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ARTICLES

Higher Education Implications of *Parents Involved in Community Schools*

Charles J. Russo & William E. Thro 239

The Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, cases which struck down race-conscious student admission plans for public schools in Seattle, and Louisville, brought the contentious topic of racial preferences back into the headlines. Although the decision deals with K-12 education, it has significant implications for higher education. This article explores those implications.

Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities

Neal H. Hutchens 271

To limit undue governmental interference with public colleges and universities, some states, with California and Michigan notable examples, provide special constitutional status to public higher education governing boards. This grant of special constitutional authority is commonly referred to as constitutional autonomy. This article examines the current legal status of constitutional autonomy provisions among the states. In addition to identifying states with legal recognition of constitutional autonomy and classifying states as possessing strong or weak grants of independent constitutional authority, the article also analyzes constitutional autonomy using the concepts of procedural and substantive autonomy derived from the higher education literature.

Participatory Lawyering & the Ivory Tower: Conducting a Forensic Law Audit in the Aftermath of Virginia Tech

Susan P. Stuart 323

The horrific events at Virginia Tech in 2007 highlighted several problems that higher education leaders face when confronted with a campus rampage. However, several comprehensive reports in the wake of Virginia Tech concluded that campuses do not just have problems dealing with the rampage scenario but have problems dealing with campus violence in general. All these reports pointed, both explicitly and implicitly, to the institutional need for better risk management plans. This Article focuses on the institutional need for higher education lawyers to participate in the risk management planning on campus by auditing current practices and by collaborating within the institutional framework to reduce campus violence and its costs to students.

The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights

Azhar Majeed 385

This article argues that some colleges and universities have misapplied peer sexual and racial harassment law to restrict student speech that is protected by the First Amendment. These institutions have misinterpreted their obligations under Title IX and Title VI to prevent true hostile environment harassment of students and, crucially, have ignored the need to preserve and protect the unfettered exchange of ideas on the college and university campus. One major factor contributing to the problem has been the practice of conflating employment harassment law under Title VII with peer harassment law under Title IX and Title VI. This article argues that Title VII hostile environment standards should not be used to shape college and university policy and practice regarding student conduct, and that colleges and universities should properly follow the peer harassment standard established by the Supreme Court in *Davis v. Monroe County*. Additionally, the article advocates for elimination of institutional liability under Title IX and Title VI for peer harassment, as this would advance campus speech rights greatly by eliminating a primary justification of colleges and universities for censoring and punishing student expression.

ESSAY

An Essay on Friends, Special Programs, and Pipelines

Michael A. Olivas 463

In this essay, Professor Michael A. Olivas calls out conservative and restrictionist groups that have actively resisted the progress of minority enrollment and affirmative action. He predicts that restrictionist and conservative actors will likely increase their efforts, even against race-neutral initiatives that are likely to assist minorities; second, mainstream and progressive groups offer little principled resistance, but rather make suggestions that are unlikely to be efficacious; and third, it is unclear what the Supreme Court will do when challenges to higher education are undertaken by these groups, as it does not always make a fine distinction between K–12 and higher education. These restrictionists, whose agendas are not aimed at progressive action or equity, but largely at preserving white privilege, are often successful at dismantling even modest efforts at integrating colleges and universities, but offer no positive or useful solution to this issue.

NOTE

Does a Coach Owe Players a Fiduciary Duty? Examining the Relationship Between Coach and Team

Sara Young 475

For many individuals in the United States, participating in sports is an integral part of their youth. While the number of participants diminishes in colleges and universities, the impact of sports on the lives of those who continue to play increases. This note explores case law and scholarly arguments surrounding when and if college and university coaches should be viewed as fiduciaries. The concept of fiduciary duty, though viewed by many as a creation of business associations and applicable only in the corporate context, can be applied to relationships touching all aspects of life. Classifying the relationship between college and university coaches and student-athletes as fiduciary would impress additional duties upon coaches at the college and university level as well as upon their employer, the college or university.

HIGHER EDUCATION IMPLICATIONS OF *PARENTS INVOLVED IN COMMUNITY SCHOOLS*

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I. INTRODUCTION

The Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved)*,¹ a case which struck down race-conscious student admissions plans in Seattle, Washington, and Louisville, Kentucky, brought the contentious topic of race-conscious remedies back into the headlines. In invalidating both programs, the Court observed that Seattle had never operated segregated schools for students of different races nor had it ever been subject to a court-ordered desegregation order.² Further, the Court noted that Louisville's schools had been declared unitary and released from judicial supervision eight years earlier.³ In *Parents Involved*, the Court concluded that educational officials in both school systems not only failed to demonstrate that the use of racial classifications in their student assignment plans was necessary to achieve the goal of racial diversity, but also failed to consider alternative approaches adequately.⁴

Part II of this Article provides a brief overview of racial preferences and related litigation, both inside and outside the world of education. Part III of the Article examines the judicial history of the *Parents Involved* cases and goes on to analyze the opinions of the Supreme Court majority and dissenters in the *Parents Involved* decision. Part IV provides a brief retrospective on race-conscious remedies. Finally, Part V of the Article considers the potential implications of *Parents Involved* for colleges and universities that are seeking to diversify their populations of students, faculty, and staff.

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1. 127 S. Ct. 2738 (2007).

2. *Id.* at 2742.

3. *Id.* at 2749.

4. *Id.* at 2767–68.

II. RACIAL PREFERENCES AND RELATED LITIGATION

The term “affirmative action” entered the American legal lexicon in 1961 in President John F. Kennedy’s Executive Order 10,925.⁵ Issued on March 6, 1961, this order created the Committee of Equal Employment Opportunity and directed administrators in federally funded projects to “take affirmative action” to eliminate racial discrimination in hiring and employment practices.⁶ More specifically, the Order declared that “it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts.”⁷

The subsequent enactment of Title VII of the Civil Rights Act of 1964, signed into law by President Lyndon Johnson on June 2, 1964, codified the prohibitions against racial discrimination in employment,⁸ but made no reference to education or affirmative action. The remainder of this section briefly reviews the Supreme Court’s judgments on race-conscious remedies.

5. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (“The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”).

6. *Id.*

7. *Id.*

8. Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2(a) (2000).

(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.

42 U.S.C. §§ 2000(e)-2(a). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court interpreted Title VII as prohibiting not only overt discrimination based on race, but also practices that seemed to be fair on their face but have a discriminatory impact. *Id.* at 431. Put another way, the Court forbade employers from applying what seemed to be neutral criteria that are often proven, by using quantitative data, to have a disparate impact on members of particular groups or classes. The Court later clarified the parameters of disparate impact in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding that plaintiffs in Title VII cases did not have to demonstrate that employers acted with discriminatory intent in cases involving allegations of disparate impact).

A. Racial Preferences in Higher Education Admissions

In its first case involving race as an admissions criterion in higher education, the Supreme Court side-stepped the merits of the underlying claim. At issue was a dispute from Washington where a white applicant to a state law school filed suit claiming that he was denied admission in favor of a less qualified minority applicant pursuant to the school's "affirmative action" plan.⁹ After a state trial court, in an unpublished opinion, directed law school officials to admit the plaintiff because he was fully qualified, the Supreme Court of Washington reversed and upheld the law school's affirmative action plan, but did not require the plaintiff to terminate his studies based on its order.¹⁰ The court explained that "[i]n light of the serious underrepresentation of minority groups in the law schools . . . [and finding] the [state's] interest in eliminating racial imbalance within public legal education to be compelling," the plan passed constitutional muster.¹¹

In *DeFunis v. Odegaard*,¹² the Supreme Court first granted certiorari but then vacated the case as moot in a per curiam opinion since the student was in his final quarter of law school and would be permitted to complete his studies regardless of the outcome of the litigation.¹³ On remand, the Supreme Court of Washington rejected the plaintiff's motion to act on behalf of the class of individuals who claimed to have been denied admission in favor of less qualified minorities.¹⁴ The court refused to let the plaintiff become involved because he could not properly represent their interests insofar as any interest that he might have had in the litigation would have been too small based on the fact that he had already graduated from law school.¹⁵ Moreover, the court reconsidered its earlier order and, in light of its broad public import, reinstated its earlier judgment upholding the admissions policy.¹⁶

The Supreme Court addressed the substantive use of race as a criterion for admission into an educational program for the first time in a dispute from California wherein a white applicant who was twice denied admission to a public medical school filed suit challenging the school's use of a race-

9. *DeFunis v. Odegaard*, 507 P.2d 1169, 1176–77 (Wash. 1973), *vacated* 416 U.S. 312 (1974). The record revealed that under the rubric that officials used in evaluating applicants, the plaintiff had a higher Predicated First-Year Average, the standard used for admissions, than most of the minority applicants who were admitted in his stead. *Id.* at 1173–77.

10. *See id.* at 1188.

11. *Id.* at 1182.

12. 416 U.S. 312 (1974).

13. *Id.* at 319–20.

14. *DeFunis v. Odegaard*, 529 P.2d 438, 441 (Wash. 1974).

15. *Id.* at 442.

16. *Id.* at 445. For a later case from Washington upholding a race-conscious admissions plan to medical school, see *McDonald v. Hogness*, 598 P.2d 707 (Wash. 1979).

conscious admissions plan.¹⁷ The plaintiff alleged that the admissions plan violated Title VI of the Civil Rights Act of 1964¹⁸ and the Fourteenth Amendment's Equal Protection Clause.¹⁹ Under the plan, university officials set aside a specified number of seats for various minority applicants while allowing them to also compete in the larger pool.²⁰ A trial court, in an unpublished opinion, struck down the plan as unconstitutional but refused to grant the plaintiff's request for an order compelling his admission because the court did not believe that the plaintiff established that he would have been admitted but for the constitutional and statutory violations.²¹ On appeals by both parties, the Supreme Court of California affirmed, holding that the admissions program was unconstitutional because it violated the rights of non-minority applicants by affording minority applicants a race-based advantage in the admissions process even though, in light of the university's own standards, they were not as qualified for the study of medicine as non-minority applicants who were denied admission.²²

After granting a stay,²³ the United States Supreme Court agreed to hear the case on appeal,²⁴ and on further review in *Regents of the University of California v. Bakke*,²⁵ a splintered United States Supreme Court reached two important conclusions.²⁶ First, the Court held that the policy was invalid.²⁷ Four justices—Justice Stevens, joined by Chief Justice Burger

17. *Regents v. Bakke*, 438 U.S. 265 (1978).

18. Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2000).

19. *Bakke*, 438 U.S. at 278.

20. *Id.* at 274–75.

21. *Id.* at 270. Bakke was eventually admitted to medical school and practiced as an anesthesiologist in Minnesota. See *Allan Bakke Working As a Doctor*, S.F. CHRON., Nov. 3, 1986, at B2; see also Jeff Jacoby, *Affirmative Action Can Sometimes Be Fatal*, BOSTON GLOBE, Aug. 14, 1997, at A19 (chronicling the career of Allan Bakke and another graduate of the medical school he attended).

22. *Bakke v. Regents*, 553 P.2d 1152 (Cal. 1976).

23. *Regents v. Bakke*, 429 U.S. 953 (1976).

24. *Regents v. Bakke*, 429 U.S. 1090 (1977).

25. *Bakke*, 438 U.S. 265.

26. For representative commentary on *Bakke*, see, e.g., Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL'Y REV. 341 (2001); John C. Jeffries, Jr., *Bakke Revisited*, 55 SUP. CT. REV. 1 (2003); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002); Michael Rosman, *Thoughts on Bakke and Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45 (2002); Jeff Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*, 92 KY. L.J. 219 (2003); Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981 (1999); Laurence H. Tribe, Comment, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Peter Widulski, *Bakke, Grutter, and the Principle of Subsidiarity*, 32 HASTINGS CONST. L.Q. 847 (2005).

27. *Bakke*, 438 U.S. at 271.

and Justices Stewart and Rehnquist—believed that the policy, which set aside seats for certain racial groups, violated Title VI of the Civil Rights Act of 1964 and did not address the constitutional issue.²⁸ Justice Powell believed that the policy violated the Equal Protection Clause of the Constitution.²⁹ Second, the Court maintained that the Constitution permitted the indirect consideration of race as one factor among many.³⁰ That portion of Justice Powell’s opinion discussing why the Constitution permitted the indirect consideration of race was joined by Justices Brennan, White, Marshall, and Blackmun.³¹ In addition, Justice Powell, writing only for himself, stated that the achievement of a diverse student body was a compelling governmental interest.³²

On the same day that it announced its judgment, the Court also vacated its earlier stay.³³ Moreover, although *Bakke* was a plurality, it has become a bellwether that has led to a steady stream of litigation over race-conscious remedies in a variety of settings outside of education in addition to admissions policies in both K–12 and higher education settings.

B. Racial Preferences in Non-Educational Settings

Beginning a year after *Bakke*, the Supreme Court examined non-educational disputes involving employment, minority set-aside programs, and voting. The Court also considered additional education-related litigation on race-conscious remedies in employment and race-conscious admissions plans. Accordingly, the next two subsections briefly review the Court’s resolution of litigation on race-conscious remedies as a backdrop for how it has resolved the most recent school-related litigation.

1. Employment

In the term following *Bakke*, in *United Steelworkers of America v.*

28. *Id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Powell, author of the Court’s opinion, was the sole member of the Court who based his analysis on the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 287 (opinion for the Court).

29. *Id.* at 320.

30. *Id.*

31. *Id.* (“In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court’s judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.”). The largest part of the plurality was formed by Justice Brennan’s opinion. *See id.* at 272 (Brennan, J., concurring in part and dissenting in part).

32. *Id.* at 315 (majority opinion).

33. *Regents v. Bakke*, 438 U.S. 912 (1978).

Weber,³⁴ the Court ruled that the prohibition against racial discrimination in Title VII did not condemn all private, voluntary, race-conscious plans.³⁵ The Court found that the plan at issue, which granted preferences to African Americans over whites to make up for past discrimination, was constitutionally permissible since it was developed pursuant to a collective bargaining agreement between the employer and its employees.³⁶ The Court was convinced that a provision in the agreement that set aside fifty percent of the openings in an in-plant craft-training program until the percentage of African Americans there was commensurate with that of African Americans in the local labor force did not violate Title VII.³⁷ The Court posited that the agreement met the mandates of Title VII because its purposes mirrored those of the statute, it did not unnecessarily override the interests of white employees, and it was a temporary measure that was not intended to preserve a racial balance but to eliminate a manifest racial imbalance.³⁸

At issue in *Local 28 of the Sheet Metal Workers' International Association v. EEOC*³⁹ was a union's challenge to an order that it violated Title VII and the rights of minorities in recruitment, selection, training, and admission to membership and an apprentice training program.⁴⁰ In addition, the union disputed the lower courts' imposing fines on it for civil contempt and directing its officials to develop, and implement, membership goals for minorities.⁴¹ The Supreme Court affirmed that Title VII's remedial provisions did not preclude the imposition of preferential relief to benefit individuals who were not actual victims of discrimination.⁴² Additionally, the Court determined that using the fines to create a special fund to increase nonwhite membership in the union and its apprenticeship program were proper remedies for civil contempt.⁴³ The Court concluded that neither the imposition of the membership goal nor the fund order violated Title VII or the equal protection component of the Due Process Clause of the Fifth Amendment.⁴⁴

34. 443 U.S. 193 (1979).

35. *Id.* at 209.

36. *Id.* at 207.

37. *Id.*

38. *Id.*

39. 478 U.S. 421 (1986).

40. *Id.* at 429.

41. *Id.* at 439-40; *see also* EEOC v. Local 638 and Local 28 Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172 (2d Cir. 1985).

42. *Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 471.

43. *Id.* at 443-44.

44. *Id.* at 483. The Court addressed the Fifth, rather than the Fourteenth, Amendment because the former applies to the federal government and its agencies. For another case under the Fifth Amendment, see *Bolling v. Sharpe*, 347 U.S. 497 (1954) (striking down segregation in the public schools of Washington, D.C.).

*United States v. Paradise*⁴⁵ involved a dispute from Alabama over the creation of procedures for the selection of new state trooper corporals.⁴⁶ A federal trial court mandated that fifty percent of promotions go to African Americans until either they filled approximately twenty-five percent of the rank of corporal or officials developed and implemented a promotion plan that conformed with prior orders and decrees.⁴⁷ On appeal, the Eleventh Circuit affirmed, holding that the policy did not violate Title VII.⁴⁸ The Supreme Court, in turn, affirmed that the percent promotion requirement was permissible under the Equal Protection Clause since it was justified by the compelling governmental interest in eradicating the past discriminatory exclusion of African Americans from positions as state troopers and was narrowly tailored to serve its stated purposes.⁴⁹

When a male employee of a county transportation agency with a higher interview score on an examination was passed over for a promotion in favor of a female colleague with a lesser score under a plan directing that sex or race be considered for the purpose of remedying the underrepresentation of women and minorities in traditionally segregated job categories, he filed suit under Title VII.⁵⁰ After a federal trial court in California found that the county agency violated Title VII,⁵¹ the Ninth Circuit reversed, upholding the constitutionality of the plan.⁵² In finding that the plan did not violate Title VII, the Supreme Court held in *Johnson v. Transportation Agency*⁵³ that since the plan was designed to remedy a situation wherein women and minorities were underrepresented, it did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement.⁵⁴

2. Minority Set-Aside Programs

In *Fullilove v. Klutznick*,⁵⁵ the Supreme Court reviewed a dispute from New York wherein associations of construction contractors, subcontractors, and others unsuccessfully sought to enjoin the enforcement of a federal set-aside program for minority business enterprises.⁵⁶ After a federal trial

45. 480 U.S. 149 (1987).

46. *Id.*

47. *Paradise v. Prescott*, 585 F. Supp. 72, 73–74 (M.D. Ala. 1983).

48. *Paradise v. Prescott*, 767 F.2d 1514, 1538 (11th Cir. 1985).

49. *Paradise*, 480 U.S. at 185–86.

50. *Johnson v. Transp. Agency*, 480 U.S. 616, 623–25 (1987). Although the case dealt directly with sex, the case is treated as dealing with a race-conscious hiring plan since it explicitly included race within its provisions.

51. *Id.* at 625.

52. *Johnson v. Transp. Agency*, 770 F.2d 752 (9th Cir. 1984).

53. *Johnson*, 480 U.S. 616.

54. *Id.* at 637–40.

55. 448 U.S. 448 (1980).

56. *Id.*

court⁵⁷ and the Second Circuit⁵⁸ denied relief, the Supreme Court sustained the statute's constitutionality.⁵⁹ In another plurality decision, in which none of the Court's five opinions could gather the support of more than three justices, the Court upheld the statute on the basis that Congress had the authority to employ racial or ethnic classifications in exercising its spending or other legislative powers.⁶⁰

*City of Richmond v. J.A. Croson Co.*⁶¹ was the first of three cases on race-conscious remedies to make two trips to the Supreme Court.⁶² Only in the second round of litigation did the justices reach a substantive outcome.⁶³ At issue was a challenge to a plan that required prime contractors who were awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more minority businesses.⁶⁴ After a federal trial court in Virginia⁶⁵ and the Fourth Circuit⁶⁶ upheld the plan, the Supreme Court summarily vacated for further review.⁶⁷ On remand, the Fourth Circuit invalidated the plan for violating the Equal Protection Clause.⁶⁸ Subsequently, the Supreme Court affirmed, stating that the plan was unconstitutional because city officials failed to demonstrate a compelling governmental interest justifying its adoption, and the plan was not narrowly tailored to remedy effects of prior discrimination.⁶⁹

A year later, in *Metro Broadcasting, Inc. v. Federal Communications Commission (Metro Broadcasting)*,⁷⁰ the Court upheld a constitutionally mandated preference policy with regard to minority ownership of new radio or television stations.⁷¹ The Court ruled that this plan was acceptable both because it bore a substantial relationship to the important congressional interest in broadcasting diversity and because it did not impose impermissible burdens on those who were not minorities.⁷²

57. *Fullilove v. Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977).

58. *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978).

59. *Fullilove*, 448 U.S. at 492.

60. *Id.* at 490.

61. 488 U.S. 469 (1989).

62. *Id.*; see also *Abrams v. Johnson*, 521 U.S. 74 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *infra* notes 85–97 and accompanying text.

63. See *J.A. Croson Co.*, 488 U.S. 469.

64. *Id.* at 477.

65. *Id.* at 483.

66. *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985).

67. *J.A. Croson Co. v. City of Richmond*, 478 U.S. 1016 (1986).

68. *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987).

69. *J.A. Croson Co.*, 488 U.S. at 505–07.

70. 497 U.S. 547 (1990).

71. *Id.*

72. *Id.* at 569, 598.

Five years later, in *Adarand Constructors, Inc. v. Peña (Adarand)*,⁷³ a closely divided Supreme Court vacated an earlier order upholding a grant of summary judgment in favor of the federal government.⁷⁴ The suit arose when a subcontracting firm in Colorado challenged not being awarded the guardrail portion of a federal highway project even though it submitted the lowest bid under a federal program designed to provide opportunities for disadvantaged business enterprises.⁷⁵ The firm claimed that the denial violated its rights under the equal protection component of the Fifth Amendment's Due Process Clause.⁷⁶

As an initial matter in *Adarand*, the Court explained that the subcontracting firm had standing to seek forward-looking declaratory and injunctive relief.⁷⁷ As to the heart of its judgment, in overruling *Metro Broadcasting*, the Court reasoned that since all racial classifications, regardless of the level of government, were subject to strict scrutiny, the case had to be remanded for a consideration of whether the program at issue met this standard.⁷⁸ Following another six years of litigation, the Supreme Court, in a per curiam judgment, refused to hear the prime contractor's challenge to the Department of Transportation's race-based programs since the Tenth Circuit decided that the contractor lacked standing to present its challenge and the contractor did not contest this finding in its petition for certiorari.⁷⁹

3. Voting

The Supreme Court has been unenthusiastic about the use of race as a factor in creating legislative districts. Even so, in a case predating *Bakke*, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,⁸⁰ a plurality sustained an order of the Second Circuit that a reapportionment plan authorized by a New York State statute that created districts in which minority voters were in the majority passed constitutional muster.⁸¹ The justices were satisfied that the permissible use of racial criteria in redistricting was not limited to eliminating the effects of past discrimination in the creation or apportionment of districts.⁸² The Court added that the plan did not violate the Fourteenth or Fifteenth Amendment

73. 515 U.S. 200 (1995).

74. *Id.* at 210, 239.

75. *Id.* at 200.

76. *Id.* at 210.

77. *Id.* at 210–12.

78. *Id.* at 226–27.

79. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

80. 430 U.S. 144 (1977).

81. *Id.* at 168.

82. *Id.* at 161.

rights of white voters⁸³ and that the legislature had the authority to draw district lines in such a way that the percentage of districts with nonwhite majorities roughly approximated the percentage of nonwhites in the county.⁸⁴

Twenty years later, a dispute from North Carolina made two trips to the Supreme Court. In the first round of litigation, *Shaw v. Reno*,⁸⁵ the justices determined that legislative action was subject to strict scrutiny where the state legislature took race into consideration in creating congressional districts with bizarre boundaries in an attempt to have minorities constitute a majority of voters in some districts.⁸⁶ When the case returned to the Court as *Shaw v. Hunt*,⁸⁷ the justices found that the statute was subject to strict scrutiny since voters who were opposed to the plan proved that race was the predominant reason for creating the districts.⁸⁸ The Court then invalidated the plan since it was insufficiently narrowly tailored to correct past instances of governmental discrimination against minorities.⁸⁹

In *Miller v. Johnson*,⁹⁰ the Supreme Court struck down a legislative plan from Georgia which would have created a gerrymandered congressional district with unusual boundaries that were designed to maximize the number of African American voters in that district.⁹¹ The Court found that the legislative scheme was unconstitutional absent proof that it was narrowly tailored to achieve a compelling governmental interest.⁹² On remand, in approving a plan with only one majority African American district due to the legislature's inability to create its own scheme, the federal trial court rejected the notion that this redistricting failed to protect the interests of African Americans.⁹³ When the case returned to the Court as *Abrams v. Johnson*,⁹⁴ the Court affirmed that the trial court neither exceeded its remedial powers nor violated the Voting Rights Act⁹⁵ by causing the position of African American voters to regress.⁹⁶ In addition, the justices agreed that the trial court had not ignored the principle of one

83. *Id.* at 167.

84. *Id.* at 163–64.

85. 509 U.S. 630 (1993).

86. *Id.* at 644, 659.

87. 517 U.S. 899 (1996).

88. *Id.* at 905–08.

89. *Id.* at 918.

90. 515 U.S. 900 (1995).

91. *Id.* at 905–10.

92. *Id.* at 920–21.

93. *Johnson v. Miller*, 922 F. Supp. 1552, 1566 (S.D. Ga. 1995).

94. 521 U.S. 74 (1997).

95. 42 U.S.C. § 1973 (2000).

96. *Abrams*, 521 U.S. at 97 (“Appellants have not shown that black voters in any particular district suffered a retrogression in their voting strength under the court plan measured against the 1982 plan.”).

person, one vote.⁹⁷

Finally, in *Bush v. Vera*,⁹⁸ another plurality decision, the Supreme Court invalidated the creation of three congressional districts in Texas where race was a key factor.⁹⁹ Those justices who supported the outcome in *Miller* also supported the outcome in *Bush*, just as those justices who dissented in the outcome in *Miller* also dissented in the outcome in *Bush*.¹⁰⁰

C. Later Cases in Education

1. Employment

The Supreme Court's only case on the merits of racial preferences involving employment in education, *Wygant v. Jackson Board of Education*,¹⁰¹ concerned the attempt of a school board in Michigan to maintain a racially integrated faculty during a reduction-in-force (RIF).¹⁰² The dispute arose when non-minority educators filed suit challenging a provision in their collective bargaining agreement that allowed the board to retain minorities with less seniority.¹⁰³ Ordinarily, the primary goal of seniority provisions in bargaining contracts is protecting workers who have been on the job longer.¹⁰⁴ A plurality of the Court was unwilling to allow the school board to rely on race as the crucial factor in evaluating who could be retained, explaining that a layoff of non-minority teachers based solely on race violated equal protection since it was insufficiently narrowly tailored to achieve the goal of eliminating societal discrimination.¹⁰⁵ In dicta, the Court suggested that the board could have attempted to use less intrusive means of eliminating discrimination such as hiring goals for minority teachers.¹⁰⁶

97. *Id.* at 98–101.

98. 517 U.S. 952 (1996).

99. *Id.* at 959–62.

100. Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas supported the outcome in both cases. Justices Stevens, Breyer, Souter, and Ginsburg dissented in both cases.

101. 476 U.S. 267 (1986).

102. *Id.* at 270.

103. *Id.* at 272.

104. *See id.* at 270, n.1.

105. *Id.* at 276 (“But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.” (emphasis in original)); *see also id.* at 274 (“This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”).

106. *Id.* at 283–84. *But see* *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100 (6th

Another case involving school employment, *Taxman v. Board of Education of the Township of Piscataway*,¹⁰⁷ almost made its way to the Supreme Court. At issue was a dispute from New Jersey in which a school board, erroneously acting on the belief that its race-conscious employment plan required it to terminate the contract of a white, rather than an African American, teacher based solely on race, dismissed the white woman even though the two had virtually identical credentials.¹⁰⁸ An en banc Third Circuit found that since the board's RIF plan, which was adopted for the purpose of promoting racial diversity rather than remedying discrimination or the effects of past discrimination, trammelled the rights of non-minorities, it was unconstitutional.¹⁰⁹ The case was days from oral argument before the Supreme Court when the parties reached a settlement, thereby leaving the status of race-conscious plans further in doubt.¹¹⁰

2. Racial Preferences in School Admissions: Higher Education

Turning to higher education, between 1994 and 2000, the Fourth, Fifth, and Eleventh Circuits struck down race-conscious admissions plans while the Sixth (at least partially) and Ninth Circuits rejected challenges to such plans. The Fourth Circuit invalidated a scholarship program at the University of Maryland that was open only to African American students as violating the Equal Protection Clause.¹¹¹ The court reasoned that the goals of the race-conscious scholarship program did not justify lowering the effective minimum acceptance criteria in creating an applicant pool which rendered only African American students eligible to receive scholarships.¹¹² The court held that the plan was insufficiently narrowly tailored to meet the university's goal absent evidence that officials tried, without success, to use a race-neutral solution.¹¹³

The Fifth Circuit, in like fashion, invalidated an admissions plan at the University of Texas School of Law that granted substantial preferences to racial minorities.¹¹⁴ The court held that a preference system based on race did not survive strict scrutiny under equal protection.¹¹⁵ On remand, a federal trial court decided that evidence in the record was sufficient to warrant the finding that the plaintiffs who challenged the program would

Cir. 1992) (permitting race to be a factor in faculty assignments).

107. 91 F.3d 1547 (3d Cir. 1996).

108. *Id.* at 1551-52.

109. *Id.* at 1563-65.

110. Mark Walsh, *N.J. District Settles Case on Race Bias: Action Heads off High Court Review*, EDUC. WEEK (Bethesda, Md.), Nov. 26, 1997, at 1.

111. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

112. *Id.* at 160.

113. *Id.* at 161.

114. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

115. *Id.* at 951.

not have had a reasonable chance of acceptance even under a system that did not employ racial preferences.¹¹⁶

In another case, the Eleventh Circuit ruled that the admissions policy of a state university in Georgia was unconstitutional.¹¹⁷ The court affirmed that the plan, which awarded an arbitrary, but fixed, numerical diversity bonus to nonwhite applicants at a decisive stage in the admissions process, failed the strict scrutiny test.¹¹⁸

On the other hand, the Ninth Circuit rejected a challenge from unsuccessful white applicants who claimed that a state law school in Washington used racially discriminatory admissions practices.¹¹⁹ The court agreed that when voters enacted an initiative prohibiting the state from granting preferential treatment to individuals or groups based on race, sex, color, ethnicity, or national origin, it rendered the students' claim moot, thereby concluding that their class action suit was properly decertified.¹²⁰

The Supreme Court's most recent rulings on race-conscious admissions policies in higher education, *Grutter v. Bollinger*¹²¹ and *Gratz v. Bollinger*,¹²² both originated at the University of Michigan.¹²³ *Grutter* was filed by an unsuccessful forty-three-year-old white female applicant who was in the eighty-sixth percentile nationally on the Law School Admissions Test and challenged the Law School's use of race as a factor in admissions.¹²⁴ During the litigation, officials at the University of Michigan conceded that the plaintiff probably would have been admitted had she been a member of one of the underrepresented minority groups, which the

116. *Hopwood v. Texas*, 999 F. Supp. 872, 897 (W.D. Tex. 1998).

117. *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001).

118. *Id.* at 1254.

119. *Smith v. Univ. of Wash.*, 233 F.3d 1188 (9th Cir. 2000).

120. *Id.* at 1195.

121. 539 U.S. 306 (2003).

122. 539 U.S. 244 (2003).

123. For representative commentaries on the impact of these decisions see, e.g., Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503 (2004); Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531 (2004); J. Kevin Jenkins, *Grutter, Diversity, & Public K-12 Schools*, 182 EDUC. L. REP. 353 (2004); Ralph D. Mawdsley & Charles J. Russo, *Supreme Court Dissenting Opinions in Grutter: Has the Majority Created a Nation Divided Against Itself?*, 180 EDUC. L. REP. 417 (2003); Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1 (2005); Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, As Shown By Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583 (2004); William E. Thro, *Commentary, No Direct Consideration of Race: The Lessons of the University of Michigan Decisions*, 196 EDUC. L. REP. 755 (2005).

124. *See Grutter*, 539 U.S. at 316-17.

plan defined as African Americans, Hispanics, and Native Americans.¹²⁵ Ultimately, the Sixth Circuit upheld the policy since it thought that it was narrowly tailored to achieving the law school's goal of a diverse student body.¹²⁶

Gratz was filed by two unsuccessful white applicants, one female, the other male, to undergraduate programs at the University of Michigan.¹²⁷ The students claimed that the use of race as a factor in admissions meant that a more stringent standard was applied to non-minorities.¹²⁸ During the year that the female sought admission, university officials accepted all forty-six applicants from the preferred minority group with the same adjusted grade point average and test scores as non-preferred candidates, less than one-third of whom were admitted.¹²⁹ Further, the policy gave members of the same minority groups as in *Grutter* a bonus of 20 points on a 150-point admissions scale, an amount roughly equivalent to one full grade on a four point GPA.¹³⁰ Yet, this scale awarded only twelve points for a perfect score of 1,600 on the Scholastic Aptitude Test.¹³¹

A federal trial court in *Gratz*¹³² struck down the race-conscious admissions policy on the basis that it was an insufficiently narrowly tailored means of achieving the government's interest in remedying the current effects of past discrimination or the discriminatory impact of other admissions criteria.¹³³ Before the Sixth Circuit could act, the Supreme Court agreed to hear the University's appeal in both cases.¹³⁴

Writing for the majority in *Grutter*, Justice O'Connor found it unnecessary to consider whether diversity is a compelling state interest since her opinion on behalf of the Court endorsed Justice Powell's concurrence in *Bakke* which established this premise.¹³⁵ The Court declared that insofar as diversity is a compelling state interest, and officials at the law school narrowly tailored their plans to achieve a "critical mass"¹³⁶ of underrepresented racial and ethnic minorities in the student

125. *Grutter v. Bollinger*, 288 F.3d 732, 790 (6th Cir. 2002) (Boggs, J., dissenting).

126. *Id.* at 752 (majority opinion).

127. *Gratz*, 539 U.S. at 251.

128. *Id.* at 252.

129. Petition for Writ of Certiorari, 8, *Gratz*, 539 U.S. 244 (No. 02-516).

130. *Id.* at 8-9.

131. *Id.* at 8.

132. *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

133. *Id.* at 802 ("Furthermore, the Court is satisfied that the LSA's [College of Literature, Science, and the Arts] race-conscious admissions programs cannot be justified as measures to remedy either the current effects of past discrimination, or the discriminatory impact of the LSA's other admissions criteria."); *id.* at 795 ("[T]he University Defendants have never claimed that the challenged programs were implemented as a means to remedy past discrimination.").

134. See *Grutter v. Bollinger*, 537 U.S. 1043 (2002).

135. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

136. *Id.* at 316.

body, they could use race as a “plus” factor in admissions decisions.¹³⁷ The Court added that diversity could be used as a factor as long as officials did not apply a quota system.¹³⁸ Insofar as all candidates for admission to the law school were subject to “a highly individualized, holistic review of each applicant’s file,” the Court was satisfied that the law school’s race-conscious admissions policy passed constitutional muster.¹³⁹ The Court concluded its opinion by professing the hope that racial preferences will no longer be necessary in twenty-five years.¹⁴⁰ Unfortunately, the Court neither justified the time frame that it established nor addressed the circumstances under which race-conscious plans should terminate or how courts and educational officials could evaluate whether they achieved their goals.

As author of the majority opinion in *Gratz*, Chief Justice Rehnquist agreed that diversity can constitute a compelling state interest.¹⁴¹ Even so, the Court struck down the admissions policy at issue as insufficiently narrowly tailored to achieve the state’s compelling interest of achieving a diverse student body.¹⁴² More specifically, the Court invalidated the policy since it failed to provide the individualized consideration that the Court described in *Grutter*.¹⁴³

3. Racial Preferences in School Admissions: Elementary and Secondary Education

As reflected in the brief review in this section, courts have reached mixed results when public school systems employ race-based admissions criteria at the elementary and secondary level. In a case that had reached the Supreme Court twenty-two years earlier,¹⁴⁴ school district officials in Denver asked a federal trial court to terminate judicial oversight of school desegregation efforts and declare unitary status.¹⁴⁵ In doing so, the board

137. *Id.* at 334.

138. *Id.*

139. *Id.* at 337.

140. *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

141. *Gratz v. Bollinger*, 539 U.S. 244, 261 n.18 (2003).

142. *Id.* at 275.

143. *Id.*

144. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). In *Keyes*, the Supreme Court’s first case dealing with a minority group other than African Americans (individuals of Mexican heritage), the Court created a spatial presumption in defining segregation in an urban context.

145. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1275 (D. Colo. 1995). One of this article’s authors, William E. Thro, represented the State of Colorado as second chair in the case. Judge Timothy M. Tymkovich of the Tenth Circuit was the first chair; he was Solicitor General of the State of Colorado at the time that the case was litigated.

indicated its desire to continue assigning students on the basis of race despite the fact that language in the Colorado Constitution prohibited student assignments for the purpose of achieving particular racial balances.¹⁴⁶ The board thus also challenged the federal constitutionality of the state provision. In rejecting the board's arguments, the district court upheld the state constitutional provision while suggesting that the federal constitution also prohibited race-based student assignments.¹⁴⁷ After the school board announced that it had no intention of assigning students on the basis of race, the Tenth Circuit dismissed the appeal as moot.¹⁴⁸

In another case, a group of white parents whose children were enrolled in the examination-based Boston Latin School challenged an admissions policy that took race and ethnicity into consideration.¹⁴⁹ On further review of a judgment in favor of the Boston School Committee,¹⁵⁰ the First Circuit reversed in favor of the parents.¹⁵¹ The First Circuit invalidated the policy, rejecting the claim of school officials that it was designed to remedy the vestiges of past discrimination.¹⁵² The court posited that since diversity was not a compelling interest, educational officials had to admit a white student because the policy violated her right to equal protection insofar as her score was higher than those of the minority applicants that were admitted in her place.¹⁵³

Along the same line, in a 1999 case from Maryland, the Fourth Circuit ruled in favor of the parents of a first grade student who questioned the constitutionality of a policy at a magnet school that used race and ethnicity as factors in considering whether students could transfer into the program.¹⁵⁴ The court directed the board to admit the child to the magnet school, acknowledging that the use of race as a factor in the transfer policy violated equal protection because it was insufficiently narrowly tailored to achieve the goal of a diversified student body.¹⁵⁵

Conversely, in the same year, the Ninth Circuit upheld a policy from California that allowed race and ethnicity to be employed as criteria in admitting students to a university's laboratory school.¹⁵⁶ The court held that the state had a compelling interest in providing effective education in urban schools and its use of race was narrowly tailored to achieve this

146. *Id.* at 1276.

147. *Id.* at 1285.

148. *Keyes v. Sch. Dist. No. 1*, 119 F.3d 1437 (10th Cir. 1997).

149. *Id.* at 1140.

150. *Wessmann v. Boston Sch. Comm.*, 996 F. Supp. 120 (D. Mass. 1998).

151. *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

152. *Id.* at 800.

153. *Id.* at 800, 793-94.

154. *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 133-34 (4th Cir. 1999).

155. *Id.* at 131.

156. *Hunter ex rel. Brandt v. Regents*, 190 F.3d 1061, 1067 (9th Cir. 1999).

goal.¹⁵⁷

In a case from Louisiana initially involving a consent decree, a magnet school, and a court-ordered desegregation plan, the Fifth Circuit held that a school board's race-based admissions policy was not narrowly tailored enough to remedy the present effects of past segregation.¹⁵⁸ Without citing either *Grutter* or *Gratz*, the court rejected the plan as unacceptable absent additional evidence that educational officials considered race-neutral means of selecting students who might have increased participation by African Americans in the school.¹⁵⁹ The court also rejected the argument that the quota system complied with the dictates of the earlier consent decree.¹⁶⁰

Later that same year, the First Circuit reached the opposite result when parents in Massachusetts whose children were denied race-conscious transfers filed a discrimination claim against school officials.¹⁶¹ Sitting en banc, the First Circuit found the plan was sufficiently narrowly tailored to meet the school committee's compelling interest in achieving the benefits of educational diversity, and was thus constitutional.¹⁶²

III. PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DIST. NO. 1

Parents Involved involved two separate cases that were argued together before the Supreme Court. This section reviews the judicial histories of the two cases before examining the opinions of the justices in *Parents Involved*.

A. *McFarland ex rel. McFarland v. Jefferson County Public Schools*¹⁶³

A dispute arose in Louisville, Kentucky, the twenty-eighth largest school system in the United States, home to 97,000 students,¹⁶⁴ when dissatisfied

157. *Id.*; see also *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) (commenting, in upholding an urban-suburban inter-district transfer program, that "indeed, such [voluntary racial] integration serves important societal functions").

158. *Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 260 (5th Cir. 2005).

159. *Id.*

160. *Id.*

161. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

162. Shortly after the Supreme Court rendered its judgment in *Parents Involved*, the Lynn parents sought to re-open the case. See Mark Walsh, *Use of Race Uncertain for Schools*, EDUC. WEEK (Bethesda, Md.), July 18, 2007, at 1. The federal trial court in Massachusetts has since denied the parents' request for relief from the final judgment, essentially dismissing their claim. *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 541 F. Supp. 2d 429 (D. Mass. 2008).

163. 330 F. Supp. 2d 834 (W.D. Ky. 2004).

164. *Id.* at 839.

parents challenged a district-wide, race-conscious school choice plan.¹⁶⁵ Officials implemented the plan even though the district had been released from judicial supervision for school desegregation in 2000.¹⁶⁶ On further review of an order upholding the plan,¹⁶⁷ the Sixth Circuit affirmed in *McFarland ex rel. McFarland v. Jefferson County Public Schools*.¹⁶⁸ In a one paragraph opinion, the court agreed that the plan was acceptable because the school board had a compelling interest in using racial guidelines and applied them in a manner that was narrowly tailored to realize its goals.¹⁶⁹ The court explained that since the plan was narrowly tailored to achieve the compelling governmental interest of preserving the presence of minority students in each school as a means of successfully implementing racial integration, it passed constitutional muster.¹⁷⁰

B. *Parents Involved in Community Schools v. Seattle School District No. 1*

Parents Involved in Community Schools v. Seattle School District No. 1,¹⁷¹ a procedurally complex case involving a Seattle, Washington, school system which had never been segregated by law,¹⁷² began prior to *Grutter* and *Gratz*.¹⁷³ In 2000, pursuant to their espoused desire to eliminate what they described as thirty years of racial isolation in the city's public schools,¹⁷⁴ educational leaders in the 46,000 student school system¹⁷⁵

165. *Id.* at 836.

166. *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000).

167. *McFarland*, 330 F. Supp. 2d at 864.

168. 416 F.3d 513 (6th Cir. 2005).

169. *Id.* at 574.

170. *Id.*

171. 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

172. Although Seattle had never been under judicial oversight for segregation, it had its share of controversy with regard to use of bussing to achieve racial balances in schools. In *Citizens Against Mandatory Bussing v. Palmason*, 495 P.2d 657 (Wash. 1972), the Supreme Court of Washington refused to invalidate a plan from the school board for equalizing educational opportunities for all students based on the concern of some parents who feared that their children would have been disadvantaged by attending schools outside of their immediate neighborhoods. *Id.* at 666. The court also rejected the parents' claim that they had the right to select public school for their children. *Id.* at 665–66. Further, in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Supreme Court struck down a voter initiative that would have forbidden local boards from requiring students to attend schools other than one of the two closest to their homes and from using a number of assignment methods such as redefining attendance zones and pairing schools. *Id.* at 487. The Court held that since the initiative impermissibly classified individuals based on race and sought to end bussing to achieve racial integration, it violated the equal protection rights of minority students. *Id.* at 471–72.

173. *See Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d 1224.

174. *Id.* at 1225.

developed an “open choice” plan to attempt to redress inequities in student assignments.¹⁷⁶

A group of parents sued the school board over the “open choice” assignment plan claiming that it violated the Equal Protection Clause and state laws by unconstitutionally relying on race as the tiebreaker in assigning students to oversubscribed high schools.¹⁷⁷ In the initial round of litigation, a federal district court granted the school board’s motion for summary judgment, finding that the use of race as a tiebreaker did not violate the Equal Protection Clause because it was narrowly tailored to serve a compelling governmental interest.¹⁷⁸ On further review, the Ninth Circuit reversed in favor of the parents,¹⁷⁹ but withdrew its opinion when it agreed to a rehearing while certifying the question to the Supreme Court of Washington.¹⁸⁰ The panel requested that the Supreme Court of Washington consider whether use of a racial tiebreaker in making high school assignments violated a state law against discriminating against, or granting preferential treatment to, individuals or groups due to race, color, ethnicity, or national origin in the operation of public schools.¹⁸¹

According to the Supreme Court of Washington, the open choice plan tie breaker did not violate state law “so long as it remain[ed] neutral on race and ethnicity and [did not] promote a less qualified minority applicant over a more qualified applicant.”¹⁸² While the Ninth Circuit had originally been persuaded that the racial integration tiebreaker violated Washington’s state law prohibiting the preferential use of race in public education, the panel changed its decision based on the Supreme Court of Washington’s holding to the contrary.¹⁸³ Subsequently, an en banc panel of the Ninth Circuit, relying on *Gratz* and *Grutter*, held that the plan did not violate equal protection since its use of race was sufficiently narrowly tailored to achieve the compelling state interest of avoiding racial isolation while increasing diversity.¹⁸⁴ The court concluded that the plan was constitutionally acceptable because it met the requirements of *Grutter* and *Gratz* insofar as

175. Walsh, *supra* note 162, at 26.

176. *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d at 1225–26.

177. *Id.* at 1226.

178. *Id.* at 1240.

179. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 285 F.3d 1236 (9th Cir. 2002).

180. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1084 (9th Cir. 2002).

181. *Id.* at 1085.

182. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 166 (Wash. 2003).

183. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 957 (9th Cir. 2004).

184. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005).

the school board engaged in a good faith consideration of race-neutral alternatives.¹⁸⁵

On further review in a non-consolidated appeal wherein the cases were argued together and addressed in a single opinion, *Parents Involved*, a bitterly divided Supreme Court struck down plans from Seattle and Louisville that classified students by race in making school assignments.¹⁸⁶

As author of the Supreme Court's judgment, Chief Justice Roberts made the declaration that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁸⁷ Chief Justice Roberts, joined in parts by Justices Scalia, Kennedy, Thomas, and Alito, wrote the majority opinion as a reflection of his taking a greater leadership role on the High Court bench.¹⁸⁸ At the outset, the Court defined the issue as "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."¹⁸⁹ The Court then reviewed the facts of the cases and declared that it had jurisdiction to resolve the dispute.¹⁹⁰

The Supreme Court utilized the familiar strict scrutiny analytical framework but did so in such a way that it represents a significant development in many respects.¹⁹¹ Initially, the Court held that correcting a

185. *Id.* at 1188.

186. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007). For representative commentary on *Parents Involved*, both before and after the Court ruled, see, e.g., Jonathan Fischbach, Will Rhee, & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491 (2008); Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1 (2007); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006); William E. Thro, *The Constitutional, Educational, and Institutional Implications of the Majority and Concurring Opinions in Parents Involved for [sic] Community Schools*, 231 EDUC. L. REP. 495 (2008); J. Harvie Wilkinson III, *The Seattle and Louisville Cases: There Is No Other Way*, 121 HARV. L. REV. 158 (2007).

187. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2768.

188. For reflections on the current state of the Court, see William E. Thro, Commentary, *The Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 EDUC. L. REP. 491 (2007).

189. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2746.

190. *Id.* at 2741, 2751. For a related discussion on standing, see *infra* notes 198 and 240.

191. See *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2751–61. The Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." *Johnson v. Cal.*, 543 U.S. 499, 505 (2005) (citations omitted). See also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995)

racial imbalance in elementary and secondary schools was not, without more, a compelling governmental interest.¹⁹² In doing so, the Court emphasized that a racial imbalance was of no constitutional consequence.¹⁹³

The Supreme Court next reasoned that obtaining the educational benefits of a diverse student body is simply not a compelling interest in the K–12 context.¹⁹⁴ This part of the opinion stands in strong contradistinction to the University of Michigan racial preference cases, *Grutter* and *Gratz*, wherein, a mere four years earlier, the justices decreed that obtaining the educational benefits of a diverse student body was a compelling governmental interest in the higher education context.¹⁹⁵ In refusing to apply a diversity rationale in the context of K–12 schooling, the Court emphasized the unique nature of higher education.¹⁹⁶ The justices thus indicated that the disputed school board policies inappropriately treated race as the decisive factor rather than merely as one factor among many.¹⁹⁷

(applying strict scrutiny “despite the surface appeal of holding ‘benign’ racial classifications to a lower standard, because ‘it may not always be clear that a so-called preference is in fact benign’” (quoting *Regents v. Bakke*, 438 U.S. 265, 298 (1978))); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“But the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”).

192. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2752. As the Court observed: We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that “the Constitution is not violated by racial imbalance in the schools, without more.” Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.

Id. (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.4 (1977)) (citations omitted).

193. *Id.*

194. *Id.* at 2754.

195. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

196. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754. As the Chief Justice remarked:

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” The Court explained that “[c]ontext matters” in applying strict scrutiny, and repeatedly noted that it was addressing the use of race “in the context of higher education.” The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

Id. (quoting *Grutter*, 539 U.S. at 329, 327, 328, 334) (internal citations omitted).

197. *Id.* at 2753. Chief Justice Roberts articulated the differences as follows:

In fact, the Court admonished local school officials for viewing “race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms” in Kentucky.¹⁹⁸

The Supreme Court went on to reemphasize that if racial classifications are going to survive strict scrutiny, then they must be effective in achieving a compelling governmental interest.¹⁹⁹ The Court pointed out that “the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”²⁰⁰ The Court expanded this rationale in noting that “[c]lassifying and assigning schoolchildren according to a binary conception of race is an extreme approach” that “requires more than such an amorphous end to justify it.”²⁰¹ By demanding that racial classifications *actually achieve* the compelling objective, the Court made it more difficult for the government to pursue the use of race in school admissions.

Rounding out its analysis, the Supreme Court strengthened the requirement that the government consider race-neutral alternatives before utilizing racial classifications.²⁰² At this point, the justices conceded that they deferred to the University of Michigan’s assertions in *Grutter* that

The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a “highly individualized, holistic review.”

Id. (quoting *Grutter*, 539 U.S. at 337). He continued,

“[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount.” The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be “patently unconstitutional.”

In the present cases, by contrast, race is not considered as part of a broader effort to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints;” race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here “do not provide for a meaningful individualized review of applicants” but instead rely on racial classifications in a “nonindividualized, mechanical” way.

Id. at 2753–54 (quoting *Grutter*, 539 U.S. at 337, 330; *Gratz v. Bollinger*, 539 U.S. 244, 276 (O’Connor, J., concurring)) (internal citations omitted) (emphasis in original).

198. *Id.* at 2754.

199. *Id.* at 2773.

200. *Id.* at 2760.

201. *Id.*

202. *Id.* at 2761.

race-neutral alternatives would be ineffective.²⁰³ However, the Court abandoned this deference in K–12 public education,²⁰⁴ responding that local school officials “failed to show that they considered methods other than explicit racial classifications to achieve their stated goals.”²⁰⁵

In sum, the Supreme Court’s analysis signals the majority’s reaffirmation of the principle that the Equal Protection Clause prevents the government from treating people differently due to race.²⁰⁶ In refusing to allow racial preferences in order to achieve racial balances, the Court rejected racial balancing in K–12 education as a compelling interest, limited the pursuit of diversity to higher education, demanded that racial classifications actually work, and directed educational officials to consider non-racial alternatives in student assignments. In this way, the Court made it more difficult for governmental agencies to pursue racial balancing.

The Roberts plurality, that portion of the Chief Justice’s opinion that was not joined by Justice Kennedy but had the support of Justices Scalia, Thomas, and Alito, effectively adopted the first Justice Harlan’s view from *Plessy v. Ferguson*²⁰⁷ that the Constitution is color-blind.²⁰⁸ Roberts asserted that “accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society.”²⁰⁹ Moreover, Roberts determined that “[a]llowing racial balancing as a compelling end in itself” would ensure “that race will always be relevant in American life” and “would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture.”²¹⁰ Roberts added that “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”²¹¹

Next, the Roberts plurality insisted that *Brown v. Board of Education*²¹² stands for the proposition that “segregation deprived black children of

203. See *id.* at 2760; see also *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

204. For an interesting article on judicial deference, see Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008).

205. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2760.

206. Of course, differing treatment is allowed if it is a narrowly tailored means of remedying the present day effects of past intentional discrimination by the government. Moreover, in the higher education context, differing treatment is allowed if it is a narrowly tailored means of achieving the educational benefits of a diverse student body.

207. 163 U.S. 537 (1896).

208. *Id.* at 559 (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”).

209. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2757.

210. *Id.* at 2758.

211. *Id.*

212. 349 U.S. 294 (1955).

equal educational opportunities . . . because government classification and separation on grounds of race themselves denoted inferiority.”²¹³ Roberts made it clear that if school boards are “to achieve a system of determining admission to the public schools on a nonracial basis,” then boards must “stop assigning students on a racial basis.”²¹⁴ The Chief Justice thus viewed non-discrimination as the constitutional command.

In dealing with issues of educational equality, it is worth noting at this point that historically, the courts “have utilized two competing ‘paradigms’ of educational equality.”²¹⁵ First, the “‘Numerical Parity Paradigm’ . . . focuses on insuring that racial and gender groups are adequately represented.”²¹⁶ This paradigm concerns

disparate impact and insuring that traditionally excluded groups such as racial minorities, women, and the poorer economic classes are adequately, if not proportionally, represented. Implicit in this paradigm is the assumption that one group must be advantaged, at least on a temporary basis, to atone for the previous sins against it. This paradigm focuses on objective criteria such as number of participants and assumes, at least implicitly, that all groups have an equal desire to pursue certain opportunities. When taken to its logical conclusion, the Numerical Parity Paradigm results in numerical or financial quotas. In the Numerical Parity Paradigm at its extreme, change is brought about by forcing educational institutions to adopt rigid numerical quotas for each gender and then finding persons of the appropriate gender to fill the quotas. [Under this approach, p]ersons are valued not so much for their individuality as for their membership in a particular gender group. Moreover, in the numerical parity paradigm, the emphasis is on the impact of a policy or decision. The fact that no one made a conscious choice to discriminate is irrelevant. What matters is that one group was disadvantaged more than another

Second, the courts have utilized a “Non-Discrimination Paradigm” which focuses on insuring that one’s race is never a consideration in any educational decision and that all students have an opportunity to attend a quality school. Implicit in this

213. *Id.*

214. *Id.* at 2768.

215. William E. Thro, *Judicial Paradigms of Educational Equality*, 174 EDUC. L. REP. 1, 6 (2003); *see also* Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL’Y 1 (1996); William E. Thro, *The Constitutional, Educational, and Institutional Implications of the Majority and Concurring Opinions In Parents Involved for Community Schools*, 231 EDUC. L. REP. 495 (2008) [hereinafter Thro, *Majority and Concurring Opinions*].

216. Thro, *supra* note 215, at 7.

paradigm is the assumption that individuals, regardless of race, should be treated the same. This paradigm ensures that there is no overt or covert gender discrimination in either participation opportunities or treatment. Instead of focusing on equality of numbers, the non-discrimination paradigm focuses on equality of treatment. As such, the paradigm acknowledges that individuals may place different values on a given program. Thus, this paradigm would require that no student be treated differently or excluded simply because of race, gender, or economic status. In the non-discrimination paradigm, change is brought about by forcing the educational institutions to take affirmative steps to promote full acceptance of persons as individuals, not as members of a group, and encouraging all persons to maximize the use of their particular talents and to pursue their specific interests in sports and other activities. [Under this approach, p]ersons are treated as *individuals*, are accorded dignity and respect, and are permitted to meet their personal objectives. Because of the non-discrimination paradigm's emphasis on the "marketplace" of desires and respect for individual differences, change is much slower than in the quota driven numerical parity paradigm. Moreover, in the non-discrimination paradigm, the emphasis is on conscious decisions to exclude or to treat differently. The fact that a neutral policy may have the unintended consequence of affecting one group more than another is considered irrelevant [under this paradigm].²¹⁷

In conclusion, the Roberts plurality asserted that race has no role in governmental decision-making except when it is used remedially as in *Paradise*. While the majority opinion effectively prohibited the *direct* consideration of race, the Roberts plurality effectively forbade the *indirect* consideration of race.

The distinction between the indirect and direct consideration of race also formed the basis for Justice Kennedy's concurrence.²¹⁸ Even so, Justice Kennedy viewed the Roberts plurality's endorsement of a color-blind constitution as "inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause."²¹⁹ In particular, Kennedy would have permitted local school board officials "to

217. *Id.* at 9–10 (emphasis in original).

218. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2788–97 (Kennedy, J., concurring). Justice Kennedy's distinction between direct and indirect consideration of race is consistent with the results in the University of Michigan decisions. See Thro, *supra* note 123; see also Elizabeth B. Meers & William E. Thro, RACE CONSCIOUS ADMISSIONS & FINANCIAL AID AFTER THE UNIVERSITY OF MICHIGAN DECISIONS (National Association of College & University Attorneys 2004).

219. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2788.

consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition” as long as officials avoided “treating each student in different fashion solely on the basis of a systematic, individual typing by race.”²²⁰ Accordingly, Kennedy’s opinion stands for the proposition that school board officials can consider race in building new schools, drawing attendance boundaries, allocating resources, and recruiting students for special programs.²²¹ He further ascertained that “[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”²²²

While Justice Kennedy refused to accept a color-blind constitution,²²³ he found the dissent’s embrace of racial balancing to be “a misuse and mistaken interpretation of our precedents [leading] it to advance propositions that . . . are both erroneous and in fundamental conflict with basic equal protection principles.”²²⁴

Unlike Justice Kennedy, Justice Thomas joined all aspects of the Roberts plurality.²²⁵ Nevertheless, he was compelled to write separately to address Justice Breyer’s dissent.²²⁶ Justice Thomas emphasized the constitutional equivalence between race-based assignments designed to help racial minorities and race-based assignments designed to hinder minorities.²²⁷ He also set out a comprehensive explanation as to why he

220. *Id.* at 2792.

221. *Id.*

222. *Id.*

223. Of course, Justice Kennedy joined four other Justices to form an opinion of the Court that adopts the Non-Discrimination Paradigm and rejects the Numerical Parity Paradigm.

224. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2788.

225. *Id.* at 2746.

226. *Id.* at 2768 (Thomas, J., concurring). As Justice Thomas explained:

Contrary to the dissent’s arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a color-blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*. This approach is just as wrong today as it was a half-century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

Id. (internal citations omitted).

227. *Id.* at 2774. Responding to the dissent’s argument that the student assignment plans should be subjected to a lesser standard, Justice Thomas observed:

These arguments are inimical to the Constitution and to this Court’s

believes that the color-blind interpretation of the Constitution is correct.²²⁸

In a brief, but biting, dissent Justice Stevens stated that he joined Justice Breyer's dissent in full.²²⁹ Even so, he wrote a separate opinion expressing his contention that the current majority had turned its back on *Brown*.²³⁰

Justice Breyer's lengthy dissent, which was joined by Justices Stevens, Souter, and Ginsburg, maintained that since the plans at issue were sufficiently narrowly tailored, especially since they were developed by democratically elected school boards,²³¹ they should have been upheld.²³² Not unlike Justice Stevens, he feared that the outcome in *Parents Involved* threatened the legacy of *Brown*.²³³

precedents. We have made it unusually clear that strict scrutiny applies to every racial classification . . . There are good reasons not to apply a lesser standard to these cases. The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking. Purportedly benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking.

Id. (internal citations omitted) (emphasis in original).

228. *Id.* at 2782–83. Justice Thomas continues to speak out in favor of color-blind programs, stating that they better serve African Americans than affirmative action. Speaking to a gathering of leaders of historically black colleges, he said that affirmative action “has become this mantra and there almost has become this secular religiosity about it. I think it almost trumps thinking.” *Thomas Says Constitution Forbids Racial Preference*, ABC NEWS, Sept. 9, 2008, <http://abcnews.go.com/TheLaw/SupremeCourt/wireStory?id=5762883>.

229. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2797 (Stevens, J., dissenting).

230. *Id.* at 2800 (“The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”).

231. As important as it is to keep the democratic process in mind, and readily acknowledging that the issues are significantly different, it is worth recalling that as of 1964, a full ten years after *Brown*, only 2.14% of African American students in seven of the eleven Southern states attended desegregated schools; the only progress was made in Kentucky, Mississippi, Oklahoma, and West Virginia. HAROLD W. HOROWITZ, KENNETH L. KARST, & WARREN D. BRACY, *LAW, LAWYERS, AND SOCIAL CHANGE: CASES AND MATERIALS ON THE ABOLITION OF SLAVERY, RACIAL SEGREGATION, AND INEQUALITY OF EDUCATIONAL OPPORTUNITY* 240 (1969). By the 1968–69 school year, this figure increased to 20.3% in schools with at least 50% white students. *Id.* at 239.

As to the democratic nature of decision making, Justice O’Connor’s salient observation in her concurrence in *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (O’Connor, J., concurring), that “we do not count heads before enforcing the First Amendment” should serve as a strong counter-balance to the argument that a majority, even a democratic majority, is always correct. *Id.* at 884.

232. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2800 (Breyer, J., dissenting).

233. *Id.*

IV. THE COURT AND RACIAL PREFERENCES: A QUICK RETROSPECTIVE

As revealed in this review of its litigation, the Supreme Court has been so overtly polarized by the issue of racial preferences that it has been unable to reach majority opinions in almost one-third of its cases on this contentious topic. These differences are starkly reflected in the fact that an examination of the nineteen cases that the Court addressed on race-conscious remedies, starting with its first substantive judgment in *Bakke* and culminating with its most recent in *Parents Involved*, reveals that these suits have generated the amazing total of ninety-two different judicial opinions, an average of 4.84 opinions per judgment. Moreover only one case (*Abrams*) had as few as two opinions, five generated six opinions (*Bakke*, *Croson*, *Adarand*, *Vera*, and *Grutter*), one rendered an incredible seven (*Gratz*), and six resulted in full pluralities (*Bakke*, *Paradise*, *Fullilove*, *Croson*, *Carey*, and *Wygant*) while one (*Parents Involved*) included a partial plurality.

It is also worth noting that judicial attitudes towards racial preferences that are designed to help minorities seem to be absolutist. Put another way, as reflected by even a cursory examinations of the votes in these cases, justices tend either never to tolerate race-based preferences or almost always to support their use.

V. IMPLICATIONS

Parents Involved dealt with K–12 education. Even so, *Parents Involved* raises significant implications for higher education, particularly with respect to admissions and financial assistance.

In *Parents Involved*, the Supreme Court held that gaining the educational benefits of a diverse student body was not a compelling interest in the K–12 context.²³⁴ A mere four years earlier, in the University of Michigan racial preference cases, the Court ruled that procuring the educational benefits of a diverse student was a compelling governmental interest in the context of higher education.²³⁵ In rejecting the application of diversity in elementary and secondary schools, the Court emphasized the unique nature of higher education.²³⁶ The Court also found that school board policies in Seattle and Louisville impermissibly made race the decisive factor rather than merely one factor among many.²³⁷ Consequently, the Court admonished the school board officials for viewing “race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms.”²³⁸ Thus, according to the Court, a desire merely to have a particular minority

234. *Id.* at 2752 (majority opinion).

235. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

236. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754; *see also supra* note 196.

237. *Parents Involved in Cmty. Sch.*, S. Ct. at 2753–54; *see also supra* note 197.

238. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754.

represented in public schools is not compelling. This aspect of *Parents Involved* is particularly significant for institutions of higher learning that do not have well-developed definitions of diversity or that have failed to tie this definition and interest closely to their educational missions. In other words, after *Parents Involved*, it is essential that officials in colleges and universities remain focused on *Grutter*'s broad definition of diversity and its emphasis on race being one factor among many.

As part of its analysis in *Parents Involved* the Supreme Court, in distinguishing the K–12 context from higher education, refused to apply the *Grutter* rationale based on the educational benefits of diversity.²³⁹ Consequently, *Parents Involved* casts serious doubt on whether the present Supreme Court would treat diversity as a compelling governmental interest outside of contexts directly related to university admissions, possibly including, for example, the faculty-hiring context.

The Supreme Court's rationale in *Parents Involved* reemphasized that if racial classifications are to survive strict scrutiny, then such plans must be effective in achieving a compelling governmental interest.²⁴⁰ Indeed, "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications."²⁴¹ Not surprisingly, the Court reasoned that "[c]lassifying and assigning school children according to a binary conception of race is an extreme approach" that "requires more than such an amorphous end to justify it."²⁴²

By demanding that racial classifications *actually achieve* their compelling objective, the Supreme Court made it more difficult for the government to pursue the use of race as a mere palliative when addressing racial discrimination. This means that under the majority's analysis in *Parents Involved*, a racial classification that does little or nothing to achieve diversity would not survive judicial scrutiny. This holding could be particularly significant in the contexts of scholarship and outreach in public colleges and universities as colleges and universities may have to provide detailed plans and objectives for the use of race when engaged in these activities.

At the same time, the Supreme Court strengthened the requirement that the government consider race-neutral alternatives before utilizing racial classifications.²⁴³ In *Grutter*, the Court had deferred to the University of Michigan's assertions that race-neutral alternatives would be ineffective.²⁴⁴ Yet, in *Parents Involved* the Court abandoned deference in pointing out that the school board preference plans were constitutionally impermissible

239. *Id.*

240. *Id.* at 2760.

241. *Id.*

242. *Id.*

243. See *id.* at 2792 for a list of possible alternatives.

244. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

because local school officials “failed to show that they considered methods other than explicit racial classifications to achieve their stated goals.”²⁴⁵ This portion of *Parents Involved* creates a greater hurdle for officials in institutions of higher learning if they try to justify the use of race in the contexts of scholarship and outreach without first having seriously considered other approaches, perhaps such as socioeconomic status, that do not directly implicate race.²⁴⁶ The use of socioeconomic status could be particularly valuable for college and university officials who wish to diversify their campuses, especially if they are interested in a broader sample of students who were raised in rural and suburban poverty, such as students who hail from such typically economically deprived regions as Appalachia.

It is significant that a four justice plurality consisting of Chief Justice Roberts and Justices Scalia, Thomas, and Alito, effectively adopted the first Justice Harlan’s view that the Constitution is color-blind²⁴⁷ in its declaration that “[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society.”²⁴⁸ In short, since the view of these four justices seems intolerant of any voluntary use of race by government, officials in colleges and universities would be well advised to keep this in mind as they deal with diversity policies based on race.

In his concurrence, Justice Kennedy did not embrace the idea of a color-blind Constitution.²⁴⁹ Moreover, he suggested that boards wishing to deal with diversity might take a variety of alternatives into account, including “strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race,”²⁵⁰ techniques (other than the first) that may work well in higher education.

Justice Kennedy’s comments are consistent with his view in *Grutter* that while diversity is a compelling interest in higher education, it simply does not rise to that level in public elementary and secondary education.²⁵¹ In sum, Justice Kennedy, like the members of the plurality, seems to be extremely skeptical of any voluntary use of race, but has not shut the door

245. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2760.

246. For an update on the situation in Louisville, see Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES MAGAZINE, July 20, 2008, at 38.

247. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”).

248. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2757; see also *supra* notes 208–214 and accompanying text.

249. See *supra* notes 218–224 and accompanying text.

250. *Id.*

251. *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., concurring).

on all tightly defined programs in which the use of race is carefully justified in light of all the facts and circumstances.

College and university counsel, other attorneys who work in higher education, administrators, and faculty members, among others, may be reassured by Justice Kennedy's continued embrace of the indirect consideration of race. Yet, they must concomitantly be aware that Justice Kennedy dissented in *Grutter* because he believed that the University of Michigan's use of race was not narrowly tailored. If confronted with a case involving racial preferences in admissions or financial aid, Justice Kennedy is likely to be equally as highly skeptical of the use of race in this context. Thus, college and university officials will have to devise creative new policies if they continue to define diversity based almost entirely on race since a majority of the justices on the Supreme Court have signaled that they are apparently unwilling to allow educators to continue to engage in business as usual.

VI. CONCLUSION

In *Grutter*, the Supreme Court ruled that, in narrow circumstances, colleges and universities may consider race as a factor in student admissions but also suggested that such racial preferences would be unnecessary in twenty-five years.²⁵² Yet, the Court made no effort to justify or explain why it set this time frame. While *Parents Involved* did not disturb *Grutter*'s core holding, it did impose additional limitations on the ability of college and university officials to consider race in admissions and, presumably, financial assistance. Moreover, four justices, including the three youngest, embraced a color-blind Constitution, a vision that is incompatible with any consideration of race except to remedy prior racial discrimination in the governmental entities in question. Even though Justice Kennedy refused to embrace this vision and emphasized that he would tolerate the indirect consideration of race, he remains skeptical that even the indirect use of race in educational settings can be narrowly tailored. Indeed, since Justice Kennedy was a dissenter in *Grutter*, after *Parents Involved*, officials in colleges and universities should be especially careful in their use of race-conscious remedies.

252. *Id.* at 337 (majority opinion).

PRESERVING THE INDEPENDENCE OF PUBLIC HIGHER EDUCATION: AN EXAMINATION OF STATE CONSTITUTIONAL AUTONOMY PROVISIONS FOR PUBLIC COLLEGES AND UNIVERSITIES

NEAL H. HUTCHENS*

INTRODUCTION

In American higher education, the need to make public colleges and universities responsive to the public interest is often in tension with the necessity of providing institutions with the requisite authority to manage their internal affairs.¹ In seeking to strike a balance between acceptable state oversight versus the need to safeguard the authority of public colleges and universities to manage their own affairs, some states rely on constitutional provisions to limit excessive state governmental intrusion.² Specifically, these provisions vest constitutional authority in public higher education governing boards to direct the affairs of institutions or systems under their direction. In contrast to this approach, in most states the powers and duties of public college and university governing boards are often largely subject to or defined by statutory authority.³ The use of a constitutional provision to establish and provide legal protection for the internal control of a public college or university is commonly referred to as constitutional autonomy.⁴

Constitutional autonomy represents a distinctive governance mechanism

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1. Michael K. McLendon, *State Governance Reform of Higher Education: Patterns, Trends, and Theories of the Public Policy Process*, in 18 HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 57, 57 (John C. Smart ed., 2003).

2. Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 177-79 (1978).

3. In some states, a governing board may be established by constitutional provision but with the powers and duties of the board subject to complete legislative control.

4. Beckham, *supra* note 2, at 179.

in public higher education, and several colleges and universities with independent constitutional authority enjoy national reputations, including the University of Michigan and campuses within the University of California system.⁵ Examination of the current legal status of constitutional autonomy provisions is potentially useful to courts faced with the task of applying constitutional provisions to new cases. In addition, higher education stakeholders may find an analysis of constitutional autonomy beneficial in relation to ongoing policy discourse concerning the appropriate degree of state oversight for public higher education.⁶ One author has even examined constitutional autonomy in California as a basis to explore issues related to federal constitutional protections for institutions under the First Amendment and principles of academic freedom.⁷ Accordingly, consideration of constitutional autonomy has possible relevance in several law and policy arenas that extend beyond just those states with judicial recognition of constitutional autonomy.

Approximately three decades have elapsed since the last comparative legal analysis of constitutional autonomy provisions by Joseph Beckham in 1978.⁸ Along with seeking to provide an updated comparative analysis covering roughly the decades since Beckham's study, the author was also motivated to examine a forecast offered in 1973 by Lyman A. Glenny and Thomas K. Dalglisch that constitutional autonomy appeared to be waning, with their work entitled *Public Universities, State Agencies, and the Law: Constitutional Autonomy in Decline*.⁹ Glenny and Dalglisch, considering non-legal trends along with legal decisions, determined that, especially in relation to control of financial issues, institutions possessing independent

5. See *infra* Part IV-A. Michigan and California, along with Minnesota, have been recognized as the states possessing the strongest forms of constitutional autonomy. See Beckham, *supra* note 2, at 181; DEBORAH K. MCKNIGHT, UNIVERSITY OF MINNESOTA CONSTITUTIONAL AUTONOMY: A LEGAL ANALYSIS 21 (2004), available at <http://www.house.leg.state.mn.us/hrd/pubs/umcnauto.pdf>.

6. For background on ongoing policy debates in this area, see generally McLendon, *supra* note 1.

7. Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005).

8. See Beckham, *supra* note 2. While McKnight listed states with at least one court case interpreting constitutional autonomy provisions in an appendix, she confined her analysis to the current legal status of constitutional autonomy in Minnesota. MCKNIGHT, *supra* note 5. Like McKnight's legal analysis, other studies on constitutional autonomy conducted since Beckham's study focus on specific states. See, e.g., Petroski, *supra* note 7; Caitlin M. Scully, Note, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927 (1987); James F. Shekleton, *The Road Not Taken: The Curious Jurisprudence Touching upon the Constitutional Status of the South Dakota Board of Regents*, 39 S.D. L. REV. 312 (1994).

9. LYMAN A. GLENNY & THOMAS K. DALGLISH, *PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE* (1973).

constitutional authority were experiencing a loss of power “to exercise final judgment on the use not only of [their] state funds but also of those derived from other sources.”¹⁰ Their conclusions, along with the desire to update Beckham’s study, helped to prompt inquiry into the current status of constitutional autonomy, including whether or not judicial decisions indicate eroding support for the legal doctrine during recent decades.

Consideration of how to deepen the study’s assessment of constitutional autonomy triggered a secondary interest in the value of looking to concepts developed in the higher education literature to examine the topic. Specifically, the concepts of substantive and procedural autonomy and their relationship to the internal authority, or institutional autonomy, possessed by public and private colleges and universities to control their internal affairs seemed to provide a promising conceptual lens. Substantive autonomy refers to the authority of institutional leaders to establish significant institutional goals and priorities.¹¹ Procedural autonomy deals with an institution’s control over determining the appropriate methods to implement major goals and objectives, including those, in the case of public institutions, established by the legislative and executive branches of state government.¹² The appeal of applying these concepts, in a somewhat exploratory fashion, to constitutional autonomy provisions motivated the undertaking of the current analysis as well.

Seeking to evaluate the current legal status of constitutional autonomy among the states and to enhance the analysis of the legal doctrine using concepts developed in the higher education literature, the article takes a fresh look at constitutional autonomy provisions for public higher education. To provide background and context, Part II of the article considers previous assessments of constitutional autonomy, with special emphasis on the scholarship of Beckham.¹³ The article in Part III provides an overview of the concepts of substantive autonomy and procedural autonomy and discusses their potential usefulness in assessing and describing how constitutional autonomy provisions may affect the overall institutional autonomy of colleges and universities with constitutional autonomy.

Part IV assesses the current legal status of constitutional autonomy and categorizes states on the basis of (1) strong judicial support for constitutional autonomy, (2) moderate to limited judicial recognition of constitutional autonomy, (3) ambiguous legal status for constitutional

10. *Id.* at 143.

11. *See infra* Part III.

12. *See infra* Part III.

13. In addition to Beckham’s analysis and that of Glenny and Dalglish, works discussing constitutional autonomy include: MALCOLM MOOS & FRANCIS E. ROURKE, *THE CAMPUS AND THE STATE* (1959) and MERRITT M. CHAMBERS, *THE COLLEGES AND THE COURTS SINCE 1950* (1964).

autonomy, or (4) rejection of the legal doctrine. As discussed in the section, cases from the past three decades do not suggest that constitutional autonomy has experienced a decline, at least in terms of judicial treatment of constitutional provisions. The article turns in Part V to an analysis of constitutional autonomy provisions using the concepts of substantive autonomy and procedural autonomy where older, landmark cases are also considered alongside more contemporary decisions. Part VI of the article summarizes how constitutional autonomy persists as a distinctive and significant governance mechanism in public higher education and the promise of using the concepts of substantive and procedural autonomy to analyze constitutional autonomy provisions.

II. PREVIOUS SCHOLARSHIP RELATED TO CONSTITUTIONAL AUTONOMY

A. Definitions of Constitutional Autonomy

Beckham defines constitutional autonomy as a constitutional provision interpreted and supported by case law that grants, with certain limits, a governing board sole control over an institution.¹⁴ Deborah McKnight offers the following definition of constitutional autonomy:

Constitutional autonomy is a legal principle that makes a state university a separate department of government, not merely an agency of the executive or legislative branch. A university with this status is subject to judicial review and to the legislature's police power and appropriations power. However, its governing board has a significant degree of independent control over many university functions.¹⁵

Her definition highlights that constitutional autonomy provisions can elevate public higher education institutions or systems to a special place within a state's constitutional structure, one not occupied by other state entities. McKnight's definition also points out, however, that this independent grant of authority must be balanced against other constitutional provisions and powers vested in other state governmental entities. Most notably, legislative authority over appropriations represents a key check on constitutionally autonomous schools.¹⁶ In general, the

14. Beckham, *supra* note 2, at 179. Beckham distinguishes between the terms constitutional status and constitutional autonomy. Constitutional status, according to Beckham, means the establishment of a governing board or structure in the state constitution but this status alone does not mean that a public college or university institution or system enjoys some form of independent constitutional authority. *Id.* Constitutional language may still vest the legislative and executive branches with complete control over the higher education institution or system. Alternatively, court opinions may not provide judicial recognition of constitutional autonomy, even if the language in a constitutional provision might suggest otherwise.

15. MCKNIGHT, *supra* note 5, at 3.

16. Beckham, *supra* note 2, at 188.

constitutional autonomy of institutions also often must yield to generally applicable state laws passed to protect the general welfare or to establish state public policy.¹⁷ Institutions with constitutional autonomy remain subject as well to numerous federal laws and regulations. The description offered by McKnight serves as an important reminder that multiple forces, including tradition, the attitudes of the citizenry, and political factors, influence the degree of control institutions and systems with constitutional autonomy exercise in relation to their internal affairs.¹⁸

B. States Recognized as Possessing or Potentially Possessing Constitutional Autonomy

Authors have designated between seven and thirteen states as possessing constitutional autonomy.¹⁹ Beckham concluded that judicial recognition of constitutional autonomy existed in nine states: California, Georgia, Idaho, Louisiana, Michigan, Minnesota, Montana, Nevada, and Oklahoma.²⁰ He determined that numerous legal opinions supporting constitutional autonomy existed in California, Michigan, and Minnesota,²¹ a result consistent with determinations by other sources that these states constitute a kind of “Big Three” in terms of constitutional autonomy.²² Though with less extensive case law, he cited judicial recognition for more than sixty years in Idaho and Oklahoma.²³ While limited case law left some ambiguity, Beckham also concluded courts had appeared to recognize constitutional autonomy in Georgia, Louisiana, Montana, and Nevada.²⁴

17. *Id.*; see also MCKNIGHT, *supra* note 5, at 9.

18. See generally GLENNY & DALGLISH, *supra* note 9.

19. This range of numbers includes the more contemporary studies, with contemporary designated as the studies of Beckham and Glenny and Dalglish conducted in the 1970s. See Beckham, *supra* note 2; GLENNY & DALGLISH, *supra* note 9. In addition, the figures also represent the findings of some earlier studies of constitutional autonomy. In 1936, Edward C. Elliot and Merritt M. Chambers identified five states (California, Idaho, Michigan, Minnesota, and Oklahoma) as having constitutional provisions providing public colleges and universities considerable freedom from other units of state government. EDWARD C. ELLIOT & MERRITT M. CHAMBERS, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, THE COLLEGES AND THE COURTS, 134–44 (1936). Later, Chambers, as shown in a 1964 work, added Arizona, Colorado, Georgia, and Nevada to the list of states appearing to recognize some form of constitutional protection for public universities. CHAMBERS, *supra* note 13, at 147. Moos and Rourke listed six to seven states (California, Colorado, Idaho, Michigan, Minnesota, Oklahoma and potentially Georgia) as providing public colleges and universities with independent constitutional authority. MOOS & ROURKE, *supra* note 13, at 22 n. 4.

20. Beckham, *supra* note 2, at 181.

21. *Id.*

22. See, e.g., GLENNY & DALGLISH, *supra* note 9, at 23–25; MCKNIGHT, *supra* note 5, at 21.

23. Beckham, *supra* note 2, at 181–83.

24. *Id.*

Courts had not issued opinions in the three states of Alabama, North Dakota, and South Dakota, and judicial treatment made constitutional autonomy doubtful in Arizona, Colorado, Hawaii, Mississippi, Missouri, New Mexico, and Utah.²⁵ Table 1 summarizes Beckham's findings.

Table 1: Judicial Interpretations of Constitutional Autonomy in Public Higher Education as Analyzed by Beckham.

Courts have Recognized Constitutional Autonomy	Courts have Not Addressed Constitutional Autonomy	Courts have Rejected Constitutional Autonomy
California	Alabama	Arizona
Georgia	North Dakota	Colorado
Idaho	South Dakota	Hawaii
Louisiana		Mississippi
Michigan		Missouri
Minnesota		New Mexico
Montana		Utah
Nevada		
Oklahoma		

In their study, Glenny and Dalglisch identified seven states (California, Colorado, Georgia, Idaho, Michigan, Minnesota, and Oklahoma) with constitutional autonomy provisions.²⁶ McKnight, focusing on constitutional autonomy in Minnesota, did not undertake a comparative legal analysis among the states, but in an appendix listed thirteen states alongside Minnesota with at least one case appearing to recognize judicially constitutional autonomy: Alabama, California, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, and Oklahoma.²⁷ The appendix also listed seven states with constitutions appearing to grant constitutional autonomy but with courts in these states rejecting constitutional autonomy or giving the doctrine minimal effect: Alaska, Colorado, Mississippi, Missouri, New Mexico,

25. *Id.*

26. GLENNY & DALGLISH, *supra* note 9, at 15.

27. MCKNIGHT, *supra* note 5, at 21–23.

South Dakota, and Utah.²⁸ Table 2 summarizes states identified by Beckham, Glenny and Dalglish, and McKnight as having court cases or attorney general opinions recognizing constitutional autonomy.

Table 2: States Identified as Having Case Law or Attorney General Opinions Supportive of Constitutional Autonomy

Beckham (1978)	Glenny & Dalglish (1973)	McKnight (2004)
---	---	Alabama
California	California	California
---	Colorado	---
---	---	Florida
Georgia	Georgia	Georgia
---	---	Hawaii
Idaho	Idaho	Idaho
Louisiana	---	Louisiana
Michigan	Michigan	Michigan
Minnesota	Minnesota	Minnesota
Montana	---	Montana
---	---	Nebraska
Nevada	---	Nevada
---	---	North Dakota
Oklahoma	Oklahoma	Oklahoma

28. *Id.*

III. CONCEPT OF INSTITUTIONAL AUTONOMY TO ANALYZE CONSTITUTIONAL AUTONOMY PROVISIONS

Concepts related to institutional control and authority developed in the higher education scholarship to discuss and describe institutional autonomy provide a potentially useful conceptual lens through which to analyze constitutional autonomy provisions. Though obvious overlap exists, the legal doctrine of constitutional autonomy is not synonymous with the concept of institutional autonomy. Constitutional autonomy is derived from legal interpretations and language in constitutional provisions while the concept of institutional autonomy has developed in the higher education literature to describe the degree of control possessed by colleges and universities, including both public and private institutions, to direct their internal affairs in administrative and academic matters free from external interference.²⁹ Thus, while the focus of this article is public colleges and universities, institutional autonomy does not represent a concept distinct to only public higher education, nor to institutions possessing constitutional autonomy.

It is also important to note that while constitutional autonomy provisions represent a potentially important legal mechanism to help preserve the institutional autonomy of public colleges and universities, the degree of institutional autonomy possessed by institutions arises from multiple sources, including non-legal ones such as support from alumni and other constituencies or a tradition of non-interference with colleges and universities by other parts of state government.³⁰ Most significantly, public colleges and universities, including those with constitutional autonomy, are dependent upon state appropriations, which creates a significant incentive for institutions to respond to the concerns and wishes of elected officials. In relation to legal mechanisms besides constitutional autonomy provisions, many states have, for instance, provided corporate status to their public colleges and universities to provide them with greater control over their internal affairs.³¹ In the case of institutions with constitutional autonomy, they too may receive corporate status and exist as a constitutional corporation.³² Whether from a statute or from a non legal source, it is necessary to keep in mind that multiple factors combine to shape the overall level of institutional autonomy possessed by a public college or university, including those with constitutional autonomy.

29. See generally Robert O. Berdahl & T.R. McConnell, *Autonomy and Accountability: Who Controls Academe?*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 70 (Philip G. Altbach et al., 1999); McLendon, *supra* note 1.

30. Berdahl & McConnell, *supra* note 29, at 73–74.

31. See MOOS & ROURKE, *supra* note 13, at 37; Beckham, *supra* note 2, at 178.

32. GLENNY & DALGLISH, *supra* note 9, at 15.

Along with tenure and academic freedom, institutional autonomy constitutes one of the distinguishing features of American higher education.³³ It is useful to distinguish the concept of institutional autonomy from academic freedom, at least as that term is described in the higher education literature. According to Berdahl and McConnell, academic freedom represents an absolute concept usually vested in faculty members, while institutional autonomy operates in a much less rigid manner with colleges and universities subject to considerable governmental oversight in numerous areas.³⁴ They attribute the term academic freedom to individuals and autonomy to institutions.³⁵ Courts have often not made such a distinction when discussing federal constitutional protections for academic freedom, and among legal scholars and courts considerable disagreement also currently exists regarding the contours of constitutional protections for academic freedom.³⁶ One federal circuit court has declared, for instance, that to the extent that academic freedom receives any sort of special judicial protection, such rights are vested in institutions and not individuals.³⁷ For purposes of this article, it is sufficient to note the ongoing disagreement among courts and scholars over First Amendment protections for academic freedom, both at the individual and institutional levels, and to point out that in the higher education literature the term academic freedom is often reserved to apply to individual scholars, with the term autonomy applied to institutions.

Rather than an absolute concept, institutional autonomy operates in a flexible manner with public colleges and universities subject to varying degrees of control. McClendon states, “[b]ecause neither absolute autonomy of the campus from the state nor complete accountability of the campus to the state is likely to be feasible, the vexing question confronting policymakers is where, precisely, the line should be drawn between campus

33. Robert O. Berdahl et al., *The Contexts of American Higher Education*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 1, 5–8 (Philip G. Altbach et al. eds., 1999).

34. Berdahl & McConnell, *supra* note 29, at 71–72.

35. Part of this distinction among courts and higher education scholars stems from the fact that courts are generally focused on First Amendment legal standards in relation to discussing academic freedom, but academic freedom represents more than a legal doctrine. Academic freedom for individual scholars at colleges and universities rests in great part on professional standards designed to promote and protect scholarly inquiry. For a discussion of the development of academic freedom based on professional standards in higher education, see J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 267–88 (1989).

36. See, e.g., *id.*; Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1 (2007); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007).

37. *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000).

and state.”³⁸ In seeking to achieve the appropriate balance between state oversight and the institutional autonomy of public colleges and universities, some states have enacted constitutional provisions to shield public higher education institutions or systems from excessive governmental interference. Institutions with constitutional autonomy have been described as possessing heightened institutional autonomy.³⁹

The concept of institutional autonomy has also been broken down by scholars to categorize and describe the kinds of institutional functions and activities potentially left to the internal control of colleges and universities. Berdahl, Altbach, and Gumport, for instance, classify institutional autonomy on the basis of substantive autonomy and procedural autonomy.⁴⁰ Substantive autonomy entails “the power of the university or college in its corporate form to determine its own goals and programs (the *what* of academe).”⁴¹ Procedural autonomy refers to “the power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the *how* of academe).”⁴² Procedural autonomy relates to such issues as “preaudits and controls over purchasing, personnel, and some aspects of capital construction.”⁴³ The authors contend that to function efficiently institutions need to retain considerable control over procedural autonomy.⁴⁴ In respect to substantive autonomy, relating to such core educational issues as curriculum and academic programs and to other major decisions concerning institutional goals and priorities, the authors point to this area as meriting greater state involvement, though also stating that institutional actors should play an important role in relation to decisions related to substantive autonomy.⁴⁵

The concepts of institutional autonomy generally, and, more specifically, of procedural and substantive autonomy, provide a potentially useful conceptual lens through which to analyze constitutional autonomy provisions. These concepts may offer greater clarity for courts comparing and contrasting various constitutional autonomy provisions and may also help better link consideration of constitutional autonomy provisions with ongoing discussions in higher education policy circles regarding issues related to institutional autonomy. Accordingly, the combination of

38. McLendon, *supra* note 1, at 57.

39. See, e.g., Berdahl & McConnell, *supra* note 29, at 75. The authors discuss, however, that even colleges and universities with constitutional autonomy have witnessed an erosion of their institutional autonomy in recent decades due to increasing efforts by states to enact accountability measures over public higher education. *Id.*

40. Berdahl et al., *supra* note 33, at 6; see also ROBERT O. BERDAHL, STATEWIDE COORDINATION OF HIGHER EDUCATION (1971).

41. Berdahl, Altbach, & Gumport, *supra* note 33, at 5 (emphasis in the original).

42. *Id.* at 6.

43. *Id.*

44. *Id.*

45. *Id.*

analytical tools drawn from legal opinions and scholarship as well as from the higher education literature potentially offers insights of value to both legal and non-legal audiences. Following a discussion focused on the current legal status of constitutional autonomy provisions in Part IV, this analysis then turns to an assessment of constitutional autonomy using the concepts of substantive and procedural autonomy.

IV. CURRENT STATUS OF CONSTITUTIONAL AUTONOMY

The article now turns to consideration of constitutional autonomy during the past three decades, the period since the most recent comprehensive comparative analysis of constitutional autonomy provisions by Beckham.⁴⁶ While looking to previous studies as a guide for states to include in the study, all states were considered. In addition to previous studies and searches for cases related to constitutional autonomy, the Education Commission of the States database of postsecondary governance structures was also used to help identify states to include in the analysis.⁴⁷ While the database does not provide interpretation or analysis of particular statutory or constitutional provisions or of legal decisions, it served as a helpful resource in selecting states that might have constitutional autonomy provisions. Twenty-two states were identified as potential constitutional autonomy candidates. To guide the comparative analysis, the states were organized on the basis of (1) substantial judicial recognition of constitutional autonomy, (2) moderate to limited judicial recognition of constitutional autonomy, (3) ambiguous legal status regarding constitutional autonomy, and (4) judicial rejection or negative treatment of constitutional autonomy.

Several factors determined separation of states into the four categories. The “substantial judicial recognition” section includes states that have tended to generate a greater number of cases concerning constitutional autonomy in comparison to other states, where state courts have offered relatively well-developed standards for the overall legal framework of constitutional autonomy, and, most significantly, where cases reflect considerable judicial deference to the constitutional autonomy possessed by institutional or system governing boards. The “moderate to limited judicial recognition” division contains states with favorable judicial treatment of constitutional autonomy but with relatively fewer cases and, even more importantly, with a less well-developed legal framework regarding the contours of constitutional autonomy in the state. The third category, “ambiguous legal status,” represents states in which case law has not clearly answered whether constitutional autonomy exists as a recognized

46. Beckham, *supra* note 2.

47. Education Commission of the States, Postsecondary Governance Structures Database, <http://www.ecs.org/clearinghouse/31/02/3102.htm> (last visited Feb. 4, 2009).

legal doctrine by state courts. As its name implies, the “judicial rejection or negative treatment” category discusses states in which courts have either explicitly rejected constitutional autonomy or cast heavy doubt on the potential for its recognition by courts. Given the significance of the states with substantial judicial recognition, these states are discussed separately to highlight attributes of constitutional autonomy in each of them. Discussion of the states in the other categories is grouped together, with relevant illustrative examples mentioned to highlight the status of constitutional autonomy in these states.

A. Substantial Judicial Recognition (The “Big Three”)

Michigan, California, and Minnesota continue as the states with the strongest judicial recognition of constitutional autonomy, not only in the number of cases, but also in the language used by state courts to describe the legal protections that result from constitutional autonomy. Especially in Michigan and California, state courts have consistently issued opinions since the period of Beckham’s study that continue to recognize substantial grants of independent constitutional authority for public higher education. In these states, courts continue to look favorably on precedent establishing and upholding strong grants of constitutional autonomy, even when ruling against governing boards in particular cases. Cases involving these three states, at least from the perspective of case law, do not indicate any substantial erosion of authority for constitutionally autonomous governing boards and their independent authority to control the internal affairs of institutions under their control. At the same time, contemporary decisions reinforce the findings of Beckham and others that, though extensive, constitutional autonomy certainly does not negate all state governmental authority over public higher education in these states.

1. Michigan

In Michigan, constitutional autonomy enjoys a long tradition. It was the first state in the nation to enact a constitutional autonomy provision,⁴⁸ and

48. Constitutional autonomy was first established for the University of Michigan by the constitution of 1850 and continued in the 1908 constitution. *See* Beckham, *supra* note 2, at 182. The 1908 constitution continued to vest constitutional autonomy in the University of Michigan and also gave similar constitutional autonomy to the state’s agricultural college, which later became Michigan State University. *State Bd. of Agric. v. State Admin. Bd.*, 197 N.W. 160, 160–61 (Mich. 1924) (stating that the “state board of agriculture was made a constitutional body; it was given the sole management of the affairs of the [agricultural] college and exclusive control of all of its funds”). Constitutional autonomy was expanded in the 1963 constitution to governing boards of multiple institutions. MICH. CONST. art. VIII, §§ 5–6 (amended 1963). Section 5 of Article 8 specifically names the University of Michigan, Michigan State University, and Wayne State University, and Section 6 refers to “[o]ther institutions of higher education established by law having authority to grant baccalaureate degrees.” *Id.* at §

cases decided during the past three decades show that courts continue to maintain strong judicial support for constitutionally autonomous governing boards in the state. Michigan courts, for example, continue to interpret constitutional autonomy as providing significant institutional control over issues related to college and university funds, an area of concern specifically noted by Glenny and Dalglisch in relation to the future status of constitutional autonomy.⁴⁹ In a 1988 case dealing with a state law that limited investments in South Africa and the former Soviet Union, a Michigan court considered the law's applicability to the University of Michigan.⁵⁰ In discussing the constitutional authority of the Regents of the University of Michigan, the court quoted the constitution as saying that "the State cannot control the action of the Regents. It cannot add to or take away from [the property held by the Regents] without the consent of the Regents."⁵¹

The opinion discussed how Michigan courts had repeatedly rejected legislative attempts to place controls over constitutionally authorized governing boards in the state.⁵² According to the decision, state courts had interpreted constitutional authority clearly to include "fiscal autonomy" for the individual college or university governing boards.⁵³ While the lower court held that the statute did not "impinge on the expenditure of university funds but only on the investment of those funds," the court of appeals stated that the constitution conferred "general fiscal autonomy on the university boards."⁵⁴ In holding that the statute could not be applied to college or university governing boards, the court also rejected that the law represented a clear statement of public policy in Michigan, which would have been a basis to override constitutional autonomy.⁵⁵

In addition to control over finances, decisions have re-affirmed that constitutional autonomy also vests control over college or university owned property. In a 1998 case, the plaintiffs challenged a university ordinance that declared lands under the control of the Board of Trustees of Michigan State University as fish and wildlife sanctuaries not open to hunting.⁵⁶ In

6; *see also* GLENNY & DALGLISH, *supra* note 9, at 17–18.

49. GLENNY & DALGLISH, *supra* note 9, at 73.

50. *Regents of Univ. of Mich. v. State*, 419 N.W.2d 773, 774 (Mich. Ct. App. 1988).

51. *Id.* at 777 (quoting MICH. CONST. art. XIII, § 8).

52. *Id.*

53. *Id.* at 778.

54. *Id.* Even in an opinion holding that the university could not ignore a law requiring a security bond for construction projects, the Michigan Supreme Court acknowledged that the Regents for the University of Michigan possess "complete power over financial decisions affecting the university." *W.T. Andrew Co. v. Mid-State Sur. Corp.*, 545 N.W.2d 351, 354 (Mich. 1996).

55. *Regents of Univ. of Mich.*, 419 N.W.2d at 779–80.

56. *Mich. United Conservation Clubs v. Bd. of Trs. of Mich. State Univ.*, 431 N.W.2d 217, 219 (Mich. Ct. App. 1988) (*per curiam*).

ruling in favor of the university, the court discussed that the constitution gave the regents the “power to control and manage [university] property to the exclusion of all other state departments.”⁵⁷

The continuing reach and depth of constitutional autonomy in Michigan is also shown by a case dealing with the state’s open meeting and records laws. While even the Minnesota Supreme Court has declined to accept constitutional autonomy as a shield to an open meeting law,⁵⁸ in a 1999 decision, the Michigan Supreme Court held that the state’s Open Meetings Act could not be applied to the “internal operations of the university in selecting a president.”⁵⁹ In *Federated Publications v. Board of Trustees of Michigan State University*,⁶⁰ the court dealt with an issue left open from a 1993 decision,⁶¹ where the defendant institution failed to properly raise constitutional autonomy in arguing against applying the state’s open meeting law.⁶² The court in *Federated Publications* stated that making the law apply to the governing boards of public colleges and universities under these circumstances infringed on the boards’ constitutional authority and noted that constitutional language already required formal sessions of governing boards to be open to the public.⁶³ The decision highlights the ongoing vitality of constitutional autonomy in Michigan in relation to state court interpretation of the doctrine.

While the past three decades do not indicate erosion of judicial support for constitutional autonomy, Michigan courts still recognize limits on independent constitutional authority for public colleges and universities. In *Federated Publications*, even while describing governing boards as

57. *Id.*

58. *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 281 (Minn. 2004). The case is discussed in the next sub-section dealing with the University of Minnesota.

59. *Federated Publ’ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 498 (Mich. 1999).

60. *Id.*

61. *Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 507 N.W. 2d 422 (Mich. 1993).

62. *Federated Publ’ns, Inc.*, 594 N.W.2d at 495.

63. *Id.* at 498. Deference to constitutional autonomy in the context of open records arose in a case in which a professor sued for the ability to review peer employment evaluations. *Muskovitz v. Lubbers*, 452 N.W.2d 854 (Mich. Ct. App. 1990). The professor sought the records under a state law granting employees access to employment records. *Id.* at 493–94. While granting the employee access to some records, the court did not grant access to records that might reveal the identities of the reviewers. *Id.* at 497. The court characterized the information as confidential and protected under the constitutional autonomy granted to universities in the state based on the fact that release of the information could hamper the effective administration of the institution. *Id.* at 498–99. Accordingly, the court balanced a general state policy of openness with employment records against the protections afforded institutions through constitutional autonomy.

possessing almost absolute control over their institutions,⁶⁴ the court found it worthwhile to point out that the boards did not constitute a separate branch of state government.⁶⁵ The opinion looked to a previous Supreme Court case,⁶⁶ which quoted a court of appeals decision stating that though it is an “independent branch” of government, an independent governing board is “not an island.”⁶⁷

In terms of limitations on constitutional autonomy, Michigan courts during the past three decades have continued to recognize that legislative authority may trump constitutional autonomy in the context of generally applicable laws passed under the state’s police powers to protect the general welfare⁶⁸ or that constitute a clear statement of public policy.⁶⁹ In a 1978 case, *Central Michigan University Faculty Association v. Central Michigan University*,⁷⁰ for instance, the Michigan Supreme Court refused to allow constitutional autonomy as a basis to restrict certain issues related to promotion and tenure as not appropriate matters for collective bargaining.⁷¹ While not arguing against legislative authority to permit collective bargaining at colleges or universities under the state’s employment relations law, the university argued that these specific issues touched on educational matters and encroached on the university’s constitutional autonomy.⁷² The court disagreed, describing the matters as related to employment and not a significant enough intrusion into academic issues to require exclusion from collective bargaining.⁷³

The issue of legally established public policy overriding constitutional autonomy came into play in a 2007 case involving the extension of public employee benefits to include same-sex couples as an issue of collective bargaining.⁷⁴ Reversing the trial court, the court of appeals held that the passage of a state constitutional amendment defining marriage as between a man and a woman prohibited extending domestic partner benefits to same-sex partners.⁷⁵ Specifically in relation to public colleges and universities,

64. *Federated Publ’ns, Inc.*, 594 N.W.2d at 497.

65. *Id.* at 498.

66. *Regents of the Univ. of Mich. v. Employment Relations Comm’n*, 204 N.W.2d 218, 224 (Mich. 1973).

67. *Federated Publ’ns, Inc.*, 594 N.W.2d at 497 (quoting *Branum v. State*, 145 N.W.2d 860, 862 (Mich. Ct. App. 1966)).

68. *Id.* at 497.

69. *Regents of the Univ. of Mich. v. State*, 419 N.W.2d 773, 778–79 (Mich. Ct. App. 1988).

70. 273 N.W.2d 21 (Mich. 1978).

71. *Id.* at 26.

72. *Id.* at 24–25.

73. *Id.* at 25.

74. *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 143 (Mich. Ct. App. 2007).

75. *Id.*

the court held that constitutional autonomy did not permit institutions to offer such benefits.⁷⁶ According to the opinion, the constitutional amendment established a clear statement of public policy, which constituted one of the areas where constitutional autonomy must yield to a general statewide policy or standard.⁷⁷ Based on interpreting the constitutional amendment as a clear statement of public policy, the court held that institutions could not rely on constitutional autonomy to offer same-sex domestic partner benefits.⁷⁸

Despite limits on constitutional autonomy under certain circumstances, courts in Michigan continue to remain sensitive to the fact that a generally applicable law might unduly interfere with the constitutional authority of governing boards. Even when ruling against the institution in *Central Michigan University Faculty Association*, the court acknowledged that legislative power could not interfere with colleges' and universities' control over educational matters.⁷⁹ This sentiment was echoed in the *Federated Publications* case where the court, in discussing the state's Open Meetings Act, looked to *Central Michigan University Faculty Association* to state that while the legislature can include colleges and universities under the state's public employee relations law, the "regulation cannot extend into the university's sphere of educational authority."⁸⁰ Thus, even a statewide law otherwise applicable to Michigan colleges and universities might impermissibly interfere with constitutional autonomy if the law unduly encroaches on clearly educational matters.

While limitations on constitutional autonomy in Michigan exist in certain instances, cases indicate that governing boards of public institutions in Michigan during the past three decades have continued to possess substantial authority to control and direct the affairs of institutions under their control. With the exception of California and possibly Minnesota, other states with constitutional autonomy do not vest their governing boards with such expansive independent constitutional power. Cases decided since the period of Beckham's study have maintained substantial judicial protection for the constitutional autonomy of individual institutional governing boards in Michigan. While state courts have not always held in favor of institutional governing boards during this period in particular cases, decisions do not indicate any substantial erosion of judicial support for constitutional autonomy, especially in relation to the financial control that governing boards possess over institutions under their control.

76. *Id.* at 152.

77. *Id.* at 152–53.

78. *Id.* at 151–52.

79. *Cent. Mich. Univ. Faculty Ass'n v. Cent. Mich. Univ.*, 273 N.W.2d 21, 27 (Mich. 1978).

80. *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 497 (Mich. 1999).

2. California

Beckham's analysis⁸¹ and other studies, including more recent ones specifically focused on California,⁸² describe the Board of Regents of the University of California system as possessing substantial independent authority under the state constitution.⁸³ Unlike in Michigan, in which governing boards of individual institutions possess constitutional autonomy, the University of California System consists of ten campuses,⁸⁴ making the regents in several respects more akin to a system governing board than to a governing board for an individual institution. While not mirroring the constitutional autonomy language in Michigan's constitution,⁸⁵ California courts employ similarly strong descriptions regarding the reach and depth of the regents' authority, describing them as enjoying almost complete autonomy in the management and control of the University of California. And like in Michigan, constitutional autonomy enjoys a long history, with constitutional provisions addressing the authority of the regents placed in the state's constitution adopted in 1879.⁸⁶ Cases decided during the past thirty years show that constitutional autonomy continues to provide meaningful legal protection to institutional autonomy for the University of California.

The California Supreme Court in a 1980 case,⁸⁷ for example, looked favorably on previous decisions that had characterized the regents as enjoying "broad powers" to control the University of California and exercising almost exclusive control of the university.⁸⁸ More recently, a state appellate court stated in a 2000 decision that the regents were meant "to operate as independently of the state as possible."⁸⁹ The court also discussed that the autonomy of the regents meant that their rules and policies enjoy a status similar to statutes for purposes of judicial interpretation.⁹⁰ As in Michigan, strong general statements of constitutional autonomy are complemented by specific legal holdings in

81. *Id.* at 181.

82. *See* Petroski, *supra* note 7; *see also* Scully, *supra* note 8. This section discusses several illustrative California decisions during the past three decades, but with Petroski's discussion of constitutional autonomy in California, the recent status of constitutional autonomy in California has been well covered in a recent work.

83. CAL. CONST. art. IX, § 9.

84. University of California, UC Campuses, <http://www.universityofcalifornia.edu/campuses/welcome.html> (last visited Jan. 28, 2009).

85. *Compare* CAL. CONST. art. IX, § 9, *with* MICH. CONST. art. VIII, §§ 5–6.

86. Beckham, *supra* note 2, at 183.

87. *San Francisco Labor Council v. Regents of Univ. of Cal.*, 608 P.2d 277 (Cal. 1980).

88. *Id.* at 278.

89. *Kim v. Regents of Univ. of Cal.*, 95 Cal. Rptr. 2d 10, 14 (Cal. Ct. App. 2000).

90. *Id.* at 13.

favor of the regents. Exemption of the University of California from municipal construction regulations⁹¹ and local wage laws⁹² provide examples of the areas where constitutional autonomy decisions continue to bolster the regents' control over university operations. In a 2005 decision, the California Supreme Court held that employees seeking to sue the university must exhaust internal administrative remedies, demonstrating continued judicial support for constitutional autonomy in California and the constitutional independence of the regents.⁹³

Despite strong judicial support for constitutional autonomy, California courts, like their Michigan counterparts, permit general limits on the regents' authority under certain circumstances. Karen Petroski, in her 2005 study, categorized these limits on the regents' authority into three broad areas: (1) certain legislative control over fiscal issues, with the regents unable to compel appropriations for salaries and under a degree of legislative oversight to make certain the safety of its funds, (2) acts passed under the legislature's police powers, and (3) acts affecting issues of statewide concern that do not involve the internal management of the university.⁹⁴

Though tempering the regents' absolute control over the University of California in certain instances, decisions rendered during the past three decades reveal the persistence of strong judicial protection of constitutional autonomy in California. State courts have maintained an interpretation of the constitution that provides the regents with substantial independent control over the University of California. As in Michigan, decisions from California courts support the fact that the state continues to occupy a position as one of the most prominent in relation to strong judicial recognition of, and support for, constitutional autonomy.

3. Minnesota

As with Michigan and California, the Board of Regents of the University of Minnesota also continues to possess considerable constitutional independence, with the state constitution providing the regents substantial control over internal university affairs.⁹⁵ Constitutional authority for the University of Minnesota has its roots in the state constitution of 1858,⁹⁶ and state court cases, including a pivotal 1928 Minnesota Supreme Court decision,⁹⁷ have helped cement legal recognition for constitutional

91. *Regents of the Univ. of Cal. v. Santa Monica*, 143 Cal. Rptr. 276, 280–81 (Cal. Ct. App. 1978).

92. *San Francisco Labor Council*, 608 P.2d at 279–80.

93. *Campbell v. Regents of the Univ. of Cal.*, 106 P.3d 976, 990 (Cal. 2005).

94. See Petroski, *supra* note 7, at 180–81; see also *Campbell*, 106 P.3d at 982.

95. MINN. CONST. art. XIII, § 3.

96. See MCKNIGHT, *supra* note 5, at 4.

97. *State v. Chase*, 220 N.W. 951 (Minn. 1928).

autonomy in the state. Deborah McKnight's guide to assist Minnesota legislators in understanding the legal implications of constitutional autonomy in the state underscores the ongoing practical legal impact of the doctrine on the University of Minnesota.⁹⁸ As stated in a 1993 Minnesota Supreme Court decision, the "internal management of the University [of Minnesota] has been constitutionally placed in the hands of the regents alone"⁹⁹

A 2000 case dealing with employment grievances demonstrates how Minnesota courts have continued to recognize and defer to the constitutional autonomy of the regents. In *Stephens v. Board of Regents of the University of Minnesota*,¹⁰⁰ the court made a unionized employee exhaust internal university grievance procedures before being able to seek a writ of certiorari to permit her to bring suit against the university.¹⁰¹ The opinion noted that whether or not a University of Minnesota employee had to exhaust administrative remedies before seeking judicial relief represented an issue of first impression for state appellate courts.¹⁰² In its analysis, the court stated that it "must be mindful of the unique grant of authority given to the university" by the state's constitution.¹⁰³ This authority means that the regents "are not subject to legislative or executive control."¹⁰⁴ Relying in large measure on the constitutional autonomy given to the University of Minnesota, the court determined that making a claimant exhaust administrative remedies served to help safeguard the independence of the University of Minnesota.¹⁰⁵ The decision helps illustrate the continued strength of constitutional autonomy in Minnesota during the past three decades.

While *Stephens* and other cases demonstrate the continuation of strong judicial recognition of constitutional autonomy in Minnesota, in a 2004 decision, *Star Tribune Co. v. University of Minnesota Board of Regents*,¹⁰⁶ the state's supreme court refused to define constitutional autonomy in the expansive manner sought by the regents. In *Star Tribune* the Minnesota Supreme Court considered whether the state's Government Data Practices

98. See generally MCKNIGHT, *supra* note 5. Her work provides a useful analysis of constitutional autonomy in Minnesota.

99. *Winberg v. Univ. of Minn.*, 499 N.W.2d 799, 803 (Minn. 1993) (citing *Chase*, 220 N.W. 951); see also *Regents of the Univ. of Minn. v. Lord*, 257 N.W.2d 796, 802 (Minn. 1977) (holding that the legislature could attach reasonable conditions to appropriations but the regents possessed control over the internal operations of the University of Minnesota).

100. 614 N.W.2d 764 (Minn. Ct. App. 2000).

101. *Id.* at 774–75.

102. *Id.* at 771.

103. *Id.* at 772.

104. *Id.* (quoting *Fanning v. Univ. of Minn.*, 236 N.W. 217, 219 (Minn. 1931)).

105. *Id.* at 774.

106. 683 N.W.2d 274 (Minn. 2004).

Act and Open Meeting Law applied to the Regents of the University of Minnesota.¹⁰⁷ The regents argued that the acts did not appropriately name them as subject to the laws or, alternatively, that the statutes impermissibly infringed on their constitutional autonomy.¹⁰⁸

With respect to the Data Practices Act, which did in fact specifically name the University of Minnesota as a covered state agency, the regents argued that it should not apply to presidential searches because the “legislature did not specifically reference university presidential search data and because only the University, and not the Regents, is named in the definition of state agency.”¹⁰⁹ The court rejected this position, determining that the Act generally makes data available unless a special exception is listed.¹¹⁰ Additionally, the opinion stated that the law’s reference to the university as opposed to the regents “was likely intended to convey a more *inclusive* meaning that would encompass all the units of the University that might possess data, including the Regents.”¹¹¹

In relation to the Open Meeting Law, the regents argued that it should not apply to them because the legislature did not specifically name the university or the regents in the act.¹¹² For support, the regents looked to *Winberg v. University of Minnesota*,¹¹³ where the Minnesota Supreme Court held that the state’s Veterans’ Preference Act did not apply to the university because the law did not specifically name the institution.¹¹⁴ The *Winberg* court discussed that the “legislature recognizes the University’s unique constitutional status and, in the great majority of laws it passes affecting the University, it expressly includes or excludes” the university or the regents as subject to or exempt from the law.¹¹⁵ According to the opinion, the legislature would have likely named the university if it intended the Veterans’ Preferences Act to apply to the institution.¹¹⁶ The court also rejected that the statute represented a generally applicable law representing the “broad public policy” of Minnesota that should apply to the university.¹¹⁷ The opinion stated that the Veterans’ Preferences Act indicated a narrower description of applicable state agencies or entities than

107. *Id.* at 278. The case arose in the context of members of the media seeking access to information and meetings related to a presidential search. *Id.* at 278–79.

108. *Id.* at 278.

109. *Id.* at 279.

110. *Id.* at 279–80.

111. *Id.* at 280.

112. 683 N.W.2d at 280–81.

113. 499 N.W.2d 799 (Minn. 1993).

114. *Id.* at 802–03.

115. *Id.* at 801.

116. *Id.* at 802.

117. *Id.* As examples of such laws, the respondent listed the Open Meeting Law and the Minnesota Human Rights Act.

the laws cited by the respondent.¹¹⁸

The court in *Star Tribune* found unpersuasive the contention that the Open Meeting Law did not apply to the regents because the act did not specifically name them and was unimpressed with the regents' efforts to rely on *Winberg*.¹¹⁹ According to the opinion, "we decline to construe . . . language from *Winberg* as creating a generally-applicable rule that the University is not subject to a law unless expressly included."¹²⁰ Among its reasons, the court discussed that language in *Winberg* did not indicate an intent to create a bright-line rule regarding the regents and legislative enactments and also pointed out that the Open Meeting Law was listed in *Winberg* as a law of general applicability that included the regents and the University of Minnesota.¹²¹

In turning to the regents' second challenge to the laws, that the acts violated their constitutional autonomy, the opinion first pointed out the "special constitutional status" enjoyed by the regents and the university.¹²² Noting that the exact boundaries of the regents' authority remained undetermined,¹²³ the opinion then stated that the regents argued the acts should not apply to them in this instance because "the search for a University President is a core function of the Regents."¹²⁴ The court concluded, however, that the laws did not infringe on "any aspect of substantive decision-making of the University" or impermissibly delegate authority over the regents to another state entity.¹²⁵ The court also made clear that the regents, while enjoying a special constitutional status, are not a distinct branch of state government. The opinion stated that the regents and the university did not exist as "an entity coordinate to the state government, or even coordinate to the legislature. Rather, the intent was to protect the internal management of the University from legislative interference."¹²⁶ The court rejected as well any suggestion that the legislature could make legislation apply to the university only in the context of conditions attached to an appropriation,¹²⁷ stating the regents are

118. *Id.* at 802–03.

119. *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 280–82 (Minn. 2004).

120. *Id.* at 281.

121. *Id.*

122. *Id.* at 283.

123. *Id.* at 284.

124. 683 N.W.2d at 284.

125. *Id.* The opinion discussed that the Open Meeting Law and the Data Practices Act imposed a lesser burden on the regents than in *Lord*, 257 N.W.2d 796, 802 (Minn. 1977), where the Minnesota Supreme Court held that the legislature could require that the regents adhere to the requirements of a state act related to selecting designers for construction projects as a condition of an appropriation.

126. *Star Tribune Co.*, 683 N.W.2d at 284.

127. *Id.* at 286.

not immune to generally applicable laws “that are not conditions attached to appropriations.”¹²⁸

The court in *Star Tribune* also found the *Federated Publications* case from Michigan¹²⁹ unpersuasive.¹³⁰ The majority, though noting previous instances of positive citations to Michigan cases dealing with constitutional autonomy, found the rationale in *Federated Publications* “contradictory” based on the holding of the case and the Michigan Supreme Court’s description of constitutionally autonomous governing boards as limited to their “proper spheres” and legislative enactments as failing only when interfering with a university’s educational or financial autonomy.¹³¹ The court in *Star Tribune* disagreed that the acts at issue somehow interfered with the regents’ control over the daily operations of the University of Minnesota or their ability to supervise the institution.¹³² The opinion also stated that the position advocated by the regents might result in no “discernible bounds” on their authority with the legislature only able to affect the university through attaching conditions on appropriations.¹³³

Future decisions are required before determining whether Minnesota courts interpret constitutional autonomy somewhat less extensively than the independent authority possessed by governing boards in Michigan and California. But the court in *Star Tribune* stressed that the legislature possesses authority over the regents that goes beyond attaching conditions to appropriations. In potentially de-emphasizing the regents’ special niche in state government, the case could provide room for future decisions to place more restrictions on the regents of the University of Minnesota than courts in Michigan and California might permit. Decisions interpreting *Star Tribune* are required, however, before making any conclusion that constitutional autonomy in Minnesota is more restricted than in Michigan and California. And even in *Star Tribune*, the court did not seek to undermine the basic principle that constitutional autonomy in Minnesota is meant to leave the internal control of the University of Minnesota with the Board of Regents. In sum, Minnesota cases issued during the past three decades suggest that the University of Minnesota continues to operate with substantial constitutional independence.

B. Moderate to Limited Judicial Recognition

Court decisions in six states (Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma) and attorney general opinions in Idaho

128. *Id.*

129. *See supra* Part IV.A-1.

130. *Star Tribune Co.*, 683 N.W.2d at 288.

131. *Id.*

132. *Id.*

133. *Id.* at 289.

confirm continuing judicial recognition of moderate to limited constitutional authority for public higher education governing boards in these seven states. When Beckham conducted his study, New Mexico courts had not yet issued decisions regarding constitutional autonomy, but in 1998, the New Mexico Supreme Court issued such an opinion.¹³⁴ In Louisiana, the state added a new constitutional autonomy provision in 1998 related to community and technical colleges that has received judicial attention.¹³⁵ These seven states are primarily differentiated from Michigan, California, and Minnesota on the basis of the degree of constitutional autonomy granted, with the legislative and executive branches in these states appearing to exercise more legal control over constitutionally autonomous institutions or systems. Judicial opinions in these states also have not offered as comprehensive a legal framework for constitutional autonomy as exists in Michigan, California, and Minnesota. Despite less extensive legal recognition of constitutional autonomy than the “Big Three,” courts in these seven states recognize varying degrees of independent constitutional authority.

In three states—Idaho, Montana, and North Dakota—constitutional autonomy persists as a recognized judicial doctrine; however it has received limited legal interpretation since Beckham’s study. Cases and attorney general opinions demonstrate that constitutional autonomy persists, but such sources shed limited light on the general outlines of constitutional autonomy in these states. In Idaho, judicial recognition of constitutional autonomy can be traced to at least a 1943 state supreme court case,¹³⁶ which interpreted constitutional language contained in the state’s constitution, which was ratified in 1889.¹³⁷ For the period dealt with in this article, attorney general opinions indicate continued recognition of the legal doctrine, with the Board of Regents of the University of Idaho considered constitutionally empowered to exercise control over university endowment funds¹³⁸ and an unofficial attorney general opinion concluding that municipal building codes cannot be applied to the University of Idaho

134. *Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers*, 962 P.2d 1236 (N.M. 1998).

135. LA. CONST. art. VIII, § 7.1.

136. *Dreps v. Bd. of Regents of the Univ. of Idaho*, 139 P.2d 467 (Idaho 1943). In *Dreps*, the Idaho Supreme Court stated:

In considering the powers and authority of the legislature . . . as compared with the power and authority of the Board of Regents, we must bear in mind that each gets its authority direct from the people and each is created by the constitution itself, so that the one has no authority over the other, unless it is specifically so granted by the constitution under which each was created.

Id. at 471.

137. *Id.* at 470. The constitution was approved by Congress in 1890.

138. *Cf.* 2000 Idaho Op. Att’y Gen. 45 (2000).

because of the institution's constitutional status.¹³⁹ The attorney general opinions suggest continued recognition of constitutional autonomy under Article 9, Section 10 of the Idaho state constitution but with little new elaboration on the doctrine in the state.

Montana is another state with little in the way of legal interpretations during the past three decades regarding language contained in the state's 1972 constitution.¹⁴⁰ In a 1997 case, the Montana Supreme Court considered whether the renting of university property to private parties, as permitted under a state law, represented an unlawful delegation of legislative authority to the Board of Regents of the Montana University system.¹⁴¹ The court's decision to allow the policy rested in part on the constitutional authority granted to the regents.¹⁴² In relation to the period constituting the primary focus of this study, a 1978 attorney general opinion, though advising that the university had to grant certain fee waivers to students, noted that the Montana Board of Regents possessed some form of independent constitutional authority.¹⁴³

Though slightly earlier than the years focused on in this article, a significant decision related to constitutional autonomy in Montana was issued in 1975 by the Montana Supreme Court.¹⁴⁴ In the case, the regents challenged a state law requiring certifications from them regarding compliance with line item appropriations from the legislature.¹⁴⁵ The opinion characterized the regents as asserting at oral argument that the state constitution made them a fourth branch of government with complete control over the University of Montana to the "exclusion of legislative and executive bodies."¹⁴⁶ While describing the constitutional authority as narrower than that sought by the regents, the court still agreed that the constitution granted them certain independent constitutional authority.¹⁴⁷

139. 1981 Idaho Op. Att'y Gen. 221 (1981), *available at* 1981 Ida. AG LEXIS 27. "It should be noted that the Board of Regents of the University of Idaho, who govern the University of Idaho, are a special case[.] The Board of [R]egents is a chartered preconstitutional body We believe that the University of Idaho would not be controlled by the city ordinances . . ." *Id.*

140. MONT. CONST. art. X, § 9(2)(a). The constitution states that the University System Board of Regents possesses full power to "supervise, coordinate, manage, and control" the state's university system. *Id.*

141. *Duck Inn, Inc. v. Mont. State Univ.-Northern*, 949 P.2d 1179 (Mont. 1997).

142. *Id.* at 1183 (stating the regents have authority over the Montana university system which is independent of that delegated by the legislature).

143. 37 Mont. Op. Att'y Gen. 698 (1978) (stating the regents were subject to the legislature's appropriations power and also to established public policy).

144. *Bd. of Regents of Higher Educ. v. Judge*, 543 P.2d 1323 (Mont. 1975).

145. *Id.* at 1325.

146. *Id.* at 1329.

147. *Id.* at 1330 ("Our task then is to harmonize in a practical manner the constitutional power of the legislature to appropriate with the constitutional power of the Regents to supervise, coordinate, manage and control the university system.").

Though the legislature possessed line item appropriation's authority within certain limits, it could not infringe on the regents' constitutional autonomy to "supervise, coordinate, manage and control the university system."¹⁴⁸ Based on this standard, the court invalidated provisions dealing with the salaries and raises of university employees and attempts to control university funds derived from sources other than state appropriations.¹⁴⁹

Similar to Montana and Idaho, constitutional autonomy in North Dakota represents a legal doctrine with apparent recognition by courts in relation to a 1938 addition to the state's constitution¹⁵⁰ but with somewhat limited legal interpretation. The North Dakota Supreme Court held in 2006 that exhaustion of administrative remedies is especially appropriate for the State Board of Higher Education because the North Dakota Constitution grants the board "full authority to control and administer the State's higher education institutions."¹⁵¹ The state's high court in a 2004 opinion¹⁵² described the state board as possessing independent constitutional autonomy.¹⁵³ According to the opinion, reviewing actions of the board was similar to reviewing decisions dealing with separation of powers issues between branches of state government.¹⁵⁴ In the case, which dealt with the discharge of a tenured faculty member for alleged misconduct,¹⁵⁵ the court stated that the board's constitutional power includes the authority to appoint and remove professors.¹⁵⁶ While acknowledging continuing judicial recognition of constitutional autonomy, the court did not elaborate on the general extent of constitutional autonomy in Montana.

Though not at the level of Michigan, California, or Minnesota, legal interpretations in recent years in Louisiana, Oklahoma, Nevada, and New Mexico have provided somewhat more guidance regarding the contemporary status of constitutional autonomy than in Idaho, Montana, and North Dakota. In Louisiana, constitutional autonomy is primarily vested in a statewide board of regents,¹⁵⁷ but some independent authority is also given to individual institutional governing boards¹⁵⁸ and to a

148. *Id.* at 1333.

149. *Id.* at 1334–35.

150. *See Posin v. State Bd. of Higher Educ.*, 86 N.W.2d 31, 34–36 (N.D. 1957).

151. *Brown v. State ex rel State Bd. of Higher Educ.*, 711 N.W.2d 194, 198 (N.D. 2006). For the applicable constitutional provision, see N.D. CONST. art. VIII, § 6.

152. *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163 (N.D. 2004).

153. *Id.* at 169 (citing *Posin*, 86 N.W.2d at 34–35).

154. *Id.*

155. *Id.* at 165.

156. *Id.* at 169.

157. LA. CONST. art. VIII, § 5.

158. LA. CONST. art. VIII, § 5 (pertaining to the Board of Supervisors of the University of Louisiana System); LA. CONST. art. VIII, § 7 (pertaining to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical

governing board for two-year institutions created by a constitutional provision enacted in 1998.¹⁵⁹ While a 1940 constitutional provision had dealt with the governance of Louisiana State University and its board of supervisors,¹⁶⁰ the state's constitution enacted in 1974 created a statewide governing board, but left certain functions to the discretion of individual governing boards or boards of supervisors.¹⁶¹

A key issue in relation to constitutional autonomy in Louisiana involves the relationship between the statewide regents and the individual governing boards. Unlike in Michigan, where a constitutionally authorized statewide board may not override the constitutional autonomy of institutional governing boards, the statewide governing board in Louisiana possesses extensive constitutional authority. A 2003 case,¹⁶² tracking constitutional language, stated the following regarding the relationship between the statewide board of regents and the governing boards of particular institutions:

[T]he Board of Regents was created . . . to manage the following functions of all public postsecondary education: to exercise budgetary responsibility; to approve, disapprove, modify, revise, or eliminate an existing or proposed degree program, department of instruction, division, or similar subdivision; to study the need for and feasibility of creating a new institution of postsecondary education, including modifying degree programs, merging institutions of postsecondary education, establishing a new management board, or transferring a college or university from one board to another; to formulate and make timely revision of a master plan for postsecondary education that shall include a formula for equitable distribution of funds . . .; to require that every postsecondary education board submit to it an annual budget . . .; submit its budget recommendations for all institutions of postsecondary education in the state; and recommend priorities for capital construction and improvements.¹⁶³

The opinion makes clear that the statewide governing board in Louisiana enjoys substantial authority over individual institutions. Governing boards for particular institutions, however, retain any powers not specifically

College).

159. LA. CONST. art. VIII, § 7.1. A 2005 case, though not ruling in favor of the board of supervisors on all issues or elaborating on the extent of its constitutional authority, described the two-year board as possessing self-executing powers not dependent upon legislative grants of authority. *Delahoussaye v. Bd. of Supervisors of Cmty. & Technical Colls.*, 906 So. 2d 646, 649–50 (La. Ct. App. 2005)

160. GLENNY & DALGLISH, *supra* note 9, at 34.

161. LA. CONST. art. VIII, §§ 5–7.1.

162. *La. Pub. Facilities Auth. v. All Taxpayers*, 868 So. 2d 124, 134 (La. Ct. App. 2003).

163. *Id.*

vested in the board of regents.¹⁶⁴ The court described the statewide board of regents as possessing “ultimate budgetary and curricular control” with the other boards retaining “all other decision-making responsibility.”¹⁶⁵

A 1986 case dealt with a dispute over the statewide board’s authority versus that of an institution to change a school’s name.¹⁶⁶ Deciding for neither, the court held that only the legislature possesses the authority to change an institution’s name.¹⁶⁷ Attorney general opinions have also addressed the legal relationship between the statewide board and individual institutional governing boards. A 1996 opinion stated that the authority to appoint chancellors and presidents could not be transferred to the statewide board from individual governing boards because this was not a power granted to the statewide regents in the constitution.¹⁶⁸ Another attorney general opinion advised that the statewide board had to follow the notice requirements contained in the state’s Administrative Procedures Act when enacting regulations that affected institutions.¹⁶⁹

In a case dealing with the Administrative Procedures Act and the authority of the statewide board, a 1983 decision limited application of certain provisions of the law to the board.¹⁷⁰ In the case, faculty members at Northeast Louisiana University contended that the Administrative Procedures Act established standards that had to be followed in processing faculty grievances.¹⁷¹ The court held that enforcement of the Act under the circumstances presented would unduly interfere with the statewide board’s discretion to manage the affairs of institutions under its control.¹⁷²

Louisiana courts continue to offer judicial support for constitutional autonomy, and the past three decades have presented new wrinkles in the treatment of the doctrine in the state. Judicial recognition of the constitutional autonomy of the statewide governing board and its authority over institutional governing boards represents an important development. The granting of constitutional autonomy for a two-year governing board also represents a significant evolution of constitutional autonomy in Louisiana. Future cases may better delineate the constitutional authority

164. *Id.*

165. *Id.*

166. *Bd. of Regents v. Bd. of Tr. for State Colls. & Univs.*, 491 So. 2d 399 (La. Ct. App. 1986).

167. *Id.* at 401.

168. La. Op. Att’y Gen. 96-491 (1996).

169. La. Op. Att’y Gen. 81-981 (1981). Because the Attorney General determined that the statewide board failed to satisfy notice requirements, it did not consider whether or not the board possessed the authority to establish admission standards for professional programs.

170. *Grace v. Bd. of Tr. for State Colls. & Univs.*, 442 So. 2d 598 (La. Ct. App. 1983).

171. *Id.* at 600.

172. *Id.* at 601.

still held by individual institutional governing boards and offer clarification of the extent of constitutional independence enjoyed by the statewide board.

Oklahoma courts, without defining exact legal boundaries, continue to affirm judicial support for constitutional autonomy. Constitutional autonomy can be traced to the state's 1907 constitution and a provision regarding the governance of the state's agricultural and mechanical schools.¹⁷³ Amendments to the constitution in 1941,¹⁷⁴ 1944,¹⁷⁵ and 1948¹⁷⁶ resulted in a system in which a statewide board exists alongside governing boards with authority over particular colleges and universities, creating a situation with certain similarities to Louisiana. Alongside the statewide Oklahoma State Regents for Higher Education,¹⁷⁷ the three governing boards with authority over particular institutions are the Board of Regents of the University of Oklahoma, the Board of Regents of Oklahoma Colleges, and the Board of Regents of Agricultural and Mechanical Colleges.¹⁷⁸ State courts, without outlining the overall contours of constitutional autonomy in Oklahoma, and similarly without examining the relationship between the statewide board and other governing boards, have continued to provide judicial support for the doctrine. In 2001, for example, the Oklahoma Supreme Court, in a succinct opinion, held that the Oklahoma Merit Protection Commission could not exercise authority over the Board of Regents for Oklahoma State University and the Agricultural and Mechanical Colleges.¹⁷⁹

A 1981 decision from the state's highest court also provides judicial support for constitutional autonomy, though it failed to outline the general nature of constitutional autonomy in Oklahoma. The case dealt with the Board of Regents of the University of Oklahoma and limits over legislative control over salaries of university employees.¹⁸⁰ In the opinion, the Oklahoma Supreme Court stated, "[w]e have no doubt that in elevating the status of [the] Board from a statutory to a constitutional entity the people

173. *Trapp v. Cook Constr. Co.*, 105 P. 667, 669 (Okla. 1909).

174. OKLA. CONST. art. XIII.A, § 2.

175. OKLA. CONST. art. XIII, § 8; OKLA. CONST. art. VI, § 31a.

176. OKLA. CONST. art. XIII.B, § 1.

177. OKLA. CONST. art. XIII.A, § 2.

178. The constitutional provisions for these three governing boards are as follows: (1) the Board of Regents of the University of Oklahoma, OKLA. CONST. art. XIII, § 8, (2) the Board of Regents of Oklahoma Colleges, OKLA. CONST. art. XIII.B, § 1, which consists of six institutions, OKLA. CONST. art. XIII.B, § 2; and (3) the Board of Regents of Agricultural and Mechanical Colleges, OKLA. CONST. art. VI, § 31a.

179. *State ex rel. Bd. of Regents of Okla. State Univ. v. Okla. Merit Prot. Comm'n.*, 19 P.3d 865, 866 (Okla. 2001) (stating that the "[l]egislature is powerless to delegate the petitioners' constitutional control over the management of their institutions to any department, commission or agency of state government.").

180. *Bd. of Regents of Univ. of Okla. v. Baker*, 638 P.2d 464 (Okla. 1981).

intended to limit legislative control over University affairs.”¹⁸¹ Pursuant to this general constitutional standard, the court held that salary determinations constituted a key component of the internal management functions of the Board of Regents of the University of Oklahoma and were not subject to legislative control.¹⁸² While explicitly re-affirming judicial support for constitutional autonomy in Oklahoma, the court declined to flesh out the general extent of the regents’ authority, though pointing out that constitutional autonomy in Oklahoma was not necessarily equivalent to that in other states.¹⁸³ The opinion demonstrates continuing judicial support for constitutional autonomy but without providing any sort of substantial legal framework to lay out the contours of constitutional autonomy in the state.

Several Oklahoma attorney general opinions have also dealt with constitutional autonomy. A 1988 opinion, for instance, advised that a college or university did not suffer an encroachment on constitutional authority in being made to follow state purchasing requirements.¹⁸⁴ Another opinion, issued in 1980, determined that the statewide regents, while possessing extensive authority, did not have the power without legislative approval to close a state institution or to establish a branch campus of an existing institution.¹⁸⁵ Other opinions have determined that constitutional autonomy places limits on legislative or executive control of institutions protected by constitutional autonomy. For instance, constitutional autonomy served as a basis for the attorney general to conclude in 1992 that institutions should be able to set internal policy in relation to paying the moving expenses of new employees, notwithstanding the provisions of a general statewide law.¹⁸⁶

Attorney general opinions have also asserted that colleges and universities in Oklahoma covered by constitutional autonomy are not subject to all of the same conditions as institutions in the state that are created by statute or that are under the control of governing boards created by statute. A 1996 attorney general opinion stated that the legislature could not empower the governor to impose a hiring freeze on the statewide governing board that would apply to constitutionally authorized institutions and governing boards, though such authority could extend to institutions that were created by statute and not under the authority of a governing board possessing constitutional autonomy.¹⁸⁷

181. *Id.* at 467.

182. *Id.* at 469.

183. *Id.* at 467–69.

184. 19 Okla. Op. Att’y Gen. 16 (1988).

185. 12 Okla. Op. Att’y Gen. 343 (1980).

186. 24 Okla. Op. Att’y Gen. 7 (1992).

187. 25 Okla. Op. Att’y Gen. 19 (1996). This distinction between statutorily and constitutionally created boards was accepted by a court considering application of the

The attorney general in a 1992 opinion also advised that institutions with constitutional autonomy, in contrast to statutorily authorized institutions, are not subject to employee leave provisions covering other state agencies and institutions.¹⁸⁸ A 1999 attorney general opinion concluded that while the legislature could transfer additional institutions to the control of the Board of Regents of Oklahoma Colleges (a constitutionally authorized governing board), any such institutions had to be established by statute and the legislature must be unable to transfer the control of institutions with governing boards established by constitutional provision.¹⁸⁹ Without articulating the general distinctions between institutions in the state created by the constitution or governed by a constitutionally empowered governing board versus those institutions existing completely subject to legislative control, attorney general opinions indicate that constitutional autonomy enhances the institutional autonomy of covered colleges and universities.

Cases and attorney general opinions demonstrate the ongoing judicial recognition of constitutional autonomy in Oklahoma during the past three decades but several key questions persist. The exact contours of constitutional autonomy are uncertain on several fronts. One key issue involves the relationship between the statewide board and the governing boards that oversee particular institutions. Another area of uncertainty deals with the general areas of authority that constitutional autonomy encompasses in the state. Despite some vagueness concerning its scope and depth in Oklahoma, however, cases and attorney general opinions issued during the past thirty years support the notion that constitutional autonomy represents an active legal doctrine in the state, one that has certainly not experienced any sort of precipitous decline.

Judicial recognition of the constitutional autonomy of the Board of Regents of the University of Nevada system also persists, though somewhat lukewarm judicial support for the doctrine may exist. In Nevada, constitutional autonomy faces an initial hurdle based on language, incorporated into the state's 1864 constitution, stating that the legislature may determine the duties of the regents.¹⁹⁰ But in a 1948 decision, the Nevada Supreme Court invalidated a legislative effort to create an advisory board for the Regents of the University of Nevada, indicating that some degree of constitutional autonomy may exist in the state.¹⁹¹ The regents sought to rely on this decision in seeking to assert constitutional autonomy in a 1981 Nevada Supreme Court case. While not accepting the regents' assertion that the university's constitutional status permitted it to

state's Administrative Procedures Act to a statutorily created community college. *Morehouse v. Okla.*, 150 P.3d 395, 399 (Okla. Civ. App. 2006).

188. 23 Okla. Op. Att'y Gen. 41 (1991).

189. 29 Okla. Op. Att'y Gen. 223 (1999).

190. NEV. CONST. art. XI, § 7(2)(c).

191. *King v. Bd. of Regents of the Univ. of Nev.*, 200 P.2d 221, 238 (Nev. 1948).

implement a mandatory retirement age despite a prohibition in a general state law, the Nevada Supreme Court stated in *Board of Regents of the University of Nevada System v. Oakley*¹⁹² that the regents enjoy freedom from legislative authority when a law interferes with essential university functions.¹⁹³ Besides limiting independent constitutional authority of the regents to the area of essential university functions¹⁹⁴—a phrase upon which the opinion did not elaborate—the court also rejected the contention that policies of the regents stand on a legal footing akin to legislative acts for purposes of judicial scrutiny.¹⁹⁵ The language in *Oakley* does suggest, however, continued judicial recognition of at least limited constitutional autonomy for the University of Nevada, even if it remains somewhat undefined by judicial interpretation.

Beckham and other scholars did not identify New Mexico as a state recognizing constitutional autonomy, but a 1998 decision from the New Mexico Supreme Court, interpreting language contained in the state's constitution adopted in 1911, suggests judicial recognition of some form of constitutional autonomy in the state for the Regents of the University of New Mexico.¹⁹⁶ In the opinion, while holding that a state law dealing with the collective bargaining rights of public employees did not interfere with the regents' constitutional authority,¹⁹⁷ the court did state that the legislature may not impede the regents' power to make decisions related to the "education policy" of the university.¹⁹⁸ The decision listed salary determinations, budget decisions, and direct control over appropriations as illustrative of areas left to the regents' control by the constitution.¹⁹⁹ Similar to language by courts in California, Michigan, and Minnesota, the

192. 637 P.2d 1199 (Nev. 1981).

193. *Id.* at 1200. The regents argued that their constitutional status under Article 11, Section 7 of the state constitution meant that they could impose a mandatory retirement age despite non-discrimination standards in state law. *Id.*

194. *Id.*

195. *Id.*; see also *Univ. & Cmty. Coll. Sys. v. DR Partners*, 18 P.3d 1042, 1047 (Nev. 2001) (reaffirming that *Oakley* expressly rejected the argument that "the Board's own regulations are equal in status and dignity to legislative enactments (in other words, statutes).").

196. *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 962 P.2d 1236 (N.M. 1998).

197. The case dealt with the applicability of the state's Public Employee Bargaining Act. *Id.* at 1239. The court did, however, state that conditions could exist where application of the Act might interfere with the regents' constitutional authority, which could be addressed as needed. *Id.* at 1252.

198. *Id.* at 1250. Article 12, Section 13 of the state constitution specifically establishes the Board of Regents for the University of New Mexico, with the legislature directed to establish governing boards for other institutions. *New Mexico Federation of Teachers* dealt with the University of New Mexico, and the court did not address whether other governing boards in the state might also possess some form of constitutional autonomy.

199. *Id.* at 1250.

court stated that constitutional independence must yield to general statewide laws when the legislature acts to protect the public welfare or addresses issues of “statewide concern.”²⁰⁰ While seemingly recognizing some degree of constitutional autonomy, the court also described the regents’ autonomy as ill-defined, highlighting a lack of cases elaborating the attributes of constitutional autonomy in the state.²⁰¹ Despite this ambiguity, New Mexico apparently should join those states determined to recognize some form of constitutional autonomy for public higher education institutions. New Mexico courts have also highlighted the ways in which new legal decisions may enhance or inhibit judicial recognition of constitutional autonomy provisions, as well as the need for periodic re-examination of the status of the doctrine.

C. Limited Independence Subject to Extensive Legislative Control

In Nebraska and South Dakota, a form of substantially limited constitutional autonomy may exist. In both states, court decisions indicate that, while subject to substantial legislative control, all power may not be removed from public governing boards. The states conceivably belong on the constitutional autonomy continuum, but they clearly rest at the opposite end of this continuum from California, Michigan, and Minnesota. Nebraska was not identified by Beckham as enjoying constitutional autonomy, ostensibly based on constitutional language going back to language in the state’s 1875 constitution, stating that the legislature may define the powers and responsibilities of the Board of Regents of the University of Nebraska.²⁰² A decision from 1977 indicates, however, that the regents may possess some form of significantly restricted constitutional autonomy.²⁰³ In the decision, the Nebraska Supreme Court declared that the legislature exercised substantial control over the board but stated the legislature could not usurp all “discretion and authority” possessed by the regents.²⁰⁴ The court struck down as overly prescriptive legislative conditions related to salaries, funds from private and federal sources, gifts to the university, and purchasing and auditing requirements.²⁰⁵

Beckham’s analysis discussed the South Dakota Board of Regents as potentially possessing constitutional autonomy.²⁰⁶ However, cases issued

200. *Id.*

201. *Id.*

202. NEB. CONST. art. VII, § 10.

203. Bd. of the Regents of Univ. of Neb. v. Exon, 256 N.W.2d 330 (Neb. 1977).

204. *Id.* at 333. (“The Legislature can not [sic] use an appropriation bill to usurp the powers or duties of the Board of Regents and to give directions to the employees of the University. The general government of the University must remain vested in the Board of Regents.”).

205. *Id.* at 334–35.

206. See Beckham, *supra* note 2, at 181. See S.D. CONST. art. 14, § 3 for the

during the past three decades prove unresponsive of any substantial independence for the board. This position is further supported by a 1994 law review article critical of how state courts refused to recognize the regents as possessing considerable constitutional authority despite language in the state's constitution.²⁰⁷ At most the regents would appear to possess a significantly restricted form of autonomy, as courts have proven unwilling to overturn or distinguish precedent from as early as 1938 which is unresponsive of constitutional autonomy, despite language in the state's constitution.²⁰⁸ Following this line of precedent, in a 1984 decision, *South Dakota Board of Regents v. Meierhenry*,²⁰⁹ the South Dakota Supreme Court stated that the regents were not granted "political autonomy" and were subject to legislative enactments, as long as rules and policies "stop short of removing all power" from the regents.²¹⁰ In the state, a diluted form of constitutional autonomy may exist, but it remains far removed from that enjoyed by governing boards in California, Michigan, and Minnesota, and even states with more moderate degrees of constitutional autonomy. Still, the legislature may not strip the regents of all their authority.

D. States with Ambiguous/Unknown Legal Status for Constitutional Autonomy

In Florida and Hawaii, relatively recent constitutional provisions have made the status of constitutional autonomy uncertain. Similarly, in Georgia ambiguous legal opinions and language added to the state's 1983 constitution regarding the statewide governing board have clouded the issue of constitutional autonomy. A constitutional amendment in Florida that took effect in 2003 created the Board of Governors of the State University system to serve as a statewide governing entity.²¹¹ The issue of legislative authority versus that of the board has created recent friction between the two bodies. A primary dispute has centered on whether the board or the legislature has the authority to establish tuition rates for public colleges and universities in the state.²¹² In response to the board's assertions that the constitution permitted it to establish tuition levels, in

constitutional provision that creates the South Dakota Board of Regents.

207. See generally Shekleton, *supra* note 8.

208. *State Coll. Dev. Ass'n v. Nissen*, 281 N.W. 907 (S.D. 1938) (describing the regents as exercising control over higher education as subject to the power of the legislature); see also *Worzella v. Bd. of Regents of Educ.*, 93 N.W.2d 411 (S.D. 1958) (stating the regents are subject to the rules and restrictions provided by the legislature).

209. 351 N.W.2d 450 (S.D. 1984).

210. *Id.* at 451.

211. FLA. CONST. art. IX, § 7; see *United Faculty of Fla. v. Public Employees Relations Comm.*, 898 So. 2d 96, 98 (Fla. Dist. Ct. App. 2005).

212. Russell Ray, *Senate Backs University Authority Plan*, TAMPA TRIBUNE, Mar. 28, 2008, at Metro 5, available at 2008 WLNR 6569604.

2008 a constitutional amendment was proposed—though it did not make it to the ballot for consideration by state citizens—to strip the board of governors of its authority.²¹³ The dispute over tuition also resulted in a lawsuit against the state legislature brought by a group of private citizens, including former U.S. Senator Bob Graham, and joined by the statewide board; however, a Florida Circuit Court ruled that the plaintiffs lacked standing.²¹⁴ In the suit, the plaintiffs contended that the board possessed the constitutional authority to establish tuition rates.

While perhaps overshadowed by more recent events involving the conflict between the board and the state legislature, in 2005 a Florida state court ratified a binding mediation agreement that did involve the board's constitutional powers over the state university system.²¹⁵ Though approving the mediation agreement, the court did not engage in any sort of any independent analysis regarding whether it correctly characterized the board's constitutional powers. According to the agreement, the constitution provides the statewide board: (1) uninhibited authority and power over the state university system, (2) the authority to establish new colleges and universities, but not community colleges, (3) exclusive authority over approving the budget for the state university system, (4) control over setting tuition and fees, (5) control over non-appropriated funds, (6) authority to select the state university system chancellor and to establish the duties of the position, (7) authority over the selection of presidents at state universities, and (8) exclusive authority over collective bargaining for the state university system.²¹⁶

While the mediation agreement was approved by the court and expressed substantial authority for the board, it does not represent an independent judicial interpretation of the potential constitutional powers possessed by the statewide board. The agreement is perhaps most useful in identifying areas of control and authority the board might likely assert it is granted by the state constitution. As demonstrated by the recent dispute over tuition, the state legislature appears far from ready to accept the notion that it must yield to the governing board's assertions of constitutional authority. The legislature has also demonstrated that it is more than willing to consider a constitutional amendment to nullify any independent constitutional power claimed by the statewide board. Future legal decisions and resolution of political disputes between the board and the state legislature will determine

213. *Id.* (noting passage of the measure in the state senate). The proposed amendment, however, did not make it to a vote by state citizens. Dave Weber, *Changes in Store for Public Schools*, ORLANDO SENTINEL, May 3, 2008, at A12, available at 2008 WLNR 8273026.

214. *Graham v. Pruitt*, No. 2007-CA-1818, 2008 WL 827840 (Fla. Cir. Ct. Jan. 3, 2008). The judge did dismiss the party's complaint without prejudice.

215. *Floridians for Constitutional Integrity v. State Bd. of Educ.*, No. 2004-CA-3040 (Fla. Cir. Ct. Jan. 29, 2005).

216. *Id.*

whether some form of constitutional autonomy for the statewide board exists in Florida.

The conflict in Florida also illustrates that even if courts have supported the existence of constitutional autonomy, governing boards must be careful not to alienate or disregard other state government entities, especially the legislative branch. Even if the response is not to seek an amendment to curtail constitutional autonomy, the legislature may choose to cut state financial support to institutions. Accordingly, the power granted to an institutional or system governing board by the state constitution must be balanced against, and considered in the context of, the array of political and social forces affecting support for public colleges and universities covered by constitutional autonomy provisions.

A 2000 constitutional change in Hawaii presents the possibility that constitutional autonomy may exist for the Board of Regents of the University of Hawaii,²¹⁷ though the provision would still seem to leave the legislature with considerable authority. While giving the regents the authority to formulate policy and exercise control over the university without legislative authorization, the provision continues to provide that “[t]his section shall not limit the power of the legislature to enact laws of statewide concern. The legislature shall have the exclusive jurisdiction to identify laws of statewide concern.”²¹⁸

In a 1981 case, the Hawaii Supreme Court stated that the Board of Regents of the University of Hawaii must yield when the legislature acts on an issue of statewide concern.²¹⁹ If sole discretion is left with the legislature to determine what constitutes a matter of statewide concern, then this restriction would seem to place significant limits on the extent of independence of the University of Hawaii from the legislature. But court decisions may result in an interpretation of the constitutional provision addressing the regents’ authority that results in some degree of autonomy for the regents that is not ultimately subject to legislative control.

Regarding Georgia, Beckham and other authors identified the state as appearing to recognize a grant of constitutional autonomy for the Board of

217. HAW. CONST. art. X, § 6. In my dissertation, I categorized constitutional autonomy as lacking judicial recognition in Hawaii. Despite the constitutional amendment, the constitutional provision states that the university must yield to legislative authority on matters of statewide concern, and the constitutional provision vests exclusive authority with the legislature to determine what constitutes a matter of statewide concern. While courts in Hawaii still have not determined whether constitutional autonomy creates some zone of authority for the University of Hawaii truly independent of the legislature’s power to determine issues of statewide concern, upon reflection I decided that the state fits better in this category, especially given the change in constitutional language in 2000.

218. *Id.*

219. *Levi v. Univ. of Haw.*, 628 P.2d 1026, 1029 (Haw. 1981) (stating the university “must act in accordance with legislative enactments that deal with statewide matters such as civil service and collective bargaining laws.”).

Regents of the University System of Georgia.²²⁰ But the adoption of a new constitution in Georgia in 1983 potentially left the status of constitutional autonomy in the state uncertain. The 1945 and 1976 constitutions stated that the board of regents possessed the powers and duties that existed by statutory authorization at the time of the ratification of the 1945 constitution.²²¹ The 1983 constitution, however, altered the language dealing with the powers of the statewide board.²²² According to the constitution, the “government, control, and management of the University System of Georgia” is given to the regents.²²³ Additionally, “[a]ll appropriations made for the use of any or all institutions in the university system shall be paid to the board of regents in a lump sum” with the Board of Regents “to allocate and distribute the same among the institutions under its control in such way and manner and in such amounts as will further an efficient and economical administration of the university system.”²²⁴ The constitution also provides that the regents may “hold, purchase, lease, sell, convey, or otherwise dispose of public property” and “may exercise the power of eminent domain in the manner provided by law.”²²⁵ However, the 1983 constitution also states that the regents “shall have such other powers and duties as provided by law” and does not provide that the regents possess any authority that existed at the time of the ratification of the 1945 constitution.²²⁶

The Georgia Court of Appeals, in a 2006 case involving a contract dispute, discussed the board’s authority as “plenary”²²⁷ but subject to “such restraints of law as are directly expressed, or necessarily implied.”²²⁸ The court, while referencing Article 8, Section 4 of the Georgia Constitution, looked as well to the board’s powers as determined under statutory authority.²²⁹ The decision makes unclear the status of independent constitutional authority for the statewide board.

220. See Beckham, *supra* note 2, at 181 (discussing that courts had appeared to recognize constitutional autonomy but had not provided a large body of case law).

221. GA. CONST. of 1945, art. VIII, § 4; GA. CONST. of 1976, art. VIII, § 4.

222. GA. CONST. art. VIII, § 4.

223. GA. CONST. art. VIII, § 4(b).

224. GA. CONST. art. VIII, § 4(c).

225. GA. CONST. art. VIII, § 4(d).

226. GA. CONST. art. VIII, § 4(d).

227. Bd. of Regents of the Univ. Sys. of Ga. v. Doe, 630 S.E.2d 85, 91 (Ga. Ct. App. 2006).

228. *Id.* at 92.

229. *Id.* A 1991 case involving the regents centered heavily on sovereign immunity in relation to the state constitution and did not directly address the issue of whether or not the 1983 constitution altered any independent constitutional powers possessed by the board. Pollard v. Bd. of Regents of Univ. Sys. of Ga., 401 S.E.2d 272 (Ga. 1991). In *Pollard*, the court considered whether a specific provision related to sovereign immunity affected the board, but the court did not address the broader issue of any independent authority for the regents.

A 1988 attorney general opinion described the board as possessing a “broad grant of authority” and discussed the specific powers related to lump sum appropriations and the acquisition and disposition of property, but also noted that its other powers and duties were to be provided by law.²³⁰ A 1996 attorney general opinion did offer an assessment supportive of constitutional autonomy for the board.²³¹ The opinion discussed that broad authority for the regents had been recognized in previous state constitutions.²³² The Attorney General, in assessing whether or not the regents were subject to a legislative resolution concerning a reserve officer training program at a state institution, concluded that “while this Joint Resolution does have the force and effect of law, it cannot bind the Board of Regents in relation to the exercise of its constitutional authority to govern, control and manage the University System of Georgia.”²³³ The Attorney General stated, “The power to determine the scope of an institution’s educational curriculum is a power uniquely reserved to the Board”²³⁴

While Georgia attorney general opinions have been supportive of constitutional autonomy, Georgia courts have not squarely addressed the alterations in the 1983 constitution. Additional guidance from states courts is required before placing Georgia among those states recognizing constitutional autonomy, but the state may well deserve to be among those recognized as providing constitutional autonomy for public higher education based on future cases.

E. Lack of Judicial Recognition

In Alabama, Alaska, and Mississippi, courts, without outright rejection of constitutional autonomy, have either not issued opinions on the doctrine or have expressly declined to decide whether constitutional autonomy exists, even when parties to litigation have raised the issue. For these states, constitutional provisions related to higher education governing boards have been in existence since the effective dates of the current state constitutions, which is 1901 for Alabama,²³⁵ 1959 for Alaska,²³⁶ and 1890

230. 1988 Ga. Op. Att’y Gen. 33 (1988). The Attorney General Opinion concluded that the regents did not need legislative authorization to merge institutions. Creation of a new institution, however, does require legislative approval. *See* GA. CONST. art. VIII, § 4.

231. Ga. Op. Att’y Gen. No. 96-12 (1996), *available at* 1996 Ga. AG LEXIS 24.

232. *Id.*

233. *Id.* at *1.

234. *Id.* at *7.

235. *See* ALA. CONST. art. XIV, § 264. Article XIV, Section 264 addresses the governance of the University of Alabama. Article XIV, Section 266 deals with the governance of Auburn University and was added to the constitution in 1961.

236. *See* ALASKA CONST. art. VII, § 3. The constitution was ratified in 1956 and became effective in 1959 when Alaska was granted statehood.

for Mississippi.²³⁷ In relation to these three states, previous authors have noted that state courts had declined to weigh in on the issue of constitutional autonomy,²³⁸ and this analysis found the continuation of such a pattern during the past three decades.

In Alabama, the state's supreme court has only gone so far as to prevent the transfer of control of the University of Alabama and Auburn University from their respective governing boards and declined to address any constitutional authority possessed by the boards.²³⁹ While not directly on point in relation to a determination of independent constitutional authority, the Alaska Supreme Court held in 1983 that the University of Alaska's constitutional status did not make the institution immune to the state's Public Records Statute.²⁴⁰ An attorney general opinion has also discussed that state courts have offered unclear guidance concerning any independent constitutional authority for the University of Alaska.²⁴¹ In Mississippi, courts have squarely refused to address claims regarding constitutional autonomy, though parties have attempted to argue that Article 8, Section 213-A of the constitution creates some form of independent constitutional authority.²⁴² Attorney general opinions have also not indicated any legal recognition of constitutional autonomy in the state.²⁴³

While the possibility of judicial recognition of constitutional autonomy lingers in Alabama, Alaska, and Mississippi, the legal doctrine appears to have resulted in, at best, no to limited practical legal effect. Judicial decisions and attorney general opinions issued so far do not indicate that constitutional autonomy enjoys meaningful judicial recognition in these states. As such, these states should not be included among those states where constitutional autonomy is recognized. Despite this status, state courts also have not explicitly held that constitutional autonomy does not exist, and future decisions may recognize the legal doctrine in one or more of these states.

Future research may well want to consider why, despite language in state

237. See MISS. CONST. art. VIII, § 213-A.

238. See, e.g., Beckham, *supra* note 2, at 179-81.

239. Opinion of the Justices, 417 So. 2d 946 (Ala. 1982).

240. Carter v. Alaska Pub. Employees Ass'n, 663 P.2d 916, 919 (Alaska 1983). The court relied heavily on the decision in *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975), a case in which the court held that the University of Alaska's constitutional status did not shield it from a state law dealing with sovereign immunity. *Id.* at 128-29. Like *Carter*, the decision in *National Aircraft* did not directly address constitutional autonomy for the University of Alaska, but certainly does not offer a ringing endorsement that independent constitutional authority exists for the University of Alaska.

241. 1977 Alaska Op. Att'y Gen. 9, available at 1997 Alaska AG LEXIS 465.

242. Bd. of Trs. of State Insts. of Higher Learning v. Miss. Publishers Corp., 478 So. 2d 269, 275 (Miss. 1985).

243. See, e.g., Miss. Op. Att'y Gen. (1998), available at 1998 Miss. AG LEXIS 546; Miss. Op. Att'y Gen. (1979), available at 1979 Miss. AG LEXIS 349.

constitutions, courts have been reluctant to recognize constitutional autonomy. Have public colleges and universities, for instance, demonstrated reluctance to press assertions of independent constitutional authority in state courts out of a fear of loss of financial support from the state legislature?²⁴⁴ Alternatively, have political and historical forces in particular states and the resulting connections between state judges and the legislature somehow made the judiciary more resistant to refute assertions against the legislature's authority? Researchers may also determine other possible explanations to consider as well. While states such as California, Michigan, and Minnesota are perhaps of more obvious interest because of strong judicial recognition of constitutional autonomy, these states, along with those in which courts have rejected the legal doctrine, are also of interest. What trends and forces in these states related to higher education governance or to broader political and social trends resulted in the failure of constitutional autonomy to take root, despite the existence of constitutional language suggesting it should exist?

F. Negative Case Treatment or Judicial Recognition Denied

For Arizona, Colorado, Missouri, and Utah, constitutional autonomy does not appear to exist as a viable legal doctrine, despite longstanding constitutional language in these states potentially supportive of some degree of constitutional autonomy. Beckham determined that judicial recognition of constitutional autonomy was lacking in these states,²⁴⁵ and this analysis reached the same conclusion. As illustrated by a 2006 Arizona Court of Appeals decision, Arizona case law continues to characterize the Arizona Board of Regents as subject to extensive legislative authority.²⁴⁶ In Colorado, language in the state's constitution of 1876 stated that the Regents of the University of Colorado possessed control over the university and its funds, but this language was repealed in 1973.²⁴⁷ In addition to the repeal of constitutional language related to the powers of the regents, state court cases in the period since Beckham's study certainly have not endorsed the notion of independent constitutional authority for the Regents of the University of Colorado and, instead, have emphasized the legislature's authority over the regents.²⁴⁸

244. Beckham, *supra* note 2, at 181, for instance, discusses that in Missouri the failure of the university to assert constitutional rights influenced judicial denial of the legal doctrine.

245. Beckham, *supra* note 2, at 179–80.

246. *Kromko v. Ariz. Bd. of Regents*, 146 P.3d 1016, 1022 (Ariz. Ct. App. 2006). The regents are created by Article 11, Section 5 of the state constitution, which took effect in 1912. *See* ARIZ. CONST. art. XI, § 5.

247. *See* COLO. CONST. art. IX, § 14 (repealed 1973).

248. *See, e.g., Colo. Civil Rights Comm'n v. Regents of the Univ. of Colo.*, 759 P.2d 726, 727–28 (Colo. 1988) (noting that Article VIII, Section 5 of the state constitution established the regents but that the state's General Assembly has conferred

Regarding Missouri, while research did not locate new opinions, an attorney general opinion described case law in the state as not recognizing constitutional autonomy.²⁴⁹ Both Beckham²⁵⁰ and Glenny and Dalglisch²⁵¹ discussed the Missouri Supreme Court's rejection of constitutional autonomy for the Board of Curators of the University of Missouri, despite constitutional language seemingly suggestive of constitutional autonomy.²⁵² Beckham and Glenny and Dalglisch also concluded judicial denial of constitutional autonomy had occurred in Utah²⁵³ based on a 1956 Utah Supreme Court decision.²⁵⁴ In a 2006 case dealing with the right of the state to permit individuals to possess firearms on campus, the Utah Supreme Court once again rejected claims that the University of Utah possesses some form of constitutional autonomy.²⁵⁵ The university argued that the state constitution granted it the constitutional authority to prohibit possession of firearms on campus.²⁵⁶ The Utah Supreme Court, in rejecting this challenge, specifically described the university as completely subject to legislative and executive control.²⁵⁷ This case, especially when considered in conjunction with the determinations of previous studies, indicates that, absent a dramatic reversal on the part of the Utah Supreme Court or a constitutional amendment, the University of Utah does not belong among those states with constitutional autonomy for public higher education.

G. Summary of Findings of Contemporary Status of Constitutional Autonomy Provisions

California, Michigan, and Minnesota continue to be the preeminent states with judicial recognition of constitutional autonomy. Research found support for continued recognition of constitutional autonomy for seven states, Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma, though without the extensive case law as the

governing powers on the regents).

249. Mo. Op. Att'y Gen. 68 (1977), available at 1977 Mo. AG LEXIS 68. Article IX, Section 9(a) of the state constitution creates the Board of Curators for the University of Missouri. See MO. CONST. art. IX, § 9(a).

250. Beckham, *supra* note 2, at 181.

251. GLENNY & DALGLISH, *supra* note 9, at 36.

252. MO. CONST. art. XI, § 9(a).

253. GLENNY & DALGLISH, *supra* note 9, at 31–33; Beckham, *supra* note 2, at 181.

254. Univ. of Utah v. Bd. of Exam'rs, 295 P.2d 348, 370–71 (Utah 1956) (rejecting the university's claims that its constitutional status limited the authority of other agencies of state government over the university in relation to the institution's finances).

255. Univ. of Utah v. Shurtleff, 144 P.3d 1109, 1118–21 (Utah 2006) (interpreting Article 10, Section 4 of the Utah Constitution).

256. *Id.* at 1112.

257. *Id.* at 1118.

aforementioned trio. A substantially restricted form of constitutional autonomy may exist in Nebraska and South Dakota. In Florida, Georgia, and Hawaii the legal status of constitutional autonomy is ambiguous. Recognition by courts of constitutional autonomy in Alabama, Alaska, and Mississippi, though not completely settled, appears unlikely. For Arizona, Colorado, Missouri, and Utah, legal decisions and attorney general opinions indicate that constitutional autonomy does not enjoy judicial recognition. Table 3 at the end of this section summarizes these findings.

The analysis also suggests some other conclusions and reflections on constitutional autonomy. An important result from looking at the status of constitutional autonomy during the past three decades relates to its continued viability. The legal doctrine has not experienced a steep decline of the kind which could have occurred, based on the findings of Glenny and Dalglisch.²⁵⁸ In Louisiana, and potentially in Hawaii and Florida, the existence of new constitutional provisions during this period demonstrates that it is not politically impossible to obtain adoption of a constitutional autonomy provision. Montana also added a provision in the 1970s that has received favorable judicial treatment. In addition, in states with long-established judicial recognition of constitutional autonomy, in general state courts have not demonstrated any kind of wholesale effort to invoke narrow interpretations of constitutional autonomy provisions. One of the concerns of Glenny and Dalglisch centered on control over financial issues,²⁵⁹ and courts during the past three decades have viewed constitutional autonomy as safeguarding institutional control over finances, including limitations on legislative power to place conditions on appropriations.²⁶⁰

While recent decades have witnessed a general increase in state oversight of higher education,²⁶¹ one potentially useful way to consider constitutional autonomy provisions is alongside decentralization and deregulation efforts that have also taken place in higher education.²⁶² This is not to suggest that deregulation efforts, which are often based in statutory authority, are completely analogous to constitutional autonomy provisions. A state in which constitutional autonomy exists might experience efforts to increase state oversight or coordination over public higher education. Still, policy analysts and higher education stakeholders might find it useful to view constitutional autonomy provisions alongside other measures designed to leave colleges and universities with greater control of their

258. See generally GLENNY & DALGLISH, *supra* note 9.

259. *Id.* at 73–103.

260. See, e.g., Bd. of Regents of Univ. of Okla. v. Baker, 638 P.2d 464, 467–69 (Okla. 1981).

261. See generally Aims C. McGuinness, Jr., *The States and Higher Education*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 182, 183–215 (Philip G. Altbach et al., eds., 1999).

262. See generally Michael K. McLendon, *Setting the Governmental Agenda for State Decentralization of Higher Education*, 74 J. HIGHER EDUC. 479 (2003).

internal operations. Even if a constitutional autonomy provision is not deemed a viable policy choice, higher education stakeholders may determine that statutory or other policy mechanisms could help achieve certain benefits identified with constitutional autonomy.

In trying to make generalizations about constitutional autonomy provisions, one issue that arises is how to make comparisons and distinctions at a somewhat more generalized level than, for instance, that provisions have been found to limit application of municipal building codes or that institutions must generally adhere to statewide health and safety laws. Comparisons and contrasts at a slightly more generalized level might prove useful not only to individuals and organizations concerned with higher education policy issues. Courts might also find such assessments worthwhile in considering the status of constitutional autonomy in other states and in addressing what areas of college and university functioning should be protected by a state's constitutional autonomy provision. The analysis of constitutional autonomy among the states on the basis of strong, moderate, weak, and ambiguous or negative treatment of constitutional autonomy provisions undertaken in this article is hopefully of assistance in making such contrasts and comparisons.

Beyond classifying constitutional autonomy along the basis of the degree of judicial recognition, other approaches to evaluating constitutional autonomy provisions may prove beneficial as well, both to courts and to higher education stakeholders. In the next section, the article turns to one such approach by using the concepts of substantive and procedural autonomy to analyze constitutional autonomy provisions. Analysis of constitutional autonomy with these concepts provides another way to describe and to compare and contrast constitutional autonomy provisions among the states. Accordingly, the article now turns to an analysis of constitutional autonomy using the concepts of substantive autonomy and procedural autonomy.

Table 3: Current Status of Judicially Recognized Constitutional Autonomy

Affirmative Judicial Recognition		
Substantial Recognition, Extensive Constitutional Autonomy	Moderate-Limited Recognition, Varying Degrees of Constitutional Autonomy	Judicial Recognition, Constitutional Autonomy Subject to Extensive Legislative Control
California	Idaho	Nebraska
Michigan	Louisiana	South Dakota
Minnesota	Montana	
	Nevada	
	New Mexico	
	North Dakota	
	Oklahoma	
Judicial Rejection of Constitutional Autonomy		
	Arizona	
	Colorado	
	Missouri	
	Utah	
Ambiguous Recognition		
	Florida	
	Georgia	
	Hawaii	
Unsettled but Unlikely Recognition		
	Alabama	
	Alaska	
	Mississippi	

V. USING SUBSTANTIVE AUTONOMY AND PROCEDURAL AUTONOMY TO ASSESS CONSTITUTIONAL AUTONOMY

Analyzing constitutional autonomy using the concepts of substantive and procedural autonomy provides a means of deepening the analysis offered in Part IV and of considering the ways in which constitutional autonomy may contribute to an institution's overall institutional autonomy. Multiple factors, as discussed in Part III, in addition to legal forces, shape the degree of institutional autonomy a college or university possesses, including a tradition of deference to public colleges and universities in a state or support for an institution from alumni and other groups. Analysis of constitutional autonomy represents just one piece of the institutional autonomy puzzle. As covered in Part III, substantive autonomy deals with "the power of the university or college in its corporate form to determine its own goals and programs (the *what* of academe)."²⁶³ And procedural autonomy refers to "the power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the *how* of academe)."²⁶⁴

In applying the concepts of substantive and procedural autonomy, it is important to keep in mind that at times a particular case or category of cases could potentially be viewed as implicating substantive autonomy as well as procedural autonomy. For instance, while control over financial decisions is often considered related to procedural autonomy, a decision permitting extensive legislative oversight of financial issues could be viewed as interfering with substantive autonomy by leaving an institution with limited meaningful control over the ways to allocate funds to implement goals or programs determined by the governing board absent extensive oversight by the legislature. While the line between procedural and substantive autonomy might appear fuzzy in particular cases, the concepts may still prove useful to courts in determining whether or not a legislative enactment encroaches on an institution's constitutional autonomy. In the case of substantive autonomy, for instance, courts can inquire as to whether a particular legislative directive intrudes into the authority of a governing board such that it unreasonably hampers the board's ability to set and/or implement major institutional goals and priorities. In relation to procedural autonomy, courts can assess whether the legislature has unduly hampered the constitutional authority of a governing board to decide how best to implement major goals and priorities, even if appropriately determined by other parts of state government.

The section first considers cases that potentially implicate substantive autonomy, and then turns to procedural autonomy. While drawing from the

263. Berdahl et al., *supra* note 33, at 6.

264. *Id.*

cases previously discussed in Part IV, this section also looks at times to foundational constitutional autonomy cases. Thus, the focus is no longer limited to cases exclusively from the past thirty years.

A. Substantive Autonomy

In cases from California, Michigan, and Minnesota, courts have consistently stated that constitutional autonomy shields the internal control and management of institutions from undue governmental control.²⁶⁵ In *Sterling v. Regents of the University of Michigan*,²⁶⁶ for example, one of the landmark constitutional autonomy cases in the state, the Michigan Supreme Court invalidated a legislative directive to relocate the university's homeopathic medical school.²⁶⁷ In describing the constitutional powers of the Regents of the University of Michigan in relation to the legislature, the court declared:

The board of regents and the legislature derive their power from the same supreme authority, namely, the constitution. In so far as the powers of each are defined by that instrument, limitations are imposed, and a direct power conferred upon one necessarily excludes its existence in the other, in the absence of language showing the contrary intent They are separate and distinct constitutional bodies, with the powers of the regents defined. By no rule of construction can it be held that either can encroach upon or exercise the powers conferred upon the other.²⁶⁸

As discussed in Part IV.A.1, Michigan courts have stated that constitutional autonomy is meant to reserve the internal control of institutions to their designated governing boards. The Michigan Supreme Court has noted that even a law otherwise applicable to an institution with constitutional autonomy could infringe on independent constitutional authority if the act interfered with educational decisions.²⁶⁹ The Michigan Supreme Court stated in a 1975 case that while the legislature may impose certain conditions on appropriations it “may not interfere with the management and control of those institutions.”²⁷⁰ In that same decision, the court held that a statewide board of education was meant to serve as a general coordinating and planning agency but could not exercise any kind of direct control over institutions.²⁷¹ While it was acceptable to require institutions to submit new programs to the statewide board, the board possessed no

265. See *supra* Part IV.A.

266. 68 N.W. 253 (Mich. 1896).

267. *Id.* at 258.

268. *Id.* at 257.

269. Cent. Mich. Univ. Faculty Ass'n v. Cent. Mich. Univ., 273 N.W.2d 21, 25–26 (Mich. 1978).

270. Regents of Univ. of Mich. v. State, 235 N.W.2d 1, 6 (Mich. 1975).

271. *Id.* at 11–12.

authority to prohibit new academic programs by institutions.²⁷² Michigan courts have made it clear that constitutional governing boards possess extensive authority, and this constitutional power is not simply limited to deciding how to implement legislative enactments. Governing boards in the state are constitutionally empowered to set major institutional goals and priorities in such areas as academic programs. These kinds of major decisions and priority setting are hallmarks of attributes used to describe substantive autonomy.

Similar to Michigan, California courts have described the Regents of the University of California as possessing almost exclusive authority, with the regents possessing “broad powers”²⁷³ and meant “to operate as independently of the state as possible.”²⁷⁴ In a 2005 decision, the California Supreme Court discussed how the broad grant of autonomy to the regents to control the affairs of the University of California stood in contrast to the “comprehensive power of regulation the Legislature possesses over other state agencies.”²⁷⁵ In assessing the authority of the regents, the opinion stated previous decisions had established that they enjoyed almost complete autonomy over the governance of the university.²⁷⁶

Minnesota courts have also described the Board of Regents of the University of Minnesota as possessing extensive authority to control and direct the affairs of the university. In the milestone decision of *State v. Chase*,²⁷⁷ the Minnesota Supreme Court, in rejecting the authority of a commission appointed by the governor to supervise any expenditure by the University of Minnesota, described the extensive constitutional authority of the regents:

So we find the people of the state, speaking through their Constitution, have invested the regents with a power of management of which no Legislature may deprive them. That is not saying they are the rulers of an independent province or beyond the lawmaking power of the Legislature. But it does mean that the whole executive power of the University having been put in the regents by the people, no part of it can be exercised or put elsewhere by the Legislature.²⁷⁸

The court defined the general distinction between the legislature and the

272. *Id.*

273. *San Francisco Labor Council v. Regents of Univ. of Cal.*, 608 P.2d 277, 278 (Cal. 1980).

274. *Kim v. Regents of Univ. of Cal.*, 80 Cal. Rptr. 2d 10, 14 (Cal. Ct. App. 2000).

275. *Campbell v. Regents of Univ. of Cal.*, 106 P.3d 976, 982 (Cal. 2005).

276. *Id.*

277. 220 N.W. 951 (Minn. 1928).

278. *Id.* at 954.

regents as that between legislative and executive power.²⁷⁹ While stating the line between the two could not be drawn with “mathematical precision,” the opinion discussed that the legislature could not usurp or transfer the regents’ authority to make academic policy for the University of Minnesota.²⁸⁰

Even in states with more moderate constitutional authority for public higher education institutions or governing boards than in California, Michigan, or Minnesota, constitutional autonomy may also protect substantive autonomy. In a 1981 Nevada decision, in which the court appeared somewhat unenthusiastic concerning constitutional autonomy, the opinion nonetheless stated that the constitutional power of the Board of Regents of the University of Nevada is violated when legislation interferes with “essential functions of the University.”²⁸¹ While declining to outline the overall contours of constitutional autonomy in Oklahoma, the state’s supreme court has stated that the constitution leaves major governance decisions with the Board of Regents of the University of Oklahoma.²⁸² In New Mexico, the state’s supreme court has held that legislative enactments may not interfere with the regents’ ability to make decisions concerning the “educational character” of the University of New Mexico.²⁸³

Especially in California, Michigan, and Minnesota, a probable reason for a lack of cases in more contemporary decisions dealing with control over issues related to basic institutional goals and objectives, such as the establishment or re-location of academic programs, is that constitutional autonomy leaves governing boards with significant discretion in this area. That is, in these states constitutional autonomy means that institutions possess constitutionally protected authority in setting significant institutional goals and priorities, with such authority reflective of attributes associated with substantive autonomy.²⁸⁴ Major decisions related to academic programs or standards such as those involving the curriculum, tuition, faculty selection, location of colleges or departments, or standards required for admittance are required by the constitution to rest largely with a constitutionally empowered governing board.

This constitutionally mandated substantive autonomy is in contrast to most other public colleges and universities. While many other public institutions in the United States may enjoy moderate to high levels of substantive autonomy due to such factors as tradition, statutory

279. *Id.*

280. *Id.* (citing *Springer v. Philippine Islands*, 277 U.S. 189 (1928) (Holmes, J., dissenting)).

281. *Bd. of Regents of Univ. of Nev. v. Oakley*, 637 P.2d 1199, 1200 (Nev. 1981).

282. *Bd. of Regents of Univ. of Okla. v. Baker*, 638 P.2d 464, 467 (Okla. 1981).

283. *Regents of Univ. of N.M. v. N.M. Fed’n of Teachers*, 962 P.2d 1236, 1250 (N.M. 1998).

284. *See supra* Part III.

authorization, or alumni support, this position is not mandated by the state's constitution. In states such as California, Michigan, and Minnesota, however, substantive autonomy appears protected by constitutional autonomy provisions and the interpretations given these provisions by state courts.

The concept of substantive autonomy may prove of value to courts faced with deciding whether a legislative enactment intrudes on an institution's constitutionally protected independence. In assessing a law, a court may use as a guiding inquiry whether the legislature has removed or unduly interfered with the authority of a governing board to establish institutional goals and priorities. While not suggesting a rigid analysis and, of course, dependent on a case's particular facts, the concept of substantive autonomy might assist courts in determining whether legislation crosses the line into excessive interference with an institution's constitutional autonomy in relation to establishing core institutional goals, especially in relation to clearly academic matters such as issues related to teaching and research.

Protection of substantive autonomy through a constitutional autonomy provision does not mean of course that other parts of state government are powerless to influence public colleges and universities, even in relation to areas implicating substantive autonomy. Most notably, public colleges and universities running too far afield from the wishes of the executive and legislative branches of government risk a reduction in appropriations. This power of the purse means that institutions with constitutional autonomy cannot lightly ignore the concerns of state leaders in setting major institutional goals and priorities. Conversely, constitutional autonomy may help protect substantive autonomy by requiring state elected officials to respect the role of constitutionally empowered governing boards in establishing major institutional goals and objectives.

B. Procedural Autonomy

The concept of procedural autonomy also appears useful in assessing constitutional autonomy provisions. For California, Michigan, and Minnesota, procedural autonomy appears nestled within the strong grants of substantive autonomy already guaranteed in constitutional autonomy provisions. In addition to controlling much of the "*what*" concerning institutional goals and priorities, public colleges and universities in these states exercise extensive control over the "*how*" as well. From municipal regulations,²⁸⁵ to prevailing wage laws,²⁸⁶ to requiring exhaustion of

285. See *Regents of Univ. of Cal. v. Santa Monica*, 143 Cal. Rptr. 276 (Cal. Ct. App. 1978).

286. *San Francisco Labor Council v. Regents of Univ. of Cal.*, 608 P.2d 277 (Cal. 1980).

administrative remedies,²⁸⁷ courts in these states have determined that constitutional autonomy is meant to provide governing boards with considerable control over the day-to-day affairs of institutions under their control along with the authority to set broad institutional goals and policies.

Beyond California, Michigan, and Minnesota, cases in other states suggest that constitutional autonomy may play an important role in protecting and providing procedural autonomy for those states with more moderate to restricted forms of constitutional autonomy. In these states, while the legislature may perhaps predominate in matters of substantive autonomy, constitutional autonomy may require that certain discretion be left to institutional or system governing boards in carrying out these aims. At a basic level, a constitutional provision may prohibit the legislature from divesting a governing board of all control over higher education.²⁸⁸

The *Exon* decision from Nebraska decision demonstrates the ways in which a constitutional autonomy provision may vest certain procedural autonomy with a governing board, even if it does not provide substantive autonomy.²⁸⁹ The case dealt with a series of legislative requirements that pertained to university funds, faculty salaries, repair and construction of facilities, requirements on data processing, and accounting procedures.²⁹⁰ While recognizing considerable legislative authority, the Nebraska Supreme Court still held that the act impinged too much on the authority of the Board of Regents of the University of Nebraska.²⁹¹ Despite noting the legislature's substantial authority to define the duties and obligations of the regents, the court stated that management of the university must remain under the regents' control.²⁹² Accordingly, constitutional autonomy in Nebraska may confer little substantive autonomy but appears to reserve certain procedural autonomy to the Board of Regents. Thus, the legislature is able to set major institutional goals and priorities, but it must leave room for the regents to best determine how to implement those legislative directives.

Decisions in Montana also appear to touch on issues related to

287. *Stephens v. Bd. of Regents of Univ. of Minn.*, 614 N.W.2d 764 (Minn. Ct. App. 2000).

288. See *Opinion of the Justices*, 417 So. 2d 946 (Ala. 1982); *Evans v. Andrus*, 855 P.2d 467 (Idaho 1993); *S.D. Bd. of Regents v. Heege*, 428 N.W.2d 535 (S.D. 1988). In *King v. Board of Regents of the University of Nevada*, the Nevada Supreme Court considered the constitutionality of the creation of an advisory board for the Regents of the University of Nevada. 200 P.2d 221, 222 (Nev. 1948). The court determined that the creation of the advisory board violated the constitutional authority granted to the Board of Regents, stating the constitution gave the regents the exclusive control over the university. *Id.* at 238.

289. *Bd. of Regents of Univ. of Neb. v. Exon*, 256 N.W.2d 330 (Neb. 1977).

290. *Id.* at 333–35.

291. *Id.*

292. *Id.* at 333.

procedural autonomy. In *Judge*, the Montana Board of Regents challenged certain provisions of a state law involving line item appropriations from the legislature.²⁹³ The regents argued that the state constitution made them a distinctive branch of government not subject to such legislative oversight.²⁹⁴ The court, though not recognizing the extent of authority sought by the regents, said that limits existed on the legislature's authority related to appropriations.²⁹⁵ The court invalidated provisions dealing with the salaries and raises of university employees and attempting to control university funds derived from private and federal sources.²⁹⁶ As in Nebraska, the court rejected legislative efforts to exert too much management control over the regents in relation to exercising their control over day to day operations.

Courts in Oklahoma have also weighed in on issues that appear related to procedural autonomy. In a 1981 Oklahoma Supreme Court case,²⁹⁷ the Board of Regents of the University of Oklahoma challenged as unconstitutional a legislative resolution that directed state agencies to provide a salary increase for all employees.²⁹⁸ The board contended that the provision interfered with its constitutionally vested control over the University of Oklahoma.²⁹⁹ In overturning the lower court's decision, the Oklahoma Supreme Court described salary determinations as an "integral part of the power to govern the University and a function essential in preserving the independence of the Board."³⁰⁰ The court held that the legislature had impermissibly interfered with the board's constitutional authority.³⁰¹

The preceding cases indicate that, as with substantive autonomy, procedural autonomy represents a useful concept through which to assess constitutional autonomy provisions. For states with substantial judicial recognition of constitutional autonomy, independent constitutional authority appears to protect both substantive and procedural autonomy. Even if constitutional autonomy does not result in strong protection for substantive autonomy, it may provide institutions with discretion over how to achieve substantive goals identified by the legislature. That is, governing boards may be able to determine the *how* of achieving goals and targets identified by the legislature.

Cases reveal that constitutional autonomy has placed limits on executive

293. Bd. of Regents of Higher Educ. v. Judge, 543 P.2d 1323, 1325 (Mont. 1975).

294. *Id.* at 1329.

295. *Id.* at 1333.

296. *Id.* at 1334-35.

297. Bd. of Regents of Univ. of Okla. v. Baker, 638 P.2d 464 (Okla. 1981).

298. *Id.* at 466.

299. *Id.*

300. *Id.* at 469.

301. *Id.*

and legislative authority in such areas as hiring, salaries, accounting procedures, purchasing practices, and control over funds not from legislative appropriations. While constitutional autonomy, even in California, Michigan, and Minnesota, does not leave institutions with unfettered control over their day-to-day operations, courts are often sensitive to viewing constitutional autonomy as providing governing boards with control over activities and functions that touch on areas encompassed by the concept of procedural autonomy.

The use of a procedural/substantive autonomy distinction also appears to provide a meaningful basis to distinguish constitutional autonomy provisions among states. A constitutional autonomy provision that protects substantive and procedural autonomy stands in marked contrast to one in which constitutional autonomy is more limited to issues affecting procedural autonomy. The concepts of procedural and substantive autonomy also underscore the reality that constitutional autonomy provisions may vary significantly among states in relation to what college and university activities and functions courts interpret the provisions to cover. Rather than a homogenous legal doctrine, constitutional autonomy should be viewed as resulting in unique attributes among the states that have adopted provisions. The analysis in this article suggests that constitutional autonomy clearly may differ among states in relation to procedural and substantive constitutional protections for institutional autonomy.

VI. CONCLUSION

Constitutional autonomy persists as a distinctive governance mechanism in American higher education, and courts continue to interpret constitutional autonomy provisions in ways that provide independent authority to governing boards possessing constitutional powers to direct the affairs of institutions or systems under their control. California, Michigan, and Minnesota remain the premier states in relation to constitutional autonomy. Courts in Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma also have recognized constitutional autonomy. Though heavily restricted, a limited form of constitutional autonomy may exist in Nebraska and South Dakota, and the status of constitutional autonomy is ambiguous in Florida, Georgia, and Hawaii.

Analysis of legal decisions from the past three decades reveals that constitutional autonomy, in terms of its treatment by courts, has not experienced a steep decline. In those states in which courts had previously recognized constitutional autonomy, decisions continue to reveal judicial concern with preserving the authority granted to constitutionally empowered governing boards. Courts in several states, in particular, have not been willing to permit legislatures to use appropriations to effectively override constitutional autonomy. In Louisiana and potentially in Hawaii

and Florida, new constitutional provisions can be viewed as marking a modest expansion of constitutional autonomy. This analysis shows that, at least as reflected by court cases, constitutional autonomy has not experienced any sort of extensive decline.

At the same time, consideration of court cases suggests that analysis of constitutional autonomy should not be limited to legal decisions. As discussed, the level of institutional autonomy possessed by public colleges and universities results from multiple forces, including many non-legal in nature. Additionally, a constitutional autonomy provision may impact how state officials treat public colleges and universities in ways that are not reflected in litigation. Future examinations of constitutional autonomy could seek to examine how legal forces interact with non-legal ones to affect institutional autonomy. Such studies could draw from data such as interviews with higher education officials or state legislators to assess whether constitutional autonomy provisions affect institutions in ways not readily captured in legal documents.

Future analysis might also seek to apply conceptual and theoretical structures that have not been previously used to examine constitutional autonomy. In looking to expand discussions related to constitutional autonomy along this line, this article took a preliminary step by using the concepts of substantive autonomy and procedural autonomy to analyze constitutional autonomy provisions. The initial assessment looks promising, as the concepts appear to have provided a helpful analytical lens. Significantly, the assessment indicated that constitutional autonomy may differ markedly among states in relation to whether a constitutional provision is limited to protecting issues related to procedural or substantive autonomy. Applying the concepts of procedural and substantive autonomy to constitutional autonomy provisions may assist courts with the task of defining areas of independent authority appropriately protected by constitutional autonomy provisions and may also help better integrate constitutional autonomy into ongoing debates among higher education policymakers regarding legal mechanisms to protect institutional autonomy.

Analysis of cases from the past three decades shows that constitutional autonomy continues as an integral part of the governance structure of public higher education in a select number of states. From the perspective of legal decisions, constitutional autonomy has not experienced any sort of decline, but rather has remained steady and perhaps can even be viewed as having experienced a modest expansion. Analysis using the concepts of substantive and procedural autonomy suggests that constitutional autonomy provisions provide one legal alternative to support the overall institutional autonomy of public colleges and universities. In sum, constitutional autonomy remains very much a vibrant part of the higher education landscape.

PARTICIPATORY LAWYERING & THE IVORY TOWER: CONDUCTING A FORENSIC LAW AUDIT IN THE AFTERMATH OF VIRGINIA TECH

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The tragic events at Virginia Tech in 2007 sent a cold wind blowing through the halls of higher education institutions: a Virginia Tech student, who had fallen through the cracks of the school's mental health services and disciplinary procedures, armed himself with firearms and murdered thirty-two students and a professor before committing suicide. In the wake of that massacre, several states and individual interest groups issued reports on campus readiness for similar catastrophes. A consistent theme throughout those reports emphasized the necessity for individual institutions to review their procedures to deal with campus violence.

This Article focuses on that institutional review and the role of lawyers in assisting colleges and universities in formulating better and more comprehensive procedures for preventing campus violence in general, but with an emphasis on preventing similar catastrophes, or at worst, minimizing their devastation. The lawyer has the best opportunity to assist by participating in the process rather than either dictating its conduct or reviewing the product after the fact. Preventive lawyering and collaborating with the academy are the only successful means for adequately addressing comprehensive plans that manage the risks raised by the needs of the new consumer student and that create a campus culture that does not tolerate campus violence. Specifically, this Article summarizes how the lawyer's collaboration with the academy should neatly incorporate the academic ends of the institution with legal ends that could minimize both the harm and the costs of campus violence.

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INTRODUCTION

The magnitude of the losses suffered by victims and their families, the Virginia Tech community, and our Commonwealth is immeasurable. We have lost people of great character and intelligence who came to Virginia Tech from around our state, our nation and the world. While we can never know the full extent of the contributions they would have made had their lives not been cut short, we can say with confidence that they had already given much of themselves toward advancing knowledge and helping others.

We must now challenge ourselves to study this report carefully and make changes that will reduce the risk of future violence on our campuses. If we act in that way, we will honor the lives and sacrifices of all who suffered on that terrible day and advance the notion of service that is Virginia Tech's fundamental mission.¹

A catastrophe inevitably triggers an audit of the events leading up to the calamity for a couple of purposes: to assure that what happened will not happen again and to determine who might have been to blame. A review of the numerous reports issued in the wake of the tragedy at Virginia Polytechnic Institute and State University (Virginia Tech) reveals that lawyers must play an integral part in assisting individual colleges and universities to conduct those audits and implement the necessary policy changes. The purpose of this Article is to focus on the audit as a preventive measure in the post-Virginia Tech higher education institution, especially in smaller colleges and universities. Lawyers should not necessarily be the chief instigators of these audits nor should they perform these audits on their own. However, lawyers do have a cooperative and collaborative role to play in educating the institutional players, in assessing institutional readiness, and in formulating institutional policy to minimize, if not prevent, similar catastrophes.

The goal of such a law audit should focus not just on the campus catastrophe but on campus violence in general as the source of the catastrophic event. In the ideal situation, the audit would prompt the institution not only to update its procedures for threat assessment and emergency preparedness, but would also create an overall institutional environment that would prevent or at least reduce the causes of, and harms

1. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL viii (2007), *available at* <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf> [hereinafter VIRGINIA TECH REPORT]; *see also* VIRGINIA TECH, PRESIDENTIAL INTERNAL REVIEW: WORKING GROUP REPORT ON THE INTERFACE BETWEEN VIRGINIA TECH COUNSELING SERVICES, ACADEMIC AFFAIRS, JUDICIAL AFFAIRS AND LEGAL SYSTEMS (2007), *available at* http://www.vtnews.vt.edu/documents/2007-08-22_internal_communications.pdf.

from, campus violence. Lawyers should participate in this process because the law is integral to any discussion of the governance of the institution as well as of the considerations the institution must assess when dealing with the safety and security of its students.² Good lawyers are also adept at formulating policies for clients that reflect adherence to both the law and the character of the institutional client. If nothing else, lawyers are essential in assessing litigation risks of which faculty and administrators may not even be aware.

The law audit envisioned here is, at its essence, the melding of the needs, character, and talents of the institution with the unique skills of the lawyer to negotiate and counsel. The overarching goal is perhaps the essence of preventive lawyering but is better characterized here as participatory lawyering. The lawyer engaged in the law audit does not hand down edicts on firm letterhead but gets down in the trenches as a member of a task force or work group, whose responsibility to the group will be to educate herself about the educational institution and its needs, to educate the other members about the pertinent law, to assist the group in understanding and assessing risks involved in campus violence, and to be one of the guides through an audit of current procedures, with the ultimate goal of helping to create new policy for the institution.

Such a participatory role for a lawyer is often a difficult one, especially for the lawyer who is not in-house with an educational institution. Consequently, Part I of this Article discusses the practical necessity for lawyers' participation in the institutional task of addressing issues raised by campus violence and the collaboration and cooperation skills essential to participatory lawyering for a higher education institution. Part II of this Article is primarily didactic and is designed to educate about the current institutional climate that is affecting not just campus violence but also potential "plaintiffs"—victimized students—that a lawyer needs to anticipate. Part III outlines the participating lawyer's educative function on a campus violence work group, especially reviewing for the other members the risks associated with inadequate prevention and planning. One thing lawyers hate to do is to "re-invent the wheel," so previous reports and forms are excellent resources to help lawyers assist the group in creating templates for the work group's dissection of the institutional policies. Part IV guides the collaborative effort by reviewing existing post-Virginia Tech audits. Part V selects several topics that figure prominently in these existing reports and that should comprise the work group's post-Virginia Tech audit of institutional policies and procedures. And Part VI suggests the first steps that a campus must make to embrace a culture of awareness about the constituent parts of a good campus plan for stemming campus

2. See, e.g., Jay P. Heubert, *The More We Get Together: Improving Collaboration Between Educators and Their Lawyers*, 67 HARV. EDUC. REV. 531, 532 (1997).

violence. Embarking on this effort to reduce campus violence is a fundamental mission that colleges and universities ignore at their peril.

I. JOINING THE FORENSIC TEAM

Lawyers often have themselves to blame for civilians' antipathy to working with them. This dynamic is partially caused by lawyers' not wanting to work with others. Instead, they want to dominate the debate. In doing so, lawyers often talk past their clients; silence and subordinate clients; and dominate the conversation about the clients' problems.³ "Rather than a lawyer giving voice to or 'translating' for a client, . . . the lawyer is often seen as unable to hear a client's needs or to respond appropriately."⁴ It should come as no surprise then that higher education clients may not be thrilled at the prospect of lawyers' involvement in creating campus violence policy: "[T]he [Wisconsin] Governor's remarks were remarkably on target in terms of not turning these issues exclusively over to lawyers."⁵

The unfortunate aspect of the other side of the coin is that higher education administrators, and more than likely most academics, are not especially attuned to legal issues and are often less well-trained in the law and administrative matters than their public school counterparts⁶ or as occurred in the Virginia Tech tragedy, overreact to a misunderstanding of the law. Higher education attorneys, at the most, hope for university administrators to spot legal issues so that counsel can step in and give advice and guidance when needed.⁷ Large colleges and universities often have the expertise at hand with in-house counsel, which is budgeted with

3. See, e.g., Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 379–80 (1996). This observation is broad and is not intended to paint all lawyers in such an unflattering light, especially lawyers who specialize in representing higher education clients.

4. *Id.* at 379 (citing Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1300–01 (1992)).

5. WISCONSIN OFFICE OF JUSTICE ASSISTANCE & OFFICE OF THE GOVERNOR, GOVERNOR'S TASK FORCE ON CAMPUS SAFETY: FINAL REPORT 63 (2007) (quoting Dr. Gary Pavela), available at <ftp://doafp04.doa.state.wi.us/doadocs/governortaskforcecampussafetyfinalreport.pdf> [hereinafter WISCONSIN REPORT]. Dr. Pavela is himself a lawyer, now primarily engaged in academic pursuits at University of Maryland—College Park.

6. David Schimmel & Linda Nolan, *Academic Administrators, Higher Education and the Practice of Preventive Law*, 194 EDUC. L. REP. 461, 461, 463 (2005). Academic lawyers can be just as bad as other academics at not being conversant in higher education law and its myriad issues and may be as much a hindrance as a help to the university's lawyer. See also Robert M. O'Neil, *The Lawyer and the Client in the Campus Setting: Who Is the Client, What Does the Client Expect and How May the Attorney Respond?*, 19 J.C. & U.L. 333, 340 (1993).

7. Schimmel & Nolan, *supra* note 6, at 469.

the faculty and staff expenses. Not so with small schools, which not only do not have in-house counsel but often must rely on counsel less attuned both to the general area of higher education law and to the intricate workings of the institution.⁸ Few resources exist for college and university administrators who deal with higher education legal issues, and other than the National Association of College and University Attorneys—some of whose resources are difficult to access without membership—there seems to be no one all-encompassing organization to which colleges and universities might subscribe that would give consistent legal guidance on campus violence and the law.⁹ Indeed, the Virginia Tech Task Force recommended that national higher education organizations develop information-sharing protocols, but, so far, little coordination or cooperation on these matters is evident.¹⁰ That leaves the individual institution's lawyer with the task of gathering and vetting best practices from meager and disparate resources on campus violence.

The lawyer's underlying goal is convincing the university of the need for advance planning and the implementation of risk management protocols for campus violence.¹¹ Such preventive law is the minimization of legal

8. *Id.* at 467.

9. However, one study suggests that higher education administrators would not use such associations' legal resources. *Id.* at 464. Additional member-only resources on campus safety are available at the website for the National Association of Student Personnel Administrators. See NASPA: Student Affairs Administrators in Higher Education, <http://www.naspa.org> (last visited Feb. 25, 2009).

10. VIRGINIA TECH REPORT, *supra* note 1, at 70. The Report names the American Council on Education, American Association of State Colleges and Universities, American Association of Community Colleges, National Association of State and Land Grant Universities and Colleges, National Association of Independent Colleges and Universities, Association of American Universities, and Association of Jesuit Colleges and Universities. See also Higher Education Associations, <http://www.ntlf.com/html/lib/assoc/index.htm> (last visited Feb. 25, 2009) (providing an extensive list of higher education groups compiled by the National Teaching and Learning Forum).

11. The tragic events at Columbine High School were the wakeup call to the public schools to embrace legal frameworks for dealing with dangerous students and threat assessment and campus security measures that higher education is more slowly embracing. See, e.g., HON. WILLIAM H. ERICKSON, COLUMBINE REVIEW COMM'N, THE REPORT OF GOVERNOR BILL OWENS' COLUMBINE REVIEW COMMISSION (2001), available at http://www.state.co.us/columbine/Columbine_20Report_WEB.pdf [hereinafter COLUMBINE REPORT]; ROBERT A. FEIN, BRYAN VOSSEKUIL, WILLIAM S. POLLACK, RANDY BORUM, WILLIAM MODZELESKI, & MARISA REDDY, U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES (2004), available at <http://www.ed.gov/admins/lead/safety/threatassessmentguide.pdf> [hereinafter SECRET SERVICE GUIDE]; MARY ELLEN O'TOOLE, FBI, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE (2000), available at <http://www.fbi.gov/publications/school/school2.pdf>. Higher education did not seem to be as attentive until the catastrophe of Virginia Tech, and the tragedy at Northern Illinois University served as a potent reminder. See, e.g., Ted Gregory, *6 Dead in NIU Shooting: Gunman Opens Fire in Lecture Hall, then Kills Self*, CHI. TRIB., Feb. 15,

risks.¹²

[P]reventive law works from the premise that preventing legal disputes is less costly than litigation. Furthermore, preventive law promotes a client-centered approach In preventive law, the lawyer and client engage in a joint decisionmaking process regarding legal strategies . . . [and] contemplates the client's long term goals and interests and how best to achieve them while minimizing exposure to the risk of legal difficulties.¹³

Preventive law is most successful when the “actor-at-law” recognizes that a problem requires legal counsel.¹⁴ Unfortunately, higher education is one of those actors-at-law often unable to self-diagnose. Consequently, preventive lawyering requires the lawyer's initiative to review the juxtaposition of the institution's facts with new developments in the law that may have an impact on the institution's law-creating events. This practice melds the institution's knowledge of its facts and the lawyer's knowledge of the updated law—cases, statutes, and regulations.¹⁵ The attorney does not do all the work while the client stands by. Instead, such preventive lawyering includes the client in collaboration to prevent problems.

The success of a collaboration to review and create campus violence

2008, at 1, *available at* 2008 WLNR 2984048. Admittedly, there are some distinct institutional and legal differences between public schools and higher education that make their respective approaches to student safety issues markedly different: public schools receive top-down instructions for safety from their schools; public schools are better capable of closing their campuses to outsiders; state legislatures regulate the due process and safety procedures imposed upon public schools; public schools typically have a somewhat higher level of liability for the safety of the students entrusted to their care; and the age of the student population in K–12 institutions typically range from five to eighteen years. The manner of governance is also different: school boards for K–12 institutions will more likely adopt state and federal mandates as well as invest in preventive attorney review of their policies to ensure they comply with the letter of the law whereas higher education institutions, even if they have in-house counsel, tend to want to over-think their policies, debate them, and chew on them until consensus is reached, which consensus may have little reliance on legal requirements. *See, e.g.*, DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 190 (2003). The events of the past couple of years have, assuredly, made preventive law more important to colleges and universities.

12. Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189, 189 (2002) (“Through periodic legal checkups, the preventive lawyer . . . identif[ies] potential future legal dilemmas and help[s] the client to avoid them.”).

13. Dennis P. Stolle, David B. Wexler, Bruce J. Winick, & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 16 (1997); *cf.* O’Neil, *supra* note 6, at 337 (“Most [college and university] issues will be resolved if the attorney sees avoidance of litigation as a primary task.”).

14. Louis M. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940, 941–42 (1956).

15. *Id.* at 947–50.

policies depends upon the nature of the decision-making. Policymaking is not always viewed as a lawyer's strength. Lawyers are trained—and often cabin off their practices—in two particular functions: counseling the client and advocating for the client. These two functions are often seen to be strictly within the province of interpreting and explaining the law to the clients, a rather one-sided affair. But the skill for counseling is easily converted to a policymaking skill if the lawyer is willing to engage in dialogue rather than monologue, is able to talk with the client rather than at the client.

Institutional in-house counsel, who are often “treating” the entirety of the client rather than small discrete parts, are attuned to this because they are attuned to the institution and the community of interests involved:

Familiarity with the special nature of academic institutions and the way they function is a sine qua non of the university attorney's role. Universities make decisions differently, have unique personnel policies and procedures (which often appear byzantine to outsiders), and have a culture and value system unlike any other institutional client. The lawyer needs to appreciate and understand these differences as legal questions arise across the campus. There are, of course, many lawyers and firms who handle academic clients as part of their varied and general practice. Outside counsel, however, may lack the expertise that specialization brings. In such situations, universities incur a serious risk by using counsel that is unaware of the niceties of tenure, academic freedom, or student due process.¹⁶

An attorney working with a university on policymaking issues must attune herself to the institution by participating in the decision-making process,¹⁷ rather than keeping aloof in the traditional counseling function.

The participatory model that perhaps best describes the most useful decision-making process for higher education is deliberative democracy. Deliberative democracy has two primary features: dialogue based on reason and dialogue based on the public good.¹⁸ Dialogue based on reason is an engaged discussion in which the parties listen to the viewpoints of the other participants to begin shaping the policy then move toward consensus.¹⁹ “[E]xisting desires should be revisable in light of collective discussion and

16. O'Neil, *supra* note 6, at 336.

17. *Id.*

18. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 205–06 (1997).

19. *Id.* at 205; see also Geoffrey Cowan & Amelia Arsenault, *Moving from Monologue to Dialogue to Collaboration: The Three Layers of Public Diplomacy*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 19–20 (2008).

debate, bringing to bear alternative perspectives and additional information.”²⁰ On the other hand, dialogue based on the public good seeks outcomes for the community’s interests and not for private self-interest.²¹ Such dialogue encourages the debate of competing viewpoints while scrutinizing those viewpoints for their salience and usefulness to the endeavor.²²

[Deliberative democracy therefore] refers . . . to the understanding that in the capacity as political actors, citizen and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general—understood as a response to the best general theory of social welfare.²³

For the lawyer to successfully negotiate the decision-making, she must ingratiate herself with the members of the institution, blending the expertise of the practitioner with that of the academic.²⁴ Collaboration in this context is a “process in which two or more persons work and play together to achieve some result or create some product in which they are jointly invested and about which they care enough to pool their strengths.”²⁵

[In this setting,] individuals adopt not a materially calculating posture but rather a richer, more emotionally nuanced *reciprocal* one. When they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public good even without the inducement of material incentives.²⁶

This reciprocity requires an active participation of the parties and may come naturally to the academy: “Reciprocal exchange is in fact integral to

20. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549 (1988).

21. Rossi, *supra* note 18, at 206.

22. Sunstein, *supra* note 20, at 1549.

23. *Id.* at 1550.

24. Nancy Macduff & F. Ellen Netting, *Lessons Learned from a Practitioner-Academician Collaboration*, 29 NONPROFIT & VOLUNTARY SECTOR Q. 46, 48 (2000). “Collaboration” in this context should not be confused with “collaborative lawyering” as identifying lawyers collaborating in alternative dispute resolution practice. *E.g.*, Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289 (2008). Instead, it is probably more akin to “collaborative lawyering” as identifying lawyers collaborating for social change within communities. *E.g.*, DAVID C. CHRISLIP, *THE COLLABORATIVE LEADERSHIP FIELDBOOK: A GUIDE FOR CITIZENS AND CIVIC LEADERS* (2002); Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006).

25. Macduff & Netting, *supra* note 24, at 48.

26. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71 (2003) (emphasis in original).

the structure of scholarly production.”²⁷ Such collective and, indeed, collaborative action is premised on trust.²⁸ And trust is something that lawyers have to promote actively in order to participate successfully on an institutional task force.

There are a few hurdles to such trust. First, many academics blame lawyers for the commodification of the university.²⁹ They view lawyers as engaged in the diminution of their importance as educators. Second, academics view attorneys as being “risk-averse” and out of touch with the university culture. Consequently, they want to form the policies, *then* consult lawyers: “We have to, first off, have a core sense of what we believe in, what we’re trying to accomplish as educators, define what we want to do, and then approach the lawyers.”³⁰ If the potential participants on a campus violence task force want to have the dialogue without the participation of the lawyers in that process, the stakeholders are not only less informed for engaging in the deliberative process, they may be wasting their time if the lawyer later finds the policies are legally inadequate or even unlawful. Last, as noted above, lawyers are not terribly good at participating. “[L]awyers routinely silence and subordinate their clients while purporting to tell ‘their’ stories.”³¹ Rather than engaging the client in a dialogue about the legal problem and the proposed remedies, lawyers bind themselves to their own sense of the law and have no “shared understanding” of the client’s plight or needs.³²

If a lawyer wants to participate in the success of the institutional client, she must be invested in the enterprise’s goals and success. Public education lawyers often have this community of interest because so much of what they do involves as much preventive lawyering as reactive lawyering.³³ Institutional in-house counsel, of course, has this legitimacy of working toward a mutual goal, being one of the community. Their being on the “premises” and their knowledge of the players gives them insights into the academic culture and the spirit of community on the campus.³⁴ On the other hand, outside counsel needs to learn to cultivate that academic

27. *Id.* at 90. *But see* Heubert, *supra* note 2, at 563. Reciprocity is also a keystone of the dialogue essential to deliberative democracy. Rossi, *supra* note 18, at 205 n.178.

28. Kahan, *supra* note 26, at 72.

29. *See, e.g.*, BOK, *supra* note 11, at 6.

30. WISCONSIN REPORT, *supra* note 5, at 61–62 (quoting Dr. Gary Pavela, Keynote address at the Wisconsin Governor’s Task Force on Campus Safety Public Summit (Aug. 9, 2007)).

31. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1300–01 (1992).

32. *Id.* at 1301.

33. *See, e.g.*, MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS* 11–12 (2005).

34. Heubert, *supra* note 2, at 559.

culture and absorb the needs of the community to do the best job of collaborating with and within the institutional community, just as one might with any other corporate client.

First, a lawyer working with a college or university needs to understand that academics not only specialize in areas with which the lawyer is unfamiliar but in an institution that, despite having attended, is still a foreign experience to her. A “significant barrier [to academic-practitioner collaboration] is the inadequate socialization of practitioners and researchers in one another’s professional or organizational cultures.”³⁵ The lawyer must also acknowledge the “complex educational judgments in an area that lies primarily within the expertise of the university” and give “a degree of deference to a university’s academic decisions.”³⁶ Second, the lawyer must be prepared to learn the skills of interprofessional collaboration and participatory lawyering.³⁷ “One important attitude is a willingness to collaborate as equals. This calls upon educators and lawyers to respect one another as individuals and professionals and to avoid the hierarchical relationships that frequently exist between lawyers and their clients.”³⁸ Third, the lawyer must tap into the skills that each member of a work group might have, not just in the institutional sense but in the academic sense. “Collaboration is improved if participants are aware that each profession has critical knowledge and skills that the other profession lacks. Moreover, each professional must be aware of what the other professional does not know.”³⁹ A work group assembled for campus violence should include not just administrators, security professionals and lawyers, but also gather the expertise that certain of the professoriate would bring to the table, like sociology, psychology, geography, education, communications, business, and even the physical sciences. Each individual could be tasked to bring her expertise to the group—not unlike an expertocratic model,⁴⁰ but instead with the good of the community in mind. The community goal is to create a systemic change in the institution—one that is more attuned to the legal risks and risk management of campus

35. Macduff & Netting, *supra* note 24, at 50.

36. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

37. Heubert, *supra* note 2, at 562–64.

38. *Id.* at 547.

39. *Id.*

40. See Rossi, *supra* note 18, at 196–98. Task force members of post-Virginia Tech reports hailed from several disciplines. See also CAMPUS LIFE AND SAFETY AND SECURITY TASK FORCE, OKLA. STATE REGENTS FOR HIGHER EDUC., FINAL REPORT 3–5 (2008), available at <http://www.okhighered.org/class/final-report.pdf> [hereinafter OKLAHOMA REPORT]; STATE OF ILL. CAMPUS SECURITY TASK FORCE, REPORT TO THE GOVERNOR, EXECUTIVE SUMMARY (2008), available at http://www.illinois.gov/documents/CSTF_Report_Executive_Summary.pdf [hereinafter ILLINOIS REPORT EXECUTIVE SUMMARY]; WISCONSIN REPORT, *supra* note 5, at i.

violence.⁴¹

Thus, the participating lawyer has several tasks for working successfully with a campus violence task force. On a “molecular” level, the lawyer must immerse herself into the institution and submerge the inclination to lead the discussion. On the professional level, the lawyer must do what she does best: educate the other members of the group on the law; collate and share other preventive law practices; check the institution’s existing policies; and, if necessary, help formulate new policies.⁴²

II. EXAMINING THE BODY IN SITU

“The scramble to get into college is going to be so terrible in the next few years that students are going to put up with almost anything, even an education.”⁴³

The first thing any lawyer for a higher education institution must do is become familiar with its business, its needs, its strengths, and its weakness. The only way to engage in preventive lawyering is to become intimately familiar with the institution, or, as a pathologist might do, examine the body in place before dissection. Although all attorneys have attended at least one institution of higher education and so have some sense of the business, that short period of time is insufficient to educate the lawyer about the idiosyncrasies of even that institution, not to mention the nearly innumerable legal issues the institution faces.⁴⁴ Much of the generic legal issues can be learned on the job, especially if the relationship is, or will be, long term. The same holds true for immersion into a particular institution’s culture that an attorney would not really have examined while a student: its mission, its past and future goals, and the faculty and staff. For purposes of better participating with the university in updating its campus violence policies, the astute lawyer should also understand and immerse herself in the dynamics of the potential student victims (as well as the potential student perpetrators) and their relationship to the institution, particularly as

41. See generally Jonathan Simon, *In the Place of the Parent: Risk Management and the Government of Campus Life*, 3 SOC. & LEGAL STUD. 15, 36–39 (1994). Incentives to the faculty, especially in the humanities, are the opportunity to apply their skills in the real world, to develop new research queries, and perhaps to develop consultancies in campus violence. See, e.g., William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMP. RTS. & EMP. POL’Y J. 377, 397–98 (2003).

42. Beyond the scope of this Article are the concerns and considerations of the economic and ethical relationship of the attorney to the client. See generally O’Neil, *supra* note 6.

43. *The Professor*, TIME, Aug. 29, 1955, available at <http://www.time.com/time/magazine/article/0,9171,823895,00.html> (quoting Barnaby C. Keeney, former President of Brown University).

44. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* (4th ed. 2007).

that relationship has evolved into a commercial business-customer relationship.

The modern college and university governance has become somewhat schizophrenic in the clash between the commercialization and commodification of colleges and universities and the traditional view that colleges and universities are cloistered halls of learning and higher intellectual thought. Unfortunately, “[u]niversities share one characteristic with compulsive gamblers and exiled royalty: there is never enough money to satisfy their desires.”⁴⁵ To satisfy that need for money, colleges and universities have long engaged in commercial practices to attract students.⁴⁶ However, since the early 1980s, colleges and universities joined the mainstream capitalistic drive to compete in the “marketplace” and became entrepreneurs.⁴⁷ Higher education institutions began to snag government and grant funding for scientific research, which in turn brought in funds from licensing rights, consulting activities, and similar academy-business joint ventures.⁴⁸

At the same time, *U.S. News & World Report* fueled the competition among colleges and universities as it published its annual rankings of colleges and universities, even their individual professional schools.⁴⁹ “Although every college president can recite the many weaknesses of these ratings, they do provide a highly visible index of success, and competition is always quickened by such measures, especially among institutions like universities whose work is too intangible to permit more reliable means of evaluation.”⁵⁰ As a consequence of all this competition, colleges and

45. BOK, *supra* note 11, at 9.

46. *Id.* at 2–3.

47. *Id.* at 3–5, 10–13. “Entrepreneurial initiative, high executive salaries, and aggressive marketing techniques are all spreading to fields of endeavor quite outside the realm of business.” *Id.* at 5. “Some [colleges and universities] have become big businesses, employing thousands and collecting millions in tuition fees, receiving grants from government and private sources, and, for a select few, raising billions in huge endowments.” STANLEY ARONOWITZ, *THE KNOWLEDGE FACTORY: DISMANTLING THE CORPORATE UNIVERSITY AND CREATING TRUE HIGHER LEARNING* 11 (2000).

48. BOK, *supra* note 11, at 11–12.

49. *Id.* at 14.

50. *Id.* The criticisms of these annual reports have generated considerable controversy in the academy and not inconsiderable scholarly attention. See, e.g., Gordon C. Chang & J.R. Osborn, *Spectacular Colleges and Spectacular Rankings: The “US News” Rankings of American “Best” Colleges*, 5 J. OF CONSUMER CULTURE 338 (2005); Symposium, *The Next Generation of Law School Rankings and Methodology*, 81 IND. L.J. 1 (2006); Stuart Rojstaczer, *College Rankings Are Mostly About Money*, SFGATE.COM (Sept. 3, 2001), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/09/03/ED28864.DTL&type=printable>. Ironically, a study commissioned by *U.S. News & World Report* itself reported significant weaknesses in the methodology used in its rankings. Nat’l Opinion Research Ctr., *A Review of the Methodology for the U.S. News & World Report’s Rankings of Undergraduate Colleges and Universities*, WASH. MONTHLY, <http://www.washingtonmonthly.com/features/2000/norc.html>.

universities go to great lengths to market themselves to students and to spend inordinate sums of capital to woo the “best” students.⁵¹

As students and their parents become targets of that marketing and hence consumers of the institutional business, they also start to take seriously the business aspect of not just the choice of institution, but what the choice should offer in return: the vast majority of undergraduates view a college degree as essential to getting a job, a view that far outstrips any other reason for attending college.⁵² “[S]tudents in the 1970s and since have viewed college as an absolutely critical screening process which would determine where in the economic hierarchy they were likely to end up.”⁵³ In addition, with the rise in the number of nontraditional students—part-timers, older, or employed—came the rise of a consumer mentality in students’ relationship with the university: “[t]heir focus is on convenience, quality, service, and cost.”⁵⁴ By the 1990s, students became more acutely attuned to the buyer-seller relationship they had with the college or university, pitting their own interests against the college or university’s interests and more actively “seeking rights of choice, safety, and information,”⁵⁵ believing that they “have the same rights as consumers do with any other commercial enterprise.”⁵⁶ Increasingly, students will lodge complaints like customers at a retail store and threaten litigation if they are not satisfied.⁵⁷ Concomitant with this consumer attitude to their education is the students’ view that, just as with traditional businesses, colleges and universities have similar business duties to them for their safety on campus.⁵⁸ These safety issues are the crux of the legal education the participating lawyer must convey to the rest of an institutional campus violence task force.

III. EXTERNAL EXAMINATION AND THE PRE-EXISTING PATHOLOGY

The attorney’s role in the education of the other members of the

51. See, e.g., WESLEY SHUMAR, COLLEGE FOR SALE: A CRITIQUE OF THE COMMODIFICATION OF HIGHER EDUCATION 126–41 (1997).

52. ARTHUR LEVINE & JEANETTE S. CURETON, WHEN HOPE AND FEAR COLLIDE: A PORTRAIT OF TODAY’S COLLEGE STUDENT 115–17 (1998).

53. Simon, *supra* note 41, at 23.

54. LEVINE & CURETON, *supra* note 52, at 50.

55. *Id.* at 70.

56. *Id.* at 52.

57. *Id.* at 51.

58. Students’ attitudes about their responsibilities for their own safety may be exemplified by a recent article in a major university’s student newspaper: “It is the duty to protect the students of this university, not a favor. College kids do not always take the safety precautions necessary, and are probably more irresponsible than most when it comes to their own safety.” Dan Josephson, *Safety Improvements on Campus Unconvincing*, THE DAILY CARDINAL (Madison, Wis.), Apr. 25, 2008, available at http://www.dailycardinal.com/frontend/article/print_version/2877.

institution engaged in improving campus violence policies includes, to a great extent, teaching the teachers. The attorney has to educate the academy of the risks the institution faces in matters of campus violence so as to better formulate the necessary policies to avoid those risks. In this way, the institution becomes preventive rather than reactive to legal issues raised by campus violence. That education instructs that, as goes the student consumerism in the institution, so goes the law.

The rise of student consumerism parallels the fall of *in loco parentis* governance in higher education. Until recently, little structural change has taken its place as colleges and universities have taken a more market-oriented, *laissez faire* approach to governing student social and private lives. Unfortunately, the consumer-savvy student has also become more litigious, leaving institutions to deal with the disparate demands of the students: I am a consumer, and I want the best; however, I am unwilling to take responsibility for the costs of my actions.⁵⁹

That leaves higher education with a new consideration in running its business: the role of risk management in minimizing the harms to the students without interfering with their private lives. The modern college or university now must consider student demands for the ideal in health and safety as part of its business plan.⁶⁰ Rather than directly shaping and regulating students' lives under the *in loco parentis* model, the modern college or university must indirectly shape and regulate its students' lives as consumers. This requires the college or university to look at the scope of actors and actions on its campus and to emphasize the risks and environment to the consumers so they can make the most responsible and rational choices over health and safety issues,⁶¹ rather than submitting to the uncontrolled domination of the *laissez faire* system.⁶² In other words, colleges and universities must inculcate in their students a sense of order in matters of campus security as responsible consumers rather than either extreme of the strictures arising from the imposition of moral authority and of the anarchy of no government at all.

Hence, one major task of the lawyer participating on a campus violence task force is to assist the other members in appreciating the importance of risk management. This task can be accomplished by supplying the most recognizable rationale for creating a campus culture of responsible choices and rational consumerism: the not inconsiderable likelihood that a college or university will incur liability for the consequences of not managing the risks of campus violence, or at the very least, the costs of defending a suit by an injured student.

59. Simon, *supra* note 41, at 23–26.

60. *Id.* at 31.

61. *Id.* at 32.

62. *Id.* at 38.

The task force lawyer-participant brings the expertise to the group that educates the other members on those legal concerns,⁶³ which begins with the stark fact that courts are increasingly awarding damages to college and university students (or their families) when they are injured by violence on campus.⁶⁴ Although the statistics are contradictory, this trend is fed by reported data that reveals approximately one-third of college students have been campus crime victims⁶⁵ as well as slightly escalating campus crime and violence during the past fifteen years or so.⁶⁶ Fatal shootings on

63. STATE OF ILL. CAMPUS SECURITY TASK FORCE, REPORT TO THE GOVERNOR, 225–37 (2008), available at <http://www.ibhe.state.il.us/CampusSafety/materials/CSTFReport.pdf> [hereinafter ILLINOIS REPORT].

64. See, e.g., John Wesley Lowery, *The Legal Implications of Campus Crime for Student Affairs Professionals*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES: A SOURCEBOOK FOR EVALUATING AND ENHANCING SAFETY PROGRAMS 205, 213–15 (Jerlando F. L. Jackson & Melvin Cleveland Terrell eds., 2007) [hereinafter CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES].

65. This figure was consistent in both 1989 and 1991 studies of 6,000 and 11,000 randomly selected undergraduates, respectively. Dorothy G. Siegel & Clarinda Harriss Raymond, *An Ecological Approach to Violent Crime on Campus*, 15 J. SECURITY ADMIN. 19, 20–21 (1992). Similar statistics existed in 1992. Bonnie S. Fisher, John J. Sloan, Francis T. Cullen, & Chungmeng Lu, *Crime in the Ivory Tower: The Level and Sources of Student Victimization*, 36 CRIMINOLOGY 671, 690 (1998).

66. According to available data gleaned from reports of postsecondary campus crime, certain criminal offenses have increased in number in the past few years. Compare NAT'L CTR. FOR EDUC. STATISTICS, CAMPUS CRIME AND SECURITY AT POSTSECONDARY EDUCATION INSTITUTIONS (1997), <http://nces.ed.gov/surveys/peqis/publications/97402/> (statistics from 1992–94), with U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE INCIDENCE OF CRIME ON THE CAMPUSES OF U.S. POSTSECONDARY EDUCATION INSTITUTIONS: A REPORT TO CONGRESS (2001), available at <http://www.ed.gov/finaid/prof/resources/finresp/ReportToCongress.pdf> [hereinafter D.O.E. 2001 REPORT TO CONGRESS], and U.S. DEP'T OF EDUC., DATA ON CAMPUS CRIME: SUMMARY CRIME STATISTICS FOR 2004–2006, <http://www.ed.gov/admins/lead/safety/criminal-04-06.pdf> (criminal offenses). According to this data, there has been a net numerical increase in violent campus crime between 1992 and 2006 although there was a slight decline between 2004 and 2006. “Violent crimes” are murder, forcible sex offenses, robbery, and aggravated assault. Part of the startling increase seems to be the doubling in the number of forcible sex offenses. However, the increase in numbers of forcible sex offenses may be a correction in reporting the types of events that constitute “forcible” offenses because reported “nonforcible sex offenses” dropped to almost nil. See also Jerlando F. L. Jackson, Melvin Cleveland Terrell, & Richie L. Heard, *The Complexity of Maintaining a Safe Campus in Higher Education: An Administrative Dilemma*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 3, 6–7 (arguing some violent crimes on campus are in decline while others are up); KAPLIN & LEE, *supra* note 44, at 880; VIRGINIA TECH REPORT, *supra* note 1, at L1–L11 (Fatal School Shootings in the United States: 1966–2007). But see Bonnie S. Fisher, Jennifer L. Harman, Francis T. Cullen, & Michael G. Turner, *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 80–81 (2002) (suggesting that campus crime is declining); J. Fredericks Volkwein, Bruce P. Szelest, & Alan J. Lizotte, *The Relationship of Campus Crime to Campus and Student Characteristics*, 36 RES. IN HIGHER EDUC. 647 (1995) (concluding campus crime decreased between reporting years 1974 and 1992).

campus are definitely on the rise.⁶⁷ This trend is in contrast to decreasing crime statistics in the public schools for the same time period.⁶⁸ Another stark trend is the increased willingness—right or wrong—of the judiciary to hold colleges and universities accountable for taking care of their students.⁶⁹

College and university students and their families have several avenues they pursue when seeking to impose liability upon colleges and universities for injuries incurred by campus violence, but they usually choose to pursue remedies under state law.⁷⁰ The past twenty years or so have produced increasingly sophisticated methods for holding higher education institutions liable for injuries to students.⁷¹ Hence, the cautionary role a lawyer must play on a campus violence task force.

The recent successes in court occurred when the plaintiff victims, or their families, asserted that the institution has a business responsibility for the safety of its students. This business model of litigation should come as no surprise, coinciding as it does with the rise of the consumer student. One such legal route, although not usually successful to date,⁷² that seeks

67. INT'L ASS'N OF CAMPUS L. ENFORCEMENT ADMINS. SPECIAL REV. TASK FORCE, OVERVIEW OF THE VIRGINIA TECH TRAGEDY AND IMPLICATIONS FOR CAMPUS SAFETY: THE IACLEA BLUEPRINT FOR SAFER CAMPUSES 10–11 (2008), available at http://www.iaclea.org/visitors/PDFs/VT-taskforce-report_Virginia-Tech.pdf [hereinafter IACLEA BLUEPRINT]. A recent white paper from the American College Health Association suggests that campus violence decreased dramatically by 54% between 1995 and 2002. JOETTA L. CARR, AMERICAN COLL. HEALTH ASS'N, CAMPUS VIOLENCE WHITE PAPER 3 (2005). However, the statistics upon which the *Campus Violence White Paper* relied came from Katrina Baum & Patsy Klaus, Bureau of Justice Statistics, U.S. Dep't of Justice, *Violent Victimization of College Students, 1995–2002*, NCJ 206836 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf>, which reported statistics of violent crimes against college students, wherever located, not just on campus. As that report reveals, 93% of those crimes occurred off-campus. *Id.* The *Campus Violence White Paper's* conclusions, however, and the position of the American College Health Association on campus violence are likely unaffected by this variance in evidence.

68. See NAT'L CTR. FOR EDUC. STAT. & BUREAU OF JUST. STAT., INDICATORS OF SCHOOL CRIME AND SAFETY: 2007 6–7, 10–11 (2007), <http://nces.ed.gov/pubs2008/2008021a.pdf>.

69. For example, some of the victims of the Virginia Tech murders will likely settle with the state for \$11 million; the remainder are free to pursue litigation after having filed tort claims notices. See Anita Kumar & Brigid Schulte, *Shooting Victims' Families Tentatively Back Virginia Deal*, WASH. POST, Apr. 11, 2008, available at 2008 WLNR 6742985.

70. Each state has its own common law rules of negligence, and when state colleges and universities are involved, there are statutory rules of negligence and of state-sanctioned immunities under that state's tort claims act. See generally KAPLIN & LEE, *supra* note 44, at 880–85; Brett A. Sokolow, W. Scott Lewis, James A. Keller, & Audrey Daly, *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008).

71. See, e.g., Sokolow, Lewis, Keller, & Daly, *supra* note 70.

72. See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 517 (Del. 1991); *Shin v. Mass.*

to hold higher education institutions liable for campus violence is based on the contractual obligations undertaken by the college or university on behalf of the student and on which a student may rely in entering into the agreement to attend the school. An implied contract may arise from the pamphlets, brochures, and other documents sent to students when they are admitted to a college or university.⁷³ Additional documents, such as student handbooks and dormitory policies, might imply a contract for students' safety. These contracts, however, go both ways and may require that the student herself not have violated their provisions, such as failing to abide by contractual procedures.⁷⁴

The most successful route for holding colleges and universities liable for the safety of their students is through negligence theories.⁷⁵ In most jurisdictions, negligence consists of the elements of duty, breach, proximate cause, and injury. When it comes to asserting higher education liability, the legal focus is on the duty, if any, owed by the institution to the student. Colleges and universities are not generally considered the insurers of their students' safety,⁷⁶ and unlike the duty of supervision imposed on teachers in public schools, the duty of higher education institutions relies less on a parental role in the protection of its students because they are considered "legally responsible adults who are able to take care of themselves."⁷⁷ However, courts are still finding that universities owe a duty to their students for third-party campus violence.⁷⁸

The Restatement (Second) of Torts § 315⁷⁹ sets forth the general

Inst. of Tech., No. 020403, 2005 WL 1869101, at *6–*8 (Mass. Super. Ct. June 27, 2005).

73. *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1469, 1470–71 (N.D.N.Y. 1988) (holding that the parents of student who was shot to death in dormitory had created genuine issue of material fact concerning university's contractual obligation to student). These documents may create a contract between the college or university and the student for purposes of imposing appropriate disciplinary procedures. *See, e.g., Goodman v. President & Bd. of Trs.*, 135 F. Supp. 2d 40, 57 (D. Me. 2001) (student handbook).

74. *Nieswand*, 692 F. Supp. at 1471.

75. *See generally* Sharlene A. McEvoy, *Campus Insecurity: Duty, Foreseeability, and Third Party Liability*, 21 J.L. & EDUC. 137 (1992).

76. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 610 (W.D. Va. 2002); *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 WL 701047, at *6 (Ohio Ct. App. Mar. 21, 2006).

77. *Furek*, 594 A.2d at 517. "The *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life." *Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993). *But see* *Jesik v. Maricopa County Cmty. Coll. Dist.*, 611 P.2d 547, 551 (Ariz. 1980) ("[A] statutory duty of adequate supervision coupled with notice imposed a specific duty to exercise reasonable care to protect the decedent [student].")

78. *See generally* Sokolow, Lewis, Keller, & Daly, *supra* note 70.

79. RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which

proposition that an actor is not liable for the safety of another from the attacks of a third party unless there is a special relationship between the actor and the victim. The most widely accepted grounds for higher education liability for the safety of its students from third-party violence arises from the special relationship between a business owner and its customers. One of the most commonly considered higher education special relationships is the university as possessor of land.⁸⁰ Courts view colleges and universities as business owners who must extend to invitees on their property—students—a degree of care to maintain the premises in a safe condition.⁸¹ A business owner has a duty to warn or protect individuals doing business on the premises—invitees—from the dangerous or criminal acts of third persons when the business owner, in the exercise of ordinary care, knows or should know that the third person presents a danger to the invitee.⁸² Thus, a university has a duty arising from this special relationship to protect its students, while they are on campus, from a third person's dangerous or criminal acts.⁸³

Another such special relationship between a college or university and a student is the landlord-tenant relationship, especially when the campus violence occurs in on-campus residences. This relationship has a slightly

imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.”)

80. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

81. *E.g.*, *Kleisch*, 2006 WL 701047, at *3.

82. RESTATEMENT (SECOND) OF TORTS § 344 (1965) (“A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.”).

83. *See, e.g.*, *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1467 (N.D.N.Y. 1988); *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1198 (Cal. 1984) (holding that the college had a duty of care to student assaulted in area of campus where other assaults had occurred); *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991); *Nero v. Kan. Sate Univ.*, 861 P.2d 768, 780 (Kan. 1993); *Williams v. State*, 786 So.2d 927, 932 (La. Ct. App. 2001) (finding that the University of Louisiana at Monroe had a duty of care to a student assaulted and robbed at gunpoint in his dormitory room); *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045, 1049 (Me. 2001) (holding that the university had a duty to a student-athlete to warn her of procedures for personal safety); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 761 (Neb. 1999) (finding that the University of Nebraska owed a duty of care to a student seriously injured during a fraternity hazing incident); *Ayeni v. County of Nassau*, 794 N.Y.S.2d 412, 413 (N.Y. App. Div. 2005) (Nassau Community College); *Kleisch*, 2006 WL 701047, at *4 (finding that the university had a duty of care for a student raped in a lecture hall by a stranger); *Butch v. Univ. of Cincinnati*, 695 N.E.2d 1245, 1247 (Ohio Ct. Cl. 1997); *Johnson v. State*, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995) (holding that Washington State University owed a duty of care to a student abducted and raped near her dormitory).

lower level of care than that owed by a business owner to its invitees. In some cases, the landlord's duty of reasonable care to its tenants only extends to the common areas, and the landlord must have actual knowledge of dangerous or defective conditions.⁸⁴ The college or university as landlord may not be liable for injuries incurred in the actual residential area because it is not the common area covered by the duty, nor for third-party violence because a violent third party is not generally considered a dangerous or defective condition of the premises.⁸⁵ However, a landlord college or university that fails to secure its campus buildings properly may be held liable under this special relationship.⁸⁶

A third special relationship is one that is created by the college or university itself, that of providing campus safety and security. This may well be the broadest duty imposed on a higher education institution and was first recognized in *Mullins v. Pine Manor College*.⁸⁷ In that case, the court observed that "colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties."⁸⁸ Viewing campuses as a "magnet" for criminal behavior because of the congregation of young, generally unsupervised, adults—especially women—modern campuses undertake to provide security. Indeed, providing security is an indispensable business practice in running a modern college or university and is part of the financial package charged to students.⁸⁹ Both parents and students rely on that provision of security.⁹⁰ Having voluntarily assumed security as a duty, the college or university must perform that duty with due care.⁹¹ Liability inures upon the college or university if it fails to exercise due care and increases the risk of harm to the student or the student relies on campus security to keep her safe.⁹² Hence, *Mullins* created a special relationship unique to higher education institutions, imposing specific duties because of their relationship to their students.⁹³ One particular

84. *Rhaney v. Univ. of Md. Eastern Shore*, 880 A.2d 357, 364 (Md. 2005) (holding that the university owed no duty to a student punched by a fellow student while in his dormitory room).

85. *Id.* at 365–66.

86. *E.g.*, *Miller v. State*, 467 N.E.2d 493, 495 (N.Y. 1984).

87. 449 N.E.2d 331 (Mass. 1983).

88. *Id.* at 335.

89. *Id.* at 336.

90. *Id.* at 336–37.

91. *Id.* at 335–36. *But see* Volkwein, Szelest, & Lizotte, *supra* note 66, at 667 ("[I]t appears that crime on campus is relatively independent of crimes and poverty in the surrounding community. In view of the relatively low rates of campus crime, perhaps students are not viewed by criminals as 'easy targets' until they leave the campus and enter the community.").

92. *Mullins*, 449 N.E.2d at 336.

93. "The instant case concerns only the distinctive relationship between colleges and their students." *Id.* at 337. *Contra* *Murrell v. Mount St. Clare Coll.*, No. 3:00-CV-

peculiarity of this duty is that the foreseeability of criminal behavior on campus is virtually proved simply by having campus security in place: “the precautions which . . . colleges take to protect their students against criminal acts of third parties would make little sense unless criminal acts were foreseeable.”⁹⁴

Related to the *Mullins* principle but more specifically reliant upon the Restatement (Second) of Torts § 323⁹⁵ is the principle that a higher education institution creates a duty when it takes direct responsibility for the safety of its students. Unlike the implicit special relationship created in *Mullins*, this relationship occurs if a college or university has direct involvement in its students’ dangerous activities. If it does, the college or university has a duty to control the situation in a non-negligent manner.⁹⁶

Not yet a duty imposed on colleges or universities but one that is looming on the horizon may be the duty to control the violent student, a duty that might be extrapolated from recent cases holding colleges and universities liable for student suicides. In 2000, the Supreme Court of Iowa determined that the University of Iowa was not liable in a wrongful death action for the suicide of a freshman.⁹⁷ In question in that case was the Restatement (Second) of Torts § 323,⁹⁸ which imposes a duty on one who “undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person.”⁹⁹ Plaintiff father argued that the University had failed to exercise reasonable care after his son previously attempted suicide and University

90204, 2001 WL 1678766, at *5 (S.D. Iowa 2001) (finding that the college was not liable for acquaintance rape by a student’s guest because it had no way of knowing it had to control this individual). In *Murrell*, the court stated: “[a] college is an educational institution, not a custodian of the lives of each adult, both student and non-student, who happens to enter the boundaries of its campus.” *Id.* (citing *Univ. of Denver v. Whitlock*, 744 P.2d 54, 62 (Colo. 1987)).

94. *Mullins*, 449 N.E.2d at 337. “That a sexual assault could occur in a dormitory room on a college campus is foreseeable and that fact is evidenced in part by the security measures that the University had implemented.” *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045, 1050 (Me. 2001) (citing *Mullins*, 449 N.E.2d 331).

95. RESTATEMENT (SECOND) OF TORTS § 323 (1965) (“One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.”).

96. *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (holding that the university policy against hazing imposed a duty on the university for the care of a fraternity pledge who was burned by lye-based oven cleaner).

97. *Jain v. State*, 617 N.W.2d 293 (Iowa 2000).

98. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

99. *Jain*, 617 N.W.2d at 297 (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

employees were aware of the attempt yet failed to pursue the matter.¹⁰⁰ The court determined that this duty could not be foisted on the University because the employees' failure to act did not increase the son's risk of suicide.¹⁰¹ However, two years later, the personal representative of another student's estate survived a motion to dismiss a cause of action because she asserted a special relationship between the College and the student sufficient to impose a duty to protect him from committing suicide.¹⁰² That special relationship arose because the student lived on campus and the College was aware that he had emotional problems. Based on the Restatement (Second) of Torts § 314A,¹⁰³ the generic principle was that a duty to protect arose from a special relationship created by the College's knowledge that the student was troubled and the facts that established his suicide were foreseeable.¹⁰⁴

In 2005, one court raised the specter of multiple grounds for university liability for a student's suicide in *Shin v. Massachusetts Institute of Technology*.¹⁰⁵ Elizabeth Shin had pre-existing mental health issues upon matriculating at MIT, mental health issues that became increasingly pronounced as her freshman and sophomore years progressed. Various MIT employees and administrators, including psychiatrists at its Mental Health Service Department, met with, treated, and counseled Shin to deal with her problems. By spring of her sophomore year, she had made numerous suicide threats for which MIT offered a variety of responses. She eventually set herself on fire in her dorm room and died.¹⁰⁶ Shin's parents filed a multi-count complaint against MIT and successfully presented triable issues of fact to overcome a motion for summary judgment filed by MIT administrators¹⁰⁷ on claims of negligence, gross negligence, wrongful death, and conscious pain and suffering.¹⁰⁸

The duty necessary to support allegations of each of these four torts was extrapolated from Restatement (Second) of Torts § 314A, recognizing a special relationship between the University and Shin arising from a "duty

100. *Id.* at 299.

101. *Id.*

102. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002).

103. RESTATEMENT (SECOND) OF TORTS § 314A (1965); *Schieszler*, 236 F. Supp. 2d at 606–07.

104. *Schieszler*, 236 F. Supp. 2d at 609; see generally Carrie Elizabeth Gray, Note, *The University-Student Relationship Amidst Increasing Rates of Student Suicide*, 31 LAW & PSYCHOL. REV. 137 (2007).

105. No. 020403, 2005 WL 1869101, at *1 (Mass. Super. Ct. Aug. 29, 2005).

106. *Id.* at *1–*4.

107. Shin's parents also survived summary judgment in claims against the MIT's individual medical professionals involved in the matter for claims of gross negligence. The gross negligence count averred that the medical professionals did not formulate nor enact a plan to respond to Shin's suicide threats. *Id.* at *8–*9.

108. *Id.* at *11.

to aid or protect in any relation of dependence.”¹⁰⁹ According to the court, this duty arises when an individual “reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so.”¹¹⁰ The court then ruled that the MIT administrators—Shin’s dormitory Housemaster and the Dean of Counseling and Support Services—were well aware of Shin’s mental problems and could have foreseen that she would likely hurt herself without appropriate supervision, thereby creating a duty to exercise reasonable care to prevent harm to Shin.¹¹¹ The MIT administrators breached that duty when they failed to create an intervention plan to protect Shin from hurting herself, despite the escalation of her suicide threats.¹¹²

The *Shin* decision should be especially frightening for college and university administrators because of the natural progression by which a court could extend the duty of care that administrators may have to suicidal students to a suicidal student’s victims, as occurred in the events at Virginia Tech. If a special relationship exists between a college or university and a suicidal student to protect the student from himself, under § 314A, it is no great leap of logic to extend that to the duty to protect others from the suicidal student under Restatement (Second) of Torts § 319, which imposes a duty on those who take control of a third party with dangerous propensities.¹¹³ If a college or university undertakes to control a suicidal student who decides to take others with him, *Shin* might stand as authority for making the college or university, or at least the specific administrators, liable for harm to the suicidal student’s victims.¹¹⁴ The fluidity by which

109. *Id.* at *12 (quoting RESTATEMENT (SECOND) OF TORTS § 314A (1965)).

110. *Id.* (quoting *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300 (Mass. 1984)).

111. *Id.* at *13.

112. *Id.* at *14. Shin’s parents ultimately settled the case with MIT, both parties agreeing that her death was probably an accident. Toxicology reports indicated that she had taken a nonlethal dose of nonprescription drugs and was likely unable to respond when candles sparked the blaze. Marcella Bombardieri, *Parents Strike Settlement with MIT in Death of Daughter*, THE BOSTON GLOBE, Apr. 4, 2006, at B1, available at http://www.boston.com/news/local/articles/2006/04/04/parents_strike_settlement_with_mit_in_death_of_daughter/.

113. RESTATEMENT (SECOND) OF TORTS § 319 (1965) (“One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.”); see also RESTATEMENT (THIRD) OF TORTS § 41 (Proposed Final Draft No. 1 2007). *But see* *Nero v. Kan. State Univ.*, 861 P.2d 768, 779 (Kan. 1993) (finding that the university did not have control over student who sexually assaulted another sufficient to impose liability under § 319 simply because it had charge of his housing assignment); *Eiseman v. State*, 511 N.E.2d 1128, 1137 (N.Y. App. 1987) (holding that the state university had no duty to control student that it knew was a former convict and former drug addict and was therefore not liable for off-campus rape and murder of fellow student).

114. See Jim Castagnera, *Legal Liability for the Virginia Tech Massacre: Inquiry Questions Cho’s Mental-Health Care History*, THE GREENTREE GAZETTE, May 2007, available at <http://www.greentreegazette.com/SpecialSeries/load.aspx?art=238>. The

courts are morphing otherwise static special relationships, such as business owner-invitee and landlord-tenant, to a more generic dependency special relationship is not inconceivable: “[a]s the harm which safely may be considered foreseeable to the defendant changes with the evolving expectations of a maturing society, so change the ‘special relationships’ upon which the common law will base tort liability for the failure to take affirmative action with reasonable care.”¹¹⁵

If the duty to the student does not trap the college or university, the foreseeability of the violent act may do so.¹¹⁶ First, in relationship to danger on campus, students must be protected from physical conditions that encourage crime:

[i]n the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.¹¹⁷

As a campus task force examines the ways to minimize harm, those physical locations that portend danger—stairwells and campus walkways without lighting, locations of earlier violence—must be dealt with.

Perhaps more important (and more unpredictable) are the acts and their actors. Regardless of how they themselves behave, students expect that campuses will exert a certain amount of control over third-party conduct. Sudden and unexpected acts are often excepted.¹¹⁸ However, harm may be foreseeable when a college or university has attempted to control the dangerous activity by providing security or otherwise attempting to regulate the conduct.¹¹⁹ A similar crime by an individual may create

Proposed Final Draft of Restatement (Third) of Torts § 41(b)(4) specifically imposes a duty of reasonable care on mental-health professionals for the safety of third persons from risks posed by their patients. RESTATEMENT (THIRD) OF TORTS § 41(b)(4) (Proposed Final Draft No. 1, 2007).

115. *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300–01 (Mass. 1984). In addition, the Proposed Final Draft of Restatement (Third) of Torts § 40 (2005), creates a specific duty between schools and students. RESTATEMENT (THIRD) OF TORTS § 41(b)(4) (Proposed Final Draft No. 1, 2007). Such a rule, if applied to higher education institutions, would have a profound impact on the liability of colleges and universities to their students for campus violence. *See* Sokolow, Lewis, Keller, & Daly, *supra* note 70, at 323–24.

116. *See* Sokolow, Lewis, Keller, & Daly, *supra* note 70, at 325–27.

117. *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1201 (Cal. 1984).

118. *E.g.*, *Luina v. Katharine Gibbs Sch. N.Y., Inc.*, 830 N.Y.S.2d 263, 264 (N.Y. App. Div. 2007) (finding that it was not foreseeable that a student would be harmed by a single punch during an altercation before class).

119. *Furek v. Univ. of Del.*, 594 A.2d 506, 521–22 (Del. 1991) (holding that the university policy regulating fraternity hazing was evidence that the student victim’s

sufficient foreseeability of the second crime to impose liability on a college or university.¹²⁰ However, the foreseeability need not be attached to a particular individual; the occurrence of similar activities may be sufficient to create foreseeability of later acts of violence.¹²¹ “[P]rior criminal activity need not involve the same suspect to make further criminal acts reasonably foreseeable for purposes of imposing a duty . . . to undertake reasonable precautionary measures.”¹²² The occurrence of similar activities sufficient to constitute a foreseeable event may require more than the *occasional* crime.¹²³ However, a general pattern of dangerous student activity in those instances when the university has control¹²⁴ is at least sufficient to go to a jury to determine foreseeability,¹²⁵ if it is not a question of law determined by the court.¹²⁶

Because of the wide variety of ways that students might be harmed by third parties on campus, colleges and universities cannot possibly plan for all eventualities. Many campuses are becoming increasingly conscious about security and safety measures and have created safety awareness programs.¹²⁷ Yet if some data are to be believed, personal crimes are on

injuries incurred from a hazing incident were foreseeable to the university).

120. A male student already accused of rape was placed in a coed dorm where he sexually assaulted his second victim. The university was aware of the previous allegation and had taken measures to prevent his contact with other coeds until the summer session when he was placed in the coed dorm. *Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993).

121. *Peterson*, 685 P.2d at 1201–02 (finding an assault foreseeable in location of other assaults); *Furek*, 594 A.2d at 521 (addressing similar hazing activities); *Williams v. State*, 786 So.2d 927, 932 (La. Ct. App. 2001) (holding that recent crime and violence on campus raised issue of fact as to foreseeability of four men assaulting and robbing a student in his dormitory room at gunpoint); *Sharkey v. Bd. of Regents*, 615 N.W.2d 889, 901 (Neb. 2000) (finding that other violent altercations at that campus locations were not unknown).

122. *Sharkey*, 615 N.W.2d at 901.

123. One rape occurring on campus during a four- or five-year period and in a different location was not enough to make the incident in question foreseeable in *Kleisch v. Cleveland State University*. No. 05AP-289, 2006 WL 701047, at *6 (Ohio Ct. App. Mar. 21, 2006).

124. *E.g.*, *Coghlan v. Beta Theta Pi*, 987 P.2d 300, 312 (Idaho 1999) (denying the university’s motion for summary judgment where university employees supervised student parties).

125. *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1468 (N.D.N.Y. 1988); *Furek*, 594 A.2d at 521–22; *Johnson v. State*, 894 P.2d 1366, 1371 (Wash. Ct. App. 1995).

126. *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764–75 (Neb. 1999).

127. The very limited literature reveals an increase in campus safety procedures in crime reporting, access to rape counseling, and increased campus lighting as well as increased security measures. These measures include increased patrols by foot or bicycle, nighttime escort, van and shuttle services; limited access to both residence halls and campus buildings; emergency phone systems; and program presentations to campus groups. LAURIE LEWIS, ELIZABETH FARRIS, & BERNIE GREENE, *CAMPUS CRIME AND SECURITY AT POSTSECONDARY EDUCATION INSTITUTIONS* 31–37 (1997), <http://nces.ed.gov/pubs/97402.pdf>; Bonnie S. Fisher, *Crime and Fear on Campus*, 539

the rise on college and university campuses. In this age of consumerism, students are less loathe to hold colleges and universities accountable for harm incurred on their business premises. Colleges and universities have, after all, been marketing themselves in competition with each other for the past two or three decades. It is therefore incumbent on the colleges and universities to understand the legal challenges they face as business owners when they put together a task force to address the campus violence issues that may be looming on their horizons.¹²⁸

IV. *HIC LOCUS EST UBI MORS GAUDET SUCCURRERE VITAE*¹²⁹

The best diagnostic tools that a lawyer can provide to a task force are reports from or about other higher education institutions, auditing their efforts to prevent campus violence and to improve their preparedness in the eventuality preventive measures do not work. Public schools and state and federal agencies engaged in these activities after the Columbine High School tragedy in 1999.¹³⁰ Eight years later, the murders at Virginia Tech finally prompted higher education and state and federal agencies to examine their own preparedness. The numerous reports generated will help other states and individual institutions learn from the past. In addition, they are templates for individual institutions to pattern the work of their own task forces, or work groups. For the individual user, these reports serve to highlight, first of all, the shortcomings of institutional preparedness. Second, they help the individual institutions formulate their own checklists of issues without having to create them from scratch. And last, the individual institution can harvest ideas from the best that others have to offer on the same issues for adaptation to their own unique institution. If nothing else, these reports are cautionary tales, especially the heart-rending report of the Virginia Tech Review Panel, from which the individual institution can judge its own preparedness for campus violence and its

ANNALS AM. ACAD. POL. & SOC. SCI. 85, 98–99 (1995). In addition, campus law enforcement has become more professionalized. See generally Kenneth J. Peak, Emmanuel P. Barthe, & Adam Garcia, *Campus Policing in America: A Twenty-Year Perspective*, 11 POLICE Q. 239 (2008). In another study, a significant number of campus law-enforcement personnel indicated that procedures and policies have improved since the passage of the Clery Act, which requires reporting of campus crime statistics. Dennis E. Gregory & Steven M. Janosik, *The Clery Act: How Effective Is It? Perceptions from the Field—The Current State of the Research and Recommendations for Improvement*, 32 STETSON L. REV. 7, 45 (2002).

128. See generally Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 120–22 (2002).

129. “This is the place where Death rejoices to teach those who live.” This declaration is often posted in morgues. See Ed Friedlander, *Autopsy*, <http://www.pathguy.com/autopsy.htm> (last visited Feb. 27, 2009).

130. E.g., COLUMBINE REPORT, *supra* note 11; O’TOOLE, *supra* note 11, at 6 (report initiated in 1998); SECRET SERVICE GUIDE, *supra* note 11.

aftermath.

On April 16, 2007, a mentally ill student at Virginia Tech, in Blacksburg, Virginia, armed himself with guns and massacred thirty-two students and faculty members before turning one of the guns on himself.¹³¹ The shooter, Seung Hui Cho, was always a withdrawn child who, at one point, was diagnosed with “selective mutism.”¹³² By the eighth grade, his writings exhibited early signs of suicidal and homicidal tendencies.¹³³ After being on anti-depressants for a year, Cho was given an Individual Educational Plan (IEP) and counseling through high school, but upon matriculating at Virginia Tech, he sought out no counseling.¹³⁴ In spring of his sophomore year, he exhibited signs of depression but still sought no therapy.

By his junior year at Virginia Tech in 2005–2006, professors and fellow students took note of serious problems: he stabbed a student’s carpet with a knife; he was removed from a poetry class because of the violence in his writing and his photographing classmates from under his desk; and a couple of female students reported his “annoying” repeated contacts.¹³⁵ Observers variously notified the Division of Student Affairs, the counseling center, the health center, the Virginia Tech Police Department, the University’s Care Team, and the Office of Judicial Affairs.¹³⁶ Throughout that winter, Cho was repeatedly interviewed by the campus counseling center and eventually put into a psychiatric hospital for overnight evaluation after he sent a suicidal instant message. However, by Spring 2006, the counseling center was not treating him, and the University Care Team failed to follow up.¹³⁷ In Fall 2006, two of his professors alerted the associate dean of students about Cho’s mental problems: his behavior was increasingly angry, and he had submitted a creative writing assignment about a young man who hates the students at his school, kills them, then commits suicide.¹³⁸

From February through April 15, 2007, Cho armed himself. Ensuing investigations reveal that he went to a firing range to practice and may have rehearsed his plan by chaining the doors of Norris Hall, a classroom building on campus and the eventual site of the majority of murders.¹³⁹

131. E. A. Torriero, Jodi S. Cohen, & Rex W. Huppke, *Bloodied Campus Asks: Where Were the Warnings? At Least 33 Die in Virginia Tech Massacre*, CHI. TRIB., Apr. 17, 2007, § 1, at 1.

132. VIRGINIA TECH REPORT, *supra* note 1, at 21.

133. *Id.*

134. *Id.* at 22.

135. *Id.* at 22–23.

136. *Id.*

137. *Id.* at 23.

138. *Id.* at 23–24.

139. *Id.* at 24.

The following is a summary of events taken from the Governor's Report¹⁴⁰:

Between 7:00 a.m. and 7:15 a.m. on April 16, 2007, Cho shot and killed a female student and resident assistant at West Ambler Johnston residence hall.¹⁴¹ By 7:17 a.m., Cho returned to his own residence hall to change out of his bloody clothes.¹⁴² Virginia Tech P.D. received a report of an injured female student, and by 7:24 a.m., an officer found the bodies at West Ambler.¹⁴³ About a half hour later, Blacksburg Police Department was called in to investigate. First classes of the day began at 8:00 a.m. as usual.¹⁴⁴

The Chief of the Virginia Tech P.D. notified the University Policy Group and advised that a possible suspect to the West Ambler murders had left campus.¹⁴⁵ By that time—8:25 a.m.—the University Policy Group was deciding how to notify the campus.¹⁴⁶ Shortly thereafter, at 8:52 a.m., the Blacksburg public schools were in lock-down.¹⁴⁷ In the meantime, the Virginia Tech and Blacksburg P.D.s were tracking down the boyfriend of the slain female student as a suspect.¹⁴⁸ Second period classes at the University convened at 9:05 a.m.¹⁴⁹

Between 9:15 a.m. and 9:30 a.m., Cho chained the doors of Norris Hall while the Policy Group sent out a campus-wide email notifying of the dormitory shootings.¹⁵⁰ At 9:40 a.m., Cho began his shooting rampage in five classrooms in Norris Hall.¹⁵¹ By 9:42 a.m., both Blacksburg P.D. and Virginia Tech P.D. had received calls about the Norris Hall shootings.¹⁵² Police arrived at Norris by 9:50 a.m., at which time the University—via email and loudspeaker—notified the campus of the shootings and warned students and faculty to stay in their buildings.¹⁵³ The rampage ended when Cho killed himself at 9:51 a.m.¹⁵⁴ At 10:17 a.m., the University sent a third email that cancelled third-period classes and a fourth at 10:52 a.m. that advised that one shooter had been arrested and a second shooter was still on

140. *Id.* at 25–29.

141. *Id.* at 25.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 26.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 27.

152. *Id.*

153. *Id.* at 28.

154. *Id.*

the loose.¹⁵⁵ Cho had killed two at the residence hall, thirty at Norris Hall, and himself before it was all over.¹⁵⁶

The most comprehensive of the reports authorized after these events was the August 2007 *Mass Shootings at Virginia Tech*, submitted to Governor Timothy M. Kaine of the Commonwealth of Virginia.¹⁵⁷ This 260-page report specifically focused on the events at Virginia Tech. Other reports focused less on Virginia Tech and more on comprehensive—albeit somewhat more general—studies of the problems with campus safety, such as the report issued by the National Association of Attorneys General, *Task Force on School and Campus Safety: Report and Recommendations*.¹⁵⁸ In addition, several states initiated task forces to examine the problems of their own campuses' safety in direct response to the events at Virginia Tech.¹⁵⁹ The Virginia Tech Report is unique in its dissection of the events

155. *Id.*

156. *Id.* at 29.

157. VIRGINIA TECH REPORT, *supra* note 1.

158. NAT'L ASS'N OF ATT'YS GEN., TASK FORCE ON SCHOOL AND CAMPUS SAFETY: REPORT AND RECOMMENDATIONS (2007), available at http://www.naag.org/assets/files/pdf/NAAG_Task_Force_on_School_and_Campus_Safety.pdf [hereinafter NAAG REPORT]; see also DEP'TS OF HEALTH & HUMAN SERVICES, EDUC., AND JUSTICE, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY (2007), available at <http://www.hhs.gov/vtreport.html> [hereinafter REPORT TO THE PRESIDENT]; IACLEA BLUEPRINT, *supra* note 67; VA. TECH SECURITY INFRASTRUCTURE WORKING GROUP, SECURITY INFRASTRUCTURE WORKING GROUP REPORT: PRESIDENTIAL WORKING PAPER (2007), available at http://www.vtnews.vt.edu/documents/2007-08-22_security_infrastructure.pdf [hereinafter VIRGINIA TECH INFRASTRUCTURE REPORT].

159. See, e.g., ILLINOIS REPORT, *supra* note 63. The Commonwealth of Kentucky initiated its task force on campus safety in 2006 but did not finish its report until after the events at Virginia Tech. GOVERNOR'S TASK FORCE ON CAMPUS SAFETY, REPORT TO THE GOVERNOR: EXAMINATION OF SAFETY AND SECURITY AT KENTUCKY'S PUBLIC AND PRIVATE POSTSECONDARY INSTITUTIONS: FINDINGS AND RECOMMENDATIONS (2007), available at <http://dpp.ky.gov/NR/rdonlyres/34C366A3-6A6C-4131-A5DA-42F462A48377/0/GovernorTaskForceReport.pdf> [hereinafter KENTUCKY REPORT]; see also GUBERNATORIAL TASK FORCE FOR UNIV. CAMPUS SAFETY, REPORT ON FINDINGS AND RECOMMENDATIONS (2007), available at <http://www.dcf.state.fl.us/campussecurity/docs/finalReport052407.pdf> [hereinafter FLORIDA REPORT]; MO. CAMPUS SECURITY TASK FORCE, SECURING OUR FUTURE: MAKING COLLEGES AND UNIVERSITIES SAFE PLACES TO LEARN AND GROW: REPORT ON FINDINGS AND RECOMMENDATIONS (2007), available at <http://dps.mo.gov/CampusSafety/GovernorsFinalReport.pdf> [hereinafter MISSOURI REPORT]; N.J. CAMPUS SECURITY TASK FORCE REPORT SUBMITTED TO GOVERNOR JON S. CORZINE (2007), available at <http://www.njhomelandsecurity.gov/pdfs/10-02-07-campus-security.pdf> [hereinafter NEW JERSEY REPORT]; OKLAHOMA REPORT, *supra* note 40; STATE OF N.M., GOVERNOR'S TASK FORCE ON CAMPUS SAFETY EMERGENCY MANAGEMENT/PUBLIC SAFETY SUBCOMMITTEE, RECOMMENDATIONS FOR ACTION: EMERGENCY PREPAREDNESS IN HIGHER EDUCATION (2007), available at <http://www.nmsupolice.com/Emergency%20Management/Final%20Subcommittee%20Recommendations.pdf> [hereinafter NEW MEXICO REPORT]; TASK FORCE ON OHIO COLLEGE CAMPUS SAFETY AND SECURITY, REPORT TO GOVERNOR TED STRICKLAND (2007), available at

of April 16, 2007, but it informed not only Virginia's analysis of its campus violence problem but also the analyses of most of the other task forces throughout the nation.

Key findings of *Mass Shootings at Virginia Tech* covered all facets of the tragedy, including Cho's mental health history,¹⁶⁰ the legality of Cho's gun purchases,¹⁶¹ and emergency medical care on-site and at the surrounding medical facilities.¹⁶² There are also recommendations for legislative action. However, the aspects of the Virginia Tech Report that are most relevant to the participating lawyer are the legal issues identified in the chronology of events—both the good things and the bad things—and the individual institution's need to take ownership of its duty to students in the matter of campus violence and to find ways of fulfilling that duty. Books could be written—and probably will be—of other palliative measures to which campuses must be attentive. But sometimes simple is better—and enough.

The Virginia Tech Report focused on several simple problems that engage the legal analysis that must be communicated to other members of an institutional task force. One of the major problems was that Cho was a walking time-bomb with problems apparent to the institution; yet he remained on campus. Thus, the Report criticized the lack of information sharing that led to ineffective or, at the end, to no intervention in Cho's mental health problems. Although privacy laws were criticized for the failure to coordinate information, the Report noted that university administrators misunderstood those privacy laws: they were not the hindrance as supposed.¹⁶³ Second, those who *did* know of the problem—the University's counseling center and Care Team—failed to provide Cho with the mental health services and other interventions that might have alleviated his problems or at least have provided him the help he needed.¹⁶⁴

Another major problem was the University's inefficient emergency plan. Although the police entities quickly responded to the calls they received about the shootings at both West Ambler and Norris Hall, Virginia Tech P.D. failed to request that the University issue an all-campus notification immediately after the West Ambler murders, and the University emergency

http://regents.ohio.gov/safetyandsecurity/CSTF-Final_Report.pdf [hereinafter OHIO REPORT]; WISCONSIN REPORT, *supra* note 5.

160. VIRGINIA TECH REPORT, *supra* note 1, at 31–52.

161. *Id.* at 71–76.

162. *Id.* at 101–22.

163. There are, however, a couple of incompatibilities between “education records” protected under the Buckley Amendment, 20 U.S.C. § 1232g (2006), and “health information” protected under HIPAA. See VIRGINIA TECH REPORT, *supra* note 1, at 2.

164. *Id.* And there was only one ineffectual effort to remove him from the campus environment. An involuntary commitment proceeding resulted in a ruling that outpatient treatment would be satisfactory, rather than commitment to a mental health facility. *Id.* at 56.

plan did not allow campus police to do so. Instead “[t]he police had to await the deliberations of the Policy Group, of which they are not a member, even when minutes count. The Policy Group had to be convened to decide whether to send a message to the university community and to structure its content.”¹⁶⁵ Two hours elapsed after the residence hall murders, during which Cho returned to Norris Hall. That failure to notify, coupled with the University’s failure to cancel classes, provided no warning to either students or faculty of imminent danger on campus.¹⁶⁶ Little analysis of higher education duties to their students is necessary to perceive the potential legal liability of that situation.

The Virginia Tech Report formulated numerous recommendations for improving safety against campus violence seized upon by ensuing reports. One recommendation was the establishment of procedures for removing *any* dangerous student from campus, not just those with mental health issues such as Cho presented.¹⁶⁷ The Report drafters also recommended that colleges and universities revisit their current student codes of conduct and student disciplinary proceedings inasmuch as Virginia Tech’s Office of Judicial Affairs had proved ineffective.¹⁶⁸ Next, colleges and universities must document and provide for emergency proceedings when a student evinces dangerous, threatening or aberrant behavior.¹⁶⁹ The college or university should also form a threat assessment team to establish the appropriate level of security for the campus, to deal with investigation, information-gathering, and case preparation for hearings, and to issue warnings.¹⁷⁰ The threat assessment team would coordinate and thereby improve information sharing about dangerous students.¹⁷¹ Last, the Report emphasized emergency preparedness protocols to deal with the dangerous student who presents himself without prior warning,¹⁷² especially the implementation of a redundant campus-alerting system.¹⁷³ These recommendations of the Report were adopted by nearly all the state reports.

However, the National Association of Attorneys General (NAAG) Report is of especial interest because, of all the post-Virginia Tech reports, it is nearly the lone voice suggesting that higher education institutions need to make some general shifts in campus culture. The NAAG Report particularly stressed that the creation of threat assessment teams is

165. *Id.* at 17.

166. *Id.* at 3.

167. *Id.* at 53–54.

168. *Id.* at 53.

169. *Id.*

170. *Id.* at 19.

171. *Id.* at 53–54.

172. The Clery Act requires public warnings be given about imminent danger on campuses. *Id.* at 19.

173. *Id.* at 18.

necessary to be more attentive to the campus population itself as a source of campus violence: “[m]ost of the perpetrators have been ‘malevolent insiders,’ students or school personnel known by the school or other students.”¹⁷⁴ In order better to assess the threats posed by such insiders, these threat assessment teams must have multiple sources of information,¹⁷⁵ including the creation of a reporting system that maintains the anonymity of students who might otherwise fear to report.¹⁷⁶ In a backhanded slap at higher education, the Attorneys General also noted that, by summer 2007, the majority of states required their public school districts to have emergency preparedness plans,¹⁷⁷ and that similar emergency preparedness plans are crucial to security on college and university campuses, with particular emphasis on upgrading, updating, and regularly testing emergency communications systems.¹⁷⁸

With the templates of these various reports, the participating lawyer can assist the organization in the tasks that an individual institution’s campus violence work group should tackle. Obviously, those institutions—especially public colleges and universities—in states with their own post-Virginia Tech reports should heed the guidance of those reports and their recommendations. However, additional assistance is available from other reports in niches that their own state did not otherwise cover, especially where state reports have a shallow treatment of campus violence. Whatever guidance is gleaned from these reports, the ultimate goal is to be able to perform an audit of the institution’s current practices and to recommend curative measures to assure the implementation of the best-suited campus violence program.

V. THE DISSECTION & THE BODY ELECTRIC¹⁷⁹

Good preventive lawyering suggests that a campus violence task force must perform an audit of its institution’s current practices, just as any other

174. NAAG REPORT, *supra* note 158, at 2.

175. *Id.* at 3–4.

176. *Id.* at 6.

177. The National Association of Attorneys General reported that thirty-eight states have such requirements, *id.* at 6, whereas the GAO report upon which they relied accounts for only thirty-two. U.S. GOV’T ACCOUNTABILITY OFF., EMERGENCY MANAGEMENT: MOST SCHOOL DISTRICTS HAVE DEVELOPED EMERGENCY MANAGEMENT PLANS, BUT WOULD BENEFIT FROM ADDITIONAL FEDERAL GUIDANCE 11, 57–58 (2007), available at <http://www.gao.gov/new.items/d07609.pdf> [hereinafter GAO EMERGENCY MANAGEMENT REPORT].

178. NAAG REPORT, *supra* note 158, at 7–8, 9–10; see also OHIO REPORT, *supra* note 159, at 134–36; see also UNIV. OF CAL., THE REPORT OF THE UNIVERSITY OF CALIFORNIA CAMPUS SECURITY TASK FORCE 8–10 (2008), available at <http://www.universityofcalifornia.edu/regents/regmeet/mar08/e2attach.pdf> [hereinafter CALIFORNIA REPORT].

179. WALT WHITMAN, LEAVES OF GRASS 77–84 (Modern Library n.d.) (1855).

good business might do.¹⁸⁰ These audits have a legal aspect to them as they focus on the management of legal matters and risks in the corporate entity. In corporations, the legal audit may focus only on the health of the company wherein the focus of the examination is its financial statements, each financial item having a legal status.¹⁸¹ But nowadays, companies engaging in preventive law also conduct a litigation audit of unavoidable lawsuits; a procedural audit that focuses on the company's business documents; and compliance audits that focus on government statutes and regulations.¹⁸² Similar procedures are appropriate for colleges and universities. Indeed, the numerous reports undertaken by the several state governments were, in many respects, just such audits of the state of health of their colleges and universities' campus safety and were done for purposes of risk management.

Like a medical checkup,¹⁸³ a law audit has a diagnostic function, trying to find hot-spots of legal problems that have arisen or will arise on a regular basis. But it also requires an assessment of compliance with new cases, statutes and regulations. In the context of campus safety and security, the audit should review the institution's policies and practices to determine whether they pose potential legal problems.¹⁸⁴ This part of the audit should then prompt a discussion whether changes need to be made and a collaborative dialogue to discuss "strategies, long- and short-term, for addressing those problems in ways that advance, or at least do not impede, the [institution's] educational priorities."¹⁸⁵

Law audits should be conducted periodically, not just on an as-needed basis. For instance, a periodic audit of Virginia Tech's campus security policies would have revealed that the University had the wrong contact information for the current Blacksburg chief of police, that its safety protocols had no provision for dealing with shooting incidents, and that its emergency preparedness plan was about two years old.¹⁸⁶

On the other hand, the as-needed audit presupposes a legal problem already exists, often too late for the institution to take preventive measures. Furthermore, postponing an audit until needed relies on the confidence that the client recognizes the legal problem in the first place, a confidence that may well be misplaced at many institutions. Under the circumstances, a post-Virginia Tech campus security audit is an as-needed audit but one that

180. ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS 180-99 (1997).

181. Louis M. Brown, *Legal Audit*, 38 S. CAL. L. REV. 431, 436 (1965).

182. Michael L. Goldblatt, *Legal Audits Can Help Companies Act Preventively*, in HARDAWAY, *supra* note 180, 194-97.

183. Stolle, Wexler, Winick, & Dauer, *supra* note 13, at 17; HARDAWAY, *supra* note 180, at 189-91.

184. Heubert, *supra* note 2, at 548.

185. *Id.*

186. VIRGINIA TECH REPORT, *supra* note 1, at 16-19.

the institution must periodically update. Ensuing periodic audits could be efficiently accomplished with a checklist for up-dating and fine-tuning campus safety and security procedures with or without formal intervention of a work group.¹⁸⁷

Any audit for campus security and campus violence poses numerous tasks for a work group to tackle. Each individual institution must make its own decisions on the scope of the work group's brief as well as the budgetary impact on the institution for implementing any recommendations. In addition, the institution may decide to focus specialized attention on the professionalization of campus law enforcement¹⁸⁸ and mental health treatment for mentally disturbed students.¹⁸⁹ Regardless of the recommendations eventually adopted, the audit is the first step in determining the institution's strengths and shortcomings in handling campus violence and, from there, implementing risk management mechanisms for "monitoring, accounting, sorting, channeling."¹⁹⁰ The primary topics targeted by the post-Virginia Tech reports or suggested by their findings are audits of and changes to college and university policies regarding: 1) student discipline; 2) campus information sharing; 3) threat assessment teams; 4) student mental health; 5) emergency preparedness protocols; and 6) campus police.¹⁹¹

A. Student Discipline

Regardless of whether the data show increasing or slightly decreasing campus violence, the fact remains that there appears to be institutional inattention, if not blindness, to the source of the vast majority of campus crime perpetrators—the students. One study suggests that 80% of the

187. HARDAWAY, *supra* note 180, at 191. It should be a "client checklist which is sufficiently inviting to clients, so that clients will complete it within limited time and limited necessity to search out facts. It becomes the first step in the fact finding and organizing process." *Id.*

188. *E.g.*, Jerry D. Stewart & John H. Schuh, *Exemplar Programs and Procedures: Best Practices in Public Safety*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 223.

189. *E.g.*, Jeanette DiScala, Steven G. Olswang, & Carol S. Niccolls, *College and University Responses to the Emotionally or Mentally Impaired Student*, 19 J.C. & U.L. 17 (1992).

190. Simon, *supra* note 41, at 33.

191. In both the as-needed audit as well as the periodic audit dealing with these areas of concern, the participatory lawyer must be attentive not just to the case law that creates the risks around which the campus wants to manage its campus violence problems but also the affirmative burdens imposed by both state and federal statutes and regulations. In particular, the lawyer will have to become familiar with, and continually update, state and federal statutes dealing with privacy, the Clery Act, weapons possession, and due process. The Illinois Report issued in April 2008 provides an Appendix C that has a checklist of legal issues that colleges and universities could use in improving campus safety. ILLINOIS REPORT, *supra* note 63, at 226.

perpetrators are fellow students.¹⁹² Indeed, institutional residence halls are apparently more violent than institutions and even students are willing to admit.¹⁹³ Unfortunately for the goal of prevention, most violent campus crimes are impulsive rather than premeditated. However, there is a direct correlation between crime on campus—especially violent crimes—and drug and alcohol use.¹⁹⁴ Consequently, any law audit worth its salt should address the institution's current code of student conduct and its disciplinary proceedings if it hopes to have any role in lowering the occasions of violence on campus, not just the mass shootings that have recently rocked higher education.

1. Student Code of Conduct

The Virginia Tech Report, because of the hole through which Cho escaped punishment for on-campus misconduct, was most explicit about the need to audit college and university codes of conduct and enforcement proceedings:

Institutions of higher learning should review and revise their current policies related to—

- a) recognizing and assisting students in distress
- b) the student code of conduct, including enforcement
- c) judiciary proceedings for students, including enforcement
- d) university authority to appropriately intervene when it is believed a distressed student poses a danger to himself or others¹⁹⁵

Although the majority of reports address the need to better serve or, in the alternative, remove the student with mental health issues, institutions must address the discipline and removal of dangerous students in general, not just those who are in mental distress. Even without the reminder of Virginia Tech, conducting a periodic audit of a code of student conduct is

192. Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 677; Siegel & Raymond, *supra* note 65, at 20.

193. Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 677.

194. Siegel & Raymond, *supra* note 65, at 21–22. There also seems to be a direct correlation between drug or alcohol use and students who are crime victims. *Id.*

195. VIRGINIA TECH REPORT, *supra* note 1, at 53. Only a couple of other reports deemed removing violent students from campus a priority. For example, in Kentucky, one priority is “[d]isciplining (consistent with university policies) repeat offenders and those who engage in unacceptable behavior associated with substances.” KENTUCKY REPORT, *supra* note 159, at 16. In Illinois, a goal is “[t]he inclusion of violence and threat of violence in the student code of conduct as behavior that may result in suspension, dismissal, or expulsion and how a violation of that standard may impact enrollment and/or housing status and appeal rights.” ILLINOIS REPORT, *supra* note 63, at 226. “The student code of conduct should clearly define what behavior is unacceptable, and students should be held accountable if their conduct is a violation.” WISCONSIN REPORT, *supra* note 5, at 62.

necessary because of the evolution of student “insubordination” as well as the changes in governing statutes and regulations.

The process of drafting or re-drafting a student conduct code allows members of the academic community to evaluate what choices they believe are educationally appropriate—away from the heat of a specific incident. It may also provide a bulwark against charges of arbitrary action; for example, allegations that the school singled out one student for particularly unfair treatment or applied processes or sanctions that were inconsistent from case to case.¹⁹⁶

Gone the way of the dodo should be a code of student conduct that merely exhorts students to conduct themselves in a manner befitting the institution. In the first place, such exhortation is simply too vague to comply with due process notice requirements.¹⁹⁷ Second, it tells the consumer nothing about the kind of behavior that might constitute a violation. And third, it gives a disciplinary body, especially one run by students without an institutional memory, the wherewithal to mete out incomplete, incoherent, and uneven justice under the school’s disciplinary system.¹⁹⁸ Violent students as well as the student disciplinary board need to be given parameters to follow, and merely appending the qualifier that students must comply with state and federal laws is not specific enough.

Even in the absence of in loco parentis governance over student lives, the college or university remains an institution that must be specific about the rules of conduct. At the very least, a code of conduct is part of the educational mission of the institution.¹⁹⁹ At the most, it is a set of workplace rules that assure the safety of its consumers (although the consumers themselves may not view it that way). Ideally, it is a code of conduct instructing students to behave as members of the institution.²⁰⁰

A college or university code of conduct need not be as specific as a criminal code; however, it must be sufficiently specific to comply with due process notice and what process is due.²⁰¹ State colleges and universities are required to comply with the due process requirements of notice, reasonable explanation of charges, and opportunity for a fair hearing under

196. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 11 (2004).

197. *Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969).

198. Calling a school disciplinary procedure a “judicial” process is incorrect because courts have fairly consistently held that campus internal disciplinary proceedings are not judicial proceedings. Stoner & Lowery, *supra* note 196, at 15.

199. *Id.* at 3–5.

200. *Id.* at 11.

201. *Id.* at 15.

the Fourteenth Amendment.²⁰² Private higher education institutions are, on the other hand, governed by a more contractual agreement to afford “fundamental” or “basic” fairness to students in their disciplinary proceedings, or to at least agree not to act “arbitrarily and capriciously.”²⁰³ Although courts may be affording some deference to private institutions in the manner in which they conduct student disciplinary proceedings, there seems no principled nor institutional reason for not affording the same procedures required of public institutions.²⁰⁴ The efficiency of having the same process, familiar to most lawyers, would have little or no cost to the institution and even if it did, the benefit would certainly eliminate the litigation that ordinarily ensues. Thus, the starting point for reviewing any student code of conduct should be one that mirrors the requirements of a public college or university.

In the spirit of not reinventing the wheel, a terrific resource for reviewing a student code of conduct is the model information set out in *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script (“Model Student Conduct Code”)*.²⁰⁵ That article sets out a very detailed analysis on building a code from scratch. But two specific areas are pertinent to a task force’s audit of an existing student code: defining prohibited student behavior (violations) and enforcement.

Regarding prohibited student behavior, the *Model Student Conduct Code* sets out a framework for specific offenses under a list of rules and regulations. A plethora of offenses is listed, including academic dishonesty; violation of federal, state, or local law; and the like. Similarly comprehensive lists have been formulated and used by numerous higher education institutions.²⁰⁶ However, several offenses stand out as worthy of

202. *Goss v. Lopez*, 419 U.S. 565, 574, 581 (1975); *Pugel v. Bd. of Trs.*, 378 F.3d 659, 663–64 (7th Cir. 2004); Joseph M. Landers, *Academic Student Dismissals at Public Institutions of Higher Education: When Is Academic Deference Not an Issue?*, 34 J.C. & U.L. 21, 28–39 (2007); Johanna Matloff, Note, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U.L. REV. 169, 169 (2001).

203. *E.g.*, *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34–35 (1st Cir. 2007) (holding that a contractual relationship between student and university includes duties of good faith and fair dealing); Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 10–11 (2003); Matloff, *supra* note 202, at 174–75; Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 657–58 (2001).

204. *E.g.*, Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 291 (1999); Tenerowicz, *supra* note 203, at 675–82.

205. Stoner & Lowery, *supra* note 196, at 1.

206. *See, e.g.*, IND. UNIV., CODE OF STUDENT RIGHTS, RESPONSIBILITIES, AND CONDUCT (2005), available at <http://dsa.indiana.edu/Code/Code%20of%20Student%20Rights,%20Responsibilities,%20and%20Conduct%202005.pdf> [hereinafter IU CODE

inclusion in a code of conduct to target both the violent and potentially violent student on campus.

First, any violent activity that is a violation of state or federal law should be prohibited behavior under the student conduct code.²⁰⁷ A second group of prohibited acts should include “[p]hysical abuse, verbal abuse, threats, intimidation, harassment, coercion, and/or other conduct [that] threatens or endangers the health or safety of any person.”²⁰⁸ More specific events could be listed, but these generic categories of physical and mental violence give notice to most students of the types of behavior proscribed by the conduct code and thereby warranting discipline.²⁰⁹ Third, hazing prohibitions have the potential to prevent violent behavior, and in some instances reflect the requirements of state law.²¹⁰

More amorphous standards designed to cut the incidence of campus violence—such as a student code’s aspiration to act in a socially responsible manner, perhaps based on a religious credo—may act as a positive influence at private institutions. Unfortunately, they are too vague to withstand due process requirements at public institutions.²¹¹ In fact, private institutions should combine this aspiration with a specific list of offenses if they really want to get through to their consumer students.

Any student conduct code must be distributed to every student each year. Freshmen and transfer students should be specifically advised of the individual behavior that will get them in trouble. The code should also be distributed annually to faculty, staff, and even parents. Annual distribution serves as notice for due process purposes but also advises the individual student of the behavioral standard to which she must conform. Annual

OF CONDUCT]; Purdue University, University Regulations 2008–2009, Part 5—Student Conduct, http://www.purdue.edu/univregs/pages/stu_conduct/stu_conduct.html (last visited Feb. 28, 2009); UNIV. OF NOTRE DAME, DULAC: A GUIDE TO STUDENT LIFE 2008–2009 97–204 (2008), available at <http://orlh.nd.edu/dulac/duLac%202007.pdf>.

207. Stoner & Lowery, *supra* note 196, at 29.

208. *Id.* at 27.

209. Colleges and universities will also have to decide how far to extend their student code of conduct, i.e., how much, if any, off-campus behavior should be considered a violation of college and university rules and regulations. *Id.* at 25–27. *But see* John Friedl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701 (2000).

As many schools expand the scope of sanctions they apply to their students’ non academic misconduct, critics protest that students fall victim to a growing wave of political correctness and a double standard that imposes a moral agenda by suspending or ignoring Constitutional safeguards that would otherwise be available in court proceedings if the students were charged with criminal misconduct.

Id. at 702.

210. Walter M. Kimbrough, *Why Students Beat Each Other: A Development Perspective for a Detrimental Crime*, in *CREATING & MAINTAINING SAFE COLLEGE CAMPUSES*, *supra* note 64, at 58, 71; Stoner & Lowery, *supra* note 196, at 28.

211. Stoner & Lowery, *supra* note 196, at 33–34 & nn. 102–03.

distribution is also an integral part of instilling a different cultural paradigm toward campus violence. Including the student conduct code in a voluminous student or faculty handbook is not realistically helpful. In the real world, nobody—faculty or students—reads those voluminous handbooks unless they are looking for something that affects their immediate lives, like the location of the nearest dining facility. Posting the code on the campus website is also of little practical value; anecdotal experience has proved how hard it is to locate the codes on some websites. Instead, the student conduct code should be a separate pamphlet distributed each year, which also includes the student disciplinary procedure.²¹² In addition, the list of offenses should be posted in easily accessible places, such as residence halls and lobbies of classroom buildings. These proactive measures may be the only way to make a campus cultural shift away from the typical reactive attitude in which the awareness of campus violence arises and lasts only a couple of weeks after a violent event.²¹³

2. The Disciplinary Process

The campus violence law audit should also re-examine the disciplinary procedures themselves to assure that they comport with due process: notice, explanation of the “charges,” and an opportunity to be heard.²¹⁴ This means that the student is entitled to have the “charges” against him reduced to writing, with an explanation “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²¹⁵ The opportunity to be heard requires no particular form of hearing, but guidelines on the procedures should be written, both for consistency’s sake and to avoid making ad hoc decisions on difficult matters.²¹⁶

It is not enough, however, to have the procedure in writing; it must be known and understood. The procedure could be easily collated with the student conduct code for easy annual distribution. Faculty should be particularly singled out to refresh themselves about the procedures for their own edification and as a resource for student questions. In addition, each member of the campus disciplinary board should be trained (or retrained) at the beginning of each academic year so as to be familiar and fluent in the procedures.

A campus violence work force might also find it useful to review the personnel who are involved in disciplinary proceedings besides students,

212. See, e.g., IU CODE OF CONDUCT, *supra* note 206.

213. Siegel & Raymond, *supra* note 65, at 23.

214. Stoner & Lowery, *supra* note 196, at 38–54; Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1071–74 (1969).

215. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); Stoner & Lowery, *supra* note 196, at 40.

216. Stoner & Lowery, *supra* note 196, at 44.

faculty, and administrators. Lawyers and mental health professionals are especially useful adjuncts to the process. The presence of a lawyer either on the panel or as an advisor to the proceedings assures the regularity of and consistency in the process. A mental health professional should also be in attendance, if not as a panel member then as an observer. That mental health professional would be better able than other members of the board to recognize students in mental distress, especially those who should be “diverted” from the disciplinary system into mental health counseling.²¹⁷

A final aspect of the disciplinary procedure that the audit must examine is the institutional attitude to sanctions meted out to violent students. Clearly, flexibility in the types of sanctions is useful,²¹⁸ and a one-size-fits-all formula for punishing violent students is unwise *viz.* the problems with zero-tolerance policies.²¹⁹ However, the work group must attend to a major problem with discipline and campus culture: other students are loathe to shun students who commit violent acts.²²⁰ One reason for this is that campus violence often involves crimes of impulse and alcohol use. Otherwise, student perpetrators are not problems on campus.²²¹ So other students do not view them as violent students and tend to be more forgiving of their transgressions.

In light of a student culture of alcohol consumption and campus violence with little peer accountability, the work group may have to tie the penalty and enforcement of violent campus crimes to a comprehensive alcohol program.²²² Creative ways to salvage the students while penalizing their violent behavior may entail requiring their participation in rehabilitation or similar diversionary program, such as anger management class. Furthermore, if the acceptance of drinking and campus violence is pervasive enough throughout a particular campus, violent offenders are not going to face punishment from a disciplinary board that includes student peers. Consequently, the work group might consider removing the enforcement function from the disciplinary board and resting it with an administrator.²²³

217. The mental health professional could be a professor on the faculty or an outsider but probably should not be a member of the campus counseling center. The student involved may already be involved in counseling, and a member of the counseling center might be inclined to be the student’s advocate rather than a disinterested professional charged with being neutral in the disciplinary process.

218. Stoner & Lowery, *supra* note 196, at 54–57.

219. See, e.g., Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH U. L.Q. 65 (2003).

220. Siegel & Raymond, *supra* note 65, at 25.

221. *Id.* at 23.

222. Sudakshina L. Ceglarek & Aaron Brower, *Changing the Culture of High-Risk Drinking*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 15, 17.

223. Stoner & Lowery, *supra* note 196, at 58–59.

3. Summary Proceedings

A necessary but perhaps overlooked part of the disciplinary process that an audit should examine is the summary proceeding, a foreshortened procedure by which a student may be immediately removed from campus, pending more formal procedures. That right is usually attributed to the Supreme Court decision in *Goss v. Lopez*:²²⁴ “[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school.”²²⁵ Although *Goss* dealt with the temporary suspension of public school students, colleges and universities typically have similar rights under the appropriate circumstances.²²⁶ Such a summary proceeding usually entails a temporary suspension from the college or university until the full panoply of due process rights will be afforded to the student.²²⁷

In following such a procedure, the college or university must still comport with a modicum of due process by offering oral or written notice of the charges against the student, an explanation of those charges, and an opportunity to rebut the charges with his own version of events.²²⁸ However, the full formalities of due process may be reserved to a later time while the student has been removed from campus. These truncated procedures are typically vested in a school administrator, who makes the immediate decision to suspend the student for health and safety reasons pending investigation and a full hearing.²²⁹ This procedure is particularly useful in removing students for a variety of behaviors that might pose a danger to the campus: criminal offenses that might endanger other students,²³⁰ assault,²³¹ alcohol-related violations,²³² drug offenses,²³³

224. 419 U.S. 565 (1975).

225. *Id.* at 582.

226. Stoner & Lowery, *supra* note 196, at 59; Wright, *supra* note 214, at 1074–75.

227. *E.g.*, Stoner & Lowery, *supra* note 196, at 59–60.

228. *Goss*, 419 U.S. at 581; Stoner & Lowery, *supra* note 196, at 59–60; *see generally* Julie Underwood, *The 30th Anniversary of Goss v. Lopez*, 198 EDUC. L. REP. 795 (2005).

229. *See, e.g.*, *Morfit v. Univ. of S. Fla.*, 794 So.2d 655, 655 (Fla. Ct. App. 2001); *Held v. State Univ. of N.Y.*, 630 N.Y.S.2d 196, 198 (N.Y. Sup. Ct. 1995); Stoner & Lowery, *supra* note 196, at 59; DePauw University, Student Handbook: Interim Suspensions and No Contact Orders, <http://www.depauw.edu/univ/handbooks/dpuhandbooks.asp?ID=430&parentid=425> (last visited Feb. 28, 2009); Purdue University, University Regulations 2008–2009, Part 5—Student Conduct, http://www.purdue.edu/univregs/pages/stu_conduct/inv_withdraw.html (last visited Feb. 28, 2009).

230. *Ali v. Stetson Univ.*, 340 F. Supp. 2d 1320 (M.D. Fla. 2004) (addressing a student arrested for off-campus weapons offense); *Wallace v. Fla. A&M Univ.*, 433 So.2d 600 (Fla. Ct. App. 1983) (addressing a student with drug conviction for possession of cocaine on a neighboring campus). *But see Held*, 630 N.Y.S.2d at 199–200 (holding the university improperly suspended student only charged but not yet convicted of various drug offenses because no evidence of harm to the campus).

231. *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283 (N.Y. Sup. Ct. 2004) (concerning

harassment,²³⁴ weapons on campus,²³⁵ and cumulative disciplinary violations of a threatening and destructive nature.²³⁶

4. Weapons And Alcohol

Two additional matters related to the student conduct code should be scrutinized by the work group because of their close relationship to campus violence—weapons and alcohol. As to the first, state law will play a part in any policy dealing with weapons on campus, particularly firearms.²³⁷ Despite the unsupported premise that an armed student could stop massacres like the one that occurred at Virginia Tech, campus officials and many students oppose the introduction of weapons on campus.²³⁸ “Weapons challenge the traditional safety and security of college campuses. Families, students, staff, and visitors to campus have an expectation of safety and nonviolence.”²³⁹

Even more vehement in their determination to keep weapons off campus are campus police.²⁴⁰ This is particularly so when alcohol is introduced

student with prior disciplinary problems who struck two other students).

232. *Saliture v. Quinnipiac Univ.*, No. 3:05cv1956, 2006 WL 1668772, at *1 (D. Conn. June 6, 2006) (addressing students arrested while hosting a keg party in an off-campus residence).

233. *Flaim v. Med. Coll. of Ohio*, No. 2004-04132, 2004 WL 2521293, at *1 (Ohio Ct. Cl. Oct. 6, 2004) (addressing a medical student who pleaded guilty to felony drug offense).

234. *Nguyen v. Univ. of Louisville*, No. Civ.A. 3:04CV-457-H, 2006 WL 1005152, at *1 (W.D. Ky., Apr. 14, 2006) (addressing a student accused of a series of harassing emails and stalking).

235. *Dvoret v. Maricopa County Cmty. Coll.*, No. CIV. 03-2133 PHX VAM, 2006 WL 1600132, at *1 (D. Ariz. June 5, 2006) (addressing a student entered campus with knife and baton three days after another disgruntled student had murdered three faculty members on a nearby campus); *Centre Coll. v. Trzop*, 127 S.W.3d 562 (Ky. 2003) (addressing a student who possessed five-inch knife on campus in derogation of campus regulations).

236. *Hill v. Bd. of Trs.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001) (addressing a student on probation for alcohol violations and interfering with people reporting rule infractions immediately suspended after participating in riot after university basketball team was defeated in Final Four).

237. The Supreme Court’s recent Second Amendment decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), still seems to reserve to the states the right to prohibit firearms in sensitive locations such as schools. *Id.* at 2816–17. Whether the Court’s use of the term “schools” embraces higher education institutions remains to be seen.

238. *E.g.*, VIRGINIA TECH REPORT, *supra* note 1, at 75; WISCONSIN REPORT, *supra* note 5, at 68–69.

239. *E.g.*, Charles Cychosz, *The Incompatibility of Weapons and College Campuses*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 188, 202.

240. IACLEA BLUEPRINT, *supra* note 67, at 7 (“[International Association of Campus Law Enforcement Administrators] does not support the carry and concealment of weapons on a college campus, with the exception of sworn police officers in the

into the equation: “[a]nother troubling element of weapons possession is the apparent co-occurrence of weapons possession with binge drinking and drug use. The disinhibiting effect of the substances results in less influence by normal social controls.”²⁴¹ Gun ownership combined with alcohol consumption is especially vexing: “gun-owning college students are more likely than their unarmed counterparts to drink frequently and excessively and, when inebriated, to engage in activities that put themselves and others at risk for life-threatening injury, such as driving when under the influence of alcohol, vandalizing property, and having unprotected intercourse.”²⁴² For the most part, however, weapons seem to play but a small part in campus violence;²⁴³ alcohol is the bigger problem.

Alcohol abuse on campus is a prime source of campus violence.²⁴⁴ Indeed, “[f]rom the perspectives of both victims and perpetrators, the more violent crimes were associated with more frequent drug and alcohol use.”²⁴⁵ The only approaches that seem to have any impact on alcohol abuse on campus are systemic, campus-wide cultural changes.²⁴⁶ Obviously, there has to be provision for on-campus drinking in any student code of conduct: underage drinking is unlawful in all states, while in many states, drinking on state property is also unlawful. Furthermore, many private schools, especially those with religious affiliations, are philosophically opposed to drinking.

High-risk, or binge, drinking has had an especially noxious effect on campus life, especially in the incidence of violence: “[B]inge drinking . . . is a major public health challenge on college campuses that leads to a number of harmful consequences, including violence, noise complaints, vandalism, transports to detox caused by overconsumption, and sexual

conduct of their professional duties.”).

241. Cychosz, *supra* note 239, at 194. An additional concern is that the presence of weapons on campus seems to increase the “lethality of suicidal behavior.” *Id.*

242. Matthew Miller, David Hemenway, & Harry Weschler, *Guns and Gun Threats at College*, 51 J. OF AM. COLL. HEALTH 57, 63 (2002) (“[T]wo[-]thirds of students with guns at college report binge drinking.”).

243. Siegel & Raymond, *supra* note 65, at 23.

244. *Id.* at 21–22; Robert F. Marcus & Bruce Swett, *Multiple-Precursor Scenarios: Predicting and Reducing Campus Violence*, 18 J. OF INTERPERSONAL VIOLENCE 553, 567–68 (2003); Siegel & Raymond, *supra* note 65, at 22 (“[O]ver 80% of the 130 students [in this study], who had both committed and been the victim of multiple crimes since enrolling in college, reported using alcohol at the time that their most serious crime was committed.”); KENTUCKY REPORT, *supra* note 159, at 13–17.

245. Siegel & Raymond, *supra* note 65, at 22.

246. *E.g.*, Ceglarek & Brower, *supra* note 222, at 15; Simon, *supra* note 41, at 31–36. This cultural change does not anticipate the college or university’s undertaking any particular duties such as posting guards in dorms, imposing curfews, or engaging in dorm checks. However, the laissez-faire attitude struck by courts in cases such as *Tanja H. v. The Regents of the University of California*, 278 Cal. Rptr. 918, 920 (Cal. Ct. App. 1991), can no longer be the expectation of the campus that does not address alcohol and substance abuse problems.

assaults, among others.”²⁴⁷ Given that 25% of the student population has reported negative consequences from problem drinking,²⁴⁸ broader campus initiatives and partnerships will be required to ameliorate its impact on campus violence. Consequently, the campus violence work group may decide that attending to this matter warrants significant study and implementation to change the campus culture, and thereby remove at least one source of campus violence.

B. Campus Information Sharing

Information-sharing within the campus community was a major problem at Virginia Tech and the subject of much concern in most of the post-event reports.²⁴⁹ The biggest problem was that the university community with whom Cho had contact—“his professors, fellow students, campus police, the Office of Judicial Affairs, the Care Team, and the Cook Counseling Center”—did not coordinate their information about his deteriorating mental state and his increasingly unstable behavior.²⁵⁰ This lack of coordination and absence of information sharing have been blamed on the restrictions of privacy laws guarding both Cho’s education records and his mental health problems. Rather than the laws themselves, the more likely culprit was a campus-wide ignorance of how those laws work and of the nearly universal exception allowing for disclosure of private information for an emergency such as existed at Virginia Tech.

At least three types of privacy laws operate to protect the nonconsensual disclosure of private information about students. The first type, state privacy laws, are unique to each jurisdiction so a lawyer participating on a campus violence task force must educate herself about their prohibitions and exceptions, if any.²⁵¹ These state laws may implicate both the privacy

247. Ceglarek & Brower, *supra* note 222, at 15.

248. *Id.* Further, “students were under the influence of alcohol or other drugs in 13% of incidents of ethnic harassment, 46% of incidents of theft involving force or threat of force, 51% of threats of physical assault, 64% of physical assaults, 71% of forced sexual touching, and 79% of unwanted sexual intercourse.” CARR, *supra* note 67, at 8.

249. *E.g.*, Darby Dickerson, *Lessons in Collaboration: Learning from the Post-Virginia Tech Task Force Reports*, CAMPUS ACTIVITIES REPORTING, Oct. 2007, at 20, available at <http://ssrn.com/abstract=1087815>; VIRGINIA TECH REPORT, *supra* note 1, at 63–70; WISCONSIN REPORT, *supra* note 5, at 61–64.

250. VIRGINIA TECH REPORT, *supra* note 1, at 63.

251. The college and university “contract” with students may also explicitly contain a waiver of certain privacy information when it allows the institution to contact a student’s parents about disciplinary issues. *See, e.g.*, *Saliture v. Quinnipiac Univ.*, No. 3:05cv1956, 2006 WL 1668772, at *5 (D. Conn. June 6, 2006) (“Quinnipiac reserves the right to communicate with parents on any student disciplinary action taken by Quinnipiac officials.”); Purdue University, *supra* note 206, at Part 5, Section III(C)(2)(b) (“A copy of the notice of charges may be sent to the parent or guardian of the student if the student is dependent as defined in Section 152 of the Internal Revenue

of a student's education and disciplinary records and the confidentiality of mental health records. State law also may be more restrictive than federal law.²⁵²

The second type of privacy law concerns the confidentiality of mental health treatment records. Many believe that these records are governed by the Health Insurance Portability & Accountability Act of 1996 (HIPAA),²⁵³ when a student—like Cho—is being treated for mental health issues by a university clinic. HIPAA regulates the electronic release of “protected health information” by health-care providers.²⁵⁴ HIPAA and its regulations pose labyrinthine challenges to understanding HIPAA's relationship to other laws, especially its relationship to disclosure of “education records” under the Family Educational Rights and Privacy Act (FERPA).²⁵⁵ However, HIPAA does not really apply to campus counseling treatment records because it does not protect treatment records of postsecondary counseling centers that are maintained only for treatment purposes and are not otherwise disclosed.²⁵⁶ In its stead, campus counseling centers and related mental health professionals generally are prohibited from revealing mental health treatment records under both ethical obligations and state and federal medical and disability laws.²⁵⁷ On the other hand, most laws will allow disclosure of counseling information if the student threatens to harm herself or others.²⁵⁸ Consequently, a campus violence task force would do a service to its faculty and staff by having the college or university's mental health professionals explain the restrictions of their confidentiality duties

Code of 1954.”); *see also* Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393, 409–15 (2008) (discussing duties and restrictions for parental notification concerning students in distress).

252. *See, e.g.*, Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361 (2005).

253. 42 U.S.C. §§ 1320d–d-8 (2000); *see also* Pub. L. No. 104-191, 110 Stat. 1936 (1996).

254. *See, e.g.*, Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1182 (2006).

255. Tribbensee, *supra* note 251, at 407–08.

256. The extent of “protected health information” under HIPAA excludes “individually identifiable health information” contained in records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2006); 45 C.F.R. § 160.103 (2008). These records are also excluded under FERPA. And HIPAA does not affect “education records” under FERPA. 45 C.F.R. § 160.103.

257. Tribbensee, *supra* note 251, at 407–08.

258. *Id.* at 406–07.

and the extent to which state law allows them to divulge dangerous activity that might threaten campus violence.²⁵⁹

Ironically, the statute that bore the brunt of the blame for lack of campus information-sharing has the lowest threshold of disclosure: FERPA.²⁶⁰ FERPA protects “education records” from nonconsensual disclosure at education institutions that receive federal funds. Education records are “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”²⁶¹ Education records do not include those materials in the sole possession of the maker nor records of an institution’s law enforcement unit.²⁶² Education records may be shared with other members of the educational institution if they have legitimate educational interests.²⁶³ Specifically exempted nonconsensual disclosures include disciplinary records when they relate to a student’s behavior²⁶⁴ and to reports of institutional, state, and federal violations of alcohol or controlled substances laws and regulations for students under twenty-one.²⁶⁵

Regardless, health and safety matters have always trumped privacy under FERPA: nonconsensual disclosures may be made “in connection with an emergency if the knowledge of the information is necessary to protect the health or safety of the student or other individuals.”²⁶⁶ This emergency regulation is to be strictly construed,²⁶⁷ but education

259. *Id.* at 408–09.

260. 20 U.S.C. § 1232g (2006); *see generally* Stuart, *supra* note 254, at 1162–73; Tribbensee, *supra* note 251, at 395–405.

261. 20 U.S.C. § 1232g(a)(D)(4)(A). These may include records at student health centers if they are maintained for more than just treatment. *See* VIRGINIA TECH REPORT, *supra* note 1, at G-4.

262. 20 U.S.C. §§ 1232g(a)(4)(B)(i), (ii).

263. 20 U.S.C. § 1232g(b)(1).

264. 20 U.S.C. § 1232g(h).

265. 20 U.S.C. § 1232g(i).

266. 34 C.F.R. § 99.36(a) (2006); 20 U.S.C. § 1232g(b)(1)(I).

267. 34 C.F.R. § 99.36(c) (2006). The Department of Education recently proposed changes to this health and safety regulation:

The Department proposes to revise § 99.36(c) to remove the language requiring strict construction of this exception and add a provision that in making a determination under § 99.36(a), an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the safety or health of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for

institutions are given significant discretion in determining what is or is not an emergency that is not likely to be second-guessed unless a “reasonable college official” would not have released the information.²⁶⁸ This regulation has been interpreted to allow disclosures impelled by “concerns for a student’s welfare such as a serious eating disorder, dangerous high-risk behavior such as heavy or binge drinking, suicidal ideation or threats, or erratic and angry behaviors that others might reasonably perceive as threatening.”²⁶⁹ Regardless, if the information is not in a “record,” it can be disclosed.

That is the irony of the confusion over FERPA’s protections. Classroom observations and personal interactions with an individual are not private records under FERPA. The record in which that information might be reduced may not be disclosable, but any word-of-mouth disclosures arising from day-to-day contact with a student does not fit within the purview of FERPA. FERPA protects the privacy of student records; it does not protect student privacy per se.²⁷⁰ One of the goals, then, of a campus violence work group is to better educate the campus community about the narrow scope of FERPA’s prohibitions so as to effectuate better information sharing about dangerous or endangered students.²⁷¹

The participating lawyer must also be attentive to two bills introduced shortly after the events at Virginia Tech and now winding their way through various congressional committees. Both are designated FERPA amendments. The Senate bill is the Family Educational Rights and Privacy Act Amendments of 2008 and adds a subsection (k) to FERPA that enables campus health professionals to share treatment records with other medical professionals.²⁷² The Senate bill would also expand the emergency disclosure exception under FERPA.²⁷³ The House bill is the Mental Health Security for America’s Families in Education Act of 2007.²⁷⁴ This Act also

that of the educational agency or institution in evaluating the circumstances and making its determination.

Family Educational Rights and Privacy, 73 Fed. Reg. 15574-01, 15589 (proposed Mar. 24, 2008) (to be codified at 34 C.F.R. pt. 99).

268. *Brown v. City of Oneonta*, 858 F. Supp. 340, 344 (N.D.N.Y. 1994). Regardless, students have no enforceable privacy rights under FERPA for wrongful disclosure. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002); see Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563, 639-40 (2004).

269. Tribbensee, *supra* note 251, at 401 (footnote omitted).

270. *Id.* at 396.

271. “For personal experiences, such disclosures may be made to appropriate persons with the expertise to provide counsel on the issues of concern without implicating FERPA.” *Id.*

272. S. 2859, 110th Cong. § 2 (2008).

273. S. 2859.

274. H.R. 2220, 110th Cong. (2007); see also John S. Gearan, Note, *When Is it OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act*, 39

adds a new subsection (k), but allows educational institutions to disclose information 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.”²⁷⁵ Obviously, keeping abreast of these developments is crucial in formulating campus information-sharing policies.

Procedures for the centralization of information-sharing are a fundamental task of a campus violence work group: “Incidents of aberrant, dangerous, or threatening behavior must be documented and reported immediately”²⁷⁶ Mandatory reporters should include professors and resident hall staff with specific guidelines for making those reports. Students should be repeatedly educated about the need to report violent behavior, anonymously if necessary to make them feel more comfortable. In fact, the failure to report and share information may incur liability for bystanders.²⁷⁷

As one state report suggested:

Develop and support a comprehensive open reporting mechanism, “No secrets,” within the university or college. This reporting mechanism must be supported by a data collection tool that: a) allows for real time submission and acceptance of incident information as submitted by all university employees and students and b) allows the investigator to rank the reported behavior by level of severity upon initiation of any investigation or intervention. There should be a mechanism in policy that compels the [designated college or university collection group] to track and review daily all currently open and pending investigations for the addition of new information, the re-determination of acuity, and the development of action plans as related to updated information.²⁷⁸

Whatever information-sharing protocols are suggested or designed by a work group, they have two crucial tasks: First, to gather the information about particular threats or violent students before an event; and second, to share information on campus in case an event actually takes place. The latter is typically an adjunct of a good emergency preparedness program, which is discussed below. However, the collection, compilation, and collation of information of those students who pose threats of either “run-of-the-mill” campus violence or calamitous events are tasks that might be best centralized by a campus threat assessment team.²⁷⁹

SUFFOLK U. L. REV. 1023 (2006).

275. H.R. 2220, § 3.

276. VIRGINIA TECH REPORT, *supra* note 1, at 53.

277. *See* Epstein, *supra* note 128, at 100–01.

278. ILLINOIS REPORT, *supra* note 63, at 177.

279. WISCONSIN REPORT, *supra* note 5, at 61–64.

C. Threat Assessment Teams²⁸⁰

The Virginia Tech Report was adamant in its recommendation that higher education institutions create threat assessment teams.²⁸¹ Threat assessment teams are integral to “identifying, assessing, and managing individuals who might pose a risk of violence to an identified or identifiable target.”²⁸² The threat assessment team is a standing committee with the training and expertise to assess threats in a multidisciplinary approach. Members of such group should include administrators, law enforcement, mental health professionals, legal counsel, disability specialists, and student affairs officers.²⁸³ Public schools have adapted to the use of threat assessment teams for some time; higher education institutions find themselves playing catch-up.²⁸⁴

280.

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

John H. Dunkle, Zachary B. Silverstein, & Scott L. Warner, *Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus*, 34 J.C. & U.L. 585, 590 (2008) (quoting DEALING WITH THE BEHAVIORAL AND PSYCHOLOGICAL PROBLEMS OF STUDENTS, NEW DIRECTIONS FOR STUDENT SERVICES 9 (Ursula Delworth ed., 1989)). Some campuses may instead use a consultative case management model to collect information on and provide interventions for students who are dangerous or in distress. Tribbensee, *supra* note 251, at 415–16.

281. VIRGINIA TECH REPORT, *supra* note 1, at 19; *see also* Shane R. Jimerson Stephen E. Brock, Jennifer L. Greif, & Katherine C. Cowan, *Threat Assessment at School: A Primer for Educators*, in HELPING CHILDREN AT HOME AND SCHOOL II: HANDOUTS FOR FAMILIES AND EDUCATORS S9-49 (Andrea S. Canter, Leslie Z. Page, Mark D. Roth, Ivonne Romero, & Servio A. Carroll eds., 2004), available at http://www.nasponline.org/resources/crisis_safety/threatassess.pdf; COLUMBINE REPORT, *supra* note 11, at xvii; ILLINOIS REPORT, *supra* note 63, at 174–81.

282. SECRET SERVICE GUIDE, *supra* note 11, at 30.

283. Dunkle, Silverstein, & Warner, *supra* note 280, at 592–95, 634. Such group might also include academics in their specialty areas, such as criminal justice and psychology. *See, e.g.*, Fairleigh Dickinson University, Threat Assessment Team, <http://view.fdu.edu/default.aspx?id=3705> (last visited Feb. 28, 2009).

284. Dunkle, Silverstein, & Warner, *supra* note 280, at 589; *see, e.g.*, Los Angeles Unified School District, Threat Assessment, http://notebook.lausd.net/portal/page?_pageid=33,259504&_dad=ptl&_schema=PTL_EP (last visited Feb. 28, 2009). Several colleges and universities have implemented threat assessment teams since the Virginia Tech events, including University of Kentucky, Boston University, University of Utah, University of Illinois-Chicago, and University of Minnesota. Associated Press, *Colleges Keep Watch over Troubled Students*, MSNBC, Mar. 28, 2008, <http://www.msnbc.msn.com/id/23847510/>; Ahnalese Rushmann, *Threat-Assessment Groups Cropping Up Nationwide: Schools Are Taking More Caution With Students in Response to Virginia Tech*, MINN. DAILY, Apr. 4, 2008, available at <http://www.mndaily.com/articles/2008/04/04/72166478>. Virginia Tech appointed its Threat Assessment Team on December 10, 2007. Memorandum from Charles W.

According to the U.S. Secret Service and the U.S. Department of Education, six principles are involved in threat assessment:

Targeted violence is the end result of an understandable, and oftentimes discernible, process of thinking and behavior

Targeted violence stems from an interaction among the person, the situation, the setting, and the target

An investigative, skeptical, inquisitive mindset is critical to successful threat assessment

Effective threat assessment is based on facts, rather than characteristics or “traits.” . . .

An “integrated systems approach” should guide threat assessment investigation

The central question of a threat assessment is whether a student poses a threat, not whether the student *made* a threat.²⁸⁵

Therefore, several enumerated goals of such a group should include 1) developing policies and procedures for the group; 2) serving as campus consultants; 3) training campus members about the group’s role and the process for sharing information; 4) determining the best confluence of assessment systems for problematic students; 5) working on appropriate intervention techniques for students; 6) periodically reviewing its assessments of problematic students; 7) monitoring problematic students;²⁸⁶ and 8) assessing specific threatening events.

This last goal would give the group “vortex” responsibilities “to assess the incident(s) and information and carry out the appropriate response”:²⁸⁷ “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.”²⁸⁸ When calamitous violence is threatened, it is usually by an avenging “insider” of whom there are “warning signs of the impending violence and frequently other persons [are] aware of the perpetrator’s intentions. The warning signs may include verbal threats, written threats, suicidal behavior, disturbing writings, self-produced videos and/or internet

Steger to All Virginia Tech Employees and Students (Jan. 31, 2008) (on file at <http://www.policies.vt.edu/policymemos/ppm251.pdf>).

285. SECRET SERVICE GUIDE, *supra* note 11, at 30–33 (emphasis in original); *see generally* O’TOOLE, *supra* note 11.

286. Dunkle, Silverstein, & Warner, *supra* note 280, at 591–92.

287. NAAG REPORT, *supra* note 158, at 3.

288. VIRGINIA TECH REPORT, *supra* note 1, at 19; *see also* ILLINOIS REPORT, *supra* note 63, at 177–78.

communications.”²⁸⁹ Of course, all threats should be taken seriously.²⁹⁰ But the team’s centralized information-sharing capacity would allow it to examine all reports carefully and thoughtfully, allowing it to evaluate the viability of a threat by examining the “specific, plausible details” of the threat; “the emotional content” of the threat; and the “precipitating stressors.”²⁹¹ This task would also require that the team’s rôle and function be highly publicized on campus for both faculty and student use.²⁹²

The group should meet regularly and not just for the purpose of identifying immediate threats. Those regular meetings should address not only issues of violence and threats but also “increased awareness, measurement, prioritization, needs assessment, causal evaluation, target hardening and early intervention.”²⁹³ The team can also offer substantive input into alleviating a culture of campus violence by creating pro-active policies to address alcohol abuse and sexual assault.²⁹⁴ Such systemic changes should embrace a coherent protocol for information gathering in

289. NAAG REPORT, *supra* note 158, at 2–3. The NAAG Report emphasized the genesis of multiple-murder events in schools and on campuses:

In virtually all the incidents of school and campus violence that have occurred in America thus far, the perpetrator or perpetrators have been what experts have identified as “avengers,” people who are responding to a real or perceived injustice and seeking vengeance. Most of the perpetrators have been “malevolent insiders,” students or school personnel known by the school or other students.

Id. at 2; see also Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 712–20 (2003) (examining threat assessment strategies in public schools).

290. O’TOOLE, *supra* note 11, at 6.

291. *Id.* at 7–8. An evaluative guide from the U.S. Secret Service is invaluable to compile and assess the information about particular students of interest, evaluating such behavior as the student’s motives, communications, inappropriate interest in school attacks and weapons, and recent experiences of depression or loss. SECRET SERVICE GUIDE, *supra* note 11, at 55–57. A handy checklist might also prove useful for reporting suspicious events. See, e.g., Eleven Questions to Guide Data Collection in a Threat Assessment Inquiry, <http://www.pent.ca.gov/thr/11questions.pdf> (last visited Feb. 28, 2009); Purdue University Calumet Threat Assessment Checklist, <http://webs.calumet.purdue.edu/hr/files/2008/01/threat.pdf> (last visited Feb. 28, 2009). However, caution should be exercised to avoid turning checklists into student profiling. Legal concerns as well as the arbitrariness of profiling checklists militate against any procedure that would penalize and stigmatize students but not serve as an adequate tool for actually assessing student danger. E.g., Gayle Tronvig Carper, Merry Rhoades, & Steven Rittenmeyer, *In Search of Klebold’s Ghost: Investigating the Legal Ambiguities of Violent Student Profiling*, 174 EDUC. L. REP. 793, 807 (2003).

292. See, e.g., Fairleigh Dickinson University, *supra* note 283; West Chester University Department of Public Safety, Threat Assessment Team, <http://www.wcupa.edu/dps/emergency/ThreatAssessment.asp> (last visited Feb. 28, 2009). This publication should include the professional schools too, such as medical and law schools.

293. Fairleigh Dickinson University, *supra* note 283.

294. *Id.*

which information would then be funneled to the team after training and coordination with faculty, residence hall staff, the student disciplinary organization, and the campus counseling center.²⁹⁵ In addition, the team could implement policies that would provide appropriate support systems for students in distress, reduce bullying on campus, and embrace an “integrated systems approach” for utilizing the university’s various departments in trust and collaboration.²⁹⁶

D. Campus Mental Health

Details on how to improve mental health treatment on campuses are beyond the scope of this Article but should surely be a consideration by a campus violence work group. The problems dealing with mentally distressed and mentally disabled students were a high priority in nearly all the reports conducted after the events at Virginia Tech because the perpetrator was failed by campus mental health services.²⁹⁷ Ironically, the mentally ill student is more likely to be the victim of violence on campus than vice versa.²⁹⁸

The considered consensus is that mental health treatment on campuses is inadequate.²⁹⁹ A lawyer’s rôle in these issues requires being conversant in the federal statutes governing disabilities as well as in individual states’ laws regulating mental health treatment and involuntary commitment procedures.³⁰⁰ Clearly discernible goals for student mental health on college and university campuses include the creation and maintenance of

295. VIRGINIA TECH REPORT, *supra* note 1, at 53–54.

296. ILLINOIS REPORT, *supra* note 63, at 176–77.

297. “The Cook Counseling Center and the University’s Care Team failed to provide needed support and services to Cho during a period in late 2005 and early 2006. The system failed for lack of resources, incorrect interpretation of privacy laws, and passivity. Records of Cho’s minimal treatment at Virginia Tech’s Cook Counseling Center are missing.” VIRGINIA TECH REPORT, *supra* note 1, at 2. Several post-event reports focused on improvement to student mental health. CALIFORNIA REPORT, *supra* note 178, at 16–22; ILLINOIS REPORT, *supra* note 63, at 13–33; OKLAHOMA REPORT, *supra* note 40, at 45–50; REPORT TO THE PRESIDENT, *supra* note 158, at 14–15; WISCONSIN REPORT, *supra* note 5, at 21–24.

298. WISCONSIN REPORT, *supra* note 5, at 21.

299. *E.g.*, OKLAHOMA REPORT, *supra* note 40, at 11; WISCONSIN REPORT, *supra* note 5, at 21. Part of the problem is that more students are attending college with pre-existing mental health problems. *Id.*; CARR, *supra* note 67, at 8; Karin McAnaney, Note, *Finding the Proper Balance: Protecting Suicidal Students without Harming Universities*, 94 VA. L. REV. 197, 202 (2008). And colleges and universities in general are experiencing a serious up-tick in the number of students with psychological problems, whether pre-existing or recently emergent while on campus. *See generally* Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349 (2008); McAnaney, *supra* note 299, at 202. On average, nearly three college students a day are committing suicide. McAnaney, *supra* note 299, at 202.

300. *See generally* Lee & Abbey, *supra* note 299, at 349.

on-campus counseling centers or some alternative provision through contractual agreements.³⁰¹ On-campus services should adhere to the standards of the International Association of Counseling Services.³⁰² In addition, existing campus counseling centers should develop a relationship with the nearest county or state entity.³⁰³ Peer mental health support groups are also encouraged, which could accompany an alcohol abuse network.³⁰⁴

Unfortunately, there is only so much that an individual institution can do if there is a funding problem for student services.³⁰⁵ The complicated mechanisms for starting or even upgrading campus mental health facilities may be beyond the capacity of a work group other than making recommendations. Furthermore, some of the issues involving mental health law and policy require legislative intervention, not just local planning. Nevertheless, a campus violence task force must at least address the weaknesses and strengths of its current campus mental health services.³⁰⁶

E. Emergency Preparedness

Emergency preparedness is not the same function as served by a threat assessment team. Emergency planning includes both prevention and what to do when a crisis occurs, despite the best efforts, best practices, and best threat assessment team a campus has assembled. At the very basic level, state law often requires that campuses provide emergency measures in cases of tornado, hurricane, or other such natural disasters.³⁰⁷ At the same

301. ILLINOIS REPORT, *supra* note 63, at 15–16; NEW JERSEY REPORT, *supra* note 159, at 6–9; OHIO REPORT, *supra* note 159, at 134–36; OKLAHOMA REPORT, *supra* note 40, at 14.

302. ILLINOIS REPORT, *supra* note 63, at 15–16; International Association of Counseling Services, Inc., Accreditation Standards for University and College Counseling Centers, <http://www.iacsinc.org/IACS%20STANDARDS.pdf> (last visited Feb. 28, 2009).

303. OHIO REPORT, *supra* note 159, at 2.

304. FLORIDA REPORT, *supra* note 159, at vi; OKLAHOMA REPORT, *supra* note 40, at 11; WISCONSIN REPORT, *supra* note 5, at 23.

305. OKLAHOMA REPORT, *supra* note 40, at 12.

306. Campus mental health capabilities will also be tested in the wake of disaster. VIRGINIA TECH REPORT, *supra* note 1, at 135–47. An improved organization scheme on campus may improve the delivery of services to the student body as a whole in the aftermath. *See generally* Catherine H. Stein, Craig J. Vickio, Wendy R. Fogo, & Kristen M. Abraham, *Making Connections: A Network Approach to University Disaster Preparedness*, 48 J. OF COLL. STUDENT DEV. 331 (2007).

307. *E.g.*, GAO EMERGENCY MANAGEMENT REPORT, *supra* note 177, at 11, 57–58; NAAG REPORT, *supra* note 158, at 7.

States should consider requiring that all schools and colleges, as a condition of receiving state funding, create, maintain, and update emergency management plans. These schools and colleges should be required to conduct exercises, to include lockdown drills if appropriate, no less than annually and the state should establish

time, campuses must prepare for calamitous events like the mass shootings that occurred at Virginia Tech and Northern Illinois.³⁰⁸

All colleges and universities should conduct a threat and vulnerability assessment as part of the institutional risk management strategy. The assessment should consider the full spectrum of threat (i.e., natural, criminal, terrorist, accidental, etc.) for the campus. The results of this assessment should guide the institution's application of protective measures and emergency planning assumptions.³⁰⁹

Five general principles should guide the task force when addressing emergency preparedness:

- Establish an effective planning process
- Establish cross-institutional teams to build support
- Use all-hazards planning to anticipate changing needs
- Include a crisis communications component
- Maintain a phased and progressive planning cycle³¹⁰

In addition, each emergency plan for higher education institutions should have four phases: prevention-mitigation, preparedness, response, and recovery.³¹¹ The first—prevention-mitigation—assesses safety and security in the campus environment to decrease the likelihood of the calamity's occurring or, barring that, of reducing the number of casualties.

audit mechanisms to ensure compliance with these requirements. Such exercises should involve students, faculty, staff, first responders, and other community stakeholders.

Id. at 8.

308. See generally LAWRENCE K. PETTIT, AMERICAN ASS'N OF STATE COLL. AND UNIV., EXPECTING THE UNEXPECTED: LESSONS FROM THE VIRGINIA TECH TRAGEDY (2007).

309. IACLEA BLUEPRINT, *supra* note 67, at 5; see also NEW JERSEY REPORT, *supra* note 159, at 2–4; NEW MEXICO REPORT, *supra* note 159, at 3–4; OHIO REPORT, *supra* note 159, at 134–36; VIRGINIA TECH INFRASTRUCTURE REPORT, *supra* note 158.

310. STEVE CHARVAT, COLLEGE AND UNIVERSITY DISASTER PLANNING: NEW GUIDELINES BASED ON COMMON INDUSTRY PRINCIPLES AND PRACTICE 3 (n.d.), <http://www.higheredcenter.org/files/documents/college-disaster-planning.pdf>.

Common characteristics of comprehensive emergency preparedness plans at college and university campuses include coherent organizations; ability to recognize multiple threats; capacity to assist multiple victims or targets; preventive as well as responsive measures; effective emergency communications; comprehensive on-campus training and education; and annual updating. Delight E. Champagne, *Elements of a Comprehensive Safety Plan*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 261, 263.

311. U.S. Dep't of Educ. Emergency Response & Crisis Mgmt. Technical Assistance Ctr., *Emergency Management Planning for Institutions of Higher Education*, HELPFUL HINTS FOR SCHOOL EMERGENCY MANAGEMENT 2007, at 3, available at http://rems.ed.gov/views/documents/HH_Vol2Issue6.pdf [hereinafter HELPFUL HINTS].

Second, preparedness anticipates the implementation of protocols in campuses and constituent departments for a coordinated response to an emergency. Third, the response phase should effectively resolve or at least contain an event. Last, the recovery phase deals with the post-event services and procedures to restore operations on campus.³¹²

Specific recommendations for the Virginia Tech type of emergency entail several best practices identified by the International Association of Campus Law Enforcement Administrators. First, the campus must assess its current capabilities of dealing with all risks.³¹³ Second is the utilization of an effective communication system to notify students, faculty, and staff. A redundant system—one with both low- and high-tech capabilities—is a minimum necessity: loud speakers in conjunction with a mass-notification system, such as voice-mail, e-mail and text-messaging.³¹⁴ And the authority to send out emergency communications should be distributed among a handful of people so warnings may be issued without decision by committee.³¹⁵ Third, campuses should pattern their emergency management plans on the procedures provided by the National Incident Management System and the Department of Homeland Security, having been developed by experts for just such unexpected events.³¹⁶ Fourth, the emergency management plans must be updated both legally and practically, including conducting regular exercises for both the emergency personnel and for the campus inhabitants.³¹⁷ Fifth, campuses should strengthen their partnerships with local government agencies.³¹⁸ And last, campus police should be provided First Responder training.³¹⁹

Regardless of their efforts today, colleges and universities will become answerable for their emergency preparedness procedures if Congress amends the Higher Education Act of 1965 with the pending Virginia Tech Victims Campus Emergency Response Policy and Notification Act.³²⁰ Introduced the week before the first anniversary of the events at Virginia

312. *Id.* at 3–5.

313. IACLEA BLUEPRINT, *supra* note 67, at 5.

314. *Id.*; NAAG REPORT, *supra* note 158, at 9–10; VIRGINIA TECH REPORT, *supra* note 1, at 19. Public warning devices should also have distinguishable signals so that the campus community will be able to differentiate among warnings, such as a tornado versus a campus shooting. *Id.* at 18; *see generally* Champagne, *supra* note 310, at 268–69; CALIFORNIA REPORT, *supra* note 178, at 8–9; OKLAHOMA REPORT, *supra* note 40, at 10.

315. *See* HELPFUL HINTS, *supra* note 311, at 2; IACLEA BLUEPRINT, *supra* note 67, at 5; VIRGINIA TECH REPORT, *supra* note 1, at 19.

316. IACLEA BLUEPRINT, *supra* note 67, at 5; ILLINOIS REPORT EXECUTIVE SUMMARY, *supra* note 40, at 2.

317. IACLEA BLUEPRINT, *supra* note 67, at 5; NAAG REPORT, *supra* note 158, at 7; VIRGINIA TECH REPORT, *supra* note 1, at 19.

318. IACLEA BLUEPRINT, *supra* note 67, at 5–6.

319. *Id.* at 6.

320. H.R. 5735, 110th Cong. § 2 (2008).

Tech, this Act will add to the disclosures that higher education institutions must give students, particularly information concerning campus safety and security.³²¹ In particular, the Act would require disclosures of current emergency preparedness procedures, which must include thirty-minute campus communication capacity, annual training to students and faculty, and annual tests on these procedures.³²²

F. Campus Police

Although the Virginia Tech Report was in general laudatory toward the work of the campus police, it still made some recommendations for upgrading campus security forces in order to handle the catastrophic emergencies created by the mass shootings. Other reports similarly suggested that higher education institutions be attentive to updating and resourcing their campus security forces.³²³

The overwhelming suggestion is that higher education institutions make sure that their campus security forces have appropriate training, such as Active Shooter training³²⁴ and First Responder training.³²⁵ These would seem to at least serve as a palliative measure for similar disasters. The campus security force should also be a member of a threat assessment team. And there should be close coordination with local police agencies.³²⁶ “Understanding the concerns of both the internal and external communities and addressing problems collaboratively are key to effective policing.”³²⁷ Of course, the long-term goal would be to have accredited, full-service, sworn law enforcement agencies on campus.³²⁸ However, the practicalities of funding may be difficult even for state colleges and universities, much less private institutions. So the short-term goals should at least include better integration into the informational process on campus, educational efforts, and improved emergency preparedness.³²⁹

321. The Act would amend 20 U.S.C. § 1092(f) (2006).

322. H.R. 5735.

323. These improvements would be a natural complement to the professional evolution of campus police departments in the past twenty years. *See* Peak, Barthe, & Garcia, *supra* note 127, at 255–56.

324. CALIFORNIA REPORT, *supra* note 178, at 9–10; FLORIDA REPORT, *supra* note 159, at ix; VIRGINIA TECH REPORT, *supra* note 1, at 19–20.

325. FLORIDA REPORT, *supra* note 159, at 10–11; IACLEA BLUEPRINT, *supra* note 67, at 6; NEW MEXICO REPORT, *supra* note 159, at 5.

326. FLORIDA REPORT, *supra* note 159, at 9; NAAG REPORT, *supra* note 158, at 8; PETTIT, *supra* note 308, at 4; WISCONSIN REPORT, *supra* note 5, at 68.

327. James A. Perrotti, *The Role of the Campus Police and Security Department in the 21st Century: An Essay Based on 30 Years of Experience*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 67, at 173, 187.

328. *E.g.*, FLORIDA REPORT, *supra* note 159, at ix; IACLEA BLUEPRINT, *supra* note 67, at 6; NEW MEXICO REPORT, *supra* note 159, at 5; WISCONSIN REPORT, *supra* note 5, at 66–68.

329. Bryan J. Reaves, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Campus*

VI. RECONSTITUTION

When the task force's work is over, the enculturation of the campus is just beginning. A constant mantra throughout the post-Virginia Tech literature is that, whatever procedures and protocols a higher education institution might adopt, those procedures and protocols must be marketed, advertised, posted, practiced and drilled within the campus community.³³⁰ There is no suggestion that campuses should become armed camps or fortresses, by any means. "There is often conflict between the need for security and maintaining an open environment. Freedom of thought and expression are cherished, and many institutions of higher education have minimal controls over campus access due to their commitment to an open environment."³³¹ Nonetheless, the student consumer expects safety and security when on campus and, when things go awry, is not likely to take responsibility.

College and university campuses are safer than the country at large.³³² In fact, students are more likely to be victimized off campus than on, especially when engaged in off-campus leisure activities.³³³ One should not, however, be sanguine about that comparison of these two disparate crime rates for a couple of reasons. First, campus crime tends to be underreported.³³⁴ Second, validity and reliability of the comparison itself are questionable: Can one really compare the environment of a college or university campus with the nation at large when it comes to crime statistics? Perhaps a more accurate analysis would be to compare the campus crime rate with the surrounding neighborhood.³³⁵ Indeed, perhaps

Law Enforcement, 2004–05, NCJ 219374, at 7–8, 16–17 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cle0405.pdf>.

330. *E.g.*, MISSOURI REPORT, *supra* note 159, at 9–10. Literature on public school safety after the tragedy at Columbine High School advises that a supportive school culture is crucial to implementing effective safety procedures. *E.g.*, Ethan Heinen, Jaci Webb-Dempsey, Lucas C. Moore, Craig S. McClellan, & Cari H. Friebel, *Implementing District Safety Standards at the Site Level*, 190 NASSP BULL. 207, 215–18 (2006).

331. Perrotti, *supra* note 327, at 173–74.

332. Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 80; D.O.E. 2001 REPORT TO CONGRESS, *supra* note 66, at 5, 7, 8. The D.O.E. statistics are somewhat misleading because the calculations of "on-campus" crimes were based on a narrower reporting paradigm than is currently employed, which now includes off-campus but related crimes since 1999. *Id.* at 10. After 1999, campus crime numbers were more than five times higher than the 2001 Report suggests. *Id.* at 11.

333. *See, e.g.*, Baum, *supra* note 67, at 5–6. *But see* Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 692–93. Some crimes are more likely to occur on campus than off campus, especially sexual and simple assaults. *Id.*

334. Siegel & Raymond, *supra* note 65, at 19; CARR, *supra* note 67, at 383.

335. A small study of Florida's state colleges and universities reveals that the crime rate on campuses, as reported on the state's Uniform Crime Reports for 1989 and 1990, was lower than the city and county wherein the respective schools were located. Max L. Bromley, *Campus and Community Crime Rate Comparisons: A Statewide Study*, 15

the location of the campus in that neighborhood increases the crime statistics.

In addition, students and their parents typically anticipate a much safer environment than the country at large. They likely anticipate, or at least hope, that the campus will be just as safe as their own neighborhoods. Indeed, higher education institutions intend to convey the notion that campuses are idyllic oases for students to learn and grow even if they are surrounded by fences and bad neighborhoods.³³⁶ What they do not expect is that the vast majority of campus perpetrators come from within. Consequently, crime on campus is a new and startling experience for students and their parents.

Unfortunately, students are “poor guardians of themselves and their property, despite the fact that many schools require freshmen and transfer students to participate in a general crime prevention awareness program or in a program devoted to a specific topic, such as rape awareness.”³³⁷ There may be any number of reasons for this phenomenon. One of those reasons may be the consumers’ expectation that the campus will be safe and that the responsibility for that safety rests on the college or university itself, with no concomitant commitment from the students. Another reason may well be the failure of maturity and risk-taking behavior in which students engage that provoke and even invite campus violence. A third reason may be a confluence of the two, a campus culture that encourages students to feel secure without actually making them responsible for doing so.³³⁸ Both the consumers and the institutions have been complicit in not acknowledging crime on campus.³³⁹ The post-Virginia Tech campus must

J. OF SECURITY ADMIN. 49, 54 (1992). And a large-scale study of 416 higher education institutions found no crime spill-over from surrounding communities or counties. Volkwein, Szelest, & Lizotte, *supra* note 66, at 666–67. Neither study, however, appeared to compare the crime rates of the immediately surrounding neighborhoods. Bromley, *supra* note 335, at 55–56.

336. Oren R. Griffen, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 432 (2006–07).

337. Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 680; Volkwein, Szelest, & Lizotte, *supra* note 66, at 649.

338. College and university students are being increasingly left to their own devices in matters of creating their own identities and making their own decisions with little adult intervention. As a consequence, peer influence plays a leading role in shaping their identities. Peer influence also plays a leading role in risk-taking and illegal behavior. Jean M. Low, David Williamson, & Jean Cottingham, *Predictors of University Student Lawbreaking Behaviors*, 45 J. OF COLL. STUDENT DEV. 535, 535 (2004).

339. “[T]o some extent administrators, parents, employees, and students simply [do] not want to acknowledge that problems exist[] in places that should perhaps be resistant to such social malaise.” Don Hummer, *Serious Criminality at U.S. Colleges and Universities: An Application of the Situational Perspective*, 15 CRIM. JUSTICE POL’Y REV. 391, 391 (2004). Another significant hindrance in understanding this problem is that the study of college crime is of relatively recent vintage. *E.g.*, Fisher,

alter that relationship by giving more than lip-service to occasional notices and explanations of campus violence and campus security, to both students and campus staff.

The trend toward greater information to the consumer students and parents was Congress's enactment of the Clery Act, which at the very least alerted the general public to the fact that there is crime on college campuses.³⁴⁰ The Clery Act—the Crime Awareness and Campus Security Act³⁴¹—is a 1990 amendment to the Higher Education Act of 1965 and requires colleges and universities to report annual statistics of crimes occurring on or near what is traditionally considered the “campus.”³⁴² The Act was named after Jeanne Clery, a nineteen-year-old Lehigh University student who was tortured, raped, sodomized and murdered by a fellow student who gained access to her dormitory room through propped-open doors.³⁴³ The Act was intended to increase student awareness of criminal activity on campus³⁴⁴ and thereby make the students safer.³⁴⁵ As a consequence, higher education institutions must annually report the number of incidents of murder, forcible and nonforcible sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, and arson that occur on or adjacent to their precincts.³⁴⁶ Unfortunately, the reported

Sloan, Cullen, & Lu, *supra* note 65, at 672; MAX L. BROMLEY, CAMPUS-RELATED MURDERS: A CONTENT ANALYSIS REVIEW OF NEWS ARTICLES 12 (2005), available at http://www.dcf.state.fl.us/campusSecurity/docs/Campus_Related_Murders050907.pdf.

340. Hummer, *supra* note 339, at 392.

341. 20 U.S.C. § 1092(f) (2006).

342. *E.g.*, KAPLIN & LEE, *supra* note 44, at 885; Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 61–62; Security on Campus, Inc., Clery Act Legislative History (1989–2000), http://www.securityoncampus.org/index.php?option=com_content&view=article&id=300:clery-act-legislative-history-1989-2000&catid=64:cleryact (last visited Feb. 28, 2009). Those locations are campus property (buildings and property owned and controlled by the university), non-campus property (buildings and property run by recognized student organizations and any other satellite buildings owned by the institution and used by students but not reasonably contiguous to campus), and public property (sidewalks, streets and parking facilities) adjacent to campus or other facility controlled by the institution. 20 U.S.C. § 1092(f)(6)(A). The Clery Act also acts as the all-campus warnings for ongoing crimes. *See, e.g.*, U.S. DEP'T OF EDUC., OFF. OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 13–17 (2005), available at <http://www.ed.gov/admins/lead/safety/handbook-part-1.pdf> [hereinafter D.O.E. HANDBOOK FOR CAMPUS CRIME]; *see also* Eric Hoover & Sara Lipka, *Colleges Weigh When to Alert Students of Danger*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Dec. 7, 2007, at A1.

343. Constance B. Clery, *Forward*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at ix; Howard Clery & Connie Clery, *What Jeanne Didn't Know*, http://www.securityoncampus.org/~securix0/index.php?option=com_content&view=article&id=52&Itemid=66 (last visited Feb. 28, 2009).

344. *E.g.*, Gregory & Janosik, *supra* note 127, at 7–8.

345. Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 71.

346. 20 U.S.C. § 1092(f)(1)(F)(i) (2006); *see* D.O.E. HANDBOOK FOR CAMPUS CRIME, *supra* note 342, at 23–48. Some states also require colleges and universities to report campus crime statistics. KAPLIN & LEE, *supra* note 44, at 887; Fisher, *supra*

numbers indicate that campus crime is on the increase, perhaps because the manner of gathering statistics has been erratic;³⁴⁷ perhaps because colleges and universities are not doing a very good job of distributing the statistics to their students;³⁴⁸ perhaps because few students are paying attention to the published statistics;³⁴⁹ or, more troubling, perhaps because schools are not fully disclosing their crime numbers.³⁵⁰

The Clery Act is just one of several avenues that higher education institutions need use to educate and train their students about campus violence. Without that education and training, the institution will have difficulty changing the culture that breeds 80% of the perpetrators. Being forthright about crime statistics may not necessarily be a good marketing tool for colleges and universities,³⁵¹ but all the more reason to make institutional efforts to lower the statistics so as to avoid the headline-grabbing catastrophic event or wave of campus crime.³⁵²

note 127, at 96–98.

347. Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 77–78.

348. *E.g.*, Gregory & Janosik, *supra* note 127, at 40–44, 46.

349. *Id.* at 46; Pamela Wilcox, Carol E. Jordan, & Adam J. Pritchard, *A Multidimensional Examination of Campus Safety: Victimization, Perceptions of Danger, Worry About Crime, and Precautionary Behavior Among College Women in the Post-Clery Era*, 53 *CRIME & DELINQ.* 219, 247 (2007).

350. *See, e.g.*, Letter from Mary E. Gust, U.S. Department of Education, to Dr. Donald Loppnow, Executive Vice President, Eastern Michigan University (Dec. 14, 2007) (on file at <http://blog.mlive.com/annarbornews/2007/12/DOE003.pdf>) (concerning Eastern Michigan's violations of the Clery Act, including efforts to conceal from the greater campus that a student was murdered and the failure to accurately report crime statistics). The U.S. Department of Education imposed a \$357,000 fine on Eastern Michigan University for its failure to report a violation of the Clery Act. Press Release, Security on Campus, Inc., Eastern Michigan University Faces Largest Ever Jeanne Clery Act Fine of \$357,000 (Dec. 18, 2007), (on file at <http://www.securityoncampus.org/update/121807.html>). Liability may attach to institutions that fail to adequately reveal crime statistics. For instance, a female student at California State University—San Diego was raped and murdered in her dorm room. Her mother's wrongful death lawsuit was allowed to proceed on several grounds, one of which was negligent misrepresentation because the university failed to warn her that there was an escalation in the number of rapes and attacks on female students, and the mother and daughter specifically relied on that misrepresentation to their detriment. *Duarte v. State*, 88 Cal. App. 3d 473 (1979); *see also* *Murrell v. Mount St. Clare Coll.*, No. 3:00-CV-90204, 2001 WL 1678766, at *6–7 (S.D. Iowa Sept. 10, 2001). Mount St. Clare College, sued in the latter case, was fined \$25,000 for failing to comply with the reporting requirements under the Clery Act. *KAPLIN & LEE, supra* note 44, at 887.

351. *See, e.g.*, Volkwein, Szelest, & Lizotte, *supra* note 66, at 648.

352. *See, e.g.*, Shaila Dewan, *Drumbeat of Shots, Broken by Pauses to Reload*, N.Y. TIMES, APRIL 17, 2007, at A1; Gregory, *supra* note 11; Tony Perry, *How the Police Busted a College Drug Scene: Young Cops Blended into Fraternity Houses at San Diego State and Netted 75 Students*, L.A. TIMES, May 7, 2008, at 1; Peter Schworm, *Violence Rattles UMass Campus: Spate of Attacks, Rowdiness, Criminal Acts in Amherst Raises Concerns*, BOSTON GLOBE, Feb. 21, 2008, at 1A; *Duquesne U. Shooting Victims Claim NBA Dreams Dashed in Lawsuit*, THEPITTSBURGHCHANNEL.COM, June 23, 2008,

Just as the Clery Act requires the publication of crime statistics, the campus violence work force must work to “market” its safety aspects. Because the Clery Act will likely be amended with the passage of the Virginia Tech Victims Act, disclosure of emergency preparedness precautions and procedures is a foregone conclusion. But these are just two aspects of the publication that should occur on campus to instill a culture of both awareness and responsibility. The campus community also must be annually reminded of the student discipline code and its attendant procedures; of the campus facilities for mental health; of the operations of the threat assessment team and its information-gathering role, perhaps including student anonymity; and of any campus-wide initiatives designed to decrease campus violence, such as sexual assaults, alcohol, drugs and weapons.³⁵³ Appropriate training protocols should be implemented for the campus community, especially for the faculty and staff.³⁵⁴ And this should include all the affiliated schools, like law schools and medical colleges. The goal is not to make the campus culture paranoid à la post-9/11 but to create educated risk managers and thereby good consumers.

VII. AND WHEN I DIE, AND WHEN I’M DEAD, DEAD AND GONE, THERE’LL
BE ONE CHILD BORN³⁵⁵

One of lawyers’ chief skills is warning of risks and trying to get the client to engage in behavior that will avoid risk. For this reason, a lawyer is critical to the process of auditing, changing and implementing procedures to address campus violence. She must be a part of policymaking, inserting herself as one with the academic vision and not on a solo mission. On the other hand, the lawyer engaged before the fact or who tries to take charge is likely to make the academic community suspicious, definitely uncooperative and perhaps thoroughly disengaged. When the lawyer is engaged after the fact, it is too late: the academic community has become too entrenched in its educational mission and views any changes the lawyer makes with resentment. Neither of these scenarios is likely to encourage an enculturation to eliminate campus violence if the adult portion of the campus community has disconnected. Indeed, the lawyer cannot enculturate without the assistance of the academic community who has to buy into the program. Perhaps more important, however, is that the academic community can put the brakes on legal efforts to saturate higher

<http://www.thepittsburghchannel.com/education/16676524/detail.html?rss=pit&psp=news> (last visited Jan. 28, 2009).

353. IACLEA BLUEPRINT, *supra* note 67, at 7.

354. For example, the rise of binge-drinking on campus may be directly related to the absence of significant interaction between students and campus adults. Siegel & Raymond, *supra* note 65, at 24.

355. Laura Nyro, *And When I Die*, as recorded by Blood Sweat & Tears, on BLOOD SWEAT & TEARS (Columbia Records 1968).

education in a culture of risk management.³⁵⁶ Academics will have a better sense of how to get the community to embrace a culture opposed to violence than will lawyers. Academics prefer carrots while lawyers seem to prefer sticks.

Ultimately, however, the progeny of a project to review and change campus policies must be embraced by the students to be effective. The fall of *in loco parentis* was surely painful for campus administrations, given the unlawful student behavior during the Vietnam years. It is ironic then that what campus violence in the 1960s and 1970s wrought in the manner of open campus governance may be shrunk because the current student population does not seem to know what to do with those freedoms. Further irony is that the academics who remember that campus violence of the 1960s and 1970s are likely those most vociferously opposed to a campus culture saturated with security measures and informers. The lawyer participating on a campus violence work force must have a deft hand in the reconstitution of the audited campus policies so as to create a viable and vibrant campus culture that reflects the institutional vitality necessary to achieve its educational goals.

356.

There is . . . a real danger in the risk-management programs of further insulating student life from the influences and provocations of the community in the name of sheltering tender subjectivities. These tendencies may form a particularly insidious link with the victimologies promulgated as one aspect of contemporary ethnic politics on campus. One feature that many risk-management techniques have in common is that of channeling people into homogeneous "risk groups." Limiting risk is often taken to mean limiting the mix of different people.

Simon, *supra* note 41, at 37.

THE MISAPPLICATION OF PEER HARASSMENT LAW ON COLLEGE AND UNIVERSITY CAMPUSES AND THE LOSS OF STUDENT SPEECH RIGHTS

AZHAR MAJEED*

INTRODUCTION

A significant problem has presented itself on campuses across the nation: some colleges and universities have misapplied hostile environment sexual and racial harassment law to suppress and punish much constitutionally protected speech. Despite clear holdings in the case law counseling against this practice, those colleges and universities have applied “overbroad harassment rationales” against student expression simply because it is deemed to be offensive, disagreeable, or critical of another person or group, even though such speech falls well short of the legal standards for sexual and racial harassment. The Third Circuit’s recent ruling in *DeJohn v. Temple University*,¹ in which it struck down the University’s sexual harassment policy as facially overbroad, is the latest decision to recognize the problem. *DeJohn* is only the most recent in a line of cases, spanning the past two decades, which have uniformly struck down college and university harassment policies.² As a strongly worded federal circuit court decision, *DeJohn* should send an unequivocal message to institution administrators, one which is much-needed in light of the misuse and abuse of harassment law that has long been a problem in the college and university setting.

The problem has historically manifested itself in two ways. First, some colleges and universities have enforced their sexual and racial harassment policies against students engaging in protected speech and other innocuous conduct. One university, for instance, found a student guilty of sexual harassment for posting satirical flyers in which he joked about freshman female students gaining weight.³ Another university found a student-employee guilty of racial harassment merely for reading a scholarly book in the presence of co-workers.⁴ Second, some colleges and universities have

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1. 537 F.3d 301 (3d Cir. 2008).
2. See discussion *infra* Part III.C.
3. See *infra* notes 28–30 and accompanying text.
4. See *infra* notes 17–19 and accompanying text.

drafted and maintained harassment policies which by their very terms are constitutionally vague, overbroad, or both. For example, the sexual harassment policy at one university prohibits “comments or inquiries about dating,” “patronizing remarks,” “innuendos,” and “dismissive comments.”⁵ Another university defines sexual harassment to include anything that “occurs when somebody says or does something sexually related that you don’t want them to say or do, regardless of who it is.”⁶ In its racial harassment policy, still another institution prohibits its students from “making disparaging remarks that insult or stigmatize a student’s cultural background or race.”⁷

By targeting and punishing students for engaging in constitutionally protected speech,⁸ these institutions are ignoring the importance on a college or university campus of allowing for robust speech rights, rigorous debate and discussion, and the unfettered exchange of ideas. The Supreme Court and lower federal courts have traditionally and consistently upheld the ideal of the college or university as a true “marketplace of ideas,”⁹ a

5. Davidson College, Student Handbook: Definition of Harassment, <http://www3.davidson.edu/cms/x8905.xml> (last visited Mar. 3, 2009).

6. The University of Iowa, What is Sexual Harassment?, <http://www.sexualharassment.uiowa.edu/index.php> (last visited Mar. 4, 2006).

7. Westfield State College, Student Handbook: Equal Opportunity, http://www.wsc.ma.edu/Current%5FStudents/Student_Handbook/Equal_Opportunity/index.html (last visited Mar. 3, 2009).

8. Students at public colleges and universities, which are legally bound by the Constitution as state institutions, enjoy the full protection of the First Amendment. *See, e.g., Healy v. James*, 408 U.S. 169, 180 (1972).

[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.

Id. Private institutions are not bound by the First Amendment, since they are not governmental entities. However, they typically promise their students extensive speech rights in school materials such as student handbooks, recruiting brochures, and codes of conduct. Courts have held in several cases that private institutions must live up to these types of promises, based on a “contract theory.” *See Schaer v. Brandeis Univ.*, 735 N.E.2d 373 (Mass. 2000); *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302 (N.Y. 1980); *McConnell v. Le Moyne College*, 808 N.Y.S.2d 860 (App. Div. 2006); *see also Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (“It is held generally in the United States that the ‘basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.” (quoting *Zumbrun v. Univ. of S. Cal.*, 25 Cal.App.3d 1, 10 (1972))).

9. *See, e.g., Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *Healy*, 408 U.S. at 180 (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of

place where free speech rights are accorded heightened protection in order to promote academic freedom and the search for truth and knowledge. Given these realities, it makes little sense for college and university administrators to misapply harassment law so egregiously. Whether such misapplication is intentional and stems from a desire to remove certain expression from campus, or rather is the result of misunderstanding the law, the end result is that some administrators are interfering with students' speech rights. This impedes the proper functioning of the college or university campus as a true battleground for ideas and place for academic debate.

Colleges and universities misapplying harassment law have sometimes justified their actions as being required under federal law, specifically Title IX¹⁰ and Title VI.¹¹ However, these statutes have a narrow focus: discriminatory conduct on the basis of gender and race, color, or national origin, respectively. The case law under both statutes has made it clear that an alleged hostile environment must be based on extreme patterns of harassing conduct rather than pure verbal expression. Properly understood, hostile environment law under Title IX and Title VI has a limited scope and should not be interpreted to encompass various protected expressions.

In overstepping their obligations under these statutes, schools are acting contrary to the stated policy of the Department of Education's Office for Civil Rights (OCR), the federal agency charged with enforcing Title IX and Title VI in the educational context. They are also acting contrary to the strong legal precedent set by courts uniformly striking down constitutionally infirm college and university harassment policies and invalidating institutions' overbroad applications of their policies.

A major contributing factor to the misapplication of harassment law in higher education has been conflation of the law under Title VII,¹² which governs harassment in employment, with Title IX and Title VI law. In a number of cases, courts have imported Title VII hostile environment principles into the college and university setting, even though the harassment standard for the workplace is legally distinct from the standard for harassment in education.¹³ Most often, courts have applied the Title VII standards for employer liability to the issue of institutional liability under Title IX or Title VI for student-on-student (or peer) harassment. Some colleges and universities have interpreted these decisions as, firstly, signaling and endorsing a parallel in the law under the respective statutes and, secondly, imposing a broader scheme of institutional liability for peer harassment. These schools have therefore decided to draft and enforce

American schools.”).

10. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006).

11. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000).

12. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

13. See discussion *infra* Part IV.A.1.

their harassment policies in a manner which tracks Title VII hostile environment standards for the workplace. This practice ignores the fundamental differences between the workplace and the campus setting as well as the unique issues raised by peer harassment.

Despite the many problems caused by the misapplication of racial and sexual harassment law on some college and university campuses, there is little existing legal scholarship on the subject. This is somewhat surprising given the amount of coverage, both in legal scholarship and in mainstream media, on general free speech issues in higher education¹⁴ and on the impact of harassment law in employment.¹⁵ This article seeks to fill the gap in the legal scholarship by analyzing the restriction of speech and doctrinal difficulties created by the misapplication of peer harassment law in the college and university setting, the root causes of this misapplication, and the most logical methods for correcting the problem.

This article will focus on peer harassment in higher education. The doctrinal analysis and prescriptions I offer are directed solely toward the subject of peer harassment, as the issues raised by professor-on-student or employee-on-student harassment require a separate analysis. Peer harassment, and the ways in which colleges and universities have addressed it, presents a unique legal issue, one which must be analyzed on its own. The right of students to speak freely on campus is a paramount concern,

14. See, e.g., ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* (1998); ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* (1997); Michael O. Finnigan, Jr., *Extra! Extra! Read All About It! Censorship at State Universities: Hosty v. Carter*, 74 U. CIN. L. REV. 1477 (2006); Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173 (2003); Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159 (2006); Suzanne Fields, *Trumping Moses and Matthew: Silencing Free Speech Is What the Campus Is All About*, WASH. TIMES, Nov. 7, 2005, at A21; Mary Beth Marklein, *On Campus: Free Speech for You But Not for Me?*, USA TODAY, Nov. 3, 2003, at 1A.

15. See, e.g., BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* (2007); DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* (2003); Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733 (2002); Tara Kaesebier, Comment, *Employer Liability in Supervisor Sexual Harassment Cases: The Supreme Court Finally Speaks*, 31 ARIZ. ST. L.J. 203 (1999); Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637 (1995); Stanford Edward Purser, Note, *Young v. Bayer Corp.: When is Notice of Sexual Harassment to an Employee Notice to the Employer?*, 1998 BYU L. REV. 909 (1998); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87 (1995); Jeffrey Rosen, *Court Watch: Reasonable Women*, NEW REPUBLIC, Nov. 1, 1993, at 12 (arguing "the most serious threat to the First Amendment of the past decade [is] the notion that words that create an intimidating, hostile or offensive working environment, without inflicting more tangible harms, can be punished as harassment.") (internal quotations omitted).

and the impact of peer harassment law upon the exercise of this right is a compelling matter and deserving of close attention and scrutiny.

Part I of this article provides some examples of the misapplication of peer harassment law on campus, both in the drafting and enforcement of college and university harassment policies, and discusses the ways in which such measures restrict student speech rights. Part II sets forth the legal framework for peer harassment under Title IX and Title VI, the statutes from which colleges and universities draw their obligations to prevent sexual and racial harassment, respectively. Part III then analyzes the tendency on the part of many schools, in addressing the problem of peer harassment, to overstep their Title IX and Title VI requirements. As detailed in Part III, schools far too often ignore the crucial distinction between actionable harassing conduct and pure speech, act contrary to stated OCR policy, and ignore strong legal precedent regarding the misuse and misapplication of harassment law in the college and university setting.

Part IV of the article argues that a major contributing factor to the misapplication of peer harassment law has been the conflation of Title VII law with Title IX and Title VI law. In Part V, I argue that, in following Title VII standards, colleges and universities fail to consider the fundamental differences between the workplace and the college or university campus, as well as the unique characteristics of peer harassment. These considerations counsel strongly against importing Title VII law into the realm of higher education.

Finally, Part VI proposes some potential solutions to the problems discussed in the article. The most important of these solutions is to amend Title IX and Title VI to abolish institutional liability for peer harassment. This solution would eliminate a college or university's primary justification for censoring and punishing much protected expression and would therefore advance campus speech rights considerably.

If eliminating institutional liability is not achievable, the best available alternate measure is to adopt the hostile environment standard formulated by the Supreme Court in its seminal decision in *Davis v. Monroe County Board of Education*¹⁶ as the controlling standard for peer racial and sexual harassment. The *Davis* standard is more stringent than other existing standards in its requirements for the creation of a hostile educational environment. It would, therefore, provide the highest possible level of protection for student speech under any system wherein institutions remain liable for peer harassment.

The third and final proposed solution is for the courts to deny qualified immunity to college and university administrators in all cases where a student at a public college or university brings suit for the deprivation of

16. 526 U.S. 629 (1999). See *infra* Part II.A.2 for a discussion of the *Davis* standard for creation of a hostile educational environment.

First Amendment rights. In taking this measure, the courts would make it much less likely that administrators continue to apply overbroad harassment rationales in contravention of free speech principles, because the threat of being held personally liable to a student for monetary damages would provide administrators with the necessary incentives to respect and uphold students' speech rights. This respect would help to ensure that the considerable impact of peer harassment law on student speech rights is ultimately reversed.

I. ESTABLISHING THE PROBLEM: THE MISAPPLICATION OF HARASSMENT LAW ON COLLEGE AND UNIVERSITY CAMPUSES

Some colleges and universities have misapplied racial and sexual harassment law, improperly targeting constitutionally protected speech as being offensive or disagreeable. This misapplication manifests in two ways. First, colleges and universities have sometimes charged students and faculty with harassment for engaging in clearly protected speech. A related, but distinct problem is that some college and university harassment policies, by their very terms, are constitutionally overbroad, vague, or both. Consequently, overbroad harassment rationales have undercut campus speech rights in several ways, making it difficult for the college and university campus to serve its vital role as a true marketplace of ideas.

A. Colleges and Universities Have Applied Harassment Rationales Against Protected Speech.

Some colleges and universities have charged students and faculty with sexual harassment, racial harassment, or simply harassment for engaging in protected speech, as demonstrated by some noteworthy cases. As an initial matter, I wish to clarify that while this article focuses on college and university policy toward student-on-student harassment, and the many problems associated therein, I have included here some examples of cases where allegations were raised against professors. Even though these cases do not fall within the doctrinal discussion and prescriptions of this article, they are presented here to illustrate the extent to which colleges and universities have misunderstood and misapplied racial and sexual harassment law.

One illustrative case took place at Indiana University—Purdue University Indianapolis (IUPUI) in 2007. Keith John Sampson, a student-employee, was charged with racial harassment merely for reading a book entitled *Notre Dame Vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan* during his work breaks.¹⁷ A co-worker filed a complaint

17. The book in question is a historical account which chronicles a street fight in 1924 between University of Notre Dame students and members of the Ku Klux Klan in South Bend, as well as the Klan's subsequent decline in influence in the state of

alleging that the book was offensive and antagonistic because of its subject matter and front cover featuring pictures of robed Klansmen and burning crosses.¹⁸ The University found Sampson guilty of racial harassment, reasoning that he “demonstrated disdain and insensitivity” toward his co-workers by openly reading a book with an “inflammatory and offensive topic.”¹⁹ In reaching this conclusion, IUPUI failed to consider the completely innocuous nature of Sampson’s behavior and instead capitulated to an unreasonable claim of offense.

Brandeis University presents another recent example of the misapplication of harassment law. In 2007, Professor Donald Hindley faced a complaint from at least one student in his class for explaining that the term “wetbacks” is commonly used as a derogatory reference to Mexican migrants.²⁰ Hindley’s discussion of the term was germane to his Latin American Politics class and did not advocate the use of the term or any other racist behavior. Nevertheless, Brandeis found Hindley guilty of racial harassment, threatened him with termination, and placed a monitor in his classes to observe him.²¹ Hindley was told by the University that it “will not tolerate inappropriate, racial and discriminatory conduct by members of its faculty.”²² Similarly to what took place at IUPUI, Brandeis found it sufficient that an individual took offense at the mere discussion of a disfavored topic and failed to consider the context in which the topic was discussed.

George Fletcher, a criminal law professor at Columbia Law School, became embroiled in a sexual harassment controversy in 1999.²³ On an exam, Fletcher presented a hypothetical case, based in part on real cases, in which a woman who had been seeking an abortion was physically assaulted by an assailant, resulting in the death of her fetus, and was thankful to the attacker for conferring this “benefit” on her.²⁴ Several students complained to the dean of the law school that this exam question created a hostile

Indiana. See Azhar Majeed, *Book-reading IUPUI Worker Deserved Better*, INDIANAPOLIS STAR, Mar. 25, 2008, at 7; Dorothy Rabinowitz, *American Politics Aren't 'Post-Racial,'* WALL ST. J., July 7, 2008, at A13.

18. Majeed, *supra* note 17.

19. Letter from Lillian Charleston to Keith John Sampson (Nov. 25, 2007), available at <http://www.thefire.org/pdfs/4b26b68ef98eb6b6de987138657f0467.pdf>.

20. Press Release, Foundation for Individual Rights in Education (FIRE), Brandeis University Tramples Free Speech and Academic Freedom: Professor Found Guilty of ‘Harassment’ and Subjected to Classroom Monitoring for Protected Speech (Jan. 23, 2008), available at <http://www.thefire.org/index.php/article/8854.html>.

21. *Id.*

22. Letter from Marty Krauss to Donald Hindley (Oct. 30, 2007), available at <http://www.thefire.org/pdfs/4bb7801320fb0fbecb4734c2cf1e4a09.pdf>.

23. Letter from The Foundation for Individual Rights in Education (FIRE) to Dean David Leebron (Sept. 6, 2000), available at <http://www.thefire.org/index.php/article/4957.html>.

24. *Id.*

environment for women. The dean subsequently informed Fletcher that the University's General Counsel found a "plausible" hostile environment claim.²⁵ Additionally, a faculty committee denied Fletcher's proposal to teach an LL.M. course for which he was certainly qualified.²⁶ In the end, Columbia relented, affirming that the exam question did not constitute sexual harassment and would have no impact on Fletcher's career.²⁷ Nevertheless, the case serves as an example of how a college or university's overzealous approach to addressing hostile environment issues can threaten academic freedom.

Lastly, Tim Garneau, a student at the University of New Hampshire, was evicted from his dormitory in 2004 for posting satirical flyers in which he joked that freshman women could lose weight by using the stairs in their residence hall rather than the elevators.²⁸ The University found Garneau guilty of several offenses, including sexual harassment, and, in addition to evicting him from his dormitory, subjected him to disciplinary probation and mandatory meetings with a counselor.²⁹ Eventually, the University yielded to public pressure and reversed the harassment finding.³⁰ However, Garneau's case remains proof that overbroad harassment rationales can be abused to reach and punish clearly protected speech.

B. College and University Harassment Policies Have Encompassed Protected Speech.

In addition to the fact that some colleges and universities have enforced their harassment policies to punish protected expression, campus speakers face another impediment: college and university policies on hostile environment sometimes encompass constitutionally protected speech by their very terms. Here the problem lies not with the way in which an institution applies its policy, but with how a policy initially defines sexual or racial harassment.

School policies are sometimes phrased in terms that are unconstitutionally vague, overbroad, or both. A statute or regulation is unconstitutionally vague when "men of common intelligence must

25. *Id.*

26. *Id.*

27. The Foundation for Individual Rights in Education (FIRE), Academic Freedom Vindicated, <http://www.thefire.org/index.php/article/110.html> (last visited Mar. 4, 2009).

28. Press Release, Foundation for Individual Rights in Education (FIRE), University of New Hampshire Evicts Student for Posting Flier (Oct. 28, 2004), available at <http://www.thefire.org/index.php/article/5005.html>.

29. *Id.*

30. Press Release, Foundation for Individual Rights in Education (FIRE), Victory at University of New Hampshire (Nov. 12, 2004), available at <http://www.thefire.org/index.php/article/5044.html>.

necessarily guess at its meaning.”³¹ In order to escape the vagueness doctrine, a statute or regulation must “give adequate warning of what activities it proscribes” and “set out ‘explicit standards’ for those who must apply it.”³² A statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.”³³

To cite one example of an infirm sexual harassment policy, Davidson College bans its students from making “[c]omments or inquiries about dating,” “[p]atronizing remarks,” “[i]nnuendos,” and “dismissive comments.”³⁴ Kansas State University prohibits “generalized sexist statements and behavior that convey insulting or degrading attitudes about women.”³⁵ The University of Iowa defines sexual harassment to include anything that “occurs when somebody says or does something sexually related that you don’t want them to say or do, regardless of who it is.”³⁶ Murray State University defines sexual harassment to include “[c]alling a person a doll, babe, or honey” and “[m]aking sexual innuendoes.”³⁷

College and university policies on racial harassment can be just as problematic. The University of North Carolina at Charlotte, for example, defines racial harassment to include behavior that “stigmatizes or victimizes an individual on the basis of race, ethnicity, or ancestry.”³⁸ Similarly, Westfield State College prohibits its students from “making

31. *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

32. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); see *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (holding that “a more stringent vagueness test” should apply to laws that interfere with the right of free speech).

33. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989); see also *Broadrick*, 413 U.S. at 611–12 (“[S]tatutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 871–72 (N.D. Tex. 2004) (citing *Broadrick*, 413 U.S. at 612) (noting that like the vagueness doctrine, “[t]he doctrine of overbreadth, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved.”).

34. Davidson College, *supra* note 5.

35. Kansas State University, Types of Sexual Harassment Covered by the Policy, http://www.k-state.edu/dh/sex_harass/types.html (last visited Mar. 4, 2008).

36. The University of Iowa, *supra* note 6.

37. Murray State University, Stop Sexual Harassment, <https://www.murraystate.edu/womenscenter/MSUWomensCenterSexualHarassment.htm> (last visited March 27, 2009).

38. University of North Carolina at Charlotte, Full-time Faculty Handbook 4, <http://www.thefire.org/pdfs/ca130fceb3dd7d6619e0f32153b285b.pdf> (last visited Mar. 4, 2008).

disparaging remarks that insult or stigmatize a student's cultural background or race."³⁹

In using amorphous terms such as "stigmatize," "patronizing," and "degrading," these harassment policies leave themselves open to a wide range of interpretation, giving students and faculty no notice of what is actually prohibited and leaving them guessing as to how they should curb their speech. This lack of notice presents a fundamental vagueness problem. Furthermore, in defining harassment to include speech which, for example, merely "insult[s]" another, is "dismissive," or involves "something sexually related," many policies bring within their sweep various protected, and indeed innocuous, expressions. These policies face an overbreadth problem.

Lastly, some institutions conflate sexual and racial harassment by addressing them within the same policy and defining them in vague or overbroad terms. Le Moyne College, for instance, bans "[s]tigmatizing or disparaging statements related to race, gender, ethnicity," and several other personal characteristics.⁴⁰ In a separate policy, Le Moyne addresses "[h]arassment and hate crimes/incidents" based on a person's gender, race, color, and other listed traits, and defines them to include "remarks, language or illustrations that deprecate or offend" another on the basis of his or her immutable characteristics.⁴¹ Another school, Saginaw Valley State University, maintains a policy on "Discrimination, Sexual Harassment and Racial Harassment" which bans "taunting or verbal abuse" and "degrading comments or jokes" relating to an individual's "race, religion, sex," and several other listed traits.⁴²

In addition to encountering the same issues of vagueness and overbreadth discussed above, these policies improperly conflate two distinct areas of the law. Colleges and universities taking this approach fail to consider the differences between sexual and racial harassment and how these differences impact the ways in which the respective problems should be addressed. Instead, they are telling their students and faculty that any expression which another person perceives to be offensive, stigmatizing, or otherwise undesirable will be treated as harassment of some kind. This represents a fundamental misapplication of harassment law.

C. The Consequences of the Misapplication of Harassment Law for

39. Westfield State College, *supra* note 7.

40. Le Moyne College, Student Handbook 2008–2009 53, http://www.lemoyne.edu/Portals/11/pdf_content/SH08-web.pdf (last visited Mar. 4, 2009).

41. Le Moyne College, *supra* note 40, at 45.

42. Saginaw Valley State University, 2007–08 Student Handbook 19, http://www.svsu.edu/emplibrary/07-08%20_Student_Handbook_B.pdf (last visited Mar. 4, 2009).

Campus Speech

I shall now examine the most visible consequences of harassment regulation for the free speech rights of students and faculty. It is important to reiterate, when discussing these consequences, that college and university campuses have long served as an important battleground for the debate and exploration of diverse views and ideas, and that the Supreme Court and lower federal courts have strongly recognized the need to uphold and protect speech rights on campus.⁴³

To begin with, when college and universities take an expansive approach toward hostile environment issues, they create a chilling effect on campus speech, curtailing much campus debate and discussion. Second, harassment law, as applied on the college or university campus, far too often restricts and punishes important types of speech such as political debate and social commentary. Third, such expansive approaches contribute to a sense among students that there is a general “right not to be offended,” a concept which is especially out of place on a college or university campus. Fourth, the enactment of vaguely-worded and open-ended harassment policies empowers administrators to engage in content-based and viewpoint-based restrictions on speech. Fifth, some schools address sexual harassment in the same policy or set of policies as sexual assault and rape, creating a misconception on campus that pure verbal expression can have consequences of the same magnitude as the more serious problems of sexual assault and rape.

1. The Chilling Effect on Speech

The first consequence of the misapplication of harassment law is that the enactment of infirm harassment policies and the frequent application of school policies against protected speech place speakers on notice that they must be very careful in what they do or say. As previously discussed, college and university policies on sexual and racial harassment are often vague, overbroad, or both.⁴⁴ Even when these policies are not actually applied to suppress protected speech, their mere existence creates a chilling effect on speech, because one cannot be sure whether the speech that one wishes to engage in might fall within the institution’s harassment policy. Of course, sexual and racial harassment policies, regardless of the terms in which they are drafted, *are* oftentimes applied against protected speech,⁴⁵ which again leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment.

The chilling effect problem has been widely recognized in the legal scholarship on harassment law. As Eugene Volokh has commented, “The

43. See cases cited *supra* note 9.

44. See discussion *supra* Part I.B.

45. See discussion *supra* Part I.A.

law's 'uncertain meaning' requires people 'to "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked," leading "[t]hose . . . sensitive to the perils posed by . . . indefinite language [to] avoid the risk only by restricting their conduct to that which is unquestionably safe."⁴⁶ Another commentator, Kingsley Browne, sees very much the same problem, in that "the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden."⁴⁷

The unfortunate result, then, is that students have a strong incentive to refrain from saying anything provocative, inflammatory, or bold and to instead cautiously stick to that which is mundane or conventional. This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas. In light of the importance on a college or university campus of allowing for the free exchange of ideas, the chilling effect on speech makes it impossible for a college or university to serve one of its central functions, thereby depriving its students of the type of free and open learning environment that they have been promised and denying them the full benefits to which they are entitled from their college or university experience.

2. Suppression of Important Types of Speech

The misapplication of harassment law has had a second major consequence for campus speech—the restriction of highly important types of expression, such as social and political debate and commentary. This is the sort of speech that usually receives "maximum protection" under the First Amendment.⁴⁸ However, college and university harassment policies, while drafted in the name of addressing only harassing conduct, are often written and applied in an overbroad manner such that they reach clearly protected speech, including social and political speech at the core of the First Amendment.⁴⁹

46. Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 568–69 (1995) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

47. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 483 (1991).

48. Volokh, *supra* note 46, at 563–64; *see, e.g., Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

49. *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (holding that Temple University's sexual harassment policy "provides no shelter for core protected speech"). The court deemed the policy to be sufficiently broad and subjective that it

In drafting and applying their harassment policies, colleges and universities frequently target protected speech merely because the expression in question is alleged to be sexist, prejudicial, or demeaning. The aforementioned policies at Kansas State University⁵⁰ and the University of North Carolina at Charlotte⁵¹ are perfect illustrations. This approach ignores the fact that even explicitly sexist or racist speech is entitled to protection,⁵² and all the more so where it espouses views on important issues of social policy.⁵³ Few people would disagree, for example, that the subjects of relations between the sexes, women's rights, and the pursuit of economic and social equality are all important matters of public concern and debate. Therefore, speech relating to such topics, regardless of whether it takes a favorable or negative view of women, is highly germane to the debate of public matters and social policy. In the marketplace of ideas, these expressions should not be suppressed merely to avoid offense or discomfort.

Moreover, as one commentator has argued, if statements such as "blacks are entitled to the same respect as whites" and "women have as much right to participate in the economic life of our country as men" are accorded full constitutional protection, then for purposes of public debate and discussion, the converse of those statements must be recognized as having the same value because of the government's fundamental obligation of neutrality.⁵⁴ In other words, "[t]hat we as a society no longer accept the truth of the statements arguing for inequality does not make them any less worthy of protection."⁵⁵ To hold otherwise would be to deny constitutional protection to certain viewpoints (and only those viewpoints) regarding gender and race issues, creating a fundamental First Amendment problem.

"could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone,'" and that, significantly, "[t]his could include 'core' political and religious speech, such as gender politics and sexual morality." *Id.* (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001)).

50. See Kansas State University, *supra* note 35 and accompanying text.

51. See University of North Carolina at Charlotte, *supra* note 38 and accompanying text.

52. See, e.g., *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). In *Hudnut*, the Seventh Circuit invalidated a statute prohibiting pornography, defined as "the graphic sexually explicit subordination of women, whether in pictures or in words." *Id.* at 324 (citation omitted). Rather than following the established legal standard for obscenity, the statute banned any and all speech depicting women in the disapproved manner. *Id.* at 324–25. This constituted discrimination on the basis of speech content, rendering the statute invalid under the First Amendment. *Id.* at 332–34.

53. Browne, *supra* note 47, at 540.

54. *Id.*; see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

55. Browne, *supra* note 47, at 540.

And since the speech implicated in sexual and racial harassment cases is typically far tamer than the examples alluded to here,⁵⁶ this argument underscores the need to restore vigorous First Amendment protection for social and political commentary.

Furthermore, one of the benefits of providing breathing room for such expression is that it allows the speaker to espouse his or her views through constructive dialogue rather than act out of frustration by committing acts of violence or hate crimes. This outlet has been labeled the “safety valve” function of speech.⁵⁷ Given that sexist and racist expression can often arise from the speaker’s feelings of resentment towards anti-discrimination policies, affirmative action policies, and other policies, such resentment is only exacerbated by attempting to insulate certain groups on campus from offense and requiring everyone on campus to restrict their speech accordingly. Thus, by taking aim at the slightest offense, college and university administrations could be acting against their own interests by creating an environment which leads to incidents that are more damaging than offensive speech could ever be.

Conversely, giving students the freedom to engage in all kinds of social and political commentary, even where it is offensive and misguided, allows the “marketplace of ideas” to serve its vital role. On the one hand, there is no reason to believe that regulation of offensive expression is an effective means of eliminating prejudice. Intuitively, it stands to reason that someone who deeply and firmly holds a particular belief will not let it go simply because he or she is not free to express it in certain settings. On the other hand, the expression of prejudicial viewpoints often has a positive impact on the listener’s social views, because “hearing such statements in their baldest form may have the effect of demonstrating the poverty of the beliefs expressed.”⁵⁸ By exposing the real ugliness of prejudice, ignorance and hate, such speech can reach and convince people in ways that polite conversation never could.⁵⁹ Moreover, ignorant or misguided speech, though seemingly possessing little value or merit on its own, often has the “downstream” effect of leading to constructive discussion and debate which would not have taken place otherwise. Consequently, the initial expression greatly benefits the marketplace of ideas and enriches students’ understanding of important issues by increasing the potential for real and meaningful debate on campus.

56. See *supra* Part I.A.

57. Browne, *supra* note 47, at 541.

58. *Id.* at 542.

59. See Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 710 (1995) (“[S]peeches arguing that women should be second-class citizens might persuade some who hear them or hear about them, but they may well galvanize greater numbers to oppose those views, and to work against them.”).

3. The Right Not to Be Offended?

The third major consequence of the misapplication of harassment law is that it has contributed to a sense among students that there is a general “‘right’ not to be offended”⁶⁰—a false notion that ill serves students as they transition from the relatively insulated college or university setting to the larger society. Colleges and universities too often address the problems of sexual and racial harassment by targeting any expression which may be perceived by another as offensive or undesirable. This can be seen in the enactment of university policies broadly aimed at protecting students from offense. Texas A&M University, for example, mandates that “respect for personal feelings” and “freedom from indignity of any type” are rights belonging to all students.⁶¹ In a similar type of policy, Jacksonville State University states, “No student shall threaten, abuse, or degrade anyone on University owned or operated property.”⁶² Johns Hopkins University simply bans “[r]ude, disrespectful behavior.”⁶³ In taking this type of approach, administrators “increasingly coddle and even reward the hypersensitive and easily outraged, perversely encouraging more people to be hypersensitive and easily outraged.”⁶⁴

This is especially troubling in that a modern liberal arts education requires exposure to, and tolerance of, a wide range of ideas and interactions, some of which may be disagreeable or offensive. Contrary to this ideal, students are being told that they have far-reaching rights which override others’ freedom of expression, and that it is okay to be easily offended. This creates the danger that, as time goes on, students will become even more hypersensitive and will feel entitled to be insulated from the slightest offense. Put succinctly, “to the extent the legal system gives people a remedy for offense, they are more likely to feel offended.”⁶⁵ This can be for one of two reasons, or in many cases both.

60. KORS & SILVERGATE, *supra* note 14, at 99. In *The Shadow University*, the authors write, “At almost every college and university, students deemed members of ‘historically oppressed groups’ . . . are informed during orientations that their campuses are teeming with illegal or intolerable violations of their ‘right’ not to be offended.” *Id.* They add, “What an astonishing expectation (and power) to give to students: the belief that, if they belong to a protected category, they have a right to four years of never being offended.” *Id.*

61. Texas A&M University, Student Rights and Obligations 1, <http://www.tamus.edu/offices/policy/policies/pdf/13-02.pdf> (last visited Mar. 5, 2009).

62. Jacksonville State University, University Policies, <http://www.jsu.edu/depart/handbook/page17.html#personal%20abuse> (last visited Mar. 5, 2009).

63. Johns Hopkins University, Principles for Ensuring Equity, Civility and Respect for All, http://www.jhu.edu/news_info/policy/civility.html (last visited Mar. 5, 2009).

64. David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 245 (2003).

65. *Id.*

The first explanation arises from the fact that students see colleges and universities taking an expansive approach to the problems of sexual and racial harassment, one that targets any offensive or disagreeable expression and in the process shortchanges free speech rights. Once granted this right to be hypersensitive, it becomes increasingly difficult for students to recede in terms of their level of sensitivity. This has been referred to as the “psychological endowment effect,” whereby “once people are endowed with a right, they lose far more utility once that right is interfered with than if it had never been granted at all.”⁶⁶

The other explanation is that allowing people to bring suit against their school for being subjected to offensive speech will lead to more lawsuits simply because the potential for a large award of monetary damages creates an incentive to interpret another person’s expression as offensive.⁶⁷ This suggests that, regardless of the extent to which they are genuinely offended, at least some harassment plaintiffs are acting out of a desire to capitalize financially. Either way, the end result is harmful for those who wish to exercise their free speech rights on college and university campuses, as the false notion of entitlement to be free from offense undercuts the proper functioning of the marketplace of ideas.

4. Content-Based and Viewpoint-Based Restrictions

Another major concern about the increased scope of harassment law on college and university campuses is that such policies empower administrators to engage in content-based and viewpoint-based restrictions and punishments. The Supreme Court has consistently held that such restrictions are an especially egregious violation of the First Amendment.⁶⁸ It has stated that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁶⁹ Rather, “[u]nder the First Amendment the government must leave to the people the evaluation of ideas.”⁷⁰

However, having vaguely worded, open-ended sexual and racial harassment policies on the books gives administrators excessive discretion

66. *Id.*

67. Browne, *supra* note 47, at 543.

68. *See, e.g.,* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *U.S. v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). In *R.A.V.*, the Court stated, “The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” 505 U.S. at 382 (citations omitted). In *Johnson*, the Court stated, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 491 U.S. at 414.

69. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

70. *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985).

to decide which expressions they will tolerate on their campus and which ones they will suppress. This opens the door to selective censorship and politicized, subjective decision-making. Courts have recognized that harassment policies are “susceptible to selective application amounting to content-based or viewpoint discrimination.”⁷¹ As a result, certain expressions face the danger of being restricted and punished under the guise of harassment regulations in ways that do not affect more favored speech.

In one example of viewpoint discrimination, DePaul University sought to punish the DePaul Conservative Alliance (DCA), a campus student group, in 2006 for holding an “affirmative action bake sale.”⁷² The University charged the group with violating its Anti-Discrimination Harassment Policy, and shut down the bake sale under the pretext that the event was taking place at an inappropriate location, even though it allowed a different student group to set up a protest table at the same location a week later.⁷³ The University seemingly had no problem with the latter student group, a chapter of the People for the Ethical Treatment of Animals, and its form of protest but refused to accord the DCA the same freedom of expression.⁷⁴

Another case arose at Pennsylvania State University. In 2006, the University’s School of Visual Arts cancelled the opening of a student’s art exhibit on the grounds that his art violated the University’s Statement on Nondiscrimination and Harassment.⁷⁵ In so deciding, the school reasoned that the exhibit, which was entitled “Portraits of Terror” and depicted Palestinian violence in Israeli settlements, “did not promote cultural diversity” or “opportunities for democratic dialogue.”⁷⁶ The school had, however, never expressed any concerns about the same student’s previous art exhibits, including one that depicted, among other things, the hind of a

71. *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

72. Press Release, The Foundation for Individual Rights in Education (FIRE), DePaul University Calls Affirmative Action Protest “Harassment” (Jan. 30, 2006), available at <http://www.thefire.org/index.php/article/6754.html>. The basic idea behind this event, a form of protest which has been used at several colleges nationwide, is to charge less money to certain minority groups than to white students for the same baked goods. In doing so, the student group hoped to satirize the use of affirmative action in college and university admissions and to spark student debate about the issue. *Id.*

73. *Id.*

74. *See id.* Making it even clearer that the administration’s actions were motivated by viewpoint, it responded to initial queries about the harassment charges by stating that it had not yet determined its reasons for intervening in the bake sale. *Id.* Essentially, the administration’s approach was to shut down the bake sale and then come up with a justification after the fact, making this an obvious case of viewpoint discrimination. *Id.*

75. Chris Perez, *Penn State Gets It Wrong*, THE TORCH, Apr. 25, 2006, <http://www.thefire.org/index.php/article/6997.html>.

76. *Id.*

horse, a man in a bathroom stall, and a nude man leaning against a janitor's broom.⁷⁷ Only when it was confronted with expression on a politically contentious issue that may have offended some students did the University invoke its harassment policy. The manifest inconsistency in the University's application of its policy is an example of content-based discrimination.

Colleges and universities should not be able to abuse harassment law to prevent students from speaking about certain topics or espousing a particular viewpoint whenever the administration finds such expression to be undesirable or inconvenient. To grant administrators this power is to open the floodgates to politicized and unprincipled censorship, creating a situation on campus wherein students are unable to benefit from a true marketplace of ideas.

5. Should Sexual Harassment Be Equated with Sexual Assault?

Finally, the misapplication of harassment law in higher education has touched upon a matter that is not directly related to campus speech: sexual assault and rape. Some colleges and universities are using the same policy or set of policies to address both sexual harassment and sexual assault, even though the obvious differences between the two issues, both in degree and nature, counsel against this practice. Yale University, for example, has a joint undergraduate policy on "Sexual Harassment & Sexual Assault" in which it lists "sexual assault [and] attempted sexual assault" as examples of peer sexual harassment.⁷⁸ Similarly, Ohio University includes "[c]oerced sexual intercourse" and "[s]exual assault or abuse" as examples of sexual harassment.⁷⁹

This trend may have developed as a reaction to the "marked increase" in Title IX suits brought by alleged victims of rape and sexual assault against their colleges and universities.⁸⁰ In drafting their sexual harassment policies, many administrations have decided to address Title IX liability for

77. Lauren Seitz, *Student Showcases Making of Art*, THE DAILY COLLEGIAN (University Park, Pa.), Feb. 14, 2006, available at <http://www.collegian.psu.edu/archive/2006/02/02-14-06tdc/02-14-06darts-02.asp>.

78. Yale University, Sexual Harassment & Sexual Assault, <http://www.yale.edu/yalecollege/students/services/harassment.html> (last visited Mar. 5, 2009).

79. Ohio University, Policy & Procedure: Harassment, <http://www.ohiou.edu/policy/03-004.html> (last visited Mar. 5, 2009).

80. BRETT A. SOKOLOW, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT., TITLE IX AND SEXUAL MISCONDUCT: WHAT DOES RECENT CASE LAW MEAN FOR INSTITUTIONS IN CASES OF STUDENT-ON-STUDENT SEXUAL ASSAULT? (2000), available at <http://www.nchem.org/whitepaper-2001-title-ix.html>. Examples of recent cases in which students brought Title IX suits for sexual assault include *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007); *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007); *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04-CV-0307, 2006 U.S. Dist. LEXIS 70444 (S.D. Ohio Sept. 28, 2006).

sexual assault and rape under the same rubric. This practice has enjoyed some support in academia as well.⁸¹

While sexual assault and rape are highly important matters of public concern, they should not be in the same category as sexual harassment. To categorize sexual assault and rape with sexual harassment is to both trivialize the serious nature of sexual assault and rape and, given the tendency that some colleges and universities have shown to interpret sexual harassment law to encompass merely offensive or undesired speech, to distort and threaten the status of such speech. In reality, the problems presented by sexual harassment and sexual assault or rape, respectively, should be handled quite differently; colleges and universities should take individualized and precisely tailored measures in order to properly respond to the particular issues and concerns presented by each problem.

With respect to the issue of sexual harassment, college and university policy should take full account of the need to provide sufficient breathing room for free expression, in light of the campus's function as a place for the free exchange of ideas. Colleges and universities should take a judicious, narrowly tailored approach to ensure that they do not infringe upon protected speech and address only that which constitutes actionable harassment. Such an approach is necessary to preserve robust campus speech rights and to avoid placing a chilling effect on speech.

By contrast, few would disagree that colleges and universities should have greater latitude to address the problems of sexual assault and rape. An administration should take the necessary precautions within its means to make its campus safe and well-policed, so that students are free from physical danger. Furthermore, policy should reflect the fact that a potential victim of sexual assault or rape faces much greater harms than does a potential victim of sexual harassment. As one commentator, in discussing the differences between sexual harassment and sexual assault or rape, has asserted, "[G]iven the severity of the conduct involved, it may no longer be a best practice to fold sexual assault within sexual harassment in terms of campus policies and procedures."⁸² Rather, they are different enough that

81. See, e.g., Holly Hogan, *What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L. J. 317, 319 (2006).

What many people do not realize is that rape and other types of sexual assault are not different forms of harassment; rather, rape and sexual assault are severe forms of sexual harassment. Sexual assault is a term that includes such actions as rape, attempted rape, and forced fondling. Sexual assault is unwelcome physical conduct of a sexual nature, and like the other forms of sexual harassment, it "can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program."

Id. (quoting U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001)).

82. SOKOLOW, *supra* note 80.

there needs to be a “stand-alone policy” addressing sexual assault.⁸³ If colleges and universities instead continue to conflate sexual harassment with sexual assault and rape, they run the risk of selling short their students’ speech rights, providing another way in which harassment law as applied in the college and university setting undermines freedom of speech.

II. PEER HARASSMENT UNDER TITLE IX AND TITLE VI

Having examined the ways in which some colleges and universities have articulated overbroad harassment rationales as well as the resulting impact on campus speech rights, I turn now to analyzing the doctrinal issues involved. In this section, I will set out the legal standards for peer hostile environment sexual and racial harassment under Title IX and Title VI, respectively. In the following section, I will argue that the misapplication of harassment law has proceeded from the efforts of colleges and universities to meet their Title IX and Title VI obligations.

A. Setting the Title IX Landscape

1. What Is the Aim of Title IX?

Title IX of the Education Amendments of 1972 reads in pertinent part, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁸⁴ Courts and commentators have often had to turn to the congressional debates from the time of Title IX’s passage to identify its main objectives, and this search has pointed towards two overarching goals—to “prevent the use of federal funds in support of discriminatory practices” based on gender, and to “provide individual citizens with some level of protection from those practices.”⁸⁵

A victim of gender discrimination within an educational program or activity, in a variety of circumstances, has the right to bring suit against the educational institution involved. Initially, Congress authorized an “administrative enforcement scheme for Title IX,” pursuant to which federal departments and agencies “with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives” of Title IX and “may rely on ‘any . . . means

83. *Id.*

84. 20 U.S.C. § 1681(a) (2006).

85. Audra Pontes, Comment, *Peer Sexual Harassment: Has Title IX Gone Too Far?*, 47 EMORY L.J. 341, 346 (1998). The members of Congress who enacted Title IX, including Senator Birch Bayh of Indiana, its sponsor, saw Title IX as filling in the respective voids of Title VII, which prohibited gender discrimination in employment practices but did not apply to educational institutions, and Title VI, which applied to educational institutions but did not prohibit gender discrimination. *Id.* at 346–47.

authorized by law,' including the termination of funding . . . to give effect to the statute's restrictions."⁸⁶ However, the Supreme Court has long recognized an implied private right of action under Title IX, dating back to its 1979 decision in *Cannon v. University of Chicago*.⁸⁷ It has also held that monetary damages are available in such suits.⁸⁸

Because the Court has historically treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, private damages are available only where an educational institution had adequate notice that it could be held liable for the conduct in question.⁸⁹ This is due to the fact that Title IX, like other Spending Clause legislation, sets up a contractual framework: it conditions an offer of federal funding to an educational institution on a promise by the funding recipient to refrain from discriminating on the basis of gender.⁹⁰ Therefore, a funding recipient can be held liable only for its own misconduct. This means that the institution itself must have excluded an individual from participation in, denied him the benefits of, or subjected him to discrimination under, its programs or activities.⁹¹ The Supreme Court has made it clear that "sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity" to provide funding recipients with the requisite notice and to serve as a basis for imposing monetary damages.⁹²

2. When Is Peer Sexual Harassment Actionable Under Title IX?

Two types of sexual harassment can constitute gender discrimination for purposes of Title IX: "quid pro quo" and "hostile environment." According to the Office for Civil Rights, quid pro quo sexual harassment occurs when an employee of an educational institution "explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature."⁹³ This form of sexual harassment is properly understood as the act of attempting to utilize one's position of authority over a student to gain sexual favors. Unlike hostile environment sexual harassment, it does not implicate free speech issues.

86. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638–39 (1999) (quoting 20 U.S.C. § 1682 (2006)).

87. 441 U.S. 677 (1979).

88. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72–73 (1992).

89. *Davis*, 526 U.S. at 640.

90. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

91. *Davis*, 526 U.S. at 640–41.

92. *Id.* at 649–50 (citing *Gebser*, 524 U.S. at 281).

93. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,038 (1997).

Therefore, quid pro quo harassment is outside the scope of this article, which focuses on hostile environment sexual harassment.

A student alleging that he or she has been a victim of peer hostile environment sexual harassment, for purposes of Title IX institutional liability, must set forth and prove six elements. First, the complainant must demonstrate that he or she belongs to a “protected group.”⁹⁴ Next, the conduct in question must (2) be “unwelcome” and (3) discriminate against the complainant, (4) on the basis of his or her gender.⁹⁵ Fifth, under the Supreme Court’s decision in *Davis*, the complainant must demonstrate conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”⁹⁶ Finally, the complainant must demonstrate that the educational institution had “actual knowledge” of the complained-of conduct and responded in a manner suggesting “deliberate indifference.”⁹⁷

a. Protected Class

The first prong is easily met. OCR has clarified that, since the express language of Title IX protects any “person” from gender discrimination, both male and female students are protected under the statute against sexual harassment perpetrated by school employees, fellow students, and third parties.⁹⁸ This holds true even if the complainant and alleged harasser are members of the same sex.⁹⁹

b. Unwelcomeness

The “unwelcome” requirement is met if the complainant “did not solicit or invite the conduct and regarded the conduct as undesirable or offensive.”¹⁰⁰ However, the fact that the complainant accepted the conduct, acquiesced in the conduct, or failed to complain does not necessarily mean that he or she regarded it as welcome.¹⁰¹ Finally, the fact

94. *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996).

95. *Id.* at 467–68.

96. *Davis*, 526 U.S. at 651.

97. *Id.* at 643.

98. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12,039.

99. *Id.*

100. *Benefield ex rel. Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212, 1217 (N.D. Ala. 2002) (citations omitted).

101. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12,040.

[A] student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a

that the complainant willingly participated in conduct on a past occasion does not mean that he or she cannot indicate that the same conduct is unwelcome on a subsequent occasion.¹⁰²

An instructive case for the “unwelcome” requirement is *Waters v. Metropolitan State University*,¹⁰³ in which a student alleged that she had been sexually harassed by one of her professors.¹⁰⁴ Her claim failed when the court ruled that the student, who had engaged in a consensual relationship with the professor, had not been subjected to unwelcome advances.¹⁰⁵ Rather than “merely acquiesc[ing]” to his advances, she had “actively encouraged a private, personal relationship with [the professor], going so far as to name him decision-maker for her children.”¹⁰⁶ On these facts, the court concluded that the student could not meet the “unwelcome” prong.¹⁰⁷ While *Waters* is a professor-student case, its analysis regarding the “unwelcome” requirement remains instructive for peer harassment cases as well.

c. Discrimination on the Basis of Gender

The third and fourth prongs require the complainant to demonstrate that he or she has been discriminated against in an educational program or activity on the basis of gender. In other words, he or she must show that he or she has been treated differently from similarly situated persons because of his or her sex. In the Title VII context, the Supreme Court has framed this inquiry in terms of “disparate treatment of men and women.”¹⁰⁸ The critical issue, according to the Court, is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹⁰⁹ The Court has not articulated a standard for determining when harassment occurs “because of” sex. However, most courts appear to have adopted a “but for” test.¹¹⁰

pattern of sexually demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments.

Id.

102. *Id.*

103. 91 F. Supp. 2d 1287 (D. Minn. 2000).

104. *Id.* at 1292.

105. *Id.* at 1291.

106. *Id.*

107. *Id.*

108. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *L.A. Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

109. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

110. See, e.g., *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 242 (4th Cir. 2000); *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988);

This requires the complainant to demonstrate that the harassment would not have taken place but for his or her gender.¹¹¹ It is important to note that, under this standard, harassing conduct need not be of a sexual nature or motivated by sexual desire in order to constitute gender-based discrimination.¹¹²

Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

111. See *supra* note 110. Other federal circuit courts took other approaches. See, e.g., Costa v. Desert Palace, Inc., 299 F.3d 838, 848 (9th Cir. 2002) (analyzing whether sex “was ‘a motivating factor’ . . . even if there were other motives”); Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981) (analyzing whether “sex is for no legitimate reason a substantial factor in the discrimination”); Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) (analyzing whether gender was a “substantial factor” in the act of discrimination).

112. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (1997) (“[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX.”).

Recent case law in the Title VII context, although not directly relevant for Title IX analysis, has demonstrated a circuit split regarding the elements of gender discrimination. Some circuits have held that a sexual harassment complainant must demonstrate intentional discrimination, while others have indicated that a showing of disparate impact is sufficient for Title VII purposes. Those circuits falling within the first group have held that it is insufficient to allege that one is disparately impacted, as a male or female, by speech or conduct in the workplace, and that one must allege that he or she was actually the target of such speech or conduct. See, e.g., Duncan v. Manager, Dep’t of Safety, City & County of Denver, 397 F.3d 1300, 1312 (10th Cir. 2005); Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 332 (4th Cir. 2003); Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 965 (8th Cir. 1999); Lyle v. Warner Bros. Television Prod., 132 P.3d 211, 229 (Cal. 2006). The circuits in the second category, conversely, have held that speech or conduct which one overhears, even though not directed or targeted at that person, can create a hostile environment. See, e.g., Reeves v. C.H. Robinson Worldwide, Inc., 525 F.3d 1139, 1143 (11th Cir. 2008); Patane v. Clark, 508 F.3d 106, 114 (2d Cir. 2007); Huff v. Sheahan, 493 F.3d 893, 903 (7th Cir. 2007).

Despite the current circuit split, some legal commentators have argued in favor of the disparate treatment approach. Eugene Volokh has proposed drawing a line in the employment context “between *directed* speech—speech that is aimed at a particular employee because of her race, sex, religion, or national origin—and *undirected* speech, speech between other employees that is overheard by the offended employee, or printed material, intended to communicate to the other employees in general, that is seen by the offended employee.” Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846 (1992) (emphasis in the original). “The state interest in assuring equality in the workplace would justify restricting directed speech, but not undirected speech.” *Id.*

Similarly, Nadine Strossen has argued that harassment, properly construed, is “a type of conduct which is legally proscribed in many jurisdictions when *directed at a specific individual or individuals* and when intended to frighten, coerce, or unreasonably harry or intrude upon its *target*.” Strossen, *supra* note 59, at 706 (quoting ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 72a (rev. ed. 1995)) (emphasis added). She therefore advocates distinguishing “generalized statements of opinion—which should enjoy absolute protection no matter how

d. The *Davis* Standard

A Title IX complainant must next demonstrate that the conduct in question rises to the level of actionable harassment. With respect to student-on-student hostile environment sexual harassment, the Supreme Court's decision in *Davis* established a standard which is highly protective of speech; the alleged conduct must be "so severe, pervasive, and objectively offensive, and . . . so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."¹¹³ Moreover, the conduct must have a "systemic effect" on a student's access to educational programs or activities.¹¹⁴ Critically, as I shall fully discuss later in this article,¹¹⁵ the *Davis* standard is legally distinct from the Title VII standard which governs harassment in the employment setting: conduct which is "sufficiently severe *or* pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹¹⁶ Compared to the Title VII standard, the *Davis* standard is more stringent and encompasses a narrower range of conduct.

As the Court's first and, to this point, only decision on peer harassment, *Davis* has been widely followed by courts deciding subsequent peer harassment cases.¹¹⁷ While many of these cases, like *Davis* itself, arose outside of the college or university setting (i.e., in elementary or secondary schools), decisions such as *Benefield ex rel. Benefield v. Board of Trustees of the University of Alabama at Birmingham*,¹¹⁸ *Simpson v. University of*

sexist—from gender-based verbal abuse that . . . is targeted on a particular employee." *Id.* at 717 (quoting Kingsley R. Browne, *Stifling Sexually Hostile Speech: To What Extent Does the First Amendment Limit the Reach of Sexual Harassment Law When the Hostile Environment is Created by Speech?*, CONN. L. TRIB., Nov. 29, 1993, at 19). A proper understanding of sexual harassment as a form of gender-based discrimination, both in education and in the workplace, must not lose sight of these important principles.

113. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

114. *Id.* at 652

115. *See infra* Part IV.A.1.

116. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (emphasis added)).

117. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1176 (10th Cir. 2007); *Williams v. Bd. of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007); *Doe v. Bellefonte Area Sch. Dist.*, 106 Fed. App'x 798, 800 n.1 (3d Cir. 2004); *Winzer v. Sch. Dist. for City of Pontiac*, 105 Fed. App'x 679, 681 (6th Cir. 2004); *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1284–85 (11th Cir. 2003); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854–55 (6th Cir. 1999); *Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL, 2006 U.S. Dist. LEXIS 29600, at *8 (D. Idaho 2006); *Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212, 1221 (N.D. Ala. 2002).

118. 214 F. Supp. 2d 1212.

Colorado Boulder,¹¹⁹ and *Williams v. Board of Regents of the University System of Georgia*,¹²⁰ all of which arose in higher education, hold that the *Davis* standard is fully applicable to the college or university campus.¹²¹

e. Actual Knowledge and Deliberate Indifference

Finally, a peer harassment complainant must establish a basis for imposing institutional liability. This requires him or her to first establish that the institution is a Title IX funding recipient, in order to subject it to Title IX liability.¹²² The complainant must then demonstrate that the educational institution had “actual knowledge”¹²³ of the complained-of conduct and responded in a manner suggesting “deliberate indifference.”¹²⁴

Actual knowledge, or actual notice, requires that an “appropriate person” have the requisite knowledge, meaning “at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.”¹²⁵ OCR has clarified that its regulations do not require any school employee, regardless of his or her actual authority, to be responsible for taking the necessary steps to end the harassment or prevent its recurrence.¹²⁶ Rather, an employee lacking such authority may be “required only to report the harassment to other school officials who have the responsibility to take appropriate action.”¹²⁷

An educational institution’s failure adequately to respond to known instances of sexual harassment will amount to deliberate indifference “only

119. 500 F.3d 1170.

120. 477 F.3d 1282.

121. However, absent an on-point Supreme Court decision, one that clarifies that the *Davis* standard applies to higher education, the possibility still exists that some courts may apply lesser standards when deciding Title IX college cases. In particular, they may defer to the OCR formulation of hostile environment, since OCR is the federal agency charged with enforcing compliance with Title IX. *See generally*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2008). In a 2003 letter sent to colleges and universities to clarify the scope and meaning of federal harassment regulations, OCR defined actionable hostile environment harassment as “sufficiently serious (i.e., severe, persistent *or* pervasive) as to limit or deny a student’s ability to participate in or benefit from an educational program.” *See* Gerald A. Reynolds, Office for Civil Rights, First Amendment: Dear Colleague, <http://www.ed.gov/about/offices/list/ocr/firstamend.html> (last visited Mar. 9, 2009) (emphasis added). By its terms, this standard is not as stringent, and consequently not as protective of speech, as the *Davis* formulation.

122. *Williams*, 477 F.3d at 1293.

123. *Id.*

124. *Id.* (quoting *Davis Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

125. *Id.* at 1293 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274, 290 (1998)).

126. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,037 (1997).

127. *Id.*

where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."¹²⁸ The proper inquiry is whether the institution's response, or lack thereof, "subject[ed]" the complainant to gender discrimination, or in other words "cause[d] [the student] to undergo" discrimination or "[made him or her] liable or vulnerable" to it.¹²⁹ This reflects the fact that a school cannot be held liable solely for the harassing behavior of someone affiliated with it, but only for its own wrongdoing in failing to react appropriately.¹³⁰

Two recent decisions hold that a complainant can establish institutional liability under Title IX through "before-the-fact" deliberate indifference just as he or she could through "after-the-fact" deliberate indifference.¹³¹ In the vast majority of cases, the complainant alleges that the educational institution was deliberately indifferent to known acts of sexual harassment that had already occurred. However, the Eleventh Circuit recognized a plaintiff's claim that her University was liable for a student-athlete's sexual assault perpetrated upon her, where the University knew that the student-athlete had previously committed acts of sexual misconduct while attending other schools.¹³² In essence, the court held that the University's failure adequately to counsel the student-athlete and monitor his behavior, given its knowledge of his proclivities for sexual misconduct, amounted to deliberate indifference on its part.¹³³

B. Setting the Title VI Landscape

1. What is the Aim of Title VI?

Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in programs receiving federal funding. It states in pertinent part, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

128. *Davis*, 526 U.S. at 648.

129. *Id.* at 644–45 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)).

130. *Id.* at 640–41.

131. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007); *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007).

132. *Williams*, 477 F.3d at 1296.

133. See *id.* Likewise, plaintiff's Title IX claim in *Simpson*, in which she alleged that she had been sexually assaulted by university football players and football recruits, was based on "before-the-fact" deliberate indifference. Plaintiff presented evidence showing that there was an obvious risk of sexual assault during football recruiting visits, and that the University was aware of this risk. *Simpson*, 500 F.3d at 1173. The court found that the University's "failure to provide adequate supervision and guidance to player-hosts" during football recruiting visits amounted to institutional deliberate indifference. *Id.*

assistance.”¹³⁴ Unlike Title IX, which covers only educational institutions, Title VI applies to all programs receiving federal funding and thus has a broader scope of coverage.¹³⁵

In the academic context, Title VI is administered by OCR. The agency has issued guidelines on Title VI in which it defines racial discrimination as follows:

[A] recipient violates title VI if one of its agents or employees, acting within the scope of his or her official duties, has treated a student differently on the basis of race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to interfere with or limit the ability of the student to participate in or benefit from the services, activities or privileges provided by the recipient.¹³⁶

In the same guidelines, OCR recognizes hostile environment racial harassment as a form of actionable racial discrimination under Title VI.¹³⁷

2. When Is Peer Racial Harassment Actionable Under Title VI?

The jurisprudence on hostile environment racial harassment under Title VI is sparse. There have been few reported decisions in this area of the law, and indeed, as recently as 1998, the Ninth Circuit stated it was “aware of no reported decision addressing the circumstances under which a school district’s failure to respond to racial harassment of one or more pupils by other students constitutes a violation of Title VI.”¹³⁸ Given the dearth of reported decisions, as well as the fact that the Supreme Court has never addressed Title VI hostile environment racial harassment, it is not surprising that the case law is unsettled as to when an educational institution can be held liable for student-on-student racial harassment.

At the same time, courts have indicated that Title VI should be adjudicated under a legal framework similar to the one developed under Title IX. The Supreme Court has commented that Title IX, when enacted, was modeled after Title VI and that Title VI “is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in

134. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (2000).

135. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

136. Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11,448, 11,448 (1994).

137. *Id.* at 11,449.

138. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998); see also Paul C. Sweeney, *Abuse, Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 50 n.47 (1997) (“Litigation under Title VI has focused on discriminatory admission policies and their impact upon racial minorities. Title VI has not been used to remedy discrimination in the post-access educational environment.”).

all programs receiving federal funds, not only in educational programs.”¹³⁹ Therefore, “[t]he two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.”¹⁴⁰ This contractual framework of the sister Spending Clause statutes¹⁴¹ distinguishes them from Title VII, which is “framed in terms not of a condition but of an outright prohibition” and “applies to all employers without regard to federal funding.”¹⁴²

The Court has recognized that Title VI and Title IX “provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination” and that “[n]either statute expressly mentions a private remedy for the person excluded from participation in a federally funded program.”¹⁴³ It has also noted, “The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been,”¹⁴⁴ which is significant because “when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy.”¹⁴⁵ Thus, given the parallels between the two statutes, including the fact that both include a judicially-recognized, implied private right of action, it should not be surprising that courts deciding Title VI racial harassment cases have tended to borrow from Title IX case law.

In *Bryant v. Independent School District Number I-38*,¹⁴⁶ for example, the Tenth Circuit stated that the Supreme Court’s decision in *Davis* would guide its resolution of the racial harassment claim before it, as “the Court’s analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial

139. *Gebser*, 524 U.S. at 286.

140. *Id.*

141. Courts have often held that Spending Clause statutes mirror each other, and not Title VII. *See, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 185–88 (2002) (holding that punitive damages are not available under the federal Rehabilitation Act, 29 U.S.C. § 794(a), precisely because punitive damages would not be available under other Spending Clause statutes such as Title VI and Title IX, whereas they would be available under Title VII); *see also* *Mercer v. Duke Univ.*, 50 F. App’x 643, 644 (4th Cir. 2002) (holding that punitive damages are not available under Title IX because they are not available under the Rehabilitation Act, its sister Spending Clause statute, under the *Barnes* decision); *Santos v. Merritt Coll.*, No. C-07-5227, 2008 WL 2622792 (N.D. Cal. July 1, 2008) (holding that punitive damages are not available under Title VI because they are not available under the Rehabilitation Act under the *Barnes* decision); *cf. Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999) (holding punitive damages are available under Title VII).

142. *Gebser*, 524 U.S. at 286.

143. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 695–96 (1979).

144. *Id.* at 696 (citing 117 Cong. Rec. 30408 (1971) (statement of Senator Bayh)).

145. *Id.*

146. 334 F.3d 928 (10th Cir. 2003).

discrimination under Title VI.”¹⁴⁷ Another federal court observed that “[c]ourts have often noted the similarity in purpose and construction of Title VI and Title IX” and therefore “have consistently found language of Title IX decisions applicable to Title VI cases.”¹⁴⁸ Similarly, other courts have affirmed that “the reasoning that applies to Title IX cases applies to Title VI claims as well,”¹⁴⁹ and that “Title VI claims are analyzed under the same standards applied to Title IX claims.”¹⁵⁰

As these precedents indicate, the required elements for setting forth a Title VI racial harassment claim largely parallel the Title IX elements discussed in the previous subsection.¹⁵¹ Courts deciding Title VI cases have conducted the same analyses as seen in Title IX cases for the elements of membership in a protected group,¹⁵² unwelcome conduct,¹⁵³ and discrimination on the basis of race (though this element is, of course, “based on sex” in Title IX suits).¹⁵⁴ These elements are therefore

147. *Id.* at 936.

148. *Davison v. Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1229 (C.D. Cal. 1998) (quoting *Grimes v. Sobol*, 832 F. Supp. 704, 711 (S.D.N.Y. 1993)). Later in the same opinion, the court reiterated, “A racially hostile environment is as actionable under Title VI as is a sexually hostile environment under Title IX.” *Id.* at 1231.

149. *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292 (E.D.N.Y. 2002).

150. *Shelton v. Trs. of Columbia Univ.*, No. 04 Civ 6714, 2005 U.S. Dist. LEXIS 26480, at *18 (S.D.N.Y. Oct. 31, 2005); *see also Steel v. Alma Pub. Sch. Dist.*, 162 F. Supp. 2d 1083, 1085 (W.D. Ark. 2001) (“Title IX and Title VI are parallel to each other and operate in the same manner”); *Malcolm W. v. Novato Unified Sch. Dist.*, No. A094563, 2002 Cal. App. Unpub. LEXIS 11443, at *8 n.3 (Cal. App. 2002) (“Because Title IX and Title VI both apply to educational programs receiving federal funds, they are interpreted in the same manner.”).

151. *See supra* Part II.A.2.

152. Like Title IX, Title VI expressly states that no “person” shall be subjected to discrimination on the basis of race, color, or national origin. *See* 42 U.S.C. § 2000d (2000). This element is therefore easily satisfied. *See, e.g., Center Grove Cmty. Sch., OCR Case No. 15-91-1168* (Dec. 31, 1991) (finding that Title VI was violated where a white student was forced to withdraw from all-white school as a result of harassment by classmates, which included a note criticizing her association with black student at another school). *But see Seabrook v. City of New York*, 509 F. Supp. 2d 393, 406 (S.D.N.Y. 2007) (holding that plaintiffs failed to state a claim under Title VI because they did not specify the protected group to which they belonged and merely stated that they were “targeted by the defendants because of their race, color, and national origin” (quoting Complaint at ¶ 116, *Seabrook*, 509 F. Supp. 2d 393 (No. 05 Civ. 10760) (emphasis added)); *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1240 (D. Ariz. 2000) (holding that “low-income ‘at risk’ students” are not a protected class under Title VI).

153. *See, e.g., Davison*, 48 F. Supp. 2d at 1230 (following *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1376 (N.D. Cal. 1997), a Title IX student-on-student sexual harassment case).

154. *Id.*; *see also Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,449 (1994) (stating that Title VI racial harassment “need not be based on the ground of the victim’s or complainant’s race, so long as it is racially motivated”).

uncontroverted in Title VI case law, with Title IX jurisprudence serving as a guide. As such, I will simply refer here to my previous discussion of these elements in the Title IX context.

The final two elements, however, remain unsettled. First, it is unresolved whether the *Davis* standard for actionable sexual harassment governs Title VI racial harassment cases, or whether a different standard applies. Likewise, it is unresolved whether the Title IX standards of “actual notice” and “deliberate indifference” govern the issue of institutional liability under Title VI. Federal courts have taken diverging approaches to these two elements and, in the absence of a Title VI racial harassment decision from the Supreme Court, may continue to do so.

a. The *Davis* Standard?

On at least three occasions courts have decided Title VI racial harassment cases under the *Davis* standard. In the aforementioned *Bryant* decision,¹⁵⁵ the Tenth Circuit expressly indicated, “On remand, the district court is instructed to apply [the test] applied by the Supreme Court in *Davis*.”¹⁵⁶ *Bryant* involved allegations by a group of high school students that school officials had facilitated and maintained a racially hostile educational environment by tolerating racial slurs, epithets, and racially charged symbols and clothing.¹⁵⁷ In overturning the lower court’s decision to grant summary judgment to the school district, the Tenth Circuit stated that plaintiffs would have to demonstrate that the conduct in question was “so severe, pervasive and objectively offensive that it . . . deprived the victim of access to the educational benefits or opportunities provided by the school.”¹⁵⁸

*Malcolm W. v. Novato Unified School District*¹⁵⁹ is another case in which a court expressly followed *Davis* in adjudicating a Title VI racial harassment claim. There, the Court of Appeal of California affirmed the relevance of *Davis* for these cases, stating that in *Davis*, the Supreme Court “set forth the test for a school district’s liability for discrimination in the form of student-on-student harassment.”¹⁶⁰ In other words, the same was true for both sexual and racial harassment. Therefore, the court required the plaintiffs to demonstrate conduct which was “so severe, pervasive and objectively offensive that it effectively bars a victim’s access to an educational opportunity or benefit.”¹⁶¹

155. See *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928 (10th Cir. 2003).

156. *Id.* at 934.

157. *Id.* at 931.

158. *Id.* at 934 (quoting *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1246 (10th Cir. 1999)).

159. No. A094563, 2002 Cal. App. Unpub. LEXIS 11443 (Cal. App. 2002).

160. *Id.* at *6.

161. *Id.* (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

In another Title VI case, the complainant alleged that she was subjected to a racially hostile educational environment in the defendant University's physician-assistance program.¹⁶² The federal district court required her to demonstrate that the alleged behavior was "so severe, pervasive, and objectively offensive that it . . . deprived plaintiff of access to the educational benefits or opportunities provided by the Program."¹⁶³ In other Title VI cases, however, courts have applied a lesser standard to the alleged creation of a hostile educational environment.

The Seventh Circuit, for instance, declined to follow *Davis* in *Qualls v. Cunningham*,¹⁶⁴ which involved a former university student's Title VI suit for the alleged creation of a racially hostile environment on campus. The court framed the issue as whether "the alleged harassment was severe or pervasive enough to deprive [plaintiff] of access to educational benefits."¹⁶⁵ In delineating this standard, however, *Qualls* cited to *Bryant*,¹⁶⁶ making this decision an ambivalent one on this issue, leaving open the possibility that the Seventh Circuit may, in a subsequent Title VI case, follow *Bryant's* lead in adopting the *Davis* standard.

Other courts have been clearer in rejecting the *Davis* standard and adopting a lesser standard for the creation of a hostile educational environment. The Western District of Virginia,¹⁶⁷ the Eastern District of New York,¹⁶⁸ and the Southern District of New York¹⁶⁹ have all decided Title VI cases by inquiring whether the conduct in question was "sufficiently severe or pervasive"¹⁷⁰ to alter the conditions of the complainant's education and create an abusive educational environment.¹⁷¹

162. *Koumantaros v. City Univ. of New York*, No. 03 Civ. 10170, 2007 U.S. Dist. LEXIS 19530 (S.D.N.Y. 2007).

163. *Id.* at *50.

164. 183 F. App'x 564 (7th Cir. 2006). As an unpublished opinion, *Qualls* does not have precedential authority in the Seventh Circuit. *See, e.g., Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (refusing to follow *Havens S. Suburban Hous. Ctr. v. Santefort Real Estate, Inc.*, 857 F.2d 1476 (7th Cir. 1988), under 7th Cir. R. 53(b)(2)). Nonetheless, it is notable as a federal appellate court decision applying a hostile environment standard which is less stringent than the *Davis* standard.

165. *Qualls*, 183 F. App'x at 567.

166. *Id.*

167. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at *15 (W.D. Va. Sept. 25, 2005).

168. *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292 (E.D.N.Y. 2002).

169. *Shelton v. Trs. of Columbia Univ.*, No. 04 Civ 6714, 2005 U.S. Dist. LEXIS 26480, at *19 (S.D.N.Y. 2005).

170. *Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1201 (N.D. Iowa 1996) (quoting *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1194 (11th Cir. 1996)) (articulating this standard for Title IX).

171. *See also Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) (quoting *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,449 (1994)) (citing the OCR guidelines for the

In examining whether the alleged conduct was sufficiently severe *or* pervasive, rather than both severe *and* pervasive, these decisions decline to follow *Davis* and instead track the Title VII standard for creation of a hostile environment.¹⁷²

OCR's guidelines likewise define actionable racial harassment as "sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient."¹⁷³ Therefore, there is conflicting legal authority on the governing standard for Title VI racial harassment. The *Bryant* decision, issued by a federal court of appeals, may well persuade other federal courts to apply the *Davis* standard. However, in the absence of a controlling Supreme Court decision, it is also possible that there will continue to be conflicting decisions on this point.

b. Institutional Liability

The issue of institutional liability in Title VI racial harassment cases is more settled than the standard for an actionable hostile educational environment. Courts have almost uniformly required Title VI complainants to demonstrate actual notice and deliberate indifference just as in the Title IX context,¹⁷⁴ despite the fact that OCR's guidelines on

proposition that actionable racial harassment must be "severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by the recipient"); *Davison v. Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1230 (C.D. Cal. 1998) (quoting *Davis*, 74 F.3d at 1194) (holding that plaintiff had alleged "sufficiently severe or pervasive" harassment for purposes of her Title VI claim). Since both of these decisions were handed down in 1998, prior to the Supreme Court's decision in *Davis*, they are of limited instructiveness for our discussion. Nonetheless, within the overall dearth of Title VI racial harassment cases, they provide two more examples of courts applying lesser standards for the alleged creation of a hostile educational environment in Title VI case law.

172. See *supra* note 113 and accompanying text.

173. Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. at 11,449.

174. See, e.g., *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003); *Koumantaros v. City Univ. of N.Y.*, No. 03 Civ. 10170, 2007 U.S. Dist. LEXIS 19530, at *50 (S.D.N.Y. Mar. 15, 2007); *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292–93 (E.D.N.Y. 2002); *Malcolm W. v. Novato Unified Sch. Dist.*, No. A094563, 2002 Cal. App. Unpub. LEXIS 11443, at *6 (Cal. App. 2002). The only two Title VI racial harassment decisions which adopted a different institutional liability standard than the one used in Title IX caselaw both came before *Davis* and therefore have not been followed in any subsequent cases. See *Monteiro*, 158 F.3d at 1034 (holding that a school district could be held liable for peer racial harassment under "actual or constructive notice," but upholding the Title IX requirement of deliberate indifference); *Davison*, 48 F. Supp. 2d at 1230–31 (holding that a school district could be held liable for peer racial harassment if it "knew or should have known" of the alleged conduct and failed to take "prompt, appropriate remedial action") (quoting *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1426 (N.D. Cal. 1997)).

racial harassment provide for different standards.¹⁷⁵ The uncertainty, however, comes from the Supreme Court's 2001 decision in *Alexander v. Sandoval*.¹⁷⁶

In *Sandoval*, the Court held that Title VI included a private right of action only to enforce the statute's prohibition against intentional racial discrimination, and did not include a private right of action to enforce "disparate impact" regulations promulgated under the statute.¹⁷⁷ *Sandoval* dealt with disparate impact discrimination and did not involve a hostile environment claim. However, courts deciding Title VI racial harassment cases after *Sandoval* have struggled to determine whether an educational institution's deliberate indifference to known acts of racial harassment constitutes intentional racial discrimination and is therefore redressable in a private action.

The Tenth Circuit in *Bryant* answered the question in the affirmative, declaring, "It is inapposite that a court could hold that maintenance of a hostile environment is never intentional. Such a broad holding would permit school administrators to sit idly, or intentionally, by while horrible acts of discrimination occurred on their grounds by and to students in their charge."¹⁷⁸ The court clarified that it was not imposing on administrations a duty "to seek out and discover instances of discrimination or risk being held liable for intentional discrimination."¹⁷⁹ However, "when administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable" under Title VI.¹⁸⁰ In the case before it, the court determined that the school principal "affirmatively chose to take no action" despite receiving numerous complaints and therefore "might have facilitated the hostile environment or, in the least, permitted it to continue."¹⁸¹

At the same time, the Tenth Circuit cautioned that "the question of intent in a hostile environment case is necessarily fact specific" and framed the issue before it as "whether the events and inaction in this case reached a point where it can be fairly said that the principal and administrators acted intentionally."¹⁸² Moreover, it read *Davis* as holding that "in certain

175. 59 Fed. Reg. at 11,449 (declaring that institutional liability is established under the standards of "actual or constructive notice" and failure "to respond adequately to redress the racially hostile environment").

176. 532 U.S. 275 (2001).

177. *Id.* at 279–80, 293.

178. *Bryant*, 334 F.3d at 933.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

circumstances, ‘deliberate indifference to known acts of [student-on-student] harassment’ can constitute ‘an intentional violation of Title IX,’”¹⁸³ suggesting that demonstrated deliberate indifference might not be sufficient in some cases. The *Bryant* court’s focus on intentional discrimination, rather than the deliberate indifference standard, as the true basis for institutional liability therefore creates some ambivalence about its ultimate holding on the issue of Title VI liability.

The *Koumantaros* court echoed the Tenth Circuit’s approach. It stated that an educational institution can be found liable under Title VI “if it is deliberately indifferent to racial harassment to such an extent that the indifference can be seen as racially motivated.”¹⁸⁴ Once again, it did not adopt the deliberate indifference standard outright, but rather qualified it with the “racially motivated” language. Since it might be difficult to determine whether race-based motives existed in a particular case, the court clarified that a Title VI complainant “does not have to show that defendant actively ‘encouraged’ or ‘condoned’ the harassment.”¹⁸⁵ Rather, “‘turn[ing] a blind eye’ to the harassment is enough to state a prima facie case of hostile educational environment.”¹⁸⁶ While these pronouncements are helpful, they fall short of establishing that demonstrated deliberate indifference will always be sufficient to hold an institution liable under Title VI.

In contrast to *Bryant* and *Koumantaros*, the court in *Langadinos* took a more stringent approach to *Sandoval*’s requirement of intentional discrimination. The court declared that an educational institution faces Title VI liability “only when it intentionally does something wrong, not when it merely sits by and does nothing at all.”¹⁸⁷ In the case before it, the court characterized the plaintiff’s complaint as focusing on the school’s “omissions, rather than on any intentional decision to discriminate.”¹⁸⁸ This was deemed insufficient, as the school could not be held liable “as a result of its ‘conscious disregard’ for the plaintiff’s rights” or “merely because it failed to do anything to help him.”¹⁸⁹

Given the stringent approach taken by the *Langadinos* court, as well as the ambivalent language contained in the *Bryant* and *Koumantaros*

183. *Id.* at 934 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

184. *Koumantaros v. City Univ. of N.Y.*, No. 03 Civ. 10170, 2007 U.S. Dist. LEXIS 19530, at *48 (S.D.N.Y. Mar. 15, 2007) (quoting *Rodriguez v. N.Y. Univ.*, No. 05 Civ 7374, 2007 U.S. Dist. LEXIS 3242, at *6 (S.D.N.Y. Jan. 13, 2007)).

185. *Id.* (quoting *Deleon v. Putnam Valley Bd. of Educ.*, No. 03 Civ. 10274, 2006 U.S. Dist. LEXIS 3337, at *12 (S.D.N.Y. Jan. 26, 2006)).

186. *Id.* (quoting *Deleon*, 2006 U.S. Dist. LEXIS 3337, at *12).

187. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at *30–31 (W.D. Va. Sept. 25, 2005).

188. *Id.* at *31.

189. *Id.*

opinions, it remains an open question whether a Title VI racial harassment complainant can establish institutional liability by demonstrating actual notice and deliberate indifference or instead will be held to a higher standard under the rubric of intentional discrimination. Despite the fact that courts deciding Title VI harassment cases have almost uniformly applied the standards of actual notice and deliberate indifference, in the aftermath of *Sandoval*, this framework stands on less secure ground under Title VI than under Title IX. Therefore, a Title VI complainant must at least satisfy the Title IX standards for institutional liability and, depending upon the court's interpretation of Title VI, may well have to meet a higher standard.

III. COLLEGES AND UNIVERSITIES ARE OVERSTEPPING THEIR TITLE VI AND TITLE IX OBLIGATIONS AND IGNORING BOTH OCR POLICY AND CLEAR LEGAL PRECEDENT

Having discussed the obligations that Title IX and Title VI place upon educational institutions, I will now analyze the tendency on the part of some colleges and universities to overstep these obligations when addressing the problems of sexual and racial harassment. First, these institutions, in enacting and applying their harassment policies, have ignored the fundamental and crucial distinction between pure speech and actionable harassing conduct. Second, they have acted contrary to stated OCR policy. Third, they have acted contrary to the strong legal precedent set by cases uniformly striking down infirm college and university harassment policies and invalidating institutions' overbroad applications of their policies.

A. The Misconception of Conduct Versus Speech

First, a fundamental flaw common to some institutions' approaches to hostile environment is the misconception that pure speech, as opposed to a pattern of conduct, can constitute actionable harassment. This problem is manifested both in the drafting of infirm harassment policies and in the overbroad application of harassment rationales, as illustrated by many of the previously discussed examples.¹⁹⁰ In both situations, these colleges and universities improperly prohibit and punish pure verbal expression, typically focusing on that which is deemed to be offensive or undesirable. In doing so, they fail to recognize that sexual and racial harassment law, properly understood, are aimed at extreme patterns of behavior, and that speech can only be an incidental part of such conduct.¹⁹¹ They may even misconstrue harassment as an outright exception to the First Amendment. However, it is plainly obvious that there is no such First Amendment exception,¹⁹² as the Supreme Court has affirmed time and again the protected status of offensive, prejudicial, and demeaning speech.¹⁹³

Moreover, Title IX and Title VI case law strongly mandate that pure

190. See *infra* Parts I.A., I.B.

191. See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (striking down school district's anti-harassment policy on overbreadth grounds, declaring, "There is of course no question that *non-expressive, physically harassing conduct* is entirely outside the ambit of the free speech clause") (emphasis added).

192. See, e.g., *id.* at 204, 209 ("There is no categorical 'harassment exception' to the First Amendment's free speech clause . . . 'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."); see also *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) ("In *Saxe*, we noted that there is no 'harassment exception' to the First Amendment's Free Speech Clause . . ."); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) ("Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment.").

193. See, e.g., *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating hate-speech ordinance); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Cohen v. California*, 403 U.S. 15 (1971) (reversing defendant's conviction for disturbing the peace for wearing a jacket in a courthouse bearing the words "Fuck the Draft"); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (reversing defendant's conviction for disorderly conduct for delivering a public speech with racist and prejudicial messages); see also *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293, 314 (D.N.H. 1994) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Iota Xi Chapter v. George Mason Univ.*, 773 F. Supp. 792, 795 (E.D. Va. 1991) ("The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane.");

speech cannot, by itself, create a hostile educational environment. To begin with, the *Davis* standard for hostile environment speaks in terms of “behavior” which is “so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”¹⁹⁴ In deciding *Davis*, the Supreme Court referred to the harasser-student’s continued five month pattern of conduct, for which he pleaded guilty to sexual battery, and similar conduct directed towards other students, as “sexually harassing conduct.”¹⁹⁵ That he made “vulgar statements” toward the complainant was significant insofar as it contributed to a “prolonged pattern” of attempting to touch her private parts, rubbing his body against her, and otherwise “act[ing] in a sexually suggestive manner” toward her.¹⁹⁶ In other words, the verbal expression involved in the case was but a small part of an extreme and continued pattern of conduct.

The facts before the Court in *Davis* parallel the underlying facts in the vast majority of Title IX and Title VI hostile environment cases, as these cases typically involve similarly extreme patterns of conduct with incidental, if any, speech components.¹⁹⁷ It is not surprising, therefore, that courts deciding Title IX and Title VI cases have echoed the *Davis* opinion in focusing on patterns of harassing conduct rather than pure speech. In *Benefield v. Board of Trustees of the University of Alabama at Birmingham*,¹⁹⁸ for example, the court spoke of Title IX’s proscription of

194. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999).

195. *Id.* at 634–35.

196. *Id.* at 634.

197. *See, e.g.*, *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007) (alleging sexual assault of college student by student-athlete); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007) (alleging sexual assault of college student by student-athlete); *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 931 (10th Cir. 2003) (alleging a Title VI claim arising from racially hostile school environment which included “offensive racial slurs, epithets, swastikas, and the letters ‘KKK’ inscribed in school furniture and in notes placed in African American students’ lockers and notebooks,” as well as white students being allowed to wear clothing featuring the Confederate flag, in violation of school policy); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000) (alleging a Title IX claim arising from student-on-student molestation and physical attacks); *Murrell v. School Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (alleging a Title IX claim arising from the sexual assault of a developmentally disabled student by another student); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999) (alleging a Title IX claim arising from alleged rape and sexual assault of student by another student); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (alleging a Title VI claim arising from repeated usage of racial slurs and graffiti on school walls featuring similar racial epithets); *Turner v. McQuarter*, 79 F. Supp. 2d 911 (N.D. Ill. 1999) (alleging a coerced sexual relationship between a college student-athlete and her basketball coach); *S.S. v. Alexander*, 177 P.3d 724 (Wash. Ct. App. 2008) (alleging a Title IX claim arising from alleged rape of student by fellow student).

198. 214 F. Supp. 2d 1212 (N.D. Ala. 2002); *see supra* notes 100–102 and accompanying text.

“conduct that is so severe, pervasive, and objectively offensive . . .” and of “harassing behavior.”¹⁹⁹ In *Theno v. Tonganoxie Unified School District No. 464*,²⁰⁰ another Title IX case implicating student-on-student harassment, the federal district court detailed a “pattern of harassment” which was “unrelenting” and went on pervasively for four years.²⁰¹ In *Monteiro v. Tempe Union High School District*,²⁰² a Title VI decision, the Ninth Circuit noted that “a hostile environment can be caused by the conduct of peers,” that the school “refused to make any effort to halt the racist conduct,” and that “[a] school where this sort of conduct occurs unchecked is utterly failing in its mandate to provide a nondiscriminatory educational environment.”²⁰³ Similarly, the Tenth Circuit in *Bryant*²⁰⁴ repeatedly referred to the “shameful student-to-student conduct” which had given rise to the plaintiffs’ Title VI suit.²⁰⁵

Affirming the case law under Title IX and Title VI, OCR has delineated the Title IX obligations placed on a funding recipient in terms of “regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX.”²⁰⁶ In the same policy guidance, OCR stated, “Title IX is intended to protect students from sex discrimination, not to regulate the content of speech,” and that a funding recipient must therefore “formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.”²⁰⁷ In the Title VI realm, OCR has similarly spoken of the responsibility of federal funding recipients to prevent “harassing conduct” within their programs and activities and of their obligations regarding “discriminatory conduct,” which “causes a racially hostile environment to develop.”²⁰⁸ The agency stated in the same policy guidance that its guidance “is directed at conduct that constitutes race discrimination under Title VI . . . and not at the content of speech.”²⁰⁹ Therefore, “OCR cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the

199. *Benfield*, 214 F. Supp. 2d at 1221 (emphasis added).

200. 377 F. Supp. 2d 952 (D. Kan. 2005).

201. *Id.* at 968 (emphasis added).

202. 158 F.3d 1022 (9th Cir. 1998); *see supra* note 138 and accompanying text.

203. *Monteiro*, 158 F.3d at 1032–34 (emphasis added).

204. *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928 (10th Cir. 2003).

205. *Id.* at 933 (quoting Record at 303, *Bryant*, 334 F.3d 928 (No. 02-6212)) (emphasis added).

206. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,045 (1997) (emphasis added).

207. *Id.*

208. Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448, 11,450 (1994) (emphasis added). Elsewhere in its guidance, OCR delineated a funding recipient’s obligation to maintain “a policy that prohibits the conduct of racial harassment” and that moreover is “clear in the types of conduct prohibited.” *Id.* (emphasis added).

209. *Id.* at 11,451 n.1 (emphasis added).

First Amendment to the United States Constitution.”²¹⁰ Thus, according to the very agency charged with enforcing Title IX and enforcing Title VI in the educational context,²¹¹ those statutes are aimed at preventing and addressing genuinely harassing conduct, not pure speech.

Lastly, legal commentators too have recognized the fundamental distinction between actionable conduct and verbal expression.²¹² In the face of such legal authority,²¹³ it is inapposite for colleges and universities to target and censor pure verbal expression in their efforts to address racial and sexual harassment. There is a clear and substantial difference between a “[c]omment[] or inquir[y] about dating” or “dismissive comment[],”²¹⁴ on one hand, and a pattern of genuinely harassing behavior, on the other. The types of innocuous speech that can easily fall into the former category simply do not rise to the level of actionable harassment. There is similarly a substantial difference between actionable harassment and the respective

210. *Id.* at 11,450 n.7.

211. Strossen, *supra* note 59 and accompanying text; *see also* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998) (“The Department of Education is the agency charged by Congress with enforcing Title VI.”).

212. *See* Strossen, *supra* note 59, at 706. In arguing for a balance between free speech principles and workplace sexual harassment law, Strossen states:

The fact that words may be used *in connection with otherwise actionable conduct* does not immunize such conduct from appropriate regulation. For example, intimidating telephone calls, threats of attack, extortion and blackmail are *unprotected forms of conduct which include an element of verbal or written expression*. As always, however, great care must be taken to avoid applying such provisions overbroadly to protected expression.

Id. (quoting ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 72a (rev. ed. 1995)) (emphasis added); *see also id.* at 725 (“[W]hen women or employers cry ‘sexual harassment!’ at any passing reference to sex, they trivialize the issue, make it a laughingstock, and deflect attention and resources from the serious ongoing problems of gender discrimination in the workplace.”). While Strossen’s discussion is focused on sexual harassment law in employment, her arguments regarding the conduct-speech distinction are certainly relevant to the college and university campus and indeed apply with more vigor where the encroachment of harassment law has had a larger impact on speech rights. Given that speech rights are much more important in the college and university setting than in the workplace, Strossen’s observations strongly counsel in favor of paying close attention to the conduct-speech distinction in college and university policy.

213. It bears mentioning here that the focus on patterns of conduct, rather than pure speech, is seen in Title VII hostile environment case law as well. *See, e.g.,* DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591, 596–97 (5th Cir. 1995) (“Where *pure expression* is involved, Title VII steers into the territory of the First Amendment [W]hen Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.” (emphasis added)); Ariel B. v. Fort Bend Indep. Sch. Dist., 428 F. Supp. 2d 640, 667 (S.D. Tex. 2006) (“The Fifth Circuit has acknowledged that all of the sexual hostile work environment cases decided by the Supreme Court have involved *patterns of long lasting, unredressed sexual conduct* that clearly affected the plaintiffs’ work environments.” (emphasis added)).

214. Davidson College, *supra* note 5; *see supra* note 34 and accompanying text.

expressions of Donald Hindley and Tim Garneau.²¹⁵ However, by enacting overbroad and vague harassment policies and by enforcing their policies against clearly protected speech, too many colleges and universities have ignored these realities.

B. Colleges and Universities Are Acting Contrary to OCR Policy

Colleges and universities taking a misguided approach toward the problems of racial and sexual harassment are also acting contrary to stated OCR policy. This is most visible in the aforementioned 2003 OCR letter²¹⁶ sent to federally-funded colleges and universities to clarify the scope and meaning of federal harassment regulations. In the letter, OCR made abundantly clear that, as a federal agency, it cannot force an institution, whether public or private, to ban protected speech in order to comply with its regulations. As the agency charged with enforcing institutional compliance with Title IX and Title VI, OCR policy guidance on the relationship between harassment law and free speech principles is owed substantial deference.²¹⁷

In the 2003 letter, OCR clarified that its regulations “are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution”²¹⁸ and added that this held true for private institutions as well as public ones.²¹⁹ Regarding the manner in which many schools had

215. See *supra* Part I.A.

216. See *supra* note 121 and accompanying text.

217. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) (“The Department of Education is the agency charged by Congress with enforcing Title VI. As such, its interpretation is entitled to a high degree of deference by the courts so long as it does not conflict with a clearly expressed congressional intent and it is reasonable.”); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997) (quoting *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 n.20 (5th Cir. 1996)) (“In general, ‘when interpreting title IX we accord the OCR’s interpretations appreciable deference.’”).

218. Reynolds, *supra* note 121.

219. With respect to private institutions, OCR stated the following:

Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR’s regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.

Id. See also *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,045 n.95 (1997) (“The receipt of Federal funds by private schools does not directly subject those schools to the U.S. Constitution However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.”).

addressed the problem of harassment on campus, the agency stated, “OCR’s regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.”²²⁰ Therefore, a college or university cannot infringe upon students’ free speech rights and then simply claim that it had no choice if it were to comply with federal harassment regulations. By making this a point of emphasis, OCR sought to eliminate a popular rationale employed by many college and university administrators to justify severe restrictions on campus speech.

As OCR’s letter explained, Title IX and Title VI are “intended to protect students from invidious discrimination, not to regulate the content of speech.”²²¹ Significantly, this means that “the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment” on a college or university campus.²²² Furthermore, any allegedly harassing behavior must be “evaluated from the perspective of a reasonable person in the alleged victim’s position.”²²³ These last two statements appear to be OCR’s way of responding to the tendency of college and university administrators to target particular expression merely because some individuals may find it offensive, disagreeable, or uncomfortable.

Therefore, OCR’s stated position is that “schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.”²²⁴ It should be noted, moreover, that OCR has presented the same arguments elsewhere, for instance in the aforementioned policy guidelines.²²⁵ Taken together, these statements

220. Reynolds, *supra* note 121.

221. *Id.*

222. *Id.* Elsewhere in the letter, OCR reiterated this point:

Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR’s standard, the conduct must also be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program.

Id.

223. *Id.*

224. *Id.* The point should not be lost that OCR once again spoke in terms of regulating *conduct*, not pure verbal expression, in order to prevent gender- or race-based discrimination. This corroborates the points made in the previous subsection regarding the fundamental distinction between conduct and speech. *See supra* Part III.A.

225. *See supra* notes 206–210.

should place college and university administrators on notice that federal law cannot be used as a justification for applying overbroad harassment rationales.

C. Courts Have Repeatedly Struck Down Infirm Harassment Policies.

Colleges and universities misapplying harassment law have also ignored the legal precedent set by decisions striking down college and university harassment policies on the grounds of vagueness, overbreadth, or both. Over the past two decades, courts have uniformly upheld challenges to college and university speech codes, with each case involving a challenge to a harassment policy.²²⁶ This trend demonstrates that a favorite mechanism of the drafters of speech codes is an overbroad harassment rationale. Given the uniformity of these cases, any institution maintaining a similarly infirm harassment policy should understand that its policy is just as unlikely to withstand a constitutional challenge.

The first in this line of cases was *Doe v. University of Michigan*.²²⁷ A student challenged the University's Policy on Discrimination and Discriminatory Harassment, which prohibited, in pertinent part, "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of" race, gender, or other listed characteristics, and that, among other things, "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities."²²⁸

The court in *Doe* found the policy to be facially vague and overbroad in sanctioning expression on the basis of its mere offensiveness.²²⁹ It stated that since terms such as "stigmatizes" and "victimizes" were "general and elude[d] precise definition" and since the University "never articulated any principled way to distinguish sanctionable from protected speech," students

226. See *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("discriminatory harassment" policy); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) ("intimidation" and "harassment" policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (sexual harassment policy); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) ("racism and cultural diversity" policy); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wisc. 1991) ("discriminatory harassment" policy); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination and discriminatory harassment" policy); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct., Feb. 27, 1995) ("harassment by personal vilification" policy); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) ("anti-harassment" policy at the secondary school level).

227. 721 F. Supp. 852.

228. *Id.* at 856.

229. *Id.* at 867.

were “necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable.”²³⁰ Therefore, there was simply no way to give the policy a constitutionally permissible reading.

In *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*,²³¹ a federal court found a racial and discriminatory harassment policy to be facially vague and overbroad. The policy prohibited “racist or discriminatory comments, epithets or other expressive behavior” if such conduct intentionally “[d]emean[ed] the race, sex, religion,” or other listed characteristics of an individual and “[c]reate[d] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.”²³²

The court rejected the University’s justification that “prohibition of discriminatory speech which creates a hostile environment has parallels in the employment setting,” and that “under Title VII, an employer has a duty to take appropriate corrective action when it learns of pervasive illegal harassment.”²³³ The court countered, “Title VII addresses employment, not educational, settings,” and moreover “it cannot supersede the requirements of the First Amendment.”²³⁴ In other words, the standards developed under Title VII hostile environment case law, which allow for comparatively broad regulation of verbal expression in the workplace, have no place in setting standards for speech in the educational setting.

In *Booher v. Northern Kentucky University Board of Regents*,²³⁵ a federal district court declared a sexual harassment policy to be overbroad and vague in prohibiting verbal and non-verbal conduct which “unreasonably affects your status and well-being by creating an intimidating, hostile, or offensive work or academic environment.”²³⁶ Finding that the policy “fail[ed] to draw the necessary boundary between the subjectively measured offensive conduct and objectively measured harassing conduct,”²³⁷ the court concluded that the policy “gives one the impression that speech of a sexual nature that is merely offensive would constitute sexual harassment because it makes the individual hearer uncomfortable to the point of affecting her status and well-being.”²³⁸ Therefore, the policy was clearly capable of reaching protected speech,

230. *Id.*

231. 774 F. Supp. 1163.

232. *Id.* at 1165.

233. *Id.* at 1177.

234. *Id.*

235. *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998).

236. *Id.* at *3.

237. *Id.* at *28.

238. *Id.* at *30.

rendering it unconstitutionally overbroad.²³⁹

Just as importantly, the court stated,

The fact that the range of speech or expressive conduct prohibited by the policy overlaps the range prohibited by Title VII and Title IX is not necessarily determinative of whether the sweep of the policy impermissibly extends into the region protected by the *First Amendment*. That region is protected against even the reach of statute.²⁴⁰

The court also recognized that, in contrast to the policy at issue, OCR policy guidance “stresses that sexual harassment involves conduct—that is, not pure speech,”²⁴¹ thus echoing the earlier discussion in this section regarding the fundamental distinction between pure speech and the conduct of harassment.

In a 2007 decision, a federal district court in California issued a preliminary injunction which limited an entire University system’s ability to enforce a policy prohibiting “[c]onduct that threatens or endangers the health or safety of any person within or related to the University community, including physical abuse, threats, *intimidation*, *harassment*, or sexual misconduct.”²⁴² Recognizing that inclusion of the terms “intimidation” and “harassment” rendered the policy facially overbroad, the court limited enforcement of the policy to only “the sub-category of intimidation and harassment that ‘threatens or endangers the health or safety of any person.’”²⁴³ In other words, it could not be applied against a student merely for engaging in expressive behavior with no intent to threaten or endanger the health or safety of another person. The court reasoned, “Standing alone, the terms ‘intimidation’ and ‘harassment’ are not clearly self-limiting and could be understood, reasonably, to proscribe at least some expressive activity that would be protected by the First Amendment.”²⁴⁴

Finally, there is the significant recent decision of *DeJohn v. Temple University*.²⁴⁵ In *DeJohn*, the Third Circuit upheld a student’s overbreadth challenge to Temple University’s sexual harassment policy.²⁴⁶ As the most

239. The court also found that the policy “fail[ed] to give adequate notice regarding precisely what conduct is prohibited,” *id.* at *31, and “delegate[d] enforcement responsibility with inadequate guidance.” *Id.* at *32. Therefore, it was unconstitutionally vague as well.

240. *Id.* at *22 (citing *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991)) (emphasis added).

241. *Id.* at *28 n.18.

242. *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1010 (N.D. Cal. 2007) (emphasis in the original).

243. *Id.* at 1022 (quoting CAL. CODE REGS. tit. 5, § 41301 (2008)).

244. *Id.* at 1021.

245. 537 F.3d 301 (3d Cir. 2008).

246. *Id.* at 320.

recent of the speech code cases, and as a strongly-worded federal circuit court opinion, *DeJohn* carries much significance and should convey a clear and powerful message to college and university administrators. At issue in *DeJohn* was a policy defining sexual harassment as “expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . such conduct has the purpose or effect of unreasonably interfering with an individual’s work, educational performance, or status; or . . . has the purpose or effect of creating an intimidating, hostile, or offensive environment.”²⁴⁷

The Third Circuit noted that under the policy’s “purpose or effect” prong, “a student who sets out to interfere with another student’s work, educational performance, or status, or to create a hostile environment would be subject to sanctions regardless of whether these motives and actions had their intended effect.”²⁴⁸ This prong, it held, ran counter to the requirement that a school “must show that speech will cause actual, material disruption before prohibiting it.”²⁴⁹ Additionally, the court held that the use of terms such as “hostile,” “offensive,” and “gender-motivated” rendered the policy “sufficiently broad and subjective” that it “could conceivably be applied to cover any speech’ of a ‘gender-motivated’ nature ‘the content of which offends someone.’”²⁵⁰ The court noted that the policy lacked “any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual’s work.”²⁵¹ By thus failing to incorporate the elements of the *Davis* standard, the policy left student speech rights at the mercy of the subjective whims, no matter how unreasonable, of the listener. As a result of these doctrinal flaws, the Third Circuit found the policy to be facially overbroad.

It is not only in the college and university context that courts have found fundamental First Amendment problems with harassment policies.²⁵² In

247. *Id.* at 305.

248. *Id.* at 317.

249. *Id.*

250. *Id.* (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001)).

251. *Id.* at 317–18.

252. *See also* *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (declaring unconstitutionally vague and overbroad a discriminatory harassment policy which defined racial and ethnic harassment as “any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . demeaning or slurring individuals . . . or using symbols, [epithets] or slogans that infer negative connotations about the individual’s racial or ethnic affiliation”); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 871–72 (N.D. Tex. 2004) (finding a public university’s speech code, including sexual harassment provision, to be unconstitutionally overbroad in banning “insults, epithets, ridicule, or personal attacks”); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d

Saxe v. State College Area School District,²⁵³ the Third Circuit found a public school district's anti-harassment policy to be unconstitutionally overbroad. The policy banned "verbal or physical conduct" based on another's race, gender, and other listed personal characteristics, when such conduct "has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."²⁵⁴

The Third Circuit held that the policy encompassed speech which did not fall under either federal or state law definitions of harassment,²⁵⁵ and, moreover, that its restrictions were not necessary to prevent "substantial disruption" or interference with the school environment or the rights of other students.²⁵⁶ Even under the comparatively lenient standards traditionally accorded by courts to secondary schools' attempts to regulate the behavior of their students,²⁵⁷ the policy was held to be legally indefensible.

Significantly, the court also noted, "we have found no categorical rule that divests 'harassing' speech, as defined by federal anti-discrimination statutes, of First Amendment protection,"²⁵⁸ and took critical notice of "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech."²⁵⁹ In handing down its decision, the Third Circuit clarified that students at the secondary level of education, and certainly at the post-secondary level, enjoy speech rights that cannot be

357, 363 (M.D. Pa. 2003) (enjoining enforcement of University speech code prohibiting "acts of intolerance" based on gender, race, and other personal characteristics, and directing students to speak in a manner that "does not provoke, harass, intimidate, or harm another" (emphasis removed)); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct., Feb. 27, 1995) (declaring University's discriminatory harassment policy unconstitutionally overbroad under California's Leonard Law, where the policy prohibited "[s]peech or other expression . . . intended to insult or stigmatize an individual" on the basis of gender, race, sexual orientation and other listed categories).

253. 240 F.3d 200 (3d Cir. 2001).

254. *Id.* at 202.

255. *Id.* at 210–11.

256. *Id.* at 216–17.

257. Under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), a school may categorically prohibit lewd, vulgar, or profane language. Under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a school may regulate school-sponsored speech, defined as speech that a reasonable observer would view as the school's own speech, on the basis of any "legitimate pedagogical concern." *Id.* at 273. Finally, under the Supreme Court's seminal decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), a student's expression, even if not lewd or profane within the meaning of *Fraser*, and even if not school-sponsored within the meaning of *Hazelwood*, may be regulated if it would "substantially disrupt" or "material[ly] interfere" with the work of the school or the rights of other students. *Id.* at 513–14.

258. *Saxe*, 240 F.3d at 210.

259. *Id.* at 209.

easily eroded away in the name of addressing the problems of harassment and discrimination. Therefore, under the baseline level of protection this decision establishes for the college and university setting,²⁶⁰ a harassment policy which restricts a college or university student's right to engage in protected speech is invalid.

D. Courts Have Repeatedly Invalidated the Application of Harassment Policies toward Protected Speech

Just as courts have repeatedly upheld facial challenges to college and university harassment policies, they have on several occasions invalidated an institution's decision to apply a harassment policy to protected expression. This line of cases should therefore send an equally strong signal that an "as applied" challenge to a college or university's abuse of overbroad harassment rationales will very likely succeed when there is a conflict with free speech rights.

In *Cohen v. San Bernardino Valley College*,²⁶¹ Professor Dean Cohen brought an action against his College under 42 U.S.C. § 1983, alleging that it had violated his First Amendment rights by ruling that he had violated the school's sexual harassment policy and taking adverse employment action against him.²⁶² The harassment finding stemmed from a student's complaint that Cohen focused on topics of a sexual nature in class discussion, used "profanity and vulgarities," intentionally directed comments "at her and other female students in a humiliating and harassing manner," and asserted controversial viewpoints in a "devil's advocate" style.²⁶³

The Ninth Circuit held that the College's policy was unconstitutionally vague as applied to Cohen's teaching methods.²⁶⁴ It reasoned, "Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years."²⁶⁵

In another case, *Silva v. University of New Hampshire*,²⁶⁶ Professor Donald Silva challenged the University's decision to suspend him without

260. While college and university officials may argue that *Saxe* is not directly on-point for the post-secondary level of education, the counterargument is that the result in *Saxe*, which counsels that constitutionally infirm harassment policies violate student speech rights even at the secondary level, underscores the trend highlighted by the aforementioned college and university cases.

261. 92 F.3d 968 (9th Cir. 1996).

262. *Id.* at 970.

263. *Id.* at 970.

264. *Id.* at 972.

265. *Id.*

266. 888 F. Supp. 293 (D.N.H. 1994).

pay for one year after it found that Silva had violated its sexual harassment policy. A group of students in Silva's technical writing course had complained after he made statements in class analogizing focus to sex and comparing belly dancing to "jello on a plate with a vibrator under the plate."²⁶⁷ A University hearing panel concluded that Silva's statements were "offensive, intimidating and contributing to a hostile academic environment."²⁶⁸

In adjudicating Silva's section 1983 claim against the University, the court held that the University's application of its sexual harassment policy toward Silva's in-class comments was "not *reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation's interest in academic freedom."²⁶⁹ Rather than constituting actionable sexual harassment, Silva's comments were made "subject to discipline simply because six adult students found his choice of words to be outrageous."²⁷⁰ Thus, the court concluded that the University had violated Silva's First Amendment rights.

Finally, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*,²⁷¹ the Fourth Circuit reviewed a university's imposition of sanctions against a fraternity for staging an "ugly woman contest."²⁷² In the contest, members of the fraternity dressed as "caricatures" of different types of women, including one fraternity member who appeared as an "offensive caricature" of an African-American woman.²⁷³ The University determined that the event created a "hostile learning environment" for female and African-American students, incompatible with the school's mission, and suspended the fraternity from all activities for the rest of the semester.²⁷⁴

The fraternity brought a section 1983 action against the University, seeking to nullify the sanctions as violative of its members' expressive rights.²⁷⁵ The Fourth Circuit held that even though the University had a "substantial interest" in maintaining a campus free of discrimination and prejudice,²⁷⁶ it could not, consistent with the First Amendment, place "selective limitations upon speech"²⁷⁷ and punish students "based on the

267. *Id.* at 299 (quoting Complaint at 8, *Silva*, 888 F. Supp. 293 (No. 93-533-SD)).

268. *Id.* at 307-08.

269. *Id.* at 314 (emphasis in original).

270. *Id.* at 313.

271. 993 F.2d 386 (4th Cir. 1993).

272. *Id.* at 387.

273. *Id.* at 388.

274. *Id.*

275. *Id.*

276. *Id.* at 393.

277. *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992)).

viewpoints they express.”²⁷⁸ The court therefore overturned the sanctions imposed against the fraternity.

The import of decisions such as *Cohen*, *Silva*, and *Iota Xi* is that applying harassment policies against protected speech runs against legal precedent in the same way as maintaining facially unconstitutional policies. Given the decisions reached in these cases, college and university administrators should be on notice that overbroad harassment rationales are legally problematic in either form.

IV. THE IMPORTATION OF TITLE VII LAW INTO HIGHER EDUCATION AND INSTITUTIONAL FEAR OF EXPANDED LIABILITY FOR PEER HARASSMENT

This article has established that some colleges and universities have overstepped their Title IX and Title VI obligations in drafting and applying their harassment policies and that, in doing so, they have ignored the crucial distinction between pure verbal expression and actionable harassment and acted in clear contravention of both OCR policy and strong legal precedent. It has also demonstrated the harm caused on the college and university campus when student speech rights are restricted. The question then becomes, how has this trend occurred?

A major contributing factor to the problem is the importation of Title VII law into higher education. Courts have in numerous cases conflated Title VII law, which properly governs harassment occurring in the workplace, with Title IX and Title VI law. Some colleges and universities have had a two-fold reaction to these decisions. First, they have interpreted them as expanding the scope of institutional liability for peer racial and sexual harassment. Second, they have interpreted them as signaling and endorsing a complete parallel between Title VII law and Title IX and Title VI law. As a result, those institutions have adopted harassment policies tracking Title VII hostile environment standards, despite the fact that these policies do not leave the necessary breathing room for campus speech. Before discussing these issues, I shall first review employment harassment law under Title VII and then examine how courts have conflated it with Title IX and Title VI law.

A. Title VII Standards for Harassment in Employment

1. Creation of a Hostile Environment

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating 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.”²⁷⁹ The seminal

278. *Id.*

279. 42 U.S.C. § 2000e-2(a)(1) (2000).

Supreme Court decision on hostile environment sexual harassment in employment is *Meritor Savings Bank, FSB v. Vinson*,²⁸⁰ where the Court held that such harassment is a form of gender discrimination within the meaning of Title VII. The Court stated that in order for sexual harassment in the workplace to be actionable under Title VII, it must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”²⁸¹

In subsequent case law, the Court emphasized, “We have never held that workplace harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations.”²⁸² Furthermore, “‘simple teasing,’ . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”²⁸³ Rather, “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”²⁸⁴

Racial harassment in employment is also adjudicated under the *Meritor* standard. The Supreme Court has cited with approval the practice of drawing upon employment racial harassment cases to decide sexual harassment cases, and vice versa.²⁸⁵ Thus, courts facing racial harassment claims under Title VII have required complainants to demonstrate that they were targeted by conduct which was “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”²⁸⁶

With these pronouncements in mind, it is clear that the Title VII standard for the creation of a hostile environment is less stringent and more

280. 477 U.S. 57 (1986).

281. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

282. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

283. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting *Oncale*, 523 U.S. at 82).

284. *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). In *Harris*, the Court attempted to create a definitive list of factors for courts to consider in deciding Title VII harassment cases: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. at 23. It also clarified that “no single factor is required” to find an abusive work environment. *Id.*

285. *See, e.g., Faragher*, 524 U.S. at 786–87; *see also id.* at 787 n.1 (“Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.”).

286. *Lovlace v. B.P. Prods. N. Am., Inc.*, 252 F. App’x 33, 39 (6th Cir. 2007) (quoting *Harris*, 510 U.S. at 21).

easily met than the *Davis* standard,²⁸⁷ which governs Title IX peer sexual harassment cases and which has been applied in several of the Title VI peer racial harassment decisions to date. Whereas Title VII law merely requires conduct to be sufficiently severe *or* pervasive, *Davis* requires conduct to be sufficiently severe *and* pervasive, as well as objectively offensive.²⁸⁸ There is a significant difference between these requirements. Indeed, the Court specifically stated in *Davis* that, under the standard it was applying, a single instance of peer harassment would not be sufficient to establish a hostile educational environment.²⁸⁹ A single instance of harassment, no matter how severe, would not meet the requirement of pervasiveness of conduct.²⁹⁰ By contrast, under the “severe *or* pervasive” standard, a single instance of harassment, if found to be sufficiently severe, would establish the creation of a hostile environment.

Moreover, the requirement that harassing conduct, in order to be actionable under Title VII, must alter the conditions of one’s employment and create an abusive work environment presents a lower threshold than does the requirement under *Davis* that harassing conduct must “so undermine[] and detract[] from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”²⁹¹ Effective denial of equal access to educational opportunities and resources is an extreme result, and therefore a more egregious violation of one’s rights than mere alteration of one’s work environment.²⁹²

Therefore, the *Davis* standard provides far more protection for speech than does the Title VII standard. This has been borne out in the case law on employment harassment, as courts have repeatedly given short service to free speech rights in the workplace.²⁹³ It should not be surprising,

287. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

288. *Id.*

289. *Id.* at 652–53 (“[W]e think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”).

290. *See, e.g.*, *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003) (“We take this to mean that gender discrimination must be more widespread than a single instance of one-on-one peer harassment and that the effects of the harassment touch the whole or entirety of an educational program or activity.”).

291. *Davis*, 526 U.S. at 651.

292. To illustrate the type of conduct that would qualify, the Supreme Court in *Davis* used the hypothetical example of male students “physically threaten[ing] their female peers every day, successfully preventing the female students from using a particular school resource,” such as an athletic field or computer lab. *Id.* at 650–51. The Court emphasized that, in contrast to such “overt, physical deprivation of access to school resources,” *id.* at 650, it would be insufficient to allege that one was subjected to “simple acts of teasing and name-calling . . . even where these comments target differences in gender.” *Id.* at 652.

293. For instance, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486

therefore, to see that various marginal harassment complaints have been brought in the employment setting on the basis of pure speech.²⁹⁴ These cases provide a glimpse into the manner in which Title VII law has constrained the freedom of speech in the workplace.

2. Employer Liability

Under Title VII, an employer is liable to a victim of sexual or racial harassment perpetrated by a co-worker if it “knew or should have known” about the conduct in question and “failed to implement prompt and appropriate corrective action.”²⁹⁵ Under the “knew or should have known standard,” an employer can be held liable on the basis of “actual” or “constructive” notice of harassing conduct.²⁹⁶ Constructive notice is established where the harassing conduct was “so severe and pervasive that [the employer] reasonably should have known of it.”²⁹⁷

(M.D. Fla. 1991), the plaintiff alleged that her co-workers created a hostile work environment by putting up sexually suggestive or demeaning pictures, posters, and similar materials. *Id.* at 1493–99. In finding for her, the federal district court flatly stated that hostile environment claims do not implicate the First Amendment. *Id.* at 1535–36. Moreover, even if the First Amendment protects speech in the workplace, the court held that the government’s compelling interest in eradicating discrimination exempts hostile environment law from First Amendment scrutiny. *Id.*; *see also* *Baty v. Willamette Indus.*, 985 F. Supp. 987, 995 (D. Kan. 1997), *aff’d*, 172 F.3d 1232 (10th Cir. 1999) (stating, with respect to defendant’s argument that the First Amendment prohibited a finding of liability for hostile work environment sexual harassment, that “the court is persuaded by the reasoning” in *Robinson* and that “since *Robinson*, the Supreme Court has indicated that Title VII does not regulate speech in violation of the First Amendment”); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (“[A]cts of expression which may not be proscribed if they occur outside of the work place may be prohibited if they occur at work Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance That expression is ‘swept up’ in this proscription does not violate First Amendment principles.”).

294. In one case, a group of librarians complained that patrons were using library computers to view images that the librarians found offensive. *See* *Bernstein supra* note 64, at 226, n.14. The Equal Employment Opportunity Commission (EEOC) found that they had “probable cause” to pursue their harassment claim, leading the librarians to file suit against the city library system. *Id.* Apparently, it did not matter to the EEOC that the conduct at issue did not involve any co-workers or supervisors, but solely library patrons, nor did it matter that the librarians inadvertently saw the material rather than intentionally being targeted with it. In other cases, co-workers have brought complaints against a library employee who displayed a New Yorker cartoon containing the word “penis” and against a graduate student who had a small photograph of his wife in a bikini on his desk. *See* *Volokh, supra* note 46, at 566–67.

295. *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996) (quoting *Rabidue v. Osceola Refining, Co.*, 805 F.2d 611, 621 (6th Cir. 1986)); *see also* *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1013 (8th Cir. 1988).

296. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003).

297. *Id.* Courts have used the following list of factors on the issue of constructive notice: “the remoteness of the location of the harassment as compared to the location of management; whether the harassment occurs intermittently over a long period of time;

On the other hand, an employer is liable for harassment perpetrated by a supervisor if the conduct was “foreseeable or fell within his scope of employment” and the employer did not respond “adequately and effectively to negate liability.”²⁹⁸ Courts have made it clear that this “agency” form of liability is broader in scope than the “*respondeat superior*” form of liability applied in co-worker harassment cases.²⁹⁹ At the same time, they have cautioned that agency principles should not be construed as imposing strict liability for supervisors’ conduct.³⁰⁰

In contrast to employer liability under Title VII, institutional liability under Title IX or Title VI, as previously discussed, requires a showing that a college or university had “actual knowledge” of the complained-of conduct and responded in a manner suggesting “deliberate indifference.”³⁰¹ On its face, this standard is distinct from the Title VII standards for liability for both co-worker and supervisor conduct. Title IX and Title VI do not incorporate the Title VII element of constructive notice and instead cover only instances where an institution had actual notice of harassing conduct.³⁰² Such notice must be given to an official “who at a minimum has authority to institute corrective measures” on behalf of the

whether the victims were employed on a part-time or full-time basis; and whether there were only a few, discrete instances of harassment.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997).

298. *Petrone v. Cleveland State Univ.*, 993 F. Supp. 1119, 1130–31 (N.D. Ohio 1998); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 184 (6th Cir. 1992); *see also* *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (“The essential question in applying agency principles is whether the act complained of took place in the scope of the agent’s employment. This determination requires an examination of such factors as *when* the act took place, *where* it took place, and whether it was *foreseeable*.” (emphasis in original)).

299. *See Kauffman*, 970 F.2d at 184 (drawing the “distinction between imposing straight common law tort liability under *respondeat superior* and broadening the scope of an employer’s liability under agency principles,” and arguing that “applying the broader general agency theory in supervisor liability cases fits with the purpose of Title VII”).

300. *Id.* (“[A]gency liability is not strict and can be negated if the employer responds adequately and effectively once it has notice of the actions.”).

301. *See supra*, note 97 and accompanying text. While most courts deciding Title VI peer harassment cases have applied the standards of “actual notice” and “deliberate indifference,” at least one court has held that a Title VI complainant must in fact go beyond this and demonstrate that the educational institution affirmatively acted in an intentionally discriminatory manner towards him or her. *See Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at *30–31 (W.D. Va. Sept. 25, 2005). Thus, the standards of actual notice and deliberate indifference form the baseline or lower end for establishing institutional liability under Title VI.

302. The Supreme Court has stated that “it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998).

institution.³⁰³ Moreover, under Title IX and Title VI, an institution must not only fail to respond adequately in order to be held liable, but must demonstrate “deliberate indifference” in doing so.³⁰⁴ Deliberate indifference requires a showing that the institution’s “response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”³⁰⁵ Therefore, Title IX and Title VI give educational institutions more latitude in responding to allegations of harassment than does Title VII to employers.

B. The Conflation of Title VII with Title IX and Title VI

In spite of the significant differences between Title VI and Title IX, on one hand, and Title VII, on the other, a number of courts have conflated the statutes and applied Title VII principles to Title IX and Title VI harassment cases. These decisions ignore crucial differences, which have been recognized by the Supreme Court, in statutory framework³⁰⁶ and in the central aims of the respective statutes.³⁰⁷

303. *Id.* at 277.

304. A look at the case law demonstrates that an educational institution must act in an egregious manner before a court will find the requisite deliberate indifference. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), for example, the harassed student was denied an opportunity to speak with the school principal, and the school ultimately failed to discipline the offending student, to separate him from the complaining student, or to establish a policy or procedure to deal with instances of sexual harassment. *Id.* at 643. This was held to be sufficient for a finding of deliberate indifference. In another case, a janitor who found a male student assaulting a physically impaired special education student simply told them to return to class, while teachers who allegedly knew about the abuse did not inform the victim’s parents and told the victim not to tell her parents. *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1246 (10th Cir. 1999). Moreover, the school did not at any point inform law enforcement, nor did it investigate the matter or discipline the offending student. The court ultimately found deliberate indifference on the part of the school. *Id.* at 1252. However, the extreme nature of the facts involved underscores the heightened nature of the “deliberate indifference” standard.

305. *Davis*, 526 U.S. at 648. In contrast to this degree of deference, an employer’s response to complaints of harassment is held to a higher standard: EEOC Guidelines stipulate that an employer’s remedy be “immediate and appropriate.” 29 C.F.R. § 1604.11(d) (2009). This has been interpreted to mean that a remedy should be “reasonably calculated to end the harassment.” *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

306. In *Gebser*, the Court recognized that Title VI and Title IX, sister Spending Clause statutes, operate in the same manner by conditioning an offer of federal funding on a promise by the funding recipient not to discriminate on the basis of race and gender, respectively, in what is essentially a contract between the government and the recipient. *Gebser*, 524 U.S. at 286. In contrast to this contractual framework, whereby Title VI and Title IX apply only to funding recipients, “Title VII applies to all employers without regard to federal funding,” and is “framed in terms not of a condition but of an outright prohibition.” *Id.*

307. The Court in *Gebser* recognized that Title VII “aims broadly to ‘eradicat[e] discrimination throughout the economy’” and to “make persons whole for injuries

I shall first discuss a line of cases which have conflated employer liability standards under Title VII with institutional liability standards under Title IX and Title VI, thereby confronting colleges and universities with the possibility of expanded liability for peer harassment. In addition, courts have broadly construed the relevance and applicability of Title VII law for deciding Title IX and Title VI cases, signaling to colleges and universities that it is permissible to borrow from Title VII law in addressing the problem of peer harassment.

1. Conflation of Liability Standards

Traditionally, courts deciding Title IX and Title VI cases have held that the question of institutional liability is governed by a different standard than the one applied in a Title VII case, whether involving co-worker or supervisor conduct.³⁰⁸ However, several courts have applied Title VII principles for employer liability to the issue of institutional liability under Title IX or Title VI. These decisions are contrary to controlling Supreme Court case law, as recognized by other federal courts.³⁰⁹

suffered through past discrimination.” *Id.* at 286, 287 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994)). “[W]hereas Title VII aims centrally to compensate victims of discrimination,” Title IX, and by implication Title VI as well, is more focused on “‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.” *Id.* at 287; *see also* *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 288 (E.D.N.Y. 2002) (recognizing the same).

308. *See, e.g.*, *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at *30 (W.D. Va. Sept. 25, 2005) (“Unlike employers, who can be vicariously liable for the discriminatory acts of their employees, schools can be held liable under Title VI . . . only for intentional conduct because [Title VI] prohibit[s] only intentional discrimination.”); *see also* *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1175 (10th Cir. 2007) (noting *Gebser*’s rejection of respondeat superior and constructive notice bases of liability and stating that “the provisions of Title IX indicate that a funding recipient should be liable only for its own actions, and not for the independent actions of an employee or a student”); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005) (discussing *Gebser*’s “express rejection of constructive notice or *respondeat superior* principles to permit recovery under Title IX”); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000) (noting that the Supreme Court has “made clear that Title IX liability is not parallel to Title VII liability”); *Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999) (stating that hostile environment law requires a showing of actual knowledge of harassment “in the case of a Title IX claim (but not under Title VII)”).

309. *See, e.g.*, *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 750 n.11 (2d Cir. 2003).

To the extent that *Kracunas* . . . held, *inter alia*, that constructive notice of hostile environment sexual harassment gives rise to Title IX liability for damages, that portion of the holding was overruled by *Gebser* . . . and *Davis* After *Gebser* and *Davis* it is clear that in Title IX cases, an educational institution that receives federal funds cannot be held liable for harassment by teachers or students short of the school’s actual knowledge of, and deliberate indifference to, the harassment.

Id.; *see also* *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 n.6 (2d Cir. 1999).

It would be inappropriate to base a finding of discriminatory intent on a

In *Kracunas v. Iona College*,³¹⁰ the Second Circuit applied the Title VII liability standard to a group of students' Title IX suit against their college for alleged sexual harassment by a professor. The court took notice of a previous decision holding that "notice under Title VII includes both actual and constructive notice" and then stated, "We now extend that holding to claims of hostile environment sexual harassment arising under Title IX."³¹¹ In another professor-student sexual harassment case, a federal district court held that "Title VII agency principles apply to sexual harassment cases brought pursuant to Title IX."³¹² Rejecting the approach of applying distinct Title IX standards, the court proceeded to ask whether the University "responded adequately and effectively to negate liability" under agency law.³¹³

The Fourth Circuit, faced with a Title IX suit alleging that a university student was the victim of rape perpetrated by two other students, asked whether "the [school] knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action."³¹⁴ Not only did the court apply the constructive notice element of Title VII law, it substituted the "prompt and adequate remedial action" standard in the place of Title IX's "deliberate indifference" standard.³¹⁵ The court thus fully incorporated Title VII liability standards into its analysis.

Another example is the Eighth Circuit's decision in *Kinman v. Omaha Public School District*,³¹⁶ which arose from a school teacher's alleged sexual relationship with a student. The Eighth Circuit had previously held that "Title VII standards for proving discriminatory treatment should be applied to employment discrimination cases brought under Title IX," and in this case chose to "extend that holding to apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student."³¹⁷

In *Davison v. Santa Barbara High School District*,³¹⁸ a federal district

defendant's failure to respond to circumstances that were not actually known to him, even if he reasonably *should have* known. The Supreme Court has rejected the use of such an objective ("should have known") test for deliberate indifference in the Title IX context.

Id. (citing *Davis*, 526 U.S. at 642-43; *Gebser*, 524 U.S. at 283-91) (emphasis in original); *Simpson*, 500 F.3d at 1176-77 (discussing *Davis* as following *Gebser*'s rejection of the constructive notice standard for liability under Title IX).

310. 119 F.3d 80 (2d Cir. 1997).

311. *Id.* at 88.

312. *Petrone v. Cleveland State Univ.*, 993 F. Supp. 1119, 1128 (N.D. Ohio 1998).

313. *Id.* at 1131.

314. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 958 (4th Cir. 1997) (quoting *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1006).

315. *Id.* at 960.

316. 94 F.3d 463 (8th Cir. 1996).

317. *Id.* at 469.

318. 48 F. Supp. 2d 1225 (C.D. Cal. 1998).

court cited OCR's guidelines on racial harassment for the proposition that a Title VI complainant must demonstrate that an educational institution had "actual or constructive notice of the racially hostile environment" and "failed to respond adequately to redress the racially hostile environment."³¹⁹ The court reasoned that importing Title VII liability principles into education "comported with case law and fairness" because "an official or a supervisor of students . . . cannot put her head in the sand once she has been alerted to a . . . hostile educational environment."³²⁰

Finally, *Oona R.-S. v. Santa Rosa City Schools*³²¹ is an interesting decision in that a federal court took judicial notice of OCR's application of the Title VII liability standards in a Title IX matter. In *Oona*, the plaintiff student brought an action under section 1983 against various school officials for deprivation of her Title IX rights, claiming that she had been sexually assaulted and harassed by a student-teacher and sexually harassed by male peers.³²² While the case did not involve a Title IX cause of action, the court discussed the fact that plaintiff had filed a complaint with OCR and that, with respect to the allegation of peer harassment, OCR had found that school officials "knew or should have known of the harassment but failed to take timely, effective action to prevent it from continuing."³²³

It is significant that OCR, the federal agency charged with enforcing compliance with Title IX, conducted its investigation and analysis under Title VII principles rather than under the Title IX standards of "actual notice" and "deliberate indifference." Moreover, *Oona* is not the only decision in which a federal court took judicial notice of OCR application of the Title VII liability standard in a Title IX investigation.³²⁴ OCR

319. *Id.* at 1229 (quoting Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (1994)).

320. *Id.* at 1230 (quoting *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1378 (N.D. Cal. 1997)). As a matter of state law, the *Davison* court also incorrectly allowed the plaintiff to present a harassment claim against the school under California's Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2007), which provides, "All persons within the jurisdiction of this state are free and equal, and no matter what their . . . race . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51. Under the Unruh Act cause of action, plaintiff sought to impose punitive damages against the school and certain officials for their alleged failure to respond adequately to the student conduct at issue. *Davison*, 48 F. Supp. 2d at 1226. In denying defendants' motion to dismiss the Unruh Act claim, the court went against case law holding that the Unruh Act reached only certain intentional discrimination, rather than merely negligent behavior. *See, e.g., Brown v. Smith*, 64 Cal. Rptr. 2d 301, 305 (Ct. App. 1997).

321. 890 F. Supp. 1452 (N.D. Cal. 1995).

322. *Id.* at 1455-56.

323. *Id.* at 1458.

324. *See Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) ("OCR has similarly relied on Title VII principles in making its informal conclusions that Title IX prohibits educational institutions who receive federal funds

application of Title VII law into the educational context misinforms the courts about the proper legal framework for Title IX and Title VI cases and therefore furthers the conflation of these two statutes with Title VII.³²⁵

2. The Misreading of *Franklin*

A chief reason for the importation of Title VII liability standards into Title IX and Title VI case law is the misreading by federal courts of *Franklin v. Gwinnett County Public Schools*.³²⁶ In *Franklin*, a faculty-on-student harassment case, the Supreme Court decided its first Title IX sexual harassment case, and analogized the issue to sexual harassment in employment, pronouncing,

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminates’ on the basis of sex.” We believe the same rule should apply when a teacher sexually harasses and abuses a student.³²⁷

As it subsequently clarified in *Gebser v. Lago Vista Independent School District*,³²⁸ the Court was merely stating the general proposition that sexual harassment constitutes discrimination on the basis of gender under Title IX and can therefore subject an educational institution to Title IX liability.³²⁹

from failing to respond to *actual or constructive* knowledge of peer sexual harassment.” (emphasis added); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1573 (N.D. Cal. 1993) (discussing OCR investigations and Letters of Finding stating that “an educational institution’s failure to take appropriate response to student-to-student sexual harassment of which it *knew or had reason to know* is a violation of Title IX” (emphasis added)).

325. See also Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039–42 (1997).

[A] school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school’s programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action

A school has notice if it actually “knew, or in the exercise of reasonable care, should have known” about the harassment.

Id. (quoting *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991)).

326. 503 U.S. 60 (1992).

327. *Id.* at 75 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

328. 524 U.S. 274 (1998).

329. The Court clarified in *Gebser*,

Whether educational institutions can be said to violate Title IX based solely on principles of *respondeat superior* or constructive notice was not resolved by *Franklin*’s citation of *Meritor*. That reference to *Meritor* was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX.

Id. at 283; see also *Olmstead v. L.C.*, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) (citing *Franklin* as “relying on *Meritor* . . . in determining that sexual

However, courts in several subsequent cases have cited *Franklin* for the much different proposition that Title IX liability follows the same standards as Title VII liability. For example, the Second Circuit stated, “The Court’s citation of *Meritor* . . . in support of *Franklin*’s central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.”³³⁰ The Sixth Circuit held that “Title VII agency principles apply to resolve discrimination claims brought under Title IX,” arguing, “This practice implicitly received the Supreme Court’s approval in *Franklin*.”³³¹ It added that, by citing *Meritor*, the Court “indicated that it views with approval the application of Title VII principles to resolve similar Title IX cases.”³³²

Likewise, in deciding a Title IX peer harassment suit brought by a group of students against their school district, a federal district court rejected the school district’s argument against applying a “knew or should have known” liability standard, reasoning that that their position was “belied” by the *Franklin* decision, “in which the Court looks to Title VII to define the nature of Title IX discrimination.”³³³ The court opined, “By citing [*Meritor*] with approval in the Title IX context, to define the critical concept of discrimination on the basis of sex, the Supreme Court in *Franklin* was analogizing the duties of school officials to prevent sexual harassment under Title IX, to those of employers under Title VII.”³³⁴

Moreover, many courts have, under an erroneous reading of *Franklin*, broadly construed the relevance of Title VII law for Title IX and Title VI cases. The Tenth Circuit stated, for instance, “Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims.”³³⁵ Elsewhere, it declared that Title VII is “the most appropriate analogue when defining Title IX’s substantive standards.”³³⁶

harassment constitutes discrimination”).

330. *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995). In *Murray*, the court proceeded from its citation of *Franklin* to analyze the plaintiff student’s Title IX claim against her University, arising from alleged sexual harassment by a third party, in terms of whether the school had actual or constructive notice of the complained-of conduct. *Id.*

331. *Doe v. Claiborne County*, 103 F.3d 495, 514 (6th Cir. 1996).

332. *Id.* The court therefore remanded the plaintiff student’s Title IX claim against her school, arising from alleged sexual assault by a teacher, with instructions to the district court to apply Title VII liability standards. *Id.* at 514–16.

333. *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 477 (D.N.H. 1997).

334. *Id.* at 477; *see also* *Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (“The Supreme Court’s utilization of its Title VII case law to interpret Title IX in *Franklin* strongly indicates that Title VII precedent is appropriate for analysis of hostile environment sexual harassment claims under Title IX.”).

335. *Gossett v. Oklahoma*, 245 F.3d 1172, 1176 (10th Cir. 2001).

336. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (quoting *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316

The Second Circuit similarly stated that “courts have interpreted Title IX by looking to . . . the caselaw interpreting Title VII.”³³⁷ In Title VI case law, at least one federal court has held that “Title VII provides the appropriate framework” for adjudicating a racial harassment claim.³³⁸

In making such broad pronouncements, courts are going beyond conflation of liability standards. They are endorsing a complete parallel between Title VII, on one hand, and Title IX and Title VI, on the other hand, and thus contributing to the dangerous trend towards full conflation of the law under these statutes. It should not be surprising, therefore, to see that many colleges and universities have followed Title VII law in attempting to meet their obligations under Title IX and Title VI.

C. The Consequences of Conflation: How Colleges and Universities Have Responded

The conflation of Title VII law with Title IX and Title VI law has had a two-fold impact upon some institutions’ approaches toward peer harassment. First, these colleges and universities have interpreted the decisions conflating the statutes as expanding the scope of institutional liability under Title IX and Title VI. By importing the constructive notice element from Title VII, these decisions have instilled fear among administrators that their institution could be held liable for peer harassment of which they “should have known.” Facing the possibility that a court adjudicating a Title IX or Title VI claim may broadly interpret the “should have known” prong, these colleges and universities have perceived it as necessary to take a stringent approach towards addressing peer harassment on their campuses. They have sought to discourage students from engaging in even remotely offensive or critical speech, thus reducing the chances of anyone on campus being offended.

Second, some colleges and universities have interpreted these decisions as endorsing a complete parallel between Title VII law and Title IX and Title VI law. In other words, they have read them as making it permissible to borrow from Title VII law in addressing peer harassment on campus. As a result of these two factors, some institutions have adopted harassment policies tracking Title VII hostile environment standards, despite the fact that these policies encompass constitutionally protected speech and fail to provide adequate breathing room for student speech on campus. These policies reflect a “better safe than sorry” approach, and are often modeled after the Equal Employment Opportunity Commission (EEOC) guidelines

n.6 (10th Cir. 1987)).

337. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994).

338. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at *15 (W.D. Va. Sept. 25, 2005).

for workplace harassment,³³⁹ Title VII case law, or some combination of the two.

A good example is the University of Connecticut's "Policy Statement on Harassment."³⁴⁰ The policy requires that members of the University community "refrain from actions that intimidate, humiliate or demean persons or groups, or that undermine their security or self-esteem."³⁴¹ It also states that the University "deplores behavior that denigrates others."³⁴² In defining harassment to include conduct which merely demeans another or undermines another's self-esteem, the policy encounters the same overbreadth and vagueness concerns discussed previously with respect to college and university harassment policies.³⁴³

Just as importantly for the present discussion, the policy defines sexual harassment as behavior which has "the effect of interfering with an individual's performance or creating an intimidating, hostile, or offensive environment."³⁴⁴ On its face, this definition parallels the harassment standards found in the EEOC guidelines and Title VII case law. In particular, it mirrors the EEOC standard of "verbal or physical conduct . . . [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."³⁴⁵ In fact, the policy is actually broader in removing the qualifier "unreasonably" before "interfering." This allows anyone who subjectively perceives interference to push forward with a complaint, no matter how unreasonable, thus placing speakers on campus at risk for prosecution over what is likely to be tame and innocuous speech.

The University of Connecticut policy falls well short of the *Davis* standard for hostile educational environment.³⁴⁶ It fails to include any threshold requirement of severity *or* pervasiveness of conduct, meaning that a one-time, seemingly innocuous interaction could potentially be treated the same as repeated, even violent acts. It also allows offensiveness

339. The EEOC has issued "Guidelines on Discrimination Because of Sex" which define sexual harassment in employment as conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1985). Furthermore, "The principles involved here continue to apply to race, color, religion or national origin," 29 C.F.R. § 1604.11(a) n.1, meaning that the EEOC standard for racial harassment in the workplace is the same as its standard for sexual harassment.

340. University of Connecticut, Policy Statement on Harassment, <http://policy.uconn.edu/pages/findPolicy.cfm?PolicyID=259> (last visited Mar. 18, 2009).

341. *Id.*

342. *Id.*

343. *See supra* Part I.B.

344. *See* University of Connecticut, *supra* note 340.

345. 29 C.F.R. § 1604.11(a)(3) (1985); *see supra* note 339 and accompanying text.

346. *See supra* note 96 and accompanying text.

to be subjectively defined, in contrast to *Davis*'s requirement that the conduct in question be objectively offensive. Finally, Connecticut's policy targets the creation of any subjectively intimidating, hostile, or offensive environment, whereas *Davis* is addressed towards the far more serious act of barring another person's access to an educational opportunity or benefit. Whereas the *Davis* standard limits itself to truly harassing patterns of conduct, Connecticut's policy encompasses protected speech and appears to be aimed at creating a polite, bland campus free of any provocative or stimulating discussion.

Another school, Lewis-Clark State College in Idaho, maintains a harassment policy prohibiting "[a]ny practice . . . that detains a member of the College community, endangers his/her health, jeopardizes his/her safety, or interferes with class attendance or the pursuit of education or work responsibilities."³⁴⁷ This policy too follows the EEOC guidelines and Title VII standards, in that it focuses on subjectively defined interference with educational or work responsibilities. There is no threshold requirement of severity or pervasiveness, no requirement that the conduct be objectively offensive, and no incorporation of a "reasonable person" standard. Rather, all that appears to matter is whether the complainant subjectively feels harassed.

Lastly, Richard Stockton College of New Jersey, another public institution, expressly states that its sexual harassment policy is modeled after the EEOC guidelines.³⁴⁸ It defines sexual harassment to include verbal or physical conduct which "has the purpose or effect of unreasonably interfering with an individual's academic/work performance or creating an intimidating, hostile or offensive academic/work environment."³⁴⁹ Once again, this policy does not incorporate objectiveness into the requirement of an "intimidating, hostile or offensive" environment, nor does it require the conduct in question to be severe and pervasive. Therefore, it serves as another example of the fact that the college and university practice of borrowing from Title VII law has resulted in the formation of harassment policies that substantially impinge upon students' expressive rights.

V. WHY TITLE VII LAW IS POORLY SUITED TO ADDRESS PEER HARASSMENT IN HIGHER EDUCATION

It is improper for colleges and universities to follow Title VII law in

347. Lewis-Clark State College, Student Code of Conduct, <http://www.lcsc.edu/osl/SHB/CodePage4.htm> (last visited Mar. 18, 2009).

348. Richard Stockton College, Policy Prohibiting Discrimination in the Academic/Educational Environment, at 3, http://intraweb.stockton.edu/eyos/affirmative_action/content/docs/Student%20Discrimination%20Policy-1.2008.doc (last visited Mar. 18, 2009).

349. *Id.*

addressing peer harassment for two major reasons. First, colleges and universities doing so are ignoring crucial differences between the campus and the work environment which counsel against depriving students of the speech rights to which they are entitled. Second, they are failing to account for the lack of a “power imbalance” in student-to-student interactions, as power imbalances in the workplace are a major reason for taking a stringent approach towards harassment in employment.

A. Differences between the Workplace and the Campus

As previously discussed,³⁵⁰ courts have repeatedly recognized the need to provide sufficient breathing room for speech on college and university campuses in order to allow for discussion and dialogue. They have held that the abuse of overbroad harassment rationales improperly restricts protected expression and places a chilling effect on student speech, to the detriment of the college or university in its ability to serve as a true marketplace of ideas. Significantly, OCR has recognized the same problem and has made it clear that its harassment regulations do not require colleges and universities to censor and punish protected speech.³⁵¹

Concurring with OCR and the aforementioned case law, much legal scholarship has affirmed that the workplace and the college or university campus require divergent approaches to the problems of racial and sexual harassment.³⁵² As commentators have largely recognized, the workplace is a place for carrying out one’s job functions and achieving certain results, whereas the college or university is a place for questioning, learning, and debating.

On one hand, restrictions upon workplace speech ultimately do not take away from the workplace’s essential functions—to achieve the desired

350. See *supra* Parts III.C. and III.D.

351. See *supra* Part III.B.

352. See, e.g., Robert W. Gall, *The University as an Industrial Plant: How a Workplace Theory of Discriminatory Harassment Creates a “Hostile Environment” for Free Speech in America’s Universities*, LAW & CONTEMP. PROBS., Autumn 1997, at 203.

Because hostile environment theory grew up within the workplace, university administrators should ask themselves about its appropriateness within the university. If Title VII’s prohibition of hostile environment harassment is troublesome on First Amendment grounds in the workplace, the incorporation of such a prohibition into a speech code is much more disturbing in the university, a place that supposedly values academic freedom and the unfettered exchange of ideas.

Id. at 205; see also Sweeney, *supra* note 138, at 89 (“The student, unlike any actor in the employment setting, faces problems which are unique to the educational setting. The major distinguishing factors [include] . . . general free speech considerations The purpose of illustrating the differences between the two environments is to make it clear that the two settings must be treated differently.”).

results, make the client happy, and get the job done.³⁵³ Employers for the most part are focused on meeting their bottom lines, and free expression in the workplace is typically not necessary for that purpose. Consequently, “[f]ar from being the quintessential ‘marketplace of ideas’ in which speech and counter-speech are freely bandied about, many workplaces are highly regulated environments in which non-work-related speech is at best discouraged, and at worst, banned or restricted.”³⁵⁴

On the other hand, freedom of speech and unfettered discussion are so essential to a college or university that compromising them fundamentally alters the campus environment to the detriment of everyone in the community. The college or university is a “special setting where a premium is to be placed on free expression so that a ‘pall of orthodoxy’ does not descend” upon the campus.³⁵⁵ “[F]ree speech and academic freedom are a necessary precondition to a university’s success, rather than abstract values that must compete with others on a pluralistic battleground.”³⁵⁶ Therefore, the proper role for harassment law in the college and university context is to ensure equal access to learning opportunities, not to protect and insulate students from offense.

Colleges and universities should avoid infringing upon the right of students to engage in protected speech. The practice of borrowing from Title VII law, however, contributes significantly towards doing precisely that. Colleges and universities must therefore recognize that the application of harassment law in higher education requires a markedly different approach than the one employers take under Title VII law.

B. Peer Harassment and the Lack of a Power Imbalance

In addition to the differences between the campus and the workplace in terms of their respective functions, there is a second compelling reason not to apply employment standards towards peer harassment in higher education: the “power imbalance” rationale for stringently regulating workplace conduct under Title VII is simply not applicable to student-on-student interactions in the college or university setting.

The fundamental problem with harassment in the workplace is that there exists an imbalance of power between the harasser and the victim,³⁵⁷ whereby the harasser holds a certain amount of authority, real or imagined, over the victim, making the latter more likely to feel intimidated, threatened, or coerced as a result of the former’s conduct. This is due to

353. See Gall, *supra* note 352.

354. Strossen, *supra* note 59, at 706–07.

355. Gall, *supra* note 352, at 205.

356. *Id.* at 211.

357. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1011 n.11 (5th Cir. 1996).

the “hierarchical structure of most workplaces, and the fact that some individuals exercise supervisory and economic power over others.”³⁵⁸ When the harasser is a supervisor, the power imbalance is fairly obvious; when the harasser is a co-worker, his or her actions “may be imputed to an employer through a theory of respondeat superior.”³⁵⁹ In either case, it is easier for the victim of harassment to feel coerced or tormented to the point that his or her working conditions are appreciably altered within the meaning of the *Meritor* standard for hostile environment.³⁶⁰

Moreover, a target of harassment in the workplace, unlike individuals on a college or university campus, typically cannot resort to the weapon of counter speech to combat allegedly harassing behavior. To do so would be to potentially jeopardize one’s job status and earning capacity, which most individuals are highly reluctant to do. Therefore, “[t]o relegate an employee who is the target of insulting, sexist remarks by her boss to the ‘remedy’ of answering him back is to foreclose her from any meaningful recourse at all.”³⁶¹ Given the power differentials and economic constraints at play in one’s employment, it is simply not realistic to expect employees to protect themselves against harassment under a “marketplace of ideas” model.

Peer harassment in education, by contrast, very rarely involves a power imbalance element, because “[i]n an educational setting, the power relationship is the one between the educational institution and the student.”³⁶² When two students interact with one another, there is no power imbalance analogous to the one between a supervisor and an employee, nor is there any “precedential or logical support” for applying a theory of respondeat superior as when one co-worker allegedly harasses another.³⁶³ This is due to the fact that a fellow student rarely, if ever, holds

358. Strossen, *supra* note 59, at 706; *see also* ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, POLICY NO. 316 (rev. ed. 1995).

Sexual harassment is made possible by power imbalances; victims of harassment are generally in a minority in the workplace or in positions of relative powerlessness. Conduct or expression that might not be actionable outside the workplace may constitute harassment in the workplace precisely because of its hierarchical nature—employers and employees, supervisors and subordinates do not interact as equals—and because most people have to work in order to survive.

Id.

359. *Rowinsky*, 80 F.3d at 1011 n.11.

360. *See supra* Part IV.A.1.

361. Strossen, *supra* note 59, at 707.

362. *Rowinsky*, 80 F.3d at 1011 n.11.

363. *Id.*; *see also* Sweeney, *supra* note 138, at 89–90.

It could be argued that a teacher’s sexual harassment of a student, or sexual harassment in a quasi-employment setting, has employment related components and, hence, Title VII principles are proper. No such analogy is present with respect to peer sexual harassment [A]dvocates for the

any institutional authority over one's grades, academic standing, and other material elements of one's education. As a result, "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker,"³⁶⁴ and the same holds true for other types of alleged harassing conduct. It should not be surprising, therefore, that a federal court has declared that "peer harassment is less likely to satisfy the requirements of Title IX than is teacher-student harassment."³⁶⁵

A student's conduct, whether verbal, physical, or both, would have to be rather extreme in order for another student's educational opportunities to be sufficiently affected,³⁶⁶ because the targeted student will not as easily feel coerced or tormented as an employee being harassed at work. Therefore, given the absence of a power imbalance between fellow students, it is improper to apply employment harassment principles when addressing peer harassment in the higher education setting. Colleges and universities should recognize that peer harassment presents different issues than workplace harassment and, accordingly, tailor their policies and practices to address it as a unique problem.

VI. PROPOSED SOLUTIONS

So what can be done to reverse the impact that harassment law has had on students' speech rights? Given that the movement toward restriction and censorship of expression under harassment rationales has been steadily building over a long period of time, one should expect that it will not be easy to reverse the trend. Meaningful change will most likely be slow to come. Nevertheless, several possibilities for creating change present themselves.

A. Eliminating Title IX and Title VI Liability for Peer Harassment

The best and most direct solution is for Congress to amend Title IX and Title VI, and for OCR to change the implementing regulations for the statutes, to eliminate institutional liability for peer harassment.³⁶⁷

importation of Title VII principles make a tenuous analogy to employee-employee sexual harassment. Such an analogy is inherently flawed and returns one to the conclusion that peer sexual harassment is a unique and distinct problem and must be analyzed accordingly.

Id.

364. *Rowinsky*, 80 F.3d at 1011 n.11.

365. *Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212, 1221 (N.D. Ala. 2002) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653 (1999)).

366. *Davis*, 526 U.S. at 652-53.

367. In this section, I am arguing for the elimination of institutional liability for peer harassment only as it pertains to institutions of higher education. As the duties faced by primary and secondary educational institutions under Title IX and Title VI are outside the scope of this article, I take no position with respect to institutional liability

Abolishing this form of liability would remove the incentives colleges and universities currently face under these statutes to stringently regulate student expression and interactions on campus and would therefore greatly advance campus speech rights.³⁶⁸ Moreover, this measure is supported by three crucial realities. First, existing legal regimes address all of the types of conduct which fall under the *Davis* standard for creation of a hostile environment. Second, the will to prevent such conduct on campus already exists, and without federal mandates, one cannot assume that colleges and universities will simply do nothing to address them. Third, as recognized by a strong body of case law, colleges and universities do not have a duty to oversee and monitor every part of their students' lives.

1. Existing Legal Regimes are Sufficient to Address Peer Harassment

The *Davis* hostile environment standard is limited to conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."³⁶⁹ This narrow standard leaves intact only extreme patterns of conduct as plausible bases for a peer harassment claim.³⁷⁰ Consequently, it is not necessary to impose upon colleges and universities institutional liability for peer harassment, as existing legal regimes encompass the entire range of actionable conduct which is left after the *Davis* decision. It is much more logical to use these other areas of the law to address such conduct, since bringing in additional federal requirements has only confused the issues and led to injudicious college and university policymaking.

With respect to Title IX, I have previously discussed the fact that the vast majority of peer sexual harassment cases arise from alleged sexual misconduct, sexual assault, or rape.³⁷¹ This phenomenon should not be

in the primary and secondary educational context.

368. At least one legal commentator has already called for the elimination of Title IX liability for peer harassment. See Sweeney, *supra* note 138, at 83 (arguing that "the importation of Title VII's sexually hostile environment theory into Title IX of the Educational Amendments of 1972 to cover peer sexual harassment is premature, improper, unsupported by Title IX's legislative history, and an arbitrary and capricious abuse of the OCR's regulatory authority"). Sweeney argues that "it is also reasonable to conclude that if Title IX was intended to cover the acts of non-agent third parties, it would have been so stated, at least once, during the debates." *Id.* at 85.

369. *Davis*, 526 U.S. at 651.

370. See *supra* Part III.A.

371. See *supra* note 197 and accompanying text. Other legal regimes which would cover genuinely harassing behavior include stalking and assault. These regimes apply to behavior, such as inappropriate touching or following an individual to his or her home, which is less extreme than sexual assault or rape but which potentially contributes to a pattern of harassing conduct. The court in *Doe v. University of*

surprising, as the mere expression of sexist and otherwise prejudicial viewpoints logically does not meet the stringent *Davis* standard. Criminal law and the existing law enforcement apparatus have traditionally dealt with the problems of sexual assault and rape and, perhaps more importantly, are much better suited to do so than campus administrators whose expertise lies outside of these areas of the law. Given that these are sensitive and extremely serious matters, it is dangerous to place the burden upon ill-equipped administrators to address them. Moreover, in light of the severity of the consequences of a finding of rape or sexual assault for the accused student, campus disciplinary processes are insufficient to handle such cases. Therefore, these matters are best dealt with through the criminal law process.

With respect to Title VI, the types of conduct which can create a racially hostile educational environment and which have given rise to the few reported peer racial harassment decisions are mostly addressed by the First Amendment exceptions of incitement to imminent lawless action, true threats, and intimidation. Incitement to imminent lawless action encompasses advocacy of the use of force or of law violation “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁷² True threats are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”³⁷³ Finally, intimidation is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”³⁷⁴ In addition, the legal regimes of vandalism and disorderly conduct cover much of the remaining behavior, such as the use of graffiti containing racial epithets on school property.

Put together, these First Amendment exceptions and other legal regimes encompass much of the conduct which has formed the basis for Title VI hostile environment claims, meaning that such conduct is proscribable independently of the federal mandate. For example, a student’s act of directing true threats to minority students with the intent to place them in fear of grave harm would fall under the exception for intimidation, as the court recognized in the aforementioned *Reed* decision.³⁷⁵ Since the case law under Title VI has required complainants to allege such types of

Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), made essentially the same point when it noted, “Many forms of sexually abusive and harassing conduct are also sanctionable. These would include abduction, rape, and other forms of criminal sexual conduct.” *Id.* at 862 (internal citations omitted).

372. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

373. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

374. *Id.* at 360.

375. *See supra* notes 242–244 and accompanying text.

conduct as opposed to the mere expression of racist or prejudicial views,³⁷⁶ it is evident that the range of harassing conduct under Title VI is covered by the First Amendment exceptions and other legal regimes discussed above. As is the case with Title IX, this renders Title VI institutional liability unnecessary.

2. Colleges and Universities Will Act to Prevent Peer Harassment without a Federal Mandate

There is a second compelling argument for eliminating peer harassment liability under Title IX and Title VI. The will to prevent actionable forms of conduct already exists on campus, and absent federal mandates, there is little reason to assume that colleges and universities will simply do nothing to address them. Conversely, the threat of institutional liability only leads to downstream distortions and the misapplication of harassment law.

The threat of institutional liability is not necessary to provide colleges and universities with the incentives to prevent peer harassment. Rather, the perceived need to stringently regulate student behavior and interactions is so deeply embedded in the institutional culture that removing the federal mandates under Title IX and Title VI is unlikely to create a sudden shift. One commentator observes that college and university administrators tend to view their campus as “an island of equality, civility, tolerance, and respect for human dignity.”³⁷⁷ The same commentator characterizes the college and university mission as “teach[ing] students how to contend vigorously within the marketplace of ideas while nevertheless observing certain norms of civility[.]”³⁷⁸ Given the commitment modern colleges and universities have shown to advancing tolerance, civility, and diversity on campus, one need not worry about administrations suddenly not being zealous enough in their efforts to prevent instances of peer harassment, for two primary reasons.

376. See, e.g., *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 931 (10th Cir. 2003) (involving a Title VI claim arising from racially hostile school environment which included “offensive racial slurs, epithets, swastikas, and the letters ‘KKK’ inscribed in school furniture and in notes placed in African American students’ lockers and notebooks,” as well as white students being allowed to wear clothing featuring the Confederate flag, in violation of school policy); *Monteiro v. Temple Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (involving a Title VI claim arising from repeated usage of racial slurs and graffiti on school walls featuring similar racial epithets); cf. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958 (W.D. Va. Sept 25, 2005) (rejecting plaintiff’s Title VI claim based on repeated offensive and prejudicial comments regarding plaintiff’s ethnicity); *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292 (E.D.N.Y. 2002) (holding that plaintiff’s allegations of “inappropriate and offensive” racially-themed comments were insufficient to support a Title VI racial harassment claim).

377. Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, LAW & CONTEMP. PROBS., Summer 1990, at 217.

378. Smolla, *supra* note 377, at 223–24.

First, colleges and universities are eager to avoid any negative publicity stemming from events which take place on their campuses. Colleges and universities largely depend on their name-recognition and institutional prestige to continue to attract students and scholars to their campuses. Consequently, the negative publicity that comes from a student being sexually assaulted on campus, for example, is highly damaging to a college or university's reputation. Fear of such publicity provides colleges and universities with considerable motivation to prevent the types of conduct which constitute actionable peer harassment under Title IX or Title VI, and to take a stern approach towards rectifying any situation which arises.

Second, colleges and universities face the prospect of liability under causes of action other than Title VI and Title IX, giving them another major incentive to regulate student behavior thoroughly and thereby seek to prevent peer harassment. This often takes the form of tort liability, as demonstrated in the seminal case of *Mullins v. Pine Manor College*.³⁷⁹ In *Mullins*, the Supreme Judicial Court of Massachusetts held that a college had been negligent in allowing a resident student to be the victim of rape on campus. The court ruled that the College demonstrated negligence in failing to correct certain deficiencies in its security system, that this negligence was the proximate cause of the rape, and that the student was entitled to recover damages for injuries suffered.³⁸⁰ *Mullins* demonstrates that tort liability is a sufficient vehicle for holding colleges and universities accountable to students for failing to prevent the type of conduct which currently falls under peer racial or sexual harassment. Therefore, the threat of tort liability provides colleges and universities with the requisite incentives to properly address the problem of peer harassment, rendering the federal mandate under Title IX and Title VI unnecessary.

3. The Demise of "In Loco Parentis"

Finally, eliminating institutional liability for peer harassment would be consistent with modern case law recognizing that colleges and universities do not have a duty to monitor and oversee every part of students' lives.³⁸¹ Courts have, in a number of cases involving varying fact patterns and legal issues, decided that a college or university no longer stands "in loco

379. 449 N.E.2d 331 (Mass. 1983).

380. *Id.* at 337-42.

381. *See, e.g.,* Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Ct. App. 1981) (affirming a general demurrer in a student's action against her University, where the student was injured in an automobile collision during a speed contest with students who had been drinking and alleged that her injury was caused by the University's negligence in failing to adequately control on-campus drinking); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986) (holding that a university did not have a custodial relationship with its students creating an affirmative duty to protect and supervise them, and therefore was not liable to a student who suffered injuries from a fall resulting from voluntary intoxication during a class field trip).

parentis,” or in the role of parental supervision, with respect to its students.³⁸² These jurisprudential trends reflect prevailing societal views and expectations regarding the maturity, sophistication, and independence of students. We as a society should thus expect that students can handle interactions with fellow students in which they exchange differing, even offensive and disagreeable ideas and beliefs.

To decide otherwise is to take a dangerously paternalistic approach to the intellectual and emotional development of these young adults. Such an approach tells offended students that, rather than counter another’s speech with more speech, the proper response is to sue the school for allowing the expression to occur in the first place. It makes no sense to apply Title IX and Title VI in this manner, both because it flies in the face of society’s deeply grounded notions regarding college and university students and because doing so does not advance the fundamental statutory objectives of protecting individuals from discriminatory practices by federal funding recipients. Instead, attaching institutional liability to merely offensive student speech makes a mockery of the ideal of the “marketplace of ideas” and provides administrators with perverse incentives to cut down severely on student speech rights. Therefore, the courts should eliminate Title IX and Title VI institutional liability for peer harassment. In doing so, they would greatly advance the expressive rights of college and university students.

B. Adoption of the *Davis* Standard

In the absence of amendments to Title IX and Title VI eliminating institutional liability for peer harassment, the best available alternative measure is for the courts, Congress, OCR, and colleges and universities to unequivocally adopt the *Davis* hostile environment standard as the controlling standard for peer sexual and racial harassment. Adoption of the *Davis* standard would offer a high level of protection for student speech rights and ensure that institutional efforts to avoid liability do not contravene free speech principles.

As previously discussed, *Davis* is highly protective of speech, holding that peer harassment is no less and no more than conduct which is, under the totality of the circumstances, “so severe, pervasive, and objectively

382. See, e.g., *Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212 (N.D. Ala. 2002) (holding that the school did not stand in loco parentis while denying a student’s Title IX suit against her university for peer-on-peer sexual harassment, even though the student was under the age of majority); *Hartman v. Bethany Coll.*, 778 F. Supp. 286 (N.D.W. Va. 1991) (holding that a college did not stand in loco parentis to a seventeen-year-old freshman student); *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) (holding that a university’s policy against hazing constituted an assumed duty and exposed it to liability for a student’s injury during a hazing incident, but clarifying that the University did not stand in loco parentis to its students).

offensive, and [which] so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."³⁸³ Courts deciding peer sexual and racial harassment cases in the aftermath of *Davis* have not only almost universally adopted this standard,³⁸⁴ they have recognized that it is a stringent standard met only by extreme patterns of conduct.³⁸⁵

Moreover, *Davis* importantly reiterated the other elements of a Title IX claim.³⁸⁶ Thus, *Davis* should be understood as requiring that conduct have the following characteristics:

- (1) unwelcome;
- (2) discriminatory;
- (3) on the basis of gender;
- (4) directed at an individual; and
- (5) "so severe, pervasive, and objectively offensive, and . . . so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."³⁸⁷

Davis also requires a showing of actual notice and deliberate indifference in order to establish institutional liability.³⁸⁸ In emphasizing all of these elements, the Supreme Court reiterated that Title IX claimants must clear a number of legal hurdles and that peer harassment truly encompasses a narrow range of conduct. In light of the full holding in *Davis*, adopting its hostile environment standard as controlling for all peer harassment cases would represent a significant advancement of student speech rights.

Therefore, courts adjudicating Title IX and Title VI peer harassment claims should uphold the *Davis* standard. Courts should emphasize that Title VII case law has no rightful place in setting the standards for peer harassment in education, that the unique qualities of the college and university setting call for a separate analysis, and that the *Davis* standard alone is capable of preserving the necessary breathing room for campus speech. If the case law on peer harassment uniformly upholds the *Davis* standard, colleges and universities cannot logically use the justification that there is some ambiguity in the law allowing for the use of broader definitions of sexual or racial harassment.

In addition, Congress could codify the courts' reading of peer

383. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

384. *See supra* note 117.

385. *See Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 937 (10th Cir. 2003) (characterizing "the standard set forth by the *Davis* Court" as "quite high").

386. *See supra* Part II.A.2.

387. *Davis*, 526 U.S. at 634, 636, 639, 651.

388. *Id.* at 650.

harassment law by amending Title IX and Title VI to decree that peer racial and sexual harassment is no less and no more than the *Davis* standard. In conjunction, OCR could amend the respective implementing regulations under the statutes to do the same. By taking these measures, Congress and OCR would provide clear guidance to colleges and universities about the types of conduct which they are obligated to prevent under Title IX and Title VI peer harassment law. There can be no more direct form of clarification to colleges and universities than to amend the statutes themselves from which institutions derive their obligations to prevent peer harassment.

Next, given that the *Davis* standard reflects existing law, OCR could write a follow-up to its 2003 letter,³⁸⁹ adopting the *Davis* standard for all higher education peer harassment cases and clarifying that conduct which falls short of the standard is not actionable. This would replace the 2003 letter and the lesser standard for hostile environment which OCR set forth in it.³⁹⁰ The follow-up letter would be a significant step forward because giving schools one standard to follow would eliminate much of the uncertainty and room for interpretation which currently exists and which has contributed to the abuse of overbroad harassment rationales.

Colleges and universities should then follow all of this legal authority by adopting the *Davis* hostile environment standard themselves. First, they should ensure that their harassment policies follow the *Davis* standard and remove or redraft any policies which define peer harassment more broadly. Second, they should apply their policies only where conduct meets the requirements of *Davis*. Taking these measures would ensure that colleges and universities are providing the highest level of protection possible for campus speech while still meeting their statutory obligations to address peer harassment.

C. College and University Administrators and Qualified Immunity

The third proposed solution would have to come from the courts in their First Amendment jurisprudence. The courts should hold that the doctrine of qualified immunity does not protect college and university administrators who violate the First Amendment rights of students, for instance by applying overbroad harassment rationales against protected speech. While this solution addresses only those institutions that are subject to the Constitution,³⁹¹ the courts would force officials at these schools to think twice before taking such measures, knowing that they will not be able to hide behind the defense of qualified immunity if a student who has been harmed by their decision sues them in their personal

389. See Reynolds, *supra* note 121.

390. *Id.*

391. See *supra* note 8.

capacity.

When a student at a public college or university has been deprived of a constitutional right by reason of official action, he or she has recourse to a section 1983 suit. This remedy allows the student to collect monetary damages from the responsible individual in his or her personal capacity. The cause of action comes from the federal Civil Rights Act of 1871,³⁹² which states:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.³⁹³

The requirement of action under color of state law means that the defendant official must have exercised power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”³⁹⁴

When facing a section 1983 suit for damages, one of the defenses available to a state official is qualified immunity. Qualified immunity shields government officials performing discretionary functions “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁹⁵ The Supreme Court has clarified this standard by adopting a two-part test: first, whether the facts as alleged demonstrate violation of a constitutional or statutory right, and second, whether that right was clearly established at the time, such that it would have been clear to a reasonable official that the alleged conduct was unlawful under the circumstances.³⁹⁶ This inquiry entails consideration of both clearly established law and the factual information possessed at the time, and therefore must be “undertaken in light of the case’s specific context, not as

392. 42 U.S.C. §§ 1983, 1985, 1986 (2000).

393. 42 U.S.C. § 1983.

394. *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

395. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

396. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In *Saucier*, the Court mandated that lower courts apply the two-part test for qualified immunity in the order indicated above. That is, a court had to first decide whether the alleged facts demonstrated violation of a constitutional or statutory right before deciding whether the law had clearly established that right. However, in its recent decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), the Court overruled *Saucier* on this point, holding that lower courts should have the discretion to decide the order in which to apply the two-part test. *Id.* Thus, while courts remain free to follow the *Saucier* protocol, they may also proceed directly to the second prong without answering the first.

a broad general proposition.”³⁹⁷ Ultimately, Supreme Court jurisprudence commands government officials to look to “cases of controlling authority in their jurisdiction” or “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”³⁹⁸

The courts, in applying this doctrine whenever it is raised as an affirmative defense in a college or university student’s section 1983 suit, should recognize that depriving a student of his or her constitutional right to free speech is in fact a violation of clearly established law. The protections for free speech set forth in the First Amendment are most certainly clearly established rights within our society and apply with particular rigor in the college and university setting, in light of the importance of allowing for the free exchange of ideas on campus. I have previously discussed the significance that the Supreme Court and lower federal courts have traditionally attached to the modern college and university’s role in our society as a true marketplace of ideas.³⁹⁹ These and similar judicial pronouncements not only go back several decades, they have been widely upheld in case law involving varying fact patterns and legal issues,⁴⁰⁰ providing college and university officials with sufficient notice about the heightened protection accorded to free speech on campus.

Furthermore, if college and university officials wish to argue that they are not aware of (nor should be aware of) clearly established law specifically dealing with the conflict between school harassment policies and speech rights, the answer lies in the previously discussed case law involving the application of overbroad harassment rationales.⁴⁰¹ These cases were *all* decided in favor of free speech, meaning that officials cannot reasonably argue that the courts have not given a clear indication of how the conflict between student speech rights and harassment law is to be resolved. Rather, the case law is over-determined on this issue. Consequently, it is disingenuous at best, and plainly ignorant at worst, for a public college or university to maintain a harassment policy mirroring one of the codes struck down in these cases or to apply a policy towards

397. *Saucier*, 533 U.S. at 194.

398. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

399. *See supra* note 9.

400. *See, e.g., Rosenberger v. Rector & Visitors*, 515 U.S. 819, 835 (1995) (citing *Healy* for the proposition that the danger of chilled speech is “especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition”); *Ornelas v. Regents of the Univ. of N.M.*, No. 99-2123, 2000 U.S. App. LEXIS 21151 (10th Cir. Aug. 21, 2000) (citing *Papish* to argue that a state university cannot expel a student in retaliation for engaging in legitimate First Amendment activity); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (citing *Papish* for the argument that a public university may not take adverse action against a student newspaper because it disapproves of the content of the paper).

401. *See supra* Parts III.C., III.D.

protected speech, and to then claim that it was unaware that its actions were unlawful. Moreover, even if a college or university official argues that none of these cases arose in his or her federal circuit and thus there were no binding legal decisions, the uniformity of the case law across several federal circuits establishes a general consensus of persuasive authority sufficient to meet the requirements of the Supreme Court's jurisprudence on qualified immunity.⁴⁰²

By rejecting the qualified immunity defense, the courts would dramatically alter the incentives for administrators addressing peer harassment. If administrators know that they face the prospect of paying monetary damages to a student who has been harmed in the exercise of his or her First Amendment rights, they will likely be much more careful when drafting and implementing sexual or racial harassment policies. They will more closely scrutinize the possibility of an infringement upon protected expression, resulting in a more sensible approach to the intersection and conflict between harassment law and free speech, allowing for much-needed breathing room for student expression on campus.

VII. CONCLUSION

In fundamentally misapplying peer harassment law, some colleges and universities have taken aim at mere offensive and critical speech, despite the fact that hostile environment law, properly understood, is narrowly aimed at extreme patterns of harassing conduct and should not be applied against the exercise of free speech rights. By doing so, these colleges and universities have overstepped their obligations under Title IX and Title VI and are acting contrary to stated OCR policy and clear legal precedent, the latest example of which is the recent Third Circuit decision in *DeJohn*.⁴⁰³

A major contributing factor to the problem has been the practice on the part of some courts to conflate Title VII law with Title IX and Title VI law. Some colleges and universities have reacted to these decisions by drafting and enforcing their harassment policies in a manner which follows Title VII hostile environment standards for the workplace. This practice is a manifestly inappropriate one; it ignores the significant differences between the workplace and the campus, and furthermore ignores the unique characteristics of peer harassment as compared to harassment in employment.

In this article, I have proposed some much-needed solutions. The most important of these is that Congress and OCR should amend Title IX and Title VI, and their respective implementing regulations, to eliminate institutional liability for peer sexual and racial harassment. The best available alternate solution is to adopt the *Davis* hostile environment

402. See *supra* note 398 and accompanying text.

403. *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

standard as the controlling standard for all peer harassment cases. While colleges and universities would still remain liable for peer harassment, adoption of the *Davis* standard would provide the highest possible level of protection for student speech rights. The third and final proposed solution is for the courts to deny qualified immunity to college and university administrators in any case alleging the deprivation of a student's First Amendment rights. Taking this measure would provide administrators with clear incentives to respect and uphold students' speech rights.

The solutions I have proposed in this article are aimed at restoring student speech rights to where they properly should be on a college or university campus. Certainly, not every expression to be defended against the encroachment of harassment law will be agreeable to all parties. Giving sufficient breathing room for campus speech necessitates that everyone will have to tolerate some expression which one finds offensive, unredeemable, or just plain wrong. However, the more important point is that outright censorship is not the answer. It is dangerous to give one individual or group of individuals, whether it is a student body, college or university administration, or faculty, the power to draw the line separating what is too offensive or unacceptable from what is not. We will all be better off if everyone is instead more tolerant of expression and less sensitive about the "wrong" type of speech. May it ever be so.

AN ESSAY ON FRIENDS, SPECIAL PROGRAMS, AND PIPELINES

MICHAEL A. OLIVAS*

At the invitation of the editors, I have been asked to write down some thoughts on the legal dimensions of conducting specialized programs and pipeline projects—the various programs undertaken to improve the flow of students into professions, such as high school newspaper editors working with newspapers, pre-med students working in labs with scientists, or pre-law students attending court with attorneys or observing judges. I have always been skeptical of these programs, even as I have been involved in them much of my professional life, as I made my way to law school and the law profession without ever having known a lawyer as I was growing up. The fact that I live in Texas leads some observers to think that I must be an advocate for pipeline programs, but I have objected to the metaphor for many years, and once wrote:

[A pipeline] is a foreign mechanism introduced into an environment, an unnatural device used to leach valuable products from the earth. It requires artificial construction; in fact, it is a dictionary-perfect artifice. It cuts through an ecosystem and can have unintended and largely uncontrollable, deleterious effects on that environment. It can, and inevitably does, leak, particularly at its joints and seams. It can also rust prematurely, and if any part of it is blocked or clogged, the entire line is rendered inoperative.

For the admissions process, I prefer the metaphor of the “river.” It is an organic entity, one that can be fed from many sources, including other bodies of water, rain, and melting snow. It can be diverted to create tributaries without altering its direction or purpose, feeding streams, canals, and fields; it can convey goods, drive mills and turbines, create boundaries, and irrigate land—all without diminishing its power

The metaphor chosen to describe the admissions process is important for its characterization of the problem, for the evidence mounted to measure the problem, and for the solutions proffered to resolve the problem. Let me illustrate briefly. Characterizing the problem of minority underenrollment at any level as a “pool

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problem” suggests a supply shortage or, at best, a failure to cast one’s line in the right fishing hole. The pipeline metaphor reinforces this view of the problem, suggesting that minority enrollment is simply a delivery glitch, or that admissions committees would admit minorities if they only used better conveyances. After all, pipelines do not produce anything of value; they only carry or convey products. While both the supply function and the conveying function are important, they are not, individually, rich enough metaphors to portray the complex phenomenon of both functions intertwining to produce undergraduates and transform them into graduate or professional students.

A river, in contrast, provides nutrients and conveys resources, unlike its more static counterparts that do one or the other, but not both It constantly changes form, seeking new flows and creating new boundaries. It can even wear down rock, as observers of the Rio Grande Gorge and Grand Canyon can attest. This is what I wish to convey; that demography and efforts by schools to do the right thing will inevitably lead to improvement over time.¹

Because I studied for the Catholic priesthood for eight years, I hold the view that anyone can be saved, and I am always the most optimistic person in the room. That having been said, I may be one of the few readers who does not think of these programs in purely legal terms, but in organizational theory ways or normative terms. It also means that things come in threes for me, so I offer these three lenses in the issue of the programs. Consider them as motivational, efficacy, and boundary-spanning grounds; they also are proxies for what are the real issues, who are your friends, and where do you look for guidance?

I. RESTRICTIONIST AND CONSERVATIVE PRESSURES WILL LIKELY INCREASE

Organized interests regularly monitor educational programs and benefits that appear to have gender or racial/ethnic restrictions, and groups such as the Center for Individual Rights (CIR) will continue to prompt defense of any programs that single out underrepresented students.² These efforts

1. Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 17–18 (2005) (quoting Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1114–16 (1997)).

2. See PETER G. SCHMIDT, *COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION* 111–129 (2007), for information on CIR and higher education. Schmidt provides a very real service in looking under this rock, although I believe he is insufficiently critical of these groups

have led to many institutions folding up the tents and abandoning their equity efforts, even in institutions that have had very few minority initiatives or successful programs. For example, Texas A&M University, a school that chose not to implement *Grutter v. Bollinger*³ in admissions, even after *Hopwood v. Texas* had been reversed by the U.S. Supreme Court,⁴ and even after underachieving for years in a state with rapidly-increasing minority populations, was sued by CIR over a small, HHS/NIH/USDA-funded summer minority apprenticeship program and settled before trial and agreed to discontinue the effort.⁵ CIR filed a similar action for a journalism program at Virginia Commonwealth University, and intimidated the institution into ending its minority summer journalism program, partially funded by a foundation.⁶ In 2006, a similar organization challenged a minority fellowship program at Southern Illinois University (SIU), and SIU blinked, dismantling the minority-specific program.⁷

Conservative advocacy groups also set their sights even upon programs such as Texas' Top Ten Percent program, a race-neutral initiative that grants automatic admission to public colleges and universities for the state's graduating students who are in the top ten percent of their classes.⁸ When Texas A&M University surfaced a plan to extend its admissions beyond that required of all state colleges and universities, the Center for Equal Opportunity (CEO) and the American Civil Rights Institute kicked up such dust that Texas A&M University backed away, even though there is no legal prohibition against them doing so.⁹ Indeed, there are public colleges and universities in Texas that have extended their automatic admissions criteria (required by statute for all institutions to be set at ten percent) to twenty percent, as Texas A&M University had considered doing.¹⁰

and their failure to provide genuine remedies.

3. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (allowing affirmative action in law school); *see also* *Gratz v. Bollinger*, 539 U.S. 244 (2003) (denying undergraduate affirmative action point plan).

4. *Grutter*, 539 U.S. 306; *see also* *Texas v. Hopwood*, 533 U.S. 929 (2001) (denying certiorari without opinion).

5. The Center for Individual Rights, *Doe v. Department of Health and Human Services*, http://www.cir-usa.org/cases/doe_v_health.html (last visited Feb. 19, 2009).

6. The Center for Individual Rights, *Smith v. Virginia Commonwealth University*, http://www.cir-usa.org/cases/smith_v_vcu.html (last visited Feb. 19, 2009).

7. *See* Peter G. Schmidt, *Southern Illinois U. and Justice Dept. Near Accord on Minority Fellowships*, CHRON. OF HIGHER EDUC. (Wash. D.C.), Feb. 3, 2006, at A26.

8. *See, e.g.*, Jeffrey Selingo, *Critics Blast Plan to Expand Class-Rank Policy in Texas as Affirmative-Action Ploy*, CHRON. OF HIGHER EDUC. (Wash. D.C.), Jan. 11, 2002, at A29.

9. *See generally*, Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. L. REV. 993, 1004-06 (1999) (reviewing the Texas percentage plan).

10. *See, e.g.*, University of Houston, Automatic Admissions, <http://www.uh.edu/admissions/undergraduate/apply-freshman/admissions->

In the area of immigration-related restrictionists, particularly groups that oppose immigration reform or who lobby against the regularization of undocumented immigrants and programs that address undocumented college and university students, a firestorm arises, fanned by the Lou-Dobbs-ification of cable television and talk shows.¹¹ While explication of this complex topic is beyond the scope of this piece, three recent examples will suffice to reveal the political salience of this topic. First, the failure to enact the Development, Relief, and Education for Alien Minors Act (“DREAM Act”), even within a military reauthorization spending bill, reveals the deep cleavages between those who support comprehensive immigration reform and those who are opposed to any form of legalization, even for highly educated undocumented college and university students (who would likely be the beneficiaries of any such revision or legalization).¹² The unpopular war, the weakened administration, and the politicization of this legislation have made it impossible to address this issue, even as conservatives respond that persons in the U.S. without authorization should return to their countries and wait in line.¹³

Second, when states have made efforts to extend state resident tuition or even extend admission to undocumented college and university students who have graduated from their public schools, a number of objections have been raised, such as in North Carolina and Arizona; conservative groups have challenged any immigration-related college and university reforms in court, and while they have lost these challenges, the damage has been done.¹⁴ Finally, even the recent presidential debates have featured a race to the bottom, as immigration reform has become the third rail of politics; as recently as December, 2007, one major Republican candidate railed against another Republican for his support of immigration reform and resident tuition status for undocumented college and university students in his state.¹⁵ Until there is comprehensive immigration reform, this issue will likely leach into discussions of educational equity and access for immigrant

criteria/index.php#automatic (last visited Feb. 19, 2009).

11. See, e.g., Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995); Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004).

12. See, e.g., Miriam Jordan, *Illegal at Princeton*, WALL ST. J., Apr. 15, 2006, at A1 (discussing a highly ranked Princeton undergraduate who is undocumented).

13. Joseph Berger, *Debates Persist Over Subsidies for Immigrant College Students*, N.Y. TIMES, Dec. 12, 2007, at B8; Elizabeth Redden, *For the Undocumented: To Admit or Not to Admit?*, INSIDE HIGHER ED, Aug. 18, 2008, <http://www.insidehighered.com/news/2008/08/18/immigrants>.

14. Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008).

15. Michael Luo, *Romney's Words Testify to Threat From Huckabee*, N.Y. TIMES, Dec. 2, 2007, at YT 29; Katherine Mangan, *Immigration: A Campaign Primer*, CHRON. OF HIGHER EDUC. (Wash. D.C.), Mar. 21, 2008, at B10.

students.

II. MAINSTREAM AND PROGRESSIVE GROUPS OFFER ADVICE AND MAKE SUGGESTIONS THAT ARE UNLIKELY TO BE EFFICACIOUS

I have detailed above the aggressive efforts of those who oppose reasonable efforts to integrate college and university student bodies and faculties. At the same time, even supporters of such efforts are not as helpful as they could be. I would analogize these to the bumptious immigration reforms for drivers licenses undertaken in a naïve and unnuanced manner by New York Governor Eliot Spitzer, only to have to beat a hasty retreat.¹⁶ For example, consider two good faith efforts by credible and established organizations. In its recent efforts to help colleges and universities craft legally-viable options, a group sponsored by the College Board issued a series of reports to respond to the *Gratz v. Bollinger* and *Grutter* decisions, and to the rise of statewide racial initiatives. The reports help sort out the complex issues, as the March 2007, *From Federal Law to State Voter Initiatives*, concludes:

[A]ttention to longer term investments (such as support for pipeline-building programs) and shorter term strategies (such as rigorous evaluation and pursuit of all available avenues—race-conscious and race-neutral—likely to advance institution goals) can frame a comprehensive and coherent action agenda that is compelling in the court of law, just as it is in the court of public opinion.¹⁷

In another 2007 report, *Echoes of Bakke*, three of the same authors write:

[I]t is important that institutions seeking to justify race-conscious policies in such ways [by using diversity practices] heed the Court's long-standing admonition (reaffirmed in the school assignment cases) that "societal discrimination" can never be a compelling interest justifying race-conscious measures by a discrete institution. The Court has observed consistently that interests unlimited in scope or time can never meet the threshold of strict scrutiny analysis. (Consider the following: At what point can a single institution pursuing broad social goals declare that its race-conscious policies have succeeded, and how would that

16. Nicholas Confessore & Danny Hakim, *Spitzer's Plan on Licenses for Immigrants Finds Support*, N.Y. TIMES, Oct. 9, 2007, at B1. As I saw these events unfold, I prayed: please save us from our supporters.

17. ARTHUR L. COLEMAN, SCOTT R. PALMER, ELIZABETH SANGHAVI & STEVEN Y. WINNICK, COLLEGEBOARD, FROM FEDERAL LAW TO STATE VOTER INITIATIVES: PRESERVING HIGHER EDUCATION'S AUTHORITY TO ACHIEVE THE EDUCATIONAL, ECONOMIC, CIVIC, AND SECURITY BENEFITS ASSOCIATED WITH A DIVERSE STUDENT BODY 9 (2007), http://www.collegeboard.com/prod_downloads/diversitycollaborative/preserving-higher-education-authority.pdf.

institution establish such evidence?)¹⁸

But the first recommendation (that schools pursue pipeline programs) suggests that these programs are somehow immune from CIR or CEO challenges, and that such programs appreciably add to the sum. I have monitored such programs—across disciplines—for years, and have reluctantly come to believe that most of these are so small, transitory, soft-money-dependent, and contingent that they almost mask the failure of mainstream opportunity structures. Money for these initiatives comes and goes, depending upon foundation priorities, and the cycle rediscovers minority pipeline programs every few years, as the mandala turns. Virtually no institutional reward structures encourage senior faculty, especially the accomplished ones, to undertake pipeline programs, whether minority-specific or more generic. And while I have never considered doing this kind of work as a tradeoff against my more fundamental scholarship activities or teaching obligations, many colleagues do consider this work as less important and more peripheral. And if you are in a public institution, or in a college or university in a state with racially-restrictive constitutional provisions (or governor initiatives, as in Florida), then the game is hardly worth the candle.¹⁹ More importantly, I cannot in good faith conjure up a single institution in the country, at least not historically-white ones or major producer schools, that could ever plausibly conclude that its race-conscious policies have succeeded and worry about what evidence could be adduced to extricate itself. Such admonitions strike me as counterproductive and chimerical, or, at the least, unnecessary.

And the American Association for the Advancement of Science (AAAS) makes a very eloquent argument in *Standing Our Ground* for Science Technology Engineering and Mathematics (STEM) programs to diversify those essential fields, but it is not clear to all observers that diversity

18. ARTHUR L. COLEMAN, SCOTT R. PALMER & FEMI S. RICHARDS, COLLEGEBOARD, FEDERAL LAW AND RECRUITMENT, OUTREACH, AND RETENTION: A FRAMEWORK FOR EVALUATING DIVERSITY-RELATED PROGRAMS 32–33 (2005), http://www.collegeboard.com/prod_downloads/diversitycollaborative/05diversity-fedlaw-framework.pdf. Although this is not the setting for a book review, I found this document to be too wordy throughout, and not always convincing. Section 4B.1 on “International Students,” for example, lumps in non-immigrants (such as students on F-1 visas) with permanent resident students, not generally thought of or treated as “international” or “foreign.” *Id.* at 32.

19. Several states have enacted voter initiatives that ban the use of affirmative action in public college and university admissions. *See, e.g.,* *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (upholding use of race but reading state statute to ban its use); *see also*, *NAACP v. Fla. Bd. of Regents*, 822 So.2d 1, 2 (Fla. Dist. Ct. App. 2002) (discussing Florida plan that “prohibit[ed] the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education”); *see generally* Coleman, Palmer, Sanghavi, & Winnick, *supra* note 17; Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259 (2008).

programs can turn on perceived labor needs or national priorities.²⁰ I appreciate the efforts that some professional associations have played in undertaking and producing specialized programs to diversify their professions and to draw attention to the problems, but this supportive role and cultivation of the process cannot fundamentally alter the production-function of campus-based efforts, where they really count. Various programs must affect and shape students (and junior faculty, for those programs that seek to develop the professoriate) in their academic programs to be truly transformative and meaningful; no peripheral agency or organization, however well-intentioned, can substitute for the home garden. I certainly think that professional associations and scholarly communities can cajole, shape, cheerlead, and assist, but at the end of the day, what counts is training and credentialing students (and faculty) where they are and where they will serve. Relying upon the periodic attention of funders or the profession as a whole cannot provide the long term personal and institutional commitments needed to remedy the serious problems.

I applaud and recognize efforts by the AAAS, the American Institute of Biological Sciences (AIBS), the American Society for Health Care Engineering's (ASHE) Institute on Equity Research Methods and Critical Policy Analysis, and many others, but I do question the extent to which these can counter the systemic failure of graduate programs to recruit and graduate underrepresented minority students.²¹ Of course, there are institutionally-based programs, such as those at Rice in Statistics (The Rice University Summer Institute of Statistics)²² and Cal Tech's Minority Undergraduate Research Fellowship Program.²³ There are others, including some that are well-established and long running.²⁴ But until the major elite feeder schools institutionalize these efforts to produce scientists, engineers, scholars, lawyers, etc., such specialized and targeted programs

20. SHIRLEY M. MALCOM, DARYL E. CHUBIN, & JOLENE K. JESSE, *STANDING OUR GROUND: A GUIDEBOOK FOR STEM EDUCATORS IN THE POST-MICHIGAN ERA* (2004).

21. See *Advancing Science Serving Society* Homepage, <http://www.aaas.org/> (last visited Feb. 19, 2009), for examples of the many such initiatives. See also RICHARD J. BENNOF, NAT'L SCI. FOUND., *THE EXTENT OF FEDERAL S&E FUNDING TO MINORITY-SERVING INSTITUTIONS I* (2004); Science Careers Minority Science Network, http://sciencecareers.sciencemag.org/career_development/miscinet (last visited Feb. 19, 2009). See American Institute of Biological Sciences: Diversity Programs and Resources, <http://www.aibs.org/diversity> (last visited Feb. 19, 2009) and Association for the Study of Higher Education Homepage, <http://www.ashe.ws> (last visited Feb. 19, 2009), for information on these programs.

22. Rice University Summer Institute of Statistics Research Program for Undergraduates, http://www.stat.rice.edu/~jrojo/RUSIS_Information.pdf (last visited Feb. 19, 2009).

23. California Institute of Technology MURF Undergraduate Research Fellowships, <http://www.murf.caltech.edu> (last visited Feb. 19, 2009).

24. Malcom, Chubin, & Jesse, *supra* note 20 (reviewing a number of other programs).

cannot meet the increasing needs of society. And rather than help with these underlying problems, restrictionist and conservative groups would rather challenge and dismantle these programs than add positively to the efforts. Where are they in offering initiatives to actually do something about the problems, rather than simply standing by and shooting the wounded on the battlefield? When will they sue an institution that is near-exclusively white or one that consistently underperforms by not enrolling minority students? Where are their integrative and developmental efforts? When will they propose acceptable pipeline programs, rather than attacking them?

III. THE SUPREME COURT DOES NOT ALWAYS MAKE A FINE DISTINCTION BETWEEN K-12 AND HIGHER EDUCATION

A number of higher education advocates have held their breath since *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved)*,²⁵ the Seattle and Louisville case decided in 2007 by the U.S. Supreme Court, as the racial attendance policies were held to be unconstitutional in the K-12 sector.²⁶ There are many decisions in one sector that leach into the other, but this decision may augur less for college and university law than it does give signals about how race cases will be decided by this Court in the future. It is true that there are college-siting and attendance cases, ones that have clear racial consequences, but *Parents Involved* will, in my estimation, not have substantial postsecondary implications. *Grutter* is likely safe for the time being, more because the Court would unlikely accept such a case for some time. *Regents of the University of California v. Bakke*²⁷ applied for over twenty-five years before it was largely reaffirmed by the University of Michigan Law School admissions case.²⁸ In *Parents Involved*, the Court held:

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*. The specific interest found compelling in *Grutter* was student body diversity “in the context of higher education.” The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.”²⁹

It also differentiated the postsecondary context:

25. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

26. *Id.*

27. *Regents v. Bakke*, 438 U.S. 265 (1978) (allowing affirmative action in college admissions but denying the use of quotas).

28. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

29. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2753 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328, 337 (2003)).

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” The Court explained that “[c]ontext matters” in applying strict scrutiny, and repeatedly noted that it was addressing the use of race “in the context of higher education.” The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.³⁰

But the U.S. Supreme Court and other courts have not consistently identified a line between higher education and K–12 cases. For example, I list three (of many such) examples where the differentiation has been clear and not-so-clear (high school newspapers and yearbooks, grooming standards, and inequities claimed on the basis of “regions” within a state):

Newspaper and yearbooks: *Hazelwood School District v. Kuhlmeier*,³¹ “We have nonetheless recognized that the First Amendment rights of students in the [K–12] public schools ‘are not automatically coextensive with the rights of adults in other settings,’ and must be ‘applied in light of the special characteristics of the school environment.’”³²

Grooming standards: *Lansdale v. Tyler Junior College*,³³ “Today the court affirms that the adult’s constitutional right to wear his hair as he chooses supersedes the State’s right to intrude. The place where the line of permissible hair style regulation is drawn is between the high school door and the college gate.”³⁴ Dissent: “I dissent, first, because I see no distinction between high schools and junior colleges under the *Karr v. Schmidt* holding, which is now the law of this Circuit.”³⁵

Residence and attendance zones in higher education: *Richards v. League of United Latin American Citizens*,³⁶ “[T]he constitutional directive to

30. *Id.* at 2754 (quoting *Grutter*, 539 U.S. at 329, 327).

31. 484 U.S. 260 (1988) (holding school administrators may exercise editorial control over contents of high school newspapers produced as part of school curriculum).

32. *Id.* at 266 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

33. 470 F.2d 659 (5th Cir. 1972) (striking down public college dress code and grooming requirements).

34. *Id.* at 663.

35. *Id.* at 666 (Roney, J., dissenting).

36. 868 S.W.2d 306 (Tex. 1994) (striking down challenge to Texas state college

maintain ‘an efficient system of public free schools’ does not apply to higher education as that term is used in this case.”³⁷

CONCLUSION

I have made three observations, and attempted to muster evidence for maintaining gains and increasing access for disadvantaged groups, particularly in the post-baccalaureate professional and graduate level, although my points apply with equal weight to the undergraduate experience and the transition from high school to college. First, restrictionist and conservative pressures will likely increase; second, mainstream and progressive groups offer advice and make suggestions that are unlikely to be efficacious; and third, the Supreme Court does not always make a fine distinction between K–12 and higher education. I am surely not the first person to make these points, and others have made one or the other observation in ways that are both eloquent and trenchant. But I have always considered myself an observer who was the last in the room to resort to legal action and the least likely to resort to the courts, unless all else fails. Therefore, I despair when I see the issues discussed today to be conducted in administrative law frameworks or to have become so legalized.³⁸

Notwithstanding the naysayers and the restrictionists, whose agendas are not aimed at progressive action or equity, but largely at preserving white privilege, I think that the country’s demography is in our favor and that when the smoke clears and the adults take over, we will not merely endure, but prevail. Indeed, it is the demographic trends that make these groups uneasy, as it will be more difficult to preserve their historical advantages when there are simply more qualified people of color and immigrants. Mark my words: when that day dawns, there will be much more support for pipeline programs and for the cultivation of what will then be “minority” talent.

funding formulae based upon geographical residence in “border area” of South Texas). See also Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391 (2005), for an analysis of several college-siting cases.

37. *Richards*, 868 S.W.2d at 315.

38. See AMY GAJDA, *THE LEGALIZATION OF ACADEMIA: THE COURTS’ GROWING ROLE ON CAMPUS AND WHY WE SHOULD CARE* (forthcoming 2009) (making this point at book length); see also Charles Toutant, *Minority Programs Under Fire*, MINORITY L. J., Summer 2008, at 10 (reviewing legal actions against affirmative action).

DOES A COACH OWE PLAYERS A FIDUCIARY DUTY? EXAMINING THE RELATIONSHIP BETWEEN COACH AND TEAM

SARA YOUNG*

I. INTRODUCTION

The relationships between college and university coaches and student-athletes raise a myriad of questions about duties and responsibilities that the former owes the latter. What happens when a coach harms a student-athlete's chances at a future in athletics—in college or professionally—or so damages a program as to endanger the student-athlete's ability to fulfill his role as a college or university ambassador? Does a player have recourse under the theory of fiduciary duty?

The concept of fiduciary duty can be applied to relationships touching all aspects of life. For many individuals in the United States, participating in sports is an integral part of growing up.¹ A student-athlete's success at a college or university is crucial, both in the classroom and on the court. Given the amount of time, energy, and money spent toward fostering the relationship between coaches and student-athletes, it is no wonder that many attorneys suspect this relationship may be a fiduciary one.² Classifying the relationship between coaches and student-athletes as fiduciary would impress additional duties upon college and university coaches, as well as the employing colleges and universities.

Part II of this article provides hypothetical situations questioning the implications of a fiduciary duty at the college and university coaching level. Part III outlines what it means to be a fiduciary and explores different modes of analyzing whether one is a fiduciary. These modes include the Scharffs-Welch framework and the Smith critical resource theory. Part III also provides context by reviewing the fiduciary

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1. See Thomas Rosandich, *Collegiate Sports Programs: A Comparative Analysis*, 122 EDUC. 471, 474 (2002) (explaining that approximately 400,000 individuals participated in college athletics in 2002 and devoted significant time and energy to their individual sports); see also Child Trend's DataBank, Participation in School Athletics, http://www.childtrendsdatabank.org/pdf/37_PDF.pdf (last visited Feb. 8, 2009) (providing studies that show over sixty percent of high school students participate in athletics).

2. See, e.g., Michael L. Buckner, *University Liability in Florida when Coaches Refer Student Athletes to Sports Agents: A Fiduciary Approach*, 73 FLA. B.J. 87 (1999); Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 170–72 (2002).

relationships arising in the college and university environment. Part IV discusses the role of college and university coaches generally. Part V explores case law and scholarly arguments concerning whether coaches should be viewed as fiduciaries and applies the two previously described analytical modes to the relationship between a coach and a student-athlete. Finally, Part VI revisits and reviews the hypothetical situations in light of the discussed case law and strategies.

II. HYPOTHETICAL SITUATIONS

A. The Future Professional Athlete

The student-athlete may be justified in an expectation of fiduciary protection when the school exerts significant control over the student-athlete as a result of his or her participation in school-sponsored athletic activities.³ Courts have held that there is a special relationship between a college or university and a student-athlete sufficient to impose a duty of reasonable care on the institution.⁴ In a column for the Florida Bar Journal, one attorney submitted the following hypothetical:

The star running back at State U. is the leading rusher in the nation during his sophomore year and is projected by professional scouts and sports experts to be a top 10 pick in the National Football League (NFL) draft after his senior year. The head football coach at State U. refers the star running back to a professional sports representative ("sports agent"). The coach is financially compensated by the sports agent for the referral. Because of the sports agent's shady representation, the star running back violates national intercollegiate athletic regulations, which cause his intercollegiate eligibility to be revoked. Thereafter, the star running back enters the NFL draft after his sophomore year and is picked in the second round. Consequently, the star running back loses millions of dollars in potential earnings as a result of being picked in the second round. The star running back initiates a lawsuit against State U. alleging that the university had a special duty to protect student athletes from the actions of the coach.⁵

The author, Buckner, argues that the nature of the coach-student-athlete relationship supports the protection of a student-athlete's expectations of

3. Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927-28 (N.C. Ct. App. 2001) (holding that there was a special relationship between the university and a sophomore cheerleader who suffered permanent brain damage when she fell from a pyramid while a member of the school-sponsored cheerleading squad).

4. See Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1368-69 (3d Cir. 1993).

5. Buckner, *supra* note 2, at 87.

intercollegiate play and potential future professional sport benefits.⁶

B. The Student-Athlete Who Lost Eligibility

When a coach damages a student-athlete's future in college and university athletics, the student-athlete may look to legal concepts like fiduciary duty to hold the coach accountable. In late 2008, a basketball coach at a major university told the press that he admitted responsibility for the violation of a conference rule, preventing a prized recruit from joining his team.⁷ By failing to stay adequately informed of the student-athlete's enrollment status, the coach was unable to advise the student-athlete not to enroll at the conference institution part- or full-time because he did not meet initial National Collegiate Athletics Association ("NCAA") eligibility requirements.⁸ The coach thought the athlete was *attending* class, when, in fact, he actually *enrolled* during August to remain on track academically.⁹ When the coach requested a waiver of the rule, he was denied.¹⁰ The athlete, a former junior college player, told the coach that if the NCAA Clearinghouse denied his appeal, he would go overseas to play professionally with hopes of getting to the NBA.¹¹

C. The Coach Who Ignored the University Mission, and NCAA Regulatory Rules

What happens when a coach damages the reputation of the college or university while also hindering the future of the student-athletes? Recently, a basketball coach became the subject of national media attention when accused of five major recruiting violations.¹² An NCAA report alleged that he "failed to deport himself . . . with the generally recognized high standard of honesty" and "failed to promote an atmosphere for compliance within the men's basketball program."¹³ These alleged violations eventually led to the coach's resignation.¹⁴ But more importantly to the program, violations of NCAA rules can carry additional punishments including postseason ineligibility and loss of scholarships.¹⁵

6. *Id.* at 88; see also Timothy Davis, *Student-Athlete Prospective Economic Interests: Contractual Dimensions*, 19 T. MARSHALL L. REV. 585, 618–19 (1994).

7. Associated Press, *Sadler Takes Blame for Sallie's Woes*, ESPN.COM, May 29, 2008, <http://sports.espn.go.com/espn/wire?section=ncb&id=3418218>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *NCAA lists five major violations; IU AD 'profoundly disappointed'*, ESPN, Feb. 15, 2008, <http://sports.espn.go.com/ncb/news/story?id=3243793>.

13. *Id.*

14. In fact, the coach resigned during the 2007–2008 basketball season. *Id.*

15. *Id.*

III. FIDUCIARY

A. What Is a Fiduciary?

It is difficult to comprehensively define a fiduciary relationship. Justice Frankfurter wrote, “to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?”¹⁶ Fiduciary duty is rooted in concepts such as good faith, trust, and confidence, and the duties that courts place under the umbrella of “fiduciary duty” are often described in lofty terms.¹⁷ A traditional example is the trustee of a trust.¹⁸ Here, the trustee-fiduciary owes the beneficiary of the trust several duties, including good faith, honesty, and fair dealing.¹⁹

Fiduciary law applies when one places special confidence in another and the latter accepts that duty.²⁰ Fiduciary duty originated in the corporate context, describing the duty directors owe to the corporation and shareholders, and requiring a director to act with loyalty, diligence, good faith, and in the best interest of the corporation.²¹ Fiduciary duty is also used as a label, describing duties in a partnership.²² In a landmark case, *Meinhard v. Salmon*,²³ Justice Cardozo stated:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.²⁴

Resulting from this stringent attempt at application of fiduciary duties, some states allow for the contracting away of specific fiduciary duties.²⁵ Additionally, while courts often list duties in almost unreachable ideals, in practice, they are much less demanding.²⁶ This is also true in the context of applying fiduciary duty at the college and university level.²⁷

16. *SEC v. Chenery Corp.*, 318 U.S. 80, 85–86 (1943).

17. Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159, 162 (2005).

18. *See, e.g.*, *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955).

19. *Id.*

20. Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1835 (2004).

21. 15 U.S.C. § 78j(b) (2006).

22. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

23. *Id.*

24. *Id.* at 546.

25. *E.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2004) (allowing the contracting away of certain fiduciary rights).

26. *Id.*

27. Courts are reluctant to find fiduciary duty at the college level. *See* discussion

Some relationships are routinely found to be fiduciary in nature, as one person places trust and confidence in another, more dominant person.²⁸ These include the trustee/beneficiary relationship, lawyer/client relationship, agent/principal relationship, doctor/patient relationship, and director/corporation relationship.²⁹ Some relationships are considered fiduciary in particular situations, such as when there are additional facets to the relationship indicating a particular degree of special confidence.³⁰

The number of potential relationships classified as fiduciary is expanding and includes the relationships between educator, educational institutions, and their students.³¹ In fact, courts have already identified that colleges and universities owe fiduciary duties to their students, including duties that arise from services provided by the faculty as advisors to students.³² Courts use elements like academic advising as a critical factor in determining whether a teacher owes a fiduciary duty to a student.³³ In an advisor-advisee situation, the advisor, because of his or her position of trust and power, must exercise good faith, and avoid abusing the situation.³⁴ One of the many hats coaches wear is that of an advisor to players, placing them squarely within this definition of a fiduciary.

B. Approaches to Analysis

There are several different methods for analyzing whether an individual

infra PART IV.B.

28. *Dunham v. Dunham*, 528 A.2d 1123, 1133 (Conn. 1987) (characterizing the fiduciary relationship by “a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other”).

29. *See, e.g., Chemtool, Inc. v. Lubrication Tech., Inc.*, 148 F.3d 742, 745 (7th Cir. 1998); *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987); *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124, 1126 (N.D. Ill. 1982); *Moore v. Regents*, 793 P.2d 479, 483 (Cal. 1990); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Farkas v. Williams*, 125 N.E.2d 600, 603 (Ill. 1955).

30. This includes the teacher-student relationship when the teacher acts as an advisor to the student. *See Weeks & Haglund, supra* note 2, at 154 (stating that courts have found fiduciary relationships between graduate students and their advisors, as well as in the relationships of faculty and staff with undergraduates to whom they serve as advisors).

31. *Scharffs & Welch, supra* note 17, at 164.

32. *Id.*; *see also Weeks & Haglund, supra* note 2, at 154; *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 97 (D. Conn. 2000) (finding that a fiduciary relationship might be established between a graduate student and his advisors since the advisors and the university were “in a position of power and authority” over the student).

33. *See, e.g., Chou v. Univ. of Chicago*, 254 F.3d 1347, 1362 (Fed. Cir. 2001) (involving a student with a claim of breach of fiduciary duty against an advisor/department chairman who “specifically represented to her that he would protect and give her proper credit for her research and inventions” but then “named himself as the sole inventor of Chou’s discoveries”).

34. *Id.*

is a fiduciary and to whom he or she owes duties. Some courts seem to use a traditional or historical approach, focusing on established doctrines and concepts.³⁵ Others appear to analyze the relationship and behavior between the two parties in such a way as to try to do equity.³⁶ Three law professors have developed two different theories for how courts and society should determine if someone is a fiduciary.³⁷ Because these two methods of analysis approach fiduciary duties differently, a relationship that may “qualify” as fiduciary under one method may not qualify under the other.

1. The Doctrinal Approach

[T]he doctrinal approach first asks whether someone is a fiduciary, and if so who the beneficiaries of that fiduciary’s duties are. Thus, the threshold question is whether or not a fiduciary relationship exists. In order for there to be a fiduciary relationship, there must be an element of entrustment by one person (the beneficiary) to another (the fiduciary), an element of power and control by the fiduciary over the interests and well-being of the beneficiary, and an element of proactivity and protection where under the fiduciary subordinates her own interests in order to pursue and protect the interests of the beneficiary.³⁸

Generally, courts are not aggressive in finding and identifying breaches of fiduciary duty.³⁹ Perhaps this is testimony to the fact that fiduciary concepts apply in unique ways to different situations, and courts must try to use more individualized methods in determining the fiduciary’s duties and when breaches of those duties occur.

2. The Scharffs-Welch Framework

Law Professors Scharffs and Welch proposed a framework using three inter-related inquiries to determine the likelihood of legal liability for alleged breaches of fiduciary duties.⁴⁰ They premise their analysis on the

35. See, e.g., *Huffington v. Upchurch*, 532 S.W.2d 576, 579 (Tex. 1976) (holding that a managing partner owed to copartners “one of the highest fiduciary duties recognized in the law”).

36. See, e.g., *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1961) (explaining that a fiduciary duty is subject to “no fixed scale”).

37. J. Reuben Clark Law School at Brigham Young University Professors, Brett Scharffs (Professor of Law) & John Welch (Robert K. Thomas University Professor of Law), have worked to develop a “framework method” for analyzing fiduciary duty. Professor D. Gordon Smith (Glen L. Farr Professor of Law) analyzes fiduciary duty using his “critical resource theory.”

38. Scharffs & Welch, *supra* note 17, at 164–65.

39. *Id.* at 165–66.

40. For a thorough explanation of the framework, see Scharffs & Welch, *supra* note 17.

recognition that not all fiduciary duties and not all breaches are equally harmful.⁴¹ The first inquiry of the Scharffs-Welch framework considers and analyzes a set of factors determining the magnitude of the duty arising within the particular fiduciary relationship and context.⁴² The second analyzes the magnitude of the breach in light of the height or degree of the fiduciary's behavior, then measures the extent to which that conduct of the fiduciary has fallen short of the required level of performance.⁴³ The last inquiry assists the court in determining the appropriate remedy by considering how difficult it would have been to fulfill the duty, trying to avoid court hindsight, and considering what available remedies are appropriate in the situation.⁴⁴

The framework stands for a general proposition that courts are most likely to find liability in cases with high magnitude duties coupled with high magnitude breaches and the ready availability of appropriate remedies.⁴⁵ Courts are less likely to find liability when a low-degree duty is paired with a low-degree breach and no real appropriate remedy exists.⁴⁶ Additionally Scharffs and Welch hypothesize that the court considers public importance, profile, and impact of the case in evaluating the possibility of a fiduciary relationship.⁴⁷

3. The Smith Critical Resource Theory

Professor Smith argues that the primary purpose of fiduciary duty law is to combat opportunism within fiduciary relationships.⁴⁸ The critical

41. ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 182 (1st ed. 1999). "While [fiduciary] duty is described in terms of [the] categories of care and loyalty, there is in fact a sliding scale of duty because some cases fall between those duties . . . [and] fiduciary duty is subject to 'no fixed scale.'" *Id.* (quoting *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1961)).

42. The factors a court may consider in identifying the magnitude of the duty owed by a fiduciary include characteristics of: the fiduciary, the beneficiary, the relationship, and the subject matter of the relationship. Within each of these four factors, the court weighs an additional myriad of considerations. This portion of the framework is clearly illustrated in Scharffs & Welch, *supra* note 17, at 167.

43. *Id.* at 218. Courts consider if a remedy is available as part of their determination of whether liability should exist at all, most likely because they are reluctant to find liability when an appropriate remedy does not exist. Potential remedies exist in a hierarchy based on the magnitude of the breach and severity of penalty. The framework developers conclude that "[i]f an appropriate remedy does not seem to exist, this will decrease the likelihood that a court will find that a fiduciary relationship exists or, if such a relationship does exist, that there has been a breach of duty." *Id.*

44. *Id.* at 167.

45. *Id.* at 218.

46. *Id.* at 167.

47. *Id.* at 190.

48. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1430 (2002).

resource theory proposes that “fiduciary relationships form when one party (“the fiduciary”) acts on behalf of another party (“the beneficiary”) while exercising discretion with respect to a critical resource belonging to the beneficiary.”⁴⁹

The “on behalf of” requirement describes relationships in which one person acts primarily for the benefit of another The “discretion” requirement implies that the fiduciary makes choices about how to perform her obligations A critical resource [can be] something valued by the beneficiary but not ordinarily considered property.⁵⁰

Smith argues that the key to the analysis is that *something* lies at the core of the relationship and binds the fiduciary to the beneficiary.⁵¹ If nothing takes this role, other than a vague expectation of loyalty, Smith argues that courts should refuse to impose fiduciary duties.⁵²

This theory “advances two primary goals: (1) It articulates the principles that distinguish fiduciary from nonfiduciary relationships, and (2) it rationalizes the content of fiduciary obligations.”⁵³ Under this analysis of fiduciary duties, a wrong is committed “when the fiduciary does or has something that is inconsistent with the beneficiary’s interest in the critical resource.”⁵⁴ However, if the beneficiary is amply protected by self-help options, external regulation, or other mechanisms, a court imposed fiduciary duty is not required.⁵⁵

The critical resource theory works not only to explain the existence of fiduciary duties, but also to identify fiduciary relationships.⁵⁶ The critical resource theory advances the principle that “fiduciaries must exercise discretion with respect to a critical resource belonging to the beneficiary, where ‘discretion’ connotes the power to use or work with the critical resource in a manner that exposes the beneficiary to harm that cannot reasonably be evaded through self-help.”⁵⁷ Thus, what distinguishes a fiduciary from a non-fiduciary is not control, but rather, discretion over the critical resource.⁵⁸ Smith argues that courts should apply fiduciary law in these relationships after considering the relative costs and benefits of fiduciary protection.⁵⁹ When a fiduciary is authorized to act on behalf of

49. *Id.* at 1402.

50. *Id.* at 1402–04.

51. *Id.* at 1404.

52. *Id.* at 1402–04.

53. *Id.* at 1401.

54. *Id.* at 1407.

55. *Id.* at 1424–25.

56. *Id.* at 1441.

57. *Id.* at 1449.

58. *Id.* at 1456.

59. *Id.* at 1458.

the beneficiary and to exercise discretion over critical resources belonging to the beneficiary, holding the fiduciary to specific duties helps to align incentives.⁶⁰

C. Fiduciary Duty in the College and University Context

As students rely on administrators for advice, services, and financial assistance in pursuing their education, colleges and universities acquire fiduciary obligations towards those students.⁶¹ In recent years, professors and institutions have been held liable to students under the vague and uncertain equitable concept of fiduciary duty.⁶² It is nothing new for colleges and universities to think about their relationship with students as infused with responsibilities and obligations; but this new trend of using fiduciary concepts is growing.⁶³

Generally, fiduciary relationships are established between a student and teacher or coach because the teacher or coach is in a place of trust, confidence, and dominance. Even though teachers assume a position of trust, confidence, and dominance, courts have been clear that students cannot pursue a fiduciary duty claim that professors failed to provide a meaningfully education because of the threat of “embroil[ing] the courts into overseeing the day-to-day operations of schools.”⁶⁴ In some cases, however, fiduciary relationships have been found to exist where a teacher serves in an advising capacity.⁶⁵ Additionally, one court has found that Plymouth State College had a fiduciary duty to protect its student from sexual harassment.⁶⁶ In the context of sexual harassment by faculty, the New Hampshire court reasoned that the relationship between the university and its students was a fiduciary one.⁶⁷ The court found that “[s]tudents are in a vulnerable situation because” of “the power differential between faculty and students.”⁶⁸

A Connecticut court denied a motion by Yale University to dismiss a breach of fiduciary duty claim brought by a graduate student when the student alleged that his dissertation advisors and the University

60. *Id.* at 1497.

61. Weeks & Haglund, *supra* note 2, at 154.

62. Scharffs & Welch, *supra* note 17, at 164.

63. *Id.*

64. *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992) (rejecting a student-athlete’s claim that his professors breached their fiduciary duty in failing to provide a meaningful education).

65. *André v. Pace Univ.*, 618 N.Y.S.2d 975, 980–81 (N.Y. City Ct. 1994).

66. *Schneider v. Plymouth St. Coll.*, 744 A.2d 101, 105 (N.H. 1999); *see also*, *e.g.*, *Williamson v. Bernstein*, 5 Mass. L. Rep. 94 (Mass. Super. Ct. 1996).

67. *Schneider*, 744 A.2d at 105.

68. *Id.* (quoting Karen Bogat & Nan Stein, *Breaking the Silence: Sexual Harassment in Education*, 64 PEABODY J. EDUC. 146, 157 (1987)).

misappropriated his dissertation ideas.⁶⁹ The student alleged, and the court agreed, that a fiduciary relationship might be established since the advisors and the University were “in a position of power and authority” over the student.⁷⁰ However in *Ho v. University of Texas at Arlington*⁷¹ a Texas court refused to find, as a matter of law, that “formal fiduciary relationships exist between teachers and students in a normal educational setting.”⁷² Additionally, college and university advisors are not required to warn applicants of obvious risks in their education program.⁷³

Courts find fiduciary relationships in the college and university context because most students are, to some degree, subservient to the will of faculty.⁷⁴ Students give tuition to the college or university to manage while they rely on subjective grading by professors to graduate and pursue future occupation. They often surrender a degree of independence to the college or university in housing and conduct codes, thereby placing trust and confidence in the administrators to protect their rights.⁷⁵ “Courts have made it clear that students and administrators cannot use charges of breached fiduciary duty instead of or before exhausting administrative remedies provided by universities.”⁷⁶

69. *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 98 (D. Conn. 2000).

70. *Id.*; see also *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1362 (Fed. Cir. 2001) (holding that a graduate student stated a sufficient claim for breach of fiduciary duty against a department chairman who “specifically represented to her that he would protect and give her proper credit for her research and inventions” but then “named himself as the sole inventor of Chou’s discoveries”).

71. *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672 (Tex. App. 1998).

72. *Id.* at 693 (holding that no informal fiduciary relationship existed imposing a duty upon a university to disclose information to stop a doctoral student from seeking a doctoral degree when the student was later dismissed from the program for academic reasons).

73. See *Maas v. Gonzaga Univ.*, 618 P.2d 106, 108 (Wash. App. 1980) (finding that a law school does not have a fiduciary duty to inform a student of the possibility of failure, because it is “unreasonable to require the university to warn applicants of the obvious”).

74. *Weeks & Haglund*, *supra* note 2, at 159.

75. *Id.*

76. *Id.* at 169.

IV. THE COLLEGE AND UNIVERSITY ENVIRONMENT—WHAT DOES IT MEAN TO BE A COLLEGE OR UNIVERSITY COACH?

Commentators and courts alike have suggested that the relationship between a student and teacher is a fiduciary relationship, carrying special legal obligations and along with them, potential liability.⁷⁷ But what of the relationship between the student-athlete and the coach? What special legal obligations arise in the fast-paced, big business, uncertain world of collegiate athletics?

The pressure to succeed, NCAA regulations, massive internal college and university regulations, big budgets, and other complexities of the collegiate athletics system create a special relationship between institution, coach, and student-athlete.⁷⁸ Some commentators argue that these special circumstances support the labeling of the coach-student-athlete relationship as fiduciary.⁷⁹ Extending fiduciary duty to the context of the coach-student-athlete relationship would solidify the importance of the relationship between a coach and his athletes by providing potential civil liability for breach of the duty running from the former to the latter.⁸⁰ To understand how fiduciary duty may arise, we must first examine the role of coaches in the college or university and in the lives of student-athletes, as well as the potential for fiduciary relationships in colleges and universities generally.

A. The “Basic” Duties

A coach trains intensively by instruction, demonstration, and practice. Outside of this basic role, a college or university athletics coach has to deal with the pressures of very public concerns over student eligibility, graduation rates, and program success.⁸¹ Athletics today is a highly regulated industry and “college coaching has become a game of high stakes—one where money talks.”⁸² In fact, “college athletics is big business. Whatever else they may be—master strategists, charismatic inspirers of young athletes, or national celebrities—today’s college athletic

77. See generally Johnson v. Schmitz, 119 F. Supp. 2d 90, 97–98 (D. Conn. 2000); Melissa Astala, *Wronged by a Professor? Breach of Fiduciary Duty as a Remedy in Intellectual Property Cases*, 3 HOUSTON BUS. & TAX L.J. 31 (2003); Weeks & Haglund, *supra* note 2; Robert P. Schuwerk, Comment, *The Law Professor as Fiduciary: What Duties Do We Owe To Our Students*, 45 S. TEX. L. REV. 753 (2004).

78. Buckner, *supra* note 2.

79. *Id.*

80. *Id.* at 88.

81. See Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127 (2001).

82. *Id.* at 134.

coaches are big businessmen.”⁸³ The similarities between coaches and businessmen, and athletics and big business, welcome the application of traditional fiduciary rules that apply to partners and in corporations.

A college or university coach operates in an environment monitored and controlled by voluminous and complicated rules—both the NCAA rules and conference or institution rules.⁸⁴ When a coach agrees to work at a college or university, he or she signs a contract, outlining his or her duties. Before specific duties of the coach can be listed in the contract, the coach must agree to devote his or her full-time best efforts to the performance and duties that generally come with the position of head coach, such as recruiting, teaching players the sport, and providing a vision for the program to succeed.⁸⁵ The coach must agree to abide by and comply with NCAA rules and regulations.⁸⁶ After these general responsibilities, the contract lists specific duties.⁸⁷ In accordance with case law in the business arena, some contracts specifically deny any kind of fiduciary relationship between the institution and the coach, but are silent on the issue of a fiduciary relationship between the coaches and the athletes.⁸⁸ It could be argued that NCAA rules and regulations adequately protect the student-athlete, but what happens when a coach violates those rules? The student-athlete is not compensated for his or her loss when a coach who shirks the rules has betrayed him or her, but a college or university may receive a portion of the salary returned, or coaching bonuses forfeited.

B. Furthering the Institution’s Mission

A long standing issue on many campuses has been the relationship between athletics and the academic mission of the college or university. There are growing concerns at many institutions about the disconnect between academic values and athletic pursuits. Even the NCAA has gotten involved in the disparities between the academic mission of producing educated citizens and the percentage of athletes who do not graduate.⁸⁹ Athletic programs and student-athletes are often an institution’s most visible ambassadors to the general public, so when a coach fails to conform

83. *Id.* at 149 (quoting Judson Graves, Commentary, *Coaches in the Courtroom: Recovery in Actions for Breach of Employment Contracts*, 12 J.C. & U.L. 545, 545 (1986)).

84. Greenberg, *supra* note 81, at 146.

85. *Id.* at 151–52.

86. *Id.* at 152.

87. *Id.* (including examples such as having “complete knowledge of the rules and regulations governing intercollegiate athletic competition” and maintaining “strict compliance therewith by the program”).

88. *See, e.g., id.* at 187 (quoting MARTIN J. GREENBERG & JAMES T. GRAY, *SPORTS LAW PRACTICE* 522, 596 n.534 (2d ed. 1998)).

89. Ben Feit, *Athletes Shouldn’t Drop—the Ball*, YALE DAILY NEWS, JAN. 26, 2004, at B3, available at <http://www.yaledailynews.com/articles/view/9734>.

to college or university missions, does a student-athlete have a fiduciary duty claim against the coach for breaching the institutional mission?

Vanderbilt University took a huge step in adjusting the focus of the athletic department to conform to the university mission in 2003 when it merged its athletic department and its student recreational activities department, thereby eliminating a separate athletic department.⁹⁰ The reorganization eliminated the traditional athletic department entirely and placed athletics under the central university administration.⁹¹ Then Chancellor, E. Gordon Gee, noted that this move did not diminish Vanderbilt's commitment to athletics, but rather demonstrated an intent to compete "consistent with the values of a world-class university."⁹²

Wabash College also provides another example of an institution's coaches embracing their role as individuals with a duty to further the institution's mission. In the summer of 2003, the college's football team traveled to Europe, playing only one game.⁹³ The team then toured museums and historical sites.⁹⁴ For many students it was the first time on an airplane or in Europe. For all, it was the first time viewing a concentration camp.⁹⁵ A representative of the college noted "We should be . . . willing to celebrate when our coaches and administrators value the institutional mission enough to embed those experiences within an athletic program."⁹⁶

Each college and university has a unique history and mission. Athletic programs should conform with the values the college or university intends to further. While it appears there are no cases directly addressing a coach's failure to support an institutional college or university mission, this presents an interesting question. What of the coach who praises the life of a student-athlete, but does not allow a student-athlete to take advantage of academic opportunities because the coach constantly requires more and more "voluntary" time from athletes to lift weights, review film, attend meetings, and travel?

90. Vanderbilt University's News Network, <http://www.vanderbilt.edu/news/audio/2003/09/09/vanderbilt-announces-athletics-program-restructuring.58053> (last visited Feb. 15, 2009).

91. *Id.*

92. *Id.*

93. Charles F. Blaich, Center of Inquiry in the Liberal Arts at Wabash College, *What Kind of Game Are We Playing*, http://www.wabash.edu/cila/home.cfm?news_id=1386.

94. *Id.*

95. *Id.*

96. *Id.*

V. ARE COACHES FIDUCIARIES?

While case law on the fiduciary duty of coaches in the college and university context is limited, there are potential legal obligations arising from the relationship.⁹⁷ Several scholars and commentators support finding fiduciary duties in intercollegiate athletics.⁹⁸ The relationship between student-athletes and coaches (and the college or university) is more intimate than for many students.⁹⁹ Student-athletes have a great deal riding on their success at their college or university, particularly athletes with potential for success at the professional level.¹⁰⁰ Consequently, these student-athletes are highly regulated by the college or university and by the NCAA.¹⁰¹ Additionally, student-athletes rely heavily on academic advisors and coaches for their success.¹⁰²

The relationship between a coach and a student-athlete is different from the relationship between the average teacher and student.¹⁰³ Unlike a classroom teacher, who works to guide students through discussion and debate, the “[e]xecution of the coach’s will is paramount” and what he says is seldom up for debate.¹⁰⁴ “Coaches possess vast control over the lives of athletes on the field, in class, and away from school.”¹⁰⁵ This relationship lends itself to abuse by a coach and requires that the student-athlete have some sort of protection from a coach abusing his duties. Additionally, as one commentator notes, “Coaches and student-athletes do not necessarily have the same goals. Coaches . . . retain job security by winning, not by guiding student-athletes to graduation.”¹⁰⁶

This relationship between student-athlete and coach is more similar to that between a graduate student and faculty advisor, than to that between a

97. Buckner, *supra* note 2, at 88.

98. *Id.*; see also Richard Salgado, *A Fiduciary Duty to Teach Those Who Don't Want to Learn: The Potentially Dangerous Oxymoron of "College Sports"*, 17 SETON HALL J. SPORTS & ENT. L. 135, 161–62 (2007) (“A fiduciary duty exists between universities and vulnerable student-athletes. However, the scope of the relationship is dependent upon where a student-athlete falls along a continuum. At one end are those student-athletes who genuinely want to pursue their education and earn a four-year degree At the other end of the continuum are student-athletes who attend class only because doing so is a requirement for them to play sports It makes little sense to force an education upon them or to impose a fiduciary duty upon schools to educate them.”).

99. Weeks & Haglund, *supra* note 2, at 170; see generally Buckner, *supra* note 2.

100. Weeks & Haglund, *supra* note 2, at 170.

101. *Id.* at 170–71.

102. *Id.* at 171.

103. Greenberg, *supra* note 81, at 220.

104. *Id.* (quoting *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995)).

105. Salgado, *supra* note 98, at 143.

106. *Id.* at 155.

normal student and teacher. Even in this area, the law is not clear. For example, in *Chou v. University of Chicago*,¹⁰⁷ the court held that a graduate student stated a sufficient breach of fiduciary claim against a graduate advisor who represented that he would give her proper credit for research and inventions, but then named himself the inventor of the discoveries.¹⁰⁸ This can be compared with *Ho v. University of Texas at Arlington*, where a Texas court held that no informal fiduciary duty existed to impose a duty upon a college or university employee to disclose information about a student's potential to earn a doctoral degree, even when that student was later dismissed for academic reasons.¹⁰⁹

A. The Regulation of the Coach-Athlete Relationship

Coaches are central figures in the network of relationships with student-athletes, parents, institutions, the general public, and more. Each relationship involves a bundle of legal and ethical obligations arising from laws, standards of conduct, and division/conference regulation. In the realm of college and university athletics, the NCAA is often the governing body, setting out rules and regulations by which coaches, colleges, and universities must abide.¹¹⁰ The NCAA has several division-wide legislative bodies and executive committees that govern athletic participation.¹¹¹ General committees also are in place to oversee sports rules, and other groups examine issues specific to a certain segment of the NCAA membership.¹¹² The NCAA governing bodies "strive to promote student-athlete welfare through legislation and program initiatives."¹¹³

NCAA regulations require that coaches act with honesty and sportsmanship at all times as to represent the honor and dignity of fair play and the generally recognized high standards associated with competitive sports.¹¹⁴ Bylaw 10 sets out examples of unethical conduct including receiving benefits for facilitating or arranging a meeting between a student-athlete and an agent.¹¹⁵ While these regulations outline duties, an NCAA investigation is a lengthy process, and can lead to what the public considers

107. *Chou v. Univ. of Chi.*, 254 F.3d 1347 (Fed. Cir. 2001).

108. *Id.* at 1363.

109. *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 693 (Tex. App. 1998).

110. Salgado, *supra* note 98, at 142 ("Though the NCAA directly dictates many regulations in college athletics . . . coaches enjoy a great deal of power over athletes").

111. NCAA, Legislation and Governance Overview, <http://www.ncaa.org/wps/ncaa?ContentID=18> (last visited Feb. 15, 2009).

112. NCAA, 2008-09 NCAA DIVISION I MANUAL 50 (2007), http://www.ncaapublications.com/Uploads/PDF/2007-08_d1_manual252fcd8c-6808-411c-a729-00db52d6a783.pdf.

113. NCAA, *supra* note 111.

114. *Id.* at 47.

115. *Id.* at 47.

inadequate punishment.¹¹⁶

B. The Case Law

Despite the somewhat tenuous and complicated relationship between coach and athlete, there is little case law in the area. This may be because before a fiduciary duty claim may be pursued, students must first exhaust institutional administrative remedies.¹¹⁷

Reviewing conflicts in athletics shows that even without pursuing a legal claim of breach of fiduciary duty, student-athletes are successful in getting coaches removed from a post. In 1998, the basketball coach at University of Texas left the university after a ten-year tenure due to complaints to university officials by his student-athletes about his abusive coaching style and lack of leadership.¹¹⁸ This ability for student-athletes to use “self-help” methods to solve breaches in fiduciary duty may be the reason so few cases actually appear in court.¹¹⁹

Despite the effectiveness of student-athlete complaints to institutional administrations, some student-athletes do pursue legal remedies against coaches for violations of duties. Courts have taken a stand on the issue of the academic advising of student-athletes.¹²⁰ One court found that fiduciary duties arise in a context such as this, “when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.”¹²¹

In *Hendricks v. Clemson University*,¹²² a baseball player transferred from a smaller school to Clemson University.¹²³ The player hoped to play for a year or two on the Clemson team and then return to his original college to complete his degree.¹²⁴ He met with an academic advisor in the Clemson athletic department to ensure he would be NCAA eligible and to discuss the transferring of credits.¹²⁵ Because of differences in majors between his original college and Clemson, the player had to declare a different major.¹²⁶ The advisor helped him register, but then realized that

116. See Matt Reichman, *NCAA Announces Penalties Against BYU*, BYU NEWSNET, Mar. 12, 2008, <http://newsnet.byu.edu/story.cfm/67857>.

117. Weeks & Haglund, *supra* note 2, at 169.

118. GREENBERG & GRAY, *supra* note 88, at 531.

119. *Id.* at 532.

120. See, e.g., *Hendricks v. Clemson Univ.*, 529 S.E.2d 293 (S.C. Ct. App 2000).

121. *Id.* at 298–99 (quoting *O’Shea v. Lesser*, 416 S.E.2d 629, 631 (S.C. 1992)).

122. *Id.*

123. *Id.* at 295.

124. *Id.*

125. *Id.*

126. *Id.*

he would need more hours to meet the NCAA “fifty percent rule.”¹²⁷

The advisor asked a graduate student to follow-up on the conflict, but never received any news.¹²⁸ Meanwhile, the player passed his classes, but was not eligible under the “fifty percent rule.”¹²⁹ The advisor requested a waiver from the NCAA but was denied.¹³⁰ The player was ineligible to compete, and that year, Clemson’s baseball team competed in the College World Series.¹³¹ The player sued under several theories, including breach of fiduciary duty, requesting monetary damages because he gave up his scholarship when he left his original university and had to pay tuition when he returned to graduate.¹³²

The trial court found that the claim of breach of fiduciary duty was really an “educational malpractice” claim and rejected the claim because the South Carolina legislature disallowed such suits.¹³³ However, the court emphasized the flexibility in the definition of fiduciary duty and left open the possibility that a relationship like this might otherwise fit the description.¹³⁴ The court of appeals found that the player had “alleged sufficient facts to support a claim for breach of fiduciary duty.”¹³⁵ The court further found that the advisor, as an agent and employee of Clemson University, owed the player a fiduciary duty to advise him competently of requirements necessary to remain academically eligible and that the advisor had failed that duty, injuring the player.¹³⁶

C. Fiduciary Duty Owed to Athletes Outside the College or University Context

The extent of fiduciary duties owed to athletes has been reviewed by the courts outside of the college and university athletics context. Courts have found that a doctor, testing athletes merely for drug use, does not owe a fiduciary duty to his patient-athlete.¹³⁷ Instead, the doctor owed a duty to his employers, the Athletic Congress and the U.S. Olympic Committee, not

127. *Id.* (pointing to the fifty percent rule, “which requires a student athlete to complete at least fifty percent of the course requirements for his degree to be eligible to compete during his fourth year of collegiate enrollment”).

128. *Id.*

129. *Id.* at 295–96.

130. *Id.* at 296.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 299.

135. *Id.*

136. *Id.* at 300.

137. *Powell v. Voy*, No. C. 92-4128 TEH, 1994 U.S. Dist. LEXIS 15883, at *9–12 (N.D. Cal. Nov. 1, 1994) (finding that a doctor’s administration of drug tests was not enough by itself to establish a fiduciary duty).

to the individual athlete.¹³⁸ The court found that because there was no physician-patient relationship, a fiduciary duty did not attach.¹³⁹

Fiduciary duty claims can arise out of injuries sustained by an athlete during practice or competition. A softball player sued her school and coach for a broken ankle she sustained during a game when a member of the opposing team slid into second base.¹⁴⁰ The court recognized both that the player assumed risks in participating in the sport and that the assumption of risk theory applied both to children and adults.¹⁴¹ The assumption of risk theory says that while players do not assume all risks of injury through participation in a game, they do assume “all risks incidental to the game, sport or contest which are obvious and foreseeable.”¹⁴²

An Iowa court held that high school counselors must use reasonable care when the counselor knows the specific need for information and provides specific information through a “counselor-student” relationship, the student exercises reasonable reliance on the information, and the counselor knows of the student’s reliance.¹⁴³ In this case, a counselor gave a student improper advice as to which class the student must take in order to be eligible to play basketball in college.¹⁴⁴ The state supreme court noted that “[courts] must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice” and reversed and remanded the case.¹⁴⁵

Courts are sometimes called upon to decide tragic cases in which students are injured during athletic events, making decisions on claims of breach of the fiduciary duty of care. When a fourteen-year-old student broke her neck while executing a practice dive into a shallow racing pool, a California court reasoned that:

A sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is “totally outside the range of the ordinary activity” involved in teaching or coaching the sport.¹⁴⁶

138. *Id.* at *12.

139. *Id.* at *11.

140. *Kelly v. McCarrick*, 841 A.2d 869, 871–72 (Md. 2004).

141. *Id.* at 876.

142. *Id.* at 877 (quoting *Nesbitt v. Bethesda Country Club, Inc.*, 314 A.2d 738 (Md. App. 1974) (emphasis removed)).

143. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 129 (Iowa 2001).

144. *Id.* at 119.

145. *Id.* at 122, 129.

146. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 32–33 (Cal. 2003) (quoting *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992), and holding that there were triable issues of material fact existing regarding whether the coach breached a duty of care by engage in reckless conduct, therefore summary judgment was improper, reversing and remanding the case).

In a similar case, a college club cheerleader fell from a pyramid during practice, breaking her neck and rendering her a quadriplegic.¹⁴⁷ Among other claims, the cheerleader alleged a breach of fiduciary duty.¹⁴⁸ After a lengthy analysis, the court granted the defendant's motion for summary judgment on the fiduciary duty count.¹⁴⁹ However, the court recognized that this relationship was likely a fiduciary relationship because of factors like sponsorship by the school and the degree of control by the coach.¹⁵⁰

D. Application of the Scharffs-Welch Framework

The developers of the Scharffs-Welch framework intended that, among other uses, the framework be used to evaluate the complexities of alleged breaches of duties by educators.¹⁵¹ The framework helps to focus the discussion and considerations for the college or university when determining potential liability and developing standards for conduct among its staff. In examining the magnitude of the duty owed by the coach to the student-athlete, the court may find that because the coach has significant qualifications and expertise, he should be held to a higher standard of duty.¹⁵² A court may also find that this duty increases because the relative weakness of the beneficiary (the student-athlete), and the intensity of the relationship between the two.

A key analysis in the Scharffs-Welch framework is the existence of appropriate remedies. In the situation of a college or university coach breaching a fiduciary duty to a student-athlete, a court is limited in the remedies it can provide. Clearly, it is not within a court's power to require specific performance of a coach, stating that he must play an athlete. A court would also likely be unable to "fire" a coach. In the situation where a coach has acted improperly and caused a student-athlete to lose eligibility, some remedies may be available. While a court cannot require eligibility be reinstated, a decision by the court may influence the NCAA. Additionally, the court can require the coach to pay the student-athlete for lost scholarships tied to eligibility or to lost opportunities if the student-athlete is unable to travel and loses per diem money. Thus, it is possible that a court will find a breach because of the high significance this has on the student-athlete's life. If the student-athlete claims loss of future

147. *Gonzalez v. Univ. System of N.H.*, No. 451217, 2005 Conn. Super. LEXIS 288, at *1 (Conn. Super. Ct. Jan. 28, 2005).

148. *Id.*

149. *Id.* at *85–86.

150. *Id.* at *34–35.

151. Scharffs & Welch, *supra* note 17, at 168.

152. Salgado, *supra* note 98, at 144 (“There is a staggering amount of money generated and spent in compensation to coaches and other athletic administrators. College athletes are the generators of this money. In the fiduciary framework, this high level of compensation implies a correspondingly higher degree of fiduciary duty.”).

earnings because of an impaired ability to impress professional scouts, the student-athlete should show clear foreseeability of the future harm and provide a fairly accurate depiction of the monetary amount of the harm.

In the situation where damages are done to the team, again, calculating damages is difficult. A court could reach out and find that the coach is liable for a loss of potential earnings, including lower draft pick positions, loss of gifts student-athletes would receive, and loss of opportunity. Again, however, it would be difficult for the court to provide proper remedies in a situation like this, but a court could stretch to compensate the players and punish the coach.

As demonstrated above, it is difficult to find appropriate remedies when the harm is speculative. However, when the harm is significant and the duty is great, courts may stretch to find appropriate remedies to secure the finding of a breach of fiduciary duty. In light of the high magnitude of duty, and many times the high magnitude of breach, courts could adjust remedies. However, when the breach is slight, courts may not find a breach of fiduciary duty because of the unavailability of a clear and obvious appropriate remedy.

E. Application of Smith's Critical Resource Theory

The "critical resource theory" maintains that the purpose of fiduciary law is to combat opportunism by a coach acting on behalf of a student-athlete while exercising discretion with respect to a student-athlete's critical resource.¹⁵³ Application of this theory should not expose colleges or universities to unfair risk.¹⁵⁴ One commentator notes that by focusing on the "discretion" of the coach, rather than the vulnerability of the student-athlete, student-athletes would receive reasonable protection.¹⁵⁵

Does the coach actually act on behalf of the student-athlete? It is hard to argue that a coach acts "on behalf of an athlete" rather than on behalf of a program or a college or university. It would seem that in most of the coach's actions, he is acting on behalf of the entire team, not merely one member. However, in a situation where a coach is acting only in the interest of one player, there is the possibility of a recognized fiduciary relationship.

Does the coach exercise discretion—making choices about how to perform his obligations? A coach has guidelines in making decisions (e.g., NCAA rules, conference rules, job contracts). But, a coach is also afforded discretion in whom to play and how to run a team.

Even if the above elements are met, the key analysis in critical resource theory is whether something lies at the core of the relationship, binding the

153. Smith, *supra* note 48, at 1497.

154. Weeks & Haglund, *supra* note 2, at 186.

155. *Id.*

coach to the student-athlete.¹⁵⁶ Without a critical resource, there is no fiduciary duty. While arguably “playing time” is a critical resource, it is a resource that is well within the contract of the coach to regulate however he wishes. There may be a strong claim, however, that eligibility is a critical resource. Additionally, when a student-athlete exchanges playing time for the ability to study and learn at a college or university, scholarship may become a critical resource. Thus, if a coach acts in a way to impede the student-athlete’s ability to learn, the coach is using discretion with regard to a critical resource.

VI. REVISITING THE HYPOTHETICAL SITUATIONS

A. The Future Professional Athlete

The key to finding a fiduciary relationship in the situation where the student-athlete has lost future earnings would be an accurate depiction of the earnings lost. When a coach receives a kickback from an agent for referring a student-athlete and the student-athlete subsequently loses eligibility, the student-athlete may be able to allege a breach of fiduciary duty. The Scharffs-Welch framework would require that student-athlete demonstrate an accurate figure to have a remedy for the situation. In the Smith critical resource theory, the student-athlete has put the critical resource in the hands of the coach. The coach, in his discretion, has acted directly contrary to the best interests of the team and likely the student-athlete, in favor of his own personal financial interests. In this situation, a court should find a fiduciary relationship and find that the coach, in pursuing his own financial interests, breached a duty to the student-athlete.

B. The Athlete Who Lost Eligibility

Courts are reluctant to treat an individual as a fiduciary when there is no clear cut remedy to fix the wrong. When a coach behaves in a way that eventually ruins a student-athlete’s eligibility by giving inappropriate class advice or otherwise misinforming a student-athlete, it is not within the court’s jurisdiction to fix that error. Using the Scharffs-Welch framework, this failure of an appropriate remedy would likely halt any chance of the court finding the relationship fiduciary. According to the Smith critical resource theory, the coach did hold a critical resource belonging to the student, eligibility. But, given the inability of the court to require the NCAA to reinstate eligibility and the student-athlete’s own duty to remain informed of rules, it is unlikely a court would find a fiduciary duty in this situation. However, in a situation where a coach intentionally injured the student-athlete and revoked eligibility through deceit, the scenario would likely be different, and while the court cannot reinstate eligibility, a court

156. Smith, *supra* note 48, at 1404.

decision may have weight with the NCAA.

C. The Coach Who Ignored the University Mission, and NCAA Regulatory Rules

Coaches, as employees of their colleges and universities, owe some duties to the college or university. These duties likely include performing all aspects of his or her job description, including furthering the institutional mission. When a coach fails to further that mission, it is unlikely a student-athlete would have a claim for breach of fiduciary duty against the coach. Under the Scharffs-Welch framework, the characteristics of the relationship would not support finding a fiduciary duty between the student-athlete and coach, but rather between the student-athlete and the college or university for breach of duty in furthering its mission. Considering the Smith critical resource theory, the student-athlete may have placed a critical resource in the control of the coach. Under one consideration, this critical resource may be the obvious resource of eligibility, and the student-athlete may have a claim against the coach for violating a fiduciary duty in this aspect. Further, the critical resource may be the somewhat more important resource of scholarship at a particular college or university. The student-athlete, who can no longer attend a particular college or university because of a coach's violation, may then have a stronger fiduciary duty claim with regard to this critical resource.

VII. CONCLUSION

Case law in this area remains quite limited. Athletic programs, however, occupy a great deal of many college and university budgets and infiltrate many aspects of student life on campus. Given the number of the students participating in college and university athletics, and the enormous potential for liability, colleges and universities should be careful to examine, regulate, and control the relationship between coaches and players on campus.¹⁵⁷

Labeling the relationship between coach and student-athlete as fiduciary would entail important duties, including, the duty of "[n]ot honesty alone, but the punctilio of an honor the most sensitive."¹⁵⁸ This opens the possibility of colleges and universities and athletic departments being held liable for the behavior and mistakes of their coaching staffs. Conversely, if courts find the relationship is not fiduciary in nature, the coach has no more duties than those clearly outlined in their contracts, which may include, at minimum, following university rules, NCAA rules, and acting in the

157. Buckner, *supra* note 2, at 88 (arguing that a "lack of judicial recognition should not deter academic institutions from recognizing and protecting against the potential legal obligations arising from [the coach-student-athlete] relationship").

158. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

general best interest of the program.

Under a fiduciary analysis, colleges and universities have two duties to student-athletes. First, to limit institutional conduct that unreasonably interferes with the student-athlete's ability to develop and participate athletically, and;¹⁵⁹ second, to prohibit institutional conduct promoting the institution's interest ahead of the interest of the student-athlete.¹⁶⁰ This area is a potential minefield for colleges or universities with large athletic departments, and student-athletes who enter professional sports.

Athletes disgruntled with the behavior of the coaches and advisors who potentially owe a fiduciary duty to them tend to utilize self-help methods as demonstrated above.¹⁶¹ "By holding schools to the morals of their own marketplace, courts can protect a student's legitimate and reasonable expectations and hold institutions accountable for their abuses without diminishing the value of the university as a social institution."¹⁶² The NCAA, colleges, and universities can control the coaches with regulations and contracts. By including basic fiduciary duties between the coach and student-athlete in the contracts or regulations, colleges and universities could regulate behavior and control remedies—eliminating confusion in the courts.

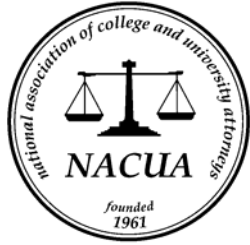
While this note lands far from providing definitive legal and substantive guidance to colleges and universities, it welcomes many questions. Importantly, it provides an opportunity for more discussion at the college and university level about the impact of labeling the relationship between coaches and student-athletes as fiduciary. The fiduciary label may invite additional duties and add unnecessary levels of liability, but it also may provide a standard for enforcing the duty of coaches to further institutional missions in their work on the athletic field.

159. Davis, *supra* note 6, at 623.

160. *Id.* at 624.

161. *See supra* Part V.B. and accompanying text.

162. Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 185 (2000).



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