THE JOURNAL OF
COLLEGE AND UNIVERSITY LAW

Volume 34 2008 Number 3

ARTICLES

College and university endowments have reported outstanding investment returns in recent years. While annual investment returns averaged around 15.2%, colleges and universities only been spend about 4.6% of their endowment assets each year. This garnered the attention of the Senate Committee on Finance, which recently considered whether endowments should be taxed or regulated. This article analyzes this issue in light of the existing literature on endowments, the rationales for tax exemptions, the justifications for the unrelated business income tax, and the reasoning behind the private foundation minimum distribution requirements. The article concludes that the existing literature would not justify taxing or regulating endowment accumulation and that any attempt to tax or regulate endowments should only be undertaken in light of a fundamental re-imagining of our tax exempt system.

Women in academia suffer from significant pay disparities in the workplace even when they hold the same rank as men. The recent *Ledbetter* decision by the United States Supreme Court holds a number of important lessons for women in academia. The article explores the revealing choices of language used in the majority opinion, written by one of the Court's newest members, Justice Samuel Alito, and the dissent, written by the Court's only remaining woman, Justice Ruth Bader Ginsburg. It concludes that these differences have significance in terms of both outcomes and the importance of gender diversity on the bench. The article evaluates the norms in academia in terms of how women faculty fare with regard to pay equity and the nature of the salary-setting norms. In addition, the article explores how academia can effectuate voluntary change in such norms. Finally, it reviews the pending Congressional legislation that "fixes" the *Ledbetter* decision and concludes that, with such normative change and legislation, women in academia may fare better in terms of pay equity in the future.

ESSAYS

One of the most passionately debated topics in the sports industry is whether or not NCAA student-athletes should be paid. This essay explores that issue by looking at the demands and limitations on student-athletes, the NCAA's reasoning behind non-compensation, and the problems associated with the current system. Ultimately, the essay proposes a solution, in the form of a proposed bylaw to the NCAA manual, that would address the concerns of the student-athletes, the NCAA, and its member institutions.

TAXING AND REGULATING COLLEGE AND UNIVERSITY ENDOWMENT INCOME: THE LITERATURE'S PERSPECTIVE

MARK J. COWAN*

"*The trustees of an endowed institution are the guardians of the future against the claims of the present.*"[1]

INTRODUCTION

College and university endowments have experienced tremendous growth in recent years. For the fiscal year which ended in June 2006, 765 institutions reported a combined $340 billion in endowment assets.[2] These assets generated earnings of 15.3%, or $52 billion.[3] This income is, in general, not subject to the federal income tax.[4] By not taxing this income, the federal government forgoes annual revenue of about $18 billion.[5] This figure dwarfs the estimated $6.6 billion annual revenue loss from the deduction for charitable contributions to educational institutions.[6]

---

* Assistant Professor, Boise State University; J.D., University of Connecticut, 2004; M.S.T., University of Hartford, 1996; B.S., University of Connecticut, 1991; CPA. This Article was presented at the Legal Research Session of the American Taxation Association's Mid-Year Meeting in Memphis, Tennessee in February 2008. I thank the anonymous reviewers and participants in the Legal Research Session for their helpful comments and suggestions. I also thank William Ilett of the Boise State University Foundation for his helpful information and Jacob Zwygart for his research assistance.

1. James Tobin, *What is Permanent Endowment Income?*, 64 AM. ECON. REV. 427, 427 (1974).

2. Memorandum from Jane G. Gravelle, Cong. Research Serv. to Sen. Baucus and Sen. Grassley (Aug. 20, 2007), *available at* http://chronicle.com/weekly/documents/v54/ i06/baucus-grassley-endowment.pdf [hereinafter CRS Memo].

3. *Id.* See *infra* Part II for a discussion of how the endowments managed such impressive returns. See also The Chronicle of Higher Education: Facts and Figures: College and University Endowments, http://chronicle.com/stats/endowments (last visited Apr. 4, 2008), for a database of endowment market values.

4. *See infra* Part I.

5. CRS Memo, *supra* note 2, at 3. This assumes the income would be taxed at the normal corporate income tax rates.

6. STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2007–2011, at 32 (2007), *available at* http://www.house.gov/jct/s-3-07.pdf. The $6.6 billion is the projection for 2007 and includes lost revenue from corporate taxpayers of $0.7 billion and from individual taxpayers of $5.9 billion.

While annual endowment investment earnings have increased to around 15.3%, payout rates (the percentage of the endowment spent each year) have remained steady at about 4.6%.[7] At the same time, tuition rates have increased.[8] In light of these numbers, some have called on colleges and universities to stop "hoarding" their endowment income and to begin using the funds to increase student aid and limit tuition increases.[9] The Senate Committee on Finance has taken note of this issue and held a hearing on September 26, 2007 to consider testimony as to whether endowment funds should be taxed or subject to minimum distribution requirements.[10] In January 2008, Senators Baucus and Grassley followed up on

---

For the period 2007–2011, the projected total revenue loss from the deduction for charitable contributions to educational institutions is estimated to be $36.8 billion. *Id.* Presumably this estimate includes gifts to educational institutions at all levels, not just gifts to colleges and universities.

7. CRS Memo, *supra* note 2, at 2. A recent survey indicates that fiscal 2007 average returns have increased to 17.2% while payout rates have remained steady at about 4.6%. *See* Goldie Blumenstyk, *Savor Big Gains but Lower Their Sights*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 1, 2008, at A1. This Article uses the fiscal 2006 figures since the fiscal 2006 figures were debated in the Senate Committee on Finance. *See infra* note 10. In any case, the fiscal 2007 estimates indicate the same issue as the fiscal 2006 amounts—a wide gap between endowment earnings and payouts. As of this writing, college and university officials are predicting that endowment returns will decline in fiscal 2008 because of a downturn in the economy and increased market volatility. *See* Blumenstyk, *supra*.

8. CRS Memo, *supra* note 2, at 2; *see also Tuition Increases Outpace Financial Aid*, WALL ST. J., Oct. 23, 2007, at D4 (reporting an average 6.6% increase in tuition for public institutions and an average 6.3% increase in tuition for private institutions in the 2007–2008 school year).

9. *See, e.g.*, *Offshore Tax Issues, Reinsurance and Hedge Funds: Hearings Before the S. Comm. on Finance*, 110th Cong. (2007) (statement of Lynne Munson, Center for College Affordability and Productivity), *available at* http://www.senate.gov/~finance/hearings/testimony/2007test/092607testlm.pdf [hereinafter *Munson Testimony*].

10. See *Offshore Tax Issues, Reinsurance and Hedge Funds: Hearings Before the S. Comm. on Finance*, 110th Cong. (2007), http://www.senate.gov/~finance/sitepages/2007hearings.htm, for prepared testimony and a video of the hearing. The September 26, 2007 hearing was billed as a discussion of offshore tax issues involving hedge funds and reinsurance companies. In addition to these topics, however, two witnesses testified regarding college and university endowments and whether such endowments should be subject to minimum distribution requirements. *See id.*; CRS Memo, *supra* note 2; *Munson Testimony*, *supra* note 9. While the focus of the testimony was on possible mandated payout percentages, the issue of taxing endowment income was also raised. *See* Andy Guess, *Senate Scrutiny for Endowments*, INSIDE HIGHER ED, Sept. 27, 2007, http://www.insidehighered.com/news/2007/09/27/endowments. A third witness discussed the use of hedge fund investments by endowments. *Offshore Tax Issues, Reinsurance and Hedge Funds: Hearings Before the S. Comm. on Finance*, 110th Cong. (2007) (statement of Suzanne Ross McDowell, Steptoe & Johnson LLP), *available at* http://www.senate.gov/~finance/hearings/testimony/2007test/092607testsm.pdf [hereinafter *McDowell Testimony*]. *See infra* Part I.C.2. No representatives of college and university endowments were invited to the hearing, but a group representing such interests did subsequently submit written testimony disputing the claims made at the hearing. *Offshore Tax Issues, Reinsurance and Hedge Funds: Hearings Before the S. Comm. on Finance*, 110th Cong. (2007) (testimony for the record submitted by the American Council on Education, the Association of American Universities, the National Association of Independent Colleges and Universities, and the National Association of State Universities and Land-Grant Colleges on Oct. 10, 2007), *available at* http://www.aau.edu/issues/Test_Assn_Univ_Endow_10-10-2007.pdf [hereinafter *Higher Education Associations*

the September hearing and sent letters to 136 colleges and universities with endowments of $500 million or more.[11] The letters requested detailed information on endowment investment, endowment payout, tuition, and financial aid policies.[12]

The question of whether to tax and/or regulate endowment income is controversial and implicates important issues of tax policy and institutional governance. The possibility of a tax or regulation is likely to engender entrenched positions on the part of endowed colleges and universities on the one hand, and education advocates and policymakers concerned about rising tuition costs on the other.[13] The purpose of this Article is to move beyond the rhetoric and analyze the endowment issue in light of the literature on the optimal use of endowments, the rationales for granting educational institutions tax-exempt status, the rationales underlying the unrelated business income tax (UBIT), and the rationales for the minimum distribution requirements currently imposed on private foundations. In short, this Article marshals and fuses the existing literature to determine whether a

---

Testimony].

The hearing on endowment practices was but one of the shots that Congressional tax-writing committees have fired across the bow of the higher education community in recent years. In October 2006, Bill Thomas, then the Chairman of the House Committee on Ways and Means, sent a letter to the National Collegiate Athletic Association (NCAA) questioning the organization's tax-exempt status. Meg Shreve, *Thomas Takes on NCAA's Tax-Exempt Status*, TAX NOTES TODAY, Oct. 5, 2006, at 193-2 (containing a link to the text of Thomas's letter). The letter focused on whether the NCAA's activities regarding intercollegiate athletics were truly "educational" in light of the millions of dollars in revenue being generated by intercollegiate football and basketball. *Id.* The NCAA responded to the Thomas inquiry with a twenty-five page letter (plus two appendices) arguing that the NCAA was continuing to advance education. Letter from Myles Brand, President of NCAA, to William Thomas, H. Comm. on Ways and Means (Nov. 13, 2006), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2006/november/20061115_response_to_housecommitteeonwaysandmeans.pdf. At present, nothing further has occurred on this front.

In May 2007, the Senate Committee on Finance considered several provisions that would affect colleges and universities, including taxing tuition benefits for children of college and university employees and subjecting some hedge fund income to the unrelated business income tax. *See infra* Part I.C.2.; *see also* Elizabeth Redden & Doug Lederman, *Muddled Tax Picture for Higher Ed*, INSIDE HIGHER ED, May 23, 2007, http://www.insidehighered.com/news/2007/05/23/tax. The Senate Committee on Finance also considered minimum distribution requirements for endowments at that time. Redden & Lederman, *supra*. To date, the Committee's activity has not resulted in new legislation.

Most recently, in October 2007, Senate Committee on Finance Ranking Member Charles Grassley announced that he would be looking into the tax status of nonprofit organizations that support college and university athletic departments. Brad Wolverton, *Key Senator to Question Tax Treatment of Booster Clubs*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 5, 2007, at A34. Grassley was responding to reports that athletic programs were getting a larger share of the donations that go to colleges and universities and that athletic donors were receiving perks such as free seats on flights charted by collegiate sports teams. *Id.*

11. *Baucus, Grassley Question Colleges on Endowments, Tax Benefits*, TAX NOTES TODAY, Jan. 24, 2008, at 17-38.

12. *Id.* Responses are due from the colleges and universities within thirty days. *Id.*

13. *See, e.g.*, J.J. Hermes, *Senators Weigh Idea of Requiring Payout Rates for Large University Endowments*, CHRON. HIGHER EDUC., Sept. 27, 2007, http://chronicle.com/daily/2007/09/2007092702n.htm (quoting representatives of groups for and against regulation/taxation of college and university endowments); *see also supra* note 10.

tax on endowment income or a minimum distribution requirement would be consistent with our current understanding of how colleges and universities should be taxed.

As of this writing, there are no specific proposals before Congress to change the way colleges and universities are taxed on their endowment income. Based on the testimony and discussion surrounding the hearings before the Senate Committee on Finance, however, this Article considers two possible changes: 1) subjecting endowment income to the corporate income tax via UBIT, and 2) mandating a minimum distribution requirement modeled on the current minimum distribution requirements for private foundations.[14] Further, this Article assumes any changes would apply to both private and public colleges and universities.[15]

This Article proceeds as follows. Part I summarizes the current tax treatment of colleges and universities, including the tax rules governing investment income from endowments. Part II then discusses endowments, the purposes they serve in higher education, and arguments for and against accumulation of endowment income. Part III reviews the rationales that commentators have developed to explain why nonprofits, including colleges and universities, are granted tax-exempt status. Part III then reviews whether a tax on endowment income would be consistent with those rationales. Part IV reviews the rationales that commentators have used to justify UBIT, which is applied to certain commercial ventures of tax-exempt organizations, and considers whether the extension of UBIT to endowment income would be consistent with those rationales. Part V reviews the rationales behind the more onerous rules that apply to tax-exempt entities classified as private foundations. Part V then goes on to compare private foundations to colleges and universities to determine if the private foundation minimum distribution requirements should be extended to endowments. The article concludes that, taking all of the literature into account, taxation or regulation of endowments

---

14. *See supra* note 10. Variations of these two ideas were discussed at the September 26, 2007 hearing. For example, perhaps a tax would only be applied if tuition were increased by a certain amount. Also, perhaps the tax or minimum distribution requirement would only apply to endowments of a certain size. To some extent, the tax and minimum distribution changes overlap in that the payout requirement would be enforced via an excise tax on undistributed income. See *infra* Part V.A. for the mechanics of the minimum distribution rules. Bear in mind that any proposal that actually materializes may be more complicated than the simple version analyzed here.

Prior to the September 26, 2007 hearing in the Senate Committee on Finance, a tax or minimum distribution requirement on endowments occasionally appeared on lists of revenue-raisers or reform ideas. *See, e.g.*, George Break & Joseph A. Pechman, *Relationship Between Corporation and Individual Income Taxes*, 28 NAT'L TAX J. 341, 344 (1975) (raising the possibility of taxing the investment income of charities if corporate and individual income taxes were integrated); Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3, 7 (1990) (describing a 1987 proposal in Congress to apply a five percent excise tax on the endowment investment income on all tax-exempt organizations, including colleges and universities); Martin Sullivan, *Revenue Raising Ideas for the Next Tax Bill*, TAX NOTES, Dec. 10, 2001, at 1363–64 (suggesting Congress consider taxing the income earned by large college and university endowments). See also *infra* note 311, for prior minimum distribution proposals.

15. *See infra* notes 18–20 and accompanying text (noting that the issues surrounding endowments are generally the same for both public and private institutions).

would not be justified based on our current understanding of how colleges and universities should be taxed.

I. CURRENT TAXATION OF COLLEGES AND UNIVERSITIES

A. The Private/Public Distinction

A private, nonprofit college or university, because it exists for educational purposes, is eligible for exemption from the federal income tax as a § 501(c)(3) organization.[16] A public college or university is exempt from the federal income tax by virtue of being part of the state government.[17] The private/public distinction, however, is not particularly critical when analyzing whether endowment income should be taxed or regulated.[18] First, despite the private/public difference in the source of the underlying tax exemption, both private and public institutions are subject to UBIT in the same manner.[19] Second, endowments of public universities are normally not held by the state institutions themselves. Rather, endowments are raised, managed, and distributed by "supporting organizations" that independently qualify for tax exemption as § 501(c)(3)

16. While I.R.C. § 501(c)(3) defines what types of organizations are eligible for the exemption, it is I.R.C. § 501(a) that actually grants the exemption. *Compare* I.R.C. § 501(c)(3) (2000), *with* I.R.C. § 501(a).

17. At first glance, it appears that I.R.C. § 115 covers the tax treatment of state governments. Section 115(1) states that "[g]ross income does not include income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof." I.R.C. § 115(1) (2000). Thus, per § 115, it appears that income from the commercial enterprises of state governments, which would not be considered an "essential governmental function," would be subject to the federal income tax while income from governmental functions would be exempt. *Id.*

The IRS, however, has interpreted the "accruing to" language in § 115 as meaning that the commercial/governmental distinction only applies to entities owned by state governments. *See* Gen. Couns. Mem. 14,407 (Jan. 23, 1935). State governments themselves are not subject to § 115. *Id.* Rather, the IRS views state governments as simply falling outside the scope of the Internal Revenue Code. *Id.* Under the IRS's view, *all* income of a state government, commercial or governmental, is exempt from the federal income tax. *See id.* While the rationale for this stance is unclear, the IRS's approach at least has the virtue of avoiding the difficult task of distinguishing between the commercial and governmental functions of the state government.

Although the IRS views states, including state colleges and universities, as generally beyond the reach of the I.R.C., there is one code provision that specifically subjects some income of states to the federal income tax. I.R.C. § 511(a)(2)(B) applies the unrelated business income tax (UBIT) to state colleges and universities. I.R.C. § 511(a)(2)(B) (2000). See *infra* Part I.C. for further discussion of UBIT.

18. The private/public distinction is, of course, relevant for nontax legal reasons. For example, a public institution owes due process and other constitutional protections to students, faculty, and staff while private institutions generally do not. *E.g.*, WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 42 (4th ed. 2006). The line dividing public and private institutions is not always clear. *See id.* at 42–43. Since the private/public distinction is not particularly important in analyzing endowments, this issue is not discussed further. *See id.* at 42–54.

19. *See infra* Part I.C. Any extension of the UBIT regime to cover endowment income would, therefore, presumably apply to both private and public institutions.

organizations. [20] Accordingly, many of the policy issues implicated by endowments are the same for both public and private institutions.[21] For the

20. The structure used by the University of Idaho, for example, is typical. The school's endowment is owned and managed by a separate entity, the University of Idaho Foundation, Inc., for the exclusive benefit of the University of Idaho. *See* University of Idaho Foundation, Inc., http://www.uidahofoundation.org (last visited Apr. 8, 2008). The foundation handles fundraising for the University of Idaho, and all decisions regarding fundraising priorities are set by the administration of the University itself. *See* University of Idaho, Frequently Asked Questions, http://www.uidahofoundation.org/default.aspx?pid=84514 (last visited Mar. 27, 2008). The foundation's website explains the use of a separate fundraising and endowment organization as follows:

> Why is the [University of Idaho] Foundation separate from the University of Idaho? The vast majority of American public colleges and universities have separate Foundations, organized as not-for-profit 501(c)(3) corporations, for good reasons: confidentiality of personal documents related to gifts such as wills, trust agreements and correspondence; stewardship of endowment funds to ensure the joint goals of growth and return are met in the best interest of the donors; and to provide flexibility through discretionary funds to the growth of programs of excellence at the University of Idaho.

Id.

The last point, regarding "flexibility through discretionary funds," is critical. Public colleges and universities use separate foundations in order to raise private money that they can use outside of the confines of state-imposed restrictions on expenditures. *E.g.*, BRUCE M. STAVE, RED BRICK IN THE LAND OF STEADY HABITS: CREATING THE UNIVERSITY OF CONNECTICUT, 1881–2006, at 112–13 (2006) (reporting that the University of Connecticut established a foundation in the 1960s to create a pool of funds the school could use, without state restrictions, to help the school achieve excellence). Many schools have more than one supporting foundation. For example, a school may have, in addition to its general supporting foundation, an athletic booster club that raises and invests money to support the school's athletics programs. *E.g.*, Paul Fain, *Oregon Debates Role of Big Sport Donors*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 26, 2007, at A38 (indicating how donations raised by booster clubs are used in college and university athletic departments). Provided the supporting foundation receives enough public support, it will not be considered a private foundation. I.R.C. § 509(a)(1) (2000). *See infra* Part V.A.

Large public college and university-related endowments are, in many cases, a relatively recent phenomena, rendered necessary by decreased state funding. *See infra* note 322. For example, the University of Connecticut Foundation was established in 1964 and, so far, has undertaken two major capital campaigns. *See* University of Connecticut, About the UConn Foundation, http://www.foundation.uconn.edu/basepage.asp?page=0044 (last visited Mar. 27, 2008).

In contrast, many private institutions, such as Yale University, have had significant endowments for centuries. *See, e.g.*, Hansmann, *supra* note 14, at 21 (indicating that "universities such as Harvard and Yale began accumulating substantial endowments by the middle of the nineteenth century"); THE YALE ENDOWMENT: 2006, at 16, 22–24, *available at* http://www.yale.edu/investments (providing a history of prominent gifts to Yale's endowment going back to the 1800s).

21. An anonymous reviewer of a draft version of this Article identified a possible public/private distinction that is worthy of note. Specifically, the reviewer suggested there may be a stronger case for imposing a minimum distribution requirement on endowments of *public* institutions because many public institutions, unlike private institutions, rely on state funds, rather than their endowment, to cover basic operating costs. Presumably, this means public institutions can better afford to accumulate their endowment earnings. This argument may be worth exploring further in another venue, but this Article does not do so.

First, the line between public and private institutions has become increasingly blurred. State

remainder of this Article, therefore, the private/public distinction is only noted where relevant.

In addition to being exempt from the federal income tax, colleges and universities are exempt from the accumulated earnings tax.[22] The accumulated earnings tax is a surcharge on the income a corporation has not distributed and which is not needed to support the reasonable needs of the business.[23] The tax is designed to prevent corporations from postponing the distribution of income to shareholders and the shareholder level tax that would apply to these distributions.[24] Unlike for-profit enterprises, colleges and universities may accumulate non-operating investments (such as endowments) free from the specter of the Internal Revenue Code.[25]

B. Basic Requirements for Tax Exemption Under § 501(c)(3)

To qualify as a § 501(c)(3) organization, a nonprofit must be:

> organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public

---

support for higher education has been declining. *See supra* note 20; *infra* note 322. This reality is forcing state institutions, like their private brethren, to raise private money to fund more of their ongoing operations. Second, if a state institution were using state funds for daily operations and unwisely accumulating its endowment, presumably the state government could pressure the public college or university to spend more of its endowment, or face possible cuts in funding. *See infra* note 317. Third, state governments may well take offense at having their institutions subjected to more federal regulation than private, and perhaps wealthier, institutions, which could raise thorny political, as well as perhaps constitutional, issues.

22. I.R.C. § 532(b)(2) (2000).

23. I.R.C. § 531 (2000) (imposing the accumulated earnings tax); I.R.C. § 537(a) (2000) (elaborating on the "reasonable needs of the business").

24. *See* I.R.C. § 532(a).

25. One commentator has suggested that, if the exclusion for nonprofits from the accumulated earnings tax were repealed, there would be a "serious question" over whether endowments would be taxed. Hansmann, *supra* note 14, at 7 n.15. Given that the tax was designed to ensure that the shareholder level tax on corporate income was not unreasonably deferred, it is unclear how the tax would be imported into the nonprofit world. Nonprofits are subject to the non-distribution constraint and thus are prohibited from distributing their income to, for example, shareholders, founders, members, or insiders. *See infra* Part I.B.2.

If the institution does not distribute the endowment earnings, they are not necessarily engaged in tax avoidance. If the earnings were distributed in the form of student aid, this presumably would not create any taxable income to the recipient. As such, the purpose of the accumulated earnings tax would not be applicable in such a case. Alternatively, if the earnings were spent on higher faculty or staff salaries, they would generate additional income to the employees receiving such salaries. In any case, what is clear is that the accumulated earnings tax concept would not be easily imported into the realm of tax-exempt nonprofits.

office.[26]

This definition, as it applies specifically to institutions of higher education, is dissected in the sections which follow.

1. The Educational Mission in the Organizational and Operational Tests

In order to attain and maintain tax-exempt status, the nonprofit must be "organized and operated exclusively" for one of the enumerated purposes listed in § 501(c)(3).[27] For colleges and universities, the enumerated purpose is, of course, education.[28] The "educational" purpose is listed separately from the more generic "charitable" purpose in § 501(c)(3). Accordingly, colleges and universities are worthy of tax exemption because they help society through education, not because they are of immediate help to the less fortunate.[29] There is no requirement for a college or university to prove that it is engaged in "charitable" works.[30] In fact, some commentators have speculated that a school, so long as it is providing education, can retain its tax exemption even if it charges high prices for its services

---

26. I.R.C. § 501(c)(3) (2000).

27. *Id.* Inherent in this requirement is an organizational test and an operational test. The organizational test requires that the nonprofit's organizational documents limit the entity's activities to tax-exempt purposes, prohibit the entity from engaging in any substantial nonexempt activities, and provide that, upon dissolution, the assets of the entity will be distributed to another nonprofit charitable organization or the government. Treas. Reg. § 1.501(c)(3)-1(b) (as amended in 1990).

The operational test requires that the nonprofit be operated in accordance with the dictates of the organizational documents, i.e., the entity must operate "exclusively" for a nonprofit purpose. Treas. Reg. § 1.501(c)(3)-1(c) (as amended in 1990). "Exclusively" actually means "primarily." *Id.* A nonprofit can therefore engage in insubstantial activities that are unrelated to its exempt mission without putting its tax-exempt status in jeopardy. Most private college and universities, and the organizations supporting public colleges and universities, easily meet these tests.

28. In some circumstances, whether an organization is "educational" can be unclear, particularly with respect to "controversial" groups expressing a particular viewpoint. *See, e.g.*, Rev. Proc. 86-43, 1986-2 C.B. 729 (articulating a "methodology test" to determine if organizations that express a particular viewpoint are engaged in education). The typical college or university does not pose such classification problems, and there is normally little doubt they are engaged in education. Recently, however, some have questioned whether certain activities of colleges and universities, like athletics, should still be considered educational. See *supra* note 10 for the discussion regarding intercollegiate athletics.

29. The Congressional Research Service explained the societal benefits of education this way: "Economic theory suggests that education causes positive externalities as the acquisition of knowledge and implementation of research occurs, generating both private benefits for individuals and social benefits for the pubic at large." Pamela J. Jackson & Erika Lunder, *Higher Education Institutions: A Discussion of Organizational Status*, TAX NOTES TODAY, Dec. 1, 2006, at 234-22.

30. *Id.* (indicating that higher education institutions "are not required by law to operate with a charitable purpose" and are not required to serve students from low-income families in order to maintain their tax-exempt status). The same can be said for the "religious" purpose in § 501(c)(3). While many religious organizations (like churches) strive to help the poor, they exist primarily to service their own members. There is no requirement that a church be devoted to helping the poor to maintain its tax-exempt status.

and does not provide any financial aid to students.[31] Since the exemption is granted based on providing education rather than giving alms to the poor, a requirement that colleges and universities spend more of their endowment income on items such as student financial aid would represent a sea change in how educational institutions are treated under the tax code.

2. No Inurement/Intermediate Sanctions

A nonprofit's tax-exempt status can be revoked if any of the organization's net earnings inure to the benefit of private shareholders or individuals.[32] This "nondistributional" constraint is the primary distinction between nonprofit and for-profit organizations. *Any* inurement, regardless of amount, can cause an organization to lose its tax-exempt status.[33] Inurement can result when an "insider," such as one of the organization's managers or executives, receives a salary that exceeds fair market value.[34]

---

31. *See, e.g.*, JAMES J. FISHMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 191 (2d ed. 2006) (posing this fact pattern in a problem); JAMES J. FISHMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS TEACHER'S MANUAL 30–31 (2d ed. 2006) (suggesting the answer to the problem posed in the casebook is that there is no "charity care-like" standard for schools). In contrast, an organization claiming tax exemption under the more generic "charitable" category in § 501(c)(3), such as a hospital, must do more than simply provide care to those willing and able to pay. *See, e.g.*, Rev. Rul. 69-545, 1969-2 C.B. 117 (applying a community benefit standard to determine whether a hospital is exempt from tax). A college or university does not need to pass a community benefit test as a prerequisite for tax exemption. *But see infra* note 330 (describing a change in this traditional approach that is taking place in the United Kingdom).

32. I.R.C. § 501(c)(3) (2000); Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 1990).

33. *See* I.R.C. § 501(c)(3) (noting "*no part* of the net earnings of which inures to the benefit of any private shareholder or individual" (emphasis added)); Church of Scientology of Cal. v. Comm'r, 823 F.2d 1310, 1316 (9th Cir. 1987) (revoking the tax-exempt status of the Church of Scientology on account of inurement, noting that an "organization loses tax exempt status if even a small percentage of income inures to a private individual").

34. *See* United Cancer Council, Inc. v. Comm'r, 165 F.3d 1173, 1176 (7th Cir. 1999) (stating that inurement generally applies to "an insider of the charity" and a § 501(c)(3) organization "is not to siphon its earnings to its founder, or the members of its board, or their families, or anyone else fairly to be described as an insider, that is, the equivalent of an owner or manager"); *Church of Scientology*, 823 F.2d at 1316 (indicating that "payment of excessive salaries will result in a finding of inurement").

While the inurement prohibition is concerned with benefits to insiders, a related, but separate, "private benefit" doctrine can apply when benefits flow from the nonprofit to *outsiders*. *See* Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1990). The private benefit doctrine is only invoked when the benefit flowing to the outsiders is substantial and essentially the organization is primarily benefiting private interests rather than the public or a large class of beneficiaries. *See, e.g.*, Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1999) (holding that a school that trained political campaign workers was not entitled to tax exemption because it primarily benefited private interests—the Republican Party—since almost all of the school's students went on to work for the Republican Party). Because the benefits to private interests must be substantial and because colleges and universities serve such a broad class of beneficiaries (students, the public, the community, etc.), the private benefit doctrine is unlikely to pose a threat to the tax exemption of most colleges and universities.

Revocation is a harsh, all-or-nothing penalty, which tends to punish the innocent while leaving those who benefited from the inurement largely unscathed. If an institution's tax exemption is revoked because earnings inured to its president via an excess salary, for example, the innocent students, staff, faculty, alumni, donors, and surrounding community would suffer—not the president who benefited from the inurement or the trustees who approved the excess compensation.[35] Recognizing this, in 1996, Congress enacted a special excise tax on excess compensation called "intermediate sanctions."[36] Except in the most egregious cases of inurement, intermediate sanctions will apply in lieu of revocation of the organization's tax-exempt status.[37]

The intermediate sanctions apply to "excess benefits" the nonprofit gives to "disqualified persons."[38] A disqualified person is normally someone in a position to "exercise substantial influence" over the organization, such as a manager, board member, or officer.[39] An excess benefit is an economic benefit that the organization gives to a disqualified person that is in excess of the value such person has provided to the organization.[40] In short, the intermediate sanctions apply when an influential person at a tax-exempt entity is given excess compensation.

Stripped of detail, the intermediate sanctions apply a tax on the disqualified person equal to 25% of the excess benefit.[41] If the excess benefit is not "corrected" (returned to the organization), the disqualified person must pay an additional tax equal to 200% of the excess benefit.[42] The intermediate sanctions also apply to organization managers who participated in the provision of the excess benefit.[43] The tax on the manager is 10% of the excess benefit,[44] capped at $20,000 for any one excess benefit transaction.[45] These rules thus seek to punish the persons who receive or approve excess benefits, rather than punish the organization itself.

While the intermediate sanction rules do not apply to state colleges and universities,[46] they do generally apply to § 501(c)(3) organizations.[47] Therefore, the intermediate sanction rules apply to private colleges and universities and the

35. JAMES J. FISHMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 246 (2d ed. 2006) .

36. I.R.C. § 4958 (2000). Only a brief overview of intermediate sanctions is provided here. See Treas. Reg. §§ 53.4958-1 to -8 (as amended in 2002) for a more detailed explanation.

37. *See* FISHMAN & SCHWARZ, *supra* note 35, at 246–47.

38. I.R.C. § 4958(c)(1)(A).

39. I.R.C. § 4958(f)(1); Treas. Reg. § 53.4958-3 (as amended in 2002).

40. I.R.C. § 4958(c)(1); Treas. Reg. § 53.4958-4 (as amended in 2002).

41. I.R.C. § 4958(a)(1).

42. I.R.C. § 4958(b), (f)(6).

43. I.R.C. § 4958(a)(2).

44. *Id.*

45. I.R.C. § 4958(d)(2).

46. *See* Treas. Reg. § 53.4958-2(a)(2)(ii) (as amended in 2002) (indicating that a governmental unit is not an "applicable tax exempt organization" and is thus not subject to the intermediate sanction rules).

47. Treas. Reg. § 53.4958-2(a)(1) (as amended in 2002).

§ 501(c)(3) fundraising organizations that support state colleges and universities. While there has been evidence of excess benefits in higher education in recent years, the intermediate sanction rules act as a check on any tendencies to use accumulated endowment funds to pay excess benefits to administrators.[48]

3. Lobbying and Political Campaign Restrictions

Beyond the fundamental prohibition on inurement, there are a couple of other explicit ways in which the tax law regulates nonprofit behavior. First, § 501(c)(3) organizations are limited in their ability to lobby.[49] Specifically, they cannot engage in "substantial" lobbying.[50] The rationale behind the lobbying restriction, which had its antecedents going back to 1919, is "clouded in obscurity."[51]

Second, § 501(c)(3) organizations cannot "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of, or in opposition to, any candidate for public office."[52] This restriction is an absolute ban—any campaign activity can result in the revocation of tax exemption and the imposition of an excise tax on any political expenditures.[53] The

---

48. As higher education executive compensation has increased, examples of excess compensation have surfaced. For example, the president of American University was forced to resign in 2005 after he was accused of misusing over $500,000 in the institution's funds. FISHMAN & SCHWARZ, *supra* note 35, at 233–34. Intermediate sanctions provide the IRS with a powerful weapon to combat such abuse.

Outside of the higher education context, there is evidence that intermediate sanctions can help reign in abuse at well-endowed institutions. For example, the intermediate sanctions were useful in addressing abuse at the Bishop Estate in Hawaii. *See generally* SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST (2006).

The Bishop Estate was originally established by the will of Princess Bernice Pauahi Bishop, the last of the Hawaiian royal family. The Princess left her substantial landholdings in Hawaii to a charitable trust (known as the Bishop Estate) to establish the Kamehameha schools. After Hawaii gained statehood and tourism increased, the landholdings of the Bishop Estate grew substantially in value. Trustees were appointed in a highly politicized process which resulted in a series of trustees that took excess compensation and abused their duties in running the organization. Because the Bishop Estate ran schools, it was exempt from regulation as a private foundation. See *infra* Part V.A. for an overview of the private foundation regime. Accordingly, it was the intermediate sanctions that proved to be the most valuable weapon at the IRS's disposal to address inurement at the Bishop Estate. *See* KING & ROTH, *supra*, at 209–10 (noting how the Bishop Estate opposed the intermediate sanctions bill).

49. I.R.C. § 501(c)(3) (2000) (indicating that "no substantial part of the activities of" the organization can be "attempting to influence legislation").

50. Because it is often difficult for an organization to tell when it is approaching the forbidden "substantial" level of lobbying, I.R.C. § 501(h) allows the organization to elect to use a complex quantitative test to determine how much it can spend on lobbying before it puts its tax exemption in jeopardy. The election under § 501(h) may trigger an excise tax on lobbying expenditures. I.R.C. § 501(h). *See* I.R.C. § 4911 (2000). See Treas. Reg. §§ 1.501(h)-1 to -3 (1990) & 56.4911-1 to -7 (1990), for further details.

51. FISHMAN & SCHWARZ, *supra* note 35, at 260.

52. I.R.C. § 501(c)(3).

53. I.R.C. § 4955 (2000). The political campaign restriction has been a high profile, controversial subject in recent years. This has been particularly true with regard to churches. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000) (upholding the revocation

origin of the campaign restriction, which was first enacted in 1954, is unclear. One theory is that the restriction was enacted at the behest of then-Senator Lyndon B. Johnson.[54] Johnson, the story goes, wanted to stop a Texas foundation from providing any further support to one of his political opponents.[55]

Both the lobbying and campaign restrictions are examples of where Congress[56] has sought to regulate nonprofit behavior without clear, articulated rationales. Accordingly, we should be skeptical of further Congressional regulation of nonprofit activity, such as regulation of endowment practices at colleges and universities.

C. Unrelated Business Income Tax (UBIT)

1. In General

While generally exempt from the federal income tax, § 501(c)(3) organizations, such as private colleges and universities and fundraising organizations that support public colleges and universities, pay the federal corporate tax on net income from certain business activities.[57] This tax, known as the unrelated business income tax (UBIT), also applies to public colleges and universities, even though such institutions are not generally governed by § 501(c)(3).[58]

UBIT applies to income a nonprofit earns from a trade or business that is regularly carried on and which is unrelated to the nonprofit's tax-exempt mission.[59] There must be a causal relationship between the trade or business and the organization's nonprofit mission in order for the trade or business to be "related" and thus exempt from UBIT.[60] Mere provision of funds for use in the

---

of a church's tax exemption for publishing an anti-Clinton advertisement in national newspapers on the eve of the 1992 election); FISHMAN & SCHWARZ, *supra* note 35, at 306–08 (recounting other examples of church involvement in political campaigns). In general, however, political campaign intervention has not been a major issue for colleges and universities.

54. FISHMAN & SCHWARZ, *supra* note 35, at 261.

55. *Id.*

56. In addition to Congressional restrictions on nonprofit behavior, there is also a loose "public policy" requirement that is imposed by the courts. The primary authority in this area is *Bob Jones University v. United States*, 461 U.S. 574 (1983). Even though I.R.C. § 501(c)(3) has no explicit public policy requirement, the Supreme Court upheld the revocation of Bob Jones University's tax exemption because the school discriminated on the basis of race. *Id.* at 605. Such discrimination violated a clear public policy and therefore violated common law notions of "charity." *Id.* at 586. The Court noted that tax exemption can be revoked on public policy grounds "only where there can be no doubt that the activity involved is contrary to a fundamental public policy." *Id.* at 592. It is unclear how far the public policy restriction extends beyond racial discrimination in education. It is fairly safe to say, however, that typical endowment practices at colleges and universities (assuming no racial discrimination is involved) should not invoke the public policy doctrine.

57. I.R.C. § 511 (2000) (imposing the tax); I.R.C. § 512 (2000) (defining the income that will be taxed); I.R.C. § 513 (2000) (defining an "unrelated trade or business").

58. I.R.C. § 511(a)(2)(B).

59. Treas. Reg. § 1.513-1(a) (as amended in 1983).

60. Treas. Reg. § 1.513-1(d)(2) (as amended in 1983).

nonprofit's charitable work is not sufficient to avoid the tax.[61] That is, the UBIT rules look to the *source* of the funds (and whether they were generated in an activity related to the organization's exempt mission) and not to the destination of the funds (that is, whether the funds were used in furthering the entity's exempt mission).

In the college and university setting, the biggest issue is normally whether the income was generated by an activity that is related to the institution's educational mission. Colleges and universities have been particularly lucky in this area, because they often generate substantial income from athletics through tickets sales and broadcast revenues. Such activities have historically been considered educational in nature, and thus exempt from UBIT.[62]

There are numerous exclusions or exemptions from UBIT.[63] The most relevant here is the exemption for passive income such as interest, dividends, capital gains, real property rents, and royalties.[64] Most of the income generated by college and university endowments falls into these categories and, therefore, is exempt from UBIT. The exception for this type of income was made because it was generally considered appropriate for tax-exempt entities to generate such income and passive investments did not raise unfair competition issues.[65]

---

61. *Id.*; I.R.C. § 513(a).

62. *See, e.g.*, Rev. Rul. 80-296, 1980-2 C.B. 195 (holding that the sale of broadcasting rights to an annual intercollegiate athletic event was exempt from UBIT because it furthered the organization's educational mission). *But see supra* note 10 (noting that the traditional view of athletic programs as primarily serving educational purposes has recently come under scrutiny).

63. Two exclusions are worthy of note. First, there is a "convenience" exception whereby a trade or business carried on by a college or university "primarily for the convenience of" its students or employees will not be considered an unrelated trade or business. I.R.C. § 513(a)(2). Accordingly, income from campus cafeterias and other food outlets will be exempt from UBIT. Second, "qualified sponsorship payments" (QSPs) are exempt from UBIT. I.R.C. § 513(i). A QSP is a payment a sponsor makes to a college or university (or another tax-exempt organization) for "which there is no arrangement or expectation that [the sponsor] will receive any substantial return benefit other than the use or acknowledgement of the name or logo (or product lines)" of the sponsor. *Id.* Colleges and universities can thus generate substantial tax-free income from lucrative sponsorship agreements with respect to their athletic programs.

64. I.R.C. § 512(b) (2000). The royalty exception to UBIT is particularly broad. A nonprofit can realize substantial tax-free income from royalties provided that the nonprofit does not provide services in exchange for the royalty payment. *See* Sierra Club, Inc. v. Comm'r, 86 F.3d 1526 (9th Cir. 1996). The UBIT exclusion for royalties is particularly lucrative for colleges and universities, which can license their name and logos for use on merchandise, such as clothing. If the income becomes significant enough, the Senate Committee on Finance may turn its attention to this issue next. See *supra* note 10 for prior, similar concerns congressional committees have raised with the higher education community.

65. FISHMAN & SCHWARZ, *supra* note 35, at 427. See *infra* Part V. for a more detailed discussion of the rationales underlying UBIT.

2. Income from Debt-Financed Property

One major exception to the passive income exclusion from UBIT relates to income from "debt-financed" property.[66] The debt-financed property rules are worthy of note because they are an expansion of UBIT similar to the development under consideration currently: the expansion of UBIT to tax income earned by endowments. In addition, attempts by colleges and universities to avoid these rules in their endowment investments have played a role in the broader debate regarding the potential regulation and taxation of endowment income.[67]

Stripped of detail, "debt-financed property" is property acquired to produce income which has "acquisition indebtedness" outstanding at any time during the year.[68] Acquisition indebtedness generally refers to the unpaid amount of debt used to acquire or improve the debt-financed property.[69] A portion of the income earned on such property will be deemed income from an unrelated trade or business, and, therefore, will be subject to UBIT.[70] The portion of income that will be taxed is equal to the gross income from the property times a fraction equal to the debt divided by the basis in the property.[71]

The debt-financed property rules were put in place to prevent charities from exploiting their tax-exempt status by entering into tax-motivated sale-leaseback transactions with for-profit enterprises.[72] While targeted at real estate, the debt-financed property rules are much broader. For example, the debt-financed property rules result in the taxation of income earned from investments bought on margin.[73]

If debt-financed property is held by a partnership in which the tax-exempt organization is a partner, then the organization's share of income from the partnership will be subject to UBIT.[74] Therefore, if a college or university invests their endowment in a leveraged hedge fund, some of the income from the fund will be subject to UBIT under the debt-financed property rules. To avoid this result, colleges and universities will often use "blocker" entities.[75] A blocker entity is a

66. I.R.C. § 512(b)(4) (indicating that passive income otherwise exempt from UBIT will nonetheless be considered income from an unrelated trade or business if the income was generated from debt-financed property); I.R.C. § 514 (2000) (defining debt-financed property).

67. *See infra* notes 74–87 and accompanying text.

68. I.R.C. § 514(b)(1).

69. I.R.C. § 514(c).

70. I.R.C. § 512(b)(4).

71. I.R.C. § 514(a). The amount subject to tax is reduced by deductions allocable to the debt financed property times the same fraction applied to gross income (debt divided by the basis in the property). *Id.* Several exceptions and special rules exist, which are not relevant here. *See generally* I.R.C. § 514.

72. FISHMAN & SCHWARZ, *supra* note 35, at 454.

73. *See, e.g.*, Bartels Trust v. United States, 209 F.3d 147 (2d Cir. 2000) (indicating that the income earned by a university's supporting organization on margin-financed securities was subject to UBIT).

74. *See* I.R.C. § 512(c)(1) (2000).

75. *McDowell Testimony*, *supra* note 10.

corporation, formed under the laws of a foreign country which imposes a low rate of tax.[76] The school invests in the stock of the blocker, which in turn invests in the leveraged hedge fund.[77] The hedge fund passes the debt-financed income to the blocker.[78] Such income is not taxed to the blocker, since the blocker is incorporated in a foreign jurisdiction and is not engaged in a U.S. trade or business.[79] The blocker then passes the income to the school in the form of dividends.[80] Because the dividends came from the blocker, which is not debt-financed, the income escapes UBIT.[81]

Members of Congress have responded to blocker use in two ways. Some consider blockers to be an abusive, offshore circumvention of the debt-financed property rules.[82] In line with this view, proposals were advanced to tax the income from blockers.[83] Others believe that blockers are simply used to avoid the debt-financed property rules in situations that the rules were never intended to cover.[84] The debt-financed property rules were put in place to attack tax-motivated sale-leaseback transactions, not mere investments in hedge funds.[85] In line with this view, proposals were introduced to exclude income from leveraged hedge funds from UBIT.[86] These proposals would allow endowments to invest in hedge funds directly (without blockers) without being subject to tax.[87]

D. Summary

The basic rules reviewed in this Part show that private colleges and universities and the fundraising organizations supporting public colleges and universities are exempt from tax because they provide education, not because they provide immediate help for the needy. Further, these entities are subject to intermediate sanctions and the specter of losing tax-exempt status if any of their earnings inure to the benefit of entity managers or other insiders. These entities are also subject to lobbying and political campaign restrictions of questionable origin and

---

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.*; *see also* I.R.C. § 882(a) (2000).

80. *McDowell Testimony*, *supra* note 10.

81. *Id.*; I.R.S. Priv. Ltr. Rul. 199952086 (Sept. 3, 1999). The income is not considered debt-financed provided that the college or university did not purchase stock in the blocker using debt.

82. *See* Ryan J. Donmoyer, *Hedge-Fund Strategy by Harvard, Stanford Gets Senate Scrutiny* (May 8, 2007), http://www.livemint.com/2007/05/08112011/Hedgefund-technique-by-Harvar.html.

83. *Id.*

84. *E.g.*, *McDowell Testimony*, *supra* note 10, at 6 (asserting that blockers are used simply to avoid the debt-financed property rules in situations "that were never intended to be within the scope of the rules").

85. *Id.*

86. Press Release, Senator Levin, Democrats Introduce Bill to Bring About Tax-Exempt Investments Onshore, Not Offshore (Sept. 7, 2007), *available at* http://www.house.gov/apps/list/press/mi12_levin/levin.pdf.

87. *Id.*

rationales. Finally, these entities may be subject to UBIT on some of their income. With the exception of situations where the debt-financed property rules are triggered, however, most of the investment income earned by endowments will be tax-exempt. With this basic tax scheme established, we now take a closer look at the operational aspects of endowments.

II. ENDOWMENTS IN HIGHER EDUCATION

A. What is an "Endowment"?

When colleges, universities, the press, Congress, and commentators refer to an "endowment," they are normally speaking about an institution's total reserve funds which may or may not have restrictions as to their use.[88] Note, however, that the legal term "endowment" has a much narrower meaning, referring only to funds that are legally restricted in their use by the donor.[89] College and university reserve funds include amounts restricted as to use by donors, amounts that are not legally restricted but which the institution has self-restricted by earmarking them for specific purposes, and pure unrestricted funds.[90] Since the debate over these funds uses the term "endowment" in its broader colloquial sense rather than in the narrow legal sense, this Article does likewise.

Critics tend to think about an endowment as one large "bank account."[91] Colleges and universities, in contrast, claim an endowment represents thousands of separate accounts with specific, designated purposes, such as a named or endowed professorship, a scholarship, a center, etc.[92] There is some truth to both claims. An endowment is normally managed as one large investment pool,[93] but internal records maintain separate accounts for each designated use. The overall investment pool earns income which is allocated to the individual accounts (perhaps net of a fee to support investment or fundraising staff). Annually, a fixed dollar amount or a designated portion of the earnings of each account is disbursed for the purpose of the account, such as in the form of a scholarship check for a deserving student. The payout rate and policy is established, in most cases, by the

88. *See* Hansmann, *supra* note 14, at 8; J. PETER WILLIAMSON, FUNDS FOR THE FUTURE: COLLEGE ENDOWMENT MANAGEMENT FOR THE 1990S, at I-5 (1993).

89. WILLIAMSON, *supra* note 88, at 1-13. Donors may restrict the use of their gift, for example, for a scholarship, endowed faculty chair, funding for a research center, or to purchase specialty items, like rare books.

90. Hansmann, *supra* note 14, at 8. These self-restricted funds are generally referred to as a "quasi-endowment." WILLIAMSON, *supra* note 88, at I-5. Any self-restrictions may generally be removed at any time by the institution.

91. *See, e.g.*, *Munson Testimony*, *supra* note 9 (focusing on the large total dollars in college and university endowments).

92. *Higher Education Associations Testimony*, *supra* note 10, at 2 (noting that "an endowment typically consists of hundreds—and in many cases, thousands—of individual funds provided by charitable gifts, as well as some institutional funds that are invested to support the institution's mission in perpetuity").

93. WILLIAMSON, *supra* note 88, at 1-14 (noting that the trend is moving towards merging as many contributed funds as possible into common investment pools).

institution's (or, in the case of a public institution, the supporting organization's) governing body. Any income allocated to the account, in excess of any fees, that is not currently paid accumulates in that account. This accumulation allows the account to maintain its value over time and provides a hedge against inflation.[94]

Colleges and universities often have broad discretion as to what portion of endowment earnings should be spent or reinvested.[95] Also, as noted earlier, endowments contain not only funds restricted for specific purposes but also self-restricted funds and unrestricted funds which could be spent at the discretion of the institution.[96] As a result, "a substantial portion of endowed funds have been accumulated by institutional discretion and not donor command."[97]

B. Endowment Investment Practices

The recent phenomenal returns of endowments reflect professional management and modern investment practices.[98] Historically, endowments were invested in conservative, fixed-income investments, rather than equities.[99] Much of the reticence to expand into equities was based on traditional views regarding what

---

94. Interview with William Ilett, Chair of the Bd. of Dirs., Boise State Univ. Found. (the supporting § 501(c)(3) organization for Boise State University) (notes on file with author) (providing the general overview included herein).

95. Hansmann, *supra* note 14, at 8. There is normally an issue over whether certain types of income generated on restricted endowment funds (for example, capital gains) can be spent currently or must be reinvested. *See infra* Part II.B.

96. *See supra* note 90.

97. Hansmann, *supra* note 14, at 8–9.

98. In many ways, the recent success enjoyed by endowments reflects a broader trend of professionalism and business practices in higher education. In recent years, colleges and universities have become particularly adept at identifying hidden value in their institutions and leveraging such value to generate new and unique streams of income. For example, many colleges and universities have received millions of dollars of additional revenue by entering into "exclusive provider agreements" with beverage companies. Under such arrangements, the institution guarantees that a beverage company (like Coca-Cola or PepsiCo) will have the right to be the only brand served at campus points of sale in exchange for donations, a variety of sponsorship payments, or a share of sales. *See generally* Mark J. Cowan, *A Coke, A Smile… And a Tax Bill? A Look at the Tax Treatment of Exclusive Provider Agreements in Higher Education*, 3 ATA J. LEGAL TAX RES. 49 (2005) (exploring the tax treatment of such contracts). In addition, many colleges and universities are now entering into lucrative arrangements with banks whereby the banks finance the cost of college and university identification cards, which also double as ATM cards. Dean Foust, *Even Cozier Deals on Campus; Joining Forces with Banks, Colleges are Now Cashing in on Student Debit Cards*, BUS. WK., Oct. 1, 2007, at 62. Colleges and universities are also adopting private-sector practices, such as outsourcing non-core functions like bookstores and food service. Ben Gose, *The Companies that Colleges Keep*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 28, 2005, at B1. College and university athletics, of course, continue to generate lucrative television and sponsorship revenue. *See, e.g.*, Stefan Fatsis, *It's Time for Money, uh, March Madness*, WALL ST. J., Mar. 15, 2004, at R1. In light of this success, some have become concerned that colleges and universities are becoming too commercial in their activities. *See generally* DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION (2003) (reviewing the commercialization trend in higher education and cautioning that institutions should not compromise their values when seeking additional funds).

99. WILLIAMSON, *supra* note 88, at 5-103.

portion of endowment income could be spent.[100] Traditionally, dividends received from stock investments were considered income that could be spent, while capital gains/appreciation of the stock were not.[101] Most of the returns generated by stocks came from capital appreciation rather than dividends.[102] In contrast, most of the income from bonds came from interest, which was clearly income that could be spent under traditional endowment spending practices.[103] Thus, endowment managers avoided the use of equity investments to ensure that the return from their investments could be currently spent, rather than added to the endowment's principal.

Beginning in the 1960s, the booming stock market and rising inflation rates made endowments rethink their reluctance to invest in equities.[104] In 1969, the Ford Foundation released a report that was critical of the conservative endowment practices of colleges and universities.[105] The report noted that the conservative investment approach taken by many endowment managers was not mandated by law.[106] Rather, the perceived legal restrictions on endowment investment activity were, in fact, "more legendary than real."[107] The report thus advised endowment managers that they had "wide latitude in their choice of investments" and urged them to keep pace with inflation by using this latitude to be more aggressive in their investments.[108]

Following on the heels of the Ford Foundation's report, many states enacted the Uniform Management of Institutional Funds Act.[109] The Act clarifies the duties of endowment managers and authorizes endowments to spend a prudent portion of

---

100. *Id.* at 5-104.

101. *Id.* This view that appreciation could not be spent was based more on tradition than on legal mandates. *See infra* notes 105–08 and accompanying text.

102. WILLIAMSON, *supra* note 88, at 5-104.

103. *Id.*

104. *Id.* at 5-103.

105. WILLIAM L. CARY & CRAIG B. BRIGHT, THE LAW AND THE LORE OF ENDOWMENT FUNDS: REPORT TO THE FORD FOUNDATION (1969).

106. *Id.* at 66.

107. *Id.*

108. *See id.* at 66.

109. WILLIAMSON, *supra* note 88, at 5-106. See Uniform Law Commission: Search Acts, http://nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60 (last visited Apr. 8, 2008), for this model law, as it applies to specific states. The model law applies to funds held by private charitable corporations, such as private colleges and universities and supporting organizations of public colleges and universities. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT § 1(1) (1972). The model law also applies to charitable or educational funds held by a governmental organization. *Id.* Accordingly, the model law applies to the endowments of both public and private institutions. In 2006, the National Conference of Commissioners on Uniform State Laws approved a revised, modernized model law, the Uniform Prudent Management of Institutional Funds Act, which is currently being considered by the states. See Uniform Law Commission: Search Acts, http://nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60 (last visited Apr. 8, 2008), for the text of the new model law and the status of state action on the model law. See also UPMIFA: Quick Comparison, http://www.nccusl.org/Update/Docs/UPMIFA_QuickCompare.pdf (last visited Apr. 8, 2008) for a comparison of the old and new model laws. Interestingly, the new model law allows states the option of presuming that a payout percentage of 7% is imprudent. *See id.*

the total return of the endowment investments, including not just interest and dividends, but capital gains as well.[110] Free to spend additional types of income, endowments began to invest in more lucrative investments, such as stocks, that generated returns in the form of capital gains.[111]

Today, endowments are managed much like other large investment pools.[112] Endowments now invest in higher risk, higher yield investments such as emerging market equities, hedge funds, and venture capital firms.[113] These investments, while lucrative, can be volatile, delivering substantial returns in some years and substantial losses in others. For example, endowments overall experienced an average return of negative six percent in 2001–2002.[114] If an institution desires to smooth out the spending of endowment income (for example, it wants to give out the same amount in scholarships each year), it must spend less than the actual return in the profitable years and more that the actual return in the loss years. Although recent returns have been impressive, there is obviously no guarantee such performance will continue.[115]

In summary, colleges and universities have been getting more creative and aggressive in managing their endowment investments. They have done so at the behest of experts who urged them to expand beyond conservative investments in order to maintain the real value of their endowment assets. The substantial returns currently being reported at some of the larger endowments are the result of this aggressive approach, and such returns cannot be relied upon to continue in perpetuity.

C. Analyzing Endowments: Henry Hansmann's Study

In 1990, Henry Hansmann explored the issue of why endowments exist and how they are managed.[116] In reviewing the arguments traditionally advanced in support of endowment accumulation, Hansmann criticized the endowment practices at many colleges and universities, including at his own institution, Yale. Hansmann's analysis, the most relevant parts of which are summarized here,

110. WILLIAMSON, *supra* note 88, at 5-106.

111. *Id.* at 5-108.

112. Harvard University's endowment, for example, is professionally managed by investment experts at the Harvard Management Company, Inc., a wholly-owned subsidiary of the university. *See* Harvard University Management Company, Inc., http://www.hmc.harvard.edu/ (last visited Apr. 8, 2008).

113. *See, e.g.*, *Higher Education Associations Testimony*, *supra* note 10; Harvard Management Company, Inc. Policy Portfolio Evaluation, http://www.hmc.harvard.edu/investment_philosophy/ (last visited Apr. 11, 2008) (showing the various categories of investments of the endowment at Harvard); *see also* John Hechinger, *Venture-Capital Bets Swell Stanford's Endowment*, WALL ST. J., Jan. 23, 2006, at A1 (detailing Stanford University's lucrative investments in venture capital funds). Some of the most lucrative investments, such as those in venture capital firms, are generally only available to larger endowments, which can meet the minimum investment requirements and shoulder the risk such investments entail. *See id.*

114. *Higher Education Associations Testimony*, *supra* note 10.

115. *See supra* note 7 (indicating that endowment officials are predicting a decline in returns for fiscal 2008).

116. Hansmann, *supra* note 14, at 3.

provides an excellent road map to the major practical and policy issues surrounding college and university endowments.

1. Intergenerational Equity

One of the principal arguments in favor of retaining and increasing endowment assets is that such action is necessary to foster intergenerational equity.[117] To maintain intergenerational equity, the institution must manage the endowment so as to provide the same services to future generations of students as is provided to the current generation of students.[118] In doing so, the current managers assume the institution will exist forever and will not receive future donations to augment the endowment.[119] The current managers manage the endowment such that the current generation of students is not favored over future generations (and vice versa).[120] Accordingly, spending more of an endowment's current income to reduce tuition or increase student services should not be done if it is expected to come at the expense of future generations of students.

Hansmann challenges this notion that retaining and expanding endowments is necessary to maintain intergenerational equity.[121] First, Hansmann notes it is likely that the economy, over the long run, will continue to expand.[122] Therefore, future generations of students will likely be more prosperous than the current generation of students.[123] Under this view, it may be fair to use endowment funds to help the current, less well-off generation of students at the expense of future generations of more well-off students.[124]

Second, Hansmann takes issue with the assumption, made by advocates of intergenerational equity, that current endowment managers should not consider future donations.[125] There is no reason to believe that future gifts will not be forthcoming.[126] If gifts can be anticipated, they should be considered in the analysis over whether to spend endowment earnings.[127] The more financial gifts that can be anticipated, "the more reason to spend, not save, current gift income."[128]

Third, Hansmann takes issue with the argument, advanced by intergenerational

117. *Id.* at 14.
118. *Id.*
119. *Id.*
120. *Id.*
121. *See id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 16.
126. *Id.* In fact, if no future gifts are expected, this would indicate there exists little ongoing public support, which might call into question the very need for the continued existence of the institution. A lack of donations would also call into question the rationale for granting the institution tax-exempt status, at least under the "donative" theory of tax exemption. See *infra* Part III.A.3. for a discussion of the donative theory of tax exemption.
127. Hansmann, *supra* note 14, at 16.
128. *Id.*

equity devotees, that endowment accumulation is necessary to provide the same level of education to future generations, since the cost of providing that education is likely to be much higher in the future than it is today.[129] Hansmann notes that demand for education is not completely inelastic, and therefore cost becomes a factor as to how much education students will consume at a college or university.[130] If the cost is kept high, less will be consumed. If the cost is kept low, more will be consumed. If today's education costs are kept artificially high (by accumulating endowment income) and tomorrow's education costs are kept artificially low (by spending endowment income that was accumulated), then there will be less consumption of education today and more consumption of education tomorrow.[131] "This would simply be substituting a more expensive good for a cheaper one."[132] Hansmann concludes that "[t]axing education through endowment accumulation in the present in order to subsidize it in the future only distorts consumption of education both within and across generations, leading us to consume too little of it today and too much tomorrow."[133]

Fourth, Hansmann claims that colleges and universities are poorly positioned to preserve and transfer wealth to the next generation.[134] Colleges and universities exist primarily to create and pass on knowledge, not to create and pass on wealth.[135] The task of passing on wealth to the next generation is best left to the federal government, through fiscal and monetary policy.[136] Colleges and universities are in a far better position to promote *intragenerational* equity by using more of their endowment earnings to help indigent individuals get an education, than to promote intergenerational equity.[137] Any attempt by colleges and universities to promote intergenerational equity by retaining endowment income comes at the expense of intragenerational equity.[138]

Fifth and finally, Hansmann raises the issue of whether *financial* accumulation is the only way to foster intergenerational equity.[139] Colleges and universities should weigh the benefits of building endowments to help future students against the benefits of spending some of the endowment income currently on research, teaching, cultivation and development of faculty, construction of facilities, and other educational activities. Such activities are likely to have a profound impact on future generations.[140] If a college or university decides to add to its endowment

129. *Id.* at 17.
130. *Id.*
131. *See id.*
132. *Id.*
133. *Id.* at 17–18.
134. *Id.* at 18.
135. *Id.*
136. *Id.* Hansmann notes that while the government can strive to promote intergenerational equity in general, the most a private institution, such as a college or university, can do is strive to promote intergenerational equity with respect to only a subset of society, i.e., the institution's current and future students. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

rather than spend gifts or income currently on teaching, research, facilities, etc. then "it is implicitly making the judgment that the [amount not spent] will have a higher rate of return if invested in stocks and bonds than in educating an undergraduate, or doing research in biophysics, or adding books to the library."[141]

2. "Lumpy" Funding

Another argument in favor of endowment accumulation is that it is particularly necessary when an institution's donations are "lumpy," with large gifts in some years and few or small gifts in other years.[142] This can be the case, for example, where a major donor makes a significant contribution that is not expected to be recurring or where an institution raises most of its funds during intensive capital campaigns.[143] Hansmann argues however, that donations are less lumpy than they used to be, given the continuous fundraising that goes on in today's colleges and universities.[144] Further, even where donations are lumpy, this does not justify accumulating *permanent* endowment funds.[145]

3. Tax Incentives for Current Giving

It is also argued that endowment accumulation allows the institution to encourage donors to give currently, rather than in the future.[146] This is because of the tax incentive to do so. For example, say that a potential donor plans to make a major contribution to a college or university at her death.[147] Instead, she can give a lesser gift now equal to the present value of the planned gift, and can prohibit the college or university from spending the gift until her death. The college or university can then invest the gift and earn income tax-free. Had the donor invested the funds personally, she would have paid tax on the income from the investments, thus lowering the return. By transferring a discounted gift today, the gift is ultimately of a greater benefit to the college or university. These "early" restricted gifts may explain some part of endowment accumulation.[148]

Hansmann believes the tax incentive to give early is not the primary impetus of endowment accumulation, however, given that there is evidence of accumulation

141. *Id.* The for-profit analog of this issue occurs when a corporation hoards cash to reduce risk rather than investing in potentially more profitable business operations. Corporations that engage in such behavior are normally not maximizing shareholder value (shareholders, after all, can invest cash on their own) and are ripe for takeover. *See generally* Michael C. Jensen, *Takeovers: Their Causes and Consequences*, 2 J. ECON. PERSP. 21 (1988) (discussing the "free cash flow theory" which holds that managers who hoard excess cash rather than investing it or distributing it to shareholders create inefficiencies that may be corrected by the market for corporate control).

142. Hansmann, *supra* note 14, at 19.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 20.

147. *Id.* (adopting the example).

148. *Id.*

even prior to the enactment of the income tax.[149] In addition, just because there is a tax incentive to accumulate does not necessarily mean it is good policy for the institution to continue to accumulate their endowment earnings in such a fashion.[150]

4. Maintaining Liquidity

Another argument advanced in favor of endowment accumulation is that the funds can help the institution survive financial shocks.[151] For example, a recession or shift in demographics may reduce enrollment (and associated tuition income) or an energy crisis may trigger higher costs.[152] Hansmann notes that businesses are also are subject to unexpected financial shocks but few businesses maintain large financial reserves.[153] A business, however, can borrow additional funds, shutter plants, layoff employees, and take other measures to ride out the financial crisis.[154] A college or university is less likely to be able to borrow additional funds in the event of a crisis.[155] Further, tenure prevents layoffs from providing significant short-term cost savings.[156]

Hansmann notes, however, that some colleges and universities accumulate far more endowment assets than necessary to survive short-term financial setbacks,[157] and there is little evidence that institutions like Yale have relied on spending down their endowments during financial setbacks.[158]

In addition, as noted earlier, many colleges and universities began to invest in stocks starting in the 1960s.[159] Institutions began to spend more of their increased endowment income (including capital gains) on increased operating budgets.[160] When the stock market declined, however, endowment values began to decrease, and endowment income was not able to keep up with the higher operating budgets.[161] Many colleges and universities blamed their aggressive spending from

---

149. *Id.* at 21.

150. *Id.*

151. *Id.*

152. *Id.* Note that Hansmann is using these as examples of *possible* financial shocks. Not all of these possible events would necessarily have a negative effect on the institution. A recession, for example, could either reduce enrollment (since fewer students could afford to pay tuition) or increase enrollment (because students choose to further their education rather than enter a lackluster job market). A recession could also lead to decreased state funding of public institutions and tighter budgets. *See, e.g.*, David L. Wheeler, *Colleges Prepare for Fiscal Downturn*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 8, 2008, at A1.

153. Hansmann, *supra* note 14, at 21.

154. *See id.*

155. *Id.* at 22.

156. *Id.* Financial exigency, however, is often grounds for revoking tenure. *Id.* at 23.

157. *Id.* at 22. Hansmann notes (at the time he was writing) that Yale could use the unrestricted portion of its endowment to survive eight years at its current budget if all of its other sources of support evaporated. *Id.*

158. *Id.* at 24.

159. *See supra* Part II.B.

160. Hansmann, *supra* note 14, at 26.

161. *Id.*

endowments to contributing to their budgetary problems.[162] Accordingly, colleges and universities, while continuing to aggressively invest their endowments, tended to become more conservative in spending their endowment income.[163] From this, Hansmann concludes that endowments are accumulating, not as a buffer against financial difficulties, but rather to keep operating budgets from rising as quickly as they did in the 1970s.[164]

5. Long-Term Security

The ability to help an institution through longer-term adverse circumstances is another justification for the use of endowment accumulation.[165] The theory behind this concept is that the endowment exists to keep the institution from liquidating in the face of sustained operating losses.[166] In the for-profit world, it is normally more efficient to liquidate in the face of a long period of losses rather than to continue using retained earnings to stay in business.[167] Colleges and universities, however, may wish to use their endowments to remain in existence, despite continued losses, to preserve their tradition and reputational capital.[168]

Colleges and universities may feel the need to stay in existence for the sake of their alumni, the theory being if the institution were to liquidate, its degrees and reputation would be damaged.[169] Further, prospective students likely would be drawn to institutions with larger endowments, as well-endowed institutions would be less likely to liquidate and damage the value of their degrees.[170] Hansmann questions, however, the importance of this rationale for endowment accumulation.[171] It is likely, in Hansmann's view, that students often receive the greatest value from the institution while they are studying there, not years later from the continued glow of the institution's reputation.[172]

A college or university may also view its endowment as necessary to ensure its continued existence and to keep its tradition alive.[173] "Tradition" is the analog of goodwill in the for-profit world.[174] Long-lived institutions often accumulate a valuable reputation and well-known traditions, which in turn help to attract students, faculty, and additional donations.[175] Hansmann notes, however, that tradition may be best maintained and fostered by spending more endowment

162. *Id.* at 25.
163. *Id.* at 26.
164. *Id.*
165. *Id.*
166. *Id.* at 27.
167. *Id.*
168. *Id.* at 27–28.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 28.
174. *Id.*
175. *Id.*

income to preserve the quality of education currently being offered.[176] Further, there are few examples of long-lived institutions liquidating because of financial problems.[177] Accordingly, endowment accumulation may not be justified as a way to maintain the institution's tradition.

6. Insulation from Outside Demands

Another reason for endowment accumulation is that it helps to insulate the college or university from the demands of donors, students, the government, or other sources of ongoing support.[178] This insulation can allow the institution's administration to express unpopular ideas without fear of the short-term financial consequences, in reduced donations or government support, that might ensue.[179] Hansmann found little evidence that this insulation was actually the reason for endowment accumulation.[180]

Further, Hansmann notes that insulation cannot entirely justify endowment accumulation.[181] On the one hand, an endowment can "help keep the maintenance of culture and the pursuit of knowledge from being blown about unduly by the shifting winds of ideology and interest."[182] On the other hand, endowments "may provide an unfortunate opportunity for irrelevance and sloth."[183] Ironically, while the goal of insulation may somewhat justify endowment accumulation, colleges and universities may have the best argument against minimum distribution requirements if they can show they are *not insulated* from constituents.[184]

---

176. *Id.*

177. *Id.*

178. *Id.* at 29.

179. *Id.* With regard to public institutions, one government-relations officer has noted that politicians should welcome outside sources of income, such as from an endowment, since they reduce reliance on state funds. Peter Onear, *Five Reasons Politicians Hate Us*, CHRON. HIGHER EDUC. (Wash., D.C.) Oct. 2, 2007, at C3. In reality, however, many politicians don't like endowments because they make state colleges and universities "free from being a slave to political largesse." *Id.*

180. Hansmann, *supra* note 14, at 29–32; *see also infra* note 321 (indicating that colleges and universities with large endowments continue to seek outside funds).

181. Hansmann, *supra* note 14, at 32.

182. *Id.* Some have questioned, however, whether Yale, with its substantial endowment, has appropriately maintained its tradition and historic mission. *See generally* WILLIAM F. BUCKLEY, JR., GOD AND MAN AT YALE (50th anniv. ed. 2002) (documenting Yale's deviation from its historic religious and economic teachings).

183. Hansmann, *supra* note 14, at 32.

184. *See infra* Part V.C. (arguing that college and university endowments should not be subject to a minimum payout requirement because, unlike private foundations, they are accountable to a variety of constituents).

7. Other Explanations for Endowment Accumulation

Hansmann notes a few other possible reasons for endowment accumulation that perhaps are less justified, from a societal standpoint, than those listed thus far. Donors, for example, may be more motivated to give endowed gifts rather than unrestricted gifts in order to "purchase a bit of personal immortality."[185] Perpetual restrictions on the use of property are generally forbidden in the law, except when it comes to charitable gifts.[186] Accordingly, restricted gifts to charity (including gifts to college and university endowments) are one of the few ways that an individual can permanently perpetuate his desires. Such desires and restrictions are usually strictly enforced.[187] Unless and until the liberal allowance of perpetual restrictions on charitable gifts is reformed, however, it remains an explanation for endowment accumulation.[188]

The risk reduction behavior of college and university administrators and faculty is another explanation for endowment accumulation.[189] Faculty and administrators, the theory goes, would rather accumulate surplus funds to enhance their job security than expand programs, as expanding instead of saving could put faculty and administrator jobs at risk in future economic downturns.[190] Accordingly, the incentive is to be conservative and save. Similar behavior occurs in the for-profit sector, where managers would rather accumulate funds to ensure liquidity and job security, than invest in value-maximizing ventures that carry significantly more risk.[191]

---

185. Hansmann, *supra* note 14, at 33.

186. *Id.* at 34.

187. *Id.* Modifications to restricted gifts are generally only possible under the very limited cy pres doctrine. *Id.* In general, to use cy pres, it must be nearly impossible to carry out the donor's original intent. *See* Ilana H. Eisenstein, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1768 (2003). While the allowance of perpetual restrictions on charitable gifts helps to encourage giving, it can also lead to odd results of questionable societal benefit.

For example, a wealthy donor, Beryl H. Buck, left an endowment restricted to benefit the needy of Marin County, California. *Id.* at 1770. After Buck's death in 1975, Marin County became one of the wealthiest areas of the country, with few needy individuals. *Id.* At the same time, the value of the endowment grew dramatically, through lucrative investments, from $9.1 million at Buck's death to nearly $400 million by the mid-1980s. *Id.* Nonetheless, courts refused to apply cy pres to allow the endowment to be used for needy individuals outside of Marin County. *Id.* at 1771. As a result "hundreds of millions of dollars remain dedicated to helping the practically nonexistent needy in one of America's wealthiest suburbs." *Id.* Such is the price we pay for allowing charitable gifts to be restricted in perpetuity. The issue of perpetual restrictions on gifts is, however, a long-standing controversial issue that is much broader than the present issue over whether and how college and university endowments should be regulated. *See generally id.* (detailing the arguments for and against perpetual restrictions on charitable gifts).

188. But see *infra* Part V.C. for a discussion of modern philanthropists that would rather see their gifts spent currently than restricted in perpetuity.

189. Hansmann, *supra* note 14, at 35.

190. *See id.*

191. *Id.* at 36–37; *see also supra* note 141.

Endowments also may accumulate because of the preferences of trustees.[192] Hansmann notes that trustees may have little expertise when it comes to the actual operations of the college or university, but they often have a great deal of acumen when it comes to endowments.[193] Accordingly, trustees often see their job as effectively building and managing endowments.[194] They tend to judge their success by benchmarking their endowments against sister institutions.[195]

Finally, Hansmann notes that endowments may accumulate simply out of custom or habit.[196] Older schools have always accumulated endowments and the newer schools simply emulate them.[197]

8. Hansmann's Conclusions

Hansmann takes serious issue with endowment accumulation policies. He did, after all, sharply question each of the identified rationales for endowment accumulation. Nonetheless, he does not call on the federal government to regulate endowments. In fact, he does the opposite:

> Given the poor state of our understanding, it would be premature to propose changes in the law governing endowment accumulation and, in particular, to propose measures to limit the discretion of universities to accumulate large endowments. Moreover, the importance of adopting such restrictions is lessened by the fact that even substantially excessive endowment building may lead to only a limited amount of waste from a social welfare standpoint. Because funds that a university devotes to endowment are today typically invested in market securities, they are at least being used productively. Indeed, efforts to limit endowment accumulation might in part have the effect of diverting universities toward other, less efficient forms of accumulation (for example, useless facilities or excessive esoteric research by faculty) or toward unproductive current spending.[198]

Thus, even one of the most ardent critics of endowment policies is opposed to government control. Hansmann does, however, note the benefits of the *threat* of government control.[199] The specter of legislation can be "a useful stimulus to universities . . . to satisfy themselves and others that their policies towards endowment accumulation are reasonable in light of the ends to which their institutions are dedicated."[200] In this light, the September 2007 hearings in the Senate Committee on Finance should incite colleges and universities to rethink

192. Hansmann, *supra* note 14, at 37.
193. *Id.*
194. *Id.*
195. *Id.* at 37–38.
196. *Id.* at 39.
197. *Id.*
198. *Id.* at 40.
199. *Id.*
200. *Id.*

their endowment policies.[201] Such rethinking may, in and of itself, address the concerns of endowment critics more effectively than actual government regulation.

III. RATIONALES FOR TAX EXEMPTIONS

We now turn our attention to the rationales underlying the tax exemption for colleges and universities to see what light they shed on the issue of whether to tax endowment income. There is no generally accepted underlying theory of tax exemption. Commentators have disagreed over the rationales behind granting tax exemptions to nonprofit organizations such as colleges and universities. Note that the theories reviewed here primarily seek to explain the rationales for granting the nonprofit entity a tax exemption; they are not designed to explain the rationale for giving donors to nonprofits a tax deduction.

A. Subsidy Theories

Most of the theories supporting tax exemption view the exemption as a government subsidy. This section will focus on three subsidy theories: the traditional public benefit subsidy theory, the capital subsidy theory, and the donative theory.

1. Traditional Public Benefit Subsidy Theory

Perhaps the most widely held view of tax exemption is that it exists to provide a government subsidy to the nonprofit sector.[202] The subsidy is justified on the grounds that nonprofits are providing services that the government is not able or willing to provide.[203] The courts generally agree with this theory.[204]

Under the traditional public benefit subsidy theory's view, tax exemption is granted to worthy activities, such as education, to "aid and stimulate private charitable enterprise, *without subjecting it to control*."[205] The lack of government control is a key part of the tax exemption regime:

> The income of each individual organization is a product of donations it receives and the investment wisdom of its managers. Since all of these operations are out of the hands of government under the exemption and deduction statutes, the beneficiary organizations receive their government aid without having to petition for it. They are, therefore, in [Harvard] President Eliot's words ". . . untrammeled in their action, and

201. In fact, there appears to be some rethinking already taking place. See *infra* notes 327–28 for recent moves by Harvard, Yale, and other institutions to spend more of their endowment on financial aid, at least partially in response to the September 2007 hearings in the Senate Committee on Finance.

202. FISHMAN & SCHWARZ, *supra* note 35, at 77–80.

203. *Id.*

204. *E.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 589–92 (1983).

205. FISHMAN & SCHWARZ, *supra* note 35, at 77 (internal citations omitted) (emphasis added).

untempted to unworthy acts or mean compliances."[206]

Accordingly, the exemption is given without control, beyond those restrictions discussed above in Part I (regarding restrictions on inurement, lobbying, campaigning, etc.). In this way, the tax exemption system helps nonprofits contribute to "a robust and pluralistic American society" in their "role as innovators and efficient providers of public benefits."[207] Inherent in this "hands-off" subsidy approach is that "[e]ffort may be wasted, mistakes may be made, agencies may even work at cross-purposes; but in the long run the well-being of mankind is thus fostered. The basic premise of the system is that progress comes through freedom."[208]

The traditional "hands-off" view of the subsidy has been lost in the debate over endowment accumulation. One key staffer on the Senate Committee on Finance commented that the government was entitled to inquire and interfere in endowment decisionmaking because of the tax exemption granted to educational institutions.[209] He was quoted as saying "Give back the tax break, and we'll leave you alone."[210] Clearly, this attitude is inconsistent with the traditional public benefit subsidy theory.

2. Capital Subsidy Theory

Henry Hansmann, whose views on endowments were discussed above in Part II, has also articulated a "capital subsidy" justification for granting tax exemption to nonprofits.[211] Under this theory, tax exemption helps to remedy the difficulty nonprofits experience in raising capital.[212] Nonprofits cannot issue stock (because of the nondistributional constraint) and have limited access to debt financing.[213] Therefore, nonprofits must rely on their retained earnings, both as a source of financing and an income stream to support borrowings.[214] If nonprofits were taxed, then their retained earnings would be reduced by thirty-five percent (at current tax rates), limiting their access to capital.[215] Therefore, the tax exemption can be viewed as a subsidy for nonprofit capital.[216]

---

206. *Id.*

207. *Id.* at 76.

208. *Id.* at 77 (internal citations omitted).

209. Goldie Blumenstyk, *Colleges' Endowments-Spending Prerogatives Get Unexpected Defense*, CHRON. HIGHER EDUC., Feb. 4, 2008, http://chronicle.com/daily/2008/02/1491n.htm (quoting key Senate aide Dean A. Zerbe).

210. *Id.* (quoting key Senate aide Dean A. Zerbe).

211. Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981).

212. *Id.* at 72.

213. *Id.*

214. *Id.* at 73–74.

215. *See id.* at 74 (noting that the tax impact would have been to cut retained earnings in half at the corporate tax rates in place at the time of Hansmann's article).

216. *Id.*

3. Donative Theory

The donative theory of tax exemption was developed by Mark Hall and John Colombo.[217] Under this theory, tax exemption is considered a subsidy, which is justified where neither the government nor the private market effectively provide a service that is demanded by a significant number (but not a majority) of citizens.[218] In order for the government to assume a duty, there must generally be majority support.[219] In the absence of such support, needs of significant sectors of society may go unmet.[220] Tax exemption thus provides a way for the government to subsidize important services without the necessity of majority support or the ability to control the organizations providing the services.[221] Voters will support tax subsidies for services provided by minority-supported organizations in which they have no interest because they, in turn, receive tax subsidies for services provided by other minority-supported organizations in which they do have an interest.[222]

Hall and Colombo use donations as a proxy for public support.[223] If an organization receives enough public support (say, ten percent of its receipts are from donations), the organization can be said to be doing something that is important to a significant segment of society which is not being done by the government or the private sector.[224] As such, the organization is entitled to the tax exemption. The use of donations as a measure of exemption-worthiness separates traditional nonprofits from for-profit institutions, which may also benefit society but which do not receive donations.[225]

Higher education fits neatly into this theory. Most private colleges and universities would meet Hall and Colombo's donation test, which means that colleges and universities are supported by a sufficient portion of the public such that exemption is justified.[226]

---

217. The theory was originally explained in Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379 (1991). Most of the discussion here is drawn from Professor Colombo's application of the donative theory to educational institutions. John D. Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841 (1993).

218. Colombo, *supra* note 217, at 875.

219. *Id.* at 874.

220. *Id.*

221. *Id.* at 875.

222. *Id.* Colombo calls this the "'I'll scratch your back if you'll scratch mine' social compact among high-demanding groups with widely divergent preferences." *Id.* Someone interested in opera, for example, is willing to allow the government to subsidize a tax break for studies of ruffled grouse because studiers of ruffled grouse are willing to allow a government subsidy for opera. *Id.*

223. *See id.* at 876.

224. *Id.* at 876–79.

225. *Id.* at 879.

226. *Id.* at 882–85.

4. Application of the Subsidy Theories to Endowments

A tax on endowment income would be inconsistent with the subsidy theories. Presumably Congress would justify the tax based on the fact that invested income was not being used to help current students at colleges and universities. A key part of the traditional public benefit subsidy theory, however, is that tax exemption is granted without control. So long as the institution is "educational," it should be entitled to run its affairs (including its investments) as it deems appropriate in carrying out its mission.

Under the capital subsidy theory, the tax exemption exists to ensure that retained earnings can be used as a source of capital. Endowments represent a pool of capital that colleges and universities can use in carrying out their missions. Accordingly, if the exemption is a capital subsidy, there certainly should not be a tax on the income earned by endowments.

Finally, under the donative theory, so long as colleges and universities, despite their sizable endowments, continue to receive a significant amount of donations, their tax exemption would be justified. Thus, the donative theory would not support a tax on endowment income unless and until donations significantly decline.[227]

B. Income Measurement Theory

The one leading theory that does not view tax exemption as a subsidy is the "income measurement" theory set forth by Boris Bittker and George Rahdert.[228] Under this theory, "public service" nonprofit organizations, such as colleges and universities, are exempt from tax because there is no accurate way to truly calculate their "income."[229] Bittker and Rahdert provide an example of a healthcare provider that can easily be adapted to apply to a college or university:[230]

227. *See supra* Part II.C.6 (regarding the theoretical ability of colleges and universities to insulate themselves from the demands of constituents, including donors, by relying on their endowments). The donative theory provides an excellent check on such power. If donations are not forthcoming, then tax exemption should be denied, and all of the college or university's income (including the earnings on endowments) should be subject to tax. We have not reached this point yet, but may someday if enough donors decide to donate to "more needy" schools. *See infra* note 324 and accompanying text.

228. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976).

229. *Id.* at 305.

230. *Id.* at 308 (adopting this example with the only significant modification being the change in line 2 to "tuition" from "membership dues" in the original).

1. Interest from Endowment	$100
2. Tuition	25
3. Gifts and Bequests	75
4. Total Receipts	$200
5. Salaries of Staff	$25
6. Scholarships/Need-based aid	125
7. Total Disbursements	$150
8. Receipts Less Disbursements (line 4 less line 7)	$50

Bittker and Rahdert state that the interest from the endowment qualifies as income under general principles of tax law, but the rest of the receipts and disbursements do not fit neatly into existing concepts of income and deduction under the Internal Revenue Code.[231] For example, is tuition taxable income?[232] Are staff salaries deductible ordinary and necessary business expenses when they were not incurred with the motive of generating a profit?[233] Even where income is clear, as is the case with earnings on endowments, uncertainty with regard to the other items of receipts and disbursements destroys the ability to tax the endowment income. This inability to tax the endowment income is due to the fact that the federal income tax is a *net* income tax that considers all income less all allowable deductions and not merely identified items of income. Due to these difficulties, nonprofits were granted tax-exempt status, not as a subsidy, but rather to avoid the task of tweaking existing definitions of income to accommodate common nonprofit receipts and disbursements.[234]

Even if income could be calculated for nonprofits, there is no way to set the appropriate tax rate.[235] The idea is that if the nonprofit were taxed, the economic incidence of the tax would be passed on to the beneficiaries of the nonprofit's services.[236] Therefore, the tax rate should be set by reference to the ability of beneficiaries to pay.[237] Given the number and diversity of beneficiaries, this would be difficult to accomplish in practice.[238] Any rate chosen would, therefore likely be arbitrary and conceivably be too high with respect to most beneficiaries.[239]

In educational institutions, the beneficiaries are primarily students, who are

231. *Id.*

232. *Id.*

233. *Id.* at 309–10.

234. *See id.* at 305. *But see* Colombo, *supra* note 217, at 860 (arguing that it is possible to calculate the income of a college or university within existing notions of taxable income and speculating that institutions like Harvard "could come up with a taxable income number if pressed to do so").

235. Bittker & Rahdert, *supra* note 228, at 314.

236. *Id.* at 315. This notion assumes that donors to do not increase their gifts to cover the tax. *Id.* The true economic incidence of tax is, of course, often difficult to determine.

237. *Id.*

238. *Id.*

239. *Id.*

likely, on average, to be wealthier than beneficiaries of other charitable entities, and thus have greater ability to pay any tax that is passed on to them.[240] Bittker and Rahdert nonetheless contend that their income measurement theory applies to support the exemption for educational institutions:

> We do not mean to imply, however, that students are the only beneficiaries of the money spent by schools and colleges or that art galleries and symphony orchestras are merely the playthings of the rich. Only a philistine would doubt that these institutions provide benefits, directly and indirectly, to an indefinably wide audience over the entire income spectrum. . . . [These] activities are no less charitable in the eye of the law because incidentally they benefit the rich as well as poor, as indeed every charity must do, either directly or indirectly. Moreover, it is precisely in the area of education, including the arts, that private institutions are especially well suited to serve as independent centers of power and influence in our society, fostering innovation and diversity with a dedication that government agencies can seldom muster or sustain.[241]

The income measurement theory, even though designed with educational institutions in mind, does not perfectly translate into the realm of modern colleges and universities. First, modern colleges and universities are acting in more entrepreneurial, businesslike ways, perhaps making income measurement easier.[242] Second, the income measurement theory assumes that any tax imposed would be borne by the charitable class, which in the case of colleges and universities, would presumably be the students.[243] Given the recent returns enjoyed by endowments, however, chances are that such institutions would be able to absorb the tax and avoid placing the burden on students.

The Tax Expenditures Budget, which lists special tax breaks and documents the revenue the federal government forgoes from offering those breaks,[244] implicitly adopts the income measurement theory. The tax exemption for charities and educational institutions is not considered a tax expenditure.[245] The rationale is that the activity of nonprofits does not involve business activity, and, thus, any income nonprofits earn falls outside the realm of the normal income tax.[246] The charitable deduction that donors receive for their gifts to colleges and universities, however, is considered a tax expenditure and, thus, a subsidy.[247] This treatment in the Tax

240. *Id.* at 334.

241. *Id.* at 334–35.

242. *See supra* note 98; *see also* Colombo, *supra* note 217, at 859.

243. But see *supra* note 241 and accompanying text for an argument that the beneficiary class includes more than just students.

244. *See* STAFF OF JOINT COMM. ON TAXATION, *supra* note 6.

245. *Id.* at 7.

246. *Id.* at 7–8.

247. *See, e.g.*, *id.* at 32 (estimating $36.8 billion of foregone revenue as a result of allowing a deduction for donations made to educational institutions which presumably includes educational institutions of all types and levels, not just colleges and universities).

Expenditures Budget, however, is controversial.[248]

If one accepts the income measurement theory, then the tax exemption for colleges and universities is not derived from a subsidy. The government, thus, need not be concerned with policing endowment policy in higher education, since it has not granted a "subsidy" for which it can demand a return benefit. The view, however, that tax exemption is not a subsidy is a minority one that has not found favor in the eyes of the courts or other commentators.[249]

IV. RATIONALES FOR THE UNRELATED BUSINESS INCOME TAX

Just as there is no one theory supporting tax exemption, there is no one, unified theory justifying the existence of UBIT. This Part reviews some of the theories that have been advanced in support of UBIT and examines whether these theories would support the extension of the UBIT regime to endowment income.[250]

A. Unfair Competition

The major reason Congress gave for enacting UBIT in 1950 was the desire to address concerns over unfair competition.[251] The fear was that nonprofits were acquiring businesses and then using their tax exemptions to unfairly compete with their for-profit (taxable) counterparts. In fact, this fear was driven by business ventures in higher education. New York University, for example, had acquired all of the stock in the C.F. Mueller Company, which produced and sold macaroni.[252] The Court of Appeals for the Third Circuit ultimately held that the C.F. Mueller Company was exempt from the federal income tax because all of its income went to benefit a tax-exempt organization, the New York University School of Law.[253] As the C.F. Mueller case was making its way through the courts, Congress felt compelled to enact UBIT or else "all the noodles produced in this country will be produced by corporations held or created by universities."[254]

The commentary has not been kind to the unfair competition explanation for the

248. *See, e.g.*, FISHMAN & SCHWARZ, *supra* note 35, at 79.

249. Colombo, *supra* note 217, at 861. Instead commentators (and courts) generally view tax exemption as a subsidy. *Id.*

250. Obviously, not all the possible theories of UBIT can be examined here. Instead, those theories that are frequently cited or particularly applicable to the issue of endowments are presented.

251. FISHMAN & SCHWARZ, *supra* note 35, at 377–78 (quoting Congressional reports for this proposition). Another reason given for the enactment of UBIT was to raise revenue to finance the Korean War. *Id.* at 378 (quoting President Truman's statement at the time UBIT was proposed). It is perhaps appropriate that the UBIT regime is still in place today, given that the Korean War has not yet formally ended. *See* Evan Ramstad, *Politics & Economics: Inter-Koreas Pact is Seen as Light on Substance*, WALL ST. J., Oct. 5, 2007, at A8 (noting that while a cease fire stopped the 1950–1953 war, North and South Korea have only recently resumed discussions regarding a peace treaty that would formally end the war).

252. C.F. Mueller v. Comm'r, 190 F.2d 120, 121 (3d Cir. 1951).

253. *Id.* at 123.

254. FISHMAN & SCHWARZ, *supra* note 35, at 377 (quoting Rep. John Dingell's remarks during hearings before the House Committee on Ways and Means).

existence of UBIT. The C.F. Mueller example aside, there is little empirical evidence that unfair competition would be a major problem in the absence of UBIT,[255] the historical record indicates there were few complaints from for-profit businesses about unfair competition at the time of its enactment,[256] and some have asserted that UBIT even *fosters* unfair competition.[257]

Even if unfair competition were a viable justification for UBIT, it certainly would not be a justification to extend UBIT to cover college and university endowment income. Passive investing done by endowments, unlike the conduct of an active business, simply does not raise unfair competition concerns.[258]

B. Efficiency

Henry Hansmann, in addition to his work on endowments[259] and the capital subsidy theory,[260] has also set forth a theory of UBIT based on economic efficiency.[261] Under this theory, UBIT helps prevent inefficiencies at nonprofits.[262] First, UBIT encourages nonprofits to diversify their investments.[263] UBIT encourages nonprofits to invest in a broad range of common stocks (which generate income exempt from UBIT), rather than investing in a few, wholly-owned businesses (which generate income taxed by UBIT).[264] In the absence of UBIT, nonprofits may switch from diversified stock portfolios to wholly-owned businesses.[265] For those nonprofits that can only afford to invest in a few businesses, there would be little diversification, thus increasing investment risk.[266] Nonprofits with the resources to own several businesses in diverse industries would essentially become conglomerates, which would create a structure ripe with inefficiencies.[267]

Second, a tax exemption for the unrelated businesses of nonprofits, in Hansmann's view, would be an inefficient government subsidy.[268] In the absence

---

255. *See* Bittker & Rahdert, *supra* note 228, at 318–20.

256. Ethan G. Stone, *Adhering to the Old Line: Uncovering the History and Political Function of the Unrelated Business Income Tax*, 54 EMORY L.J. 1475, 1510 (2005).

257. Susan Rose-Ackerman, *Unfair Competition and Corporate Income Taxation*, 34 STAN. L. REV. 1017, 1038 (1982). The idea is that nonprofits, because of UBIT, will concentrate their efforts on businesses that are related to their exempt mission and, thus, not taxed by UBIT. *Id.* The effect is to concentrate nonprofit businesses in certain markets, hurting for-profit businesses competing in those markets. *Id.*

258. Since unfair competition was the given reason for the enactment of UBIT, it makes sense that UBIT excludes most passive/investment-type income. *See supra* Part I.C.1.

259. *See supra* Part II.C.

260. *See supra* Part III.A.2.

261. Henry B. Hansmann, *Unfair Competition and the Unrelated Business Income Tax*, 75 VA. L. REV. 605, 607 (1989).

262. *Id.* at 614.

263. *Id.* at 614–15.

264. *Id.*

265. *Id.* at 615.

266. *Id.*

267. *Id.* at 617.

268. *Id.* at 616.

of UBIT, nonprofits would not use their extra resources (i.e., the tax savings) to under-price their for-profit competitors.[269] Instead, with no shareholders to be accountable to, nonprofits would keep their prices the same as their for-profit competitors and would spend the tax savings on inefficient operations, therefore wasting the government subsidy.[270] UBIT thus serves to prevent a wasted subsidy.

Third, Hansmann believes that, in the absence of UBIT, nonprofits would be encouraged to invest in unrelated businesses, which, in turn, would encourage nonprofits to save rather than spend.[271] Hansmann cites endowment accumulation as evidence that nonprofits are already pre-disposed to over-save.[272] A repeal of UBIT would only serve to encourage even more saving behavior: in a UBIT-free world, colleges and universities would spend even less and accumulate even more.[273]

Hansmann's efficiency theory would not seem to support the extension of UBIT to cover endowment income. Regarding his point about diversification, endowment income should not be taxed. If endowment income were subject to UBIT, colleges and universities would no longer be encouraged to have diversified equity portfolios. In a world where both business income and passive investment income were subject to tax, endowments would invest in wholly owned businesses if they could get a higher return on such investments. Assuming that is the case, endowments would invest in a few operating businesses rather than in a range of stocks, which would either stifle diversification or lead to conglomeration—two results Hansmann views as inefficient.

Hansmann's point about the tax subsidy for unrelated businesses being absorbed by inefficient operations provides no basis for taxing endowment income. Endowment income is made from passive investments, and, for the most part, impressive returns indicate that the portfolios are being managed efficiently.

Hansmann's last point, that UBIT helps prevent inefficient over-saving, may appear to support a tax on endowment income. Since UBIT discourages savings via unrelated businesses, extension of UBIT to endowment income should further discourage savings by organizations (such as colleges and universities) already predisposed to over-saving. However, Hansmann does not argue that UBIT be extended to further dampen savings; he merely states that repeal of UBIT would further exacerbate any preexisting over-saving problem.[274] Further, in his subsequent work on endowments, discussed above, Hansmann came out against government *regulation* of endowment accumulation policies and noted that any inefficiencies/waste created by over-accumulation is likely to be minimal.[275] Presumably, a similar argument can be made against using a *tax*, such as UBIT, to dampen spending tendencies.

---

269. *Id.*

270. *Id.*

271. *Id.* at 618–19.

272. *Id.* at 620.

273. *Id.*

274. *See id.*

275. Hansmann, *supra* note 14, at 40. See *supra* Part II.C., for a detailed discussion of Hansmann's article on endowments.

C. Threats to Sovereignty

Evelyn Brody developed the theory that UBIT and other limitations on tax exemption are designed to limit the power of organizations that have been granted tax-exempt status.[276] Nonprofits operate as independent "sovereigns" according to this theory.[277] The true sovereign, the federal government, grants nonprofits this independence and sovereignty through tax exemption, while limiting it through devices such as UBIT to keep nonprofits from gaining too much property and power: "underlying some of the more perplexing rules limiting the scope of exemption [e.g., UBIT] is an unarticulated vestigial fear of a too-powerful nonprofit sector, traceable to earlier periods when the most powerful charity was the church."[278]

If college and university endowments were considered too large, and thus conferring too much power on the schools, then the extension of UBIT to tax endowment income would be consistent with the sovereignty theory. While Brody *identifies* sovereignty as an explanation for UBIT, she does not advocate its continued use.[279] In fact, she urges policymakers to "resist the lures" of the sovereignty approach and to consider broader reforms of the tax treatment of charities.[280]

D. The "Old Line"/Political Function Theory

Ethan Stone has advanced the theory that UBIT exists to encourage nonprofits to avoid activities that are politically embarrassing.[281] UBIT, in general, taxes activities that are considered unseemly while not taxing items considered to be in the proper province of the nonprofit sector. Stone concludes:

> The UBIT was designed to channel charities away from problematic activities by setting up a tax gradient that favored income-generating activities compatible with perceptions of charitable activity. At the taxable end were highly visible activities that challenged perceptions of charitable activities—active business endeavors unrelated to any charitable purpose. Law schools that wanted to make Congress uncomfortable by running spaghetti and piston-ring factories would have to pay for the privilege. At the exempt end were activities more compatible with perceptions of charitable activity—traditional, passive investment and active business endeavors related to accomplishing a charitable objective. Charities willing to "adhere to the old line" of

276. Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998).

277. *Id.* at 586–87.

278. *Id.* at 629. Indeed, Brody notes historic limitations on church power, such as Henry VIII's seizure of monasteries in England and Mexico's laws against church-ownership of property (not repealed until 1992). *Id.* at 586 n.2.

279. *Id.* at 587.

280. *Id.*

281. *See* Stone, *supra* note 256, at 1479–80.

good works and passive investment were rewarded.[282]

Stone's theory comes right out and explains why passive income is not subject to UBIT. Nonetheless, if college and university endowments become so large that they pose a political problem, then it appears that the political function theory may call for the extension of UBIT to endowment income. While some (namely the Senate Committee on Finance) have raised concerns about endowments, it does not appear that we have reached the point where endowments, and their returns, have become as politically problematic as investments in noodle companies. Accordingly, the political function theory does not currently support the extension of UBIT to endowment income.

E. Summary

In summary, the various theories for the rationale underlying UBIT reviewed here do not support taxing endowment income. Unfair competition is likely not a good rationale to explain UBIT and, even if it were, endowment investments simply do not raise unfair competition concerns. Hansmann's efficiency theory raises concerns about over-saving, as may be occurring in endowments, but does not necessarily call for endowment income to be taxed. In fact, much of his theory would counsel against it. Brody's sovereignty theory may call for UBIT to apply to endowment income as a check on the property and power being accumulated by colleges and universities. Brody herself, however, does not think the sovereignty theory should guide policy. Finally, Stone's political function theory rules out taxing endowment income, at least at present.

V. PRIVATE FOUNDATIONS

The previous Part reviewed the rationales underlying UBIT to determine if they would justify taxing income from college and university endowments. This Part examines the rationales underlying the relevant parts of the private foundation rules to determine whether these rules should be extended to impose a minimum distribution requirement on college and university endowments.

A. Overview of Private Foundation Rules

Colloquially, a private foundation is a § 501(c)(3) organization that derives the bulk of its support from limited sources—normally a wealthy family or a corporation.[283] While some private foundations actually run charities themselves, many simply make grants to other charitable organizations, which carry out the actual charitable work.[284] Technically, all § 501(c)(3) organizations are considered

---

282. *Id.* at 1554.

283. FISHMAN & SCHWARZ, *supra* note 35, at 510. Note that whether or not an organization uses "foundation" in its name is of no consequence. Many nonprofits use "foundation" in their name but are not subject to the private foundation rules.

284. The former are known as "operating foundations" and are subject to a slightly less onerous tax regime. *See* I.R.C. § 4942(a)(1) (2000). For example, an operating foundation is not subject to the minimum distribution requirements of I.R.C. § 4942.

private foundations unless they meet one of the enumerated exceptions in the Internal Revenue Code.[285] Colleges and universities, regardless of the source of their funds, are not classified as private foundations.[286] Likewise, organizations supporting public colleges and universities[287] are normally exempt from private foundation status as well.[288]

Section 501(c)(3) organizations that are classified as private foundations are subject to a litany of requirements in addition to the normal rules governing tax-exempt organizations.[289] For example, private foundations are subject to a one or two percent tax on their net investment income,[290] are prohibited from entering into certain transactions with foundation officers (i.e., self-dealing),[291] are required to make minimum distributions to charity,[292] cannot own more than a specified percentage of their principal donor's business,[293] are subject to prudent investment requirements,[294] and are prohibited from making any lobbying or political campaign expenditures.[295] These requirements are backed up by a series of excise taxes which seek to punish noncompliance.[296]

The most relevant private foundation rule for present purposes is the minimum distribution requirement.[297] It is this requirement that Congress may consider

285. I.R.C. § 509(a) (2000).

286. I.R.C. § 509(a)(1) (indicating that an organization described in I.R.C. § 170(b)(1)(A) will not be considered a private foundation); I.R.C. § 170(b)(1)(A)(ii) (2000) (referring to "an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on"—a definition which obviously applies to the typical college or university).

287. *See supra* note 20 and accompanying text.

288. I.R.C. § 509(a)(1) (indicating that an organization described in I.R.C. § 170(b)(1)(A) will not be considered a private foundation); I.R.C. § 170(b)(1)(A)(iv) (2000) (referring to an organization with substantial public support "which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university . . . and which is an agency or instrumentality of a State"). Such organizations are commonly referred to as "supporting organizations." Provided these organizations meet the requisite public support test, they will not be classified as private foundations.

289. *See infra* Part I.

290. I.R.C. § 4940 (2000).

291. I.R.C. § 4941 (2000). For example, a foundation cannot loan money to an officer. I.R.C. § 4941(d)(1)(B).

292. I.R.C. § 4942 (2000).

293. I.R.C. § 4943 (2000).

294. I.R.C. § 4944 (2000).

295. I.R.C. § 4945 (2000).

296. I.R.C. §§ 4941–4945 (2000). In addition, the charitable deduction for donations to private foundations is subject to stricter percentage limits. *See* I.R.C. § 170(b)(1)(B) & (D) (2000). The details are not particularly relevant for purposes of this Article.

297. I.R.C. § 4942. Private foundations that do more than simply make grants—i.e., those that meet the requirements to be considered "operating foundations"—are not subject to the minimum distribution rules I.R.C. § 4942(a)(1), (j). It would seem quite odd for Congress to exempt operating foundations and yet impose the minimum distribution requirements on colleges and universities—which are not even considered private foundations under the law.

extending to college and university endowments. Stripped of unnecessary detail, private foundations are required to spend at least 5% of the net fair market value of their assets (other than assets used to carry out charitable activities) on charitable purposes.[298] Failure to distribute the required amount by the end of the year following the taxable year triggers excise taxes. The initial excise tax is equal to 30% of the undistributed amount.[299] This tax continues to apply each year to any of the required distribution amount that remains undistributed.[300] If any part of the required distribution continues not to be made, a second tier tax of 100% of the undistributed amount will apply.[301]

Note that the 5% distribution requirement is currently greater than the average 4.6% spending rate currently used by college and university endowments.[302] While this may not seem like a big difference, given the amounts involved (in the billions in some cases), the absolute dollar amount of additional distributions that would be required could be significant.[303]

B. Rationales for Private Foundation Rules

Leading commentators have been unsuccessful at finding a clear, reasonable rationale for the higher level of regulation imposed on private foundations.[304] Much of the regulation, originally imposed in the Tax Reform Act of 1969, was targeted at specific organizations because of specific abuses or for political reasons.[305]

Perhaps the only plausible overall justification for increased regulation of private foundations is their lack of accountability. A major study of foundations put it this way:

> A major cause of the various sins committed by foundations—arrogance, discourtesy, inaccessibility, and the others—is their lack of accountability. Most other institutions in America, whether in the civic sector, the for-profit sector, or government, benefit from continuing challenges, criticism, and oversight provided by others to whom they

298. I.R.C. § 4942(e)(1). The five percent is called the "minimum investment return." *Id.*

299. I.R.C. § 4942(a).

300. *Id.*

301. I.R.C. § 4942(b). This tax will apply if the required distribution remains unpaid at the end of the "taxable period," as defined in I.R.C. § 4942(j)(1) (noting that, generally, the "taxable period" ends on the date the IRS mails a notice of deficiency with respect to the thirty percent initial tax).

302. *See supra* note 7.

303. Goldie Blumenstyk, *Pressure Builds on Wealthy Colleges to Spend More of Their Assets*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 11, 2007, at A1.

304. Bittker & Rahdert, *supra* note 228, at 341 (indicating that a search for a rationale for the special rules on private foundations "is not likely to be fruitful"). Bittker and Rahdert specifically criticize the excise tax on investment income in I.R.C. § 4940. Billed as a "user charge" to cover the cost of auditing private foundations, it bore no relation to concepts of net income and effectively taxed grants rather than the foundation itself. *Id.* at 326–28. Further, there was really no justification for charging private foundations, but not other nonprofit enterprises, for the audit costs incurred by the government. *Id.* at 327.

305. *See id.* at 338, 341.

are accountable.[306]

Many private foundations received their funding from one source—an individual, a family, or a corporation—in perpetuity.[307] Once the principal donors have left, private foundations have few constituencies that are privy to their finances and operations. Many private foundations can thus get by with doing very little in the way of "charitable" work.[308] Therefore, it might make sense for the federal government to more heavily regulate private foundations to ensure they at least engage in a minimum level of charitable work.

The counterargument to the "lack-of-accountability" rationale is that the government is regulating private foundations for less noble purposes. If private foundations were free of government control (save for the rules that apply to regular public charities), they would be free to experiment. This could lead to problems with politicians: "Private organizations displaying independence, flexibility, and originality are bound to tread on toes, and when the toes belong to public officials, an adverse legislative reaction should not come as a surprise."[309] Accordingly, private foundations end up contending with a more onerous regulatory regime.

Whatever the virtues of the private foundation regime, commentators have strongly cautioned against its extension to police against other real or perceived abuses by public charities:

> It is common knowledge that preachers sometimes divert church funds to personal ends, that the nonprofit facade of a school or college can mask a proprietary operation, that some hospitals serve primarily to enrich their physician-entrepreneurs, and that some publicly supported charities allow most of their contributions to be siphoned off by grasping fundraisers. It is equally clear, however, that these instances did not—and should not—impel Congress to extend to the vast body of charitable organizations the labyrinth of statutory restrictions, navigable only by lawyers and accountants and guarded by penalties far exceeding the civil penalties for deliberate tax fraud, which were prescribed in 1969 for private foundations.[310]

By the same rationale, the fact that some institutions may be erring on the side of investing rather than spending endowment earnings should not justify the extension of private foundation-type rules to colleges and universities.

C. Differences Between Private Foundations and Colleges and Universities

Extension of private foundation-type rules, such as a minimum distribution

306. JOEL L. FLEISHMAN, THE FOUNDATION: A GREAT AMERICAN SECRET 153 (2007).

307. FISHMAN & SCHWARZ, *supra* note 35, at 510.

308. Anecdotal evidence of private foundations accumulating income and ignoring their charitable purpose led to some of the reforms, such as the minimum distribution requirement. *Id.* at 608. It is unclear exactly how wide-spread this problem actually was. *See id.*

309. Bittker & Rahdert, *supra* note 228, at 342; *see also supra* Part IV.C (regarding Brody's rationale for UBIT, which invokes similar issues).

310. Bittker & Rahdert, *supra* note 228, at 341–42.

requirement, to colleges and universities has been proposed before.[311] However, the perceived abuses at private foundations (due to their insular nature and lack of transparency and accountability) that perhaps warrant the minimum distribution requirement simply are not present in the college and university environment. In contrast to private foundations, colleges and universities must answer to various active and vocal constituencies.[312]

Colleges and universities must be responsive to concerns of students, faculty, staff, alumni, and the surrounding community. Such groups are rarely shy about expressing their views. Furthermore, colleges and universities must compete with one another for prospective students and faculty. All else being equal, an institution that is strategically using its endowment to make investments in student aid or faculty development may be better positioned to attract student and faculty talent.

Colleges and universities are also subject to review by private accreditation agencies, both at the institutional and individual program levels.[313] Further, they must comply with a litany of federal guidelines to ensure that their students can receive federal financial aid.[314]

College and universities, unlike private foundations, have miniature-cities to run. They must deal with a work force and physical facilities that require a long-term, sustained commitment that the endowment can help support.[315] Private foundations have no such commitments. They may have a small office and staff, but could likely liquidate their endowments in a short period of time without much consequence.[316]

---

311. In 1977, the Filer Commission (a 1970s study of nonprofit groups) suggested that the five percent of investment asset distribution requirement that applies to private foundations be extended to all nonprofits with endowments (including colleges and universities). Hansmann, *supra* note 14, at 6 (internal citations omitted). Germany and Canada have experimented with minimum distribution requirements. *Id.* Both countries initially enacted restrictive payout rules and then later liberalized them. *See id.* Further discussion of international policy towards endowments is beyond the scope of this Article. Instead, this Article focuses on whether restrictions on endowment accumulation make sense in light of the underlying rationales for the tax-exempt rules that have traditionally applied in the United States.

312. *Higher Education Associations Testimony*, *supra* note 10.

313. *See, e.g.*, KAPLIN & LEE, *supra* note 18, at 1530–34.

314. Patricia J. Gumport & Stuart K. Snydman, *Higher Education: Evolving Forms and Emerging Markets*, *in* THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK 462, 467 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006). Federal funding for higher education tends to take the form of aid provided to students, rather than direct support to colleges and universities. *Id.* Despite the compliance costs involved, "[c]olleges and universities of all types have an enormous incentive to become and remain eligible for student financial aid programs." *Id.*

315. Blumenstyk, *supra* note 303 ("Washington University employs more than 13,000 people and operates more than 150 buildings on its main campus, medical-center complex, and surrounding sites.").

316. Despite the hardship that would come with summarily liquidating an endowed college or university, at least one commentator has suggested (in jest?) that some high-profile Ivy League schools do just that. Thomas Bartlett, *Yanking (the Chains of) the Ivies*, CHRON. HIGHER EDUC., (Wash., D.C.), Oct. 26, 2007, at A1. Author Malcolm Gladwell recently made this suggestion because, in his view, Ivy League schools don't do a good job of promoting social mobility. *Id.* *The Chronicle of Higher Education* painted an interesting picture of the proposed liquidations:

Public colleges and universities, moreover, are subject to state control and are often answerable to a diverse governing board made up, often, of elected and appointed members.[317] Private colleges and universities tend to be similar to private foundations in their governance structures, using closed proceedings and governing boards whose new members are chosen by current members and the school's administration.[318] Nonetheless, concerned alumni will not hesitate to raise their voices to criticize board decisions or to weigh in on important issues of institutional governance or mission. A recent controversy over board membership and governance issues at Dartmouth College is evidence of this.[319] In fact, entire books have been written criticizing private institutions and their governance.[320] Such criticism is not nearly as common in the private foundation world.

Finally, and perhaps most importantly, the higher education community is subject to the scrutiny of donors and potential donors. Colleges and universities, unlike private foundations, must raise money. Despite having large endowments, institutions continue to fundraise, which makes them subject to prospective donor scrutiny.[321] While fundraising has always been important for private institutions, it is increasingly becoming important for public institutions as well.[322] Colleges and universities must be accountable to current and potential donors in their stewardship of current and future gifts. Capital campaigns, for example, have become the nonprofit analog of the initial public offering (IPO). A college or university undertaking a capital campaign, much like a company contemplating an IPO, must develop a strategic plan, identify its unmet needs (such as a new building, more scholarships, more graduate programs, endowed professorships,

---

"Their campuses turned into luxury condos. Their students distributed evenly throughout the colleges of the Big Ten. Their endowments donated to charity, or used to purchase Canada." *Id.*

317. Gumport & Snydman, *supra* note 314, at 471. Endowments of public institutions are often housed in separate supporting organizations. *See supra* note 20. These separate organizations are designed to be outside of state restrictions, but there may be issues regarding just how legally independent from the state these organizations truly are. *See, e.g.*, KAPLIN & LEE, *supra* note 18, at 241–49. These legal complexities aside, the supporting organizations are at least partially answerable to the school's administration, which, in turn, is answerable to the state. It is not unreasonable to assume that a state governing board would consider the level of private giving (evidenced by the endowment) in making decisions regarding the school.

318. Gumport & Snydman, *supra* note 314, at 471.

319. Joseph Rago, *The Weekend Interview with T.J. Rogers: Mr. Rogers Goes to Dartmouth*, WALL ST. J., Sept. 1, 2007, at A7 (reporting how new trustees at Dartmouth, elected by the alumni, are shaking up the normally staid board by demanding action on several issues including enhancing academic freedom and the hiring of more professors).

320. *E.g.*, BUCKLEY, *supra* note 182 (criticizing Yale's governance structure and its deviation from its historic mission).

321. *See, e.g.*, Zachery M. Seward, *Rich Alumni Stiff Elite Alma Maters, Give to Needier Colleges*, WALL ST. J., Aug. 28, 2007, at B1 (indicating that even Harvard, which has the largest endowment, continues to solicit donations). Based on this fact, there is little evidence that institutions are using endowment accumulation to insulate themselves from outside demands. See *supra* Part II.C.6 for discussion of Hansmann's concern over this issue.

322. Gumport & Snydman, *supra* note 314, at 467 (noting that public colleges and universities have gone from "state-supported" to "state-assisted" and now, according to some, to merely "state-located"); see also *supra* note 20, for further discussion of state school fundraising.

etc.), and sell the merits of fulfilling those needs to prospective donors.[323] In short, the institution must be accountable in order to raise funds.

The accountability and transparency necessary to attract financial contributions puts pressure on institutions to better monitor their endowment accumulation policies. A large endowment, for example, may encourage potential donors to give elsewhere—where their money is more urgently needed.[324] In fact, some colleges and universities have discovered the necessity of addressing endowment size in soliciting new gifts. Harvard University, for example, informs prospective donors that many areas of the university remain unsupported by its current endowment and thus additional contributions to the endowment are required.[325]

As colleges and universities solicit funds, they may find that a new trend in philanthropy stifles attempts to expand endowments. Modern philanthropists such as Warren Buffet, for example, seem determined to see their charitable gifts spent currently, rather than endowed in a perpetual foundation.[326]

In summary, donors play a strong role in regulating college and university behavior, including their approach to endowments. This sort of outside scrutiny is lacking in private foundations.

All in all, many diverse groups scrutinize the conduct of colleges and universities and prevent such institutions from becoming insular. Colleges and universities and private foundations may, at first glance, appear similar because of their substantial endowments. In fact, they are two very different types of institutions, and they should not be taxed and regulated as if they were the same.

---

323. *See, e.g.*, Destination Distinction: The Campaign for Boise State University, http://www.boisestate.edu/foundation/campaign/index.html (last visited Apr. 8, 2008) (detailing the school's recently-launched $175 million capital campaign and explaining the specific needs—scholarships, professorships, facilities, etc.—for which the money is being raised). Boise State's capital campaign goal ($175 million) is relatively modest. There are currently thirty-one colleges or universities that are each attempting to raise $1 billion or more via capital campaigns. Marisa Lopez-Rivera, *Updates on Billion-Dollar Campaigns at 31 Universities*, CHRON. HIGHER EDUC., Jan. 9, 2008, http://chronicle.com/daily/2008/02/1551n.htm.

324. *See, e.g.*, Seward, *supra* note 321 (profiling "a rising cohort of philanthropists who are eschewing their richly-endowed alma maters in favor of schools with meager resources"). Note, however, that many give to their alma maters out of a sense of emotional attachment or a need to feel they are "giving back." Therefore, it might not be so easy for a donor to take funds intended for his alma mater and give them to some other institution with which he has little connection. *See* Hansmann, *supra* note 14, at 35.

325. Seward, *supra* note 321.

326. Stephanie Strom, *Big Gifts, Tax Breaks, and Disagreement on How to Help the Poor*, N.Y. TIMES, Sept. 6, 2007, at A22 (indicating that Warren Buffet's gifts to the Bill and Melinda Gates Foundation are to be spent within a year of receipt).

CONCLUSION

Five themes emerge from our review of the tax law of higher education and the literature that attempts to explain that law. First, education is not synonymous with charity. A college or university is entitled to tax exemption because it educates—not because it helps the less fortunate. The education provided by colleges and universities is of sufficient societal benefit to warrant the tax exemption.

Second, one of the hallmarks of tax exemption is the provision of a government subsidy without government control. Colleges and universities, dedicated to the exempt function of education, should be left to carry out their missions free from interference from the federal government. Inefficiencies and failures, such as the over-accumulation of endowments, may result, but they are tolerated to promote the loftier goals of fostering freedom, independence, and flexibility in the nonprofit sector.

Third, past instances in which the federal government extended its taxing or regulatory reach into the nonprofit world, such as via the UBIT regime or the private foundation rules, have not been based on solid reasoning. The rationales that scholars have been able to find for these rules would not support extension of these regimes to endowments. In fact, extension of these regimes into the endowment world would be contrary to many of the rationales articulated to date.

Fourth, even one of the most vocal critics of endowment policy, Henry Hansmann, advises against regulation of endowment income. He reached this conclusion after an exhaustive study and critique of endowment policies in higher education.

Fifth, the private foundation rules, whatever their merit, simply do not import well into the college and university community. Colleges and universities, unlike private foundations, are accountable to a broad range of constituents. There is little benefit to adding a minimum distribution requirement to the list of the forces already guiding higher education behavior.

The existing literature on endowment management, the rationales for tax exemption, the justifications for UBIT, and the law of private foundations provide little justification for taxing or regulating endowment income. While some schools may well be hoarding their endowment earnings, there is not a strong theoretical case for imposing a tax or minimum distribution requirement on endowments. Hopefully, the Senate Committee on Finance's work to date and the specter of congressional action will prompt any institutions spending their endowments in less than optimal ways to rethink their strategies. In fact, there is some evidence that this is in fact occurring: both Harvard and Yale have recently announced that they plan to tap into their endowments to significantly expand aid programs for students from middle income families.[327] A few other institutions have also

327. *See* Eric Hoover, *Yale Follows Harvard in Announcing Big Student-Aid Jump*, CHRON. HIGHER EDUC., Jan. 15, 2008, http://chronicle.com/daily/2008/01/1235n.htm. Yale's annual financial aid budget will increase from $24 million to $80 million under the new plan. *Id.* Yale officials admitted that the recent focus on endowments by lawmakers was one factor (among

announced increased endowment spending on financial aid.[328] It remains to be seen whether these moves will induce additional institutions with large endowments to rethink their spending policies.

In addition to the threat of congressional action, increased transparency requirements may also influence endowment policies. The IRS and the Financial Accounting Standards Board have recently announced they may be requiring colleges and universities to disclose further details about their endowments and spending policies.[329] These additional disclosure requirements could pressure colleges and universities to better monitor their endowment policies.

If a tax or minimum distribution requirement were to be imposed on endowments, we would be casting aside our traditional, and current, understanding of how nonprofits should be taxed and regulated. Casting aside these understandings, however, would require a fundamental re-imagining of the nonprofit sector, that would go well beyond the relatively narrow issue of endowments. If we embarked on such a task, it would require that we rethink our notions of "charity"[330] and "education," our allowance of charitable gifts with

---

others) that led to the new program. *Id.* In addition, Yale has re-calibrated its endowment spending policy, now targeting a minimum payout rate of 4.5% and a maximum payout rate of 6%. Press Release, Yale to Increase Endowment Payout to Expand Access and Advance Science (Jan. 7, 2008) http://www.yale.edu/opa/newsr/08-01-07-01.all.html. Under Harvard's plan, its annual financial aid budget will increase from $98 million to $120 million. *See* John Hechinger, *Harvard Trims Tuition Bills for Families*, WALL ST. J., Dec. 11, 2007, at B17.

328. *See Brown Ends Tuition for Lower Income Students*, N.Y. TIMES, Feb. 25, 2008, at A13 (indicating that Brown University, while raising tuition overall, will eliminate tuition for students with families earning under $60,000 per year); Anne Marie Chaker, *Some Colleges Cut, Eliminate Debt*, WALL ST. J., Nov. 29, 2007, at D1 (describing how several institutions, such as Williams College and Stanford University, are tapping their endowments to expand aid); Robert Tomsho, *Stanford Joins Its Elite Peers in Boosting Aid*, WALL ST. J., Feb. 21, 2008, at D1 (describing how Stanford will eliminate tuition for students with families earning less than $100,000 per year); see also Chaker, *supra*, for a summary of the recent financial aid reforms made by well-endowed institutions.

Some fear that increased spending by wealthier, elite institutions will make it even more difficult for other ("non-elite") institutions to compete for students—escalating what has been dubbed "the academic arms race." Goldie Blumenstyk, *Colleges' Endowments-Spending Prerogatives Get Unexpected Defense*, CHRON. HIGHER EDUC., Feb. 4, 2008, http://chronicle.com/daily/2008/02/1491n.htm. This concern also argues against forcing colleges and universities to increase spending from their endowments.

329. The IRS has announced that colleges and universities will need to report the value of their endowments on Form 990. Goldie Blumenstyk, *IRS Issues Final Version of Tax Form for Colleges and Other Nonprofit Groups*, CHRON. HIGHER EDUC., Dec. 21, 2007, http://chronicle.com/daily/2007/12/1063n.htm. The IRS has also announced that it will begin a college and university compliance initiative in 2008 that will involve sending questionnaires to higher education institutions. Christopher Quay, *EO's 2008 Workplan Focuses on Universities, Non-501(c)(3) Orgs*, TAX NOTES TODAY, Dec. 14, 2007, at 241-6. Among many other topics, the questionnaires will ask how the colleges and universities are using their endowments. *Id.* The Financial Accounting Standards Board has announced that it is moving forward with new disclosure requirements on endowments, including disclosures on endowment spending policy and planned endowment distributions. Carolyn Wright LaFon, *FASB Moves Forward on New Disclosures for Nonprofit Endowments*, FINANCIAL REPORTING WATCH, Jan. 9, 2008, at 6–7.

330. Such a rethinking may be going on currently in the United Kingdom. Under the Charities Act 2006, private schools can have their tax exemptions revoked unless they can

perpetual restrictions, and the appropriate bounds of government regulation of the nonprofit sector. Perhaps someday we will accomplish this task, and can revisit endowments in light of our new understanding of the broader nonprofit universe. Until that day, Congress should avoid piecemeal reforms and follow the lesson taught by our tour of the nonprofit literature: that the fruit that is endowment income is not only low-hanging; it is also forbidden.

---

demonstrate that they are providing a benefit to the public. *See* Polly Curtis & David Brindle, *Do More For Poorer Children or Lose Your Charitable Status, Private Schools Are Told*, GUARDIAN (London), Jan. 16, 2008, at 4. To retain tax exemption, a school must do more than educate—it must also show it is not an "exclusive club for the rich" and that it benefits low income students. *Id.*

IN A DIFFERENT VOICE: LESSONS FROM *LEDBETTER*

PAULA A. MONOPOLI*

INTRODUCTION

> One year out of college, women working full time earn only 80 percent as much as their male colleagues earn. Ten years after graduation, women fall farther behind, earning only 69 percent as much as men earn. Controlling for hours, occupation, parenthood, and other factors normally associated with pay, college-educated women still earn less than their male peers earn.[1]

Women in academia—among some of the best educated women in America—suffer from similar salary inequities. The most salient fact is that women faculty "earn lower salaries on average *even when they hold the same rank as men*."[2] The American Association of University Women (AAUW) has concluded that "women have made remarkable strides in academia" in the last twenty years and that "[d]espite these gains, women remain underrepresented at the highest echelons of higher education. . . . On average, compared to men, women earn less, hold lower-ranking positions, and are less likely to have tenure."[3] The AAUW makes the case that sex discrimination in academia has broad implications, because "[u]niversities and colleges have been powerful cultural institutions in western culture since medieval times."[4]

---

* Marbury Research Professor of Law and Founding Director, Women, Leadership & Equality Program, University of Maryland School of Law; B.A. Yale College, 1980; J.D. University of Virginia School of Law, 1983. The author would like to thank Susan G. McCarty for her research assistance and Marin Scordato for his insights. She would also like to acknowledge the allusion to Carol Gilligan's seminal work on gender difference, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982), in the title of this article. Finally, she would like to dedicate this article to Lilly Ledbetter, whose courage in pursuing her claim has been invaluable to other women in the workplace.

1. JUDY GOLDBERG DEY & CATHERINE HILL, AAUW EDUC. FOUND., BEHIND THE PAY GAP 2 (2007), *available at* http://www.aauw.org/research/upload/behindPayGap.pdf.

2. MARTHA S. WEST & JOHN W. CURTIS, AM. ASS'N UNIV. PROFESSORS (AAUP), AAUP FACULTY GENDER EQUITY INDICATORS 12 (2006) (emphasis added), *available at* http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815 5792D93856F1/0/ AAUPGenderEquityIndicators 2006.pdf.

3. AAUW EDUC. FOUND. & AAUW LEGAL ADVOCACY FUND, TENURE DENIED: CASES OF SEX DISCRIMINATION IN ACADEMIA 1 (2004), *available at* http://www.case.edu/president/ aaction/TenureDenied.pdf [hereinafter AAUW, TENURE DENIED].

4. *Id.* at 2.

"Professors help shape the intellect and social conscience of [our] students and, hence, of our society."[5] Thus, what happens in academia ripples out to the rest of the nation.[6] As in the broader workplace, women are now common in academia, but the promise of full equality has yet to be fulfilled, and the AAUW has identified sex discrimination as a major cause of inequality.[7] The recent *Ledbetter* decision by the United States Supreme Court on pay disparity thus holds a number of important lessons for women in academia.[8]

Disparities in salary have been tied, in part, to factors other than sex discrimination. For example, empirical data suggests reluctance on the part of women to negotiate salaries.[9] Since women in academia are presumptively better educated than women in other workplaces, one might assume the lessons of *Ledbetter* do not apply to such women. Arguably, they should be more effective at negotiating for comparable salaries than others, enabling them to buck the continuing trend of under-compensation. However, much of the research on women and negotiation shows that women negotiate very well when trained to do so for third parties—with comparable, if not better, outcomes than men—but that women, including women faculty, fare far worse when negotiating for themselves.[10] This is likely due both to socialization and to the very different and negative reaction toward women who attempt to negotiate.[11]

Any good negotiation relies in large part on information, and women gather information very well. However, in most academic environments, salary information is not public and, even in those state colleges and universities where it is a matter of public record, it is not always easy to obtain.[12] Without reliable data

---

5. *Id.*

6. *Id.*

7. AAUW, TENURE DENIED, *supra* note 3, at 2.

8. *See generally* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007).

9. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1–2 (2003).

10. *Id.* at 6. The authors write:

> A recent study shows that this is true even at institutions with a committed policy against discriminating between men and women. This study describes a man and a woman with equivalent credentials who were offered assistant professorships by the same large university. Shortly after the two were hired, a male administrator noticed that the man's salary was significantly higher than the woman's. Looking into it, he learned that both were offered the same starting salary. The man negotiated for more, but the woman accepted what she was offered. Satisfied, the administrator let the matter drop. He didn't try to adjust the discrepancy or alert the female professor to her mistake. The university was saving money and enjoying the benefits of a talented woman's hard work and expertise. He didn't see the long-term damage to his institution and to society from not correcting such inequities . . . and she didn't know how much she had sacrificed by not negotiating the offer she'd received.

Id.

11. *Id.* at 1–2.

12. *See Ledbetter*, 127 S. Ct. at 2182 n.3 (Ginsburg, J., dissenting) ("One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy." (citing Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social*

on where one stands in the faculty array vis-à-vis male colleagues, and with amorphous standards of merit that rule in the academy, women are at a significant disadvantage. The research clearly demonstrates that they, like their sisters in other professions, suffer from clear pay disparities even when doing the same job with the same title.[13]

This article explores the intersection of these observations with the recent U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Company*.[14] It evaluates the soundness of the majority's opinion as it pertains to academia. The position of the Court is inconsistent with the realities of the American workplace and, as Justice Ruth Bader Ginsburg notes in her dissent, in contravention of the federal government's own interpretation of the statute at issue through its agency, the Equal Opportunity Employment Commission (EEOC).[15] The majority opinion, written by Justice Samuel Alito, highlights the profound sea-change in the Court's jurisprudence on issues affecting women since the retirement of Justice Sandra Day O'Connor. This article suggests that this same case may well have had a different result were Justice O'Connor still sitting on the Court.

The article first examines the impact of the *Ledbetter* decision. Second, the article explores the facts of the case and summarizes the analysis of both the majority and the dissent. This section pays particular attention to the revealing choices of language used in the majority opinion, written by one of the Court's

---

Norms and the Law, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004))).

13. *See* WEST & CURTIS, *supra* note 2, at 11–12. The authors write:

> The final Gender Equity Indicator compares average salaries of men and women by rank and across all academic ranks. In 2005–06, across all ranks and all institutions, the average salary for women faculty was 81 percent of the amount earned by men. This comparison has remained virtually unchanged since the AAUP began collecting separate salary data for women and men faculty in the late 1970s. When men and women faculty at the same rank are compared, women's relative salary is somewhat higher. Among all full professors at all types of institutions in 2005-06, women earned on average 88 percent of what men earned. For associate and assistant professors, the overall national figure for women was 93 percent. However, these numbers are actually slightly lower than they were thirty years previously, down from 90 and 96 percent respectively.
>
> The overall salary disadvantage for women is a combination of two primary factors: women are more likely to have positions at institutions that pay lower salaries, and they are less likely to hold senior faculty rank. [Our research] reflects both of these aspects of salary differences for 2005–06, but also indicates that women earn lower salaries on average even when they hold the same rank as men. . . .
>
> [T]he comparison of average salaries within rank shows that women do not reach parity with men in any of the institutional categories. Women's proportion of men's average salary is significantly lower at doctoral universities for all three ranks, while the proportions at master's, baccalaureate, and associate degree institutions are similar to one another. The differences in average salary . . . may seem small. However, viewed another way, the [data] indicate[] that women earn average salaries that are two to nine percentage points lower than men's salaries, *even when they hold the same rank*.

Id.

14. *Ledbetter*, 127 S. Ct. at 2162.

15. *Id.* at 2185 & n.6 (Ginsburg, J., dissenting).

newest members, Justice Samuel Alito, and the dissent, written by the Court's only remaining woman, Justice Ruth Bader Ginsburg. Third, this article suggests that former Justice O'Connor's approach to cases involving women's issues was different than that of Justice Alito and asks whether his replacement of her may account for the outcome in the *Ledbetter* case. Fourth, the article outlines the current situation in academia both in terms of how women faculty fare in equitable pay and what norms exist for setting salaries, negotiating for increased pay, determining what factors constitute merit, and evaluating how recruiting practices like competing offers and market forces have a disproportionately negative effect on women's pay. Fifth, it explores how academia can effectuate voluntary change in such norms through alternatives to involuntary remedies. Finally, it reviews the pending Congressional legislation that fixes the *Ledbetter* decision and concludes that, with such normative change and legislation, women in academia may fare better in terms of pay equity in the future.

I. THE IMPACT OF THE *LEDBETTER* DECISION

Colleges and universities are subject to the two major statutory schemes used to ameliorate pay disparities,[16] the Equal Pay Act[17] and Title VII of the Civil Rights Act of 1964.[18] In particular, there are a number of cases involving Title VII in the context of wage differentials among college and university faculty.[19] The history

16. The Education Amendments of 1972, 20 U.S.C. § 1681 (2000) [hereinafter Title IX] also apply to the employment practices of colleges and universities. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (upholding ability of government agency to impose Title IX regulations on the employment practices of higher education institutions). However, Title IX is rarely, if ever, applied in cases of employment in higher education where Title VII remedies are available to plaintiffs. *See, e.g.*, Morris v. Wallace Community Coll. Selma, 125 F. Supp. 2d 1315, 1342–43 (S.D. Ala. 2001) ("At least two courts of appeal have held that an employee of an educational institution subject to both Title VII and Title IX may bring a claim for employment discrimination only under Title VII, reasoning that to rule otherwise would allow a plaintiff to avoid the carefully measured administrative requirements of Title VII." (citing Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 861–62 (7th Cir. 1996) and Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995), *cert. denied*, 519 U.S. 947 (1996) ("We hold that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions."))). Title IX applies only to cases of intentional discrimination rather than the broader disparate impact theory available under Title VII, codified at 42 U.S.C. § 2000e-2(k) (2000). *See* Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993). More recently, the Supreme Court decided *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), which upheld the right of a male coach to sue under Title IX for the retaliatory behavior of his employer in response to his complaints about the school underfunding his girls' basketball team in violation of Title IX—but such a plaintiff would not be afforded Title VII's protections on those facts. See *Jackson*, 544 U.S. at 175, for Justice O'Connor's comparison of the two statutory schemes.

17. 29 U.S.C. § 206(d) (2000).

18. Title VII of the Civil Rights Act of 1964 originally exempted colleges and universities "with respect to the employment of individuals to perform work connected with the educational activities of such institution." Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255. However, Congress amended the Act in 1972, removing colleges and universities from the exemption. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103–04.

19. *See, e.g.*, Travis v. Bd. of Regents, 122 F.3d 259 (5th Cir. 1997) (reversing jury verdict

of such cases and efforts to remediate pay differentials indicates that courts are reluctant to intervene in such decisions when it comes to colleges and universities.[20]

The statistics clearly indicate that women in academia still earn less than their male counterparts at similar ranks.[21] Given the uniquely fuzzy metrics by which academic salaries are set,[22] the inability of many women in academia to find out what their colleagues' salaries are, and the harsh outcomes under the rigid application of the 180-day rule as interpreted by the Court in *Ledbetter*, it is clear that women in academia must be aware of the hazard of waiting too long to bring a claim against their employer for such disparities based on gender discrimination. This rigid interpretation is clearly detached from the realities in many workplaces. In particular, it is disconnected from the realities of the academic workplace and the tenure process when viewed in light of the pre-tenure perils that await any candidate who complains about anything, let alone gender bias in rank and pay.[23]

Lilly Ledbetter was a factory supervisor who worked at a Goodyear plant in

---

in favor of plaintiff professor on the grounds that she "did not prove a violation of Title VII by a preponderance of the evidence"); Covington v. S. Ill. Univ., 816 F.2d 317, 325 (7th Cir. 1987) (holding that the disparity between plaintiff female professor and male professor was "the result of a factor other than sex"); Soble v. Univ. of Md., 778 F.2d 164, 167 (4th Cir. 1985) (noting that a female professor who was paid less than male professors was not discriminated against because she did not "perform work substantially equal in skill, effort, and responsibility"); Spaulding v. Univ. of Wash., 740 F.2d 686, 709 (9th Cir. 1984) (affirming dismissal of Title VII and EPA claims because plaintiffs "failed to prove substantially equal work"); Craik v. Minn. State Univ. Bd., 731 F.2d 465 (8th Cir. 1984) (finding university had discriminated against women faculty in rank and salary); Sweeney v. Bd. of Trs., 569 F.2d 169 (1st Cir. 1978), *vacated on other grounds*, 439 U.S. 24 (1978) (upholding the district court's decision that sex discrimination did not affect plaintiff's pay); Keyes v. Lenoir Rhyne Coll., 552 F.2d 579, 580 (4th Cir. 1977) (affirming decision that college had based its faculty pay on "legitimate, reasonable and non-discriminatory factors").

20. Barbara A. Lee et al., *Implications of Comparable Worth for Academe*, 58 J. HIGHER EDUC. 609, 618–19 (1987). The authors write:

> Recent litigation results make it apparent that courts will not impose upon employers the obligation to implement equal pay for comparable work, nor will they find employers liable for discrimination for the use of market considerations in the setting of salaries. This, however, does not mean that an employer could not, as a matter of policy, adopt the comparable worth philosophy, in total or in part, in setting salary policy. Nor will the lack of legal compulsion necessarily reduce the pressure from employees, especially state employees in institutions of higher education, to have the issue addressed.

Id.

21. *See* WEST & CURTIS, *supra* note 2, at 11–12.

22. Lee et al., *supra* note 20, at 610.

23. *See* AAUW, TENURE DENIED, *supra* note 3, at 4. The report notes:

> Secrecy [in tenure decisions] is needed, some argue, to allow for candid review. The downside, however, is that candidates do not have access to key documents used to make the tenure decision and often learn about deliberations through rumor. Because candidates receive only partial or inaccurate information, they do not know if they have been treated fairly.

Id.

Gadsden, Alabama, for nineteen years.[24] Upon her retirement, her wages were lower than any of her male colleagues despite the fact that she received numerous raises along with an award for being "employee of the year."[25] Early in her career, a supervisor told her that "women didn't belong in the company" and he proceeded to give her lower pay increases, which resulted in a significant disparity in her pay over twenty years later.[26]

In March 1998, Lilly Ledbetter began the complaint process by filing a questionnaire with the Equal Employment Opportunity Commission (EEOC).[27] She filed a formal EEOC charge in July 1998.[28] Ledbetter retired from Goodyear in November 1998.[29] Upon her retirement, Ledbetter filed suit under Title VII of the Civil Rights Act of 1964, and the Federal District Court allowed the claim to proceed to trial.[30] The gravamen of her Title VII claim was that several supervisors had given her poor evaluations over the years due to her gender. Therefore, her pay had not increased as it would have without the discrimination and, upon her retirement, the net effect was that she was earning significantly less than her male colleagues.[31]

The jury in the District Court agreed and awarded Ledbetter back pay and damages.[32] On appeal, Goodyear raised its defense that the pay discrimination claim was time-barred with regard to all pay decisions made before September 26, 1997—180 days before Ledbetter filed the EEOC questionnaire.[33]

The Eleventh Circuit Court of Appeals reversed the lower court's decision.[34] It concluded that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the last pay decision during the EEOC charging period. The court found insufficient evidence that Goodyear acted with discriminatory intent in making the only two pay decisions left unaffected by the time-bar—denials of raises in 1997 and 1998.[35]

When the case reached the United States Supreme Court, the National Partnership for Women and Families was joined by the National Women's Law Center and others ("Amici") in filing an amicus brief.[36] In asking the Court to

---

24. Stephanie B. Goldberg, *Women's Employment Rights, Timing is Key in Wage Discrimination Claims*, PERSPECTIVES, Summer 2007, at 4–5.

25. *Id.* at 5.

26. *Id.*

27. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165 (2007).

28. *Id.*

29. *Id.*

30. *Id.* (granting summary judgment to Goodyear on Ledbetter's Equal Pay Act claim).

31. *Id.* at 2166.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Brief for National Partnership for Women & Families et al., as Amici Curiae Supporting Petitioner at 1, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074), *available at* http://www.nwlc.org/pdf/LedbetterAmicusBrief.pdf [hereinafter Amici Brief] ("*Amici curiae* are twenty-four organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans.").

reverse the Eleventh Circuit's ruling on appeal, Amici characterized what was at stake as follows:

> The Eleventh Circuit's ruling can only aggravate the longstanding gender wage gap. To this day, women earn less than men in virtually every occupation and job category, at every age and stage in the employment lifecycle, and for every hour worked. The wage gap expands over the course of a woman's working life, with serious economic consequences. Pay discrimination is responsible for a significant portion of this gap, and Title VII must be construed broadly and fairly in order to effectively combat it.
>
> The Eleventh Circuit's untethering of discriminatory pay decisions from the subsequent paychecks that implement them is contrary to the way in which typical employers set and review wages. By not permitting employees to challenge pay decisions that continue to affect their paychecks, the court below has created a safe harbor for pay discrimination to persist and grow over time.
>
> The ruling below improperly imposes overwhelming burdens on the victims of pay discrimination. Pay discrimination is rarely accompanied by overt bias, and employee salaries are notoriously cloaked in secrecy. Victims thus have difficulty perceiving pay discrimination and, in any event, are unlikely to promptly complain about it. These difficulties are compounded for employees subjected to discrimination in their starting salaries, when much pay discrimination begins.[37]

Nonetheless, the Supreme Court agreed with the Eleventh Circuit, holding that Ledbetter's claim was untimely, because the effects of past discrimination do not restart the clock for filing an EEOC charge.[38] Justice Alito wrote the majority opinion.[39] He was joined by Justices Scalia, Kennedy, Thomas, and Roberts.[40] Justice Ginsburg wrote the strong dissent, in which she was joined by Justices Stevens, Souter, and Breyer.[41] A comparison of Justice Alito's written analysis and its stark contrast with Justice Ginsburg's analysis of the same statute and precedents illustrates the concern many groups expressed when Justice Alito was elevated to the Court as an Associate Justice.[42] Both the majority opinion and the

37. *Id.* at 1–2.

38. *Ledbetter*, 127 S. Ct. at 2172.

39. *Id.* at 2165.

40. *Id.* at 2164.

41. *Id.* at 2178 (Ginsburg, J., dissenting).

42. *See, e.g.*, Amy Goldstein & Jo Becker, *Critics See Ammunition in Alito's Rights Record*, WASH. POST, Nov. 3, 2005, at A1; Stephen Labaton, *Court Nominee Has Paper Trail Businesses Like*, N.Y. TIMES, Nov. 5, 2005, at A1; Mary Shaw, Editorial, *Alito: Plenty of Reasons to Be Wary*, PHILA. DAILY NEWS, Nov. 11, 2005, at 17; Henry Weinstein, *Alito's Findings for Employers Cited as Evidence*, L.A. TIMES, Nov. 5, 2005, at A12; Press Release, Nat'l Org. for Women, Samuel Alito: Wrong Judge for U.S. Women (Jan. 8, 2006), *available at* http://www.now.org/press/01-06/01-08.html; Press Release, People for the Am. Way, Judge Alito: Closed Mind in Employment Discrimination Cases (Jan. 10, 2006), *available at* http://www.pfaw.org/pfaw/general/default.aspx?oid=20295.

dissent are analyzed below; their sharply contrasting views of the realities of pay discrimination and the workplace for women support the conclusion that the Court's jurisprudence turns largely on the political views of the justices and their actual life experience.

II. THE MAJORITY'S OPINION AND A VIGOROUS DISSENT

A. The Facts Through Different Lenses

As one legal scholar notes:

> Thinking about judicial opinions is a "rhetorical and literary activity," one that requires close attention to the use of language, the choice of words, and the form of arguments. Legal reasoning is important not only for the set of rules it produces, but also for the *meanings* that are articulated in and through its principles, metaphors, analogies and narratives.[43]

Ledbetter provides a powerful example of this insight. The different rhetorical styles of Justices Alito and Ginsburg reveal much about the importance of having women on the bench, the power of language, and the elusive nature of equal pay and its theoretical underpinnings.[44]

Justice Alito begins the majority opinion with a rather detached version of the facts surrounding Lily Ledbetter's claims. He writes:

> Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire and Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998, Ledbetter commenced this action, in which she asserted, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963

---

43. Yasmin Dawood, *Minority Representation, the Supreme Court, and the Politics of Democracy*, 28 STUD. L. POL. & SOC'Y 33, 37 (2003) (citing J.B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW, at x–xi (1985)).

44. *See, e.g.*, *Ledbetter*, 127 S. Ct. at 2175. The Court explained:

> While this fundamental misinterpretation of *Morgan* is alone sufficient to show that the dissent's approach must be rejected, it should also be noted that the dissent is coy as to whether it would apply the same rule to all pay discrimination claims or whether it would limit the rule to cases like Ledbetter's, in which multiple discriminatory pay decisions are alleged.

Id. As a simple but profound example, Justice Alito's striking characterization of the dissent as "coy" is particularly suprising, given his use of an odd phrase and one which has uniquely feminine connotations, given that the dissent was authored by the only woman on the nine-member Court.

(EPA).[45]

On the other hand, Justice Ginsburg characterized the facts as follows: "Lily Ledbetter was a supervisor at Goodyear Tire and Rubber's plant in Gadsden, Alabama, from 1979 until her retirement in 1998."[46] While somewhat similar to Justice Alito's opening sentence, Justice Ginsburg's is less distant, eschewing the formal terms of petitioner and respondent which tend to put both parties on a neutral plane. She continues:

> For most of those years, she worked as an area manager, a position largely occupied by men. Initially, Ledbetter's salary was in line with the salaries of men performing substantially similar work. Over time, however, her pay slipped in comparison to the pay of male area managers with equal or less seniority. By the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236.[47]

Note Justice Ginsburg's use of powerful language like "stark" to illustrate the profound disparity in pay involved in the case. In addition, she includes the actual dollar amounts in her dissent. This makes the disparity far more concrete and the reader is struck by the clear difference in actual paychecks.

B. What Constitutes a "Discriminatory Act" under Title VII and When Does It Occur?

Title VII provides relief for "unlawful employment practices."[48] One of the clear differences between Justices Alito and Ginsburg is how each chose to interpret and apply that essential element of the claim for relief. For example, Justice Alito writes:

> We have previously held that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when the discriminatory act occurs. We have explained that this rule applies to any "discrete act" of discrimination . . . .

---

45. *Id.* at 2165 (citing 29 U.S.C. § 206(d) (1963)).

46. *Id.* at 2178 (Ginsburg, J., dissenting).

47. *Id.*

48. *See* 42 U.S.C. § 2000e-2 (2000). Unlawful employment practices for employers include:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

> Because a pay-setting decision is a "discrete act," it follows that the period for filing an EEOC charge begins when the act occurs.[49]

Justice Ginsburg interprets the same statutory phrase "discriminatory act" quite differently. She notes that "Ledbetter's petition presents a question important to the sound application of Title VII: What activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation."[50] Justice Ginsburg lays out the two competing approaches as follows:

> One answer identifies the pay-setting decision, and that decision alone, as the unlawful practice. Under this view, each particular salary-setting decision is discrete from prior and subsequent decisions, and must be challenged within 180 days on pain of forfeiture. Another response counts both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices. Under this approach, each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice; prior decisions, outside the 180-day charge-filing period, are not themselves actionable, but they are relevant in determining the lawfulness of conduct within the period. The Court adopts the first view, but the second is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose.[51]

Justice Ginsburg goes on to defend the latter rule and to clearly outline why it is more faithful to both the Court's prior decisions and the decisions of a majority of the federal appellate courts below.[52] Her arguments are persuasive, grounded in her fundamental understanding of the actual nature of such decision-making and its impact on women. One might suggest that this deeper understanding arises from her life experience as a working woman.[53]

C. Is Each Pay Check a New Discriminatory Act?: Interpreting *Bazemore*

The Justices continue to disagree about the implications of prior precedent as well. For example, Justice Alito reads the Court's decision in *Bazemore v. Friday*,[54] a case decided in 1986, as having a significantly different meaning than does Justice Ginsburg. Justice Alito notes that Ledbetter argues that *Bazemore* requires different treatment of her claim than those claims addressed in prior Court decisions in *Evans*,[55] *Ricks*,[56] *Lorance*,[57] and *Morgan*,[58] because Ledbetter's claim

---

49. *Ledbetter*, 127 S. Ct. at 2165 (majority opinion).

50. *Id.* at 2179 (Ginsburg, J., dissenting).

51. *Id.* (internal citation omitted).

52. *Id.* at 2179–88.

53. *See, e.g.*, Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 160–62 (detailing Justice Ginsburg's pre-judicial career).

54. 478 U.S. 385 (1986) (per curiam).

55. United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

56. Del. State Coll. v. Ricks, 449 U.S. 250 (1980).

57. Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989).

relates to pay.[59] In *Bazemore*, the Court noted that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[60] Justice Alito describes Ledbetter's position as the Court adopting a "'paycheck accrual rule' under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred."[61] Justice Alito criticizes this interpretation as being "unsound," noting that under Ledbetter's reading of *Bazemore*, the case would have "dispensed with the need to prove actual discriminatory intent in pay cases and, without giving any hint that it was doing so, repudiated the very different approach taken previously in *Evans* and *Ricks*."[62]

Justice Alito then lays out the facts of *Bazemore,* writing:

> [It] concerned a disparate-treatment pay claim brought against the North Carolina Agricultural Extension Service (Service). Service employees were originally segregated into a "white branch" and "a 'Negro branch'" with the latter receiving less pay, but in 1965 the two branches were merged. After Title VII was extended to public employees in 1972, black employees brought suit claiming that pay disparities attributable to the old dual pay scale persisted. The Court of Appeals rejected this claim, which it interpreted to be that the "discriminatory difference in salaries should have been affirmatively eliminated."[63]

The *Bazemore* Court reversed, with all members joining Justice Brennan's separate opinion that the Extension Service discriminating with respect to salaries prior to the application of Title VII to public employees "does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII."[64] Justice Alito interprets this as being "[f]ar from . . . the approach that Ledbetter advances," but instead as consistent with prior precedents in ruling that "when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination when it issues a check to one of these disfavored employees" for as long as the employer continues to use that pay structure.[65] Justice Alito focuses on Brennan's invocation of *Evans* in looking at "whether 'any *present violation* existed.'"[66]

Justice Alito concludes that *Bazemore* stands for the proposition that an

---

58. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).
59. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2172 (2007).
60. Bazemore v. Friday, 478 U.S. 385, 395 (1986).
61. *Ledbetter*, 127 S. Ct. at 2172.
62. *Id.*
63. *Id.* (citing *Bazemore*, 478 U.S. at 395).
64. *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring).
65. *Ledbetter*, 127 S. Ct. at 2173.
66. *Id.* (quoting *Bazemore*, 478 U.S. at 396–97 (Brennan, J., concurring)).

employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.[67] "But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.'"[68] Thus, Justice Alito sees a vast difference between an overall pay scheme based on gender discrimination and a case in which—as he acknowledges—Goodyear chose to discriminate against Ledbetter individually based on her gender.[69] He uses interesting language when describing his view: "[A]ll Ledbetter has alleged is that Goodyear's agents discriminated against her individually in the past and that this discrimination reduced the amount of later paychecks."[70] Justice Alito concludes that Ledbetter thus "cannot maintain a suit based on [such] past discrimination."[71] The use of the phrase, "all Ledbetter has alleged" conveys a clear implication of the insignificance of the individual gender bias of which she was a victim. At the least, it diminishes the importance of such bias.

In her dissent, Justice Ginsburg treats that individual discrimination with much more gravitas, thus conferring upon it much greater significance:

> [Ledbetter] charged insidious discrimination building up slowly but steadily. Initially in line with the salaries of men performing substantially the same work, Ledbetter' salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments. Over time, she alleged and proved, the repetition of pay decisions undervaluing her work gave rise to the current discrimination of which she complained. Though component acts fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm.[72]

She cites *Goodwin*,[73] a Tenth Circuit case, in asserting that *Bazemore* stands for the proposition that there is "'a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation . . . . Each . . . payment constitutes a fresh violation of Title VII.'"[74]

D. Should Pay Cases Be Treated Differently?: Interpreting *Morgan*

Justice Alito argues that *Morgan* distinguished between "discrete" acts of discrimination and a hostile work environment.[75] A discrete act is an act that

---

67. *Id.*
68. *Id.* at 2174 (quoting Lorance v. AT&T Techs., Inc., 490 U.S. 900, 911 (1989)).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 2181 (Ginsburg, J., dissenting) (citations omitted).
73. Goodwin v. Gen. Motors Corp., 275 F.3d 1005 (10th Cir. 2002).
74. *Ledbetter*, 127 S. Ct. at 2184 (Ginsburg, J., dissenting) (quoting *Goodwin*, 275 F.3d at 1009–10 (alteration in original)).
75. *Id.* at 2169 (majority opinion).

"itself 'constitutes a separate actionable 'unlawful employment practice'' and that is temporally distinct."[76] Justice Alito notes that the Court gave as examples "termination, failure to promote, denial of transfer, or refusal to hire."[77] These were distinguished from a hostile work environment which "typically comprises a succession of harassing acts, each of which 'may not be actionable on its own.'"[78] Such a hostile work environment does not occur on a particular day and thus it is not the hostile acts but rather the environment created thereby that is the gravamen of the claim.[79]

Justice Alito notes that the dissent argues that pay claims are different from such discrete acts and much more like a hostile work environment claim because both are "'based on the cumulative effect of individual acts.'"[80] Justice Alito argues that this analogy "overlooks the critical conceptual distinction" between the two and that it is a "fundamental misinterpretation of *Morgan*."[81]

Such a conceptual distinction does not seem significant in the face of the realities of workplace pay discrimination—why is a supervisor's continuing choice to pay Ledbetter less each time not a series of cumulative acts? How can the plaintiff prove that each time she receives a paycheck, her supervisor remembered (or not) that the reason he is paying her less is because of her gender? Such conscious decisions likely did not happen in the *Bazemore* pay structure, but that initial discriminatory choice of overall pay structures is somehow distinct from an initial choice to make an individual discriminatory pay decision? And how much of this behavior in both cases is conscious?[82] What constitutes a "decision" in the first place?[83]

Justice Ginsburg rejects this spurious distinction, and, in doing so, makes a much more persuasive argument. With regard to the *Morgan* decision she notes:

> Subsequently, in *Morgan*, we set apart, for purposes of Title VII's timely filing requirement, unlawful employment actions of two kinds: "discrete acts" that are "easy to identify" as discriminatory, and acts that recur and are cumulative in impact . . . . [versus] "claims . . . based on the cumulative effect of individual acts." The *Morgan* decision placed hostile work environment in that category. . . . The persistence of the discriminatory conduct both indicates the management should have known of its existence and produces a cognizable harm. . . .

---

76. *Id.* at 2175 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) (internal quotations omitted)).

77. *Id.*

78. *Id.* (quoting *Morgan*, 536 U.S. at 115–16).

79. *Id.*

80. *Id.* (quoting the dissenting opinion, at 2180).

81. *Id.*

82. *See* Virginia Valian, *The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037, 1045 (1999) ("The main answer to the question of why there are not more women at the top is that our gender schemas skew our perceptions and evaluations of men and women, causing us to overrate men and underrate women."); s*ee also* Virginia Valian, *Beyond Gender Schemas: Improving the Advancement of Women in Academia*, 20 HYPATIA 198 (2005).

83. *See Ledbetter*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting) (noting that Title VII requires intentional behavior).

> Pay disparities, of the kind Ledbetter experienced, have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination. Ledbetter's claim, resembling Morgan's, rested not on one particular paycheck, but on "the cumulative effect of individual acts."[84]

E. EEOC Deference?

Justices Alito and Ginsburg also have remarkably different views of how much deference to give a governmental agency in answering all these questions. Justice Alito notes that the interpretation by the EEOC, which would treat the 180-day period running anew with each paycheck, is found in its *Compliance Manual*.[85] The Court, he argues, has refused to extend deference to the *Compliance Manual* and to EEOC's adjudicatory positions.[86] Much like Justice Alito suggests the dissent misunderstands *Bazemore*, he accuses the EEOC of "misreading" the *Bazemore* decision.[87]

Justice Ginsburg, on the other hand, makes a powerful argument in favor of deference to the very agency charged with implementing Title VII in such cases. Justice Ginsburg explicitly describes the workplace realities that the EEOC's interpretation better reflects, i.e., the significant difficulty of discovering salary information.[88] She concludes, "The Court dismisses the EEOC's considerable 'experience and informed judgment' as unworthy of any deference in this case. But the EEOC's interpretations mirror workplace realities and merit at least respectful attention."[89]

F. Justice Ginsburg's Clarion Call

A number of commentators have been struck by the power of Justice Ginsburg's dissents since Justices Roberts and Alito have ascended to the bench and Justice O'Connor has retired. For example, Linda Greenhouse wrote a column immediately after the decision in *Ledbetter*, noting that "[w]hatever else may be said about the Supreme Court's current term . . . it will be remembered as the time

---

84. *Id.* at 2180–81 (citations omitted).

85. *Id.* at 2177 n.11 (majority opinion).

86. *Id.*

87. *Id.* Justice Alito explains his refusal to apply *Chevron* deference in a footnote of his opinion. *Id.* He points out that the EEOC decision is based on the agency's interpretation of a prior Supreme Court case, *Bazemore*, rather than a *Chevron*-type interpretation of an ambiguous statute where the EEOC has expertise greater than the Court's. *Id.* Such an agency interpretation has "no special claim to deference . . . ." *Id.* Justice Alito also states that there is no "reasonable ambiguity in the statute itself," offering an argument in the alternative for the Court's failure to defer to the EEOC. *Id.*

88. *Id.* at 2178–79 (Ginsburg, J., dissenting).

89. *Id.* at 2185 n.6 (quoting Firefighters v. Cleveland, 478 U.S. 501 (1986)) (internal citation omitted); *see also* Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993) ("The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to [the Department of Education] the task of prescribing standards for athletic programs under Title IX.").

when Justice Ruth Bader Ginsburg found her voice, and used it."[90]

Greenhouse notes that the oral dissent "is an act of theater" that is used to communicate that "the majority is not only mistaken, but profoundly wrong."[91] It is a rarely used device that Justice Ginsburg has used sparingly and has never used twice in one term.[92] In fact, Greenhouse and other scholars suggest that Justice Ginsburg is using this rhetorical device to assert that the majority's opinions in both *Gonzalez v. Carhart*,[93] the so-called partial-birth abortion case, and in *Ledbetter*, are long on politics and short on legal analysis and precedent.[94] Justice Ginsburg is becoming increasingly frustrated, according to these commentators, about the unwillingness of the new justices to be persuaded on those issues of great importance to her. For example, in the past, Justice Ginsburg persuaded Chief Justice Rehnquist, a noted conservative, to vote with her in the decision that struck down the Virginia Military Institute's men-only admissions policy in 1996.[95] Justices Alito and Roberts are proving less open to compromise and conciliation.

Justice Ginsburg concludes her dissent in *Ledbetter* with an explicit call to Congress to correct the majority's ruling: "This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose. Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[96] And Congress, as discussed below, has answered that call.[97]

G. A Discovery Rule?

An initial reaction to the *Ledbetter* majority opinion is that, at the very least, it seems unfair to begin running the 180-day period before the plaintiff has or should have discovered the pay disparity. Given the difficult nature of finding out pay scales in most workplaces, it would seem that a more appropriate rule would begin running the clock from the date the plaintiff discovered, or should have discovered with some reasonable diligence, the gender-based pay disparity.[98] Justice Alito

---

90. Linda Greenhouse, *Supreme Court Memo: Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1.

91. *Id.*

92. *Id.*; *see also* Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1 (noting that reading from the bench "is a usually rare practice that [Justice Ginsburg] has now employed twice in the past six weeks to criticize the majority").

93. 127 S. Ct. 1610 (2007).

94. Greenhouse, *supra* note 90, at A1 (quoting legal commentators' opinions of Ginsburg).

95. United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring in the judgment).

96. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2188 (Ginsburg, J., dissenting) (internal citations omitted).

97. *See infra* notes 148–60 and accompanying text.

98. *See* Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 683–84 (2007). The author writes:

> [T]he Supreme Court has been content to leave the existence of a discovery rule in Title VII cases an open question, an indication that it views *justifiable* delays in perceiving discrimination to be the exception, rather than the norm. . . . More

refused to consider the issue of whether the 180-day rule began to run on the date the pay disparity started or the date of the plaintiffs' discovery of the disparity.[99] He reasoned that the issue was not before the Court in *Ledbetter*, since there was no suggestion that Lily Ledbetter had not discovered the pay inequity until just before she filed her EEOC complaint.[100] Justice Alito notes that "[w]e have previously declined to address whether Title VII suits are amenable to a discovery rule. Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue."[101]

As the Amici in *Ledbetter* argue, however:

> A discovery rule, although appropriate for Title VII claims generally, would do little to alleviate these concerns and would turn virtually every pay discrimination case into a messy factual dispute over what the plaintiff knew and when. Employees governed by the lower court's ruling will face undue pressure to file first and ask questions later in order to preserve their Title VII rights.
>
> At the same time, the decision below undermines the incentives for employers to prevent and correct pay discrimination. Because this ruling grandfathers in pre-existing pay discrimination, it creates little incentive for employers to find and correct pay disparities between male and female workers. Instead, it encourages employers to conduct periodic *pro forma* salary reviews so as to insulate prior discriminatory decisions from challenge.[102]

Thus, the retention of a bright-line rule by which the Title VII claim may be brought within 180 days of each new paycheck would best ensure that female faculty will be able to preserve their ability to enforce their right to equal pay under Title VII.

> importantly, perhaps, even those lower courts that have adopted a discovery rule in Title VII cases have failed to grapple with the complexity of perceiving discrimination. These courts have applied the discovery rule to set the moment in time when the plaintiff should have known of the alleged discrimination at the point when the plaintiff first learned of the adverse job decision (or in the case of pay, that a male comparator earns more), rather than the moment when the plaintiff actually perceived the discrimination.

Id. (footnote omitted).

99. *Ledbetter*, 127 S. Ct. at 2177.

100. *Id.*

101. *Id.* at 2177 n.10.

102. *See* Amici Brief, *supra* note 36, at 2.

III. O'CONNOR'S GHOST

Justice O'Connor resigned from the Court in January 2006.[103] She and Justice Ginsburg had "formed a deep emotional bond, although they differed on a variety of issues."[104] Her replacement on the Court was Justice Alito.[105] Would O'Connor's presence on the Court have made a difference in the outcome of the *Ledbetter* case?[106]

The National Women's Law Center (NWLC) predicted that then-Judge Alito would have a negative impact on women's rights. The NWLC sounded this alarm as soon as would-be Justice Alito was nominated:

> For women in this country, the stakes could not be higher, nor the implications more profound. In recent years, the Supreme Court has decided cases affecting women's legal rights by narrow margins over vigorous dissents, often by votes of 5 to 4. Justice Sandra Day O'Connor, the first woman on the Supreme Court, has often cast the decisive vote in these cases. In a number of key cases, Justice O'Connor has parted company with the Court's most doctrinaire, conservative Justices, and if she is replaced by a Justice in their mold, critical women's rights are likely to be seriously weakened if not lost altogether. Judge Alito's record makes clear that his approach to the law is dramatically different from that of Justice O'Connor.[107]

The NWLC went on to describe Justice Alito's rulings on prior cases involving gender discrimination in the employment context.[108] Like *Ledbetter*, the focus of many of these cases was on the application of Title VII. According to the NWLC, Justice Alito's decisions effectively put more of a burden on plaintiffs in proving that discrimination occurred.[109] Among the cases he cited, he included his dissent in *Sheridan v. E.I. DuPont de Nemours & Co.*, a sex discrimination case in which *all ten of the other members of the Third Circuit* joined in reversing the trial court's rejection of a jury verdict for the plaintiff.[110] The NWLC argues that then-Judge Alito ignored applicable legal standards to urge overturning the jury verdict,

---

103. Linda Greenhouse, *With O'Connor Retirement and a New Chief Justice Comes an Awareness of Change*, N.Y. TIMES, Jan. 28, 2006, at A10.

104. Greenhouse, *supra* note 90, at A1.

105. Joan Biskupic, *Contrast Obvious Between O'Connor, Would-be Successor*, USA TODAY, Nov. 2, 2005, at 5A.

106. *See* Ellis Cose, *The Supremes' Technical Failure*, NEWSWEEK, June 11, 2007, at 34 (noting that "O'Connor did not seem to have a problem with a strict interpretation of Title VII's deadlines" but also that "she clearly had a world view that accepted the reality of inequality—and the need to do something about it.").

107. NAT'L WOMEN'S LAW CTR., THE NOMINATION OF SAMUEL ALITO: A WATERSHED MOMENT FOR WOMEN 1 (2005), [hereinafter NWLC, NOMINATION OF SAMUEL ALITO].

108. *Id.* at 28–31 (discussing Alito's employment discrimination opinions).

109. *Id.* at 30 ("Several other opinions authored by Judge Alito betray a disturbing tendency to . . . heighten the evidentiary burden on an individual trying to prove discrimination.").

110. *Id.* at 28–29 (discussing *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996)).

inappropriately credited the employer's explanations for its actions, and, standing in for the jury, downplayed the plaintiff's evidence.[111]

The NWLC highlighted "an independent review of all 311 of Judge Alito's published Third Circuit opinions, [in which] Knight Ridder concluded that 'Alito has been particularly rigid in employment discrimination cases.'"[112] The NWLC concluded:

> Judge Alito has found ways to make it harder for a plaintiff to prevail, or even to allow a jury to decide on his or her claims. These opinions resolve issues of fact that should be left to the jury; inappropriately discredit the plaintiff's evidence of discrimination and construe the evidence in a light favorable to the employer; fail to examine the totality of the plaintiff's evidence; and even bar the plaintiff from presenting relevant evidence at all out of concern that it would create "unfair prejudice" against the employer. In one case in which Judge Alito dissented . . . , the majority went so far as to say that had Judge Alito's position prevailed, "Title VII . . . would be eviscerated."[113]

What effect does Justice Alito's approach to employment discrimination cases, which, according to the NWLC analysis cited above, makes it more difficult for "plaintiffs to win, or even to get to a jury,"[114] have on women in academia?

---

111. NAT'L WOMEN'S LAW CTR., FACT SHEET: THE ALITO NOMINATION PLACES WOMEN'S RIGHTS AT RISK 2 (2005), *available at* http://www.nwlc.org/pdf/12-1505_AlitoAndWomens IssuesFactsheet.pdf [hereinafter NWLC, FACT SHEET]; *see also* NWLC, NOMINATION OF SAMUEL ALITO, *supra* note 107, at 29–30. The report notes:

> Similarly, in *Bray v. Marriott Hotels*, Judge Alito dissented from a panel decision that allowed Beryl Bray, who alleged race discrimination in her employer's failure to promote her, to present her case to a jury. Again disregarding the legal requirement that the court give Bray "the benefit of all reasonable inferences" in deciding whether a jury should hear her case, Judge Alito ignored numerous inconsistencies in the employer's evidence of the reason for its actions; dismissively characterized the employer's clearly false statement that Bray was not qualified for the job as merely "loose language" insufficient to raise even a question of pretext; and decided for himself that the employer honestly believed that Bray was less qualified than the white applicant. . . . The majority went so far as to declare that "Title VII would be eviscerated if our analysis were to halt where [Judge Alito's] dissent suggests"—i.e., at the employer's assertion that it honestly believed it had selected the best candidate for the job.

Id. (discussing Bray v. Marriott Hotels, 110 F.3d 986, 1000–02 (3d Cir. 1997) (internal citations omitted)).

112. NWLC, NOMINATION OF SAMUEL ALITO, *supra* note 107, at 28.

113. *Id.* (quoting *Bray*, 110 F.3d at 993).

114. *Id.* at 32.

IV. ACADEMIC SALARY SETTING: AN ART NOT A SCIENCE

Many female faculty in academia face large, if not insurmountable, obstacles when it comes to discovering salary information. Many private colleges and universities do not make salary information available.[115] Of those that do, including public colleges and universities, it is often difficult to find the information.[116] There may be a stigma or cultural pushback against those who do find the information and discuss it with their department chair or dean. Often, the salary information that is published does not include "soft money" or stipends that may also flow to certain faculty members for additional work as administrators, directors of programs, or other similar functions.

Compounding the accessibility issue, the vague benchmarks used to set salaries in academia in terms of what constitutes merit, coupled with the decentralized nature of this process, all contribute to the differences in pay between male and female faculty of the same rank.[117] The criteria for tenure at most institutions include teaching, scholarship, and service, with teaching and service being dominated by women, and research being dominated by men.[118] Research is by far the most salient factor in tenure, promotion and pay decisions.[119] Even when

---

115. *See, e.g.*, Aliya Sternstein, *Schools Weigh Merits of Disclosing Pay Online*, NAT'L J. TECH. DAILY, Mar. 16, 2007, http://nationaljournal.com/pubs/techdaily/pmedition/tp070316.htm#5 (discussing the public college and university's problem of "balancing the public's right to know and the university's need to retain its own faculty").

116. *Id.*

117. Lee et al., *supra* note 20, at 610–11. The authors write:

> That colleges and universities have been the target of comparable worth litigation is not surprising when one considers the context in which faculty salary decisions occur. At four-year colleges and universities in particular, hiring, promotion, and salary decisions are often decentralized to the department or school level, and unless the institution adheres to a published salary schedule tied to rank or years of service, salaries may vary widely between departments, and among faculty within the same department. Criteria for making salary decisions may be vague or unwritten, and faculty who are visible and mobile have an advantage in negotiating starting salaries or raises. Salary compression may become a problem as departments must meet demands for starting salaries which are not far below the salaries of mid-career professors.

Id. See also THE COLLABORATIVE ON ACAD. CAREERS IN HIGHER EDUC. (COACHE), TENURE TRACK FACULTY JOB SATISFACTION SURVEY: HIGHLIGHTS REPORT (2007), *available at* http://gseacademic.harvard.edu/~coache//downloads/COACHE_ReportHighlights_20070801.pdf [hereinafter COACHE, HIGHLIGHTS] (describing the statistical evidence showing that female tenure-track faculty find the tenure process more unclear than male faculty).

118. *See generally* Shelley M. Park, *Research, Teaching, and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 51 (1996).

> In treating teaching and service as undifferentiated activities, the argument for prioritizing research utilizes a technique commonly used to devalue women's work and, thus, rationalize the unpaid or underpaid status of that work. It assumes that there is no difference between good and bad teaching (and service) or, that if there is, this difference is unaccounted for by levels of skill, because these are activities that are *instinctual* or *natural* for those who perform them.

Id.

119. *See generally id.* at 50.

teaching is given some weight in assessing compensation, the use of student evaluations has serious flaws, as noted in a wide body of literature on gender bias in student evaluations.[120] Utilizing such evaluations can have negative effects on compensation in direct and indirect ways, including time taken from scholarship by the need for women to work harder than men to receive comparable student evaluations.[121]

There is a psychological reluctance to accept the fact that one is being treated in a different and less favorable way than one's peers. And there are practical difficulties in developing such an awareness as well. For example, scholars have found that that:

> [A]ggregate data is extremely important in enabling people to recognize individual instances of discrimination. Without data showing across-the-board disparities, people are more likely to hypothesize nondiscriminatory reasons for individual disparities and less likely to perceive discrimination. With respect to pay disparities, for example, slight variations in any of the criteria used for setting pay are likely to be perceived as excusing gender gaps in pay, while data documenting organization-wide disparities greatly increases the likelihood of perceiving pay discrimination.

> Why should research be the primary criterion for tenure and promotion? One line of argument, which focuses on research as an indicator of faculty merit, goes something like this: "Research separates the men from the boys (or the women from the girls). Teaching and service won't serve this function because everyone teaches and does committee work." A variation on this theme argues that "[t]eaching and service won't serve this function because there is no satisfactory way of evaluating teaching and service." According to the first line of reasoning, research performance is the only factor that *differentiates* faculty presumed to be equal in other respects. According to the second line of reasoning, research performance is the only factor by which faculty members can be *objectively* evaluated, even if they are unequal in other respects.

Id.

120. *See* Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, 53 SEX ROLES 779 (2005).

121. *Id.* at 791. The authors write:

> Note that students' memories of their worst-ever teachers appear to be more emotionally charged than their memories of their best-ever teachers and that the most hostile words are saved for women teachers. The worst women teachers are sometimes explicitly indicted for being bad women through the use of words like bitch and witch. Students may not like their arrogant, boring and disengaged men teachers, but they may hate their mean, unfair, rigid, cold, and "psychotic" women teachers. These findings are substantiated by the observations of other feminist researchers who have reported incidents of student hostility toward women instructors who are perceived as not properly enacting their gender role or who present material that challenges gender inequality. . . . That is, women teachers may be called on to do more of what sociologists call emotional labor, labor that is frequently invisible and uncounted. Thus, if teachers are being held accountable to, and are attempting to meet, gendered standards, then women and men may be putting out very different levels of effort to achieve comparable results. If it takes more for a woman to get a 5 and she nearly kills herself to do it, that difference in effort will not be measurable on student rating scales.

Id. (internal citations omitted).

> Not only the information itself but also how it is presented and formatted strongly influences peoples' ability to perceive discrimination. Presenting information on disparities in an aggregate, across-the-board format makes it much more likely that people will perceive discrimination than showing them the same information in case-by-case format. Apparently, the case-by-case formatting leads people to hypothesize neutral, nondiscriminatory justifications, while the all-at-once, aggregate format make such speculation less likely.[122]

Such aggregate data is rarely available in the workplace, and the culture surrounding discussions of pay, especially in academia, suggests that systematic studies of pay disparities among individuals within departments and among departments are not likely to become widespread in the near future. Without such a systematic study, women in academia are likely to remain the victim of sex discrimination in pay—without even knowing it.[123]

---

122. Debra L. Brake & Joanna Grossman, *The Failure of Title VII as a Rights-Claiming System* 25 (U. Pittsburgh School of Law, Working Paper No. 67, 2007), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1068&context=pittlwps; *see also* Faye Crosby, *The Denial of Personal Discrimination*, 27 AM. BEHAV. SCI. 371, 377–78 (1984); Faye Crosby et al., *Cognitive Biases in the Perception of Discrimination: The Importance of Format*, 14 SEX ROLES 637, 644–46 (1986); Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 293, 332 (1994) ("It is easier to see discrimination on the collective level than on an individual level."); Brenda Major et al., *Prejudice and Self-Esteem: A Transactional Model*, 14 EUR. REV. SOC. PSYCHOL. 77, 81 (2003).

123. This is especially true in traditionally male academic departments like science, medicine, and engineering. *See, e.g.*, Christine Laine & Barbara J. Turner, Editorial, *Unequal Pay for Equal Work: The Gender Gap in Academic Medicine*, 141 ANNALS OF INTERNAL MED. 238 (2004); Andrew Lawler, *Tenured Women Battle to Make It Less Lonely at the Top*, 286 SCI. 1272 (1999); Lee et al., *supra* note 20, at 610.

> Institutions of higher education have not escaped the debate about comparable worth. Nationally, women faculty's earnings were approximately 81 percent of the earnings of male faculty in 1983; when adjusted for rank, the disparity ranged from 85 percent for full professors to 93 percent for assistant professors. Reasons offered to explain the segregation of women faculty into lower-paying disciplines such as nursing, education, and the arts and humanities echo those attributed to occupational segregation in general: socialization, choice, and erratic labor force behavior resulting from homemaking and child-rearing obligations versus discrimination. There is a similar lack of consensus about the remedy for the salary gap in academe: advocates of academic comparable worth reject the notion that the market should set academic salaries, whereas opponents argue that ignoring the market will decimate the ranks of highly paid disciplines or lower the quality of education.

Id. But see MASS. INST. OF TECH., A STUDY ON THE STATUS OF WOMEN FACULTY IN SCIENCE AT MIT (1999), *available at* http://web.mit.edu/fnl/women/women.pdf (detailing a model that could increase the participation of women and minorities on faculties).

V. ALTERNATIVES TO TITLE VII

Given the unwillingness of judges and courts to venture into the realm of salary setting for academics generally, one is forced to look to alternative remedies.[124] Even if courts were more hospitable, the emotional and financial cost of pursuing legal remedies would militate in favor of institutional reform as a preferred avenue to eradicate pay inequities in academia.[125] For example, the authors of *Tenure Denied*, a major study of sex discrimination cases in academia, note that both the personal and professional costs of bringing a Title VII action can be extraordinary.[126] There are of course, the litigation fees, which can run into the hundreds of thousands of dollars.[127] In addition, plaintiffs suffer untold emotional costs including depression and suicidal thoughts in some cases.[128] They lose marriages and time with their spouses and children.[129] Their relationships with those in their departments suffer permanent damage and many plaintiffs are struck by how little support they received from colleagues.[130] Such emotional abandonment by other women in particular seems to take a large toll.[131]

In much of academia, salaries are now set in large part based on "market forces."[132] There is significant research that documents how this approach disadvantages women.[133] In a world where visiting at another academic institution has become almost a requirement for a lateral offer to join that institution, it is clear women cannot compete.[134] They are far less likely to have husbands who are mobile and willing to relocate for a year to join them on a visit.[135] Academic merit, too, has been based on norms that are historically male. Publishing has great weight in salary setting in academia, and there is substantial research

---

124. *See* Lee et al., *supra* note 20, at 618–19. The authors write:

> Recent litigation results make it apparent that courts will not impose upon employers the obligation to implement equal pay for comparable work, nor will they find employers liable for discrimination for the use of market considerations in the setting of salaries. This, however, does not mean that an employer could not, as a matter of policy, adopt the comparable worth philosophy, in total or in part, in setting salary policy. Nor will the lack of legal compulsion necessarily reduce the pressure from employees, especially state employees in institutions of higher education, to have the issue addressed.

Id.

125. AAUW, TENURE DENIED, *supra* note 3, at 63.

126. *Id.*

127. *Id.* at 65.

128. *Id.* at 71.

129. *Id.* at 70.

130. *Id.* at 68–69.

131. *Id.* at 69.

132. Scott Jaschik, *Real Pay Increases for Professors*, INSIDE HIGHER ED, Apr. 12, 2007, http://www.insidehighered.com/news/2007/04/12/salaries.

133. *See, e.g.*, Joan Williams, *What Stymies Women's Academic Careers? It's Personal*, CHRON. HIGHER EDUC. (WASH., D.C.), Dec. 15, 2000, at B10.

134. *Id.*

135. *Id.*

demonstrating that women publish less than men for a number of reasons, including more time with students, family obligations and other external limits on their time.[136] Finally, much salary setting in academia is based on perception of status, and such perception-based behavior is discretionary and subject to unconscious gender schemas and bias.[137] Women are rarely described as "brilliant" or standouts, and brilliance is the coin of the realm in academia.[138] Women self-promote less frequently and are promoted by their institutions on websites and in marketing brochures far less.[139] Society teaches women not to self-promote or negotiate for salary and this behavior leads to lower salaries in a milieu where perception is a central ingredient for raises and promotions.[140] In general, there is a norm among academics that to be concerned about monetary compensation is not in keeping with the intellectual life that eschews money for knowledge.[141] All of these factors create an environment where women are far

---

136. *See* Park, *supra* note 118, at 47. The author writes:

> Current working assumptions regarding (1) what constitutes good research, teaching, and service and (2) the relative importance of each of these endeavors reflect and perpetuate masculine values and practices, thus preventing the professional advancement of female faculty both individually and collectively. A gendered division of labor exists within (as outside) the contemporary academy wherein research is implicitly deemed 'men's work' and is explicitly valued, whereas teaching and service are characterized as 'women's work' and explicitly devalued.

Id. See also CHARMAINE YOEST, PARENTAL LEAVE IN ACADEMIA 2 (2004), *available at* http://faculty.virginia.edu/familyandtenure/institutional%20report.pdf (noting that even when an institution officially attempts to accommodate family obligations, "anecdotal responses provide some evidence that stigma is still a factor" to parental leave policy use).

137. *See* Linda A. Krefting, *Intertwined Discourses of Merit and Gender: Evidence from Academic Employment in the USA*, 10 GENDER, WORK & ORG. 260 (2003) (discussing "the gendered basis for academic merit"); *see also* U.S. GOV. ACCOUNTABILITY OFF., GENDER ISSUES: WOMEN'S PARTICIPATION IN THE SCIENCES HAS INCREASED, BUT AGENCIES NEED TO DO MORE TO ENSURE COMPLIANCE WITH TITLE IX 3–4 (2004), *available at* http://www.gao.gov/new.items/d04639.pdf. The GAO found:

> [T]he proportion of faculty in the sciences who are women has also increased since the early 1970s. However, female faculty members still lag behind their male counterparts in terms of salary and rank, and much of their gain in numbers has been in the life sciences, as opposed to mathematics and engineering. A variety of studies indicate that experience, work patterns, and education levels can largely explain differences in salaries and rank . . . . A few studies also suggest that discrimination may still affect women's choices and professional progress, assertions we also heard during many of our site visits to selected campuses.

Id.

138. *See, e.g.*, Valian, *Beyond Gender Schemas*, *supra* note 82 (describing study where writers of letters of recommendation for women used quantitatively fewer "stand-out adjectives" than in letters for men).

139. SHEILA WELLINGTON, BE YOUR OWN MENTOR, STRATEGIES FROM TOP WOMEN ON THE SECRETS OF SUCCESS 51 (2001).

140. BABCOCK & LASCHEVER, *supra* note 9.

141. *See* Piper Fogg, *Young Ph.D.s Say Collegiality Matters More Than Salary*, CHRON. HIGHER EDUC. (Wash, D.C.), Sept. 29, 2006, at A1; Scott Jaschik, *The Clarity Gap*, INSIDE HIGHER ED, Sept. 26, 2006, http://www.insidehighered.com/news/2006/09/26/coache (quoting Kenyon College President Georgia Newton: "If faculty were people who really cared primarily about money," she said, "they wouldn't be in this business.").

less likely to be properly compensated for their contributions to the institution and to have their value recognized.

Some have noted that "this fundamental imbalance in academic labor economics is precisely the sticking point for judges facing comparable worth arguments. They are highly reluctant to interfere in the market, other than to reinforce and enhance the free operation of competition."[142] Legal academia is one of the fields regularly used as an example of an academic discipline driven by competing market forces.[143] In fact, the maxim that all law professors could be making far more money if they returned to law practice is really true only of the very top candidates. By definition, there is a limited supply of such faculty candidates and fewer women in that pool, since the apex of credentialing is now a year spent as a United States Supreme Court clerk.[144] If one looks beyond these few top candidates, there is actually an excess supply of candidates very willing to work for a fraction of law firm associate pay.

As an alternative to Title VII and other statutory remedies, some scholars have outlined proposals for moving toward a model of salary setting in academia that reflects a theory of comparable worth:

> There are several ways in which comparable worth problems might be addressed, and these methods, for both legal and policy reasons, would be superior to Title VII lawsuits for resolving bona fide inequities. The most obvious route is the voluntary adjustment of salary, wage, benefit, and classification systems. This approach could be taken at the individual, job group, department or division, or institutional level. . . .

---

142. Lee et al., *supra* note 20, at 620.

143. *Id.*

> But the key point is that, even where job content may be measurably similar, as in the case of deans, salary differences are responsive to very substantial market factors acting to differentiate salary structures among fields. One would expect to find that a typical full professor in one field, such as law, would receive a salary at great variance with a typical professor in another, such as education, at the same university. These market driven differences might exist in spite of direct similarities in objective job content and in objective measures of job performance. The market factors are so powerful that deans in some fields—dentistry, law, and medicine—receive average salaries higher than the average salaries for university presidents. Arguably, presidents' jobs are more demanding than deans' jobs; and, arguably, presidents have superior qualifications and experience to those of deans. Yet to find a dean, one might have to accept market forces that de-couple salary from an objective analysis of job and qualifications. To some extent, these variations depend on the viability of external employment alternatives. Both law and engineering, for example, are cited as fields in which private or corporate practice at high competitive salaries may be hurting universities' ability to recruit faculty. In other fields, such as the humanities, there are fewer external opportunities for employment and therefore for market competition.

Id.

144. *See* David H. Kaye & Joseph L. Gastwirth, Where Have All the Women Gone? "Random Variation" in the Supreme Court Clerkship Lottery 1 (Nov. 10, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=944058 (describing the fifty-percent drop in the number of women clerks in 2006).

> The second means is to establish a policy on comparable worth. The policy could be framed to deal with the conceptual problem or with its constituent elements. It could also be substantive or procedural in its content. . . .
>
> A third means of dealing with a comparable worth problem is what might be analogized to the "consent decree" approach. Under a collective bargaining agreement or some other authoritative document of concord, the particulars of a settlement concerning comparable worth might be specified.[145]

In fact, women faculty as a group might do much better if faculty unions took hold throughout academia.[146] A lockstep compensation system, rather than one based on gendered definitions of merit, would likely inure to the benefit of the largest group of women faculty. A few women might suffer, but, in the aggregate, by limiting the discretion of administrators across the board and tying pay to objective criteria such as years out of graduate school, most women would do better. Gender disparities in pay would likely be more effectively minimized than a system in which individual negotiations can create large disparities in pay.

What is the likelihood that such collective action through unions might become more prevalent? Some have suggested that the strikes of student teaching assistants may offer some insight into this question:

> Although the Yale strike did not involve faculty salaries, the implications for unionized institutions of higher education are clear. Just under 25 percent of the public colleges and universities in the U.S. have faculty unions . . . and comparable worth could serve as an organizing issue for unions, particularly at public research and comprehensive institutions where salary differences among disciplines may be more visible (and more widely known) than at private liberal arts colleges. It is too early to gauge the potential for collective bargaining to advance the comparable worth doctrine for women faculty (or for comparable worth to promote the spread of faculty unionization), but policy makers should be aware of developments in the nonfaculty sector of academe.[147]

While such remedies offer future hope of resolving pay inequities, a more immediate response to the *Ledbetter* case is pending in Congress.

---

145. Lee et al., *supra* note 20, at 625–26.

146. *See* JUDITH WAGNER DECEW, UNIONIZATION IN THE ACADEMY: VISIONS AND REALITIES 85 (2003).

147. Lee et al., *supra* note 20, at 618.

VI. REMEDIAL LEGISLATION INTRODUCED

A number of women's groups reacted quickly to the *Ledbetter* decision.[148] They worked with Congress to introduce legislation that would adopt the EEOC's interpretation of the 180-day rule.

The National Women's Law Center explains why it supports such legislation:

> More than four decades after Congress outlawed wage discrimination based on sex, women continue to be paid, on average, only 77 cents for every dollar paid to men. This persistent wage gap can be addressed only if women are armed with the tools necessary to challenge sex discrimination against them. But the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.* severely limits workers' ability to vindicate their rights and distorts Congress' intent to eliminate sex and other forms of discrimination in the workplace. In July 2007 the House of Representatives passed legislation to reverse the Supreme Court decision; a parallel bill, the Fair Pay Restoration Act, is currently pending in the Senate. Restoring adequate protection against pay discrimination is critical to assuring that all workers have fair workplace opportunities. As a result, Congress should act expeditiously to enact the Fair Pay Restoration Act.[149]

The NWLC describes the impact of the Fair Pay Restoration Act.[150] The Act

---

148. Press Release, Nat'l Women's Law Ctr., Supreme Court Decision Severely Weakens Remedies for Workplace Discrimination (May 29, 2007). The Press Release stated:

> The U.S. Supreme Court's decision in Ledbetter v. Goodyear Tire and Rubber Co. severely weakens remedies for employees who have faced wage discrimination and represents a flawed interpretation of our nation's civil rights laws, the National Women's Law Center (NWLC) said today. "The Court's decision is a setback for women and a setback for civil rights," said Marcia Greenberger, Co-President of NWLC . . . . "Not only does the ruling ignore the reality of pay discrimination, it also cripples the law's intent to address it, and undermines the incentive for employers to prevent and correct it. Victims of pay discrimination who did not initially know of pay disparities or were afraid to file a complaint now will have no effective remedy against discrimination, even when it continues," Greenberger added. . . .
>
> "This 5-4 decision authored by Justice Alito shows just how important one vote can be," Greenberger said. "By a one-vote margin, this Court has put at risk women's ability to combat the wage discrimination to which they are far too frequently subject."

Id.

149. NWLC, *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*: THE SUPREME COURT LIMITATION ON PAY DISCRIMINATION CLAIMS AND THE LEGISLATIVE FIX 1 (2007), *available at* http://www.nwlc.org/pdf/Broad%20Ledbetter%20Fact%20Sheet-Letterhead.pdf [hereinafter NWLC, *LEDBETTER*].

150. *Id.* at 3 (describing S. 1843, 110th Cong. (2007)). The House of Representatives passed a nearly identical legislative remedy, The Lily Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. (2007), on July 31, 2007. *See also* Brake & Grossman, *supra* note 122, at 3 n.1 (noting "[s]oon after *Ledbetter* was decided, a bill to undo the ruling was introduced in Congress). The bill was passed by the House of Representatives, 110 Bill Tracking H.R. 2831, and is currently pending in the Senate. President Bush, however, issued a formal statement of opposition to the Act. Executive Office of the President, *Statement of Administration Policy: H.R. 2831—Lilly*

itself would supersede the Court's decision in *Ledbetter* and make it clear that Congress intended Title VII to be applied by Courts using the "paycheck accrual rule."[151] This approach ensures that a Title VII claim exists "whenever a discriminatory pay decision or practice is adopted, when a person becomes subject to the decision or practice, or when a person is affected by the decision or practice, including whenever s/he receives a discriminatory paycheck."[152]

As a policy matter, enactment of the Act will provide an incentive for employers to assess whether they engage in gender discrimination on a continuing basis. The NWLC argues that the legislation encourages "voluntary compliance" by employers because they will clearly be exposed to continuing liability each time they issue a paycheck to an employee.[153] The 180-day period for filing a complaint with the EEOC will be triggered with the issuance of each paycheck and the discrimination that occurred at the time the employer originally decided on what that employee should be paid.[154]

As noted above, the actual reality at most workplaces, including academia, is that many people are completely unaware of or unable to determine whether they are being paid less than their colleagues.[155] A major benefit of the paycheck accrual approach, according to the NWLC, is that it will allow a Title VII claim to survive until a woman either later discovers she is being paid less than her male counterparts or is in a position to make an official complaint, without fear of retaliation.[156] This is best illustrated in academia by the untenured female professor who rightly fears the very real impact an EEOC complaint may have on her tenure vote. And, given the closed nature of the tenure process, she might never be able to establish that her speaking up was the cause of a denial of tenure. In the small world of academia, such an official complaint may well cause her to be blackballed as well.

As the NWLC notes, these initial pay disparities are compounded over time by raises, pensions and similar benefits tied to pay level.[157] The adoption of the paycheck accrual rule will ensure that women preserve their right to challenge these decisions well into the future. In the case of academia, a female professor may well want to wait until she obtains tenure and her job is secure before filing an EEOC complaint. While such a complaint may still trigger retaliation on the part of the administration in terms of merit raises, research grants, and other compensatory decisions, at least she will have her job and will not face the issue of

---

Ledbetter Fair Pay Act of 2007 (July 27, 2007). Brake and Grossman were also Amici on the brief in support of Lily Ledbetter. *See* Amici Brief, *supra* note 36.

151. NWLC, *LEDBETTER*, *supra* note 149, at 3.

152. *Id.*

153. *Id.*

154. *Id.*

155. *See* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2182 n.3 (2007) (citing Bierman & Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004) (noting one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy)).

156. NWLC, *LEDBETTER*, *supra* note 149, at 3.

157. *Id.*

having to look within academia for another position, with the taint of having been labeled a "troublemaker" by filing an EEOC complaint. As many have noted, "[b]ecause academic disciplines are often tightly knit communities, rejected faculty can find it difficult to get a new job elsewhere in academia."[158]

The pending legislation gives plaintiffs time to carefully gather evidence of discrimination and to decide whether the significant costs of bringing a complaint are worth it. Plaintiffs bear the burden of proof under Title VII, and if they bring their claim too early, they risk having it summarily dismissed.[159] As the NWLC notes, "The Fair Pay Restoration Act simply restores prior law, which had been applied by nine of the twelve federal courts of appeals and the EEOC before the *Ledbetter* decision."[160] The two-year statute of limitations for back pay under Title VII should ensure that employers are not held liable for stale claims and passage of this remedial legislation in Congress simply clarifies what the practice has already been.

CONCLUSION

Justice Alito's impact on the outcome in *Ledbetter* is striking. Given the views of his earlier decisions, the result in *Ledbetter* may have been predicted. However, his reasoning and choice of language clearly demonstrate his failure to recognize the difficulty in perceiving that one is being paid less than one's colleagues simply because of one's gender. One is tempted to suggest to Justice Alito that he, as an Italian-American and a Catholic, may have been the victim of discrimination in his life because of his ethnic and religious background.[161] However, perhaps Justice Alito's profound belief in the egalitarian ideal of American society blinded him to such discrimination. Or perhaps such disparate treatment remained hidden behind secret pay decisions, and Justice Alito never suspected that his ethnicity or religion might have been used to peg him as less deserving of a comparable salary.

The realities of the academic workplace exacerbate this problem. The nature of the powerlessness of pre-tenure track faculty is legendary.[162] Even if one perceives discrimination, it is hard to prove. The cost of trying to seek a remedy may mean being denied tenure in a process that is opaque at best and that facilitates discriminatory decision-making at worst. Sadly, reporting a suspicion of discriminatory pay may cost the faculty member her job. A female faculty member in this position may find it impossible to continue in a profession that is reluctant to hire a "troublemaker" and in which there are few alternative paths of employment once denied tenure.

Thus, *Ledbetter* offers those in academia a number of lessons. First, the gender

158. AAUW, TENURE DENIED, *supra* note 3, at 3, 68.

159. NWLC, *LEDBETTER*, *supra* note 149, at 3.

160. *Id.*

161. There is no doubt that such ethnic stereotyping still exists. *See, e.g.*, Evan Thomas & Suzanne Smalley, *Growing Up Giuliani*, NEWSWEEK, Dec. 3, 2007, at 30 (including a subhead about then-presidential candidate Rudy Giuliani that includes a reference to "hoods" in his family).

162. *See generally* COACHE, HIGHLIGHTS, *supra* note 117.

of our judges matters. Women judges often view the same evidence through a different lens, reflecting their different life experiences.[163] For example, Justice Ginsburg gives great weight to the actual evidence presented to the *Ledbetter* jury below—and the way she recounts that evidence makes it clear that she sees it as tremendously damning to the defendant.[164] Justice Alito, on the other hand, uses dismissive language that illustrates his failure to understand the profound impact such discrimination had on Lilly Ledbetter and the centrality of her claim to her life.[165]

Under the reasoning of *Ledbetter*, women in academia must choose between speaking up immediately upon any suspicion that their male colleagues are receiving greater pay or risk losing the opportunity to ever do so. That puts such women faculty at risk of moving too early under Title VII, where they have the burden of proof. It puts younger, untenured women in the position of choosing between lower pay on the one hand, and tenure and job security on the other. Given the nature of the tenure process, they may never know if a colleague or administrator improperly held their complaint about pay disparity against them in the tenure decision.[166] Putting women faculty between Scylla and Charybdis is untenable in a world where we seek equality in our academic institutions and

---

163. *See, e.g.*, Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113 (2005); Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 131–32 (1993); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 208 (1983); Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on* Galloway v. General Motors Service Parts Operations *and* Rodgers v. Western-Southern Life Insurance Co., 46 DEPAUL L. REV. 741, 742 (1997); Gerald S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 153 (1986); John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971); Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 208 (1990); Lynn Hecht Schafran, *Not From Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953 (2005); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 433 (1994); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 178 (1990); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 48 J. POL. 596 (1985); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Susan Moloney Smith, Comment, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179 (1994); Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689, 690 (2004).

164. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2187 (2007) (Ginsburg, J., dissenting).

165. *See supra* note 70 and accompanying text.

166. *See* AAUW, TENURE DENIED, *supra* note 3, at 4. The AAUW found:

> Secrecy [in tenure decisions] is needed, some argue, to allow for candid review. The downside, however, is that candidates do not have access to key documents used to make the tenure decision and often learn about deliberations through rumor. Because, candidates receive only partial or inaccurate information, they do not know if they have been treated fairly.

Id.

where women have yet to come close to such equality.[167] Those of us who are full professors with tenure are in the best position to move our institutions toward gender equality, and we have an obligation to use our positions to do so.

167. *See id.* at 2; *see also* Marina Angel, *Women Lawyers of All Colors Steered to Contingent Positions in Law Schools and Law Firms*, 26 CHICANO-LATINA L. REV. 169 (2006); Park, *supra* note 118, at 46. "Despite myths concerning the efficacy of affirmative action programs, there are still relatively few women in academia. Moreover, the female professors one does encounter in the academy are apt to be found in lower-paying, less prestigious, and less secure positions." *Id.* (internal citations omitted).

MANAGING VIOLENT AND OTHER TROUBLING STUDENTS:

THE ROLE OF THREAT ASSESSMENT TEAMS ON CAMPUS

JOHN H. DUNKLE,* ZACHARY B. SILVERSTEIN,** & SCOTT L. WARNER***

* John Dunkle is Executive Director of the Counseling and Psychological Services at Northwestern University. He earned a B.A., *summa cum laude*, and a M.A. from the State University of New York College at Cortland in 1988 and 1990, respectively, and his Ph.D. from the State University of New York at Albany in 1995.

** Zach Silverstein is a partner with the Chicago law firm of Babbitt, Land, Silverstein, & Warner LLP. He earned a B.A., *magna cum laude*, from Yale College in 1990 and a J.D., *cum laude*, in 1999 from Northwestern University.

*** Scott Warner is also a partner with Babbitt, Land, Silverstein, & Warner LLP. He earned a B.A. in 1993 and a J.D, *cum laude*, in 1995 from the University of Michigan.

INTRODUCTION

Violence on college and university campuses has been a serious concern of administrators and others for some time,[1] and particularly in light of recent events at Virginia Tech and Northern Illinois University, it is considered one of the leading issues currently facing institutions of higher education.[2] While incidents of campus violence, specifically homicides, occur infrequently,[3] the impact they have on campus communities when they do occur can be quite profound. During the past few decades, there have been a number of high-profile violent incidents in middle, secondary, and post-secondary schools.[4] In many ways, however, the recent Virginia Tech tragedy could be considered the "9/11" of higher education. Much like the tragic terrorist attacks on September 11, 2001, the April 2007 events at Virginia Tech opened the eyes of many and motivated higher education like no other event has in recent memory.[5] Since that dreadful day, campus administrators and others across the country have increasingly focused on safety issues generally and, more specifically, on the management of disruptive students who may also have serious mental health concerns.[6] Obviously, not all individuals with mental

---

1. The American College Health Association (ACHA) made the issues of campus violence, bias, and violations of human rights a priority when it released a position statement regarding these issues in 1999. This position statement led to a thorough analysis by ACHA of campus violence trends, campus crime data, and prevention strategies. The results of this analysis were summarized in a white paper by the ACHA Campus Violence Committee. JOETTA CARR, AM. COLL. HEALTH ASS'N, CAMPUS VIOLENCE WHITE PAPER (2005), *available at* http://www.acha.org/info_resources/06_Campus_Violence.pdf.

2. The *Healthy Campus 2010* initiative targets the leading health concerns for college and university students that institutions likely will have to face during the next decade. Injury and violence rank seventh on the top ten list of concerns, after concerns about the level of physical activity among students, weight and obesity, tobacco use, substance abuse, responsible sexual behavior, and mental health. Am. Coll. Health Ass'n, Healthy Campus 2010: Making It Happen, http://www.acha.org/info_resources/hc2010.cfm (last visited Apr. 17, 2008).

3. From 1995 to 2002, crimes involving students between the ages of eighteen and twenty-four as victims decreased by over fifty percent. KATRINA BAUM & PATSY KLAUS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995–2002, at 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf. Overall, college and university students are less likely to be victims of violent crime compared to non-students of comparable ages (41 per 1000 versus 102 per 1000, respectively). *Id.* Furthermore, research has revealed that college and university students are more likely to be victimized by strangers at an off-campus location than by other students on campus. *Id.*

4. According to *U.S. News & World Report*, there have been thirty-three high school and middle school shootings and fifteen college and university shootings resulting in mass casualties since 1990. Interestingly, only eight comparable school shootings were recorded from 1966–1989, suggesting that this type of violence is on the rise. *Timeline of School Shootings*, U.S. NEWS & WORLD REPORT, Feb. 15, 2008, http://www.usnews.com/articles/news/national/2008/02/15/timeline-of-school-shootings.html.

5. *See* Kathleen A. Rinehart, *Higher Education's 9/11: Crisis Management, Lessons From The Tragedy At Virginia Tech*, UNIV. BUS., Dec. 2007, http://www.universitybusiness.com/viewarticle.aspx?articleid=967.

6. Data indicate that the average age of onset for major mental illness is during the traditional college age years (eighteen to twenty-four years old). *See generally* Phillip W. Long, Internet Mental Health, http://www.mentalhealth.com (last visited Apr. 17, 2008) (providing general background on mental illnesses). Therefore, by virtue of age alone, college and

health issues cause disruption or are violent.[7] Most students with mental health concerns successfully complete their studies without experiencing any significant behavioral problems or requiring any emergency intervention. But some do, in fact, engage in behavior that causes concern on campus.

A number of widely reported findings from government agencies and others analyzing the issues surrounding violence on college and university campuses have recommended that institutions create some sort of threat assessment team to monitor and respond to students exhibiting disturbing behavior.[8] These teams are designed to implement the systems approach described in a model formulated by Ursula Delworth and advocated by other commentators.[9] The report commissioned by the Governor of Virginia ("GOVERNOR'S REPORT") provides the most exhaustive review of the tragic events at Virginia Tech, including the timeline of key events; the local, state, and federal law enforcement responses; and the background and mental health history of Seung Hui Cho, who committed the atrocities at Virginia Tech.[10] The GOVERNOR'S REPORT included numerous

university students are at risk of developing mental illness while in school. A group of researchers at Kansas State University found some evidence that the severity of mental health issues has been increasing in that institution's student population over a thirteen-year period. Sherry A. Benton et al., *Changes in Counseling Center Client Problems Across 13 Years*, 34 PROF'L PSYCHOL.: RES. AND PRAC. 66, 66–72 (2003). This finding appears to be a trend across campuses and warrants further research. *See also* RICHARD T. KADISON & THERESA F. DIGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT (2004); ARTHUR SANDEEN & MARGARET J. BARR, CRITICAL ISSUES FOR STUDENT AFFAIRS: CHALLENGES AND OPPORTUNITIES 158–160 (2006).

7. Researchers have observed that certain types of severe psychiatric disorders—schizophrenia, major depression, and bipolar illness—that are accompanied by active psychotic symptoms may be associated with a higher likelihood of violent behavior. Richard A. Friedman, *Violence and Mental Illness: How Strong is the Link?*, 355 NEW ENG. J. MED. 2064, 2064–66 (2006). However, the vast majority of people with mental health concerns are not violent whatsoever. *Id.* Furthermore, not all individuals with severe psychiatric disorders become violent and not all individuals who are violent have mental health issues. *Id.*

8. *See, e.g.*, ROBERT FEIN ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS (2002), *available at* http://www.secretservice.gov/ntac/ssi_guide.pdf; FLA. GUBERNATORIAL TASK FORCE FOR UNIV. CAMPUS SAFETY, REPORT ON FINDINGS AND RECOMMENDATIONS 6–7 (2007); STATE OF ILLINOIS CAMPUS SECURITY TASK FORCE REPORT TO THE GOVERNOR (2008), *available at* http://www.ibhe.org/CampusSafety/materials/CSTFReport.pdf; TASK FORCE ON SCH. AND CAMPUS SAFETY, NAT'L ASS'N OF ATT'YS GEN., REPORT AND RECOMMENDATIONS 3–4 (2007); UNIV. OF N. C. CAMPUS SAFETY TASK FORCE, REPORT OF THE CAMPUS SAFETY TASK FORCE PRESENTED TO ATTORNEY GENERAL ROY COOPER 7 (2008); VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH (2007), *available at* http://www.vtreviewpanel.org/report/index.html [hereinafter GOVERNOR'S REPORT]; WIS. GOVERNOR'S TASK FORCE ON CAMPUS SAFETY, INTERIM REPORT 15 (2007); *see also* M. Jablonski et al., In Search of Safer Communities: Emerging Practices for Student Affairs in Addressing Campus Violence (Feb. 15, 2008) (unpublished NASPA paper), http://www.naspa.org/files/InSearchofSaferCommunities.pdf (proposing the use of a threat assessment team as one component of a Crisis Management Model).

9. *See infra* Part I.

10. GOVERNOR'S REPORT, *supra* note 8. The Panel was charged, in part, with the following:

> The Panel's mission is to provide an independent, thorough, and objective incident review of this tragic event, including a review of educational laws, policies and

recommendations to help institutions learn from the events at Virginia Tech, including that institutions should have an inter-disciplinary threat assessment team on their campuses charged with detecting and monitoring students of concern and managing the flow of information regarding such students.[11] Such teams provide a centralized method for student conduct officers, mental health professionals, law enforcement, and other administrators to work together to detect, track, and intervene with students of concern with the ultimate goal of reducing, if not completely avoiding, violence and tragedy on campus. These teams have been called several different names, including but not limited to threat assessment teams, campus assessment teams, students-of-concern teams, and campus crisis teams, but they all have the same overriding goals mentioned above. Because most commentators, reports, articles, and other sources refer to these teams as "threat assessment teams," the authors will use that term in this article.

Since the recommendation regarding threat assessment teams appeared in the GOVERNOR'S REPORT, many institutions have been considering how to: (a) develop, run, and coordinate such teams on their campuses; (b) define the roles and responsibilities of the various team members; and (c) address the ethical and legal parameters that govern threat assessment teams. The purpose of this article is to provide institutions of higher education with practical suggestions on how to create and maintain threat assessment teams consistent with best practices and in accordance with applicable ethical and legal parameters. Part I describes a framework for establishing and operating a threat assessment team, including recommendations regarding which administrators to include on the team, the roles and responsibilities of the various team members, and the development of policies and procedures to govern the team's operations. While detecting and monitoring potentially violent students is an important role of threat assessment teams, these teams can also be used to monitor other students who may be troubled or troubling in other ways (e.g., suicidal students, students with substance abuse problems, and

---

> institutions, the public safety and health care procedures and responses, and the mental health delivery system. With respect to these areas of review, the Panel should focus on what went right, what went wrong, what practices should be considered best practices, and what practices are in need of improvement. This review should include examination of information contained in academic, health and court records and by information obtained through interviews with knowledgeable individuals. Once that factual narrative is in place and questions have been answered, the Panel should offer recommendations for improvements in light of those facts and circumstances.

Exec. Order 53, Office of the Governor, Commonwealth of Virginia (2007).

11. GOVERNOR'S REPORT, *supra* note 8, at 19. There are more than seventy recommendations detailed in the GOVERNOR'S REPORT. *Id. passim*. Recommendation II-3 states:

> Virginia Tech and other institutions of higher learning should have a threat assessment team that includes representatives from law enforcement, human resources, student and academic affairs, legal counsel, and mental health functions. The team should be empowered to take actions such as additional investigation, gathering background information, identification of additional dangerous warning signs, establishing a threat potential risk level (1 to 10) for a case, preparing a case for hearings (for instance, commitment hearings), and disseminating warning information.

Id. at 19.

students with eating disorders). Part II addresses the application of the disability laws to threat assessment teams with a particular focus on the practical issues that often arise in connection with voluntary and involuntary leave policies and disciplining students who are or may be disabled. Part III explores the applicability of various privacy and confidentiality laws to the information obtained and used by threat assessment teams, including a discussion of available strategies for maximizing the ability to share crucial information about troubled students.

I. DEVELOPING A THREAT ASSESSMENT TEAM: A PRACTICAL GUIDE

The concept of threat assessment is not new, as evidenced by this technique's use in primary, middle, and secondary schools where, in recent decades, administrators have had to respond to a number of violent incidents.[12] Traditionally, threat assessment teams in higher education were uncommon, although a few colleges and universities have had them for some time.[13] The pre-Virginia Tech literature described various frameworks and guidelines for developing and implementing assessment teams based largely upon law enforcement models[14] and models that were applied in elementary, middle, and secondary schools.[15] Recently, other models have emerged.[16] These models offer a great deal of useful guidance for institutions in determining how best to fashion a threat assessment team suiting their specific campus communities.

Almost twenty years ago, Ursula Delworth, a former professor of counseling psychology at the University of Iowa, developed a useful model that merits attention from institutions grappling with how best to address students of concern.[17] Section A of this Part briefly describes the Delworth model. Using this model as a starting point, Sections B–E outline the various stages involved in implementing a threat assessment team: (a) forming the team and defining the members' roles and responsibilities; (b) conducting assessments of student behavior; (c) evaluating various intervention strategies to determine the best

12. *See* FEIN ET AL., *supra* note 8.

13. For example, Iowa State University initiated a Critical Incident Response Team in 1994 to provide an integrated response to critical incidents on campus. Iowa State Univ., Dep't of Pub. Safety, Critical Incidents http://www.dps.iastate.edu/wordpress/?page_id=101 (last visited Apr. 17, 2008).

14. *See* FEIN ET AL., *supra* note 8; MARY ELLEN O'TOOLE, FED. BUREAU OF INVESTIGATION, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE (2000), *available at* http://www.fbi.gov/publications/school/school2.pdf.

15. *See, e.g.*, Univ. of Va., Guidelines for Responding to Student Threats of Violence, http://youthviolence.edschool.virginia.edu/guidelinesmanual80305.html (last visited Apr. 17, 2008).

16. The National Center for Higher Education Risk Management (NCHERM) has developed a model, specifically in response to the Virginia Tech tragedy, called the College and University Intervention Team (CUBIT). Nat'l Ctr. for Higher Educ. Risk Mgmt., The Cubit Model, http://www.ncherm.org/cubit.html (last visited Apr. 17, 2008).

17. DEALING WITH THE BEHAVIORAL AND PSYCHOLOGICAL PROBLEMS OF STUDENTS, NEW DIRECTIONS FOR STUDENT SERVICES 45 (Ursula Delworth ed., 1989) [hereinafter DELWORTH].

approach in a given situation; and (d) collecting relevant data and making appropriate modifications to the team's practices, policies, and procedures.

A. The Delworth Model: A Brief Overview

In her seminal monograph, Delworth explained the rationale for using a threat assessment team:

> All campuses have or should have some system in place for handling the discipline or judicial problems and the psychological problems of students. The issue often becomes one of insufficient coordination, inadequate information flow, and lack of a shared process . . . . The group responsible for such coordination is usually termed campus intervention team, but is equally effective by any other name . . . .[18]

Arguably, Delworth's monograph did not garner the attention it deserved at the time of its publication, but the framework she articulated, the Assessment-Intervention of Student Problems (AISP) Model, remains as relevant and useful as it did when it first appeared almost twenty years ago. There are three essential components to this model: (a) the formation of a campus assessment team; (b) a general assessment process for channeling students into the most appropriate on-campus and off-campus resources; and (c) intervention with the student of concern.[19] Delworth's model provides a practical approach that can be applied by campus administrators more easily than some of the other models mentioned above. Moreover, the Delworth model is unique among these other models for multiple reasons. First, it identifies the most appropriate members of an assessment team and articulates the roles and responsibilities of each team member. Second, it provides a heuristic and pragmatic diagnostic tool for members of a threat assessment team to quickly assess students of concern and differentiate between behavioral issues and mental health issues. Third, it guides team members in connecting students to the most appropriate resources to protect both the student's and the broader campus community's safety and well-being.[20] Another advantage of the Delworth model is its usefulness in addressing a wide range of student conduct issues beyond homicidal and suicidal behavior.[21]

Since the introduction of the Delworth model, the issues facing institutions have evolved and become increasingly complex. The remaining sections of this Part, therefore, will describe the Delworth model in greater detail and will expand upon it to address its application in a contemporary setting affected by the events at Virginia Tech and, more recently, at Northern Illinois University. As discussed in more detail below, the Delworth model provides a very helpful framework for developing and administering threat assessment teams in today's environment.

---

18. *Id.* at 9.

19. *Id.* at 4.

20. *Id.* at 9.

21. *Id.* at 5. Delworth offers a variety of categories of student issues and problems that can be assessed and monitored.

B. Threat Assessment Team Formation

As indicated above, the first step under Delworth's model is to develop a threat assessment team.[22] This stage involves both identifying the appropriate team members and defining the members' roles and responsibilities.[23] The name of the team is not nearly as important as deciding which campus administrators should serve on the team and delineating the roles and responsibilities of each team member.[24] Diagram 1[25] provides a proposal regarding the various individuals who might serve on a threat assessment team based upon the roles and responsibilities of various campus representatives. Diagram 2[26] contains guidelines regarding the suggested roles and responsibilities of certain team members and a recommended process for managing the various matters that may come before the team.[27]

The goals of the threat assessment team are multifold. The team should: (a) engage in a collaborative process to develop the most appropriate policies and procedures governing the team's operations, including a provision regarding the frequency of team meetings;[28] (b) serve as consultants to various campus constituents who may have concerns about students based upon their interactions

---

22. *Id.* at 9. Delworth actually referred to this type of team as a "campus assessment team."

23. *Id.* In terms of the team composition, Delworth recommends that:

> The team is minimally composed of key personnel from (1) campus mental health services, (2) campus security, (3) the student services administration, (4) the institution's legal counselors, and (5) the student services judicial or discipline office. Other relevant persons can be included on a permanent basis, or included as needed for a specific issue . . . .

Id.

24. *Id.* at 10. The authors understand and appreciate that some small institutions, and even some large institutions with budget constraints, may not have all of the resources available on their campuses to administer a threat assessment team. This potential lack of resources and the impact it can have on campuses that are trying to adopt threat assessment teams and provide services to students of concern has received a substantial amount of attention in the higher education community. Institutions with fewer or limited resources on campus may be able to engage with off-campus resources such as community mental health providers and local law enforcement to fulfill some of the threat assessment team's roles and responsibilities. *See* Elizabeth Farrell, *Public Colleges Lack Funds to Help Troubled Students*, CHRON. OF HIGHER EDUC., Feb. 21, 2008, http://chronicle.com/daily/2008/02/1750n.htm. Prior to the creation of a team, institutions should conduct a thorough evaluation of the resources available, both on and off campus, for developing the team and implementing the various policies and procedures that will govern the team's operations. Deficits in certain areas should be considered by the institution's senior administration to determine how best to ensure that a threat assessment team has access to the resources necessary to carry out the team's mission. John H. Dunkle et al., Pre-Conference Workshop at the Nat'l Ass'n of Student Personnel Adm'rs Nat'l Conf., Dealing with Disturbing and Disturbed Students: Best Practices and Applications, Mar. 29, 2004.

25. *See infra* Appendix I.

26. *See infra* Appendix II.

27. Diagrams 1 and 2 expand upon the original Delworth model by further explaining the roles and responsibilities of threat assessment team members. These diagrams were developed for a pre-conference program at the annual meeting of the National Association of Student Personnel Administrators (NASPA). *See* Dunkle et al., *supra* note 24.

28. DELWORTH, *supra* note 17, at 11. Institutions should hold frequent and regular threat assessment team meetings. Additional meetings can be held as needed, depending upon the number and severity of cases that may require the team's attention.

with these students;[29] (c) educate and train campus community members about the role and purpose of the team so that faculty, staff, and students know how and when to bring an issue to the team's attention;[30] (d) determine the most appropriate systems, both inside and outside the institution, for assessing students of concern;[31] (e) work together to determine how to best intervene with students when necessary;[32] and (f) review the results of its assessments to monitor any trends and evaluate the team's performance.[33] While the Delworth model articulated these goals, another important goal that has been raised more recently is the development of a system to monitor students who come to the attention of a threat assessment team, thereby facilitating efforts to gather information regarding these students and helping ensure that they do not fall through the cracks.[34]

As Diagram 1 indicates,[35] the college or university president or other top administrative official, while most likely not involved directly in the administration of the threat assessment team, should be knowledgeable about the team in case a major incident occurs on campus. In this way, the president, as the institution's chief executive officer and potential spokesperson, will be able to refer to the team in an informed manner. The president may also play a crucial role in making appropriate financial and other resources available to assist the team in achieving its mission of assessing and monitoring students of concern.

The role of the Vice President for Student Affairs or other chief student affairs officer (CSAO) is to ensure that the team is constituted, the roles and responsibilities of members are clearly articulated, and any team policies and procedures comport with applicable ethical, legal, and best-practice standards.[36] The CSAO should educate the president and other senior officers about the team and keep the senior administration informed about any high-profile situations that the team is handling.[37] The CSAO can also serve as an advocate for the team in

29. *Id.* at 8. While some administrators struggle over what information can be shared in the threat assessment context, research has shown that collateral information gathered from a number of different sources is often crucial in assessing and intervening with students with mental health concerns. *See* John H. Dunkle et al., Nat'l Ass'n of Student Personnel Adm'rs Symp., Dealing With Distressed and Disruptive Students: What's an Administrator To Do?, Mar. 19, 2005.

30. *See* DELWORTH, *supra* note 17, at 10. The Virginia Tech Report specifically articulated the importance of training campus community members in Recommendations II-4:

"Students, faculty, and staff should be trained annually about responding to various emergencies and about the notification systems that will be used. An annual reminder provided as part of registration should be considered." GOVERNOR'S REPORT, *supra* note 8, at 19.

31. *See* DELWORTH, *supra* note 17, at 9.

32. *Id.* at 9.

33. *Id.* at 10.

34. *See* John H. Dunkle, Invited Program at the Nat'l Ass'n of Student Personnel Adm'rs Prof'l Dev. Series, Newport, R.I.: Building a Local Clinical Database: Let Your Local Data Be Your Guide in Developing Effective Mental Health Services, Jan. 7, 2005.

35. *See infra* Appendix I.

36. Resources such as the CAS Standards also can aid institutions in articulating roles and responsibilities and best practices. *See* COUNCIL FOR THE ADVANCEMENT OF STANDARDS IN HIGHER EDUC., CAS PROFESSIONAL STANDARDS FOR HIGHER EDUCATION (6th ed. 2006) [hereinafter CAS].

37. Arthur Sandeen, *A Chief Student Affairs Officer's Perspective on the AISP Model*, *in*

securing the necessary resources for the team to function effectively.[38] Consideration of local and national data trends can aid the team in carrying out its duties, as an institution's particular circumstances and more general trends in higher education may inform the best approach in a given situation. As such, the CSAO should ensure that the team tracks local data through annual reports and other methods and considers any relevant national benchmarking data. It is also important for the CSAO, in conjunction with other members of the threat assessment team, to monitor and periodically update team policies and procedures, as the law and best practices may change over time.

As Diagram 1 indicates,[39] the team leader should be a senior student affairs administrator who has high-level authority to manage student behavior and who has a solid understanding of the institution's administrative structure, the institution's policies and procedures concerning student conduct, and the complexity of managing difficult student issues.[40] The individual in this position may be the CSAO, a dean of students, or a judicial affairs officer. Such a senior-level student affairs administrator is often in the unique position of having a broader perspective regarding student issues as a result of receiving information from a wide variety of campus constituents outside the threat assessment team context. Furthermore, unlike mental health professionals, a senior student affairs administrator is not limited by medical confidentiality laws and, therefore, often has greater flexibility in sharing student information on a need-to-know basis.[41] In addition, student affairs administrators often have specific training and expertise in providing students with the requisite procedural protections that may be required by law or under the institution's policies. Perhaps most important, a team leader who understands student conduct codes and the student judicial process will ensure the process remains focused on student behavior. By focusing on student conduct, administrators can help reduce the likelihood of potential claims of discrimination based upon a mental health or other disability and can open the door to a number of intervention options based upon a student's behavior.[42]

As proposed in Diagram 2,[43] the threat assessment team leader can serve as a designated point of contact for staff, faculty, and others who may have concerns about a particular student.[44] The team leader can also be responsible for assembling the team to begin the assessment process. The team leader's principal role at the beginning of the assessment process is to consider what other institutional systems or external resources should be involved in a given situation. Furthermore, the team leader can help the team stay focused on a student's conduct

---

DELWORTH, *supra* note 17, at 57.

38. *Id.*

39. *See infra* Appendix I.

40. *See* DELWORTH, *supra* note 17, at 4.

41. Privacy and confidentiality laws are discussed in more detail in Part III.

42. *See infra* Part II; *see also* Nancy Tribbensee, Distressed and Distressing Students: Legal Issues (2005), http://www.law.stetson.edu/excellence/HigherEd/archives/2005/DistressedDistressingStudents.pdf.

43. *See infra* Appendix II.

44. *See supra* note 24 and accompanying text.

rather than his or her actual or perceived mental health condition or disability. (Please note that the "student conduct process" section in Diagram 2 is shaded to signify the importance of focusing on student behavior.) Finally, if parental contact is necessary, the team leader may be in the best position to initiate that contact.[45]

Another key member of a threat assessment team is a mental health professional, either from an on-campus service or an off-campus mental health provider or agency. If a student of concern is known to be experiencing, or is suspected of experiencing, mental health problems, a mental health professional can play a very important role in helping assess the level of risk a student may pose to self and others. Because most state laws concerning confidentiality of mental health treatment records are quite restrictive, the mental health professional may not be able to share specific information about a student's treatment absent an appropriate signed release.[46] As discussed in Part III, however, medical confidentiality laws typically include exceptions that allow, or even require, clinicians to disclose patient information to protect the welfare of the patient or potential victims of violence. Even when a mental health professional cannot disclose identifiable patient information, he or she can still offer a great deal to the team by talking in hypothetical terms about similar situations or offering guidance regarding the best course of action given the details of the specific case at hand as reported by other team members.[47] For institutions with on-campus mental health services, it is recommended that, if possible, an identified administrator, typically the director or other representative of the campus mental health service who does not have a treatment relationship with the student, serve as the representative on the threat assessment team to eliminate or significantly reduce the possibility of a conflict of interest that could arise by having the treating clinician serve in a dual role as the provider and also as a team member.[48]

---

45. Institutions should have clear policies and procedures regarding when and under what circumstances parental contact may be appropriate and who at the institution is responsible for handling these communications. Some administrators, faculty, and staff perceive federal privacy laws as barriers to sharing information about students of concern, even though such laws do not prohibit contacting parents in emergency situations. *See infra* Part III. In any event, the issue of parental notification about students who are suicidal or a concern in other ways has received considerable attention by lawmakers who are considering revising laws to allow for more notification to parents and clarifying the issue so that perceived legal barriers are reduced. Anita Kumar, *Lawmakers Weigh Parental Notification Changes*, WASH. POST, Feb. 10, 2008, at C1.

46. *See* Brent Paterson & Sandy Colbs, *Navigating Student Privacy Laws*, LEADERSHIP EXCHANGE, Winter 2008, at 30.

47. Mental health professionals serving on a threat assessment team should be aware of the following caveat:

> It is important, however, for a clear distinction to be made between the mental health professional in this administrative role and the mental health professional in the role of personal therapist in order to protect the student's right to privacy and not interfere with future treatment. Caution must be observed to ensure confidentiality when establishing the campus intervention team so that the value of the mental health system is not diminished and perceived by students as watchdog for the administration.

Brown & Decoster, *The Disturbed and Disturbing Student*, *in* DELWORTH, *supra* note 17, at 50.

48. Brown and Decoster further stated:

Diagrams 1 and 2 also propose that a threat assessment team include a disability specialist, a law enforcement representative, and legal counsel.[49] The main role of the disability specialist is to provide expertise about any applicable disability laws and to help the institution avoid discriminating against a student based upon a diagnosed or perceived disability. Law enforcement can provide very useful support in terms of safety planning as well as gathering any available background information regarding students who may be of concern. In this regard, it is recommended that institutions consider mutual aid agreements with off-campus law enforcement to coordinate law enforcement efforts when necessary. Finally, legal counsel can advise the team as to governing legal provisions and how they influence the various options that the team can consider. It is essential for the team to have open and easy access to legal counsel to avoid any delay in the assessment process or emergency notification due to any perceived legal barriers.[50]

Other campus representatives and resources may also be called upon to assist the threat assessment team, either as members of the team or on an *ad hoc* basis. For example, if the team is assessing and intervening with a student who has an eating disorder, it could be critical to have a physician or other health care provider involved because of the medical complications that often accompany eating disorders. Similarly, if a non-U.S. citizen is a student of concern, it would be important for the threat assessment team to include, or at least consult with, offices on campus that support international students. A representative from such offices might, for example, be able to provide useful information about the impact various intervention strategies may have on the student's visa status. Similarly, if a student involved in a study abroad program is the focus of concern, consultation with the institution's study abroad office or official would be essential in identifying resources and any complicating issues in the host country.

C. Conducting an Assessment

Once the threat assessment team has been formed and roles and responsibilities have been clearly articulated, the Delworth model raises several issues regarding the assessment of students of concern. Delworth offered a simple preliminary diagnostic tool for quickly assessing students and channeling them into the most appropriate systems for more complete assessment and subsequent intervention.[51]

> A decision to remove the student from the campus environment is an administrative function determined either by appropriate campus authorities or by local community authorities. For example, though the campus mental health professional may have established a relationship with the student and so be influential in facilitating a voluntary withdrawal from the college, this same professional should not be a member of an institutional decision-making body assembled to make withdrawal determinations unless specifically requested to participate by the client or otherwise allowed to do so through a signed consent form.

Id.

49. *See infra* Appendices I & II.

50. The Council for the Advancement of Standards in Higher Education recommends, as a best practice, timely access to legal counsel for all functional areas in higher education. *See* CAS, *supra* note 36.

51. *See* DELWORTH, *supra* note 17, at 4–9.

Specifically, Delworth proposed that students of concern could be categorized in the following ways: (a) students who are disturbing, (b) students who are disturbed, and (c) students who are both disturbing and disturbed (hereinafter, "the disturbing/disturbed student").[52] Disturbing students are those whose conduct violates an institution's code of conduct but who do not have any evident mental health concerns.[53] The behavior of disturbing students can often be addressed using the student disciplinary system. Disturbed students are those who may be experiencing mental health problems but whose conduct does not violate the college or university's code of conduct.[54] These students are often the most difficult to detect because they may not be in treatment at a campus health service and they may be achieving their educational goals without causing disruption on campus. The disturbing/disturbed student is both disruptive and suffering from mental health problems.[55] It is this category of students that can cause the most vexing and challenging problems for threat assessment teams and other members of the campus community.[56]

The Delworth model offers a framework that threat assessment teams can use to distinguish between student behavior that should be addressed through disciplinary channels and student mental health issues that may require intervention of a different kind.[57] Diagram 2 delineates two simultaneous and inextricably linked response tracks, with one track addressing the mental health issues and the other focusing on student conduct.[58] By clearly distinguishing between conduct on the one hand and potential mental health issues on the other, students can be funneled into the most appropriate systems for assessment and intervention. The team leader can also ensure that a student's conduct is handled through the appropriate disciplinary system and that the student has access to any available mental health services. Regardless of the presence of mental health concerns, it is often appropriate and desirable for institutions to hold students accountable for their behavior.[59]

A key question that the team leader should address, preferably in consultation with others on the threat assessment team, is whether the student poses an imminent danger to self or others.[60] If so, law enforcement and others need to intervene immediately to protect the safety of the student and others on campus.[61] The campus conduct officer can provide information to the team about the

52. *Id.*

53. *Id.* at 4.

54. *Id.* at 7.

55. *Id.* at 8.

56. SANDEEN & BARR, *supra* note 6, at 160.

57. DELWORTH, *supra* note 17, at 4–9.

58. *See infra* Appendix II.

59. United Educators, *Administrative Leave and Other Options for Emotionally Distressed or Suicidal Students*, RISK RES. BULL. (Apr. 2006); *see infra* Part II.B.1.

60. *See* DELWORTH, *supra* note 17, at 12.

61. It is crucial that the threat assessment team be aware of any on-campus or off-campus crisis response systems and coordinate the team's responses with those systems when an imminent danger exists. For a more detailed discussion of the legal requirements associated with the assessment of students with mental health concerns, see *infra* Parts II and III.

student's past behavior based upon any prior disciplinary proceedings or other information in the conduct officer's possession.[62] Gathering such information is a crucial component of the assessment process, as past behavior may be an indicator of future behavior. Mental health professionals may be called upon to determine if a student needs hospitalization for psychiatric reasons. As such, the mental health professional should be familiar with both voluntary and involuntary hospitalization or commitment procedures, which are typically codified by statute.[63] In addition, the mental health professional, and perhaps other members of the threat assessment team, should consider developing collaborative working relationships with local hospitals to facilitate the provision of emergency care to students when necessary. It is crucial that the threat assessment team understand the process for accessing emergency care for students at local hospitals, including how to gain access to any information the hospital is willing to provide once the student is admitted and after the student is discharged. This type of collaboration can be extremely helpful in coordinating the efforts of the threat assessment team and off-campus medical providers.[64]

Another issue for the team to consider at the outset is the location of the disruptive behavior, including whether the conduct occurred on campus or at an off-campus location. Many institutions have moved toward the development and implementation of disciplinary policies and procedures that extend the applicability of the student code of conduct to certain off-campus behavior.[65] Depending upon the circumstances, the threat assessment team may wish to coordinate its efforts with local law enforcement or other off-campus resources in addition to considering whether a student's off-campus behavior should be addressed through the institution's disciplinary system.

Regardless of where a particular student's conduct occurs, mental health professionals are often called upon to help determine whether a student may pose a serious threat to self or others.[66] This process may involve a referral to campus mental health services or to off-campus resources for a mandated assessment.[67] It

---

62. *See infra* Part III.A.2.a.

63. Under Illinois law, for example, the Mental Health and Developmental Disabilities Code sets forth the legal process for the voluntary and involuntary admission of individuals for psychiatric evaluation in emergency situations. *See* 405 ILL. COMP. STAT. 5/3-401 to -405, -600 to -611 (2007).

64. The GOVERNOR'S REPORT emphasized the coordination of care among on-campus and off-campus resources in dealing with students of concern. GOVERNOR'S REPORT, *supra* note 8, at 60–62. As discussed in Part III, medical privacy and confidentiality laws may limit what information local hospitals can share with an institution's threat assessment team. Releases of information signed by the student or the student's legal representative can allow access to information when an imminent danger does not exist. Mental health professionals on the threat assessment team should be trained regarding how to secure legally acceptable releases of information and also how to comply with institutional policies regarding such releases.

65. Elia Powers, *Extending the Arm of Campus Law*, INSIDE HIGHER ED, Nov. 20, 2007, http://www.insidehighered.com/news/2007/11/20/offcampus.

66. *See infra* Part II.B.2.

67. In the case of graduate and professional students engaged in clinical rotations, internships, and other activities during which they have contact with the patients or other members of the public, questions may arise regarding whether a student is fit for duty. Fitness for

is crucial that the mental health providers be skilled at conducting a safety assessment, including assessing threats to self and others.[68] Mental health professionals must also be able to perform culturally-sensitive assessments to differentiate between normal expressions of behavior and conduct that is indicative of potentially dangerous behavior. Furthermore, it is crucial that the mental health professional be versed in the nuances of assessment for severe psychiatric disorders, such as major depression and bipolar illness,[69] eating disorders,[70] and

---

duty evaluations are highly specialized assessments that typically require referral to off-campus experts. *See, e.g.*, CARY D. ROSTOW & ROBERT D. DAVIS, A HANDBOOK FOR PSYCHOLOGICAL FITNESS-FOR-DUTY EVALUATIONS IN LAW ENFORCEMENT (2004).

68. There are tools available to aid team members in conducting a rapid and competent suicide risk assessment and violence-toward-others risk assessment. *See, e.g.*, *Quick Reference for Forensic and Ethical Issues in Psychiatry*, 1 FOCUS 345, 347–48 (2003). The National Center for Higher Education Risk Management (NCHERM) and Center for Aggression Management websites include some useful protocols and training materials for conducting threat assessments and detecting "red flags" that may be indicative of certain behaviors. *See* Welcome to NCHERM, http://www.ncherm.org/index.php (last visited Apr. 17, 2008); Center for Aggression Management, http://www.aggressionmanagement.com (last visited Apr. 17, 2008).

69. Effectively treating these conditions often involves a combination of psychotherapy and psychotropic medications. Most students who are diagnosed and compliant with treatment recommendations are able to perform satisfactorily in school. AM. PSYCHIATRIC ASS'N, AMERICAN PSYCHIATRIC ASSOCIATION PRACTICE GUIDELINES 145 (1996). If a student is left untreated or non-compliant, however, major depression and bipolar illness can be fatal. For example, it is estimated that suicide occurs in ten to fifteen percent of bipolar patients. *See* AM. PSYCHIATRIC ASS'N, PRACTICE GUIDELINE FOR THE TREATMENT OF PATIENTS WITH BIPOLAR DISORDER 17 (2d ed., Am. Psychiatric Publ'g 2002) (1995), *available at* http://www.psychiatryonline.com/content.aspx?aid=50051 [hereinafter BIPOLAR DISORDER PRACTICE GUIDELINE]. For an excellent comprehensive review of mood disorders and understanding suicide, see also KAY R. JAMISON, NIGHT FALLS FAST: UNDERSTANDING SUICIDE (1999). Major depression is characterized by the presence of a subjective experience of sadness or depressed mood for at least a two-week period, markedly decreased interest in pleasurable activities, suicidal ideation, and several other possible symptoms. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 349 (2000) [hereinafter MANUAL OF MENTAL DISORDERS].

There are two versions of Bipolar Disorder: Bipolar 1 and Bipolar 2. Bipolar 1 Disorder, historically referred to as manic-depression, involves the cycling between periods of major depression and periods of mania (extremely elevated, expansive, and irritable mood), whereas Bipolar 2 involves the occurrence of at least one major depressive episode and one or more periods of hypomania (involves elevated mood but less severe than mania). *Id.* at 382–97. In the case of Bipolar 1 disorder, untreated mania can progress to impulsive, reckless, and potentially dangerous behavior. BIPOLAR DISORDER PRACTICE GUIDELINE, *supra*, at 7. Upon direct assessment and inquiry by a mental health professional, an individual who is manic will frequently deny any suicidal or violent ideation or intent. *Id.* Because irritability and impulsivity increase as the mania proceeds, however, the individual could begin to engage in dangerous behavior toward self or others (e.g., driving a car dangerously fast in the opposite direction of traffic). *See id.* Untreated mania can often involve the development of psychotic symptoms that could lead to potentially dangerous behavior toward others (e.g., experiencing command hallucinations and/or paranoia that lead to impulses to harm another person). *Id.* at 11. Individuals experiencing mania hopefully will be connected to treatment in a controlled setting, such as an inpatient unit, since they are often at greater risk for suicide at the time when medication is initiated and the mood begins to shift to depression. *Id.* The key point here is that these disorders may involve specific, elevated risks even though the affected individual denies any suicidal ideation or intent to harm self or others. *Id.* at 7. Further complicating this analysis,

substance abuse or dependence disorders[71] (including the abuse of prescription drugs, an increasingly common phenomenon).[72] In such circumstances, determining the existence of an imminent danger is not always easy given the subtleties of different conditions and their specific and varying risks. Another issue that mental health professionals and campus communities are increasingly seeing is self-mutilating behavior (e.g., self-induced cutting or burning).[73] Such

---

individuals with bipolar illness are often in denial about their own illness and therefore are ambivalent about their treatment, often leading to problems with non-compliance as well as patients with co-morbid conditions such as substance abuse or dependence. *Id.* at 12.

It is crucial that mental health professionals be skilled at conducting differential diagnostic assessments of mood disorders to avoid misdiagnoses. For example, a mistaken diagnosis, such as diagnosing a patient as major depression when in fact there is bipolar illness, could lead to added safety concerns. *Id.* at 6. Furthermore, there are several other forms of mood disorders that require precision in diagnosis. *See* MANUAL OF MENTAL DISORDERS, *supra*, at 398–428. It is beyond the scope of this paper to go into greater detail about those conditions.

70. Anorexia nervosa and bulimia are the two most common eating disorders; they both involve a preoccupation with one's weight. *See* MANUAL OF MENTAL DISORDERS, *supra* note 69, at 583–95. Anorexia specifically involves the refusal to maintain a normal body weight and an intense fear about weight gain. *Id.* at 583. Individuals with bulimia engage in cycles of binging (ingesting an excessive amount of food at one sitting) and purging (ridding oneself of the ingested food through some compensatory behavior, such as vomiting, over-exercising, or using laxatives). *Id.* at 589. There are, however, several variations of these eating disorders that may present themselves. Women are more likely to be diagnosed with eating disorders, but more cases are emerging among men, especially gay men. *Id.* at 592. *See also* B. Timothy Walsh & David M. Garner, *Diagnostic Issues*, *in* HANDBOOK OF TREATMENT FOR EATING DISORDERS 25 (2d ed. 1997). Campus administrators are typically most concerned about the medical complications that are often associated with eating disorders. Students suffering from eating disorders often deny any intent to harm themselves or others, but the medical condition resulting from an eating disorder could be fatal. Determining whether an imminent danger exists in these situations can be extremely challenging and should involve consultation with a medical professional who has expertise in eating disorders. *Id.* at 38. The level of risk can be even more pronounced when a student is in denial about his or her disease or if a student also has a substance abuse problem and/or is suffering from major depression. *Id.*

71. Students often experience a great deal of peer pressure to use various substances, especially alcohol. *See* KADISON & DIGERONIMO, *supra* note 6, at 30. A small percentage of students will develop a full-blown substance abuse or dependence that will require an intensive evaluation and intervention program. *Id.* at 115. Even if a student does not meet the criteria for a substance abuse disorder, binge drinking (i.e., four or more drinks per episode for women and five or more drinks per episode for men) may lead to negative consequences, such as getting sick, missing classes, or engaging in dangerous behavior resulting in injury or death. *Id.* at 114–15. Use of alcohol almost always results in an increase in the level of risk associated with the underlying behavior. Although alcohol use, in and of itself, does not necessarily lead to imminent danger to self or others, it does have the potential to lead to unintended negative consequences that can result in serious harm to self or others. When They Drink: Practitioner Views and Lessons Learned on Preventing High-Risk Collegiate Drinking (Robert J. Chapman ed., 2008), (unpublished manuscript), *available at* http://www.rowan.edu/centers/cas/hec/documents/draftmanuscript_000.pdf.

72. For an excellent overview of data about college and university student abuse of prescription drugs and a description of a research study confirming that a substantial percentage of students are using prescription drugs recreationally, see Ethan A. Kolek, *Recreational Prescription Drug Use Among College Students*, 43 NASPA J. 19, 19–39 (2006).

73. KADISON & DIGERONIMO, *supra* note 6, at 142–46; *see also* Gregory T. Eells, *Mobilizing the Campuses Against Self-Mutilation*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Dec.

behaviors typically are not done with the intent of causing serious harm to oneself, but rather to experience relief from internal pain and suffering.[74] It is essential that threat assessment teams understand the phenomenon of self-mutilation and how to apply intervention strategies to students who engage in this behavior.[75]

The results of any mental health assessment can then be filtered back to the threat assessment team for consideration (as long as the student has signed an appropriate release authorizing the disclosure or when such sharing of information is otherwise permitted by law).[76] As discussed in Part II, any assessment must be individualized for each student and not be based upon generalizations, assumptions, misconceptions, or unfounded evidence. In this way, the threat assessment team may limit the institution's exposure to potential legal claims, particularly those premised upon an allegation of disability discrimination.

D. Evaluating and Applying Intervention Strategies

Based upon the information gathered by the threat assessment team, it can consider various methods of intervention, including those described below.

1. Voluntary Leave of Absence

It may be appropriate for the student to spend some time away from campus by agreeing to voluntary medical leave.[77] Such leaves can be accomplished by engaging the student, perhaps in conjunction with one or both of the student's parents, to help the student understand the potential benefits associated with temporarily taking time away from the pressures of classes and other school-related responsibilities.[78] Institutions should consider having a clearly articulated and well-publicized voluntary leave policy that includes the conditions a student must meet both to initiate a leave and to later resume his or her studies.

2. Interim Suspension/Involuntary Withdrawal

In rare cases, an institution may determine that a student must be removed from

---

8, 2006, at B8.

74. KADISON & DIGERONIMO, *supra* note 6, at 142–46.

75. *See* Letter from Sheralyn Goldbecker, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Kent Chabotar, President, Guilford Coll., 2003 NDLR (LRP) LEXIS 627 (Mar. 6, 2003) [hereinafter OCR Letter to Guilford Coll.].

76. The student conduct officer or other student affairs team member is probably the best candidate to present any relevant information regarding a mental health assessment to the threat assessment team for purposes of determining the most appropriate course of action.

77. *See* United Educators, *supra* note 59.

78. Convincing a student, and perhaps the student's parents, to take a voluntary leave can take time and requires a great deal of patience from campus mental health professionals and other administrators. A technique known as "motivational interviewing" can be very useful in this process. Threat assessment team members should consider learning about this technique because it offers a collaborative and educational approach to helping students that is less likely to be perceived as confrontational or punitive. *See generally* WILLIAM R. MILLER & STEPHEN ROLLNICK, MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE FOR CHANGE (2d ed. 2002).

campus immediately because of imminent safety concerns.[79] Many institutions have some form of interim suspension policy in place for these situations. Any such policy should specify who at the institution has the authority to impose an interim suspension, under what circumstances the institution can impose an interim suspension, and how any such suspension may be lifted or modified. Many institutions have also developed involuntary withdrawal procedures that may be used to remove a dangerous student from campus if the student will not agree to a voluntary leave of absence. Prior to imposing an involuntary withdrawal, institutions typically should secure an opinion from a mental health provider that the student poses an imminent risk of serious harm to self or others.[80] There is some controversy regarding involuntary leave policies, and some commentators have argued that it is preferable to utilize interim suspension or other disciplinary procedures so that the focus remains on a student's conduct rather than his or her mental health condition.[81] Each institution should determine the best approach for its campus in conjunction with legal counsel.

3. On-Campus and Other Interventions

In many situations, a threat assessment team may decide that voluntary or involuntary leave is not necessary or advisable. In such situations, the team may decide that some other form of intervention may be best. For example, perhaps a referral to a mental health provider will suffice. Contacting a student's parents or other family members, either alone or in conjunction with a mental health referral, may also be an effective means of intervention. The assessment process may also reveal a mental health condition that had not been known to the student or others on campus. To the extent such a condition qualifies as a disability under disability law, the student and the institution may be able to work together to find reasonable accommodations that may rectify the situation.[82] Finally, regardless of the presence of a mental health condition, it is often appropriate for the institution to ensure that the student is somehow held accountable for his or her behavior. The threat assessment team can trigger the student disciplinary process and, later, ensure that any disciplinary sanctions are enforced. While the threat assessment team must be sensitive to the mental health of the student, an appropriately administered disciplinary system often can afford an excellent educational

79. *See supra* notes 60–61 and accompanying text.

80. *See infra* Part II.B.4.

81. Gary Pavela, Director of Judicial Programs at the University of Maryland at College Park, cautions against the use of such involuntary withdrawal policies as "hair trigger removal policies." Eric Hoover, *Giving Them the Help They Need: The Author of a New Book on Student Suicide Says Colleges Need to Think About a Lot More than Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), May 19, 2006, at A39. Instead, Pavela proposes utilizing administrative and campus conduct policies to send the clear message to students that threatening and/or suicidal behavior is not acceptable and that removal from campus is a possibility if the behavior is not addressed. *Id.* Others have urged institutions to consider intermediate steps before invoking a campus judicial or disciplinary system or imposing an involuntary withdrawal to allow for a more collaborative, non-confrontational approach. *See, e.g.*, Marlynn H. Wei, *College and University Policy and Procedural Responses to Students at Risk of Suicide,* 34 J.C. & U. L. 285 (2008).

82. For a discussion of these and related disability law concepts, see *infra* Part II.A.

opportunity for the student.[83] In other situations, some other means of ensuring accountability outside the disciplinary process may be more appropriate. As with all potential intervention strategies, the best approach depends upon the precise circumstances of the particular situation.

E. Tracking and Monitoring Procedures

Although clearly articulated assessment and intervention procedures go a long way in dealing with students of concern, it is equally important to have procedures in place to track the actions of the threat assessment team and to monitor students who come to the team's attention. For example, threat assessment teams must determine the most appropriate manner to document and store information collected during the assessment process. The student conduct officer may be a good candidate to serve as the record custodian given his or her role in holding students accountable for their behavior. However, this decision should be made by each threat assessment team in light of the institution's culture, relevant policy considerations, and applicable law.[84] Regardless of how threat assessment team records are maintained, institutions should give careful consideration to the method of recording information to ensure that the assessment team has a clear record of the actions it has taken and its reasons for doing so.[85]

Threat assessment teams should also consider the development of a procedure to track each student and the various interventions the team considered and implemented for each student. A tracking system could be as simple as a periodic meeting with the student to assess his or her current status. The team may also wish to develop a system to verify that the student adheres to any behavioral conditions recommended or required by the institution. Another important aspect of tracking the team's work is developing a system to record any important trends with regard to the various cases the team manages. In this way, the institution will have access to longitudinal data that can help its threat assessment team identify significant trends and adjust the team's practices and procedures accordingly.[86] Such data can also help the threat assessment team ensure it is treating students consistently, which can be an important aspect of complying with various legal requirements under applicable disability laws, as well as other laws governing the privacy and confidentiality of student information.

---

83. Some administrators and teams may be reluctant to pursue disciplinary action for fear of "pushing the student over the edge," but the educational benefits of a properly administered campus disciplinary system can be extremely useful. *See* John H. Dunkle & C. Presley, *Helping Students with Health and Wellness Issues*, *in* HANDBOOK OF STUDENT AFFAIRS ADMINISTRATION, (George S. McClellan and Jeremy Stringer eds., 3d ed. forthcoming 2009) (on file with authors).

84. *See infra* Part III.

85. *See infra* note 130.

86. The threat assessment team should consider developing a method for tracking various demographic and other data about matters addressed by the team. This can then be analyzed and reviewed each year and tracked over a long period of time to assess trends and make any necessary modifications to the team's policies and procedures. Dunkle, *supra* note 34.

II. THE DISABILITY LAWS AND THREAT ASSESSMENT TEAMS

Understanding how disability laws apply to threat assessment teams is essential to the effective and efficient operation of these teams. Section A of this Part will discuss the basic aspects of disability law relevant to the creation and implementation of threat assessment teams. Section B will discuss in greater depth critical questions of disability law as they relate to threat assessment teams. Section C will summarize some conclusions about how threat assessment teams can carry out their mission without running afoul of the disability laws.

A. Basic Aspects of Disability Law

There are numerous legal concerns to consider when implementing a threat assessment team. Most salient among these concerns are the legal requirements of complying with disability law and student confidentiality and privacy laws.[87] Institutions considering the implementation of threat assessment teams should consult with legal counsel to discuss not only these issues but also questions of potential liability under negligence theories, contract law, defamation law, and other areas of law that might relate to use of a threat assessment team.[88]

To create and operate a threat assessment team, it is essential for administrators to possess a basic understanding of disability law.[89] There are numerous state and federal laws designed to protect persons with disabilities, including students. Virtually every institution of higher education is subject to one or more of these laws.[90] Most notably, any institution that accepts federal funds, as most institutions in the country do, is subject to § 504 of the Rehabilitation Act of 1973.[91] Further, public institutions of higher learning are subject to Title II of the Americans with Disabilities Act (ADA)[92] and their private counterparts fall under

87. See *infra* Part III for a detailed discussion of student confidentiality and privacy laws.

88. A full discussion of these other legal issues is beyond the scope of this article.

89. Because a number of recent commentators have explored the contours of disability law in some detail, this article summarizes key elements of the law in order to provide a basic understanding within the context of threat assessment teams. For a more detailed description of the framework of disability law, see Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 510–19 (2006); Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349 (2008); Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217 (2003). For a thorough overview of the disability laws applicable to institutions of higher education, see LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW § 3 (3d ed. 2006).

90. *See* Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., (Mar. 16, 2007), *available at* http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070316.html ("[N]early every institution of postsecondary education in the United States is subject to Section 504 or Title II.").

91. Section 504 of the Rehabilitation Act of 1973 applies to all colleges and universities that receive federal funding. *See* 29 U.S.C. § 794(b)(2)(A) (2000 & Supp. IV 2004); 34 C.F.R. §§ 104.3(h), 104.41–.47 (2007).

92. 42 U.S.C. §§ 12131–12134 (2000 & Supp. IV 2004). Title II of the ADA covers public services, including those provided by public colleges and universities. *See id.*

Title III of the ADA as institutions providing public accommodations.[93] Other laws that may apply to colleges and universities include the Fair Housing Act[94] and a host of state and local laws.[95]

Disability laws have a number of common elements critical to understanding how the law impacts threat assessment teams.[96] First, these laws prohibit discrimination on the basis of disability.[97] Second, they include mental health impairments in the class of disabilities that may be accorded protection.[98] And third, they may require an institution to provide reasonable accommodations to a student.[99]

Despite their broad reach, disability laws have important limits. Most notably, they do not require institutions to fundamentally alter their educational programs,[100] to lower institutional standards,[101] or to assume an undue burden in accommodating individuals with disabilities.[102]

---

93. *Id.* §§ 12181–12189 (2000 & Supp. IV 2004). Title III of the ADA applies to places of public accommodation, which includes most private higher educational institutions. *See id.*

94. *Id.* §§ 3601–3631 (2000).

95. *See* JOHN W. PARRY, AM. BAR ASSOC., MONOGRAPH ON STATE DISABILITY DISCRIMINATION LAWS (2005) (providing a comprehensive overview of state disability discrimination laws).

96. In addition, courts generally review claims brought under either the Rehabilitation Act or the ADA using the same analytical framework. *See, e.g.*, Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.").

97. 29 U.S.C. § 794(a) (2000); 42 U.S.C. §§ 12132, 12182 (2000). The disability laws also prohibit harassment on the basis of a disability and retaliation against a student exercising his or her rights under the disability laws. *See, e.g.*, Office of Civil Rights, U.S. Dept. of Educ., Disability Discrimination: Overview of the Laws, http://www.ed.gov/about/offices/list/ocr/disabilityoverview.html (last visited April 28, 2008).

98. 42 U.S.C. § 12102(2)(A) (2000); 34 C.F.R. § 104.3(j)(1) (2007).

99. 29 U.S.C. § 701 (2000); 42 U.S.C. § 12112(b)(5)(A) (2000). Note that the student has the burden of seeking an accommodation in the higher education context. *See* Letter from Charles Smailer, Office of Civil Rights, U.S. Dep't of Educ., to Terry Queeno, Campus Dir., Brown Mackie Coll., 2004 NDLR (LRP) LEXIS 658, at *8 (Dec. 10, 2004) ("[I]t is the responsibility of the student to notify the educational institution of the existence of any claimed disability covered by Section 504, provide satisfactory documentation of the disability if requested to do so, and specify what aids, services or adjustments, if any, are being requested.").

100. *See* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979) (stating that colleges and universities need not fundamentally alter their program to accommodate disabled students under the Rehabilitation Act).

101. *Id.* at 413 n.12 ("[N]othing in the [Rehabilitation] Act requires an educational institution to lower its standards."); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998) (stating that requiring the medical school to advance a student with an anxiety disorder who had received insufficient grades in classes would be "a substantial, rather than a reasonable accommodation"); *see also* Letter from Mahoney, Office of Civil Rights, U.S. Dep't of Educ., to Stuart Sutin, President, Cmty. Coll. of Allegheny Cty., 2005 NDLR (LRP) LEXIS 589, at *12–13 (June 28, 2005) (upholding the college's determination that class participation and attendance could not be waived upon the request of a student claiming disability).

102. *See* Amir v. St. Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (holding that the ADA does not require a provider of public accommodation to modify its program to accommodate the needs of a disabled student if the modification constitutes an undue burden); s*ee also* McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 860 (5th Cir. 1993) (denying additional

The fundamental concepts set forth in the preceding two paragraphs can be counterintuitive and challenging to grasp. In addition, the application of disability law often turns on a case-by-case basis.[103] Further complicating matters, situations facing a threat assessment team are often exigent, requiring quick decision-making. For these reasons, it may be necessary to consult with student disability professionals or legal counsel, especially for some of the more complex questions that may arise.[104] Nonetheless, a basic familiarity with the issues discussed in this article may facilitate discussion amongst threat assessment team members, sharpen questions for counsel, and enhance the collective judgment of threat assessment teams.

To be protected under the disability laws, a student must meet the definition of "disabled" and also be "qualified" to participate in the educational program at issue.[105] Someone who is "disabled" for purposes of the law has a physical or mental impairment that renders the individual substantially limited in a major life activity.[106] The law includes in the definition of "disabled" those individuals who are "regarded as" disabled by their academic institutions or who have a history of disability.[107] To be "qualified" to participate in the academic program, the student must meet the fundamental requirements of the program with or without reasonable accommodations.[108]

Different decision-makers reviewing disability claims brought by college and university students have interpreted the definitions of "disability" and "qualified" in very different ways. The Office for Civil Rights of the United States Department of Education (widely known as "OCR"), which enforces § 504 and Title II of the ADA, appears to take a relatively broad view as to whether a student is "qualified" to participate in a particular academic program.[109] Courts

---

accommodations requested by a student because they "would constitute preferential treatment and go beyond the elimination of disadvantageous treatment mandated by § 504").

103. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198–99 (2002) (discussing 42 U.S.C. § 12102(2) and the intent of Congress that the existence of a disability be determined on a case-by-case basis).

104. Indeed, threat assessment teams should, ideally, include a student disability expert and legal counsel. *See supra* notes 48–50 and accompanying text.

105. 29 U.S.C. § 794(a) (2000); 42 U.S.C. § 12132 (2000). At least one court has questioned whether the "qualified" requirement applies to claims brought under Title III of the ADA. *See* Singh v. George Washington Univ. Sch. of Med. and Health Scis., 508 F.3d 1097, 1105–06 (D.C. Cir. 2007) (noting that Title III does not contain either the phrase "otherwise qualified" or "qualified individual" but also citing cases finding that Title III does, in fact, have a "qualified" requirement).

106. 42 U.S.C. § 12102(2) (2000); 28 C.F.R. § 35.104 (2007); 34 C.F.R. § 104.3(j)(1) (2007).

107. 42 U.S.C. § 12102(2); 28 C.F.R. § 35.104 (2007); 34 C.F.R. § 104.3(j) (2007).

108. 29 U.S.C. § 794(b) (2000 & Supp. IV 2004); 42 U.S.C. §§ 12111(8), 12131(2); 34 C.F.R. § 104.3(l)(3).

109. *See, e.g.*, Letter from Rhonda Bowman, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Lee Snyder, President, Bluffton Univ., at 5 (Dec. 22, 2004), *available at* http://www.bazelon.org/pdf/OCRComplaintBluffton.pdf (finding that the student "qualified within the meaning of Section 504" because she had been "admitted to the University") [hereinafter OCR Letter to Bluffton Univ.]; Letter from Michael E. Gallagher, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Finuf, S. Ohio Coll., 2002 NDLR (LRP) LEXIS

interpreting the disability laws have tended to be more critical in determining whether a student is "qualified" and, therefore, protected under the disability laws.[110]

Likewise, in situations where an institution takes an adverse action against a student (such as involuntarily withdrawing her from studies), OCR has considered the student to be "regarded as" disabled on the basis of the involuntary action and, therefore, protected under disability law.[111] Courts, on the other hand, have tended to impose substantial and rigorous analysis in determining whether a student is "disabled" for purposes of the law.[112] One court-driven concept that has the potential to be particularly far-reaching in this regard is that of "mitigating measures." Under this doctrine, which stems from a series of U.S. Supreme Court decisions beginning with *Sutton v. United Air Lines, Inc.*,[113] courts generally find that a student who refuses to take measures that would mitigate his impairment is not "substantially limited" in a major life activity and therefore is not disabled.[114]

943, at *10–13 (Nov. 15, 2002) (finding that a student who was enrolled, attending classes, and maintaining a passing grade point average was considered by the college to be "qualified" under Section 504, even where the student had exhibited "inability" to comply with the college's conduct code)[hereinafter OCR Letter to S. Ohio Coll.].

110. *See, e.g.*, Millington v. Temple Univ. Sch. of Dentistry, No. 06-4796, 2008 WL 185792 (3d Cir. Jan. 23, 2008) (holding that a dental student who had been granted accommodations but who missed classes and failed exams was not "otherwise qualified" and therefore not disabled); Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9, 1999) (finding that a student who threatened a professor was not "otherwise qualified" even if the behavior was caused by a mental disability); Anderson v. Univ. of Wis., 841 F.2d 737, 740 (7th Cir. 1988) (holding that a law student who did not meet the standard for academic scores was not "otherwise qualified" under the Rehabilitation Act).

111. *See, e.g.*, OCR Letter to Guilford College, *supra* note 75, at *24 (finding that a college "either knew or should have known" that its student had a disability when it decided to involuntarily withdraw the student, despite insufficient evidence demonstrating that the student had identified herself as being disabled).

112. *See, e.g.*, Marlon v. Western New England Coll., 124 Fed. App'x 15, 16–17 (1st Cir. 2005) (rejecting a law student's argument that the college had regarded her as disabled where it had provided her with accommodations for carpal tunnel syndrome); Davis v. Univ. of N.C., 263 F.3d 95, 99–101 (4th Cir. 2001) (finding that, although the university may have perceived that a student in its teacher certification program who had multiple personality disorder was limited in the major life activity of teaching, the student was not disabled because there was insufficient evidence that the university perceived her to be "*substantially* limited") (citing Murphy v. United Parcel Serv., 527 U.S. 516, 521–22 (1999) (emphasis in original)).

113. 527 U.S. 471 (1999). *Sutton*, in conjunction with *Murphy*, 527 U.S. at 516 (holding that plaintiff taking medication for high blood pressure was not disabled under ADA) and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that plaintiff who mitigated vision impairment by subconsciously adjusting for it was not disabled), are frequently referred to as the "Sutton Trilogy." *See, e.g.*, LaPorta v. Wal-Mart Stores, Inc., 163 F. Supp. 2d 758, 765 (W.D. Mich. 2001).

114. *Sutton,* 527 U.S. at 482 ("[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."); *see also* McGuinness v. Univ. of N.M. Sch. Of Med., 170 F.3d 974, 978–79 (10th Cir. 1998) (finding that a student who failed to mitigate impairment by retaking the first year of medical school was not disabled); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 238 (D. Mass. 1999) (finding that a dental student,

B. Critical Concepts of Disability Law Relating to Threat Assessment Teams

There are a number of critical situations threat assessment teams will face that raise questions of disability law. These situations include: (a) violation of student conduct codes by students with mental health disabilities; (b) violence or potential violence committed by students with mental health disabilities against self or others; (c) assessment of students whose behavior presents a significant risk of harm to the health or safety of the student or others; and (d) mandatory assessment, involuntary withdrawal, and conditional readmission of students with mental health impairments. This section will discuss application of the disability laws to these situations in turn.

1. Discipline and Conduct Codes

Threat assessment team members may question whether they will run afoul of the anti-discrimination mandate of disability law if they discipline a student suspected of having or known to have a mental health impairment. But, in general, the law permits an institution to discipline a student for violations of its conduct code regardless of the student's disability status.[115] OCR has stated it "does not generally question a recipient's decision on whether or not to impose or continue a disciplinary action, provided that their [sic] decision is based on legitimate, nondiscriminatory reasons."[116] In addition, an institution typically may enforce its disciplinary policies even where the conduct in question is caused by a disability.[117] The institution must ensure, however, that it applies its conduct code in a similar fashion to other, non-disabled students.[118] Institutions should strive,

---

whose eye condition was largely corrected with contact lenses and occupational bifocals, was not substantially limited in a major life activity and, therefore, not disabled under the ADA or the Rehabilitation Act). The doctrine of "mitigating measures" has received substantial criticism. *See, e.g.*, Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 326 (2003) (criticizing the "*Sutton* trilogy"). As this article goes to press, Congress is considering measures that would require courts to determine whether an individual has a disability "without considering the impact of any mitigating measures." ADA Restoration Act, H.R. 3195, 110th Cong. (2007), at § 3; ADA Restoration Act, S. 1881, 110th Cong. (2007).

115. OCR Letter to S. Ohio Coll., *supra* note 109, at *11 ("Section 504 permits a recipient to establish reasonable rules to maintain a safe and orderly environment.").

116. Letter from Gary D. Jackson, Dir., Office of Civil Rights, U.S. Dep't of Educ., to Robert Spitzer, President, Gonzaga Univ., 2003 NDLR (LRP) LEXIS 1034, at *9 (Nov. 25, 2003).

117. OCR Letter to S. Ohio Coll., *supra* note 109, at *11 ("Section 504 allows a college to discipline a student for misconduct, even though that misconduct resulted from the student's disability, if the behavior violates an essential conduct code."); *see also* Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9, 1999) (affirming summary judgment for a university that expelled a student who threatened a professor "even if the behavior was precipitated by [plaintiff's] mental illness").

118. OCR has identified two limited instances in which a college may take into account a student's disability for purposes of applying discipline:

> For purposes of Section 504, a student's disability does not generally play a role in the disciplinary process except in two limited circumstances: first, where the student's

for instance, to apply the same discipline to a student who exhibits mental health concerns as they would to a non-disabled star athlete or the student government president.

Another legal consideration an institution must keep in mind when disciplining students with mental health concerns is whether there is a modification of its usual policies or practices that it could implement in order to accommodate a student who qualifies as disabled under the law. The law at present is not entirely clear on this point. Although OCR has acknowledged schools may have "legitimate concerns" about disruption caused by students suffering from mental health impairments, it has stated that administrators must attempt to address disruptive behavior by "modifying [the institution's] usual policies or practices in a nondiscriminatory manner acceptable under Section 504."[119] OCR also has advised that, in addition to providing a student who suffers from a mental health disability with adequate notice of the school's behavioral standards and the basis for the institution's belief that the student has failed to meet the standards, it must provide the student with "a reasonable opportunity to modify the behavior or engage in counseling so the student can comply with [the school's] reasonable standards of conduct."[120] This interpretation of § 504 as requiring the institution to consider reasonable accommodations for a student who has violated a conduct code—and who may not even have requested the accommodations—seems to run counter to the decisions of most courts holding that an institution need not lower institutional standards or assume an undue burden in order to comply with the disability laws.[121] Some courts have held that students who fail to comply with conduct codes or honor codes are simply not protected under the law because they are no longer "otherwise qualified" to participate in the institution's educational programs.[122]

> inability to comply with the conduct code resulted from the college's failure to provide a reasonable academic adjustment or accommodation; or second, where as part of its regular disciplinary process, a college takes into account mitigating situational factors, such as the loss of a parent. If such factors are taken into account, a student's disability should be considered as a mitigating factor.

OCR Letter to S. Ohio College, *supra* note 109, at *12.

119. Letter from Pearthree, Office of Civil Rights, U.S. Dep't of Educ., to Bernard O'Connor, President, DeSales Univ., 2005 NDLR (LRP) LEXIS 568, at *19–20 (Feb. 17, 2005) [hereinafter OCR Letter to DeSales Univ.]; *see also* Letter from Office of Civil Rights, U.S. Dep't of Educ., to Robert A. Hoover, President, Univ. of Idaho, 1998 NDLR (LRP) LEXIS 470, at *14 (Feb. 24, 1998) (upholding the university's dismissal of a student for violating disciplinary code where there was no evidence that the university had failed to consider the student's disability-related reasons for conduct violation).

120. Letter from James E. Heffernan, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Byron E. Kee, President, N. Cent. Tech. Coll., 1997 NDLR (LRP) LEXIS 724, at *10 (June 3, 1997); *see also* OCR Letter to S. Ohio Coll., *supra* note 109, at *12.

121. *See supra* notes 99–102. Although courts have held that higher education institutions have "a real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that [they] conscientiously carried out this statutory obligation," *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25–26 (1st Cir. 1991), the application of the accommodation requirement to conduct that would be subject to discipline seems to extend the accommodation requirement beyond where most courts have taken it.

122. *See, e.g.*, Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9,

Institutions considering disciplining a student with a mental health disability may also need to consider the impact of the disciplinary process on the student and whether the student is fit to undergo that process. Whether the disciplinary process and any likely punishment would have an adverse impact on a student's mental health is an appropriate topic for a threat assessment team to consider. In particular, although the mental health expert on the team may be prohibited by confidentiality laws from discussing the specific diagnosis or treatment of the student in question, the expert might be able to opine on the impact of the disciplinary process on students exhibiting particular symptoms. Upon such consultation, the institution might decide to suspend disciplinary proceedings until the student in question is fit to undergo them.[123] Alternatively, it may consider the student's mental health condition to be a mitigating factor when imposing any sanction.[124] These approaches raise the possibility that a student could make a claim he was "regarded as" disabled and treated differently by the institution on that basis, but, as long as the institution does not subject the student to any additional *adverse* treatment on the basis of his disability (real or perceived), the institution should run little risk of liability if faced with a claim of discrimination.

Conduct violations are important to the threat assessment process because they often provide an opportunity for the student to interact with the school. When a student is suspected of having or is known to have mental health concerns, and the student commits a conduct violation, there may be an opportunity to suggest counseling services to the student (whether the institution's or those of an outside provider). Likewise, where the institution believes a student would benefit from time away from school, it may use the opportunity to give the student a choice of serving a disciplinary suspension or voluntarily withdrawing for a period of time. This use of conduct violations to leverage voluntary action by the student has been criticized in commentary and in the press.[125] But, assuming the student in question has violated an institution's conduct code and the institution applies it equally to disabled and non-disabled students, it appears to be a legally permissible strategy. As a practical matter, it is a strategy upon which many institutions rely.

When pursuing these courses of action, it is important to keep a number of concerns in mind. First, an institution should never manufacture conduct code violations in order to force a student to withdraw. This would raise serious ethical

---

1999); Childress v. Clement, 5 F. Supp. 2d 384, 390–92 (E.D. Va. 1998) (finding that a student with a disability who was expelled from the university for plagiarizing and cheating was not "otherwise qualified"). *But see* Mershon v. St. Louis Univ., 442 F.3d 1069, 1077 (8th Cir. 2006) (finding that a student who the university accommodated until it perceived him as threat to a professor and barred him from campus could not show that he had requested "reasonable specific accommodations" that might have rendered him "otherwise qualified").

123. *See supra* note 83.

124. *See supra* note 109 (discussing OCR Letter to S. Ohio Coll.).

125. *E.g.*, Elizabeth Wolnick, Note, *Depression Discrimination: Are Suicidal College Students Protected By the Americans with Disabilities Act?*, 49 ARIZ. L. REV. 989 (2007); Karen W. Arenson, *Worried Colleges Step Up Efforts Over Suicide*, N.Y. TIMES, Dec. 3, 2004, at A1; Susan Kinzie, *GWU Suit Prompts Questions of Liability*, WASH. POST, Mar. 10, 2006, at A1; Bonnie Miller and Megan Twohey, *Colleges Take Hard Line on Psychological Problems: Critics See Harm; Officials Cite Court Rulings, Virginia Tech*, CHI. TRIB., Dec. 27, 2007, at 1.

concerns and legal risks under the anti-discrimination mandate of disability law. In addition, to avoid discriminatory action, an institution must not treat its disabled students any more harshly under its conduct code than it treats non-disabled students. Finally, an institution may wish to consider reputational concerns in determining whether to force a student to withdraw on the basis of a conduct violation rooted in a mental health problem.[126]

2. Violence Against Self or Others

There has been deep and widespread concern on campuses in the wake of the tragic events at Virginia Tech, Northern Illinois University, and other schools about violence committed by students with mental disabilities.[127] Violent episodes that injure or threaten others almost certainly constitute conduct code violations and institutions may, accordingly, discipline students for violating the institution's conduct standards.

Whether and how a college or university intervenes with a student who it believes to be at risk of self-harm or suicide raises more difficult issues.[128] In addressing students whom a threat assessment team considers to be at risk of self-harm and/or suicide, it is important to note that, in most cases, the student at risk is willing to work with the school to obtain counseling and treatment and complete her educational program. It is the experience of the authors that, when approached with thoughtful concern,[129] most students who are at risk of self-harm will: agree to sign waivers that permit information sharing between caregivers and college or university administrators; voluntarily move to more appropriate housing; and even voluntarily withdraw from school on a temporary basis until they are able to obtain the treatment and care they need in order to diminish any risk of harm.[130] Where the student has agreed to permit threat assessment teams to share information that would otherwise be confidential, or where a student agrees to withdraw voluntarily from a program in order to seek treatment, the risk of a legal claim against the

126. Arenson, *supra* note 125, at A1. Note that there has also been coverage of threat assessment teams that is generally positive. *See, e.g.*, Elizabeth Bernstein, *Bucking Privacy Concerns, Cornell Acts as Watchdog*, WALL ST. J., Dec. 28, 2007, at A1; Anthony Morgano, *Team Prevents Violence at UW*, THE BADGER HERALD, Feb. 26, 2008, *available at* http://badgerherald.com/news/2008/02/26/team_prevents_violen.php.

127. *See, e.g.*, Alex Kingsbury, *Toward a Safer Campus: The Ivory Tower is More Secure Than Ever, But More Safeguards May Still Be Needed*, U.S. NEWS & WORLD REP., Apr. 30, 2007, at 48; Christine Lim, *Warning of Danger Via Text Message*, TIME, Aug. 09, 2007, http://www.time.com/time/specials/2007/article/0,28804,1651473_1651472_1651580,00.html; Gary Pavela, *Commentary: Fearing Our Students Won't Help Them*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Feb. 18, 2008, at A37.

128. For an excellent overview of the issues surrounding suicide and self-harm on campus, see Linda J. Schutjer, Suicide and Self Harm: Legal Trends and Risk Management (June 27, 2006) (unpublished manuscript, on file with the National Assoc. of Coll. and Univ. Attorneys).

129. *See supra* note 78.

130. *See also* Schutjer, *supra* note 128, at 6 ("The vast majority of students who are unable to continue their studies at a college or university due to a medical or mental illness or issue recognize that they need to take time off and will pursue a voluntary leave or withdrawal.").

institution is greatly reduced.[131] Thus, it is important for threat assessment teams to engage students of concern consensually throughout the threat assessment process to the extent possible.[132]

Where a student refuses to participate in the threat assessment process or where circumstances arise that are so exigent that the institution must act without obtaining the student's consent, the law permits colleges and universities to take adverse action against a student who is disabled (or "regarded as" such) if the school finds the student is a "direct threat" to herself or others and if the school applies the appropriate process.[133] The law permits actions adverse to the very people it was designed to protect because a student found to be a "direct threat" to the health and safety of others is not a "qualified individual" within the meaning of § 504 of the Rehabilitation Act of 1973.[134] OCR, which has expanded this concept to include a student who is a threat to self, has confirmed its policy permits action adverse to a disabled student if the student poses a "direct threat" to the health or safety of himself or others:

> OCR policy holds that nothing in Section 504 prevents educational institutions from addressing the dangers posed by an individual who represents a "direct threat" to the health and safety of self or others, even if such an individual is a person with a disability, as that individual may no longer be qualified for a particular educational program or activity.[135]

The appropriate manner of determining whether a direct threat exists is discussed in detail immediately below.

---

131. Although a valid release permitting the sharing of student information may waive a student's rights under various privacy or confidentiality laws, the risk of legal liability is not completely eradicated. Even students who voluntarily agree to measures designed to protect their well-being may later file claims against the institution. These claims are more easily defended when there is a well-documented record of the institution's decision-making process. For this reason, the authors recommend that one member of the threat assessment team keep thorough records of decisions with regard to students. It is important that the records include objective facts and observations rather than speculation or ill-considered, conclusory statements. A full discussion of threat assessment record-keeping is beyond the scope of this article.

132. *See supra* note 78.

133. *See* OCR Letter to Bluffton Univ., *supra* note 109, at 4; Letter from Michael E. Gallagher, Office for Civil Rights, Dep't of Educ., to Jean Scott, President, Marietta Coll., 2005 NDLR (LRP) LEXIS 371, at *6–7 (July 26, 2005); OCR Letter to Guilford Coll., *supra* note 75, at *26; OCR Letter to DeSales Univ., *supra* note 119, at *15.

134. *See* OCR Letter to DeSales Univ., *supra* note 119, at *15; OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Guilford Coll., *supra* note 75, at *26; *see also* 42 U.S.C. § 12113(b) (2000).

135. OCR Letter to Bluffton Univ., *supra* note 109, at 4; *see also* OCR Letter to DeSales Univ., *supra* note 119, at *15; OCR Letter to Guilford Coll., *supra* note 75, at *26.

3. Direct Threat Assessment of Students Exhibiting Mental Health Problems

a. Determining Whether a Direct Threat Exists

OCR has provided substantial guidance in opinion letters regarding assessment of students to determine whether a direct threat exists. "[T]he 'direct threat' standard applies to situations where a college proposes to take adverse action against a student whose conduct resulting from a disability poses a *significant risk to the health or safety of the student or others*."[136] A "significant risk" exists when there is a "high probability of substantial harm and not just a slightly increased, speculative, or remote risk."[137]

It is critical that the team investigating whether a student's circumstances rise to the level of a direct threat engage in an *individualized and objective assessment* of the student's ability to participate safely in the educational program at issue.[138] The institution must be careful not to base this assessment on stereotypes.[139] Rather, it must ground its assessment upon reasonable judgment based upon current medical knowledge or the best available objective evidence to ascertain the following:

(a) The nature, duration, and severity of the risk;

(b) The probability that potentially threatening injury actually will occur;[140] and

(c) Whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk.[141]

b. Complying with Due Process

In applying the direct threat standard, colleges and universities must comply with due process.[142] Due process is a constitutional concept requiring fair

---

136. OCR Letter to DeSales Univ., *supra* note 119, at *14 (emphasis added).

137. OCR Letter to Guilford Coll., *supra* note 75, at *7; *see also* OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to DeSales Univ., *supra* note 119, at *14.

138. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *7; OCR Letter to Guilford Coll., *supra* note 75, at *24; OCR Letter to DeSales Univ., *supra* note 119, at *14.

139. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *7; OCR Letter to Guilford Coll., *supra* note 75, at *26; OCR Letter to DeSales Univ., *supra* note 119, at *14–15.

140. The "probability" prong of the direct threat analysis poses inherent difficulty, as several commentators have noted that future violent behavior is exceedingly difficult to predict. *See supra* note 7; FEIN ET AL., *supra* note 8, at 20 (rejecting use of "profiles" of students who might engage in violence); Gary Pavela, ASJA L. AND POL'Y REP. No. 277 (Feb. 21, 2008) (quoting Gene Deisnger, Ph.D.) ("Threat assessment and management are much more about preparing for future behavior than they are about predicting behavior *per se*.").

141. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *7–8; OCR Letter to Guilford Coll., *supra* note 75, at *24–25; OCR Letter to DeSales Univ., *supra* note 119, at *14.

142. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *26; OCR Letter to DeSales

procedures.[143] In the context of higher education, due process is typically binding upon public institutions but not private ones.[144] But, under the disability laws as applied by the OCR, due process requires any college or university subject to § 504, whether public or private, to "adhere to procedures that ensure that students with disabilities are not subject to adverse action on the basis of unfounded fear, prejudice, or stereotypes."[145]

With regard to the mechanics of due process, OCR distinguishes between "minimal due process" and "full due process." Threat assessment teams facing "exceptional circumstances . . . where safety is of immediate concern . . . may take interim steps pending a final decision regarding an adverse action against a student as long as [they provide] minimal due process."[146] OCR interprets this to mean that the institution must provide the student with (a) adequate notice of the adverse action and (b) an opportunity to address the evidence acquired by the institution.[147] Further, an institution taking action under the minimal due process standard must follow up with full due process as soon as practicable.[148]

Where a situation is no longer an emergency or where it is not otherwise exigent, the institution must apply full due process.[149] In addition to adequate notice and an opportunity to address the evidence supporting an adverse action, full due process in this context requires the institution to afford the student the right to a hearing and to an appeal.[150]

Due process is a critical concept for threat assessment teams to understand because of its profound prophylactic qualities. First, by its very nature, it tends to protect students from arbitrary action by avoiding prejudice, encouraging a thorough review of evidence, and providing for notice and an appeal. Due process also protects the institution applying it. Courts tend to defer to higher education

---

Univ., *supra* note 119, at *15–16.

143. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125 (1990) (stating that the Due Process Clause "encompasses . . . a guarantee of fair procedure").

144. *See, e.g.*, Harwood v. Johns Hopkins Univ., 747 A.2d 205, 209 (Md. Ct. Spec. App. 2000) ("Although the actions of public universities are subject to due process scrutiny, private universities are not bound to provide students with the full range of due process protection.").

145. OCR Letter to Marietta Coll., *supra* note 133, at *8; *see also* OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Guilford Coll., *supra* note 75, at *26.

146. OCR Letter to Marietta Coll., *supra* note 133, at *8; *see also* OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *15–16.

147. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

148. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

149. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

150. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

institutions making decisions involving their academic judgment, including questions of reasonable accommodation[151] and whether a student is "qualified" under the disability laws,[152] unless the institution in question has acted arbitrarily or capriciously.[153] Similarly, OCR has specifically stated that it "accords significant discretion to decisions of postsecondary institutions made through a fair due process proceeding."[154] Thus, a threat assessment team that employs due process, as described by OCR, is almost certainly taking great strides toward protecting its students and other constituents and also toward limiting institutional exposure to legal liability.[155]

4. Mandatory Assessment, Involuntary Withdrawal, and Conditional Readmission

It is critical for threat assessment team members to have a basic understanding of the direct threat standard because it permits an institution to take useful and consequential steps that otherwise might be deemed discriminatory. These steps include mandatory assessment, involuntary leave, and conditional readmission.

a. Mandatory Assessment

It appears that a college or university may use its need to determine whether a direct threat exists as the basis for a program of mandatory assessment. For example, some institutions have adopted policies requiring a mandatory assessment of students exhibiting suicidal behavior.[156] The legal foundation for

151. *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1047–48 (9th Cir. 1999) (holding that, once the educational institution has sought suitable means of reasonably accommodating the disabled student and submitted a factual record showing conscientious effort to accommodate, the court will defer to the institution's academic decision).

152. *See* Hash v. Univ of Ky., 138 S.W.3d 123, 128–29 (Ky. Ct. App. 2004) (deferring to the university's determination that a student suffering from depression who had withdrawn from law school was not qualified for readmission under state law).

153. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 91–92 (1978) (warning against "judicial intrusion into academic decisionmaking" where the defendant university had followed its rules and the plaintiff medical student had failed to show arbitrary or capricious action on part of the university); *see also* McGregor v. La. St. Univ. Bd. of Supervisors, 3 F.3d 850, 859 (5th Cir. 1993) (deferring to the law school's decision not to modify its full-time attendance and in-class examination requirements for a disabled student where the court found no evidence of malice, ill will, or efforts to impede the student's progress).

154. OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

155. *See, e.g.*, Esmail v. S.U.N.Y. Health Sci. Ctr. at Brooklyn, 633 N.Y.S.2d 117, 117 (N.Y. App. Div. 1995) (affirming the dismissal of a disability discrimination claim by the student where the court found "no procedural irregularities" in the defendant university's decision). Assuming that the institution's policies meet applicable legal standards, threat assessment teams should review any applicable policies, such as involuntary leave policies, to ensure compliance. Failure to comply with an institution's published policies can lead to numerous legal claims by affected students, including breach of contract, discrimination, retaliation, and other claims.

156. *See, e.g.*, Univ. of Ill. Urbana-Champaign, Counseling Ctr., Suicide Policy, http://ccserver4.ad.uiuc.edu/?page_id=53 (last visited Apr. 10, 2008) (outlining the University of Illinois's mandatory assessment policy following suicide threats and attempts); Univ. of Or.,

requiring students whom the institution regards as disabled (or at least as potentially disabled) to undergo a mandatory assessment is somewhat unclear. On the one hand, it may be that mandatory assessment, at least in the case of a suicide threat, is permissible as a disciplinary response to a threat of violence (i.e., to self).[157] On the other hand, it seems reasonably clear that an institution could justify a mandatory assessment policy on the basis of its need to determine whether a direct threat exists.[158] An institution must be able to determine whether a direct threat exists, and a mandatory assessment policy, if invoked upon a reasonable belief that the student in question might pose a direct threat to self or others,[159] is a reasonable way to achieve the individualized and objective analysis required by the direct threat standard.

b. Involuntary Withdrawal

Even more important, the direct threat standard provides the basis for involuntary withdrawal. As numerous OCR letters make clear, a college or university can remove a student from its programs and even terminate enrollment if it finds that the student constitutes a direct threat to the health or safety of self or others.[160] Absent the direct threat concept or some clear inability to comply with rules of conduct,[161] involuntary withdrawal of students with mental health problems would almost certainly be challenged as discriminatory.

c. Conditional Readmission

Another significant area in which the direct threat concept permits institutions to take actions that would otherwise appear discriminatory is with regard to readmission to the institution (or institutional program) from which the student has withdrawn. OCR has repeatedly instructed that, assuming an institution has a policy on emergency withdrawal and readmission, it may place conditions on a

---

Student Medical Leave Policy, http://arcweb.sos.state.or.us/rules/OARS_500/OAR_571/571_023.html (last visited Apr. 10, 2008) (outlining the University of Oregon's policy regarding student medical leave, including provisions for mandatory professional assessment); Univ. of Puget Sound, Mandated Assessment for Risk of Suicidality and Self-Harm (2003), http://www.ups.edu/documents/MARSSH_Disclosure_Statement.pdf (last visited Apr. 10, 2008); *see also* Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081 (2007). In carrying out a mandatory assessment program, institutions should be mindful of due process considerations. *See* Wei, *supra* note 81, at 310.

157. *See* Gary Pavela, *Direct Threat Analysis and the Illinois Mandated Assessment Policy*, ASJA L. & POL'Y REP., Sept. 21, 2005 ("A suicide threat, for example, is first of all a *threat of violence*. Threats of violence may be sanctioned through the campus disciplinary system (or administrative equivalent), after appropriate due process.").

158. OCR Letter to Guilford Coll., *supra* note 75, at *26 ("A college may inquire into a student's medical condition where the college, on a nondiscriminatory basis, believes that a student represents a direct threat to self or others.").

159. *See id.*

160. *See supra* note 133.

161. OCR Letter to S. Ohio Coll., *supra* note 109, at *11.

student's return to campus after the student has been found to be a direct threat.[162] As with the determination of whether a direct threat exists, a college or university must determine the conditions a returning student must satisfy "on an individual basis."[163]

OCR has explicitly suggested that an institution may require a returning student to provide documentation of steps he has taken to reduce the previous threat, including that the student: (a) followed a treatment plan; (b) submitted periodic reports of his progress; and (c) granted permission for the institution to talk to his treating professional.[164] Further, several courts have deferred to decisions by institutions not to readmit students where the institution was acting within its academic discretion.[165]

The institution's right to place conditions on a student seeking readmission is not unlimited.[166] First, colleges and universities must apply their readmission policies equitably and may not discriminate against students with disabilities seeking readmission.[167] Thus, an institution would appear to run afoul of the anti-

---

162. Bluffton Univ., *supra* note 109, at 6 (permitting conditions on a student's return); OCR Letter to Marietta Coll., *supra* note 133, at *14 (permitting an emergency withdrawal policy that included "conditions for a student's return to the College after an emergency withdrawal, consistent with Federal disability laws and with consideration of the individual circumstances of each student"); OCR Letter to Guilford Coll., *supra* note 75, at *33–34 (permitting an institution limited discretion in conditions for a student's return, including requiring documentation that the student acted to reduce the previous threat); OCR Letter to DeSales Univ., *supra* note 119, at *25 (permitting the university to condition receipt of the benefit of returning upon "showing that the student is no longer a threat" and to require periodic reports from the student's physician).

163. OCR Letter to Guilford Coll., *supra* note 75, at *34.

164. OCR Letter to Guilford Coll., *supra* note 75, at *34; OCR Letter to DeSales Univ., *supra* note 119, at *15.

165. *See, e.g.*, Hash v. Univ. of Ky., 138 S.W.3d 123 (Ky. Ct. App. 2004) (affirming summary judgment to the defendant university that rejected an application for readmission by a law student who withdrew due to depression). For a thorough review of recent case law and OCR decisions regarding readmission of students with disabilities, see Daggett, *supra* note 89, at 527–53.

166. *See, e.g.*, Carlin v. Trs. of Boston Univ., 907 F. Supp. 509 (D. Mass. 1995) (denying summary judgment to the university defendant where the university denied readmission to a Ph.D. student who took a one year leave of absence due to symptoms of depression); Dearmont v. Tex. A & M Univ., No. H-87-3665, 1991 NDLR (LRP) LEXIS 1013 (S. D. Tex. 1991) (awarding judgment and reinstatement to a student with a learning disability under the Rehabilitation Act where the court found that the university had failed to make reasonable accommodations and had engaged in harassment of the student); OCR Letter to Guilford Coll., *supra* note 75, at *33–34 ("While the institution has discretion in fashioning return conditions, its discretion is not unlimited."). *But see* Haight v. Haw. Pacific Univ., No. 95-16810, 1997 U.S. App. LEXIS 20024 (9th Cir. Jun. 16, 1997) (finding that a student who was offered conditional readmission and made no attempt to fulfill the conditions had not been "excluded" from the program and therefore could show no violation of the Rehabilitation Act or ADA). For a discussion of cases in which claims by students with disabilities who had sought readmission to defendant institutions survived summary judgment (and in the case of *Dearmont,* prevailed), see Daggett, *supra* note 89, at 536–46.

167. OCR Letter to Guilford Coll., *supra* note 75, at *33 ("[A]n educational institution must not discriminate on the basis of disability in establishing conditions under which a student can return after having been withdrawn from any of the institution's programs, whether academic, housing, both, or other.").

discrimination mandate of disability law if it denied readmission to a disabled student with a history of substance abuse while permitting readmission for a non-disabled student withdrawn due to his own history of substance abuse.

Second, an institution may not require as a condition for readmission that the student's "disability-related behavior no longer occurs, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications."[168] Nor may an institution require that, as a precondition of returning to his studies, a student completely cease all self-injurious behavior, as "[n]ot all self-injurious behavior may be sufficiently serious as to constitute a direct threat."[169] Thus, under OCR's view, it would appear impermissible to withhold readmission from a student whose severe eating disorder had previously led to a direct threat finding on the basis that the student still purges or refuses to eat *unless* the current behavior meets the standard for a direct threat.

Thus, as far as OCR is concerned, the permissibility of imposing conditions on a student's participation in educational programs is tied to the continued existence of a direct threat or the need to determine whether such a threat exists. If no direct threat exists, or if the threat has subsided, OCR's approach apparently forbids higher education institutions from withholding readmission from a disabled student.

C. Concluding Thoughts Regarding the Disability Laws

Disability laws, as applied to institutions of higher education, are designed to provide an "even playing field" for students with disabilities.[170] Application of these laws can be challenging for threat assessment teams for many reasons. For instance, challenges arise because each case turns on its own facts, the law continues to evolve, and circumstances may be exigent and require immediate decisions. In addition, the standard set forth by OCR for determining whether a direct threat exists is extremely high and the analysis required is rigorous. Nonetheless, certain practices will most likely result in OCR and courts granting significant discretion to institutions making decisions under disability law.

First and foremost, courts and the OCR care deeply about procedure.[171] Thus,

---

168. *Id.* at *34; OCR Letter to DeSales Univ., *supra* note 119, at *15.

169. OCR Letter to Guilford Coll., *supra* note 75, at *35; *see also* OCR Letter to DeSales Univ., *supra* note 119, at *15; Schutjer, *supra* note 128, at 8 (discussing the OCR Letter to Guilford Coll.).

170. *See* 42 U.S.C. §§12101(a)(8)–(9) (2000); Felix v. N.Y. City Trans. Auth., 324 F.3d 102, 107 (2d Cir. 2003); 34 C.F.R. § 104.4(b)(2) (2007).

171. *Compare* Esmail v. S.U.N.Y. Health Sci. Ctr. at Brooklyn, 633 N.Y.S.2d 117 (N.Y. App. Div. 1995) (no procedural regularities), *with* Dearmont v. Tex. A & M Univ., No. H-87-3665, 1991 NDLR (LRP) LEXIS 1013 (S.D. Tex. May 28, 1991) (criticizing university's procedures). *See also* OCR Letter to Bluffton Univ., *supra* note 109, at 5 (criticizing failure to provide due process); OCR Letter to Marietta Coll., *supra* note 133, at *12–13; OCR Letter to Guilford Coll., *supra* note 75, at *29–37 (criticizing the college's failure to adhere to due process principles, failure to have formal procedures for involuntary withdrawal for medical reasons, and failure to offer grievance procedures); OCR Letter to DeSales Univ., *supra* note 119, at *16 (noting the university's failure to give a disabled student notice that it believed he had a serious mental impairment that might require long-term treatment); *id.* at *20 (noting the university's

institutions must be careful to have up-to-date, thoughtful policies to address situations implicating disability law. Further, assuming such procedures are in place, threat assessment teams must make every effort to comply with them. In so doing, the teams must focus on objective facts and current student conduct rather than stereotypes. They also should refrain from rushing to judgment based on their experience with a particular mental health condition and make an individualized inquiry into a student's current circumstances. Moreover, teams should appoint a member to document objectively and thoroughly their decisions and supporting evidence.[172] Finally, threat assessment teams and the institutions employing them should always provide adequate due process, following the guidance set forth by OCR and discussed above.

III. PRIVACY AND CONFIDENTIALITY LAWS: UNDERSTANDING THE WHO, WHAT, AND WHEN OF SHARING STUDENT INFORMATION

In addition to addressing the many issues that can arise under disability law, it is essential for threat assessment teams to understand how various privacy and confidentiality laws affect their operations. As reflected in the GOVERNOR'S REPORT, confusion often abounds on campuses regarding what information about troubled students legally can be shared within an institution and with individuals outside the institution.[173] In their report to President George W. Bush, the Secretaries of Health & Human Services and Education and the Attorney General echoed these concerns, noting that critical information sharing has been severely hampered because of the "confusion and differing interpretations about state and federal privacy laws."[174] Various officials at Virginia Tech "explained their failures to communicate with one another or with Cho's parents by noting their belief that such communications are prohibited by the federal laws governing the privacy of health and education records" despite the fact that "federal laws and their state counterparts afford ample leeway to share information in potentially dangerous situations."[175]

Given the various federal and state laws that potentially apply in this context and their interrelationship with one another, some level of confusion is understandable, but the events at Virginia Tech and Northern Illinois University have given institutions a strong incentive to gain a firm grasp on what disclosures are permitted under privacy and confidentiality laws that apply to the information that institutions maintain and collect regarding troubled students.[176] It is essential for the members of a threat assessment team to understand how the Family

failure to provide the student with an opportunity to present evidence or be heard regarding expulsion from the university housing and failure to provide notice of what behavior it would consider in reaching a decision).

172. *See supra* Section I.E.

173. GOVERNOR'S REPORT, *supra* note 8, at 2, 52, 63–70.

174. DEP'T OF JUSTICE ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7 (2007), *available at* http://www.hhs.gov/vtreport.gov.

175. GOVERNOR'S REPORT, *supra* note 8, at 2.

176. *See* Mike Gangloff, *Legislating Privacy: How Open Should Information Be?,* ROANOKE TIMES, Dec. 30, 2007, at A1.

Educational Rights and Privacy Act (FERPA),[177] the Health Insurance Portability and Accountability Act (HIPAA),[178] and any applicable state laws affect the ability of team members to collect and share information with one another and to disclose information to a student's family members, local law enforcement officials, or others outside the institution. The Virginia Tech Review Panel correctly concluded that these laws allow disclosure of information when a student poses a serious threat to self or others.[179] Precisely what disclosures are permitted depends upon what law or laws apply and the particulars of the situation at hand.

The U.S. Department of Education's Family Policy Compliance Office (FPCO) has issued further guidance regarding FERPA in the wake of the tragic events at Virginia Tech.[180] The apparent confusion over FERPA has also been acknowledged in the proposed legislation reauthorizing the Higher Education Act (HEA) which would require the U.S. Department of Education to

> provide guidance that clarifies the role of institutions of higher education with respect to the disclosure of education records . . . in the event that [a] student demonstrates that the student poses a significant risk of harm to himself or herself or to others, including a significant risk of suicide, homicide, or assault . . . [and] clarify that an institution of higher education that, in good faith, discloses education records or other information in accordance with the requirements of this Act and [FERPA] shall not be liable to any person for that disclosure.[181]

Indeed, the Department of Education has now issued proposed amendments to the FERPA regulations, many of which are designed to memorialize the recent guidance from the FPCO.[182]

This Part will explain how threat assessment teams can determine what laws apply when dealing with students who may pose a serious threat to self or others and what information can be disclosed under these laws to help protect these

---

177. 20 U.S.C. § 1232g (2000); 34 C.F.R. § 99 (2007).

178. 42 U.S.C. §§ 1320d to d-8 (2000); 45 C.F.R. pts. 160, 162, 164 (2007).

179. *See* Steven J. McDonald, *The Family Rights and Privacy Act: 7 Myths—and the Truth*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 18, 2008, at A53.

180. *See* U.S. Dep't of Educ., Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Colleges and Universities, http://www.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf (last visited Apr. 20, 2008) [hereinafter Balancing Student Privacy and School Safety]; U.S. Department of Educ., Disclosure of Information from Education Records to Parents of Postsecondary Students, http://www.ed.gov/policy/gen/guid/fpco/hottopics/ht-parents-postsecstudents.html (last visited Apr. 20, 2008) [hereinafter Disclosure of Information from Education Records]; Ass'n for Student Judicial Affairs, FERPA Questions for Lee Rooker, Director of the Family Policy Compliance Office, U.S. Department of Education (2007) (unpublished manuscript), *available at* http://www.asjaonline.org/attachments/wysiwyg/525/FERPAQUESTIONSanswered.doc [hereinafter FERPA Questions for Lee Rooker].

181. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 865 (2007).

182. *See* Family Education Rights and Privacy, 73 Fed. Reg. 15,573 (proposed Mar. 24, 2008). Among other things, the proposed amendments would clarify permissible disclosures to parents and permissible disclosures of directory information; specify conditions that apply to disclosures in health or safety emergencies; allow disclosures to third parties in connection with the outsourcing of services; and revise the definitions of various key terms. *Id.*

students, the campus community, and the general public. Section A of this Part will discuss the applicability of FERPA and its many exceptions. Section B will address federal and state laws that govern the privacy and confidentiality of student health information. Whether to share or disclose information in a given situation is, of course, a question separate from the issue of whether a particular disclosure is legally permissible. The discussion in this Part focuses on what disclosures are legally permissible. After determining the legality of a contemplated disclosure, institutions still must carefully consider the policy issues of when and under what circumstances to share or disclose information both within the institution and outside of it.

A. Understanding FERPA's Scope and Exceptions

FERPA, also known as the Buckley Amendment, is a federal statute that affords "eligible students" certain rights with respect to their "education records."[183] More specifically in this context, it provides students who are attending an institution of postsecondary education the right to inspect and review their "education records," request an amendment of any education records that are inaccurate or misleading, and exercise some level of control over the disclosure of their education records (and the personally identifiable information contained therein).[184] FERPA's reach is quite broad. It applies to all educational institutions that accept funding at any level under any program administered by the Department of Education and requires such institutions to notify students annually of their rights under FERPA.[185] FERPA generally covers all records, regardless of their format, containing personally identifiable student information that are maintained by an institution or an employee or other agent of the institution.[186] In addition to more traditional academic records, such as transcripts, "education records" also include "non-academic student information database systems, class schedules, financial aid records, financial account records, disability accommodation records, disciplinary records, and even 'unofficial' files, photographs, e-mail messages, hand-scrawled Post-it notes, and records that are publicly available elsewhere or that [a] student . . . has publicly disclosed."[187]

With regard to any records that are subject to FERPA, an institution can

183. 20 U.S.C. § 1232g (2000 & Supp. V 2005); *see also* 34 C.F.R. § 99 (2007). For a very helpful summary of the events that led to the adoption of FERPA, FERPA's basic requirements, and the U.S. Supreme Court and other leading court decisions interpreting FERPA, see Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679 (2003). NAT'L ASSOC. OF COLL. & UNIV. ATT'YS, THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: A LEGAL COMPENDIUM (Steven J. McDonald ed., 2d ed. 2002) is another excellent resource. *See also* Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393 (2008).

184. 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.5; *see also* Steven J. McDonald & Nancy E. Tribbensee, *FERPA and Campus Safety*, NACUANOTES, Aug. 6, 2007, http://www.myacpa.org/pd/documents/ferpa1.pdf.

185. 20 U.S.C. § 1232g(a), (e), (f); 34 C.F.R. §§ 99.1, 99.7.

186. 34 C.F.R. § 99.3.

187. McDonald & Tribbensee, *supra* note 184.

disclose information from those records only if (a) it is "directory information;"[188] (b) the student has consented in writing to the disclosure;[189] or (c) one or more exceptions to FERPA's written consent requirement applies.[190]

Despite FERPA's broad reach and general prohibition against disclosures of student record information absent the student's express written permission, FERPA nonetheless provides institutions and their threat assessment teams with a fair amount of flexibility when it comes to disclosing student information in two important respects. First, FERPA expressly *excludes* from its coverage several categories of records and information regarding students. Second, even with regard to student record information covered by FERPA, the statute and implementing regulations include a number of important exceptions allowing institutions to share student record information both within the institution and with others outside the institution.

1. Records and Information Excluded from FERPA

As relevant in the threat assessment team context, FERPA does not cover the following information and records even if they contain personally identifiable information about a student: (a) personal observations or direct interactions not derived from an existing education record; (b) records created and maintained by a "law enforcement unit" for a law enforcement purpose; and (c) student medical treatment records.[191]

---

188. FERPA defines "directory information" as follows:

> [I]nformation contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

34 C.F.R. § 99.3 (citing 20 U.S.C. § 1232g(a)(5)(A)).

An institution may disclose directory information about a current student without the student's express written permission if it describes in its annual FERPA notification: (a) the types of personally identifiable information that the institution has designated as directory information; (b) the student's right to request that the institution not designate any or all of his or her information as directory information; and (c) the period of time within which a student has to notify the institution in writing that he or she does not want any or all of his or her information designated as directory information. 20 U.S.C. § 1232g(a)(5)(A)–(B); 34 C.F.R. § 99.37.

189. Unless an exception applies, an institution must obtain the student's express written consent before disclosing personally identifiable information from the student's education records. 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.30(a). The written consent must: (a) be signed and dated by the student; (b) specify the records that may be disclosed; (c) state the purpose of the disclosure; and (d) identify the party or class of parties to whom the disclosure may be made. 20 U.S.C. § 1232g(b) (2000); 34 C.F.R. § 99.30(a)–(b) (2007). Under certain circumstances, an electronic signature may be acceptable evidence of a student's written consent, but an e-mail from a student will not suffice. 34 C.F.R. § 99.30(d).

190. 20 U.S.C. § 1232g(b); 34 C.F.R. §§ 99.30, 99.31; *see also* McDonald & Tribbensee, *supra* note 184.

191. Other categories of records are also excluded from the definition of "education records"

a. Personal Knowledge or Observations

FERPA only protects information derived from student education records; it does not apply to personal observations of, or direct interactions with, students.[192] If, at some point, a faculty or staff member describes his or her observations of a student in a document that is maintained by the institution or an employee of the institution, that document would be subject to FERPA, but the faculty or staff member would still be permitted to disclose his or her personal observations to a threat assessment team member or other appropriate school official without regard to FERPA.[193] The record itself, however, could be disclosed only in accordance with FERPA.[194] As a result, FERPA would not prohibit a school official from contacting a student's parents to advise them about any concerns based upon the individual's own personal observations of the student.[195] This is a very important exception given that a number of faculty or staff members may observe or interact with a student whose conduct may be of concern for one reason or another. Accordingly, it is essential for institutions to understand that information obtained based upon one's direct interactions with a student is not covered by FERPA.

b. Law Enforcement Unit Records

"Law enforcement unit" records are records that are: (a) created by a law enforcement unit; (b) created for a law enforcement purpose; and (c) maintained by a law enforcement unit.[196] Many colleges and universities have their own police or public safety department, but even institutions that do not have a separate unit dedicated to public safety and security can designate a particular office or employee as the unit or official responsible for referring alleged violations of law to local law enforcement authorities.[197] Significantly, a "law enforcement unit" does not lose its status as such under FERPA if it performs other, non-law enforcement functions for the institution, including the investigation of incidents or conduct that leads to disciplinary action against a student.[198] Institutions should identify in their FERPA policy and annual notification which office or official

---

and, therefore, are not covered by FERPA. They include: (a) student employment records; (b) alumni records; and (c) records that are kept in the sole possession of the maker of the records, used only as a personal memory aid, and are not accessible to or shared with any other person except a temporary substitute for the maker. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3(b)(1), (3), (5).

192. 20 U.S.C. § 1232g(a)(4).

193. *Id.* As discussed in more detail below, *infra* Part III.A.1.c, even if the information at issue is covered by FERPA, members of a threat assessment team can often access the information under the "legitimate educational interest" exception that allows school officials to access information contained in a student's "education records" as long as the team members have a legitimate need to know the information to perform their job function.

194. *See* McDonald & Tribbensee, *supra* note 184; Disclosure of Information from Education Records, *supra* note 180.

195. Disclosure of Information from Education Records, *supra* note 180.

196. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

197. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

198. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

serves as the institution's "law enforcement unit."[199] Law enforcement unit officials employed by the institution should also be identified in the institution's annual notification as "school officials" with a "legitimate educational interest"[200] so they can gain access to a student's "education records" as a member of a threat assessment team or to otherwise carry out their job responsibilities.[201]

Investigative reports and other records created and maintained by law enforcement units are not "education records" covered by FERPA so long as the records are created, at least in part, for a law enforcement purpose.[202] Records created exclusively for a non-law enforcement purpose, such as pursuing disciplinary action against a student, would still be subject to FERPA.[203] In addition, law enforcement unit records that are shared with non-law enforcement personnel at an institution, such as members of a threat assessment team or student affairs personnel, become "education records" subject to FERPA in the hands of non-law enforcement personnel.[204] The copies of these same records maintained by a law enforcement unit remain exempt from FERPA, and information from those records can be freely disclosed by law enforcement personnel.[205] Similarly, "education records" shared with law enforcement unit officials remain subject to FERPA, even while in the possession of the law enforcement unit.[206] As a result, it is wise to maintain law enforcement unit records separately from education records to ensure that an institution can take full advantage of the ability to disclose information from law enforcement unit records.[207] In sum, FERPA does not prohibit institutions from disclosing law enforcement unit records (and the information contained therein) to anyone, even where they do not have a student's consent.[208] This exception can, of course, facilitate communications between an institution's law enforcement officials and local law enforcement, a student's parents and family members, and others outside the institution.

c. Student Medical Records

Certain student medical records are also excluded from FERPA if they are: (a) made or maintained by a physician, psychiatrist, psychologist, or other health care professional acting in his or her professional capacity; and (b) made, maintained, or used only in connection with treatment of the student.[209] Such records are

199. *See* Balancing Student Privacy and School Safety, *supra* note 180.

200. *See* discussion *infra* Part III.A.2.a.

201. *Id.*

202. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

203. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

204. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

205. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

206. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

207. *See* Balancing Student Privacy and School Safety, *supra* note 180.

208. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8; LeRoy Rooker, Dir., Fam. Pol'y Compliance Off., Address at the University of Vermont Legal Issues in Higher Education Conference: Post Virginia Tech Communication: What, When, and To Whom? (Oct. 16, 2007); Balancing Student Privacy and School Safety, *supra* note 180.

209. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

referred to herein as "student treatment records." The exclusion for student treatment records is narrower than it first may seem because any such records that are used or disclosed for any purpose other than treatment (e.g., disclosures to an insurance company for billing purposes, disclosures to a disability services office on campus for purposes of evaluating a request for accommodations, etc.), become "education records" and, therefore, are protected by FERPA.[210]

However, unlike direct personal observations and law enforcement records, exclusion of this information from FERPA does not mean that the information contained in student treatment records can be freely disclosed. Student medical records, and the information contained therein, are typically subject to state medical records laws or state laws governing physician-patient confidentiality.[211] In addition, HIPAA may restrict disclosure of these records if the institution is a "covered entity" or its health service is a "covered component" of the institution within the meaning of HIPAA.[212]

2. Exceptions to FERPA's Written Consent Requirement

For records that are "education records" protected by FERPA, as noted above, a student's express written consent is required for disclosure of the information contained in these records unless it is limited to "directory information" or an exception applies.[213] The most significant exceptions to the written consent requirement for threat assessment purposes include disclosures: (a) to other school officials with a "legitimate educational interest;"[214] (b) to parents of a dependent student;[215] (c) in a health or safety emergency;[216] (d) in connection with certain disciplinary proceedings involving alcohol, drugs, crimes of violence, or non-forcible sex offenses;[217] (e) to comply with a subpoena or court order;[218] and (f) to other schools in which a student seeks or intends to enroll.[219] Significantly, all of these exceptions are independent of one another. Thus, institutions may find that more than one exception allows for disclosure in a particular situation. They are also permissive rather than mandatory. Although an institution is not required to disclose information if one or more of the following exceptions applies, in the context of a threat assessment team, an institution likely will be searching for ways to make disclosures if necessary to protect the welfare or safety of a student, the broader campus community, or the public at large.

---

210. *See* FERPA Questions for Lee Rooker, *supra* note 180.
211. *See* discussion *infra* Part III.B.2.
212. *See* discussion *infra* Part III.B.1.
213. *See* 20 U.S.C. § 1232g(a)(5)(A), (b)(1), (b)(2)(A); 34 C.F.R. §§ 99.3, 99.30.
214. 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).
215. 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8).
216. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.31(a)(10).
217. 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.31(a)(13)–(15).
218. 20 U.S.C. § 1232g(b)(1)(J); 34 C.F.R. § 99.31(a)(9).
219. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. § 99.31(a)(2).

a. Institutional Officials with a Legitimate Educational Interest

FERPA permits the disclosure of information from a student's education records to other institutional officials (known under FERPA as "school officials") without the student's consent as long as the institution defines in its annual FERPA notification who qualifies as an institutional official and what constitutes a "legitimate educational interest."[220] Generally speaking, a legitimate educational interest exists when there is a need to know the information at issue in order to perform one's professional responsibilities for the institution.[221] To take full advantage of this exception, institutions should consider adopting an expansive definition of "institutional official" in their annual FERPA notification.

For example, the FPCO's *Model Notification of Rights Under FERPA* includes the following definition of a "school official":

> [A] person employed by the [institution] in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the [institution] has contracted as its agent to provide a service instead of using [institutional] employees or officials (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another [institutional] official in performing his or her tasks.[222]

Members of a threat assessment team could easily qualify as institutional officials, and their collection of information regarding students of concern and sharing of that information with one another would be essential to carrying out the team's mission. As a result, assuming they fall within the definition of a "school official" set forth in the institution's annual FERPA notification, members of a threat assessment team should be able to share student record information with one another, even absent express written permission. In addition, others at the institution should be free to share such information with the team for purposes of reporting any information that may be of interest to the team.

b. Parents of a Dependent Student

FERPA also permits disclosure of student information to the parents of a student who is a dependent for federal income tax purposes.[223] Neither the age of the student nor the parent's status as the custodial parent is relevant.[224] If a student is claimed as a dependent by one or both parents, either parent may be given access to the student's education records and the information contained in those

220. 20 U.S.C. § 1232g(e)–(f); 34 C.F.R. § 99.7(a)(3).

221. *See* Fam. Pol'y Compliance Off., U.S. Dep't of Educ., Model Notification of Rights Under FERPA for Postsecondary Institutions, http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html.

222. *Id.*

223. 20 U.S.C. § 1232g(b)(H); 34 CFR § 99.31(a)(8).

224. Rooker, *supra* note 208.

records.[225] To rely on this exception, however, the institution must have a copy of the most recent federal tax return (or relevant portion thereof) identifying the student as a dependent or a signed and dated acknowledgement from the student indicating that the student is a dependent of at least one parent for federal income tax purposes.[226] Assuming an institution has the appropriate documentation on file, it may freely share student record information with either or both of a student's parents. Whether to do so in a particular situation is a decision that should be made on a case-by-case basis.

c. Health or Safety Emergency

The FERPA exception that has probably received the most attention in the wake of the events at Virginia Tech is the "health or safety emergency" exception. FERPA allows for disclosure of student record information in connection with a health or safety emergency "if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[227] Safety concerns that may call for a disclosure of student record information could include "a student's suicidal [or homicidal] statements or ideations, unusually erratic and angry behaviors, or similar conduct that others would reasonably see as posing a risk of serious harm."[228]

In relying upon this exception, the institution has the responsibility to make an initial good-faith determination of whether disclosure is necessary to protect the health or safety of the student or others.[229] Institutions should document any disclosures under this exception, including a description of the emergency. The FPCO has indicated it will be very reluctant to second-guess an institution's use of this exception so long as there is documentation reflecting the basis for the institution's determination that a health or safety emergency existed.[230] Stated somewhat differently, the FPCO "will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational."[231] As other commentators have noted:

---

225. *Id.*

226. *Id.*

227. 20 U.S.C. § 1232g(b)(1)(I); *see* 34 C.F.R. §§ 99.31(a)(10), 99.36(a). The proposed amendments to the health or safety emergency exception would remove the language requiring strict construction of this exception and add language making it clear that institutions can take into account the totality of the circumstances pertaining to a threat to health or safety. Family Education Rights and Privacy, 73 Fed. Reg., 15,573, 15,589 (proposed Mar. 24, 2008). In addition, if an institution determines that there is an articulable and significant threat to the health or safety of the student or others, the proposed amendments would allow the institution to disclose information from the student's education records as long as there is a rational basis for the institution's determination. *Id.* In such situations, the Department of Education would not substitute its judgment for that of the institution. *Id.*

228. *See* McDonald & Tribbensee, *supra* note 184.

229. *See* FERPA Questions for Lee Rooker, *supra* note 180.

230. Rooker, *supra* note 208.

231. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Melanie P. Baise, Assoc. Univ. Counsel, Univ. of N. M. (Nov. 29, 2004), *available at* http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html [hereinafter New Mexico

> [A] limited disclosure to a limited number of people, made on the basis of a good-faith determination in light of the facts available at the time . . . is highly unlikely to be deemed a violation of FERPA, even if the perceived emergency later turns out, in hindsight, not to have been one.[232]

Under this exception, records and information can be released to appropriate parties such as law enforcement officials, public health officials, and trained medical personnel.[233] The FPCO also interprets FERPA as permitting institutions to disclose information from education records to parents if a health or safety emergency involves their son or daughter.[234]

Although institutions appear to have discretion in interpreting and applying the health or safety emergency exception, they should nonetheless be mindful of student privacy interests and also understand that the exception is designed to be narrowly construed. In particular, this exception is limited to the period of the emergency and, generally, does not allow for the blanket release of personally identifiable information from a student's education records.[235] In general, and when reasonably possible, the initial disclosure should be made to professionals trained to evaluate and handle such emergencies, such as campus mental health or law enforcement personnel, who can then determine whether further disclosures are appropriate.[236]

Determining whether the health or safety emergency exception applies depends largely on the situation at hand. As a result, it is typically wise for threat assessment team members or other appropriate college or university officials to work together in deciding whether this exception applies. In the threat assessment context, this exception should allow institutions to disclose student record information when there is reason to believe the student poses a serious threat to his or her own safety or to the safety of others.

d. Disciplinary Proceedings Involving Alcohol, Drugs, Violent Crimes, and Non-Forcible Sex Offenses

FERPA also allows institutions to disclose information related to certain types of disciplinary proceedings. For example, an institution may inform the parent of a student who is under the age of twenty-one if it has determined that the student has committed a violation of its drug or alcohol policies.[237] To rely upon this exception, the student must be under age twenty-one at the time of the disclosure,

---

FPCO Letter].

232. *See* McDonald & Tribbensee, *supra* note 184.

233. *See* Balancing Student Privacy and School Safety, *supra* note 180.

234. *Id.*

235. *Id.*

236. *See* Letter from Fam. Pol'y Compliance Off., U.S. Dep't of Educ., to New Bremen Local Schs. (Sept. 22, 1994); New Mexico FPCO Letter, *supra* note 231; Letter from LeRoy S. Rooker, Dir., Fam. Pol'y Compliance Off., U.S. Dep't of Educ., to Martha Holloway, State Sch. Nurse Consultant, Ala. Dep't of Educ. (Feb. 25, 2004); McDonald & Tribbensee, *supra* note 184.

237. 20 U.S.C. § 1232g(i) (2000 & Supp. V 2005); 34 C.F.R. § 99.31(a)(15) (2007).

but need not be a dependent for federal income tax purposes.[238] An institution may also disclose to the alleged victim the final results of a disciplinary proceeding against a student accused of committing certain crimes of violence (i.e., arson, assault, burglary, homicide, manslaughter, destruction of property, kidnapping, robbery, forcible sex offenses) or a non-forcible sex offense (i.e., statutory rape, incest), regardless of the outcome of that proceeding.[239] The final results include the name of the alleged perpetrator, the outcome of the proceeding, and any sanctions imposed.[240] FERPA also permits disclosure to anyone—not just the victim—of the final results of a disciplinary hearing, if the institution determines an alleged perpetrator of a crime of violence or non-forcible sex offense committed a violation of the institution's code of conduct or other disciplinary policies.[241]

e. Compliance with Subpoenas and Court Orders

FERPA also permits institutions to disclose student records to the extent required to comply with lawfully issued subpoenas and court orders.[242] Prior to any disclosure, the institution must make a reasonable attempt to notify the student of the subpoena or court order and give the student a reasonable opportunity to seek court protection, unless the subpoena or court order specifically directs the institution not to disclose the existence or contents of the subpoena or court order.[243] Institutions are encouraged to consult with legal counsel to assess the validity of any subpoena or court order and ensure the applicable notice requirements have been satisfied before providing any education records or student information in response to a subpoena or court order.

238. 20 U.S.C. § 1232g(i); 34 C.F.R. § 99.31(a)(15).
239. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. §§ 99.31(a)(13), 99.39.
240. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. §§ 99.31(a)(13), 99.39.
241. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. §§ 99.31(a)(14), 99.39.
242. 20 U.S.C. § 1232g(b)(2)(A)–(B); 34 C.F.R. § 99.31(a)(9).
243. 20 U.S.C. § 1232g(b)(1)(J)(i)–(ii); 34 C.F.R. § 99.31(a)(9).

f. Other Educational Institutions

Colleges and universities are also permitted to disclose student record information to other schools in which a student seeks or intends to enroll.[244] To rely upon this exception, an institution must make a reasonable attempt to notify the student that it intends to release student record information in a particular instance or include this practice in its annual FERPA notification.[245] The institution must also provide the student with a copy of the disclosed records upon request and give the student an opportunity to request a hearing to challenge the accuracy of the disclosed records.[246]

B. Medical Records Laws

As noted above, understanding FERPA is just one piece of the puzzle when it comes to determining if an institution may disclose information regarding its students in the threat assessment context. In addition to the rules governing disclosure of "education records" protected by FERPA, various medical records laws may also apply. Although student medical records used only for treatment purposes are not covered by FERPA, as noted above, such records may be subject to additional privacy or confidentiality protection under other laws such as HIPAA and state medical records laws.[247] These laws often govern when and under what circumstances medical record information maintained by an institution's health service can be disclosed. Threat assessment teams, mental health professionals, or other health care providers serving on these teams must be mindful of these restrictions in connection with their participation in the assessment process.

1. HIPAA

Among other things, HIPAA, through regulations collectively known as the Privacy Rule,[248] establishes standards and imposes requirements to protect the privacy of individually identifiable health information maintained by "covered entities" (or by "covered components" of entities that are not subject to HIPAA in their entirety).[249] Unless a use or disclosure of identifiable patient information

244. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34. The proposed amendments to the FERPA regulations would make it easier for institutions to share information from a student's education records with other educational institutions, even after the student has already enrolled or transferred, as long as the disclosure is for purposes related to the student's enrollment or transfer. Family Education Rights and Privacy, 73 Fed. Reg. 15,573, 15,581 (proposed Mar. 24, 2008).

245. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34.

246. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34.

247. *See* McDonald & Tribbensee, *supra* note 184; FERPA Questions for Lee Rooker, *supra* note 180.

248. 42 U.S.C. § 1320d to d-8 (2000); 45 C.F.R. pts. 160, 164 (2007).

249. In addition to the Privacy Rule, the HIPAA regulations also include the Security Rule and transaction and code sets standards. *See* 45 C.F.R. pts. 160, 162, 164 (2007). The Security Rule specifies a number of administrative, technical, and physical security procedures designed to safeguard the confidentiality of protected health information maintained in electronic form by

(commonly known in HIPAA parlance as "protected health information" or "PHI") is for treatment, payment, or health care operations, the entity maintaining the information generally must secure the patient's written authorization to use or disclose the information.[250] Like FERPA and state medical records laws, HIPAA includes a number of exceptions to the written authorization requirement, including an exception permitting disclosure of protected health information without the patient's consent if the health care provider determines "in good faith" that the disclosure "[i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public" and is made to "a person or persons reasonably able to prevent or lessen the threat, including the target of the threat."[251]

Despite the attention that HIPAA has received since it was passed, many institutions of higher education are not even subject to HIPAA, at least with respect to student medical records. Perhaps most important, HIPAA expressly excludes from its coverage any records that qualify as "education records" or student treatment records (used only for treatment purposes) under FERPA.[252] Because any student records maintained by an institution's health center almost certainly qualify as student treatment records or "education records" within the meaning of FERPA, these records should fall outside the scope of HIPAA. As a result, a campus health center that provides treatment only to students should not be subject to HIPAA with regard to the records and information it maintains.[253]

---

covered entities. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Overview of Security Rule, http://www.cms.hhs.gov/SecurityStandard/ (last visited Apr. 17, 2008). The transaction and code sets standards require health care providers who engage in any of the specified transactions in electronic form to comply with the applicable standard for those transactions to ensure consistency with regard to the health care transactions, code sets, and identifiers used by health care providers that do business electronically. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Overview of Transaction and Code Sets Standards, http://www.cms.hhs.gov/TransactionCodeSetsStands/ (last visited Apr. 17, 2008).

250. 45 C.F.R. § 164.508.

251. 45 C.F.R. § 164.512.

252. 45 C.F.R. § 160.103; *see* Balancing Student Privacy and School Safety, *supra* note 180.

253. Prior to the adoption of the final Security Rule, which was published in the Federal Register on February 20, 2003, only the Privacy Rule, which incorporated the definition of "protected health information," expressly excluded education records and student treatment records from the definition of "protected health information" covered by HIPAA. 67 Fed. Reg. 53,182, 53,267 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164). As a result, it appeared that other portions of HIPAA outside the Privacy Rule might apply to student medical records. Judy Eisen, Coordination of HIPAA and FERPA, http://counselonline.cua.edu/archives/hot%20legal%20topics/HIPAA%20by%20Judy%20Eisen.doc (last visited Apr. 17, 2008). With the adoption of the final Security Rule, however, the definition of "protected health information" was moved from the Privacy Rule to the portion of the HIPAA regulations entitled "General Administrative Requirements." *See* 45 C.F.R. pt. 160. This definition applies generally to all HIPAA regulations, thus making it clear that the scope of information covered by both the Privacy and Security Rules is the same. 68 Fed. Reg. 8340, 8342 (Feb. 20, 2003) (codified at 45 C.F.R. §§ 160.102, 160.103). Given that the definition of "protected health information," which excludes both "education records" and student treatment records, now appears in the General Administrative Requirements that apply to the Privacy Rule, Security Rule, and the transaction and code set regulations, it appears that "education records" and student treatment records, as those terms are defined under FERPA, may be exempted from HIPAA as a whole. 45 C.F.R. §

A campus health center that also treats and creates health records for non-students (e.g., dependents of students, faculty, or staff), may, however, be subject to HIPAA, at least with regard to any non-student health records, if the health center engages in any "covered transactions" in electronic form.[254] These transactions are set forth in the HIPAA transaction and code sets regulations.[255] Examples include requests from a health care provider to obtain payment from a health plan,[256] an inquiry from a health care provider to a health plan to determine eligibility or coverage under a health plan,[257] and transmission of information regarding payment for services or an explanation of benefits from a health plan to a health care provider.[258]

If a campus health center qualifies as a "covered entity" under HIPAA as a result of providing treatment to non-students, the institution may elect to cease treating any non-students if it does not wish to be subject to HIPAA. If an institution with a "covered" health center wants to continue treating non-students, the institution will have to decide whether to treat all of its health records in accordance with HIPAA or whether to segregate any student health records from non-student health records, thereby undertaking an obligation to comply with HIPAA only with respect to those non-student health records actually subject to HIPAA. Given potential logistical complications associated with segregating records, an institution that treats non-students and engages in transactions covered by HIPAA may very well elect to treat both student and non-student health records as being subject to HIPAA.

Institutions should carefully consider whether to treat both student and non-student health records as subject to HIPAA given the choice. As an initial matter, compliance with HIPAA would not relieve an institution of its obligation to comply with FERPA with regard to any "education records."[259] Because HIPAA provides a federal floor of privacy protection and does not preempt state laws that provide greater privacy protection, institutions would also have to continue to comply with any state medical records laws that are not in direct conflict with HIPAA.[260] A potential drawback to treating "education records" or student treatment records as being subject to HIPAA (even though not technically required) is that HIPAA, unlike FERPA, does not allow an institution to share student health records with other institutional officials for legitimate educational purposes without the student's express written permission.[261] Given the potential

160.103. The FPCO may be issuing further guidance regarding the interrelationship between HIPAA and FERPA. Given the many intricacies involved in this analysis, institutions are encouraged to seek legal advice in determining the extent to which HIPAA governs any medical or other health information they maintain.

254. 45 C.F.R. §§ 160.102(a), 160.103, 162.402.

255. *See* 45 C.F.R. §§ 162.1101–.1801.

256. 45 C.F.R. § 162.1101.

257. 45 C.F.R. § 162.1201.

258. 45 C.F.R. § 162.1601.

259. McDonald & Tribbensee, *supra* note 184.

260. *See* 45 C.F.R. §§ 160.201–.203.

261. Eisen, *supra* note 253.

limitation on sharing information in the threat assessment team context and the added complexity of having to comply with another set of regulations in addition to FERPA and state medical records laws (not to mention HIPAA's civil and criminal penalty provisions),[262] institutions should carefully assess the implications associated with HIPAA compliance before voluntarily electing to be HIPAA-compliant in connection with any student health records they maintain.[263]

However, even if HIPAA does apply to an institution's student medical records, it is important to note it also allows for disclosures of information in certain emergency situations.[264] As a result, HIPAA should not hinder the ability of threat assessment teams to obtain and share information in situations where a student poses a serious and imminent threat to self or others.

2. State Medical Records Laws

In addition to the FERPA and HIPAA considerations outlined above, any student or other health records that colleges and universities maintain are also likely subject to state laws protecting the doctor-patient privilege or otherwise governing the privacy or confidentiality of medical records. As noted above, institutions must generally comply with these laws, in addition to FERPA, and regardless of whether they are subject to HIPAA. These laws often place severe restrictions on the ability of health providers—especially mental health providers—to disclose information obtained in the course of treatment absent the student's express written permission.[265] Fortunately, however, these laws also typically include exceptions, sometimes referred to generally as "*Tarasoff* exceptions,"[266] that allow providers to make limited disclosures without a student's consent if the provider determines the disclosure is necessary to protect the student or another person against an imminent risk of serious injury or death.[267] As with HIPAA, these laws generally allow for some limited disclosure of information when a student poses a serious, imminent risk to his or her own safety or the safety of others. Because these laws vary from state to state, however, it is important for each institution to consult its state's laws and seek legal advice to ensure that its threat assessment team understands the circumstances under which mental health or other student medical information may be disclosed.

---

262. 42 U.S.C. §§ 1320d-5 to -6 (2007); 45 C.F.R. §§ 160.400–.426.

263. Institutions whose health centers are subject to HIPAA only because they treat non-students may wish to consider whether to continue treating non-students. By treating only students, a health center may be able to avoid having to comply with HIPAA. *See* discussion *supra* Part III.B.1. Such a decision is a policy decision best resolved by an institution's senior administration.

264. 45 C.F.R. § 164.512 (2007).

265. *See, e.g.*, CAL. CIV. CODE §§ 56.10(c), 56.104 (West 2008); D.C. CODE § 7-1203.03 (2001); FLA. STAT. ANN. §§ 456.059, 491.0147 (West 2000); N.Y. MENTAL HYG. LAW § 33.13(c) (McKinney 2007).

266. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

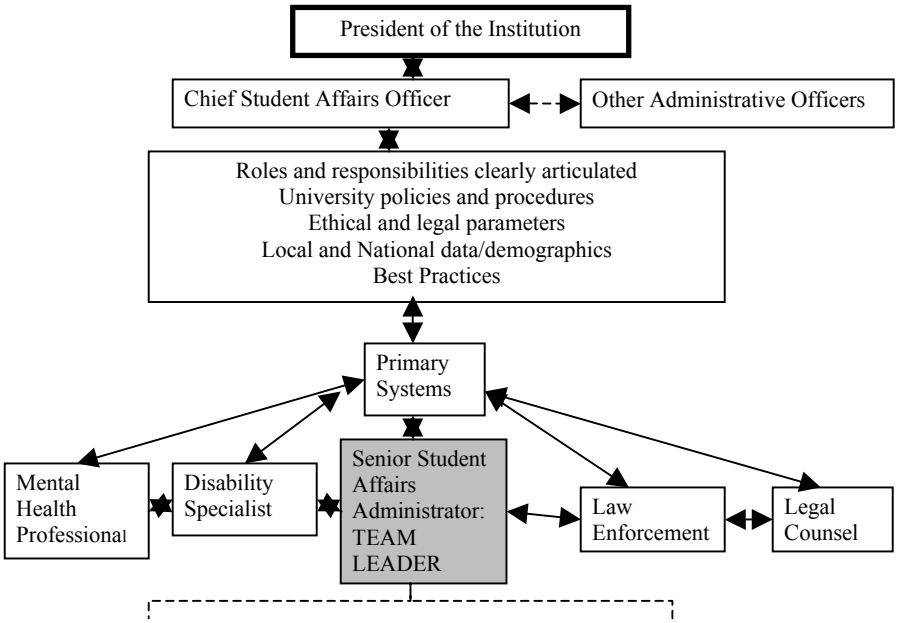
267. *See, e.g.*, CAL. CIV. CODE §§ 56.10(c), 56.104; D.C. CODE § 7-1203.03; FLA. STAT. ANN. §§ 456.059, 491.0147; N.Y. MENTAL HYG. LAW § 33.13(c).

CONCLUSION

The events at Virginia Tech and Northern Illinois University have created a sense of urgency at colleges and universities around the country with regard to the development and implementation of strategies for dealing with students who may be disturbing, disturbed, or a combination of both. The model that Delworth articulated almost twenty years ago demonstrates that these issues have been percolating for some time. Delworth's model provides a useful and straightforward approach for implementing a threat assessment team. With all of the attention these teams have received recently, institutions have access to a wealth of information regarding best practices in this area. Although the issues arising under disability law and laws governing the privacy and confidentiality of student information can be complex, institutions now have every incentive to develop threat assessment team policies and procedures that not only comport with applicable legal requirements but also serve to promote appropriate information sharing and foster a safe, productive campus community.

APPENDIX I

Diagram 1: A Proposed Threat Assessment Team Formation

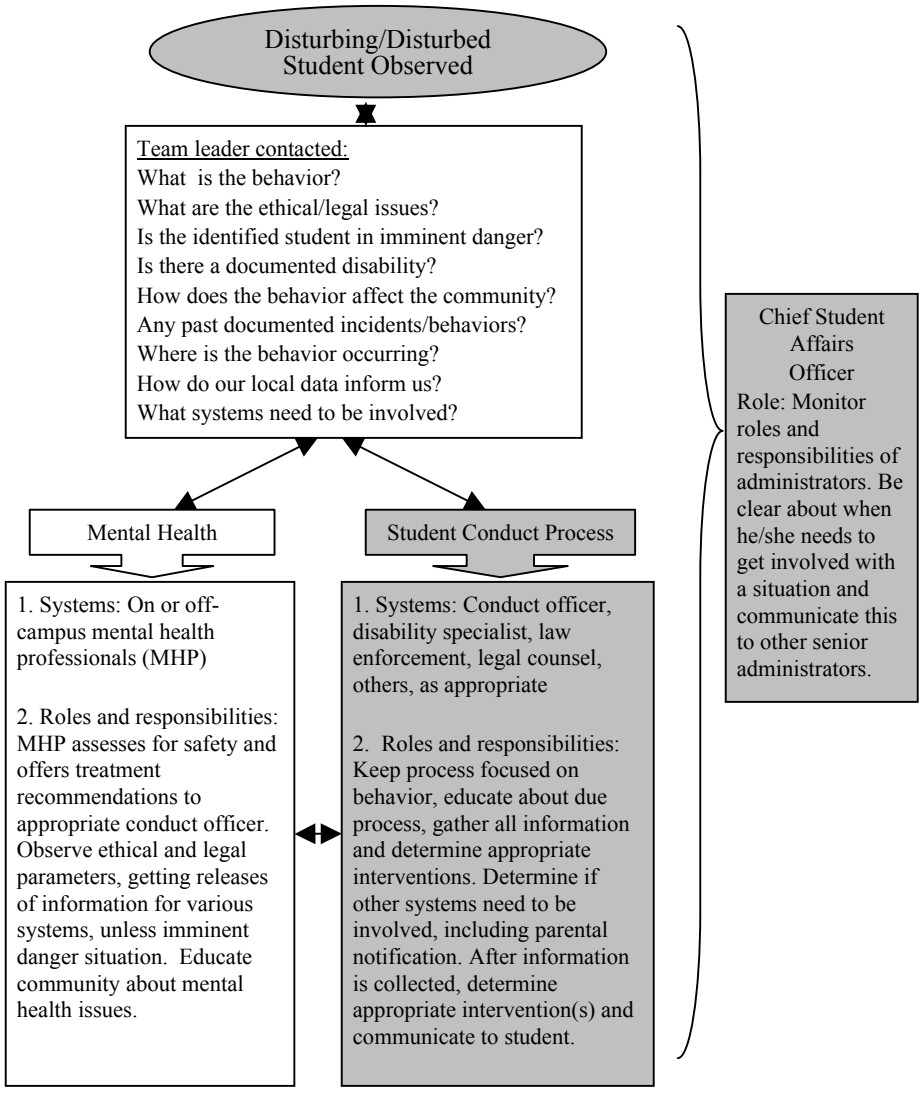


Other Possible Systems

- University Residential Life
- University Chaplains/Religious leaders
- Academic deans/faculty
- International office
- Campus Health Services
- Other systems, as needed

APPENDIX II

Diagram 2: Threat Assessment Team: General Guidelines for Team Process



HIGHER EDUCATION STUDENT ELECTIONS AND OTHER FIRST AMENDMENT STUDENT SPEECH ISSUES: WHAT *FLINT V. DENNISON* PORTENDS

DAVID ARONOFSKY*

On June 1, 2007, in *Flint v. Dennison*,[1] the Ninth Circuit Court of Appeals rejected a *Buckley v. Valeo*[2]-based First Amendment challenge to public university student government election campaign spending limits. The court supported its decision on the following rationale:

> Why, then, may a state university tell students how much they may spend to be elected to student office? Because, unlike the exercise of state-wide political self-determination at a national level at issue in *Buckley*, the student election at issue here occurred in a limited public forum, that is, a forum opened by the University to serve viewpoint neutral educational interests but closed to all save enrolled students who carried a minimum course load and maintained a minimum grade-point average. These educational interests outweigh the free speech interests

* General Counsel and Adjunct Faculty, Schools of Law and Education, University of Montana (UM); B.S., Education, J.D. (with honors), University of Texas at Austin; M.Ed., Counseling, Southern Methodist University; Ph.D., Florida State University. Mr. Aronofsky litigated the *Flint* case in the U.S. District Court of Montana and argued it in the Ninth Circuit, ably assisted by National Voting Rights Institute/Demos attorneys Brenda Wright and Lisa Danetz. Several University of Montana law students also assisted as interns at the UM Legal Counsel Office. The author especially acknowledges the invaluable contributions of 2007 UM Law School graduate Aaron Bouschor, who exhaustively researched student speech case law. He co-authored a presentation on this topic for the NACUA 2007 Annual Conference and helped prepare the *Flint* case oral argument by role-playing opposing counsel in a mock oral argument. The author also acknowledges the special help of 2007 UM Law School graduate Heather O'Laughlin, a former UM student government leader whose insight proved key at several points in the case. In 1974–75, the author had the pleasure of serving as the elected Student Body President at Florida State University while pursuing a Ph.D. in Higher Education. The views expressed herein are solely his personal ones and should not be attributed to The University of Montana.

1. 488 F.3d 816 (9th Cir. 2007), *aff'g*, 361 F. Supp. 2d 1215 (D. Mont. 2005), *cert. denied*, 128 S. Ct. 882 (2008).

2. 424 U.S. 1 (1976) (per curiam) (holding that campaign spending limits in elections for public office violate First Amendment speech rights).

of the students who campaigned within that limited public forum.[3]

The implications of *Flint* go well beyond student election speech issues. The decision raises an important question as to the extent to which public colleges and universities can apply limitations on other forms of student speech. National syndicated political columnist George Will has excoriated The University of Montana's campaign spending limits as part and parcel of "the grossly anti-constitutional premises of McCain-Feingold [federal campaign finance reform laws] seep[ing] through society, poisoning the practices of democracy at all levels."[4] The editors of a newspaper published in Missoula, Montana urged repeal of these spending limits because they are anathema to First Amendment political speech principles.[5] Professor Volokh has characterized these calls for repeal as legally misplaced, arguing that public education student projects have always differed from government political speech and thus enjoy far less First Amendment protection.[6] The Supreme Court denied certiorari,[7] which may have temporarily quieted the legal controversy, but probably not the political controversy.

This article has two primary purposes. The first is to describe *Flint* in the student election context, which, itself, offers useful insight into how campuses may (and may not) restrict student-government speech without violating the First Amendment. The second is to assess how the limited public forum analysis in *Flint* might reasonably apply to other forms of public campus student organization and individual student speech. Part I describes forum analysis principles generally applied by courts in First Amendment cases alleging government restrictions on protected speech. Part II provides the history of *Flint* from its beginning on May 5, 2004, when the lawsuit was filed in the Missoula Division of the U.S. District Court for the District of Montana. Part III discusses other relevant public higher education student election cases. Part IV reviews other student-initiated public higher education First Amendment litigation to examine the *Flint* decision's possible effects on the legal rules and reasoning in these cases. Part V offers some conclusions which are necessarily tentative, because the *Flint* case was decided relatively recently.

---

3. *Flint*, 488 F.3d at 820.

4. George F. Will, *The $114.69 Speech Police*, WASH. POST, Oct. 25, 2007, at A25.

5. Editorial, *Repeal Spending Limits for ASUM Campaigns*, MISSOULIAN, Nov. 5, 2007, *available at* http://www.missoulian.com/articles/2007/11/05/opinion/opinion2.txt.

6. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/1193352920.shtml (Oct. 25, 2007, 18:55 EST).

7. 128 S. Ct. 882 (2008).

I. FORUM ANALYSIS PRINCIPLES

To understand *Flint*, it is first necessary to review the basic principles of forum analysis as they have been applied to cases involving government restrictions on speech communicated on government premises, including higher education settings. A legal commentator has explained forum analysis as being a process whereby "courts identify the location, either literal or figurative, where the speech will be expressed; the subject of the message; and the source, timing, and effect of any restrictions."[8] Forum analysis has played a prominent role in First Amendment jurisprudence since at least 1897, when the Supreme Court held that a government may generally control speech activities on its own property.[9] In the late 1930s, however, the Court began to recognize constitutional limits to the exercise of such control when it held that citizens retain some speech rights in public settings.[10] Since then, the Court has adopted and applied rules describing certain forum categories and types, in general and in public college and university settings.

A forum will always be either public or non-public. Within the public forum category, there are several forum types, each of which brings its own set of legal rules and precedents. For example, a traditional public forum is a place where tradition generally permits "assembly, communicating thoughts, and debating public questions,"[11] with few restrictions except those pertaining to volume and time of access. Traditional public fora tend to be limited in number, scope, and location, and courts are usually reluctant to conclude that a forum is of this type, preferring, instead, other forum types that are more conducive to at least some form of speech regulation.

In contrast to the traditional public forum, a designated public forum is a more limited area, such as an auditorium, where the government purposely permits expression by various classes of speakers and generally does not require individuals within each such speaker class to obtain permission to speak.[12] Courts recognize two types of designated public forum: a non-limited designated or open public forum, which allows all forms of expression and imposes no limit on who can speak,[13] and a limited designated or limited public forum, which restricts

8. Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 485 (2005).

9. *Id.* at 495 (discussing Davis v. Mass., 167 U.S. 43 (1897)).

10. *Id.* (discussing Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939)).

11. *Id.* at 497 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1231 (7th Cir. 1985)).

12. *Id.* at 497–98 (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998)).

13. *Id.* at 498 (citing Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir. 1990); Rutgers 1000 Alumni Club v. Rutgers, 803 A.2d 679, 688–89 (N.J. Super. Ct. App. Div. 2002)).

forum access based on designated group status or membership.[14] As to limited public fora, public college or university students or employees may, for instance, be entitled to such access, while commercial vendors or persons unrelated to the campus are not. Designated public fora are not limited to physical sites or locations; they may also include speech-based programs such as a student election, a campus newspaper, or a student government funding activity.

Courts treat government property lacking traditional or designated public forum status as a non-public forum, where public speech can generally be regulated or even prohibited altogether, such as in work areas or classrooms in an educational setting.[15]

Most higher education forum analysis cases, including *Flint*, appear to apply limited public forum principles which permit regulation of speech on bases other than viewpoint and, in some instances, content. One commentator appears to treat as synonymous the legal effects of speech regulation on the basis of viewpoint and regulation based on content.[16] Although the Supreme Court has deemed viewpoint discrimination as being "but a subset or particular instance of the more general phenomenon of content discrimination," the Court has also acknowledged that the line between the two "is not a precise one."[17] The Court has also imposed viewpoint neutrality requirements on speech regulation in a limited public forum, while upholding the validity of content regulation consistent with the reason for the forum's creation.[18] For example, a public college or university may choose to limit student speech as a legitimate content restriction, but it may not limit student speech on the basis of particular student viewpoints.

Professor Beschle perhaps best captures the current state of forum analysis law in this regard when he suggests that if a limited or designated public forum regulates speech content based on the content's relevance to the forum, and its regulation remains viewpoint neutral, the forum does not have to be content neutral.[19] In a non-public forum, reasonable restrictions on speech are usually upheld.[20] Most of the higher education cases discussed in Parts III and IV below turn on the presence or absence of content or viewpoint neutrality, or both. In *Flint*, however, this was essentially a non-issue because the student election spending limits were found both neutral and evenly applied.[21]

---

14. *Id.* (citing *Gregoire*, 907 F.2d 1366).

15. *Id.* (citing *Ark. Educ. Television Comm'n*, 523 U.S. at 678; *Perry Educ. Ass'n*, 460 U.S. at 46).

16. *Id.* at 501. This same commentator nonetheless recognizes that there is a "subtle distinction" between content and viewpoint. *Id*. at 494.

17. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

18. *Perry Educ. Ass'n*, 460 U.S. at 46.

19. Donald L. Beschle, *Seventh Circuit Review: The First Amendment in the Seventh Circuit: 2002*, 36 J. MARSHALL L. REV. 807, 811–13, 823 (2003); *see also* Leslie Gelow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003) (recognizing that the test for distinguishing content from viewpoint "remains murky").

20. Langhauser, *supra* note 8, at 503.

21. *See* Flint v. Dennison, 488 F.3d 816, 834–35 (9th Cir. 2007).

II. THE LEGAL HISTORY OF *FLINT V. DENNISON*

On May 5, 2004, Aaron Flint filed a lawsuit against George Dennison, in his capacity as the President of The University of Montana, as well as certain students in their capacity as officials of the Associated Students of The University of Montana (ASUM) who were involved in the decision not to seat Flint because of his ASUM Senate election spending violation.[22] Flint claimed that the campaign spending limit, as applied, violated his rights under the First and Fourteenth Amendment, and he brought his claim under 42 U.S.C. § 1983.[23]

Aaron Flint ran for and won the 2003–04 academic year ASUM student body presidency.[24] He and his vice-presidential running mate spent a combined $300 on the election, in violation of ASUM election rules or bylaws limiting ASUM election expenditures to $100.[25] They also failed to fully disclose all their election expenditures, in violation of ASUM election requirements.[26] As a result of these violations, Flint and his running mate were censured by the ASUM Senate, but they were allowed to keep their ASUM positions.[27] The following year, Flint ran for and won an ASUM Senate seat and, again, he exceeded ASUM's $100 senate election spending limit by spending $214.69.[28] Upon filing his campaign spending report with ASUM disclosing the excessive spending, the ASUM Senate, upon ASUM Elections Chair recommendation, denied Flint his senate seat.[29] Flint then filed his lawsuit challenging this decision.[30]

The *Flint* litigation had three phases: the initial district court injunctive relief efforts, the district court summary judgment proceeding, and the Ninth Circuit appeal.

A. The District Court Injunctive Relief Litigation

Flint initially filed a motion for a temporary restraining order to set aside the ASUM Senate refusal to let him take his senate seat.[31] The district court immediately denied Flint's motion.[32] Subsequently, Flint filed a motion for a preliminary injunction, which the district court denied on August 20, 2004.[33] In denying the preliminary injunction, U.S. District Court Judge Donald Molloy chose not to apply *Welker v. Cicerone*,[34] a case decided under somewhat similar

22. *Id.* at 821–22.
23. *Id.*; *see also* Flint v. Dennison, 361 F. Supp. 2d 1215, 1216–17 (D. Mont. 2005).
24. *Flint*, 488 F.3d at 822.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. Flint v. Dennison, 336 F. Supp. 2d 1065, 1070 (D. Mont. 2004).
34. 174 F. Supp. 2d 1055 (C.D. Cal. 2001).

circumstances, to set aside student election spending limits.[35] Judge Molloy, instead, followed *Alabama Student Party v. Student Government Association of the University of Alabama*,[36] an earlier case which upheld, against First Amendment attack, student election non-spending rules restricting campaign activities on the basis of date and campus location.[37] Judge Malloy assessed the ASUM campaign spending limits against the reasonableness standard, and concluded that Flint's probability of succeeding on the merits of his claim was low.[38] He also found ASUM's campaign spending limits to be "a reasonable attempt to maintain equal access to the pedagogical benefits of ASUM participation throughout the student body."[39] Judge Molloy also found that in balancing the hardships that would be faced by Flint in denying the preliminary injunction against the hardships to ASUM in granting it, "the balance of hardships favors . . . ASUM," because otherwise ASUM's "ability to enforce its election regulations is undermined."[40] Judge Molloy criticized Flint's decision to challenge ASUM spending limits so long after he first became aware of (and was censured for violating) them when he was elected ASUM President, well before he violated the limits a second time in his senate campaign.[41]

B. The Summary Judgment Litigation

Defendants filed various Rule 12(b)(6) dismissal motions, which Judge Molloy converted to a motion for summary judgment dismissal on October 8, 2004.[42] Following extensive briefing and oral argument in connection with the summary judgment motion, Judge Molloy granted summary judgment to the defendants on March 28, 2005.[43] Citing *Widmar v. Vincent*,[44] a case that recognized a public institution's "right to exclude even First Amendment activities that violate reasonable campus rules,"[45] the court applied a deferential standard of reasonableness to its analysis of the ASUM spending limits rules.[46] Rejecting the application of *Welker*, in favor of *Alabama Student Party*, Judge Malloy reasoned

35. *Flint*, 336 F. Supp. 2d at 1068–69 (discussing Welker v. Cicerone, 174 F. Supp. 2d 1055 (C.D. Cal. 2001)).

36. 867 F.2d 1344 (11th Cir. 1989).

37. *Flint*, 336 F. Supp. 2d at 1068–69.

38. *Id.* at 1070.

39. *Id.*

40. *Id.*

41. *Id.*

42. Flint v. Dennison, 361 F. Supp. 2d 1215, 1216 (D. Mont. 2005).

43. *Id.* at 1222.

44. 454 U.S. 263 (1981).

45. *Id.* at 277. Interestingly, *Widmar* upheld a First Amendment challenge by a student religious group seeking the right to meet and worship on a public university campus. Although the Court recognized a university's right to impose "reasonable campus rules" restricting on-campus speech, the Court nonetheless found the campus ban on religious group meetings a First Amendment violation as discriminatory against religious speech. *Id.* at 277 (Stevens, J., concurring).

46. *Flint*, 361 F. Supp. 2d at 1218.

that "a state university may, in the interest of preserving the quality and availability of educational opportunities for its students, place reasonable restrictions on free speech that would be impermissible outside the academic environment."[47] He found student government participation well within The University of Montana mission for its role in "instructing students on many aspects of the governmental process."[48]

Notably, Judge Molloy relied on a sworn declaration by ASUM Faculty Advisor Hayden Ausland, in which he described ASUM's long history of providing its students leadership experience and how ASUM has learned to deal with complex decisions involving student governance.[49] Judge Molloy also gave weight to the sworn declaration of ASUM President Gale Price, who cited her own participation in student government "as strengthening her decision-making skills, teaching her how to work for the good of the University closely aside people with whom she often disagrees, and providing her with leadership experience."[50] Further, Judge Molloy fully embraced the University's position that the ASUM provides an important learning opportunity, as part of the University's mission and that the ASUM was created to further the education of students serving in the ASUM.[51] Concluding his opinion, he wrote:

> Rendering student government an educational opportunity for only those students who can afford to run . . . is contrary to a university's educational mission. . . . [I]f we reach the stage where participation in student government is perceived as only given to those interests with large money contributions, the fundamental predicate of student governance breaks down. When the cynicism of wealth invades the academy, students learn not the lessons of orderly governance but instead are imbued with the anti-egalitarian notion that wealth is power."[52]

Granting summary judgment, Judge Molloy found ASUM campaign spending limits "reasonable in light of ASUM's educational purpose" and, therefore, not in violation of Flint's First Amendment rights.[53]

---

47. *Id.* at 1219.
48. *Id.* at 1220.
49. *Id.*
50. *Id.*
51. *Id.* at 1220–21.
52. *Id.* at 1221.
53. *Id.* at 1222.

C. The Ninth Circuit Appeal

Flint appealed the summary judgment dismissal of his case to the Ninth Circuit.[54] The court considered whether Flint's claims were moot because he had already graduated from The University of Montana in 2004.[55] Although generally a student who graduates no longer has a live case or controversy required for federal court jurisdiction,[56] the Ninth Circuit rejected the mootness argument upon deciding that the ASUM's findings of election rules violations and its subsequent refusal to let Flint take his senate seat constituted a "disciplinary" record in his student file.[57] Noting that Flint's prayers for relief included expungement of these adverse decisions from his student file, the court reasoned that because it had the power to order the expungement, the case was "live" for purposes of retaining jurisdiction over the appeal.[58]

The University chose not to question the ASUM decision to keep Flint from his senate seat, because this, in turn, would have been contrary to the University's recognition of the educational importance of ASUM participation and decision-making. The ASUM actions stand as public record, and the question whether they constitute "disciplinary" records, from a student records standpoint, was left unanswered because the Ninth Circuit ultimately decided *Flint* on the merits.

The Ninth Circuit also rejected the University's Eleventh Amendment immunity defense when it ruled that Flint's case involved a prospective injunctive relief claim for record expungement, subject to the *Ex Parte Young* doctrine,[59] which creates a narrow exception to the Eleventh Amendment bar against federal court suits against states and arms of states.[60] As the court noted, even though state institutions cannot generally be sued in federal court because of this Eleventh Amendment ban, claims for prospective injunctive relief against state university officials may be brought in federal courts.[61]

The court began its analysis by rejecting a primary argument made by both Flint

---

54. Flint v. Dennison, 488 F.3d 816, 823 (9th Cir. 2007).

55. *Id.*

56. *Id.* at 824.

57. *Id.*

58. *Id.*

59. *See generally* Ex Parte Young, 209 U.S. 123 (1908).

60. *Flint*, 488 F.3d at 825 (internal citations omitted). The court did not address the University's argument that the individually named defendants, all of whom were students except for University of Montana President George Dennison, were not state actors and thus should have all claims against them dismissed, based on federal decisions in other circuits refusing to find that students were state actors for § 1983 cases. *See* Mentavlos v. Anderson, 249 F.3d 301 (4th Cir. 2001) (refusing to treat students as state actors for § 1983 purposes); Leeds v. Meltz, 85 F.3d 51 (2d Cir. 1996) (refusing to treat students as state actors for § 1983 purposes); *see also* Husain v. Springer, 494 F.3d 108 (2d Cir. 2007) (refusing to find that public college or university student senators are state actors for § 1983 purposes). Normally, § 1983 claims against non-state actors must be dismissed as a matter of law. *Husain*, 494 F.3d at 134. The Ninth Circuit Panel chose, instead, to decide the case on its merits.

61. *Flint*, 488 F.3d at 825.

and the University, namely that forum analysis should not be used to decide the case.[62] Flint's position was that *Buckley* forecloses forum analysis, because all election spending limits, including those applicable to public campus student government elections, violate the First Amendment.[63] Meanwhile, the University cited *Widmar* as a precedential basis for not using forum analysis in educational speech cases.[64] The court refused to accept Flint's argument that political speech principles apply to student elections, and, instead, treated student election speech at public institutions as educational in nature.[65] Likewise, the court refused to accept the University's and Judge Molloy's position that reasonable educational decisions require strong deference.[66] Instead, the court cited both *Rosenberger v. Visitors of University of Virginia*[67] and *Board of Regents of University of Wisconsin System v. Southworth*,[68] as examples of Supreme Court cases pertaining to public higher education speech cases utilizing forum analysis.[69] The Ninth Circuit determined that "the constitutionality of the campaign expenditure limitation" at issue in *Flint* "depends on the nature of the forum [in which it was imposed, and on] whether the limitation on speech is a legitimate exercise of government power in preserving the character of the forum."[70]

Having concluded that forum analysis was required in student election speech cases, the court applied forum analysis to determine whether the otherwise constitutionally protected student election speech at The University of Montana could be lawfully restricted by the ASUM spending limits.[71] After reviewing public, non-public, designated and limited public forum legal principles,[72] the court found ASUM elections to constitute a limited public forum, *i.e.*, a forum open to certain groups and topics.[73] "[B]ecause Flint challenges the limitations on speech within the confines of the ASUM election, whether the speech is delivered on campus or off, the relevant forum is the ASUM election itself, with its accompanying rules and regulations."[74] The court also determined that this particular forum, as well as ASUM generally, should be attributable to the University, for purposes of assessing the validity of challenged speech.[75]

---

62. *Id.* at 826.
63. *Id.* at 826–27.
64. *Id.*
65. *Id.* at 827–28.
66. *Id.* at 828.
67. 515 U.S. 819 (1995).
68. 529 U.S. 217 (2000).
69. *Flint*, 488 F.3d at 828–29.
70. *Id.* at 829; *see also id.* at 829 n.9 (finding student government election speech not to be school-sponsored, but instead an activity communicated in a forum opened by the University for election speech purposes).
71. *Id.* at 830.
72. *Id.* For an excellent description of forum analysis in a higher education setting, see Langhauser, *supra* note 8.
73. *Flint*, 488 F.3d at 830–31.
74. *Id.* at 831.
75. *Id.* at 831 n.10.

Once the court found ASUM elections to be a limited public forum, it analyzed the constitutionality of the election spending limits by first finding the limits viewpoint-neutral, a finding essential to any later decision that the speech limits in question are, themselves, valid.[76] The evidentiary record in *Flint* demonstrated equal application of ASUM election rules to all candidates "regardless of their views."[77] Although Flint contended that ASUM spending limits discriminate on the basis of his viewpoint because he, as a candidate, had fewer speech rights than student noncandidates and groups, as well as outsiders, the court rejected these contentions when it found that the spending limits were based on speaker status, not viewpoint.[78] The court then found the spending limits reasonable, because they were directly tied to the purpose for which the forum was created, namely student participation in ASUM as an important educational activity.[79] The court cited the ASUM Faculty Advisor Declaration, as had Judge Malloy, in making this determination:

> ASUM exists for essentially educational purposes. . . . The election of student representatives to ASUM leadership positions is designed to help further the educational purpose of ASUM. The evidence before us clearly shows that the University views the spending limitation as vital to maintain the character of ASUM and its election process as an educational tool, rather than an ordinary political exercise. . . . The primary intent of the spending limits is to prevent student government's being diverted by interests other than ones educational. It is thus obvious that the purpose of imposing the spending limit on student candidates is to serve pedagogical interests in educating student leaders at the University.[80]

The court referenced the "art of persuasion, public speaking, and answering questions face-to-face with one's potential constituents" and student campaigners "wearing out their shoe-leather rather than wearing out a parent's—or an activist organization's—pocketbook" as examples of pedagogical benefits that result from the ASUM spending limits.[81] The court concluded its opinion by noting:

> Even if not the best or most effective means of providing the student

---

76. *Id.* at 833; *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

77. *Flint*, 488 F.3d at 833; *see also id.* at 834.

> The $100 limit does not apply solely to vegetarians, pacifists and Marxists, but not to meat-eaters, bellicists and fascists. Neither does the limit apply to candidates who might wish to abolish student government or at least intercollegiate athletics, but not to servile apple-polishers of the status quo or "jocks." Thus the campaign expenditure limitation does not constitute viewpoint discrimination.

Id.

78. *Id.* at 834.

79. *Id.* at 834–35.

80. *Id.* at 835 (internal citations omitted).

81. *Id.*

> candidates the educational experience that the University seeks to provide through the ASUM elections, we are confident the spending limits reasonably serve the purpose of the forum. . . . In a limited public forum, the First Amendment requires nothing more.[82]

III. OTHER PERTINENT HIGHER EDUCATION STUDENT ELECTION CASES

College and university student election cases involving spending limits or other legal issues have not flooded the courts. Generally, there have not been many college and university student government cases, although *Rosenberger* and *Southworth* rank among the most significant higher education cases in U.S. legal history. A brief recap of key student election cases warrants reference here, to assess their relationship to *Flint*, and vice versa.

The best starting point for understanding student election First Amendment case law in public higher education is *Alabama Student Party v. Student Government Association of the University of Alabama*.[83] In that case, University of Alabama students challenged student government regulations that limited when and where student campaign literature could be distributed (including a ban on such distribution on student election days).[84] They also challenged rules that limited candidate fora and debates to the weeks of election as being First Amendment speech violations.[85] In affirming summary judgment dismissal of the lawsuit, the Eleventh Circuit applied a First Amendment review standard based on the two closely intertwined legal principles of giving broad judicial deference to college and university decisions pertaining to education and the reasonableness of challenged speech restrictions.[86] In other words, once the court found student elections to be educational, rather than political, activity, plaintiffs had to overcome the broad deference courts afford higher education institutional policy decisions and show that the election rules are inherently unreasonable. The plaintiffs could not do so.[87] Notably, Judge Molloy adopted this analytical approach in *Flint*,[88] whereas the Ninth Circuit rejected it in favor of forum analysis.[89]

In *Welker*, University of California at Irvine (UCI) student plaintiffs launched what appears to be the first, and to date only, successful student election spending

---

82. *Id.* at 836 (internal citation omitted).

83. 867 F.2d 1344 (11th Cir. 1989).

84. *Id.* at 1345.

85. *Id.*

86. *Id.* at 1347.

87. *Id.*

88. Flint v. Dennison, 361 F. Supp. 2d 1215, 1219–20 (D. Mont. 2005).

89. Flint v. Dennison, 488 F.3d 816, 827–28 (9th Cir. 2007). At least in the Ninth Circuit, the *Alabama Student Party* deference-reasonableness standard is inapplicable to public college or university student election speech restrictions. That stated, however, the Ninth Circuit would ostensibly reach the same result as the Eleventh Circuit when it dismissed the *Alabama Student Party* lawsuit on the ground that the election restrictions were permissible under the *Flint* appellate opinion forum analysis.

limits challenge.[90] In *Welker*, Judge Timlin adopted *Buckley*'s essential holding that election spending limits of any kind violated the First Amendment,[91] applied this holding to the UCI student election spending rules,[92] and preliminarily enjoined their enforcement by the UCI student legislative body that sought to deny a legislative seat to a candidate who had breached the limits and went on to win the election.[93] Judge Timlin determined that the plaintiffs would likely prevail on the merits under *Buckley*, and found the other preliminary injunction elements satisfied.[94] Judge Timlin rejected the *Alabama Student Party* court's reasoning, which considered student elections to be educational activities, choosing instead to view student elections more as traditional non-educational political campaign speech.[95] The lawsuit settled soon afterwards, and no further litigation ensued in the case. Both Judge Molloy and the Ninth Circuit rejected *Welker* altogether in *Flint*, effectively overruling *Welker*'s applicability to student election cases with comparable facts in the Ninth Circuit.[96]

About a year after *Welker* was decided against UCI, a group of students at the University of California at Santa Cruz (UCSC) initiated a similar First Amendment challenge to their school's student election spending limit and candidate selection rules in *Students for a Conservative America v. Greenwood*.[97] Unlike in *Welker*, however, the *Greenwood* district judge dismissed the lawsuit on Eleventh Amendment and mootness grounds, finding that federal courts lack power to require new elections—the remedy sought by plaintiffs—and that the UCSC student government had mooted the case when it eliminated the challenged election rules.[98] The Ninth Circuit affirmed the lower court dismissal on both grounds and, in an amended opinion, later mooted the case on the ground that the student plaintiffs had been seated in the UCSC legislative body after the challenged rules were changed.[99]

---

90. Welker v. Cicerone, 174 F. Supp. 2d 1055 (C.D. Cal. 2001).

91. *Id.* at 1065.

92. *Id.*

93. *Id.* at 1067. *Welker* and *Flint* have at least one remarkably similar fact. The *Welker* plaintiff spent $233.40 at a campus with a $100 spending limit at the time. *Welker*, 174 F. Supp. 2d at 1066. Flint spent $214.69 in violation of the $100 limit imposed by ASUM. *Flint*, 361 F. Supp. 2d at 1217.

94. *Welker*, 174 F. Supp. 2d at 1065–67.

95. *Id.* at 1063.

96. *Flint*, 361 F. Supp. 2d at 1219–20; Flint v. Dennison, 488 F.3d 816, 828 n.7 (9th Cir. 2007) ("[Unlike Judge Timlin in *Welker*] [w]e see the several differences . . . between ASUM's elections and state and national political elections and therefore have no trouble making such a distinction.").

97. 378 F.3d 1129 (9th Cir. 2004).

98. *Id.* at 1130–31. The Ninth Circuit agreed with the lower court that a demand for a new election is an injunctive relief not subject to the *Ex parte Young* exception to Eleventh Amendment immunity, because it seeks retroactive, rather than prospective, relief.

99. Students for a Conservative America v. Greenwood, 391 F.3d 978 (9th Cir. 2004). The Ninth Circuit *Flint* panel refused to apply *Greenwood* mootness principles because The University of Montana did not change ASUM election rules. Moreover, The University of Montana chose not to contest the nature of the ASUM Senate censure of Flint in a student record

Three other student government election cases deserve passing reference here, even though they do not involve issues litigated in *Flint*, *Greenwood*, and *Welker*. Recently, in *Husain v. Springer*,[100] the Second Circuit refused to dismiss a First Amendment challenge of the CUNY Staten Island President's decision to nullify the results of a student election after the student newspaper had endorsed candidates, in violation of campus rules requiring neutrality of student-funded organizations.[101] The *Husain* court concluded that because the newspaper had never been subject to censorship, and student government rules did not preclude student publication endorsements, there was no sound educational policy to justify infringement upon the paper's or candidates' First Amendment rights on what the court found was a viewpoint basis.[102] Like the Ninth Circuit in *Flint*, the Second Circuit applied forum analysis and found the newspaper and elections to constitute a limited public forum, but unlike *Flint*, the censorship was deemed viewpoint non-neutral.[103]

In *Ellingsworth v. University of Kentucky Office of Student Affairs*,[104] a state trial court enjoined public campus administrators from overturning student election results after finding the administrators' attempted actions to be arbitrary and capricious. It is not altogether clear that any First Amendment issue was present in the case, although the decision, nonetheless, suggests that student election decisions have sufficient educational value to merit judicial deference when administrators attempt to overturn these decisions without reasonable cause. Finally, in *Papineau v. Associated Students of Western Washington University*,[105] state trial and intermediate appellate courts rejected a student's challenge to his disqualification from holding student office for his failure to file a timely election spending disclosure, as required by student election rules, and for campaigning via email spam, also in violation of student election rules.[106] The *Papineau* courts found no First Amendment speech infringement in the disclosure requirement and mooted the spam claim after the plaintiff's violation of the disclosure requirement was proven.[107]

---

expungement context. *Flint*, 488 F.3d at 824 n.3.

100. 494 F.3d 108 (2d Cir. 2007).

101. *Id.* at 125–26.

102. *Id.* at 127.

103. *Id.* at 122–28.

104. 2005-CA-001868 (Ky. Ct. App. Oct. 11, 2005) (affirming trial court injunction barring campus administrators from overturning student government election results).

105. No. 44237-6-I, 2000 WL 784252 (Wash. Ct. App. June 19, 2000).

106. *Id.* at *1.

107. *Id.* at *3–4.

IV. OTHER STUDENT FIRST AMENDMENT SPEECH CASES

This Part reviews other categories of public higher education student First Amendment speech litigation, including student government cases not involving elections, student religious speech cases, offensive and inappropriate student speech cases, student retaliatory speech and related conduct cases, other kinds of student forum analysis cases, and student publications cases. The objective of this Part is to determine the extent to which the *Flint* legal rules and analysis might apply to each category of cases.

A. Student Government Non-Election Cases

In addition to higher education of student government election cases, there have been a number of significant student activity spending cases, including *Rosenberger*[108] and *Southworth*,[109] which have reached the Supreme Court.

Rosenberger presented the question of whether a public college or university may allow its student government to ban the use of student activity fees to pay for religious speech as a way of avoiding First Amendment Establishment Clause violations.[110] In a challenge by a Christian student seeking to use activity fees to fund the publication of a religious newsletter, a sharply divided Supreme Court decided that First Amendment religious freedom principles prohibited discrimination against religious communications at public colleges and universities and required the University of Virginia to fund the newsletter's publication.[111] The Court concluded that barring activity fee spending on religious communications constituted viewpoint discrimination, which overrides Establishment Clause concerns, because paying for such communications does not constitute public agency endorsement of the religious message itself.[112] The decision was perhaps predictable because in 1981 the Court, in *Widmar v. Vincent*,[113] had already ruled that public colleges and universities choosing to open their buildings to First Amendment-protected expressive activities and groups had to allow religious organizations and services on campus premises.[114] The *Rosenberger* majority cited *Widmar* to require equal treatment for religious and non-religious speech at public colleges and universities.[115] The four dissenting *Rosenberger* Justices paid relatively little heed to *Widmar* and, instead, provided a lengthy Establishment Clause analysis declaring the use of public funds for religious speech as contrary to U.S. constitutional principles and history.[116]

---

108. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).
109. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).
110. *Rosenberger*, 515 U.S. at 822–23.
111. *Id.* at 820–21.
112. *Id.* at 822–46; *Id.* at 846–52 (O'Connor, J., concurring).
113. 454 U.S. 263 (1981).
114. *Id.* at 277.
115. *Rosenberger*, 515 U.S. at 842–53.
116. *Id.* at 863–99 (Souter, J., dissenting).

The *Rosenberger* majority used forum analysis to find the student government funding process a "metaphysical" limited public forum which had been opened to pay for a wide variety of communicative speech protected by First Amendment viewpoint neutrality principles.[117] Once open, the forum could not subject proposed speech to viewpoint discrimination.[118]

Five years after *Rosenberger*, the Supreme Court again decided a public university student activity fee spending case in *Southworth*.[119] At issue was whether the University of Wisconsin at Madison (UW) student government may allocate mandatory student activity fees to groups that other students may find offensive for engaging in perhaps politically and ideologically objectionable expression.[120] In other words, the objecting students did not want their student fees supporting political groups and activities hostile to the objectors' views. The Court concluded that as long as the student government allocated fees to student organizations on a viewpoint neutral basis, no First Amendment violation occurred merely because certain students objected to certain funded groups.[121] After distinguishing its prior cases that invalidated on First Amendment grounds mandatory union or professional dues used for political activities considered objectionable by certain dues-paying members,[122] the Court applied *Rosenberger* forum analysis and upheld the student government allocation process as viewpoint neutral except for the student referendum process.[123]

---

117. *Id.* at 828–35 (majority opinion).

118. In *Flint*, the Ninth Circuit cited the *Rosenberger* forum analysis to assess whether ASUM's spending limits were viewpoint neutral and reasonable. Finding viewpoint neutrality as required by *Rosenberger*, the *Flint* panel deemed the limits reasonable and permissible under the First Amendment. Flint v. Dennison, 488 F.3d 816, 831–35 (9th Cir. 2007). *Flint* also cites *Widmar* as a basis for requiring viewpoint neutrality, although the court makes clear that ASUM elections are not the expansive forum type found in *Widmar*, but instead are a limited purpose public forum subject to reasonable speech restrictions. *Id.* at 828–29, 832 n.11.

119. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

120. *Id.* at 221.

121. *Id.* at 219. The Court remanded the case to the lower courts to determine whether the UW referendum process allowing students to vote on certain groups' funding protected viewpoint neutrality, because such neutrality requires protection of minority views from majority will. *Id.* This ignores the fact that a majority of student government legislators at public campuses will routinely vote to fund or not fund student groups over the objection of a legislative minority.

122. *Id.* at 230–32. The Court in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), prohibited union use of member dues for political activities not germane to union labor purposes and activities. *Id.* at 235–36. The Court in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), applied similar germaneness reasoning to state bar member dues use by bar associations. *Id.* at 13–14.

123. *Southworth*, 529 U.S. at 233–34. The Ninth Circuit *Flint* opinion cites *Southworth* to require forum viewpoint neutrality, but otherwise does not use the case. *Flint*, 488 F.3d at 828–29. While acknowledging the UW student government funding criteria to be viewpoint neutral and carefully drawn, on remand, the Seventh Circuit and the district court concluded that criteria pertaining to student travel and durational existence of student organizations posed viewpoint neutrality problems. Southworth v. Bd. of Regents of the Univ. of Wis. Sys., 307 F.3d 566 (7th Cir. 2002). More important, both courts found that because UW significantly changed its student government funding allocation criteria in response to the lawsuit, plaintiffs acquired prevailing party status entitling them to attorneys' fees and costs totaling several hundred thousand dollars. Southworth v. Bd. of Regents of the Univ. of Wis. Sys., 376 F.3d 757, 764 (7th Cir. 2004).

Two other pertinent student fee cases have emerged since *Southworth*. In a somewhat unusual party posture, University of California at Santa Barbara (UCSB) and the University of California at Berkeley (UCB) student governments recently sued the University of California Board of Regents in a First Amendment challenge to the Regents' ban on the use of student activity fees for state ballot measures.[124] The court found no First Amendment right at issue because the Regents are not required to use public funds to subsidize student political speech. In a more recent case, the Second Circuit applied *Southworth* to uphold a First Amendment challenge by two students and a student organization against the SUNY Albany student government use of advisory referenda to allocate funds to a public interest organization that plaintiffs found objectionable.[125] The court here found that the referenda use violated viewpoint neutrality that is required in the type of forum applicable to fee allocation cases.[126] These cases suggest that even though student fee allocations by student governments have important educational value, there are limits on how student governments may exercise fee allocation powers.

B. Student Religious Speech and Related Freedom of Association Cases

Since *Rosenberger*, some important student religious speech First Amendment cases have been or are being litigated. These cases fall primarily into two categories. The first involves a clash between the First Amendment right of student religious groups to discriminate on the basis of religious belief as to who can be organizational officers or members, and public college or university anti-discrimination policies that bar recognition and funding for student groups engaged in any form of religious discrimination. The second involves individual student religious viewpoint speech that clash with institutional academic policies.

The Christian Legal Society (CLS) actively litigates the rights of CLS law student chapters to restrict chapter officer status to persons who share CLS religious views. In *Christian Legal Society v. Walker*,[127] CLS obtained a preliminary injunction against Southern Illinois University (SIU) to prevent SIU from revoking its recognition of its CLS chapter in violation of SIU's anti-discrimination policy.[128] After expressing doubt that the CLS chapter had in fact

---

These developments suggest that public colleges and universities that respond to First Amendment lawsuits challenging student government (or other student organization and activity) speech policies by changing the challenged policies may find themselves on the losing end of an attorney fee dispute. Although neither ASUM nor The University of Montana saw a need to change student election rules after Flint filed his lawsuit and thus avoided this dilemma, a public college or university might reasonably wonder whether changing policies in the wake of First Amendment challenges likely to fail on the merits is a good idea.

124. Associated Students of Univ. of Cal. at Santa Barbara v. Regents of the Univ. of Cal., No. C05-04352, 2007 WL 196747 (N.D. Cal. Jan. 23, 2007).

125. Amidon v. Student Ass'n of State Univ. of N.Y., 508 F.3d 94 (2d Cir. 2007), *aff'g* 399 F. Supp. 2d 136 (N.D.N.Y. 2005).

126. *Id.* at 95.

127. 453 F.3d 853 (7th Cir. 2006).

128. *Id.* at 867.

violated any actual SIU anti-discrimination policies, the court determined that CLS would likely prevail on the merits of its First Amendment challenge to the SIU policy under two separate theories.[129] The first involves First Amendment freedom of association rights for persons sharing a common religious belief not to be excluded or discriminated against by public agencies when trying to associate, subject to disruption exceptions inapplicable to the case.[130] The second involves the First Amendment right of CLS members not to be excluded on the basis of their religious views from a forum created to permit broad forms of speech.[131] The court applied *Rosenberger* forum analysis and determined, despite expressing uncertainty about what kind of forum actually existed in the SIU Law School, that CLS would likely prevail on a viewpoint discrimination claim because CLS had been singled out to lose student organization recognition status based on its religious views.[132] CLS had similar success challenging the Arizona State University (ASU) Law School anti-discrimination policy.[133] In addition, a University of Wisconsin at Madison (UWM) Catholic student group obtained a preliminary injunction against enforcement of the UWM student recognition policy by persuading the court that *Walker* permitted the group to limit membership to Catholic students, even though this restriction violated the policy.[134]

In contrast to *Walker* and the ASU cases, CLS did not fare well in a similar challenge to the University of California Hastings Law School's anti-discrimination policy. The case, *Christian Legal Society of University of California v. Kane*,[135] resulted in summary judgment dismissal of CLS's claims.[136] First, the *Kane* court found that the Hastings anti-discrimination and organizational recognition policies challenged CLS regulated conduct, rather than speech, and, as

129. *Id.* at 860–61. The court saw little evidence that CLS had violated any federal or state anti-discrimination law, in response to the SIU requirement that all student groups comply with all applicable laws, or that CLS by its nature as a private student group could violate the SIU Affirmative Action/EEO policy requiring equal educational opportunities for all, without regard to sexual orientation or other classifications. *Id.*

130. *Id.* at 861–64.

131. *Id.* at 865–67.

132. *Id.*

133. Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow, No. CV 04-2572, 2006 U.S. Dist. LEXIS 25579 (D. Ariz. Apr. 28, 2006). CLS obtained attorneys' fees as a prevailing party.

134. Univ. of Wis.-Madison Roman Catholic Found., Inc. v. Walsh, No. 06-C-649-S, 2007 U.S. Dist. LEXIS 17084 (W.D. Wis. Apr. 4, 2007); *see also* Alpha Iota Omega Christian Fraternity v. Moeser, No. 1:04CV00765, 2006 U.S. Dist. LEXIS 28065 (M.D. N.C. May 4, 2006). The *Moeser* court initially granted a preliminary injunction against enforcement of a University of North Carolina at Chapel Hill anti-discrimination policy to a male Christian student group and then mooted the case, pursuant to a changed campus policy, when the group received recognition. *Id.* at * 12–13. The court denied attorneys' fees and costs to plaintiff by determining that even though the litigation changed the campus policy, the plaintiff obtained the recognition it sought and had no further legal case or controversy for prevailing party status purposes. *Id.* at *45.

135. No. C 04-04484, 2006 WL 997217 (N.D. Cal. May 19, 2006).

136. *Id.* at *1.

such, the policies did not violate any constitutional rights, because the policies equally applied to all Hastings student organizations as pre-conditions for recognition.[137] The court went on, however, to review the challenged policies as if they did trigger freedom of association and First Amendment religious speech considerations.[138] In its exhaustive analysis, the court applied *Rosenberger* and *Southworth* forum principles to find that Hastings had created a limited public forum requiring viewpoint neutrality.[139] The Hastings anti-discrimination policy was viewpoint neutral because it applied equally to all student organizations, and it was a reasonable educational policy designed to bar discriminatory practices on campus property.[140] The court then determined that the Hastings policy violated no First Amendment freedom of association rights because CLS members were free to meet and express their views, albeit not as a recognized student organization at Hastings.[141] Finally, the court rejected CLS free exercise and equal protection arguments.[142] The *Kane* decision is currently on appeal to the Ninth Circuit, and it would be premature to speculate how much, if any, of the lower court's opinion will stand. That said, the author's view is that there is no viable way to reconcile *Kane* with *Walker*.[143]

Although not a religious speech case per se, a recent Second Circuit decision, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. CUNY*,[144] may reinforce public campus authority to impose anti-discrimination policies without violating constitutional rights. The case involves a predominantly Jewish, all male fraternity that had obtained a lower court preliminary injunction against enforcement of the CUNY-Staten Island campus anti-discrimination policy denying student organization recognition of student groups with membership restricted on the basis of gender.[145] In vacating the injunction, the Second Circuit determined that the campus interest in barring gender discrimination outweighed any First Amendment intimate associational rights, and it further determined that such associational rights did not warrant extensive constitutional protection.[146] Because speech was

137. *Id.* at *5–8.

138. *Id.* at *10.

139. *Id.*

140. *Id.* at *10–20. This is essentially the analysis used by the Ninth Circuit in *Flint*.

141. *Id.* at *20–24.

142. *Id.* at *24–27.

143. On December 14, 2007, CLS filed suit in the U.S. District Court for the District of Montana, Missoula Division, against The University of Montana School of Law Dean and Student Bar Association Executive Board Members. Press Release, Alliance Defense Fund, University of Montana School of Law Continues Trend of Silencing Christian Groups at Public Universities (Dec. 14, 2007), *available at* http://www.alliancedefensefund.org/news/pressrelease.aspx?cid= 4331. The lawsuit challenges the Law School SBA decision not to fund CLS. *Id.*

144. 502 F.3d 136 (2d Cir. 2007).

145. 443 F. Supp. 2d 374 (E.D.N.Y. 2006). In granting the preliminary injunction, the court rejected the *Kane* analysis and refused to apply its ruling. *Id.* at 392.

146. 502 F.3d at 148–49 (noting that First Amendment associational expressive rights, like those seen in CLS and other religious organization cases, were not properly presented on appeal).

not at issue before the Second Circuit, the court did not perform forum analysis in this case. The court did stress, however, the fundamental importance of public campus anti-discrimination policies, and suggested that such policies could likely override competing First Amendment speech rights.[147]

Student plaintiffs have challenged public campus policies that are allegedly restrictive of or offensive to student religious beliefs and expression. In *Goehring v. Brophy*,[148] the court considered and rejected a University of California at Davis (UCD) student's religious freedom challenge to the use of mandatory student health fees for abortion services after it found a compelling state public health interest which outweighed the burden on the plaintiff's anti-abortion beliefs grounded in religion.[149] Federal and state courts rejected free exercise and other First Amendment claims by a San Jose State University student who, among other claims, challenged the California state teacher certification agency and accrediting body requirements that student teachers demonstrate multicultural sensitivities as a condition for being allowed to student teach.[150] Offering little explanation, the federal court dismissed the case for failure to state a claim under Federal Rule 12(b)(6).[151] The appellate court cited *Rosenberger* and *Southworth* in its detailed analysis and found that the challenged curricular requirements were well within the University's right to set its own curricular requirements without judicial interference.[152]

Student plaintiffs challenging campus curricular policies in *Axson-Flynn v. Johnson,*[153] a Tenth Circuit case, and *Watts v. Florida International University*,[154] a case in the Eleventh Circuit, have had more success sustaining First Amendment religious free exercise claims, at least against early dismissal. *Axson-Flynn* involved a Mormon student's challenge to the University of Utah drama program's refusal to accommodate her religious objections to certain acting roles which required her to use foul language.[155] The Tenth Circuit conducted a forum analysis and found the drama program to be a non-public forum, and it further found that

147. *Id.* at 149 n.2.

148. 94 F.3d 1294 (9th Cir. 1996), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2000), *as recognized in* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

149. The case initially included a number of challenges to the mandatory student fees, but the only one remaining on appeal after the others were dismissed by the lower court was the religious freedom claim. *Id.* at 1297.

150. Head v. Bd. of Trs. of the Cal. State Univ., No. C 05-05328, 2006 U.S. Dist. LEXIS 60857 (N.D. Cal. Aug. 14, 2006); Head v. Bd. of Trs. of the Cal. State Univ., No. H029129, 2007 Cal. App. LEXIS 393 (Cal. Ct. App. Jan. 18, 2007).

151. *Head,* 2006 U.S. Dist. LEXIS 60857, at *9–29.

152. *Head,* 2007 Cal. App. LEXIS 393, at *28–47 (applying the principle recognized in Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 242–43 (2000), and Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995), to the right of public colleges and universities to determine the content of their own institutional speech to the teacher education requirements at issue).

153. 356 F.3d 1277 (10th Cir. 2004).

154. 495 F.3d 1289 (11th Cir. 2007).

155. *Axson-Flynn*, 356 F.3d at 1280.

the curricular requirements constituted school-sponsored speech that is entitled to broad latitude.[156] Such latitude is not unlimited, however, in that certain allegations raised a material factual dispute as to whether the Utah program requirements, as applied to plaintiff, were pretextual and intentionally hostile to her religion.[157] The Court reversed dismissal of plaintiff's claims to allow discovery about whether such hostility existed, and, if so, whether they violated her free exercise rights.[158] In *Watts*, the Eleventh Circuit reversed the lower court's Rule 12(b)(6) dismissal of a social work graduate student's free exercise claim resulting from the student's ouster from a mandatory practicum because the student had informed a client about the availability of a religious program, in violation of the campus and practicum site's policy not to discuss religion with clients.[159] Foregoing forum analysis, the *Watts* court allowed the plaintiff to proceed with his claim that he was illegally discriminated against because of his religious beliefs, while precluding the lower court or campus from assessing the sincerity of the claimed religious belief.[160] *Watts* does not address the issue of school-sponsored speech or the validity of the curricular requirement.

The extent to which forum analysis applies to religious free exercise claims is debatable. Certainly a public college or university must have the authority to set reasonable curricular requirements. Assuming that curricular delivery takes place in a non-public forum, plaintiffs making free exercise claims should have to meet a very high threshold of proving unreasonable burdens on their religious beliefs to bring such claims. As long as these requirements are uniformly applied and not intended to target students with only certain viewpoints for adverse academic treatment because of such viewpoints, free exercise claims arising from curricular disagreements appear unlikely to succeed.

C. Offensive And Inappropriate Student Speech Cases

Most reported public higher education cases involving controversial and offensive—offensive to at least some institutional administrators—speech tend to involve faculty or other employees as plaintiffs, rather than students.[161] These employee cases have been decided somewhat inconsistently, with some resulting in invalidation of campus speech restrictions or their application on vagueness and overbreadth grounds, while others have seen little to no First Amendment protection at all.[162] A recent case, *Garcetti v. Ceballos*,[163] will likely have

156. *Id.* at 1285.

157. *Id.* at 1286–89.

158. *Id.* at 1299.

159. *Watts*, 495 F.3d at 1277. The Eleventh Circuit affirmed dismissal of various other claims. *Id.* at 1301.

160. *Id.* at 1294–300.

161. *See, e.g.*, Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001); Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001); Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (en banc); Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995).

162. *Compare Hardy*, 260 F.3d at 671 (concluding that instructor's use of racial slurs is

significant impact on public higher education First Amendment speech cases involving employees. In *Garcetti*, the Court rejected a First Amendment challenge by a Los Angeles prosecutor who was disciplined for publicly protesting case management decisions by his superiors, because the Court found that public employee workplace speech pertaining to workplace issues is generally unprotected.[164] The application of *Garcetti* to higher education institutions is only now beginning, and most speech cases involving employees are decided in favor of the institutions because the speech tends to be work-related rather than a matter of public concern, which would entitle citizens to speak publicly.[165] How *Garcetti* will apply to future higher education student speech cases, if at all, is uncertain, because it is an employment-specific decision. Meanwhile, the controversial student speech cases that have been decided to date offer at least some guidance as to how courts might decide similar cases in the future by applying forum analysis, as the *Flint* court had done.

One of the first contemporary student offensive speech First Amendment cases, *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*,[166] appears to still be valid precedent. George Mason University severely punished a fraternity for putting on, in the student union cafeteria, an "ugly women" skit which incorporated crude gender- and race-based humor, with one member painted in black face to emulate an African-American female in less than flattering light.[167] The Fourth Circuit affirmed a preliminary injunction barring application of the punishment based on First Amendment grounds, namely the protected nature of the speech as artistic parody containing viewpoint-specific content.[168] While the court did not conduct forum analysis to reach its result, a concurring opinion suggested that the campus probably could have banned the speech had it taken steps to do so

protected speech that outweighs the institution's interest in regulating it), *and Cohen*, 92 F.3d 968 (holding institution's sexual harassment policy to be unconstitutionally vague), *and Dambrot*, 55 F.3d 1177 (concluding that the institution's discriminatory harassment policy was unconstitutionally vague and overbroad), *with Bonnell*, 241 F.3d 800 (holding that the institution's interest in protecting confidentiality outweighs the professor's speech interest in circulating a list of sexual harassment complainants), *and Urofsky*, 216 F.3d at 401 (holding that a statute prohibiting state employees from accessing sexually explicit material on state owned computers did not violate First Amendment rights).

163. 126 S. Ct. 1951 (2006).

164. *Id.* at 1961–62.

165. *See, e.g.*, Bessent v. Dyersburg State Cmty. Coll., 224 F. App'x 476 (6th Cir. 2007); Bradley v. James, 479 F.3d 536 (8th Cir. 2007); Battle v. Bd. of Regents for Ga., 468 F.3d 755 (11th Cir. 2006); Piggee v. Carl Sandburg Coll., 464 F.3d 667 (7th Cir. 2006); Massey v. Johnson, 457 F.3d 711 (7th Cir. 2006); Bowers v. Rectors & Visitors of the Univ. of Va., 478 F. Supp. 2d 874 (W.D. Va. 2007); Hood v. Tenn. Bd. Of Regents, No. 3:04-0473, 2006 U.S. Dist. LEXIS 65881 (M.D. Tenn. Sept. 14, 2006); Wells v. Bd. of Trs. of Cal. State. Univ., No. C 05-02073 CW, 2006 U.S. Dist. LEXIS 68260 (N.D. Cal. Sept. 7, 2006); Allen v. Or. Health Scis. Univ., No. 06-CV-285, 2006 U.S. Dist. LEXIS 54885 (D. Or. Aug. 4, 2006); Payne v. Univ. of Ark. Fort Smith, No. 04-2189, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006); Hughes v. Timko, No. 255229, 2007 Mich. App. LEXIS 530 (Mich. Ct. App. Aug. 2, 2007).

166. 993 F.2d 386 (4th Cir. 1993).

167. *Id.* at 387–88.

168. *Id.* at 389–93.

with clear advance notice about what was banned.[169]

In *Gay Lesbian Bisexual Alliance v. Pryor*,[170] the Eleventh Circuit invalidated an Alabama statute barring public colleges and universities from directly or indirectly using public funds to encourage same-sex sodomy acts, which were subject to Alabama criminal punishment.[171] The Alabama statute also barred institutions from distributing public funds through student organizations for the same prohibited purpose.[172] The court conducted forum analysis and found that the campuses subject to the statute were limited public fora.[173] The court also found the statute to be viewpoint censorship, and thus enjoined its application.[174] The court cited and applied *Rosenberger* to support its conclusion that public campuses (and state legislative bodies) cannot create a limited public forum for student expression and then censor speech based on viewpoint. [175]

United States v. Alkhabaz, a Sixth Circuit case, involves gruesome email chat content written and communicated by a male student at the University of Michigan, which was purportedly fictional, about torture, rape and murder of a female whose name was identical to one of his female classmate's.[176] The male student was indicted for allegedly violating a federal statute,[177] which criminalizes interstate communications containing threats to kidnap and harm another person.[178] The Sixth Circuit affirmed dismissal of the indictments because the emails were mere communication of sexual fantasies between two men, and they contained no actual threats.[179] The majority declined to consider the First Amendment issues raised by both the accused student and the prosecution, even though the lower court had cited the First Amendment to dismiss the charges.[180] The dissenting judge argued that the majority should have considered and then rejected any First Amendment protection of the speech at issue because of its violent content that

169. *Id.* at 394–95 (Murnaghan, C.J., concurring). The concurrence cites Justice Stevens' *Widmar* concurrence, suggesting that college and universities have the ability to regulate speech-related behaviors. Widmar v. Vincent, 454 U.S. 263, 278 (1981) (Stevens, J., concurring). This seems consistent with the Ninth Circuit *Flint* view authorizing public colleges and universities to restrict speech for educational purposes, although the viewpoint neutrality condition linked to the permissibility of such regulation would be problematic in cases like *Iota Xi*.

170. 110 F.3d 1543 (11th Cir. 1997).

171. ALA. CODE § 16-1-28 (2007). This statute is still on the books. Notably, the statute, then as it does now, includes the following provision: "This section shall not be construed to be a prior restraint of the First Amendment protected speech. It shall not apply to any organization or group whose activities are limited solely to the political advocacy of a change in the sodomy and sexual misconduct laws of this state." *Id.* § 16-1-28(c).

172. *Id.*

173. *Pryor*, 110 F.3d at 1548.

174. *Id.* at 1549–50.

175. *Id.* (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995)). This is consistent with the Ninth Circuit's reasoning in *Flint*.

176. 104 F.3d 1492 (6th Cir. 1997).

177. *Alkhabaz*, 104 F.3d at 1493.

178. 18 U.S.C. § 875(c) (2008).

179. *Alkhabaz*, 104 F.3d at 1494–96.

180. *Id.* at 1493.

was arguably directed at the female classmate.[181] The case raises troubling constitutional concerns about the extent to which campuses can bar and punish even the most graphically violent speech when it is not directly communicated to an identifiable victim as a threat intended to intimidate. Ironically, a number of years before *Alkhabaz*, a Michigan federal district court invalidated the University of Michigan anti-harassment policy on vagueness and overbreadth grounds.[182]

Bair v. Shippensburg University,[183] a case decided in 2003, demonstrates the difficulties faced by public colleges and universities in trying to regulate offensive speech. Shippensburg's Student Conduct Code had a provision urging or requiring—depending on the plaintiff's or defendant's position—students not to engage in "acts of intolerance directed at others for ethnic, racial, gender, sexual orientation, physical, lifestyle, religious, age, and/or political characteristics."[184] The Code also stated that "the expression of one's beliefs should be communicated in a manner that does not provoke, harass, intimidate, or harm another."[185] The court enjoined enforcement of this language for being overly broad and unduly restrictive of protected speech in violation of the First Amendment.[186]

A much more recent *Bair*-like case occurred in *College Republicans at San Francisco State University v. Reed*.[187] The case arose after students were charged and investigated for disparaging Islam,[188] when the anti-terrorism rally sponsored by the plaintiff College Republicans at San Francisco State University resulted in the desecration of the Hezbollah and Hamas flags, which feature the word "Allah."[189] The Standards for Student Conduct stated that students are (a) "expected . . . to be civil to one another and to others in the campus community, and to contribute positively to student and university life;" (b) required to refrain from "intimidation" or "harassment;" and (c) refrain from organizational behaviors

181. *Id.* at 1502–06 (Krupansky, J., dissenting).

182. Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001) (invalidating a high school anti-harassment policy on vagueness and overbreadth grounds); Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); Booher v N. Ky. Bd. of Regents, Nos. 98-6126/98-6194, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Dec. 21, 1998). Applying the *Flint* analysis would appear to make such speech restrictions problematic in a limited public forum because tough speech tends to be viewpoint-specific—e.g., "I want to kill this stupid university president" or "Our governing board is comprised of idiots who ought to be put out of their misery"—and therefore protected.

183. 280 F. Supp. 2d 357 (M.D. Pa. 2003).

184. *Id.* at 362–63.

185. *Id.* at 363.

186. *Id.* at 367–73. The court did not conduct forum analysis, but, instead, enjoined application of the Code on straightforward First Amendment censorship grounds. *See id.* Applying the *Flint* analysis, even if a limited forum were created and recognized as such, one would be hard-pressed to find viewpoint neutrality in much of the speech prohibited or otherwise restricted by the Code.

187. 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

188. *Id.* at 1009-10.

189. *Id.* at 1007.

"inconsistent with SF State goals, principles, and policies."[190] Although the investigations did not lead to sanctions, the court preliminarily enjoined application of the Code's civility and organizational behaviors language because they were held as being contrary to First Amendment speech rights.[191] At the same time, the court upheld the validity of the intimidation and harassment language.[192] The court took especially serious issue with the civility requirement by noting:

> The First Amendment difficulty with this kind of mandate should be obvious: the requirement "to be civil to one another" and the directive to eschew behaviors that are not consistent with "good citizenship" reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.[193]

The court issued the injunction on vagueness and overbreadth grounds.[194]

Brown v. Li,[195] a Ninth Circuit case, is a somewhat complex First Amendment case because of its unique facts. Christopher Brown, a University of California at Santa Barbara (UCSB) graduate student who had received committee approval of his thesis subsequently added a "Disacknowledgements" section containing crude and obscene language critical of various UCSB faculty and staff.[196] When the student then tried to file the thesis with the library, the thesis committee learned of the addition and it refused to approve the thesis as changed.[197] The student received his degree but the thesis was kept from the library, resulting in a First Amendment challenge.[198] The Ninth Circuit split as to reasoning, and two judges held that no First Amendment violation had occurred because they found the thesis a curricular assignment subject to reasonable campus pedagogical requirements.[199] Judge Graber, writing for the court, determined that the thesis was not a public forum but instead a school-sponsored activity subject to regulation.[200] Reinforcing a public college or university's right to control curricular content, Judge Graber also applied *Hazelwood School District v. Kuhlmeier*,[201] an earlier case in which the Supreme Court ruled that school officials may lawfully censor high school

190. *Id.* at 1010–11.
191. *Id.* at 1017-18.
192. *Id.* at 1022.
193. *Id.* at 1019.
194. *Id.* at 1021.
195. 308 F.3d 939 (9th Cir. 2002).
196. *Id.* at 943.
197. *Id.* at 943–44.
198. *Id.* at 945.
199. *Id.* at 952 (plurality opinion); *id.* at 956 (Ferguson, J., concurring).
200. *Id.* at 950–55 (plurality opinion).
201. 484 U.S. 260 (1988).

newspapers on the ground that they constitute school-sponsored speech.[202] Judge Ferguson's concurrence did not endorse Judge Graber's analysis but, instead, treated the "Disacknowledgements" section as the equivalent of academic fraud with no First Amendment credence.[203] Judge Reinhardt's dissent, on the other hand, recognized a potentially significant First Amendment issue and suggested possible public or limited public forum treatment of the thesis, while rejecting altogether Judge Graber's *Hazelwood* analysis.[204]

The *Flint* court declined to apply *Brown* school-sponsored speech principles to ASUM election rules.[205] Applying *Flint* to *Brown* poses First Amendment problems because it would seem that if curricular speech were treated as a limited public forum, restrictions on much of that speech would not likely be viewpoint neutral. Therefore, restricting it, at least under traditional forum analysis, raises serious First Amendment difficulties. Perhaps the better course would be to treat curricular speech as a non-forum, much the way Judge Graber did in *Brown*,[206] so that it can be reasonably regulated by the academy.

D. Student First Amendment Retaliatory Speech and Related Conduct Cases

Some of the harder student speech First Amendment disputes to explain with any consistency are those in which the allegedly protected speech encompasses behavior subject to student disciplinary penalties. For example, in *Feldman v. Community College of Allegheny County*,[207] the administration had a student forcibly removed and arrested for violating the campus computer lab use policy, following a dispute between the student and the computer lab director lasting many months.[208] Among other claims, the student alleged that he was the subject of illegal retaliation in violation of the First Amendment, because of remarks he had made to the college's president about the dispute, which the student claimed resulted from racial and religious discrimination by the lab director (the student being a white Jewish male, the director an African-American female).[209] The court applied a three-part test comprised of whether (i) the student's statements were protected by the First Amendment; (ii) the statements were a "motivating factor" in his being denied computer lab use and later arrested; and (iii) the student would

202. 308 F.3d at 947–53. The application of *Hazelwood* to higher education had been rare prior to this case with one exception in *Alabama Student Party v. Student Government Ass'n of the University of Alabama*, 867 F.2d 1344, 1346–47 (11th Cir. 1989). The Seventh Circuit has now done so in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), a public university newspaper case, and the Ninth Circuit did so in *Flint v. Dennison*, 488 F.3d 816, 829 n.9 (9th Cir. 2007), for the limited purpose of forum analysis application.

203. 308 F.3d at 955–56 (Ferguson, J., dissenting).

204. *Id.* at 956–64 (Reinhardt, J., dissenting).

205. *Flint*, 488 F.3d at 829 n.9.

206. *See supra* notes 145–47 and accompanying text.

207. 85 F. App'x 821 (3d Cir. 2004).

208. *Id.* at 824.

209. *Id.*

have been denied access and later arrested for reasons other than his statements.[210] The court found that the student could not meet the first part of the test because the remarks to the president were about a private dispute over lab use and access policies, and not a matter of public concern protected by the First Amendment.[211]

The Second Circuit applied a different First Amendment retaliatory speech test and analysis in *Garcia v. SUNY Health Sciences Center*.[212] There, a student who was academically dismissed from medical school and subsequently diagnosed with a learning disability sought readmission, which would have been granted but for the student's disagreement with the school over how much of the first year curriculum he had to retake.[213] Among other claims, the student filed a First Amendment retaliatory speech claim, alleging that he was retaliated against for a letter he had written more than a year before the readmission denial, complaining about certain course grading problems he and several other students with similar academic problems had experienced.[214] The court concluded that student speech of this nature was protected and found adverse action against the student.[215] The court, nonetheless, dismissed the First Amendment claim because there was no causal connection between the protected speech and the adverse action.[216] The court did not perform forum analysis, despite its finding that the speech was broadly protected.

Student critics of public college and university administrators are not without First Amendment rights to be free from retaliatory strikes against them. In *Brown v. Western Connecticut State University*,[217] a student expelled for allegedly changing his grades survived early dismissal of his First Amendment retaliatory speech claim by pleading that various defendant university administrators had, in effect, fabricated the charges to get rid of the student and stop his incessant criticisms of their performance.[218] In *Qvyjt v. Lin*,[219] a federal district court reached a similar result, in allowing a Northern Illinois University graduate student to proceed with a First Amendment retaliatory speech claim because the student was barred from using campus lab facilities following his complaint about faculty

210. *Id.*

211. *Id.* at 824–25. This analysis is similar to that later used in *Garcetti* in that the court looked to the nature of the student speech at issue within the context of the student's campus relationships. *See supra* notes 121–22 and accompanying text. No forum analysis was used. A *Flint* analysis might not have the same result if student complaints about campus policies were subjected to a limited public forum analysis because speech in these cases would almost always have viewpoint bias rather than neutrality.

212. 280 F.3d 98 (2d Cir. 2001).

213. *Id.* at 104–05.

214. *Id.* at 105.

215. *Id.* at 106–07.

216. *Id. Flint* probably would not apply to this kind of situation because viewpoint neutrality issues are seldom present in these kinds of cases.

217. 204 F. Supp. 2d 355 (D. Conn. 2002).

218. *Id.* at 363–65.

219. 953 F. Supp. 244 (N.D. Ill. 1997).

research misconduct.[220] The court rejected the employee speech-public concern mode of analysis and, instead, the court treated the content of his speech as fully protected, and, under the circumstances, therefore free from punishment.[221] No forum analyses were conducted in these cases.

Student critics may enjoy First Amendment freedom from retaliatory punishment by campus employees unhappy with the criticisms, but these freedoms have obvious limits. In *Moore v. Black*,[222] the court rejected a First Amendment claim by a student banned from the SUNY Buffalo campus for threatening to beat one administrator with a baseball bat and hit another in the face.[223] A federal district court, in *Willett v. CUNY*,[224] likewise, dismissed a First Amendment challenge by a law student claiming his criticism of classmates' children was the basis for his removal, when in fact the student had committed several major disciplinary infractions that were more than sufficient to support his ouster, even assuming his speech was protected.[225] And although it is not a retaliatory speech case, in *Pi Lambda Phi Fraternity v. University of Pittsburgh*,[226] the Third Circuit rejected a First Amendment freedom of association claim by a fraternity that was severely punished after several members were arrested for illegal drug possession in the chapter house.[227] The court concluded that the justification for disciplinary punishment outweighed any First Amendment rights the group might have.[228]

These retaliatory speech and conduct cases do not employ forum analysis, and, thus, *Flint* would seem inapplicable. That stated, however, the line between regulating student speech in a forum context and punishing students for engaging in speech-like activity on a public college or university campus seems at times a bit blurred. For example, students at a public college or university ostensibly have some speech rights to criticize administrators and faculty, perhaps even loudly and rudely, unless—as seems unlikely—*Garcetti* has eliminated student criticism rights. Assuming students have such rights, administrators would seemingly need to use care before punishing students for expressing viewpoints contrary to what the administrators wish to see and hear.

E. Other Student Speech Cases Involving Forum Analysis

Most higher education forum analysis cases not mentioned above do not involve students, but they do directly affect how courts decide all campus forum cases.[229]

---

220. *Id.* at 247.

221. *Id.* at 247–48 (citing Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973), wherein the Court had determined graduate students cannot be punished for the content of their speech).

222. No. 03-CV-033A, 2004 U.S. Dist. LEXIS 18023 (W.D.N.Y. Sept. 2, 2004).

223. *Id.*

224. No. 94 CV 3873, 1998 WL 355321 (E.D.N.Y. May 5, 1998).

225. *Id.* at *2.

226. 229 F.3d 435 (3d Cir. 2000).

227. *Id.* at 442.

228. *Id.* at 441.

229. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Gilles v.

Public colleges and universities can generally restrict speech in a nonpublic forum and even restrict speech in a limited public forum on a viewpoint neutral basis. Once the campus has created a public forum, however, speech restrictions on any basis other than time, place, and manner normally fail to pass First Amendment muster. In addition, even when colleges and universities create a public forum for unfettered free speech, they may not unduly restrict speech in other parts of campus. Two Texas cases illustrate these points.

In *Pro-Life Cougars v. University of Houston*,[230] an anti-abortion student group and individual group members prevailed on a First Amendment challenge to the University of Houston's refusal to permit them to demonstrate in a part of the campus set aside for all types of speech, because the administration considered plaintiffs' speech "potentially disruptive."[231] The court invalidated application of campus policy in this case, because it offered no guidance to prospective speakers or administrators on how to define "potentially disruptive" speech, in a way that would permit its restriction or prohibition within constitutional bounds.[232]

In *Roberts v. Haragan*,[233] the court imposed what may be the broadest definition of public forum on a public college or university of any case to date. The court in that case essentially found all open areas of the Texas Tech campus a designated public forum which could not be restricted as to speech content or delivery.[234] The court found in favor of a Texas Tech law student who had filed a First Amendment challenge to the campus policy requiring students to obtain permission to speak and hand out literature outside the free speech zone, on the ground that it burdened free expression.[235] Even though the campus had changed its policy to eliminate the discretionary grant or denial of permission, the court found that requiring anyone to seek permission to speak in a designated public forum violated First Amendment rights as an unnecessary, and thus not narrowly tailored, restriction.[236] The court also invalidated application of the campus speech code, which restricts offensive speech such as threats, insults, or sexually harassing communication, even in designated free speech zones because the code suppressed much more than unprotected speech.[237] In addition, the court invalidated certain restrictions on the distribution of printed materials by finding these restrictions inconsistent with designated public forum principles.[238]

Blanchard, 477 F.3d 466 (7th Cir. 2007); Bowman v. White, 444 F.3d 967 (8th Cir. 2006); ACLU v. Mote, 423 F.3d 438 (4th Cir. 2005); Justice for All v. Faulkner, 410 F.3d 760 (5th Cir. 2005); Giebel v. Sylvester, 244 F.3d 1182 (9th Cir. 2001); Brister v. Faulkner, 214 F.3d 675 (5th Cir. 2000); KKK v. Curators of Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000); Jones v. Mont. Univ. Sys., 155 P.3d 1247 (Mont. 2007).

230. 259 F. Supp. 2d 575 (S.D. Tex. 2003).

231. *Id.*

232. *Id.* at 582–84.

233. 346 F. Supp. 2d 853 (N.D. Tex. 2004).

234. *Id.* at 858–63.

235. *Id.* at 869–70.

236. *Id.* at 868–70.

237. *Id.* at 870–73.

238. *Id.* at 873. This particular court would not likely adopt the *Flint* view that most campus

If *Pro-Life Cougars* and *Roberts* represent the broadest form of public forum application, the Tenth Circuit, in *Pryor v. Coats*,[239] approaches the issue more narrowly. The court defined bulletin boards in public college and university buildings as being limited public fora that are subject to administrative restrictions on who gets to post communications on these boards, based on reasonable organizational criteria.[240] At issue in the case was the school's requirement limiting bulletin board use to registered student groups which, in turn, required at least ten student members.[241] The court upheld the validity of this restriction as viewpoint neutral.[242] The Ninth Circuit subsequently followed suit in determining that a public campus may remove fliers posted on nonpublic forum bulletin boards as long as it is clear that the ban is viewpoint neutral and the bulletin boards are not opened for broad forms of expression.[243] In *Wilson v. Johnson*,[244] the Sixth Circuit recently reached the same result when it concluded that campus buildings are not designated public fora entitling students to communicate political messages wherever they wished, but that, instead, they are nonpublic fora in which schools could ban political messages altogether.[245]

Finally, in *Hickok v. Orange County Community College*,[246] a federal district court in New York addressed the issue of whether a public college or university may have and enforce a policy requiring lectures to be apolitical and non-partisan in nature.[247] The court in *Hickok* held that the campus lecture series was a limited public forum created solely to permit non-partisan, apolitical speech, and it upheld the validity of the policy.[248]

F. Student Publication Cases

Student publication cases present perhaps the most interesting and pertinent First Amendment forum cases. During the past few years, the laws applicable to public higher education student publications have become reasonably well-established. Generally, the cases fall into three First Amendment categories. The

---

expressive activities take place in a limited public forum that is more susceptible to viewpoint neutral regulation on a reasonable basis. This court rejected the Texas Tech argument that most of its campus was a limited public forum. *Id.* at 861–63. For an interesting discussion of how this case was litigated by a prominent conservative advocacy organization, see Clay Calvert & Robert D. Richards, *Interview and Commentary: Lighting a Fire on College Campuses: An Inside Perspective on Free Speech*, *Public Policy and Higher Education*, 3 GEO. J. L. & PUB. POL'Y 205 (2005).

239. No. 99-6271, 2000 U.S. App. LEXIS 1805 (10th Cir. Feb. 9, 2000).

240. *Id.* at *18–19.

241. *Id.* at *3.

242. *Id.* at *18–19.

243. Desyllas v. Bernstine, 351 F.3d 934, 944 (9th Cir. 2003).

244. No. 05-6733, 2007 WL 1991057 (6th Cir. July 5, 2007).

245. *Id.* at *4.

246. 472 F. Supp. 2d 469 (S.D.N.Y. 2006).

247. *Id.* at 473.

248. The court dismissed the First Amendment case for plaintiff's failure to show how the campus had caused him legal injury. *Id.* at 476.

first involves student publication First Amendment rights to be free from censorship. The second involves the issue of whether publications enjoy autonomy from administrative control. If they do, there can be no First Amendment claim, because there is no state action. The third is comprised of cases that raise novel constitutional issues regarding publication rights and status.

The newest legal trend in this area appears to be application of K-12 education *Hazelwood* principles to public higher education publications. In *Hosty v. Carter*,[249] the Seventh Circuit found that public colleges and universities create designated public fora.[250] When the college or university allows student publications to exist as extra-curricular activities under the supervision of student publication boards, the publications cannot be subjected to viewpoint or content censorship by the administration.[251] This case involved an administrator's refusal to pay the campus newspaper printing bills unless the administrator had first reviewed and cleared the newspaper content.[252] Under these circumstances, the court had little difficulty treating the student publication as a designated public forum, while simultaneously recognizing that the law in this area was unsettled enough to grant the Governors State University administrator qualified immunity from suit.[253] The *Flint* court considered *Hazelwood*'s application to the ASUM election rules but concluded that *Hazelwood* should only be used for forum analysis, rather than for general use in higher education.[254] Unlike the Seventh Circuit in *Hosty*, however, the Ninth Circuit found that the ASUM elections were a limited public forum which could be regulated by the campus on a viewpoint neutral basis.[255] This is probably appropriate, given the difference between student government elections, which are less susceptible to First Amendment speech protection, and newspapers, which traditionally enjoy more First Amendment rights.

A somewhat similar censorship issue arose in *Kincaid v. Gibson*,[256] when a Kentucky State University (KSU) administrator confiscated and held the student-published yearbook because of purported technical deficiencies in content.[257] The court reviewed the campus student publications policy and found the yearbook a limited public forum which may be censored only in a viewpoint-neutral manner, based on reasonable rules.[258] The court then concluded that the censorship at issue was neither viewpoint neutral nor reasonable because the confiscation occurred when the administrator objected to the content that students wanted to publish.[259]

249. 412 F.3d 731 (7th Cir. 2005) (en banc).
250. *Id.* at 737.
251. *Id.* at 737–38.
252. *Id.* at 733.
253. *Id.* at 735–38.
254. Flint v. Dennison, 488 F.3d 816, 829 (9th Cir. 2007).
255. *Id.* at 820.
256. 236 F.3d 342 (6th Cir. 2001) (en banc).
257. *Id.* at 345.
258. *Id.* at 347–51.
259. *Id.* at 356.

Furthermore, the confiscation was apparently unprecedented on the campus.[260] The court specifically noted in dictum that not even a non-public forum of this nature could be censored because of speaker viewpoint.[261]

In *Pitt News v. Pappert*,[262] the Third Circuit addressed a different kind of censorship, in the form of a Pennsylvania statute which banned advertisers from paying for the dissemination of alcoholic beverage advertising by media affiliated with colleges, universities, and other educational institutions.[263] The University of Pittsburgh student newspaper, which suffered financially from the ban, successfully sued the state to enjoin the statute's enforcement.[264] The court found the statute unconstitutional as applied because it impermissibly restricted commercial speech by not directly advancing reduction of underage drinking and for not being narrowly tailored to achieve this stated statutory objective.[265] Further, the court found that the statute presumptively violated the First Amendment because it targeted a narrow segment of the media, namely educational institution media, rather than media generally.[266] The court conducted no forum analysis but instead treated the First Amendment issue solely on the basis of commercial speech.[267]

Two cases have directly addressed the issue of when public college or university student newspapers lack public agency status for First Amendment analysis purposes. In *Leeds v. Meltz*,[268] a CUNY Law School student newspaper refused to publish an advertisement that the paper staff considered potentially defamatory, and the would-be advertiser filed a First Amendment challenge, claiming government censorship.[269] The court concluded that because neither the Law School nor campus administration could control editorial content or decisions, there was no state action or state actors, and so there was no First Amendment

260. *Id.*

261. *See supra* note 182 and accompanying text.

262. 379 F.3d 96 (3d Cir. 2004).

263. 47 PA. CONS. STAT. ANN. § 4-498 (West 2003).

264. 379 F.3d at 103.

265. *Id.* at 107–09.

266. *Id.* at 109–13.

267. At least one federal appellate court has determined that commercial speech cases should not be subject to forum analysis in a public higher education setting. Fox v. Bd. of Trs., 841 F.2d 1202 (2d Cir. 1988). The precedential value of this ruling is questionable, because the U.S. Supreme Court reversed the Second Circuit in *Board of Trustees. v. Fox*, 492 U.S. 469 (1989), when it found error in the lower court commercial speech analysis requiring the least restrictive means test to determine First Amendment permissibility. The Supreme Court, instead, determined the test was whether the speech was protected at all, and if so, as commercial speech the test would be whether the ban was reasonably related to its purpose, namely a ban on product-selling in public campus dormitories, without being invalid on overbreadth grounds. The case was ultimately mooted on other grounds. *See* Fox v. Bd. of Trs., 42 F.3d 135 (2d Cir. 1994). Under a *Flint* analysis, it is unclear whether this particular ban is viewpoint neutral. But, based on the Third Circuit analysis, the ban would likely fail on reasonableness grounds, even if it is viewpoint neutral because it was unlikely to achieve its stated purpose.

268. 85 F.3d 51 (2d Cir. 1996).

269. *Id.* at 53–54.

violation in the case.[270] In *Lewis v. St. Cloud State University*,[271] a Minnesota state appellate court reached a similar result that the lack of administrative editorial control over the student paper eliminated any state action by the paper, and thus precluded defamation liability against the university for any alleged defamation by the paper.[272] Neither decision contains mention of forum analysis.

Under a *Flint* analysis, one would be hard-pressed to argue that student newspaper activities at public colleges and universities do not have educational significance. Although the Court in *Hazelwood* determined that high school papers are not a public forum because of direct school sponsorship and curricular characteristics,[273] the Seventh Circuit in *Hosty* concluded that the campus paper was a designated public forum not susceptible to censorship because of full student editorial control.[274] And the Second Circuit in *Husain* found the student paper a limited public forum.[275] The Sixth Circuit likewise found the student yearbook in *Kincaid* a limited public forum.[276] The challenging question in these limited public forum decisions is whether, and if so, how, censorship of college or university publication content could ever be viewpoint neutral or reasonable, and thus legally permissible. In *Coppola v. Larson*,[277] a First Amendment challenge by former editors of the Ocean City (New Jersey) Community College student-run paper to the removal of the paper's advisor in alleged retaliation for paper content hostile to the campus, the court suggested the answer is likely no: "Once a limited public forum, like the *Viking News,* has been created, students must be able to express their views free of editorial control and censorship from the school's administration."[278]

V. SOME TENTATIVE QUESTIONS

As noted at the outset of this article, *Flint* is too new for anyone to know whether it will be followed, either in the Ninth Circuit or elsewhere, with regard to student election speech. It is sufficiently different from *Alabama Student Party*, in terms of legal analysis, for *Flint* to be *sui generis* as to any kind of student government election case. *Flint* stands for the legal proposition that student extracurricular activity of significant educational value and a First Amendment speech component may constitute a limited public forum. Student governments will, in turn, be treated as important educational activity, rather than as political organizations with a broad grant of free speech rights, such that their speech can be subject to viewpoint neutral and objectively reasonable restrictions.

---

270. *Id.* at 55–56.
271. 693 N.W.2d 466 (Minn. Ct. App. 2005).
272. *Id.* at 472–73.
273. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269–70 (1988).
274. Hosty v. Carter, 412 F.3d 731, 737–38 (7th Cir. 2005) (en banc).
275. Husain v. Springer, 494 F.3d 108, 124–25 (2d Cir. 2007).
276. Kincaid v. Gibson, 236 F.3d 342, 347–51 (6th Cir. 2001) (en banc).
277. No. Civ. 06-2138, 2006 WL 2129471 (D.N.J. July 26, 2006).
278. *Id.* at *7.

The inability of public colleges and universities to regulate student organizational and individual speech deemed educationally valuable on the basis of speaker viewpoint nonetheless has significant educational ramifications. For example, what if student extracurricular organizational speakers urge that students of a certain gender, race, ethnicity, or religion be excluded altogether from the campus as "undesirable elements"? Under *Flint*, such speech would be protected from campus regulation.[279] Of course, the student religious organization speech cases litigated by the Christian Legal Society and Roman Catholic Foundation are, in essence, about the right of exclusion. Certain student religious organizations seek to exclude openly gay students involved in same sex relationships from holding office or being members, or in a non-sexual orientation context, they seek to limit their participants to persons of the same religious beliefs. Conversely, students opposed to these student religious groups seek to exclude them from having full-fledged rights and status equivalent to what other student organizations enjoy. As seen in *Walker* and *Kane*, when two courts effectively cancel each other out on the same factual and legal questions, the issue of exclusion advocacy in a limited public forum is such that reasonable judicial minds can reach opposite conclusions. A legal scholar recently wrote, "The legal conflict between the homosexual movement and those who oppose it on religious grounds is intense and likely to grow; neither side is about to obliterate the other. This conflict cannot be resolved by a single legislative or judicial act; it will play out in innumerable skirmishes."[280] Limited public forum analysis of the sort applied in *Flint* appears to tilt the scale against application of campus anti-discrimination policies to the extent such policies, as written or applied, result in viewpoint-based censorship.

Offensive non-religious speech by student organizations and individuals raises equally difficult First Amendment challenges if such speech is presented in a limited public forum. The school-sponsored curricular principle seen in *Brown v. Li*,[281] a Ninth Circuit case, seldom applies to student extracurricular activities. If contemporary courts choose to follow the approach used in *Roberts v. Haragan*,[282] treating most of a public campus outside the instructional classroom or laboratory as a designated public forum with even more rights than are seen in a limited public forum, the notion of "anything goes" speech by students will flourish. To this author, very little offensive speech does not express a viewpoint (albeit at times quite inarticulately), and so it cannot be censored. Again, speech code cases like *Bair* and *Roberts* appear to reinforce this point. *Flint* thus adds to the weight of legal authority ruling that when a limited public forum is present, offensive speech cannot be viewpoint regulated. This assumes, of course, that objectively bad behavior not constituting speech can still be regulated and punished.[283]

---

279. The speech code cases such as *Bair* and *Roberts* also suggest they will be protected from regulation.

280. George W. Dent, *Civil Rights for Whom?: Gay Rights versus Religious Freedom*, 95 KY. L.J. 553, 647 (2006-2007).

281. 308 F.3d 939 (9th Cir. 2002).

282. 346 F. Supp. 2d 853 (N.D. Tex. 2004).

283. United States v. O'Brien, 391 U.S. 367 (1968) (upholding criminal punishment for draft

Student publication cases appear to offer the closest parallel to student government in terms of educational value. Courts to date have not hesitated to find these publications a limited public forum shielded from campus viewpoint regulation and, based on *Kincaid*, any other sort of restriction at all. This author predicts that *Flint* will be applied in future student publication cases whenever valuable educational experience arguments tied to these publications are raised.

Finally, *Flint* appears to eliminate future application of educational deference standards to student speech communicated in a limited public forum. It may seem incongruous that valuable student educational activity cannot be restricted on the basis of offensive viewpoint if it is extracurricular in nature and occurs in a limited public forum. On the other hand, as the Supreme Court noted many years ago in one of the nation's earliest public campus student speech cases:

> We note . . . that the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.[284]

Flint v. Dennison paves new ground by subjecting important student extracurricular activity containing speech to limited public forum status. Although the case itself involved no viewpoint issue, in adopting the limited public forum approach to decide it, the Ninth Circuit has undoubtedly created a new panoply of student expressive rights at public higher education institutions.

---

card burning as illegal behavior rather than lawful First Amendment-protected speech). The case remains valid precedent.

284. Healey v. James, 408 U.S. 169, 194 (1972).

THE CHANGING COLLECTIVE DEFINITION OF COLLEGIATE SPORT AND THE POTENTIAL DEMISE OF TITLE IX PROTECTIONS

TODD CROSSET* & LISA MASTERALEXIS**

INTRODUCTION

Although not universally admired, Title IX of the Education Amendments of 1972[1] has become far less controversial over the last fifteen years. The law mandated gender equity in educational programs and activities, including collegiate sport, among other things. The principle that women should receive similar support, opportunities, and experiences as men in varsity athletics is generally accepted, although the definition and implementation of Title IX are widely debated. Given the Civil Rights Restoration Act of 1988,[2] the U.S.

* Todd Crosset, Ph.D., is an Associate Professor in the Department of Sport Management in the Isenberg School of Management at the University of Massachusetts Amherst. His research interests in sport management include, gender, racism, and sexual assault in sport. Professor Crosset recently published *Capturing Racism: An Analysis of Racial Projects Within the Lisa Simpson vs. University of Colorado Football Rape Case* in the International Journal of the History of Sport.

** Lisa Pike Masteralexis is Department Head and Associate Professor in the Department of Sport Management at the University of Massachusetts, Amherst. Her primary research interests are in legal issues and labor relations in the sport industry. In 2000, Professor Masteralexis co-authored an amicus brief to the U.S. Supreme Court on behalf of disabled professional golfer Casey Martin. She is a certified player agent with the Major League Baseball Players Association and is a principal in DiaMMond Management Group, a professional athlete management firm. She holds a J.D. from Suffolk University School of Law and a B.S. in Sport Management from the University of Massachusetts-Amherst.

The authors would like to thank Rachael Zilboorg for her patient editing and Catherine Pieronek for her helpful comments, without which this paper would be far less than what it has become.

1. 20 U.S.C. §§ 1681–1688 (2000). The relevant section with respect to athletics is that "[n]o 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." *Id.* § 1681.

2. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.). The Civil Rights Restoration Act was passed in response to Grove City Coll. v. Bell, 465 U.S. 555 (1984), in which the Supreme Court ruled that only those programs which received Federal financial aid, and not the institution as a whole, had to abide by Title IX anti-discrimination regulations. The Act made clear that when any program or activity of an institution receives Federal funding, the entire institution must abide by Title IX.

Supreme Court's rulings in *Franklin v. Gwinnett County Public Schools*[3] and *Jackson v. Birmingham Board of Education*,[4] and the denial of certiorari by the Court in almost all Title IX cases involving collegiate sport,[5] most advocates for women's sport seem confident that state support of gender equity in sport is reliable. Over the past fifteen years, women's sport advocates have become confident that federal courts will enforce their Title IX rights because of a history of federal courts upholding the Office of Civil Rights' (OCR) Title IX Policy Interpretations[6]—even in situations where men's sport teams are eliminated to bring the college or university into compliance with Title IX.[7]

This article challenges the prevailing assumption that federal courts will continue to interpret Title IX as specified by the OCR Policy Interpretations by finding that women's athletics programs must be equitable to men's. While legal precedent supports the continuation of Title IX protection for women's collegiate sport in the near future, there are long term socio-political movements foreshadowing that Title IX, as currently applied to collegiate sport, may be in danger. To be clear, Title IX is not in jeopardy because of an ideological backlash against women's rights, a right-wing political assault, or even the result of men's

3. 503 U.S. 60 (1992) (holding that damages and attorneys' fees were available in a Title IX action because Congress did not specify otherwise). The impact of this case was to increase the number and frequency of Title IX participation cases.

4. 544 U.S. 167 (2005) (holding that a coach who was retaliated against because he complained of Title IX violations could bring a private action for intentional discrimination, even though he was not the victim of the sex discrimination in his complaints). The impact of this case will be to provide protection for coaches and teachers who may be in a more knowledgeable position to file complaints in Title IX cases because they have greater maturity and experience; access to information, documents and forms; and knowledge of processes for filing complaints.

5. *E.g.*, Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996); Kelley v. Bd. of Trs., 35 F.3d 265 (7th Cir. 1994).

6. Every circuit that has reviewed the 1979 Policy Interpretations and specifically the three-part test for proportionality has concluded that they are entitled to substantial deference; further, every circuit that has reviewed the proportionality prong of Title IX's three-part test has upheld its constitutionality under equal protection. *See, e.g.*, Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046 (8th Cir. 2002); *Cohen*, 101 F.3d at 155; *Kelley*, 35 F.3d at 271; Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888, 896–97 (1st Cir. 1993).

7. *See, e.g.*, *Miami Univ. Wrestling Club*, 302 F.3d at 615 (eliminating men's athletic programs did not violate Title IX); *Chalenor*, 291 F.3d at 1048–49 (eliminating men's wrestling team not a violation of Title IX); *Boulahanis*, 198 F.3d at 639 (eliminating the men's soccer and wrestling teams to attain Title IX proportionality not a violation as long as men's participation continued to be substantially proportionate to their enrollment); Neal v. Bd. of Trs., 198 F.3d 763, 765 (9th Cir. 1999) (holding Title IX does not bar institutions from taking remedial measures to ensure proportionality is met); *Kelley*, 35 F.3d at 272–73 (eliminating men's swim team was not a Title IX violation); Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004) (dismissing suit that sought to enjoin the Department of Education's Title IX enforcement policies); Harper v. Bd. of Regents, 35 F. Supp. 2d 1118, 1122 (C.D. Ill. 1999) (permitting university to eliminate men's soccer and wrestling for Title IX compliance); Gonyo v. Drake Univ., 879 F. Supp. 1000, 1006 (S.D. Iowa 1995) (eliminating men's wrestling team and its scholarships did not violate Title IX).

Olympic (non-revenue) sport efforts to undermine the law's protection. The ideo-political push for gender equity that brought Title IX into existence has been generally accepted.[8] Rather, Title IX, as it is applied to sport, is in jeopardy because the fundamental assumptions that undergird Title IX are in flux and wrought with tension. These tensions have far less to do with social justice and gender equity than with the meaning of "sport" in American culture and the ongoing political debate regarding the extent of state intervention that ought to be allowed in democratic society. Fundamentally, the weak linchpin supporting Title IX's application to collegiate sport is the assumption that collegiate sport serves an educational purpose and is thus a matter of public concern and, therefore, a concern of the state.

We are not making a legal argument. Rather, the discussion in this article is a broader socio-political one that has legal implications—placing Title IX, its implementation, and sport within a fluid, socio-historical context. The argument revolves around two presuppositions that are in flux: 1) the state's understanding of collegiate athletics as a voluntary association and the extent to which college and university athletic departments operate as private, voluntary associations;[9] and 2) the state's assumptions about the educational value of sport.[10] The prevailing view is that collegiate sport serves an educational purpose and is governed by private voluntary associations such as the National Collegiate Athletic Association (NCAA). But these presuppositions are not static.

Since the passage of the Civil Rights Restoration Act,[11] the educational value of collegiate sport, particularly Division I collegiate sport, has been consistently questioned. The once-established educational underpinnings are essential to the justification for regulation of sport by the state.[12] Without them, the justification diminishes. When combined with the fundamental reluctance of the state to intervene in the affairs of private associations, Title IX protection for women's collegiate sport may be in jeopardy. Moreover, the notion that collegiate sport is a voluntary association is changing as an increasing number of people view

8. The practice of gender equity in sport has not matched its ideological acceptance. There is an argument that less overt efforts steeped in assumptions of masculine privilege are working to undermine Title IX as applied to collegiate sport. *See, e.g.*, Michael A. Messner & Nancy M. Solomon, *Social Justice and Men's Interests: The Case of Title IX*, 31 J. SPORT & SOC. ISSUES 162 (2007). As we have witnessed in other areas of affirmative action for women at colleges and universities, "the structure of a large private government and the existence of social networks cutting across formal boundaries can work together to blunt the effectiveness of regulation." Stewart Macaulay, *Private Government*, *in* LAW AND THE SOCIAL SCIENCES 445, 461 (Leon Lipson & Stanton Wheeler eds., 1986). Clearly the study of regulators of public law in private governments is an important aspect of our concern as changes in public opinion will limit or encourage enforcement of Title IX. For the sake of this article, though, our focus is on political, structural, and legal shifts.

9. JOHN WILSON, PLAYING BY THE RULES: SPORT, SOCIETY AND THE STATE 193 (1994).

10. *Id.* at 280.

11. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.).

12. *Id.*

collegiate sport as a business enterprise.[13] If this understanding becomes the prevailing view of the state, application of Title IX to collegiate sport will be unjustifiable.

I. THE SOCIO-POLITICAL CONTEXT

1. Three Spheres

One way scholars understand liberal democratic societies is to divide them into three spheres: the State, the Market, and Civil Society.[14] These three spheres of social action, although distinct, are interdependent. For example, the market depends on the state to regulate and police commercial behavior to ensure fair competition. As market innovations lead to technological advancements, we rely on a robust civil society to determine the ethically appropriate uses of new technology.[15] However, for the most part, these are fairly clearly differentiated spheres of social action.[16]

The civil sphere encompasses a broad array of groups—from soccer leagues and family units to religious groups and trade associations. The civil sphere is populated with voluntary associations that have some sort of organizational structure and governance—or what some call "private governments."[17] For example, most athletic organizations have a private governance system that regulates league play.[18]

It is too simplistic to view private and public government as completely separate entities. "[P]ublic and private governments are interpenetrated."[19] Sometimes voluntary associations are sanctioned or licensed by the state to provide services that the state does not or cannot provide. For example, rather than provide assistance to the impoverished directly, the state may grant funding to a private group that provides the specialized services where needed.[20] Or, the state might sanction one private group to regulate or govern a field or profession, such as the training of medical doctors by the American Medical Association (AMA) or lawyers by the American Bar Association (ABA).[21] The state might also direct a

13. KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, PUBLIC OPINION POLL EXECUTIVE SUMMARY (2006), http://www.knightcommission.org/images/uploads/pollresults1-20-06.pdf.

14. ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 7 (1989).

15. *Id.* at 241–56.

16. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 6–10, 21–26 (1983).

17. WILSON, *supra* note 9, at 194; *see also* Macaulay, *supra* note 9, at 447–48.

18. WILSON, *supra* note 9, at 193–98.

19. Macaulay, *supra* note 8, at 449.

20. DAVID WAGNER, WHAT'S LOVE GOT TO DO WITH IT?: A CRITICAL LOOK AT AMERICAN CHARITY 148–61 (2001).

21. In the United States, the federal government relinquishes regulatory control of a number of public services if private associations prove to be more knowledgeable or efficient. For example, in the early 1900s, the federal government recognized the AMA as the governing body regulating the practice of medicine and the ABA as the regulating body for the legal profession.

group to take control of an area that is normally regulated privately but that also serves the public, such as the United States Olympic Committee's (USOC) coordination of American athletes' training for international events.[22]

However, the fact "[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action."[23] The Supreme Court considered this question in *NCAA v. Tarkanian*.[24] The University of Nevada, Las Vegas (UNLV), a state university, suspended Tarkanian as a result of multiple NCAA rule violations.[25] The Court considered whether UNLV's actions, done in accordance with NCAA rules, made the NCAA a state actor.[26] The Court determined that even though UNLV participated in the creation of the rules, the state was not the source of the rules.[27] The Court concluded that UNLV "engaged in state action when it adopted the NCAA's rules to govern its own behavior."[28] The Court also determined, however, that the NCAA itself was not a state actor merely because it had formulated the disciplinary rules.[29] The Court noted that UNLV "retained the authority to withdraw from the NCAA and establish its own standards,"[30] and therefore was not acting under the color of state law.

2. The State and Organization of Collegiate Sport

Regulation of college and university athletics began in 1905 at the urging of the executive branch. In response to public criticism of college football and in an effort to reduce injuries in the game, President Theodore Roosevelt brought representatives of Yale, Harvard, and Princeton to the White House to discuss rule changes to make the game safer.[31] This effort eventually led to the formation of the NCAA.[32] The NCAA, governed by non-profit institutions of higher education, benefited from its association with institutions that were already franchised by the state to provide citizens with education, medical and scientific research, and

---

In other words, voluntary associations, regulating a public good, are franchised by the state.

22. Amateur Sports Act of 1978, 36 U.S.C. §§ 220501–220512 (2000). The USOC is not a governmental actor, but rather is the group that Congress directed "to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States." S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 543–44 (1987) (quoting H.R. REP. NO. 95-1627, at 8 (1978)). According to the Court, the Amateur Sports Act "merely authorized the USOC to coordinate activities that always have been performed by private entities." *Id.* at 544–45. In fact, "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function." *Id.*

23. *S.F. Arts*, 483 U.S. at 544 (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)).

24. 488 U.S. 179 (1988).

25. *Id.* at 180–81.

26. *Id.* at 181–82.

27. *Id.* at 193.

28. *Id.* at 194.

29. *Id.*

30. *Id.* at 194–95.

31. PAUL R. LAWRENCE, UNSPORTSMANLIKE CONDUCT: THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND THE BUSINESS OF COLLEGE FOOTBALL 8 (1987).

32. NCAA, The History of the NCAA, http://www.ncaa.org/about/history.html (last visited Apr. 2, 2008).

economic and military development.[33] By 1952, the NCAA had become the primary regulatory body of men's collegiate sport, with its own enforcement powers.[34] In 1955, NCAA Executive Director Walter Byers asked the president of each member institution to sign a statement that the institution would abide by NCAA rules and regulations, thereby significantly strengthening the NCAA's enforcement program.[35] Byers nurtured the NCAA into a regulatory powerhouse through three mechanisms: college football, the NCAA basketball tournament, and its rulemaking and enforcement processes.[36] Today, the NCAA is the primary regulatory group for collegiate sport. Member colleges and universities abide by the NCAA's governing authority in the arenas of rulemaking and enforcement.

The NCAA did not have to address the full weight of Title IX until the Civil Rights Restoration Act was passed in 1988.[37] Once it decided to govern women's athletics, the NCAA sought the demise of the Association for Intercollegiate Athletics for Women (AIAW) and Title IX.[38] It has since, however, left gender equity to the purview of the state. The NCAA Principle of Gender Equity,[39] adopted in 1994, states that "[i]t is the responsibility of each member institution to comply with federal and state laws regarding gender equity."[40] Further, the NCAA constitution states, "The Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions' compliance with applicable gender-equity laws."[41] Despite NCAA-developed guides on gender equity for administrators[42] and the more recent adoption of rules that require the accountability of college athletic departments, the 1994 gender equity principle still governs.

NCAA member institutions are subject to Title IX because virtually all public and private institutions accept federal funds. The NCAA itself, however, has not

---

33. WAGNER, *supra* note 20, at 90–93; *see also* JEROME L. HIMMELSTEIN, LOOKING GOOD AND DOING GOOD: CORPORATE PHILANTHROPY AND CORPORATE POWER 14–38 (1997).

34. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 17 (1995). Women's sports did not come under the authority of the NCAA until 1983. Joan S. Hult, *The Story of Women's Athletics: Manipulating a Dream 1890–1985*, *in* WOMEN AND SPORT: INTERDISCIPLINARY PERSPECTIVES 99, 100 (D. Margaret Costa & Sharon Guthrie eds., 1994). Prior to 1980, women's athletic programs were governed by the Association for Intercollegiate Athletics for Women (AIAW). *Id.* In 1981–1982, however, the NCAA offered women's championships in all three divisions in most AIAW sports. *Id.*

35. DON YAEGER, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL 13 (1991).

36. *Id.*

37. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.). The NCAA did not cover women's athletics until 1984, the same year the Supreme Court gutted Title IX in *Grove City College v. Bell*. *See supra* note 2.

38. Hult, *supra* note 34, at 99; *see also* WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX 45–80 (2005).

39. NCAA, 2006–07 NCAA DIVISION I MANUAL § 2.3 (2006), *available at* http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

40. *Id.* § 2.3.1.

41. *Id.* § 2.3.2.

42. *Id.* § 22.2.3.1.

yet been subjected to the restrictions of Title IX. In *Smith v. NCAA*,[43] the United States Court of Appeals for the Third Circuit held that the NCAA's receipt of dues from federally-funded member institutions would suffice to bring the NCAA within the scope of Title IX.[44] The Supreme Court reversed, reasoning that such an application would be inconsistent with the governing statute and Court precedent. The Court held that "dues payments from recipients of federal funds [do not] suffice to subject the NCAA to suit under Title IX."[45]

Despite the pronouncements made by the NCAA's own task force that

> an athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender [and that] [n]o individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics,[46]

the NCAA has no gender equity policy independent of Title IX or similar state laws. The NCAA has left the door open on gender equity. If the state's view of Title IX as it is applied to collegiate sport shifts, NCAA member institutions are free to modify their stance on gender equity as well. As such, the broad focus of this article is on the relationship between the state and civil society with specific attention to shifts in the relationship between the state and collegiate sport.

3. State Interference with Voluntary Associations

The relationship between the state and civil society is fundamentally different from the state's relationship with the market. The state sets the rules that govern the market and protects commercial actors from dishonest non-competitive practices. The state, within the American liberal democratic state, is reluctant to interfere in the affairs of civil society. The tendency of the state is to allow voluntary organizations to run themselves.[47]

In some arenas, the power of private associations exceeds that of the state. For example, the state considers mandatory, random, suspicionless drug testing of adults a violation of Fourth Amendment rights because it amounts to a warrantless search, due to the lack of reasonable suspicion.[48] Yet, the state allows the NCAA to test its athletes for a broad range of performance-enhancing drugs in order to ensure fair play,[49] and failed drug tests can lead to athletes' exclusion from

---

43. 139 F.3d 180 (3d Cir. 1998), *rev'd*, 525 U.S. 459 (1999).

44. *Id.* at 190–91.

45. NCAA v. Smith, 525 U.S. 459, 470 (1999).

46. NCAA, NCAA Gender Equity/Title IX, http://www1.ncaa.org/membership/ed_outreach/gender_equity/general_info/index.html (last visited Apr. 2, 2008).

47. WILSON, *supra* note 9, at 197.

48. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 664 (1989) (holding that employees may be forced to submit to random, suspicionless, mandatory drug testing where jobs involve drug interdiction or the carrying of weapons); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 613 (1989) (holding that employees may be subjected to random, suspicionless, mandatory drug testing where jobs involve public safety).

49. Hill v. NCAA, 865 P.2d 633, 669 (Cal. 1994) (holding that the NCAA had not violated plaintiffs' privacy rights through its ban on drug use and its adoption of a drug testing program

participating on teams or in certain competitions.[50] In other contexts, such as the market sphere, exclusion is a violation of basic rights—life, liberty or property.[51] But the state views membership on a collegiate team as voluntary and as a privilege, not as a right.[52] Therefore, the NCAA can set its own rules with regard to exclusion and eligibility, drug testing, and season and practice length.[53]

While the state intervenes in the affairs of members of private associations very reluctantly, there are times when the state has become involved with the operations of the NCAA and its member institutions. In the mid-1990s, for example, Congress passed the Equity in Athletics Disclosure Act[54] and the Student Right to Know Act,[55] which forced the NCAA and its member institutions to disclose gender equity data and a breakdown of graduation rates by race, sex, and sport.[56]

With regard to voluntary associations, what we consider within the purview of the state is a political issue.[57] Wilson argues that the state is unlikely to meddle in the affairs of a private association when: 1) members enjoy easy exit from the group or have other options available in lieu of a specific group membership; 2) members of the group embrace the goals of the organization and do not seek state intervention to solve disputes; 3) the settlement of disputes would require specific, technical, or insider knowledge; or 4) the organization does not provide important public services (e.g., health and well being, education, arts).[58]

Note, for example, the following Congressional findings from the Equity in Athletics Disclosure Act, in which lawmakers expressed the state's view of college athletic participation in society and justified its intervention into the affairs of the NCAA:

---

that was reasonably calculated to further its legitimate interest in safeguarding intercollegiate athletic competition).

50. *See, e.g.*, NCAA, WRESTLING: 2008 MEN'S RULES AND INTERPRETATIONS, RULE 6.6.1, WI-16, *available at* http://www.ncaa.org/library/rules/2008/2008_wrestling_rules.pdf.

51. WILSON, *supra* note 9, at 206.

52. *Id.* at 215.

53. *See* NCAA v. Smith, 525 U.S. 459 (1999) (upholding rule preventing undergraduate student athlete from participating in athletics while enrolled in a graduate program at a different institution); Banks v. NCAA, 977 F.2d 1081, 1089–90 (7th Cir. 1992) (upholding rules revoking athlete's eligibility to participate in intercollegiate sport if athlete chose to enter a professional draft or hire agent); McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (upholding rules limiting football players' compensation to scholarships); Hennessey v. NCAA, 564 F.2d 1136, 1153 (5th Cir. 1977) (upholding rule limiting number of assistant football and basketball coaches that Division I institutions could employ); Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (upholding rules revoking athlete's eligibility to participate in intercollegiate sport if athlete chose to enter a professional draft or hire an agent); Justice v. NCAA, 577 F. Supp. 356, 382 (D. Ariz. 1983) (upholding rule denying athlete eligibility to participate if the athlete accepted pay for participation in the sport).

54. Pub. L. No. 103-382, § 360B, 108 Stat. 3518, 3969 (1994) (codified as amended at 20 U.S.C. § 1092(g) (2000)).

55. Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092(e) (2000)).

56. 20 U.S.C. § 1092(e), (g) (2000).

57. WILSON, *supra* note 9, at 200–01.

58. *See id.* at 197.

> The Congress finds that—
>
> (1) participation in athletic pursuits plays an important role in teaching young Americans how to work on teams, handle challenges and overcome obstacles;
>
> (2) participation in athletic pursuits plays an important role in keeping the minds and bodies of young Americans healthy and physically fit;
>
> (3) there is increasing concern among citizens, educators, and public officials regarding the athletic opportunities for young men and women at institutions of higher education.[59]

The first two findings demonstrate that lawmakers perceive sport as educational. In the third finding, lawmakers' general concern for equal opportunities for men and women in education trumps the tendency of lawmakers to leave well enough alone.[60] Further, the concern here was not about the specific rules, but about a broad policy—gender equity—that required only general knowledge to enforce properly.

Because the judiciary has adopted a position of limited judicial review, courts rarely intervene, instead standing in deference to a private association's decision.[61] Yet courts "have demonstrated more of a willingness to intervene in the internal matters of private associations when they conclude that there are inadequate procedural safeguards to protect members' rights."[62] Courts have also shown a willingness to intervene in private association decisions when:

(1) the rule, regulation, or bylaw challenged by the plaintiff exceeds the scope of the association's authority;[63]

(2) the rule, regulation, or bylaw challenged by the plaintiff violates an individual's constitutional rights;[64]

---

59. Equity in Athletics Disclosure Act, § 360B(b).

60. *Id.*

61. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 22–23, 433 (2005).

62. Crouch v. NASCAR, 845 F.2d 397, 401 (2d Cir. 1988).

63. *See, e.g.*, Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1226 (N.D. Ga. 1977) (overturning the Commissioner of Baseball's decision where it exceeded the scope of authority granted to him); Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555, 564 (Iowa 1972) (striking down an athletic association's good conduct rule because it exceeded the association's scope of authority by controlling conduct outside of the athletic season); Am. League Baseball Club of N.Y. v. Johnson, 179 N.Y.S. 498, 504–06 (N.Y. Sup. Ct. 1919), *aff'd*, 179 N.Y.S. 898, 899 (N.Y. App. Div. 1920) (granting equitable remedy when League President's action exceeded scope of authority).

64. *See, e.g.*, Menora v. Ill. High Sch. Ass'n, 683 F.2d 1030, 1034–36 (7th Cir. 1982) (holding that an athletic association's ban on the wearing of yarmulkes by basketball players violated the First Amendment Freedom of Religion); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503, 513–14 (1969) (striking down efforts to discipline students for constitutionally-protected freedom of expression in school); Ludtke v. Kuhn, 461 F. Supp. 86, 93–94 (S.D.N.Y. 1978) (holding that league rule restricting female reporters from locker room violated Fourteenth Amendment's Equal Protection Clause).

(3) the rule, regulation, or bylaw challenged by the plaintiff violates an existing law, such as the Sherman Antitrust Act or the Americans with Disabilities Act;[65]

(4) the rule, regulation, or bylaw challenged by the plaintiff is applied in an arbitrary and/or capricious manner;[66] or

(5) the association breaks one of its own rules, regulations, or bylaws.[67]

What constitutes a private association and what falls under the purview of the state shifts with changing societal norms, as well as the political will of lawmakers. For example, in the early 1980s, Grove City College, a private coeducational liberal arts college, chose not to accept direct federal assistance so as to maintain its institutional autonomy.[68] Grove City College's students, however, received federal educational grants and loans. The issue before the Court in this Title IX case centered on whether Title IX applied to the entire institution because the student aid was non-earmarked funding or whether Title IX applied simply to that program or department receiving federal assistance, in this case, the Financial Aid Office.[69] The U.S. Supreme Court held that the latter interpretation was correct.[70] The effect of that decision was to remove athletics from the reach of Title IX. In 1987, however, Congress responded to this judicial narrowing of civil rights legislation by passing the Civil Rights Restoration Act,[71] making it clear that sport and other school-sponsored extra-curricular activities were part of the overall education of young people.

---

65. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661, 662 (2001) (holding that professional sport organization is reviewable where it violates the Americans with Disabilities Act); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 86 (1984) (holding that private athletic association rule is reviewable where it violates the Sherman Antitrust Act).

66. *See, e.g.*, Tiffany v. Ariz. Interscholastic Ass'n, 726 P.2d 231, 236 (Ariz. Ct. App. 1986) (holding that the Executive Board of the Arizona Interscholastic Association acted unreasonably, capriciously, and arbitrarily when it refused to consider a request of waiver); Clements v. Bd. of Educ. of Decatur Pub. Sch. Dist. No. 61, 478 N.E.2d 1209, 1211 (Ill. App. Ct. 1985) (holding student-athlete can prevail if he or she can establish the actions of school are arbitrary and capricious); Ind. High Sch. Athletic Ass'n v. Avant, 650 N.E.2d 1164, 1167–68 (Ind. Ct. App. 1995) (holding that athletic associations' decisions are reviewable under arbitrary and capricious standard).

67. *See, e.g.*, *Atlanta Nat'l League Baseball Club, Inc.*, 432 F. Supp. at 1226; Christ the King Reg. High Sch. v. Catholic High Sch. Athletic Ass'n, 624 N.Y.S.2d 755, 756 (N.Y. Sup. Ct. 1995).

68. Grove City Coll. v. Bell, 465 U.S. 555, 559 (1984).

69. *Id.* at 559–63. Although it recognized that Title IX's provisions are program-specific, the Third Circuit likened the assistance flowing to Grove City through its students to non-earmarked aid and declared that "[w]here the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the 'program.'" *Id.* at 562 (quoting Grove City Coll. v. Bell, 687 F.2d 684, 700 (3d Cir. 1982)).

70. *Id.* at 573–74.

71. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.).

4. Private Associations, Commercial Activities, and the Concept of Public Accommodation

The state is also more likely to intervene in the affairs of a private association if the association engages in commercial activities.[72] In order to ensure fair competition in the marketplace, the state may step in to regulate the commercial activities of private associations. Even if these private associations are non-profit in nature, the state may still intervene, because "the absence of profit is no guarantee that an entity will act in the best interest of consumers."[73]

The distinction between the civil and market spheres is not always clear. Over the past two decades, profit-making organizations have been providing public services that were once the exclusive realm of charitable non-profit organizations.[74] Health clubs, child care facilities, and after-school programs are just as likely to be operated by for-profit entities as they are to be operated by not-for-profit entities. Further, charitable organizations support a variety of market-oriented activities in an effort to raise funds (e.g., museum restaurants and shops) or compete directly with profit-making competitors by servicing more affluent clients (YMCA).

The state has interfered in the affairs of the NCAA where those affairs are business-like and where the NCAA has violated the formal rationality of the market.[75] In the mid 1990s, for example, assistant coaches were subject to salary caps.[76] The intent of the caps was to maintain a level playing field. In 1998, the Tenth Circuit ruled that by limiting the salaries of assistant coaches, the NCAA violated the Sherman Antitrust Act.[77] Likewise in 1984, the Supreme Court found in *NCAA v. Board of Regents of the University of Oklahoma*[78] that the NCAA violated antitrust laws when it limited the ability of colleges and universities to enter into contracts for televising games.[79] The Court also found that the NCAA's plan that limited the number of games that a college or university could televise was an unreasonable, horizontal restraint of trade because it limited the games available to the public and barred negotiation between broadcasters and institutions.[80] If the structure of a private association becomes increasingly commercial over time, the state is more likely to intervene.

If a private association is seen as a place of public accommodation and is

72. JANE JACOBS, SYSTEMS OF SURVIVAL: A DIALOGUE ON THE MORAL FOUNDATIONS OF COMMERCE AND POLITICS, 34–38, 204 (1994).

73. United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993) (affirming district court's application of antitrust law to non-profit educational institutions and holding that scholarship and financial aid decisions implicated trade or commerce).

74. WAGNER, *supra* note 20, at 144.

75. *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 85 (Guenther Roth & Claus Wittich eds., 1978).

76. Law v. NCAA, 134 F.3d 1010, 1012–14 (10th Cir. 1998).

77. *Id.* at 1012–15.

78. 468 U.S. 85 (1984).

79. *Id.* at 98–99.

80. *Id.*

engaged in discriminatory behavior, the likelihood that the state will intervene increases.[81] "State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains."[82] Over time, the definition of "place of public accommodation" expanded from clearly commercial entities, such as restaurants, bars, and hotels, to include membership organizations such as the Jaycees and the Boy Scouts.[83] As such, conflict between state public accommodations laws and the First Amendment rights of organizations—including the right to freely associate and the right of organizations to express ideas—has increased.[84] These rights often conflict with public accommodations laws that are based in a state's compelling interest in eliminating discrimination.[85] Sometimes a private association will be redefined by the state as a place of public accommodation because of broader societal changes or political activism—an approach upheld by the Supreme Court until *Boy Scouts of America v. Dale*.[86] When the state is determining whether to identify a private organization as a place of public accommodation, the decision is inherently a political one.

Quite possibly no sport case illustrates the political nature of private associations better than the legislative work of Lana Pollack. In 1991 and 1992, Pollack, a Michigan state senator, pushed the state of Michigan to intervene into the affairs of what many consider to be a very private association—private golf country clubs.[87] Pollack took her cue from *Roberts v. United States Jaycees*,[88] in which Kathryn Roberts, the Human Rights Commissioner of Minnesota, enforced the Minnesota Human Rights Act against the Jaycees, requiring them to admit women to membership.[89] Relying on the principles set forth in *Roberts*, Pollack shepherded a law through the Michigan legislature that declared public and private golf clubs as places of public accommodation.[90] As a result, state officials demanded that golf clubs uphold the principle of equal opportunity.[91] The law prohibited the exclusion of women from country clubs and exclusionary tee times

81. *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

82. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (citing Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc., 515 U.S. 557, 571–72 (1995)); Romer v. Evans, 517 U.S. 620, 627–29 (1996) (describing the evolution of state public accommodation laws).

83. *Romer*, 517 U.S. at 627–29.

84. *Id.*

85. *Id.*; *see also Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548–49.

86. 530 U.S. 640 (2000). In dissent, Justice Stevens notes that until this case, the Supreme Court had "never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law." *Id.* at 679 (Stevens, J., dissenting).

87. George Kehoe**,** *Getting Equal: The Real Difference Between Women's and Men's Golf*, GOLF FOR WOMEN, Aug. 1993, at 22.

88. 468 U.S. 609 (1984).

89. *Id.* at 621–22.

90. Kehoe, *supra* note 87.

91. *Id.*; *see also* MARCIA CHAMBERS, THE UNPLAYABLE LIE: THE UNTOLD STORY OF WOMEN AND DISCRIMINATION IN AMERICAN GOLF 205–07 (1995).

or eating and drinking rooms within a club.[92] Over the last twenty-five years, as a result of this legislation and other political and court actions, private golf and country clubs in other states have either become more inclusive of women or have taken steps (such as limiting memberships and prohibiting the discussion of business) to retain their status as a private club.[93]

Within the courts, what constitutes a place of public accommodation can change and is subject to political struggles, as illustrated by *Boy Scouts of America v. Dale*[94] and *PGA Tour v. Martin*.[95] In *Dale*, James Dale rose to the rank of Eagle Scout and was invited to become an assistant scoutmaster, only to be forced out in 1990 by the Boy Scouts of America (BSA) when the organization's leaders learned from a newspaper article that he is gay.[96] Dale filed a lawsuit for reinstatement in the BSA. The New Jersey Supreme Court ruled that the BSA was a place of public accommodation under the New Jersey state statute.[97] Factors in the decision included: 1) the Boy Scouts were not expressly exempt in the statute; 2) they were nonselective; 3) they engaged in broad recruitment; 4) they adopted inclusive practices; 5) they made invitations to nonmembers; and (6) they are not sufficiently personal or private to warrant constitutional protection.[98] That is, despite being a private non-profit group, the mission of BSA was so broad and inclusive that the courts no longer considered it a private association. However, the U.S. Supreme Court, by a 5–4 majority, overturned the unanimous New Jersey Supreme Court decision and ruled, in part, that applying the public accommodations statute to BSA was unconstitutional.[99] The Court found that the First Amendment protected BSA's rights to instill values in youth through the adult leaders' expressions and examples.[100] Because Dale admitted to public advocacy of homosexuality, his presence as a group leader would have forced a message on the group that was counter to BSA's public position.[101] Thus, BSA had a state-protected right to set its own rules, including, as in this case, the exclusion of openly-gay people from leadership positions. Even in the strongly-worded dissent by Justice Stevens, the debate was less about the position of BSA as a private association or a place of public accommodation than it was about the interpretation of BSA's stated mission and the right to exclude gay men from leadership.[102]

Similarly, in *PGA Tour v. Martin*,[103] the PGA Tour argued that it was a private association and as such should set its own rules regarding the play of the game of

92. Kehoe, *supra* note 87.

93. Benjamin Leedy, *Recent Trends in Anti-Discrimination Lawsuits Against Private Golf Clubs*, CLUB MGMT., Oct. 2006, at 24.

94. 530 U.S. 640 (2000).

95. 532 U.S. 661 (2001).

96. *Dale*, 530 U.S. at 645.

97. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1219 (N.J. 1999).

98. *Id.*

99. *Dale*, 530 U.S. at 661.

100. *Id.* at 656.

101. *Id.* at 660–61.

102. *Id.* at 667–79 (Stevens, J., dissenting).

103. 532 U.S. 661 (2001).

golf.[104] This case challenged the rights of a sport organization to set its own rules against the reach of the Americans with Disabilities Act (ADA).[105] Under the ADA, it is illegal to discriminate against people with physical or mental disabilities in places of public accommodation, such as golf courses.[106] Lawyers for the PGA Tour conceded that, because golf tournaments are open to the public, they must make reasonable accommodations for spectators who are disabled.[107] However, the PGA Tour argued that it did not need to do the same for competitors because the competitors are not clients or customers, but rather employees or independent contractors, and are therefore not subject to the ADA public accommodation clause.[108] The Supreme Court read the law more simply, however, and ruled that the PGA Tour offers two "privileges" to the public: first, to spectators as entertainment, and second, to athletes in the form of an invitation to compete to join the Tour.[109] The Supreme Court found that the PGA Tour must accommodate both groups in accordance with the ADA.[110] As a result, the PGA Tour's walking rule was scrutinized to determine whether riding in a cart would fundamentally alter the sport and the competition. The 7–2 majority ruled that the use of a cart was not inconsistent with the character of golf, the essence of which was shot-making.[111] Justice Scalia issued a fierce sixteen page dissent in which he argued against intervention into the governance of a private association, particularly as it relates to matters requiring specific knowledge.[112] "[T]he rules are the rules," he wrote.[113] "They are (as in all games) entirely arbitrary, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be 'nonessential' if the rule maker (here the PGA Tour) deems it to be essential."[114]

These cases illustrate that it is not always clear whether an organization is a private association (and relatively free of government oversight) or a place of public accommodation (and subject to the legal rules governing commerce). Defining groups as private associations or places of public accommodation is a political matter. The outcome of the battle over definitions will have much to do with who holds political power, as well as the social context within which the organization operates.

104. *Id.* at 669.
105. *See generally* 42 U.S.C. §§ 12101–12213 (2000).
106. Americans with Disabilities Act, 42 U.S.C. § 12181(7)(L) (2000).
107. *Martin*, 532 U.S. at 678.
108. *Id.*
109. *Id.* at 680.
110. *Id.*
111. *Id.* at 684.
112. *Id.* at 700–04 (Scalia, J., dissenting).
113. *Id.* at 700.
114. *Id.*

II. COLLEGIATE SPORT DEVELOPMENTS SINCE 1987

Much has changed in and around collegiate sport since the passage of the Civil Rights Restoration Act. Some of the changes will shape the state's perception of collegiate sport and, therefore, the way and extent to which Title IX will be applied to collegiate sport in the future. Below we explore four areas of change that affect state justifications for the intervention into sport as it relates to Title IX: 1) increased alternative sport offerings for collegiate women, 2) NCAA restructuring and structurally-encouraged commercialization, 3) the sport reform movement, and 4) the advent of school-affiliated athletic associations.

1. Increased Options for Collegiate Women

Recall Wilson's first observation regarding the unlikelihood of state intervention when members of a private association enjoy easy exit from the group or have other options available to them.[115] If college and university women have reasonable competitive sport alternatives that resemble varsity experiences, the state is less likely to intervene.

In the mid-1980s, outside of the occasional intramural game or club rugby team, there were no alternative sport options for women athletes other than participation on varsity teams. In the last five years, however, the club system has grown substantially. At the time of this writing, college and university students across the country are organized into 12 divisions, including more than 175 club women's lacrosse teams,[116] 90 volleyball teams,[117] and over 110 women's soccer teams.[118] Although this trend is, in part, a response to efforts by athletic departments to reduce the overall number of varsity sports on campus, the club sport movement has an appeal all its own. Student-run teams hold regular practices, have regional leagues, and participate in national championships.[119] They have the look and feel of intercollegiate athletics without the burden of NCAA rules and restrictions.

Women now enjoy access to a wide variety of participatory sports, such as road races and triathlons, which were not readily available to women when Title IX was passed. The first year the Boston Athletic Association officially sanctioned women in the Boston Marathon was 1971, when the Amateur Athletics Union permitted it to do so.[120] Eight women entered and finished the race the following

115. WILSON, *supra* note 9, at 197.

116. US Lacrosse, WDIA Teams, http://www.uslacrosse.org/wdia/teams.phtml (last visited Apr. 2, 2008).

117. National Intramural-Recreational Sports Association, Volleyball Leagues, http://www.nirsa.org/sports/volleyball/sport_club/leagues.aspx (last visited Apr. 2, 2008).

118. National Intramural-Recreational Sports Association, Collegiate Soccer Sport Club Championships http://www.nirsa.org/sports/soccer/sport_club/leagues.aspx (last visited Apr. 2, 2008).

119. *See id.*; *see also* US Lacrosse, *supra* note 116; National Intramural-Recreational Sports Association, Volleyball Leagues, *supra* note 117.

120. Boston Athletic Association, History, http://www.bostonmarathon.org/BostonMarathon/History.asp (last visited Apr. 2, 2008).

year.[121] In 2007, more than eight thousand women started the race.[122] Furthermore, much has changed since Congress passed the Civil Rights Restoration Act in 1988. Take, for example, the annual Thanksgiving Day 10K road race in Cincinnati, Ohio. In 1987, of the 1872 participants, 22.8% were women.[123] Ten years later, 3689 participants crossed the finish line, with women representing 35% of the field.[124] In 2007, 10,623 participants finished the race, 51% of whom were women.[125] Clearly, varsity sport is not the only option for women athletes.

Granted, the club sport movement and independent road races are not direct substitutes for varsity athletics.[126] Neither the state nor the courts would look favorably on a school that tried to count club sport participation as a varsity offering.[127] Further, the OCR might apply Title IX to club sports.[128] Nonetheless, club sport is becoming an avenue for women to play a fairly high level of competitive sport while in school without participating in varsity—and NCAA-regulated—sport. As club sport opportunities increase and as organizational structures become more standardized, the state may view club sport as a viable alternative for varsity athletes. This distinction may decrease the likelihood that the state will intervene on behalf of varsity women athletes.[129]

2. Commercialization

Because collegiate sport looks and acts more and more like a business, the state is more likely to regulate it as such. The Supreme Court decision in 1984,[130] allowing colleges and universities to pursue their own broadcast contracts, enabled colleges and universities to make millions of dollars and, in doing so, brought greater economic competition to collegiate sports.[131] The NCAA and its member institutions now have the dual mission of regulating collegiate athletics while operating to generate millions of dollars in revenue. The most obvious evidence of

---

121. *Id.*

122. Boston Athletic Association, Boston Marathon 2007—Statistics, http://www.boston marathon.org/2007/cf/public/statistics.htm (last visited Apr. 2, 2008).

123. Bob Roncker's Running Spot, *Thanksgiving Day 10K Official Race Results: Cincinnati*, (Nov. 16, 1987) (on file with author).

124. *See* Cool Running, Bob Roncker's Thanksgiving Day 10K Race Results, http://www.coolrunning.com/results/97/oh/ronc1127.htm (last visited Apr. 2, 2008).

125. *See* Online Race Results, 98th Thanksgiving Day Race 2007: 10K Run/Walk, http://www.onlineraceresults.com/race/view_race.php?race_id=7104 (last visited Apr. 2, 2008).

126. For instance, varsity teams provide additional benefits beyond competition for their athletes that club teams would likely not provide. Among them are access to top coaches, publicity, academic advising, and prestige.

127. *See* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996).

128. *See id.*

129. *See* Sarah K. Fields, *Intramural and Club Sports: The Impact of Title IX*, 33 J.C. & U.L. 521 (2007) (discussing application of Title IX to intramural and club sports).

130. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98–99 (1984).

131. Welch Suggs, *Football, Television, and the Supreme Court*, CHRON. HIGHER EDUC. (Wash., D.C.), July 9, 2004, at A32.

increased commercialization in collegiate athletics are the coaches' extraordinary salaries and endorsement contracts,[132] donations provided by boosters to Division I programs, and the revenues generated from corporate sponsorships and television rights.[133] Beyond the financial benefits to the institutions, coaches, and the NCAA, it is also important to emphasize the actions taken by the NCAA Division I members in the past decade to restructure the division to make it more compatible with commercialization.[134] Commercialization has been institutionalized in the NCAA Division I structure**.**

At the 1996 NCAA Convention, members voted to implement a more federated organization structure to take effect in August 1997.[135] Prior to the NCAA restructuring of 1997, all member institutions voted on NCAA legislation.[136] Even rules specifically designed for Division I institutions had to meet the approval of the majority of the membership, including Division II and III institutions. At that time there were 328 Division I institutions and well over 500 Division II and III institutions.[137] The big revenue-producing colleges and universities have long complained about this structure because their legislative actions were tempered by the votes of the Division II and III members.[138] In the new system, rules that apply only to Division I are voted on by Division I institutions.[139] The restructuring of the NCAA redistributes power to the Division I institutions and allows them to self-regulate.

The philosophy of Division I institutions is outlined in the NCAA Manual, § 20.9.[140] Section 20.9 contains three provisions that push Division I college and university sport toward the business of entertainment and, we argue, toward potential conflict with educational goals. Specifically, § 20.9 requires that a Division I member:

> (c) Recognizes the dual objective in its athletics program of serving both the university or college community . . . and the general public . . . ;
>
> (f) Believes in scheduling its athletic contests primarily with other members of Division I, especially in the emphasized, spectator-oriented sports, as a reflection of its goal of maintaining an appropriate competitive level in its sports program;

---

132. Jodi Upton & Steve Wieberg, *Million-Dollar Coaches Move Into Mainstream*, USA TODAY, Nov. 16, 2006, at 1A.

133. Michael Lewis, *Serfs of the Turf*, N.Y. TIMES, Nov. 11, 2007, at D13.

134. *Id.*

135. LISA PIKE MASTERALEXIS, ET AL., PRINCIPLES AND PRACTICES OF SPORT MANAGEMENT 147–50 (2d ed. 2005). There are currently 330 active Division I institutions, 290 Division II and 445 Division III member schools. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. NCAA, 2007–08 NCAA DIVISION I MANUAL § 20.9 (2007), *available at* http://www.ncaa.org/library/membership/division_i_manual/2007-08/2007-08_d1_manual.pdf. [hereinafter 2007–08 MANUAL].

> (g) Strives to finance its athletics program insofar as possible from revenues generated by the program itself. All funds supporting athletics should be controlled by the institution.[141]

Taken together, these three precepts de-emphasize the primacy of the athlete and promote the concerns of the spectator and the financial concerns of the department. In each case, the educational component of the activity takes a back seat to the more pressing demand to entertain and generate revenue.

In 1996, Sharon Shields, a leader in sport reform and an advocate for women's sport, argued, "It's time for us to face the reality that sports in college is a business, and it's revenue-generating and it's entertainment and it sacrifices the student-athlete. If we believe that is a reality, then there may be a need for a separation of sport from education."[142] This comment reflects the sentiment of a large and growing segment of the general public. In a 2006 poll conducted for the Knight Commission on Intercollegiate Athletics, roughly three out of four Americans (74%) agree that commercial interests often prevail over academic values and traditions.[143] Three out of four Americans (73%) believe there is a conflict between the commercialization of college and university athletics and academic values.[144] If this perspective continues to dominate views of collegiate sport, the public comes to accept the professionalization of collegiate sport, and the structures and rules of the NCAA continue to emphasize the commercial aspects of collegiate sport, the state is less likely to feel a compulsion to apply Title IX to collegiate sports. The state is more likely to regulate Division I-A sports like a business. The same 2006 Knight Commission poll found that most Americans (83%) have an overall positive opinion of college and university sports.[145] However, they are divided as to whether college and university sports are "out of control:" 44% believe they are, while 47% believe they are not.[146] But from a longitudinal analysis, Americans appear to be increasingly comfortable with the direction of college and university sports.[147] A Louis Harris poll conducted for the Knight Commission in 1990 found that 75% of people tended to agree that intercollegiate athletics were out of control;[148] a 1993 poll for the Commission found that 52% of the public agreed with the above statement.[149] By 2006, however, less than half population thought college and university sports were out of control. Taken together, the studies suggest that the general public is increasingly comfortable with highly commercialized college and university sport even when it is in conflict with educational values of the institution.

---

141. *Id.*

142. Sharon Shields, *Educational and Athletic Pursuits Should Be Separate*, USA TODAY, Sept. 20, 1996, at C20.

143. KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 13.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

3. Education and the Reform Movement

Since 1987, we have witnessed a host of academics and other insiders emphasize the growing dissonance between sport and education.[150] Robert Benford has identified twenty-five reform organizations such as the Knight Commission, the Drake Group, and the National Coalition Against Violent Athletes, most of which focus on intercollegiate athletics.[151] Academics like Murray Sperber and former Princeton President William Bowen have written popular books on the problem of athletics.[152]

Collectively, these sports reform movements constitute a social movement industry—"the clustering of a set of social movements around a broadly related set of goals and interests."[153] Each reform movement is first and foremost engaged in a battle over the framing of sport. Framing entails not only identification of problems in sport, "but also attributions of blame and the delineation of solutions."[154] Benford found that collegiate sport reform movements argue that, in addition to the commercialization discussed previously, collegiate sport: 1) damages the integrity of higher education, 2) exploits athletes, and 3) contributes to the harm of non-athletes.[155] In a phrase, varsity sport, as it is currently structured and practiced, is anti-educational.

Sport reformers question the educational value of sport. For example, in *The Game of Life*, Bowen and Shulman argued that while athletes get preferential treatment at admissions, they do not contribute to the broader mission of the college or university.[156] While on campus, they do not excel academically as a group, nor do they contribute to the diversity of the campus.[157] Preferential admission treatment for athletes, Bowen and Shulman argue, is fundamentally different than affirmative action admission policies for minority students, which have long-term benefits for both the institution and society as a whole.[158] Athletics, on the other hand, do not contribute to the educational mission of the college or university.[159]

---

150. *See* Robert D. Benford, *The College Sports Reform Movement: Reframing the "Edutainment" Industry*, 48 SOC. Q. 1 (2007).

151. *Id.* at 8.

152. JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2001).

153. Benford, *supra* note 150, at 8.

154. *Id.*

155. *Id.* at 9.

156. SHULMAN & BOWEN, *supra* note 152, at 258–67.

157. *Id.* at 261–62.

158. *Id.* at 191–93.

159. *The Game of Life* had a significant impact on collegiate sports, particularly at elite institutions and conferences, despite significant methodological and analytical problems. *See, e.g.*, Hal S. Scott, *What Game Are They Playing? A Review of The Game of Life by James L. Shulman & William G. Bowen*, 28 J.C. & U.L. 719, 753–54 (2002); *see also* RICHARD F. DALLINGER ET AL., HOW DOES THE GAME OF LIFE PLAY AT LIBERAL ARTS INSTITUTIONS? (2004), *available at* http://www.wabash.edu/cila/docs/athletic_study_report-6.pdf; Robert L. Simon, Does "The Game of Life" Really Score? (Oct. 7, 2002) (unpublished manuscript),

No other western country has elite sport so deeply embedded in institutions of higher learning. There is some sentiment among intercollegiate administrators in support of the idea that collegiate sport, while not harming the educational mission of the college or university, is not educational.[160] In some cases, the connection between sport and education has become downright inconvenient. In 1989, for example, during hearings on the Student Right to Know Act, Congressman Carl Perkins asked Dick Schultz, the executive director of the NCAA at that time, what the NCAA was doing to stem student-athlete attrition.[161] Schultz responded by distancing sport from the educational mission of institutions. "[T]he primary function of the NCAA," he instructed Perkins, "is to govern intercollegiate athletics. I think the NCAA has been drawn into the educational side of it, which really should not be their basic responsibility because of a perceived need."[162] The primary motivation for Schultz's comment may have been to discourage government intervention in the affairs of the NCAA by distancing sport from education.[163]

The unintended consequence of well-intentioned reformers and autonomy-minded sport administrators is a weakening of Title IX. Even if collegiate sport remains in the civil sphere and reformers are able to reverse its slide toward the entertainment market, if enough people are convinced by these reformers' framing of collegiate sport as anti-educational or adopt a more neutral "Schultzian" perspective in which sports are distinct from education, the state is less likely to consider collegiate sport to be a public concern. It would follow, then, that the state will not find justification for continued intervention on behalf of collegiate women athletes.

4. New Structures

The place of collegiate sport within the college or university is rarely clear and often contested. Is it a commercial entity, an educational department, or a separate voluntary association? Recently, collegiate sport has witnessed structural changes at individual athletic departments that distance the athletic department from the college or university (although not necessarily toward the entertainment market). The new structures suggest that collegiate sport is becoming a private association distinct from the college or university.

These changes in structure and practice are fueled by financial challenges facing

---

available at http://www.trincoll.edu/depts/educ/GOL/Simon.pdf.

160. WILSON, *supra* note 9, at 290–91.

161. *Id.*

162. *Id.*

163. Historically, the association of sport with education was the perceived need of collegiate sport. Sport needed some justification other than fun and distraction. Physical education served that need initially. But as sport gained institutional power, the ties between sport and physical education were severed and the ideology that sport is educational remained. *See generally* RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS (1988).

collegiate athletics.[164] For example, a comparison between the percentage of revenues for athletics at the University of Colorado Boulder between financial years 1990–91 and 2004–05 reveals a large decrease in university funding and student fees.[165] This decrease is offset by an equally dramatic increase in conference distributions (television revenues) and contributions.[166]

Donations to athletic departments have increased significantly. A survey conducted by the *Chronicle of Higher Education* found that booster clubs representing the six major conferences raised more than $1.2 billion in 2006–07.[167] Some schools tripled their annual gifts received by athletic departments within the last decade.[168] Research by Stinson and Howard in 2007 revealed that alumni athletic giving as a percent of the total giving to Division I-A football institutions increased from 14.7% in 1998 to 26% in 2003,[169] while giving to the institutions' general fund remained flat,[170] suggesting that this drive to woo sport donors is cutting into giving for academic programs.

As donations become an increasingly important source of revenue for athletic departments, college and university-affiliated foundations have also played a more critical financial role in athletics. At least three schools—the University of Florida, the Georgia Institute of Technology (Georgia Tech), and the University of Georgia—have opted to structure their athletic departments as foundations.[171] That is, rather than housing athletics within a department within the institution structure, these schools have formed a non-profit corporation to administer athletics for the institution.[172] While these foundations are school-affiliated and enjoy interlocking directorates, they are separate legal entities.

As non-profit entities, these foundations have mission statements separate from their institutions.[173] For example, the University Athletic Association, Inc., which is responsible for intercollegiate athletics at the University of Florida, states:[174]

> [T]he UAA is governed by a Board of Directors who provide guidance and direction through approval of policies, procedures and the budget. The UAA has developed a mission statement that was adopted by the Board of Directors to provide goals and objectives in the development

164. *See* DANIEL L. FULKS, 2002–03 NCAA REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETIC PROGRAMS REPORT (2005), *available at* http://www.ncaa.org/library/research/i_ii_rev_exp/2003/2002-03_d1_d2_rev_exp.pdf.

165. *See* UNIVERSITY OF COLORADO BOULDER, DEPARTMENT OF INTERCOLLEGIATE ATHLETICS FINANCIAL UPDATE (2005), http://www.cu.edu/regents/BoardMeetings/powerpoint/JanuaryPresentations/Regents_%20athletics%20finances%202005%20-%20A.pps.

166. *Id.*

167. Brad Wolverton, *Growth in Sports Gifts May Mean Fewer Academic Donations*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 5, 2007, at A1.

168. *Id.*

169. Jefferey L. Stinson & Dennis R. Howard, *Athletic Success and Private Giving to Athletic and Academic Programs at NCAA Institutions*, 21 J. SPORT MGMT. 235, 249 (2007).

170. *Id.* at 259.

171. University Athletic Association, http://www.uaa.ufl.edu (last visited Apr. 2, 2008).

172. *See id.*

173. *Id.*

174. *Id.*

> and delivery of the athletics program at the University of Florida. This "vision" provides the road map for the University's commitment to be second to none in the area of intercollegiate athletics.[175]

The focus for these schools incorporates education and development of athletes, but at the same time embraces the new reality of a commercialized, professional sport model. For instance, boosters at Florida claim 13,000 members and raised $11.9 million in donations to the athletic association in 2007.[176] The University of Georgia and Georgia Tech have adopted similar models.[177] If more schools and athletic departments take advantage of this structure, questions about the place of collegiate sport within the college or university are likely to increase. In sum, a separate-yet-affiliated non-profit structure may contribute to the controversy regarding the educational value of sport and the position of sport within higher education. As athletic associations distinguish themselves from the college and university missions and oversight, and while awareness grows that donations to athletic teams undermines and competes with donations to academic programs, the state is likely to reevaluate the non-profit charity status of gifts earmarked for athletic programs. The House of Representatives' Ways and Means Committee has been investigating tax-exempt organizations since 2004.[178] In October 2006, the NCAA's tax-exempt status became a critical issue for the committee.[179] In a letter to NCAA President Myles Brand from Rep. Thomas, the NCAA was asked to justify its status as a non-profit charity organization.[180] The status was questioned because of the revenue from Division I men's basketball and football, the "professional" nature of these programs, and the NCAA's $6 billion TV contract with CBS for men's basketball.[181] Rep. Thomas sought to determine how these high-profile programs supplemented the educational mission of the member institutions and, on a broader scale, how the NCAA retaining its tax-exempt status benefits federal taxpayers.[182] Rep. Thomas inquired specifically about revenues and expenses for Division I men's basketball and football, coaches' salaries, NCAA revenue distribution, charitable donations in exchange for tickets, athletic department budgets, and budget growth rates.[183] More recently, in response to the

175. *Id.*

176. *See* UAA, FINANCIAL STATEMENTS JUNE 30, 2007 AND 2006 (2007), *available at*, http://www.uaa.ufl.edu/uaa/UAA%20Financial%20Statements%20-%20June%2030,%202007%20and%202006.pdf.

177. *See* Georgia Tech Official Athletic Site, http://ramblinwreck.cstv.com/genrel/111501aab.html (last visited Apr. 2, 2008); UGA Athletic Association Homepage, http://www.sports.uga.edu/ (last visited Apr. 2, 2008).

178. *Congress Questions NCAA's Tax-Exempt Status*, MSNBC, Oct. 4, 2006, *available at* http://nbcsports.msnbc.com/id/15133560/.

179. *Id.*

180. *Id.*

181. Letter from Bill Thomas, Chairman, House Ways and Means Committee, to Dr. Myles Brand, President, National Collegiate Athletic Association (Oct. 2, 2006), *available at* http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm.

182. *Id.*

183. *Id.*

evidence that sports donations represent over twenty-five percent of all donations to colleges and universities, Senator Chuck Grassley, a Republican from Iowa, questioned the logic of continuing to characterize donations to Division I athletic departments as charity.[184]

In his response to Rep. Thomas's letter, Brand defended the mission of the NCAA by arguing that the "uniquely American" system binding athletics and education broadens the education of student-athletes outside the classroom.[185] Brand argued that Division I athletics is different than professional sports in that its purpose is not entertainment-centered,[186] a seeming contradiction with the NCAA's own rules.[187] Brand's comment also contradicts comments made by past NCAA executive director Dick Schultz before Congress that all but denied the educational mission of the NCAA. This contradiction is a clear reflection of the place of the NCAA and collegiate athletics in our society, between education and commerce. In an effort to maintain the status quo, collegiate sport administrators can and will pull from either side of this position.

CONCLUSION

The argument in this article began with the observation that we operate in a differentiated society composed of distinct spheres of action. "Good fences" between the spheres maintain social harmony.[188] As such, legislators and courts are reluctant to interfere with the affairs of voluntary associations operating within the civil sphere.

Yet boundaries between spheres are flexible and permeable. The state will intervene in the civil sphere if certain conditions are met: 1) members do not enjoy easy exit from the group and/or do not have other options available to them; 2) members seek state intervention to solve disputes; 3) the settlement of disputes requires only general knowledge to resolve; and 4) the organization provides important public services.

Athletic departments met those conditions nearly four decades ago when Title IX was enacted. Women ages eighteen to twenty-five had few options to participate in high level sport other than collegiate sport. Sport was understood to be educational and, as such, a concern of the state. Additionally, sex discrimination requires only general knowledge (not sport specific or technical knowledge) to resolve a dispute. It is relatively easy to determine whether a school offers women an equal number of opportunities as it offers men, for example. Finally, women athletes sought relief from the state when they felt slighted by sport administrators.

---

184. Wolverton, *supra* note 167.

185. Letter from Dr. Myles Brand, President, National Collegiate Athletic Association, to Bill Thomas, Chairman, House Ways and Means Committee (Nov. 13, 2006), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2006/november/20061115_response_to_housecommitteeonwaysandmeans.pdf.

186. *Id.*

187. *See* 2007–08 MANUAL, *supra* note 140, § 20.9.

188. WALZER, *supra* note 16, at 319.

Much has changed since 1972. The developments discussed in this article indicate a possible change in the definition of collegiate sport and, thus, in the applicability of Title IX. Since the passage of Title IX, opportunities for women athletes outside of varsity athletics has increased. The assumption that collegiate sport is part of the educational mission of colleges and universities is no longer taken for granted. The sport reform industry has raised serious questions about the educational value of sport at the collegiate level. Structural arrangements at the league and school level further remove athletic departments from the educational mission of the institution. Combined with the increasingly commercial activities of collegiate sport, the state is more likely to view Division I collegiate sport as something other than an educational activity.

If the trajectory of collegiate sport and the post-1987 structural, political and ideological changes continue, collegiate sport will be viewed either as part of the entertainment market or as a non-educational voluntary association. Future debate concerning the application of Title IX to sport may be less about contemporary issues, such as gender equity, and more about the position of collegiate sport in society and the appropriate place and form of government interference in the affairs of sport.

No single factor will change the state's view of collegiate sport. However, when combined with the state's inherent reluctance to intervene in the affairs of a private entity, the concurrent changes may erode the state's willingness to uphold Title IX as it applies to collegiate sport. Our contention is that the place of women's collegiate sport, currently a concern of the state, is on the brink of change. Boundaries between spheres are "vulnerable to shifts in social meaning," Walzer writes, "and we have no choice but to live with the continual probes and incursions through which these shifts are worked out. Commonly the shifts are like sea changes, very slow . . . . But the actual boundary revision, when it comes, is likely to come suddenly."[189]

Advocates for women's collegiate athletics need to be prepared for such a shift.

189. *Id.*

"PROGRESSION" SINCE CHARLES WHITMAN: STUDENT MENTAL HEALTH POLICIES IN THE 21ST CENTURY

A. JASON HUEBINGER*

I. STUDENT MENTAL HEALTH: THE PENDULUM EFFECT

In 1941, a man by the name of Charles Whitman was born in the small town of Lake Worth, Florida.[1] From a young age, it was apparent that Whitman was a well-rounded and talented individual, excelling in both academic and physical pursuits.[2] In addition, Whitman's family was fairly well off and respected; however, Whitman's home-life was not as pleasant as this façade would indicate.[3] His father, C.A. Whitman, belittled and abused Charles from a young age, along with his mother and two brothers.[4] In an act of rebellion, Whitman joined the Marines against his father's will shortly before turning eighteen, where he became very proficient with a rifle.[5]

In September 1961, Whitman enrolled in the University of Texas at Austin. Through a prestigious Marine Corps scholarship, he pursued an engineering degree tuition-free.[6] Unfortunately, Whitman did not react well to the transition from the dictatorial atmosphere created by his father to the absolute freedom of university life.[7] His grades were lackluster, and he participated in a prank where he was

* B.B.A., *cum laude*, Texas A&M University, 2004; Juris Doctor Candidate, Notre Dame Law School, 2008. The author would like to thank Associate Dean John Robinson for his thoughtful and thorough suggestions; the entire staff of the Journal of College and University Law for their dedication both to this note and to the Journal; and his parents, Donna and Jeffrey Schmatz, for their constant and unwavering support.

1. Marlee MacLeod, *Charles Whitman: The Texas Tower Sniper*, CRIME LIBRARY, http://www.crimelibrary.com/notorious_murders/mass/whitman/index_1.html (last visited Apr. 14, 2008).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* Whitman received a Sharpshooter's Badge, along with Good Conduct and Marine Corps Expeditionary medals. His proficiency is further illustrated by the fact that he scored 215 out of a possible 250 points on shooting tests. He also excelled at rapid fire from a long distance and was most accurate when shooting at moving targets. *Id.*

6. *Id.* Whitman received the scholarship through the Naval Enlisted Science Education Program, which paid for his tuition and books, and provided a stipend of $250 per month. *Id.*

7. *Id.*

arrested for poaching a deer.[8] These problems led to the discontinuation of his scholarship, forcing him to return to active duty.[9] During this period, Whitman married his girlfriend Kathy Leissner, a woman who he would later murder.[10]

After an honorable discharge from the Marines in 1964, Whitman returned to the University of Texas.[11] Although he was finally free of the military life, he was not able to escape his family troubles; Whitman's mother filed for divorce in 1966 and moved to Austin, Texas.[12] Shortly thereafter, Whitman began to suffer from overwhelming depression—a fact he admitted to a doctor.[13] Whitman was subsequently advised to seek help from university psychiatrist Dr. Maurice Heatly.[14] During their meeting, Whitman said that he was extremely frustrated with his life and that he sometimes had thoughts of "going up on the Tower with a deer rifle and shooting people."[15] Whitman never attended another counseling session with Dr. Heatly.[16]

Four months later on July 31, 1966, Whitman purchased a Bowie knife and binoculars and began writing an explanatory letter where he claimed that he did not "consider this world worth living in."[17] In the early hours of the following morning, Whitman killed his mother and wife and proceeded to the top of the University of Texas clock-tower.[18] It was from this vantage that he killed fourteen people before he was finally shot and killed by two police officers.[19]

This tragedy brought to the forefront many issues regarding student mental health. When should a college or university be held liable for the extreme actions of its students? How should a college or university respond to threats of violence by a student? Should the response to a threat be different if the threat is suicidal rather than homicidal in nature? The Whitman case also represents a time when the mindset was at one extreme, with colleges and universities providing students access to mental health facilities, but with their proactive duties going no further than to prescribe medication. Today, modern realities dictate that colleges and universities can no longer rely on laissez-faire policies with regard to student mental health. Unfortunately, judicial responses to cases involving student mental

---

8. *Id.*

9. *Id.* Whitman tried to have his scholarship renewed, but his request was denied. He also discovered that the year and a half he spent in Austin did not count toward his active duty requirements. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* In his note, Whitman stated:

> It was after much thought that I decided to kill my wife, Kathy. . . . The prominent reason in my mind is that I truly do not consider this world worth living in, and am prepared to die, and I do not want to leave her to suffer alone in it.

Id.

18. *Id.*

19. Jim Yardley, *Off Limits Since '74, Deck Reopens,* N.Y. TIMES, Sept. 16, 1999, at A18.

health issues have begun to develop a standard that may discourage colleges and universities from being proactive in providing assistance for student mental health-related situations.

In order to develop an understanding of the current need for student mental health awareness at the college and university level, the next section of this note outlines the current state of mental health among college and university students from a statistical standpoint. Thereafter, the note analyzes a developing "immediate probability" standard with regard to student mental health issues and this standard's possible effect on college and university responses to student mental health problems. Finally, this note analyzes college and university liability as a general matter both from a historical and modern standpoint in order to identify possible judicial standards that would provide colleges and universities with greater flexibility to address student mental health issues while still allowing liability when necessary.

II. THE CURRENT STATE OF MENTAL HEALTH AMONG STUDENTS

A. General Statistics

According to the National Institute of Mental Health, over one-fourth of Americans over the age of eighteen, almost 58 million people, suffer from some form of mental disorder.[20] That number includes almost 15 million people suffering from major depressive disorder, 6 million from panic disorder, 2.2 million from obsessive compulsive disorder, 2.4 million from schizophrenia, and 15 million from social phobia.[21] Almost 21 million Americans suffer from some sort of mood disorder, including "major depressive disorder, dysthymic disorder, and bipolar disorder" and approximately 40 million suffer from anxiety disorders.[22] All of these conditions are relevant to students, especially within the context of their transition into college or university life; however, statistics alone do not even scratch the surface of student mental health as a whole.

The 2006 National College Health Assessment—the largest known comprehensive data set on the health of college and university students—reported that at least once within a span of twelve months approximately 65% of college and university females and 50% of college and university males reported feeling

---

20. Nat'l Inst. of Mental Health, The Numbers Count: Mental Disorders in America, http://www.nimh.nih.gov/publicat/numbers.cfm (last visited Mar. 14, 2008).

> Mental disorders are common in the United States and internationally. An estimated 26.2 percent of Americans ages 18 and older—about one in four adults—suffer from a diagnosable mental disorder in a given year. When applied to the 2004 U.S. Census residential population estimate for ages 18 and older, this figure translates to 57.7 million people.

Id. (internal citations omitted).

21. *See id.* Major Depressive Disorder is considered the "leading cause of disability" in the United States for ages 15–44. *Id.* (internal citation omitted).

22. *Id.* "Anxiety disorders include panic disorder, obsessive-compulsive disorder, post-traumatic stress disorder, generalized anxiety disorder, and phobias (social phobia, agoraphobia, and specific phobia)." *Id.*

"things were hopeless," over 80% of females and almost 70% of males reported feeling "very sad," and 45% of females and 35% of males reported feeling "so depressed it was difficult to function."[23] Even more alarming is the fact that approximately 10% of females and 9% of males "seriously consider[ed] attempting suicide" at least once within the same twelve-month span.[24]

B. Suicides

Suicide is a continuous and major concern among college and university officials and healthcare providers. Approximately 30,000 people commit suicide each year, making suicide the eleventh leading cause of death in the United States.[25] Even more staggering is the number of attempts. Each day, 1500 people attempt suicide,[26] which means there are almost 550,000 suicide attempts each year. About 90% of suicide victims suffered from at least one psychiatric disorder,[27] with 60% estimated to suffer from major depression,[28] also relevant due to the prominence of depression and other mental conditions among college and university students. Up to 50% of people who commit suicide had attempted suicide in the past.[29]

Regarding college and university students specifically, suicide is the second leading cause of death.[30] Young males are much more prone to commit suicide than young females, with 16.5 young males per 100,000 committing suicide in 2001 in relation to only 2.9 young females per 100,000 committing suicide in the same year.[31]

C. Modern Trends

These numbers are exacerbated by the fact that an increasing number of students are being diagnosed with mental disorders. The percentage of students who sought help for depression and suicidal tendencies doubled between 1989 and 2001 according to a Kansas State University study.[32] The same study found that, even though the number of students seen by Kansas State University's counseling

---

23. AM. COLL. HEALTH ASS'N, NATIONAL COLLEGE HEALTH ASSESSMENT 13 (2006), http://www.acha-ncha.org/docs/ACHA-NCHA_Reference_Group_ExecutiveSummary_Fall 2006.pdf.

24. *Id.*

25. *See* AM. FOUND. FOR SUICIDE PREVENTION, FACTS ABOUT SUICIDE (2006), http://www.afsp.org/files/College_Film/factsheets.pdf.

26. *Id.*

27. *Id.* "Certain personality disorders, such as borderline and antisocial personality disorders, appear to carry high risk for suicide. Impulsivity also appears to be a risk factor for suicide." *Id.*

28. *Id.* at 3.

29. *Id.* at 1.

30. *Id.* at 2. Among individuals ages 15 to 24 in the United States, only accidents and homicides cause more deaths than suicides. *Id.*

31. *Id.*

32. *See* Erica Goode, *More in College Seek Help for Psychological Problems*, N.Y. TIMES, Feb. 3, 2003, at A11.

center remained stable, the percentage of students taking some kind of psychiatric medication doubled between 1989 and 2001.[33] "In a 2002 national survey, more than 80 percent of 274 directors of counseling centers said they thought the number of students with severe psychological disorders had increased over the previous five years."[34] This belief seems to conflict, however, with the fact that there was no significant increase in students with eating disorders, chronic mental disorders, or drug and alcohol abuse issues between 1989 and 2001.[35] In addition, "[i]n a 2005 national survey of the directors of college counseling centers, 95 percent of counseling directors reported an increase in students who were already on psychiatric medications when they came in for help."[36]

While it is uncertain whether this increase is due to an enlargement of the overall number of students with psychiatric disorders or if physicians today are simply more inclined to prescribe psychiatric medication, student mental health is certainly a major issue facing colleges and universities.

III. MODERN RESPONSES TO MENTAL HEALTH THREATS

While the liability of colleges and universities regarding students' mental health-related injuries is still unclear, some courts have adopted a narrow foreseeability standard that focuses on whether a college or university knew of an "imminent probability" of injury. In *Schieszler v. Ferrum College*,[37] a student at Ferrum College in southwest Virginia, Michael Frentzel, got into an argument with his girlfriend, Crystal.[38] Campus police responded to the disturbance and discovered that Frentzel had several self-inflicted bruises and was exhibiting suicidal behavior.[39] Officials from the college arrived on the scene and had Frentzel sign a letter promising not to hurt himself.[40] The officials then left Frentzel in a room alone, even after Crystal warned them that he had tried to commit suicide before and that she received an email implying that he was going to try again.[41] By the time officials returned to Frentzel's room, he had already hung himself with a belt.[42] LaVerne Schieszler, Frentzel's aunt and the personal

33. *Id.*

34. *See id.*

35. *Id.*

36. Lynette Clemetson, *Off to College on Their Own, Shadowed by Mental Illness*, N.Y. TIMES, Dec. 8, 2006, at A1.

37. 236 F. Supp. 2d 602 (W.D. Va. 2002).

38. *Id.* at 605. The defendants moved for dismissal based on lack of subject-matter jurisdiction and failure to state a claim. *Id.* The representative for Michael Frentzel later moved to add three defendants and assert a claim for punitive damages. 233 F. Supp. 2d 796, 797 (W.D. Va. 2002).

39. *See Schieszler*, 233 F. Supp. 2d at 798. "The campus police . . . went to Frentzel's room and found the door locked. Frentzel eventually let them in but stated that he wanted to be left alone because he had something to do. Frentzel indicated that bruises on his head and neck were self-inflicted." *Id.*

40. *See id.*

41. *See id.* at 799. "Frentzel sent an email to an unnamed person stating that he was 'sorry' and that the recipient should 'tell Crystal that he loved her.'" *Id.*

42. *Id.*

representative of his estate, brought a wrongful death action against Ferrum College and its representatives.[43]

In ruling on a motion to amend the complaint, the court made two important conclusions: (1) a special relationship existed between Frentzel and Ferrum College and (2) a trier of fact could find that there was an "imminent probability" that Frentzel would try to hurt himself.[44] Factors that supported this "imminent probability" included college officials finding Frentzel alone in his room with self-inflicted bruises, their knowledge of a suicidal email sent from Frentzel to Crystal, and a statement signed by Frentzel promising that he would not harm himself.[45] The last factor, Frentzel's signed statement, indicated that the college believed Frentzel wanted to kill himself.[46] This ruling marked one of the rare occasions where a court used a foreseeability standard when determining college or university liability for student behavior. In addition, "imminent probability" was the standard adopted by the court when determining foreseeability in this negligence case.[47]

A recent ruling involving the Massachusetts Institute of Technology ("MIT") incorporated *Schieszler's* ruling. In *Shin v. Massachusetts Institute of Technology*,[48] a student, Elizabeth Shin, began to suffer from psychiatric problems in February 1999.[49] She subsequently overdosed on Tylenol with codeine and was admitted to a hospital for a one-week psychiatric observation, during which doctors discovered that she suffered from mental health problems and had previously engaged in self-injurious behaviors.[50] Shin was later diagnosed with "adjustment disorder" and suffered from "situational issues" due to a recent break-up with a boyfriend combined with mediocre grades.[51]

In October 1999, Shin was sent to MIT Mental Health after admitting that she had suicidal thoughts.[52] Shin continued to cut herself and told a teaching assistant that she intended to take a bottle of sleeping pills.[53] She continued treatment until April 10, 2000, when MIT Mental Health received notification that Shin had discussed plans to kill herself.[54] MIT Mental Health decided not to respond to this notification because Shin had recently informed a psychiatrist that she was fine and because there had been overreactions to a suicide threat that she made just two

43. *Id.* at 797–98.

44. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608–09 (W.D. Va. 2002).

45. *Id.* at 609.

46. *Id.*

47. *See id.* at 608–09.

48. No. 020403, 2005 WL 186910 (Mass. Super. Ct. June 27, 2005).

49. *Id.* at *1.

50. *Id.* (noting that Shin engaged in cutting behaviors in high school).

51. *Id.* at *2. Shin had made a suicidal comment to her boyfriend with whom she had broken up. The doctors suggested she read "Feeling Good" by David Burns. She was also instructed to continue her therapy sessions after returning from her parents' house in New Jersey, where she stayed during her freshman summer break. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at *5.

days earlier.[55] Later that night, Shin set fire to her clothes and burned to death.[56]

Shin's parents subsequently filed suit against MIT and various MIT employees.[57] While the trial court dismissed all claims against MIT, it rejected dismissal on specific claims aimed at institution administrators.[58] The court then cited *Schieszler's* "imminent probability" standard and used a very similar analysis, but focused on the history between Shin and the institution. As stated by the *Shin* court, institution administrators "were well aware of Elizabeth's mental problems at MIT from at least February 1999. . . . Accordingly, there was a 'special relationship' . . . imposing a duty . . . to exercise reasonable care to protect Elizabeth from harm."[59]

Both *Schieszler* and *Shin* settled. While these cases merely provide persuasive authority for future rulings, they may illustrate a trend toward the use of an "imminent probability" standard with regard to college or university liability for student mental health. However, solely relying on such a standard may discourage colleges and universities from providing adequate mental healthcare for their students. Under such a standard, a college or university has little incentive to go out of its way to promote health center services to the student body at large and such a standard may force colleges and universities to overreact toward any possibility that a student may harm him or herself.

There are also examples of colleges and universities taking reactive rather than proactive stances toward student mental health issues. In 2004, a student at Hunter College of the City University of New York attempted suicide by swallowing an overdose of Tylenol.[60] While paramedics were able to save her, she returned to school to discover that her dorm room door locks had been changed and that she was expelled from the dorm.[61] In 2004–05, the Hunter College housing contract stated:

> A student who attempts suicide or in any way attempts to harm him or

---

55. *See id.* at *4–5.

56. *Id.* at *5–6.

> That night, shortly before 9:00 p.m., students in [Shin's residence hall] heard the smoke alarm sounding in Elizabeth's room. The MIT Campus Police were called and . . . responded within minutes. The Campus Police broke open Elizabeth's door and found her with her clothing engulfed in flames. . . . As a result of the fire, Elizabeth suffered third-degree burns over 65% of her body [and] . . . suffered irreversible neurological brain damage. . . . At 1:50 a.m. on April 14, 2000, Elizabeth Shin was pronounced dead as a result of injuries suffered in the fire.

Id.

57. *See id.* at *1. The plaintiffs filed suit "against the Defendants Massachusetts Institute of Technology, MIT Medical Professionals, MIT Administrators, and MIT Campus Police Officers." *Id.*

58. *Id.*

59. *See id.* at *13. Institute officials consisted of Dean Arnold Henderson and Nina Davis-Mills. Arnold Henderson was a Counseling and Support Services Dean who met with Shin on several occasions and originally received the email from Shin's professor regarding the sleeping pills. Nina Davis-Mills was Shin's housemaster at her college dorm. *Id.* at *1–4.

60. *See Some Colleges Evicting Suicidal Students*, MSNBC, Sept. 1, 2006, http://www.msnbc.msn.com/id/14626533.

61. *Id.*

> herself will be asked to take a leave of absence for at least one semester from the residence hall and will be evaluated by the school psychologist or his/her designated counselor prior to returning to the residence hall.[62]

Under this policy, attempting suicide was a violation of the student housing contract.[63] The student sued, claiming that her expulsion from the dorms was in violation of federal disability discrimination law.[64] Hunter College agreed to pay the student $65,000 and has since reevaluated its suicide policy.[65]

An egregious example of the possible effects related to an "imminent probability" standard involves George Washington University and a student named Jordan Nott. In the fall semester of 2004, Nott began to develop psychological problems as a result of being unable to stop one of his college friends from committing suicide.[66] Eventually, Nott asked his roommate to take him to George Washington Hospital for psychiatric evaluation.[67] Soon thereafter, Nott received a disciplinary letter, informing him that he could either withdraw from the university or face suspension, expulsion, or, potentially, criminal charges.[68] Nott was evicted from his dorm, barred from attending any classes, and was warned that he would be treated as a trespasser if he came on campus for any reason.[69] Nott sued George Washington University and various affiliated individuals under the Americans with Disabilities Act, the Rehabilitation Act, and the Fair Housing Act, among others.[70]

The case settled in October 2006.[71] In a press release, Nott said, "I certainly hope that other universities will not discipline their students for seeking mental

---

62. *See* Eve Bender, *Lawsuit Prompts College to End Policy on Suicide Attempts*, PSYCHIATRIC NEWS, Oct. 6, 2006, at 27.

63. *Id.*

64. *Id.*

65. *Id.*

66. Complaint at 4, Nott v. George Washington Univ., No. 05-8503 (D.C. Super. Ct. 2006), *available at* http://www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf. Nott's friend committed suicide by jumping out of his dorm's window. *Id.* Nott and a peer knew about the suicide but were unable to stop it because they were unable to open a locked door. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 6. The letter read:

> You are barred according to DC Code section 22-3302—unlawful entry on property, which is defined as: any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $100 or imprisonment or jail for more than six months, or both, in the discretion of the court. Should you be found in or on GW property in the future, you will be arrested for unlawful entry. You are not permitted on The George Washington University property, either as a guest, or to utilize University facilities, without written authority from the Chief Police at The George Washington University.

Id. at 17–18.

70. *See id.* at 4–5.

71. *See Student Settles Suit with University*, PSYCHIATRIC NEWS, Dec. 1, 2006, at 18.

health treatment."[72] Dr. John Williams, Provost and Vice President for Health Affairs, said, "While we recognize that some steps in the process may not have been perfect, we stand by the result. We appreciate Mr. Nott's support in resolving this matter, and we wish him continued success."[73]

Dr. Williams is correct; the process was far from perfect. Unlike the *Schieszler* and *Shin* cases, Nott did not try to commit suicide and he did not even state that he was thinking about committing suicide. Nott simply felt guilt over the loss of a friend—a perfectly normal response—and sought help in the best manner he could. The decision to seek help is the kind of behavior colleges and universities should encourage, not punish. While George Washington University has said its intention was to "protect a life," it has provided no explanation as to how expelling a depressed student would constitute a step to protect him.[74]

Not all agree that withdrawal should be a taboo area with regard to depressed students. In 2003, Paul Joffe analyzed the formal suicide prevention program of the University of Illinois at Urbana-Champaign.[75] This program requires that any student who threatens or attempts to commit suicide attend four sessions of psychiatric assessment.[76] Failure to comply with this program may result in mandatory withdrawal from the university.[77] Joffe's major defense of the program's strict, mandatory nature is founded on the notion of "control."[78] According to Joffe, if the university simply referred the student to psychiatric services rather than requiring such services, there is a significant chance that the suicidal student will not accept the referral, and even if he or she does, that student will be hesitant to discuss his or her suicidal tendencies.[79]

Joffe thinks that this reaction stems from the student's notion that he or she has a right to commit suicide, thus creating a control or power struggle with the university that is attempting to help the student.[80] The mandatory nature of the program, however, allows the university to shift the focus from the asserted right to end one's life to the privilege of attendance and how, if the student wishes to continue enrollment, he or she must conform to certain standards of conduct.[81] Joffe concludes that the student is often so invested in his or her enrollment in the university that he or she will "forgo his perceived privilege to engage in life-ending strategies" and submit to the mandatory assessment process.[82]

While the possibility of an institution compulsorily withdrawing a suicidal

---

72. *Id.*

73. *Id.*

74. *See Some Colleges Evicting Suicidal Students*, *supra* note 60.

75. Paul Joffe, An Empirically Supported Program to Prevent Suicide Among a College Population 1 (Feb. 16, 2003) (unpublished manuscript), *available at* www.jedfoundation.org/articles/joffeuniversityofillinoisprogram.pdf.

76. *Id.* at 9.

77. *Id.* at 10.

78. *Id.* at 6.

79. *Id.*

80. *Id.* at 12.

81. *Id.*

82. *Id.*

student may seem disconcerting at first, a line needs to be drawn between the University of Illinois program, which uses withdrawal as a means of incentivizing a suicidal student's participation in psychiatric evaluation, and the Nott situation, in which George Washington University punished a depressed student for seeking help. In the first situation, while the University of Illinois may be taking a hard-line approach toward the suicidal student, the university is motivated by the desire to help the student deal with his or her mental instability. On the other hand, even if George Washington University was attempting to adopt a hard-line approach similar to that of the University of Illinois, its failure to incentivize treatment and its harsh action toward a student who did not threaten suicide were misguided.

The University of Illinois is not the only college or university with complex procedural guidelines for treating students with mental health problems. The University of San Diego, for example, provides four instances when the university may withdraw a student for mental health-related issues.[83] Before making such a determination, the vice president or dean must meet with the student, relevant university officials, and the student's parents, if appropriate.[84] Similar to the University of Illinois, Harvard University's Divinity School also allows for the withdrawal of a threatening student who refuses to cooperate with university psychiatric evaluations.[85] The dean responsible for withdrawing the student must meet with appropriate university officials before making the decision and the student may apply for readmission.[86]

On the other hand, several colleges and universities have policies that are less procedurally robust. For example, the University of Notre Dame's Office of Student Affairs may withdraw a student upon the advisement of the University Counseling Center or University Health Services that the student is "incapable of properly functioning in this community or is in such a condition that he or she could cause harm to himself or herself or to others."[87] This policy is vague,

---

83. Univ. of San Diego, Student Discipline: University Policies, *available at* http://www.sandiego.edu/discipline/policies.php (last visited Mar. 14, 2008). The policy provides:

> The term "disruptive or dangerous behavior" includes but is not limited to . . . :
>
> (1) Behavior that poses a threat to self, including but not limited to a suicidal attempt, gesture, or statement of suicidal attempt;
>
> (2) Behavior that demonstrates an imminent, foreseeable or existing threat to the safety or well-being of a student, other member of the University community, or clients of University-related programs on or off campus;
>
> (3) Behavior that disrupts or interferes with the ability of other students, faculty or staff to participate in the educational programs, living environment, or employment opportunities offered by the University;
>
> (4) Behavior that indicates that a student is unable to control his/her behavior or to perform the essential functions of a student.

Id.

84. *See id.*

85. HARV. DIVINITY SCH., HANDBOOK FOR STUDENTS 19 (2007), *available at* http://www.hds.harvard.edu/registrar/handbook/handbook.pdf.

86. *Id.*

87. UNIV. OF NOTRE DAME, DU LAC: A GUIDE TO STUDENT LIFE 189 (2007), *available at* http://orlh.nd.edu/dulac/duLac%202007.pdf.

especially with regard to the "improperly functioning" language, and does not specifically provide that the Office of Student Affairs must meet with the student or outline a readmission policy. In addition, Arizona State University and the University of Michigan have emergency withdrawal procedures allowing the dean of students or the vice president to unilaterally and immediately withdraw a student from those universities.[88] While these policies do not provide the same procedural safeguards found in the policies of the University of Illinois and the University of San Diego, this lack of strict formality may provide those institutions with the increased flexibility needed to handle situations on a case-by-case basis. On the other hand, the lack of procedural mechanisms may create ambiguity and inconsistency in enforcement of mental health policies and could possibly discourage students from seeking help.

IV. THE EVOLUTION OF COLLEGE AND UNIVERSITY LIABILITY

A. Potential Impact of "Imminent Probability"

With an increasing number of students seeking help from colleges and universities for mental health-related issues, institutions should facilitate this need with adequate facilities, competent personnel, and policies that encourage students to utilize such assistance. If, however, more courts adopt an "imminent probability" standard, colleges and universities may face liability for actively promoting and thoroughly providing these services.

A good illustration of this point would be a comparison of the Jordan Nott incident and the Elizabeth Shin case. For hypothetical purposes, it will be assumed that, in response to his expulsion, Nott committed suicide. In the Shin case, MIT actively encouraged Shin to attend counseling and provided psychiatric service for over a year.[89] Although, the officials misinterpreted direct warning signs of Shin's suicidal intentions, there was at least an effort to help her. In the Nott hypothetical, there was no interpretation of the signs or intervention to help, only punishment.

While George Washington University's actions in this hypothetical may have contributed to the suicide of Nott, there also would be no basis to argue that the university had any direct knowledge of the "imminent probability" that Nott would kill himself. Nott did not try to commit suicide or say he was going to attempt suicide; he simply checked in for depression.[90] Thus, there would have been no basis for the university to conclude that he had suicidal tendencies; on the other hand, he was in a fragile mental state and needed help, not chastisement. Unfortunately, this fact would probably play no part in the determination of the

88. *See* Ariz. St. Univ., Involuntary Withdrawal, http://www.asu.edu/aad/manuals/usi/usi104-05.html (last visited Mar. 14, 2008); Univ. of Mich., Withdrawal and Readmission, http://www.studentpolicies.dsa.umich.edu/mentalhealth.htm (last visited Mar. 14, 2008).

89. *See* Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *1 (Mass. Super. Ct. June 27, 2005). Shin received treatment starting in February 1999 and continuing until her suicide in April 2000. *Id.* at *6.

90. *See* Complaint at 5, Nott v. George Washington Univ., No. 05-8503 (D.C. Super. Ct. 2006), *available at* http://www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf.

university's liability for Nott's suicide under an "imminent probability" standard.

"Imminent probability" is arguably a valid factor when determining whether a college or university should be liable for injuries related to student mental health problems because it ties into the concept of foreseeability. "Imminent probability" creates an incentive for colleges and universities to act in emergency situations or be subject to liability, as illustrated in *Schieszler*.[91] However, if "imminent probability" ever became the sole factor for determining liability of institutions for student suicide, it could create a disincentive for a college or university to be proactive because such action may increase the chance it will be in an "imminent probability" situation. The analysis in *Shin* exacerbates this risk by using MIT's history of assisting a student with mental health issues against it; as stated by the court, institution officials were "well aware of Elizabeth's mental problems."[92] While this certainly was the case, such a conclusion in this context raises the question of whether this history of caring for the student should also be viewed as a positive that may mitigate damages, similar to how a court may analyze the extent of moral blame attached to a college or university in assumption of duty cases.[93]

In order to reach a conclusion as to the appropriate standard for college and university liability in student mental health cases, it is important to understand the history related to college and university liability for student action. For that reason, the following is a general outline of the how college and university liability developed. In addition, this section provides examples of non-mental health-related college and university liability cases using an analysis that may strike the proper balance between the narrow "imminent probability" standard and the broader in loco parentis concept adopted during the initial founding of American colleges and universities.

B. History of In Loco Parentis

When American colleges and universities were first established, they were modeled after their European counterparts and thus adopted many of the European ideals and philosophies.[94] One ideal adopted was the concept of in loco parentis; in essence, the college or university would stand in the place of the parent.[95] This was the predominant philosophy in the early stages of American educational institution development and allowed colleges and universities to exercise some of the authority and control usually reserved for the parents of a student.[96]

The law has designated special relationships that give rise to a duty of care and, in turn, to liability for violations of this duty of care.[97] In loco parentis creates a

---

91. *See* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002).

92. *Shin*, 2005 WL 1869101, at *13.

93. *See infra* notes 136–142 and accompanying text.

94. *See* Nick Sweeton & Jeremy Davis, *The Evolution of* In Loco Parentis*,* 13 COLO. ST. J. STUDENT AFF. 1 (2004).

95. *Id.*

96. *Id.*

97. *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965).

special relationship between the college or university and the student—a relationship that can be used when defining the breadth of the institution's liability to an injured student, as well as the enforcement power of a college or university.

Gott v. Berea College[98] is an example of how in loco parentis was initially applied. In that case, J.S. Gott was the owner of a restaurant near Berea College in central Kentucky. He challenged a college rule forbidding students from entering any "eating houses" or "places of amusement" in the town under the premise that such a rule unlawfully and maliciously injured his business.[99] In upholding the rule, the court stated:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents.[100]

Initially, in loco parentis was attractive to colleges and universities. Due to the low average age of students at the time, it assured parents that the college or university would care for and protect their son or daughter. As educational institutions in America evolved, however, the influence of in loco parentis was diminished.

The in loco parentis doctrine remained a viable principle until the 1960s and 1970s, when a series of decisions substantially affected the doctrine.[101] During this period, the civil rights movement catalyzed student demand for more

---

> Special Relations Giving Rise to Duty to Aid or Protect
>
> (1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

98. 161 S.W. 204 (Ky. Ct. App. 1913).

99. *See id.* at 205. The policy stated:

> Eating houses and places of amusement in Berea, not controlled by the college, must not be entered by students on pain of immediate dismission. The institution provides for the recreation of its students, and ample accommodation for meals and refreshment, and cannot permit outside parties to solicit student patronage for gain.

Id.

100. *Id.* at 206.

101. *See, e.g.*, Moore v. Student Aff. Comm. of Troy St. Univ., 284 F. Supp. 725 (M.D. Ala. 1968); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968); Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (Cal. Ct. App. 1967); *see also* Kerry Robert Brittain, Comment, *Colleges and Universities: The Demise of* In Loco Parentis, 6 LAND & WATER L. REV. 715 (1971).

autonomy.[102] The relationship between the institution and student changed, with the focus switching away from institutional officials dictating policy to the student and toward recognition of student desire to have a say in the functioning of the institution. The phenomenon of student government was born and student affairs officials began to concentrate more on coordination and less on discipline.[103]

One of the first cases that illustrates this change in the role of colleges and universities is *Goldberg v. Regents of the University of California*.[104] The plaintiffs in the case were four students at the University of California at Berkeley who had organized rallies in response to a non-student's arrest for displaying an obscene sign on campus.[105] As a result of the rallies, one student was expelled and three were suspended.[106] The students sued, claiming their punishments were unconstitutional limitations on their First Amendment rights, were administered pursuant to constitutionally vague regulations, deprived the students of their due process rights, and were an invasion into an area exclusively controlled by state law.[107]

While the court upheld these punishments, it also downplayed the concept of in loco parentis in the decision:

> For constitutional purposes, the better approach . . . recognizes that state universities should no longer stand in loco parentis in relation to their students. Rather, attendance at publicly financed institutions of higher education should be regarded a benefit somewhat analogous to that of public employment. . . . The test is whether conditions annexed to the benefit reasonably tend to further the purposes sought by conferment of that benefit and whether the utility of imposing the conditions manifestly outweighs any resulting impairment of constitutional rights.[108]

---

102. *See* Sweeton & Davis, *supra* note 94, at 1.

103. *See id.* ("The role of student affairs professionals, once consisting of discipline and authority, now focused on education and coordination of campus life." (internal citations omitted)).

104. 57 Cal. Rptr. 463 (Cal. Ct. App. 1967); *see also* Brittain, *supra* note 101, at 728.

105. *See Goldberg*, 57 Cal. Rptr. at 466.

106. *See id.* at 470–71.

107. *Id.* at 466.

108. *Id.* at 470–71 (internal citations omitted). The court cited a previous court's decision regarding in loco parentis in support of its dicta, referencing the general trend of older students attending colleges and universities as evidence to why the in loco parentis doctrine no longer applied. *Id.*

> In earlier decades in loco parentis had some superficial appeal because the vast majority of college students were below 18. Today, in contrast, there are more students between the ages of 30 and 35 in universities than there are those under 18, and the latter group account for only seven per cent of the total college enrollment. . . . Apart from the values of a university education to the individual and to society, its significance in this state is reflected in the spectacular increase in enrollment in our public universities in the last decade and the commensurate rise of state and federal support.

Id. at 470 n.11.

While this decision was limited in scope to public universities,[109] it indicated a general change in the courts' mentality regarding the in loco parentis doctrine and the role of colleges and universities with regard to student conduct issues.

Shortly thereafter, the court in *Moore v. Student Affairs Committee of Troy State University*[110] reached a similar conclusion to the one reached in *Goldberg*. The plaintiff in the case, Gregory Moore, lived in a dorm at Troy State University ("TSU") in southeastern Alabama.[111] He was in good standing until TSU and Alabama Health Department officials searched his room, under his supervision, and found marijuana. Moore was subsequently expelled.[112] Moore sued TSU, claiming the search violated his Fourth Amendment right to be free from illegal searches and that the procedures related to his dismissal taken by TSU violated his procedural due process rights.[113] The court dismissed all of Moore's claims.[114]

In dicta, the court stated that TSU could not justify the search purely on in loco parentis grounds. It said, "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."[115] The last sentence of this quotation embodies the conflict faced by the court, the college or university, and the student when attempting to define the relationship between the latter two parties. The confines of this relationship are often blurry and in flux as societal, institutional, and political values change.

Within the tort context, courts in the 1970s and early 1980s began to treat colleges and universities as bystanders to student behavior and as entities that owed no duty to the adult students.[116] The key case illustrating this point is *Bradshaw v. Rawlings*.[117] The plaintiff in *Bradshaw*, a sophomore at Delaware Valley College in eastern Pennsylvania, was severely injured in a car accident after attending a class "picnic" during which large amounts of alcohol were

---

109. *See id.* at 471.

110. 284 F. Supp. 725 (M.D. Ala. 1968); *see also* Brittain, *supra* note 101, at 729.

111. *See Moore*, 284 F. Supp. at 727.

112. *Id.*

113. *Id.* The court described the confines of search and seizure with respect to student dormitories:

> The college, on the other hand, 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. 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.

Id. at 729.

114. *Id.* at 731.

115. *Id.* at 729.

116. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981); *see also* ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY 56–57 (1999).

117. 612 F.2d 135 (3d Cir. 1979).

consumed.[118] A faculty member sponsored the event but did not attend.[119] Bradshaw, in turn, sued the college, among other parties, for negligence. In an oft quoted passage, the court began with "a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades."[120] The court supported its finding:

> Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, partial visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties in loco parentis, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives.[121]

With these words, "*Bradshaw* became the judicially self-serving declaration of student independence and the announcement of the birth of a new 'adult' student body."[122]

The last major event signaling the period's progressive downplay of the in loco parentis doctrine occurred in 1972 with the ratification of the Twenty-Sixth Amendment and the reduction of the voting age to eighteen.[123]

> The nascent empowerment of students resulted in even more autonomy and, consequently, altered the college landscape. Vibrant student activism reached new levels during this period, epitomized by involvement in anti-war movements and the struggle for civil rights for minorities and women. Numerous clubs and campus organizations sprouted during this time that reflected desire for independence in personal and public matters.[124]

This "nascent empowerment" paved the way for the flurry of student involvement in college and university politics and the subsequent diminution of disciplinary control over students.

Experts disagree, however, as to the remaining amount of influence the in loco parentis doctrine possesses.[125] Some experts believe that the in loco parentis doctrine suffered a complete demise after 1970.[126] Others believe that the doctrine

---

118. *See id.* at 137.

119. *Id.*

120. *Id.* at 138.

121. *Id.* at 139–40.

122. *See* BICKEL & LAKE, *supra* note 116, at 59.

123. *See* Sweeton & Davis, *supra* note 94, at 1.

124. *Id.*

125. *Id.*; *see also* Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post* In Loco Parentis *College*, 37 IDAHO L. REV. 531 (2001).

126. *See* Lake, *supra* note 125, at 532.

was not completely removed from the legal realm, but has simply changed, retaining much of its former vigor.[127]

C. The Current State of College and University Liability

Recent case law indicates that the type of liability imposed on a college or university today is dependent on the type of activity at issue. For example, with regard to cases involving alcohol, courts utilize a more fact-intensive test than they do with regard to cases associated with mental disorders.

A line of cases supporting this conclusion began with an incident that occurred during "Rush Week" at the University of Idaho.[128] Rejena Coghlan, a sophomore at the university, attended several parties associated with the end of Rush Week, including a "Jack Daniels' Birthday" party and a "Fifty Ways to Lose Your Liver" party.[129] Two employees of the university were present at the latter party.[130] After attending the parties and being helped to bed by a sorority sister, Coghlan fell three stories from a fire escape and sustained permanent injuries.[131] As a result of this incident, Coghlan filed a complaint against the university and various fraternities and sororities.[132] The lower court dismissed her claims against the university, holding that the school owed no duty of care to Coghlan.[133] On appeal, the Supreme Court of Idaho reversed.[134]

The court stated that while the institution-student relationship is not listed in the Restatement of Torts[135] as giving rise to a duty of care, a college or university can voluntarily assume a duty of care.[136] Indications of a voluntary assumption included the fact that two university employees were present at the "Fifty Ways" party, that the employees knew or should have known that alcohol was being served at the parties, and that the employees knew or should have known that Coghlan was intoxicated and that she needed assistance in the hours preceding her accident.[137]

---

127. *See* Sweeton & Davis, *supra* note 94, at 1. Sweeton and Davis note:

> While the concept dramatically changed, this perception of demise is untrue. Today's college students and their parents have explicit expectations of what role the university should play, which illustrates the fluid nature of in loco parentis. In loco parentis is not the trademark of a defunct era; it is an evolving notion. For many generations of college students, this notion has, in one degree or another, been a factor of their college experience.

Id.

128. *See* Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 305 (Idaho 1999) (defining "Rush Week" as "an event sponsored and sanctioned by the University in conjunction with campus fraternities and sororities.").

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 314.

135. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

136. *See Coghlan*, 987 P.2d at 312.

137. *Id.*

The court identified several factors to consider when determining if a duty of care exists for a college or university. These factors include the foreseeability of harm to the student, the degree of certainty related to the foreseeable harm, the "closeness of the connection" between the institution's conduct and the injury, and the extent of moral blame attached to the university's conduct.[138] Courts should also, according to the Idaho Supreme Court, look at relevant policies that may prevent future harm, the burden placed on the college or university in preventing the harm versus the consequences to the community at large in imposing a duty of care with resulting liability for any breach, and factors related to the availability of insurance for the risk in question.[139]

The court emphasized that it had not ruled that a special relationship existed between the university and the student, but rather that the university had assumed responsibility through its actions.[140] Given, however, the court's emphasis that the employees "should have known" there was underage drinking taking place, and considering the very public nature of fraternity and sorority parties, the court may have effectively created a "special relationship" even though it claimed not to have done so.[141] Conversely, the court may have simply been sending a message that, while colleges and universities are not required to patrol all elements of student alcohol use, they are required to take reasonable steps to protect their students from high-risk alcohol-related activities.[142] Within the context of mental health, adopting an assumption-of-the-risk analysis may deter colleges and universities from providing adequate mental healthcare in order to avoid creating a duty of care. If, alternatively, there is a special relationship between the institution and its students, the college or university may have a greater duty to take reasonable steps to ensure the mental wellbeing of its students.

In *Knoll v. Board of Regents of University of Nebraska*,[143] Jeffrey Knoll was allegedly abducted from the basement of his on-campus dorm by a fraternity and taken to an off-campus fraternity house.[144] In this house, Knoll was handcuffed to various objects and was forced to drink alcohol.[145] It was later determined that Knoll had a blood alcohol content of .209.[146] He eventually managed to escape through a window, only to fall and suffer severe and permanent injuries.[147] The university regulated the house in which these events occurred but did not own it.[148] Knoll sued the university, alleging that the university "had acted negligently in

138. *Id.* at 311 (internal citation omitted).

139. *Id.*

140. *Id.* at 312.

141. *See* Lake, *supra* note 125, at 535.

142. *See id.*

143. 601 N.W.2d 757, 760 (Neb. 1999).

144. *Id.* at 760.

145. *Id.*

146. *Id.* All states have adopted a legal blood alcohol content of .08. Ctrs. for Disease Control and Prevention, Frequently Asked Questions, http://www.cdc.gov/alcohol/faqs.htm#8 (last visited Mar. 14, 2008).

147. *Knoll,* 601 N.W.2d at 760.

148. *Id.* at 764.

failing to enforce prohibitions against acts of hazing, the consumption of alcohol, and physically abusive behavior when the University knew or should have known that the [fraternity] house was in violation of the rules prohibiting such activities."[149]

The university argued that it had no duty to the student, and that it had no way of knowing what was transpiring.[150] The court found, however, that a duty to the student existed.[151] The landowner/invitee relationship is one of the special relationships under Section 314A of the Restatement (Second) of Torts,[152] and while the major events occurred off-campus, the initial abduction happened on university property; thus, the university had a duty to protect the student from reasonably foreseeable harm.[153]

The court made two relevant conclusions. First, while the relationship between the institution and the student does not in and of itself create a special duty of care, that duty can be inferred through other relationships that exist.[154] Considering the various ways in which students' lives are intertwined with their colleges or universities, this standard could be stretched to fit many different situations. Second, while the event happened off-campus, the court held that there was enough of a link between the university and the off-campus establishment for a duty of care to arise.[155] In reaching this conclusion, the court used a "totality of the circumstances" test, which requires a landowner not only to consider the risk inherent in its land, but also the risks inherent in nearby property.[156]

In determining the duty of the university to its students, the court used a "risk-utility" test, considering "(1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution."[157] The court also made sure to note that foreseeability alone was "not dispositive."[158]

In both *Knoll* and *Coghlan*, the courts carved out a niche within the concept of duty and utilized tangential elements of the general rule in order to fit the facts of each case without affirmatively creating a duty between institutions and their students. In *Knoll*, the court stated that the university assumed the risk and thus created the relationship, and in *Coghlan*, the court focused on how there was a close link between the university and the injury that created a duty. These two cases also demonstrate how courts will look at the entirety of the facts when deciding if a duty did arise. In *Coghlan*, the court focused on the fact that there

149. *Id.* at 761.
150. *Id.*
151. *Id.* at 765.
152. *See supra* note 97 and accompanying text.
153. *Knoll*, 601 N.W.2d at 762.
154. *Id.* at 764–65.
155. *Id.*
156. *Id.* at 764.
157. *Id.* at 761.
158. *Id.*

were university employees present;[159] in *Knoll*, the court focused on the fact that the initial event that triggered the injury occurred on university property.[160] While the element of "foreseeability" is considered, the courts also considered the proactive steps taken by each institution in preventing the injuries, or rather, the lack of steps taken.

D. New College and University Liability Principles as Applied to Actions Involving Mental Health

Coghlan and *Knoll* exemplify a type of analysis that should be utilized in cases involving mental health issues. For example, we can examine the facts of *Shin* focusing on the factors laid out in *Coghlan.*[161] While it was arguably foreseeable that Shin would attempt to commit suicide, there was not a great degree of certainty that she would. The connection between the institution's conduct and the suicide was fairly tangential considering they had scheduled a psychiatric appointment for the next day. There is also little moral blame attached to the institution considering how much care it provided Shin over the course of a year. Since the policies of the institution were fairly thorough, imposing liability on the institution in light of its efforts would result in a great burden that would hinder its efforts to provide such care in the future.

Returning to the hypothetical involving Jordan Nott's suicide, the opposite is true. While there was less foreseeability of harm when compared to *Shin*, there would also be a much closer connection between George Washington University's actions and the injury with much higher moral blame attached to the university. The burden placed on the university would be simply to avoid punishing students for seeking out help for mental conditions. This comparison illustrates the need for courts to limit the reliance on absolute standards like "imminent probability" and instead emphasize standards that take a broad range of factors into account.

CONCLUSION

The pendulum is certainly beginning to swing; while colleges and universities were previously extremely lax in their responses to student mental health in general, they now understand the importance of adequate student mental healthcare. In addition, the number of students taking medication for psychiatric disorders is increasing. Whether this increase is due to an actual climb in the number of student mental health disorders, a broader acceptance of mental health

159. *See* Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 312 (Idaho 1999).

160. *See Knoll*, 601 N.W.2d at 764–65.

161. *See Coghlan*, 987 P.2d at 311. *Coghlan*'s factors were:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. (internal citation omitted).

treatments, or is simply indicative of physicians' inclination toward prescribing such medication, colleges and universities should be working in a proactive manner to encourage mental health awareness.

The courts' trend toward heightened college and university liability[162] and the adoption of an "imminent probability" standard by two courts[163] have put colleges and universities in a precarious position: the college or university should be doing as much as possible to aid students with mental health issues, but such aid may increase the institution's potential liability.[164] If courts do not implement a fact-intensive test that encourages colleges and universities to provide high quality and readily available mental healthcare, then colleges and universities may choose to resort to playing safe. Flexible standards that do not rely solely on "imminent probability" may help make situations like Jordan Nott's the exception rather than the rule.

162. *See, e.g.*, *Knoll*, 601 N.W.2d 757; *Coghlan*, 987 P.2d 300.

163. *See* Schieszler v. Ferrum Coll., 233 F.Supp.2d 796 (W.D. Va. 2002); Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *13 (Mass. Super. Ct. June 27, 2005).

164. *See supra* Part IV.A.

FINANCIAL BAND-AID: REACTIONARY FIXES TO FEDERAL FAMILY EDUCATION LOAN PROGRAM INDUCEMENT GUIDELINES SOLVE SOME PROBLEMS, RAISE OTHERS

RYAN G. MILLIGAN*

INTRODUCTION

In 1848, Horace Mann proclaimed that "[e]ducation . . . beyond all other devices of human origin, is a great equalizer of the conditions of men,—the balance wheel of the social machinery. . . . [I]f this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society."[1] Access to higher education, however, is at times limited by the high cost of obtaining an education.[2] Congress sought to break down that cost barrier by enacting the Higher Education Act of 1965 (HEA) to provide greater accessibility to financial resources for postsecondary and higher education.[3]

Today, rising tuition rates challenge the effectiveness of the HEA's student loan programs. In the past thirty years, tuition at America's colleges and universities increased nearly three hundred percent.[4] As a result, parents and students are

---

* Candidate for Juris Doctor, Notre Dame Law School, 2009; B.S. Business Administration with concentration in Management, Indiana University, 2001. To Brianne, Ella, and Camille for their continued support throughout school. Thanks to Joseph Russo for his insightful edits and to the members of the editorial staff of the Journal of College and University Law for all of their efforts in editing this Note.

1. HORACE MANN, SEC'Y OF MASS. STATE BD. OF EDUC., TWELFTH ANNUAL REPORT OF HORACE MANN AS SECRETARY OF MASSACHUSETTS STATE BOARD OF EDUCATION (1848), *available at* http://www.tncrimlaw.com/civil_bible/horace_mann.htm.

2. *See* Edward M. Kennedy, *Grant Access to Higher Education*, BOSTON GLOBE, Feb. 15, 2007, at A11. Senator Kennedy maintains, "400,000 qualified students a year don't attend a four-year college because they can't afford it." *Id.*

3. *See generally* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001–1140 (2000 & Supp. 2005)).

4. Mindy Fetterman & Barbara Hansen, *Young People Struggle to Deal with Kiss of Debt*, USA TODAY, Nov. 20, 2006, at 1A.

> The average price of college has grown much faster than the rate of inflation. Average annual tuition at public four-year colleges and universities is $5,836 in 2006–07, up 268% from 1976–77, according to the U.S. Education Department and the National Center for Education Statistics. Private college tuition is up 248% to $22,218 a year.

Id.

forced to borrow more to finance higher education, a phenomenon that catapulted student lending into an $85 billion a year industry.[5] The industry's rapid growth led to a "battle for dominance" among private lenders seeking to increase loan volume under the federally-backed Federal Family Education Loan (FFEL) Program, which lenders view as a low risk, high profit lending segment.[6]

As a result of increasing tuition and a more complex borrowing environment, the student loan process is increasingly difficult for students and parents to navigate. Financial aid offices serve a vital role in helping parents and students plot a course through this increasingly complex lending environment by providing borrowers with impartial information related to loan products.[7] Because private-based aid is increasingly necessary to help borrowers close the gap between tuition rates and federal lending caps, institutions often scan the marketplace of private lenders to ensure that borrowers receive as many benefits as possible.[8] Financial aid offices distill this information for borrowers based on the holistic evaluation of several criteria, including waiver of fees, variety of repayment options, competitiveness of interest rates, superior customer service, efficiency of technology and processing, the stability and longevity of lenders, and other factors.[9]

This process, which is typically very effective, is capable of breaking down if it becomes influenced by conflicts of interest. Financial aid offices normally prevent such conflicts by serving as gatekeepers. In limited instances, however, lenders attempting to get the upper hand in the increasingly competitive student lending industry engaged in questionable bargaining practices with a handful of institutions.[10] In these situations, lenders exploited ambiguities in the FFEL Program's statutory and regulatory framework, poor oversight and guidance, and

---

5. Jonathan D. Glater & Karen W. Arenson, *Lenders Sought Edge Against U.S. in Student Loans*, N.Y. TIMES, Apr. 15, 2007, at A1 (noting that student loan volume rose "above $85 billion in 2005–06 from just over $30 billion 10 years earlier").

6. *Id.* The FFEL Program is part of the Higher Education Act of 1965. Pub. L. No. 89-329, 79 Stat. 1219 (codified at 20 U.S.C. §§ 1071–1087-4 (2000)). See *infra* notes 16–20 and accompanying text, for a more complete description of the FFEL Program.

7. *See* Haley Chitty, *Preferred Lenders: Setting the Record Straight*, U. BUS. (May 2007), http://www.universitybusiness.com/viewarticle.aspx?articleid=766.

8. *See* Tara Bahrampour, *Grants Help Fill Tuition Gap*, WASH. POST, Oct. 11, 2004, at B5; *see also* Clay Holtzman, *Student Borrowing Swells to Fill Gap*, PUGET SOUND BUS. J., Dec. 8, 2006, *available at* http://www.bizjournals.com/seattle/stories/2006/12/11/story2.html. Additionally, Chitty observes that federal loan limits have increased only modestly in the past decade for most borrowers and have not increased at all for upper-class and graduate students. *See* Chitty, *supra* note 7.

9. *See* Nat'l Ass'n of Student Fin. Aid Adm'rs, *Guide to Developing a Preferred Lender List*, 15 MONOGRAPH 1, 2–4 (May 2005), *available at* http://www.nasfaa.org/subhomes/MediaCenter/monograph15.pdf.

10. *See, e.g.*, Press Release, Edward M. Kennedy, U.S. Senate, Kennedy, Durbin Introduce Bill to Prevent Exploitation of Students by Private Lenders (Feb. 1, 2007), *available at* http://kennedy.senate.gov/newsroom/press_release.cfm?id=aba816bf-d7be-4d09-8f17-6f1457b35d4b; s*ee also* David Armstrong, *Trade Group Saw Possible Conflicts in Student Loans*, WALL ST. J., Apr. 11, 2007, at A1; Glater & Arenson, *supra* note 5.

lax enforcement to structure dubious arrangements with institutions.[11] Critics allege that such lender-institution relationships create an appearance of conflict of interest, undermine financial aid offices in their performance of their gate keeping function, and increase the risk of illegal lender inducements.[12]

As these potential weaknesses became highly publicized through prominent state investigations and media frenzy, Congress and the Department of Education ("Department") took action to implement reforms aimed at eliminating the potential for such conflicts.[13] The resulting reform measures achieve the noble goal of increasing transparency in the student lending process; however, the reactionary nature of the reform effort, often characterized by exaggerated press accounts and political rhetoric, left many unexamined and unintended consequences.[14] These potential consequences include increased costs for borrowers, decreased availability of grant money, reduced product offerings, and less comprehensive service.[15] With that background in mind, this Note examines reforms at the federal level and discusses the resulting impact on lenders, institutions, and borrowers.

First, the Note explores the historical legal and regulatory environment surrounding the FFEL Program and examines the shortcomings of that regime, including the lack of clarity and guidance on what constituted a prohibited inducement and a lack of consistent oversight and enforcement. Second, the Note explores the genesis of the federal reform effort. Third, the Note surveys prohibited inducements and preferred lending arrangements, two particular problem areas in the pre-reform regime. This discussion includes background information on conflict of interest issues, discusses current and pending reform measures, and analyzes potential deficiencies in these measures. Finally, this Note provides a brief overview of the potential impact that reform measures may have on institutional policies and procedures.

---

11. *See, e.g.*, Megan Barnett et al., *Big Money on Campus*, U.S. NEWS & WORLD REPORT, Oct. 29, 2003, at 30. Lenders used various inducements directly or indirectly aimed at increasing loan volume, including financial arrangements with institutions and/or the provision of gifts, services, or other benefits to institutions and financial aid office employees. See *infra* Part III.A, for a more complete discussion.

12. *See, e.g.*, Press Release, Edward M. Kennedy, *supra* note 10.

13. *See infra* notes 68–72 and accompanying text (discussing the New York Attorney General Office's investigation of student lending practices and subsequent federal action aimed at avoiding disparate state regulations).

14. *See, e.g.*, Chitty, *supra* note 7. "Media reports suggest that the preferred lender list is the result of an 'unholy union' between financial aid officers and student loan companies designed to pick the pockets of students and their parents. As financial aid administrators know, the reality is much less nefarious." *Id.*

15. *See infra* Part III.A.

I. HISTORICAL LEGAL AND REGULATORY ENVIRONMENT

Congress enacted the Higher Education Act of 1965 "[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education."[16] One of the major vehicles the government created through the HEA to meet this purpose was low-interest loan products for students, including the FFEL Program.[17] The FFEL Program consists of a federal program of student loan insurance for private lenders that eliminates the lender's risk of lending to students by insuring the principal balance of loans made under the HEA.[18] Under the program, private lenders make loans to students that are reinsured by the federal government indirectly through guaranty agencies.[19] The Department administers the program and exercises oversight over lenders and institutions, an essential part of which is to prevent conflicts of interest.[20] The effectiveness of the Department's administration of the program, however, is handicapped by a lack of clarity on prohibited activities and the absence of effective oversight and enforcement.

A. Ambiguity in the FFEL Program Framework

The failure to effectively police prohibited activities is fundamentally due to a lack of clarity caused by ambiguous definitions and guidance related to "prohibited inducements." As a starting point, the traditional HEA framework utilizes an "eligible lender" definition as a mechanism for proscribing certain behavior by disqualifying offenders from the program.[21] The relevant definition states as follows:

> The term "eligible lender" does not include any lender that the Secretary determines, after notice and opportunity for a hearing, has . . . offered, directly or indirectly, points, premiums, payments, or *other inducements*, to any educational institution or individual in order to secure applicants for loans under this part.[22]

The purpose of this definition was to disqualify lenders from the FFEL Program that attempted to secure loan volume by entering into quid-pro-quo arrangements with institutions or their employees.[23] In other words, Congress sought to ensure that financial aid offices served effectively as gatekeepers by eliminating the

16. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001–1140 (2000 & Supp. 2005)).

17. 20 U.S.C. § 1071 (2000).

18. *See id.* § 1074(a).

19. *Id.* § 1078(a)–(c).

20. *See id.*; *see also* Coll. Loan Corp. v. SLM Corp., 396 F.3d 588, 590 (4th Cir. 2005).

21. 20 U.S.C. § 1085(d)(5).

22. *Id.* § 1085(d)(5)(A) (emphasis added).

23. *See* Blain B. Butner & Aaron D. Lacey, *Avoiding Illegal Lender Inducements*, STUDENT AID TRANSCRIPT, Mar. 1, 2006, at 32, *available at* http://www.nacua.org/documents/Lender Inducements2Blain.pdf.

potential for conflicts of interest.[24] The ambiguity of the phrase "other inducements," however, provided incomplete guidance to lenders and institutions on what exactly constituted a prohibited inducement.[25]

In subsequent years, Congress declined opportunities to define inducements with more clarity and "continually declined to clarify this sweeping law, despite the significant transformation of the FFEL industry since [its inception]."[26] The legislative history behind the HEA and its amendments similarly provides little insight.[27] Congress's most extensive effort to clarify the inducement provision came in a 1998 reauthorization amendment to HEA that provided an exception to the anti-inducement provision by outlining a range of acceptable activity.[28] In the amendment Congress added the following language:

> It shall not be a violation . . . for a lender to provide assistance to institutions of higher education comparable to the kinds of assistance provided to institutions of higher education by the Department of Education.[29]

The amendment, when read in conjunction with the Department's comments to its proposed 1999 regulations, established a "safe harbor" for certain activities, including counseling, outreach, computer support, and training.[30] Congress did not

---

24. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 61,960, 61,976 (Nov. 1, 2007) (to be codified at 34 C.F.R. pts. 674, 682, 685) (containing the Secretary's discussion of comments on the proposed regulations).

25. *See* 20 U.S.C. § 1085(d)(5) (2000 & Supp. 2005). The 1986 amendments to the HEA gave only cursory consideration to the issue by noting circumstances for "[d]isqualification [of lenders] for use of certain incentives." Higher Education Amendments of 1986, Pub. L. No. 99-498, § 435, 100 Stat. 1268 (1986) (codified as amended at 20 U.S.C. § 1085(d)(5) (2000 & Supp. 2005)).

26. Butner & Lacey, *supra* note 23, at 33.

27. *See* H.R. REP. NO. 99-383 (1985). The report states:

> Additionally, the Committee has become aware of practices that use incentives to attract new borrowers to certain lending institutions. The committee considers such activities to be contrary to the best interests of the program and feels that they represent exploitation of student and parent borrowers. Thus the Committee adopted language prohibiting such undertakings and disqualifying any lenders who continue these practices from participating in the Federal student loan programs.
>
> However, it is not the intention of the Committee that lenders be prohibited from paying to an institution or a state guaranty agency reasonable fees for loan counseling, disclosure, or other administrative services that will promote the purposes of the Federal loan programs. Nor are these provisions intended to preclude lending institutions from sponsoring such activities as receptions and indirect support for organizations such as the National Council on Higher Education Loan Programs or the National Association of Student Financial Aid Administrators.

Id. at 37.

28. Higher Education Act Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (codified as amended in scattered sections of 20 U.S.C. (2000 & Supp. 2005)).

29. Pub. L. No. 105-244 § 429, 112 Stat. 1708 (amending 20 U.S.C. § 1085(d)(5)).

30. *See* Federal Family Education Loan Program & William D. Ford Direct Loan Program, 64 Fed. Reg. 43,428, 43,429–30 (Aug. 10, 1999) (codified at 34 C.F.R. pts. 682, 685) (implementing changes made in the 1998 HEA amendments that create an exception to the

purport for the safe harbor to be an exhaustive list of acceptable activities, however, and the amendment did little to define "other inducements" with positive law.

Similarly, the Department only sporadically issued guidance aimed at clarifying the inducement provision of HEA.[31] A 1989 Dear Colleague Letter (DCL) from the Department contained its most detailed guidance, reminding lenders and institutions of their obligations under the HEA by stating that the provisions related to inducements "were broadly intended to prohibit the direct or indirect offering of payment of any kind of financial incentive to any entity or person to secure applicants for [FFEL] loans . . . regardless of the form of the incentive or its mode of payment."[32] The letter also listed various examples of prohibited activities, including the employment of any agents to solicit individual loans from students, the payment of referral or finder's fees, certain lender promotional activities, and the provision of printings, computer equipment, or services at a reduced or no cost.[33] Additionally, the letter references activities that "provide some financial benefit. . . but are nevertheless permissible because the financial value of the benefit is nominal, or the activity is not undertaken to directly secure applications from individual prospective borrowers."[34] While providing some refinement to the inducement provision, the guidance did not prevent a handful of lenders from offering inducements that the DCL did not directly proscribe.

Following the 1989 DCL, the Department did not issue further guidance on the subject of inducements until a subsequent 1995 DCL.[35] The 1995 DCL promised vigorous enforcement of the inducement provisions of the HEA and warned institutions to take the proper steps to allow borrowers to make decisions based on the merits of loan terms and conditions rather than marketing incentives.[36] The letter stated that the goal of the inducement provision was to "remov[e] an economic interest that may affect the school's objectivity as it advises the student with respect to financial assistance."[37] The guidance was ineffective, however, because it still did not satisfactorily distinguish between prohibited inducements and those incentives negotiated appropriately by institutions on behalf of

prohibited inducement provision for certain counseling, outreach, computer support, and training activities); *see also* Butner & Lacey, *supra* note 23.

31. Aside from the few efforts already noted, the Department's primary guidance on the subject came in the form of a sporadic series of Dear Colleague Letters issued in 1989 and 1995. *See infra* notes 32, 35. The Department also issued guidance in connection with the creation of the Federal Direct Loan Program. *See* Federal Family Education Loan Program & William D. Ford Direct Loan Program, 64 Fed. Reg. at 43,428.

32. Letter from Dewey L. Newman, Deputy Assistant Sec'y for Student Fin. Servs., & Daniel R. Lau, Dir. of Student Fin. Assistant Programs, Dep't of Educ. (Feb. 27, 1989), *available at* http://www.nacua.org/documents/InducementsProhibited.pdf.

33. *Id.* The letter may have also confused the issue, however, by again defining prohibited inducements in the negative by vaguely describing activities permissible under federal law. *See id.*

34. *Id.*

35. Letter from Leo Kornfeld, Senior Advisor to Sec'y, Dep't of Educ. (Mar. 1, 1995), *available at* http://ifap.ed.gov/dpcletters/doc0134_bodyoftext.htm.

36. *Id.*

37. *Id.*

borrowers.[38]

As competition among FFEL lenders increased in the nineties with the introduction of the William D. Ford Federal Direct Loan Program,[39] some lenders utilized the continued ambiguity in the inducement provision to gain competitive advantage. By way of background, the Federal Direct Loan Program allows borrowers to bypass loans from private lenders through the FFEL Program and obtain funds for higher education directly from the government.[40] In passing the program, Congress expected that the arguably lower costs to both students and taxpayers would cause the program to grow quickly and surmount private-based, federally-backed programs such as the FFEL Program.[41] The direct loan program did grow quickly, but Congress underestimated the response from private lenders not willing to easily forego profitable and low risk FFEL Program lending.[42] In fighting back, some lenders exploited the vacuum created by the government's failure to set forth any clear standard for prohibited inducements by offering incentives to institutions aimed at increasing loan volume.[43]

Such activities did not go unnoticed by the Department. The Department's Office of Inspector General (OIG) reported on the issue as early as August 2003, when it released an Alert Memorandum reviewing alleged lender inducements.[44] Prompted by an allegation that a lender offered illegal inducements to institutions in exchange for increased loan volume, the OIG conducted a review that identified several shortcomings in the Department's guidance on illegal inducements.[45] Specifically, the OIG noted that the Department had not issued guidance since 1995 and that its informal guidance was insufficient.[46] Based on its review, the OIG determined that certain improper bargaining practices existed between lenders and institutions in violation of the anti-inducement provisions.[47] As a result, the OIG's Memorandum suggested several changes to the Department's practices that would recognize the "current market realities in the FFELP," including guidance on the application of the anti-inducement provision and consideration of statutory

38. *See id.*

39. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 355(a), 108 Stat. 3967 (codified at 20 U.S.C. § 1078(c)(1)(G) (2000 & Supp. 2005)).

40. 20 U.S.C. § 1078.

41. Glater & Arenson, *supra* note 5.

42. *Id.*

43. *Id.* These means include inducing institutions to leave the federal direct loan program, to obtain preferred lender status, and to enter arrangements under the college-as-lender program. *See infra* Part III.A; *see also* Barnett et al., *supra* note 11.

44. Memorandum from Cathy H. Lewis, Assistant Inspector Gen., Educ., Inspection, and Mgmt. Servs. to Sally Stroup, Assistant Sec'y, Office of Postsecondary Educ. (Aug. 1, 2008) (on file with author), *available at* http://www.nacua.org/documents/AlertMemo_LenderInducements.pdf.

45. *Id.*

46. *Id.*

47. *Id.* Specifically, the review concluded that at least one of two schools investigated had negotiated with Sallie Mae for preferred lender status in exchange for private loans to the institution. *Id.*

and regulatory changes.[48]

In an attempt to prevent government intervention, a consortium of private organizations issued a "set of guidelines . . . concerning compliance with certain inducement prohibitions" in the HEA.[49] The consortium promised to encourage lender and institutional compliance with the "letter and spirit of the guidelines."[50] It intended for the guidelines to supplement existing guidance and recommended against certain arrangements between lenders and institutions, including exchanging private loans for FFEL Program loan volume, offering referral or marketing fees, and offering excessive gifts or entertainment.[51] Ultimately, the foregoing government and private efforts at providing guidance were inadequate in providing sufficient clarity to the inducement provision of the HEA.

B. Oversight and Enforcement of FFEL Programs

In addition to ambiguity in the FFEL framework, the administration of the Program suffered from ineffective oversight and meager enforcement.[52] An OIG Audit found that the General Manager of Financial Partners (Financial Partners), the federal entity that administers the FFEL Program, established a "weak control environment for monitoring and oversight."[53] The report attributed this weakness in large part to a fundamental problem with Financial Partners' approach in administering the program. The report maintained that Financial Partners emphasized partnership with program participants rather than an atmosphere of compliance.[54] This view is substantiated by Financial Partners' own mission statement, which outlines its mission as follows:

> [T]o promote the best in business and strive for greater program integrity through innovative technical development, oversight, technical assistance, partnership and community outreach programs by working in partnership with Guaranty Agencies, Lenders, Servicers, Trade Associations, Trustees, Schools and Secondary Markets to ensure

48. *Id.*

49. Press Release, Consumer Bankers Ass'n., Educ. Fin. Council, & Nat'l Council of Higher Educ. Loan Programs, Inc., Loan Associations Endorse Inducement Guidelines (Nov. 16, 2004), *available at* http://www.nchelp.org/news/inducementguidelines11-16-04.pdf.

50. *Id.*

51. *Id.*

52. *See* OFFICE OF INSPECTOR GEN., U.S. DEPT. OF EDUC., REVIEW OF FINANCIAL PARTNERS' MONITORING AND OVERSIGHT OF GUARANTY AGENCIES, LENDERS, AND SERVICERS, FINAL AUDIT REPORT 6 (2006), *available at* http://www.ed.gov/about/offices/list/oig/auditreports/a04e0009.pdf. Terry W. Hartle, Senior Vice President at the American Council on Education, succinctly described the situation as "[w]hat [happens when] unbridled competition meets lack of oversight." Glater & Arenson, *supra* note 5.

53. OFFICE OF INSPECTOR GEN., *supra* note 52, at 2. The responsibility for administering the FFEL program is given to the General Manager of Financial Partners (Financial Partners), a division of Federal Student Aid. At the time of the audit report, Financial Partners had seventy-five employees scattered across several regional offices and duty stations. With this minimal staff, Financial Partners administered oversight on approximately 3400 lenders, 35 guaranty agencies, 72 third-party servicers, and other program participants. *Id.* at 4.

54. *Id.* at 8.

> access for students to federal student loans.[55]

This partnership-oriented approach created a conflict of interest and led to insufficient monitoring of program participants.[56]

As a result, the agency did not "adequately review, test, identify, and report significant instances of non-compliance in its program reviews and technical assistance."[57] Fundamentally, the Report found that the policies and procedures in place for lender oversight were inadequate and lacking in supervision.[58] Even those policies and procedures that were in place for conducting reviews of program participants were not followed.[59] The ultimate result was that Financial Partners poorly implemented procedures utilized for oversight.[60] The agency severely under-utilized the risk assessment tool it used to identify problem areas and ensure compliance with the FFEL Program.[61] As a result, Financial Partners did not focus its limited resources on the program partners who were most at risk.[62]

The Department's lack of administrative oversight predictably led to a serious failure to administratively or judicially enforce the inducement provision. In *LTV Education Systems, Inc. v. Bell*, one of the Department's few judicial proceedings on the inducement issue, the court observed that the Department's action against LTV for violating the "points and premiums" provision of Department regulations was the "government's first reported judicial enforcement of the points and premiums regulation, a regulation promulgated [eighteen] years ago."[63] The court called the Department's enforcement policy "schizophrenic" and noted a "less than

---

55. *Id.* at 7–8.

56. *See id.* at 8. The public-private partnership is not per se a weakness of the FFEL Program; rather, it is a weakness insofar as it leads to insufficient oversight. See *infra* Conclusion, for a brief discussion of the value of public-private partnership.

57. *See id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* Specifically, Financial Partners never fully implemented the risk assessment tool, failed to complete written policies and procedures for carrying it out, and neglected to put a process in place to determine the effectiveness of the risk assessment model. *Id.*

62. *See id.*

63. LTV Educ. Sys., Inc. v. Bell, 862 F.2d 1168, 1174 (5th Cir. 1989). The "points and premiums" regulation promulgated under the HEA was a predecessor to the inducement provision added at 20 U.S.C. § 1085(d)(5)(A) and read as follows:

> No points, premiums or additional interest of any kind may be paid to any eligible lender in order to secure funds for making loans or to induce such a lender to make loans to the students of a particular institution or any particular category of students and, except in circumstances approved by the Commissioner, notes (or any interest in notes) evidencing loans made by educational institutions shall not be sold or otherwise transferred at a discount.

45 C.F.R. § 177.6(e)(1) (1970). In the LTV case, an operator of private trade schools brought suit against the Department, maintaining breach of insurance contract after the Department ceased making payments on defaulted federal loans. *LTV*, 862 F.2d at 1171. The Department moved for summary judgment on the grounds that LTV was disqualified from the program for maintaining compensating balances with lenders in violation of the points and premiums regulation. *Id.* at 1171–72. The court affirmed the district court's grant of the Department's motion for summary judgment. *Id.* at 1177.

admirable shift in [the Department's] enforcement policy."[64]

In addition, the OIG noted that, as of 2003, the Department had brought only one formal administrative action on the prohibited inducement provision added to HEA in 1986.[65] Its lone effort proved futile as a district court held that the Department's limitation of Student Loan Marketing Association's participation in the FFEL Program was arbitrary and capricious.[66] These minimal efforts characterize the Department's lax approach to enforcing the anti-inducement provisions of the HEA.

The foregoing shortcomings permitted some lenders to operate with impunity in the gray areas of the anti-inducement provision. The lack of guidance as to what exactly constituted a prohibited inducement combined with an extreme lack of oversight and enforcement left a vacuum that lenders exploited in some instances. As increased borrowing and the introduction of the Federal Direct Loan Program increased competition in the industry, the conflict of interest problem caused by these inducements became much more visible, ultimately prompting reform.

II. ORIGINS OF REFORM EFFORTS

Although inquiries into student lending practices resulted in extensive reforms at the federal level, the genesis of these reforms can be traced back to state investigations. New York Attorney General Eliot Spitzer led the earliest and most publicized investigation, which his successor Andrew Cuomo continued and expanded.[67] During the course of the investigation, the New York Attorney General's office uncovered instances of conduct that it viewed as improper lender inducements.[68] The practices involved allegedly improper arrangements between institutions and lenders whereby the former were given inappropriate inducements in exchange for providing loan volume to the lenders.[69] Chief among these practices were "kickbacks" from lenders to institutions in exchange for loan

64. *Id.* at 1175.

65. Memorandum from Cathy H. Lewis, *supra* note 44.

66. Student Loan Mktg. Ass'n v. Riley, 112 F. Supp. 2d 38 (D.D.C. 2000). In that case, Student Loan Marketing Association (SLM) appealed the Department's administrative determination that it violated the prohibited inducement provision of HEA by repurchasing loans at a premium made under the school-as-a-lender program. *Id.* at 39. The court held that the Department's determination was "arbitrary and capricious" and set it aside under 5 U.S.C. § 706(2)(A) (2000) because SLM's activities were not aimed at securing additional loan applications and SLM could not be characterized properly as a lender when it was in fact a third-party service provider under the arrangement. *See id.* at 43.

67. AM. COUNCIL ON EDUC., BACKGROUND INFORMATION FOR PRESIDENTS AND CHANCELLORS ON THE RECENT CONTROVERSY SURROUNDING STUDENT LOANS (Apr. 16, 2007), *available at* http://www.acenet.edu/AM/Template.cfm?Section=Legal_Issues_and_Policy_Briefs2&CONTENTID=21777&TEMPLATE=/CM/ContentDisplay.cfm.

68. Press Release, Andrew M. Cuomo, N.Y. State Att'y Gen., Office of the N.Y. State Att'y Gen., Attorney General Expands College Loan Investigation to Direct Marketing Companies (Oct. 11, 2007), *available at* http://www.oag.state.ny.us/press/2007/oct/oct11a_07.html. Cuomo claimed to uncover "deceptive practices" adverse to the interests of students resulting from what he called an "unholy alliance" between institutions and lenders. *Id.*

69. *Id.*

volume, extra benefits provided to curry favor with institutions, lender payments to institutions to encourage them to drop out of the Federal Direct Loan Program, and improper gifts or services provided by lenders to institutions in exchange for placement on preferred lender lists.[70] This investigation eventually resulted in the State's passage of the Student Lending Accountability, Transparency and Enforcement Act,[71] which codified a Student Bill of Rights, and several financial settlements with lenders.[72]

Fearing that similar investigations would lead to disparate state regulations and hamper monitoring efforts, Congress and the Department acted hastily to tighten federal oversight of student lending.[73] In December 2006, shortly after Spitzer announced the New York investigation, the Department began a negotiated rulemaking process to amend federal student loan program regulations.[74] The goal of the rulemaking process, which targeted, inter alia, prohibited inducements and preferred lender lists, was to develop new regulations suitable to all constituencies affected by the rules.[75] To start the process, the Department drafted a set of amendments to the current regulations and solicited commentary from lenders, institutions, and private organizations.[76] The Department published the final regulations in November 2007, and most of these regulations will become effective in July 2008.[77]

For its part, Congress hurriedly introduced several pieces of legislation aimed at inducements, which ultimately resulted in bills to amend the HEA.[78] The House of Representatives ("House") version of the bill is most comprehensive, containing a series of integrity provisions intended to prohibit specific inducement activities, guidelines for preferred lender lists, and new enforcement mechanisms.[79] The Senate version, while not as comprehensive, addresses "educational loan arrangements" and revises the definition of eligible lender to include more specificity on prohibited inducements.[80] Together, the foregoing regulatory and legislative reform measures address many perceived areas of weakness in the

70. *Id.*

71. N.Y. EDUC. LAW §§ 620–632 (McKinney 2007).

72. Press Release, Andrew M. Cuomo, *supra* note 68.

73. John W. Schoen, *Will Student Loan Reforms Cut Borrowers' Costs?*, MSNBC, Aug. 29, 2007, http://www.msnbc.msn.com/id/20397254/.

74. AM. COUNCIL ON EDUC., *supra* note 67.

75. *Id.*

76. *Id.*

77. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 61,960 (Nov. 1, 2007) (to be codified at 34 C.F.R. pts. 674, 682, 685).

78. The House of Representatives and Senate introduced several different pieces of legislation aimed at conflicts of interest in the FFEL Program. *See, e.g.*, Student Loan Sunshine Act, H.R. 890, 110th Cong. (2007); Student Loan Sunshine Act, S. 486, 110th Cong. (2007); Student Loan Accountability and Disclosure Reform Act, S. 1262, 110th Cong. (2007). Most of these bills are now incorporated into House and Senate versions of HEA amendments. *See infra* notes 79–80 .

79. *See* College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. §§ 151–153, 155–156 (2007).

80. Higher Education Amendments of 2007, S. 1642, 110th Cong. §§ 151–153, 428 (2007).

existing HEA framework.

III. IMPORTANT AREAS OF REFORM

Federal reforms of the FFEL Program target two principal conflict of interest problems. First, the Department and Congress addressed prohibited inducements in order to ensure the integrity of the FFEL Program and keep borrowing costs as low as possible. Second, the reforms addressed preferred lender lists to ensure that institutions use appropriate selection criteria when developing such lists. Importantly, reforms also add more meaningful enforcement mechanisms to address the oversight and enforcement shortcomings prevalent in the Program. These three important areas of reform will be discussed in turn.

A. Prohibited Inducements

The regulatory and statutory reforms related to the inducement provision of the HEA establish the boundaries of acceptable activity for lenders and institutions with increased clarity. The House and Senate versions of the HEA Amendments would address inducements in different manners. The House version, as previously mentioned, would establish a series of comprehensive integrity provisions to prohibit a broad range of activities that lead to conflicts of interest.[81] The Senate version is slightly less ambitious and would largely address the inducement provision by expanding the "eligible lender" definition to provide increased clarity.[82] The Department's regulations fall somewhere in between, incorporating a modified version of previous guidance to supplement the amorphous inducement provision.[83] Together, these reforms target specific types of conduct that create apparent conflicts of interest contrary to the interests of borrowers.

First, the reforms target lender provision of gifts and services to colleges and universities in exchange for increased loan volume or other preferential treatment. A Senate investigation of such practices concluded that five lenders made large marketing expenditures directed towards certain schools or events that could be viewed as improper incentives.[84] These purchases included tickets for sporting events, premiums and promotional items, meals for college and university employees, luncheons and receptions for students, and sponsorships and "direct access" marketing.[85] Lenders also made periodic expenditures for "value-added

81. *See* H.R. 4137.

82. S. 1642, § 428; *see also* 20 U.S.C. § 1085(d)(5)(A) (2000 & Supp. 2005) (containing the current definition for "eligible lender").

83. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 32,410, 32,420 (proposed June 12, 2007) (to be codified at 34 C.F.R. pts. 674, 682, 685).

84. HEALTH, EDUCATION, LABOR, & PENSIONS COMMITTEE, 110TH CONG., REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM 12 (Comm. Print 2007), *available at* http://kennedy.senate.gov/imo/media/doc/Student%20Loan%20Report.pdf.

85. *Id.* at 15–17.

services" such as banking, printing, and counseling services.[86] The Senate investigation concluded that marketing expenditures were "out of control," creating an appearance of conflict even where the then-existing FFEL regime did not specifically prohibit many of these activities.[87]

The regulations target such activities by prohibiting lenders from providing gifts and other benefits to institutions or employees of those institutions.[88] The only gifts permitted under the regulations are "items of nominal value that constitute a form of generalized marketing or are intended to create good will."[89] The House version of the HEA amendments would establish a prohibition on gifts, preventing any financial aid office employee from soliciting or accepting any gifts from a lender.[90] The Senate version would not specifically establish a gift ban, but it would add prizes, entertainment expenses, and the provision of information-technology equipment at a reduced cost to the list of prohibited activities under the definition of eligible lender.[91] The reforms suggest that the Department will consider most gifts prohibited inducements.

Second, the reforms target lender-established advisory boards. Lenders purportedly formed such boards to receive feedback from college and university officials in order to improve products and services for institutions and borrowers.[92] Critics argue, however, that some lenders used the boards to circumvent the inducement guidelines and build inappropriate relationships with college and university officials.[93] A Senate investigation found that, even where specific quid pro quo arrangements did not exist, lenders at times used the advisory boards "to curry favor with school officials and provide lavish perquisites to those officials," creating a high risk of prohibited inducements.[94] For example, one lender struggling to obtain market share offered a complimentary trip to college and university officials and their spouses to a Four Seasons Resort in the Carribean to

86. *See id.* at 19–23.

87. *Id.* at 14; *see also id.* at 19 (noting that certain of the activities mentioned "[did] not fall within any exception to the inducement provision").

88. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. at 32,420.

89. *Id.* at 32,421

90. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 155 (2007). The legislation defines a gift as "any gratuity, favor, discount, entertainment, hospitality, loan, or other item having monetary value of more than a de minimum amount." *Id.* Certain exceptions exist to this ban, including (1) food, refreshments, and training as an integral part of a training session designed to improve the service of a lender, (2) exit counseling services, and (3) philanthropic contributions that are unrelated to education loans. *Id.*

91. Higher Education Amendments of 2007, S. 1642, 110th Cong. § 428 (2007).

92. *See* Jonathan D. Glater, *Offering Perks, Lenders Court Colleges' Favor*, N.Y. TIMES, Oct. 24, 2006, at A1 (quoting multiple college and university officials stating that the advisory board meetings are a "mechanism for giving feedback" and cover topics "that would be benefits for all students").

93. *See* REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 84, at 24; *see also* Glater & Arenson, *supra* note 5.

94. *See* REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 84, at 26.

participate in a summit.[95] Another advisory board meeting destination was a trip to a Pebble Beach resort in which a lender paid all travel and lodging expenses for college and university officials who attended.[96] While such events can be valuable information sharing opportunities, critics argue that they are nothing more than junkets that lead to improper relationships between lenders and institutions at the expense of borrowers.[97]

The various federal reform measures take differing positions on advisory board participation by college and university officials. The Senate's legislation would not prohibit advisory boards but would forbid compensation to college and university officials for serving on the boards except for reimbursement of reasonable travel expenses.[98] The House integrity provisions would go farther, prohibiting officials from participating in lender advisory councils altogether.[99] The Department's revised regulations, however, only indirectly address the issue of advisory board participation. While they do not specifically prohibit such participation, the regulations prevent lenders from paying most of the associated costs. For instance, lenders are prohibited from paying "any lodging, rental, transportation, and other gratuities related to lender-sponsored activities for employees of a school or a school-affiliated organization."[100] With varying levels of strictness, the federal reforms suggest that lenders and college and university officials avoid conferences that give an appearance of impropriety.

Third, reforms address situations in which college and university officials hold financial interests of various kinds in lenders.[101] These reforms generally address two different areas that might result in conflicts: college and university officials holding stock in or receiving consulting contracts from lending companies. Such arrangements were isolated and rare, with only a few instances of note, but typically led to the lender's appearance on the preferred lender lists at those particular institutions.[102] For instance, financial aid directors at three institutions held stock in one lender.[103] In one of those situations in particular, the lender appeared at the top of the school's preferred lender list while its financial aid director owned shares in the company that the official eventually sold for a

95. *See* Glater, *supra* note 92.

96. Cuomo, *supra* note 68.

97. *See* Glater & Arenson, *supra* note 5.

98. Higher Education Amendments of 2007, S. 1642, 110th Cong. § 428 (2007).

99. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 155 (2007).

100. Federal Family Education Loan, 72 Fed. Reg. 61,960, 61,999 (Nov. 1, 2007) (to be codified at 34 C.F.R. § 682.200).

101. Stephen Burd, *Borrowing Trouble*, L.A. TIMES, Apr. 10, 2007, at A19.

102. *See* REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 84, at 3, 33–40; *see also* Jonathan D. Glater & Sam Dillon, *Student Lender Had Early Plans to Woo Officials*, N.Y. TIMES, Apr. 10, 2007, at A1.

103. Glater & Dillon, *supra* note 102. The article also points out that a Department official owned stock in the company as well. *Id.* It is also asserted that "[a]t least eight top officials in the Education Department . . . either came from student-loan or related organizations or have taken lucrative jobs in that arena since leaving the agency." John Hechinger & Anne M. Chaker, *Did Revolving Door Lead to Student Loan Mess?*, WALL ST. J., Apr. 13, 2007, at B1.

substantial profit.[104]

Similarly, in a few instances college and university officials received large consulting contracts and other payments from lenders that were on their preferred lender lists or otherwise recommended to students.[105] In the most excessive example, a school official received over $93,000 in consulting fees from a particular lender over a period of several years.[106] That lender consistently appeared on the institution's preferred lender list.[107] In fact, its share of loan volume at the institution increased from thirty-four percent in 2002 to nearly forty-four percent in 2006.[108] While the school official frequently sent invoices to the lender for services rendered, there was no formal consulting contract between the two and no evidence that the official performed any specific consulting services for the lender.[109]

Reform measures address both of these situations with differing approaches. The House integrity provisions directly prohibit any type of contracting arrangement between lenders and college and university officials.[110] This includes a prohibition on "any fee, payment, or other financial benefit (including the opportunity to purchase stock) as compensation for any type of consulting arrangement or other contract to provide services to the lender."[111] The Senate bill and Department regulations take a somewhat more amorphous approach. The Senate bill would expand the inducement definition to prohibit lenders from offering payments, stocks, and tuition repayment in exchange for loan volume.[112] Implementing regulations initially do not address the issue directly.[113] The conflicting approaches fail to establish a reliable standard at this point, but a safe assumption is that the Department will view any stock or consulting arrangements as a conflict of interest because of the vested interest it gives college and university officials in a particular lender.

Finally, reforms target certain financial arrangements between lenders and institutions. The most common examples of such arrangements include opportunity pools and revenue-sharing arrangements.[114] Opportunity pools are funds advanced from the lender to the institution to loan to students "with little or no underwriting criteria."[115] Institutions use these funds to help students close the

104. *See* REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 84, at 24–26.

105. Glater & Dillon, *supra* note 102.

106. *See* REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 84, at 41.

107. *Id.*

108. *Id.*

109. *Id.*

110. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 155 (2007).

111. *Id.*

112. Higher Education Amendments of 2007, S. 1642, 110th Cong. § 428 (2007).

113. *See* Federal Family Education Loan, 72 Fed. Reg. 61,960, 61,978 (Nov. 1, 2007) (to be codified at 34 C.F.R. pt. 682.200).

114. *See* Barnett et al., *supra* note 11.

115. HEALTH, EDUC., LABOR, & PENSIONS COMM., 110TH CONG., SECOND REPORT ON

gap between tuition and federal loan caps, which assists institutions in providing the dual benefit of supplying need-based aid to prospective students and keeping enrollment rates high.[116]

Revenue-sharing arrangements existed in many different forms, but in the private lending context they were based primarily on a model utilized by institutions participating in the federal "School as Lender" program.[117] Under the "School as Lender" program, institutions that meet certain threshold qualifications can serve as lenders under the FFEL Program and loan funds to graduate students.[118] Institutions participating in this program typically use the profits from the lending operation to provide scholarships and need-based grants to students.[119] Lenders and institutions replicated this model, seemingly legitimized in *Student Loan Marketing Association v. Riley*,[120] in the private lending context by entering into revenue sharing arrangements in which institutions received compensation based upon loan volume.[121] For instance, institutions may receive a percentage of the interest earned on loans referred to certain lenders.[122] Critics maintain that this money could instead be used to reduce borrowing costs for students and parents.[123]

Federal reform measures address financial arrangements between lenders and institutions in a direct and comprehensive manner. The House integrity provisions would establish an outright ban on revenue sharing arrangements.[124] Additionally, the legislation would prohibit lenders from offering funds to institutions that may be used to extend private loans to students, including opportunity pool arrangements.[125] The Senate version does not prohibit such arrangements but instead establishes a comprehensive scheme for disclosing the nature of such

---

MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM 7 (Comm. Print 2007), *available at* http://kennedy.senate.gov/imo/media/doc/second_report%20final.pdf; *see also* Press Release, Andrew M. Cuomo, *supra* note 68. For instance, one lender offered a total of $7 million in opportunity pool funds to two large, public universities in exchange for their withdrawal from the federal direct loan program. Glater & Arenson, *supra* note 5.

116. *See* Barnett et al., *supra* note 11.

117. *See* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C. (2000 & Supp. 2005)).

118. 20 U.S.C. § 1085(2)(F) (2000 & Supp. 2005).

119. Loyola University Chicago, School as Lender Program: FAQS, http://www.luc.edu/finaid/sal_faq.shtml (last visited Apr. 11, 2008).

120. 112 F. Supp. 2d 38 (D.D.C. 2000). See *supra* note 66, for a full discussion of the case.

121. In one such arrangement, a revenue sharing agreement between a lender and an institution paid the institution half a percent of the interest earned on loans referred to the lender. The institution made over $100,000 through the agreement, which resulted in the lender obtaining ninety eight percent of the school's student loan volume. Armen Keteyian et al., *Target of Investigation*, CBS NEWS, Mar. 16, 2007, http://www.cbsnews.com/stories/2007/03/16/eveningnews/main2579808.shtml.

122. *Id.*

123. *Id.*

124. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 155 (2007). The legislation defines a "revenue sharing arrangement" as a situation in which "the institution recommends the lender" and, "in exchange, the lender pays a fee or provides other material benefits, including revenue or profit sharing, to the institution." *Id.*

125. *Id.*

"educational loan arrangements" to borrowers, the Department, and Congress.[126]

More specifically, before providing a student loan, the lender must disclose certain specific information about the loan to the borrower, including interest rates, fees, repayment plans, term and conditions of forbearance, and collection practices.[127] Institutions would also have an obligation under this regime to submit an annual report to the Department for each arrangement. The report must detail the information mentioned above along with "a detailed explanation of why the covered institution believes the terms and conditions of each type of educational loan provided pursuant to the agreement are beneficial for students attending the covered institution."[128] The Senate version would take a less favorable approach to this revenue model in the "School as Lender" context, sunsetting the program and forbidding schools from participating in FFEL as lenders.[129] The Department's regulations take an approach mirroring that proposed by the House by banning any payments for loan applications or referrals.[130] At a minimum, these various reform proposals will require disclosure of financial arrangements between lenders and institutions that give the appearance of conflict in order to allow students and parents to make more informed borrowing decisions.

Aside from detailing specifically prohibited activity, the regulations also provide an exhaustive list of permissible activities. The Department provided these safe harbor provisions to allow lenders to compete on a level playing field against the federal government by providing assistance comparable to that allowed under the direct loan program.[131] More specifically, lenders may offer reduced origination fees or reduced interest rates, pay off federal default fees on behalf of the borrower, and purchase loans from other loan holders at a premium.[132] The proposed regulations would also specifically enable lenders to engage in the following activities:

1. Participate in student financial aid outreach activities so long as the lender does not market its products or services and the lender provides full disclosure of

---

126. Higher Education Amendments of 2007, S. 1642, 110th Cong. § 151(4) (2007).

> The term `educational loan arrangement' means an arrangement or agreement between a lender and a covered institution—(A) under which arrangement or agreement a lender provides or otherwise issues educational loans to the students attending the covered institution or the parents of such students; and (B) which arrangement or agreement--(i) relates to the covered institution recommending, promoting, endorsing, or using educational loans of the lender; and (ii) involves the payment of any fee or provision of other material benefit by the lender to the institution or to groups of students who attend the institution.

Id.

127. *Id.* § 152.

128. *Id.* § 153.

129. *Id.* § 428. Under the amendment, the program would expire on June 30, 2012. *Id.* § 428(A).

130. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 32,410, 32,421 (proposed June 12, 2007) (to be codified at C.F.R. pt. 682.200).

131. *Id.* at 32,420. The reality might be just the opposite, i.e., that the federal reforms will allow the Federal Direct Loan Program to compete with private lenders. *Id.*

132. *Id.*

any sponsorship;

2. Establish communication systems for the FFEL program, including a toll free telephone number and free data transmission services;

3. Offer repayment incentive programs to borrowers, including reduced interest rates and forgiveness of loan principal;

4. Sponsor meals, refreshments, and receptions to school officials and employees provided they are reasonable in cost and in conjunction with meeting and conference events; and

5. Provide institutions and borrowers items of nominal value through generalized marketing campaigns or to create good will.[133]

Together with the detailed prohibitions on certain activities, these safe harbors provide a substantially clearer picture on the acceptable range of activities for lenders and institutions.

While these reforms address important gray areas in the inducement provision, they are poorly conceived and create numerous unintended consequences. In large measure, these shortcomings are due to the draconian nature of the government investigations and reforms, which intimidated financial aid professionals and led to a media frenzy.[134] Rather than carefully considering the scope of the problem and drafting thoughtful, targeted reforms, Congress and the Department ushered through overbroad reforms that in many instances counter the HEA's objective of providing maximum borrower benefits and accessibility to students.[135] For instance, the reforms create greater legal uncertainty, increase borrowing costs and impede access to funds, and reduce the quality of customer service.

Fundamentally, the reforms create a broader, even if temporary, legal uncertainty for lenders and institutions seeking compliance with the rules. As the foregoing discussion illustrates, the various reforms arrive at substantially different solutions to many issues. This may be due to the reactionary approach to federal reforms, in which the Department issued implementing regulations before Congress amended the overarching statute.[136] Adding various reforms at the state level to the mix further complicates the issue for lenders and institutions. In other words, while the inducement standards have more clarity, several standards exist, at least temporarily, which complicate compliance efforts.[137]

Additionally, the reforms in some areas suffer from the unintended consequence

---

133. *Id.*

134. Donald E. Heller, *Student Loans, the Baby and the Bathwater*, INSIDE HIGHER ED., Apr. 17, 2007, http://www.insidehighered.com/views/2007/04/17/heller. Mr. Heller notes that recent government action has many financial aid professionals "living in fear" and "on the defensive." *Id.*

135. *See infra* notes 141–151 and accompanying text.

136. While some respondents argued that the regulations were premature as a result, the Department maintained that the situation required expedited reform in advance of Congressional action. Federal Family Education Loan, 72 Fed. Reg. 61,960, 61,977 (Nov. 1, 2007) (to be codified at 34 C.F.R. pt. 682.200).

137. Note that the House and Senate versions of the HEA Reauthorization Amendments will eventually be reconciled, but the reconciled bill may still conflict with some provisions of the final regulations promulgated by the Department. See *infra* note 195, for a discussion of the reconciliation of the House and Senate Bills.

of unnecessarily restricting several activities that may ultimately benefit borrowers. For instance, many of the reforms restrict advisory board participation by financial aid office employees. Feedback from financial aid employees in advisory capacities, however, has the potential to "contribute to greater responsiveness and effectiveness of the student loan industry."[138] Such dialogue ultimately will benefit borrowers by leading to lower costs and improved products and services.[139] While restrictions on excessive compensation may be appropriate in this context, other prohibitions contained in some reforms on reasonable compensation for travel, meals, and other expenses related to serving on advisory boards unnecessarily complicate dialogue that can benefit students.[140]

Similarly, the reforms have the potential to effectively increase the cost of borrowing for students and parents and reduce access for low-income students. For instance, prohibitions on opportunity pools and revenue sharing arrangements eliminate lending sources and revenue streams that institutions previously utilized to provide loans and scholarships to students.[141] Many institutions also use these funds to offset stagnation in funding of need-based financial aid.[142] The elimination of revenue sharing agreements or "School as Lender" arrangements will cut off a vital source of funding and decrease access to higher education.[143] Mandating disclosure is a sensible measure, but the complete elimination of this model reduces competition and borrower benefit and is counter to the HEA objective of increasing access to higher education.

Additionally, excessive restrictions on lenders and an overt government effort to promote the direct loan program ultimately resulted in a "profit squeeze" on lenders.[144] Such intervention resulted in cutbacks on loan incentives and a reduction in borrower benefits.[145] Also, the excessive restrictions will contribute to greater instability in the student loan industry as the resulting shakeout will lead some lenders to cease operation.[146] Collectively, these industry pressures will reduce competition that leads to greater borrower benefits, create greater instability, and limit borrower choice.[147] While reform efforts are commendable

138. Letter from Constantine W. Curris, President, Am. Ass'n of State Colls. and Univs., to Margaret Spellings, Sec'y, Dep't of Educ. (June 7, 2006) (on file with author), *available at* http://www.aascu.org/leadership/curris_060707.htm

139. *See* Heller, *supra* note 134.

140. *See id.*; *see also* Glater, *supra* note 92.

141. Chitty, *supra* note 7.

142. *Id.*

143. *See* Loyola University Chicago, School as Lender Program: FAQS, http://www.luc.edu/finaid/sal_faq.shtml (last visited Apr. 11, 2008).

144. Schoen, *supra* note 73.

145. *Id.*

146. *Id.*

147. *See* Press Release, Sallie Mae, Financial Aid Officials: Cuts to Private Sector Student Lending Program Will Increase Cost of Attendance and Reduce Services (Feb. 8, 2007), *available at* http://www.salliemae.com/about/news_info/newsreleases/020807_faas+on+FFELP.htm (containing a sample of comments from thirteen financial aid officials and a summary stating that "[f]inancial aid administrators and school officials expressed concern that the proposed cuts will significantly increase the cost of college for students and families, greatly

insofar as they increase transparency and seek to eliminate conflicts in the FFEL Program, an uncertain legal standard and excessive restrictions on lenders negate the otherwise positive aspects of the reform measures.

B. Preferred Lender Lists

The issue of prohibited inducements is one that is very closely related to preferred lender lists. Preferred lender lists are lists of recommended lenders developed by financial aid offices based upon certain selection criteria.[148] Institutions develop these lists "to help families sort through the ever growing array of available loan terms and conditions and to identify loans with the most favorable borrower benefits."[149] Properly constructed preferred lender lists are a valuable resource for borrowers because they create greater efficiencies in determining the most favorable loan terms.[150] The lists may also benefit borrowers indirectly by resulting in administrative cost-savings to institutions that can be passed on to borrowers.[151] When institutions use improper selection criteria such as inducements to develop the lists, however, this potentially valuable resource can mislead borrowers into selecting loans based on considerations other than merit.

From a lender's perspective, preferred lender lists represent a promising way to increase loan volume.[152] Placement on such a list typically provides substantial returns for a lender in terms of loan volume. According to the New York Attorney General's investigation, lenders on preferred lender lists "typically receive in aggregate up to 90% of the loans taken out by the institution's students and their parents."[153] While this concentration of borrowing often reflects a particular lender's superior product and service offerings, in some instances something more

---

diminish services, and will dramatically reduce competition by squeezing many student loan providers out of the market.").

148. *See* Chitty, *supra* note 7.

149. *Id.*

150. *Id.* As the article states,

> Financial aid administrators use their intimate knowledge of the student loan industry to choose lenders that generally offer the best products and services to most students, but each student's circumstance is different. . . . Many students and parents don't have the time or resources to conduct such a thorough review of the plethora of private loan options and companies. Private lenders offer an array of upfront and back-end benefits and interest rates that can vary depending on the student's credit history, intended major, and institution chosen. Some factors the university considered when selecting lenders for their list would never be considered by students and parents. But ultimately these factors benefit the borrower.

Id.

151. Illegal Inducements and Preferred Lender Lists, FINAID.ORG, http://www.finaid.org/educators/illegalinducements.phtml (last visited Apr. 11, 2008).

152. *Id.*

153. Att'y Gen. of the State of N.Y., In the Matter of SLM Corp., Assurance of Discontinuance, 4 (Apr. 11, 2007), http://www.oag.state.ny.us/family/student_lending/SLM%20Corporation%20Assurance.pdf; *see also* Illegal Inducements and Preferred Lender Lists, *supra* note 151 (stating that "[t]he first lender on a preferred lender list often gets 75% to 95% of the college's student loan volume.").

sinister is at work. Because placement on the lists can result in significant increases in market share, competition for such placement is intense and lenders on some occasions provided institutions various prohibited inducements in exchange for inclusion.[154]

In one instance that received extraordinary attention due to the egregious nature of the allegations, a large public institution systematically placed lenders at the top of the preferred lender list based upon lender inducements. Internal correspondence recovered from one lender "show[ed] that the office and its leadership prioritized lender treats over competitive pricing and borrower benefits in deciding which lenders would be at the 'top of the preferred lender list.'"[155] In formulating the institution's preferred lender list, lenders who provided inducements were given a higher "visibility" score, one of the criteria used for selecting preferred lenders.[156] An internal document described the visibility score as one based on the number of benefits provided to the staff, which the financial aid office tracked on a computer spreadsheet.[157] The benefits included birthday parties, golf tournaments, meals, and bottles of wine and alcohol.[158]

Other examples exist of lenders offering inducements in an effort to secure or maintain placement on preferred lender lists. One lender sponsored a school event at a cost of $50,000, and a representative of the lender later asked for the school to place it on its preferred lender list in return.[159] As previously noted, one lender maintained the top spot on an institution's preferred lender list while the school's financial aid director owned a financial stake in the company.[160] Additional examples exist of conversations in which inducements, such as professional sporting event tickets, meals, and trips, were juxtaposed with conversations of placement on preferred lender lists.[161] Such arrangements have the potential to improperly influence selection criteria for preferred lender lists to the detriment of borrowers relying on the information as an impartial assessment of the financial aid office's research.

The HEA and regulations promulgated thereunder did not address preferred lender lists prior to the recent reforms.[162] The reforms address this area somewhat

---

154. Illegal Inducements and Preferred Lender Lists, *supra* note 151 ("There is a lot of competition among lenders in the school relations channel as they try to convince the colleges to add them to the college's preferred lender list.").

155. REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 84, at 12.

156. *Id.* at 13.

157. *Id.*

158. *Id.* at 12–14.

159. SECOND REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 115, at 4.

160. REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, *supra* note 84, at 35.

161. *Id.* at 15–19. The report stated that marketing expenditures were "out of control" and pointed to lender expenditures such as a $1500 meal at Outback Steakhouse, a $21,142 sponsorship of a scholarship luncheon, and a $5000 sponsorship of a golf outing. *Id.* at 14–16.

162. The HEA and regulations promulgated thereunder contained a blanket restriction on the limitation of borrower choice but did not address preferred lender lists with any specificity. *See*

uniformly by requiring various disclosures from lenders and institutions that participate in preferred lender arrangements. The House HEA amendments mandate that all institutions prepare and submit to the Department an annual report for each lender on its preferred lender list.[163] This detailed report must contain information about the loans offered by a lender to students of that institution, including the following:

1. Interest rates, fees, and repayment terms;
2. Forbearance or deferment options;
3. The annual percentage rate of the loan; and
4. The average amount borrowed and average interest rates of similar loans provided to students of the same institution.[164]

The institution must also provide an explanation of why the terms and conditions of each type of loan offered under its preferred lender agreement are beneficial to borrowers.[165] It must make the report available to the public and, in particular, to students or prospective students and their parents.[166] Preferred lender agreements also fall within the auspices of the educational loan arrangement provision of the Senate amendments.[167] The Senate bill would require disclosures similar to those of the House version utilizing a similar model disclosure format and would require the listing of a minimum two to three lenders depending on the program.[168]

The regulations promulgated by the Department impose an additional series of requirements on institutions choosing to provide a preferred lender list.[169] These requirements include the following:

1. The regulations require an institution to place at least three unaffiliated lenders on a preferred lender list;
2. The regulations prohibit institutions from placing lenders on a preferred list that have offered improper inducements to the institution in exchange for placement on the list;

---

34 C.F.R. § 682.603(e) (2006).

163. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 153 (2007). The annual report must be submitted using a model disclosure form that will be developed by the Department. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. See *supra* notes 126–129 and accompanying text, for more information about Senate bill provisions relating to educational loan arrangements.

168. Higher Education Amendments of 2007, S. 1642, 110th Cong. §§ 152–153, (2007). On a related note, the competing federal Direct Loan Program does not require that there be any additional lenders aside from the federal government. *Id.*

169. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 32,410, 32,425 (proposed June 12, 2007) (to be codified at C.F.R. pts. 674, 682, 685). Some argue that the Department lacks the authority to regulate in this area because it is not addressed in the HEA, which is the enabling legislation giving the Department the authority to regulate. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 61,986 (Nov. 1, 2007) (to be codified at 34 C.F.R. pts. 674, 682, 685).

3. The regulations require an institution to make certain disclosures to borrowers as part of the list. These disclosures include the method used for selecting lenders, comparative information about the benefits and interest rates provided by the lenders, and a "prominent statement" informing the borrower that they are not required to select a lender from the list.[170]

Collectively, the enacted and pending preferred lender list reforms will likely increase transparency, ensure borrowers access to impartial information, and prevent mistrust of the lists and the financial aid offices that produce them.[171]

Despite these benefits, the federal reform effort in the area of preferred lender lists resulted in several negative consequences for borrowers. Most notably, the changes decrease efficiencies in student lending and increase costs to students. As previously mentioned, institutions gain efficiencies in administrative costs by working with a limited number of lenders. For instance, varying lender certification processes and institutional administrative systems make interfacing with too many lenders expensive and complex.[172] Similarly, "[c]ollege [and university] financial aid offices . . . have limited staff available to evaluate the hundreds of lenders and offerings that may change many times a year."[173] Forcing colleges and universities to deal with a certain minimum amount of lenders will increase such administrative costs, which will be passed on to students in the form of higher tuition.

In addition to administrative costs, compliance costs are likely to increase sharply for institutions, at least in the short-term. The Department estimates that changes to the preferred lender regulations alone will increase the compliance burden on institutions by 141,625 hours.[174] This estimate may be conservative when factoring in the legal uncertainty caused by conflicting reform measures and the depth and breadth of the federal reforms. Therefore, while the preferred lender reforms establish an increased level of clarity in some respects, they also have the effect of increasing costs for institutions that will be passed on to students in the form of higher tuition rates.

Additionally, the preferred lender list reforms place an over-emphasis on certain

---

170. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. at 32,426. The House bill also would require lenders to make certain disclosures. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. §§ 151–153 (2007). Fundamentally, lenders must disclose information on the model disclosure form to borrowers. *Id.* The lender is required to submit this report to the House of Representatives and Senate committees related to education and also make them available to institutions, other lenders, and the public. *Id.* Additionally, the statute prevents lenders from providing loans to students attending institutions with which the lender has a preferred lender arrangement "until the covered institution has informed the student or parent of their remaining options for borrowing" under the FFEL Program. *Id.* § 152. Furthermore, lenders must certify on an annual basis that any preferred lender relationships satisfy the provisions of the statute. *Id.* §§ 151–152.

171. *See* Chitty, *supra* note 7.

172. Illegal Inducements and Preferred Lender Lists, *supra* note 151.

173. *Id.*

174. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed Reg. at 32,433.

factors while failing to adequately reflect the importance of others. For instance, the model disclosure requirements essentially espouse a "who has the lowest rate today" line of thinking by prominently featuring interest rate disclosures.[175] While such disclosures are valuable, they fail to reflect a complete picture of the financial aid office's research into the lending industry. In other words, the disclosures de-emphasize important factors such as the overall quality of a lender's product offerings, the value of customer service, the technologies utilized, and the longevity and stability of the lender.[176]

Furthermore, the distrust that investigations and the media frenzy created in financial aid offices, and preferred lending lists in particular, causes students to seek advice from other, less informed sources. One source is direct-to-consumer advertising from lenders, which in some cases may contain misleading information or improper incentives.[177] Another source is third party student loan comparison sites, which purport to impartially provide prospective students with data about student loan offerings.[178] The objectivity of these services is questionable, however, because revenue models for the services are based on fees from lenders and advertising campaigns.[179] The reform measures thus undercut the superior and more holistic judgment of financial aid offices, which are better positioned to analyze lending options and consider student needs. Taken together with the aforementioned unintended consequences, these shortcomings offset many of the benefits of preferred lender list reforms.

C. Enforcement

In addition to providing more clarity on inducements and preferred lender lists, the House amendments and regulations provide the Department with additional enforcement mechanisms to ensure transparency and prevent conflicts. As a threshold issue, the House legislative proposal would require that program participants comply with HEA provisions as a condition to receiving federal funds.[180] The amendment also would enable the Department to penalize lenders and institutions that violate the HEA. Specifically, lenders would face the limitation, suspension, or termination of participation in the program for violations of the statute while institutions could face civil penalties up to $25,000 for

175. See *supra* notes 163, 170 and accompanying text, for more information on disclosure requirements.

176. By placing an emphasis on the disclosure of certain limited factors, the reforms necessarily fail to account for other factors that financial aid offices consider. See generally *Guide to Developing a Preferred Lender List*, *supra* note 9, for a discussion of such factors.

177. *See* Press Release, Andrew M. Cuomo, *supra* note 68. Cuomo claims a "spike in misleading and deceptive practices in the direct marketing segment of the student loan industry" following government reforms of preferred lender arrangements. *Id.*

178. Andy Guess, *'Consumer Reports' for Student Loans*, INSIDE HIGHER ED, Oct. 22, 2007, http://www.insidehighered.com/news/2007/10/22/preferred.

179. *Id.*

180. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 156, (2007).

violations.[181]

Aside from these threshold changes, the implementing regulations would make three changes to improve enforceability of the inducement provisions. First, and most significantly, the rules would create a rebuttable presumption that any prohibited payment or activity by the lender is done for the purpose of securing additional FFEL Program loan volume.[182] This change places the burden on the lender to prove that it undertook a specific activity or made a payment for a purpose other than to secure additional loan volume.[183] Second, the new enforcement regulations would disqualify from guaranty any loans obtained through the program by improper inducement.[184] In other words, any improperly obtained loan would not be eligible for federal subsidy payments under the FFEL program. Third, the proposed regulations would clarify and expand the borrower's legal rights.[185] The most significant advance in borrower's rights is the application of the Federal Trade Commission's Holder Rule, which subjects the lender to any of the claims or defenses that the borrower may have against the institution to all loans under the FFEL Program.[186] Collectively, these changes have the potential to lead to more effective oversight of the FFEL Program if utilized appropriately and consistently by the Department.

While effective oversight serves the long-term interest of the FFEL Program, many lenders and institutions expressed concern with the use of a rebuttable presumption standard for determining whether a particular activity qualifies as an inducement. Specifically, respondents to the proposed regulations "argued that the use of a rebuttable presumption [is] inconsistent with the statutory requirement that the [Department] determine that an inducement was offered in order to secure loan applications."[187] The Department defends this standard by arguing that the rebuttable presumption does not relieve the Secretary of Education's burden to show that a lender offered an inducement for the purpose of securing additional loan volume.[188] Instead, once the Department identifies a prohibited inducement, it merely places the burden on the lender to show that the inducement was not offered for the purpose of securing loans.[189]

---

181. *Id.*

182. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 32,410, 32,420 (proposed June 12, 2007) (to be codified at C.F.R. pts. 674, 682, 685).

183. *Id.* See *infra* notes 187–194 and accompanying text, for a discussion of how this is a controversial provision of the new regulations.

184. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. at 32,420.

185. *Id.*

186. *Id.*

187. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 61,960, 61,976 (Nov. 1, 2007) (to be codified at 34 C.F.R. pts. 674, 682, 685).

188. *Id.* Several opponents also made the argument that the Department exceeded its regulatory authority. The Department argued that the establishment of a rebuttable presumption is within its legal authority. *Id.*

189. *Id.*

Notwithstanding the Department's argument, the use of a rebuttable presumption increases uncertainty for lenders and institutions engaged in often-complex relationships. As a result of the broad definition of prohibited inducements and the rebuttable presumption standard, "a number of activities would automatically be presumed by the Department to be a violation."[190] As an example, National Association of Student Financial Aid Administrators (NASFAA) Chairman Michael Bennett points to the wide range of philanthropic activities engaged in by lenders, predominantly for reasons other than securing additional loan volume.[191] Even for donations unrelated to securing loan volume, a lender could be faced with the task of defending its actions at great expense.[192] This automatic presumption waters down the statute's quid pro quo requirement and has the potential to unfairly restrict lender activities on campus related to the creation of goodwill or general marketing.[193]

Additionally, no rule or legislative enactment will per se guarantee uniform oversight and enforcement in the FFEL Program. The current environment of controversy may actually increase the odds of inconsistent enforcement as external pressures may cause the Department to overreact by "reflexively imposing large administrative fines against our nation's colleges or by unreasonably limiting, suspending or terminating . . . lenders."[194] In order to give meaning to reforms, the Department must issue timely guidance, ensure effective oversight, and enforce guidelines fairly and consistently. Lenders and institutions have a right to the certainty that the program previously lacked in determining how to structure relationships with institutions that will provide the maximum benefit to borrowers.

190. *Id.*

191. Posting of Michael Bennett to National Chair's Blog, http://nasfaachair.org/blog/?p=9 (Nov. 27, 2007, 05:00 EST).

192. *See id.*

193. Jonathan Vogel, *What's Ahead on Student Loans in 2008*, INSIDE HIGHER ED, Jan. 3, 2008, http://www.insidehighered.com/views/2008/01/03/vogel.

194. *Id.*

IV. ENSURING COMPLIANCE

Although the revised regulations do not take effect until July 2008 and the final contents of any HEA amendment is uncertain, the reform proposals provide a good roadmap for institutions to implement reform.[195] Specifically, institutions can guard against conflict and prepare for reforms to take effect by comprehensively reviewing current practices, updating financial aid office standards, and establishing protocol for periodic review. In some instances the recent reforms facilitate these processes by laying out specific standards or model processes to accomplish these tasks. In others, the reforms create new problem areas that institutions must overcome.

The process should begin with a comprehensive review of current practices. As a starting point, institutions should review existing contracts and arrangements with lenders. This review should ensure that these relationships comply with updated reform measures and do not create the appearance of conflicts of interest.[196] Similarly, institutions should question financial aid office employees to obtain any information about existing or potential conflicts of interest.[197] Mechanisms should be established for the continuous review for conflict in these areas and institutions should put disclosure and approval procedures in place to deal with potential conflicts.

Following a comprehensive review of practices, institutions should ensure that all standards meet or exceed updated guidelines. The primary area of importance in this respect is the financial aid office code of conduct. As a starting point, the code of conduct should comply with any applicable state and federal laws and regulations. Importantly, the integrity provisions of the House HEA amendments would mandate that schools develop such codes of conduct for officers,

---

195. Congress was working towards a March 31, 2008 deadline to reconcile the differences between House and Senate versions of the bill, but significant differences remain. Nathan C. Strauss, *Bush Criticizes Updated Higher Ed Bill*, HARV. CRIMSON, Feb. 12, 2008, *available at* http://www.thecrimson.com/article.aspx?ref=521841. The possibility of a veto from the White House looms as well, with President Bush opposing significant portions of the House bill. Specifically,

> the Administration strongly opposes House passage of H.R. 4137, the "College Opportunity and Affordability Act of 2007," as reported by the Committee on Education and Labor, because it would restrict the Department of Education's authority to regulate on accreditation; create nearly four dozen new, costly, and duplicative Federal programs; condition receipt of Federal grant funding on tuition price; and restrict the Department's ability to evaluate and effectively manage Upward Bound and other TRIO programs.

OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: THE COLLEGE OPPORTUNITY AND AFFORDABILITY ACT OF 2007, FISCAL YEAR 2008 (Feb. 6, 2008), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr4137-r.pdf. Despite this legal uncertainty, the various reform measures are a good indication of the federal government's approach to eliminating conflicts of interest in the FFEL Program and collectively provide a good basis for institutional reforms. *Id.*

196. Illegal Inducements and Preferred Lender Lists, *supra* note 151 (containing the section entitled *Tips for Avoiding Conflicts of Interest*).

197. *Id.*

employees, and agents.[198] The amendment would require that institutions publish the code on the institution's website and that it be designed in accordance with the statute to prohibit conflicts on interest.[199]

More specifically, the code should be comprehensive, yet well written and easy to understand. It should contain as many bright-line rules as feasible and avoid complicated legalese.[200] It should also afford due process protections and "clearly identify the types of conduct proscribed, the disclosures required, the procedures observed to investigate complaints, and the sanctions used to punish violations."[201] Although it may be impossible to predict with certainty whether the code of conduct requirement will make it into the final bill, it provides a good model and is indicative of Congress' expectations for compliance.[202]

Additionally, institutions should allocate adequate resources for training and enforcement related to the code of conduct. The code will play only an insignificant role in preventing conflicts of interest if colleges and universities fail to properly train employees on compliance with the code's mandates.[203] Failure to do so could also violate federal law as the House HEA amendments would

198. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 156 (2007).

199. *Id.*

200. Vincent R. Wilson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 33 (2008). "Whenever possible, [codes of conduct] should contain bright-line rules and never three-armed lawyer gobbledygook–that is, on the one hand this, on . . . the other hand that, and on the third hand something else." *Id.*

201. *Id.*

202. Institutions may also look to other sources in an effort to develop a more comprehensive code of conduct. One such source is the College Loan Code of Conduct, which the New York Attorney General's office created in response to its investigation of student lending practices. Press Release, Andrew M. Cuomo, N.Y. State Att'y Gen., Office of N.Y. State Att'y Gen., College Loan Code of Conduct (2007), *available at* http://www.oag.state.ny.us/family/student_lending/College%20Code%20of%20Conduct.pdf. In many respects, the provisions of this code overlap with the statutory provisions of the federal law; however, the New York code goes a bit further and serves as a good supplement to the federal requirements. The code establishes prohibitions on revenue sharing, gifts and trips, and advisory board compensation. *Id.* It also requires that institutions make certain disclosures to students and parents. *Id.*

An additional resource is the code of conduct published by the National Association of Student Financial Aid Administrators (NASFAA). NAT'L ASS'N OF STUDENT FIN. AID ADM'RS, NASFAA'S STATEMENT OF ETHICAL PRINCIPLES AND CODE OF CONDUCT FOR INSTITUTIONAL FINANCIAL AID PROFESSIONALS (2007), *available at* http://www.nasfaa.org/subhomes/mediacenter/nasfaacodeofconduct.pdf. This code establishes ethical principles and a code of conduct for financial aid employees. The ethical principles outlined in the guide include providing students and parents with useful information, protecting the privacy of student records, ensuring equity, and committing to a high level of ethical behavior. *Id.* The code of conduct establishes professional standards for financial aid employees. *Id.* Specifically, the code prohibits financial aid employees from acting in their own interests, acting contrary to law or the interests of the student, and from accepting anything "of other than nominal value from any entity." *Id.* Additionally, the code implores that employees maintain objectivity when dealing with any entity related to the making of student loans. *Id.* There is also a disclosure requirement that requires the employee to disclose to the institution any involvement in any entity involved in student aid. *Id.*

203. Wilson, *supra* note 200, at 40.

establish training and compliance requirements. The integrity provisions require institutions to "administer and enforce [the] code of conduct . . . by, at a minimum, requiring all of its officers, employees, and agents with responsibilities with respect to educational loans to obtain training annually in compliance with the code."[204] In the current dynamic environment, exceeding this minimum requirement by requiring more frequent training places a relatively low administrative burden on the institution and will ensure that employees are aware of all changing laws and regulations affecting their duties.

Colleges and universities should also ensure compliance with reform measures by performing a comprehensive review of procedures for developing preferred lender lists.[205] Appropriately developed and researched lists "can serve as a source of unbiased information that facilitates rather than limits informed borrower choice."[206] To guard against conflicts of interest, preferred lenders lists should be developed at arms-length according to statutory and regulatory guidelines, the merits of the lender's proposals, and an objective system of evaluation focused on benefits to the borrower.[207]

Developing an objective system of review essentially depends on two factors: objective criteria for lender inclusion on the preferred lender list and objective decision-making. First, institutions should develop a uniform procedure for evaluating lenders. The evaluations should be based on factors such as lender stability, the quality of the lender's products, customer service ratings, and operational standards.[208] Institutions should weight and score these criteria to arrive at a total score for each lender and choose at least three unaffiliated lenders that score highest in evaluations.[209] When published, the list should contain the disclosures required by law in an easy to read, accessible format.

Additionally, institutions can ensure objective decision-making throughout the process by spreading out the authority to make decisions regarding the preferred lender lists. This may be accomplished by appointing a panel composed of several people who will be tasked with developing the selection criteria and methods and, ultimately, the lenders that will be included on the preferred lender list. For instance, one institution utilizes a nine-member panel to review and rank proposals from different lending companies based upon pre-determined criteria.[210] The panel should review the list annually to ensure that the selection criteria and methods are adequate and that the lenders on the preferred lender list represent the best options for borrowers.

Even after adopting such changes, institutions should strive for continuous

---

204. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 155 (2007).

205. *See Guide to Developing a Preferred Lender List*, *supra* note 9, at 8.

206. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 61,960, 61,987 (Nov. 1, 2007) (to be codified at 34 C.F.R. pts. 674, 682, & 685).

207. *See Guide to Developing a Preferred Lender List*, *supra* note 9, at 9–10.

208. *See id.* at 2–3.

209. *See id.* at 8.

210. Chitty, *supra* note 7.

improvement of processes and procedures. The regulatory environment is uncertain and there is no way to determine what will ultimately emerge from pending legislation.[211] Institutions should monitor developments in this area closely and ensure that codes of conduct and preferred lender practices are in compliance with current federal and state law and Department regulations. Implementing these practices will ensure that the process is transparent and will allow financial aid offices to continue serving vital advisory roles for students faced with the difficult task of financing higher education.

CONCLUSION

Financial aid offices play a critical role in improving access to higher education by helping students navigate through the financial aid process to secure the necessary funding to attend colleges and universities. Transparency and objectivity are both central components in ensuring that students are able to properly utilize this resource. While the regulatory and legislative reform measures facilitate these goals, they are poorly conceived in many respects. Specifically, the reforms create legal uncertainty and ultimately harm borrowers by creating higher costs, impediments to access, instability in the private lending industry, and a reduction in the quality of product offerings and services. The frenzied nature of the reform effort also undermined trust in an entire profession based upon the misdeeds of a handful of people. A more thoughtful and collaborative government response could have avoided such problems.

These shortcomings underscore the need for further study and policy analysis of the FFEL Program framework, and particularly the value of public-private relationships. The goal of keeping ethical lines clear is indeed commendable, but more emphasis should be placed on a balanced support for the longstanding, proven public-private partnership approach, which yields reasonable resources for financing higher education costs at relatively modest taxpayer expense. In the interim, institutions can do their part by thoroughly reviewing policies and procedures, revising practices to comply with reforms, and investing appropriate resources in training and continuous improvement. Those institutions that are committed to fostering public-private partnerships that are beneficial to borrowers will be in the best position to ensure greater access to higher education and restore credibility to the valuable role that financial aid offices serve for borrowers.

211. *See supra* note 195 (discussing the legal uncertainty surrounding pending reform proposals).

EXPLORING STUDENT-ATHLETE COMPENSATION: WHY THE NCAA CANNOT AFFORD TO LEAVE ATHLETES UNCOMPENSATED

AARON BROOKS* & DAVID DAVIES**

INTRODUCTION

The core purpose of the National Collegiate Athletic Association ("NCAA"), founded in 1906, is to regulate competition among the more than one thousand colleges and universities who voluntarily submit to its authority[1] and to "integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount."[2] Therefore, according to its mission statement, the NCAA is, foremost and fundamentally, a guardian of the educational experience of the students who attend its member institutions and choose to participate in intercollegiate athletics. To guard against the trappings of professionalism, which presumably would adversely impact this educational experience, the NCAA requires its athletes to remain amateurs in order to participate in collegiate sports.[3] The NCAA defines an amateur athlete as "one who participates in physical sports only for the pleasure and the physical, mental,

* Aaron Brooks received his bachelor's degree from the University of Central Arkansas in 2005, and his law degree from Harvard Law School in 2008. He will be clerking for the Fourth Circuit Court of Appeals during the 2008–2009 term.

** David Davies is a former Assistant Attorney General for the State of Arkansas, who now has a civil appellate practice in central Arkansas. He received his bachelor's degree from the University of Tulsa in 1996, and his law degree from the University of Arkansas in 2001.

1. NCAA, 2006 NCAA MEMBERSHIP REPORT 24 (2006), *available at* http://www.ncaa.org/library/membership/membership_report/2006/2006_ncaa_membership_report.pdf [hereinafter MEMBERSHIP REPORT].

2. NCAA, Our Mission, http://www.ncaa.org/wps/portal (follow the "About the NCAA" hyperlink; then follow the "Overview" hyperlink; then follow the "Our Mission" hyperlink) (last visited Feb. 16, 2008).

3. NCAA, 2006–2007 NCAA DIVISION I MANUAL § 2.9 (2006), *available at* http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf [hereinafter NCAA MANUAL]; *see also* Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS, Jan. 3, 2000. However, in 1974 the NCAA modified its rules to allow student-athletes to compete as a professional in one sport while retaining their amateur status in another. *Id.*

moral and social benefits directly derived therefrom."[4] This definition of the collegiate athlete was written in 1916 and, to be sure, is both noble and honorable—safeguarding our students' educational experience, protecting them from exploitation, insuring that their pleasurable and beneficial athletic endeavors are unsullied by crass commercialism and profit motives—purposes that should be lauded and treasured. Yet, today's NCAA has become the very thing from which it originally sought to protect student-athletes—a profit-driven institution sanctioning a win-at-all-cost mentality that undermines the educational experience of its student-athletes.[5] Indeed, the NCAA places greater restrictions on student-athletes' conduct and greater demands on their time than are imposed on the rest of the student body while simultaneously exploiting their talents to reap an ever-increasing economic windfall.

The purpose of this Essay is to, in effect, call the NCAA back to its roots—to exhort it to protect the best interests of its student-athletes and, more specifically, to raise the maximum allowable athletic scholarship for student-athletes to a level which covers the actual costs of attending college. In order to accomplish these goals, Part I will look at the economic reality of the present system, Part II will explain the demands and restraints placed on a modern-day student-athlete, Part III will explore the argument for maintaining the status quo and set forth the reasons why change is a necessary and just result, and Part IV will advocate a workable solution.

I. THE ECONOMIC REALITY OF MODERN COLLEGE ATHLETICS

The world of intercollegiate athletics has changed dramatically since the founding of the NCAA. Early athletes presumably never envisioned stadiums filled with over 100,000 fans, coaches making four million dollars a year, athletes spending as many as fifty hours a week in sport-related activities, and media outlets devoted solely to the coverage of the endeavors of these athletes who the public is told participate in their sports simply for the pleasure and health benefits of the activity.[6] But ninety-one years later, this is our reality—pleasure and health of the athlete have been replaced by televised games, filled luxury boxes, alumni who express their satisfaction in cash donations, and the hope of future professional fortunes as the approved motivations for playing college and university sports.[7] The NCAA, instead of functioning as the protector of its

4. Hawes, *supra* note 3.

5. *See* Frank P. Tiscione, *College Athletics and Workers' Compensation: Why the Courts Get It Wrong in Denying Student-Athletes Workers' Compensation Benefits When They Get Injured*, 14 SPORTS LAW. J. 137 (2007).

6. *See* Michael McCarthy, *ESPN to Ride College Football Wave with Daily 'Live' Show*, USA TODAY, Feb. 26, 2007, at 5C; *see also Polar Frog Digital Inks Deal for College Sports Programming*, BUS. WIRE, July 19, 2007, http://www.tmcnet.com/usubmit/2007/07/19/2796507.htm; Press Release, NCAA, Presidential Task Force Calls for Moderation of Budget Growth Rate, Integrating Athletics Within Academics (Oct. 30, 2006), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2006/october/20061030_presidential_task_force_rls.html.

7. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate*

student-athletes, more often than not appears to be most concerned with protecting the highly marketable image of college and university athletics.[8]

And so, even as discussions of the Bowl Championship Series ("BCS")[9] ratings system dominate water-coolers around the country and "March Madness" draws over 100 million viewers each year,[10] even as NCAA athletics has become a multi-billion dollar industry that pulses with corporate sponsorship, luxury boxes, and merchandising riches, even as the NCAA operates at a $35 million surplus, the players—the product on the backs of which this entire industry rests—are held by the NCAA to the strictures of "amateurism."[11] In fact, a typical Division I football player at a BCS school is permitted to receive less financial aid for his athletic gift than a gifted musician or chemist may receive from his school.[12] This reality leads to a rather curious result: even as schools use the success of these players to reap giant donations from boosters which greatly impact the economic viability of the entire college or university, student-athletes are still forced to pay for basic needs out of their own pockets in order to protect their "amateur" status—irrespective of whether an increase in their stipend would enhance their educational experience by increasing their quality of life and reducing the financial stress that many of them bear.[13]

Current NCAA guidelines mandate that the maximum allowable scholarship grant available to a student-athlete, called a "grant-in-aid," amounts to no more than tuition and fees, room and board, and required course-related books.[14] In comparison, a student who excels in another discipline within the general student body is allowed to receive scholarships up to the actual cost of attendance. The difference between the two packages is estimated to be around $2000 per school year.[15] Although this seems facially inequitable, NCAA President Myles Brand "could not be more opposed" to any change in the system.[16] He points to the

---

Athletic Association, 8 VAND. J. ENT. & TECH. L. 211, 276 (2006).

8. *Id.*; *see also* Eric Thieme, *You Can't Win 'Em All: How the NCAA's Dominance of the College Basketball Postseason Reveals There Will Never Be an NCAA Football Playoff*, 40 IND. L. REV. 453, 471 (2007).

9. Bowl Championship Series, http://www.bcsfootball.org/bcs/football (last visited Feb. 17, 2008).

10. Stacy Sterna, *March Madness Gets Contagious*, THE DAILY TITAN, Mar. 23, 2006, *available at* http://media.www.dailytitan.com/media/storage/paper861/news/2006/03/23/Sports/March.Madness.Gets.Contagious-1714759.shtml.

11. *Dollars, Dunks and Diplomas* (PBS television broadcast July 9, 2001) (transcript available at http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html.); *see also* Chris Isidore, *College Sports' Fuzzy Math*, CNNMONEY.COM, Nov. 10, 2006, http://money.cnn.com/2006/11/10/commentary/sportsbiz/index.htm.

12. Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 236 (2004).

13. Michael Aguirre, *From Locker Rooms to Legislatures: Student-Athletes Turn Outside the Game to Improve the Score*, 36 ARIZ. ST. L.J. 1441, 1458 (2004).

14. NCAA MANUAL, *supra* note 3, § 15.02.5.

15. Aguirre, *supra* note 13, at 1458.

16. Dr. Myles Brand, *Sustaining the Collegiate Model of Athletics*, NCAA, Dec. 10, 2003, http://www.ncaa.org/releases/MylesBrand/20031210sportsbus.html.

amateurism of the student-athlete as the primary source of his resistance.[17]

The NCAA claims parity and education as the dual goals of amateurism rules, but their impact runs much deeper.[18] In fact, Dr. Brand credits amateurism as the "defining difference between the collegiate and professional models of sports."[19] One of the purposes of the NCAA is to "retain a clear line of demarcation between intercollegiate athletics and professional sports,"[20] and this demarcation is important because "student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[21] It is difficult to imagine a more ironic statement from the President of an organization whose operating budget in fiscal year 2006 was over $525 million.[22] Yet, Dr. Brand fails to see the irony. Instead, he attempts to reconcile the largess of the NCAA's revenue with the rigidity of his stance towards increasing the compensation available to student-athletes by neatly partitioning the two issues: "Amateurism has never been about the size of budgets or salaries. It isn't about facility expansion, or skyboxes or commercialism. Amateurism is about why student-athletes play sports. And that, we should never change."[23]

Dr. Brand fails to address, however, why raising the athletic scholarship available to a student-athlete to cover actual costs of attending college or university would undermine the integrity of "why student-athletes play sports." Certainly this omission seems callous in the face of the robust economic reality of NCAA member institutions. At a time when college and university sports generate $60 billion a year[24] and individual athletes can generate millions of dollars for their schools through television revenues and merchandise sales,[25] Dr. Brand's comments seem, at best, hollow and aloof. College and university coaches routinely make over $1 million per year;[26] bowl games will pay participating schools $2.2 billion over the next decade;[27] media outlets like CBS and ESPN make huge advertising profits during college and university athletic events;[28]

---

17. *Id.*

18. Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221, 243 (2005).

19. Dr. Myles Brand, President, NCAA, State of the Association Speech (Jan. 8, 2005) (transcript available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/january/20050108_soa_speech.html).

20. NCAA MANUAL, *supra* note 3, § 1.3.1.

21. *Id.* § 2.9.

22. MEMBERSHIP REPORT, *supra* note 1, at 33.

23. Brand, *supra* note 19.

24. *See* Hawes, *supra* note 3.

25. Tim Sullivan, *That Appearance of Impropriety*, UNION-TRIB. (San Diego), Apr. 25, 2006, at D1.

26. Of the 119 Division I college football coaches in the country, 42 of them make over $1 million per year. Jodi Upton & Steve Wieberg, *Million Dollar Coaches Move Into Mainstream*, USA TODAY, Nov. 16, 2006, at 1A.

27. Outback Bowl, *College Bowl Games… Where Everybody Wins*, http://www.outbackbowl.com/facts/collegegames.html (last visited Apr. 12, 2008).

28. CBS earned between $9 million and $10 million from online advertising alone during the 2007 NCAA Men's College Basketball Tournament. Stuart Elliott, *A CBS Take on the YouTube Madness*, N.Y. TIMES, Feb. 28, 2007, at C4.

Division I-A member schools bring in an average of $1.2 million in profit;[29] and the NCAA brought in $560 million in revenue during the 2005–2006 fiscal year.[30] Thus, given the flourishing economic engine that is NCAA athletics, a troubling reality emerges: when the NCAA tries to reconcile its stated goals of maintaining amateurism and academic integrity with the economic and entrepreneurial activities of college and university sports, the players bear the burden.[31]

II. DEMANDS AND RESTRAINTS PLACED ON STUDENT-ATHLETES

Student-athletes' lack of compensation does not stem from a lack of commitment—involvement in a college and university sport entails enormous sacrifice. Although the NCAA presumably limits intercollegiate sports to twenty hours of athletically-related activity per week during the playing season, a player's time commitment is often much higher.[32] For example, during the fourteen weeks of the football season players consistently spend more than fifty hours a week on football related activities.[33] Away games necessitate an entire weekend of activities; and outside of practice, there is game film to watch and injuries to treat.[34] On top of this, players must take a full academic schedule (a twelve credit minimum), attend class, and devote at least ten hours per week of mandatory study hall time.[35]

The sacrifice demanded of football players extends into the off-season as well.[36] Coaches are able to get around time restrictions by imposing "optional" workout sessions and player-initiated practices.[37] Realistically then, the off-season entails several required workouts per week in addition to regular individual workouts. Also, the players must attend team meetings each day and engage in six weeks of grueling spring practice.[38] Most Division I programs require their players to remain on campus during the summer and early morning weightlifting sessions are

29. Press Release, NCAA, College Sports: Profits or Losses? (Nov. 19, 1996), *available at* http://www.ncaa.org/releases/miscellaneous/1996/1996111901ms.htm. It is important to note, however, that the athletic department profit cited includes institutional support. If this support is removed from the budget, the result is a $237,000 deficit.

30. MEMBERSHIP REPORT, *supra* note 1, at 30.

31. Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 31 (1996).

32. NCAA MANUAL, *supra* note 3, § 17.1.5; *see also* Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 835 (2006) (estimating that the average Division 1 college football player invests 40-50 hours per week in football related activities).

33. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 99 (2006).

34. *Id.* at 100.

35. *Id.* at 101.

36. NCAA MANUAL, *supra* note 3, § 17.1.5.2(a) (limiting student-athletes to eight hours per week of athletically related activities during the "non-playing season," with no mandatory events during the summer).

37. McCormick & McCormick, *supra* note 33, at 100.

38. *Id.* at 102.

not uncommon.[39] During the two weeks of preseason camp, players are effectively on duty from 6:30 a.m. until 10:00 p.m. for six days a week.[40] Unquestionably, student-athletes contribute a significant amount of time to their respective sports.

Student-athletes sacrifice financially as well. In addition to limiting institutional funding, the NCAA greatly restricts the ability of student-athletes to earn money from other sources.[41] An individual's likeness can only be used for charitable or educational activities, and it cannot promote commercial ventures of any nonprofit organization, no commercial agency can be significantly involved, and the student may only receive the "actual and necessary" expenses, such as travel and food, required for the agency to receive their likeness.[42]

Also, a student-athlete is not allowed to accept any remuneration or permit the use of his name or picture to advertise, recommend, or promote directly the sale or use of a commercial product or service of any kind.[43] In fact, even if a student's name or picture is used to promote commercial items without his knowledge or consent, the student-athlete is required to take affirmative steps to stop such activity in order to retain his eligibility.[44] Interestingly, the NCAA does not allow this concern with noncommercialism and unjust exposure to affect its own interests—the name or picture of an enrolled student-athlete can be used to promote NCAA championships, as well as other NCAA events, activities, and programs, even though the NCAA profits financially from these ventures.[45]

Additional NCAA regulations further highlight the tension inherent in protecting athletes while promoting NCAA interests. A student-athlete is allowed to appear at media programs throughout the season, thereby promoting his team and college or university, but he is not allowed to receive remuneration and can only receive expenses.[46] A student-athlete's apparel during competition cannot bear anything except the manufacturer's normal label or trademark, which cannot exceed 2 ¼ square inches in area, even though college and university arenas are routinely filled with corporate advertisements and sponsors.[47] Alumni and donors are strictly prohibited from buying gifts or even meals for players, but coaches' salaries and benefits are provided in large part by donations from these same boosters.[48] Seemingly, the only time the NCAA lacks enthusiasm for the purity and amateurism of college and university sports is when their member institutions, but not the players, stand to profit.

---

39. *Id.*
40. *Id.*
41. *See generally* NCAA MANUAL, *supra* note 3, §§ 12.5.1–12.5.7.
42. *Id.* § 12.5.1.1.1.
43. *Id.* § 12.5.2.1.
44. *Id.* § 12.5.2.2.
45. *Id.* § 12.5.1.1.1.
46. *Id.* § 12.5.3.
47. *Id.* § 12.5.4.
48. Ian Lind, *UH May Be Breaking State Ethics Laws*, STAR-BULLETIN (Honolulu), May 21, 1997, *available at* http://starbulletin.com/97/05/21/news/story2.html.

III. THE ARGUMENT FOR MAINTAINING THE STATUS QUO AND THE REASON THAT CHANGE IS NECESSARY AND JUST

Those in favor of the current financial landscape of intercollegiate athletics advance several justifications for their position. The first concerns equitable distribution within the general student body. With athletes already receiving an increasingly expensive education for free, how can they possibly seek more money? After all, the vast majority of students receive less aid than a point guard on the basketball team who rarely plays, and some people find this fundamentally unfair. Yet, the inequitable axe cuts both ways—in the words of a California state senator, "If you get a drama scholarship or a music scholarship or any other art scholarship, there's no limit to the amount of money that they could potentially give you. Why should the NCAA limit what the school wants to offer for athletes . . . ?"[49] The relevant comparison for looking at equitable distribution is between student-athletes and other students with special talents, rather than the general student body. Intuitively, gifted students should be afforded equal opportunities regardless of their department, but student-athletes are restricted in a way that student-musicians or student-intellectuals are not.

Additionally, it seems duplicitous for the NCAA to allow tens of thousands of dollars to be spent on a student-athlete while simultaneously claiming that a couple more thousand would cross some invisible line between the purity of amateurism and the stain of professionalism. Realistically, no such bright-line can be drawn, and it seems highly unlikely that spending $2,500 more on a student-athlete who is already attending school for free would destroy the fabric of college or university sports. To maintain that a grant-in-aid scholarship does not constitute payment but that an additional stipend to cover the actual cost of higher education crosses the line is merely playing semantics.[50] This is so, in particular, given that the NCAA amended its bylaws in 2004 to allow student-athletes to receive scholarships or grants that are unrelated to athletic ability which may be added to the basic grant-in-aid based on athletic ability to total the actual cost of attending a college or university.[51] Thus, the NCAA seems to have no problem with athletes receiving funding to cover the actual cost of attending a college or university, provided that the athletic departments that they represent do not have to foot the bill.

Critics also point out that student-athletes are allowed to work during the off-season of their respective sports, provided that they are compensated only for work actually performed and that compensation is distributed at a level commensurate with the going rate in that locality for similar services.[52] Attacking additional compensation on necessity grounds, critics assert that student-athletes should be able to save enough money during the course of their off-season to cover their school-year expenses. However, this claim ignores the reality of the athletics

---

49. Parent, *supra* note 12, at 236 (quoting a telephone interview with Senator Murray of California).

50. *Id.* at 248.

51. NCAA MANUAL, *supra* note 3, § 15.1.

52. *Id.* § 15.2.7.

business. As noted earlier, athletes at major colleges or universities simply do not have off-seasons; rather they are routinely required to remain on-campus even during the summer to sharpen their skills.[53]

Certainly, at the heart of any justification for maintaining the status quo is that student-athletes already receive the most important compensation of all: a free education. This, of course, is a very valid point, and it certainly demonstrates a concern for that with which the NCAA is supposed to be concerned—the student-athlete's educational experience. Yet this argument does not alter the fact that many student-athletes generate great income for their colleges and universities while being denied the right to receive a scholarship package based on their athletic ability that includes the actual cost of attending their college or university. In effect, the NCAA's restrictions on aid leave many student-athletes paying money to make money for their colleges and universities. Moreover, the NCAA's commitment to student-athlete education must be questioned considering the atrociously low graduation rates for major athletic programs[54] and, perhaps more troubling, the fact that the NCAA demands that athletic scholarships be offered only on a year-to-year basis and may be terminated based on lack of athletic performance.[55]

An impartial observer could easily evaluate the high profits of the NCAA and its member institutions, the low graduation rates of Division I student-athletes, and the NCAA's reticence to share its record profits by loosening its restrictions to enable colleges and universities to provide scholarships that cover the actual cost of attending school and conclude that the NCAA enjoys having a very cheap labor force that is bound by the immutable law of amateurism. Moreover, one could conclude that the NCAA's reluctance to increase funding for its student-athletes lies in some misplaced profit motive rather than a paramount concern for the "educational experience" of its constituents. If the NCAA were chiefly concerned with that educational experience, they would not allow scholarships to be pulled based on poor athletic performance.[56] This policy of allowing on-the-field performance to determine whether a student-athlete is able to complete his education seems to further support the claim that the NCAA has strayed from its core purpose and has become chiefly a corporate entity attempting to ensure a competitive and entertaining product rather than remaining a guardian of the educational experience of its student-athletes.[57]

---

53. McCormick & McCormick, *supra* note 33, at 99.

54. Parent, *supra* note 12, at 250. Particularly troubling are the racial disparities in these graduation rates. According to a 2001 NCAA study, 36 of the 323 Division I colleges had a zero percent graduation rate among black college basketball players. Among these programs were powerhouses such as LSU, Cincinnati, Arkansas, and Georgia Tech. *Richardson: 'I'm Supposed to Make a Difference*', ESPN, Feb. 28, 2001, http://espn.go.com/ncb/s/2002/0228/1342915.html.

55. NCAA MANUAL, *supra* note 3, § 15.02.7.

56. *See generally* Presidential Task Force on the Future of Division I Athletics, http://www.ncaa.org/wps/wcm/connect/NCAA/Legislation+and+Governance/Committees/Future+Task+Force/ (last visited Apr. 8, 2008) (providing Task Force subcommittee reports).

57. Parent, *supra* note 12, at 233.

IV. A WORKABLE SOLUTION

As stated in the introduction, the purpose of this Essay is to call the NCAA back to its roots of being, foremost and fundamentally, an organization dedicated to guarding the educational experience of its student athletes. The first four parts of this Essay illustrate how college and university athletics has evolved from an extracurricular activity whose chief purpose was health and recreation of student-athletes to a multi-billion dollar national obsession, on the back of which the economic future of institutions, both college and corporate, rise and fall. In light of this seismic shift in definition, it is foolish and naïve to expect the NCAA to refuse the corporate suitors who are lining up to write enormous checks to participate in its programs and events. However, it is neither foolish nor naïve to demand that the NCAA use the riches gained from the efforts of its student-athletes to, as a matter of first importance, ensure that the educational experience of its student-athletes be as complete as possible. To that end, the NCAA has a responsibility to ensure that its student-athletes know that their financial needs are taken care of while they are devoting themselves to their respective sports. In order to accomplish this purpose, the NCAA should amend its bylaws to allow student-athletes to receive from its member institutions an athletic scholarship package that covers the actual cost of attending a college or university. No longer should college and university athletes be forced to take out loans, receive Pell grants from the federal government or do without meager spending money when their efforts are creating massive profits for colleges and universities, coaches, networks, magazines, internet sites, sponsor corporations, and the NCAA itself. This change would demonstrate that the NCAA had recommitted to its noble purpose—to guard student-athletes from exploitation.

Across the country, reform of student-athlete compensation is on the horizon both in the courtroom and in the legislature. The NCAA's financial aid structure is currently being challenged as a violation of the Sherman Antitrust Act in *White v. NCAA*.[58] The lawsuit, filed in February 2006 as a class action on behalf of Division I-A football and basketball players, aims to raise the NCAA scholarship cap, allowing institutions to provide the actual cost of attendance, amounting to a $2,500 annual increase over the standard grant-in-aid.[59] Some NCAA critics feel that an antitrust lawsuit is the best opportunity to change the system,[60] asserting that the NCAA and its member institutions collude to create a monopoly over the student-athlete's ability to share in profits created by college and university

58. Complaint, White v. NCAA, No. CV-06-0999 (C.D. Cal. Feb. 17, 2006), *available at* http://www.voluntarytrade.org/downloads/6P09_Complaint.pdf.

59. Tom Farrey, *NCAA Might Face Damages in Hundreds of Millions*, ESPN, Feb. 21, 2006, http://sports.espn.go.com/ncaa/news/story?id=2337810. After the district court partially granted the NCAA's motion to dismiss, the plaintiffs filed an amended complaint. On October 20, 2006, the court certified the class. White v. NCAA, No. CV-06-0999 (C.D. Cal. Oct. 19, 2006), *available at* http://www1.ncaa.org/eprise/main/administrator/white_v_ncaa/15.pdf.

60. Parent, *supra* note 12, at 243; *see also* Ricardo J. Bascuas, *Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes*, 105 YALE L.J. 1603 (1996).

sports.[61]

The likelihood of the plaintiffs' success in this case is minimal, however, as the NCAA has historically prevailed against similar claims.[62] In the past, the NCAA's accepted justification was preserving amateurism, although Professor Tibor Nagy points out that there has never been a comprehensive survey to suggest that the NCAA's amateurism rules are essential to the product of college and university football, as the NCAA asserts and courts assume.[63]

The plaintiffs in *White* propose that because "football and basketball players are generating billions of dollars, they should be able to afford basic toilet paper, soap and deodorant. Most of these athletes are from low-income backgrounds, and it's a constant struggle."[64] Distributional fairness may be the most persuasive attack on NCAA policies. Given that student-athletes create the interest and revenue that colleges and universities capitalize and profit from, it stands to reason that the student-athletes themselves be entitled to at least a small portion of that profit. The NCAA claims that such redistribution would violate the principles of amateurism, but this concern has not prevented the NCAA from increasing corporate sponsorship to cover its own costs.[65]

This case brings to the fore the tension between the NCAA, largely a wealthy establishment, and economically and educationally disadvantaged student-athletes who lack adequate financial support based on the NCAA's "ideals of amateurism."[66] Many student-athletes simply do not have the means to pay for incurred incidental expenses. Although they could take out loans (as other students admittedly do) or receive federal government aid, student-athletes that generate significant revenue for their institutions should not be required to go into debt to pay for their education nor should they receive grant money from the federal government which could go to other potential college and university students who do not create great wealth with their talents.

In Nebraska, State Senator Ernie Chambers sponsored Nebraska Legislative Bill 688, which calls for additional compensation for football players at the University of Nebraska and which was signed into law on April 16, 2003.[67] The bill's text

---

61. Parent, *supra* note 12, at 243.

62. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

63. Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 359 (2005). *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 266 (1986); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (2003); Thomas Scully, *NCAA v. The Board of Regents of the University of Oklahoma: The NCAA's Television Plan is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857 (1985) (providing further antitrust analysis regarding the NCAA).

64. Farrey, *supra* note 59 (quoting Ramogi Huma, former linebacker for the UCLA Bruins).

65. *Congress' Letter to the NCAA*, USA TODAY, Oct. 5, 2006, http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm; *see also* Steve Wieberg, *NCAA's Tax Status Questioned*, USA TODAY, Oct. 5, 2006, at 3C.

66. Parent, *supra* note 12, at 243.

67. NEB. REV. STAT. §§ 85-1, 131-37 (2003); *see* Greg Skidmore, *Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319, 323 (2004).

outlines the problems inherent in college and university athletics and suggests that the substantial burdens placed on student-athletes by the University of Nebraska's emphasis on success should be balanced by increasing their financial aid, probably between $200–$400 per month.[68]

The bill also provides an alternative to compensation: limiting the number of hours in which student-athletes can participate in a sport.[69] No specific limit is suggested, but it should be low enough so that student-athletes "can have a normal academic schedule, graduate in four years, participate in campus activities, and work an average of twelve hours per week."[70] It would seem that the Nebraska legislature has, in some small way, taken up the mantle that the NCAA has willfully laid down—that of protecting the educational experience of the student-athlete. Yet, the only reason that a clash with the NCAA has thus far been avoided is because the legislation does not take effect until four other states with Big 12 schools pass similar legislation.[71]

Certainly the Nebraska proposal is too narrow in scope—only one school and one sport's athletes are covered. But the legislation does an excellent job of pointing out the inequalities of the current system. A proposal by two California state senators would go further than the Nebraska bill and establish a Student-Athletes' Bill of Rights.[72] The bill's co-sponsor, Senator Kevin Murray, points out that the legislation would not require increased spending but merely allow schools to pay players more by exempting them from NCAA regulations.[73] Senator Chambers agrees, opining that "a fair rate of financial compensation would give players a choice when offered illicit inducements, compensation, or assistance."[74]

Both of these proposals advocate a free-market, laissez-faire approach to the funding problem.[75] The theory is simple: by removing restrictions and allowing high school athletes to market their services to the highest bidder, college and university athletics would function the same as other American industries.[76] The market would set the appropriate compensation level for these athletes' services, and college athletes would attend the colleges where their talents would be most useful and productive. Cheating and hypocrisy would be largely eliminated and increased educational regulation would ensure that these athletes could be distinguished from professionals.[77]

Despite its reliance on "educational regulation," the California proposal would eviscerate any notion of amateurism. In so doing, student-athletes would have neither safeguards against exploitation nor protection of their educational experience. Additionally, like other industries, colleges and universities would

68. Skidmore, *supra* note 67, at 324.
69. *Id.*
70. *Id.* at 325.
71. *Id.* at 326.
72. Parent, *supra* note 12, at 229.
73. *Id.* at 240.
74. *Id.* at 234.
75. *Id.* at 228.
76. Schott, *supra* note 31, at 42.
77. *Id.* at 42.

become even more cutthroat and would no doubt exercise their right to terminate the services of the nonproductive student-athletes with even more regularity, thus further undermining the educational goals of the college or university.[78] Finally, smaller sports would be largely eliminated, collegiate athletics would turn into a quasi-minor league, and the competitive balance would suffer.

While none of the examples provided above fully and adequately address the problem, it is encouraging that the issue of student-athlete compensation is beginning to gain national attention. And by borrowing principles from each effort, it is possible to find a workable solution to this problem. The antitrust suit provides the scope of the first wave of reform: obtaining additional funding for Division I basketball players and Division I football players in the Bowl Division.[79] The Nebraska Bill provides the justification for starting with a particular group of Division I student-athletes—namely that the demands on their time and pressures associated with their sports go well beyond what other athletes face.[80] The California initiative explains that it is impractical for market forces to not be introduced into a multi-billion dollar industry.[81] Each of these lessons are instructive as we explore the practical implementation of this proposal.

According to NCAA bylaws, each Division I football team in the Bowl Division may offer 85 scholarships.[82] Given that there are 119 Division I football Bowl Division schools, there are a possible 10,115 scholarships available for student-athletes.[83] Thus, in order to offer additional scholarship money to cover the actual expenses of attending a college or university to every Division I Bowl Division scholarship athlete, schools would have to increase their athletic budgets by a collective $25,287,500, or $212,500 per school, per year. Also, according to NCAA bylaws, each Division I basketball program may offer 13 men's scholarships and 15 women's scholarships.[84] Given that there are 326 Division I basketball schools,[85] there are 4,238 men's basketball scholarships and 5,040 women's basketball scholarships that are possibly available for student-athletes. Thus, in order to offer additional scholarship money to cover the actual expense of going to college to every Division I men's and women's scholarship basketball player, schools would have to increase their athletic budgets by a collective $23,194,999, or $71,150 per school, per year. In short, a Division I school such as the University of Alabama could cover the actual costs of attending college for all of its scholarship football and basketball players for $283,650 per year, or 7% of head football coach Nick Saban's annual salary.[86]

---

78. *Id.* at 43.

79. *See supra* notes 58–66.

80. *See supra* notes 67–71.

81. *See supra* notes 72–78.

82. NCAA MANUAL, *supra* note 3, § 15.5.5.1.

83. NCAA, Composition and Sport Sponsorship of the NCAA (Sept. 1, 2007), *available at* http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html.

84. NCAA MANUAL, *supra* note 3, §§ 15.5.4.1–15.5.4.2.

85. Richard Lapchick, *The Blame Game for Graduation Rates*, ESPN, Mar. 15, 2006, http://sports.espn.go.com/espn/news/story?id=2369630.

86. Adam Jones & Cecil Hurt, *Saban's Contract a Done Deal*, DATELINE ALA., June 15,

Because of the overwhelming number of football scholarships available, the proposal will admittedly benefit a disproportionate number of men and thus implicate Title IX.[87] However, NCAA bylaws already make exceptions for football in their gender equity guidelines.[88] At least one scholar believes that a stipend, even if limited to only male athletes in basketball and football, would not offend any Title IX provisions.[89] But this proposal does not hinge on such a scenario.[90] Ultimately, the economic resources are available to benefit a significant number of women and men.

Moreover, by limiting the increase to Division I schools, the economic impact will be further limited to the schools that can withstand an increased athletic budget with the most ease. Division II and III programs generate insufficient revenue to justify this type of stipend and typically demand less of their players.[91] Additionally, most schools in lower divisions very rarely award full scholarships, so an additional stipend would be largely irrelevant.[92] Furthermore, there is nothing in the NCAA bylaws that requires schools to use all of their available scholarship money for a given sport. Thus, if the burden on a school's budget is simply too great to bear, a school may offer a smaller financial package to its student-athletes. In this way, free market forces are allowed to play a hand in the process. Obviously, this may result in the school recruiting a less talented team, but this seems like a terrible reason to deny a better, more financially secure educational experience to student-athletes who attend schools that can afford to offer an enhanced scholarship package. To do so would further reinforce the NCAA's image of being a corporate entity with the primary purpose of ensuring a competitive and entertaining product.

Thus, the proposal to raise athletic scholarships to an amount that covers the actual cost of higher education incorporates the benefits of the free-market system without many of its limitations. By allowing schools to compensate players but setting a moderate limit, the free-market can naturally match competitive schools with talented players, without creating a slippery slope leading to all-out bidding

---

2007, http://www.tuscaloosanews.com/apps/pbcs.dll/article?AID=/20070615/NEWS/706150345/1011/dateline&cachetime=3&template=dateline.

87. Title IX of the Educational Amendments of 1972 prohibits sex discrimination against students and employees of educational institutions. 20 U.S.C. §§ 1681–1688 (2000).

88. *See generally* NCAA, GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS (2007), *available at* http://www.ncaa.org/library/general/gender_equity/gender_equity_manual.pdf.

89. Schott, *supra* note 31, at 44; *see also* Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL'Y 131 (1996).

90. The Title IX issues raised here are quite complex. While they deserve full consideration, a meaningful attempt to address them would not fit within the constraints of this article. However, it is worth noting that if Title IX ultimately requires exact equality in scholarship funding, athletic budgets would have to increase $25,287,500 annually a year to account for the increased football stipend, discussed above.

91. Donald Siegel, *The Union of Athletics With Education*, http://www.science.smith.edu/exer_sci/ESS200/Ed/Athletic.htm (last visited Feb. 17, 2008).

92. EducationPlanner.org, NCAA Scholarship Limits: 2007–2008 Total Annual Scholarship Limits, http://www.educationplanner.com/education_planner/paying_article.asp?sponsor=2859&articleName=NCAA_Scholarship_Limits (last visited Apr. 9, 2008).

wars.[93] Competitive balance under the system would be analogous to professional basketball, with the stipend limit serving as a rough "salary cap" limiting the extent to which "small market" universities like Xavier are forced to spend to keep up with Texas and USC.

One potential drawback to introducing a stipend would be the negative effect it might have on non-revenue sports. Distributional fairness does not necessarily require that these athletes receive a stipend, as basketball and football players tend to put in more time and produce more money for the school; in a sense, these athletes fund their own stipend. However, an adverse impact could occur as athletic departments raid the budgets of non-revenue sports in order to finance the increased budgets for basketball and football. To protect against this possibility, the NCAA should introduce supplemental legislation prohibiting the increase in athletic scholarship amounts for basketball and football from coming out of the general athletic budget.

Because the increase in athletic scholarships would be optional, the NCAA should require schools to administer it without taking money away from other programs. This could be accomplished by permitting colleges and universities to raise the additional scholarship money through the same private means that they use to pay the exorbitant salaries of their football and basketball coaches. Certainly if private foundations are allowed to subsidize a coach's salary by millions of dollars per season, it would not violate any code of amateurism to allow these same foundations to provide an additional few hundred thousand dollars a year to ease the economic burden on a significant portion of the school's student-athletes. By permitting private foundations to finance the increase in athletic budgets, in essence, the NCAA would be using the considerable corporate clout of its product to actually benefit the product itself—a decidedly noble use of market forces.

CONCLUSION

The NCAA was founded on the principle of insuring that the educational experience of its student-athletes would not get overwhelmed by powerful outside forces that took the game that they play for pleasure and health and turned it into a multi-billion dollar national obsession. Yet, one hundred years later, modern student-athletes are, indeed, overwhelmed. More troubling is the fact that the NCAA is the gatekeeper of their economic exploitation. This must change. The NCAA must reclaim the moral high ground by using its vast resources, first and foremost, as a means to protect and benefit its student-athletes. The first step is to ease the economic burden on its revenue-producing athletes by increasing the ceiling on athletic scholarships to cover the actual cost of attending a college or university. The change appropriately balances the NCAA's concern with amateurism and academic integrity with notions of distributional fairness, equity, and competition, and, therefore, it should be adopted. This change will neither undermine the bedrock principle of amateurism nor create an economic burden on its member institutions. Conversely, this change will signify that the NCAA cares

93. Parent, *supra* note 12, at 236.

more about its individual student-athletes than it does about profits and its product. The NCAA states that a portion of its basic purpose is to "retain a clear line of demarcation between intercollegiate athletics and professional sports."[94] Nothing would highlight the distinction more than the NCAA's willingness to put the needs of its student-athletes ahead of the profit motives of its member institutions and its corporate sponsors.

APPENDIX A: A PROPOSED BYLAW FOR THE NCAA DIVISION I MANUAL

[Under the "Definitions" Section of Article 15 (Financial Aid)]

15.02 Full Grant-In-Aid. A full grant-in-aid is financial aid that consists of tuition and fees, room and board, and course-related books, as well as an allowance for supplies, transportation, and miscellaneous personal expenses not to exceed $2,500 per year.

15.02.1. Disabled Student-Athletes. For a disabled student-athlete, an allowance for expenses reasonably incurred and related to the student's disability, but not provided for by other agencies, is permitted.

15.02.2. Restitution. For violations of Bylaw 15.02 and its subsection in which the value of the benefit is $100 or less, the eligibility of the individual shall not be affected conditioned on the individual repaying the value of the benefit to a charity of his or her choice. However, the individual shall remain ineligible from the time the institution has knowledge of receipt of the impermissible benefit until the individual repays the benefit. Violations of this bylaw remain institutional violations per Constitution 2.8.1, and documentation of the individual's repayment shall be forwarded to the enforcement staff. (*Tracking Bylaw 12.4.2.5.*).

94. NCAA MANUAL, *supra* note 3, § 1.3.1.

NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

The Association's purpose is to improve the quality of legal assistance to colleges and universities by educating attorneys and administrators on legal issues in higher education. NACUA accomplishes this goal through its publications, conferences, and workshops. NACUA also operates a clearinghouse for references through which attorneys share knowledge and work products on current legal problems. With its headquarters in Washington, D.C., NACUA monitors governmental developments having significant legal implications for its member institutions, coordinates the exchange of information concerning all aspects of law affecting higher education, and cooperates with other higher education associations to provide general legal information and assistance.

Accredited institutions of higher education in the United States and Canada are the primary constituents of NACUA. Each member institution may be represented by several attorneys, any of whom may attend NACUA meetings, perform work on committees, and serve on the Board of Directors.

UNIVERSITY OF NOTRE DAME

The Law School

Notre Dame Law School, the oldest Roman Catholic law school in the United States, was founded in 1869 as the nation's third law school. The Notre Dame program educates men and women to become lawyers of extraordinary professional competence who possess a passion for justice, an ability to respond to human need, and a compassion for their clients and colleagues. Notre Dame Law School equips its students to practice law in every state and in several foreign nations. The school raises and explores the moral and religious questions presented by the law. The learning program is geared to skill and service. Thus, the school is committed to small classes, especially in the second and third years, and emphasizes student participation.

In order to further its goal of creating lawyers who are both competent and compassionate, Notre Dame Law School is relatively small. The Admissions Committee makes its decisions based on a concept of the "whole person." The Law School offers several joint degree programs, including M.B.A./J.D. and M.Div./J.D. Notre Dame Law School is the only law school in the United States that offers study abroad for credit on both a summer and year-round basis. Instruction is given in Notre Dame's own London Law Centre under both American and English professors. The Center for Civil and Human Rights, which is located on the home campus, adds an international dimension to the educational program that is offered there. Notre Dame Law School serves as the headquarters for the *Journal of College and University Law*.

University of Notre Dame
Officers of Administration

President
John I. Jenkins, C.S.C.

Provost
Thomas G. Burish

Executive Vice President
John Affleck-Graves

Notre Dame Law School
Officers of Administration

Dean
Patricia A. O'Hara

Director of the Kresge Library and Associate Dean
Edmund P. Edmonds

Associate Dean
John H. Robinson

Associate Dean
John C. Nagle

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

The Journal of College and University Law

Published three times per year in cooperation with the Notre Dame Law School (University of Notre Dame), the *Journal of College and University Law* is the only national law review devoted exclusively to higher education legal concerns. Issues generally include articles of current interest to college and university counsel, commentaries on recent cases, legislative and administrative developments, book reviews, student comments, and occasional papers from the Association's Annual Conference. All NACUA members receive the *Journal* as a benefit of membership.

Publications, Subscriptions, and Orders for Back Copies

To inquire about subscriptions to the *Journal of College and University Law* or to obtain a single issue of the current volume, contact the *Journal* directly at Notre Dame Law School, Room B3, Notre Dame, IN 46556. Orders for back issues of both the *Journal* and the *College Law Digest* can be obtained from William S. Hein and Company Inc., 1285 Main Street, Buffalo, NY 14209-1987, (800) 828-7571.

Correspondence relating to editorial and membership matters should be addressed directly to the Association's national office at NACUA, Suite 620, One Dupont Circle, N.W., Washington, DC 20036.

The Journal of College and University Law, 1973–2008

Volume 34 (2007-08) Subscription: $67.00 Per Issue: $27.00	Volume 33 (2006–07) Subscription: $64.00 Per issue: $23.00	
Volume 32 (2005–06) Subscription: $64.00 Per issue: $23.00	Volume 31 (2004–05) Subscription: $64.00 Per issue: $23.00	Volume 30 (2003–04) Subscription: $64.00 Per issue: $23.00
Volume 29 (2002–03) Subscription: $61.00 Per issue: $17.00	Volume 28 (2001–02) Subscription: $61.00 Per issue: $17.00	Volume 27 (2000–01) Subscription: $61.00 Per issue: $17.00
Volume 26 (1999–2000) Subscription: $57.00 Per issue: $16.00	Volume 25 (1998–99) Subscription: $55.00 Per issue: $15.00	Volume 24 (1997–98) Subscription: $52.50 Per issue: $14.00
Volume 23 (1996–97) Subscription: $50.00 Per issue: $13.50	Volumes 21–22 (1994–95) Per volume bound: $47.50 Per issue: $11.50	Volumes 19–20 (1992–94) Per volume bound: $47.50 Per issue: $11.50
Volumes 17–18 (1990–92) Per volume bound: $47.50 Per issue: $11.50	Volumes 14–16 (1987–90) Per volume bound: $47.50 Per issue: $11.50	Volumes 12–13 (1985–87) Per volume bound: $47.50 Per issue: $11.50
Volumes 8–11 (1981–85) Per volume bound: $35.00 Per issue: $8.50	Volumes 5–7 (1977–81) Per volume bound: $35.00 Per issue: $8.50	Volumes 1–4 (1973–77) Per volume bound: $30.00 Per issue: $8.50

College Law Digest, 1971–1982

Volumes 10–12 (1980–82) Per volume bound: $35.00	Volumes 1–2 (1971–72) The set, bound: $25.00
Volumes 3–9 (1973–79) Per volume bound: $25.00	Volumes 1–12 (1971–82) The set, bound: $290.00

(Note: Since 1982 (Vol. 12), back copies of the *College Law Digest* are available from the NACUA National Office *rather than* William S. Hein and Company Inc.)

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

This country has witnessed great changes and challenges in education law during the past decade: judicial decisions have changed student and faculty rights and their relations with institutions; colleges and universities have entered an era of severe financial constraints with many legal ramifications; and Congress has dictated new procedures and requirements for serving members of protected classes. The professionals who deal with education law need a resource to keep current on this burgeoning body of law.

The *Journal of College and University Law* is such a resource and, in fact, is the only law review devoted totally to the concerns of higher education. If you do not subscribe at present, or if you receive your subscription online and want to receive a hard copy of each issue, send in the application below—and please pass the subscription information on to someone you know who may benefit from the *Journal*.

…….....

Mail subscription to:

The Journal of College and University Law
Notre Dame Law School
Box 780
Notre Dame, IN 46556

Volume 34
One year subscription (3 issues)
for non-NACUA members: $67.00
for NACUA members: $33.50
International: $74.00
Single issue costs
Domestic: $27.00
International: $27.00

☐ Payment enclosed

Make checks payable to the
Journal of College and University Law

Name: _____

Institution/Business: _____

Street: _____

City: _____ State: _____ Zip: _____

Membership in the National Association of College and University Attorneys (NACUA) includes an online subscription to the *Journal* and one complimentary copy of each issue per institution. For information on joining NACUA, write: NACUA, Suite 620, One Dupont Circle, N.W., Washington, DC 20036.

INSTRUCTIONS FOR AUTHORS

The *Journal of College and University Law* is a publication of the National Association of College and University Attorneys (NACUA) and the Notre Dame Law School. It is a refereed, professional journal specializing in contemporary legal issues and developments important to postsecondary education.

The *Journal* publishes articles, commentaries (scholarly editorials), book reviews, student notes, and student case comments. Experts in the law of higher education review all manuscripts.

Manuscripts should be typewritten on 8½" × 11" paper and should be double-spaced. Set-off quotations should be double-spaced. Footnotes should reflect the format specified in the eighteenth edition of A Uniform System of Citation (the "Bluebook"). A paragraph on the title page should provide the position, the educational background, the address and telephone number of the author. Each author is expected to disclose in an endnote any affiliation or position—past, present, or prospective—that could be perceived to influence the author's views on matters discussed in the manuscript. Authors should be prepared to submit an electronic version of their article, preferably initially written in Microsoft Word.

Decisions on publication usually are made within four weeks of a manuscript's receipt. Student editors, an outside reviewer, and a Faculty Editor edit articles accepted for publication. The *Journal* submits editorial changes to the author for approval before publication. The Faculty Editor reserves the right of final decision concerning all manuscript changes. When an article is approved for publication, the *Journal* retains the exclusive right to publish it, and the copyright is owned by NACUA.

Manuscripts should be submitted to: Associate Dean John H. Robinson, *Journal of College and University Law*, Notre Dame Law School, Room B3, Notre Dame, IN 46556.

The Journal of College and University Law
(ISSN 0093-8688)

The *Journal of College and University Law* is the official publication of the National Association of College and University Attorneys (NACUA). It is published three times per year by the National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036 and indexed to *Callaghan's Law Review Digest*, *Contents of Current Legal Periodicals*, *Contents Pages in Education*, *Current Index to Journals in Education*, *Current Index to Legal Periodicals*, *Current Law Index*, *Index to Current Periodicals Related to Law*, *Index to Legal Periodicals*, *LegalTrac*, *National Law Review Reporters*, *Shepard's Citators*, and *Legal Resource Index* on Westlaw.

POSTMASTER: Send changes of address requests to the *Journal of College and University Law*, Room B3, Law School, Notre Dame, IN 46556.

Postage paid at Washington, D.C., and at additional mailing offices.

Cite as — J.C. & U.L. —
Library of Congress Catalog No. 74-642623

ABOUT THE JOURNAL AND ITS EDITORS

The *Journal of College and University Law* is the only law review entirely devoted to the concerns of higher education in the United States. Contributors include active college and university counsel, attorneys who represent those institutions, and education law specialists in the academic community. The *Journal* has been published annually since 1973 and now boasts a national circulation of more than 3,800. In addition to scholarly articles on current topics, the *Journal of College and University Law* regularly publishes case comments, scholarly commentary, book reviews, recent developments, and other features.

In 1986, the Notre Dame Law School assumed publication of the *Journal*, which had been published at the West Virginia University College of Law from 1980–1986.

Correspondence regarding publication should be sent to John H. Robinson, Faculty Editor, *Journal of College and University Law*, Notre Dame Law School, Room B3, Notre Dame, IN 46556. The *Journal* is a refereed publication.