decrease liability include that a college or university could “choose to completely deny any association between itself and the student organization, thereby relinquishing all control over the organization.”<sup>119</sup> It could also “maintain control over the student organizations, [and] . . . carefully monitor the organizations and make sure regulations were being implemented.”<sup>120</sup> It is important for colleges and universities to take these initiatives because they are in a better position than national fraternities to implement these policies to prevent tragedies.

Defenses that have been used for injuries that occurred during hazing activities in fraternities include consent, assumption of the risk, and contributory negligence—each of which similarly suggests that the pledge was to some extent responsible for his injury.<sup>121</sup> Consent is an “[a]greement, approval, or permission as to some act or purpose, esp[ecially] given voluntarily by a competent person; legally effective assent.”<sup>122</sup> In order for consent to function as a defense, the plaintiff must have had the capacity to consent and actually consented to the conduct in question or to substantially similar conduct.<sup>123</sup> Consent cannot be used as a defense if the conduct in question was excessive or disproportionate to the consent or if the injured person is exposed to serious bodily injury or death.<sup>124</sup> Assumption of the risk is broader than consent; it requires that the plaintiff knew of the risk and understood its nature, and that the plaintiff’s choice was free and voluntary.<sup>125</sup> “This knowledge requirement is exceedingly difficult for a defendant

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116. Mumford, *supra* note 54, at 767.

117. *Id.* at 768.

118. *Id.* at 767–68.

119. Kendrick, *supra* note 5, at 437 (citing Jennifer L. Spaziano, Comment, *It’s All Fun and Games Until Someone Loses an Eye: An Analysis of University Liability for Actions of Student Organizations*, 22 PEPP. L. REV. 213, 244 (1994)).

120. *Id.*

121. See Susan J. Curry, *Hazing and the “Rush” Toward Reform: Responses From Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 107 (1989).

122. BLACK’S LAW DICTIONARY 160 (8th ed. 2004).

123. Curry, *supra* note 120, at 108. See *Davies v. Butler*, 602 P.2d 605, 611 (Nev. 1979) (holding that the giving of the jury instruction that “[a] person may expressly or by voluntarily participating in an activity consent to an act which would otherwise be a battery,” was misleading and reversible error).

124. Curry, *supra* note 120, at 109.

125. *Id.* See *Ballou v. Sigma Nu Gen. Fraternity*, 352 S.E.2d 488, 495 (S.C. Ct. App. 1986) (holding that the plaintiff’s consumption of an excessive quantity of liquor detracted from his ability to appreciate the increased risks and the jury could conclude that it no longer constituted “deliberate drinking with knowledge of what [was] being consumed.”). See also *Ex parte Barran*, 730 So. 2d 203, 206–08 (Ala. 1998) (holding that the plaintiff could not hold a fraternity liable for his injuries because the pledge had assumed the risk of participating in the fraternity’s hazing).

to prove, even if the hazing does not involve drinking to intoxication.”<sup>126</sup> Contributory negligence, unlike assumption of the risk, denies all recovery to the plaintiff due to her own negligent behavior.<sup>127</sup> Due to the severe result from the imposition of the contributory negligence defense, courts have adopted the alternative of comparative negligence, which shifts the focus from liability to damages and divides the damages among all of the negligent parties based on their individual degree of fault.<sup>128</sup>

#### D. Recent Fraternity Hazing Litigation with No Liability Imposed

There also exist cases in which institutions and fraternities have escaped liability. For example, *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*<sup>129</sup> demonstrates how colleges and universities have avoided liability when taking part in the hazing activities at fraternity houses is voluntary rather than required. In *Prime*, a pledging fraternity member brought a personal injury action for injuries sustained from participating in a fraternity initiation event. Matthew Prime, a nineteen-year-old pledge of the Beta Gamma chapter of Pi Kappa Alpha fraternity at the University of Kansas, “was provided alcoholic beverages in large quantities and encouraged *but not required* to drink them during the occasion.”<sup>130</sup> Prime consumed excessive amounts of alcohol because of what he perceived to be “peer pressure” after he was told “if you want to drink that would be fine because it will be ‘the time of your life’” and Prime did so in order to “fit in.”<sup>131</sup> However, Prime was not able to recall who had actually said those words to him. He later lost consciousness, at which point the fraternity members took him to the hospital. Prime’s blood alcohol content was .294.<sup>132</sup> Prime brought a personal injury action against the local chapter, the national fraternity organization, and the University of Kansas, among others. Eventually, Prime released the University from all claims, and the Kansas Supreme Court granted summary judgment in favor of all defendants after it determined that no duty was breached.<sup>133</sup> One statement which greatly aided the court’s finding was a statement Prime made to the emergency room physician who treated him at the hospital—Prime told her that his intoxication “had nothing to do with hazing and that he was told he did not have to drink alcohol if he did not want to.”<sup>134</sup> Thus, this case illustrates that when hazing is a choice, defendants may avoid liability.

Cornell University avoided liability in *Lloyd v. Alpha Phi Alpha Fraternity*.<sup>135</sup>

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activities).

126. Curry, *supra* note 121, at 110.

127. *Id.*

128. *Id.*

129. 47 P.3d 402 (Kan. 2002).

130. *Id.* at 404 (emphasis added).

131. *Id.* at 406.

132. *Id.* at 404. “[Prime] alleged that he incurred medical expenses but no permanent injuries.” *Id.*

133. *Id.*

134. *Id.* at 406.

135. No. 96-CV-348, 97-CV-565, 1999 WL 47153 (N.D.N.Y. Jan. 26, 1999).

In that case, Sylvester Lloyd, Jr. was accepted to pledge Alpha Phi Alpha Fraternity, the oldest African-American fraternity in the United States. Lloyd based his complaint on his participation in the initiation activities that occurred on March 12, 1995, and allegedly included physical beatings and torture, psychological coercion, and embarrassment—some of which occurred at the fraternity house, which was owned by Cornell.<sup>136</sup> Lloyd sought to hold Cornell liable for his injuries under three New York common law theories: (1) premises liability, (2) negligent supervision and control, and (3) breach of implied contract. In *Lloyd*, the federal district court for the Northern District of New York held that “[a]lthough the University published materials about the dangers of hazing and its prohibition on campus, and at times offered a seminar to help fraternities improve their pledge education programs, this involvement does not rise to the level of encouraging and monitoring pledge participation.”<sup>137</sup> Moreover, Lloyd failed to prove that a duty to supervise is to be “imposed whenever a university creates a ‘special relationship’ with an organization affiliated with the campus.”<sup>138</sup>

With regard to premises liability, the *Lloyd* court cited cases that recognized that a landowner could be “held liable to a plaintiff for harm suffered—even where the plaintiff engages in a voluntary activity—if the landowner (a) had actual or constructive knowledge that injurious conduct was likely to occur or recur, and (b) fails to control that conduct despite the opportunity to do so.”<sup>139</sup> The court held, however, that Lloyd did not prove that Cornell had a duty as a landowner to control the behavior of the fraternity members, as Lloyd failed to show actual knowledge through a history of hazing and failed to show constructive knowledge through the landlord/agent relationship.<sup>140</sup>

The court distinguished *Lloyd* from *Furek*, where the court held the University liable to Furek as an invitee on campus grounds, because in *Furek* the University’s knowledge came from past experience. More specifically, the *Lloyd* court noted several differences between *Furek* and the case at hand. In *Furek*, the University had knowledge of past hazing incidents on campus that resulted in injuries to students; pre-hazing activities were witnessed by campus security personnel; and it was common knowledge that hazing was occurring, including the fact that Furek’s

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136. *Id.* at \*1.

137. *Id.* at \*3. See *Rothbard v. Colgate Univ.*, 652 N.Y.S.2d 146, 148 (N.Y. App. Div. 1997) (rejecting the plaintiff’s contention that because the university expressly provided in its student handbook that “certain conduct by its students was prohibited,” it thus voluntarily “assumed the duty to take affirmative steps to supervise plaintiff and prevent him from engaging in the prohibited activity”).

138. *Lloyd*, 1999 WL 47153, at \*3.

139. *Id.* at \*4. See *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 680 N.Y.S.2d 277, 278 (N.Y. App. Div. 1998) (“[A] landowner cannot be held liable for injuries sustained by a party engaged in a voluntary activity unless the landowner had knowledge of the activities and exercised a degree of supervision or control.”); *Jarvis v. Eastman*, 609 N.Y.S.2d 683, 684 (N.Y. App. Div. 1994) (“[N]o liability will be imposed when the injury . . . is the direct result of the manner in which the injured party engaged in a voluntary activity and the landowner neither participated in the activity nor exercised any supervision and control over the activity.”).

140. *Lloyd*, 1999 WL 47153, at \*5–9.

fraternity had performed hazing for at least five years before Furek's injuries.<sup>141</sup> In contrast, the court stated that "Cornell did not have this much history to rely upon."<sup>142</sup> For example, while Cornell officials received two anonymous letters alleging that the fraternity members were engaging in hazing activities, the letters did not indicate how the pledges were being mistreated, and one of the letters came from a phony address.<sup>143</sup> More importantly, Lloyd did not demonstrate that the fraternity at Cornell participated in yearly ritual hazing as had the fraternity in *Furek*, and Lloyd did not demonstrate that Cornell students were generally aware of hazing at the fraternity.<sup>144</sup> The court stated:

The only common knowledge to which Plaintiff holds Cornell is that black fraternities have a history of problems with hazing. This knowledge[,] however, is too general to impose a duty upon Cornell. Otherwise, the common knowledge that hazing can occur within any fraternity would impose a duty upon all colleges that have Greek organizations, regardless [of] whether any hazing actually occurs on a particular campus.<sup>145</sup>

Moreover, Lloyd made a concerted effort to hide the incidents rather than report them to Cornell officials. Thus, "[i]f Cornell is unable to learn about hazing through the individual student, the fraternity chapter, the student body, or the national fraternity organization, then it is contrary to common sense to think a duty could be imposed upon the University to protect persons against these unknown activities."<sup>146</sup> Cornell also took immediate action when it was informed of suspected hazing, including opening an investigation and commencing disciplinary proceedings.<sup>147</sup> Due to Cornell's responses to previous hazing incidents and to its lack of knowledge of the hazing at Alpha Phi Alpha, it could be argued that Cornell was justifiably excused of any liability for Lloyd's injuries.

Both *Prime* and *Lloyd* demonstrate that despite the major turning point in hazing litigation begun by the *Furek* and *Morrison* decisions, those cases have not resulted in a complete rejection of the "no duty" rule for colleges and universities. *Prime* and *Lloyd* suggest that for a college or university to incur liability for hazing, the hazing occurring at fraternities housed on college or university property must be compulsory; the student must not hide the injuries; and, most importantly, the colleges and universities must have knowledge of the hazing activities, either due to previous reports of hazing or common knowledge that hazing has occurred at a certain fraternity.<sup>148</sup>

The question now becomes whether this analysis also extends to the student-

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141. *Id.* at \*6. See *Furek v. Univ. of Del.*, 594 A.2d 506, 510, 520 (Del. 1991).

142. *Lloyd*, 1999 WL 47153, at \*7.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Common knowledge of hazing at fraternities in general is not included because that would impose liability upon all colleges and universities with Greek organizations.

athlete context. While this analysis of college and university liability for hazing at fraternities is comparable to the analysis of college and university liability for injuries caused by hazing in intercollegiate athletic team settings, it should also be somewhat different if the college and university's duty toward the student-athlete is stronger than its duty toward the fraternity pledge. The next section will compare the analysis of college and university liability in the fraternity context to the student-athlete context.

### III. COLLEGE AND UNIVERSITY LIABILITY FOR HAZING OF STUDENT-ATHLETES

Since the first recorded incident of hazing in collegiate sports in 1923 at Hobart College when football players beat a freshman and threw him into a lake, "hazing in college sports has continued and appears to be on the rise."<sup>149</sup> Awareness of athlete hazing grew even more after the death of Nicholas Haben in a lacrosse team initiation involving alcohol in 1990 at Western Illinois University.<sup>150</sup> However, hazing continued despite this increased awareness. For example, in January 2000, the University of Vermont cancelled its men's ice hockey season after a freshman filed suit alleging that players hazed the freshmen team members by coercing them "into drinking large amounts of alcohol, parading naked while holding one another's genitals and engaging in other degrading activities."<sup>151</sup> More recently, in June 2006, the University of California at Santa Barbara issued a press release stating that "[f]ollowing a campus investigation, the University . . . has taken punitive actions against the women's lacrosse club team for engaging in activities that were in violation of the campus's anti-hazing regulations."<sup>152</sup> This investigation occurred after the disclosure on the Internet of photographs from a 2004 party "showing members of the team engaging in activities that appeared to be in violation of UCSB's anti-hazing rules."<sup>153</sup>

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149. Sussberg, *supra* note 13, at 1430. For example, in 1996, a freshman on the University of North Carolina men's soccer team was hospitalized after drinking excessive amounts of alcohol at a team co-captain's house; in 1997, seventeen swim/dive team members at West Virginia University were suspended for two meets after they forced underclassmen to drink alcohol and perform calisthenics; also in 1997, the University of Washington placed the men's soccer team on probation after campus police found three players taped to a luggage cart on school grounds; in 1999, students on the University of Vermont hockey team alleged alcohol consumption, improper sexual touching, and other hazing practices; and in 2000, Coach Paul Caufield of Marian College's hockey team resigned after a hazing incident on the team bus. ESPN.com, *Sports Hazing Incidents*, June 3, 2002, <http://espn.go.com/otl/hazing/list.html> (containing a list compiled by ESPN.com using various sources including newspaper articles and hazing authority Hank Nuwer).

150. Tom Farrey, *Athletes Abusing Athletes*, ESPN.COM (June 3, 2002), <http://espn.go.com/otl/hazing/monday.html>.

151. Clark Thiemann, *Men's Hockey Rival Vermont Cancels Season after Hazing Cover-up*, DAILY PRINCETONIAN (Feb. 3, 2000), available at <http://www.dailyprincetonian.com/archives/2000/02/03/sports/57.shtml>.

152. Press Release, University of California, Santa Barbara, UCSB Investigation Finds Women's Lacrosse Club Team Did Engage in Hazing; Team is Issued Punitive Sanctions (June 6, 2006), available at <http://www.ia.ucsb.edu/pa/display.aspx?pkey=1472>.

153. *Id.*



Hazing of student-athletes is comparable to that of fraternity pledges in several ways including its frequency. For example, more than eighty percent of the over 325,000 athletes surveyed in 1999 were subjected to some form of hazing to join a collegiate team,<sup>154</sup> and twenty percent of those surveyed reported hazing that “crossed the line between youthful hijinks and significant danger.”<sup>155</sup> When these figures are projected to the national population, over 255,000—more than a quarter of a million athletes—were hazed.<sup>156</sup> “Athletes most at risk for any kind of hazing for college sports were men; non-Greek members; and either swimmers, divers, soccer players, or lacrosse players.”<sup>157</sup> However, out of the forty-five percent who reported that they knew of, heard of, or suspected hazing on their campuses, only twelve percent reported being hazed as part of this initiation into an athletic team.<sup>158</sup> “[W]hile students would acknowledge a wide range of hazing-type behaviors, they most often were reluctant to label them ‘hazing,’”<sup>159</sup> which is understandable since hazing is a crime in most states.<sup>160</sup> This reluctance to label hazing-type behaviors as hazing explains why eighty percent of those surveyed admitted to being subjected to some form of hazing to join a college or university team while only twelve percent of athletes reported actually being hazed.<sup>161</sup> One student even wrote, “If no one is hurt to the point where they need medical attention, just leave it alone. All the kids get accepted when it’s over . . . [ninety] percent of the time, it’s a one-time deal and it’s over. Leave it alone.”<sup>162</sup>

The large role alcohol plays in joining athletic teams was also confirmed by respondents in the Alfred University survey, as more than half of them admitted to involvement in alcohol-related initiation activities despite the fact that many were under the legal drinking age.<sup>163</sup> This also includes prospective college and university teammates who are in high school and given alcohol on their recruit trips, as two in five respondents reported they consumed alcohol on recruitment visits before enrolling.<sup>164</sup> Interestingly, NCAA Division I athletes and NCAA scholarship athletes “were significantly more likely to consume alcohol on

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154. Sussberg, *supra* note 13, at 1426–27; Hoover, *supra* note 13, at 8.

155. Peter Schmuck, *Solution to Hazing is Elusive*, BALTIMORE SUN, Sept. 17, 1999, at 1D.

156. Hoover, *supra* note 13, at 12. The Alfred University study was conducted in response to a hazing incident involving the school’s football team. *Alfred University Cancels Football Game Following Hazing Incident*, AP ONLINE (Sept. 2, 1998), available at <http://www.highbeam.com/doc/1P1-19515635.html> (detailing the incident involving five players arrested for restraining freshmen with rope and forcing them to consume alcohol). The study was conducted together with the National Collegiate Athletic Association (NCAA), and was done via direct mail that guaranteed anonymity. The survey included athletes, coaches, administrators, and all NCAA athletic directors and senior student affairs officers. Results for the athletes were based on 2,027 respondents. Hoover, *supra* note 13, at 8.

157. Hoover, *supra* note 13, at 6.

158. *Id.* at 8.

159. *Id.*

160. *See supra* note 30 and accompanying text.

161. Hoover, *supra* note 13, at 8.

162. *Id.* at 13.

163. *Id.*

164. *Id.* at 6.

recruitment as part of initiation onto a team than Division II, III, or non-scholarship athletes.”<sup>165</sup>

The Alfred University survey was very influential in helping the public realize that hazing was not simply confined to the Greek life on college and university campuses nationwide, but it also occurs at a fairly high rate in other campus groups, especially athletic teams. However, despite the prevalence of hazing in college and university athletic teams across the country, there are significantly fewer cases reaching state and federal courts involving athlete hazing rather than fraternity hazing. This is surprising simply considering the fact that the Alfred University study found that nearly eighty percent of college and university athletes nationwide are subjected to hazing. The next section will explain possible reasons for this disparity.

#### A. The Dearth of College and University Athlete Hazing Cases

A possible explanation for the lack of cases involving college and university athlete hazing reaching the state and federal court system is that the schools deal with the situation themselves rather than involving the court systems.<sup>166</sup> After all, “[h]azing is secretive by its very nature” and “[t]he idea of taking part in the private rituals of an exclusive organization is part of the allure of hazing.”<sup>167</sup> Under-reporting may be caused, in part, by the contradictory objectives of the Crime Awareness and Campus Security Act<sup>168</sup> (“CSA”) and the Federal Educational Rights and Privacy Act (“FERPA”).<sup>169</sup> While CSA requires colleges and universities to make a full report of campus crimes, FERPA requires that student records be protected from disclosure.<sup>170</sup> Moreover,

[w]hile hazing is a crime in most states, there is no consistency among colleges and universities as to whether hazing incidents are to be prosecuted criminally, handled through an institution’s in-house judicial process, or both. There is still no clear answer as to whether student disciplinary records are educational records within the meaning of FERPA, thus crimes that are handled through a college or university’s judicial process may go unreported in official campus crime statistics.<sup>171</sup>

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165. *Id.* at 18. The number of Division I athletes hazed was forty-one percent while the number of Division II athletes hazed was twenty-two percent and Division III was thirty-seven percent. *Id.*

166. *See* Ball, *supra* note 8.

167. *Id.* at 479 (citing Amie Pelletier, Note, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 381 (2002)). *See* Curry, *supra* note 120, at 117.

168. 20 U.S.C. § 1092(f) (2000) (originally enacted as the Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, §§201–05, 104 Stat. 2381 (1990)).

169. 20 U.S.C. § 1232(g) (2000) (originally enacted as the Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974)).

170. Ball, *supra* note 8, at 478.

171. *Id.* (citing Benjamin F. Sidbury, Note, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress*

Therefore, “[a]t the intersection of FERPA and CSA is a potential loophole by which colleges and universities could disguise the number of student-on-student crimes when those crimes are adjudicated through a campus judicial system rather than through the criminal courts.”<sup>172</sup> The secretive nature of campus crimes committed within the context of hazing may also contribute to the under-reporting.<sup>173</sup>

Rather than encourage criminal prosecution, some college and university communities choose to handle hazing incidents through their in-house judicial processes.<sup>174</sup> This use of in-house judicial processes results in under-reporting because after a campus judicial proceeding is put on a student’s educational record, FERPA protects it from being disclosed.<sup>175</sup> Thus, using the campus judicial process instead of criminal prosecution prevents hazing incidents from being compiled as campus crime statistics.<sup>176</sup> This under-reporting can be particularly dangerous due to the widespread nature of the hazing problem on campuses nationwide. The danger lies in the fact that the under-reporting of hazing incidents will leave students unaware of the possibility that they may be hazed if they join these organizations. “Among the possible solutions to the problem of under-reporting of hazing incidents are to prosecute all hazing incidents criminally, to enact legislative reform to specifically include hazing incidents in reports required under CSA, or to require disclosure of hazing incidents to all prospective members of organizations.”<sup>177</sup> The most effective method to prevent hazing of students would be to disclose hazing incidents to all prospective members of organizations. Students will then be aware of potentially hazardous situations that they can then avoid.

It is possible that under-reporting and the use of an institution’s own in-house judicial process affects cases involving athletes more than fraternity pledges due to the significant difference in the number of cases that actually go to trial between the two. This possibility that student-athlete cases are more affected could be a result of stronger fiduciary duties or existing special relationships between a college or university and the student-athletes who represent it. Thus, colleges and universities may take extra measures to ensure that these hazing incidents involving student-athletes are taken care of in-house. Colleges and universities do not want the reputation of their athletic teams tarnished, which may provide further incentive to use their in-house judicial process. At the same time, however, it is

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*Can Eliminate the Loophole*, 26 J.C. & U.L. 755, 769 (2000)).

172. *Id.* at 479 (citing Ethan M. Rosenzweig, Comment, *Please Don’t Tell: The Question of Confidentiality in Student Disciplinary Records under FERPA and The Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 448–49 (2002)). This judicial process, for most colleges and universities, “serves the dual purposes of punishing unacceptable behavior as well as providing an opportunity for education in the development of an appropriate community based value system.” *Id.* at 484.

173. Pelletier, *supra* note 166, at 381.

174. Rosenzweig, *supra* note 171, at 448.

175. *Id.*

176. *Id.* at 449–50.

177. Ball, *supra* note 8, at 479 (citation omitted).

possible that the in-house judicial processes may affect both Greek life and student-athletes to the same extent, but that injured student-athletes may simply be less likely to bring such suits—whether it be for fear of tarnishing the team’s reputation or fear of rattling out his or her teammates, or because they are simply less likely to recover.

#### B. College and University Liability in the Athlete Context

As noted before, despite the lack of cases holding colleges and universities liable for the hazing of student-athletes, hazing has still been a major problem in varsity sports across the nation.<sup>178</sup> Moreover, “[w]hile the Alfred Survey confirmed that hazing was not merely a concern for fraternities and sororities, there are notable differences between hazing in college athletics and that which occurs during fraternity . . . ‘pledge’ periods.”<sup>179</sup> For example, one key difference is that the coach of a college or university team has usually already selected the students who will compete on the team while fraternities solicit students who voluntarily pledge and desire to become members typically through initiation activities that many times consist of hazing activities.<sup>180</sup> Since an athlete is already part of a team, one cannot also argue that a student-athlete voluntarily assumes the risk involved in potential initiation activities as a fraternity pledge does. After all, an athlete may be unaware that such an initiation was to take place until immediately before it occurs. Moreover, “the youngest members are simply looking for peer acceptance from their teammates,” and “that need for approval can be a powerful component, considering the importance of teamwork in an individual’s athletic success.”<sup>181</sup> Therefore, in some circumstances “[a] student-athlete [may have] no choice but to be hazed, and failure to do so may negatively impact his athletic experience due to the numerous social costs that will be imposed.”<sup>182</sup> So, while it seems as if colleges and universities should be held to a higher level of liability for hazing in athletics, it remains problematic that so few cases involving the hazing of athletes are actually brought to trial.

Another reason for this scarcity may lie in the fact that it is difficult for student-athletes injured from hazing incidents to demonstrate that the institution had a legal duty to protect them from foreseeable injury.<sup>183</sup> In order for a student-athlete to establish a duty, she will most likely use the landowner-invitee theory and the special relationship theory—both seen in the fraternity context. A student-athlete may use the landlord-invitee theory based on the fact that “[u]niversities are considered landlords to their student-athletes based on the ownership of campus

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178. See *supra* Part II.

179. Sussberg, *supra* note 13, at 1432 (citation omitted).

180. *Id.*

181. Farrey, *supra* note 150.

182. Crow & Rosner, *supra* note 27, at 100.

183. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1367–68 (3d Cir. 1993). Just as in the fraternity context, student-athletes injured in hazing incidents will primarily rely on the theory of negligence, in which they must prove: (1) legal duty of care on the university’s behalf, (2) breach of this duty, (3) actual and proximate causation, and (4) resulting injury to the plaintiff. Crow & Rosner, *supra* note 27, at 92–93.

dormitories and buildings.”<sup>184</sup> Moreover, “a landlord has a duty to aid or protect those invitees who enter his land. This duty, which is one of reasonable care, extends only to reasonably foreseeable acts.”<sup>185</sup> Therefore, pursuant to the court’s finding in *Furek*, to recover under the landowner-invitee theory, the student-athlete must demonstrate that the hazing was reasonably foreseeable—the college or university knew or should have known about it—and that it occurred on the college or university’s property.<sup>186</sup> Recovery could be constrained by the location at which the hazing took place, for example, if it occurred off of institutional property, even if it is proven that the hazing was foreseeable (either by demonstrating a tradition of hazing or a high prevalence of hazing on that team) and even if it is proven that the college or university does have a duty to protect student-athletes from hazing via the landlord-invitee theory.<sup>187</sup>

There is a similar result in liability arising out of the special relationship between student-athletes and colleges and universities. One would think that since “college sports [can be] a business, with student-athletes essentially ‘working’ for the university,” the courts would take the creation of a special relationship between student-athletes and the college or university for granted.<sup>188</sup> However, while several courts have found a special relationship between student-athletes and a college or university,<sup>189</sup> court systems, including the Third Circuit, have inconsistently described the special relationship, thus creating ambiguity in determining when the duty of care is owed. Moreover, “[i]f a special relationship between a university and its student-athletes exists, it is still unclear whether a student-athlete injured during a hazing incident may succeed in recovering under this theory.”<sup>190</sup> Based on the Third Circuit’s holding in *Kleinknecht v. Gettysburg College*,<sup>191</sup> a special relationship between the school and its student-athlete is established when three factors are shown: (1) the injured student-athlete must have been “actively recruited,” (2) the athlete must have been acting in an athletic capacity while injured, and (3) the resulting injury must have been reasonably foreseeable.<sup>192</sup> Applying this to the hazing context, the hazing itself along with the resulting injury would have to be reasonably foreseeable. The most problematic

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184. Crow & Rosner, *supra* note 27, at 94 (citing Gil B. Fried, *Illegal Moves Off-The-Field: University Liability for Illegal Acts of Student-Athletes*, 7 SETON HALL J. SPORT L. 69, 77 (1997)).

185. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 314A(3), 344 (1965)).

186. *Id.* at 95.

187. *Id.* at 96.

188. Sussberg, *supra* note 13, at 1435 (citing Elsa Kircher Cole, Book Note, *Applying a Legal Matrix to the World of Sports*, 99 MICH. L. REV. 1583, 1584 (2001) (“The recent NCAA/CBS negotiations that resulted in a record \$6.2 billion contract for the right to broadcast, *inter alia*, the Men’s Division I Final Four Basketball Championship over an eleven-year period, [are] an example of the value quality sports events have in today’s media market.”)).

189. See, e.g., *Kleinknecht*, 989 F.2d at 1368 (holding that the student-athlete was owed a duty of reasonable care when participating in a college-sponsored athletic activity for which he was recruited).

190. Crow & Rosner, *supra* note 27, at 98.

191. *Kleinknecht*, 989 F.2d 1360.

192. *Id.* at 1367.

factor for student-athletes injured during hazing incidents is the second factor—that they should be acting in an athletic capacity in order to deserve a duty of care.<sup>193</sup> One court has noted that this factor is established when a student-athlete was “participating as one of its intercollegiate athletes in a school-sponsored athletic activity”;<sup>194</sup> participated in “an athletic event involving an intercollegiate team of which he was a member”;<sup>195</sup> and “in his capacity as an intercollegiate athlete engaged in school-sponsored intercollegiate athletic activity.”<sup>196</sup> Thus, liability based on a special relationship will largely depend upon the facts of the specific case and will probably only arise when the student-athlete is actually playing the sport. Therefore, a student-athlete injured in a hazing incident is “unlikely to recover”<sup>197</sup> on a special-relationship theory unless it is expanded beyond the *Kleinknecht* framework.

This potentially great difficulty in establishing college and university liability for injuries to student-athletes during hazing incidents is most likely the main reason for the small number of such cases going to trial as compared to hazing at fraternities. This difficulty may also help to facilitate such hazing at colleges and universities across the nation at levels consistent with those reported in the Alfred University study in 1999. Thus, courts should consider adopting new tests for when to impose college and university liability for physical injuries resulting from hazing incidents. The next section will outline when colleges and universities should be held liable for injuries to students from hazing incidents in both the fraternity and student-athlete context.

#### IV. WHEN SHOULD LIABILITY BE IMPOSED?

The *Furek* and *Morrison* decisions found that the college or university assumes a duty of care to a pledge of a fraternity when the college or university attempts to regulate certain conduct with student welfare in mind and when it has knowledge of hazing activities taking place at fraternities. In such situations, a college or university should be held liable for any injuries to students from these foreseeable hazing incidents, since their inaction or lack of appropriate action may have facilitated the occurrence of those incidents. Thus, if colleges and universities are aware of hazing taking place on their campuses at particular fraternities, either due to previous reports of hazing or common knowledge that hazing has occurred over the years at a certain fraternity, it is imperative that they take immediate action in order to prevent injuries to students as a result of engaging in hazing activities. It will be up to courts to determine whether colleges' and universities' responses to prevent foreseeable injuries are adequate.

This argument that liability should be imposed for foreseeable injury accords with the general progression of tort law. More specifically, the history of tort law has led toward an abandonment of no-duty rules and the subsequent creation of

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193. Crow & Rosner, *supra* note 27, at 99.

194. *Kleinknecht*, 989 F.2d at 1373.

195. *Id.* at 1368.

196. *Id.* at 1369.

197. Crow & Rosner, *supra* note 27, at 100.

rules of liability for failure to prevent foreseeable injuries.<sup>198</sup> The relationship of colleges and universities to their students justifies moving in that direction. Moreover, this increased “negligence liability is also supported by a concern for safety. An obvious safety advantage of negligence liability is that it can discourage improper harmful conduct; indeed, a deterrence rationale has been influencing tort judges for over a century.”<sup>199</sup> Thus, not only is imposing liability on colleges and universities for foreseeable injuries from hazing incidents in accordance with the general trend of American tort law, but it is also consistent with deterrence and safety rationales.

In order to ensure the safety of student-athletes across the country from senseless hazing that can destroy athletic careers and lives, a college or university’s responsibility and liability to its student-athletes, “should carry over to unexpected acts of hazing that have now become an extension of the actual game.”<sup>200</sup> Courts should impose a different test from those currently applied to establish a college or university’s duty to the student-athlete to prevent hazing injuries. For example, the requirement that the injury occur while the student-athlete is acting in an athletic capacity should be changed to include acts of foreseeable hazing that occur due to a student’s participation in an athletic team. If such hazing incidents are foreseeable and a college or university could have prevented them, then it should be liable for the resulting injuries. This increased liability should in turn lead to deterring hazing incidents from occurring at college and university campuses nationwide.

Thus, this imposition of liability in the student-athlete context would be similar to that in the fraternity context where the key factor is foreseeability rather than whether the injured student was acting in an athletic capacity when being hazed. The definition of foreseeability would be roughly the same in both contexts: whether colleges and universities are aware of hazing taking place on their campuses at particular fraternities or athletic teams, either due to previous reports of hazing or common knowledge that hazing has occurred over the years in a certain fraternity or athletic team. The degree of foreseeability would be a question for each circumstance. Due to the stronger relationship between a college or university and its student-athletes, who are representing the college or university

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198. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 959 (1981) (“Gradually the no-liability principles—immunities, privileges, and no-duty considerations imported from other conceptual systems (property, contract, and such)—retreated, like a melting glacier in a hostile environment, before the successive onslaughts of fault.”); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) (describing the huge growth in tort liability occurring since 1960 and characterizing that rise as involving “the vitality of negligence,” or the expansion of a defendant’s liability for harm caused by negligent conduct) (“The last quarter-century has witnessed what can fairly be described as a vindication or unleashing of the negligence principle—the dismantling of obstacles that previously have impeded the achievement of that principle’s full potential.”) (citation omitted). See also Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

199. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, *supra* note 197, at 607.

200. Sussberg, *supra* note 13, at 1435–36 (citation omitted).

during athletic competitions, than that between the college or university and fraternity pledges, less may be required to establish liability for foreseeable hazing injuries to student-athletes. At the same time, more should be required to establish liability for foreseeable hazing injuries to fraternity pledges who are further removed from the college or university.<sup>201</sup> Thus, liability should be more readily imposed for injuries to student-athletes because of the peculiar relationship between the students and the college or university. However, this liability should be limited to physical injuries from foreseeable hazing incidents, and not extend to rituals among college or university sports teams that do not lead to serious physical injury. Additionally, courts should not discriminate between actively recruited athletes and walk-ons. Hazing injuries to walk-ons should be treated just as seriously as those to recruited athletes because they both represent their schools in the same capacity. Admittedly, courts may have difficulty establishing such a precedent since few student-athlete hazing cases go to trial, but just one seminal case comparable to *Furek's* impact on fraternity hazing could stem the tide of injuries related to student-athlete hazing. Such a case would safeguard student-athletes from the potentially disastrous consequences of hazing on college and university campuses.

For the sake of the well-being of these students, hazing is a problem that cannot and should not be ignored. While both state legislatures and colleges and universities themselves have taken measures to correct the problem, further efforts need to be made in light of the continuing problem hazing poses both in the fraternity and the student-athlete context. One of the main problems that needs to be fixed is the under-reporting of hazing. As "more information becomes available, the more empowered potential victims are likely to be."<sup>202</sup> If students realize that the hazing injuries they suffered are not a unique occurrence at colleges and universities, they may feel more comfortable with reporting such incidents. Consequently, this increased reporting will deter students or coaches from encouraging hazing activities. Colleges and universities must also educate their students about hazing and its potentially disastrous consequences. Education may make students aware of the detriments of engaging in hazing activities, and thus education might serve to deter such activity. It is also imperative to standardize the definition of hazing at least within each state to ensure a clear definition that courts can easily apply without confusion. This will prevent such mistrials as the Florida A&M hazing case, which occurred due to confusion on the scope of the definition of serious bodily injury.<sup>203</sup> The implementation of such recommendations is a step in the right direction toward ridding colleges and

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201. Cf. RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (explaining that a duty to control dangerous behavior arises from a special relationship between the defendant and the victim or the defendant and the injurer).

202. Ball, *supra* note 8, at 495.

203. See *supra* Part I.A.



universities of the plague of hazing in fraternities and college and university athletics.

#### CONCLUSION

Hazing is a serious problem among students in colleges and universities from the east coast to the west, as it “capitalizes on the dangerous intersection of vulnerability and daring that is characteristic of college-aged men and women.”<sup>204</sup> Colleges and universities must take responsibility for the hazing occurring on their campuses. While strict liability is not recommended, some courts seem to be moving in the right direction, as is evidenced by the decisions in *Furek* and *Morrison*. If colleges and universities have knowledge of hazing occurring on their campuses and have not taken appropriate action to prevent such incidents, then colleges and universities must be held accountable or else hazing will continue to occur.<sup>205</sup> However, there should be limits to college and university liability; colleges and universities should not be held liable if the hazing incident was not foreseeable—if, for example, it was an isolated event or if the college or university had no prior knowledge of hazing incidents in that fraternity or athletic team. Definitions of what exactly constitutes hazing in both state legislatures and college and university policies should also be made clear so that ambiguity is minimized. For example, innocent jokes that do not result in physical harm should not be confused with hazing that often results in significant physical and emotional injury. More efforts to prevent hazing must also be made in the student-athlete context because even though significantly fewer cases involving student-athlete hazing and college and university liability go to trial, hazing still frequently occurs. Student-athlete hazing is shrouded in secrecy, and this veil must be lifted in order for the physical and emotional injuries of hazing to disappear from the lives of college and university students nationwide.

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204. Ball, *supra* note 8, at 481.

205. “The university/student relationship is such that it should include a duty of reasonable care to protect the student from foreseeable, dangerous or negligent acts of third persons.” Mumford, *supra* note 54, at 746.

# AN ALTERNATIVE TO PRESCRIPTIVE STANDARDS IN HAZARDOUS WASTE REGULATION: SUBPART K AND PERFORMANCE-BASED STANDARDS FOR ACADEMIC LABS

JEFFREY L. VERCAUTEREN\*

## INTRODUCTION

A veteran Environmental Protection Agency (EPA) inspector entered a lab on the University of Wisconsin campus, observed shelf after shelf of hazardous substances stored in small vials and jars, and remarked that in all his years of inspecting hazardous waste facilities, he had never seen hazardous substances stored in anything smaller than fifty-five-gallon drums.<sup>1</sup> Such a reaction aptly exemplifies EPA's relationship with college and university labs since the enactment of the Resource Conservation and Recovery Act (RCRA) in 1976. Over the past thirty years, the focus of EPA's hazardous waste regulation has been on large industrial facilities. This is largely due to the fact that college and university labs account for less than one percent of the total hazardous waste production in the United States.<sup>2</sup> College and university labs have thus experienced difficulty in meeting RCRA standards designed for industrial settings, and their often futile efforts have only led to high costs and steep fines, sometimes reaching hundreds of thousands of dollars.<sup>3</sup>

The central problem is that industrial facilities tend to generate very large amounts of a small number of chemicals, whereas college and university labs, and research labs more generally, tend to generate very small amounts of a large number of chemicals.<sup>4</sup> Specifically, college and university labs have had difficulty meeting the complex and detailed record-keeping requirements and storage time

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1. Peter A. Reinhardt, *What EPA Does Not Understand About Academic Laboratories*, in WASTE DISPOSAL IN ACADEMIC INSTITUTIONS 55 (James A. Kaufman ed., 1990).

2. Mary Corrigan, *How Hazardous Waste Regulations Apply to University Research Laboratories*, Apr. 16, 1996, <http://www.abrf.org/ABRFNews/1996/March1996/mar96hazwaste.html>.

3. Cheryl Hogue, *Campus Hazard*, CHEM. & ENG'G NEWS, Nov. 22, 2004, at 43-48.

4. *Academic Labs Urge Performance-Based Approach in EPA RCRA Rule*, INSIDE THE EPA, Apr. 7, 2006, § 14.

limits of RCRA.<sup>5</sup> Colleges and universities have been petitioning EPA for over twenty years to create alternative regulations specifically designed for the research lab environment. In 1983, Congress ordered EPA to report on the problem of hazardous waste compliance by college and university labs.<sup>6</sup> While the final report, prepared by a private consulting firm, contained such reform recommendations as the simplification of hazardous waste identification requirements and the extension of storage time limits, EPA did not agree to modify any regulations and instead simply indicated to Congress that such changes were possible.<sup>7</sup>

Twenty-three years later, in May 2006, EPA finally took steps to implement much-needed and long-overdue changes to RCRA.<sup>8</sup> EPA's proposed rule, referred to as Subpart K, would create a new set of performance-based standards specifically for college and university labs under RCRA, allowing academic labs more flexibility to meet EPA requirements.<sup>9</sup> Contrary to prescriptive standards, which require regulated entities to reach certain health-based and environmental-based goals in a specific manner, performance-based standards maintain these goals while allowing regulated entities to determine the manner in which the goals are reached.<sup>10</sup> While Subpart K appears to embody the reforms for which college and university labs have petitioned for years, it is questionable whether the proposed rule goes far enough in certain respects to remedy the unique problems of academic labs, whether it goes too far in other respects, and whether performance-based standards are even appropriate for hazardous waste regulation.<sup>11</sup>

#### I. UNIQUE CHALLENGES OF HAZARDOUS WASTE REGULATION IN ACADEMIC LABS

The purpose of RCRA is to protect human health and the environment from the potential dangers of hazardous waste disposal.<sup>12</sup> RCRA is a form of prescriptive, "cradle-to-grave" regulation which establishes strict requirements that generators of hazardous waste must meet and imposes significant penalties on those generators that fail to meet such requirements.<sup>13</sup> With very limited exceptions, the hazardous waste regulations established by EPA in Subpart C of RCRA apply uniformly to industrial facilities, academic labs, and other generators of hazardous

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5. Reinhardt, *supra* note 1, at 56.

6. *Id.* at 58.

7. *Id.* at 58–59.

8. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29,712 (proposed May 23, 2006) (to be codified at 40 C.F.R. pts. 261–62).

9. *Academic Labs Urge Performance-Based Approach in EPA RCRA Rule*, *supra* note 4.

10. See generally Cary Coglianese, et. al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection*, 55 ADMIN. L. REV. 705 (2003).

11. EPA proposed Subpart K on May 23, 2006. On August 21, 2006, EPA extended the comment period, which subsequently ended on September 20, 2006. The final rule is expected to be released later this year.

12. Theodore L. Garrett, *An Overview of RCRA*, in THE RCRA PRACTICE MANUAL 1 (Theodore L. Garrett ed., 2d ed. 2004).

13. *Id.*

waste.<sup>14</sup>

However, given that college and university labs handle a large number of chemicals in a non-production, academic environment, such labs often fail to satisfy strict requirements for hazardous waste determinations, record-keeping, container management and labeling, and storage and removal of hazardous waste.<sup>15</sup> Under RCRA, generators must determine whether material is a hazardous waste at the point of generation, which for colleges and universities is often in a classroom or small academic lab.<sup>16</sup> Once the hazardous waste determination is made and the total amount of hazardous waste in a lab exceeds fifty-five gallons, the waste must be removed within three days.<sup>17</sup> Generators are then responsible for tracking the transportation and disposal of the waste and for obtaining from the transporter and disposal facility proper documentation that the waste was in fact disposed of.<sup>18</sup> Given the large number of chemicals that academic labs handle, and the large number of labs within any given college or university,<sup>19</sup> these requirements place tremendous burdens on academic institutions.<sup>20</sup> Most laboratory waste is disposed of in fifty-five-gallon drums, called “lab packs,” which are capable of holding about fifteen gallons of packaged waste after absorbent material is placed inside.<sup>21</sup> The cost to dispose of each lab pack varies from hundreds to thousands of dollars, depending on the type of waste.<sup>22</sup> Therefore, depending on the size and output of each college and university lab, the cost—in time and money—for academic institutions to properly dispose of hazardous waste according to the requirements of RCRA can easily reach very high levels. While using sound disposal practices and hazardous waste management recordkeeping methodologies are legitimate costs of research involving hazardous materials, the industrial facilities that incur high hazardous waste disposal costs are profit-seeking entities that are better able to absorb and redistribute these costs than are academic institutions.

Given the high cost of meeting the hazardous waste disposal requirements of RCRA, college and university labs have an incentive to work around or simply ignore the statutory requirements.<sup>23</sup> With EPA’s “frequently variable, capricious,

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14. Letter from Robert R. Rich, M.D., President, Fed’n of Am. Soc’ys for Experimental Biology, & Jordan J. Cohen, M.D., President, The Ass’n of Am. Med. Colls., to John Morrall, Adm’r, Office of Info. and Regulatory Affairs (May 16, 2002), *available at* <http://www.aamc.org/advocacy/library/research/corres/2002/051602.htm>.

15. *Id.*

16. Hogue, *supra* note 3.

17. *Id.*

18. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 859 (3d ed. 2004).

19. For example, Harvard University has approximately 1,200 labs that generate hazardous waste, 1,000 satellite hazardous waste accumulation areas, and numerous main hazardous waste accumulation areas. Letter from Joseph Griffin, Director, Env’tl. Health and Safety, Harvard Univ., to U.S. EPA (Sept. 18, 2006).

20. Hogue, *supra* note 3.

21. Corrigan, *supra* note 2.

22. *Id.*

23. PLATER, *supra* note 18, at 863.

and poorly targeted” enforcement with respect to college and university labs,<sup>24</sup> such a strategy is not surprising. Even labs that make a good faith effort to comply with RCRA may find themselves in violation of the statute. EPA enforcement is highly variable from region to region and state to state, often due to differences in interpretation depending on the inspector.<sup>25</sup> Labs found violating RCRA are subject to oftentimes capricious fines and other penalties, again depending on the individual inspector.<sup>26</sup> Therefore, institutions wishing to avoid the cost of complying with RCRA hazardous waste disposal requirements may be quite willing to take the chance that EPA will either not enforce RCRA in regard to that particular institution or that the EPA inspector will interpret the rules favorably for the institution or issue a small fine or penalty for a violation.

However, as history has proven, taking this chance can sometimes prove costly for academic institutions when EPA decides to aggressively enforce RCRA requirements. In 2004, EPA fined the Maine Community College System \$238,225 for violations, including failing to properly label containers.<sup>27</sup> In 2002, EPA fined the University of Hawaii \$505,000 for having unmarked and open containers of hazardous materials in a university storage area.<sup>28</sup> And in 2001, EPA fined the Massachusetts Institute of Technology \$150,000 for violating storage, handling, and labeling requirements.<sup>29</sup> Since 2000, EPA has fined or penalized 145 academic institutions for violating RCRA.<sup>30</sup> Many of the violations involved labeling and reporting requirements in which no environmental harm was caused.<sup>31</sup> Therefore, even if college and university labs ensure the safety of human health and the environment through methods other than those required in RCRA, the strict, prescriptive standards of RCRA impose further costs and burdens on these labs.

## II. THE DEVELOPMENT OF PERFORMANCE-BASED STANDARDS IN RCRA

While academic institutions have been petitioning EPA to change the way RCRA applies to college and university labs since at least the early 1980s,<sup>32</sup> EPA's first significant move toward modifying RCRA came in 1999 when EPA, as part of

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24. David W. Drummond, *The Role of Enforcement Policy in Changing the Regulatory Climate*, Mar. 17, 2006, <http://www2.fpm.wisc.edu/chemwasteinfo/EnforcementPolicyRoleInRegClimate.htm>.

25. *Id.*

26. *Id.*

27. Hogue, *supra* note 3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. In 1984, pursuant to a Congressional directive, EPA began a study of the unique challenges of hazardous waste accumulation, storage, and disposal at college and university labs. In an April 1989 Report to Congress, EPA found that academic labs generally lack an awareness of hazardous waste regulations due to the transient nature of the student population. EPA also found that academic labs generally produce highly variable wastes and lack the resources to properly manage hazardous wastes.

the national Project XL initiative to find more cost-effective approaches to environmental regulation, initiated the New England University Laboratories XL Project, a pilot program for three colleges and universities<sup>33</sup> to experiment with new regulatory approaches.<sup>34</sup> In 2001, EPA initiated another pilot program in collaboration with the Howard Hughes Medical Institute (HHMI) and ten major academic institutions, specifically designed to test performance-based standards for RCRA regulation.<sup>35</sup> The HHMI study has been a significant factor in EPA's development of Subpart K and performance-based standards for academic labs.

#### A. The Howard Hughes Medical Institute Initiative

In 2000, Congress announced its support for the HHMI initiative to develop "consensus best practices for hazardous waste management in academic research laboratories," and encouraged EPA to participate in and support the initiative.<sup>36</sup> Later that year, HHMI began its collaboration with EPA, state environmental agencies, and ten academic institutions to test a performance-based approach to the regulation of hazardous wastes in an academic environment.<sup>37</sup> The ten academic institutions, one from each EPA region, included Duke University, Harvard University, Rockefeller University, Stanford University, the University of Colorado, the University of Pennsylvania, the University of Texas, the University of Washington, the University of Wisconsin, and Washington University.<sup>38</sup> The study took place from October 2000 to October 2001, culminating in a report published by HHMI.<sup>39</sup> The institutions agreed to apply fourteen "consensus best practices" designed to provide flexibility in compliance while maintaining the safety of human health and the environment.<sup>40</sup> The consensus best practices provided broad guidelines for the institutions while allowing them to design implementation programs that best suited the unique aspects of each institution.<sup>41</sup>

The language of the consensus best practices demonstrates the initiative's commitment to broad goals rather than narrow standards. The first two consensus best practices state that the executive leadership of each institution must be committed to protecting human health and the environment and that the members of each institution's labs be responsible and accountable for implementing the institution's waste management program.<sup>42</sup> The third through eleventh consensus

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33. Those three colleges and universities were Boston College, the University of Massachusetts–Boston, and the University of Vermont.

34. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29,712, 29,716.

35. *Id.*

36. HOWARD HUGHES MED. INST. OFFICE OF LAB. SAFETY, REPORT ON CONSENSUS BEST PRACTICES FOR MANAGING HAZARDOUS WASTES IN ACADEMIC RESEARCH INSTITUTIONS 1–2 (2001).

37. *Id.* at 1.

38. *Id.* at 6.

39. *Id.*

40. *Id.* at 7.

41. *Id.*

42. *Id.* at 7–8.

best practices state that each institution must establish policies and procedures for pollution prevention and effective hazardous waste management.<sup>43</sup> Each institution must establish procedures for handling, containing, and storing chemicals in laboratories; make such procedures readily available to all of the members of the institution's labs; have labels with sufficient information to warn of potential health and safety standards; reduce or eliminate chemical waste wherever possible; make a proper hazardous waste determination; and plan for a response to chemical emergencies in labs.<sup>44</sup> The twelfth and thirteenth consensus best practices state that each institution must provide training that corresponds to the responsibilities of each member of the institution's labs and that a communication system must be in place to maintain awareness of the institution's waste management program throughout the institutional hierarchy.<sup>45</sup> Finally, the fourteenth consensus best practice states that each institution must conduct regular evaluations of its chemical waste management program.<sup>46</sup>

At the conclusion of the one-year trial period of these consensus best practices, HHMI found that a performance-based approach, such as the consensus best practices, was preferable to the strict, prescriptive approach currently used in RCRA.<sup>47</sup> HHMI found that the prescriptive regulatory approach, by requiring academic institutions to expend a large amount of resources meeting specific record-keeping and labeling requirements, was actually counter-productive in some instances to meeting the goal of protecting human health and the environment by diverting resources from waste minimization and other environmental stewardship activities.<sup>48</sup> HHMI stated in its Report on Consensus Best Practices that a performance-based regulatory approach for academic labs "could improve RCRA effectiveness and compliance in universities, and become a catalyst to bring about commitment and action for promoting stewardship and responsibility for health, safety, and environment" by providing incentives for academic institutions to find the most cost-effective manner to satisfy hazardous waste regulations.<sup>49</sup> HHMI urged EPA to adopt such an approach, based on the consensus best practices, which would achieve RCRA compliance while allowing flexibility for academic institutions.<sup>50</sup>

In its March 2002 report to Congress evaluating the HHMI initiative, EPA stated its unequivocal support for the development of consensus best practices.<sup>51</sup>

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43. *Id.* at 8–10.

44. *Id.*

45. *Id.* at 10–11.

46. *Id.* at 11.

47. *Id.* at 30.

48. *Id.*

49. *Id.*

50. *Id.*

51. OFFICE OF SOLID WASTE, U.S. EPA, REPORT TO CONGRESS: EVALUATING THE CONSENSUS BEST PRACTICES DEVELOPED THROUGH THE HOWARD HUGHES MEDICAL INSTITUTE'S COLLABORATIVE HAZARDOUS WASTE MANAGEMENT DEMONSTRATION PROJECT AND THE NEED FOR REGULATORY CHANGES TO CARRY OUT PROJECT RECOMMENDATIONS 9 (2002).

EPA recognized that academic research institutions have difficulty complying with current RCRA regulations and found the consensus best practices to be a sufficient alternative for protecting human health and the environment.<sup>52</sup> EPA was particularly pleased with the fact that the consensus best practices “encourage academic research institutions to develop thoughtful approaches to managing their hazardous waste.”<sup>53</sup> EPA concluded that a regulatory change would be best to institute performance-based standards in RCRA, rather than working within the constraints of the current statute, and sought to allow “the consideration of diverse viewpoints through the regulatory development and notice and comment processes.”<sup>54</sup> In addition, EPA stated that a new regulation would promote more consistency and acceptance than simply issuing agency guidance.<sup>55</sup> In concluding, EPA reaffirmed its commitment to “developing regulatory reforms that endorse best management practices and other sound alternative approaches to achieving RCRA compliance.”<sup>56</sup> Thus, the development of Subpart K and performance-based standards for academic labs began.

EPA established a three-phase approach to address the findings of the HHMI initiative.<sup>57</sup> Phase one, in June 2003, focused on gathering information from colleges and universities to determine the extent to which academic institutions were experiencing difficulty under current regulations.<sup>58</sup> Phase two, in March 2004, included guidance memoranda issued by EPA to clarify issues raised by institutions during the information-gathering process.<sup>59</sup> Subpart K is part of phase three, intended to remedy those issues that could not be addressed by guidance memoranda alone and to provide flexibility through performance-based standards.<sup>60</sup>

#### B. Performance-Based Standards in Other Federal Regulations

Two federal agencies, the Nuclear Regulatory Commission (NRC) and the Occupational Safety and Health Administration (OSHA), currently include performance-based standards in some regulations. NRC has experienced widespread success in encouraging academic institutions to comply with its regulations by focusing on the end result, such as the protection of human health and the environment, rather than the process involved in reaching the result.<sup>61</sup> Such a performance-based approach was adopted by NRC in the early 1990s and

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52. *Id.*

53. *Id.* at 10.

54. *Id.* at 11.

55. *Id.*

56. *Id.* at 11.

57. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29,712, 29,716.

58. *Id.*

59. *Id.*

60. *Id.*

61. Drummond, *supra* note 24.



has been upheld and reaffirmed in current enforcement policies.<sup>62</sup>

OSHA has also implemented a performance-based approach for the regulation of labs.<sup>63</sup> Central to OSHA's performance-based standards is the requirement that labs establish a Chemical Hygiene Plan, similar to the laboratory management plan required in the HHMI consensus best practices approach.<sup>64</sup> OSHA has established broad guidelines that labs must adhere to; however, the manner of compliance is largely left to the discretion of the labs.<sup>65</sup> Such guidelines assure the protection of human health and the environment while allowing labs flexibility in achieving compliance. OSHA has "discovered that a broad approach works better than a narrow one."<sup>66</sup> OSHA has found that performance-based standards provide a practical framework which allows regulated parties the opportunity to find the best approach to meet such standards and address problems.<sup>67</sup> As a result of the imposition of performance-based standards in some areas of OSHA regulation, regulated entities have taken a more systematic approach to addressing broader health and safety concerns in the workplace.<sup>68</sup> An important element of the performance-based standards approach is the creation of a culture of health and safety by giving regulated entities more control over the manner in which standards are met.<sup>69</sup> By allowing companies to satisfy regulations in the most efficient and cost-effective manner, OSHA performance-based standards have maintained or improved health and safety standards while reducing costs and burdens for regulated parties. Accordingly, the general trend in OSHA regulations seems toward broad, flexible, performance-based standards rather than narrow, inflexible, prescriptive standards.

The success and continued use of performance-based standards by both NRC and OSHA demonstrates that EPA could achieve the same or better results while simultaneously easing the burden on academic institutions by moving to performance-based standards in RCRA. In fact, such standards have served as a template for EPA's development of Subpart K.

### III. SUBPART K AND PERFORMANCE-BASED STANDARDS FOR ACADEMIC LABS

Subpart K, proposed by EPA in May 2006, modifies RCRA standards for academic labs in seven primary areas: (a) container management and labeling; (b) training of laboratory employees; (c) hazardous waste determination; (d) removal time; (e) laboratory cleanouts; (f) recordkeeping; and (g) laboratory management

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62. *Id.*

63. 29 C.F.R. § 1910.1450 (2006).

64. *Id.*

65. *Id.*

66. Charles N. Jeffress, Assistant Sec'y, Occupational Safety and Health Admin., Address at the Chicago Risk Management Forum: OSHA: A View of Today and Tomorrow (Oct. 12, 1999), *available at* [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=SPEECHES&p\\_id=243](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=243).

67. *Id.*

68. *Id.*

69. *Id.*

plans. The intent of the proposed rule is “to establish an alternative set of generator requirements for college and university laboratories that is better suited to their specific circumstances, and promotes environmental protection and public health through safer management of laboratory hazardous wastes.”<sup>70</sup> Subpart K is optional in that colleges and universities may choose to remain subject to current regulations or to become subject to Subpart K regulations.<sup>71</sup> However, the adoption of Subpart K will not be an option for a college or university until the state in which it is located adopts Subpart K as state law.<sup>72</sup> All labs in a college or university must operate under the same set of regulations;<sup>73</sup> however, certain academic laboratories are not covered under the definition of a laboratory under Subpart K and thus are subject to current regulations regardless of whether the college or university chooses to follow the new standards.<sup>74</sup> The proposed rule only applies to those labs “within a college or university where relatively small quantities of chemicals and other substances are used on a non-production basis for teaching or research purposes.”<sup>75</sup> The proposed rule thus does not apply to private research institutions, even though their operations are similar to those of academic labs.

#### A. Container Management and Labeling

Current regulations require that containers containing hazardous materials be kept in good condition, that waste be compatible with the containers, and that containers holding hazardous waste always be closed, except when adding or removing waste.<sup>76</sup> While most college and university labs generally do not have problems satisfying the first two elements of the current container management standards, problems often arise with the requirement to keep containers closed at virtually all times. Labs often have ongoing experiments and other processes that require the frequent use of containers and claim that keeping containers closed at all times is not always practical, given the number and complexity of materials used throughout a chemical process.<sup>77</sup> The proposed container management regulations under Subpart K still require that labs keep containers in good condition and compatible with the wastes they contain; however, the new rules give more discretion to the college or university to determine the best method to prevent spills and leaks.<sup>78</sup>

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70. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29,712, 29,714.

71. *Id.* at 29,712.

72. *Id.* at 29,712–13. Under Section 3006 of RCRA, states are not required to adopt Subpart K. *Id.*

73. *Id.*

74. *Id.* at 29,723.

75. *Id.*

76. *Id.* at 29,729.

77. Nat'l Ass'n of Coll. & Univ. Bus. Officers, *EPA Proposes Performance-Based Standards for Academic Labs*, NACUBO BULL., May 31, 2006, available at <http://www.nacubo.org/x8097.xml>.

78. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards

Regarding container labeling, the current standards require that containers containing hazardous waste be marked with the words “hazardous waste” or with other such words that identify the contents of the container, and that the label contain the generator’s name and address and the manifest document number.<sup>79</sup> Given the small size of the containers academic labs generally handle, many labs have experienced difficulty in fitting all of the required information on containers.<sup>80</sup> The proposed rule requires that generators label hazardous materials containers with the words “unwanted material” and with sufficient information to alert emergency personnel and transporters of the contents.<sup>81</sup> Labs are free to determine what information will be sufficient for such purpose.<sup>82</sup> Additionally, unlike under current regulations, labs may use systems, such as barcodes, that associate information with each container, thus eliminating the problem of fitting a large amount of information on a small container.<sup>83</sup>

### B. Training and Instruction

Current regulations do not contain requirements for training laboratory employees or instructing students. As a result, individuals making hazardous waste determinations in labs are often untrained and unqualified to make such a determination, resulting in improper handling of hazardous wastes, the inclusion of non-hazardous wastes in hazardous waste disposal processes, and increased costs both monetarily and environmentally.<sup>84</sup> The proposed rule attempts to remedy this problem by requiring that college and university labs provide training for lab workers commensurate with their duties and instruction for students relevant to their activities in the lab.<sup>85</sup> Academic institutions are given great deference to determine the appropriate type and amount of training and instruction.

### C. Hazardous Waste Determination

Presently, generators must make a hazardous waste determination<sup>86</sup> at the point of generation.<sup>87</sup> Any one college or university may have hundreds or thousands of

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Applicable to Academic Laboratories, 71 Fed. Reg. at 29,729.

79. Garrett, *supra* note 12, at 73.

80. Nat’l Ass’n of Coll. & Univ. Bus. Officers, *supra* note 77.

81. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,729.

82. Nat’l Ass’n of Coll. and Univ. Bus. Officers, *supra* note 77.

83. *Id.*

84. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,714.

85. *Id.* at 29,730.

86. The hazardous waste determination generally includes four elements: (a) whether the material is a solid waste as defined in 40 C.F.R. § 261.2, (b) whether the material is subject to a hazardous waste exclusion under 40 C.F.R. § 261.4, (c) whether the material is or contains a hazardous waste listed in 40 C.F.R. § 261(d), and (d) whether the material is ignitable, corrosive, reactive, or toxic as defined in 40 C.F.R. § 261(c). *Id.* at 29,721.

87. *Id.* at 29,714.

labs or chemical hoods on campus, all of which may be considered points of generation.<sup>88</sup> It is thus difficult for academic institutions to assure that a properly-trained individual is present at each point of generation to make the hazardous waste determination.<sup>89</sup>

The proposed rule provides flexibility for academic labs by allowing the hazardous waste determination to be made in the lab before the materials are removed or at an on-site central accumulation area or on-site treatment, storage, or disposal facility within four days of arrival.<sup>90</sup> The hazardous waste determination must be made by a RCRA-trained individual; however, there is no requirement that the individual generating the material in the lab be familiar with RCRA hazardous waste regulations.<sup>91</sup> The proposed rule assures that the hazardous waste determination is made by a properly-trained individual, while allowing academic institutions the flexibility to make the determination in the most convenient and cost-effective manner. The accumulation of wastes in a central on-campus area also encourages the redistribution of unwanted chemicals, thus reducing the amount of hazardous waste produced by an academic institution.<sup>92</sup>

#### D. Removal Time

One major provision of the proposed rule that is absent from current regulation is a maximum accumulation time for hazardous waste. While the current rule requires that hazardous waste be removed from a lab whenever fifty-five gallons or more of hazardous waste or one quart or more of reactive acutely hazardous waste accumulates,<sup>93</sup> the proposed rule also adds a six-month time limit for removal after the waste has been produced.<sup>94</sup> In addition, the proposed rule expands the amount of time that labs have to remove the waste after passing the fifty-five-gallon, one-quart, or six-month threshold from three calendar days, as required under the current regulations, to ten calendar days.<sup>95</sup>

The problem with the current removal time regulations is twofold. First, given that academic labs rarely accumulate fifty-five gallons of hazardous waste, the current regulations encourage labs to keep waste for long periods of time, thereby increasing the risk of container deterioration and leakage. Second, the requirement that hazardous waste be removed from labs within three days after reaching the fifty-five-gallon or one-quart threshold creates difficulties for academic institutions, as they are often unable to arrange for removal within such a short period of time.<sup>96</sup> The proposed rule remedies both problems by creating a dual

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88. *Id.*

89. *Id.*

90. *Id.* at 29,734.

91. *Id.* at 29,728.

92. Nat'l Ass'n of Coll. & Univ. Bus. Officers, *supra* note 77.

93. Reactive acutely hazardous wastes are listed in 40 C.F.R. § 261.33(e).

94. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,732–33.

95. *Id.*

96. *Id.* at 29,733.

threshold for the removal of hazardous materials. Even if a lab has not generated fifty-five gallons of hazardous waste or one quart of reactive acutely hazardous waste within a six-month period, it is still required to remove all hazardous waste present within the lab or central accumulation area.<sup>97</sup> While this requirement increases the burden on academic institutions to arrange for more frequent removal of hazardous waste, it encourages colleges and universities to establish a regular removal schedule in order to prevent stockpiling of hazardous wastes. Additionally, by extending the removal time period from three calendar days to ten calendar days, the proposed rule allows academic institutions more flexibility to arrange for removal in a convenient and cost-effective manner.

#### E. Laboratory Cleanouts

An exception to the removal provisions of the proposed rule involves laboratory cleanouts, defined by EPA as “an evaluation of the inventory of chemicals and other materials in a laboratory that are no longer needed or have expired and the subsequent removal of those chemicals or other unwanted materials from the laboratory.”<sup>98</sup> Cleanouts often occur when a professor leaves an institution or when a large research project ends and involve the removal of any unused chemicals and other hazardous materials.<sup>99</sup> Two problems arise for academic labs in relation to cleanouts under current regulations. First, given the requirement that labs remove hazardous waste within three days after accumulating fifty-five gallons or more, it is difficult and costly for labs to conduct lengthy cleanouts, since multiple pickups of hazardous waste may be required.<sup>100</sup> Second, because cleanouts involve the removal of larger amounts of hazardous waste than are produced by academic institutions in a typical month, the institution may be considered a large-quantity generator during the month of the cleanout, thus subjecting the institution to different standards.<sup>101</sup> While small-quantity generators, which produce between 100 and 1000 kilograms of hazardous waste per month, can accumulate waste on-site for up to 180 days without a permit, large-quantity generators, which produce more than 1000 kilograms of hazardous waste per month, can accumulate waste on-site for only ninety days without a permit.<sup>102</sup> Large-quantity generators must also submit a biennial hazardous waste report to EPA.<sup>103</sup> Conditionally-exempt small-quantity generators, which produce less than 100 kilograms of hazardous waste per month, are subject to very limited waste management standards and need not comply with accumulation, storage,

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97. *Id.*

98. *Id.* at 29,724.

99. *Id.* at 29,718.

100. Nat'l Ass'n of Coll. & Univ. Bus. Officers, *supra* note 77.

101. *Id.*

102. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,720.

103. U.S. EPA, LABS RULE Q AND A (May 15, 2006), <http://www.epa.gov/epaoswer/osw/specials/labwaste/lab-q-a.pdf>.

recordkeeping, or reporting requirements.<sup>104</sup> As a result, cleanouts can temporarily subject academic institutions to a different level of regulation, imposing stricter storage time limits and greater recordkeeping and reporting requirements.

Subpart K attempts to remedy these problems by excluding one cleanout per year for each lab from the determination of an institution's generator status.<sup>105</sup> Therefore, colleges and universities that are normally small-quantity generators will not be made large-quantity generators due to a Subpart K laboratory cleanout. In addition, during the Subpart K laboratory cleanout, the removal time is extended from ten calendar days to thirty calendar days in order to reduce the number of hazardous waste shipments a college or university must make.<sup>106</sup> While labs can perform an unlimited number of lab cleanouts during the year, only one such cleanout will be excluded under Subpart K during each one-year period.<sup>107</sup> Any wastes determined to be hazardous prior to the beginning of the cleanout period must be counted toward the institution's generator status.<sup>108</sup> The proposed rule eases burdens on academic institutions by preventing a temporary change in generator status due to a lab cleanout and by extending the amount of time institutions have to remove waste accumulated during a lab cleanout.

#### F. Recordkeeping

The proposed rule is intended to reduce or minimize the burden on colleges and universities in terms of recordkeeping requirements.<sup>109</sup> While academic labs are currently required to keep certain records depending on their generator status, those institutions choosing to follow Subpart K standards would need to maintain additional records including a notification to EPA of the institution's participation in Subpart K, a Laboratory Management Plan, training records for lab workers, and documentation of any lab cleanouts conducted.<sup>110</sup> While this requirement may increase the burden on some colleges and universities to develop new recordkeeping systems, most colleges and universities already have Chemical Hygiene Plans in place, as required by OSHA, which can easily be revised to meet the requirements of Subpart K.<sup>111</sup>

#### G. Laboratory Management Plan

The requirement that each academic institution participating in Subpart K create a laboratory management plan is perhaps the most important aspect of the

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104. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,720. The proposed regulations do not apply to conditionally-exempt small-quantity generators, and thus they will remain subject to current regulations, absent further regulatory amendments. *Id.* at 29,722.

105. *Id.* at 29,737–38.

106. *Id.*

107. *Id.* at 29,738.

108. *Id.*

109. *Id.* at 29,741.

110. *Id.*

111. *Id.*

proposed rule. EPA intends that the laboratory management plan and its formation process will “improve a college or university’s coordination and integration of hazardous waste management procedures and enhance environmental awareness among researchers and students at colleges and universities, leading to a transfer of good environmental management practices to the larger community.”<sup>112</sup> The laboratory management plan is thus a mechanism for implementing the performance-based standards set forth in the proposed rule by specifying the steps that the college or university will take to meet the goals of Subpart K.<sup>113</sup>

The laboratory management plan must describe the college or university’s methods for (a) removing hazardous wastes from laboratories; (b) managing and labeling containers; (c) instructing students and training lab workers; (d) ensuring the safe transportation of hazardous wastes to on-site accumulation areas; (e) preparing and responding to emergencies; and (f) conducting lab cleanouts.<sup>114</sup> While the laboratory management plan is a mandatory requirement for all academic institutions choosing to follow Subpart K, EPA has not decided whether to make the provisions of the laboratory management plan enforceable.<sup>115</sup>

According to EPA, the laboratory management plan is intended to encourage academic institutions to address their waste management programs more broadly.<sup>116</sup> EPA particularly intends that colleges and universities streamline their waste management systems to reduce waste and prevent pollution.<sup>117</sup> Accordingly, as part of the proposed rule, EPA encourages, but does not require, academic institutions to implement an environmental management system<sup>118</sup> to better assess and manage the institution’s environmental impacts.<sup>119</sup>

#### H. The Overall Benefits of Subpart K

EPA estimates that colleges and universities that choose to adopt Subpart K will realize an aggregate cost savings of one-half to three million dollars per year compared to the costs of meeting current hazardous waste disposal requirements.<sup>120</sup> Most of the estimated savings will come in the form of more efficient waste disposal and waste minimization efforts.<sup>121</sup> EPA also estimates that

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112. U.S. EPA, *supra* note 103.

113. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,739.

114. *Id.*

115. *Id.* at 29,752.

116. *Id.* at 29,739.

117. *Id.* at 29,715.

118. An environmental management system is a system of management practices and related documentation, procedures, and work practices that is put in place to manage an institution’s overall environmental impacts. *Id.* An environmental management system thus covers a much broader range of areas than a laboratory management plan.

119. *Id.*

120. *Id.* at 29,745.

121. *Id.* For example, the performance-based standards used in the HHMI study resulted in a reduction of disposal costs at the University of Washington by over sixty percent. HOWARD HUGHES MED. INST. OFFICE OF LAB. SAFETY, *supra* note 36, at 17.

the adoption of the proposed rule will result in greater safety in laboratory environments,<sup>122</sup> less exposure of humans and the environment to hazardous substances, and an overall reduction in hazardous waste.<sup>123</sup>

#### IV. EVALUATING SUBPART K

Colleges, universities, and other academic organizations are generally supportive of Subpart K. The American Council on Education (ACE), the Campus Safety, Health and Environmental Management Association (CSHEMA), and the National Association of College and University Business Officers (NACUBO), in addition to dozens of academic institutions and other interested parties, have submitted comments supporting the proposed regulations and encouraging the further implementation of performance-based standards in RCRA.<sup>124</sup> According to one ACE official, academic organizations have been trying to convince EPA for twenty years of the need to revise hazardous waste disposal regulations to accommodate the unique nature of academic labs, and the proposed rule makes such accommodations quite effectively.<sup>125</sup> However, support for Subpart K has not been uniform, and opposition to the proposed rule, in whole or in part, has been expressed by a number of interested parties.

##### A. The Scope of Coverage

The primary area of contention has been EPA's definition of a laboratory in Subpart K. The proposed rule only applies to those labs "within a college or university where relatively small quantities of chemicals and other substances are used on a non-production basis for teaching or research purposes."<sup>126</sup> The exclusion of college and university hospitals has upset medical schools and academic institutions with medical research facilities. The primary problem is that research faculty often operate out of labs located within college and university-

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122. The performance-based standards used in the HHMI study at Stanford University resulted in a fifty-five percent increase in the knowledge of hazardous characteristics and a sixty-seven percent increase in the knowledge of handling procedures by lab workers. HOWARD HUGHES MED. INST. OFFICE OF LAB. SAFETY, *supra* note 36, at 13.

123. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,745.

124. Am. Council on Educ., *ACE Supports Changes to EPA Policy Regarding Academic Lab Waste Disposal*, Aug. 15, 2006, <http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=17811>.

125. *Id.*

126. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,723. Therefore, labs that are associated with an academic institution but nonetheless located outside of the college or university campus, such as hospitals, and labs located on the college or university campus but nonetheless used for a purpose other than teaching or research, such as photo processing labs, are not considered laboratories under the proposed rule. *Id.* Furthermore, the proposed rule does not apply to research institutions which are independent from a college or university. *Id.*



affiliated hospitals.<sup>127</sup> EPA's rationale for excluding hospital laboratories is that the types and amounts of waste generated in academic labs differ from those generated in hospital labs.<sup>128</sup>

While this is true to some extent, this rationale does not support a complete exclusion of hospital labs from Subpart K. Instead, the rule should include all research labs associated with a college or university, regardless of whether the lab is located in a university-affiliated hospital. To do otherwise would be to create different standards for very similar research labs within an academic institution. Under the language of the proposed rule, it is possible that a research professor could be subject to Subpart K hazardous waste regulations in his research lab in a university classroom building, and Subpart C hazardous waste regulations in his research lab in a university hospital. Such arbitrary, dual standards would create confusion for research faculty and increase the costs and inefficiencies of hazardous waste disposal. However, Subpart K should not be expanded to include university-affiliated hospital labs the main purpose of which is not teaching or research. Instead, a slight modification to include research labs at university-affiliated hospitals is appropriate. This modification will assure that large streams of biomedical waste are still regulated by current RCRA regulations, thus satisfying health and safety concerns, while allowing research labs within hospitals to operate under the same regulations as other research labs within a university. Such a position is supported by the Association of American Medical Colleges,<sup>129</sup> the American Council on Education,<sup>130</sup> the National Association of College and University Business Officers,<sup>131</sup> Harvard University,<sup>132</sup> and Stanford University,<sup>133</sup> among others. However, some would argue for an even broader definition to cover all laboratories affiliated with a college or university, such as photo labs, regardless of the research or non-research purpose of the lab.

Another problem with the definition of a laboratory in Subpart K is the exclusion of those research facilities not affiliated with a college or university, even though independent research institutions generate similar types and quantities of hazardous waste as academic institutions.<sup>134</sup> Part of the EPA definition of a laboratory in Subpart K is the requirement that the lab be located within a college

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127. Letter from Darrell G. Kirch, M.D., President, Ass'n of Am. Med. Colls., to U.S. EPA (Sept. 20, 2006).

128. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,723.

129. Kirch, *supra* note 127.

130. Letter from Sheldon E. Steinbach, Vice President & Gen. Counsel, Am. Council on Educ., & John Walda, President, Nat'l Ass'n of Coll. & Univ. Bus. Officers, to U.S. EPA (Aug. 18, 2006).

131. *Id.*

132. Griffin, *supra* note 19.

133. Letter from Lawrence M. Gibbs, Assoc. Vice Provost for Env'tl. Health & Safety, Stanford Univ., to U.S. EPA (Sept. 14, 2006).

134. Letter from Scott E. Merkle, Chief, Health and Safety Branch, Nat'l Inst. of Env'tl. Health Scis., to U.S. EPA (Aug. 16, 2006).

or university.<sup>135</sup> EPA has not cited health and safety concerns or any other rationale for such a requirement, and thus the distinction between academic and non-academic institutions seems arbitrary. Non-academic laboratories face the same challenges as academic laboratories in meeting the conditions of current hazardous waste regulations.<sup>136</sup> Furthermore, research faculty at academic institutions often work closely with research personnel at non-academic institutions, and some individuals work in both academic and non-academic labs.<sup>137</sup> As with the distinction between university labs and university-affiliated hospitals, such arbitrary, dual standards would create confusion for research personnel and increase the costs and inefficiencies of hazardous waste disposal. In addition, given that most research personnel at non-academic institutions receive their initial training and experience at academic institutions, independent labs would find it necessary to train employees to comply with a different set of hazardous waste requirements.<sup>138</sup> Thus, the costs and burdens of RCRA compliance for independent labs would be further increased. Therefore, the definition of a laboratory in Subpart K should be expanded to include independent research facilities operating under similar circumstances as academic research facilities. Such a position is supported by the American Chemical Society<sup>139</sup> and the National Institute of Environmental Health Sciences, a part of the National Institutes of Health.<sup>140</sup>

#### B. Weighing the Costs and the Benefits

One major complaint from academic institutions and state environmental agencies about Subpart K is the increased cost of compliance under the proposed regulations. Some parties have argued that requirements for hazardous waste removal and container labeling under Subpart K actually impose greater costs and burdens on academic institutions than current regulations.<sup>141</sup> However, such concerns are unwarranted given that the cost savings under Subpart K, in addition to the benefits to human health and the environment, likely outweigh the additional costs imposed.<sup>142</sup>

The central problem some academic institutions and state agencies have with Subpart K's provisions for hazardous waste removal and container labeling is that the provisions are not performance-based standards, but instead are strict,

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135. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29,712, 29,723.

136. Letter from Charles P. Casey, President, Am. Chem. Soc'y, to Matthew Hale, Dir., Office of Solid Waste, U.S. EPA (Oct. 26, 2004), available at [http://membership.acs.org/c/ccs/pubs/white\\_papers/0410\\_laboratory\\_regulation.pdf](http://membership.acs.org/c/ccs/pubs/white_papers/0410_laboratory_regulation.pdf).

137. *Id.*

138. *Id.*

139. *Id.*

140. Merkle, *supra* note 134.

141. See Griffin, *supra* note 19; Letter from Elizabeth W. Cannon, Chief, Hazardous Waste Section, N.C. Dep't of Env't & Natural Regs., to U.S. EPA (Sept. 20, 2006).

142. See *supra* Part III.H; see generally HOWARD HUGHES MED. INST. OFFICE OF LAB. SAFETY, *supra* note 36.

prescriptive standards, contrary to the stated purpose of Subpart K.<sup>143</sup> While this is true to some extent, this fact does not degrade the value of Subpart K or necessitate the revision of these provisions. Instead, the stricter standards in these provisions are necessary to assure the protection of human health and the environment while relaxing standards in other provisions. In addition, the fact that the standards of Subpart K are in some ways stricter and in other ways less strict than current standards is evidence that the new standards are better tailored to the particular research lab context.

In terms of the removal of hazardous wastes from academic labs and other facilities, the current rule requires that hazardous waste be removed from a lab whenever fifty-five gallons or more of hazardous waste or one quart or more of reactive acutely hazardous waste accumulates.<sup>144</sup> The proposed rule maintains the fifty-five-gallon and one-quart provisions and also adds a six-month time limit for removal after the waste has been produced.<sup>145</sup> In its comments on the proposed rule, Harvard University argues that the new removal provisions would “result in increased waste volume and disposal cost associated with removal of partially-filled containers, in conflict with the waste minimization goals of RCRA.”<sup>146</sup> Harvard advocates the revision of the removal provisions to include performance-based standards that would allow colleges and universities flexibility to remove wastes at their own discretion.<sup>147</sup>

However, such a move is unnecessary and in fact contrary to the goals of Subpart K. Requiring labs to regularly remove hazardous waste from labs does not impose a significant burden on academic institutions. The six-month time limit requires colleges and universities to remove wastes twice per calendar year. While this frequency requirement is more often than most institutions remove wastes under current regulations, the costs and burdens of scheduling two removals per year are not likely to be significant. In addition, the benefits to human health and the environment are significantly greater than any increased costs. Requiring labs to regularly remove wastes prevents the buildup of potentially-reactive hazardous materials. The intent of Subpart K is, in part, to promote “environmental protection and public health through safer management of laboratory hazardous wastes.”<sup>148</sup> Eliminating the six-month removal requirement would run contrary to this intent by encouraging labs to exercise lax removal policies that place cost savings ahead of health and safety. Therefore, the benefits of the proposed removal provisions very likely outweigh the greater burdens and costs placed on generators.

In terms of labeling requirements, the proposed rule requires that generators

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143. See, e.g., Gibbs, *supra* note 133; Griffin, *supra* note 19; Cannon, *supra* note 141.

144. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29,712, 29,732.

145. *Id.* at 29,733.

146. Griffin, *supra* note 19.

147. See *id.*

148. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,714.

label hazardous materials containers with the words “unwanted material” and with sufficient information to alert emergency personnel and transporters of the contents.<sup>149</sup> Labs are free to determine what information will be sufficient for such purpose.<sup>150</sup> The date the hazardous waste began accumulating and sufficient information to allow for a proper hazardous waste determination must also be associated with the container in some way, such as with a barcode.<sup>151</sup> Some comments submitted to EPA argue that the new labeling requirements are unnecessary and will create confusion.<sup>152</sup> However, these commentators seem to misread the proposed labeling regulations. By requiring that labels include certain information, and by giving labs the flexibility to determine what information is appropriate and to use referencing identification such as barcodes, EPA has struck a proper balance between a prescriptive standard and a performance-based standard. Creating greater flexibility in labeling standards would create difficulties for lab inspectors and emergency personnel when determining the contents and age of a hazardous material. By maintaining certain base standards while allowing for some flexibility in the specific language of the labels, Subpart K assures the health and safety of humans and the environment while minimizing the burden on generators.

### C. Potential Loopholes and Areas of Abuse

Two major potential problems with Subpart K are the enforceability of laboratory management plans and the exclusion of hazardous wastes generated during lab cleanouts from counting toward the lab’s generator status.

EPA’s proposed rule offers two options for the laboratory management plan. Under the first option, an academic institution must develop, implement, and retain a laboratory management plan; however, there is no requirement that the institution comply with the specific provisions of the plan.<sup>153</sup> Under the second option, an academic institution must similarly develop, implement, and retain a laboratory management plan, and the institution must comply with the specific provisions of the plan.<sup>154</sup> At this time, EPA has not decided which option to employ in the final rule, and has requested comments on this subject from interested parties.<sup>155</sup> The majority of comments submitted to EPA support the first option, making the specific provisions of the laboratory management unenforceable, thus allowing colleges and universities the flexibility to change practices as necessary.<sup>156</sup> However, such an approach is ill-advised.

By requiring academic institutions to create a laboratory management plan,

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149. *Id.* at 29,729.

150. Nat’l Ass’n of Coll. & Univ. Bus. Officers, *supra* note 77.

151. *Id.*

152. *See, e.g.,* Griffin, *supra* note 19; Cannon, *supra* note 141.

153. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,752.

154. *Id.*

155. *Id.* at 29,739.

156. Merkle, *supra* note 134.

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EPA is encouraging them to evaluate laboratory conditions on a system-wide level and create cost-effective hazardous waste solutions while simultaneously protecting human health and the environment. Allowing institutions the freedom to develop a laboratory management plan grants them a tremendous amount of flexibility to find the best approach to hazardous waste problems based on the unique characteristics of the institution. As long as the laboratory management plan addresses the six elements provided in the proposed rule,<sup>157</sup> the plan will be acceptable. However, unless the provisions of the plan are enforceable, the plan becomes meaningless, and EPA is left with less control over hazardous waste at academic institutions. In developing a laboratory management plan, colleges and universities have great liberty to draft reasonable and attainable provisions. Once an institution has committed to managing its hazardous waste in a certain manner, it should be held to such provisions. Allowing labs to stray from the provisions of the laboratory management plan would create inconsistencies throughout campus labs and disrupt the systematic nature of the laboratory management plan which EPA intended. Furthermore, state agencies would be faced with a regulatory nightmare if each lab within an institution had a way of managing hazardous waste different from that specified in the laboratory management plan.

The regulations for OSHA's Chemical Hygiene Plan support the notion that specific provisions of the laboratory management plan must be enforceable. OSHA requires that "the employer shall develop *and carry out* the provisions of a written Chemical Hygiene Plan."<sup>158</sup> Thus, according to OSHA, it is not sufficient for an employer to simply develop a Chemical Hygiene Plan in accordance with OSHA regulations. Instead, the employer must carry out the provisions of the plan in order to be in compliance with the regulations. The Chemical Hygiene Plan approach of OSHA has worked well in laboratories for fifteen years and, when coordinated with the laboratory management plan approach of RCRA, should be even more beneficial.<sup>159</sup> In order to preserve the original intent of Subpart K and the laboratory management plan, maintain consistency and uniformity within each academic institution, and ease the regulatory burden on state agencies, the specific provisions of the laboratory management plan must be enforceable.

In addition to the enforceability of the laboratory management plan, another potential problem in the proposed rule is the exclusion of hazardous wastes generated during a Subpart K cleanout period from counting toward the institution's generator status. Such an exemption runs contrary to the purpose of RCRA to protect human health and the environment, as well as the purpose of Subpart K to minimize the production of hazardous wastes.

By allowing academic institutions to exclude a significant amount of waste generated each year, the exemption discourages waste minimization by allowing labs to remain subject to small-generator requirements, when in actuality the labs should be subject to large-generator requirements. The problem many academic

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157. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. at 29,752.

158. 29 C.F.R. § 1910.1450(e)(1) (2006) (emphasis added).

159. Steinbach & Walda, *supra* note 130.

institutions currently have with cleanouts is that they can be temporarily subject to a different level of regulation, imposing stricter storage time limits and greater recordkeeping and reporting requirements.<sup>160</sup> However, such additional burdens do not justify a cleanout exemption in the hazardous waste regulations.

Whenever a generator produces the threshold amount of hazardous waste per month, regardless of the reason for such production, the generator should be subject to the appropriate generator status and requirements. Thus, every generator that produces between 100 and 1000 kilograms of hazardous waste per month should be subject to small-generator requirements and every generator that produces over 1000 kilograms should be subject to large-generator requirements.

Given the risks and dangers involved with handling large amounts of hazardous waste, EPA has placed appropriate safeguards and stricter requirements in the regulations for generators of larger quantities of waste. The fact that waste is generated during a cleanout period does not degrade the risks and dangers of handling large quantities of hazardous waste. Furthermore, under the proposed rule, in addition to exempting wastes from being counted towards the institution's generator status, the cleanout exemption would also exempt such waste from being reported on the institution's biennial report used by state agencies to collect hazardous waste data.<sup>161</sup> The exemption of such data will inhibit the ability of state agencies to accurately track and control the amount of hazardous waste disposed of within the state, thus leading to ineffective regulation.<sup>162</sup> Therefore, in order to assure the full availability of necessary data and to properly regulate the disposal of large amounts of hazardous waste, all hazardous waste generated during a cleanout period should be counted toward an institution's generator status.

#### D. Enforcement and the Burden on State Environmental Agencies

A number of state agencies, including the Nebraska Department of Environmental Quality (NDEQ), the Idaho Department of Environmental Quality (IDEQ), and the Ohio Environmental Protection Agency, have expressed concern about the burden on state agencies under Subpart K.<sup>163</sup> NDEQ and IDEQ have even gone so far as to assert that performance-based standards should not be a part of RCRA regulations.<sup>164</sup> The central concern for agencies is that Subpart K creates dual standards within RCRA, thus placing "increased demands on regulatory enforcement staff as they must learn and apply another set of unique rules."<sup>165</sup> Given that the adoption of Subpart K in most states is dependent on action by state agencies, the increased cost of enforcement to state agencies is a valid and significant concern. By essentially requiring those states that adopt Subpart K to

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160. See *supra* Part III.E.

161. Letter from Joseph P. Koncelik, Director, Ohio EPA, to U.S. EPA (Aug. 29, 2006).

162. *Id.*

163. Letter from David B. Haldeman, Waste Div. Adm'r, Neb. Dep't of Env'tl. Quality, to U.S. EPA (Aug. 18, 2006); Letter from Brian R. Monson, Hazardous Waste Program Manager, Idaho Dep't of Env'tl. Quality, to U.S. EPA (Sept. 12, 2006); Koncelik, *supra* note 161.

164. Haldeman, *supra* note 163; Monson, *supra* note 163.

165. Koncelik, *supra* note 161.

enforce two different sets of regulations and by not offering to assist states with the costs of such additional enforcement efforts, EPA is in effect reducing the likelihood that states will adopt Subpart K.

However, the state agencies have not presented any evidence that enforcement costs after the adoption of Subpart K will be greater than current enforcement costs. Under the current, strict, prescriptive standards of RCRA, state agencies must closely monitor each step in the hazardous waste process. Meanwhile, under the proposed, flexible, performance-based standards of Subpart K, if EPA decides to make the provisions of the laboratory management plan unenforceable, state agencies will essentially only need to monitor the end result to assure that states are meeting established hazardous waste standards, and thus it is likely that the costs of enforcement for state agencies will be less than current costs. However, if EPA does make the provisions of the laboratory management plan enforceable, then states could be subject to higher enforcement costs. Without cost projections, it is difficult to be certain.

Yet even if the assertions of the state agencies are true, the benefits of Subpart K likely outweigh the increased costs of enforcement. EPA estimates that the aggregate cost savings to academic institutions under Subpart K will be one-half to three million dollars per year.<sup>166</sup> EPA also estimates that the adoption of the proposed rule will result in greater safety in laboratory environments, less exposure of humans and the environment to hazardous substances, and an overall reduction in hazardous waste.<sup>167</sup> These benefits of cost savings for academic institutions, increased health and safety, and a reduction in hazardous waste likely outweigh the costs state agencies could face after the adoption of Subpart K. Therefore, state agencies should adopt Subpart K in order to serve broader societal interests. Additionally, EPA should increase RCRA grant allocations for those states that adopt Subpart K in order to ease the potential burden of additional enforcement costs and to encourage state adoption.

Another concern of state agencies is that performance-based standards are inappropriate for hazardous waste regulation.<sup>168</sup> In a letter to EPA, NDEQ asserts that “the addition of specific regulation[s] for college lab generated waste [is] unsupported by the rationale provided in the proposed rule.”<sup>169</sup> NDEQ states that “so-called flexible approaches are essentially unenforceable in the real world. What is enforceable are clear requirements designed to be met by any generator of hazardous waste.”<sup>170</sup> In echoing these concerns, IDEQ argues that the adoption of Subpart K “may cause more time spent at inspections, record reviews, and enforcement activities.”<sup>171</sup>

However, the history of hazardous waste regulation has demonstrated that strict,

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166. Standards Applicable to Generators of Hazardous Waste; Subpart K—Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29,712, 29,745.

167. *Id.*

168. Haldeman, *supra* note 163; Monson, *supra* note 163.

169. Haldeman, *supra* note 163.

170. *Id.*

171. Monson, *supra* note 163.

prescriptive standards simply do not work well in research laboratory environments. In many situations, it is impossible for academic labs to comply with standards designed for industrial settings.<sup>172</sup> While straightforward, specific requirements may be easier to enforce, the fact is that such requirements are simply not practical or applicable in all situations. Instead of writing off performance-based standards, state agencies should recognize the overall benefits of a more flexible approach and embrace such standards in hazardous waste regulation. By allowing academic labs the opportunity to find the best and most effective solutions for their hazardous waste needs, flexible standards will likely reduce enforcement costs by encouraging self-enforcement and peer review. Labs will take the initiative to reduce hazardous waste disposal costs as much as possible by reducing their waste production, thus benefiting human health and the environment by reducing the amount of hazardous material being placed into the natural world. Therefore, in order to serve the broader interests of protecting human health and the environment, state agencies should recognize the overall benefits of performance-based standards and adopt Subpart K.

#### E. Subpart K as a Template for the Overhaul of RCRA

Subpart K has the potential to serve as a template for the broader overhaul of RCRA hazardous waste regulations. By finally agreeing to performance-based standards after over twenty years of petitioning from academic organizations, EPA has set in motion a process that could revolutionize hazardous waste regulation, if not broader environmental regulation. Over the past thirty years of environmental regulation, prescriptive standards have often proven to be costly and ineffective. Strict standards simply do not work in every area. Therefore, EPA and state agencies should move forward with the implementation of Subpart K, and academic institutions should adopt Subpart K standards as soon as reasonably possible. By moving forward with the widespread use of performance-based standards in hazardous waste regulation, it can be demonstrated whether such standards prove to be less costly and more effective than prescriptive standards.

If it is the case that Subpart K proves to effectively protect human health and the environment while reducing costs and burdens for academic labs, then EPA should consider implementing performance-based standards throughout RCRA. By moving toward a more flexible approach to hazardous waste regulation, EPA will encourage ingenuity and efficiency in the implementation of hazardous waste programs. The proper approach certainly seems to be broad, flexible standards designed to assure the protection of human health and the environment while simultaneously minimizing the detriment to regulated entities. Such an approach, using Subpart K as a template, very well could be the future of environmental regulation.

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172. *Academic Labs Urge Performance-Based Approach in EPA RCRA Rule*, *supra* note 4. See *supra* Part I.



## V. DEVELOPING A CULTURE OF HAZARDOUS WASTE REDUCTION

Regardless of the regulatory system EPA chooses to adopt, academic institutions, independent laboratories, industries, and other regulated entities have a duty to serve as stewards of the environment. At all times generators should manage all hazardous materials, not only hazardous wastes in a manner that protects human health and the environment.<sup>173</sup> By allowing regulated entities to find more effective and efficient ways to protect the environmental and human health,<sup>174</sup> EPA is granting such entities a substantial amount of discretion. Thus, it is the responsibility of these entities to exercise good moral judgment in order to avoid abusing this discretion. The true test will be whether governments and regulated entities work together to adopt innovative approaches to achieve improved environmental results at a lower cost.<sup>175</sup>

The most effective way for hazardous waste generators to act as good stewards of the environment is to prevent the generation of hazardous waste at the source. With continued efforts to reduce the production of hazardous waste, it is possible to reduce, if not completely eliminate, hazardous waste pollution from future processes.<sup>176</sup> By developing pollution prevention practices within academic institutions, such practices will be passed on to future generations of researchers, engineers, and industrial workers.<sup>177</sup>

The first step in developing a culture of hazardous waste reduction in an academic institution is to centralize waste management.<sup>178</sup> By eliminating the decentralized nature inherent in academic environments, institutions can assure consistency and uniformity in hazardous waste management. Once a centralized system is in place, it is important to establish realistic, progressive goals for hazardous waste reduction, both on an institutional and departmental basis.<sup>179</sup> By setting goals and encouraging employees to meet such goals, institutions define acceptable limits for hazardous waste production and encourage employees to find ways to reduce hazardous waste production in order to meet these goals. In order to best define and meet goals, it is important to establish programs to track the sources of waste within an institution.<sup>180</sup> Tracking hazardous waste makes it easier for institutions to spot problem areas and to assure that all waste is being properly handled. Once a tracking system is in place, an institution can then establish a program for the exchange of unused hazardous materials.<sup>181</sup> A large amount of the hazardous waste generated by academic labs comes in the form of unused materials, generally left over after a project is finished or a researcher leaves.

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173. Reinhardt, *supra* note 1.

174. ALFRED A. MARCUS ET AL., REINVENTING ENVIRONMENTAL REGULATION 1 (2002).

175. *Id.*

176. OHIO EPA, RESEARCH AND EDUCATIONAL LABORATORY WASTE REDUCTION 1 (1997), available at <http://www.p2pays.org/ref/04/03852.pdf>.

177. *Id.*

178. *Id.* at 2.

179. *Id.*

180. *Id.*

181. *Id.*

Academic institutions can eliminate a large amount of hazardous waste by reusing hazardous materials in other labs within the institution. Labs can also conduct periodic audits to check for unnecessary materials that could be used by other labs.<sup>182</sup>

Another method to reduce hazardous waste production is to limit purchases of hazardous materials to only that amount which is necessary for a particular project.<sup>183</sup> Academic institutions often stockpile materials and buy in bulk in order to save on purchase costs. However, few institutions consider disposal costs when excess materials must be removed.<sup>184</sup> Disposal costs can often exceed twenty to fifty times the purchase price.<sup>185</sup> Therefore, academic institutions should consider both the costs of purchase and of disposal when buying hazardous materials. In addition, institutions should decline donated or sample chemicals from companies unless such materials are actually needed.<sup>186</sup>

Another important factor in reducing hazardous waste production is employee training.<sup>187</sup> By training employees in methods of hazardous waste reduction and by educating them about the benefits of waste minimization, academic institutions can significantly aid efforts to develop a culture of hazardous waste reduction. In addition, by using alternative methods of teaching and experimentation, such as using computer simulation, substituting less hazardous materials, reusing materials, and consolidating instruction, institutions not only reduce the present production of hazardous waste but also teach future generations methods to minimize waste production.<sup>188</sup>

The best way to manage a waste problem is to prevent waste wherever possible.<sup>189</sup> Therefore, by maintaining a commitment to hazardous waste reduction and by implementing widespread waste minimization policies, academic institutions can develop a culture of hazardous waste reduction.

#### CONCLUSION

After twenty years of petitioning from academic institutions, EPA appears to have finally developed hazardous waste regulations appropriate for the unique academic environment. While the development of performance-based standards in RCRA was a long and tedious process, the implementation of such standards through Subpart K will likely be less so. Subpart K, as proposed, is imperfect, and the recommendations herein made do not purport to achieve perfection either. However, through the implementation of performance-based standards in hazardous waste regulation, regardless of the specific details of such standards, academic labs will be better off than under current prescriptive standards. EPA is

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182. *Id.* at 3.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 4.

189. *Id.* at 5.

granting academic institutions a great deal of discretion in Subpart K,<sup>190</sup> and it is the duty of these colleges and universities to exercise such discretion in a manner that assures the protection of human health and the environment.

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190. Given this discretion, as well as the novelty of performance-based standards in academic labs, it is imperative that EPA actively monitor the program and continually evaluate its strengths and weaknesses.



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