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## ARTICLES

### **Higher Education and Foreign Schools in China**

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As China continues its impressive growth and seeks to move up the value chain toward innovation and a more skilled workforce, its demand for quality education poses a considerable challenge which its institutions of higher education struggle to meet. To meet this demand, China has dedicated considerable resources to improving its educational base and has sought to attract world class educational institutions to China. Although the Chinese education sector has seen significant reforms, foreign educational institutions and companies seeking to enter a Chinese educational market thirsty for foreign talent face considerable legal challenges. In this article, the authors examine these and other issues and offer some thoughts on the future of educational reform in China.

### **Common Legal Issues When Employing Staff in Support of Overseas Academic Programs**

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Internationalization of the curriculum has become a top priority for colleges and universities of all sizes in the United States. Unprecedented growth in demand for overseas programs will challenge colleges and universities in many ways. This Article introduces counsel and academic administrators to key legal and administrative issues to be considered when launching and sustaining activities outside of the United States, with a particular focus on labor and employment challenges. Intended as a practitioner's overview, the issues identified provide a solid basis for initiation of proactive consultation with host country. Local counsel for foreign talent face considerable legal challenges. In this article, the authors examine these and other issues and offer some thoughts on the future of educational reform in China.

**Going Global: Managing Liability in International Externship Programs—A Case Study**

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As globalization continues to affect education, colleges and universities will be under increasing pressure to create new international programs. The creation of international externship programs allows the university to create a low cost, low risk opportunity for students to learn through cultural immersion. This article analyses the university's duty to its students and to the externship placement sites and sets for best practices for minimizing the university's risk of liability in international externship programs.

**Making the Implicit Explicit: Demonstrating the Value Added of Higher Education by a Qualifications Framework**

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American higher education is a diverse and decentralized system. Acknowledging the changing global environment and the importance of higher education as the driver for 21<sup>st</sup> century competitiveness, 47 European countries have joined together to dramatically reform and transform their higher education systems. Through ten years of effort, this higher education change process, the Bologna Process, is making progress toward advancing in Europe a focus on student centric higher education, quality and accountability, and transparency of the learning a degree represents. This article argues that American higher education should learn from and build on the lessons of the Bologna Process and offers recommendations about how those lessons could be advanced within the unique context of American higher education law and policy.

**Where in the World are Your Employees? Institutions as Global Employers: Employment Law Considerations in the Age of International Programs**

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This article discusses the obligations of an institution of higher education as an employer when operating an international program. For illustrative purposes, the article compares the major employment laws and regulations in the United States, France and China. As demonstrated by the varying employment laws in each jurisdiction, institutions must carefully analyze and consider the impact of the operating in a foreign jurisdiction prior to retaining employees there.

## NOTE

### **Students or Employees? The Struggle Over Graduate Student Unions in America's Private Colleges and Universities**

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In 2000, the National Labor Relations Board ignored decades of precedent by permitting graduate students at private universities, who work as teaching or research assistants in exchange for a stipend, to unionize. In 2004, the Board changed course again, holding that such students were not "employees" within the meaning of the National Labor Relations Act. The uncertainty stems from the lack of clarity surrounding the word "employee" in the NLRA, a statute written long before Universities began making widespread use of graduate student "labor." This note examines NLRB decisions on graduate student unionization and argues that Congressional action would be the best way to resolve the issue.

# HIGHER EDUCATION AND FOREIGN SCHOOLS IN CHINA

STEVEN N. ROBINSON, JUN WEI, YINGZI GONG, AND MICAH SCHWALB\*

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## I. INTRODUCTION

Despite sweeping reforms, higher education in China still falls short of international standards. Membership in the World Trade Organization (WTO), a vibrant economy, and an influx of foreign investors has heightened the demand for skilled professionals. Education drives

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government policies and Chinese society, but the People's Republic of China (PRC) work force still has a relatively low average education level, and higher education does not provide students with the skills necessary to compete in the global economy.<sup>1</sup> China's colleges and universities award four million degrees each year and the PRC has 700 million workers, but China still has only forty percent of the skilled laborers found in Organization for Economic Cooperation and Development (OECD) countries, and less than half of China's graduates can find jobs within months of leaving school.<sup>2</sup> In 2009, the Chinese labor force has been faced with absorbing more than six million new graduates, of whom less than half held concrete job offers as of June, while Chinese colleges and universities simultaneously increased enrollment of graduate students by five percent. In the wake of the financial crisis, average monthly salaries for recent graduates have fallen by more than twenty percent.<sup>3</sup> Foreign-educated PRC nationals, on the other hand, command a premium in the marketplace due to their valuable skills and experiences abroad.<sup>4</sup> The problem has become so pronounced that U.S. companies rate the lack of qualified Chinese employees as the top challenge of their PRC operations.<sup>5</sup>

China promised to allow parties from WTO member nations to provide "educational services" in China, subject to certain restrictions, when it joined the WTO in 2001.<sup>6</sup> This promise meant that foreign schools could open high schools, colleges, and universities on the mainland, though primary and middle school education would remain the province of

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1. See CARL DAHLMAN ET. AL., *ENHANCING CHINA'S COMPETITIVENESS THROUGH LIFELONG LEARNING* 3 (World Bank Institute 2007).

2. Yao Li et al., *The Higher Educational Transformation of China and its Global Implications* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 13849, 2008), available at <http://www.nber.org/papers/w13849>.

3. Cong Cao, *China's College Graduate Statistics*, UPI ASIA, NOTES ON CHINA BLOG (July 14, 2009), <http://bit.ly/AsAJu>. As the article notes, two different methodologies are offered for calculating the number of recent graduates considered to be "employed." The Chinese Ministry of Education method is to "count those entering domestic and foreign graduate schools as employed, as well as those who enlist in the military, both areas that have witnessed increases in recent years," while the alternative method used by MyCos, a Chinese human resources company, counts only those with "concrete job offers," as referenced above. *Id.* Therefore, according to the Ministry of Education, the figure of employment would be 68%, as opposed to MyCos' less sanguine 40% for bachelor's degrees and 30% for community college degrees. *Id.*

4. DAHLMAN ET. AL., *supra* note 1, at 142.

5. AMERICAN CHAMBER OF COMMERCE IN SHANGHAI, 2006 CHINA BUSINESS REPORT 23, available at <http://www.amcham-shanghai.org/NR/rdonlyres/450BBC10-E2F8-4EB7-B830-A1F340E9A4DD/3908/ChinaBusinessReport.pdf>.

6. WORLD TRADE ORGANIZATION, REPORT OF THE WORKING PARTY ON THE ACCESSION OF CHINA, *Addendum, Schedule CLII – The People's Republic of China*, WT/ACC/CHN/49/Add.2 (Oct. 10, 2001), available at <http://bit.ly/bskYuS> [hereinafter WTO Education Commitments].

domestic providers.<sup>7</sup> Since China's accession to the WTO, a growing number of institutions of higher education ("IHEs") from western countries have relied on this promise and subsequent enabling laws to enter China's education market through partnerships and contracts with Chinese colleges and universities. In addition, a bilateral agreement between the United States and China has encouraged exchange programs, the organization of delegations and visiting groups, as well as data exchanges, subject to the laws and regulations of both countries.<sup>8</sup> However, despite China's having somewhat opened the educational services sector to foreign participation, the degree of success among foreign schools in their China strategy varies broadly.<sup>9</sup>

On one end of the spectrum lie institutions that follow an oft-repeated pattern and encounter difficulties in achieving their objectives. After months of negotiation and trans-Pacific travel, a U.S. college or university signs a letter of intent with a peer Chinese school or, in some instances, a private PRC company.<sup>10</sup> The parties publish a joint press release announcing the relationship, which typically involves a foreign exchange program, a research and development project, a joint degree program, a distance learning initiative, a Sino-foreign cooperative educational institution, or some combination thereof.<sup>11</sup> Sometime later, however, as the foreign party begins to implement its plans, it discovers that it must secure more or different approvals from ministries and bureaus within the Chinese government than it had originally anticipated, or that its own government lacks the capacity to process the volume of visa applications required to facilitate the travel of Chinese citizens to the foreign party's U.S. campus.<sup>12</sup> If the initiative involves educating Chinese citizens in China, the foreign party also learns that the PRC government maintains the authority to approve personnel, curriculum, tuition and fees.<sup>13</sup> At this juncture, for reasons that vary depending upon the goals and the details of the proposed program, some projects languish, some fall apart and others

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7. See 中华人民共和国中外合作办学条例 [Regulations of the People's Republic of China on Sino-Foreign Cooperative Education] (promulgated Mar. 1, 2003, effective Sept. 1, 2003) arts. 3, 65.

8. Agreement for Cooperation in Educational Exchanges, PRC-US, Mar. 28, 2000; see Welcoming Remarks for Don Q. Washington at the International Graduate Scholarship Conference, US EMBASSY IN BEIJING, available at <http://beijing.usembassy-china.org.cn/092107e.html>.

9. US TRADE REP., REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 94 (2006).

10. Elizabeth Redden, *The Phantom Campus in China*, INSIDE HIGHER ED, Feb. 12, 2008, <http://www.insidehighered.com/news/2008/02/12/china>.

11. See *id.*

12. *Id.*

13. See Ian Gow, *Removing the Rose-Tinted Spectacles*, in BRITISH UNIVERSITIES IN CHINA: THE REALITY BEYOND THE RHETORIC 7-8 (Anna Fazackerley ed., 2007).

require further negotiation.<sup>14</sup>

A few foreign institutions lie at the other end of the spectrum, having successfully navigated the path through thorny regulatory issues. The Hopkins Nanjing Center, a collaboration between Johns Hopkins University and Nanjing University that began in 1986, was the first joint academic program offering a full master's degree approved in both China and the United States.<sup>15</sup> The University of Nottingham-Ningbo, thanks to strong financial support from the Ningbo local government, became the first partnership between a British institution and a Chinese university.<sup>16</sup> A growing number of joint degree programs (1,300 as of 2006) include partnerships between Chinese IHEs and a diverse group of U.S. institutions. As of 2007, twenty-four percent of American graduate schools indicated in a survey that they had established one or more degree programs with Chinese institutions.<sup>17</sup> An Australian company even bought a Chinese university outright, acquiring its entire physical plant and operations as a going concern.<sup>18</sup> The successful Sino-foreign cooperative educational efforts, though differing in scale, complexity and structure, share two common attributes: extensive prior planning and successful navigation of the Chinese legal system.

To help institutions avoid the pitfalls of failed entry into China's education market, we have prepared the following article. We begin in Part II by identifying the unique characteristics of the Chinese education system and how it differs from education in the United States and other western countries. Part III explores the regulations governing foreign education providers in China by way of examples, where available. Finally, in Part IV, we discuss the results of China's educational reform efforts and opportunities for future change.

## II. BACKGROUND

At first glance, education in China resembles education in western countries. Local governments fund the first nine years of schooling in part through funding from the central government.<sup>19</sup> Children not only have the

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14. See Redden, *supra* note 10.

15. Hopkins-Nanjing Center, HNC History, <http://nanjing.jhu.edu/about/index.htm> (last visited January 23, 2010).

16. See Gow, *supra* note 13, at 78.

17. Kenneth E. Redd, *Data Sources: International Dual, Joint, and Other Collaborative Degree Programs*, COUNCIL OF GRADUATE SCHOOLS, available at [http://www.cgsnet.org/portals/0/pdf/DataSources\\_2007\\_10.pdf](http://www.cgsnet.org/portals/0/pdf/DataSources_2007_10.pdf).

18. Geoff Maslen, *Australian Firm is First to Buy a Chinese University*, TIMES HIGHER ED. (UK), Feb. 21, 2003, (noting that Australian IT firm Amnet Limited became the first investor to acquire a Chinese IHE outright, buying Chongqing HaiLian University from its Principal for \$27 million Australian dollars), available at <http://www.timeshighereducation.co.uk/story.asp?storyCode=174918&sectioncode=26>.

19. See ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD*

right, they “have the *obligation* to receive [such] compulsory education, regardless of gender, nationality, race, status of family property, religion, belief, etc.”<sup>20</sup> Government funding for education continues through middle school, which consists of two stages roughly analogous to junior high and high school, but high school and college are funded primarily by local governments and parents.<sup>21</sup> After entering higher education, students can earn the equivalent of an associate’s, bachelor’s, master’s, or doctorate degree.<sup>22</sup> Vocational training parallels high school and tertiary education, and provides post-baccalaureate training as well.<sup>23</sup> Despite some similarities in structure, education in China differs from that in western countries in several significant ways.

#### A. Education is Linked to National Policy

After Mao Zedong died, China’s leadership explicitly linked education with national development and reform policies. Deng Xiaoping, Mao’s successor, instituted a plan to modernize China by improving agriculture, industry, science and technology, and national defense.<sup>24</sup> The Four Modernizations, as they were called, prioritized education as a means of restoring national stability and unity after the ravages of the Cultural Revolution.<sup>25</sup> Over thirty years later, Deng’s plan continues to drive domestic policy-making, in that education remains the backbone of China’s five-year planning process. In 2003, for instance, the Central Committee of the Communist Party of China declared that:

We should introduce a modern system of national education and a lifelong learning system; build a society that keeps learning; push forward quality education in a comprehensive way; enhance citizens’

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*Economic Surveys: China* 24 (2005) [hereinafter OECD 2005 SURVEY]; 中华人民共和国义务教育法 [Compulsory Education Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1984, amended June 29, 2006, effective Sept. 1, 2006), art. 2.

20. Compulsory Education Law of the People’s Republic of China, *supra* note 19, at art. 4 (emphasis added).

21. See Li Lixu, *China’s Higher Education Reform 1998-2003: A Summary*, 5 ASIA PAC. ED. REV. 14, 15–18 at 20 tbl. 5 (2004).

22. 中华人民共和国高等教育法 [Higher Education Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 1998, effective Jan. 1, 1999), art. 17; 中华人民共和国学位条例 (2004 修正 (2004 Revision) [Regulations of the People’s Republic of China on Academic Degree (2004 Revision)] (amended Aug. 28, 2004), art. 3.

23. 中华人民共和国职业教育法 [Vocational Education Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., May 15, 1996, effective May 15, 1996).

24. *International Rankings and Chinese Higher Education Reform*, WORLD ED. NEWS & REVIEWS (Oct. 2006), <http://www.wes.org/ewenr/06oct/practical.htm>.

25. See CHRISTOPHER R. HUGHES, *CHINESE NATIONALISM IN THE GLOBAL ERA* 24 (Routledge 2006).



capabilities in seeking employment, innovation, and entrepreneurship; and strive to turn the country's huge population into an advantageous ample supply of human capital.<sup>26</sup>

In its 2003–2007 Action Plan for Revitalizing Education, the Ministry of Education simply stated that “[e]ducation represents the basis of fundamental long-term development.”<sup>27</sup> More recently, the Eleventh Five-Year Plan included specific measures for education under the banner of “Implementing the Strategy of Developing China Through Science and Education and the Strategy of Strengthening China Through Tapping Human Resources.”<sup>28</sup> In this way, education has become inextricably linked with national policy.

### B. Central Government Control

Unlike the federal government in the United States, the central government in China acts as the direct supervisor and administrator of higher education. Despite market reforms, the PRC remains a unitary, non-federated state in which state power emanates from the central organs of the national government.<sup>29</sup> Laws enacted by the National People's Congress, China's top legislature,<sup>30</sup> determine the composition and management of colleges and universities.<sup>31</sup> The State Council, China's highest executive body, oversees and manages education on an ongoing basis in consultation with several entities under its direct authority,

26. 中共中央关于完善社会主义市场经济体制若干问题的决定[Decision of the Central Committee of the Communist Party of China on Some Issues Concerning the Improvement of the Socialist Market Economy] (promulgated Oct. 14, 2003, effective Oct. 14, 2003), art. 33.

27. MINISTRY OF EDUCATION, CHINA 2003–2007 ACTION PLAN FOR REVITALIZING EDUCATION: A LEARNING GUIDEBOOK (Beijing: Educational Science Press 2004).

28. NATIONAL DEVELOPMENT AND REFORM COMMISSION, THE OUTLINE OF THE ELEVENTH FIVE-YEAR PLAN FOR NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT OF THE PEOPLE'S REPUBLIC OF CHINA ch. 7, available at <http://bit.ly/9Eppa8>.

29. Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 369 (2002).

30. As defined by China's 1982 Constitution, the National People's Congress is the “highest organ of State power.” CHINA BUSINESS LAW GUIDE, Kluwer Law International, ¶1-230 (2005). As such, it has final authority over the judiciary and executive branches of government, in addition to legislative power. *Id.* Its main functions and powers include: to amend the Constitution and oversee its enforcement; to enact and amend basic statutes on criminal and civil law, the organization of the State and other matters; to elect and appoint members to central State organs; and to approve the national economic plan and hear reports on its implementation. *Id.* Readers curious about the government and political system of China are encouraged to consult other sources. *See, e.g.*, CHINA BUSINESS LAW GUIDE, Kluwer Law International, ¶1-200- ¶1-550 (2005).

31. 中华人民共和国教育法[Education Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 18, 1995, effective Sept. 1, 1995); Higher Education Law of the People's Republic of China, *supra* note 22; Vocational Education Law of the People's Republic of China, *supra* note 23.

including the Ministry of Education (MOE).<sup>32</sup> The MOE in turn decides how many students will be admitted to colleges and universities each year, how much institutions can charge for tuition, what subjects will be taught, and which foreign institutions will receive licenses to operate in the PRC, among other matters.<sup>33</sup> Where independent non-profit institutions maintain quality standards through accreditation and testing in the United States, in China the MOE and local governments regulate education through a licensing system. The MOE also administers nationwide standardized testing.

### C. Role of Education in the Chinese Family

Education is the central focus of Chinese family life.<sup>34</sup> Every June, graduating high school seniors take the national college entrance examination, a three-day event that captures national attention.<sup>35</sup> The entrance exam traces its roots to the seventh century, when the 科举 (*keju*, or imperial examination) was first used to examine officials selected to serve the Emperor.<sup>36</sup> The 高考 (*gaokao*, or high exam), the modern equivalent of the *keju*, sorts students into four hierarchical levels of tertiary schools based on their examination scores, a rite of passage associated with the growing opportunity for economic advancement through schooling.<sup>37</sup> Reflecting the importance of the exam and subsequent education in Chinese society, as well as the fact that China does not yet have a system for financing education similar to student loans in the United States, educational expenses for children represent the top consumption category for Chinese households, exceeding outlays for housing and pensions.<sup>38</sup> Notably, public opinion polls list higher education as one of the top three causes of discontent with China's central government.<sup>39</sup>

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32. See, e.g., Haisheng Li, *Chronicle of Major Educational Policies of China (1997-1999)*, CHINA EDUCATION AND RESEARCH NETWORK, Dec. 25, 2001, available at [http://www.edu.cn/Researchedu\\_1498/index.shtml](http://www.edu.cn/Researchedu_1498/index.shtml).

33. Robert Hartmann, *Chinese Higher Education Fails the Test*, ASIA TIMES, Dec. 21, 2006, available at <http://www.atimes.com/atimes/China/HL21Ad01.html>.

34. Lan Yu & Hoi K. Swen, *Historical and Contemporary Exam-Driven Education Fever in China*, 2 KEDI J. ED. POL'Y 17, 29 (2005), available at <http://suen.ed.psu.edu/~hsuen/pubs/KEDI%20Yu.pdf>.

35. See, e.g., *GaoKao Stars*, CHONGQING TIMES, June 24, 2008, available at [http://www.danwei.org/front\\_page\\_of\\_the\\_day/the\\_gaokao\\_stars.php](http://www.danwei.org/front_page_of_the_day/the_gaokao_stars.php).

36. Yu & Swen, *supra* note 34, at 19.

37. *Id.* at 20; Gary S. Becker & Kevin M. Murphy, *The Upside of Income Inequality*, THE AMERICAN, May/June 2007, available at <http://www.american.com/archive/2007/may-june-magazine-contents/the-upside-of-income-inequality/>.

38. CHINESE ACADEMY OF SOCIAL SCIENCES (2005).

39. Hartmann, *supra* note 33.

#### D. Structural Changes Underway

Higher education in China is undergoing significant structural change. Between 2000 and 2005, for example, the number of short-term colleges grew by almost four hundred percent and the number of vocational-technical schools grew by more than five hundred percent.<sup>40</sup> In the past decade, the number of graduates from tertiary education grew four-fold, the number of IHEs reached 1,792, the number of enrolled undergraduates hit 16 million, and the number of enrolled postgraduates reached almost one million.<sup>41</sup> While the United States had 16 million students enrolled in 4,000 colleges and universities in 2004, comprising fifty to sixty percent of the school-age population, China had almost the same number of people enrolled in just under 1,800 IHEs, comprising just fifteen percent of its school-age population. However, by 2008, more than four million Chinese students were enrolled in either short or long-term courses in private colleges and universities, a significant increase.<sup>42</sup> Such increases in both the number of institutions and the number of enrollees seem likely to continue, especially given estimates that predict the number of college and university students worldwide will nearly double by 2020.<sup>43</sup>

However, some have questioned whether China has been able to achieve improvements in quality as well as quantity.<sup>44</sup> To be sure, because of improvements in education, “the average quality of the labour [*sic*] force has also been improving significantly, with new entrants to the labour [*sic*] force having almost three times as many years of schooling as those who are retiring.”<sup>45</sup> But today, “[p]erhaps no tension in China is greater than that between the desire to provide increased access to education at all levels and the equally strong desire to maintain and increase educational quality to ‘world-class’ standards.”<sup>46</sup>

#### E. Balancing National Priorities

Despite far-reaching reforms in commerce and industry, education in

40. Li et al., *supra* note 2; *see also* 国务院关于大力发展职业教育的决定 [Decision of the State Council on Vigorously Developing Vocational Education] (promulgated Oct. 28, 2005, effective Oct. 28, 2005).

41. Lixu, *supra* note 21.

42. NATIONAL BUREAU OF STATISTICS, <http://www.stats.gov.cn/english/>.

43. *See, e.g.,* Redden, Elizabeth, *In a Global Recession, Global Ed Still Growing*, INSIDE HIGHER EDUCATION, May 29, 2009, available at <http://www.insidehighered.com/news/2009/05/29/international>.

44. *See* Dahlman et al., *supra* note 1, at 32.

45. OECD 2005 SURVEY, *supra* note 19, at 17.

46. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *Governance in China: China in the Global Economy* 540 (2005) [hereinafter OECD CHINA GOVERNANCE REPORT].

China remains subject to strong political forces.<sup>47</sup> As a result, educational institutions must balance the changing demands of the professional marketplace with academic rigor, scientific development, and overarching political considerations.<sup>48</sup> In China:

Education must serve the socialist modernization drive and must be combined with production and physical labour in order to train for the socialist cause builders and successors who are developed in an all-round way—morally, intellectually and physically.<sup>49</sup>

Not unlike governments in the United States, China's central government prioritizes other concerns when faced with footing the bill for its own policy mandates.<sup>50</sup> Granted, the PRC recently spent \$3.6 billion upgrading and consolidating the top 100 domestic IHEs, using a portion of that sum to position China's top nine universities as world-class competitors.<sup>51</sup> But, while enrollments quadrupled, government tuition subsidies for students dropped to less than fifty percent of the cost of attendance, and expenditures per student fell by more than five percent.<sup>52</sup> Today, learning facilities and teaching methods in many areas remain out of date, and modern information and communications technologies are not harnessed to the same degree as in comparable western institutions.<sup>53</sup> Compounding the issues posed by the generally low quality of many domestic IHEs is their wide dispersal across China, one of the world's largest and most populous countries. Despite the presence of a number of excellent universities in cities like Beijing, Shanghai, and Wuhan, the vast majority of college students in China do not attend universities in these 'first tier' or 'second tier' cities, further limiting their options upon graduation, especially for those students unwilling to relocate for work.<sup>54</sup> In addition, according to statistics from China's Ministry of Commerce (MOFCOM), virtually all (ninety-seven percent) foreign direct investment in the education sector through 2007 remains relegated to the 'Eastern' region of China, leaving only small-scale projects for the central and western provinces of China.<sup>55</sup>

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47. Hughes, *supra* note 25, at 26.

48. OECD CHINA GOVERNANCE REPORT, *supra* note 46, at 547.

49. Education Law of the People's Republic of China, *supra* note 31, at art. 5.

50. See Li et al., *supra* note 2.

51. *Id.* at 17; see Pallavi Aiyar, *China Hunts Abroad for Academic Talent*, ASIA TIMES, Feb. 18, 2006, [http://atimes.com/atimes/china\\_business/hb18cb05.html](http://atimes.com/atimes/china_business/hb18cb05.html).

52. See Li et al., *supra* note 2, at 24; Diana Farrell & Andrew Grant, *Addressing China's Looming Talent Shortage*, McKinsey & Company (Oct. 2005), available at [http://www.mckinsey.com/mgi/reports/pdfs/China\\_talent/ChinaPerspective.pdf](http://www.mckinsey.com/mgi/reports/pdfs/China_talent/ChinaPerspective.pdf).

53. Dahlman et al., *supra* note 1.

54. See, e.g., Diana Farrell & Andrew Grant, *Addressing China's Looming Talent Shortage*, McKinsey & Company (Oct. 2005) at 7, available at [http://www.mckinsey.com/mgi/reports/pdfs/China\\_talent/ChinaPerspective.pdf](http://www.mckinsey.com/mgi/reports/pdfs/China_talent/ChinaPerspective.pdf).

55. *The Survey of Foreign Investment in China's Education Industry of 2007*,

Educational institutions at all levels charge service fees in addition to tuition, and these expenses can prevent students in less-developed areas from progressing beyond junior high, let alone high school.<sup>56</sup> Faced with rising costs, growing enrollments, and limited capacity, MOFCOM has advocated increased foreign involvement in domestic education.<sup>57</sup> As one observer noted, “[i]f China is to catch up, and catch up fast, it needs to profit from the existing strengths of other nations.”<sup>58</sup>

### III. THE LAW OF HIGHER EDUCATION AND FOREIGN INSTITUTIONS IN CHINA

To the benefit of China, U.S. colleges and universities feel “intense pressure” to deepen exchanges with Chinese schools, to tap into the growing market of Chinese consumers who can now, or in the future, afford U.S. tuition rates, and to provide overseas programs for American students seeking experience in China.<sup>59</sup> And after years of successful student and faculty exchanges, “universities in China with strong international ties have begun to move towards more complex forms of international academic collaboration.”<sup>60</sup> As indicated above, such partnerships typically involve foreign exchange programs, distance education initiatives, joint research and development laboratories, joint degree programs, Sino-foreign cooperative educational institutions, or some combination thereof. In the section that follows, we first discuss issues that are common to most programs, and then we tackle issues that affect various types of programs, dividing them into programs that (1) grant a degree or certificate to Chinese nationals, (2) establish an institution, or (3) educate students in person or via the Internet.<sup>61</sup>

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FOREIGN INVESTMENT ADMINISTRATION OF THE MINISTRY OF COMMERCE, Nov. 11, 2008, available at [http://www.fdi.gov.cn/pub/FDI\\_EN/Economy/Sectors/Service/Education/t20081124\\_99522.htm](http://www.fdi.gov.cn/pub/FDI_EN/Economy/Sectors/Service/Education/t20081124_99522.htm).

56. OECD 2005 SURVEY, *supra* note 19, at 53; see also Xinhua News Agency, *Chinese Urban Students Will be Free from Tuition and other Fees*, CHINA VIEW, July 30, 2008, available at [http://news.xinhuanet.com/english/2008-07/30/content\\_8862983.htm](http://news.xinhuanet.com/english/2008-07/30/content_8862983.htm).

57. See *The Survey of Foreign Investment in China's Education Industry of 2005*, FOREIGN INVESTMENT ADMINISTRATION OF THE MINISTRY OF COMMERCE, Mar. 22, 2006, [http://www.fdi.gov.cn/pub/FDI\\_EN/Economy/Sectors/Service/Education/t20060422\\_25535.htm](http://www.fdi.gov.cn/pub/FDI_EN/Economy/Sectors/Service/Education/t20060422_25535.htm).

58. Anna Fazackerley, *To Know the Road Ahead, Ask Those Coming Back*, in BRITISH UNIVERSITIES IN CHINA: THE REALITY BEYOND THE RHETORIC 1 (Anna Fazackerley ed., 2007).

59. *Morning Edition: US Schools Tap Growing Ranks of Chinese Students* (National Public Radio broadcast May 29, 2008), transcript available at <http://www.npr.org/templates/story/story.php?storyId=90931460>.

60. Madelyn C. Ross, *China's Universities Look Outward*, IIE NETWORKER MAG., Fall 2004, available at <http://www.iienetwork.org/?p=Ross>.

61. This section emphasizes the effect of Chinese law on foreign parties seeking to provide educational services in the PRC. Readers curious about US federal or state law

### A. Common Issues

Before detailing the ways in which China regulates foreign providers of higher education, we note here that certain challenges confront all visitors in China. These issues span immigration, employment, taxation, dispute resolution, property and land use, as well as negotiations for government approval. To the extent that prior scholarship on foreign investment in China considers these topics, however, we review them here only briefly in the context of higher education.

Foreign citizens and entities must of course comply with China's immigration regulations.<sup>62</sup> Students must apply to the Chinese embassy or consulate in their home country for a visa that will allow for study, but not employment, in the PRC.<sup>63</sup> Foreigners and their immediate family members may similarly apply for F Visas to "visit, investigate, lecture, do business, conduct scientific, technological and cultural exchanges, and take short-term refreshment courses and do practical training," but not to secure employment in the PRC.<sup>64</sup> Entities established in China, however, can hire foreigners by helping them secure a work visa, an Alien Employment Permit, and a Residence Permit.<sup>65</sup>

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that impacts educational initiatives in China are advised to consult other sources. *See, e.g.*, Kenneth D. Salomon, *A Primer on Distance Learning and Intellectual Property Issues*, 96 ED. LAW REP. 305 (1995); Bertrand Harding, *Federal Tax Issues Raised by International Study Abroad Programs*, 27 J.C. & U.L. 207 (2000); William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth...the Life of a Student*, 27 J.C. & U.L. 151 (2001); Jamie Lewis Keith, *The War on Terrorism Affects the Academy*, 30 J.C. & U.L. 239 (2004); Kam C. Wong, *Implementing the USA PATRIOT Act: A Case Study of the Student and Exchange Visitor Information System (SEVIS)*, 2006 B.Y.U. EDUC. & L.J. 379 (discussing registration of foreign students at U.S. colleges and universities in the wake of the terrorist attacks on the United States on September 11, 2001); Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309 (2006); William F. Ferreira, *Conducting Research and Sponsored Programs Overseas*, 7 MED. RES. L. & POL'Y REP. 441 (2008) (discussing a range of issues relating to the operation of research programs abroad).

62. *See Ferreira, supra* note 61, at 446.

63. 中华人民共和国外国人入境出境管理法实施细则[Rules for the Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners] (promulgated by the Ministry of Labor, the Ministry of Public Security, the Ministry of Foreign Affairs, and the Ministry of Foreign Trade and Economic Cooperation, Dec. 27, 1986, effective Dec. 27, 1986), art. 4 [hereinafter Visa Rules]; 劳动部, 公安部, 外交部, 外经贸部关于颁发《外国人在中国就业管理规定》的通知 (劳部发 (1996) 29号) [Regulations on the Management of Employment of Foreigners in China] (promulgated Jan. 22, 1996, effective May 1, 1996), art. 8 [hereinafter Foreign Worker Regulations].

64. *Id.*

65. *See, e.g.*, 劳动和社会保障部办公厅关于对外国人在中国就业管理有关问题的函(劳社厅函(2005) 231号) [Letter of the General Office of the Ministry of Labor and Social Security on the Relevant Issues concerning the Administration of Employment of Foreigners in China] (promulgated July 4, 2005, effective July 4, 2005).

The relevant procedures for obtaining a visa or permit are simplified in some instances if a foreign party forms a subsidiary in China, typically known as a wholly foreign-owned entity (WFOE).<sup>66</sup> For this reason, however, current regulatory policy in China limits the scope of educational activity in which a WFOE can engage, so parties to Sino-foreign cooperative educational institutions typically agree that the Chinese party will assist the cooperative institution in applying for visas and hiring Chinese personnel. In a few limited instances, however, foreign schools will form a WFOE, a type of limited liability company that reduces obstacles to employing both foreign citizens and Chinese nationals.<sup>67</sup> However, foreign schools may not form a WFOE to award degrees to Chinese citizens, and professors and other faculty must be hired as “education consultants” to work for a WFOE.<sup>68</sup> Thus, foreign schools typically only form a WFOE to hire persons responsible for logistics and administration, not instruction.

Labor laws likewise impact foreign schools. First and foremost, foreign employers cannot directly hire any Chinese nationals, and so must rely on an appropriate hiring relationship with a domestic entity or a contractual arrangement. The Labor Contract Law requires executed contracts for all “labor relationships,” regardless of whether the employee is a PRC national, and limits the employer’s ability to fire employees before the expiration of their contract term.<sup>69</sup> Schools employing Chinese nationals must contribute to social insurance accounts in amounts that vary depending upon the location of the employing entity and the form of insurance.<sup>70</sup> Regulations also prohibit workplace discrimination based

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66. ALL ROADS LEAD TO CHINA, *Can a WFOE [sic] in China Provide Visas? How Many?* (Apr. 29, 2004), [www.allroadsleadtochina.com/index.php/2008/04/29/can-a-wfoe-in-china-provide-visas-how-many/](http://www.allroadsleadtochina.com/index.php/2008/04/29/can-a-wfoe-in-china-provide-visas-how-many/).

67. See Steven M. Dickinson, *Introduction to the New Company Law of the People’s Republic of China*, 16 PAC. RIM L. & POL’Y J. 1 (2007). Limitations under U.S. law may prevent certain institutions from forming such an entity. See Theodore J. Hopkins, Jr., *Foundations Supporting Colleges and Universities: Unrelated Business Income Taxation*, 40 S.C. L. REV. 597, 600 (1989).

68. See 外商投资产业指导目录(2007年修订) (国家发展和改革委员会, 商务部令(第57号) [Catalogue of Industries for Guiding Foreign Investment (Revised 2007), Catalogue of Industries Encouraged for Foreign Investment] (promulgated by National Development and Reform Commission and the Ministry of Commerce Order No. 57, Oct. 31, 2007, effective Dec. 1, 2007), art. X (1) (requiring that foreign investment in higher education occur through an equity or a contractual joint venture).

69. 中华人民共和国劳动合同法(promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008), arts. 10, 36–50.

70. See 北京市失业保险规定 (1999年9月14日北京市人民政府第38号令发布根据2007年6月14日北京市人民政府第190号令修改) [Provisions of Beijing Municipality on Unemployment Insurance] (promulgated by Beijing Government Order No. 38, Sept. 14, 1999, effective Nov. 11, 1999, amended June 14, 2007), art. 7; 深圳经济特区企业员工社会养老保险条例 (2006修正) [Regulation of Shenzhen Economic Zone on Social Endowment Insurance for Employees of Enterprises]

upon nationality, race, sex, and religious belief, and include specific measures designed to protect female employees, but such regulations typically have limited significance in a Chinese context.<sup>71</sup>

Local tax laws also impact both employees and their employers. Entities in China must withhold individual income tax payments for employees, though some U.S. citizens serving on the faculty of Sino-foreign cooperative educational institutions are exempt from withholding if they stay in China for less than three years. Other U.S. citizens are likewise exempt under a detailed set of rules agreed upon by the PRC and U.S. governments.<sup>72</sup> Foreign entities must also pay taxes, but such entities are not double-taxed under the same agreement between the PRC and the US.<sup>73</sup> (As non-profit Chinese entities are extremely difficult for even *domestic* parties to register, foreign institutions typically do not enjoy tax-free status.)<sup>74</sup> China's enterprise income tax, business tax, value-added tax, and various consumption taxes typically apply to entity income, though the value-added tax and consumption taxes rarely apply in an educational context.<sup>75</sup> While in the past, foreign investors benefited from preferential tax treatment, such preference was largely repealed by the new enterprise income tax law that came into effect as of January 1, 2008.<sup>76</sup> Foreign parties that are not engaged in a cooperative institution (but that provide

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(promulgated Jan. 1, 1999, effective July 26, 2006), art. 8; Cooperative Education Regulations, *supra* note 7, at art. 28.

71. See [Labor Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 12; 女职工劳动保护规定 [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated July 21, 1988, effective Sept. 1 1988), art. 1.

72. 中华人民共和国个人所得税法 (2005修正) [Individual Income Tax Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, amended Oct. 27, 2005, effective Oct. 27, 2005), art. 8; Agreement for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, PRC-US, art. 19, Apr. 30, 1984, PRC-US Income Tax Convention, *available at* <http://www.irs.gov/pub/irs-trty/china.pdf> [hereinafter PRC-US Double Taxation Treaty].

73. Xinhua News Agency, *China Avoids Double Taxation on Expats*, PEOPLE'S DAILY, Aug. 3, 2004, [http://english.peopledaily.com.cn/200408/02/eng20040802\\_151625.html](http://english.peopledaily.com.cn/200408/02/eng20040802_151625.html); PRC-US Double Taxation Treaty; see Devin Xie et al., *Regulations Implement New Enterprise Income Tax Law*, HOGAN & HARTSON CHINA UPDATE, Dec. 2007/Jan. 2008 at 4.

74. See Karla W. Simon, *Reform of China's Laws for NPO's—A Discussion of Issues Related to Shiye Danwei Reform*, in ZEITSCHRIFT FUER CHINESISCHE RECHT 75 nt.42 (2005), *available at* [http://www.iccs1.org/pubs/Aufsatz\\_Simon.pdf](http://www.iccs1.org/pubs/Aufsatz_Simon.pdf); 社会团体登记管理条例 [Regulations on Registration and Administration of Social Organizations] (promulgated Oct. 25, 1998, effective Oct. 25, 1998).

75. See James M. Zimmerman, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 336 (2d ed. 2005).

76. 中华人民共和国企业所得税法 (中华人民共和国主席令第63号) [Enterprise Income Tax Law of the People's Republic of China] (promulgated by Order of the President of the People's Republic of China No. 63, Mar. 16, 2007, effective Jan. 1, 2008).



educational services to Chinese parties) typically enjoy a five percent business tax rate, while parties operating a cooperative institution pay twenty-five percent on “reasonable returns,” once the MOE approves their disbursement.<sup>77</sup>

To earn taxable income, however, a foreign entity and a Chinese party must execute a contract. In such a cross-border contract, foreign schools should be mindful of provisions regarding forum selection, indemnification, arbitration, intellectual property, and governing law.<sup>78</sup> Public institutions should also pay attention to language that operates to waive sovereign immunity or immunity from execution. Parties should note that, if a dispute arises, Chinese courts will only enforce a foreign judgment if China and the awarding jurisdiction have signed a treaty that allows for reciprocal recognition and enforcement of judgments.<sup>79</sup> As of 2007, China had thirty such treaties in force, but none with its largest trading partners, including the United States, the United Kingdom, and Japan.<sup>80</sup> As of August 1, 2008, however, parties may apply to PRC courts to enforce certain final judgments awarded in Hong Kong pursuant to an arrangement between the PRC Supreme People’s Court and the Hong Kong

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77. When providing services in China, non-resident enterprises are subject to a 5% business tax, and may also be subject to a 25% enterprise income tax, with “income” calculated according to the following formula: total service fees × the profit margin (usually 10-40%), determined by the competent taxation authority. When a non-resident enterprise has a permanent establishment (*e.g.*, a representative office; a plant; a place where services are provided; a place where projects involving construction, installation, assembly, repair or exploration are carried out; or a place where production and business operations are carried out) in China, such enterprise must pay the 25% enterprise income tax on incomes derived from China and on incomes it earns outside China that have real connection with said establishment. However, under the PRC Enterprise Income Tax Law, when a non-resident enterprise does not have any permanent establishment in China, or when the incomes earned by a non-resident enterprise with a permanent establishment in China have no real connection to said establishment, such enterprise only has to pay the 10% withholding tax on incomes derived from China. Despite the letter of the Law, tax experts maintain that in practice the 10% withholding tax is only applicable to passive incomes (*e.g.*, interests, rental fees, royalties and dividends). When services are involved, a non-resident enterprise without any permanent establishment in China may still have to pay the 25% enterprise income tax (rather than the 10% withholding tax) on service incomes derived from China according to the abovementioned formula. However, it is also possible that such enterprise would not have to pay any enterprise income tax or withholding tax since the competent taxation authority has significant discretion on whether or not a foreign service provider without a permanent establishment in China should pay the 25% enterprise income tax (and what the deemed profit margin should be, if the taxation authority determines that the 25% enterprise income tax is applicable) on service incomes derived from China.

78. See Zimmerman, *supra* note 75, at 102.

79. See Graeme Johnston et al., *China*, in GETTING THE DEAL THROUGH: DISPUTE RESOLUTION 43 (2007), available at <http://www.chinalawblog.com/ChinaDisputeResolution.pdf>.

80. *Id.*

Special Administrative Region.<sup>81</sup> Because the Arrangement is still relatively new, cross-border contracts typically include mandatory arbitration provisions, as PRC courts will enforce foreign arbitral awards under the New York Convention and a similar agreement with Hong Kong.<sup>82</sup>

To the extent that a college or university intends to remit funds outside of China, such transfers are subject to the strict control measures governing all types of foreign exchange transactions that cross China's borders, as China's official currency, the *Renminbi* (RMB), is not freely convertible in the international foreign exchange market.<sup>83</sup> The State Administration of Foreign Exchange (SAFE), a bureau of China's central bank, regulates the movement and/or conversion of foreign exchange, both inward and outward.<sup>84</sup> Detailed rules specify the precise extent of approval authority that local banks and local branches of SAFE wield over each type of transaction. Such rules are changed periodically, but the general trend appears to be that SAFE is gradually delegating more authority to approve foreign exchange transactions to local banks. Thus, any IHE with a project in China that involves the inflow or outflow of currency should consider maintaining a good working relationship with a bank in China that is qualified to perform such foreign exchange related services.

With respect to government approvals, the many steps required to secure licenses and permits in China "make . . . the process lengthy and sometimes frustrating."<sup>85</sup> Like most nations, China has "its own laws, paperwork, and various approvals to obtain before it will allow program activities to begin."<sup>86</sup> While IHEs with experience in other countries may be accustomed to the need for translated documents and the administrative processes for obtaining properly authenticated documents, such requirements may sometimes seem daunting to IHEs embarking on their

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81. Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, PRC-HK, art. 1, Aug. 1, 2008, *available at* <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandrej20060719e.pdf>.

82. Johnston, *supra* note 79, at 44; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 3, June 10, 1958, *available at* [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf); Memorandum of Understanding on the Arrangement concerning Mutual Enforcement of Arbitral Awards, PRC-HK, art. 7, June 21, 1999, *available at* <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf>.

83. See Wayne M. Morrison & Marc Labonte, *China's Currency: A Summary of the Economic Issues*, CONGRESSIONAL RESEARCH SERVICE, No. RS21625, 1 (2007), *available at* <http://www.fas.org/sgp/crs/row/RS21625.pdf>.

84. See, e.g., 中华人民共和国外汇管理条例 (中华人民共和国国务院令 (第193号)) [Regulations of the People's Republic of China on Foreign Exchange Administration] (promulgated by Decree 193 of the State Council of the People's Republic of China, Jan. 29, 1996, effective Apr. 1, 1996).

85. Ferreira, *supra* note 61, at 442.

86. *Id.* at 444.

first international program in China. Overall, a foreign party seeking to provide educational services may need approvals from one or more of the following: the MOE, the Ministry of Human Resources and Social Security (formerly known as the Ministry of Labor and Social Security), or, MHRSS, the General Administration of Press and Publication (GAPP), the Ministry of Industry and Information Technology (MIIT), and the State Administration for Industry and Commerce (SAIC), as well as the local offices of those entities.<sup>87</sup> As this tangled web of jurisdiction indicates, “there is no single Chinese legal ‘system,’ . . . [but] instead many Chinese legal systems, each with its own jurisdiction, hierarchy of [legal] authority, and way of operating.”<sup>88</sup> Indeed, though China is a unitary government, significant authority nonetheless resides in administrative bodies and local governments.<sup>89</sup> Successful entrants therefore engage with the relevant agencies early and often.

#### B. Programs that do not grant degrees to Chinese citizens.

Educational programs that do not confer degrees or certificates on Chinese citizens fall beyond the scope of regulations governing cooperative education in China. The regulations specifically distinguish between programs that educate Chinese citizens and those that do not.<sup>90</sup> Exchanges that simply acknowledge credits from both institutions without aiming to enroll Chinese citizens or bringing in “substantial foreign educational resources” or research and development initiatives are explicitly excluded from mandatory approval processes.<sup>91</sup>

Foreign exchange programs in the United States typically function in one of four different ways.<sup>92</sup> With respect to programs owned or operated by IHEs, the IHEs operate their facilities and programs abroad “as if they were extensions of the home campus.”<sup>93</sup> In contractual programs, one foreign institution will partner with one or more colleges or universities,

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87. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 8. The Ministry of Information Industry was reorganized into the newly-formed MIIT in June of 2008, while the Ministry of Labor and Social Security will soon become the Ministry of Human Resources and Social Security under a plan approved by the NPC. See Xinhua News Agency, *Super Ministry Inaugurated in Beijing*, CHINA DAILY, June 29, 2008, available at <http://en.chinaelections.org/newsinfo.asp?newsid=18226>.

88. Donald C. Clarke, *How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China*, 19 COLUM. J. ASIAN L. 50, 64 (2005).

89. Corne, *supra* note 29, at 369-70.

90. See 中华人民共和国中外合作办学条例实施办法 (教育部令 (第20号)) [Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China] (promulgated June 2, 2004, effective July 1, 2004), art. 2.

91. *Id.* at arts. 2, 60.

92. Hoye & Rhodes, *supra* note 61, at 155.

93. *Id.*

typically under a contractual arrangement designed to allocate liabilities and revenue between the parties.<sup>94</sup> Under a “permissive” program, a college or university will allow a student or faculty member to study abroad on their own recognizance, essentially placing them on a leave of absence and not forming any relationship with the recipient institution.<sup>95</sup> Schools may also operate some combination of the options described above, such as a program that hires only a few employees in the foreign country, but also contracts with another foreign college or university for the purposes of revenue-sharing and risk allocation.<sup>96</sup>

In programs like the Hopkins-Nanjing Center, foreign parties lease property from a Chinese partner, contract for revenue-sharing, allocate responsibility for securing government approvals, and may even require the Chinese party to pay PRC taxes. Contractual programs that involve foreign faculty teaching Chinese citizens require compliance with the appropriate immigration procedures, as well as approvals from the MOE and, in some circumstances, the partner university.<sup>97</sup> Simple student exchanges typically require compliance with immigration procedures and the negotiation of a contract. Again, for exchanges that do not involve teaching Chinese students, a foreign party need not partner with a Chinese IHE.<sup>98</sup> It is worth noting, however, that for a variety of reasons, partnering with a Chinese IHE provides significant practical advantages.

Perhaps for this reason, exchanges between western countries and China have grown significantly in the past ten years.<sup>99</sup> Educators in the United Kingdom recognize their financial dependence on “a tide of Chinese students flooding into [Great Britain] that could very easily be diverted elsewhere . . . .”<sup>100</sup> With respect to China and the United States, however, the statistics are astounding: the number of U.S. citizens studying in China grew by 543% in the last ten years.<sup>101</sup> In the same period, the number of Chinese citizens studying in the United States expanded by 159%, with Chinese nationals comprising 11.6% of all foreign students in the United

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94. *Id.* at 155-56.

95. *Id.* at 156.

96. *Id.*

97. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 2, 60. To qualify as a visiting scholar, faculty members must: (1) hold a masters degree or above; (2) have at least 5 years’ relevant working experience; (3) agree to comply with PRC laws and regulations during their stay in the PRC; (4) be in good physical condition; and (5) lack a criminal record.

98. *Id.* at art. 60.

99. Dahlman et al., *supra* note 1, at 5.

100. Fazackerley, *supra* note 58, at 1.

101. *Country Background: China*, INSTITUTE OF INTERNATIONAL EDUCATION, Nov. 7, 2007), available at <http://www.opendoors.iienetwork.org/page/113181/> [hereinafter IIE 2007 CHINA REPORT].

States as of 2007, second only to India.<sup>102</sup> Fueled by an increase in income among Chinese families and the growth of a booming industry devoted to placing Chinese students in tuition-hungry American schools, many American institutions are experiencing exponential growth in the number of Chinese undergraduates. A few years ago, Carleton College in Minnesota enrolled only three or four Chinese students, none with the wealth to pay their own tuition. In 2009, Carleton enrolled eighteen, many of whom needed no financial aid at all.<sup>103</sup> Ohio University enrolled four times as many undergraduates from China in 2008 as it did in 2007, many paying full tuition in addition to fees paid to agents who help the students find a school.<sup>104</sup> With respect to faculty exchanges, China sends more scholars to the United States than any other nation, increasing exports between 2005–2006 and 2006–2007 by 20.5%.<sup>105</sup> Observers expect such exchanges to grow even further, both in terms of headcount and the overall number of programs.<sup>106</sup>

Similarly, research and development initiatives are accorded considerable flexibility under China's Higher Education Law, which "encourages cooperation in diverse forms between institutions of higher learning and enterprises, institutions, societies and other social organizations in scientific research, technological development and extension."<sup>107</sup> To that end, the MOE and the Ministry of Science and Technology jointly formulated the "Outline for the Development Program of National University Science and Technology Parks" to promote the development and growth of technologically-advanced inventions and enterprises.<sup>108</sup> Chinese and foreign IHEs have formed so many different kinds of joint research and development programs that it would be impossible to catalogue them all in one place. Yale University has multiple cooperative programs in China, including one with Peking University

102. *Id.*

103. Scott Jaschik, *The Chinese Are Coming*, INSIDE HIGHER EDUCATION, Sept. 28, 2009, available at <http://www.insidehighered.com/news/2009/09/28/china>.

104. Tamar Lewin, *Matching Newcomer to College, While Both Pay*, N.Y. TIMES, May 11, 2008, <http://www.nytimes.com/2008/05/11/education/11agents.html?pagewanted=all>.

105. INSTITUTE OF INTERNATIONAL EDUCATION, OPEN DOORS REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE 2007, fig. 12c, <http://opendoors.iienetwork.org/page/113171/>.

106. Johnson, *supra* note 61, at 309.

107. Higher Education Law of the People's Republic of China, *supra* note 22, at art. 35.

108. 科技部, 教育部关于印发《国家大学科技园“十五”发展规划纲要》的通知(2001年6月6日国科发高字(2001)184号) [Circular of the Ministry of Science and Technology and the Ministry of Education Concerning the Distribution of the Outline for the Development Program of National University Science and Technology Parks During the Tenth Five-Year Period] (promulgated June 6, 2001, effective June 6, 2001).

founded in 2001,<sup>109</sup> while more recent examples include a relationship between the University of Massachusetts and Tsinghua University that began in 2006,<sup>110</sup> as well as the preliminary 2009 extension of a corporate-sponsored research partnership between an American company and University of California, Los Angeles to include Peking University.<sup>111</sup> Tsinghua and the Brookings Institution also formed the Brookings-Tsinghua Center for Public Policy in Beijing.<sup>112</sup> The history department at Fudan University established the Center for Asian Studies with the Korean Higher Education Consortium, as well as several technology development projects with non-educational partners, including Lucent Technologies, Cisco, and Toshiba.<sup>113</sup> Intel sponsors courses at several Chinese universities, as well as several research and development laboratories, under the aptly-named “multi-core” program.<sup>114</sup> As these programs typically do not involve a foreign institution granting degrees or certificates to Chinese students, they are not required to partner with a Chinese IHE.<sup>115</sup>

As with exchange programs, the same issues concerning contractual provisions apply to research and development initiatives. Where research and development initiatives differ, however, is with respect to the joint ownership of intellectual property (IP), in that parties must negotiate the use of existing IP, as well as the ownership and use of any IP created by the partnership. In our practice, we have seen a spectrum of different arrangements, ranging from partnerships in which the foreign party owns all of the resulting IP and grants the Chinese party a license, to initiatives in which both parties decide to jointly own any IP produced by the initiative.

### C. Education of PRC Nationals.

China encourages foreign education for Chinese nationals.<sup>116</sup>

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109. See, e.g., *Beijing University, Yale Found Joint Research Center*, PEOPLES DAILY, May 7, 2001, available at [http://english.people.com.cn/200105/07/eng20010507\\_69374.html](http://english.people.com.cn/200105/07/eng20010507_69374.html).

110. *University of Massachusetts the First Foreign College to Offer (Online) Classes in China*, STRAITS TIMES, Apr. 1, 2008 [hereinafter UMass].

111. *Xilinx Sponsors Peking University-UCLA Joint Research Institute of Science & Engineering*, REUTERS, June 17, 2007, available at <http://www.reuters.com/article/pressRelease/idUS99343+17-Jun-2009+PRN20090617>.

112. Brookings-Tsinghua Center, About Us, <http://www.brookings.edu/brookings-tsinghua/about.aspx> (last visited July 30, 2008).

113. Fudan University, Joint Program (2003), available at <http://www.fudan.edu.cn/englishnew/research/program.html>; Fudan University, Joint Project (2003), available at <http://www.fudan.edu.cn/englishnew/research/project.html>.

114. Boon-Lock Yeo, *Innovation & Collaboration with Chinese Universities: Multi-Core and Beyond*, INTEL CORPORATION, [http://cache-www.intel.com/cd/00/00/33/05/330513\\_330513.pdf](http://cache-www.intel.com/cd/00/00/33/05/330513_330513.pdf).

115. Implementation Measures for the Cooperative Education Regulations of the People's Republic of China, *supra* note 90, art. 2.

116. Catalogue of Industries for Guiding Foreign Investment (Revised 2007),

Regulations and guidance from both the State Council and the MOE establish the framework for entry, allowing foreign schools to educate students on the mainland in partnership with peer Chinese IHEs so long as the foreign school is not religiously affiliated and restricts its activities to upper middle and higher education.<sup>117</sup> The Cooperative Education Regulations “encourage leading western institutions to come to China, bringing teaching and research systems and staff to carry out research-led teaching, in English, on undergraduate and postgraduate degrees which are internationally excellent.”<sup>118</sup> The MOE’s Implementation Measures for the Cooperative Education Regulations, which clarify the Regulations, likewise promote “cooperative education between Chinese education institutions and foreign education institutions whose academic level and educational and teaching quality are universally acknowledged.”<sup>119</sup> China specifically hopes to draw “cooperative education activities relating to the subjects, specialties and fields that are new and badly demanded in China[,]” as well as “Chinese-foreign cooperative education in China’s [western], remote and poverty-stricken regions.”<sup>120</sup> To date, however, much of the activity has taken place in the coastal cities, although programs such as the University of Montana’s association with Xinjiang Normal University seek to extend the cooperation to inland cities.

“Chinese-foreign cooperative education must . . . implement Chinese education policies . . . .”<sup>121</sup> Foreign schools should, therefore, recognize that in 2006, in addition to the priorities identified above, the MOE emphasized public interest principles when it declared that education is not a “trade in goods,” and that it would “strictly put an end to the acts of

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Catalogue of Industries Encouraged for Foreign Investment, *supra* note 68, at art. X (1); *see also* 人事部, 教育部, 科技部, 公安部, 财政部关于印发《关于鼓励海外留学人员以多种形式为国服务的若干意见》的通知 (人发(2001)49号) [Circular of Ministry of Personnel, Ministry of Education, Ministry of Science and Technology, Ministry of Public Security and Ministry of Finance on Printing and Distributing Some Opinions on Encouraging Those Having Studied Abroad to Render Their Services to the Motherland in Multi-Ways (No. 49 (2001) issued by Ministry of Personnel)].

117. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7; 教育部关于当前中外合作办学若干问题的意见 (教外综(2006)5号) [Opinions of the Ministry of Education on Some Issues Concerning Current Sino-Foreign Cooperative Education] (promulgated Feb. 7, 2006, effective Feb. 7, 2006) [hereinafter 2006 MOE Opinion on Cooperative Education].

118. Press Release, Univ. of Nottingham, Bridge from China to the World: Official opening by Deputy PM (Feb. 23, 2006), *available at* [http://www.nottingham.ac.uk/public-affairs/press-releases/index.phtml?menu=pressreleases&code=BRI30a/06&create\\_date=23-feb-2006](http://www.nottingham.ac.uk/public-affairs/press-releases/index.phtml?menu=pressreleases&code=BRI30a/06&create_date=23-feb-2006).

119. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 3.

120. *Id.*

121. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 5.

arbitrary charges and high charges in the name of Sino-foreign cooperative education, and prevent the trend of educational industrialization.”<sup>122</sup> The MOE also highlighted the need to strengthen “political sensitivity . . . so as to maintain national security, social stability, and normal educational order[,]” as well as the “leading position of Chinese institutions . . . .”<sup>123</sup> Finally, the Implementation Measures specified that cooperative education must remain a non-profit activity, though cooperative educational initiatives are allowed to remit “reasonable returns” to the parties involved.<sup>124</sup> This concept of “reasonable returns” leaves open to interpretation the issue of whether any surplus generated from fees and tuition can be returned to the respective parties, and there is little regulatory guidance on this issue.

Through the approval system, the MOE and the governments of provinces, autonomous regions and municipalities directly under the central government wield significant authority over both higher education and vocational training in China.<sup>125</sup> Labor bureaus of provincial-level governments, for instance, approve vocational training programs.<sup>126</sup> The MOE approves diploma-granting higher education initiatives based upon the parties’ application materials, as well as an opinion from the provincial-level government responsible for the area in which the parties want to conduct the program.<sup>127</sup> The governments of provinces, autonomous regions and municipalities directly under the central government approve higher education initiatives that do not grant diplomas.<sup>128</sup> Programs or institutions involving a “double campus” approach must obtain a special license from the MOE, must include a course of study in which more than one third of the classes and teaching hours are provided by the foreign partner, and must be taught primarily at the campus of the Chinese partner.<sup>129</sup> Regardless of the proposed program, however, both the applications and their review must comply with detailed rules and regulations published by the MOE in accordance with China’s law on administrative licensing.<sup>130</sup>

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122. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 1.

123. *Id.* at art. 2.

124. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 28, 43.

125. *See* Higher Education Law of the People’s Republic of China, *supra* note 22, at art. 29.

126. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 12.

127. *See id.* at art. 12; Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 5, 35, 36.

128. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 5, 35, 36.

129. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 5.

130. 实施教育行政许可若干规定[Several Provisions on the Implementation of Educational Administrative Licensing] (promulgated Apr. 21, 2005; effective June 1,



Parties must submit applications for higher education initiatives in March or September, and experts from the approval authority must examine the application. Approvals typically take at least a month,<sup>131</sup> though it is not unheard of for approvals to take considerably longer. The MOE looks at whether an application involves a famous foreign school, a foreign school with famous programs or professors, or a foreign provider that already operates a similar initiative, as well as considering school rankings and whether the initiative will serve central or western China.<sup>132</sup> The MOE wants to attract foreign partners who can help build vocational institutions that increase the quality of labor in “the advanced manufacturing industry, modern agriculture and modern service industry, especially, in the fields of energy, minerals, environmental protection and banking,”<sup>133</sup> and not “low-level educational programs of business, management, computer, IT and other subjects (specialties) whose cost is relatively cheap.”<sup>134</sup>

Once parties secure the necessary approvals, certain rules govern the ongoing management of both projects and institutions. Textbooks must come through “lawful” channels.<sup>135</sup> Cooperative initiatives must have an appropriate ratio of Chinese and foreign instructors.<sup>136</sup> The relevant approval authority must receive book lists and course lists, and the parties must comply with the rules and bylaws that govern the management of student records and teaching, not to mention advertisements and enrollment brochures.<sup>137</sup> Institutions must publicize the items and standards for all charges, but only after receiving approvals from the relevant pricing, financial, and educational authorities.<sup>138</sup> School financial departments must collect tuition in RMB pursuant to permits issued by designated pricing authorities.<sup>139</sup> Tuition rates must conform to standards set by the

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2005), art. 1.

131. See Implementation Measures for the Cooperative Education Regulations, *supra* note 90, at arts. 38-39; 中华人民共和国行政许可法 [Administrative License Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 27, 2003, effective July 1, 2004), art. 42.

132. 教育部关于进一步规范中外合作办学秩序的通知 [Notice of the Ministry of Education on Further Regulating Sino-Foreign Cooperation in Running Schools] (promulgated & effective Apr. 6, 2007), art. 3 [hereinafter 2007 MOE Cooperative Education Notice]; 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 3.

133. 2007 MOE Cooperative Education Notice, *supra* note 132, at art. 4.

134. 2007 MOE Cooperative Education Notice, *supra* note 132, pmbl.

135. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 44.

136. 2007 MOE Cooperative Education Notice, *supra* note 132, pmbl.

137. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 44-47.

138. 2007 MOE Cooperative Education Notice, *supra* note 132, at art. 2.

139. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 38; see, e.g., Provisional Measures for the

provincial-level government, which also sets a maximum ratio between tuition and other costs, and may not be increased without prior approval.<sup>140</sup> With respect to tuition charged by the Chinese party, PRC nationals and ethnically Chinese foreign citizens pay lower tuition than non-Chinese foreign citizens,<sup>141</sup> so IHEs need to consider whether this is a potential cause of concern under the relevant anti-discrimination laws which they are subject to in the United States. Diplomas issued by a foreign institution to graduates of a project or initiative must match those issued to graduates of the foreign institution not enrolled in the project or initiative.<sup>142</sup> Relevant regulations provide that in granting diplomas, parties may not recognize credits for preparatory foreign-language training.<sup>143</sup> This may impact students' choice with regard to such preparatory training. Finally, parties may only use tuition to establish and repair schools, to pay salaries for teaching and administrative personnel, and to cover other select operating expenses; they may not use it for "profit-making purposes."<sup>144</sup>

Programs that confer degrees from a Chinese IHE must comply with two recent notices promulgated by the MOE concerning electronic registration.<sup>145</sup> The regulations require that both foreign students beginning a formal course of study at a four-year college level or above,

Administration of Fee Collection of Secondary Vocational Schools (1996); Provisional Measures for the Administration of Fee Collection of Higher Education (1996); Public Notice System of Education Fee Collection (2002).

140. Provisional Measures for the Administration of Fee Collection of Secondary Vocational Schools (1996); Provisional Measures for the Administration of Fee Collection of Higher Education (1996); Public Notice System of Education Fee Collection (2002).

141. 教育部、国家发展改革委、财政部、国务院侨务办公室关于调整国内普通高校招收海外华侨学生收费标准及有关政策问题的通知 (教财(2006)7号)[Notice of the Ministry of Education, the National Development and Reform Commission, the Ministry of Finance and the Overseas Chinese Affairs Office of the State Council on Adjusting the Charging Rates for Overseas Chinese Students by Domestic Regular Higher Educational institutions and Relevant Policies] (promulgated July 11, 2006, effective Sept. 1, 2006), art. 1.

142. Implementation Measures for the Cooperative Education Regulations of the People's Republic of China, *supra* note 90, at art. 49.

143. 2007 MOE Cooperative Education Notice, *supra* note 132, at art. 5.

144. Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 39.

145. 教育部关于印发《普通高等学校新生学籍电子注册暂行办法》的通知 (教学(2007)3号) [Notice of the Ministry of Education on Printing and Distributing the Interim Measures for the Electronic Registration of New Students of General Institutions of Higher Education] (promulgated Mar. 13, 2007, Sept. 1, 2007) [hereinafter Domestic Student Electronic Registration Notice]; 教育部办公厅关于试行普通高等学校外国留学生新生学籍和外国留学生学历证书电子注册的通知 (教外厅(2007)5号) [Notice of the General Office of the Ministry of Education on the Trial Implementation of Electronic Registration of Enrollment of New Foreign Students and Academic Education Certificates of Foreign Students in Ordinary Institutions of Higher Learning] (promulgated Nov. 22, 2007, effective Nov. 22, 2007) [hereinafter Foreign Student Electronic Registration Notice].

and Chinese students entering an institution at a two-year college level or above, register electronically.<sup>146</sup> If the IHE fails to electronically register the enrollment of a student, the MOE will not recognize any coursework that the student completes, and will not allow the IHE to grant the student a degree.<sup>147</sup> As a result, parties should be careful to ensure the registration of all students with the MOE by the prescribed deadlines, and be sure that any related contracts include provisions to allocate related liabilities. Moreover, given the recent riots at independent colleges that failed to grant graduates diplomas from their more prestigious parent universities, parties should be careful to specify in both contracts and marketing materials which institution will ultimately confer the degree awarded, if any.<sup>148</sup>

### 1. "Projects"

Again, as mentioned above, regulations distinguish between cooperative projects and cooperative institutions that grant diplomas or certificates. Diploma-granting projects are a popular approach for foreign IHEs in China, in part because they place fewer burdens on the foreign institution.<sup>149</sup> To create a cooperative educational project, institutions of the same level and type must develop curricula and courses in subjects already offered by both institutions or, if the project will introduce a new subject to the Chinese institution, the Chinese institution must have sufficient resources and faculty to handle the new subject.<sup>150</sup> The parties must also execute a cooperative agreement that describes the goals of the program and sets a project term, and they must apply to the appropriate approval authority.<sup>151</sup> According to recent guidance from the MOE, project partners should ensure that "the educational and teaching plan, fostering plan, courses, and contents of teaching formulated by them jointly shall not be inferior to the standards and academic requirements of the foreign education institution in the country where it is located."<sup>152</sup> Beyond that, however, all of the same rules listed above apply.

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146. Domestic Student Electronic Registration Notice, *supra* note 145, at art. 3; Foreign Student Electronic Registration Notice, *supra* note 145, at art. 4.

147. Domestic Student Electronic Registration Notice, *supra* note 145, at art. 14; Foreign Student Electronic Registration Notice, *supra* note 145, at art. 4, ¶7.

148. See Joseph Kahn, *Rioting in China Over Label on College Diplomas*, N.Y. TIMES, June 22, 2006, available at <http://www.nytimes.com/2006/06/22/world/asia/22china.html>.

149. OBSERVATORY ON BORDERLESS HIGHER EDUCATION, SINO-FOREIGN JOINT EDUCATION VENTURES: A NATIONAL, REGIONAL AND INSTITUTIONAL ANALYSIS (2006) (noting that Chinese and foreign IHEs entered into more than 1,300 joint degree programs as of 2006 and had planned an additional 400 more).

150. Implementation Measures for the Cooperative Education Regulations of the People's Republic of China, *supra* note 90, at art. 33.

151. *Id.* at art. 5.

152. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 4, ¶2.

## 2. "Institutions"

Establishing a cooperative educational institution involves more steps than a "project,"<sup>153</sup> and the obstacles to a United States IHE's involvement in such an institution are daunting. Parties first submit a preliminary application, which the approval authority must process within 45 working days, and then submit a second formal application within three years after the approval of the preliminary application.<sup>154</sup> Upon accepting a formal application, authorities must decide whether or not to license a vocational institution within three months or a college or university within six months.<sup>155</sup> Proposed schools (including vocational schools, colleges and universities) must have qualified teachers, facilities and equipment, as well as sufficient funds to support current and long term operations, and proposed universities must have at least three "major" departments, as designated by the State.<sup>156</sup> Colleges and universities, in particular, must possess a "strong teaching and scientific research ability, have a higher level and scope of teaching and scientific research, and be in a position to impart undergraduate and post-graduate education."<sup>157</sup> All in all, 230 foreign schools met these requirements in 2006, a figure that includes not only IHEs, but also private primary and middle schools.<sup>158</sup>

In terms of structure and governance, vocational institutions operate as joint ventures with legal person status and higher education institutions operate as contractual joint ventures with status analogous to a partnership.<sup>159</sup> The principal or chief executive must be a PRC citizen and permanent resident in China with teaching experience who "loves the country" and "observes high moral standards."<sup>160</sup> The board of directors or

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153. Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 13.

154. *Id.* at arts. 15, 18. Schools may not enroll Chinese students until approval of a final application.

155. *Id.* at art. 18.

156. See Education Law of the People's Republic of China, *supra* note 31, at art. 26; Higher Education Law of the People's Republic of China, *supra* note 22, at art. 25.

157. Higher Education Law of the People's Republic of China, *supra* note 22, at art. 25.

158. *The Survey of Foreign Investment in China's Education Industry of 2005*, FOREIGN INVESTMENT ADMINISTRATION OF THE MINISTRY OF COMMERCE, Mar. 22, 2006, *available at* [http://www.fdi.gov.cn/pub/FDI\\_EN/Economy/Sectors/Service/Education/t20060422\\_25535.htm](http://www.fdi.gov.cn/pub/FDI_EN/Economy/Sectors/Service/Education/t20060422_25535.htm).

159. See Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 11; 民政部关于对中外合作办学机构登记有关问题的通知 [Notice of the Ministry of Civil Affairs on the Issues concerning the Registration of Sino-Foreign Cooperative Educational Institutions] (promulgated Dec. 12, 2003, effective Dec. 12, 2003), art. 4.

160. *Survey of US Posts, International Education: Obstacles and Opportunities*, INTERNATIONAL EDUCATION STUDY TEAM 11 (2001); Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at arts. 21,

management committee must have at least five members, at least half of whom are Chinese citizens, at least two thirds of whom have five or more years of teaching experience, and all of whom must be approved by the relevant approval authority.<sup>161</sup> In addition, the institution may not establish any branches or subsidiary entities.<sup>162</sup>

With respect to funding, cooperative vocational institutions must maintain a minimum amount of registered capital, since Chinese law emphasizes registered capital to protect creditors.<sup>163</sup> Less clear, however, are MOE regulations which specify that “[t]he operators who run Sino-foreign cooperative schools or establish Sino-foreign cooperative educational institutions or projects shall have corresponding capital investment for the education.”<sup>164</sup> In essence, this requirement means that the MOE decides when Chinese and foreign partners have invested sufficient capital in a proposed institution or project. Notably, institutions that bring in “foreign quality education resources” may partner with private organizations or individuals to secure funding, as well as funding for ongoing operations.<sup>165</sup> In addition, non-cash assets like intellectual property can serve as registered capital, but such contributions are limited to one third of the foreign party’s total contribution unless the MOE or a local government authority invites the party to invest more, and the parties comply with specific procedures regarding the calculation and certification of such non-cash assets.<sup>166</sup> Land use rights may be contributed as well, and last for 50 years in the event that the land is owned by a Chinese IHE, and

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161. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 21.

162. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 7.

163. Dickinson, *supra* note 67, at 3; 中华人民共和国公司法(2005修订) [Company Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 26.

164. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 6.

165. See Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 8.

166. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at arts. 10, 27. According to the Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, the value of capital contributions in the form of IP may be determined in one of two ways: either the Chinese and foreign partners must agree on a value for the IP, or they must engage a qualified asset appraisal institution to determine the value for them. *Id.* The Ministry of Finance (MOF) and the State Intellectual Property Office (SIPO) monitor the activities of asset appraisal institutions and hold regular training and certification sessions for appraisers in order to enhance their IP appraisal capacity. See, e.g., 财政部、国家知识产权局关于加强知识产权资产评估管理工作若干问题的通知 (财企[2006]109号) [Notice of the Ministry of Finance concerning Several Issues related to Strengthening the Regulation on the Appraisal of Intellectual Property Asset] (promulgated Apr. 19, 2006, effective 19, 2006).

not a third party.<sup>167</sup> Parties should be aware, however, that additional requirements apply if the Chinese party is either state-owned or intends to contribute state-owned property to a joint venture.<sup>168</sup>

Finally, joint ventures in which the partners pay separate taxes must maintain joint accounting records that reflect the separate records of each joint venture partner.<sup>169</sup> Cooperative educational institutions that enter into contractual relationships must therefore make special provisions to comply with Chinese accounting procedures.<sup>170</sup>

CIBT, a Canadian company that has several activities in China, is one example of a foreign company operating educational services using in China, including operating a business school offering an MBA degree through the Beijing University of Technology and City University of Seattle,<sup>171</sup> as well as a consulting company, a vocational college and a vocational institute teaching auto repair. The company operates a network of community colleges in Canada and is publicly listed on both American and Canadian stock exchanges. CIBT is relatively unique in that it operates a consulting company, its own independent vocational schools, and an international degree program in cooperation with a Chinese university. As a listed company, its relative success or failure may be instructive for other education management companies seeking to enter the China market.<sup>172</sup>

#### D. Distance Education Initiatives

Distance education initiatives involve their own complexities. In the US, private and public institutions have developed their own distance learning initiatives, many forming for-profit subsidiaries that allow for the development and marketing of e-learning in China, albeit without the necessary approvals.<sup>173</sup> Institutions need to appreciate the pervasive

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167. See WTO Education Commitments, *supra* note 6, at 3.

168. See, e.g., Provisional Regulations on Using Foreign Investment to Reorganize State-Owned Enterprises (2003); Provisional Measures on the Administration of the Transfer of State-Owned Property Rights in Enterprises (2004); Rules on the Evaluation and Management of State Assets, art. 3 (1991); Research Center of the State-Owned Asset Supervision and Management Commission of the State Council, Adhere to the Orientation of State-Owned Enterprise Reform to Propel the Standardized State-Owned Enterprise Restructuring (Apr. 18, 2006); ORGANISATION OF ECONOMIC COOPERATION AND DEVELOPMENT, *China: Open Policies Towards Mergers And Acquisitions* 53-54 (2006).

169. Zimmerman, *supra* note 75, at 472.

170. 2007 MOE Cooperative Education Notice, *supra* note 132, pmb1.

171. See, e.g., City University of Seattle—Asia, China, Beijing, <http://www.cityu.edu/locations/beijing.htm>, and 美国城市大学 Beijing University of Technology CIBI School of Business, <http://www.cibt.edu/zhaosheng/meiguo.html>.

172. See, e.g., CIBT Corporation Homepage, *available at* <http://www.cibt.net/>; Jinhua College of Vocation and Technology Homepage, *available at* <http://www.jhc.cn/>.

173. See Risa L. Lieberwitz, *The Corporatization of the University: Distance*

regulation of content on the Internet by the Chinese government and should only consider marketing e-learning programs to students in China after gaining an understanding of the specific issues that can impact such programs. Such e-learning programs vary widely.

These programs take diverse forms, including: partnerships between public or private sector colleges and universities and for-profit corporations to market distance learning; for-profit subsidiaries, wholly-owned by a public or private nonprofit college or university; for-profit subsidiaries of a public or private nonprofit college or university, funded by venture capital; and for-profit distance learning institutions created and owned by a for-profit corporation.<sup>174</sup>

Similar models exist in China, and several have expanded considerably in recent years, as domestic authorities encourage the use of distance learning in higher education, but require that providers obtain several approvals and licenses before an entity can even establish the necessary infrastructure and websites, let alone confer a degree upon a student.<sup>175</sup> It is important to note, however, that private entities may only provide the technical platform to provide distance education in China and must partner with an IHE in order to confer a degree.<sup>176</sup> That is, as a legal matter, private entities themselves may not provide “educational services” as that term is thought of under Chinese law, only the websites and other means of access from which educational services are delivered.

Specifically, educational websites and online education schools may provide higher education, teacher education, vocational education, adult education and other public educational information to Chinese citizens in the form of online content or through other means not involving a classroom.<sup>177</sup> The term “educational websites” refers to organizations

*Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L.J. 73, 74 (2002). These programs are available in China simply via Internet access.

174. *Id.* at 104.

175. See Higher Education Law of the People’s Republic of China, *supra* note 22, at art. 16; Decision on Setting Down Administrative Licenses for the Administrative Examination and Approval Items Really Necessary to be Retained (State Council, June 29, 2004).

176. Four such entities were among a larger wave of initial public offerings recently concluded by Chinese entities in the United States. See New Oriental Education & Technology Group Inc., Prospectus (Form 424(b)(4)), at 93 (Sep. 6, 2006), available at <http://www.sec.gov/Archives/edgar/data/1372920/000119312506186897/d424b4.htm> [hereinafter New Oriental Prospectus]; ChinaCast Education Corp., Prospectus (Rule 424(b)(3)), at 27 (June 25, 2007), available at <http://files.shareholder.com/downloads/CCHYY/0x0xS950134-08-1203/1261888/filing.pdf> [hereinafter ChinaCast Prospectus]; ChinaEdu Co., Prospectus (Form 424(b)(4)), at 118 (Dec. 11, 2007), available at <http://bit.ly/bKKiCY> [hereinafter ChinaEdu Prospectus]; Rick Aristotle Munarriz, *A Chinese IPO for Thinkers*, MOTLEY FOOL (Nov. 27, 2007), <http://www.fool.com/investing/international/2007/11/27/a-chinese-ipo-for-thinkers.aspx>.

177. Administrative Regulations on Educational Websites and Online and Distance

providing education or education-related information services to website visitors by means of a database or online education platform connected via the Internet or an educational television station.<sup>178</sup> “Online education schools” refer to education websites that issue educational certificates in connection with education services or training.<sup>179</sup> In marketing their services, online education schools may not recruit existing full-time students, and schools offering online degrees may only recruit working adults.<sup>180</sup> Moreover, service providers may not set up stand-alone websites without coupling them to a physical, brick-and-mortar presence.<sup>181</sup>

Indeed, for online degree programs, Chinese law requires the establishment of physical support centers (typically referred to as “learning centers”) to assist enrolled students.<sup>182</sup> The centers may not recruit students, teach students, or issue degrees in their own right; rather, these activities must be conducted in conjunction with the IHEs awarding the actual degrees.<sup>183</sup> In addition, learning centers may not conduct any business that is irrelevant to online education services.<sup>184</sup> Each learning center is required to be associated with at least one educational institution or other entity approved by the MOE to provide online education services, and can only provide logistics services to educational institutions for the recruitment of students and the administration of examinations.<sup>185</sup>

Moreover, each learning center and the educational institution with which it is associated must jointly apply to the education authorities for approval before the learning center can provide services to any online education program.<sup>186</sup> Additional approvals are required for a learning

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Education Schools (2000).

178. *Id.*

179. *Id.*

180. Circular on the Student Enrollment of Online Degree Education by the Pilot Universities Which Are Permitted to Operate Online Degree Education (MOE, Feb. 27, 2004).

181. *Id.*

182. Principles on the Establishment and Administration of Modern Distance Education Off-Campus Learning Center (Pilot) (MOE 2002); Interim Provisions on Administration of Modern Distance Education Off-Campus Learning Center (MOE 2003).

183. Principles on the Establishment and Administration of Modern Distance Education Off-Campus Learning Center (Pilot) (MOE 2002).

184. *Id.*

185. *Id.*

186. ChinaEdu Co. Prospectus, *supra* note 176, at 119; 关于现代远程教育校外学习中心(点)建设和管理的原则意见 (教高厅 (2002) 1号) [Opinions on the Principles Regarding the Establishment and Management of Modern Distance Education Local Learning Centers] (promulgated Jan. 7, 2002, effective Jan. 7, 2002), art. 4; 现代远程教育校外学习中心(点)暂行管理办法 (教高厅(2003)2号) [Provisional Measures Concerning the Management of Modern Distance Education Local Learning Centers] (promulgated Mar. 10, 2003, effective Mar. 10, 2003), arts. 6, 7.



center if it intends to provide support services to additional educational institutions.<sup>187</sup> The education authorities have the authority to supervise, inspect and evaluate the learning centers from time to time.<sup>188</sup> A learning center's approvals may be withdrawn by the education authorities if during a periodic inspection they determine that the learning center is unqualified to continue operations.<sup>189</sup>

To date, however, there has been no reported instance of a foreign provider receiving the appropriate approvals to operate a distance learning initiative. This is not to say that foreign providers are prohibited from providing distance education in China, just that none has yet received the approval to do so.

Notably, online education requires compliance with several rules and regulations beyond those described above, including some that require schools to simply register the fact that they are offering an online degree program.<sup>190</sup> For example, "Internet content providers," like e-learning companies, are prohibited from producing, copying, publishing or distributing information that opposes fundamental principles outlined in the Constitution, disrupts social stability, insults or slanders a third party, infringes the lawful rights and interests of others, or otherwise violates relevant laws and administrative regulations.<sup>191</sup> Internet content providers operating bulletin board services may not disclose personal user information to any third party without the user's consent, absent compulsory legal processes.<sup>192</sup> Chinese parties licensed to provide online content for profit, typically private companies, may not lease, transfer, or sell that license to a foreign provider, or provide transmission facilities.<sup>193</sup> Under rules issued jointly by GAPP and the MIIT, distance learning providers must secure approvals if they plan to:

[S]elect, edit and process works created by themselves or others (including content from books, newspapers, periodicals, audio and video products, electronic publications, and other sources that have already been formally published or works that have been made public

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187. Opinions on the Principles Regarding the Establishment and Management of Modern Distance Education Local Learning Center, *supra* note 186, at art. 4.

188. *Id.*

189. *Id.*

190. Yong Zhao, Gaoming Zhang, & Ning Li, *The Life of "Internet Colleges": Policies, Problems, and Prospects of Online Higher Education in China*, 41 *EDUCAUSE REV.* 48 n.6 (Nov.–Dec. 2006), available at <http://connect.educause.edu/Library/EDUCAUSE+Review/TheLifeofInternetColleges/40672?time=1234422882>.

191. Nick Abrahams & Trent Lyndon, *Digital Content Distribution in the Asia Pacific Region*, 25 *COM. & MEDIA LAW ASS'N INC.* 1 (Sep. 2006), available at <http://www.camla.org.au/clb/CLB%20-%20Volume%2025,%20Issue%201.pdf>.

192. See Internet Electronic Bulletin Board Service Administrative Measures.

193. Notice on Strengthening Management of Foreign Investment in Operating Value-Added Telecom Services (MII, July 2006).

in other media) and subsequently post this content on the Internet or transmit it to users over the Internet for browsing, use or downloading by the public.<sup>194</sup>

Distance learning providers must also secure a license from the State Administration of Radio, Film, & Television (SARFT) to transmit any audio-visual material over the Internet, a television, or a mobile phone.<sup>195</sup> Moreover, as in most western countries, institutions are also liable for publishing copyrighted material on the Internet without prior authorization from the copyright holder.<sup>196</sup>

Foreign IHEs only recently began to apply for the licenses that would allow them to award degrees in China based entirely on distance learning programs.<sup>197</sup> The Stevens Institute of Technology and the University of Massachusetts offer online degree programs in China, such degrees, while they may be recognized in the United States, are not officially recognized or approved by the MOE or other agencies.<sup>198</sup> Some foreign colleges and universities have instead opted to offer non-degree, stand-alone educational content in partnership with commercial distance education providers, as demonstrated by the Western Institute of Technology at Taranaki, New Zealand, and the British Columbia Institute of Technology, both of whom partnered with ChinaEdu to provide in-room classes under ChinaEdu's private international curriculum program.<sup>199</sup> As of November 2007, however, no foreign educational provider had partnered with a Chinese IHE to offer Ministry-approved, degree-awarding higher education online.<sup>200</sup> Instead, as of December 2007, the MOE had licensed 68 *domestic* colleges and universities to offer such programs under a special pilot initiative.<sup>201</sup>

194. ChinaEdu Prospectus, *supra* note 176, at 123-24; 互联网出版管理暂行规定 (新闻出版总署, 信息产业部令第17号) [Provisional Regulations for the Administration of Internet Publishing] (promulgated by the State Press and Publications Administration and the Ministry of the Information Industry, Jun. 27, 2002, effective Aug. 1, 2002), arts. 5, 6.

195. 互联网等信息网络传播视听节目管理办法 (国家广播电影电视总局令第39号) [Measures for the Administration of the Publication of Audio-Visual Programs through the Internet and Other Information Networks] (promulgated by State Administration of Radio, Film and Television Order No. 39, Jul. 6, 2004, effective Oct. 11, 2004), art. 6.

196. 互联网著作权行政保护办法 (国家版权局、信息产业部令2005年第5号) [Measures for the Administrative Protection of Internet Copyright] (promulgated by National Copyright Administration, Ministry of Information Industry of the People's Republic of China, Apr. 29, 2005, effective May 30, 2005), art. 2.

197. UMass, *supra* note 110. While Stevens Institute of Technology and other schools have offered online degree programs in China for quite some time, such degrees are not officially recognized or approved of by the Ministry of Education.

198. *Id.*

199. ChinaEdu Prospectus, *supra* note 176, at 110-11.

200. *See id.* at 110.

201. ChinaCast Prospectus, *supra* note 176, at 28.

## IV. RESULTS AND FUTURE REFORMS

The challenges China faces in developing and increasing the education of its present and future workforce are daunting, but receiving considerable attention from policy experts and Chinese officials alike. According to the Vice Minister of the Development Research Center of China's State Council, Li Jiange, in China "[f]ormal education falls short. . .in terms of teaching methods, curriculum, and pedagogies, and needs to be adjusted to respond to the new demands of economic and social development."<sup>202</sup> Li believes that "[t]he role of government needs to shift from that of key decision maker and sole provider of education and training to that of system architect, rule-maker and promoter."<sup>203</sup> He therefore advocates lowering barriers to private capital and transforming government from a direct manager of education into a policy-making body focused on quality concerns and financing, much like the Department of Education in the United States.<sup>204</sup> To successfully affect this transition, however, several additional changes must occur.

First, Chinese colleges and universities must institute modern, effective governance. To its credit, the central government has paved a path towards greater institutional autonomy, carrying out decentralization and market-based reforms beginning in the mid-1980s to reduce the burden of education on the central government, and letting local governments and individual institutions play a greater role in management and financing.<sup>205</sup> As of 2001, 71 IHEs were under the direct control of the central government, while the number under the leadership of local governments had reached 896.<sup>206</sup> Moreover, the MOE sends 100 college and university presidents and party secretaries abroad each year to learn about leadership and management from top-flight research institutions like the University of Michigan and Yale University.<sup>207</sup> Nonetheless, in China education is still viewed as a mechanism for spreading official ideology,<sup>208</sup> and colleges and universities still follow the Mao-era model in which Party leadership within each IHE controls policy-making, budgets, and personnel decisions, while administrators implement Party directives.<sup>209</sup> Moreover, the consolidation of institutions mentioned above has created an often bizarre mix of

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202. Dalhman et al., *supra* note 1, at xvi.

203. *Id.*

204. *See id.*

205. Ngok King Lun & Chan Kin Keung, *Towards Centralization and Decentralization in Educational Development in China: The Case of Shanghai*, in CENTRALIZATION AND DECENTRALIZATION: EDUCATIONAL REFORMS AND CHANGING GOVERNANCE IN CHINESE SOCIETIES 81 (Ka-ho Mok, ed. 2003).

206. Lixu, *supra* note 19, at 16.

207. *See* Constance Ewing Cook, *How China is Reforming Higher Education*, CHANGE, May/June 2008, 33.

208. Lun & Keung, *supra* note 205, at 82.

209. Cook, *supra* note 207, at 33, 34.

institutions with different disciplinary focuses and cultures, as well as geographic locations, which further complicates attempts to institute effective governance.<sup>210</sup> As one scholar pointed out, the state of governance in China's top universities makes the goal of becoming a world leader in education particularly unrealistic: even Tsinghua University and Peking University, among the most renowned universities in China, have between twelve and sixteen people serving simultaneously as university head.<sup>211</sup>

Second, China must establish and refine a reliable system for enhancing and measuring quality. For students, the "normative pedagogy is the lecture, and many university curricula still focus on narrow occupational preparation as opposed to a liberal arts education that teaches critical thinking and problem-solving."<sup>212</sup> For teachers, institutions have begun to stress publications in international journals, international citations, and involvement in international faculty exchange programs as qualitative measures.<sup>213</sup> For the overall system, six organizations publish rankings of the top Chinese universities.<sup>214</sup> Of the rankings, however, none provides a stable data set or a sufficiently transparent methodology that can be used to reliably measure performance.<sup>215</sup> Meanwhile, inconsistent standards for faculty evaluations, promotions based on seniority, and problems of corruption and plagiarism undermine any quality improvements that have been made.<sup>216</sup> Moreover, if Chinese IHEs are to maintain the 14:1 mandatory student-to-teacher ratio in higher education and the requirement that professors hold at least a master's degree in their field, then China needs to produce an additional 220,000 qualified professors in the near term.<sup>217</sup> The State Council has called for "[r]aising the quality of higher education" and deepening the reform of "the system for measuring educational quality[.]" but has no plans as of yet for a formal measurement mechanism.<sup>218</sup>

Third, China needs a better system of financing for higher education. Educational expenditures are undertaken by lower levels of government that lack independent sources of revenue and must rely upon wealth

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210. *Id.* at 34; *see also* Li et al., *supra* note 2, at 11 (discussing, for example, the incorporation of Beijing Medical University into Peking University in 2000).

211. Lixu, *supra* note 21, at 21.

212. Cook, *supra* note 207, at 34.

213. Li et al., *supra* note 2, at 12.

214. Nian Cai Liu & Li Liu, *University Rankings in China*, 30 HIGHER EDUC. IN EUROPE 217 (2005).

215. *Id.* at 226.

216. Cook, *supra* note 207, at 34.

217. Lixu, *supra* note 21, at 21.

218. 国务院关于印发2008年工作要点的通知 (国发(2008)15号) [Notice of the State Council on Printing and Distributing the Major Tasks for 2008] (promulgated & effective Mar. 29, 2008), arts. 30, 31.

transfers from the central government.<sup>219</sup> Thus, the government needs to design a system of fiscal transfers between the different levels of government that ensures that the money reaches the administrative bodies that are responsible for delivering such services.<sup>220</sup>

For now, the latest central plan emphasizes student loans to help poorer students gain access to higher education.<sup>221</sup> But lenders, in particular the four biggest commercial banks in China, are wary of providing money to poor Chinese citizens, and often ask them to pay back the balance of loan payments as soon as they graduate.<sup>222</sup> Indeed, if students do not pay back their loans before they graduate, then they may not be granted whatever degree or certificate for which they took out the loans, which drastically reduces their chances of finding employment that would enable them to pay back the loans in the first place.<sup>223</sup> Though the government does not currently tax the interest on savings accounts opened specifically for education, clearly more must be done.<sup>224</sup>

Other developing nations have shored up deficiencies in domestic education systems by using sovereign wealth to import educational services, a phenomenon that one observer described as an “educational gold rush.”<sup>225</sup> Qatar used wealth from its natural gas reserves to fund branch campuses for five American universities in Education City, a brand-new complex just outside Doha.<sup>226</sup> Singapore’s sovereign wealth funded overseas offerings for the University of Nevada, Las Vegas, New York University, Duke, the University of Chicago and Australia’s University of New South Wales.<sup>227</sup> Three of the United Arab Emirates poured petrodollars into branch campuses for George Mason, NYU and Michigan State.<sup>228</sup> As host governments often pay all start-up and operational expenses, including salaries for faculty members and administrators, the willingness of other nations to import education has helped U.S. institutions expand overseas without incurring heavy up-front costs.<sup>229</sup>

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219. OECD 2005 SURVEY, *supra* note 19, at 24.

220. *Id.* at 53.

221. Li et al., *supra* note 2, at 27.

222. *Id.* at 27.

223. *Id.*

224. See OECD 2005 SURVEY, *supra* note 17, at 192.

225. Tamar Lewin, *US Universities Rush to Set Up Outposts Abroad*, N.Y. TIMES, Feb. 10, 2008, <http://www.nytimes.com/2008/02/10/education/10global.html>.

226. Lucy Hodges, *Qatar: An Oasis of Education in the Desert*, INDEPENDENT (UK), May 15, 2008, <http://www.independent.co.uk/news/education/higher/qatar-an-oasis-of-learning-in-the-desert-828049.html>.

227. John Austin, *New Center Helps Make A&M a Pioneer*, FORT WORTH STAR-TELEGRAM, Mar. 19, 2007, at A9.

228. Lewin, *supra* note 225.

229. See Jodi S. Cohen, *NU Expands 2 Schools to Mideast: Qatar to pay start-up costs and salaries*, CHIC. TRIB., Nov. 8, 2007, at 7.

Indeed, overseas education is now a billion-dollar business for U.S. colleges and universities.<sup>230</sup> There are now more than one hundred and sixty branch campuses worldwide, a dramatic increase from thirty-five just a decade ago, with China playing host to fifteen such campuses.<sup>231</sup>

China, on the other hand, does not yet use its budget or its sovereign wealth to fund branch campus build-outs for foreign institutions.<sup>232</sup> Were China to use its sovereign wealth to attract schools from the United States and the United Kingdom, or even simply reduce restrictions on their involvement in the Chinese educational system, these institutions could provide China with instant access to quality resources and more spots for Chinese nationals to earn reputable degrees from programs conducted at home.<sup>233</sup> In addition, supplementing local provision of higher education with foreign education in the PRC would not only postpone the expensive task of building local infrastructure, but also aid in the improvement of local educational providers.<sup>234</sup> Like it or not, the United States and the United Kingdom dominate education, and the Chinese government stands to benefit from their expertise.<sup>235</sup> But as it stands, Chinese law often inhibits IHEs from entering China by placing too much power in the hands of Chinese partners and the Chinese government and by focusing too much attention on brand names.<sup>236</sup>

#### V. CONCLUSION

We hope that in writing this Article we have helped to smooth the road for future partnerships between PRC and foreign IHEs by (1) providing a background on the Chinese educational system, (2) reviewing the laws and regulations governing foreign involvement in higher education in the PRC, and (3) highlighting areas for future reform and change. We note that the ground covered in this Article is neither exhaustive nor static. As in the United States, Chinese laws are frequently updated and amended, and those laws involving foreign parties are prone to even more change than bodies of law focused solely on Chinese companies and citizens.

We also hope that this Article provides strategic insight into those areas in which foreign IHEs can lend assistance. To reiterate, there are three

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230. Ann McClure, *Made in America: IHEs Strive to Ensure Academic Quality as they Expand Globally*, U. BUS., Oct. 1, 2006, at 50.

231. Scott Jaschik, *International Campuses on the Rise*, INSIDE HIGHER ED, Sept. 3, 2009, available at <http://www.insidehighered.com/news/2009/09/03/branch>.

232. See, e.g., MICHAEL F. MARTIN, CHINA'S SOVEREIGN WEALTH FUND, CRS REPORT FOR CONGRESS ORDER CODE RL34337, at 9-10 (Jan. 22, 2008) (describing investments by the China Investment Corporation).

233. See Simon Marginson, *Dynamics of Global Competition in Higher Education*, 52 HIGHER ED. 1, 19-21 (2006).

234. *Id.* at 20.

235. *Id.* at 25.

236. See Gow, *supra* note 13, at 7-8.

main areas in higher education that the Chinese government hopes to improve: the quality of education provided by Chinese schools, the research and innovation conducted in Chinese universities, and the ranking of China's leading universities as world-class institutions.<sup>237</sup> Foreign college and universities that can find synergies between their own goals and the Chinese government's policies, as well as the needs of the Chinese people, will be better served in the long run than those that look toward China solely as a potential revenue source, given its huge population. China hopes to match international standards rather quickly, but some college and university leaders think it could take as long as fifty years before reforms in education help China reach its goals.<sup>238</sup> Any party that can help China achieve this goal in a shorter time frame would, we think, find both substantial success and strong support in the PRC.

Finally, we should note that it is not uncommon to see Chinese and foreign parties have disputes after years of successful collaboration.<sup>239</sup> In 2001, for example, the University of Colorado at Denver attempted to unilaterally raise tuition in a joint degree program offered in partnership with China Agricultural University.<sup>240</sup> The program fell apart in 2005, only to be resurrected in 2007.<sup>241</sup> Of course, such problems can occur in any relationship, so it is best for institutions considering such a partnership to "choose wisely."<sup>242</sup>

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237. See Cook, *supra* note 207, at 37–38.

238. *Id.*

239. Bruce Finley, *Rising China Carving its own Path*, DENVER POST, Apr. 8, 2001, available at <http://extras.denverpost.com/news/news0408e.htm>.

240. *Id.*

241. University of Colorado at Denver and Health Sciences Center, *Chinese Students, UCDHSC Ready for Reintroduction* (Aug. 14, 2007).

242. INDIANA JONES AND THE LAST CRUSADE (Lucasfilm 1989).

# COMMON LEGAL ISSUES WHEN EMPLOYING STAFF IN SUPPORT OF OVERSEAS ACADEMIC PROGRAMS

PETER F. MAY \*

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INTRODUCTION

Internationalization of the curriculum has become a top priority for colleges and universities of all sizes in the United States. Once considered something of a luxury, colleges and universities now routinely seek to offer their students opportunities to extend their educational experience to an overseas setting. During the 2007–2008 academic year, 262,416 U.S. students studied abroad, up eight and a half percent from the year before, according to the latest annual survey by the Institute of International Education (IIE).<sup>1</sup> In November 2005, the Congressionally and federally appointed Lincoln Commission issued recommendations in support of expanding to one million the number of American students studying abroad annually in the next decade.<sup>2</sup>

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1. INSTITUTE OF INTERNATIONAL EDUCATION, OPEN DOORS 2009: REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE (2009), <http://opendoors.iienetwork.org/?p=150651> [hereinafter OPEN DOORS].

2. COMMISSION ON THE ABRAHAM LINCOLN STUDY ABROAD FELLOWSHIP PROGRAM, GLOBAL COMPETENCE AND NATIONAL NEEDS: ONE MILLION AMERICANS STUDYING ABROAD (2005), *available at* <http://www.forumea.org/documents/>

Unprecedented growth in demand for overseas programs will challenge colleges and universities in many ways. In 2008, two major study abroad membership groups issued substantial white papers providing guidance to their college and university member institutions on (a) best practices in management of study abroad programs<sup>3</sup> and (b) ethical principles for study abroad.<sup>4</sup> Growth in study abroad activities, as well as the financial management and other business practices of colleges and universities as they relate to study abroad, have also recently attracted the scrutiny of regulators and law enforcement authorities, as demonstrated by the investigation into college and university study abroad business practices launched in 2007 by the Attorney General of the State of New York,<sup>5</sup> and later joined by the Attorney General of Connecticut.<sup>6</sup> As the spotlight increasingly shines on study abroad programming, colleges and universities will need to take care that they are applying the same level of legal, administrative and risk management discipline and oversight to these activities as they do in relation to their domestic affairs.

To support growth in demand for overseas programming, colleges and universities will need to determine which program models best suit their needs and aspirations, taking into account a host of evaluative factors, from availability of investment resources to ability to collaborate with foreign partners, to tolerance for organizational risk.<sup>7</sup>

This Article will introduce college and university legal counsel and administrators to some of the key issues to be considered when launching and sustaining college and university activities outside of the United States, with a particular focus on labor and employment challenges. Section I will provide an overview of some of the most common academic programs and research activities engaged in by colleges and universities and the range of

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lincoln\_commission\_report.pdf.

3. NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS, STRENGTHENING STUDY ABROAD: RECOMMENDATIONS FOR EFFECTIVE INSTITUTIONAL MANAGEMENT FOR PRESIDENTS, SENIOR ADMINISTRATORS, AND STUDY ABROAD PROFESSIONALS (2008), [http://www.nafsa.org/\\_/File/\\_/final\\_imsa\\_taskforce.pdf](http://www.nafsa.org/_/File/_/final_imsa_taskforce.pdf).

4. THE FORUM ON EDUCATION ABROAD, CODE OF ETHICS FOR EDUCATION ABROAD (2008), <http://www.forumea.org/documents/ForumonEducationAbroadCodeofEthics.pdf>.

5. See Jonathan D. Glater, *Inquiry of Study Abroad Programs Grows*, N.Y. TIMES, Jan. 21, 2008, at A10.

6. Diana Jean Schemo, *Study Abroad is New Focus of Inquiry Into Perks*, N.Y. TIMES, Aug. 16, 2007, at A13; Elizabeth F. Farrell, *New York Attorney General Seeks Information from Study-Abroad Providers*, CHRON. OF HIGHER EDUC., Aug. 15, 2007, available at <http://chronicle.com/article/New-York-Attorney-General/39400>.

7. See generally BARBARA A. HILL & MADELEINE F. GREEN, A GUIDE TO INTERNATIONALIZATION FOR CHIEF ACADEMIC OFFICERS (American Council on Education 2008); *Cross Border Activities of Colleges and Universities*, ABANA REV. (Arab Bankers Ass'n of N. Am. New York, N.Y.), Winter 2005, at 7-9, available at [http://www.arabbankers.org/download/123321\\_U127360\\_\\_150842/ABANA\\_Review\\_Winter05.pdf](http://www.arabbankers.org/download/123321_U127360__150842/ABANA_Review_Winter05.pdf).

legal operating models available to support them. Section II will discuss the three main categories of college and university employees working outside the United States and the typical sources of foreign law and regulation generally applicable to their employment. It will also review some of the key concepts concerning employment, tax and immigrant status, as distinct from the concept of labor authorization. Section III will review some of the key legal and practical concepts applicable to employment agreements in the international context. Section IV will address issues important to the termination of the employment relationship. Section V will briefly survey issues relating to the application of foreign benefit schemes and Section VI will flag additional issues to consider when employing staff abroad.

The legal landscape with respect to employment varies dramatically from country to country. The observations expressed in this Article are necessarily general and are drawn from the author's experience advising an accredited international education and exchange organization in relation to its education and development assistance activities in more than fifty countries. They are meant to be a practitioner's overview of the topic and to provide college and university counsel and administrators with a solid basis to begin asking questions of host country local counsel.<sup>8</sup> Local counsel, critical to the successful implementation of international programming, can best guide the college or university attorney or administrator to the specific statutory and other frameworks applicable to the college or university's proposed employment activities.<sup>9</sup>

As a first step towards assisting a client institution in understanding its appetite and options in the international arena, college and university counsel must work closely with college and university officials at every level. What was once a somewhat overlooked and often highly diffuse set of activities, housed in disparate parts of the institution, must now be examined with discipline. Mandates from, and the explicit support of, the college and university's highest authorities, including the Board of Trustees and the President, are crucial.<sup>10</sup> Counsel should also work with study

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8. See Peter F. May, *12 Risky Issues When Hiring Abroad*, CHRON. OF HIGHER EDUC., Mar. 21, 2010, available at <http://chronicle.com/article/12-Risky-Issues-When-Hiring/64744/>.

9. See, e.g., Lex Mundi, [http://www.lexmundi.com/lexmundi/Member\\_Search.asp?SnID=1417148456](http://www.lexmundi.com/lexmundi/Member_Search.asp?SnID=1417148456) (last visited Mar. 4, 2010); International Lawyers Network, <http://iln.com/> (last visited Mar. 4, 2010); HG.org, Law Firms and Lawyers International Associations, <http://www.hg.org/lawfirms-associations.html> (last visited Mar. 4, 2010); William P. Nicholson, *Global Engagement: Key US and Foreign Law Considerations When Doing Business Abroad*, National Association of College and University Attorneys Annual Conference Presentation, June 24-27, 2009, at 3 n.3 (recommending clients to obtain lawyer referrals from other entities working in the foreign country, domestic law firms that work internationally, etc.) (on file with the author).

10. HILL & GREEN, *supra* note 7, at 1, 7.

abroad officers, international program faculty, and relevant academic department heads and deans to inventory exactly what activities are currently taking place.<sup>11</sup> Without a full understanding of an institution's existing footprint of activities, college and university counsel cannot effectively advise on potential existing exposures or recommend alternative program models that might better meet the largest number of institutional priorities.

Perhaps the most common basis for foreign programming misadventures is the scenario where faculty or international programs office staff initiate significant levels of activity in a foreign jurisdiction, often the fruit of long-standing professional and intellectual ties with like minded academics, without recognizing, analyzing and anticipating the need for significant financial and legal support. This Article will hopefully add some analytical tools for counsel and administrators to help steer their institutions and faculty through uncharted waters. The enduring success of college and university internationalization efforts will depend in part upon identifying and addressing the legal and administrative challenges up front, before significant institutional resources and credibility have been put on the line.

#### I. OVERVIEW OF COMMON OVERSEAS PROGRAM STRUCTURES AND OPERATING MODELS

This section will provide an introduction to the common international operating models available to colleges and universities in foreign jurisdictions. Section I.A will provide some background definitions from the emerging lexicon of international programming, defining in particular "College and University-Sponsored Programs," "Contractual Programs," and "Permissive Programs."<sup>12</sup> Section I.B will introduce the reader to some common threshold issues to be addressed when evaluating proposed operating models. It will then offer a range of typical operating models generally available to colleges and universities operating abroad. The discussions in Section I.A and Section I.B will set the stage for understanding some of the legal and administrative issues relating to the employment of staff overseas.

##### A. The Emerging Lexicon of International Programming

Understanding the range of international activities now being undertaken by colleges and universities and their students, faculty and staff provides a helpful starting point for examining programming models. Examples of typical college and university overseas activities include:

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11. William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth the Life of a Student: Reducing the Risk in International Programs*, 27 J.C. & U.L. 151, 162 (2000).

12. *Id.* at 155–57.

- Direct enrollment relationships with foreign institutions<sup>13</sup>
- Students enrolled in home college and university campuses located abroad
- Mutual student and faculty exchange programs
- Internships, independent study, and service learning<sup>14</sup> experiences
- Joint ventures with foreign institutions
- Faculty led short-term study tours
- Student organizations and clubs traveling internationally (music groups, athletes)
- Faculty research and sabbaticals
- Attendance at conferences and other meetings
- Alumni travel abroad programs

Each of the above activities falls within one of the following three program categories: College and University-Sponsored Programs; Contractual Programs; and Permissive Programs.<sup>15</sup>

### 1. College and University-Sponsored Programs

College and university-sponsored programs<sup>16</sup> are organized, operated and maintained by a college or university with little or no outside assistance. Traditional study abroad programs—ten weeks or more of study resulting in academic course credit<sup>17</sup>—can fall into this category, as well as short-term, faculty-led trips and service learning or internship opportunities organized by a college or university. Language immersion

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13. “Direct enrollment” generally refers to relationships where a U.S. college or university enters into an agreement with a host institution in a foreign country pursuant to which the host institution agrees to enroll the U.S. institution’s students in the host institution’s academic program or in a program customized for the U.S. institution’s students as a group. *See generally* NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS, NAFSA’S GUIDE TO EDUCATION ABROAD FOR ADVISERS AND ADMINISTRATORS (3d ed. 2005).

14. “The term ‘service-learning’ means a method—(A) under which students or participants learn and develop through active participation in thoughtfully organized service that—(i) is conducted in and meets the needs of a community; (ii) is coordinated with an elementary school, secondary school, institution of higher education, or community service program, and with the community; and (iii) helps foster civic responsibility; and (B) that— (i) is integrated into and enhances the academic curriculum of the students, or the educational components of the community service program in which the participants are enrolled; and (ii) provides structured time for the students or participants to reflect on the service experience.” 42 U.S.C. § 12511(40) (2006).

15. *See* Hoye & Rhodes, note 11, at 155–57; GALLAGHER HIGHER EDUCATION PRACTICE GROUP, COLLEGE AND UNIVERSITY INTERNATIONAL EDUCATION PROGRAMS: MANAGING THE RISKS (2007), *available at* [http://www.nacua.org/documents/ManagingTheRisks\\_GallagherIntl.doc](http://www.nacua.org/documents/ManagingTheRisks_GallagherIntl.doc) (adopting Hoye and Rhodes’ categories).

16. Hoye & Rhodes, *supra* note 11, at 155.

17. GALLAGHER, *supra* note 15, at 7.

programs are also a popular college and university-sponsored activity. While college and university-sponsored programs may be sponsored by more than one U.S. institution, the critical distinguishing factor is that no outside contracted entities are involved in the design or delivery.

With respect to employment issues, college and university-sponsored programs create the greatest degree of legal, administrative and liability risks for an institution because there is no other party to which any or all of such risks may be transferred.<sup>18</sup>

## 2. Contractual Programs

Contractual programs<sup>19</sup> involve the outsourcing by a college or university of most, if not all, aspects of a particular overseas academic offering. Generally, an overseas institution or a domestic study abroad provider organization designs and administers the program in consultation with the college or university. Alternatively, a college or university may enter into a formal exchange agreement with another host institution, in which all aspects of the relationship (recruiting, admissions, tuition, credit transfer, and other matters) are addressed.<sup>20</sup> Increasingly, colleges and universities are turning to contractual programs for shorter-term foreign programs, such as experiential and service learning trips, internships for work experience in a chosen field, and language immersion programs.<sup>21</sup>

With respect to employment issues, contractual programs create legal, administrative and liability risks to the institution, but they can usually be managed to minimize liability for the institution through well-crafted contracts, hold-harmless agreements, waivers, and other similar measures.<sup>22</sup> In the employee context, however, it is important to note that some jurisdictions impose joint and several liability upon companies and their subcontractors for the proper registration and treatment of the subcontractor's employees.<sup>23</sup>

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18. Hoye & Rhodes, *supra* note 11, at 155.

19. *Id.* at 155–56.

20. *Id.* at 155; GALLAGHER, *supra* note 15, at 8.

21. OPEN DOORS, *supra* note 1; Beth McMurtrie, *Study-Abroad Numbers Continue to Climb, Trips Are Shorter, Report Says*, CHRON. OF HIGHER EDUC., Nov. 16, 2007, International, at A36; Karin Fischer, *Study-Abroad Directors Adjust Programs in Response to Recession*, CHRON. OF HIGHER EDUC., Mar. 6, 2009, International, at A25 [hereinafter Fischer, *Response to Recession*]; Karin Fischer, *More Colleges Coach Professors to Lead Study-Abroad Trips*, CHRON. OF HIGHER EDUC., Feb. 7, 2010, available at <http://chronicle.com/article/More-Colleges-Coach-Professors/63901/> [hereinafter Fischer, *More Colleges*].

22. Contractual agreements with local partners can be a very useful tool for transferring the responsibility for employment related issues, as the local partner agrees to assume all responsibility for the labor relationships required to deliver the program. GALLAGHER, *supra* note 15, at 8; Hoye & Rhodes, *supra* note 11, at 157–58.

23. For example, under Article 42 of the Spanish Workers' Statute, a company that engages part of its own activity with contractors and/or subcontractors can be

### 3. Permissive Programs

Programs that are not required, sponsored, paid for, organized, or endorsed by a college or university may be categorized as permissive programs.<sup>24</sup> Examples include: trips that students, faculty and staff may elect to take for purposes of academic and professional development, such as attendance at conferences; self-funded research and study; or self-organized consulting or lecturing at foreign institutions.

With respect to employment issues, in most instances, permissive travel creates the least amount of legal, administrative and liability risk for colleges and universities.<sup>25</sup> Two important caveats should be borne in mind, however. First, if a student or faculty member remains enrolled or employed by the institution for the duration of the permissive program, it is possible that the college or university may retain a degree of responsibility for potential health and safety related issues during the program. For example, domestic health insurance frequently does not apply to a faculty member or student who is outside the United States.<sup>26</sup> If a faculty member is permitted and funded to travel for professional development purposes,

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found liable for pending salary and social security obligations of the contractor/subcontractor towards its workers. Art. 42 of Texto Refundido de la Ley del Estatuto de los Trabajadores (B.O.E. 1995, 1), available at <http://www.uned.es/ugt/legislacion/estatutodiciembre03.pdf> [hereinafter Spanish Workers' Statute]. In particular, the main company can be held responsible: (1) jointly and severally, for 1 year after the termination of the agreement with the contractor/subcontractor, as a consequence of pending salaries accrued while the agreement was in force, (2) jointly and severally, for some social security obligations accrued while the agreement was in force (e.g., lack of payment of social security contributions), (3) subsidiarily, for other social security undertakings, if the contractor/subcontractor goes bankrupt, and (4) for not having checked whether the contractor/subcontractor fulfils its health and safety commitments. *Id.* In order to avoid, or at least reduce, these risks, the main college or university should obtain from the Spanish social security administration a certificate attesting that the contractor/subcontractor is up to date regarding social security contributions and also make sure, from time to time (e.g., monthly) that the contractor/subcontractor is paying salaries and social security contributions.

Under Spanish law, joint and several liability for employee matters depends in part on whether a company is outsourcing a part of its "own activity" within the meaning of Article 42 of the Spanish Workers' Statute. See Spanish Workers' Statute, *supra* at art. 42. The parameters of "own activity" has not been determined by Spanish statute. A 2002 Spanish labor tribunal case found, for example, that there was no relationship of main company and contractor between an academic center and the company that was providing the canteen service. TSJ, Oct 17, 2002 (J.T.S., No. 3719).

24. GALLAGHER, *supra* note 15, at 8; Hoye & Rhodes, *supra* note 11, at 156.

25. Hoye & Rhodes, *supra* note 11, at 156.

26. U.S. Department of State, *Tips for Traveling Abroad*, [http://travel.state.gov/travel/tips/tips\\_1232.html](http://travel.state.gov/travel/tips/tips_1232.html) (last visited Mar. 5, 2010); Worldwidemedical.com, International Travel Medical Insurance and Visitors Health Insurance – Save Money, <http://www.worldwidemedical.com> (last visited Mar. 5, 2010); International SOS, International SOS – Medical and Security Solutions, Products and Assistance, [www.internationalsos.com](http://www.internationalsos.com) (last visited Mar. 5, 2010).

care should be taken in policy language and other communications to alert the faculty member that his or her coverage may not apply. Similarly, in the case of required internships where a student identifies and vets the internship site and conditions but a faculty advisor or other college or university employee approves the internship, a college or university may face responsibility for ensuring the general appropriateness of the site, or at least for disclosing any material safety information of which it may be aware (e.g., prior incidents of sexual harassment, etc.).<sup>27</sup>

## B. Introduction to Operating Models

Having reviewed the three basic categories of overseas academic programs engaged in by colleges and universities and noted some of the very general employment attributes relating to such categories, this section will inventory some of the common legal operating models available to colleges and universities when initiating overseas academic programs. The common operating models will be categorized according to the contractual program, college and university-sponsored program, and permissive program lexicon.

### 1. Contractual Programs

The range of contractual program operating models is huge. It is also growing, as demand for overseas programming, especially short-term options, continues to rise.<sup>28</sup> Typical arrangements include direct enrollment agreements, variously described “affiliation” agreements, and third-party provider agreements.

#### *a) Direct Enrollment Agreements*

Direct enrollment agreements between U.S. colleges and universities and foreign host institutions are historically the most common model for traditional study abroad.<sup>29</sup> Officials at each institution work together to assemble a written agreement, pursuant to which the U.S. institution’s students are permitted to enroll directly in the host college or university and receive home institution credit on a transfer credit basis upon their return to the United States. While the range of options varies tremendously, often

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27. Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 345, 355–56 (2006).

28. Fischer, *More Colleges*, *supra* note 21; *See also* Press Release, Institute of International Education, Americans Study Abroad in Increasing Numbers (Nov. 16, 2009), available at <http://opendoors.iienetwork.org/?p=150651>; Press Release, Institute of International Education, U.S. Study Abroad Up 8% Continuing Decade-Long Growth (Nov. 17, 2008), available at <http://opendoors.iienetwork.org/?p=131592>.

29. *See generally* Richard Rodman & Martha Merrill, *Unlocking Study Abroad Potential: Design Models, Methods and Masters*, in 18 FRONTIERS: THE INTERDISCIPLINARY JOURNAL OF STUDY ABROAD (Fall 2009).



the host college or university will design a curriculum or suite of course offerings specifically for the U.S. students, especially in countries where English is not the native language.<sup>30</sup> Admissions criteria, tuition arrangements, housing, student discipline, academic probation and other policies must be carefully addressed in the agreement.

To effectively reduce a college or university's exposure to legal and administrative risks in the host country arising out of direct enrollment relationships, care should be taken to avoid the involvement of college and university faculty and staff working on the ground in the host country. As will be noted repeatedly below, the hiring of a single college or university employee working in the host country almost always triggers some level of formal legal responsibility to register or formalize the institution's presence in the host country, notwithstanding the terms of written agreements with host institutions.<sup>31</sup>

For liability purposes, some U.S. colleges and universities require full academic withdrawal or leaves of absence for students who enroll directly with a foreign host institution.<sup>32</sup>

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30. NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS, *supra* note 13, at 183.

31. In India, for example, provisions of the Convention between the Government of the United States of America and the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income concerning the creation of a Permanent Establishment (PE) for tax purposes can be triggered by the presence of a single employee of a foreign entity. *See* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. V, U.S.-India, Sept. 12, 1989, T.I.A.S. No. 11,771, *available at* <http://www.irs.gov/pub/irs-trty/india.pdf> [hereinafter Indo-U.S. DTA]. If the government finds that a permanent establishment exists, the worldwide income of the foreign entity as is attributable to the PE or other business activities carried on of the same or similar kind as those affected through the PE may become subject to Indian taxation. *See id.* at art. VII. *See also* The Supreme Court of India's ruling in *Mumbai v. Morgan Stanley & Co. Inc.* 292 ITR 416 (SC 2007), *available at* <http://vlex.in/vid/dit-international-mumbai-morgan-stanley-inc-29613103>; Foreign Exchange Management (Establishment in India of Branch or Office or Other Place of Business) Regulations, 2000, *available at* [http://www.rbi.org.in/Scripts/BS\\_FemaNotifications.aspx?Id=176](http://www.rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=176) (last visited Apr. 5, 2010) [hereinafter India's Foreign Exchange Management Regulations]; LARRY A. DIMATTEO, *LAW OF INTERNATIONAL CONTRACTING* 273 (2d ed. 2009) (noting that "[i]n Germany, for example, the hiring of a single employee can result in the company being designated as having 'permanent status' which can lead to the taxation of the exporter's German-generated revenues.").

32. *See, e.g.*, Hartwick College, *Study Abroad*, <http://www.hartwick.edu/x13181.xml> (last visited Mar. 5, 2010) (permitting students to take a leave of absence for non-Hartwick College sponsored study abroad); University of California, Santa Cruz, *Leave of Absence for Non-UC Study Abroad*, [http://oie.ucsc.edu/sa/\\_forms/NUCSALeaveOfAbsence.pdf](http://oie.ucsc.edu/sa/_forms/NUCSALeaveOfAbsence.pdf) (last visited Mar. 5, 2010) (requiring leave of absence and liability release for study in countries subject to U.S. State Department Travel Warnings).

*b)Affiliation Agreements*

Affiliation agreements are another way for U.S. colleges and universities to gain access to foreign academic programming. These agreements typically involve a much greater degree of collaboration between institutions and may include student exchanges, faculty exchanges, scholars in residence programs, teacher training, and professional and technical exchanges. As a creature of contract, the parties should carefully examine each activity to be undertaken by each party. In many cases, where U.S. faculty and administrator travel or even temporary relocation to the host country is envisioned, careful attention should be paid to the local rules governing immigration, employment and work permission, as discussed further below.

*c)Third-Party Provider Agreements*

Third-party provider agreements are becoming increasingly popular as colleges and universities attempt to expand the number of overseas offerings for their students while minimizing direct investment costs.<sup>33</sup> In some cases, colleges and universities band together into consortia, for the purpose of setting up a range of programming options to be provided to the member institutions' students, as well as to students from non-member institutions.<sup>34</sup> In other cases, independent study abroad provider organizations contract with colleges and universities to provide established overseas academic program sites with fully developed course curricula, language instruction and student services support.<sup>35</sup>

With respect to legal, administrative and liability concerns, third-party provider arrangements offer an increasingly attractive way for colleges and universities to limit their exposure to risks from activities occurring in a foreign jurisdiction. Agreements address the full range of services to be provided by the third party provider, including enrollment and billing procedures, compliance with local law, independent contractor provisions, allocation of risk, including indemnity and insurance provisions, as well as the range of support for students (medical insurance, evacuation coverage, contingency planning, and risk assessment, etc.). See Appendix A for a sample third party provider agreement between two U.S. institutions.

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33. Elizabeth Redden, *The Middlemen of Study Abroad*, INSIDE HIGHER ED (Aug. 20, 2007), available at <http://www.insidehighered.com/news/2007/08/20/abroad>.

34. See, e.g., IES Abroad, <http://www.iesabroad.org> (last visited Mar. 5, 2010) (IES is a non-profit membership organization comprised of more than 175 academic institutions).

35. See, e.g., Council on International Educational Exchange, <http://www.ciee.org> (last visited Mar. 5, 2010) (operating independent study abroad programs in 35 cities); World Learning, *Welcome to World Learning* (2010), <http://www.worldlearning.org> (World Learning's accredited SIT Study Abroad program offers independent study abroad programs in more than 50 countries).

## 2. College and University-Sponsored Programs

In general, there has been an increasing appetite in higher education, especially among larger institutions with more global brand recognition, to establish all-encompassing branch campuses of their institutions abroad.<sup>36</sup> Care must be taken, however, not to confuse a branch campus, and the U.S. regional accrediting body approval thereof, with the underlying operating model for such activity. Public colleges and universities need to review their charter documents carefully to ensure that appropriate powers have been granted to them to conduct activities directly outside of the United States. In any situation where a U.S. institution seeks to establish a presence in a foreign jurisdiction, great care must be taken at the outset to address fundamental threshold issues. This analytical imperative applies whether the proposed activity involves establishing a complete branch campus or simply sending a group of students and a faculty member on a college or university sponsored inter-term language immersion excursion. See Appendix B for a general checklist of legal and administrative matters to consider when auditing or starting up a college or university sponsored program.

The nature and extent to which a college or university-sponsored program will be subject to legal registration, tax and other responsibilities often depends on an analysis of the nature and extent of the contacts that a college or university and its staff will have with the jurisdiction. Unlike contractual programs, where the legal, tax and administrative burdens of operating in the host country may be transferred by contract to a host institution or a third-party provider, even the most modest college or university-sponsored program often triggers some level of legal responsibility. For example, in the area of immigration, even for short-term programs, appropriate entry visas must be obtained for all participants and accompanying faculty and staff.<sup>37</sup> In the post-9/11 era, gone are the

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36. Tamar Lewin, *U.S. Universities Rush to Set Up Outposts Abroad*, N. Y. TIMES, Feb. 10, 2008, at A1. See also Press Release, New York University: The Office of Public Affairs, NYU to Open Campus in Abu Dhabi (Oct. 12, 2007), available at <http://www.nyu.edu/public.affairs/releases/detail/1787>.

37. Tourist visas may be appropriate for short-term, faculty led academic programs where the duration of the visit is less than 90 days. See, e.g., Embassy of Hungary: Consular Affairs, <http://www.huembwas.org/consul/ENG/consularaffairs.htm> (last visited Mar. 5, 2010). For programs lasting longer than 90 days, however, a student or other residency visa may be required. See, e.g., *id.*; Swiss Federal Department of Foreign Affairs, Schengen Visa Information, [http://www.eda.admin.ch/eda/en/home/rep/nameri/vusa/ref\\_visinf/visusa.html#ContentPar\\_0011](http://www.eda.admin.ch/eda/en/home/rep/nameri/vusa/ref_visinf/visusa.html#ContentPar_0011) (last visited Mar. 5, 2010). While tourist visas may appear to be the easiest route to follow, it should be noted that in most countries immigration officials at the border often have administrative discretion to grant visas of a much shorter duration than the prescribed maximum. In Mexico, for example, Article 42-I of the General Law of Population (Ley General de Población) governs visas granted to tourists. It provides as a maximum a term of six months which is non extendible. Within such period of time,

days when Americans abroad could rely on a sympathetic immigration official or local police if proper visa status was not obtained. Similarly, some jurisdictions require the withholding of employer income tax and payment of social benefits levies on employees working in a country for as few as thirty days.<sup>38</sup> Furthermore, it is typical for corporate income tax issues to arise from activities carried out by college and university employees providing services in a foreign country, even when payment for those services is received in the United States or a third country.<sup>39</sup> Notably, a foreign jurisdiction may not necessarily recognize an institution's U.S. non-profit status and thus local counsel should be sought at the outset of program planning to verify the income tax treatment of associated revenues.

Finally, as noted above, as a general matter, the engagement of a single host country national to provide services for a college or university or the presence of a U.S. faculty or staff member performing services for a college or university in a host country quite frequently triggers employment related legal and tax obligations (e.g. requirement of written employment agreement),<sup>40</sup> which in turn, often cannot be addressed without establishing a formal legal presence in the foreign jurisdiction. Appendix C sets forth a sample list of countries and indicates, in summary form, whether formation of a formal legal entity in the host country is required before hiring local nationals as employees. Appendix C also indicates whether special contract language is required in order to employ local nationals or expatriates.

There are many legal frameworks applicable to the kinds of activities colleges and universities engage in when establishing college and university-sponsored programs in foreign jurisdictions. For public and non-profit colleges and universities, the issue of tax exempt status often surfaces as an important threshold matter. As a general observation, legal

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the immigration officers may grant less time. Usually the immigration officers grant a term of 90 days, pursuant to instructions of the officers of the National Institute of Migration.

38. In China, for example, foreign workers providing services in China are taxable on their income from the day they commence providing services. The relevant piece of legislation is the Notice concerning Several Detailed Questions in Calculating Individual Income Tax for Those Individuals who do not have Residence in China, issued by the State Administration of Taxation on March 23, 1995. If the residence in China is shorter than 90 days, the income generated in China can be waived for income tax. This is allowed under the Notice concerning Several Issues relating to the Waiver of Individual Income Tax based on the Actual Days of Residence for those who gets income in China during the Temporary Stay in China, issued by the State Administration of Taxation on March 5, 1988.

39. For a discussion of the Permanent Establishment regulations in India, see Indo-US DTA, *supra* note 31.

40. Hoyer & Rhodes, *supra* note 11, at 161 (highlighting the fact that written employment agreements may be required by local law).

frameworks applicable to non-profit or tax exempt activities are often modestly developed around the world, especially as they relate to foreign entities. Therefore, care should be taken with local counsel at an early stage to explore creative ways to achieve a college or university's goal of tax exempt treatment. Because the process for obtaining tax exemptions is so lengthy, the outcome so dubious and the reporting and administrative requirements so onerous, taxable or commercial models may be the best option for meeting a college and university's needs.

By way of example, in Brazil, where charitable foundations and other non-profit vehicles have historically been abused by unscrupulous businesspeople and politicians, the route to tax exemption is long and sometimes dubious for foreign educational enterprises.<sup>41</sup> For at least one study abroad provider organization,<sup>42</sup> formation of a taxable entity provided a solution. A simple corporate entity was formed to meet the administrative needs of students and faculty traveling to Brazil for semester long study. The Brazilian entity operates as a wholly owned subsidiary of the parent academic institution in the United States and has the power to act locally as the employer of record for hiring local and international staff and independent contractors (e.g. drivers, occasional lecturers, etc.). The entity also facilitates the myriad other elements of delivering an international program, including banking, student/cultural visa sponsorship for participants, and work permit sponsorship for non-Brazilian professional staff. With regards to corporate taxation, taxes are generally minimized by characterizing funds transferred to Brazil by the U.S. parent academic institution as working capital contributions or reimbursements of local expenses.

A detailed treatment of the legal frameworks available throughout the world to support activities relating to college and university-sponsored programs and the employment of staff abroad is beyond the scope of this Article. Local counsel must be consulted to analyze the proposed activities and determine whether formal registration of some kind will be required and, if so, to select the most suitable registration strategy.<sup>43</sup> By way of

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41. See Gustavo Justino de Oliveira, *Ongs, Neopopulismo e Corrupção* [NGOs, Neo-populism and Corruption] INTEGRAÇÃO, <http://integracao.fgvsp.br/ano9/09/opinio.htm> (last visited Mar. 12, 2010); Rodrigo Ledo, *CPI dans ONGs resgata escândalo do dossiê mas adia votações sobre UnB* [Congressional Investigation of NGOs Reveals the Dossier Scandal but Postpones Voting], ÚLTIMO SEGUNDO, Apr. 1, 2008, available at [http://ultimosegundo.ig.com.br/brasil/2008/04/01/cpi\\_das\\_ongs\\_aprova\\_investigacao\\_que\\_resgata\\_dossie\\_das\\_eleicoes\\_de\\_2006\\_1252026.html](http://ultimosegundo.ig.com.br/brasil/2008/04/01/cpi_das_ongs_aprova_investigacao_que_resgata_dossie_das_eleicoes_de_2006_1252026.html); Reinaldo Azevedo, *No escândalo da Petrobras, as Ongs* [In the Petrobras Scandals, the NGOs], VEJA.COM, July 10, 2007, available at <http://veja.abril.com.br/blog/reinaldo/geral/no-escandalo-petrobras-as-ongs/>.

42. World Learning Inc. formed World Learning Do Brasil Intercâmbio Educacional Ltda., in order to administer its academic programs in Brazil (registration paperwork and charter on file with the author).

43. For an introductory discussion of considerations when establishing operations

illustration, registration strategies can include one or more of the following approaches:

- Direct registration of U.S. college and university as a foreign entity<sup>44</sup>
- Registration of a college or university as a foreign Non-Government Organization (NGO)<sup>45</sup>
- Registration of a Representative or Liaison Office<sup>46</sup>
- Registration of a formal branch of the college or university<sup>47</sup>

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abroad, see DETLEY F. VAGTS ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* 393–439 (4th ed. 2008).

44. Where available, this type of registration is the easiest to execute and generally involves the least amount of administrative reporting and corporate housekeeping. Documentation requirements can be as simple as providing the U.S. institution's charter documents (Articles of Incorporation and By-laws), I.R.S. tax-exempt determination letters and a simple statement of the activities to be undertaken.

45. Many countries with experience working with relief agencies like CARE or with United States Government contractors that are administering foreign assistance (for example, U.S. Agency for International Development contracts, cooperative agreements and grants) have specific registration pathways for foreign NGOs. *See, e.g.,* The Republic of Uganda, Non-Governmental Organisations Registration Regulations, Chap. 113 (1989), *available at* <http://www.usig.org/countryinfo/laws/Uganda/NGO%20Registration%20Act%201989%20Chap%20113.pdf>; *see also* Hashemite Jordanian Kingdom, Law on Societies of 2008 (2008), *available at* [http://www.ngoregnet.org/Library/Jordan\\_NGO%20Law\\_2008%20Eng.pdf](http://www.ngoregnet.org/Library/Jordan_NGO%20Law_2008%20Eng.pdf)

(permitting registration of foreign NGOs upon filing of application accompanied by (a) the registration certificate of the foreign association, (b) the bylaws or the memorandum of association of the foreign association, (c) the places the foreign association operates in, (d) the programs and projects that the foreign association intends to perform in Jordan, (e) the representative(s) of the foreign association who will handle its affairs in Jordan, and (f) the representative(s) of the foreign association who will handle its affairs in Jordan).

46. "Representative" or "Liaison" Office registrations are usually designed for firms that are seeking to establish an initial presence in a country or testing the waters for new products or services provided by the parent institution back home. These frameworks are best suited to manufacturing, software, technology, and other companies seeking new markets for their products. While typically there is exemption from income tax on the activities of the office, depending on the country, the activities of the office can be quite restricted. For example, India prohibits any activities which could be characterized as carrying on a business while under the rubric of a liaison office registration. *See* India's Foreign Exchange Management Regulations, *supra* note 31 (defining a Liaison Office as "a place of business to act as a channel of communication between the Principal place of business or Head Office by whatever name called and entities in India but which does not undertake any commercial/trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel").

47. Branch Offices, like Representative Offices and Liaison Offices, are extensions of the home country entity and have no independent legal existence. Unlike Representative and Liaison Offices, however, they generally are permitted to carry on business activities as permitted by the Government. *See* India's Foreign Exchange Management Regulations, *supra* note 31. In India, a branch office is considered a permanent establishment under tax laws. Absent an available exemption from taxes,

- Registration of a Foreign Investment Company<sup>48</sup>
- Registration of a wholly owned local domestic entity<sup>49</sup>
- Registration of a local affiliated entity (e.g. Foundation, Association)<sup>50</sup>
- Registration via a Formal Memorandum of Understanding<sup>51</sup>

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however, it is likely that the revenue generating activities of a branch office will be taxed by local authorities and be also subject to requirements of tax transfer pricing regulations. *See* Indo-U.S. DTA, *supra* note 31, art. V, VII. For a general discussion of branch formation versus subsidiary formation, *see also* VAGTS ET AL., *supra* note 47, at 395–97.

48. For larger scale college or university-sponsored program activities, including significant branch campuses, most countries facilitate direct investment in the economic development of the host country through the formation of foreign investment companies. Foreign investment companies come in all flavors, depending upon the political, legal, and economic environment of the host country. In Indonesia, for example, the government permits foreign investors to establish a Foreign Investment Company (PT-PMA), and in many cases allows majority ownership by a foreign investor. *See* Presidential Regulation of the Republic of Indonesia Number: 77 of 2007, *available at* [http://www.bkpm.go.id/file\\_uploaded/PresReg\\_77\\_2007\\_eng.pdf](http://www.bkpm.go.id/file_uploaded/PresReg_77_2007_eng.pdf); Regulation of President of the Republic of Indonesia Number: 111 of 2007, *available at* [http://www.bkpm.go.id/file\\_uploaded/Perpres%2011%20Year%202007%20English.pdf](http://www.bkpm.go.id/file_uploaded/Perpres%2011%20Year%202007%20English.pdf) (relating to businesses that are closed to foreign investment and those that are open to it).

49. Domestic entities, including domestic corporations, are often relatively straightforward to establish (similar to establishing a corporation under Delaware law) and can be quickly approved by the relevant authorities. However, in some instances there are fairly onerous restrictions in the areas of management and governance. Some countries explicitly require that host country nationals participate in the capital and in the governance of host country domestic entities. In Indonesia, for example, local law requires that local corporations cannot have foreign capital participation unless their activities have not been declared restricted and unless they have been registered with the central or provincial approval authority. *See* Law of the Republic of Indonesia Number: 25 of 2007, *available at* [http://www.bkpm.go.id/file\\_uploaded/Investment\\_Law\\_Number\\_25-2007.pdf](http://www.bkpm.go.id/file_uploaded/Investment_Law_Number_25-2007.pdf).

50. In somewhat rare circumstances, a host country's legal regime simply will not allow for the direct conduct of a foreign university's activities in the host country, whether through direct registration, Representative/Liaison Office, Branch Office, or otherwise. More commonly, adverse tax consequences or restrictions on governance and control mechanisms required of other legal vehicles cause a college or university to explore sponsoring the establishment of a local non-profit entity, such as an association or a foundation. These types of entities vary tremendously in terms of form, formalities, membership requirements, and financial reporting.

51. No treatment of the topic of overseas program operating models would be complete without describing the concept of the Memorandum of Understanding (MOU). These sometimes ill-defined documents come in all shapes and sizes and frequently bestow an astonishing level of implied operational authority on the foreign party (sometimes in fewer words than the average fine print on a parking ticket). Some countries require U.S. institutions to sign an MOU with the host country's Ministry of Education or other governmental authority. In some instances MOUs can substitute entirely for other formal registration or entity formation process, providing all that is needed to establish locally compliant operations (for example bank accounts, local payroll administration, and immigration and work visa sponsorship). In Jordan, for

The wide range of operating models and their legal and administrative attributes demonstrates the urgent need for college and university counsel and administrators having early and detailed input into any significant international academic program development activity. While scale is important (e.g., establishing a complete branch campus as opposed to sending a college or university group on a two week Spanish language excursion to Mexico), the labor and employment issues discussed in the following sections of this Article almost always rear their heads at an astonishingly low level of college and university engagement in the host jurisdiction.

## II. EMPLOYEE CATEGORIES AND SOURCES OF LAW

Having briefly examined a range of international academic program categories and operating models in Section I above, the remainder of this Article will focus on labor and employment issues specific to those program categories and operating models. This section will introduce the three common categories of employees working for U.S. colleges and universities overseas—host country nationals, expatriates, and third country nationals—and will discuss in general terms the sources of labor and employment laws applicable to their employment.<sup>52</sup> It will also review some of the key concepts applicable to the distinction among employment, tax, and immigrant status, as distinguished from labor authorization.

### A. Employee Categories

#### 1. Host Country Nationals (HCNs)

Host country or local nationals (HCNs) are individuals holding citizenship of the host country or having the equivalent status of a U.S. “permanent resident.”<sup>53</sup> In the context of college and university-sponsored programs, colleges and universities frequently engage HCNs in all aspects of program delivery, whether as local program directors, local faculty, support staff or even drivers and security personnel where applicable. As

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example, for many years, the *Law on Societies* authorized foreign institutions to enter into Cooperative Agreements with the Jordanian Government via Jordan’s Ministry of Social Development and other ministries. Jordan’s new *Law on Societies* (No. 51 of 2008) abolished the MOU registration route in favor of a direct NGO Registration process. Euro-Mediterranean Human Rights Network, *Monitoring Report on Freedom of Association in Euro-Mediterranean Region – 2009*, available at [http://www.euro.parl.europa.eu/meetdocs/2009\\_2014/documents/dmag/dv/dmag20100324\\_05\\_/dmag20100324\\_05\\_en.pdf](http://www.euro.parl.europa.eu/meetdocs/2009_2014/documents/dmag/dv/dmag20100324_05_/dmag20100324_05_en.pdf).

52. For a general analysis of multi-jurisdictional employment issues, see Kevin Cranman & John F. Baum, *Ten Proactive Steps for the Multi-Jurisdictional Employer: A Global Approach to Your Employment Law Audit*, 25 ACC DOCKET (2007).

53. STEPHEN PERKINS & SUSAN SHORTLAND, *STRATEGIC INTERNATIONAL HUMAN RESOURCE MANAGEMENT* 88–90, 147 (2d ed. 2006).



discussed below, some countries prohibit the direct employment by foreign institutions of HCNs, thus requiring an intermediary employer, such as a state-run employment agency or a local partner, or the establishment of one of the more involved legal operating models such as creation of a locally recognized corporate subsidiary.<sup>54</sup> In China, for example, foreign firms are prohibited from employing Chinese nationals directly for their representative offices in China.<sup>55</sup> Foreign firms' representative offices may only employ Chinese nationals via one of the state-owned or privately controlled employment intermediaries.<sup>56</sup>

While rare exceptions do exist (e.g. under MOUs directly negotiated with host governments), HCNs will be subject to the application of host country laws and regulations concerning labor and employment.<sup>57</sup>

## 2. Expatriates (Expats)

Parent country nationals or expatriates (expats) are U.S. citizens working overseas for a U.S. college or university.<sup>58</sup> While the analysis will depend on the facts of the particular case, the majority of U.S.-based college and university employees assigned to work on a temporary basis in a host country will likely be considered expats by the host country government. As noted below, in certain limited circumstances, exemptions from local employment laws and regulations may be available to college and university employers engaging expats abroad.

## 3. Third-Country Nationals (TCNs)

Third-country nationals (TCNs) are non-U.S. citizens working in a host country but holding citizenship of a third country.<sup>59</sup> TCNs present the most

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54. In China, the Labor Law of the People's Republic of China, effective on January 1, 1995, applies to "enterprises inside the People's Republic of China" and to "employees" who have an employment relationship with such entities. Andreas Lauffs, *China*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 55-7 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009). "The term 'enterprises inside the People's Republic of China' includes both SOEs [state owned enterprises] and foreign-invested enterprises (FIEs), such as wholly foreign-owned enterprises (WFOEs) and Sino-foreign joint ventures . . . . [c]overed enterprises may be collectively or privately owned." *Id.*

55. *Id.*

56. See FESCO Service System, <http://www.fesco.com.cn/164/index.htm> (last visited Mar. 6, 2010) ("Founded in 1979, Beijing Foreign Enterprise Human Resource Service Co., Ltd. . . . is China's first professional human resource service provider for foreign enterprise representative offices in China, foreign financial institutions and economic organizations.").

57. Thomas J. Manley & Valerie Barney, *Globalization of Work: Offshore Outsourcing*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 96-23 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009).

58. PERKINS & SHORLAND, *supra* note 53, at 88-90, 147.

59. *Id.*

difficult cases when analyzing a college or university's labor and employment related obligations, as in some cases employment-related mandates such as social security and pension related schemes of the TCN's home country may need to be observed, even though the TCN is not working in his or her country of citizenship.<sup>60</sup>

### B. Sources of Law

As a threshold matter, it is absolutely critical that college and university counsel take to heart that "at will" employment is largely an American concept.<sup>61</sup> Nearly all countries outside the United States regulate the employment relationship and many times to astonishing degrees.<sup>62</sup> The most common sources of local law include (i) the civil code,<sup>63</sup> (ii) the labor

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60. This is especially true where the TCN has been hired under the laws of one country and is then assigned to work in another country as a continuation of the initial employment relationship. For example, a German-based faculty member of a U.S. university, holding German citizenship and hired under German law, is assigned by the U.S. university to teach in South Africa for a two year period. In this example, the U.S. university would be required to continue contributions to the German social security system. Sozialgesetzbuch IV [Social Security Code], Jan. 1, 1977 at § 4, *available at* [http://bundesrecht.juris.de/sgb\\_4/\\_4.html](http://bundesrecht.juris.de/sgb_4/_4.html) (last visited Apr. 2, 2010) (stating that employers must contribute to the German social security system if an employee has a persisting employment contract with the German employer and will stay abroad only for a fixed period of time). In regards to health care expenses, if this employee (who still participates in the German national health system) falls ill abroad, the employee might have recourse against the employer *directly* for the costs of medical coverage. While the employer may then make a claim on the employee's health insurance in Germany, the employer's claim against the insurance is limited to the (hypothetical) costs of medical coverage in Germany. That means the employer sends the employee abroad at the employer's own risk and must assume any additional charges for medical coverage. Sozialgesetzbuch V [Health Insurance], Jan. 1, 1989 at § 17.

61. Wendi S. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 98-3 to -5 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009); Kevin Cranman & Natasha Baker, *Where in the World are Your Employees? Institutions as Global Employers: Employment Law Considerations in the Age of International Programs*, 36 J.C. & U.L. 565, 582 n. 70 (citing *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th 384 (2006)); DIMATTEO, *supra* note 31, at 273 ("[t]he employment relationship is viewed differently both culturally and legally throughout the world. The differences in the legal status of the employment relationship varies from the employment at will doctrine in the United States to the view of employment as a property right in Germany and the notion of 'lifetime employment' in Japan.").

62. For example, French law requires that all employees be invited to a pre-employment termination meeting with management, at which the employee may have present an employee of the company or a local representative registered on a specific list established by the State authorities. This pre-employment termination meeting must be held in French, except if the employee agrees that it is held in a foreign language. *See, e.g.*, French Labor Code, C. TRAV. arts. L1232-2, L1232-3, L1232-4, L1232-7.

63. For example, The Greek Civil Code Art. 185 requires binding employment agreements, and Art. 192 describes the offer and acceptance process. Astikos Kodikas

code,<sup>64</sup> (iii) mandatory collective bargaining provisions,<sup>65</sup> and (iv) case law.<sup>66</sup> As a general rule, local labor standards will govern the employment relationship between the institution and individuals working overseas unless there is a recognized exception.<sup>67</sup>

### 1. The Expatriate Exception

The most common exception to the application of local law is known as the expatriate exception. This exception is generally a creature of case law and may vary from country to country.<sup>68</sup> As a general matter, when

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[A.K.] [Civil Code] 1:185, 192 (Greece). *See also* Civil Code of Quebec, art. 2092 C.C.Q. (1994) (outlining notice requirements relating to contract employees).

64. For example, Act XXII of the 1992 Hungarian Labor Code requires a written employment contract, and specifies what it must include. It also sets forth the minimum amount of time off that an employer must allow its employees. *See* <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex4.pdf> The Czech Republic's Labor Code of 2006, Act. No. 262/2006 Coll., as amended, governs numerous aspects of the employment relationship. It also provides that if an employee is dismissed from a position, the employment relationship is not terminated—other work must be offered to the employee. *See* [http://www.mpsv.cz/files/clanky/3221/labour\\_code.pdf](http://www.mpsv.cz/files/clanky/3221/labour_code.pdf).

65. *See, e.g.*, Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, in 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 75-1, 75-54 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (“Brazilian law establishes a ‘corporatist’ system in which the union represents *all* of the workers in a particular professional category in a designated geographical area.”).

66. *See, e.g.*, Cour d’appel [CA] [regional court of appeal] Paris, 18e ch., Apr. 3, 1995, SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto [hereinafter SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto]; Cour d’appel [CA] [regional court of appeal] Paris, 21b ch., May 22, 1998, Joaquim Gasalho v. SA TAP Air Portugal [hereinafter Joaquim Gasalho v. SA TAP Air Portugal] (Both decisions held that Portuguese expatriates involved had an employment relationship that continued to be governed by their original Portugal employment agreement.). *See also* Jorge Daniel Orlansky, *Argentina*, in 2B INTERNATIONAL LABOR AND EMPLOYMENT LAWS 76-1, 76-21 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (citing *Vizzotti v. AMSA S.A.* (Supreme Court of Justice Sept. 14, 2004) (addressing the acceptable parameters of seniority pay relative to severance)).

67. Thomas J. Manley & Valerie Barney, *supra* note 57, at 96-23. *See also* Frederique Sauvage, *France*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS 4-1, 4-7 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (“French law recognizes the right of the parties to an employment contract to choose the law applicable to such contract, as provided by the Rome Convention of June 19, 1980. In the absence of any clear choice of law, French law recognizes that the contract is to be governed by the law that has the closest connection with the employment contract. However, as provided by the Rome Convention, the choice of law may not deprive the employee from the protection of rules that are mandatory in the countries where the employment is being performed and the law of which would be applicable in the absence of a specific choice.”); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-22 (stating that the general rule is that the applicable law for an international employment agreement is the law of the place where the services are provided, citing the Superior Labor Court, Precedent No. 207).

68. Three U.K. cases discussing the parameters of the expatriate exception are

determining whether to allow for the application of a foreign jurisdiction's labor laws to an employee working within its jurisdiction, foreign courts will analyze, among other factors, the following criteria: (a) whether there is a substantial prior home country employment relationship; (b) whether the foreign assignment period is of limited duration (generally an outside maximum of 5 years), and (c) whether the employee has an intent to return to their home country at the end of their assignment.<sup>69</sup>

The value of the expatriate exception can be substantial. For example, the employer can argue more easily for the continued application of U.S. labor law and local courts are more likely to enforce U.S. choice of law provisions in employment agreements.<sup>70</sup> Local courts are more likely to

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*Lawson v Serco Ltd, Botham v Ministry of Defence, and Crofts v Veta Ltd*, [2006] UKHL 3, [2006] I.C.R. 250, available at <http://www.bailii.org/uk/cases/UKHL/2006/3.html> (last visited Apr. 2, 2010). Denmark has followed EU Act. No. 188 of June 19, 1980 ("Rome Convention") since May 9, 1984. Jacob Sand, *Denmark, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 12-1, 12-8 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (The Rome Convention states that an agreement of employment is governed by the law of the country in which the employee most frequently carries out his work, even if he is temporarily employed in another country).

69. In France, for example, U.S. bona fide expatriates assigned to France under the following conditions: (1) expatriated employees remaining on U.S. payroll and receiving instructions from their U.S. employers, and (2) expatriation periods being no longer than 2 to 3 years [5 years maximum if period is to be linked to U.S./France social security treaty] should have their U.S. employment agreement govern their employment relationship while in France subject to local labor code and applicable collective bargaining agreement "public order" matters (compensation, working time, vacation, etc.). Except for grossly unreasonable situations, the basis for terminating employees and related benefits such as notice, termination indemnity and damages for unjust terminations will be governed by U.S. law per the employee's original employment agreement, including their "employment at will" feature. See *SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto*, *supra* note 66, *Joaquim Gasalho v. SA TAP Air Portugal*, *supra* note 66. Both decisions held that Portuguese expatriates involved had an employment relationship that continued to be governed by their original Portugal employment agreement. See also John F. Woyke, *Compensating the Internationally Mobile Executive*, in 1B *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 97-2 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (As contrasted with third country nationals working abroad, "expatriates" may be defined as U.S. employees who work abroad for a finite period with the expectation they will return to the United States for the balance of their careers.).

70. See John Robinson, *The Extraterritorial Application of American Law: Preliminary Reflections*, 27 *J.C. & U.L.* 187, 203 (2000). See also, BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 151 (Hart Publishing 2005) (discussing in depth the extraterritorial application of labor laws and the EU Posted Worker Directive). For a different perspective, Italian law generally holds that when an employee carries out services under an employment relationship in a foreign country, he will normally be subject to the labor law of that country, unless foreign law is conflicting with Italian principles of public order. Recently, the Italian Supreme Court twice ruled that the principle of termination at will applicable in the United States is conflicting with Italian public order, and Italian law was deemed applicable as a result of the non-application of the conflicting U.S. principles. Italian Supreme Court decisions 11th November

enforce exclusive forum and other dispute resolution provisions providing for litigation or arbitration in the United States. Home country employee benefits may generally be continued without interruption<sup>71</sup> and continuity of employment service may be maintained.

There are several common misapplications of the expatriate exception of which college and university counsel and administrators should be mindful. While the convention is different from country to country, generally speaking the expatriate employee must end the foreign assignment within three years or, at the outside margin, five years.<sup>72</sup> Foreign jurisdictions with protective labor codes and active collective bargaining units are likely to favor the application of local law and collective bargaining positions the longer the employee remains working in the host country.<sup>73</sup> It is also important to remember that an individual who might qualify for the expatriate exception in connection with a prior U.S. employer may not meet the exception's requirements if hired by another U.S. employer while working overseas.<sup>74</sup> Some jurisdictions provide for mandatory application of their labor codes to all persons working within their jurisdiction (Mexico).<sup>75</sup> And finally, certain countries apply special laws to foreign citizens working within their borders (e.g. the EU Posted Worker

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2002, n. 15822 and 9th May 2007, n. 10549.

71. Note that U.S. benefit providers, including retirement and pension funds, are often not registered to provide products or services outside of the territory of the United States.

72. Five years is the limit of home country social security benefits protection under the U.S. France social security treaty. US-France Social Security Agreement, art. 6(1), Oct. 21, 1987, available at [http://www.ssa.gov/international/Agreement\\_Texts/french.html#part1](http://www.ssa.gov/international/Agreement_Texts/french.html#part1).

73. See Nestor de Buen Lozano, Carlos de Buen Unna, & Manuel Cuevas-Trisan, *Mexico*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS 32-1, 32-11 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) ("Mexican law does not contemplate the application of a foreign nation's law in Mexico in matters related to labor, employment, or for purposes of the resolution of labor disputes.").

74. Recall the condition in the French cases of SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto, *supra* note 66, and Joaquim Gasalho v. SA TAP Air Portugal, *supra* note 66, that, in order to enjoy the exception to application of French labor law to the employment agreement, the expatriate employee must receive continuing instruction from his or her home country employer. This is a particularly challenging situation for universities who often look to hire resident directors, academic directors and key faculty based on their experience with another institution's University Sponsored Program in the host country.

75. See Nestor de Buen Lozano, Carlos de Buen Unna, & Manuel Cuevas-Trisan, *Mexico*, *supra* note 73, at 32-11 ("Mexican law does not contemplate the application of a foreign nation's law in Mexico in matters related to labor, employment, or for purposes of the resolution of labor disputes."). Compare Elena G. Barikhnovskaya, *Russia*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS 41-17 to -18 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) ("There is no published information on any case involving the implementation of foreign labor law within the territory of the Russian Federation").

Directive).<sup>76</sup>

## 2. Bi-Lateral Agreement Exceptions

The terms and conditions of bi-lateral agreements, such as those between the U.S. government and a foreign government or between a U.S. college or university and a local education or foreign ministry, can also provide for the application of U.S. law to the employment of U.S. nationals working in the host country and can also provide for significant income tax exemptions and exemptions from the application of local social security and other social welfare schemes.<sup>77</sup>

## 3. Employment Status vs. Tax Status

It is vital for college and university counsel to recognize that employment status and tax status are distinct matters that are often governed by separate legal frameworks.<sup>78</sup> The labor law of a given foreign jurisdiction will govern issues relating to the employment relationship itself, including hiring rules, employment agreements, mandatory benefits, termination procedures and termination indemnities.<sup>79</sup> The tax laws of a given jurisdiction will determine whether an individual residing in a foreign jurisdiction will be liable for locally applicable income and other employment related taxes.<sup>80</sup> As a general matter, many jurisdictions follow the rule that presence in the jurisdiction for more than 181 or 183 days in

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76. See Council Directive 96/71 1996 O.J. (L 018) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:EN:HTML> (concerning the posting of workers in the framework of the provision of services). This Directive essentially requires EU member countries to mandate that employers provide basic employee benefits to individuals working within their borders (e.g. maternity leave). See also HEPPLER, *supra* note 70, at 165–72.

77. For the U.S. Social Security Administration's list of social security or totalization agreements with foreign governments, see Social Security Online, *U.S. International Social Security Agreements*, [http://www.ssa.gov/international/agreements\\_overview.html](http://www.ssa.gov/international/agreements_overview.html) (last visited Mar. 6, 2010). See also John F. Woyke, *Compensating the Internationally Mobile Executive*, *supra* note 69, at 97-18; for USAID Bilateral agreements, see InsideNGO: Operating Excellence for Global Impact, <http://www.insidengo.org/linkspages/linkspage.htm#rules> (last visited Mar. 6, 2010).

78. In the United States, employment status is governed by the Immigration and Nationality Act (8 U.S.C. §§ 1–1701 (2006)). Tax status is governed by the Internal Revenue Code (26 U.S.C. §§ 1–9833).

79. See generally Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61, at 98-3 to -5.

80. For an introductory discussion of the international tax environment and the bases for taxation, see VAGTS ET AL., *supra* note 43, at 220–62. In New Zealand, these tax laws are known as the “residence rules” and “source rules,” and are contained in sections YD 1 and YD 4 (respectively) of the New Zealand Income Tax Act 2007 (“NZITA”). Income Tax Act 2007, 2007 S.N.Z. No. 97 § YD1, YD4, available at <http://www.legislation.govt.nz/act/public/2007/0097/latest/DLM1512301.html> (last visited Apr. 6, 2010) [hereinafter New Zealand Tax Act].

either the tax year or a rolling twelve-month period will trigger “tax presence” for purposes of local income tax.<sup>81</sup> Of particular concern in this regard are local tax regimes that require employers to withhold and remit to local tax authorities applicable income taxes on behalf of the employee.<sup>82</sup> Failure by the employer to withhold and remit income tax can result in significant penalties and interest for both the employer and the employee.<sup>83</sup> In some jurisdictions, failure to withhold is a criminal offense, subjecting company officials to fines and potentially imprisonment.<sup>84</sup>

A practical problem for many college and university employers stems from the scenario where the duration of an overseas assignment is unclear. For example, a faculty member may be hired to teach full-time at a college or university’s campus in a foreign jurisdiction for a single semester. Unexpectedly, the assignment must be extended for a second semester, triggering tax presence after the applicable period elapses. In this scenario, the faculty member and the college and university may become liable for income tax/tax withholding *retroactive to the beginning of the*

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81. See Indo-US DTA, *supra* note 31, at art. XVI (protecting a U.S. salaried employee from taxation in India where the employee’s stay in India does not exceed 183 days and other conditions are met.) However, it may be possible for professors/teachers to seek an exemption which may enable a claim for exemption from personal taxation in India for a period up to two years if the professor/teacher comes to India for the purpose of teaching or engaging in research at a university, college or other recognized educational institution in India. See *id.* at art. XXII. In New Zealand, the “183 day test” is set out in sections YD 1(3) and (4) of the NZITA. New Zealand Tax Act, *supra* note 80, at § YD1(3)-(4). There is also an independent “permanent place of abode” test in section YD 1(2) of the NZITA, which depends on the extent of connections with New Zealand rather than days physically present there. *Id.* at § YD 1(2).

82. See Indo-US DTA, *supra* note 31, at art. V(2)(1), XVI. In New Zealand, section RA 5 of the NZITA requires employers to withhold and account to the New Zealand Inland Revenue for tax known as “PAYE” (pay-as-you-earn) on behalf of their employees. New Zealand Tax Act, *supra* note 80, at § RA 5.

83. In New Zealand, section RA 10 of the NZITA provides that an employer who fails to pay employment related taxes owes a debt to Inland Revenue. New Zealand Tax Act, *supra* note 80, at § RA 10. Section RA 8 confirms that an employee may also be liable for any unpaid PAYE. *Id.* at § RA 8. Part IX of the New Zealand Tax Administration Act 1994 (“NZTAA”) contains the penalties regime which applies to unpaid tax: this includes 5% initial plus 1% incremental late payment penalties, as well as civil penalties that range from 20% to 150% of the unpaid tax (depending on the employer’s culpability). Tax Administration Act 1994, 1994 S.N.Z. No. 166, available at <http://www.legislation.govt.nz/act/public/1994/0166/69.0/DLM348343.html> (last visited Apr. 6, 2010) [hereinafter New Zealand Tax Administration Act]. Part VII of the NZTAA contains the provisions that impose interest on unpaid tax (the rate is set at the Reserve Bank of New Zealand’s 90-day bank bill rate plus 4.5%). *Id.* at § 120H; Taxation (Use of Money Interest Rates Setting Process) Amendment Regulations 2009, 2009 S.R. No. 6 (N.Z.).

84. In New Zealand, sections 143A, 143B and 147 of the NZTAA provide for criminal offences in relation to taxes, on the part of both an employer and its employees/officers. New Zealand Tax Administration Act, *supra* note 87, at §§ 143A, 143B, 147.

*assignment*.<sup>85</sup> Often times, the faculty member has not planned for this situation and the college or university employer is then in the awkward position of having to extract the applicable taxes retroactively from the employee's pay in order to come into compliance.<sup>86</sup> College and university counsel, in consultation with local tax counsel, should pay close attention to the local rules regarding taxation and communicate the practical risks to program administrators in advance of making faculty assignments to overseas locations.

#### 4. Immigration Status vs. Employment Status/Labor Authorization

A common source of confusion for college and university counsel and administrators is the distinction between immigration status and employment status/labor authorization. In many jurisdictions, for example, U.S. citizens may lawfully enter the country and remain for a period of up to 90 days without obtaining a residency or other immigration-related visa.<sup>87</sup> Lawful entry in and of itself, however, does not normally confer upon a foreign national the privilege of working in the jurisdiction. In many cases, application must be made in advance for an appropriate employment visa or work permit.<sup>88</sup> Generally, such visas and permits must be sponsored by an employer with local standing<sup>89</sup>, which in turn can require a college and university to pursue registration as an employer or in some instances formation of a local entity to act as the employer.<sup>90</sup> To further complicate matters, it can often take many months for a work permit application to be granted. In some jurisdictions, application for

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85. See, e.g., Indo-U.S. DTA, *supra* note 31, at art. 5(2)(1), 16.

86. Well-crafted tax assistance policies for expatriates will often address the issue of reimbursement of foreign taxes paid, as discussed in Section V below.

87. See, e.g., Embassy of Austria — Washington D.C., Entry and Residence Permits, <http://www.austria.org/content/view/38/64/> (last visited Apr. 6, 2010); Government of Canada, Temporary Resident (Visitor) Visa, [http://www.canada.international.gc.ca/washington/imm/visa\\_temp.aspx?lang=eng#CITIZENS](http://www.canada.international.gc.ca/washington/imm/visa_temp.aspx?lang=eng#CITIZENS) (last visited Apr. 6, 2010); Embassy of Mexico in Washington, Consular Services, <http://portal.sre.gob.mx/usa/index.php?option=displaypage&Itemid=111&op=page&SubMenu> (last visited Apr. 6, 2010).

88. See generally Ravi Singhania, *India*, in 2B INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 57-87 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (“[U]nder [India’s] central government policy, an employment visa is required of foreign workers, and employment visas are issued only to foreigners who are skilled professionals and are engaged by companies, organizations, and economic undertakings as technicians, technical experts, senior executives, and the like. Applicants are required to submit proof of contract/employment/engagement by the company or organization in India”).

89. See generally Ravi Singhania, *India*, *supra* note 88, at 57-87 (“Applicants [for employment visas] are required to submit proof of contract/employment/engagement by the company or organization in India”).

90. See Appendix C, *infra*.



work permission may only be made from outside the jurisdiction.<sup>91</sup> In some cases, work may commence provisionally upon submission of the appropriate application.<sup>92</sup> Beginning work in country without work authorization is illegal and can subject both the employee and the employer to fines, deportation, and in some cases imprisonment.<sup>93</sup>

The work permission conundrum is especially challenging for college and university employers. Many institutions have historically assigned faculty and administrative staff on a short-term basis—less than one year or even a single semester. The current study abroad trend is towards increased short-term programs, where students and faculty travel together to one or more foreign sites for a period of weeks.<sup>94</sup> Obtaining appropriate work permission for short term assignments can be very expensive and administratively burdensome. In some cases, work permission cannot be obtained in the time frame needed to accommodate academic calendars. Given that many faculty rely on access to certain countries to continue their academic research, employers should be wary of authorizing overseas assignment without first obtaining proper work authorization. A U.S. faculty member facing deportation or potential restrictions on re-entry due to the failure of his or her U.S. employer to obtain proper work authorization would certainly consider seeking damages against that employer for any economic damages (e.g. lost wages) suffered due to the oversight.<sup>95</sup>

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91. See, e.g., Migration Regulations, 1994, (Austl.) sched. 1, item 1223A, § 3 (ag), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_reg/mr1994227/sch1.html](http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/sch1.html) (provisions requiring a visa application to be lodged outside Australia where the individual is applying for a work permit and being sponsored by an entity with no presence in Australia (e.g. wishing to set up in Australia)).

92. Enrique Munita, *Chile*, in *LABOUR & EMPLOYMENT 2009* at 58 (Law Business Research Ltd 2009) (Foreigners' Department of the Ministry of the Interior may authorize "permission to work with a visa currently under proceedings....").

93. See, e.g., Douglas G. Gilbert & Rhonda R. Shirreff, *Canada*, in *LABOUR & EMPLOYMENT 2009* at 50 (Law Business Research Ltd 2009) ("An employer that employs a foreign national who is not authorized to work in Canada is liable for fines ranging from C\$10,000 to C\$50,000 as well as imprisonment for a term of six months to two years."); Patricia Ponce Arteta, *Ecuador*, in *LABOUR & EMPLOYMENT 2009* at 82 (Law Business Research Ltd 2009) ("The main sanctions against employers who hire foreigners without a visa are fines and the prohibition on deducting as a company expense the salaries or any other expense incurred in relation to the foreigner. The foreigner can be deported."); Paola Tradati, *Italy*, in *LABOUR & EMPLOYMENT 2009* at 141 (Law Business Research Ltd 2009) ("...[E]mployer runs a risk under article 22(12) of the Immigration Act that 'the employer that employs, at his own instigation, a foreign employee without the required work permit is punished with imprisonment from three months to one year and a pecuniary penalty of E5,000 for each employee employed.'").

94. OPEN DOORS, *supra* note 1, at 1 ¶ 1.

95. See, e.g., *Bauman v. Sisco Stevedoring, LLC*, 560 F.Supp.2d 1181 (S.D. Ala. 2008) (lost wages awarded for employer negligence).

### 5. Tax Treaties and Social Security Conventions

Extensive consideration of tax treaties and social security conventions is beyond the scope of this Article's introductory treatment of overseas employment issues. College and university counsel should be aware, however, that the United States has negotiated double taxation and other tax related treaties with numerous foreign jurisdictions.<sup>96</sup> In essence, double taxation treaties allow tax residents of one country to deduct taxes paid to a foreign jurisdiction from their tax obligations in their home jurisdiction.<sup>97</sup> Absence of a double taxation treaty can present serious challenges for college and university employers as most faculty and administrators cannot afford to pay income tax in both their home and their foreign jurisdictions. Tax assistance policies and other similar measures should be developed by college and university employers to address those situations where relief from double taxation is not available (or where foreign tax rates are significantly higher than in the United States).

Similarly, social security conventions and totalization agreements between the United States and foreign jurisdictions are designed to provide relief from the application to foreign workers of local social security, retirement and other mandatory social benefit schemes.<sup>98</sup> These agreements generally provide that, upon proof of participation in a foreign social benefit scheme, a foreign national working in a host country will not be compelled to contribute to the host country's social benefit program.<sup>99</sup> Such agreements typically provide for up to 5 years of relief, after which time foreign nationals are required to participate.<sup>100</sup> Familiarity with these

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96. For a list of countries with which the United States maintains double taxation treaties, see U.S. Tax Treaties, <http://www.unclefed.com/ForTaxProfs/Treaties/index.html>. See also John F. Woyke, *Compensating the Internationally Mobile Executive*, *supra* note 69, at 97-18; VAGTS, *supra* note 43, at 252-62 (discussing generally tax treaties).

97. See generally VAGTS, *supra* note 43, at 245-62 (discussing generally double taxation).

98. See Frederique Sauvage, *France*, *supra* note 67, at 4-8 ("Irrespective of the choice of law applicable to [an] employment contract, the question of whether [an] employee will be covered by the French social security system needs to be looked into. In this regard, unless otherwise provided by a treaty allowing for the employee to continue being subject to a social security system other than the French one, French social security contributions are applicable to all employees working in France, irrespective of the duration of employment.").

99. See, e.g., Agreement on Social Security art. 6, U.S.-Fr., Mar. 2, 1987, 1516 U.N.T.S 26266.

100. See John F. Woyke, *Compensating the Internationally Mobile Executive*, *supra* note 73, at 98-20 ("many reciprocal treaties and tax benefits will expire" after five years have elapsed, and the employee may be considered localized, under host country law"). "Typically expatriate agreements are for a period of less than five years, because many reciprocal treaties and tax benefits will expire thereafter and the employee may be considered localized, and subsequently subject to many of the tax and social benefit obligations of host country residency." *Id.*

conventions is important for college and university counsel and administrators, as social benefit contribution costs can amount to nearly 40% of gross salary costs in certain countries, especially in the European Union.<sup>101</sup>

#### 6. Employer Liability

College and university counsel should be sure to explore with local counsel any local obligations with respect to worker's compensation and similar employer liability schemes.<sup>102</sup> In addition, there are a number of competitive underwriters in the United States that will write foreign worker's compensation and employer liability policies for U.S. colleges and universities.<sup>103</sup> Care should be taken to understand the universe of employees—host country nationals (HCNs), third country nationals (TCNs) and expatriates that will be covered in any given circumstance.

#### 7. The Independent Contractor Trap

As a general matter, many of the most significant work related laws in foreign jurisdictions depend on the existence of an employment relationship.<sup>104</sup> In the United States, courts examine a variety of factors to determine the effective level of control that the hiring entity exercises over the engaged individual in areas such as supervision of work assignments, establishment of terms and conditions of work (e.g. pay, work schedules, work methods), and provision of resources needed to accomplish work assignments.<sup>105</sup> Classification of individuals working overseas for

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101. See Social Security Online, 77 note 81.

102. See, e.g. Ravi Singhania, *India*, *supra* note 88, at 57-73 ("The Workmen's Compensation Scheme was established by the Workmen's Compensation Act, 1923 and is administered by the Ministry of Labour . . . . The Workmen's Compensation Scheme is an employer liability scheme. All employers are required to obtain workers' compensation insurance for all workers in their employ, unless they have been exempted from doing so."); Julian Fiechter et al., *Austria*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 9-62 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (Austria requires employers to contribute toward occupational injury insurance); Lubos Tichy et al., *The Czech Republic*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 11-56 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (Czech Republic imposes employer liability for work-related injuries and occupational illness); Jacob Sand, *Denmark*, *supra* note 71, at 12-52 (Denmark requires employers to contribute to a fund — amount based on the number of employees and number of "industrial diseases" typical in that line of business).

103. See, e.g., ACE Group — A Leading Global Insurance Organization, <http://www.ancelimited.com/AceLimitedRoot/>.

104. Manley & Barney, *supra* note 57, at 96-23.

105. See, e.g. CORPORATE COUNSEL'S GUIDE TO INDEPENDENT CONTRACTORS § 101.009 (Thomson West ed., 2004); COMM. ON DEV. OF THE LAW UNDER NAT'L LABOR RELATIONS ACT, AM. BAR ASS'N, THE DEVELOPING LABOR LAW, 2131-68 (Patrick Hardin & John E. Higgins eds., 4th ed. 2001).

educational institutions is a thorny issue. As a general matter, foreign jurisdictions apply their own version of a totality of facts and circumstances test.<sup>106</sup> For example, under South Africa's Basic Conditions of Employment Act (BCEA),<sup>107</sup> a person is deemed to be an employee if one or more of the following factors are present:

- The manner in which the person works is subject to the control or direction of another person;
- The person's hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organization, the person is part of that organization;
- The person has worked for another person for an average of at least 40 hours per month over the last three months;
- The person is economically dependent on another person for whom the person works or renders services;
- The person is provided with tools of trade or work equipment by another person; or
- The person only works for or renders services to one person.<sup>108</sup>

Due to the relatively high cost of employer related social benefit contributions, the generally lower tax burden applied to independent contractors, and the exemption from unfair dismissal claims at termination,<sup>109</sup> college and university administrators and in-country local staff members are often highly motivated to classify local staff as

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106. See e.g., Andreas Lauffs, *China*, *supra* note 53, at 55-9 ("The term 'employee' does not include independent contractors who are engaged on a contract (*laowu hetong*) basis. Whether a person is providing services as an independent contractor or employee is decided not by the title chosen by the parties, but by the facts. This distinction governs whether or not the Labor Law applies to the relationship, a vital consideration in that only employees qualify for social security payments and employment protection rights. Distinguishing between independent contractors and employees depends on a number of factors, such as whether the employer's policies and procedures are applied to the individual, and whether the individual carries out work for compensation arranged by the employer.").

107. Basic Conditions of Employment Act 75 of 1997 (S. Afr.)(amended 2001, 2002), available at <http://www.info.gov.za/view/DownloadFileAction?id=70820>.

108. Basic Conditions of Employment Amendment Act 11 of 2002 § 83A (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=68045>.

109. See, e.g., E. Johan Lubbe, *South Africa*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 50-16 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) "A person's classification as an 'independent contractor,' rather than an 'employee,' typically gives the principal (or the alleged employer) greater flexibility. For example, when the relationship is terminated, an independent contractor may not claim unfair dismissal as an employee may be entitled to do." *Id.* at 50-16 n.69. "The existence of an 'employment relationship,' as opposed to an 'independent contractor' relationship, is a jurisdictional fact for the unfair dismissal provisions of the [Labor Relations Act] to apply." *Id.* (citing AVBOB Mut. Ass'n Soc'y v. Comm'n for Conciliation, Mediation & Arbitration 2003 (24) I.L.J. 535 (LC) at 538 (S.Afr.)).

independent contractors. This keeps the program costs lower and, unfortunately, can be a common practice among local businesses that do not operate with the profile of an international organization. There are numerous problems with misclassifying employees as independent contractors, however, including failure to comply with local collective bargaining agreements, failure to withhold and remit income tax, and failure to contribute to mandatory retirement and other social benefit schemes, among others.

For college and university employers, classification rules can be very tricky. For example, employment of local nationals to provide periodic language courses on a seasonal but regular basis (e.g. per semester) can lead to a finding of a permanent employment relationship.<sup>110</sup> Part-time lecturers, if engaged on a regular basis, can also be considered employees in some jurisdictions. Longer-term misclassification nearly always rears its ugly head at the time the college and university wants to separate from the independent contractor. Because foreign labor tribunals strongly favor host national employees, especially when pitted against foreign employers, a negative finding in a labor action can result in significant fines, penalties, interest and payment of back retirement benefits. College and university counsel are well advised to seek local counsel's advice on each of the individuals and service providers that will be involved in the foreign activity and be sure to observe and if necessary document the appropriate classification at the time of engagement.

#### 8. Who is the Employer?

As noted briefly above, an important threshold issue is whether or not a

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110. In Brazil, for example, employment agreements for specific projects/fixed terms are only permitted by Brazilian Labor Law as an exception. *See* Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-26. The general rule is to hire employees for an indefinite term. *Id.* Accordingly, fixed-term contracts are accepted only in the following situations: (i) trial period (in which case the term cannot exceed 45 days with the possibility of one renewal for the same period – total of 90 days; and (ii) to perform determined seasonal or transitory activities (in both cases the term cannot exceed 2 years and any renewal of the agreement results in considering it an agreement effective for an indefinite term). Lei No. 5452 [Consolidation of Brazilian Labor Laws – CLT], de 1 maio de 1943, D.O. de 9.8.1943, art. 443 para. 2 (Brazil). In the case of language teachers providing Portuguese language classes for a part of each semester of a study abroad program, it is likely that such employees will be rendering services which will be permanent (e.g. will correspond to the institution's core activity), although seasonally. Although Brazilian labor law authorizes fixed-term contracts, if the activity performed by the employee is the core activity of the institution (therefore, a permanent one), the contract may be considered as entered for undetermined term. *See* T.R.S.T., São Paulo Labor Court of Appeals. Proceedings No. 00215-2007-255-02-00-9 - Decision No. 20090828547 (October 13, 2009). "Fixed term agreement. It is not within the characteristics of a fixed term employment agreement the hiring of an employee to perform activities within the employer's corporate purpose" *Id.* (*citing* CLT art. 443, para. 2).

U.S. college and university may directly employ individuals as employees in the host country—whether they are Host Country Nationals, TCNs or Expats. Early local counsel on this question is crucial to avoid potentially serious tax, labor and other consequences. In some countries, such as France, Russia, Vietnam, the PRC and Brazil, the local labor code requires that a locally recognized employer engage local staff.<sup>111</sup> In other countries, such as Taiwan, there is no requirement for a local employer *per se*, but, in order to remit local employment related taxes, the employer must have a local entity/registration to effect payment.<sup>112</sup> In some countries, such as Malaysia and Mozambique, the commercial code triggers registration or company formation requirements upon the engagement of the first employee in the host country.<sup>113</sup>

It should also be noted that often times engaging local employees or assigning expats to work in a host country constitutes “doing business” in the host country.<sup>114</sup> Once such a nexus is established, issues of registration, corporate taxation, labor compliance, financial reporting, etc. are immediately presented.

### III. EMPLOYMENT AGREEMENT CONSIDERATIONS

A comprehensive treatment of employment agreements in the international context is beyond the scope of this Article.<sup>115</sup> This section will provide an overview of the typical types of employment agreements found in the international employment context and discuss some of the threshold issues to consider when entering into employment agreements.<sup>116</sup>

A couple of generally applicable principles should be borne in mind, however, when consulting with local counsel. First, in many jurisdictions

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111. See, e.g., Andreas Lauffs, *China*, *supra* note 54, at 55-5, 55-7 (citing Company Law (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 1993, effective July 1, 1994) (P.R.C.)); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-68 (citing Lei No. 6815, de 19 de agosto de 1980, D.O.U. de 21.08.1980, amended by Lei No. 6964, de 9 de dezembro de 1981, art. 99)(Brazil).

112. See John Briggs, Forming and Concluding Foreign Employment Relationships, Presentation at National Association of College and University Attorneys Conference on Compliance Programs 4 (Apr. 20, 2007), available at <http://www.nacua.org/nacuanet/NACUAResourcePages/Docs/InternationalPrograms/BriggsOutline.pdf>.

113. *Id.*

114. In India, for example, provisions of the Indo-US DTA concerning the creation of a Permanent Establishment for tax purposes can be triggered by the presence of a single employee of a foreign entity. See Indo-U.S. DTA, *supra* note 31, at art. 5(2)(l).

115. For an excellent treatment on the topic of expatriate employment agreements, see Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61.

116. For excellent examples of clauses and drafting considerations for foreign employment engagements, see John Briggs, *supra* note 112.

(e.g. France, PRC, Poland, Russia), local labor rules require that the employer and employee document their labor relationship in the form of a written agreement.<sup>117</sup> Other jurisdictions permit written agreements between employers and employees (e.g. Germany, Sweden, Japan, Australia).<sup>118</sup> And still others (e.g. South Africa, United Kingdom, Japan) require the development of written work rules for all employees.<sup>119</sup>

#### A. Types of Employment Agreements

In general, there are five common types of employment agreements in the international context. The “Indefinite Period” agreement fixes no end date for the employment relationship;<sup>120</sup> termination and other applicable

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117. See, e.g., Labor Contract Law (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008), art. 10 (P.R.C.) (China employers must conclude a written employment contract with each of their employees); Opinion on Several Issues Concerning the Thorough Implementation of the Labor Law (promulgated by the Ministry of Labor, Aug. 4, 1995) 1995 Lao Bu Fa 309, art. 16 (P.R.C.); Frederique Sauvage, *France*, *supra* note 67, at 4-8, 4-9. France requires written agreements. *Id.* (citing C. Trav. arts. L120 to -4, L 121 to -10, L 122 -54. See also Council Directive 91/533, 1991 O.J. (L 288) (EC); Andrzej Czopski, *Poland*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 17-18 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Poland Labor Code, art. 29 requires written labor agreements); Elena G. Barikhovskaya, *Russia*, *supra* note 75, at 41-21 (Russian Labor Code art. 67 and S. Ct. Decree No. 2, cl. 12 requires written labor agreements within the first three days of employment).

118. See, e.g., Walter Ahrens & Mark S. Dichter, *Germany*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 5-10 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Germany followed EU Directive 91/533 of October 14, 1991 by passing the Statute Concerning Notice of Relevant Terms and Conditions of Employment, Jul. 20, 1995); Reinhold Fahlbeck & Bernard Johann Mulder, *Sweden*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 19-22 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Sweden, which honors oral contracts, followed EU Directive 91/533 through the implementation of 1982 Employment Protection Act §6(a)); Setsuko Ueno & Marjorie Culver, *Japan*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 56-14 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (discussing Japan’s Labor Standards Law of 1947); John Cooper & Julian Clarke, *Australia*, in 2B INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 70-15 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (discussing Australia’s Workplace Relations Act of 1996).

119. Except in limited circumstances (e.g., employment of children under 15 years of age), South African law does not require written employment agreements with employees. See E. Johan Lubbe, *South Africa*, *supra* note 109, at 50-18 (“Section 29 of the BCEA, however, does impose an obligation on employers to provide newly hired employees who will be working more than 24 hours per month with ‘written particulars of employment,’ a statement setting out the essential terms and conditions of employment.”). See also Paul Callaghan, *United Kingdom*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 8-16 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (The U.K. requires written “terms and conditions” relative to employment, pursuant to Section 1 of the Employment Rights Act of 1996); Setsuko Ueno & Marjorie Culver, *Japan*, *supra* note 118, at 56-10 (discussing Japan’s Labor Standards Law of 1947, art. 89).

120. See Frederique Sauvage, *France*, *supra* note 67, at 4-10 (“A contract for an

procedures are usually prescribed by the applicable labor code.<sup>121</sup> “Fixed Period” agreements generally fix an end date for employment,<sup>122</sup> after which the employer generally has no further contractual obligations.<sup>123</sup> It is important to note, however, that utilization of successive “Fixed Period” agreements beyond two periods, or about two years, is generally prohibited.<sup>124</sup> Courts will often apply statutory and other benefits as if an employee were subject to an “Indefinite Period” agreement if the employer continues to issue successive “Fixed Period” contracts to its employees.<sup>125</sup>

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indefinite period is made without limitation in time and is the standard employment relationship in France. Any employment contract that is not validly concluded for a fixed period is deemed to be in force for an indefinite period.”) See also Labor Contract Law (P.R.C.), *supra* note 117, at art. 14 (open-ended employment contract is a contract where the employer and worker have agreed that the contract does not have a definite date of conclusion); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-26. “In the absence of a specific termination date, it is presumed that a contract is for an indefinite period. This presumption is rebuttable, but is so strong that the existence of a contract for a fixed period must be proved by the party claiming there is a termination date.” *Id.* (citing Amauri Mascaro Nascimento, *History of Labor Law in Brazil, in A PANORAMA OF BRAZILIAN LAW* 235, 251 (Jacob Dolinger & Keith Rseñ eds., 1992)).

121. See e.g. Employment Contract Law (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008 (limiting the number of fixed-term contracts that an employer may sign). See also Andreas Lauffs, *China*, *supra* note 54, at 55-11, 55-12 (discussing Article 2 of the Shenzhen Labor Contracts Regulations and Article 15 of the Beijing Labor Contracts Regulations).

122. See Frederique Sauvage, *France*, *supra* note 67, at 4-10. “Contracts entered into for a set term are an exception to the standard French employer-employee relationship, which is entered into for an indefinite period of time. An employment contract may be concluded for a fixed term only if the conditions set by the Labor Code are met. Such a contract may not be used in connection with the normal and permanent activities of the employer. The reason for entering into the fixed term employment contract must be clearly stated in the contract, which must be evidenced in writing. Failure to meet the conditions for a valid fixed term employment contract result in its requalification into an agreement with no fixed term.” *Id.* (citing C. TRAV. art. 122-3-1 (Fr)). See also Labor Contract Law (P.R.C.), *supra* note 117, at art. 13 (fixed term employment contract is one where the concluding date of employment is established and agreed upon by the employer and the worker); Lei No. 10.406, de 10 de janeiro de 2002, D.O.U. de 11.1.2002, art. 596 (Brazil) (provisions on contracts for a fixed term).

123. *But see* Frederique Sauvage, *France*, *supra* note 67, at 4-11. “At the term of a fixed term agreement, the employee is entitled by law to a payment of 10 percent of the gross compensation received during the term of the agreement to compensate the employee for having been employed pursuant to a fixed-term agreement.” *Id.* (citing C. TRAV. art. L 122-3-4).

124. See *id.* at 4-10. “A contract for a fixed term may be renewed once. However, it must not, in most instances, exceed a maximum of 18 months, including the renewal period.” *Id.* (citing C. TRAV. art. L 122-1-2 (Fr.)). See also Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-26 to -27. “[T]he terms of . . . permissible fixed-term employment contracts [in Brazil] may not exceed a term of 2 years. . . . The law only permits one extension of an existing contract for a fixed term.” *Id.* (citing Consolidacao das Leis do Trabalho, arts. 445, 451 (Brazil)).

125. See Frederique Sauvage, *France*, *supra* note 67, at 4-10. “Failure to meet the conditions for a valid fixed term employment contract result in its requalification into



For colleges and universities that commonly issue successive one year contracts to foreign faculty, care should be taken to recognize that after about two years, the relationship will likely automatically be considered a permanent one, potentially triggering substantial termination benefits and indemnities at the end of the period of employment.

“Temporary Period” agreements are a variation on the fixed term agreement and may be used in limited circumstances to engage employees for limited periods and for specific purposes.<sup>126</sup> “Specific Purpose” or “On-Call” agreements have also been developed more recently to assist employers in managing staffing needs, without the need for full-time permanent hiring.<sup>127</sup> Finally, “Secondment” agreements are sometimes used to temporarily assign an employee from one employer to another employer or affiliated entity and can be helpful in preserving the primary employment relationship and attendant benefits and seniority.<sup>128</sup>

### B. Standard Agreement Terms

Where a written employment agreement is required by foreign law or is desirable for the clear administration of the employment relationship between a U.S. college or university and an employee working abroad, there are a number of standard terms and conditions to be considered for inclusion. Generally speaking, the employment agreement should address such foundational issues as:

- Definition of the contracting parties (especially if a local affiliate of the college or university will be the formal employer)<sup>129</sup>

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an agreement with no fixed term.” *Id.* (citing C. TRAV. art. L 122-3-1 (Fr.)).

126. See Labor Contract Law (P.R.C.), *supra* note 117, at art. 15 (permitting contracts which “expire upon the completion of a certain job”); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-30 to -31. “‘Temporary labor’ is defined by statute as ‘that rendered by an individual to a firm, because of a temporary need to substitute its regular permanent staff or an extraordinary increase in business.’” *Id.* (citing Lei 6.019, de 3 de janeiro de 1974, D.O.U. de 04.01.1974, I Colecao art. 2 (Brazil)).

127. For example, Spain allows the formation of temporary employment contracts for the performance of a specific task of service. See Lourdes Martin Florez & Alvaro Navarro Cuellar, *Spain*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 7-17 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Royal Decree 2720/1998 of Dec. 18, implementing SW art. 15 on temporary employment contracts); E. Grace van Arkel & Cees J. Joonstra, *The Netherlands*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 6-25 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Book 7, Title 10 of the The Netherlands Civil Code (governing employment agreements) allows for the formation of “on-call” pre-agreements (*voorovereenkomst*) between employers with varying workflow or seasonal tasks, and employees).

128. For an illustration of and rationale for typical secondment agreement provisions (in dicta,) see *Eschelbach v. CCF Charterhouse/Credit Commer. de Fr.*, 2006 U.S. Dist. LEXIS 50672, at \*24 (S.D.N.Y. July 25, 2006).

129. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61, at 98-2.

- At-will versus fixed-term engagement<sup>130</sup>
- Choice of law and jurisdiction<sup>131</sup>
- Dispute resolution<sup>132</sup>
- Term of employment and renewal<sup>133</sup>
- Reassignment<sup>134</sup>
- Localization<sup>135</sup>
- Scope of employment<sup>136</sup>
- Foreign language requirement<sup>137</sup>
- Compensation, benefit plans, social security, and stock plans<sup>138</sup>
- Notice and termination<sup>139</sup>
- Repatriation and severance packages<sup>140</sup>
- Post-employment obligations and restrictions: confidential information, trade secrets and restrictive covenants<sup>141</sup>

### C. Mandatory Agreement Provisions

As noted above, the labor codes and other sources of law in many countries prescribe certain mandatory provisions that must be recited in an employment agreement or that will be automatically read into the agreement by the local labor court. Examples of these include prescriptions as to the content and form of the agreement,<sup>142</sup> probationary

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130. *Id* at 98-3.

131. *Id* at 98-5 to -12. See also F. Gamillschegg & M. Franzen, *Conflicts of Laws in Employment Contracts and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 160-80 (R. Blanpain & C. Engels eds., 6th ed. 1998).

132. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61, at 98-12 to -19.

133. *Id.* at 98-19 to -21.

134. *Id.* at 98-21.

135. *Id.* at 98-21 to -22. "Localization" is a term used to describe a process whereby an employee engaged initially on an expatriate basis (with home office salary and perquisites), after a period of years, is moved to a salary and benefits package that more closely approximates the local labor market conditions. *Id.*

136. *Id.* at 98-23.

137. *Id.* at 98-23.

138. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 65, at 98-24.

139. *Id.* at 98-32 to -37.

140. *Id.* at 98-37 to -38.

141. *Id.* at 98-39 to -47.

142. For example, Germany requires a written notice to employee including ten specific categories of information such as date employment commenced, expected period of employment, annual leave and compensation and benefits. Walter Ahrens & Mark S. Dichter, *Germany*, *supra* note 118, at 5-10 to -11. If salary amount is not specified, employee is entitled to claim a "usual" salary, which is generally held to be equivalent to what the salary under an applicable collective bargaining agreement

periods (generally 30 days<sup>143</sup> to 6 months<sup>144</sup>), and leave provisions.<sup>145</sup>

#### D. Common Agreement Traps

College and university counsel should be aware of several common traps when dealing with employment agreements. In many jurisdictions an “offer letter” that states all of the basic employment terms can create a contract and preclude negotiation of additional terms and conditions favorable to the employer’s position (e.g. probation periods, mandatory arbitration, governing law, etc.).<sup>146</sup> Blithely reciting the local labor statutes can lead to residual contractual entitlements. Agreements to agree are generally unenforceable, and inclusion of speculative terms such as contingent compensation can lead to serious disputes with employees down the road.

#### E. Modification of Terms and Conditions: Constructive Dismissal

Care needs to be taken when seeking to modify the terms and conditions of employment agreements in the international context. Many jurisdictions adopt a general standard of “constructive dismissal” that can lead to unintended and harsh consequences for the employer. In South Africa, a unilateral change to an employee’s terms and conditions of employment by the employer and without the employee’s consent can amount to an automatically unfair dismissal, an unfair dismissal, or a constructive dismissal. An employee may be reinstated with retrospective effect or awarded up to 24 months’ remuneration as compensation for an automatically unfair dismissal, or up to 12 months’ remuneration for an unfair dismissal or a constructive dismissal.<sup>147</sup> In France, unless otherwise

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would be. *Id.* at 5-11.

143. See, e.g., David J. Millstone & Judit Nador, *Hungary*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 14-30 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (discussing Hungarian Labor Code §91).

144. Italy requires that employment contracts include any applicable probationary period, which may vary in length depending on the category of employment (with a maximum of six months for upper management) pursuant to an applicable National Collective Bargaining Agreement. See Piergiovanni Mandruzzato, *Italy*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 6-13 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Italy Civil Code, Article 2096).

145. See *supra* note 142 discussing German law.

146. The Netherlands only requires an offer and acceptance to form an employment agreement, which may be either oral or written. E. Grace van Arkel & Cees J. Joonstra, *The Netherlands*, *supra* note 127, at 16-22. Certain terms may not be incorporated at a later time (such as a provision requiring a mandatory probationary period), if not agreed upon in writing at the onset. *Id.* at 16-23.

147. Labour Relations Act 1995, 1995 S.N.Z. No. 66 (N.Z.) § 194. In *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd*, the South African Court of Appeal held that an employer’s termination of a group of shift workers for failing to agree to a change in shift schedules was an automatic unjust dismissal and ordered their

provided in the employment agreement, an employee is permitted to refuse a substantial modification to his or her employment agreement. If the employer does not obtain the proper consent, the employee can claim that the employment contract was modified to his or her detriment, and bring a constructive discharge claim.<sup>148</sup> Generally speaking, these examples show that unilateral action of the employer that substantially modifies a material term or condition of an employment agreement to the detriment of the employee without effective ratification by the employee can result in a finding of constructive or unjust dismissal.

#### IV. TERMINATION OF EMPLOYMENT

As noted above, the concept of “at-will” employment does not generally apply in jurisdictions outside of the United States. Great care needs to be taken when considering severing the employment relationship with employees working overseas. Local labor counsel should be consulted as early as possible to ensure that all applicable regulations and procedures are followed to avoid claims of “unjust dismissal” or other punitive action.<sup>149</sup>

Immediate termination of employment can frequently be achieved in cases of serious dereliction of duty, fraud, theft and other serious misconduct. Many times the bases for immediate termination are set forth in the relevant statutory framework. In Ecuador, for example, upon presentation to the labor inspector, employment may be terminated for the following reasons under the Labor Code:<sup>150</sup>

- Worker repeatedly arrives late to work or cannot justify his/her tardiness or when worker abandons his/her post without just cause for more than three consecutive days so long as said

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reinstatement with retroactive effect. *Chemical Workers Industrial Union v. Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

148. Carole E. Scott, *Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France*, 7 *SAN DIEGO INT'L L.J.* 341, 360 (2006).

149. LARRY A. DiMATTEO, *supra* note 31, at 274. “For example, the Russian Labour Code makes it very difficult for the employer to terminate employment. Furthermore, the written contract is the basic form for commencing an employment relationship and there are detailed requirements for dismissing employees.” *Id.* (citing *Trudovoi Kodeks RF [TK] [Labor Code] arts. 77-84 (Russ.)*). For college and university employers, agency principles in the local context must be studied to ensure that nothing contained in a commercial agency contract is repugnant to imperative [mandatory] provisions of any law applicable to the contract. *Id.* at 276. “In many countries a non-resident principal will be liable for tax if the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the principal. For instance, when a principal appoints an agent in a foreign country, with a fixed office therein and with power to make contracts on his behalf, the principal may be deemed to be carrying on a business in that foreign country and be taxed accordingly.” *Id.* (citing Council Directive 86/653, 1986 O.J. (L 382) 7 (EC)).

150. Patricia Ponce Arteta, *Ecuador, supra* note 93, at 84-85.

- causes were produced within a monthly period of work;
- Serious acts of indiscipline or disobedience in violation of legally approved internal regulations;
- Lack of integrity or immoral conduct of the worker;
- Serious damage caused to the employer, the employer's spouse, relatives, or representative;
- Worker's unfitness for the job for which he or she was hired;
- Unjustified accusation against the employer with respect to its social security obligations. If such an accusation is justified, the worker will be guaranteed job security for another two years;
- Failure to follow safety, preventive and sanitary measures required by law, regulations or a competent authority; or failure to follow a doctor's prescriptions and orders without justification.

Employment termination without a valid legal basis will most often be considered unjust termination and result in damages, penalties and sometimes reinstatement. Unjust termination may subject organizations and their representatives to criminal penalties (in extreme cases, imprisonment) as well as civil sanctions. For example, in France, unjust termination in violation of the French Labor Code is likely to give rise to a significant award of damages to the employee, in addition to fines payable by the employer.<sup>151</sup> In these recent challenging economic times, colleges and universities should not rely on the U.S. expectation that poor economic conditions or "redundancy" will provide a valid basis for employment termination. Damages can be significant, as demonstrated by the Ecuador Labor Code, which awards one month salary for each year of service (up to 25x monthly salary) for employees with more than 3 years of service, plus a bonus equal to 25% of the last monthly salary for each year of service.<sup>152</sup>

A valid or just termination generally can only be effected by conforming to the cause, process and procedure standards applicable in the relevant jurisdiction. Certain jurisdictions (France, UK) require strict pre-termination procedures and meetings with employees and care should be taken not to communicate a final decision before affording the required process. In the UK, for example, the following steps must be followed in order to implement a valid reduction in force of 20 or more employees:<sup>153</sup>

- Verbal announcement
- Written confirmation of announcement

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151. In France, unjust termination in violation of the French Labor Code is likely to give rise to a significant award of damages to the employee in addition to other fines, payable by the employer. 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 4-22 & 4-23 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

152. Patricia Ponce Arteta, *Ecuador*, *supra* note 96, at 84-85.

153. The generally applicable employment legislation in the UK is the Employment Rights Act of 1996. Employment Rights Act, 1996, c. 18 (Eng.), *available at* [http://www.opsi.gov.uk/acts/acts1996/ukpga\\_19960018\\_en\\_1](http://www.opsi.gov.uk/acts/acts1996/ukpga_19960018_en_1).

- Written invitation to meeting #1
- Discuss ideas and alternatives
- Written invitation to meeting #2
- Respond to ideas and alternatives
- Written confirmation with appeal process
- Conduct appeal meetings and confirm
- Distribute waivers and pay for legal review
- Execute waivers and separate

It is always important to remember that foreign labor courts will generally favor the employee in disputed termination scenarios. In addition, care should be taken to distinguish between the provision of “notice” and the provision of “severance”. They have different meanings and sometimes inartful drafting can extend the length of time for which an employer may be liable for termination indemnities. As in the United States, releases of claims must generally be supported by new consideration. And finally, all termination documentation must follow the local country language requirement and protocols.<sup>154</sup>

#### V. BENEFITS

The range of employment related benefits available to college and university employees working overseas is huge. This section will briefly overview the typical benefit schemes that will be encountered by college and university counsel and administrators. As a general matter, colleges and universities employing staff abroad will be required to observe the local laws and regulations concerning employment related benefits. These benefits are specific to each country, but almost universally include mandatory retirement schemes.<sup>155</sup> Other examples include:

- Vacation pay
- Sick pay
- Maternity benefits<sup>156</sup>
- Worker re-training funds
- Worker’s compensation funds
- Commuter travel allowances

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154. See, e.g., C. TRAV. arts. L1232-2, L1232-3, L1232-4, L1232-7.

155. For example, the French Labor Code provides for mandatory retirement schemes, as paid through the national social insurance system, or, in some cases, as required by collective bargaining agreements. 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 4-97 & 4-98 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

156. In India, The Maternity Benefit Act, No. 53 of 1961 provides for paid maternity leave at full salary for up to 12 weeks. 2B INTERNATIONAL LABOR & EMPLOYMENT LAWS 57-82 to 57-85 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

- Meal allowances
- Housing allowances
- Public health insurance schemes
- Short and long term disability schemes
- “13<sup>th</sup> month” salary<sup>157</sup>

The cost of social security and other benefit schemes can be formidable, so careful planning should be undertaken to understand the full cost profile of a local hire before any offer of employment is tendered.

Navigating policy issues as they relate to benefits, both mandatory and customary, presents unique challenges for the multinational college and university employer. For true expatriates—faculty or staff employed in the United States and assigned for limited duration in a foreign country – the cost of local mandatory retirement schemes must be borne by both employer and employee with little hope that any benefits will ultimately accrue to either.<sup>158</sup> This raises the costs of running overseas programs, as both U.S. and local retirement benefits must be paid by the parties. Expats with full international health benefits contracted in the United States to cover their overseas stay often face similar mandatory health benefit schemes in countries where the public facilities available to them do not meet the standards typically expected by a U.S. employee.

With regard to host country nationals, enrolling in the local mandatory retirement and other benefit schemes can be time consuming and the terms and amounts of benefits can change dramatically due to changes in economic conditions or in the political landscape. As noted above, such schemes typically apply from the very first employee hired locally, thus adding to start up costs in potentially unanticipated ways. Sometimes local employers engage in labor practices designed to avoid paying full benefits for their host country national employees. Sometimes these practices are so ingrained that a U.S. college or university’s local managers will assume that the college or university should follow the local custom, even if technically in violation of local law. It is important to remember, however, that U.S. colleges and universities are visible international organizations when working overseas, particularly in lesser developed countries. After years of pressure from the World Bank, the International Monetary Fund

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157. The “13<sup>th</sup> Month” salary generally refers to the additional one month of salary paid to employees, especially in South America, in respect of vacation. *See* Patricia Ponce Arteta, *Ecuador*, *supra* note 93, at 83 (“Christmas bonus or 13<sup>th</sup> salary . . . consists of a sum equivalent to the twelfth part received by the employee in the 12 months from 1 December of the previous year to 30 November of the year the payment is made. For this payment, all remunerations, including overtime pay, are added to the employee’s earnings.”). Ecuador even has a School bonus or 14<sup>th</sup> salary, which is equivalent to the base unified salary and is paid each year by the 15<sup>th</sup> of August in the highlands and Oriente, and by the 15<sup>th</sup> of March in the coastal area. *Id.* at 84.

158. But see the discussion of totalization agreements and tax treaties, *supra* part II.B.2, which may provide some relief.

and other multi-lateral international agencies to get serious about tax policy and enforcement,<sup>159</sup> many countries are looking first to international employers to exercise their new enforcement muscles, particularly because international employers often offer salaries at the higher end of the local scale.

Given the anticipated growth in international programming, U.S. college and university administrators need to think through policies in at least three key areas: compensation philosophy, tax assistance and currency protection. In the compensation area, decisions are required up-front as to whether staff working overseas (whether local nationals or expats) will be compensated at a local rate and in line with local market conditions or at rates tied to U.S. based salaries.<sup>160</sup> For expats, many institutions begin with a U.S. based salary, plus a formula for location allowances indexed to local market conditions.<sup>161</sup> A key rationale for this approach is that faculty or staff on temporary assignment overseas must also cover the costs of maintaining their U.S. residences and commitments, at least to some degree. After a period of years, however, this assumption (and the high costs to the employer) prompts most employers to transition even expat staff towards local salary and benefit scales.<sup>162</sup> Where significant numbers of U.S. based faculty or staff are assigned to multiple overseas locations, a compensation philosophy that balances equity in base pay for similar positions (e.g. overseas faculty) with the sometimes dramatically different salary scales and costs of living from country to country (e.g. Ghana vs. Switzerland) is critical.

A second key benefits policy to consider is tax assistance. Tax rates in

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159. At a joint meeting between The Organization for Economic Cooperation and Development (OECD) Committee on Fiscal Affairs (CFA) and the OECD Development Assistance Committee (DAC), the two Committee chairs announced the creation of a Task Force on Tax and Development. *See* Joint Meeting on Tax and Development between the Committee on Fiscal Affairs (CFA) and the Development Assistance Committee (DAC), The Organization for Economic Cooperation and Development (Jan. 27, 2010), *available at* <http://www.oecd.org/dataoecd/7/36/44493096.pdf>.

160. For a general treatment of compensation issues in the international employment context, see STEPHEN PERKINS & SUSAN SHORTLAND, *STRATEGIC INTERNATIONAL HUMAN RESOURCE MANAGEMENT* 137 (2d ed. 2006)(discussing choices and consequences in international employee compensation). *See also* PETER J. DOWLING, DENICE E. WELCH, & RANDALL S. SCHULER, *INTERNATIONAL HUMAN RESOURCE MANAGEMENT* 181 (3d ed. 1999).

161. PETER J. DOWLING, DENICE E. WELCH, & RANDALL S. SCHULER, *supra* note 160, at 182–87. 162. This transition is known in international human resources circles as “localization.” *See, e.g.*, Expat localisation: policy versus practice, HR Story, Expatica The Netherlands, *available at* <http://www.expatica.com/hr/story/Trends-in-expat-localization-policies.html>.

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some jurisdictions can approach 45% of gross wages when the costs to the employee of locally mandated benefits are added into the equation. A well designed tax assistance policy can help ease some of the financial burdens for faculty and staff working overseas.<sup>163</sup> The two most common approaches are known as “tax equalization” and “tax protection.”<sup>164</sup> Under tax equalization, “firms withhold an amount equal to the home country tax obligation of the expat and pay all taxes in the host country.”<sup>165</sup> Under tax protection, “the employee pays up to the amount of taxes he or she would pay on compensation in the home country. In such a situation, the employee is entitled to any windfall received if total taxes are less in the foreign country than in the home country.”<sup>166</sup>

Finally, currency protection policies can be important tools for avoiding large losses of purchasing power for employees receiving U.S. dollar denominated salaries while working overseas.<sup>167</sup> Again, such policies can range from simple to complex with respect to terms and implementation, with most attempting to protect purchasing power within a band of 10% or so, and relatively few requiring repayment of funds in the event of a windfall in purchasing power due to currency fluctuation.

As should be evident from the brief overview of benefits and policies provided above, the college or university’s venture into the world of international employment can quickly bring with it a range of significant challenges for human resource and finance administrators. International program design and development activities should factor in the costs of developing the expertise in house or contracting with outside professionals to fully support the employment of expats, local nationals and third country nationals.

## VI. OTHER ISSUES TO FLAG

While beyond the scope of this Article, other issues to consider when employing staff overseas include:

- Application of U.S. employment related statutes and regulations to U.S. citizens working abroad (e.g. Title VII)<sup>168</sup>

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163. PETER J. DOWLING, DENICE E. WELCH, & RANDALL S. SCHULER, *supra* note 160 at 193-95.

164. *Id.* at 194.

165. *Id.*

166. *Id.*

167. *Id.* at 195.

168. See John H. Robinson, *The Extraterritorial Application of American Law: Preliminary Reflections*, 27 J.C. & U.L. 187, 197-98 (2000). See also Timothy J. Darby, *Extraterritorial Application of U.S. Laws*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 34-1 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009); See Baker and Cranman, *supra* note 61.

- The European Union (EU) Data Protection Directive<sup>169</sup>—EU’s comprehensive data privacy rules when handling host national personal information
- Avoiding the “double employer” trap (when an employee holds contracts with both the U.S. employer and a local employer (e.g. a branch or affiliate of the U.S. employer) for the same or overlapping duties
- Application of local non-discrimination and other protective measures<sup>170</sup>
- Labor unions and collective bargaining agreements

#### VII. ADDITIONAL RESOURCES AND CONCLUSION

The range of labor issues and regulations applicable to employing staff overseas is incredibly varied. Because this variation is compounded across the great number of jurisdictions in which colleges and universities are seeking to operate, there are relatively few primary source English language legal research materials upon which to draw. This Article has attempted to highlight some of the threshold considerations for college and university counsel when advising their clients on international assignments for staff and faculty and engagements of local nationals abroad. Appendix D contains some useful reference resources for college and university counsel and administrators that provide further insight into local labor regulations.

In all cases, college and university counsel and senior administrators, in consultation with local foreign counsel, need to be involved as early as possible in the initial planning and implementation of human resource plans. With proper preparation and foresight, and a healthy dose of patience and cross-cultural sensitivity, U.S. colleges and universities can successfully take advantage of the many exciting opportunities to internationalize their curricula and successfully staff their overseas programs in conformance with local and international norms.

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169. Council Directive 95/46 1995 O.J. (L 281) 31 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>.

170. See Baker and Cranman, *supra* note 61. See also Peter Schmidt, *AAUP Urges Faculty Role in Protecting Workers’ Rights at Overseas Campuses*, CHRON. OF HIGHER EDUC., Apr. 9, 2009, <http://chronicle.com/article/AAUP-Urges-Faculty-Role-in/47174/>.

## APPENDIX A

### AGREEMENT BETWEEN “UNIVERSITY” AND “PROVIDER”

University, a \_\_\_\_\_ corporation (“University”) and Provider, a \_\_\_\_\_ corporation (“Provider”) hereby agree that Provider will permit the University’s students to participate in Provider’s international study abroad program in Uganda, Africa. The following provisions shall govern the conduct of the parties:

1. Students from University participating on the Provider’s study abroad program sponsored and operated by Provider in Uganda, Africa will remain as matriculated students at University.
2. Provider will provide formal notification to students and to the International Study Programs Office at University of their enrollment status within two weeks of acceptance.
3. For the Uganda program, Provider will bill University for the required \$400 program deposit with each student’s final program bill. University agrees to pay this deposit under the terms outlined in Provider’s Conditions of Participation.
4. University students applying to the Uganda program will make their required payments for standard program fees to University; Provider will bill University for the amount of the program (including tuition, fees, room and board). Payment to Provider shall be made within 30 days of receipt of Provider’s invoice, subject only to later disbursement of non-University financial aid, in which case payment shall be made as promptly as possible following disbursement.
5. All financial aid awarded to University students will be administered by University’s Financial Aid office, with the exception of Provider scholarships. Provider scholarships require a separate application form; these awards are administered by Provider’s Financial Aid Office.
6. Provider will provide notification of grades by sending a grade report to each University student participating in the Uganda program.
7. Provider will provide University with formal college transcripts (and a narrative evaluation of the Independent Study Project) for each

student who participates in the Uganda program.

8. The parties recognize and acknowledge that all rights and goodwill in their respective trademarks are the exclusive property of their separate organizations. University may announce its affiliation with Provider with respect to the Uganda program in its catalog or other printed materials, and may publicize the Provider sponsored and operated program in Uganda in a manner deemed mutually acceptable to the parties. Provider may include University's name in its published list of student home institutions. Except as set forth above, the parties agree not to use the other's name or other trademarks in advertising, marketing or other materials without the prior written permission of the other.
9. This Agreement shall remain in effect from \_\_\_\_\_ through \_\_\_\_\_, unless terminated earlier pursuant to the terms hereof, and may thereafter be renewed by mutual written agreement of the parties. Notwithstanding the foregoing, this Agreement may be terminated at any time by either party for its convenience upon one hundred and eighty (180) days written notice to the other party hereto. The parties understand and agree that nothing herein shall require Provider to run the Uganda or any other program and that students from University shall be subject to all admissions and other criteria relating to their participation. Provider may cancel, modify or otherwise adjust its program offerings, including the Uganda program, at any time and for any reason.
10. Provider agrees to indemnify, defend and hold harmless University and its officers, trustees, employees, agents, affiliates and representatives (the "University Representatives") with respect to any and all claims, demands, damages, actions, causes of action, judgments and expenses (including without limitation reasonable attorneys' fees)(collectively, "Losses") which arise out of, relate to or are in any manner connected with the international program contemplated herein or any travel, field trip, field experience, internship or activity incident thereto and which arise out of the negligent, tortious, intentional or unlawful acts, omissions or conduct of Provider or its employees, officers, directors, agents, affiliates, contractors or representatives (the "Provider Representatives"), including, without limiting the foregoing, any Losses alleging personal injury, death, property damage, negligent supervision, unlawful discrimination, harassment, negligent hiring or any other claim or cause of action connected with or arising out of this Agreement, the Uganda program or any travel, field trip, field

experience, internship or activity incident or related thereto.

University agrees to indemnify, defend and hold harmless the Provider Representatives with respect to any and all Losses which arise out of, relate to or are in any manner connected with the international program contemplated herein and which arise out of the negligent, tortious, intentional or unlawful acts, omissions or conduct of the University Representatives. This indemnification obligation shall not apply to any acts, omissions or conduct of University students as they are not employees or agents of University.

11. This Agreement shall be governed by, and construed in accordance with the laws of the State of \_\_\_\_\_, without regards to its conflicts of laws rules. Any dispute between the parties and arising out of or related to this Agreement, the international program contemplated hereunder or any travel, field trip, field experience, internship or activity incident thereto shall be resolved exclusively via confidential, binding arbitration under the commercial rules of the American Arbitration Association, in \_\_\_\_\_ or at another location within the United States that is mutually agreed upon by the undersigned parties in writing.
12. Provider agrees to provide employer's liability insurance, automobile liability insurance and general liability insurance in amounts sufficient to adequately cover the Provider Representatives in planning, providing and operating the Uganda program and carrying out Provider's rights and responsibilities arising out of or in connection with this Agreement or the international program contemplated hereunder. At a minimum, Provider shall have auto liability insurance coverage with minimum policy limits of \$2,000,000 each person/\$2,000,000 bodily injury and property damage each accident; general liability insurance in minimum limits of \$5,000,000 bodily injury and property insurance each occurrence and aggregate, and employer's liability with limits of \$1,000,000.00 each accident. Claims made policies shall not be acceptable. Satisfactory certification that all of the insurance policies and coverages required by this Paragraph are in full force during the term of this Agreement must be furnished before commencement of any services hereunder. With respect to each of the policies of insurance or coverages required by this Paragraph, Provider shall provide to the Department of Risk Management and Safety at University, in advance of the commencement of providing any services hereunder, certificates of insurance (in the English language) evidencing that said policies of insurance are and will remain in effect throughout the

term of this Agreement; that University is an additional insured thereunder; and, that University will be notified by Provider's insurer(s), in writing, at least thirty (30) days in advance if any such policy or coverage is to be canceled or terminated for any reason.

13. With respect to University student participants in the Provider's Uganda program, Provider shall, subject to the Family Educational Rights & Privacy Act, immediately report to University's International Studies Program staff:
  - a. incidents or complaints involving violations of Provider policies or
  - b. disciplinary rules;
  - c. incidents or allegations of harassment, discrimination or other unlawful conduct;
  - d. any accidents, injuries, arrests or emergencies
14. In the performance of the services contemplated herein, Provider shall not be considered an agent of University but shall be, and shall be deemed to be, an independent contractor. The undersigned parties agree that University shall have no control over the day-to-day operations of the program contemplated herein. Provider, not the University, shall control the manner, means and methods of the performance of Provider's obligations under this Agreement.
15. In advance of their departure, Provider and University each agree to require that each University student participating in the Uganda program execute a liability waiver form for the Uganda program.
16. This agreement is subject to the provisions of the Anti-Kickback Enforcement Act of 1986, Public Law 99-634 (41 U.S.C. secs. 51-58). By agreeing to this binding Agreement, the transacting parties (1) certify that they have not paid kickbacks directly or indirectly to any employee of University for the purpose of obtaining this or any other agreement, purchase order or contract from University and (2) agree to cooperate fully with any Federal Agency investigating a possible violation of the Act. Copies of the statute and the pertinent regulations may be obtained from University upon request of the Office of Affirmative Action and Government Regulation Compliance.
17. Provider hereby certifies that it is an Equal Employment Opportunity employer and that it complies with the provisions set forth in Executive Order 11246, as amended, and with all other

applicable state and federal statutes and regulations that prohibit discrimination in the workplace, including but not limited to Department of Labor regulations and The Rehabilitation Act of 1973, as amended. The contract clauses set forth at 41 CFR sec. 60-1.4 (a) and (b), 41 CFR sec. 60-1.7, 41 CFR sec. 60-250.4 and 41 CFR sec. 60-741.4 are hereby included and made a part of this agreement.

IN WITNESS WHEREOF, the undersigned parties hereto have set their hands by and through their duly authorized officers on the date and year first recited above.

UNIVERSITY:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

PROVIDER:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

## APPENDIX B

### UNIVERSITY SPONSORED OVERSEAS ACADEMIC PROGRAMS

#### Start-Up Issues Check List

##### Registration/Legal Status

1. Is University registered or otherwise qualified to do business in this country?
  - a. If yes, what is the official registered name and the legal nature/structure (e.g. Direct Registration, Branch Office, Wholly Owned Subsidiary, Local NGO, etc.)?
  - b. If no, do the proposed activities require registration of University (e.g. as an employer) as a foreign organization conducting business in this country? Note that even where University is working through a local partner institution, University staff working in-country paid directly by the University may trigger local employment obligations (e.g. tax withholding).
  - c. Are there any U.S. Government restrictions on conducting activities in this country (e.g. Cuba, Iraq)?
  - d. Consult with University Counsel and local counsel *before* commencing activities.

##### Real Estate

###### *Program Office:*

1. Will the activities require the leasing of administrative or program office space by University?
2. How will the Program Office be adequately secured and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws? Will the space be inspected by a University person prior to facility use? (recommended). Is there a checklist for inspection?
3. Create an inventory of all University owned, leased, and rented personal property. Consult with University risk manager to ensure appropriate coverage(s), including coverage for items in transit.

###### *Classroom Space:*

1. Will the activities require the leasing of Classroom Space by University?
2. How will the Classroom Space be adequately secured and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws? Will the space be inspected by a University person prior to facility use? (recommended). Is there a



checklist for inspection?

3. Is there Lab/Research space? What steps need to be taken to comply with University policy and local regulations with hazardous materials disposal, etc.?

*Staff Housing:*

1. Will the activities require the leasing of residential housing for University expatriate staff by University?
2. Will the lease of housing be accomplished in the name of the University or in the name of the individual expatriate? Will the University's insurance policies cover these premises?

*Student Housing*

1. What will be the arrangements for housing students during the program (e.g. dormitory, homestay)?
2. If dormitory or other institutional space will be utilized, how will the space be adequately secured and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws? Will the space be inspected by a University person prior to facility use? (recommended). Is there a checklist for inspection?
3. If homestay or similar non-institutional space will be utilized, how will placements be handled? How will screening and orientation of families be accomplished?

*Excursion Sites:*

1. Briefly inventory and describe the nature, frequency, duration and location of Program excursions or other travel related to the proposed activities (include rural homestays).
2. Will any written contracts be required to govern any aspects of these excursions (i.e. transportation, lodging, activities etc)?
3. How will excursion lodgings be adequately secured, and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws?
4. What sorts of activities will be allowed and/or disallowed (e.g. renting vehicles, riding motorcycles, scuba diving and other risk prone activities)?

**Employees - Local Hires**

1. Will the activities require the hiring of local nationals, for what types of positions and at what rate of compensation?
  - a. If yes, what employer registration requirements are applicable, including registrations for local tax withholding, retirement, social security, health and other benefits?

2. How will local hires be paid – e.g. through a local payroll, cash, direct deposit?
3. How will required deductions and remittances for local payroll be handled and what reporting systems will be needed?

Consult University Counsel and local counsel *before* commencing any local hiring.

### **Employees – Expatriate**

1. Will the activities require the hiring of Expatriate staff (U.S. or third country nationals), for what types of positions and at what rate of compensation?
  - a. If yes, what employer registration requirements are applicable, including registrations for local tax withholding, retirement, social security, health and other benefits?
2. How will Expatriates be paid – e.g. through a U.S. Bank Account, local payroll, cash, direct deposit?
3. How will required deductions and remittances for payroll be handled and what reporting systems will be needed?
4. What work authorization or visa will be necessary for proper employment and immigration status in country?

Consult University Counsel *before* commencing any Expatriate hiring.

### **Independent Contractors**

1. Will the activities require the hiring of Independent Contractors, for what types of services and at what rate of compensation?
  - a. If yes, what local registration requirements are applicable, including registrations for local tax withholding?
2. How will Independent Contractors be paid – e.g. by check, cash, direct deposit?
3. How will required deductions and remittances for taxes be handled and what reporting systems will be needed?

Be sure to check with local counsel as to rules regarding classification of service providers who are individuals (employee vs. independent contractor).

### **Tax Issues**

#### *Corporate Income Tax:*

1. Based on the local registration status of University and University's U.S. tax exempt status, will University have any obligation to report on its activities to local income tax authorities?
2. Will tuition revenues in the United States be considered gross revenue to University derived from local activities and therefore subject to local corporate income tax regime (absent a local exemption)?

*Other Taxes:*

Briefly inventory local tax withholding obligations in each category noting any balance/payment level that triggers tax liability:

- a. Local Hires
- b. Expatriates (generally subject to local income tax if staying in country longer than 183 days)
- c. Independent Contractors
- d. Program Funds
- e. Rental / leased property
- f. VAT Tax paid / Refunds
- g. Fringe Benefits paid In Country

Consult local accountant *before* making any payments.

**Banking/Cash Management**

1. How will the proposed activities be funded?
2. What is the average annual program expenditure?
3. Will a bank account be required?
  - a. If yes, who should be the signatories on this account (note: VP Finance should be a co-signatory on all accounts where possible)?
  - b. If no, what alternative cash safekeeping/management strategies are in place (if a personal bank account is used, list the signatories on this account)?
4. Who will be primarily responsible for program record-keeping and account reconciliation?
5. What receipting practices for transactions and petty cash will be required?

**Transportation**

1. Describe all methods of transport expected to be used in connection with the proposed activities (including excursion, rural homestays, etc.)
2. Will there be any recurring transportation arrangements with local companies to provide transport for students, participants and/or staff?
3. Certificates of Insurance Coverage should be obtained from any transportation providers.
4. Will University own or *control* any vehicles used in transporting students, participants, and/or staff (include Staff vehicle if ever used in transporting students, participants and other members of staff)?
5. If yes, please provide details of vehicles and of how insurance coverage on these vehicles (i.e. make/model/year as well as insurance company/insured amount/limits/deductibles etc) will be handled.

**Insurance/Risk Management**

1. Is the University required to purchase any form of insurance locally (property, fire, health for local employees, disability, workers' compensation, etc.)?
2. Do the students/participants have appropriate health/medical insurance coverage while in-country?
3. Does University's health/medical coverage cover University employees working outside the United States?
4. Does University's liability insurance program adequately cover the proposed activities (some policies exclude coverage for countries where the U.S. Department of State has issued a Travel Warning, most exclude war)? Primarily, 4 lines of insurance coverage are implicated: General Liability, Auto Liability, Property Insurance (covering University's owned property) and Workers' Compensation.
5. Will University require a formal release and/or liability waiver from participants before permitting them to participate in the program?

#### **Crisis Planning and Communication**

1. Be sure that all students, participants and expatriate staff are registered with the local Embassy or Consulate.
2. In the event of an emergency situation in-country, there needs to be an established *written* communication procedure for reaching all students, participants and staff and University headquarters. Phones, cell phones and/or satellite phones should be required.
3. In the event of an emergency situation in-country, there should be an established *written* evacuation procedure for students, participants and staff.
4. In the event of a *medical* emergency situation in-country, is there an established *written* med-evac plan for all phases of the program activity?

#### **Student, Participant Visas**

Establish what types of visas your program participants, students or others visiting the site should have.

1. Do you need a sponsoring organization other than University?

#### **Health and Safety**

1. Are there any abnormally dangerous conditions at the program/activity site (including excursion, homestay and rural visit sites), e.g. consular information, unusually high crime rates, potential for sexual harassment, unique risks for disease, unsafe blood supply, civil unrest, terrorism etc.?

(March 2008)

## APPENDIX C

Countries Requiring Formation of Registered Entity to Employ Local Nationals<sup>171</sup>

Country	Requires Formation	Special Contract for Local Hire	Special Contract for Expatriate
Indonesia	Yes	Yes	No
China (PRC)	Yes	Yes	Yes
Mongolia	Yes	Yes	No
Mexico	Yes	Yes	Yes
Viet Nam	Yes	Yes	No
Jamaica	Yes	Yes	No
Ghana	Yes	Yes	No
Jordan	Yes	Yes	Yes
Chile	Yes	Yes	No
Australia	No	Yes	No
France	Depends	Yes	Yes
Brazil	Yes	Yes	Yes
Bolivia	Yes	Yes	No
Ecuador	Yes	Yes	No
Botswana	Yes	Yes	No
Cameroon	Yes	Yes	Yes
Germany	No	Yes	No
Ireland	No	Yes	No
Madagascar	Yes	Yes	Yes
Morocco	Yes	Yes	Yes
Netherlands	No	Yes	No
Nepal	Yes	Yes	No
South Africa	Yes	Yes	Yes
Spain	Yes	Yes	No
Switzerland	No	Yes	No
Senegal	Yes	Yes	Yes
Uganda	Depends	Yes	Yes
Samoa	Yes	Yes	No

**Disclaimer:** This table does not constitute legal advice and is provided for illustrative purposes only. Information is current as of February 2010. Always consult local foreign counsel for advice; the applicable laws in many jurisdictions may change with some frequency.

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171. All data gathered from Worldwide Consulting Group LLC, <http://www.worldwideconsulting.com> (last visited Mar. 29, 2010).

## APPENDIX D

### USEFUL INTERNATIONAL EMPLOYMENT LAW RESOURCES 2010

#### **American Bar Association:**

The American Bar Association has an International Employment law Section and Committee which has its own annual conference, monthly newsletter, and resources, including the following publications:

AMERICAN BAR ASSOCIATION, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: INTERNATIONAL LABOR AND EMPLOYMENT LAW, VOLUME I (EUROPE) (Philip M. Berkowitz, Anders Etgen Reitz, & Dr. Thomas Muller-Bonanni eds., 2d ed. 2008).

AMERICAN BAR ASSOCIATION, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: INTERNATIONAL LABOR AND EMPLOYMENT LAW, VOLUME II (Philip M. Berkowitz, Anders Etgen Reitz, & Dr. Thomas Muller-Bonanni eds., 2d ed. 2008).

LUCINDA A. LOW, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: INTERNATIONAL LAWYER'S DESKBOOK (2d ed. 2002).

AMERICAN BAR ASSOCIATION, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: LABOR AND EMPLOYMENT LAW IN THE NEW EU MEMBER AND CANDIDATE STATES (Anders Etgen Reitz ed., 2007).

1A INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

1B INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

2A INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

2B INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

The American Bar Association also puts out regular newsletters on International Labor and Employment Law topics. Their section website is: <http://www.abanet.org/dch/committee.cfm?com=IC835000>.

**Other Compendia:**

GETTING THE DEAL THROUGH, LABOUR & EMPLOYMENT IN 43 JURISDICTIONS WORLDWIDE (Barry A. Hartstein & Tram-Anh T. Frank eds., 2009), *available at* <http://www.gettingthedealthrough.com>.

**Web-Sites:**

The Doing Business Project, <http://www.doingbusiness.org/>

# GOING GLOBAL: MANAGING LIABILITY IN INTERNATIONAL EXTERNSHIP PROGRAMS—A CASE STUDY

KATHLEEN M. BURCH<sup>\*</sup>

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The article fills a gap in the current scholarship by recognizing the need for international externship programs and by providing a legal framework for educational institutions, and law schools in particular, to assess the risks involved in the design and implementation of an international externship program. Part II of the article clarifies the current law on an educational institution's potential legal duty to exercise reasonable care in minimizing reasonably foreseeable risks of harm to its students and includes a discussion of the few cases where students have sued their educational institution for injuries received while participating in international programs. Part III of the article discusses the educational institutions' potential duty to an externship placement site to exercise reasonable care

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in the placement of students at an externship site and explores the actions an institution can or should take to fulfill that duty. Part IV of the article utilizes the “facilitator model” first articulated by Robert Bickel and Peter Lake to illustrate how an educational institution can manage risk in the design and implementation of an international externship program. Part IV also discusses whether a law school’s compliance with the ABA Standards for the Approval of Law Schools and the ABA Criteria for the Approval of Foreign Summer Programs is sufficient to establish that the law school has acted reasonably in the design and implementation of its international externship program and has thus satisfied its duty of care to both the student and the placement site. The article concludes that international externship programs expose the law school or sponsoring institution to less risk, are more cost effective and provide the student with greater learning opportunities than do study abroad programs.

As the practice of law continues to become more globalized, and as the demand to graduate students who can competently practice law increases, law schools will need to respond by increasing the number of international educational opportunities available to their students. Graduates with international practice experience who exhibit the cultural competence to work and live in foreign countries will be more marketable. Thus, the new educational opportunities which law schools need to design are international externships. *Going Global* provides law schools with a paradigm by which to design and implement an international externship program while minimizing the risk of harm to its students, to the placement site, and to itself.

## I. INTRODUCTION

Globalization is affecting the practice of law and law schools must respond.<sup>1</sup> The globalization of the practice of law is evident from the American Bar Association’s rule of law programs,<sup>2</sup> as well as the trend by U.S. law firms to open offices in foreign countries.<sup>3</sup> In 2007, the U.S.

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1. See N. William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years (Part 2)*, AALS NEWS NO. 2005-3 (Ass’n Am. L. Sch., D.C.), Nov. 2005, available at [http://www.aals.org/services\\_newsletter\\_presNov05.php](http://www.aals.org/services_newsletter_presNov05.php) (“Law schools find themselves racing to keep up with the rapid pace of the changes wrought by advancing globalization.”); see also Jon Mills & Timothy McLendon, *Law Schools as Agents of Change in Justice Reforms in the Americas* 5, 6 (Mar. 25-26, 2006) (unpublished paper, presented at Univ. of Fl. Conf. on Legal and Policy Issues in the Americas), available at [http://www.law.ufl.edu/cgr/conference/06confmaterials/5\\_Panel/5\\_MillsMcLendon-LawSchoolsasAgentsofChange.pdf](http://www.law.ufl.edu/cgr/conference/06confmaterials/5_Panel/5_MillsMcLendon-LawSchoolsasAgentsofChange.pdf).

2. ABA Rule of Law Initiative, <https://www.abanet.org/rol/> (last visited Feb. 22, 2010).

3. See Ted Zablocki, *Moving Abroad*, LEGAL TIMES, June 24, 2002, at 29–30. See also *International Law Firms*, <http://www.ilflaw.com> (last visited Feb. 22, 2010); *Law Firm Alliance*, <http://www.lawfirmalliance.org> (last visited Feb. 22, 2010).

exported 1.25 billion dollars of legal work and imported 1.5 billion dollars of legal work.<sup>4</sup> One hundred forty of the Global 500 companies are U.S. corporations.<sup>5</sup> Law firms and their clients are operating in an international market. Students are increasingly including an international experience as part of their education.<sup>6</sup> Future law school graduates will be expected to and will expect that upon graduation they will be able to competently practice law in a global economy.<sup>7</sup>

Legal education's response to globalization must be within the context of its mission to graduate students who are ready for the practice of law.<sup>8</sup> Two recent reports on the state of U.S. legal education conclude that law schools must do a better job of preparing students for the practice of law by teaching students the law in context.<sup>9</sup> Teaching the law in context requires that students learn, not just in the classroom, but in the field—solving the real world problems of real world clients.<sup>10</sup> Teaching in context is usually best done through a law school's clinical program<sup>11</sup> or through its

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4. Hines, *supra* note 1.

5. *World's Largest Corporations*, FORTUNE, June 20, 2009, at F-1, available at <http://www.money.cnn.com/magazines/fortune/global500/2009/countries/US.html>.

6. See *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002); see also Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 309 n.1 (2006). In the 2006–2007 academic year, 241,791 American students studied abroad. Press Release, Inst. of Int'l Educ., U.S. Study Abroad Up 8%, Continuing Decade-Long Growth, (Nov. 17, 2008), available at <http://opendoors.iienetwork.org/?p=131592>. A list of ABA approved law schools with study abroad programs can be found at <http://www.abanet.org/legaled/studyabroad/coop.html>.

7. Hines, *supra* note 1 (“The shrinking of the world through trade, travel and instant communications means that lawyers from county seats to regional cities to Wall Street have a common interest in the legal elements of international economic developments, whether the U.S./Australia Free Trade Agreement, the latest round of GATT negotiations or the continuing ABA debate about multi-jurisdictional practice.”).

8. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 301(a), at 19 (2009–2010), available at <http://www.abanet.org/legaled/standards/standards.html> [hereinafter ABA STANDARDS] (“A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”); GREGORY S. MUNRO, INSTITUTE FOR LAW SCHOOL TEACHING, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 88 (2000); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 39 (2007), available at [http://law.sc.edu/faculty/stuckey/best\\_practices/best\\_practices-02.pdf](http://law.sc.edu/faculty/stuckey/best_practices/best_practices-02.pdf) (“At its core . . . legal education is a professional education, and part of the mission of every law school is to prepare its students to enter the legal profession. It is why law schools exist.”).

9. See STUCKEY, *supra* note 8, at 39–91; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87–125 (2007).

10. STUCKEY, *supra* note 8, at 188–205; SULLIVAN, *supra* note 9, at 120–22.

11. A law school clinic usually operates “in-house” as part of the law school and full-time faculty direct the clinic and supervise student work. STUCKEY, *supra* note 8, at 188–89.

externship program.<sup>12</sup>

A law school that already operates a campus in a foreign country and has appropriate facilities can, if allowed by the foreign country's laws, open a clinic in a foreign country. Most law schools, however, do not operate facilities in foreign countries. The cost and liability of doing so is likely prohibitive.<sup>13</sup> Law schools are thus often left with the option of creating international externship opportunities.<sup>14</sup> These opportunities generally take two primary forms. The first is an externship that is operated as a component of a study abroad program.<sup>15</sup> The second is an externship that is operated in the same manner as the law school's domestic externship program.<sup>16</sup>

The organizational design of a law school's program determines both the ABA Standards which apply to the program<sup>17</sup> and the types of risks, particularly the risk of tort liability, to which the law school may be exposed. While legal scholars have focused on the liabilities and risks of operating study abroad programs,<sup>18</sup> on the general tort liability of colleges

12. Usually, in an externship, a student is placed in a law office and her work is supervised by an attorney who is employed by the externship site. *Id.* at 198; *see also* ABA STANDARDS, *supra* note 8, § 305, at 26–27 (setting forth the minimum standards by which a law school's externship program must operate).

13. For a discussion of the risks of study abroad programs, which include operation of facilities, see William P. Hoye, *The Legal Liability of Risks Associated with International Study Abroad Programs*, 131 ED. LAW REP. 7 (1999).

14. Atlanta's John Marshall Law School's Micronesian Externship Program operates in the Federated States of Micronesia and the Republic of Palau, as well as the Territory of Guam and the Commonwealth of the Northern Marianas Islands. *See* Atlanta's John Marshall Law School, Micronesian Externship Program, <http://www.johnmarshall.edu/academics/Micronesian01.php> (last visited Feb. 22, 2010) [hereinafter Micronesian Externship Program]. *See also* American University Washington College of Law, International Legal Studies Program, <http://www.wcl.american.edu/ilsp/> (last visited Feb. 22, 2010); Seattle University School of Law, International Externships, [http://www.law.seattleu.edu/Academics/Externship\\_Program/International\\_Externships.xml](http://www.law.seattleu.edu/Academics/Externship_Program/International_Externships.xml) (last visited Feb. 22, 2010).

15. *See* ABA CRITERIA FOR THE APPROVAL OF FOREIGN SUMMER PROGRAMS, STUDENT STUDY AT FOREIGN INSTITUTIONS, AND APPROVAL OF SEMESTER ABROAD PROGRAMS, *available at* <https://www.abanet.org/legaled/standards/20082009StandardsWebContent/Criteria%20for%20Approval%20of%20Foreign%20Programs%20etc.pdf> [hereinafter ABA CRITERIA].

16. Atlanta's John Marshall Law School's Micronesian Externship Program operates in the same manner as its domestic externship program. Micronesian Externship Program, *supra* note 14.

17. Study abroad programs must comply with ABA CRITERIA, *supra* note 15. Externship programs must comply with ABA STANDARDS, *supra* note 8, § 305, at 26–27.

18. *See, e.g.,* Hoye, *supra* note 13; William P. Hoye & Dr. Gary M. Rhodes, *An Ounce of Prevention is Worth . . . The Life of a Student: Reducing Risk in International Programs*, 27 J.C. & U.L. 151 (2000); Johnson, *supra* note 6.

and universities,<sup>19</sup> and on university liability for extra-curricular activities,<sup>20</sup> only one scholar has focused on law school liability in domestic externship programs.<sup>21</sup> None of these articles focus on the risks to law schools in providing international externship opportunities.

This article explores the risk of liability<sup>22</sup> which can arise from the operation of a law school's international externship program.<sup>23</sup> Part II discusses the duty which courts have recognized that educational institutions<sup>24</sup> owe their students, both on and off-campus, and in the

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19. See, e.g., ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* (1999); Joseph Beckham & Douglas Pearson, *Negligent Liability Issues Involving Colleges and Students: Does a Holistic Learning Environment Heighten Institutional Liability?*, 175 *EDUC. L. REP.* (West) 379 (2003); Helen H. de Haven, *The Elephants in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 *J.C. & U.L.* 503 (2009); Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 *J.C. & U.L.* 621 (2005) [hereinafter Lake, *Rights and Responsibilities Revisited*]; Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 27 *IDAHO L. REV.* 531 (2001) [hereinafter Lake, *Law and Policy Ramifications*]; Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 *MO. L. REV.* 1 (1999) [hereinafter Lake, *Rise of Duty*]; Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" To Bystander to Facilitator*, 23 *J.C. & U.L.* 755 (1997) [hereinafter Lake, *New Paradigms*]; Ralph D. Mawdsley, *The Community College's Responsibility to Educate and Protect Students*, 189 *EDUC. L. REP.* (West) 1 (2004).

20. See, e.g., Robert C. Cloud, *Extracurricular Activities and Liability in Higher Education*, 198 *EDUC. L. REP.* (West) 1 (2005).

21. See Kathleen Connolly Butler, *Share Responsibility: The Duty to Legal Externs*, 106 *W. VA. L. REV.* 51 (2003). Butler does not discuss cases where students have sued educational institutions for events occurring in the institution's study abroad program. The majority of scholarship on externship programs has focused on the design and/or pedagogy used in teaching in the externship program. See, e.g., Bernadette T. Feeley, *Training Field Supervisors to be Efficient and Effective Critics of Student Writing*, 15 *CLINICAL L. REV.* 211 (2009); Anahid Gharakhanian, *ABA Standard 305's "Guided Reflections": A Perfect Fit for Guided Fieldwork*, 14 *CLINICAL L. REV.* 61 (2007).

22. The sections of this article which discuss the law school's duty of care for its students are also applicable to the law school's operation of domestic externship programs. Likewise, many of the suggested best practices to reduce risk are applicable to the law school's operation of domestic externship programs and to the operation of externship programs in other departments within the university. See discussion *infra* Part II.

23. For discussion of contract and other legal issues triggered for operation of overseas programs, see Hoye, *supra* note 13; Hoye & Rhodes, *supra* note 18; and Johnson, *supra* note 6.

24. "Educational institution" is used as a generic term to refer to all post-secondary educational institutions, including universities and their component parts (departments, colleges, programs, institutes, etc.), colleges, community colleges, vocational institutions, and adult education programs. There is no reason to believe that courts will hold law schools to a lower standard of care, and, as discussed in more detail in Part II.A.1.a., it is more likely that law schools will be held to a higher

operation of study abroad programs. Part III discusses the educational institution's potential duty to the provider of an externship placement site to exercise reasonable care in placing students at the site. Part IV discusses how best to manage risk in a law school's international externship program and whether compliance with ABA Standards can be used to establish that the law school acted reasonably and thus, did not breach its duty. Part IV also provides some best practices for risk management within the context of international externship programs.<sup>25</sup> The article concludes by recognizing that international externship programs are low cost and can be low risk, while providing students a unique educational and cultural immersion experience as they live, work, and learn in a foreign country.

## II. THE EDUCATIONAL INSTITUTION'S DUTY TO THE STUDENT

Although courts are quick to recognize that an educational institution is not an insurer of its students' safety and welfare,<sup>26</sup> courts have also recognized that both students and the institution have rights and responsibilities to each other.<sup>27</sup> The duty of care that an educational institution owes its student is an evolving standard.<sup>28</sup> When determining both the existence of a duty and the scope of that duty, courts will look to the expectations that the public, students, and students' families have of the educational institution.<sup>29</sup> In recognizing that under some circumstances educational institutions owe their students a duty of care and are liable to students when the institution's breach of that duty of care causes the student injury, courts weigh the goal of higher education, which is to assist students to mature and develop into responsible and productive citizens,<sup>30</sup>

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standard of care.

25. The discussion in Part II of the duty owed to students and the discussion in Part III of the duty owed to the externship placement site are applicable to all educational institutions. While the discussion in Part IV focuses on how law schools should manage the risk of international externship programs, the analytical paradigm is applicable to all educational institutions.

26. See *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005) ("College is not an insurer of the safety of its students"); see also *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 312 (Idaho 1999).

27. See, e.g., *Niles v. Bd. of Regents*, 473 S.E.2d 173 (Ga. Ct. App. 1996).

28. Compare *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at \*3 (Mass. Super. Ct. Oct. 12, 1994) ("changes with evolving expectations of a maturing society"), with *Univ. of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987) ("fairness under contemporary standards").

29. *Judson v. Essex Agric. and Technical Inst.*, 635 N.E.2d 1172, 1174 (Mass. 1994) (finding no "social values or customs demonstrating that vocational schools . . . have a duty to protect their students during their employment"); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983); *Stanton v. Univ. of Me.*, 773 A.2d 1045 (Me. 2001).

30. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986). The purpose of

against the burden of imposing a duty.<sup>31</sup> Courts balance public policy considerations,<sup>32</sup> including whether the institution can in fact satisfy the duty if imposed and the cost of doing so;<sup>33</sup> whether in fulfilling the duty the institution will need to infringe upon other rights of the student;<sup>34</sup> and whether imposing the duty will alleviate the student of responsibility to consider the risks of their behavior, thus providing students protection from their own bad choices which protection the law does not provide to their non-student age peers.<sup>35</sup>

There are two primary types of tort claims which students bring against their educational institutions. In the first type of claim, the student sues the educational institution alleging that the institution or its employees acted negligently.<sup>36</sup> In the second type of claim, the student sues the educational institution alleging that the institution had a duty to protect the student from the acts of third parties.<sup>37</sup> There is much confusion in this area of law. This confusion has occurred because sometimes the student's complaint contains both types of claims,<sup>38</sup> sometimes the pleadings of the parties are vague and unclear as to the specific type of tort alleged,<sup>39</sup> sometimes the courts' opinions do not identify which type of case is under consideration, and sometimes, because the public policy considerations are the same, the

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educational institutions

is to educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol

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*Id.*

31. *See* Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999) (finding that the imposition of a duty would have negated the intended educational experience).

32. *See* Patterson v. Sacramento City Unified Sch. Dist., 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007) (discussing a student injured while participating in an adult education program and finding that "'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection").

33. *Beach*, 726 P.2d at 418.

34. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987).

35. *Webb v. Univ. of Utah*, 125 P.3d 906, 912–13 (Utah 2005); *Beach*, 726 P.2d at 418.

36. *See, e.g.,* Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th Cir. 1941); *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888, at \*1 (W.D. Pa. Jul. 30, 2008); *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000).

37. *See, e.g.,* Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); *Leonardi v. Bradley Univ.*, 625 N.E.2d 431 (Ill. App. Ct. 1994); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

38. *See, e.g., Nova*, 758 So. 2d at 86.

39. *Fed. R. Civ. P.* 8.

law for one type of tort is applied to the other type of tort.<sup>40</sup> This article attempts to clarify some of the common types of confusion that tend to arise in this area of law.

#### A. The Educational Institution's Own Acts<sup>41</sup>

When a student sues an educational institution alleging that the institution itself acted negligently, the usual rules of tort law apply.<sup>42</sup> In order for a student to prevail on a negligence claim against the educational institution in this context, the student must establish that the educational institution owed the student a duty of care, that the educational institution breached this duty of care, that the educational institution's breach of its duty of care was the proximate cause of the student's injury, and that the student has suffered injury or damages.<sup>43</sup> Because the threshold issue in a student's negligence claim against an educational institution is the existence or non-existence of a legal duty, almost all of the reported cases focus on the educational institution's duty to the student.<sup>44</sup> Whether the educational institution has a duty of care is a question of law for the court to decide.<sup>45</sup> Whether the educational institution breached its duty of care and whether the educational institution's breach of its duty was the proximate cause of the student's injury are questions of fact for the jury.<sup>46</sup>

##### 1. The Existence of a Duty

The mere fact that a harm is foreseeable<sup>47</sup> is not sufficient to establish that a legal duty exists.<sup>48</sup> When determining whether a legal duty exists,

40. See, e.g., *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at \*3 (Mass. Super. Ct. Oct. 12, 1994).

41. Most states have enacted statutes waiving sovereign immunity, thus allowing public educational institutions to be sued and held liable for the same torts as would a private educational institution. See, e.g., *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661, 663-64 (Minn. Ct. App. 1999).

42. See *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888 (W.D. Pa. Jul. 30, 2008). In *Hawkins*, a student sued the college for an injury received while operating an electric saw when building scenery as part of a theater class requirement. *Id.* at \*2. See also *Nova*, 758 So. 2d at 89-90 ("There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.").

43. See, e.g., *Webb v. Univ. of Utah*, 125 P.3d 906, 909 (Utah 2005).

44. See, e.g., *Nova*, 758 So. 2d at 86.

45. *Nero v. Kan. State Univ.*, 861 P.2d 768, 772 (Kan. 1993).

46. *Id.*

47. The concept of "foreseeability" in determining whether a duty exists is often confused with the concept of foreseeability in determining whether there is proximate cause. See *Knoll v. Bd. of Regents of the Univ. of Neb.*, 601 N.W.2d 757, 763 (Neb. 1999).

48. *McClure v. Fairfield Univ.*, No. CV000159028, 2003 WL 21524786, at \*2

courts in many U.S. states tend to apply the following risk/utility analysis:

(1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature that plaintiff suffered was likely to result, and (2) a determination, on the basis of public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or to the particular plaintiff in the case . . . The first part of the test invokes the question of foreseeability, and the second part invokes questions of policy.<sup>49</sup>

As early as 1941, courts have found that educational institutions have a duty to "exercise ordinary care."<sup>50</sup> The exercise of ordinary care requires that the educational institution furnish "instruction and supervision" at a level equivalent to that provided by similar institutions under similar circumstances.<sup>51</sup> At a minimum, educational institutions must exercise ordinary care when they are designing and implementing curriculum.

The educational institution, however, does not owe the same duty of care to all of its students for all of the school-related activities in which the student may participate. In determining whether an educational institution owed a duty of reasonable care to the student at the time of the injury under the circumstances giving rise to the injury, the court balances the following factors:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>52</sup>

Most of the courts addressing the issue of duty have focused on the type of student involved (undergraduate versus graduate, minor versus adult)

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(Conn. Super. Ct. Jun. 19, 2003).

49. *Id.* (citing *Gazo v. Stamford*, 765 A.2d 505 (Conn. 2001)).

50. *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836, 840 (10th Cir. 1941) (student injured in chemistry lab explosion while engaged in a class assignment).

51. *Id.* at 841. In *Lillywhite*, a student who was injured in chemistry lab explosion was allowed to introduce evidence of how other area educational institutions supervised their students when the students conducted experiments in the lab. *Id.*

52. *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007) (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)); *see also* *Stockinger v. Feather River Cmty. Coll.*, 4 Cal. Rptr. 3d 385, 401–402 (Cal. Ct. App. 2003).



and the amount of control that the educational institution had at the time of the injury. In addressing the characteristics of the student, courts tend to combine foreseeability of harm, degree of certainty of the injury, and moral blame. In addressing the amount of control exercised by the educational institution, the court tends to focus on foreseeability, the closeness of the connection between the educational institution's conduct and the student's injury, the policy of preventing future harm, and the extent of the burden on the educational institution. By focusing on the characteristics of the student and the amount of control exercised by the educational institution, the court can address all of the traditional balancing factors in a manner which is tailored to the unique relationship between students and their educational institutions.

*a. The Characteristics of the Student*

When the court's duty analysis centers on the characteristics of the student, the court is usually looking at who has the most knowledge and training to be able to identify the risk involved. When students have special needs, the educational institution has been held to owe a higher standard of care.<sup>53</sup> Courts have required an educational institution to provide more supervision and instruction to undergraduate students, who by definition have less knowledge and training, than they have usually required institutions to provide to doctoral candidates, especially when the doctoral candidate has the specialized knowledge and training to identify the risks for himself; under such circumstances, the graduate student is required to act with prudence and care.<sup>54</sup> Nevertheless, when an instructor has knowledge of a risk and injury to the student from the risk is foreseeable, the instructor has a duty to minimize the risk to the student.<sup>55</sup>

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53. See *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (finding that the college had a fiduciary duty to a disabled student); see also *Rydzynski v. N. Shore Univ. Hosp.*, 692 N.Y.S.2d 694 (N.Y. App. Div. 1999) (holding that the operators of an educational rehabilitation program owed a duty of care akin to *in loco parentis* to a mentally handicapped adult who was injured by another student).

54. Compare *Fu v. State*, 643 N.W.2d 659, 867 (Neb. 2002) (lesser duty owed to graduate student injured in chemistry lab explosion; student should have acted as "reasonably prudent graduate student with [his] level of education and experience"), and *Niles v. Bd. of Regents*, 473 S.E.2d 173 (Ga. Ct. App. 1996) (no duty to warn owed to graduate student), with *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941) (duty owed to undergraduate student injured in chemistry lab explosion where undergraduate student was inexperienced in chemistry and chemical reactions). See also *Regents of the Univ. of Cal. v. Roettgen*, 41 Cal. App. 4th 1040, 1046 (Cal. Ct. App. 1996) (stating that the existence of a duty is determined by the "facts surrounding [the student's] levels of experience and/or [the student's and instructor's] relationships to one another in the activity resulting in the plaintiff's injury").

55. *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293 (M.D. Ala. 2004). In *Molinari*, a veterinary student was injured by a cow while performing a required surgical procedure during class and the instructor was aware that the cow was

The mere fact that the injured student is a graduate or doctoral student is not sufficient to relieve the educational institution of its duty of care.<sup>56</sup> In determining the duty of care owed, the focus is on whether the student is already deemed to be a professional.<sup>57</sup> When a graduate student has already earned a degree which provides the basic training required to practice within the profession, there is no duty to supervise the student or warn the student of dangerous situations which should be obvious to an individual with their training.<sup>58</sup> Where, however, the graduate student has not yet received the basic training required to practice within the profession, the educational institution has a duty to supervise the graduate student.<sup>59</sup> The amount and type of supervision and instruction owed the graduate student is dependent on the risks posed by the specific type of graduate program.<sup>60</sup>

An educational institution must exercise its duty of ordinary care in designing curriculum to insure that students receive the degree of supervision and instruction that is appropriate based on the student's level of knowledge and training in the area and to insure that the amount of supervision and instruction given is equivalent to that given by other institutions to their students in similar programs.

*b. The Amount of Control Exercised by the Educational Institution*

In determining whether the educational institution owed a duty to the student at the time of the injury, courts have made distinctions between those activities which take place on-campus during class time, those activities which are school-sponsored and a required part of the course curriculum, and those activities which students are engaged in for their own benefit and pleasure.<sup>61</sup> The more control the educational institution has over the student and the activity at the time of the injury, the more likely a court will find that the educational institution owed the student a duty of

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uncooperative. *Id.* at 1296–97.

56. *Mizutani v. Cal. State Univ. Long Beach*, No. B152490, 2002 WL 31117258 (Cal. Ct. App. Sept. 25, 2002). In *Mizutani*, the University owed a duty of care to a graduate student who was assaulted by professor during class. *Id.* at \*9.

57. *Niles*, 473 S.E.2d at 175 (“Ordinarily, there is no duty to give warnings to the members of a profession against generally known risks. There need be no warning to one in a particular trade or profession against a danger generally known to that trade of profession.”).

58. *Id.*

59. See *Roettgen*, 41 Cal. App. 4th at 1040.

60. *Molinari*, 339 F. Supp. 2d at 12968–99. In *Molinari*, the veterinary school knew of the cow's dangerous propensity and failed to make restraining equipment available during surgical procedures. *Id.* at 1301–02.

61. Compare *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007), and *Mizutani*, 2002 WL 31117258, at \*1, \*9, with *Ochoa v. Cal. State Univ.*, 72 Cal. App. 4th 1300, 1306 (Cal. Ct. App. 1999).

care.<sup>62</sup> If a student is acting for his own benefit and making his own choices, it is less likely a court will find that the educational institution owed the student a duty.<sup>63</sup> An educational institution can be in control even when the injury occurs off-campus.<sup>64</sup>

In determining control, the court looks to factors such as: whether the injury occurred while participating in a curricular activity which was required for a grade;<sup>65</sup> whether the instructor altered the academic environment, thereby creating additional risk to students;<sup>66</sup> whether the educational institution provided sufficient equipment for the academic activity;<sup>67</sup> and whether the educational institution approved the location of off-campus curricular work.<sup>68</sup>

A nice bright-line rule would be that if the event occurs while the student is participating in a class activity, then the educational institution has a duty of care. Courts, however, have not developed such a bright-line rule, because such a rule would have the tendency to blur the distinction between acts of the educational institution and acts of third parties, particularly the acts of other students. Educational institutions cannot always foresee when one student will act to injure another.

For example, in *Webb v. University of Utah*,<sup>69</sup> a student was injured while on a required trip as part of his earth science class to explore fault lines.<sup>70</sup> The faculty member in attendance instructed the students to walk across sidewalks covered in ice and snow to view the fault lines.<sup>71</sup> Applying the proposed bright-line rule to these facts, the university would have had a duty of care to prevent the student's injury. The student, however, was not injured by an act of the instructor, but was injured when another student slipped and grabbed onto the student for support.<sup>72</sup> Although the injury to the student occurred during a curricular activity, the injury was caused not by the institution's act, but by the act of a third party, another student.<sup>73</sup>

62. See *Patterson*, 66 Cal. Rptr. 3d at 377.

63. See *Ochoa*, 72 Cal. App. 4th at 1306.

64. See *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000); see also *Webb v. Univ. of Utah*, 125 P.3d 906 (Utah 2005).

65. See *Nova*, 758 So. 2d at 89; see also *Webb*, 125 P.3d at 910.

66. *Webb*, 125 P.3d at 911.

67. *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293, 1301-02 (M.D. Ala. 2004) (finding that the university should have had sufficient cow restraining equipment for all veterinary students to use when an unrestrained cow kicked a student performing an in-class surgical procedure).

68. See *Nova*, 758 So.2d at 89; see also *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at \*3 (Mass. Super. Ct. Oct. 12, 1994).

69. 125 P.3d 906 (Utah 2005).

70. *Id.* at 908.

71. *Id.*

72. *Id.*

73. *Id.*

It does not appear that the student made the argument that his injury was caused by an act of the instructor, because neither he nor the other student would have been on the ice but for the required field trip and the instructor's directive to cross the ice.<sup>74</sup> Even if the student had made such an argument, the court applying the balancing principles could have determined that a college student residing in an area which is known for snow and icy conditions should either know how to safely cross the snow and ice or should not do so. Thus, in finding a duty of care in this situation, the court would have been providing the student with more protection from the law than if he was not a student.<sup>75</sup> For the law to provide students with more protection than non-students is contrary to public policy.<sup>76</sup>

The *Webb* Court analyzed the facts under the "special relationship" doctrine,<sup>77</sup> which was applicable because the student's injuries were caused by the act of a third party, another student. As part of its "special relationship" analysis, the Court addressed the issue of control, stating that:

[D]espite the relative developmental maturity of a college student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience. This is a phenomenon that should, and certainly does, at least unconsciously guide all decisions made by instructors relating to the selection of an environment for learning.<sup>78</sup>

The *Webb* Court refused to find that "every college student is responsible for his own protection in any school-related activity, regardless of the risk."<sup>79</sup> The *Webb* Court focused on whether the student was engaged in an activity directly related "to the academic enterprise of the class" at the time of the injury.<sup>80</sup> The court concluded that the instructor's directive to walk on the ice and snow was "tangential", because "it is not reasonable to believe that any student" would believe that obtaining a good grade requires them to ignore the open and obvious risk of walking across ice.<sup>81</sup> The *Webb* court held that the instructor had not created a "special

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74. *Cf. Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993). In *Nero*, the court held that the university, who controlled the placement of a known sex offender in a co-ed dormitory, had breached the duty of care owed to other students in the dormitory. *Id.* at 782-83.

75. There was no discussion in the case of the liability of the premises owner for snow and ice removal. If such liability exists under Utah law, then the person injured is in the same position with regard to the law regardless of whether or not the person was a student at the time of injury.

76. *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986).

77. See "special relationship" discussion *infra* Part II.B.1.

78. *Webb*, 125 P.3d at 911-12.

79. *Id.* at 912.

80. *Id.*

81. *Id.* at 912-13.

relationship”, because the instructor did not exercise control over the student’s common sense<sup>82</sup> at the time of the injury.

Likewise in *Nova Southeastern University, Inc. v. Gross*,<sup>83</sup> in finding that the University owed the student a duty of care, the Court focused on the “amount of control the school has over the student’s conduct.”<sup>84</sup> The student, a doctoral student in the University’s psychology program, was injured when she was attacked in the parking lot of the placement site while participating in a mandatory off-campus internship.<sup>85</sup> “There was evidence that prior to the [attack on the student], Nova was aware of a number of other criminal incidents which had occurred at or near the [internship’s] parking lot.”<sup>86</sup>

The Florida Supreme Court applying ordinary tort principles held that the University owed the student a duty of care.<sup>87</sup> Focusing on the amount of control that the University exercised over the student in choosing the internship site,<sup>88</sup> the Court held that the University had a duty “to act with reasonable care”, because the University had undertaken to locate, approve, and assign students to internship sites.<sup>89</sup> A duty is created when the University’s actions create “a foreseeable zone of risk.”<sup>90</sup> Although the University’s duty does not rise to the level of duty required in the school-minor context,<sup>91</sup> the University has a duty to “use ordinary care in providing educational services and programs to one of its adult students.”<sup>92</sup> The duty to use ordinary care can include, “but is not necessarily limited to warning of the known dangers at [a] particular practicum site.”<sup>93</sup> An educational institution’s duty to its students to exercise ordinary care in the design and implementation of its educational programs includes minimizing the student’s unnecessary exposure to a known risk of harm when engaging in required curricular activity.<sup>94</sup>

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82. Courts have limited an educational institution’s liability to a student based upon the affirmative defenses of the assumption of the risk and inherent dangerousness of the activity. See *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293 (M.D. Ala. 2004); *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337 (Cal. Ct. App. 2007). These issues are not addressed in this article.

83. *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000).

84. *Id.* at 89.

85. *Id.* at 87.

86. *Id.* at 88.

87. *Id.*

88. *Nova*, 758 So. 2d at 89.

89. *Id.*

90. *Id.*

91. *Id.* at 90.

92. *Id.*

93. *Nova*, 758 So. 2d at 90.

94. Based upon the same theory of duty of supervision, an educational institution owes a duty to the placement site to assign students who are not a risk to others working at the placement site, particularly if the institution controls the assignment of

Although decided under different theories of liability, for both the *Webb* and *Nova Southeastern* courts, the key to the educational institution's liability was the amount of control that the university exerted over the student at the time of the injury. The Florida Supreme Court was willing to recognize the fact that even graduate students "inevitably relinquish a measure of behavioral autonomy"<sup>95</sup> to the institution when required by the institution to do so. In *Webb*, the student had available alternative means of accomplishing the educational endeavor, such as crossing the ice and snow at a safer location, wearing different shoes, and avoiding inexperienced students. In *Nova Southeastern*, the student was given no alternative means for completing the curricular requirement. Where there are no alternative means for completing a curricular requirement and the educational institution controlled almost all aspects of the design and implementation of the curricular requirement, the fact that the injured student is a graduate student will not alleviate the educational institution of its duty to use ordinary care in the design and implementation of the institution's program.

When the college or university controls the actors or the facilities which cause the injury, it has been held to have a duty to the student,<sup>96</sup> regardless of whether the student could have satisfied a curricular requirement through a different activity<sup>97</sup> or whether the injury occurred off-campus.<sup>98</sup> Where the educational institution does not have control, the court is unlikely to find that the institution has a duty to the student.<sup>99</sup> An

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the student and has superior knowledge concerning the student. *See* *Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at \*1 (E.D. Pa. Aug. 14, 2008); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *see also* discussion *infra* Part II.

95. *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005).

96. *See, e.g., Mizutani v. Cal. State Univ. Long Beach*, No. B152490, 2002 WL 31117258, at \*5 (Cal. Ct. App. Sept. 25, 2002) (finding that, where a teacher inflicted injuries on graduate student during class time, "[i]mposing liability on a college that fails to discipline a professor who repeatedly batters innocent students in the classroom is not incompatible with a college's purpose or the freedom of its students or faculty.").

97. *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888, at \*6 (W.D. Pa. July 30, 2008) (finding that the college had a duty to "act with reasonable care in training [the student] and supervising his use of . . . equipment" where student was injured when using college's workshop and tools to fulfill theater course requirement, even though the student could have fulfilled course requirements through different activities and regardless of student's prior experience with power tools.)

98. *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343-47 (Cal. Dist. Ct. App. 2007) (finding that a duty existed because event was required, and the institution chose the location and type of event and chose and provided the equipment when a student was injured while working on a required community activity intended to provide student with practical experience).

99. *See, e.g., Mintz v. State*, 362 N.Y.S.2d 619, 620 (N.Y. App. Div. 1975) (finding that because the students were "assumedly cognizant of perilous situations and were able to care for themselves," and because the risk of the squall was not foreseeable, the University did not have a duty to two students killed while on canoe trip during a sudden squall); *Judson v. Essex Agric. and Technical Inst.*, 635 N.E.2d

educational institution can have no duty either because it lacks control over the premises<sup>100</sup> or because the student, and not the educational institution, controlled the location of the employment.<sup>101</sup>

When there is an off-campus event which includes times when the educational institution is in control and times when the student is acting in their own interests, the court will look to see whether the event occurred as part of the educational enterprise or during the student's recreational activities.<sup>102</sup> When the student's injury occurs during the non-curricular portion of the off-campus activity and is a result of the student's voluntary intoxication, the educational institution does not owe the student a duty of care.<sup>103</sup> When the student is not engaged in the academic enterprise at the time of her injury, courts are loathe to provide protection to the student which is not available to non-students.<sup>104</sup>

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1172, 1174–75 (Mass. 1994) (finding no duty where school's agreement with employer required employer to obtain workman compensation insurance to cover the student, when the student was injured after falling from a barn loft while working at a local farm, even though the student was responsible for finding own employment, employment related to coursework was required); *Marshall v. Univ. of S. Cal.*, No. B187931, 2007 WL 602984, at \*5 (Cal. Ct. App. Feb. 28, 2007) (finding that the university owed no duty to student who was at work at the time of the injury and who recovered under employer's worker's compensation policy). *But see Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at \*3 (Mass. Oct. 12, 1994). *Silvers* was decided three months after *Judson*. The court found a duty in *Silvers* where the school's placement office had forwarded the student's resume to an employer. *Id.*

100. See *Judson*, 635 N.E.2d 1172, 1174–75 (finding that the educational institution had no control over the employer's premises).

101. *Compare Nova Se. Univ. v. Gross*, 758 So. 2d 86, 89 (Fla. 2000), with *Judson*, 635 N.E.2d 1172.

102. The educational enterprise does not include homework. See *Stockinger v. Feather River Cmty. Coll.*, 111 Cal. App. 4th 1014 (Cal. Ct. App. 2003) In *Stockinger*, the student was injured off-campus when she was thrown from the back of a pick-up truck driven by another student, while working on a group homework assignment; the purpose of the assignment was to provide students with an opportunity to develop the requisite leadership and practical skills needed to learn responsibility. *Id.* at 1020. The court found that the college had no duty to ensure that the student had safe transportation, stating, "a college must be able to give its students off-campus assignments, without specifying the mode of transportation, and without being saddled with liability for accidents that occur in the process of transportation." *Id.* at 1035.

103. See *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986). *Beach* is the first in a line of cases in which courts were unwilling to hold educational institutions liable when the student's injuries were due in part to their own voluntary intoxication. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979); *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552, 562 (Ill. App. Ct. 1987); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

104. *Beach*, 726 P.2d at 418:

Had she not been a college student, but an employee in industry, she could not argue realistically that her employer would be responsible for compensating her for injuries occurred by her voluntary intoxication if she violated state liquor laws during her off-hours while traveling on company business. We do not believe that [the student] should be viewed as fragile and

In exercising its duty of care in designing and implementing the curriculum, an educational institution can design assignments which require a student to accept responsibility and take on leadership roles because assisting students to develop into mature, responsible citizens who will be future leaders in the community is one of the goals of the educational institution.<sup>105</sup> Even when participating in the required assignment, students are not deemed to have relinquished all of their autonomy to the institution, but are deemed to have retained sufficient autonomy to exercise common sense and avoid those risks which an average citizen would recognize and avoid.<sup>106</sup> Nevertheless, when the educational institution removes all choice from the student in determining how the curricular requirement will be satisfied or when the educational institution has the ability to remove the risk of harm, the educational institution is in control and owes the student a duty of care.<sup>107</sup>

#### B. The Educational Institution's Duty to Protect Against the Acts of Third Parties

The idea that a college or university has a duty to protect its students against the acts of third parties is a relatively recent development.<sup>108</sup> As courts have struggled to define the nature and scope of the duty that may be owed to a student, courts and litigants have focused on two tort concepts – the special relationship doctrine and voluntary assumption of duty. Educational institutions usually assert that they do not have a duty because college students are usually adults and thus, the doctrine of *in loco parentis* does not apply.<sup>109</sup> The student-university relationship alone is not sufficient to create a duty.<sup>110</sup> Students, relying on Section 315 of the Restatement Second of Torts, counter that there is a special relationship between themselves and the educational institution.<sup>111</sup> Students also counter by claiming that, by its actions, the educational institution has voluntarily assumed a duty<sup>112</sup> pursuant to Section 323 of the Restatement

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in need of protection simply because she had the luxury of attending an institution of higher education.

105. See *Stockinger*, 11 Cal. App. 4th at 1020.

106. *Webb v. Univ. of Utah*, 125 P.3d 906, 911–912 (Utah 2005).

107. *Nova Se. Univ. v. Gross*, 758 So. 2d 86, 89–90 (Fla. 2000).

108. For a discussion of the evolution of higher education law from no duty and application of *in loco parentis* to duty see BICKEL & LAKE, *supra* note 19, at 105–58.

109. *Webb*, 125 P.3d at 911.

110. *Id.*

111. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

112. Voluntary assumption can be the basis of finding a duty both when the student's cause of action is based on the acts of the educational institution and when the student's cause of action is based on the acts of third parties. See *Nova*, 758 So. 2d at 90.



Second of Torts.<sup>113</sup> Regardless of whether the relationship between the educational institution and student is deemed a “special relationship” or whether the educational institution “voluntarily” assumed a duty, the court must still determine as a matter of law what the scope of the duty is.<sup>114</sup>

### 1. The “Special Relationship”

Where students have sued their educational institutions for injuries caused by the act of a third party, courts have consistently applied Section 315 of the Restatement (Second) of Torts,<sup>115</sup> which provides:

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

114. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993) (“The determination that the College owes a duty of care to its intercollegiate athletes could merely define the class of persons to whom duty extends, without determining the nature of the duty or demands it makes on the College.”). Circuit Judge Samuel Alito dissented in *Kleinknecht* on the grounds that the facts alleged were insufficient to establish that the College had breached its duty to the student. *Id.* at 1375.

115. Reference is to the Restatement (Second) of Torts because that is the provision the courts relied upon in deciding the cases discussed in this section. See, e.g., *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888 (W.D. Pa. Jul. 30, 2008); *Webb v. Univ. of Utah*, 125 P.3d 906 (Utah 2005); *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000); *Knoll v. Bd. of Regents of the Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999); *Judson v. Essex Agric. and Technical Inst.*, 635 N.E.2d 1172 (Mass. 1994); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337 (Cal. Ct. App. 2007); *Stockinger v. Feather River Cmty. Coll.*, 111 Cal. App. 4th 1014 (Cal. Ct. App. 2003); *Mizutani v. Cal. State Univ. Long Beach*, No. B152490, 2002 WL 31117258 (Cal. Ct. App. Sept. 25, 2002); *Mintz v. State*, 362 N.Y.S.2d 619, 620 (N.Y. App. Div. 1975).

Section 40 of the Restatement (Third) of Torts provides:

(a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

- (1) a common carrier with its passengers,
- (2) an innkeeper with its guests,
- (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
- (4) an employer with its employees who are: (a) in imminent danger; or (b) injured and thereby helpless,
- (5) a school with its students,
- (6) a landlord with its tenants, and
- (7) a custodian with those in its custody, if: (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and (b) the custodian has a superior ability to protect the other.

RESTATEMENT (THIRD) OF TORTS § 40 (Tentative Draft No. 5, 2005) (emphasis added).

Subsection (b)(5) is a new addition. Comment 1 primarily focuses on the duty owed to elementary and secondary schools to their students. RESTATEMENT (THIRD) OF TORTS § 40 cmt. 1 (Tentative Draft No. 5, 2005). Comment 1 leaves open the possibility that Section (b)(5) applies to college students when it states “because of the wide range of students to which it is applicable, what constitutes reasonable care is

There is no duty so to control the conduct of a third person so as to prevent him from causing physical harm to another unless

(a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relationship exists between the actor and the other which gives to the other a right to protection.<sup>116</sup>

The determination of whether a "special relationship" exists is a question of law for the court to decide.<sup>117</sup> The scope of the duty owed when a "special relationship" exists is limited to the risks, which "arise within the confines of the relationship" and are usually limited by "geography and time."<sup>118</sup> The duty applies regardless of whether the source of the risk is the educational institution or a third party.<sup>119</sup>

When determining whether a special relationship exists, courts have consistently held that the student-university relationship is not sufficient in itself to create a special relationship.<sup>120</sup> Those courts which have found that a special relationship exists have determined that at the time of the student's injury the educational institution's relationship with the student was the same as that of the business invitee,<sup>121</sup> property owner,<sup>122</sup> or landlord-tenant.<sup>123</sup> Because the educational institution was providing the same type of services to the students that any business would provide an invitee, any property owner would provide one legally on their property, or any landlord would provide a tenant, the educational institution was held to the same duty of care as that owed by non-educational institutions in similar situations.<sup>124</sup> The courts provided students with the same protection

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contextual – the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students." *Id.*

116. RESTATEMENT (SECOND) OF TORTS §315 (1965).

117. RESTATEMENT (THIRD) OF TORTS § 40 cmt. e (Tentative Draft No. 5, 2005).

118. *Id.* at cmt. f.

119. *Id.* at cmt. g.

120. *See, e.g., Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993) ("[T]he university-student relationship does not in and of itself impose a duty upon universities to protect students from actions of fellow students or third parties.").

121. *See Leonardi v. Bradley Univ.*, 625 N.E.2d 431, 435 (Ill. App. Ct. 1994) ("While we might agree with plaintiff that a student can be a business invitee of a university while engaged in various activities conducted by the university, such as attending classes or participating in university-sponsored activities, we cannot agree that a special relationship exists" when student is attending a fraternity party and is sexually assaulted.).

122. *See Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at \*1 (E.D. Pa. Aug. 14, 2008).

123. *See Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (finding an alternative ground for recovery was the student's status as an invitee on University property).

124. *See Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000).

of the law on-campus as they had off-campus. Thus, courts have been consistent in treating students and non-students alike in the eyes of the law.

In determining the scope of duty owed by educational institutions to their students, the focus often has been on reasonable foreseeability.<sup>125</sup> For an event to be reasonably foreseeable does not require that the educational institution have actual knowledge that the event would occur, but only requires that when taking into account all of the circumstances, whether “the ordinary man under such circumstances should reasonably have foreseen” that the event would occur.<sup>126</sup> In order for a duty to arise when an event is reasonably foreseeable, “the risk of harm [must be] sufficiently high and the amount of activity needed to protect against the harm [must be] sufficiently low to bring the duty into existence.”<sup>127</sup> When engaging in this balancing test, the court applies the same factors as it does to determine foreseeability when the student alleges that the institution itself acted negligently.<sup>128</sup> Courts have consistently refused to impose a duty on educational institutions that would result in impossible or impractical standards.<sup>129</sup>

When student injuries occur on the educational institution’s property, particularly in student housing, courts tend to impose the same duty on the educational institution as has been imposed on other landlords.<sup>130</sup> An educational institution has “a duty to exercise reasonable care in taking such measures as were reasonably necessary for [the student’s] safety in

125. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 815 (Cal. Ct. App. 1981).

126. *Id.* at 815–16.

127. *Id.* at 816 (citing *Bartell v. Palos Verdes Peninsula Sch. Dist.*, 147 Cal. Rptr. 898, 902 (Cal. Ct. App. 1978)).

128. *Id.*

[T]he degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

*Id.*

Courts have also described the test as a “risk-utility test”, which takes into account: “(1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.” *Sharkey v. Bd. of Regents of the Univ. of Neb.*, 615 N.W.2d 889, 900 (Neb. 2000).

129. *Christiansen v. Univ. of Minn. Bd. of Regents*, No. 69DU-CV-05-2027, 2006 WL 6191767, at \*10 (Minn. Dist. Ct. Mar. 22, 2006) (finding that the university was not in a position to protect student); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) (finding that the duty would have been “realistically incapable of performance”).

130. *But see Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552, 562 (Ill. App. Ct. 1987) (“[Under Illinois law,] the landlord-tenant relationship has not been considered a special relationship which could create the existence of a duty.”).

light of all then existing circumstances.”<sup>131</sup> In determining the measures reasonably necessary, most jurisdictions apply a totality of the circumstances test,<sup>132</sup> while a minority of jurisdictions require that a similar prior criminal act have occurred on the premises.<sup>133</sup> Reasonable care requires that the educational institution maintain the premises in good order, including locks on doors and windows,<sup>134</sup> provide warnings to students of criminal activity in the area and advise students on safety measures,<sup>135</sup> and provide adequate security.<sup>136</sup>

Courts have also found a special relationship between the educational institution and the student when the educational institution has exerted control.<sup>137</sup> Control focuses on the amount of autonomy retained by the student in relation to the actions taken by the educational institution.<sup>138</sup> As discussed in detail above,<sup>139</sup> the more control the educational institution exercises, the more likely a special relationship will be found. Courts have found a special relationship between the educational institution and students participating in intercollegiate sports, but not for students participating in intramural sports.<sup>140</sup> Courts are split over whether a special

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131. *Stanton v. Univ. of Me.*, 773 A.2d 1045, 1048 (Me. 2001) (citing *Schultz v. Gould Acad.*, 332 A.2d 368, 370 (Me. 1975)).

132. *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999) (applying totality of circumstances with focus on knowledge landowner had or should have had with regard to foreseeability of the injury).

133. See *L.W. v. W. Golf Ass'n*, 712 N.E.2d 983, 985 (Ind. 1999) (finding that no similar events had occurred on premises); *Agnes Scott Coll., v. Clark*, 616 S.E.2d 468, 470–71 (Ga. Ct. App. 2005) (holding that no similar criminal activity had occurred on premises or in the area).

134. See *Delaney v. Univ. of Houston*, 835 S.W.2d 56, 60 (Tex. 1992) (finding that the university had a duty to repair locks on doors to prevent criminal acts of third persons).

135. See *Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993) (holding that the university had duty to warn the student that a fellow student had been charged with sexual assault when university placed charged that student in co-ed housing); see also *Stanton*, 773 A.2d at 1050 (“[T]he University owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety.”).

136. See e.g., *Delta Tau Delta*, 712 N.E.2d at 974 (foreseeable sexual assault); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336–37 (Mass. 1983) (student abducted from room and sexually assaulted on campus); *Sharkey v. Bd. of Regents of the Univ. of Neb.*, 615 N.W.2d 889, 901 (Neb. 2000) (wife sexually harassed by fellow student, husband also attacked by student).

137. See *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005); see also *supra* notes 111–16 and accompanying text.

138. See *Webb*, 125 P.3d at 911; see also *supra* notes 111–16 and accompanying text.

139. See discussion *supra* Part II.A.1.b.

140. Compare *Davidson v. Univ. of N.C.*, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001) (duty to junior varsity cheerleader injured during warm-up for game), and *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993) (duty to lacrosse player injured at practice), with *Ochoa v. Cal. State Univ.*, 72 Cal. App. 4th 1300, 1308 (Cal. Dist. Ct. App. 1999), *aff'd* 85 Cal. Rptr. 2d 768, 773 (Cal. Ct. App. 1999) (no

relationship exists between an educational institution and a student who has committed suicide.<sup>141</sup>

The largest number of cases which have been decided under the special relationship doctrine are cases which involve a student's voluntary intoxication. Until recently, courts have refused to find that educational institutions had a duty to protect students from injuries due to their own or a fellow student's voluntary intoxication.<sup>142</sup> In finding no duty, courts focused on the lack of a close connection between the educational institution's failure to prevent voluntary alcohol consumption and the injury.<sup>143</sup> Other courts found that a duty to protect students against the voluntary consumption of alcohol was both impossible and impractical for the educational institution to accomplish.<sup>144</sup> Moreover, imposition of such a duty would require that the educational institution limit other freedoms of students, which would be against public policy.<sup>145</sup> It was clear, however,

duty to student playing intramural soccer).

141. *Compare Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 610 (W.D. Va. 2002) (citing *Mullins*, 449 N.E.2d at 336) (finding "special relationship" and imposing duty because "parents, students, and the general community still have a reasonable expectation fostered in part by colleges themselves, that reasonable care will be exercised to protect students from foreseeable harm[,] and reasoning that harm was foreseeable where an institution believed a student likely to harm him- or herself based on college's interventions), *with Jain v. State*, 617 N.W.2d 293, 298-99 (Iowa 2000) (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)) (finding no duty because no affirmative act of the institution "increased the risk of harm" to the student).

142. *See, e.g., Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987); *Brooker v. Lehigh Univ.*, 800 F. Supp. 234 (E.D. Pa. 1992); *Barran v. Kappa Alpha Order*, 730 So. 2d 203 (Ala. 1998); *L.W. v. W. Golf Ass'n*, 712 N.E.2d 983 (Ind. 1999); *Robertson v. State*, 747 So. 2d 1276 (La. Ct. App. 2000); *Garofalo v. Lamda Chi Alpha Fraternity*, 616 N.W.2d 647 (Iowa 2000); *Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003); *Hall v. Moravian Coll.*, No. 1999-C-9238, 2002 WL 34103009 (Pa. Ct. Com. Pl. Apr. 1, 2002); *Christiansen v. Univ. of Minn. Bd. of Regents*, No. 69DU-CV-05-2027, 2006 WL 6191767 (Minn. Dist. Ct. Mar. 22, 2006); *Pawlowski v. Delta Sigma Phi*, No. CV-03-0484661S, 2009 WL 415667 (Conn. Super. Ct. Jan. 23, 2009). *But see, Knoll v. Bd. of Regents of the Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999) (applying landowner liability theory, the court found a "special relationship" because the University had knowledge of hazing, which made the student's injury foreseeable, and the University could have controlled the behavior of the hazers through its Student Code of Conduct).

143. *Baldwin*, 176 Cal. Rptr. at 816.

144. *See e.g., Christiansen*, 2006 WL 6191767, at \*10 (finding that the university was not in a position to protect student); *Beach*, 726 P.2d at 418 (finding that the duty would have been "realistically incapable of performance").

145. *Pawlowski*, 2009 WL 415667, at \*5 (holding that the imposition of a duty would be against public policy because it would require acts by the university which were against public policy); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987) (citing *Beach*, 726 P.2d at 419) (imposing a duty would encourage University to limit student choice creating a "repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education"); *Booker*, 800 F. Supp. at 241

that courts were placing the moral blame for the injury not on the educational institution, but on the student who had voluntarily consumed alcohol to excess.<sup>146</sup>

To the extent that the educational institution has knowledge of an unreasonably dangerous condition and has the ability to eliminate the dangerous condition or diminish the risk of harm posed by the dangerous condition, the educational institution has a duty to take reasonable action to eliminate or diminish the risk of harm to the student, even when the dangerous condition may be another student.

## 2. Voluntary Assumption of Duty

Where students have sued their educational institutions for injuries caused by the act of a third party, courts have consistently applied Section 323 of the Restatement (Second) of Torts,<sup>147</sup> which provides:

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

His failure to exercise such care increases the risk of such harm, or

The harm is suffered because of the other's reliance upon the undertaking.<sup>148</sup>

Educational institutions can voluntarily assume a duty either by contract or by the actions they take.<sup>149</sup> Courts have split on whether the adoption of a policy or a provision of a student handbook or code of conduct is evidence

(imposing such a duty would infringe on other rights of students); *Beach*, 726 P.2d at 418 (finding that the existence of a duty would have been "fundamentally at odds with the nature of the parties' relationship").

146. *Robertson*, 747 So. 2d at 1284 (refusing to protect the student from "his deliberate act of recklessness"); *Baldwin*, 176 Cal. Rptr. at 816.

147. Reference is to the Restatement (Second) of Torts because that is the provision the courts relied upon in deciding the cases discussed in this section. *See cases supra* note 115. Section 42 of the Restatement (Third) of Torts provides:

An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking; or

(b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

RESTATEMENT (THIRD) OF TORTS § 42 (Tentative Draft No. 5, 2005).

148. RESTATEMENT (THIRD) OF TORTS § 42 (Tentative Draft No. 5, 2005).

149. *Id.* at cmt. a.

of a voluntary assumption of duty.<sup>150</sup> The first question for the court is whether the educational institution had knowledge that its “undertaking will reduce the risk of harm to another.”<sup>151</sup> The second question is whether the educational institution’s act increased the risk of harm “beyond that which existed in absence of the actor’s undertaking.”<sup>152</sup> Reliance by the student on the educational institution is just one way that risk of harm can be increased.<sup>153</sup>

In *Silvers v. Associated Technical Institute, Inc.*,<sup>154</sup> the court found that the vocational school’s contractual obligation to provide its students with job placement services was a voluntary assumption of a duty and required the school to exercise due care in providing the placement services. When the placement office received a job posting for a “[f]emale tech for Communications switching complex a lot of travel part-time,”<sup>155</sup> due care required the school to make some effort to investigate the potential employer in order “to avoid placing [students] with an employer likely to harm them.”<sup>156</sup> The court applied “existing social values and customs, and . . . appropriate social policy” to determine that a job order that requested only female applicants should have been sufficient to put the school on notice that the employer may not be reputable.<sup>157</sup> Moreover, the student acted reasonably in “[a]ssuming that [the school] would only refer [her] name to legitimate employers which it had screened.”<sup>158</sup>

Likewise, in *Nova Southeastern v. Goss*,<sup>159</sup> the University could be viewed as having voluntarily assumed a duty when it designed a required internship program, chose the placement sites, and assigned students to the placement sites.<sup>160</sup> Once the University exerted control, the University assumed the duty to exercise due care in choosing placement sites and placing students in those placement sites. The duty to exercise due care includes protecting students from foreseeable dangers. Foreseeable dangers include those dangers the University had actual knowledge of; in

150. Compare *Brooker*, 800 F. Supp. 234 (language is aspirational), and *Jain*, 617 N.W. 2d 293 (finding that a policy of notifying a parent of student’s self-destructive behavior was not an assumption of a duty to prevent suicide), with *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) (assumption of duty).

151. RESTATEMENT (THIRD) TORTS § 42 cmt. d (Tentative Draft No. 5, 2005).

152. *Id.* at cmt. f.

153. *Id.*

154. *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at \*3 (Mass. Oct. 12, 1994) In *Silvers*, the student, who used the school’s employment placement services, was sexually assaulted and harassed by her employer.

155. *Id.* at \*1.

156. *Id.* at \*3.

157. *Id.* at \*4 (citing *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070 (Mass. 1989)).

158. *Id.* at \*2.

159. 758 So. 2d 86 (Fla. 2000); see discussion *supra* pp. 11–12.

160. *Nova*, 758 So. 2d at 87–88.

this case, other criminal activity near the placement site which made the risk of harm to the student reasonably foreseeable.<sup>161</sup> Because of the amount of control exerted by the University in the implementation of its internship program, the student “relied” upon the University to only place her at sites deemed safe, and the student suffered injuries due to her reliance on the University.<sup>162</sup> In addition, the University’s failure to warn the student of the known dangers of the placement site was a failure to exercise due care which failure increased the risk that the student would be injured at the placement site,<sup>163</sup> because the student did not have the knowledge she needed to take precautions to protect herself.

In alcohol consumption and fraternity cases, courts that have refused to find the existence of a special relationship may find that the educational institution has voluntarily assumed a duty.<sup>164</sup> In *Furek v. University of Delaware*,<sup>165</sup> the student was injured during a fraternity hazing event,<sup>166</sup> which was held at the fraternity house located on University property, but leased to the fraternity.<sup>167</sup> The University’s Student Guide to Policies stated that “[h]azing, the subjection of an individual to any form of humiliating treatment and the violation of the rights of other students, have no place in the University community.”<sup>168</sup> Despite the University’s policy, hazing continued on campus, and campus officials had knowledge that hazing was occurring.<sup>169</sup> When notified of the student’s injuries due to hazing, the University instituted its own investigation, but was unable to initiate disciplinary proceedings due to lack of cooperation.<sup>170</sup> The court found that even though the doctrine of in loco parentis did not apply to the University-student relationship, the University still maintained a residual duty of control and stated that “where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the

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161. *Id.* at 88.

162. RESTATEMENT (SECOND) OF TORTS § 323(b) (1965).

163. *Id.* at § 323(a).

164. *McClure v. Fairfield Univ.*, No. CV000159028, 2003 WL 21524786, at \*8 (Conn. Super. Ct. Jun. 19, 2003) (finding that because the University had advertised and offered a shuttle service, the University had voluntarily assumed a duty to protect students “who traveled to and from parties at the beach area.”); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 310–12 (Idaho 1999) (declining to find special relationship, but leaving open the possibility that the University had voluntarily assumed a duty of care because it had provided supervision at the fraternity party where the underage student voluntarily became intoxicated).

165. 594 A.2d 506 (Del. 1991).

166. There is no mention that alcohol was involved in the hazing event. *See id.* at 506.

167. *Id.* at 509.

168. *Id.* at 510 n.2.

169. *Id.* at 510–11.

170. *Furek*, 594 A.2d at 511.



university cannot abandon its residual duty of control.”<sup>171</sup> Applying Section 323 of the Restatement, the court held that the “University’s policy against hazing, like its overall commitment to provide security on its campus . . . constituted an assumed duty which became ‘an indispensable part of the bundle of services which colleges . . . afford their students.’”<sup>172</sup> In coming to its conclusion, the court relied upon the expectations of students, parents, and the community to protect students from these types of dangerous activities.<sup>173</sup>

The *Silvers*, *Nova Southeastern*, and *Furek* cases indicate that courts are willing to expand an educational institution’s duty to its students under a voluntary assumption of duty analysis.<sup>174</sup> The problem for educational institutions under a voluntary assumption of duty analysis is that if the institution is fulfilling its duty of care in designing and implementing its curriculum, then the institution has already taken into account how it can reduce the risk of harm to its students while still creating opportunities for the students to take on responsibility and leadership roles. Under a *Furek* type analysis, almost any action taken by an educational institution can be deemed to be a voluntary assumption of duty. The exception then becomes the rule and provides students with more legal protections than non-students, which is against public policy. In determining whether an educational institution has voluntarily assumed a duty, the court should only find that the educational institution assumed a duty when there is an increased level of risk, the educational institution knows or should know of the increased level of risk, and the educational institution can control the risk. These three factors were present in all three cases. In *Silvers*, the placement office should have known of the increased risk of sexual harassment because the request was only for female applicants and the placement office could have refused to accept the placement request. In *Nova Southeastern*, the University had knowledge of recent criminal activity near the placement site and the University controlled the selection of sites and placement of students at sites. In *Furek*, the University knew or should have known that hazing was occurring on campus and the University, as evidenced by its actions after the events, had the authority to punish students and student organizations participating in hazing. Again, it is the educational institution’s knowledge and control of the risk which creates the duty to the student.

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171. *Id.* at 520.

172. *Id.* at 520 (citing *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983)).

173. *Id.*

174. *But see* *Guest v. Hansen*, No. 06-cv-0500, 2007 WL 4561104, at \*1 (N.D.N.Y. Dec. 18, 2007); *Rogers v. Del. State Univ.*, 905 A.2d 747, 747 (Del. 2006); *Ingato v. Wilmington College, Inc.*, 882 A.2d 761, 761 (Del. 2005).

### C. Litigation Arising Out Of Study Abroad Programs

Although the primary focus of this article is on international externship programs, the author could find no reported cases regarding international externship programs. In fact, there are very few reported cases where students have sued their college or university for events which occurred during their study abroad program.<sup>175</sup> While injuries to students abroad have often made headline news,<sup>176</sup> few of these events appear in reported cases. The reason for this phenomenon is unknown.<sup>177</sup> Given the breadth and diversity of locations in which U.S. students study abroad, it seems unlikely that the lack of reported cases is simply because these students are in a safer environment when studying abroad than they are at home in the United States. In *The Rights and Responsibilities of the Modern University: Who Assumes the Risk of College Life?*,<sup>178</sup> Peter Lake surmises that the dearth of reported cases addressing college and university tort liability and the fact that most reported cases are resolved in the college's or university's favor has occurred because college and university policy makers and college and university counsel settle cases which would make bad law for the university and only litigate those cases where there is an opportunity to develop law favorable to the college or university.<sup>179</sup> Perhaps, because international incidents result in bad publicity and institutions want and need good publicity in order to continue to attract students, universities are settling these cases. Or, perhaps because the events occurred in a foreign country, U.S. courts are perceived as not having jurisdiction over all the necessary parties.<sup>180</sup>

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175. In 1999, in *The Legal Liability of Risks Associated with International Study Abroad Programs*, William Hoye identifies two reported cases. Hoye, *supra* note 13, at 8 n.2 (Furrh v. Ariz. Bd. of Regents, 676 P.2d 1141 (Az. Ct. App. 1983) (student with mental disorder restrained in Mexico); Sipple v. Bd. of Governors, 318 S.E.2d 256 (N.C. Ct. App. 1984) (student sued college for refund when tour operator went into bankruptcy and stopped operating)). In 2006, in *Americans Abroad: International Educational Programs and Tort Liability*, Vincent Johnson identified six cases where students sued their university for events occurring in the study abroad program. Johnson, *supra* note 6, at 312–13.

176. See Mary Beth Marklein, *Students Abroad and Alone: No Government or School Agency Oversees Programs*, USA TODAY, May 28, 2009, at Life 1D.

177. Fewer cases filed in the United States for incidents occurring overseas, subject matter and personal jurisdiction problems, and other factors may play a role in this phenomenon.

178. See BICKEL & LAKE, *supra* note 19.

179. *Id.* See also Lake, *Rights and Responsibilities Revisited*, *supra* note 19.

180. FED. R. CIV. P. 19. See also Phillips v. Saint George's Univ., No. 07-CV-1555, 2007 WL 3407728, at \*5 (E.D.N.Y. Nov. 15, 2007) (refusing to find jurisdiction even though university solicited students and accepted funds in United States, because University was located in Grenada, West Indies, and all acts occurred in Grenada, West Indies); Paneno v. Centres for Academic Programmes Abroad, Ltd., 118 Cal. App. 4th 1447 (Cal. Dist. Ct. App. 2004) (finding jurisdiction where corporation designing and marketing overseas study programs divided duties between United States and United

Regardless of why there are so few reported cases arising out of study abroad programs, the reported cases show a trend that U.S. courts are willing to hear such claims and are not willing to allow educational institutions to shield bad behavior behind waivers and exculpatory clauses<sup>181</sup> or behind claims that the court does not have jurisdiction because the events occurred outside of the United States.<sup>182</sup> These cases are a wake-up call. Educational institutions, including law schools, need to assess the risks of their study abroad programs and take measures to reduce the risk of foreseeable injury from events the institution can control and thus, be held to have had a duty to exercise reasonable care to protect the student. To the extent that international externship programs include similar risks, a court may find that the college or university had a duty to exercise reasonable care to protect the student.

### 1. Medical Treatment

The courts of New York and Pennsylvania have taken opposing positions regarding whether an educational institution has a duty to supervise the medical treatment provided a student participating in a study abroad program.<sup>183</sup> The New York Court of Appeals found that because New York did not apply the doctrine of *in loco parentis* to universities, the university had no obligation to supervise the medical treatment received by the student.<sup>184</sup> The Court of Common Pleas of Pennsylvania found as a matter of law that because Theil College required all of the students participating in the study abroad program to execute a consent for medical treatment, the College owed the student a special duty of care.<sup>185</sup> These cases are distinguishable both on their facts and on public policy grounds.

#### *a. McNeil v. Wagner College*

The student was participating in Wagner College's study abroad program in Austria when she slipped on ice and broke her ankle.<sup>186</sup> It is unknown whether, at the time of the injury, the student was actively participating in a curricular component of the study abroad program or

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Kingdom corporations in order to avoid jurisdiction of United States court).

181. For a discussion of the types of documents that an institution of higher learning should consider, including waivers, assumption of risk, and exculpatory language, see Hoye & Rhodes, *supra* note 18, at 157–62 and Hoye, *supra* note 13, at 18–21.

182. See *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 786–88 (E.D. Mich. 2002).

183. Compare *McNeil v. Wagner*, 667 N.Y.S.2d 397 (N.Y. App. Div. 1998), with *Fay v. Theil Coll.*, 55 Pa. D. & C.4th 353 (Pa. Ct. Com. Pl. 2001).

184. *McNeil*, 667 N.Y.S.2d at 398.

185. *Fay*, 55 Pa. D. & C.4th at 363.

186. *McNeil*, 667 N.Y.S.2d at 398.

whether the student was pursuing her own interests.<sup>187</sup> The student claimed that the administrator of the study abroad program “assumed the duty to act as an interpreter for [the student] in the Austrian hospital and that she suffered nerve damage due to the [administrator’s] failure to inform her of the treating physician’s recommendation that she undergo immediate surgery.”<sup>188</sup>

The student’s theory of liability was based on Section 323 Restatement (Second) of Torts<sup>189</sup> that the administrator had “voluntarily assumed a duty of care by acting as her interpreter at the hospital and that his breach of that duty placed [the student] in a more vulnerable position than she would have been otherwise.”<sup>190</sup> The court refused to find that the administrator had assumed such a duty when the evidence submitted by the College established that the treating physician could speak English.<sup>191</sup> Moreover, the student failed to offer any evidence that the administrator had been “told of the recommendation of immediate surgery and negligently withheld that information from [the student].”<sup>192</sup>

The court held that an institution which assists its student in obtaining medical treatment in a country with modern medical practices from a doctor who speaks the same language as the student has taken reasonable steps to protect its student from foreseeable risk. There was no evidence before the court that the student could not communicate directly with the doctor herself or that the student was required to rely upon the translation provided by the program’s administrator. Nor was there any evidence before the court that the program’s administrator knew and understood that the recommendation was for immediate surgery. The court focused on the college’s duty to the student and thus, did not discuss the difficulty the student would have had in proving that the failure of the program’s administrator to translate proximately caused the student’s nerve damage. Moreover, if the same injury (slipping on ice in the town square) had occurred to the student while in the United States, the College would have had no duty to insure that the student received appropriate medical

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187. *Id.* When addressing the issue of duty for injuries occurring in the U.S., courts have distinguished between those events which are curricular or which are done in furtherance of the institution’s interests and those events which are done for the student’s own recreation. Compare *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927–98 (N.C. Ct. App. 2001) (duty to junior varsity cheerleader injured during warm-up for game), and *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993) (duty to lacrosse player injured at practice), with *Ochoa v. Cal. State Univ.*, 85 Cal. Rptr. 2d 768, 773 (Cal. Ct. App. 1999) (no duty to student playing intramural soccer).

188. *McNeil*, 667 N.Y.S.2d at 398.

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

190. *McNeil*, 667 N.Y.S.2d at 398.

191. *Id.*

192. *Id.*

treatment. The court was holding the College to the same duty in its study abroad program as the College has in operating its domestic programs. Moreover, the court was providing the student the same protection of the law as is provided to non-students.

*b. Fay v. Thiel College*

The student was participating in Thiel College's study abroad program in Peru,<sup>193</sup> under the supervision of three of the College's faculty members.<sup>194</sup> In order to participate in the trip, all students were required to execute a "Waiver of Liability" and a "Thiel College Consent Form".<sup>195</sup> While on the trip, the student became ill and was admitted to a medical clinic in the city of Cuzco.<sup>196</sup> After the student was admitted, the faculty members and the other students left on a prescheduled trip.<sup>197</sup> The student, who was not fluent in Spanish, was left alone at the clinic<sup>198</sup> where a missionary, whom the student had not met until her admission to the clinic, acted as the student's translator.<sup>199</sup>

When the student was informed through the missionary/translator that surgery was going to be performed, the student requested to be transferred to a hospital in Lima, to fly home, and to talk to her parents.<sup>200</sup> All of the student's requests were denied.<sup>201</sup> The missionary/translator authorized the surgery.<sup>202</sup> The student was "subjected to the unnecessary surgical removal of her appendix."<sup>203</sup> The student was conscious during and after the procedure, during which time the surgeon and anesthesiologist sexually assaulted her.<sup>204</sup>

The court found that the waiver of liability agreement<sup>205</sup> was an invalid "contract of adhesion," because (1) the waiver of liability agreement was a

193. *Fay v. Theil Coll.*, 55 Pa. D. & C.4th 353, 354 (Pa. Ct. Com. Pl. 2001).

194. *Id.* at 354–55.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 355.

199. *Fay*, 55 Pa. D. & C.4th at 355–56.

200. *Id.* at 356.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Fay*, 55 Pa. D. & C.4th at 357–58. The exculpatory clause provided:

As a condition of my participation in the study or project, I understand and agree that I am hereby waiving any and all claims arising out of or in connection with my travel to and from and/or my participation in this project or study that I, my family, my heirs or my assigns may otherwise have against Thiel College and/or its personnel.

*Id.*

requirement of participation in the study abroad program, (2) the terms of the agreement were not bargained for between the student and the College, and, (3) the student could not alter the form.<sup>206</sup> In response to the College's claim that it had no special relationship with the student, owed the student "no special duty beyond that of a reasonable standard of care," and did not violate the reasonable standard of care when it left the student in the Peruvian medical clinic,<sup>207</sup> the court found "as a matter of law" that the College owed the student "a special duty of care as a result of the special relationship<sup>208</sup> that arose between Thiel College and [the student] pursuant to the consent form that she was required to execute prior to participating in the Thiel-sponsored trip to Peru."<sup>209</sup>

Relying upon Section 448 of Restatement (Second) of Torts,<sup>210</sup> the College claimed that it could not be "liable for the unforeseeable sexual assault and/or medical malpractice of the Peruvian medical staff."<sup>211</sup> Because the surgical room was in a restricted portion of the clinic, the presence of a faculty member at the clinic would not have prevented the surgery or sexual assault.<sup>212</sup> The doctors' acts were a superseding cause of

206. *Id.* at 360–61.

207. *Id.* at 361.

208. *Id.* at 363; *see also* Bird v. Lewis & Clark Coll., 303 F.3d 1015 (9th Cir. 2002).

A special relationship arises when "one party has authorized the other to exercise independent judgment in his or her behalf" and, as a result, the party owing the fiduciary duty must take care of certain affairs belonging to the other. What makes a relationship special is not its name, but the roles assumed by the parties.

*Id.* at 1023 (quoting Conway v. Pacific Univ., 924 P.2d 818, 824 (Or. 1996) (citing Strader v. Grange Mut. Ins. Co., 39 P.3d 903, 906 (Or. Ct. App. 2002)).

Because the College had "assured" the student and her parent that the program would accommodate the disability, because the College represented to the student that the Australian company making the arrangements had experience in accommodating the needs of individuals with disabilities such as hers, because the faculty member in charge of the program represented that there would be "adequate facilities" for the outdoor portion of the program, and because the College had made substantial modifications to its home campus to accommodate the student's disability, there were sufficient facts for the jury to find that the College and the student had a "special relationship." *Id.* at 1023.

209. *Fay*, 55 Pa. D. & C.4th at 363.

210. Section 448 of the Restatement (Second) of Torts provides:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS § 448 (1965).

211. *Fay*, 55 Pa. D. & C.4th at 364.

212. *Id.*

the student's injuries for which the College cannot be held liable.<sup>213</sup> The Court found that the purpose of Section 323 of the Restatement (Second) of Torts,<sup>214</sup> was "to relax the degree of certainty required of a plaintiff's evidence to provide a basis upon which a jury may find causation."<sup>215</sup> The Court held that the student need only prove that the College's negligence increased the risk of harm to the student and that the increased risk of harm "was a substantial factor in bringing about the harm."<sup>216</sup> The student is not required to prove that a faculty member's presence would have prevented the harm, just that the absence of one increased the risk that the harm would occur.

The court held that the issue of whether the college breached its duty of care to the student,<sup>217</sup> and whether the absence of a faculty member increased the risk of harm to the student, were questions of fact for the jury.<sup>218</sup> There was sufficient evidence for a jury to determine that the absence of a faculty member increased the risk that the Peruvian medical staff would harm the student.<sup>219</sup>

One way that an educational institution which establishes a program in a country where the student is not fluent in the local language or the doctor is not fluent in the student's primary language may attempt to meet its duty of care to students and to minimize the risk to the student by providing translation services. In addition, if the program is operating in a developing country where the medical practices are not considered to be of the same level as the United States, the educational institution would be well advised to minimize the risk that the student will be exposed to unnecessary medical procedures. An educational institution which abandons its student to seek medical care from a rural clinic whose doctors do not speak English has breached its duty of care to the student.

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213. *Id.*

214. Section 323 of the Restatement (Second) of Torts provides:

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.

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

215. *Fay*, 55 Pa. D. & C.4th at 364.

216. *Id.* at 366.

217. *Id.* at 363.

218. *Id.* at 366-67.

219. *Id.*

## 2. Personal Injury—Student Housing

There are no reported cases in which a U.S. court has addressed a college or university's duty to provide students in its study abroad program with safe housing. Students have, however, sued companies operating study abroad programs for injuries from accidents occurring in program provided housing. In *Paneno v. Centres for Academic Programmes Abroad, Ltd.*,<sup>220</sup> the student enrolled in a study abroad program in Florence, Italy, operated by the Centres for Academic Programmes Abroad ("CAPA").<sup>221</sup> CAPA contracted with a company experienced in locating student housing to obtain apartment housing for students enrolled in the Florence Program.<sup>222</sup>

In September of 2000, the student traveled to Florence, Italy, and commenced his studies without problem.<sup>223</sup> During the program, the student resided with other students participating in the Program in an apartment to which he had been assigned by the Program.<sup>224</sup> On October 21, 2000, while on the balcony to the apartment, the student leaned against the balcony railing which gave way, fell six stories, and is now paralyzed.<sup>225</sup>

The issue before the court was CAPA's motion to quash service; the court did not address the merits. When the court does address the merits, it will likely apply the same legal standard as it would if the injury had occurred in the United States, and find that there is a special relationship between the educational institution and the student which creates a duty for the educational institution to exercise reasonable care in choosing and maintaining safe housing for students participating in its study abroad program,<sup>226</sup> because in most programs, the educational institution controls where the student lives while participating in the program. Moreover, to find a duty of care provides the student with the same type of legal protection as non-students in similar circumstances.

## 3. Sexual Assault—The Duty to Warn

In *Bloss v. University of Minnesota Board of Regents*,<sup>227</sup> the University

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220. 13 Cal. Rptr. 3d 759 (Cal. Ct. App. 2004). The issue before the California Court of Appeals in *Paneno* was whether the defendant was subject to the jurisdiction of California courts. *Id.* at 760.

221. *Id.* at 760–61.

222. *Id.* at 762.

223. *Id.*

224. *Id.*

225. *Id.* at 763.

226. See discussion *supra* Part II.B.1.

227. 590 N.W.2d 661 (Minn. Ct. App. 1999). The court found that the university was protected by statutory immunity, which is only available to state-owned, post-secondary institutions. Statutory immunity is a reservation of protection from the



exercised discretion when it designed its study abroad program, including the location of student housing, to meet particular educational goals.<sup>228</sup> At the time of the sexual assault, the student was participating in the “University’s Spanish in Cuernavaca Program at the Cemanahuac Educational Community,” a “cultural immersion program.”<sup>229</sup> While participating in the program, students live with host families<sup>230</sup> and either walk to school or commute via public bus or taxi.<sup>231</sup> The University, however, had “no written guidelines governing the distance of host families from schools or transportation for the program.”<sup>232</sup>

Students, including the student assaulted, “attend mandatory orientation sessions at which they receive explicit oral and written warnings relating to safety in Cuernavaca.”<sup>233</sup> In this case, the warnings the student received “included specific admonitions that it was dangerous for women to go out alone at night, that [students] should call for a taxi at night rather than hail a taxi on the street, and that women should never sit in the front seat of taxis.”<sup>234</sup> In the eighteen years the Program was operating prior to the sexual assault of the student, there had been no sexual assault of a student in the Program, nor did the University have any knowledge of a sexual assault of a tourist.<sup>235</sup>

At the time of the sexual assault, the student was riding in the front seat of a taxi which she had hailed on the street at night.<sup>236</sup> The student was on her way to a friend’s house when the taxi driver sexually assaulted her.<sup>237</sup> The student sued the University claiming “negligence in its failure to secure housing closer to the Cemanahuac campus, failure to provide transportation to and from campus, failure to adequately warn about risks, and failure to protect students from foreseeable harm.”<sup>238</sup>

Designing the Program required the University to engage in balancing “competing public policy considerations,”<sup>239</sup> including “academic,

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waiver of sovereign immunity usually contained in a state’s tort claims act. Sovereign immunity usually protects the state agency when in its discretionary, policy making activities. *Id.* at 664, 667.

228. *Id.* at 662.

229. *Id.*

230. Host families must meet a set of criteria in order to participate in the Program. Students unhappy with their host family are allowed to select another family. *Id.* at 663.

231. *Id.* All host families are located within walking distance or on a bus line.

232. *Id.*

233. *Paneno*, 590 N.W.2d at 663.

234. *Id.* at 666.

235. *Id.* at 663.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Paneno*, 590 N.W.2d at 665.

financial, political, economic, and social considerations,”<sup>240</sup> in order to meet the educational goals of the study abroad program. The court indicated that it was not persuaded that the University could have done more to protect the student when the student acknowledged that she engaged in the very behavior that she was warned against during the mandatory orientation session.<sup>241</sup> The court concluded by holding that the University is not a guarantor of student safety; it is both physically impossible and unrealistic to believe that a University can protect all of its students, all of the time while the student is participating in a study abroad program.<sup>242</sup>

Educational institutions have discretion to design study abroad programs to meet particular, identified educational goals. In exercising that discretion, educational institutions must not only identify reasonably foreseeable risks to students, but must warn students of the risks and provide students with strategies to avoid these risks. Educational institutions have not been, and should not be, held to impossible standards.

#### 4. Federal Civil Rights Statutes<sup>243</sup>—Title IX,<sup>244</sup> the Rehabilitation Act,<sup>245</sup> and Title III of the Americans with Disabilities Act<sup>246</sup>

Although there are few cases, U.S. courts have applied federal civil rights statutes to U.S. schools operating study abroad programs when the alleged violation of the civil rights statutes occurred overseas.<sup>247</sup> The courts’ rationale has been that it was the intent of Congress that the protection of these statutes apply to all education programs and activities operated by U.S. educational institutions.<sup>248</sup> Congress did not include an explicit exception for study abroad programs.<sup>249</sup> Because the role of the

240. *Id.*

241. *Id.* at 666.

242. *Id.*

243. The cases discussed in this section, although based upon statutory duties, illustrate additional types of behavior which create risks for the educational institution in its study abroad and international externship programs.

244. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2009).

245. Rehabilitation Act of 1973, 29 U.S.C. §§ 791–94 (2009).

246. Title III of the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12181–89 (2009).

247. *See e.g.*, *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (Rehabilitation Act and Title III of the ADA); *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002) (Title IX); *Philips v. Saint George’s Univ.*, No. 07-CV-1555, 2007 WL 3407728, at \*1 (E.D.N.Y. Nov. 15, 2007) (Title IX).

248. *King*, 221 F. Supp. 2d at 790–91. Because the female students were enrolled in a U.S. university, the female students were “persons within the United States” for purpose of Title IX, even if the education program that they were participating in and the harassing acts occurred in a foreign country. *Id.*

249. *Id.* at 788.

court is to apply the statute as intended by Congress, the court was not in a position to create an exception that both Congress and the executive branch agency charged with enforcing the statute had refused to create.<sup>250</sup> The court emphasized that “[s]tudy abroad programs are an integral part of college education today. A denial of equal opportunity in those programs has ramifications on students’ education as a whole and detracts from their overall education.”<sup>251</sup>

The mere fact that the events at issue occurred in a foreign country as part of an educational institution’s study abroad program is not sufficient to relieve the institution of its duty to its student. In the few reported study abroad cases, courts have been consistent in holding educational institutions to the same legal duty to its students in both its domestic and foreign educational programs. The good news is that the educational institution knows what its obligations to its students are and can therefore exercise reasonable care in the design and implementation of its study abroad programs.

### III. THE EDUCATIONAL INSTITUTION’S DUTY TO THE EXTERNSHIP PLACEMENT SITE

Over the past decade, courts seem to have been leveling the playing field by treating students and non-students alike in the eyes of the law and by treating educational institutions and businesses/landowners alike in the eyes of the law. It is likely that this trend will continue. And, if it does, it is not difficult to predict that a court will find that under certain circumstances an educational institution owes a duty of care to non-students.<sup>252</sup> Such circumstances are likely to include externship programs, particularly when the educational institution has knowledge about a student that makes it reasonably foreseeable that the student may cause harm to another at the placement site. Although no court has yet to address this issue, educational institutions have knowledge of their students’ behavior and usually exert sufficient control in the design and implementation of their externship programs for a duty to exercise reasonable care to arise.

When an educational institution has knowledge that one of its students is likely to injure another person, the institution should act with reasonable care to prevent the injury. Knowledge means information that the educational institution actually knows, which, at a minimum, includes the information contained in a student file, but likely also includes that information which staff and faculty have that should have been reported to an individual with authority to act on the information.<sup>253</sup> Where the

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250. *Id.*

251. *Id.* at 791.

252. *See Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

253. *See Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002)

educational institution does not have the ability to control the acts of the student,<sup>254</sup> the duty of reasonable care may be limited to warning the non-student of the potential harm.<sup>255</sup> The educational institution is “in control” when it has the ability to remove the risk—here the student—from the program or facility. When the educational institution is “in control,” a court is likely to find that the institution’s duty of reasonable care includes more than just warning the individual likely to be harmed. When the educational institution is “in control,” it may need to take steps to limit the ability of the dangerous student to harm others.<sup>256</sup>

Although *Tarasoff v. Regents of the University of California*<sup>257</sup> is not a school case, and did not involve an international program, it establishes the rationale and parameters for when public policy requires the recognition of a duty of reasonable care to protect third parties from a dangerous individual. In *Tarasoff*, the underlying event was Prosenjit Poddar’s murder of Tatiana Tarasoff.<sup>258</sup> Prior to the murder, during his voluntary outpatient treatment at Cowell Memorial Hospital at the University of California Berkeley, Poddar informed his therapist that he was going to kill a girl (who was easily identified as Tatiana Tarasoff) when she returned home from her summer travels.<sup>259</sup> The therapist recommended that Poddar be committed for observation in a mental hospital, and campus police were notified of the request for commitment.<sup>260</sup> Campus police took Poddar into custody, but upon determining that he was “rational, released him on his promise to stay away from Tatiana.”<sup>261</sup> The plaintiffs’ alleged that the therapist’s “negligent failure to warn Tatiana or others likely to apprise her of her danger” was the proximate cause of Tatiana’s death. The University claimed that it had no duty of care to warn Tatiana or her parents of Poddar’s threat.<sup>262</sup> The California Supreme Court stated that “when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special

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(finding a duty to protect where college had knowledge that student was dangerous to himself).

254. An educational institution’s lack of authority to control the acts of a student may come from a variety of sources, including state and federal law.

255. See *Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at \*1 (E.D. Pa. Aug. 14, 2008). But see *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993).

256. *Nero*, 861 P.2d at 780.

257. 551 P.2d at 334.

258. *Id.* at 339.

259. *Id.* at 341.

260. *Id.*

261. *Id.*

262. *Id.* at 342.

relationship to the *dangerous person or to the potential victim*.”<sup>263</sup> Applying Section 315 of the Restatement Second of Torts, the court found that a special relationship exists between the doctor/therapist and patient and that “[s]uch a relationship may support affirmative duties for the benefit of third persons.”<sup>264</sup> In balancing the patient’s privacy interest, the interest in confidential dialogue between patient and doctor, and the protection of the public, the court held that the therapist had “a duty to exercise reasonable care to protect Tatiana.”<sup>265</sup> The duty to exercise reasonable care required the therapist to notify the patient’s potential victim or the potential victim’s family member of the threat.<sup>266</sup>

In *Nero v. Kansas State University*,<sup>267</sup> the injured student was sexually assaulted in the basement recreation room of a co-ed residence hall by a male student during a summer session.<sup>268</sup> Approximately one month earlier, the male student had been accused of raping J.N., a female student living in his residence hall, which resulted in criminal charges.<sup>269</sup> After being released on bond, the male student was assigned to an all male residence hall for the remainder of the academic year.<sup>270</sup> For the summer session, the only campus housing available was a co-ed dormitory, and the male student moved to the co-ed residence hall.<sup>271</sup> The University did not warn the female students living in the co-ed residence hall that the male student had been charged with rape.<sup>272</sup> The court determined that because the University was providing housing to its students, it was in competition with private landlords, and thus, owed the same duty of care to its students as a private landlord owed to its tenants.<sup>273</sup> The court held that the University had “a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and *within the university’s control*.”<sup>274</sup> The court emphasized that the University knew that the male student had been charged with rape and that

263. *Nero*, 861 P.2d at 342–43 (emphasis added).

264. *Id.* at 343; *see also* *Merchs. Nat’l Bank & Trust v. United States*, 272 F. Supp. 409 (D. N.D. 1967) (holding that where Veteran’s Administration arranged for mentally ill patient to work, but did not inform employer of patient’s mental illness, Veteran’s Administration liable for wrongful death of patient’s wife when patient left work and killed wife during work hours.).

265. *Tarasoff*, 551 P.2d at 348 (holding that the plaintiff could amend her complaint against the therapist and other defendants for breach of duty of reasonable care).

266. *Id.* at 347–48.

267. *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993).

268. *Id.* at 771.

269. *Id.*

270. *Id.*

271. *Id.* at 772.

272. *Id.* at 768.

273. *Nero*, 861 P.2d at 779.

274. *Id.* at 780 (emphasis added).

the previous semester the University had taken reasonable steps to protect other students.<sup>275</sup> The court also emphasized that the University could have refused to rent the male student a room in the co-ed residence hall during the summer session.<sup>276</sup> Because the University had both the knowledge that the student was dangerous and the ability to control the dangerous student in order to reduce the risk of harm to the injured student, the University owed the injured student a duty of care.

In *Fitzpatrick v. Universal Technical Institute*,<sup>277</sup> Fitzpatrick's Estate sued the Institute claiming that the Institute's students had used the knowledge learned at the Institute and the Institute's facilities to alter their cars so that the cars could be driven faster during drag races held near campus.<sup>278</sup> The Estate claimed that the school was aware of its students' racing as it had enacted "a policy of dismissing students seen exhibiting this behavior."<sup>279</sup> The Estate also claimed that the Institute's failure to "properly police its students was negligent and was a proximate cause of the accident," which killed Fitzpatrick.<sup>280</sup> The Institute contended that it had no duty "to prevent its students from harming others, even if the harm is foreseeable."<sup>281</sup> The court applied the general property rule that a property owner has a duty to police the use of his property, if he "has reason to expect that a person will use that property in a manner likely to cause injury to others."<sup>282</sup> Thus, if the Institute knew or should have know that its students were using the Institute's facility to alter their cars for the purpose of drag racing, then the Institute owed a duty of care to those persons who could foreseeably be injured by the students use of the altered cars.

Arguably all three cases are premised upon a "special relationship" with either the student or the third party – therapist/patient, landlord/tenant, and property owner. An educational institution could argue that because the student/university relationship itself is not sufficient to create a special relationship, the educational institution offering an externship program to its students does not have a duty to the placement site or anyone at the placement site. Moreover, in an externship relationship, it is the placement site that is in the position of premises owner vis-à-vis the student as business invitee, not the educational institution. Thus, if a special relationship exists it is between the placement site and the injured person,

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275. *Id.*

276. *Id.*

277. *Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at \*1 (E.D. Pa. Aug. 14, 2008).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at \*2.

not the educational institution and the injured person.

Because the courts' primary focus in these analogous cases was not on the relationship between the various actors, but on the knowledge that the institution had and the public policy of protecting innocent third parties from violence,<sup>283</sup> it seems a court is unlikely to accept such an argument from an educational institution. As between the placement site and the educational institution, it is usually the educational institution that has superior knowledge about its student's background, criminal record, prior bad acts, and level of dangerousness, if any. A court is more likely to find that when the educational institution has knowledge that one of its students is dangerous and has the ability to control the student's participation in the externship program, the institution has a duty to protect not only its students, but others who could foreseeably be injured by the dangerous student. An institution can control the dangerous student's participation in the externship program by refusing to allow the student to enroll in the program or by removing the dangerous student from the program. If the educational institution cannot control the student, the institution still has a duty to warn those whom it is foreseeable that the student might injure.

In order for the educational institution's duty of reasonable care to be triggered, the institution must have knowledge that the student is a danger. An educational institution is not required to investigate each of its students prior to allowing the student to participate in the externship program. If, however, the educational institution has knowledge that one of its students has physically injured or assaulted another student or a third party, the institution then could well have a legal duty to exercise reasonable care in placing that student in an externship program. Because knowledge can be received by the institution in different offices and by different people, the educational institution must be sure to communicate within its administration in order to fulfill its duty of care to both its students and other third parties.

As discussed in more detail above,<sup>284</sup> an educational institution voluntarily assumes a duty when there is an increased level of risk, the educational institution knows or should know of the increased risk, and the educational institution can control the risk. In the externship setting, there is an increased level of risk when it is reasonably foreseeable that a dangerous student is known to be likely to harm others at the placement site. An educational institution can mitigate or control the risk by the manner in which it designs and implements the externship program. For example, the educational institution can and should reserve the discretion to admit or deny students into the externship program or to limit student

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283. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 346-48 (Cal. 1976).

284. *See* discussion *supra* Part II.

placement to particular sites.<sup>285</sup> The educational institution can create internal methods of communication so that the externship director can try to reasonably determine if a student is dangerous and should not be placed at a particular site. A voluntary assumption of duty should only be found where the educational institution had knowledge that a student was dangerous. Moreover, it would be reasonable, and consistent with public policy, for the placement site to rely upon the educational institution to not send students to the placement site that the institution knows are dangerous.

#### IV. MANAGING RISKS AND DEFINING DUTIES IN AN INTERNATIONAL EXTERNSHIP PROGRAM

International externship programs are one way for a law school to meet its goal of graduating students who can competently practice law in the global market. In order for graduates to competently function in the global market, law schools must not only teach students legal doctrine, but also provide students with opportunities to take responsibility and develop leadership skills.<sup>286</sup> With responsibility comes risk, and with risk comes the possibility of injury.<sup>287</sup> Just as the university is not an insurer of student safety,<sup>288</sup> a law school is not an insurer of a law student's safety.<sup>289</sup> And, just as the university owes a duty to its students to exercise reasonable care in the design and implementation of its curriculum, so too does a law school.

A law school can fulfill its duty to exercise reasonable care in the design and implementation of its international externship program if it has clearly defined educational goals for the program, identifies the reasonably foreseeable risks that students participating in the program will be exposed to, and takes reasonable action to minimize the risk to students. An international externship program has some of the same inherent risks as a study abroad program,<sup>290</sup> and some unique challenges of its own. Because one of the purposes of developing an international externship program is to

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285. A student may be deemed dangerous for one placement site, but not another. For example, in *Nero*, the male student was deemed too dangerous to be placed in a co-ed residence hall, but not a male residence hall. *See Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993). *But see Butler*, *supra* note 21, at 114–15 (recommending allowing a student to choose her placement site as a means of limiting the institution's duty to the student).

286. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

287. *See id.*

288. *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005) (citing *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003)).

289. *See Butler*, *supra* note 21; *see also Donnell v. Cal. W. Sch. of Law*, 246 Cal. Rptr. 199, 204 (Cal. Ct. App. 1988) (finding that a law school had no duty to student injured on public sidewalk adjacent to law school property).

290. For a discussion of some of these risks, see generally Hoye, *supra* note 13, Hoye & Rhodes, *supra* note 18, and Johnson, *supra* note 6.



transition the law student from student to practitioner, identifying and managing risk in such a program is best done by using a facilitator model.<sup>291</sup> This section provides a brief explanation of the facilitator model and then applies the model to the challenge of implementing and designing an international externship program.

#### A. The Facilitator Model

In *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?*,<sup>292</sup> Robert Bickel and Peter Lake suggest that a responsible and efficient way for educational institutions to manage risk is through the implementation of a “facilitator model.”<sup>293</sup> When the educational institution acts as a facilitator, the institution acts as “a guide who provides as much support, information, interaction, and control as is reasonably necessary and appropriate to the situation.”<sup>294</sup> In a facilitator model, students take responsibility for their own actions, but the facilitator can limit the choices which can be made.<sup>295</sup>

Information, training, instruction and supervision, discussion, options and in some cases, withdrawal of options are all appropriate for facilitators. A facilitator . . . is keenly aware of aberrant risks and risks known only to the more experienced. A facilitator is very aware of the types of students and the particular university community.<sup>296</sup>

Contrary to the business/invitee model used by some courts, under a facilitator model, the students are not merely consumers and educational institutions do not provide goods or services in the same manner as other businesses.<sup>297</sup> Both students and the educational institution must act in a manner that furthers the institution’s goal to “educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future.”<sup>298</sup> In order to mature, students must be given responsibility.<sup>299</sup> Giving students responsibility means giving them choices. And, sometimes, choices and responsibilities include risks. It is the duty of the educational institution to prepare the student, through adequate instruction and supervision, to make choices and assume responsibility. Once students are adequately prepared,

291. BICKEL & LAKE, *supra* note 19, at 159–214.

292. *Id.*

293. *Id.*

294. *Id.* at 193.

295. *Id.*

296. *Id.*

297. BICKEL & LAKE, *supra* note 19, at 194.

298. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987) (quoting *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986)).

299. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981).

they must take responsibility for their own actions.

The facilitator model does not hold the educational institution to a higher standard of care than courts have already articulated. The facilitator model does, however, provide a manner by which educational institutions can constructively assess and address risk in order to reduce risk, thereby reducing student injury and institutional liability. A facilitator model places the educational institution in the position of being proactive instead of reactive. When a student sues an educational institution, the institution is reacting to the events, is in a defensive mode, and is not in control of defining the legal issues. When an educational institution is a facilitator, the institution is proactive; it is in an offensive mode and can define and eliminate legal issues. As facilitator, the educational institution is in control and can act to protect itself and its students in the design and implementation of its educational programs.

Key to the facilitator model is determining what is reasonable. “A proper line of facilitation draws at what is reasonable. A facilitator cannot and does not eliminate all risks, but neither does it ask students to assume those unreasonable risks that would arise from lack of proper university planning, guidance, instruction, etc.”<sup>300</sup> The facilitator allows for the inherent risk, but not the unreasonable risk.<sup>301</sup> In order for the institution as facilitator to provide adequate “[i]nformation, training, instruction and supervision, discussion [and] options,” the educational institution must identify the reasonable risks that the “information, training, instruction and supervision, discussion, [and] options” are meant to address.<sup>302</sup> The risks are those risks that are reasonably foreseeable to a prudent person. In determining whether a risk is reasonably foreseeable, the facilitator model utilizes the same balancing factors used by the courts. Those factors are:

- Foreseeability of harm;
- Nature of the risk;
- Closeness of the connection between the college’s act or omission, and the student injury;
- Moral blame and responsibility;
- The social policy of preventing future harm (whether finding duty will tend to prevent future harm);
- The burden on the university and the larger community if duty is recognized; [and]
- The availability of insurance.<sup>303</sup>

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300. BICKEL & LAKE, *supra* note 19, at 195.

301. *Id.*

302. *Id.* at 193.

303. *Id.* at 202. Compare *id.* with *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007) (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)); with BICKEL & LAKE, *supra* note 19, at 202.

The educational institution should “use reasonable care to prevent foreseeable risks.”<sup>304</sup> By using the same balancing test to identify risks as a court will use in imposing a duty on the educational institution, the institution is ensuring that it is satisfying its duty to its students at the same time it is designing the educational program.<sup>305</sup> The program should undergo periodic review to ensure that no new risks have developed either during the implementation of the program or by the passage of time.

Use of the facilitator model does not mean that the educational institution will not be sued by a student. Nor does it mean that there is no risk of injury to a student in the educational institution’s program.<sup>306</sup> By using a facilitator model, an educational institution should be making conscious decisions as to what types of risks are appropriate and perhaps necessary to create the type of learning opportunities that students need to develop into mature, responsible, and productive citizens.<sup>307</sup> The educational institution can decide what risks students should not be exposed to, what risks the institution is willing to insure against, and what risks students should insure against. By using a facilitator model, the educational institution knows and understands the risks and the duties imposed by those risks.

#### B. Facilitating the International Externship Opportunity

In designing an international externship program, an educational institution, acting as a facilitator, needs to balance the educational goals for the students and the needs of the placement site. In creating an international externship program, the institution is creating an international community. It must consider the nature of the risks present in the new international community and the cultural competency required for students and supervising attorneys or employers to adequately function within this new community.

The mere fact that most of the externship program will occur in a foreign country does not alleviate the law school of its duty to its students or the placement site.<sup>308</sup> Nor does it alleviate the requirement that the law school comply with the ABA Standards for the Accreditation of Law Schools.<sup>309</sup>

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304. BICKEL & LAKE, *supra* note 19, at 203.

305. In addition, the institution’s records should be organized in a manner that allows the institution’s counsel to understand the steps taken to both identify and minimize risk, making it easier for counsel to defend the institution in the event of litigation.

306. The facilitator model allows for inherent risk. *See* BICKEL & LAKE, *supra* note 19, at 195.

307. *See* Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661, 664–66 (Minn. Ct. App. 1999).

308. *See* discussion *supra* Part III; *see also* BICKEL & LAKE, *supra* note 19, at 205 (“The boundaries of a campus are more elastic than geographical.”).

309. ABA STANDARDS, *supra* note 8, at 26–28 (governing study outside the

The law school's international externship program should be shaped in part by the law school's duty to its students to exercise reasonable care in the design and implementation of its curricular programs and in part by the ABA Standards, which establish minimum criteria<sup>310</sup> for the program.

### 1. The Community—The Students and The Placement Site

At first blush, it would seem that because law students are graduate students, the law school owes its students a lesser duty of care than the undergraduate institution owes to its students.<sup>311</sup> This analysis is faulty. In those cases where an educational institution was deemed to owe the graduate student a lesser duty of care, the graduate student's lower level degrees had provided the student with the basis of specialized knowledge as to the risks involved in the behavior that the student was engaging in.<sup>312</sup> Law students do not come to the laboratory of legal practice with a standardized basis of knowledge. It has been recognized that the practice of law can be dangerous.<sup>313</sup> Moreover, the practice of law in a foreign country includes the risks inherent in foreign travel, primarily the risk of the unknown. The risk of foreign travel is, however, a risk that makes life worth living.<sup>314</sup> An international externship experience includes the types of risks inherent in the practice of law and inherent in foreign travel. Because these are the types of experiences that assist students to mature from student to practitioner, these risks are reasonable. Nevertheless, because law students do not usually have specialized knowledge of risk in the workplace or risk in foreign travel, a law school should presume that it owes its students a duty of care similar to the duty an undergraduate institution owes its adult students.

This duty of care is not overly burdensome; it merely requires that the law school, particularly the faculty designing the program, do what it teaches its students they will do in the practice of law – identify risks and then create risk avoidance strategies. This is exactly what the facilitator model requires. Thus, by using the facilitator model to design the international externship program, the law school is modeling good lawyering skills for its students.<sup>315</sup>

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classroom).

310. *Id.* at viii (“The Standards for Approval of Law Schools of the American Bar Association are . . . minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.”).

311. See discussion *supra* Part II.A.

312. See *Fu v. State*, 643 N.W.2d 659, 672–73 (Neb. 2002); see also *Niles v. Bd. of Regents of the Univ. Sys. Of Ga.*, 473 S.E.2d 173, 175–76 (Ga. Ct. App. 1996).

313. See *Butler*, *supra* note 21.

314. See *BICKEL & LAKE*, *supra* note 19, at 195.

315. See *STUCKEY ET AL.*, *supra* note 8, at 128–29.

The law school also owes a duty to the externship site.<sup>316</sup> Unlike a domestic externship, it is unlikely that the foreign placement site will have an opportunity to meet and interview a student prior to the student's placement at the site. The placement site will be relying upon the law school to screen student applicants such that only those students that meet the requirements of the program will be placed at the externship site. Such reliance by the placement site on the law school is reasonable.

## 2. The Duty

Law schools owe students participating in the school's curricular programs a duty of care.<sup>317</sup> Because students earn academic credit for their participation in international externship programs,<sup>318</sup> such programs are curricular programs and thus, law schools owe their students a duty of care in the design and implementation of the program.<sup>319</sup> The extent of that duty is determined by the application of ordinary tort principles.<sup>320</sup> In determining the nature of the duty, the law school's educational goals in creating an international externship opportunity for its student<sup>321</sup> should be balanced against the burden of imposing the duty,<sup>322</sup> including whether the imposition of the duty would defeat the educational aspects of the program.<sup>323</sup> In determining whether the law school has met its duty of care, a court will look to the industry standard, which for law schools is compliance with the ABA Standards.<sup>324</sup>

316. See discussion *supra* Part III.

317. See discussion *supra* Part II.

318. ABA STANDARDS, *supra* note 8, at 26–27 (“A law school may grant credit toward the J.D. degree for courses or a program that permits or requires student participation in studies or activities away from or outside the law school.”).

319. See *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941).

320. See *Hawkins v. Waynesburg Col.*, No. 07-5, 2008 WL 2952888, at \*6 (W.D. Pa. Jul. 30, 2008).

321. For an example of an international externship program's goals see MICRONESIAN EXTERNSHIP PROGRAM, *supra* note 14:

[T]he Micronesia Externship Program aims to provide students experience in the following areas: (a) working in an international environment; (b) understanding the role of the United States in the development of the law of other nations; (c) understanding how the law develops in various communities; (d) understanding cultural differences and how those differences help to shape the law; (e) understanding alternative dispute resolution models as they relate to cultural needs and understandings; and (f) understanding the intersection between local culture and tradition and the law.

322. See *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 346–47 (Cal. Ct. App. 2007).

323. See *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999) (court refused to impose duty that would defeat “cultural immersion” aspect of program).

324. ABA STANDARDS, *supra* note 8, at 26–28 (governing externship programs). The ABA Criteria for Approval of Foreign Summer Programs is also instructive. See

The law school does not need to eliminate all risk from its externship program.<sup>325</sup> The law school may knowingly include risks if those risks are the type of risk that will assist the student to accept responsibility, to develop leadership skills, and to make the transition from law student to global practitioner of law.<sup>326</sup> Inclusion of such risks will only be deemed reasonable if (1) the risks further the educational goals of the program,<sup>327</sup> (2) the program informs the students of the risk, (3) the program provides the student with strategies that will assist the student to avoid the risk, and (4) the risk is no greater than the risk the student would be exposed to if they were in the foreign country as a tourist.<sup>328</sup> By providing the student with the knowledge of the risk and the training to address the risk in a safe manner, the law school is acting as a facilitator. If the risk to the student is no greater than if the student were a tourist, the law school has not voluntarily assumed a duty, because there is no increased level of risk. Moreover, because public policy requires that students and non-students be provided with the same legal protections,<sup>329</sup> educational institutions should not be held to a higher standard than other businesses; students and tourists should be treated the same.

Because the law school has superior knowledge regarding its students and can prevent the student from participating in the international externship program,<sup>330</sup> the law school may arguably owe a duty of care to the placement site. The duty is only triggered if the law school has knowledge that the student is dangerous. Because not all law schools provide the same types of services for their students,<sup>331</sup> a law school may not have the type of knowledge that will trigger the duty. Although a law school cannot knowingly ignore information,<sup>332</sup> it does not have a duty to investigate the student beyond the information that the law school already knows or should know. The faculty member responsible for accepting students into the program should seek information from the associate dean

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ABA CRITERIA, *supra* note 15, at 26

325. *See Bloss*, 590 N.W.2d at 661.

326. *See Stockinger v. Feather River Cmty. Coll.*, 4 Cal. Rptr. 3d 385, 397–98 (Cal. Ct. App. 2003).

327. ABA STANDARDS, *supra* note 8, at 27 (“A field placement program shall include . . . a clear statement of the goals and methods, and a demonstrated relationship between those goals and methods to the program in operation”); *see also id.* at 28 (“A law school that has a field placement program shall develop, publish and communicate to students and field instructors a statement that describes the educational objectives of the program.”).

328. *See Bloss*, 590 N.W.2d at 661; *see also* discussion *supra* Part II.C.3; ABA CRITERIA, *supra* note 15, at § VI.C.; ABA STANDARDS, *supra* note 8, at 307.

329. *See generally Beach v. Univ. v. Utah*, 726 P.2d 413, 418 (Utah 1986).

330. *See* ABA CRITERIA, *supra* note 15, at § IV.

331. Usually an independent, stand alone law school does not provide the same types of services to its students as a university-affiliated law school.

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

for academic affairs, the dean of students, and the registrar regarding whether the student is in good standing, whether there are any disciplinary charges pending, and whether there is any other information in the student's file that indicates the student is dangerous.<sup>333</sup> If the law school accepts students from other schools into its international externship program, the law school should request that the same type of information be provided by the visiting student's home institution.<sup>334</sup> The law school has a duty to exercise reasonable care to not place a student that the school knows is dangerous at the placement site. At a minimum, reasonable care requires checking the student's file.

### 3. Foreseeability

A law school is not responsible for all injuries which arise within the context of the international externship program. The law school has a duty of care to protect students from the reasonably foreseeable risk of injury. In determining foreseeability, focus should be on knowledge and control. Knowledge in the context of foreseeability is not just what the law school knows, but also what a reasonable faculty member, administrator, or law school should have known.<sup>335</sup> In order for a law school to have control, the law school must have the ability to take action that will manage the unreasonable risk. A risk may be unreasonable if the student's exposure to the risk does not further curricular goals. A law school can manage risk by (1) informing students about the risk and how to appropriately address the risk, (2) reducing the amount of harm which can be caused by the risk, or (3) eliminating the risk.<sup>336</sup> Because most of the risks that will arise in the context of an international externship program will occur in the foreign

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333. While FERPA limitations will place some constraints on the sharing of this sort of educational information, there is a strong argument to be made that faculty members need to know this information in this context. *See* 34 C.F.R. §99.31 (2004) ("An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure . . . is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.").

334. *See* ABA CRITERIA, *supra* note 15, at § IV(C). As noted above, however, getting this sort of information will create present significant challenges under FERPA, and may be difficult to obtain from other schools.

335. *See, e.g.,* BICKEL & LAKE, *supra* note 19, at 218, noting that:

Colleges and universities that spend their time resisting student litigation on the grounds that their students are beyond their control, spend money on lawyers and lawsuits that could have been better spent remedying danger and disorder and preventing student injury. A college or university is better advised to avoid liability by demonstrating that it exercised reasonable care under the circumstances than to assert that it had no duty to a student regarding her safety on campus.

336. *See* Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999).

country, the law school may not always have knowledge of the risk and may be surprised by new and challenging situations.

The law school cannot just ignore risks which it knows or should know about. At a minimum, the law school must provide the innocent students with the knowledge that they need in order to take action to protect themselves.<sup>337</sup> In identifying and informing students about the risks of the international externship program, law schools will be held to industry standards. Although no court has so held, the industry standard here is likely that standard which is provided by the ABA and requires that a faculty member must supervise the program,<sup>338</sup> must train, evaluate, and communicate with the supervising attorney at the placement site,<sup>339</sup> and periodically conduct “on-site visits or their equivalent.”<sup>340</sup> Implicit in the supervision requirement is communication with the student while the student is at the placement site.<sup>341</sup> Although the primary purpose of the site visit and communication with the supervising attorney will be to insure the educational component of the externship program,<sup>342</sup> a law school faculty member cannot ignore obvious indicators that there is a foreseeable risk of harm to the student.<sup>343</sup> If from the faculty member’s contact with the placement site, the faculty member can or should be able to identify reasonably foreseeable risks to the student, then the law school must act to address the risk such that the likelihood of harm to the student is minimized. Industry standards, which require site visits and contact with both the supervising attorney and the student, provide the law school with sufficient opportunity to identify risks of foreseeable harm to the student. Failure to follow industry standard will likely be deemed to be a breach of the law school’s duty of care.<sup>344</sup> Moreover, failure to minimize unreasonable risk which was or should have been identified when the law school followed industry standards will also likely be deemed to be a breach of the law school’s duty of care.

If the foreseeable risk of harm to the student is unreasonable, the law school should decline to either place the student at the site or if the student is already at the site, remove the student from the site. The design of the law school’s program should be flexible enough to allow the faculty member the discretion to make these types of decisions on an on-going basis.

The risk of unreasonable harm must be assessed at both the level of

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337. RESTATEMENT (THIRD) OF TORTS § 42 cmt.f (Tentative Draft No. 5, 2005).

338. See ABA STANDARDS, *supra* note 8, at 26.

339. *Id.* at 27.

340. *Id.*

341. *Id.*

342. See Butler, *supra* note 21.

343. See Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 622 (W.D. Va. 2002).

344. See Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th Cir. 1941).



whether the office is safe and whether the country is safe. The risk must also be continually assessed, including at the time the program is designed, at the time a student is placed at a particular site, and while the student is working at the placement site. There may be instances where the site is a safe office working environment, but residing in the country poses an unreasonable risk for a U.S. student. On the other hand, the country may be safe, but the site may pose an unreasonable risk. A country's safety can be assessed through various mechanisms. The law school should provide the student with the U.S. State Department Consular Information Sheets for the country in which the placement site is located.<sup>345</sup> Students should also be informed of any U.S. State Department Travel Warnings.<sup>346</sup> If during the student's externship, the U.S. State Department declares the country of the placement an "Area of Instability" or issues a travel warning, the student should be informed and should be given the option to terminate the externship at that location,<sup>347</sup> and if possible, to be placed at a different site for completion of the program. The law school should also determine if the U.S. Peace Corps has or had a program in the particular country.<sup>348</sup> If the U.S. Peace Corps will not place volunteers in a particular country or area of a country for safety reasons then a prudent law school should not place law students in volunteer positions in that country.<sup>349</sup>

The law school exercises the ultimate control in that it chooses the country, approves the site, and is involved in placing the student at the site.<sup>350</sup> A law school acting as a facilitator and following industry standards will exercise more control in an international externship program, than it may exercise in a domestic externship program. The law school is, however, not required to control all aspects of the program. Although the law school should take a proactive approach in choosing the country and pre-screening placement sites, the law school can design the program such that the student can apply to more than one of the pre-approved placement sites.<sup>351</sup> Likewise, if more than one student applies to the same placement site, the site can be given the opportunity to choose who will receive the offer.<sup>352</sup> The goal of the law school as facilitator is not to micro-manage

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345. ABA CRITERIA, *supra* note 15, at § VI.C.1.

346. *Id.* at § VI(C)(2).

347. *Id.* at § VI(C)(1)(b), -(2)(b).

348. *See* UNITED STATES PEACE CORPS, <http://uspeacecorps.gov> (last visited on Feb. 3, 2009).

349. Atlanta's John Marshall Law School will not place students on islands where the U.S. Peace Corps will not place female volunteers.

350. ABA CRITERIA, *supra* note 15, at § IV(A).

351. Students applying to the Micronesian Externship Program are allowed to choose from a list of 22 approved placement sites. *See* Micronesian Externship Program Application, <http://www.johnmarshall.edu/academics/Micronesian01.php> (last visited on Feb. 6, 2009).

352. Placement sites participating in the Micronesian Externship Program receive

the student's international externship experience, but to provide the student with options which fulfill the educational goals of program and where risk can be managed at an acceptable level.

#### 4. Special Problems

Although there are risks inherent in any international program, international externship programs create fewer risks for educational institutions than do study abroad programs. In an international externship program, unlike a study abroad program, the law school does not hold classes and does not provide housing.<sup>353</sup> Therefore, the types of risks which open a law school to the imposition of a duty under the "special relationship" doctrine such as business-invitee, premises owner, or landlord tenant theories should not be applicable to an externship program.

##### *a. Travel*

Externship programs typically do not arrange travel for the student. The student should be counseled to arrange their own transportation using reputable carriers. The travel arrangements and the student's safety during travel is the student's own responsibility. Nonetheless, to the extent that the faculty member is aware of particular travel risks, the student should be informed of these risks.

In the Micronesian Externship Program, the Pacific islands where the students are placed receive limited flights, many of which arrive in the early hours of the morning. In order to address the risk that a jet-lagged student may have difficulty arriving safely at their housing on an unfamiliar island in the middle of the night after twenty-four hours of travel, the Program's Externship Agreement requires that the placement site "make arrangements for a responsible person from the [placement site] to meet the student at the airport and transfer the student to the student's housing."<sup>354</sup> On several occasions, the entire placement office staff has met the student at the airport.

##### *b. Housing*

Unlike study abroad programs, law schools do not generally provide housing for students participating in an externship program. But housing is necessary in order for the student to participate in the externship program. Both the law school and the student are usually unfamiliar with the best and safest housing alternatives for the student. Although students can

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the application materials of all students who applied for that site. The placement site makes the final decision as to which student will receive the offer. *Id.*

353. See ABA CRITERIA, *supra* note 15, at §§ IV and V.

354. ATLANTA'S JOHN MARSHALL LAW SCHOOL EXTERNSHIP AGREEMENT (on file with author).

sometimes locate housing using internet resources, because of the student's lack of knowledge, there is still a risk that the student will not identify safe and appropriate housing.

Housing is a risk which can be transferred to the placement site. As a term of its Externship Agreement, Atlanta's John Marshall Law School requires that the placement site "assist the student in identifying and securing safe, appropriate housing."<sup>355</sup>

### *c. Medical Treatment*

Unlike a study abroad program, in an externship program, a faculty member does not accompany the student to the foreign country.<sup>356</sup> The student, however, is still exposed to the same types of risks of medical malpractice and other injuries as the students in *McNeil v. Wagner College*<sup>357</sup> and *Fay v. Thiel College*<sup>358</sup> were exposed to. The law school has no ability to control the quality or availability of medical care in the foreign country.

When designing the externship program, especially if placement sites are located in developing countries, the law school should research the medical care available and provide this information to students, or offer students health insurance for purchase through a reputable third party. Students should be informed of the practice of local or "indigenous" medicine and the dangers, if any, of participating in such healthcare practices.<sup>359</sup> Students with special healthcare needs should be informed to bring their own medication with them, as they might not be able to fill prescriptions in

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355. *Id.* Appropriate housing is defined in the Externship Agreement as "a furnished studio apartment or its equivalent in a secure area of the island." *Id.* Safe housing "means the housing has functioning windows and doors with locks and is not located in a known high crime area." *Id.* The student is responsible for paying for the housing. *Id.*

356. Compare ABA CRITERIA, *supra* note 15, at § II (requiring that at least one tenure track faculty member be present on-site "for the entire duration of the program"); with ABA STANDARDS, *supra* note 8, at 305(e)(5) (requires "periodic on-site visits or their equivalent by a faculty member").

357. *McNeil v. Wagner Coll.*, 667 N.Y.S.2d 397 (N.Y. App. Div. 1998) (student suffered nerve damage in ankle from emergency surgery performed at hospital in Austria). See discussion *supra* Part I.C.1.a.

358. *Fay v. Thiel Coll.*, 55 Pa. D. & C. 4th 353 (Pa. Com. Pl. 2001) (after student's appendix was unnecessarily removed, doctors sexually assaulted student in rural Peruvian medical clinic). See discussion *supra* Part II.C.1.b.

359. Students participating in the Micronesian Externship Program are informed that the practice of "local" medicine is still prevalent on most islands, that most of the "local" medicine has not been subject to any scientific testing, and has not been FDA approved. Students are also informed that some of the "local" medicine is similar to homeopathic medicine and does appear to work. Students are warned that there is always a risk in using "local" medicine and are warned not to partake of "local" medicine from anyone they do not know. But, the choice of medical care, if and when needed, is left to the student.

the foreign country.<sup>360</sup> All students should be provided with information regarding the Center for Disease Control and Prevention's and the World Health Organization's recommended vaccinations and health warnings.<sup>361</sup> All students should be required to obtain health insurance and evacuation insurance.<sup>362</sup>

*d. Extra-curricular Activities*

Educational institutions usually do not owe their students a duty of care when the student is engaged in recreational activities.<sup>363</sup> Because many placement sites will be chosen not only for their educational value, but also for their geographical desire (students want to visit the country), the law school should provide basic information about safety guidelines for those recreational activities for which it is reasonably foreseeable that the student will participate. Although the law school has no duty to the student for injuries received from participation in extra-curricular activities, the law school as facilitator should take a proactive role and inform the student of the dangers from the activities that the law school knows that a student is likely to participate. As a general rule, if a tourist will travel to the location to participate in the activity, then the student will likely participate. If the law school knows that it is common for a local person to invite a traveler to participate in an activity which is not an advertised tourist activity, then the student will likely receive an invitation to participate in the activity. For example, the Micronesian islands are known for their pristine coral reefs, making them tourist destinations for scuba diving, snorkeling, and fishing.<sup>364</sup> Students are informed of recent events of lost divers and other such accidents and are cautioned that if they decide to scuba dive they should only use PADI<sup>365</sup> certified dive shops.

*e. Acts by Employees of the Placement Site*

As a curricular program, the externship program is governed by the law school's policies and by the federal civil rights laws.<sup>366</sup> Thus, the law

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360. Students in the Micronesian Program are also encouraged to bring any over the counter medication which they think they might need as these products are not always available on-island. Any such medication should be transported in its original, unopened packaging.

361. Center for Disease Control and Prevention, <http://www.cdc.gov> (last visited on Feb. 6, 2010).

362. See Hoye, *supra* note 13; see also MICRONESIAN EXTERNSHIP PROGRAM, *supra* note 14 (insurance information).

363. See discussion *supra* Part I.A.1.b.

364. See Federated States of Micronesia Visitor's Bureau, <http://www.visit-fsm.org> (last visited on (Feb. 6, 2010)).

365. PADI is the Professional Association of Diving Instructors. See PADI, [www.padi.com/scuba/](http://www.padi.com/scuba/) (last visited on Feb. 6, 2010).

366. See discussion *supra* Part I.A.1.b.

school's non-discrimination policy, its harassment policy, and its disabilities policy apply to the program. The law school must communicate these policies to the placement site,<sup>367</sup> provide the placement site with copies of the policy and copies of the applicable laws,<sup>368</sup> and should obtain the placement sites agreement to abide by the policy. If the supervising attorney or placement site's decision-maker refuses to comply with the law school's policies, the law school should not include that site in its externship program.

*f. Acts by the Student at the Placement Site*

Because the externship is a curricular program, the student is bound by the law school's rules and regulations as published in its student handbook or other documents. The law school, thus, has control over the student's behavior. The law school should inform the student of the behavior that is governed by the law school's code of conduct and the consequences if the student violates that code.<sup>369</sup>

As discussed in more detail above, if the law school has knowledge that the student is dangerous, the law school may have a duty to inform the placement site of the danger and either refuse to allow the student to participate in the externship program or remove the student from the placement site.<sup>370</sup>

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367. ABA STANDARDS, *supra* note 8, at 27.

368. Law school policies can be provided electronically.

369. Students participating in the Micronesian Externship Program sign an Agreement for Participation which provides as follows:

2. I will comply with the John Marshall Law School Code of Student Responsibility throughout the duration of my participation in the Program. I agree that the Program Director shall have the right to enforce appropriate standards of behavior and that I may be dismissed from the Program at any time for failure to comply with such standards. I understand that if I am dismissed from the Program, I shall receive a grade of "no credit" for the externship.

3. I understand that as an extern I hold a position of trust and am bound by the standards of attorney conduct for the jurisdiction where the placement site is located. I further understand that if my placement site is a government office I am bound by the ethical standards for government employees, including all polices relating to gifts and conflicts of interest. I understand that a violation of the standards of attorney conduct is a violation of the Law School's Code of Student Responsibility and is grounds for dismissal from the Program pursuant to paragraph 2.

MICRONESIAN EXTERNSHIP PROGRAM, *supra* note 14 (Program Agreement for 2009 Participation).

370. See discussion *supra* Part II.B.3.

*g. Cultural Competency*<sup>371</sup>

Many of the risks which students may be exposed to may not be obvious, but may arise because of cultural differences. Although the law school may not be able to identify the specific harm, the risk that certain culturally inappropriate behavior may create a risk of harm to the student is reasonably foreseeable. A law school will only be able to assess the risks posed by cultural incompetence if the law school itself possesses cultural competence. A law school will possess cultural competence if a member of its faculty or staff who is associated with the externship program has cultural competence. A law school should not consider offering an international externship opportunity in a community for which it does not have cultural competence.<sup>372</sup>

Because the risk that a student with a lack of cultural competence may be harmed is foreseeable, the law school may have a duty to provide the student with information about and training in the culture of the placement site. This training should occur before the student leaves for the placement site. In the Micronesian Externship Program, before traveling to their placement site, students attend a one week (14 hour) class during which students are provided basic information and training about Micronesian customs and traditions, including how to avoid cultural offenses both in the office and in social settings. Students are also exposed to aspects of how culture and tradition have influenced and continue to influence the development of the law in their placement site jurisdiction.

## V. CONCLUSION

The risk inherent in a student's participation in an international externship program is the type of risk which makes law school (and university life) worth living. If the institution acts as facilitator in the design and implementation of the international externship program, the it can manage the risk to the student, to the placement site, and to itself. An international externship program designed with managed risks creates opportunities for students, faculty, and a law school itself to participate in the globalization of legal education and the law.

Because international externship programs do not require classroom and library space or require the number of faculty and staff as do traditional study abroad programs, externship programs cost less. If designed well,

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371. Cultural competency means more than just knowing something about the country and the cultural of its people. Acquiring cultural competency requires that one acknowledge, identify, and deconstruct their own cultural assumptions; be aware of the manner in which cultural assumptions are present in non-verbal communication; and learn cultural awareness.

372. See ABA CRITERIA, *supra* note 15, at § II.C.2. ("At least one member of the full-time faculty or on-site staff must . . . [b]e familiar with the country in which the program is offered.").

international externship programs can also expose the law school to less risk of liability. The key to diminishing the risk to the law school is to be certain that the faculty who design the program assess all reasonably foreseeable risk to the student or which could be caused by the student and take reasonable steps to reduce the risk. Because students participating in an international externship program are likely to have more direct contact with the local population, it is essential that the externship program is designed to impart knowledge of local customs and traditions and is designed to achieve cultural competency in the participating students before departing for the externship.

International externship programs require students to completely immerse themselves in the foreign country's professional and social culture. Unlike study abroad programs, externs are not tourists. Externs are performing legal work under the supervision of foreign attorneys—solving the real world problems of real world clients. International externship programs enrich the law school because they provide students the ability to move from domestic student to global practitioner of law. Students who participate in international externship programs are more likely to be able to competently practice law in a global economy upon graduation from law school.

# MAKING THE IMPLICIT EXPLICIT: DEMONSTRATING THE VALUE ADDED OF HIGHER EDUCATION BY A QUALIFICATIONS FRAMEWORK

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## I. INTRODUCTION

There was a time when higher education in the United States enjoyed considerable autonomy as far as state and federal law were concerned.<sup>1</sup> Over the course of the past fifty years, however, enormous inroads have been made into that autonomy. Using its spending power, its taxing power, its commerce power, and its civil rights enforcement power, Congress now exerts enormous power over American higher education.<sup>2</sup> The states have created and continue to fund the vast majority of American public colleges and universities and have come to expect more from their institutional creations than they did in earlier times.<sup>3</sup> The vast majority of American private colleges and universities are subject to state and federal laws regarding discrimination on the basis of sex, race, and disability, as well as to state-based contract law, tort law, and the law of not-for-profit corporations.<sup>4</sup> Furthermore, an enormous portion of the research that is conducted in those institutions is subject to an intricate web of governmental regulation.<sup>5</sup> Still, higher education in the United States has retained some of its former autonomy,<sup>6</sup> and that autonomy contributes significantly to both the diversity that characterizes American higher education and to the relative decentralization of control exercised over it today.

The decentralized approach to education has resulted in tremendous variety in American higher education—to the benefit of both individuals and society. However, this approach can be problematic when there is need for a major transformation in higher education. In this article we are claiming that, at this point in our history, a major transformation is exactly what American higher education needs. First, the emergent global knowledge economy requires of us a higher education system that contributes significantly to the development of the knowledge and skills that will help us to become competitive in the global economy. Second, despite the enormous growth in higher education that took place in the decades that followed the end of the Second World War, our higher educational system has, in recent years, begun to stagnate, at least in regards to educational attainment. Third, as we seek to remedy that stagnation, we need to make transparent what is currently opaque in the educational process.

While the first part of this argument needs little explanation, the second and third parts, as expressed here, necessitate elaboration. When we speak

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1. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 1.2 (4th ed. 2006).

2. *Id.* at § 1.3.3. *See also infra* Part IV.D.1–3.

3. *Id.* at § 1.3.3.

4. *Id.* at §§ 1.4.2.4, 5.3, 6.4, 8.2.4.

5. *Id.* at §§ 13.2.3, 13.4.3.

6. *Id.* at § 7.1.6.

of stagnation in educational attainment rates, here is what we mean: The educational attainment rate of a nation refers to the percentage of its people who have earned advanced degrees of one sort or another. In the United States today, roughly forty percent of adults have earned a two- or four-year degree, and this rate has held remarkably steady for the past forty years.<sup>7</sup> In other nations, however, more than half of their young adults have earned degrees of this sort.<sup>8</sup> Further, educational attainment rates in those nations are on the increase, while ours remains stagnant.<sup>9</sup>

When we speak of opacity of the process in America, here is what we mean: In American higher education, students accumulate credits as they progress towards a degree. As long as they do well enough on the papers that they write, the tests that they take, etc., and once they have accumulated enough credits, with due regard for requirements of different sorts, they get a degree. We do not require the institutions at which students study to tell them, and the community, just what it is that someone who has been awarded a particular degree should have learned on his or her way to that degree. This is what we mean when we call American higher education “opaque.” We believe that opacity should be expelled from American higher education and that transparency should take its place. By that we mean that American higher education should develop the ability to tell its students and the rest of us just what learning outcomes any academic degree represents. When, a college or university confers a bachelor’s degree in, say, Geology on a cohort of its undergraduate Geology majors, it should be able and willing to tell us what knowledge those students have shown themselves to possess and in what skills they have demonstrated some level of competence.

Increasing the percentage of Americans with high-quality degrees and credentials has become a national priority.<sup>10</sup> With increasing clarity,

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7. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), EDUCATION AT A GLANCE 2009: OECD INDICATORS (2009), available at [www.oecd.org/edu/eag2009](http://www.oecd.org/edu/eag2009) [hereinafter OECD INDICATORS].

8. *Id.* But see CLIFFORD ADELMAN, INSTITUTE FOR HIGHER EDUCATION POLICY, THE SPACES BETWEEN THE NUMBERS: GETTING INTERNATIONAL DATA ON HIGHER EDUCATION STRAIGHT 13–15 (2009), available at [http://www.ihep.org/assets/files/publications/s-z/\(Report\)\\_The\\_Spaces\\_Between\\_Numbers-Getting\\_International\\_Data\\_on\\_Higher\\_Education\\_Straight.pdf](http://www.ihep.org/assets/files/publications/s-z/(Report)_The_Spaces_Between_Numbers-Getting_International_Data_on_Higher_Education_Straight.pdf) (pointing to reasons to doubt whether the data raises any cause for alarm).

9. OECD INDICATORS, *supra* note 7.

10. President Barack Obama emphasized the importance of the United States regaining its place as number one in adult degree attainment, asserting that:

It is our responsibility as lawmakers and educators to make this system work. But it is the responsibility of every citizen to participate in it. And so tonight, I ask every American to commit to at least one year or more of higher education or career training. This can be community college or a four-year school; vocational training or an apprenticeship. But whatever the training may be, every American will need to get more than a high school diploma. And dropping out of high school is no longer an option. It’s not just quitting

policymakers, educators, and business leaders are concluding that the social and economic challenges facing the United States can be addressed only by educating far more people beyond high school.<sup>11</sup>

It is counterproductive to increase degree attainment without regard to what type of learning a degree represents and what opportunities are afforded to an individual based on a degree or credential. Quality is imperative: yet, how should quality be defined? A high-quality degree must have well-defined and transparent outcomes that provide clear pathways to further education and employment. The current higher-education system lacks a mechanism that defines what a degree represents in terms of what a student knows, understands and is able to do. A degree is currently defined by time and credits.

The United States has long enjoyed the reputation of having the best higher education system in the world.<sup>12</sup> However, many countries are not only reforming their higher education systems, but are also radically transforming the educational experience. An array of international initiatives exist that address higher education, the most significant of which is the Bologna Process.<sup>13</sup> The Bologna Process began in 1999 as an

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on yourself, it's quitting on your country—and this country needs and values the talents of every American. That is why we will provide the support necessary for you to complete college and meet a new goal: by 2020, America will once again have the highest proportion of college graduates in the world.

Barack Obama, U.S. President, Remarks of President Obama, Address to Joint Session of Congress (February 24, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress](http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress).

The Obama administration's higher education initiatives are focused on more resources for community colleges, completion strengthening data and research, and improving remedial education for under prepared students. *See* Michael Shear & Daniel de Vise, *Obama Announces Community College Plan*, WASH. POST, July 15, 2009, at A02. The American graduation initiative proposal calls for an unprecedented federal investment in community colleges. *Id.*

11. *See, e.g.*, Center on Education and the Workforce, <http://cew.georgetown.edu> (last visited Apr. 1, 2010). The Center on Education and the Workforce provides research and analysis on the future labor market and the skills and education needed for those jobs with the greatest increase being in jobs that need some sort of higher education. *Id.*

12. SECRETARY OF EDUCATION'S COMMISSION ON THE FUTURE OF HIGHER EDUCATION, A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 13 (2006) [hereinafter COMMISSION], *available at* <http://ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf>.

13. *See, e.g.*, Benelux Bologna Secretariat, Official Bologna Process Website, [www.ond.vlaanderen.be/hogeronderwijs/bologna](http://www.ond.vlaanderen.be/hogeronderwijs/bologna) (last visited Apr. 1, 2010) (describing the Bologna process); Open Society Institute & Soros Foundations Network, International Higher Education Support Program (HESP), <http://www.soros.org/initiatives/hesp/about> (last visited Apr. 1, 2010) (explaining the Open Society Institute program for the advancement of higher education); Organization for Economic Cooperation and Development (OECD), Feasibility Study for the International Assessment of Higher Education Learning Outcomes (AHELO),

agreement among the education ministers of twenty-nine European countries to address issues facing higher education—issues that, while not identical to challenges facing American higher education, are certainly similar.<sup>14</sup> The Bologna Process is transforming higher education in Europe, and the United States should pay attention to what is happening in Europe with a view towards catalyzing a comparable transformation in our own unique higher education context. This should be a selective approach and not in any way or sense a replication of the European initiative.

In this article, we will, first of all, describe the Bologna Process, focusing, in particular, on its qualification frameworks, Tuning, and Credit Transfer System. We will then argue in favor of the development and adoption of a common degree framework in the United States. Finally, we will suggest some ways in which this could be accomplished.

#### A. The Bologna Process

During the final years of the previous millennium, the education ministries of several European nations decided to work collaboratively on the transformation of higher education in their countries. . This transformative process owes its origins to the *Magna Charta Universitatum*,<sup>15</sup> a statement issued in September, 1988, by the rectors of 388 European universities. While that statement focused primarily on the need that colleges and universities have for autonomy, it also addressed the role that an educated workforce would play in the economic success of the European community and the need that students and teachers have for geographic mobility.<sup>16</sup> The next step in this process was the Lisbon Recognition Convention in 1997,<sup>17</sup> a joint convention of the United

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[www.oecd.org/edu/ahelo](http://www.oecd.org/edu/ahelo) (last visited Apr. 1, 2010).

14. See CLIFFORD ADELMAN, INSTITUTE FOR HIGHER EDUCATION POLICY, THE BOLOGNA CLUB: WHAT U.S. HIGHER EDUCATION CAN LEARN FROM A DECADE OF EUROPEAN RECONSTRUCTION at xi, 5–8, 39 (2008) [hereinafter ADELMAN, BOLOGNA CLUB], available at <http://www.ihep.org/assets/files/TheBolognaClub.pdf>. See also CLIFFORD ADELMAN, INSTITUTE FOR HIGHER EDUCATION POLICY, THE BOLOGNA PROCESS FOR U.S. EYES: RE-LEARNING HIGHER EDUCATION IN THE AGE OF CONVERGENCE 12–15, 55 (2009) [hereinafter ADELMAN, BOLOGNA PROCESS], available at <http://www.ihep.org/assets/files/eyesfinal.pdf>.

15. MAGNA CHARTA OBSERVATORY OF FUNDAMENTAL UNIVERSITY VALUES AND RIGHTS, MAGNA CHARTA UNIVERSITATUM (2003), available at [http://www.magna-charta.org/pdf/mc\\_pdf/mc\\_english.pdf](http://www.magna-charta.org/pdf/mc_pdf/mc_english.pdf).

16. *Id.*

17. For the text of this convention and for a list of the states that have ratified it, see Convention on the Recognition of Qualifications concerning Higher Education in the European Region, <http://conventions.coe.int/Treaty/en/Treaties/Html/165.htm> (last visited Apr. 1, 2010) and Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=1&DF=26/01/2010&CL=ENG> (last visited Apr. 1, 2010). See also European Higher Education Area, Participating Countries and Organisations, <http://www.ond.vlaanderen.be/hogeronderwijs/bologna/pcao/> (last visited Apr. 1, 2010).

Nations Educational, Scientific and Cultural Organization (UNESCO) and the Council of Europe. In this convention, thirty-three nations (twenty-nine European Council members plus four non-Council members, including the United States) agreed to a set of principles governing the mutual recognition of educational credentials; this convention is the only legally binding component of the Bologna Process. The number of signatory nations and those that have subsequently ratified the Convention has steadily increased; the United States, however, has not, to date, ratified the Convention.

The following two Declarations were the real commencement of the Bologna Process: the Sorbonne Declaration,<sup>18</sup> and the Bologna Declaration.<sup>19</sup> Both declarations were named after the location of the meetings. In the first of these declarations, the education ministers of France, Germany, Italy, and the United Kingdom agreed to create, *inter alia*, a common degree structure for their colleges and universities and to facilitate cross-border mobility for teachers and students.<sup>20</sup> In the second of these declarations, the education ministers of twenty-nine European nations agreed to a process that would cause the transformation that they had for the several previous years been advocating. It is this second declaration that gave its name to this transformative process.<sup>21</sup>

The Bologna Process is an attempt on the part of the educational agencies of most every European nation to create a European Higher Education Area (EHEA).<sup>22</sup> The primary purposes behind the creation of the EHEA include: to increase “the international competitiveness of the European system of higher education”;<sup>23</sup> to provide Europe with the highly educated workforce that is essential to success in a globalized economy;<sup>24</sup> and to contribute to the maintenance of “stable, peaceful and democratic societies in the European Union and in neighboring states.”<sup>25</sup>

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18. Sorbonne Joint Declaration, Joint Declaration on Harmonisation of the Architecture of the European Higher Education System, [http://www.bologna-bergen2005.no/Docs/00-Main\\_doc/980525SORBONNE\\_DECLARATION.PDF](http://www.bologna-bergen2005.no/Docs/00-Main_doc/980525SORBONNE_DECLARATION.PDF) (last visited Apr. 1, 2010) [hereinafter Sorbonne Declaration].

19. The Bologna Declaration of 19 June 1999, Joint Declaration of the European Ministers of Education, [http://www.bologna-bergen2005.no/Docs/00-Main\\_doc/990719BOLOGNA\\_DECLARATION.PDF](http://www.bologna-bergen2005.no/Docs/00-Main_doc/990719BOLOGNA_DECLARATION.PDF) (last visited Apr. 1, 2010) [hereinafter Bologna Declaration].

20. Sorbonne Declaration, *supra* note 18.

21. For a fuller description of the conventions and agreements leading up to the Bologna Process, see Appendix A.

22. At the ministerial meeting held on March 11-12, 2010, the Budapest-Vienna Declaration stated in paragraph 1 that it would “launch the European Higher Education Area (EHEA), as envisaged in the Bologna Declaration of 1999.” See [www.ond.vlaanderen.be/hogeronderwijs/bologna/2010\\_conference/documents.htm](http://www.ond.vlaanderen.be/hogeronderwijs/bologna/2010_conference/documents.htm) (accessed 14/03/2010).

23. Bologna Declaration, *supra* note 19.

24. *Id.*

25. *Id.*

Within the EHEA, extending from Ireland in the west to Russia in the east, and from Norway in the north to Turkey in the south, metaphorical bridges will be built, facilitating the free movement of students from educational institutions in one “member-nation” (any of the signatory states) to those in other “member-nations.” For that free movement to occur, the degrees awarded by the institutions within the EHEA will have to be comparable. A bachelor’s degree in geology from the University of Moscow will, for example, have to be substantially similar in level and competencies to a bachelor’s degree in geology from the University of East Anglia in the United Kingdom.

To avoid the standardization of higher education in the EHEA—something that is recognized on all sides as baneful—the proponents of the Bologna Process are instead pursuing harmonization of the differing degree programs in thousands of institutions located in the forty-seven nations that are now committed to the Bologna Process.<sup>26</sup> This is to ensure transparency of the degrees. Under harmonization: “Everyone is singing in the same key, just not necessarily with the same tune,” as one advocate of the Bologna Process puts it.<sup>27</sup>

This harmonization is to be achieved, first of all, by bringing some order to the current disparate state of the degrees that academic institutions in Europe have previously awarded. The basic idea is for all of the institutions in the EHEA to adopt a three-stage degree program, with the first stage identified as the bachelor’s degree stage, the second as the master’s degree stage, and the third as a the doctoral degree stage. The second step in harmonization is the development of “qualification frameworks” for each degree to sit within—and for the equivalent of each major in each degree—that each of the institutions award. The third step, used in an increasing number of countries, is known as the Tuning Process, and the fourth is a Credit Transfer and Accumulation System. It is to a brief description of these latter steps that we now turn.

### 1. Qualifications Frameworks

“A qualifications framework is a statement of learning outcomes and competencies a student must demonstrate in order for a degree at a specific level to be awarded.”<sup>28</sup> Before the implementation of qualifications frameworks, European institutions were unable to compare degrees in terms of learning outcomes that were awarded across institutions. Qualifications frameworks involve performance criteria. They hold institutions accountable for requiring each student to be able to demonstrate

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26. *See supra* text accompanying note 17.

27. ADELMAN, BOLOGNA PROCESS, *supra* note 14, at viii.

28. ADELMAN, BOLOGNA CLUB, *supra* note 14, at ix.

proficiency and completion of required outcomes at different levels of the three-stage degree program described above.

A crucial feature of a qualifications framework is its ability to describe qualifications in terms of learning outcomes, rather than the amount of time to achieve the degree. The Quality Assurance Agency of the United Kingdom states: “The fundamental premise of the [Framework for Higher Education Qualification] is that qualifications should be awarded on the basis of achievement of outcomes and attainment rather than years of study.”<sup>29</sup> Qualifications frameworks are used and implemented by countries that are part of the EHEA.<sup>30</sup> Each country’s framework reflects the educational characteristics of that country’s higher education system, and the common degree framework is consistent with the overarching EHEA framework. Such frameworks are now used in many places throughout the world.<sup>31</sup>

To aid in the development of national qualifications that would be comparable—so that countries in the EHEA would be able to understand what degrees awarded in different countries meant—the Dublin Descriptors were developed.<sup>32</sup> The Dublin Descriptors operate at the overarching

29. THE QUALITY ASSURANCE AGENCY FOR HIGHER EDUCATION, THE FRAMEWORK FOR HIGHER EDUCATION QUALIFICATIONS IN ENGLAND, WALES AND NORTHERN IRELAND 2 (Aug. 2008), available at <http://www.qaa.ac.uk/academicinfrastructure/fheq/ewni08/fheq08.pdf>.

30. See SJUR BERGAN, QUALIFICATIONS: INTRODUCTION TO A CONCEPT 145–159 (2007).

31. See Campus Alberta Quality Council, Canadian Degree Qualifications Framework, available at <http://www.caqc.gov.ab.ca/pdfs/CDQF-FINAL.pdf> (last visited May 1, 2010). See also Joint Quality Initiative, Shared ‘Dublin’ descriptors for Short Cycle, Second Cycle and Third Cycle Awards (2004), available at [http://www.uni-due.de/imperia/md/content/bologna/dublin\\_descriptors.pdf](http://www.uni-due.de/imperia/md/content/bologna/dublin_descriptors.pdf); European Higher Education Area Qualifications Framework, Self-Certification: Verification of compatibility of the Danish National Qualifications Framework for Higher Education with the Framework for Qualifications of the European Higher Education Area, available at <http://www.ond.vlaanderen.be/hogeronderwijs/bologna/qa/documents/DK-QF-report-EN.pdf> (Denmark); Scottish Qualifications Authority, An Introduction to the Scottish Credit and Qualifications Framework (2d ed. Oct. 2003), available at [http://www.sqa.org.uk/files\\_ccc/IntroductiontoSCQF-2ndEdition.pdf](http://www.sqa.org.uk/files_ccc/IntroductiontoSCQF-2ndEdition.pdf); The Quality Assurance Agency, The Framework for Higher Education Qualifications in England, Wales and Northern Ireland (Aug 2008), available at <http://www.qaa.ac.uk/academicinfrastructure/FHEQ/EWNI08/FHEQ08.pdf>.

32. Nick Clark, *Bologna: Curriculum Reform and Other Considerations*, WORLD EDUC. NEWS & REVIEWS (World Educ. Services, New York, N.Y.), March 2007, available at <http://www.wes.org/eWENR/07mar/feature.htm>.

The first step in bridging this gap [gap between what a student needs as general core competencies such as critical thinking and problem solving skills and the discipline specific knowledge and skills] has been the definition of generic, cycle-specific learning outcomes. These generic learning outcomes will form one of the major building blocks of the European Qualifications Framework, which is being promoted as an overarching framework designed to find points of convergence between national qualifications frameworks. Finalized in October 2004 by members of the Joint Quality Initiative, and

EHEA level and outline the learning that is represented by foundation, first cycle, second cycle and third cycle degrees (in the United States, this corresponds to associate's, bachelor's, master's, and doctoral degrees). This nomenclature has helped frame the concept of qualifications frameworks and has provided a structure for countries to use in developing their own degree frameworks. Figure 1 translates the Dublin Descriptors into language used within American higher education.

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known commonly as the 'Dublin Descriptors,' these learning outcomes can be considered a description of the transferable skills that students are expected to possess [sic] upon completion of each 'Bologna-compliant' degree cycle. They relate to any and all disciplines and define attributes such as problem-solving, communication, written, research, and team-working skills. The idea—and a central tenet of Bologna—is that while European degree programs will vary among institutions and subjects, they will nonetheless equip students with a set of cycle-specific core competencies designed to meet the needs of the workplace and also to prepare students for further studies.

*Id.*



**Figure 1: Degree Descriptions**

	<b>Knowledge &amp; Understanding</b>	<b>Apply Knowledge</b>	<b>Judgment</b>	<b>Communication</b>	<b>Learning Autonomy</b>
<b>Associate to Bachelor's</b>	Demonstrates specific knowledge, supported by textbooks, prepares for vocation or further study	Applies knowledge to a vocation or further studies, understands and develops routine arguments	Uses data to solve clearly-defined problems	Communicates information, problems, solutions to peers and supervisors	Learns in a structured environment, develops skills sufficient to continue studies
<b>Bachelor's</b>	Demonstrates broad knowledge built on prior studies, supported by textbooks, prepares for profession or further study	Applies concepts and knowledge to a profession or vocation, develops more complex arguments, solves problems drawing on existing research	Gathers and interprets data, can use data to make decisions and judgments, reflects on social or ethical questions	Communicates information, ideas, problems and solutions to peers and external audiences	Develops skills sufficient to continue more independent studies
<b>Master's</b>	Demonstrates broad and comparative knowledge in specialized field, develops original ideas	Applies concepts and knowledge in broader contexts, solves problems related to field, may conduct research	Integrates knowledge, makes judgments without complete data, makes decisions in complex situations, reflects on social or ethical issues	Communicates cumulative knowledge of field to broad audiences	Demonstrates academic initiative and self-direction, continues studies or professional development independently
<b>Doctoral</b>	Demonstrates mastery of specialized field and associated research methods	Conducts substantial and original research or scholarship that contributes to and expands the field, research is suitable for publication	Synthesizes complex knowledge and ideas, analyzes critically, exercises judgment in complex situations, informs society on social or ethical issues	Communicates broad expertise in the field to all audiences	Promotes and leads the field in all contexts, promotes advancement of society

## 2. Tuning Process

The Tuning Process was the academic response to the Bologna Process initiatives. It was designed to affirm institutional and academic autonomy, to respect the diversity of institutions and programs, and to provide a mechanism for faculty to provide the definition of quality.<sup>33</sup> Tuning began in 2000 as a project to link more directly the objectives of the Bologna Process and the Lisbon Strategy<sup>34</sup> with institutions and faculty. While the Bologna Process was initiated by education ministers, the Tuning Process

33. See, e.g., Julia Gonzalez, *The TUNING Methodology (2004)*, available at <http://www.sefi.be/technotn/wp-content/uploads/the-tuning-methodology-julia-gonzalez.ppt>.

34. See *infra* Appendix A (discussing the Lisbon Strategy).

was a “bottom up” approach, designed to involve a wide array of stakeholders, including employers, in defining what a degree in a subject matter should include.<sup>35</sup> Dr. Julia Gonzalez, a co-director of the European Tuning Project, has found that tuning has significantly changed approaches in teaching, learning and in assessment.<sup>36</sup>

Tuning is a process that defines subject specific learning outcomes and transferrable skills that students should possess and be able to demonstrate to earn a degree in a particular discipline.<sup>37</sup> At least 145 universities in thirty-three European countries and 186 universities in nineteen Latin American countries have formally engaged in the process.<sup>38</sup> The name ‘tuning’ was chosen for the process to “reflect the idea that universities do not and should not look for uniformity in their degree programmes or any sort of unified perspective or definitive European curricula but simply look for points of reference, convergence and common understanding.”<sup>39</sup> Clifford Adelman writes that tuning “provides a common language for expressing what a curriculum at a specific institution aims to do but does not prescribe the means of doing it.”<sup>40</sup>

Tuning is helpful in providing reference points for students to understand what they have accomplished or what they will be able to accomplish. These reference points include, for example: a demonstration of knowledge of the foundation and history of that major field, a demonstration of an understanding of the overall structure of the discipline and the relationships among its subfields and to other disciplines, and a demonstration of the ability to communicate the basic knowledge of the field in coherent ways and appropriate ways.<sup>41</sup>

Tuning helps students understand how courses fit into curriculum and degree programs. Further, it aids employers in knowing what graduates

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35. See Gonzalez, *supra* note 33.

36. See *id.*

37. See Tuning Educational Structures in Europe, <http://tuning.unideusto.org/tuningeu/> (last visited Apr. 1, 2010) [hereinafter Tuning Educational Structures].

38. See *id.* See also Tuning América Latina, <http://tuning.unideusto.org/tuningal/> (last visited Apr. 1, 2010).

39. See Tuning Educational Structures, *supra* note 40.

40. ADELMAN, BOLOGNA PROCESS, *supra* note 13, at 48.

41. See *id.* at 52. Early in 2009, the Lumina Foundation for Education launched a pilot Tuning project involving three American states and six academic subject areas. The project, following the approach used by the Tuning Process in Europe and in Latin America, is faculty-led and has student representation at the meetings, a fundamental principle and requirement for Tuning, with academics working to build consensus within their fields (Indiana: history, education, and chemistry; Minnesota: biology and graphic arts; and Utah: physics and history) about what a student should learn and therefore be able to demonstrate at each degree level in a specific subject area. Thus, a bachelor’s degree in chemistry from Indiana University should convey the same information to stakeholders as the equivalent degree from the University of Minnesota because of established, shared expectations within the discipline about the learning an undergraduate chemistry student should be able to demonstrate. *Id.*

with degrees in a discipline are able to do. Because it is an organic, ongoing, and systematic methodology, which is faculty-led but invites the participation of students and others, the Tuning Process celebrates diversity while recognizing the need for common reference points. It is about learning outcomes and not about content.

A U.S. common degree framework,<sup>42</sup> with subject specificity, would complement the Tuning Process by creating a common definition of the general learning outcomes that a student should achieve at each degree *level*—associate’s, bachelor’s, master’s, doctorate—across all higher education institutions in every state. The framework will make clear the “ratcheting up” that must occur between degree levels, and it will make explicit the additional skills and learning represented by one degree level as compared with another.<sup>43</sup>

### 3. European Credit Transfer & Accumulation System

The European Credit Transfer & Accumulation System (ECTS)<sup>44</sup> has gained prominence throughout Europe due in part to its successful implementation of the relevant parts of the Bologna Process, including the use of active learning outcomes, the assessment of each individual student to obtain credit, and the recognition of student workload.<sup>45</sup> The original purpose of ECTS was to promote student mobility among countries and institutions throughout Europe; now it is used either as the credit system within a country (for example, Italy) or as a reference point (for example, England) to determine whether a student is eligible to earn a particular degree.<sup>46</sup>

The credit system used in the United States originated as a way of assessing the efficiency of institutions and as a way of measuring the amount of contact time between students and the professor or faculty.<sup>47</sup> A credit hour is calculated by reference to the number of minutes that a student spends in class during each week of a semester. A degree represents a set number of credit hours and a specified minimum grade point average. In contrast, ECTS comprises three components: learning

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42. In this article, the terms “qualifications framework” and “qualifications frameworks” are used to refer to the frameworks that have been developed by other countries. The term “common degree framework” is used to refer to what the authors suggest should be developed in the United States.

43. See ADELMAN, BOLOGNA CLUB, *supra* note 13, at 15–32; ADELMAN, BOLOGNA PROCESS, *supra* note 13, at 55.

44. European Credit Transfer and Accumulation System (ECTS), [http://ec.europa.eu/education/lifelong-learning-policy/doc48\\_en.htm](http://ec.europa.eu/education/lifelong-learning-policy/doc48_en.htm) (last visited Apr. 1, 2010).

45. *Id.*

46. *Id.*

47. See Jessica M. Shedd, *The History of the Student Credit Hour*, 122 NEW DIRECTIONS FOR HIGHER EDUCATION 5–12 (2003).

outcomes, student workload, and grades.<sup>48</sup> ECTS has developed to provide a mechanism for students to accumulate enough credits, typically from a variety of institutions, to be awarded a degree. The European approach to qualifications frameworks has made this accumulation of credits and the awarding of degrees more possible.<sup>49</sup> To account for lifelong learning (a key component of the Bologna Process) and distance learning, and to recognize prior learning and prior experiential learning, credits must be based upon the abilities required by learning outcomes, not by “time served.”

### B. Comparing the U.S. Reality with What Faced Europe

Today in the United States we are faced with a new set of circumstances requiring action. We must address these circumstances by finding a way to increase educational attainment while maintaining quality, to control rising costs that go hand-in-hand with earning a degree, and to address other national issues. The business community increasingly demands accountability—a demonstration of the value added of a college degree and the assurance that those possessing a degree have the skills and abilities needed. Employers find themselves lacking workers with critical thinking and problem solving skills, and higher education often fears that in making itself “accountable” in this way, it will become akin to vocational training.<sup>50</sup> Interestingly, Europe faced a similar challenge in the late 1990s when it became clear that in a knowledge economy, higher education would be the driver and the Bologna Process would be the vehicle to transform European higher education.

The United States can learn from the Bologna Process. One tool of that process is a qualifications framework—a framework that makes explicit the learning outcomes and competencies a student must demonstrate for a degree at a particular level to be awarded.<sup>51</sup> This framework provides the

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48. See ADELMAN, BOLOGNA CLUB, *supra* note 13, at 51.

49. See European Universities Continuing Education Network, National Qualifications Frameworks, *Higher Education: A State Of Play*, available at <http://www.eucen.org/EQFpro/GeneralDocs/FilesFeb09/STATEofPLAY.pdf> (last visited Mar. 24, 2010) (explaining that “[c]redits expressed in terms of learning outcomes are a powerful way to recognise and quantify learning achievements from different contexts; they also provide an effective structure for relating qualifications to each other”).

50. See ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, RAISING THE BAR: EMPLOYERS’ VIEWS ON COLLEGE LEARNING IN THE WAKE OF THE ECONOMIC DOWNTURN 9 (2010), available at [http://www.aacu.org/leap/documents/2009\\_EmployerSurvey.pdf](http://www.aacu.org/leap/documents/2009_EmployerSurvey.pdf). See also Valerie Strauss, *Balancing Academic Tradition and Skills Employers Demand*, WASH. POST, Mar. 3, 2008, at B02. “‘A college education is increasingly recognized as critical for career success,’ Cornell University President David J. Skorton said. ‘So much so, in fact, there is a real danger of thinking of higher education predominantly as a job training enterprise.’” *Id.*

51. See National Framework of Qualifications, <http://www.nfq.ie/nfq/en/>

mechanism for defining what quality means, provides students with clarity as to the pathways through higher education and into the work force, and assures students, employers and other stakeholders of the true value-added of a degree.<sup>52</sup>

Some will argue that any sort of common degree framework is impossible either due to the diversity of American higher education or because it is antithetical to the values of American higher education to have imposed national benchmark standards. Neither argument is sound. First, any framework that is developed must, at its essence, honor the diversity of American higher education in order to be successful. This diversity is a great strength of our system. Second, this article is not suggesting a common degree framework that would focus on a standardization of content curriculum or pedagogy—this is most certainly not a “No Child Left Behind”<sup>53</sup> for higher education. Instead, a common degree framework would provide transparency with respect to the actual learning that each level of a degree represents. Quality, transparency, and the demonstration of measurable outcomes do not mean a standardization that reduces higher education to the lowest common denominator.<sup>54</sup>

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learner.html (last visited Apr. 1, 2010).

The NFQ provides a structure (a framework) to compare and contrast the level and standard of different qualifications. This helps you to make informed decisions about your qualification choices and to consider progression opportunities available to you. The NFQ also makes it easier for you to explain to others what qualifications you hold, or are studying for. This becomes very important when you are considering further learning or when you are applying for a job—at home or abroad.

*Id.*

52. European Commission, Press Release: Frequently asked questions: Why does the EU need a European Qualifications Framework?, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/427> (last visited Apr. 1, 2010).

It is a key aim of the EQF to contribute to creating a truly European workforce that is mobile and flexible. For employers, the EQF will make it easier to interpret the qualifications of foreign applicants. The EQF will support labour market mobility in Europe both between and within countries and sectors by simplifying comparisons between qualifications and enabling a better match between supply and demand for knowledge, skills and competences.

*Id.*

53. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

54. See Achieve, Inc., [www.achieve.org](http://www.achieve.org) (last visited Mar. 24, 2010). There is an increasing concern that high school students graduate unprepared for college and the work force. *Id.* This concern is leading to the formation of national standards in English and math. *Id.* See also WILLIAM H. SCHMIDT ET AL., THOMAS FORDHAM INSTITUTE, INTERNATIONAL LESSONS ABOUT NATIONAL STANDARDS 11–13 (2009), available at [http://fordhaminstitute.org/doc/20090826\\_International\\_Lessons\\_Report.pdf](http://fordhaminstitute.org/doc/20090826_International_Lessons_Report.pdf). In 1997 both the United States and Germany were surprised by the poor academic performance of their grade and high school students as compared with students from other countries. *Id.* Germany and the United States have taken dramatically different approaches to resolving the problem. *Id.* Ten years later, the

Within the forty-seven Bologna signatory countries, however, there are those who argue that the process does lead to standardization. For example, some German and Austrian students and academics maintain, that Bologna unleashes an “‘English-American’ system” that is “regimented” and “too examination-heavy.”<sup>55</sup> The degree of opposition to the Bologna stimulated reforms varies among countries and in level of intensity. Often the complaints are in fact against the actions of the national government that has cloaked change in the name of Bologna—changes that are disliked by students, for example include: establishing or increasing fees, making changes in contact hours, requiring student success within decreased linear time limits (three years instead of the five-plus years previously allowed). Those who are experiencing the most change do, it seems, display the greatest antagonism.<sup>56</sup>

As societal demands for more Americans to complete postsecondary education increase, the expectation grows for degrees earned to lead to further education and employment. Higher education must take the challenge to create a common degree framework—an overarching architecture that makes explicit the implicit—one that ensures that, irrespective of institutional prestige, degrees that are awarded have standards—that a bachelor’s degree represents attainment of real skills and knowledge. This is the beginning of redefining what American higher education means by quality. Quality means that degree-bearing graduates can demonstrate acquisition of the learning outcomes assigned to their particular degree level. If higher education doesn’t take the initiative in this process, quality assurance could potentially be imposed upon it by an outside source—a common degree framework developed by the national accreditation system, by implementation of uniform state laws or by federal government intervention. The task is not only to understand the challenges facing higher education, but also to develop a framework that makes learning explicit, that offers student mobility and transfer, and that provides

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United States still lags, while German students are faring better. *Id.* The relative success of German students seemingly supports our contention that in a globally competitive environment, national standards drive excellence.

55. John Morgan, *Bologna not to the taste of Austrians and Germans*, TIMES HIGHER EDUCATION, Dec. 31, 2009, available at <http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=409733>.

56. See David Palfreyman, *The legal impact of Bologna implementation: exploring criticisms and critiques of the Bologna Process*, 20 EDUC. AND THE LAW 249, 249–55 (2008). Palfreyman’s literature review summarizes and analyzes a number of critical viewpoints on the Bologna Process and focuses mainly on the detrimental effects that he feels are or will be materializing in the United Kingdom under the Bologna Process. *Id.* Palfreyman argues that the United States has the better system of higher education, as compared to the European system under the Bologna process, because the system in the United States is a diverse system. *Id.* at 254–55. He finds it “bizarre” and unthinkable that European countries would want a system that supports convergence when the “lesson” seemingly is that “monolithic, public sector higher education systems are inefficient, under-productive and over-expensive.” *Id.* at 255.

quality assurances for institutions and their degree programs, as well as for stakeholders, as higher education continues to develop and as innovation occurs.<sup>57</sup>

Historically, federal intervention in higher education has occurred only when a significant need existed for national reform of higher education.<sup>58</sup> The current societal demands for an educated workforce require significant reform. Higher education is a national issue that is time sensitive and requires a national approach. A degree awarded in Wyoming should be comparable to a degree awarded in Wisconsin. U.S. higher education leaders and stakeholders should seize this leadership opportunity and frame a national agenda to develop a well-defined degree requirements framework through national collaborative effort.<sup>59</sup> If each state's government were to initiate this process, they could create frameworks and use existing processes for the development of uniform laws, but the existing mechanisms would take years for development and enactment.<sup>60</sup> If stakeholders don't develop a common degree framework to ensure quality, the federal government could and should impose such a framework and accountability mechanisms.<sup>61</sup>

## II. WHAT AMERICA STANDS TO LEARN FROM THE BOLOGNA PROCESS

No one seriously doubts the need for a modern workforce to be both knowledgeable and skilled at a level significantly higher than was adequate even a generation ago. Neither does anyone doubt that each nation's higher education institutions must play a major role in educating and training the members of its workforce in such a way that it can compete effectively in the global economy. The principal concerns that motivate us to recommend the Bologna Process to American educators are two-fold. First, other countries are increasing degree attainment with a focused intentionality. Second, the Bologna Process is a significant process that reframes higher education from what is taught to what is learned. In the process of putting the student at the center, the Bologna Process is expanding educational opportunities and reframing the definition of "quality higher education".

America is falling behind much of the industrialized world in educational attainment. Even with all of the imperfections and flaws in its

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57. Anya Kamenetz, *How Web-Savvy Edupunks Are Transforming American Higher Education*, FAST COMPANY, Sept. 1, 2009, available at <http://www.fastcompany.com/magazine/138/who-needs-harvard.html>.

58. See, e.g., Julie Margetta Morgan, Note, *Consumer-Driven Reform of Higher Education: A Critical Look at the New Amendments to the Higher Education Act*, 17 J.L. & POL'Y 531, 535-43 (2009) (noting that the federal government's involvement in higher education has "evolved in response to pressing governmental and societal needs").

59. See *infra* Part IV.A.

60. See *infra* Part IV.C.

61. See *infra* Part IV.D.

implementation, the Bologna Process does provide an illustration of how change might be achieved both in terms of process and outcomes. We do not in any way, shape, or form recommend that America should adopt the Bologna Process, but we do urge that the United States analyze, adapt, and improve upon that which is appropriate, relevant, and useful in the Bologna Process.

Attracting more recent high school graduates into higher education and helping them to persevere to graduation is one obvious way for a nation to improve its educational attainment rate; facilitating the entry of adults into higher education—or their return to it—is another way to achieve the same result. With respect to either of these strategies, questions of costs and quality arise. As serious as the cost questions are, we will focus here on questions of quality. Historically, these questions have been left, in the first instance, to the academics who decide what the contents of any particular degree program should be, and in the second instance, to the accrediting institutions that, once every so many years, review either entire institutions or specific degree programs, in an attempt to “ensure a basic level of quality” in the education that the institution or program in question provides.<sup>62</sup>

#### A. Degree Transparency and Accountability

Since the end of the nineteenth century, the U.S. higher education system has relied upon private accrediting agencies to perform quality assessment of its institutions and programs. Accrediting agencies serve to “ensure a basic level of quality” in institutions of higher education or specific academic programs within institutions.<sup>63</sup> Yet, accreditation conveys little information about the inherent value of a degree from an accredited institution or program for external stakeholders such as students and employers.

In addition, growing numbers of new for-profit and not-for-profit education providers have emerged to fill market voids. They are often unaccredited, however, which suggests that there is no existing way to measure or compare the quality of the credentials and degrees offered by these institutions.

The U.S. higher education accreditation system varies greatly from other countries around the globe. The United Kingdom, for example, operates under a Code of Practice for the Assurance of Academic Quality and

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62. U.S. Dep’t of Educ., Financial Aid for Postsecondary Students: Accreditation in the United States, [http://www.ed.gov/admins/finaid/accred/accreditation\\_pg2.html](http://www.ed.gov/admins/finaid/accred/accreditation_pg2.html) (last visited Apr. 1, 2010) [hereinafter Accreditation in the United States]. See also WILLIAM K. SELDEN, ACCREDITATION: A STRUGGLE OVER STANDARDS IN HIGHER EDUCATION 29 (1960) (describing the founding of the first accrediting agencies by higher education institutions).

63. Accreditation in the United States, *supra* note 63.



Standards in Higher Education.<sup>64</sup> The Code explains that: “In the [United Kingdom’s] system of higher education, institutions are responsible for the quality of the education they provide and the academic standards of the awards they offer. External examining provides one of the principal means for maintaining nationally comparable standards within autonomous higher education institutions.”<sup>65</sup>

As a result of the lack of information about the quality of a given institution or program, potential students and potential employers of an institution’s graduates rely upon information, such as institution and program rankings, institutional prestige, or personal familiarity with the specific institution to determine degree value. In order to redirect the focus of the existing quality assessment function of the accrediting agencies from a self-contained process to a transparent system providing valuable information to the public, quality assessment in the United States needs to evolve. Drawing upon lessons from the European paradigm, American higher education should develop a common degree framework consisting of general student learning outcomes for each degree level. This would facilitate the development of a system in which each type and level of degree would hold universal meaning and value.

### 1. A Meaningful Measurement of Quality

The value of a degree in the United States is often measured by the prestige of the degree granting institution or an external ranking tool such as *U.S. News and World Report*.<sup>66</sup> This assessment mode is based on “input” measures such as reputation, faculty salaries, and entering student SAT scores<sup>67</sup> and it does not provide stakeholders—potential employers, graduate school admissions officers, the student—a definitive indication of what skills or knowledge the degree holder actually possesses. With each modern reauthorization of the Higher Education Act of 1965,<sup>68</sup> the major federal legislative intervention in higher education, the debate has returned to the question of how to measure degree quality in a meaningful way.

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64. THE QUALITY ASSURANCE AGENCY FOR HIGHER EDUCATION, CODE OF PRACTICE FOR THE ASSURANCE OF ACADEMIC QUALITY AND STANDARDS IN HIGHER EDUCATION, SECTION 4: EXTERNAL EXAMINING 1 (2004), available at [http://www.qaa.ac.uk/academicinfrastructure/codeOfPractice/section4/COP\\_external.pdf](http://www.qaa.ac.uk/academicinfrastructure/codeOfPractice/section4/COP_external.pdf).

65. *Id.* at 3.

66. See *Rankings*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/sections/rankings/index.html> (last visited Apr. 1, 2010). The U.S. News & World Report rankings have been heavily criticized as arbitrary and easily manipulated by institutions seeking to bolster their rank. See, e.g., Doug Lederman, ‘Manipulating,’ *Er, Influencing ‘U.S. News,’* INSIDE HIGHER ED, June 3, 2009, <http://www.insidehighered.com/news/2009/06/03/rankings> (last visited Apr. 1, 2010).

67. *Rankings*, *supra* note 66.

68. Higher Education Act of 1965, Pub. L. No. 89-329, § 101, 79 Stat. 1219.

Although it is likely that rankings will continue to be one way of measuring institutional quality, the question remains as to the true value of the degree awarded by an institution: “Global education markets, just like other markets, need information to function efficiently. But it needs to be the *right* information.”<sup>69</sup> The *Washington Monthly College Rankings* attempt to provide stakeholders with an alternative view of institutional value by focusing on three criteria: social mobility, research, and service. The *Washington Monthly* argues that “America’s best colleges are those that work hardest to help economically disadvantaged students earn the credentials that the job market demands.”<sup>70</sup> The argument is that institutions that successfully graduate the students who are the most prepared for college could in fact have little value added. One could easily disagree with those criteria for assessing colleges and universities on the grounds that they are under-inclusive, and we will not defend them here. Our point is that establishing alternative rankings may help to provide a better picture of institutional quality. Regardless, rankings alone do not provide a mechanism for assuring the quality of a degree or what a learner is able to do with his or her learning. A common degree framework would verify quality by replacing indicators of degree value—such as institutional prestige—with the *actual learning* that a student gains from an academic program.

## 2. The Value of a Qualifications Framework to Stakeholders

Transparency with regard to the actual learning involved in earning a particular degree will not only create common expectations for students across institutions, but will also facilitate public understanding of the inherent value of a degree. Stakeholders will recognize the value behind the degree because they will possess knowledge of the skills students are required to master in order to earn a degree in a particular field of study. External stakeholders, such as recruiting employers who are presented with a candidate holding a certain degree, will understand what knowledge and skills that person possesses regardless of familiarity with the degree-granting institution. Prior to making the commitment to pursue a degree in higher education, students will know what a particular degree represents to employers, and thus, its market value. Equipped with this information, potential students will be able to assess the long-term benefits of obtaining a specific degree against the opportunity costs incurred in pursuing that education. Potential students will also have access to pre-established

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69. Ben Wildavsky, *International Studies: How America’s Mania for College Rankings Went Global*, WASH. MONTHLY, Sept.-Oct. 2009, available at [http://www.washingtonmonthly.com/college\\_guide/feature/international\\_studies.php](http://www.washingtonmonthly.com/college_guide/feature/international_studies.php).

70. *Introduction: A Different Kind of College Ranking by the Editors*, WASH. MONTHLY, Sept.-Oct. 2009, available at [http://www.washingtonmonthly.com/college\\_guide/feature/introduction\\_a\\_different\\_kind\\_1.php](http://www.washingtonmonthly.com/college_guide/feature/introduction_a_different_kind_1.php).

expectations for achievement of a degree in advance, enabling them to make a truly informed commitment to embark on a degree program. This would ultimately improve student performance by eliminating upfront some, or even most of, those students who cannot meet program expectations. Evidence from the United Kingdom's Quality Assurance Agency indicates that students are better able to engage with their learning when it is outlined in terms of learning outcomes and when they are involved in the process of assessing the effectiveness of their learning—did the approach to demonstrating mastery actually work?<sup>71</sup> The European Students' Union<sup>72</sup> also endorses the value of student engagement in the development of their learning.<sup>73</sup>

Members appointed to former Secretary of Education Margaret Spellings' Commission on the Future of Higher Education ("Spellings Commission") to investigate the state of higher education in the United States recognized that the existing system lacked the necessary transparency, and argued that transparency was essential to "maintaining public trust in higher education."<sup>74</sup> A system of established student learning outcomes for each degree level—a system that is grounded in mutual accountability within the higher education community—will provide the necessary transparency with common language that makes clear what a degree means in learning and in so doing makes the value of a degree explicit.

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71. THE QUALITY ASSURANCE AGENCY FOR HIGHER EDUCATION, *LEARNING FROM ACADEMIC REVIEW OF HIGHER EDUCATION IN FURTHER EDUCATION COLLEGES IN ENGLAND 2005-07* at 11 (2007), available at <http://www.qaa.ac.uk/reviews/academicReview/learningfromheInFe08/HEinFE2007.pdf>.

A large number of reports note that subject benchmark statements are being used to inform the development of intended learning outcomes. Many colleges make effective use of subject benchmark statements to develop intended learning outcomes which relate to the vocational nature of their programmes. A number of reports note that colleges have developed intended learning outcomes which encourage progression to employment or further study in line with college aims. For example, the "intended learning outcomes . . . prepare students for further study and employment [to] meet the needs of local employers and the community."

*Id.*

72. European Students' Union, *Global Student Statement To the UNESCO World Conference on Higher Education +10*, Jan. 23, 2009, 3–4, available at [http://www.esib.org/documents/statements/GlobalStudentStatement\(english\).pdf](http://www.esib.org/documents/statements/GlobalStudentStatement(english).pdf).

73. Aaron Porter, 2 NAT'L UNION OF STUDENTS HE FOCUS 1 (2009), available at [http://resource.nusonline.co.uk/media/resource/HE%20Focus%20IL\\_v%205.pdf](http://resource.nusonline.co.uk/media/resource/HE%20Focus%20IL_v%205.pdf).

"Engaging students as co-producers of their education, involving them in the design, delivery and review of their experience will ensure the future of the academic community and help institutions across the [United Kingdom] continue to improve and deliver a robust and excellent experience for all their students." *Id.*

74. COMMISSION, *supra* note 12, at 14.

## B. Engagement of Disadvantaged and Non-Traditional Students

### 1. Persistent Limited Access for Underserved Groups

Transparent requirements behind each degree level—requirements that sustain a common understanding of degree value—will facilitate students’ ability to navigate the higher education system and complete a course of study. This transparency will be especially advantageous to students from populations that traditionally have been less successful, as compared to the national average, in degree completion. The Spellings Commission found that access to higher education is still very limited for underserved and nontraditional student groups, such as adult learners, ethnic and racial minorities, and low-income populations.<sup>75</sup> Furthermore, the Commission found that the traditional perception of the typical undergraduate as an eighteen to twenty-two year-old high school graduate at a four-year institution of higher education often no longer applies.<sup>76</sup> Of fourteen million undergraduate students in the United States, more than 40 percent go to community college, almost 30 percent are older than twenty-four years, 40 percent are enrolled in school part time,<sup>77</sup> and 27 percent have children themselves.<sup>78</sup> Access and achievement gaps for disadvantaged and minority students persist, with only 17 percent of African-Americans and 11 percent of Hispanics obtaining a bachelor’s degree by age twenty-nine, compared to 34 percent of Caucasians.<sup>79</sup> Eighty-one percent of high-income students will earn a bachelor’s degree within eight and a half years after matriculating at a college, while only 36 percent of low-income students will reach the same level at the same pace.<sup>80</sup> The Commission urged policymakers to recognize the altered American higher education landscape, stating that in response to the new reality, “the nation must be committed to building and sustaining a higher education system that is accessible to all qualified students in all life stages.”<sup>81</sup>

A common degree framework that explicitly outlines the learning for degree progression will assist underrepresented populations in navigating the complexities of the higher education system. In addition, by making explicit the progression, the framework will also make explicit the implications of student program and curriculum choices and the options or barriers that result from those choices.

### 2. Enhancing Student Mobility Through Multiple Higher

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75. *Id.* at 8.

76. *Id.* at xi.

77. *Id.*

78. *Id.* at 9.

79. *Id.*

80. COMMISSION, *supra* note 12, at 9.

81. *Id.* at 8.

### Education Pathways

Creating a public understanding of the value of a degree—what one will be able to demonstrate and do with the learning that a degree represents—through a common degree framework is one step toward increased higher education engagement for currently underserved populations. Additionally, changing the credit transfer system is also necessary to facilitate multiple pathways through the higher education system, particularly for nontraditional or disadvantaged students who are less likely to proceed vertically through the system. As the Spellings Commission pointed out in its final report, over twelve million non-traditional students in the United States are enrolled in degree-granting programs at colleges and universities.<sup>82</sup> Many of these adults have children and full-time jobs. As a result, many of them attend school part-time and will therefore require longer than the traditional four years to obtain a degree.

The current credit recognition system does not properly accommodate students who might accumulate credits at several institutions—a community college, a proprietary school, a state university—throughout their higher education career. The existing system lacks a standardized method of determining the worth of previous credits earned by a student, often resulting in wasted credits—representing needlessly expended time, money, and other valuable resources for the student. A U.S. system that builds on the European Credit Transfer System<sup>83</sup> would enable the increasing number of nontraditional learners to accumulate credits from numerous institutions over a period of years to earn a degree. A fluid credit transfer system would minimize wasted student resources and duplicative learning, while acknowledging previous coursework or skills obtained from an accredited higher education institution. In addition, a revised credit system could account for knowledge or skills developed through non-academic means, such as on-the-job training, that would better reflect a student's individual education level than the numeric credits that he or she has accumulated. The Spellings Commission's report concluded the necessary action to be:

Students must have clearer pathways among education levels and institutions and we urge colleges to remove barriers to student mobility and promote new learning paradigms (e.g., distance education, adult education, workplace programs) to accommodate a far more diverse student cohort. States and institutions should review and revise standards for transfer of credit among higher education institutions, subject to rigorous standards designed to ensure educational quality, to improve

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82. *Id.* at 9. Nontraditional students are those not in the 18-24 age group. *Id.*

83. *See supra* notes 44–49 and accompanying text (explaining the ECTS).

access and reduce time-to-completion.<sup>84</sup>

The modern U.S. college student often no longer proceeds neatly along the traditional four-year path—especially those students from groups that are underserved by the current system—and the higher education credit system must be reformed to reflect the new reality. Such a credit system would be possible in the United States if there were an overarching common degree framework to provide clarity regarding what students must demonstrate at each level of learning along their path to a degree.

### C. Global Precedent and the Internationalization of Higher Education

American higher education policy-makers are becoming increasingly interested in the efforts of their international counterparts. It is important that students and workers are equipped to handle a globally competitive environment. As evidenced by the financial crisis of 2008-2009, educational institutions and systems are globally connected.<sup>85</sup> Some segments of U.S. higher education have taken note of the potential implications of the Bologna Process, most notably graduate schools that must grapple with international undergraduate degrees.<sup>86</sup> However, the globalization of higher education goes beyond the Bologna Process. An ongoing debate concerning the treatment of education under the World Trade Organization's General Agreement on Trade in Services ("GATS") is currently underway.<sup>87</sup> As higher education operates in ways that go beyond the concept of education in one place, to include, for example, distance education, online courses and traditional education in several different countries, the reality that higher education is a service that is provided globally becomes increasingly more significant.

Individuals, programs, and institutions within the U.S. higher education community have begun to pay attention to the Bologna Process and other higher education reforms around the world. Much of their focus is typically upon the potential economic impact of the emerging competition and the competitive advantage that countries may enjoy because of reformed higher education systems.<sup>88</sup> The Spellings Commission report

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84. COMMISSION, *supra* note 12, at 18.

85. See Elizabeth Redden, *In Global Recession, Global Ed Still Growing*, INSIDE HIGHER ED, May 29, 2009, available at <http://www.insidehighered.com/news/2009/05/29/international>. See also Aisha Labi, *British Universities Affected by Financial Meltdown in Iceland*, CHRON. HIGHER EDUC., Oct. 14, 2009, available at <http://chronicle.com/article/British-Universities-Affect/1243/>.

86. See *infra* Part II.C.2.

87. See World Trade Organization, General Agreement on Trades in Services, [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Mar. 24, 2010).

88. See, e.g., NAFSA: ASS'N OF INT'L EDUCATORS, RESTORING U.S. COMPETITIVENESS FOR INTERNATIONAL STUDENTS AND SCHOLARS (2006), available at [http://www.nafsa.org/uploadedFiles/NAFSA\\_Home/Resource\\_Library\\_Assets/Public\\_Policy/restoring\\_u.s.pdf](http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/restoring_u.s.pdf) [hereinafter NAFSA]. See generally John Aubrey Douglass,

argues that the U.S. higher education system became complacent, failing to acknowledge that, after having been at the top of higher education for a long period of time, it has now been surpassed by many of its global competitors.<sup>89</sup> Further, the Commission found that America's ongoing research and innovation production, social mobility and future economic growth depend upon the quality and effectiveness of our higher education system.<sup>90</sup> Thus, higher education reforms must be undertaken to allow the United States to safeguard and strengthen its global economic competitiveness in the face of newly emerged competition from countries with reformed higher education systems.<sup>91</sup> Europe initiated the Bologna Process to bolster the region's global competitiveness. Accordingly, the United States should draw upon the best practices of international competitors to enhance the American higher education system.

### 1. Legal Education

Some members of the U.S. legal community have monitored the Bologna Process and are aware of its international implications for legal education and the legal profession in general.<sup>92</sup> Professor Laurel Terry—a leading scholar writing on the impact of the Bologna Process on the United States—offers several policy arguments for why U.S. legal educators should, at a minimum, be knowledgeable of the Bologna changes.<sup>93</sup>

Professor Terry explains that U.S. law schools, along with every other U.S. graduate program, must decide whether or not to admit international students who have graduated with the three-year Bologna bachelor's degree.<sup>94</sup> Terry argues that law schools need a recognition policy for ECTS or diploma supplements in order to deal with previous credit

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*The Global Higher Education Race*, 49 INT'L HIGHER EDUC., Fall 2007, available at [http://www.bc.edu/bc\\_org/avp/soe/cihe/newsletter/Number49/p4\\_Douglass.htm](http://www.bc.edu/bc_org/avp/soe/cihe/newsletter/Number49/p4_Douglass.htm) (describing the emerging globally competitive higher education environment).

89. COMMISSION, *supra* note 12, at x.

90. *See id.* at ix–xiii.

91. Casey E. George-Jackson, *The Spellings Commission on the Future of Higher Education: Global Competitiveness as a Motivation for Postsecondary Reform*, 5 HIGHER ED. REV. 68, 73 (2008).

92. *See generally* AM. BAR ASS'N: SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES (July 15, 2009), available at [www.abanet.org/legaled/committees/International%20Issues%20Report%20\(final\).DOC](http://www.abanet.org/legaled/committees/International%20Issues%20Report%20(final).DOC) [hereinafter SPECIAL COMMITTEE ON INTERNATIONAL ISSUES] (discussing the impact of the Bologna Process on U.S. recognition of foreign lawyers and credits from foreign law schools).

93. *See* Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107 (2008) [hereinafter Terry, *Degree Changes*]; Laurel S. Terry, *The Bologna Process and its Implications for U.S. Legal Education*, 57 J. LEGAL EDUC. 237 (2007) [hereinafter Terry, *Implications*].

94. Terry, *Implications*, *supra* note 93, at 242. *See generally* Terry, *Degree Changes*, *supra* note 96.

obtained by foreign students.<sup>95</sup> Under the Lisbon Convention, a student possessing qualifications in one country is entitled to have those qualifications assessed by another ratifying country through a fair and predetermined procedure.<sup>96</sup> Professor Terry suggests that many U.S. law schools lack the kind of set recognition procedure generally adopted by institutions in nations where the Lisbon Convention has been ratified.<sup>97</sup>

Furthermore, the Bologna Process could “lead to discussions about international law school accreditation standards” of which U.S. legal educators should be aware.<sup>98</sup> For instance, Terry suggests that the Bologna Process quality assurance standards may be superior to law school accreditation in the United States.<sup>99</sup> Curriculum reform is another area where Terry notes that the United States may want to imitate the European higher education transformation.<sup>100</sup> She suggests that for U.S. lawyers to be competitive in foreign markets, U.S. legal educators need to identify commonalities and differences between U.S. legal education and foreign legal educations in order to harmonize the curriculum where necessary: “For example, if representatives from forty-six European countries were to decide that students studying ‘X’ area of law needed to master certain substantive law concepts, it would be important for U.S. lawyers and students to be familiar with those substantive concepts.”<sup>101</sup> In other words, the U.S. legal community needs to know what European law students are learning and to adjust U.S. legal curriculum to keep pace.

Professor Terry also points out the financial impact the Bologna Process could have on U.S. legal education. International students provide a significant source of income for U.S. law schools at the LL.M. level.<sup>102</sup> As European schools have improved and become more attractive and affordable options for international students, they may compete more directly with U.S. law schools.<sup>103</sup> As Professor Terry’s observations indicate, legal educators have begun to appreciate the value in paying attention to the restructuring of higher education around the world, recognizing that “[i]n an increasingly interconnected world, these changes will likely have an impact in the United States.”<sup>104</sup>

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95. See Terry, *Implications*, *supra* note 93, at 243.

96. See *id.* The United States signed the Lisbon Convention but has not ratified it. *Id.* at 243, n.38. See SPECIAL COMMITTEE ON INTERNATIONAL ISSUES, *supra* note 92, at 12.

97. See Terry, *Implications*, *supra* note 93, at 243.

98. See *id.* at 245.

99. See *id.* at 246.

100. See *id.*

101. See *id.* at 247.

102. See *id.* at 249.

103. See Terry, *Implications*, *supra* note 93, at 250.

104. *Id.* at 252.



## 2. Other Higher Education Programs and Organizations

Science and engineering educators have also begun a dialogue on how U.S. educators should respond to the potential impact of the Bologna Process on science and engineering higher education in the United States. The United States has traditionally been an international leader in these fields of higher education, attracting more top-notch foreign students and academics than any other nation.<sup>105</sup> Yet, the National Science Foundation has reported that many other countries, including countries which have signed on to the Bologna Process, are attracting an increasing number of foreign science and engineering graduate students.<sup>106</sup>

The National Academy of Sciences similarly recognizes that the U.S. is facing emerging international competition, arguing that “it is essential to the national interest of the United States to maintain its excellence and overall leadership in [science and engineering] research and education so that it can maintain its own comparative advantage with respect to global knowledge production.”<sup>107</sup> A report for the National Academy of Sciences by its affiliate, the National Research Council, points out that because other advanced industrial societies have followed the lead of the United States and realized the economic value of possessing leading graduate programs in the sciences, the United States faces stiff competition for “the most talented scientists and engineers worldwide.”<sup>108</sup> In order to remain globally competitive in science and engineering higher education, the United States will need to “maintain or enhance its current quality and effectiveness in [science and engineering].”<sup>109</sup>

Like science and engineering educators, the Council of Graduate Schools is pushing for higher education reform that will allow the United States to remain internationally competitive in *all* higher education fields.<sup>110</sup> The Council claims that graduate education enables the United States to “remain competitive in the global economy” and to “protect our national security, whether from political forces, diseases, or natural

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105. NATIONAL SCIENCE FOUNDATION, SCIENCE AND ENGINEERING INDICATORS 2006, GLOBAL HIGHER EDUCATION, HIGHER EDUCATION IN SCIENCE AND ENGINEERING at 2-31, available at <http://www.nsf.gov/statistics/seind02/pdf/c02.pdf> [hereinafter SCIENCE AND ENGINEERING INDICATORS 2006].

106. *Id.* at 2-36. See also Aisha Labi, *As World Economies Struggle, Competition Heats Up for Students From Abroad*, CHRON. HIGHER EDUC., Nov. 21, 2008, at A22, available at <http://chronicle.com/weekly/v55/i13/13a02201.htm>.

107. NATIONAL RESEARCH COUNCIL, POLICY IMPLICATIONS OF INTERNATIONAL GRADUATE STUDENTS AND POSTDOCTORAL SCHOLARS IN THE UNITED STATES 4 (2005).

108. *Id.* at ix.

109. *Id.* at 5.

110. See COUNCIL OF GRADUATE SCHOOLS, GRADUATE EDUCATION: THE BACKBONE OF AMERICAN COMPETITIVENESS AND INNOVATION, available at [http://www.cgsnet.org/portals/0/pdf/GR\\_GradEdAmComp\\_0407.pdf](http://www.cgsnet.org/portals/0/pdf/GR_GradEdAmComp_0407.pdf).

disasters.”<sup>111</sup> Citing numerous reports that “have enumerated the multiple threats to future U.S. competitiveness,” the Council suggests that graduate education reform will help alleviate these obstacles to prosperity.<sup>112</sup> Other umbrella organizations for educators have also pushed for the United States to be aware of and respond to an increasingly competitive environment for the best international students and scholars in light of the Bologna Process and other higher education reforms throughout the world.<sup>113</sup>

#### D. Conclusion

As evidenced by the conclusions of the Spellings Commission, along with the ongoing dialogue in legal education and science and engineering education, it appears many voices in the United States favor higher education reform. The development of qualifications frameworks in other countries has resulted in increased transparency regarding what exactly a degree represents. These developments have provided a mechanism to determine comparability of degrees and programs. Building from what other countries have developed, a common degree framework with common student learning outcomes for each degree level would create a tool to address challenges faced by higher education in the United States.

A common degree framework-based reform would foster transparency by introducing shared student learning outcomes as a meaningful measure of degree quality to which institutions and programs would hold one another mutually accountable. Transparency and the institutional accountability that would inevitably follow will allow potential and current students to understand the market value of a given degree and weigh the costs and benefits of the investment involved in it. It would also give external stakeholders, such as employers, a systematic tool to more accurately compare the learning and skills that employee candidates possess. Further, a common degree framework would make higher education more attractive to nontraditional and disadvantaged student groups—such as minorities, adult learners, and low-income people—by making the market-value of a given degree readily apparent. Finally, reform of this sort would facilitate the development of a more streamlined credit transfer system, allowing credits accumulated from different institutions over time to be recognized in a systematic, understandable, and uniform fashion.

A common degree framework has the potential to confront issues discussed here, and to also stimulate national dialogue on higher education, paving the way for further constructive transformations. The legal community, science and engineering educators, and graduate educators

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111. *Id.* at 6.

112. *Id.*

113. *See, e.g.,* NAFSA, *supra* note 91. *See generally* Douglass, *supra* note 91 (describing the emerging globally competitive higher education environment).

represent only a small portion of the stakeholders who have begun to push for U.S. higher education policymakers to look internationally as they pursue domestic reform. Implementing a framework would create a mechanism in which degrees from U.S. institutions would hold the inherent market value necessary to maintain global economic competitiveness.

### III. HOW A COMMON DEGREE FRAMEWORK COULD BE DEVELOPED

#### A. The Bologna Process in Europe

During the last years of the previous millennium, the nations of Europe began an effort to reconstruct and transform higher education.<sup>114</sup> Today forty-seven countries are involved in the Bologna Process, with four thousand institutions and sixteen million students working to increase geographic mobility for students and faculty.<sup>115</sup>

The Bologna Process has increased dialogue and cooperation among countries beyond the forty-seven signatory states. Israel, Kazakhstan, Australia, New Zealand, and the nations in the Maghreb, along with countries in Asia and Africa, are showing increasing interest in the Bologna Process and are implementing facets of the process.<sup>116</sup>

Many in the United States are taking notice of the Bologna Process. For example, the Council of Graduate Schools, the National Academy of Sciences, the National Science Foundation, and the National Education Association, have all published articles about the possible impact of the Bologna Process.<sup>117</sup> Further, during a conference on “Graduate Education and American Competitiveness” in 2005, it was said that “[v]irtually every speaker at the conference, in one way or another, stated that international competition in graduate education threatens American world-wide leadership in research and innovation and therefore threatens American prosperity.”<sup>118</sup> A speaker at the conference also summarized the events unfolding in European higher education as constituting a vast transformation of it, one which would ultimately provide more competition

114. See generally Terry, *Degree Changes*, *supra* note 93.

115. For a list of countries see, Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=1&DF=26/01/2010&CL=ENG> (last visited Apr. 1, 2010).

116. See EUROPEAN HIGHER EDUCATION IN A GLOBAL SETTING WORKING GROUP, THE EUROPEAN HIGHER EDUCATION AREA (EHEA) IN A GLOBAL CONTEXT: REPORT ON OVERALL DEVELOPMENT AT THE EUROPEAN, NATIONAL AND INSTITUTIONAL LEVELS (Feb. 13, 2009), available at [http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/2009\\_EHEA\\_in\\_global\\_context.pdf](http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/2009_EHEA_in_global_context.pdf).

117. See, e.g., SCIENCE AND ENGINEERING INDICATORS 2006, *supra* note 108; NAFSA, *supra* note 91.

118. See Terry, *Degree Changes*, *supra* note 93, at 210 (quoting Paul Tate, *Graduate Education and American Competitiveness*, CGS COMMUNICATOR (Council of Graduate Schs., Washington, D.C.), June 2005, at 2, available at [http://www.cgsnet.org/portals/0/pdf/comm\\_2005\\_06.pdf](http://www.cgsnet.org/portals/0/pdf/comm_2005_06.pdf)).

for the United States.<sup>119</sup>

While there are many features of the Bologna Process that should inform American higher education, qualifications frameworks, Tuning, and the Credit Transfer System should be foremost.<sup>120</sup> American higher education should not simply replicate or adopt a Bologna-type methodology. However, U.S. higher education can benefit from, and be informed by, learning from Bologna. The crucial word is “inform.” The U.S. system of higher education and its stakeholders will, no doubt analyze, digest, reconfigure, contextualize, adapt and possibly adopt the principals of the Bologna Process, but to not be informed would be unwise.

#### B. Why a Common Degree Framework would Benefit American Higher Education.

By implementing a common degree framework, the United States would provide a mechanism for clearly outlining and defining the learning outcomes of each degree level and would make clear the pathways to further education and employment. Higher education and its stakeholders would benefit from the clarity as to what students are able to do with a degree.

One consequence of the Bologna Process has been a great deal of debate over the “purpose, methodology, and assessment of higher education.”<sup>121</sup> Our European counterparts for over a decade have studied, discussed, and calculated the best possible practices to ensure not only that students seeking higher education in Europe receive an exemplary education but also that they will have completed qualifications ensuring demonstration of a proficiency in a field. In addition, potential employers will have knowledge of candidate qualifications based on frameworks and a credit system. Europe’s qualifications frameworks can bring about a systematic change by broadening goals and preparing students for future endeavors upon completion of their degree.<sup>122</sup>

A common degree framework would bring transparency and clarity to the U.S. higher education system. Stakeholders would be cognizant of the benefits and additional value added to a system provided with a common degree framework. In addition, a focus on outcomes and what students are able to do with their degrees would provide clarity on the pathways through

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119. See Terry, *Implications*, *supra* note 93, at 241.

120. See John H. Yopp, *Convergent Evolution of European and U.S. Higher Education Systems: Adapting to the Environments of Globalisation*, in INTERNATIONALISATION OF HIGHER EDUCATION HANDBOOK (2009). Dr. Yopp argues that the United States should examine the European Credit and Transfer System. He suggests that U.S. higher education needs to realize the limitations of its current credit system and analyze the implications of the European approach to credits and the correlation with learning outcomes, qualification frameworks and tuning. See *id.*

121. See Terry, *Implications*, *supra* note 93, at 246.

122. See BERGAN, *supra* note 30, at 247.

higher education and would provide the United States with a leadership opportunity in defining higher education in a global context.

#### IV. HOW TO DEVELOP A COMMON DEGREE FRAMEWORK

There are, as we see it, four ways in which a common degree framework could come into being. The first, and the best, way would be for leaders of the higher education community, working cooperatively with students, employers, and others, to develop and pilot a common degree framework and then to honor its demands. The second way in which a common degree framework would come about would be for accrediting agencies, to shift from their current input oriented assessment modalities to a vastly more output-oriented approach. Once they made that shift, they would be well on their way towards assessing quality with reference to a framework quite similar to the one that we have described here. The third way would be for the states to enact a Uniform National Framework for Higher Education Act that the National Conference of Commissioners on Uniform State Laws had proposed to them. The fourth way would be for Congress, acting on its spending power, to amend the Higher Education Act in such a way as to make compliance with a common degree framework a condition precedent to an institution's receipt of federal funds.

Each of the ways to develop a common degree framework has challenges. With the value American higher education places on institutional autonomy, the most desirable approach is to voluntarily build consensus around the concept. In this part of our article, we will explore, in a quite preliminary and tentative fashion, each of the four ways to develop a common degree framework, as well as the trade-offs involved in each of them.

##### A. The First Way: Institutional Initiatives

A U.S. overarching common degree framework consisting of general student learning outcomes at each degree level would ideally be developed and fostered through the voluntary, combined effort of higher education leaders, experts, and key stakeholders. The diversity of U.S. higher education leadership provides for a wealth of expertise and experience that, if united towards the common purpose of establishing agreed-upon national student learning outcomes at each degree level, could create the ideal framework for the U.S. higher education system. These stakeholders should be brought together to reach a consensus that shared learning outcomes are a desirable and feasible solution to some of the problems plaguing higher education today, and then to discuss the best process for designing and implementing these learning outcomes in a manner that reflects the uniqueness and complexity of U.S. higher education.<sup>123</sup>

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123. Key individuals should include, for example, the leadership of institutional

A common degree framework movement could emerge from within the field through higher education practitioners. Professor Paul Gaston proposes uniting faculty members, students, university board members, administrators, state higher education officers, members of the public, and higher education association representatives, a group which he terms the Higher Educators' Congress.<sup>124</sup> The Congress could include an executive committee charged with managing liaisons with state and federal agencies to obtain the necessary government support, and an organizing committee comprising the leadership of subcommittees established throughout the process.<sup>125</sup> The objective of the Congress would be to reach a consensus on an agenda for comprehensive higher education reform, informed by the lessons of the Bologna Process.<sup>126</sup> Underlying that objective would be the premise that some form of common degree framework is a desirable means of addressing some of the problems in U.S. higher education, but the participants would have to be free to determine how the framework should be formed and what it should look like.

The Higher Educators' Congress would carefully delineate the strengths and weaknesses within the current higher education system, and distill an agenda for reform intended to address the current problems in U.S. higher education.<sup>127</sup> One focus might be upon creating a national framework of student learning outcomes for each degree. Through a collaborative voluntary effort, higher education leaders would "frame a strategy of reform that first recognizes and incorporates existing efforts and then identifies gaps and the means of addressing them."<sup>128</sup> In the context of a framework discussion, this would entail recognizing those associations, institutions, disciplines, states, and individuals who have already begun to work towards remedying many of the issues that a qualifications framework would address.<sup>129</sup> This stocktaking would prevent duplicative

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membership associations such as the American Council on Education, the Council of Independent Colleges, the Association of Public and Land-Grant Universities, the American Association of State Colleges and Universities, and the Association of American Colleges and Universities. See The American Council on Education, [www.ace.org](http://www.ace.org) (last visited Apr. 1, 2010); Council of Independent Colleges, [www.cic.org](http://www.cic.org) (last visited Apr. 1, 2010); The Association of Public and Land-Grant Universities, [www.aplu.org](http://www.aplu.org) (last visited Apr. 1, 2010); American Association of State Colleges and Universities, [www.aascu.org](http://www.aascu.org) (last visited Apr. 1, 2010); The Association of American Colleges and Universities, [www.aacu.org](http://www.aacu.org) (last visited Apr. 1, 2010).

124. PAUL GASTON, *THE CHALLENGE OF BOLOGNA: WHAT U.S. HIGHER EDUCATION HAS TO LEARN FROM EUROPE, AND WHY IT MATTERS THAT WE LEARN IT* 183–85 (2010).

125. *Id.* at 184.

126. *Id.* at 183–84.

127. For a discussion of the major issues in U.S. higher education today see *supra* Part I.B.

128. GASTON, *supra* note 124, at 184.

129. See GASTON, *supra* note 124, at 177–79 (discussing present efforts to positively transform U.S. higher education).

efforts, build upon already-established practices, and identify stakeholders who had not been involved in the process but whose dedication to transforming U.S. higher education would merit their inclusion.<sup>130</sup> The stakeholders would collaborate, among other things, to identify general student learning outcomes at each higher education degree level.

#### B. The Second Way: Initiatives by Accrediting Agencies

The traditional function of accreditation in the United States is to assess and make a judgment for the government and the public on the quality of a higher education program or institution in relation to predetermined standards.<sup>131</sup> The modern accreditation process has evolved into a comparison of an institution's programs and activities to its own stated mission and goals, rather than a comparison to uniform standards.<sup>132</sup> While accrediting agencies are technically private associations comprising institutional members, they also possess an "involuntary and public character" because of the federal government's reliance upon accreditation to determine institutional eligibility for federal funding.<sup>133</sup> Accreditation is not compulsory; an institution must apply to be reviewed by the relevant agency. In so doing, the institution signifies that it seeks to conform to the accrediting agency's standards so that it may reap the resulting benefits, most notably federal aid eligibility.<sup>134</sup> The accreditation process involves peer review of an institution or program by higher education faculty, administrators, and members of the public.<sup>135</sup> Thus, from the perspective of an institution, accreditation is essentially a seal of approval from its accredited institutional peers stating that the institution meets shared expectations of quality within higher education. In their capacity as warrantors of higher education institutions for the federal government, the public at large, and for the benefit of the accredited institutions, accrediting agencies have tremendous potential to initiate a movement for reform at the institutional level.

If a voluntary process of defining student outcomes results in a common degree framework, accrediting agencies can play a significant role in influencing the implementation and use of the common degree framework to drive accountability and provide assurance of quality. A collaborative effort by the regional and specialized accrediting agencies could reinvent

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130. *See id.* at 178–79.

131. *See, e.g.,* HAROLD ORLANS, PRIVATE ACCREDITATION AND PUBLIC ELIGIBILITY 2–3 (1975); SELDEN, *supra* note 62.

132. *See* 20 U.S.C. § 1099b (2008).

133. ORLANS, *supra* note 131, at 2.

134. *See id.*

135. COUNCIL FOR HIGHER EDUCATION ACCREDITATION (CHEA), THE FUNDAMENTALS OF ACCREDITATION 2 (2002), available at [http://www.chea.org/pdf/fund\\_accred\\_20ques\\_02.pdf](http://www.chea.org/pdf/fund_accred_20ques_02.pdf).

modern accreditation to better address some of the issues facing higher education today. As accrediting agencies approach the issue of developing a common degree framework, they should turn to their existing accreditation process to build upon the quality-review elements that already work to promote quality and consistency, and to make changes to the process to better meet the original, fundamental goal of accreditation: accurately measuring quality.

### C. The Third Way: Uniform State Law

In addition to a stakeholder-directed voluntary approach or an accrediting agency initiative, the process could also be initiated through state law. A uniform state law would be the best channel to promote the adoption of common degree framework legislation by as many states as possible.

Every state has adopted some type of legislation to regulate its public higher education system. State constitutions often contain a provision establishing a public education system, including state colleges and universities or a state college and university system, and sometimes community colleges.<sup>136</sup> Each state surveyed for purposes of this discussion also includes a title pertaining to higher education in its code.<sup>137</sup> In either the constitution or elsewhere in the code, states establish the governing or coordinating authority for higher education in the state.<sup>138</sup> In the state statutes analyzed here, responsibility for higher education lies with a state board charged with duties similar to those of directors of a not-for-profit organization.<sup>139</sup> Through uniform legislation that could be inserted into existing state higher education code, state governing or coordinating boards could be authorized to initiate the creation of frameworks at the individual state level.

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136. The authors surveyed the state constitutions in Indiana, Utah, Minnesota, Alabama, Illinois, and Montana to obtain a general idea of how higher education is treated by certain states. *See, e.g.*, ALA. CONST. art. XIV; ILL.CONST. art. X; IND. CONST. art. 8; MINN. CONST. art. XIII; MONT. CONST. art. X; UTAH CONST. art. X.

137. *See generally* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION, STUDENT EDITION 24 (2007) (explaining the placement of higher education in state constitutions and statutory schemes).

138. *Id.*

139. *See, e.g.*, ILL. CONST. art. X, § 2; MONT. CONST. art. X, § 9; UTAH CONST. art. X, § 3; ALA. CODE § 16-5-8 (2001); ILL. COMP. STAT. 205/2 (West 2006); IND. CODE § 21-18-6-1 (2007); MINN. STAT. § 136F.06 (West 2003). *See also* Aims C. McGuinness, The Education Commission of the States, Policy Brief: Governance and Coordination: Definitions and Distinctions, <http://www.ecs.org/clearinghouse/31/62/3162.htm> (last visited Mar. 25, 2010) (explaining the responsibility of a state governing or coordinating board).



### 1. Background on the National Conference of Commissioners on Uniform State Laws

The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) is the main entity responsible for drafting and promulgating uniform laws in the United States.<sup>140</sup> A long-standing institution, the NCCUSL held its first convening in 1892 after an ABA resolution urging states to achieve national uniformity through “voluntary state action” before the federal government could override conflicting state laws with federal legislation.<sup>141</sup> Today, the NCCUSL is a nonprofit, unincorporated association of around 300 commissioners from all states, plus the District of Columbia, Puerto Rico, and the Virgin Islands.<sup>142</sup> Most states provide for their commission by statute, and each jurisdiction determines the number and method of appointment for commissioners.<sup>143</sup> States typically appoint three to four commissioners, but each state receives only one vote in the Conference.<sup>144</sup> The majority of state commissioners are practitioners, judges or law professors who are selected because of their elite knowledge base and “intellectual interest in uniform law.”<sup>145</sup>

The state commissioners meet annually at the National Conference to “study and review the law of the states to determine which areas of law should be uniform.”<sup>146</sup> The work of the NCCUSL allows for uniformity of state law in areas where it is practical and beneficial, while preventing duplicative efforts by individual states.<sup>147</sup> In some ways similar to a legislative body, the Conference, through study and drafting committees, creates and proposes uniform laws in desirable legal areas.<sup>148</sup> However, no proposal for enactment of a uniform law becomes law in any state unless that state’s legislature votes to adopt it.<sup>149</sup> While its projects vary greatly, the Conference usually distinguishes between law *reform* and codification of existing common law principles with an interstate application.<sup>150</sup> The Conference tries to avoid new legal subjects, yet exceptions exist, such as

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140. See National Conference of Commissioners on Uniform State Laws, Organization, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited Apr. 1, 2010) [hereinafter NCCUSL Organization].

141. See WALTER P. ARMSTRONG, JR., A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 16–19 (1991); James F. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2097, 2102 (1991).

142. See NCCUSL Organization, *supra* note 140.

143. See *id.*

144. See Discussion, *Uniform State Laws: A Discussion Focused on Revision of the Uniform Commercial Code*, 22 OKLA. CITY U. L. REV. 257, 261 (1997). See also 25 ILL. COMP. STAT. 135/5.07 (2006); IOWA CODE § 5.1 (2003).

145. White, *supra* note 141, at 2096.

146. NCCUSL Organization, *supra* note 140.

147. See *id.*

148. See *id.*

149. *Id.*

150. See White, *supra* note 141, at 2098.

the Uniform Workmen's Compensation Act, in instances where states strongly desired legislation in new legal areas.<sup>151</sup> Today the Conference has moved beyond simply codifying existing common law, but as a general rule it avoids new legal issues with no previous legislative or administrative history.<sup>152</sup>

## 2. Uniform Law Creation and Promulgation

It takes several years for NCCUSL to create a uniform law. The process begins with the Scope and Program Committee creating the agenda for the annual Conference by investigating proposed acts and reporting to Executive Committee on which acts are feasible and desirable to undertake.<sup>153</sup> Once the Executive Committee approves a project, a drafting committee of commissioners and at least one ABA advisor is appointed.<sup>154</sup> The commissioners meet throughout the year to produce tentative drafts, which receive extensive consideration.<sup>155</sup> A draft is then submitted to the annual Conference for initial debate.<sup>156</sup> Each draft must be read aloud word-by-word at a minimum of two consecutive annual meetings of the entire Conference.<sup>157</sup> Commissioners comment on various provisions of the draft and offer suggestions on statutory language.<sup>158</sup> The Conference must then approve the new draft that emerges.<sup>159</sup> Finally, a majority of the states present, but not less than twenty, must approve the draft before it can be officially adopted as a uniform law.<sup>160</sup> The act must also be submitted to the ABA for endorsement by the House of Delegates.<sup>161</sup> A uniform law

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151. *See id.* at 2099.

152. *See id.*

153. *See* National Conference of Commissioners on Uniform State Laws, Procedures, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited Apr. 1, 2010) [hereinafter NCCUSL Procedures]. *See also* National Conference of Commissioners on Uniform State Laws, New Project Criteria, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42> (last visited Apr. 1, 2010) [hereinafter NCCUSL New Project Criteria] (listing the criteria that the Scope and Program Committee uses to evaluate project proposals).

154. *See* NCCUSL Procedures, *supra* note 153; *see also* National Conference of Commissioners on Uniform State Laws, Constitution and Bylaws, art. 30, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18> (last visited Apr. 1, 2010) [hereinafter NCCUSL Constitution and Bylaws].

155. *See* NCCUSL Procedures, *supra* note 153; *see also* NCCUSL Constitution and Bylaws, *supra* note 154.

156. *See* NCCUSL Procedures, *supra* note 153.

157. *See* NCCUSL Procedures, *supra* note 153; *see also* NCCUSL Constitution and Bylaws, *supra* note 154, at art. 8, § 1.

158. *See* NCCUSL Procedures, *supra* note 153.

159. *See id.*

160. *See* NCCUSL Procedures, *supra* note 153; *see also* NCCUSL Constitution and Bylaws, *supra* note 154, at art. 8, § 3.

161. *See* NCCUSL Procedures, *supra* note 153; *see also* NCCUSL Constitution and Bylaws, *supra* note 154, at art. 7, § 1.

is then officially promulgated to the individual states for adoption by the state legislature.<sup>162</sup> Commissioners encourage their own state legislatures to adopt the uniform law as-is to promote the goal of uniformity, but state legislatures are free to modify the proposed law as they wish prior to codifying it in their respective state.<sup>163</sup>

Other key stakeholders in the state uniform law process include the ABA and the American Law Institute (ALI). The NCCUSL and the ABA are formally affiliated through an agreement in which ABA advisors in different subject areas assist in the uniform law drafting process, and the House of Delegates (the ABA's policymaking body) endorses final drafts before they are officially promulgated as uniform laws.<sup>164</sup> Like the NCCUSL, the ALI drafts model legislation.<sup>165</sup> The ALI worked collaboratively with the NCCUSL to develop the Uniform Commercial Code—the most significant undertaking to date for either organization.<sup>166</sup> ALI model legislation differs from uniform state laws in that it explicitly seeks to *reform* the law,<sup>167</sup> whereas NCCUSL uniform laws aim to operationalize existing legal principles through clarification and codification. Also, the NCCUSL only addresses state law issues, whereas the ALI takes on projects on all types of law.<sup>168</sup>

There are numerous policy justifications to support the use of uniform law over federal legislation to achieve national uniformity. First, the drafting of uniform laws involves a sustained process that requires years of consideration and revisions.<sup>169</sup> Elected federal congressmen serve short

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162. See NCCUSL Procedures, *supra* note 153.

163. See *id.* See also Discussion, *supra* note 133, at 266–71 (discussing issues that arise during the uniform law adoption process by individual state legislatures and possible solutions for those issues).

164. See American Bar Association, Participation of ABA Liaisons with National Conference of Commissioners on Uniform State Laws Drafting Committees and Procedures with Respect to the Formulation of Uniform Acts to the American Bar Association, <http://www.abanet.org/leadership/nccusl/> (follow “For the procedures with respect to the formulation of uniform acts to the American Bar Association” hyperlink) (last visited Apr. 1, 2010). See also American Bar Association, Instructions for ABA Advisors to Drafting Committees of The National Conference of Commissioners on Uniform State Laws, <http://www.abanet.org/leadership/nccusl/> (follow “For more information on NCCUSL and its relationship with the ABA” hyperlink) (last visited Apr. 1, 2010).

165. See American Law Institute, Overview, <http://www.ali.org/index.cfm?fuseaction=projects.main> (last visited Apr. 1, 2010) [hereinafter ALI Overview].

166. National Conference of Commissioners on Uniform State Laws, History, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited Apr. 1, 2010).

167. See ALI Overview, *supra* note 165.

168. See American Law Institute, Current Projects, <http://www.ali.org/index.cfm?fuseaction=projects.currentprojects> (last visited Apr. 1, 2010) [hereinafter ALI Current Projects].

169. See Discussion, *supra* note 144, at 263.

terms, and the condensed federal legislative process allows for much less time to consider potential legislation.<sup>170</sup> Also, because commissioners are not concerned with reelection, they tend to be more interested in long-term issues than the typical legislator concerned with establishing immediate political support.<sup>171</sup> Uniform laws also hold vast potential to be technically and substantively superior to laws drafted by Congress, because the commissioners are appointed to projects according to their expertise and interest in the subject area.<sup>172</sup> As a result, the commissioners who will ultimately write a uniform law have legal expertise on the specific subject matter that the average congressman simply will not possess. The uniform law drafting and consideration process is also much more open and transparent than some congressional decisions made behind closed committee doors or in the hands of congressional staffers. In contrast, uniform laws are read aloud, line-by-line, in front of the entire NCCUSL Conference on at least two separate occasions, with an open debate and revisions occurring at the meeting.<sup>173</sup> Finally, the NCCUSL process makes certain that each state will have a voice in the ultimate product,<sup>174</sup> rendering it much more likely that the uniform law will satisfy individual state needs.

### 3. A Uniform State Degree Framework Law

As entities with statewide responsibility for higher education, state governing or coordinating boards represent the most viable means of implementing a framework that would apply to all public institutions throughout the state. Their comprehensive oversight capabilities place the state-level boards in an ideal position to receive statutory enforcement responsibilities in a uniform state framework. Thus, state code subchapters that stipulate the powers and duties of the higher education governing or coordinating board would seem to be the most appropriate place to insert a uniform state degree framework.

Among a board's typical statutory duties in the states surveyed, several would allow for the board to originate the development of student learning outcomes for each degree level at institutions state-wide. For example, Alabama, Illinois, and Indiana authorize their respective boards to create a long-term plan for higher education in the state, including setting "statewide objectives and priorities with methods and guidelines for achieving them."<sup>175</sup> A state framework can be characterized as a forward-

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170. *See id.* at 262.

171. *See id.* at 263.

172. AMERICAN LAW INSTITUTE, ABOUT THE AMERICAN LAW INSTITUTE, available at <http://www.ali.org/doc/thisIsALI.pdf>.

173. *See* NCCUSL Constitution and Bylaws, *supra* note 154, at art. 44A, § 1.

174. *Id.* at art. 2, § 2.

175. *See* ALA. ADMIN. CODE r. 300-1-1-.01(3)(a) (2001). *See also* 110 ILL. COMP.

thinking transformation of the state higher education system with the expectation of significant lasting benefits, which would certainly fall under long-term planning. Alabama, Illinois, and Indiana also authorize the board to recommend potential legislation pertaining to higher education to the governor and state legislature.<sup>176</sup> Uniform state laws qualify as potential legislation, thus, the state governing or coordinating board could actively promote a uniform qualifications framework law to the state legislature. Finally, Alabama, Indiana, Minnesota, and Utah empower the board to review and approve academic programs.<sup>177</sup> This duty could include ensuring that institutions establish and maintain student learning outcomes at each degree level.<sup>178</sup>

Apart from existing state code provisions that would allow for the governing or coordinating board to enforce a state framework with minimal statutory revisions necessary, creating a freestanding framework subchapter within a state higher education title is another possibility. In this type of uniform legislation, regulatory authority could be vested in the state governing or coordinating board or an alternative method of ensuring institutional compliance could be constructed. For instance, new licensing to operate a higher education institution within a state or license renewal for established institutions could be conditioned upon the implementation of a state framework consisting of statewide student learning outcomes.<sup>179</sup> This approach would have the advantage of encompassing state institutions *as well as* private institutions.

Absent the promulgation of a uniform state framework law, no reliable means exists to ensure the cooperation of each individual state in implementing a framework law.<sup>180</sup> Yet a uniform framework law could

STAT. 205/6 (2010); IND. CODE § 21-18-8-1 (2007).

176. *See, e.g.*, 110 ILL. COMP. STAT. 205/9.02 (2010); IND. CODE § 21-18-8-4 (2007); ALA. ADMIN. CODE r. 300-1-1-.01(3)(c)(1) (2001).

177. *See, e.g.*, IND. CODE § 21-18-9-5 (2009); MINN. STAT. § 136F.30 (2003); UTAH CODE ANN. § 53B-6-101 (2009); ALA. ADMIN. CODE r. 300-1-1-.01(3)(c)(2) (2001).

178. *See, e.g.*, ALA. ADMIN. CODE r. 300-1-1-.01 (2001) (describing in detail the goals and responsibilities of the Alabama Commission on Higher Education). A challenge of this approach is whether both public and private institutions fall within the statutory requirements.

179. The Education Commission of the States (“ECS”) has compiled state profiles on Postsecondary Governance Structures in each state. According to the profiles for each of the six states surveyed for this Memo, the Illinois Board of Higher Education and the Minnesota Higher Education Services Council have licensing authority over private, degree-granting institutions in the state. In Montana, a degree-granting institution must have the Board of Regents’ approval or be accredited by a recognized accreditation agency. Utah, Alabama, and Indiana lack a licensing agency for private, accredited degree-granting institutions. *See* ECS Postsecondary Governance Structures Database – Single State Profiles, [http://www.ecs.org/dbsearches/Map\\_Searches/SRCH\\_DB\\_StateNarrativeProfiles.htm](http://www.ecs.org/dbsearches/Map_Searches/SRCH_DB_StateNarrativeProfiles.htm) (follow individual state hyperlinks to view respective profiles) (last visited Mar. 25, 2010).

180. As an incentive for state cooperation, the federal government could make conditional federal funding available to states that are willing to implement a state

require years to create and promulgate. First, an idea conforming to the NCCUSL project criteria would need to be submitted. The NCCUSL project criteria and the examples of past projects suggest that the Conference would be hesitant to take on qualifications framework legislation because this type of higher education legislation would constitute a new legal area. If the NCCUSL did decide to undertake the project, legal experts on higher education law and other related subjects along with ABA advisors from relevant sections would need to be involved in the extensive research, drafting, and revisions that would follow. Meanwhile, stakeholders would need to obtain the critical support of as many states, individual commissioners, and outside influential parties as early in the process as possible to ensure a smooth promulgation of the final uniform law by the state legislatures. Based upon the experiences of other uniform acts such as the Uniform Trust Code, the entire process from initial consideration and drafting to enactment by the first state legislature would require approximately 10 years.<sup>181</sup>

Arguably, a uniform state framework law would be superior to the option of federal legislation because of its voluntary creation by state NCCUSL commissioners and vertical adoption process requiring individual state buy-in. Yet, even if the NCCUSL took on the project, the process includes no guarantee that *any* state will adopt the uniform law that is created, let alone *all* of the states. As a result of the uncertainty of the adoption of the resulting uniform law in individual states and the intensive and lengthy process the project would entail, the creation and promulgation of a uniform state law—while theoretically possible—is not a realistic means of achieving a common degree framework.

#### D. The Fourth Way: The Federal Approach

Traditionally, with the exception of the five military academies and some institutions that serve Native American populations, the federal government played a background role in American higher education. In the mid-twentieth century, however, the federal government assumed a more direct statutory involvement in regulating higher education as a result of changing social and political circumstances, including vast institutional growth, technology advances, and increasing numbers of students in higher education due in part to civil rights progress.<sup>182</sup> The main objective of federal government involvement in higher education was to establish

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qualifications framework under the congressional spending power. *See infra* Part III.D.2. *See also* White, *supra* note 130, at 2099.

181. Posting of Steven Maimes to The Trust Advisor Blog, <http://thetrustadvisor.com/tag/uniform-trust-code> (Oct. 2, 2009) (noting that the Uniform Trust Code was written in 2000 and that the twenty-first state to adopt the Code is Michigan, whose statute becomes effective Apr. 1, 2010).

182. KAPLIN & LEE, *supra* note 1, at § 1.2.

national spending priorities and to provide funds appropriated through federal statutes.<sup>183</sup> Congressional spending power allows the federal government to place restrictions on the use of federal funds.<sup>184</sup> Through grant-in-aid statutes, such as the Higher Education Act of 1965 that implement preconditions to federal funding allocated under the statute, the federal government took on a much greater role in higher education.

## 1. A Significant Federal Role in Higher Education: The Higher Education Act of 1965

### (a) *Background and Purpose*

The Higher Education Act of 1965 (HEA) remains the most significant piece of legislation authorizing federal higher education spending.<sup>185</sup> The HEA and similar legislation of its time were enacted to address difficulties arising from a dramatic increase in the student population and institutions of higher learning that occurred throughout the 1950s and 1960s.<sup>186</sup> Beginning with the GI Bill of 1944,<sup>187</sup> Congress passed a series of laws allowing returning veterans the financial opportunity to attend college.<sup>188</sup> HEA was the most far-reaching piece of legislation passed during this period because it provided the most expansive financial assistance opportunities for students and institutions.<sup>189</sup>

Congress, in an effort to contain federal control over higher education, continued to defer to existing private accrediting agencies to determine the quality of education provided by institutions for eligibility to receive federal funds.<sup>190</sup> Private accrediting agencies had been performing the quasi-governmental function of monitoring the quality of higher education institutions and programs since the late nineteenth century.<sup>191</sup> In order to ensure that these accrediting agencies were reliable authorities, the

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183. *Id.* at § 13.1.2.

184. *Id.*

185. *Id.* at § 13.4.1.

186. H.R. REP. NO. 89-621, at 2 (1965).

187. Servicemen's Readjustment Act, Pub. L. 78-346, 58 Stat. 284m (1944).

188. Other legislation that followed including the National Defense Education Act of 1958, the Higher Education Facilities Act of 1963, the Health Professions Educational Assistance Act of 1963, and the Nurse Training Act of 1964, also assigned the federal government a new, direct role in providing access to higher education for certain groups of students. See Matthew W. Finkin, *The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education*, 57 LAW & CONTEMP. PROBS. 89, 97 (1994). See also KAPLIN & LEE, *supra* note 1, at § 13.4.1.

189. Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1, 6 (2008). See also KAPLIN & LEE, *supra* note 1, at § 13.4.1.

190. Jeffrey C. Martin, *Recent Developments Concerning Accrediting Agencies in Postsecondary Education*, 57 LAW & CONTEMP. PROBS 121, 124 (1994).

191. See Finkin, *supra* note 188, at 90–91.

Commissioner of Education (now the Secretary) was charged for the first time with officially recognizing agencies in the Veteran's Readjustment Assistance Act of 1952, in an attempt to correct alleged abuses of veteran's educational benefits through more stringent federal oversight.<sup>192</sup>

The report accompanying the original HEA states that “[i]nadequate library resources, a lack of qualified teachers, packed classrooms, and insufficient scholarship funds characterize many of the Nation's colleges and universities. . . . It is the purpose of the Higher Education Act of 1965 to overcome, or at least to ameliorate, some of these problems.”<sup>193</sup> The most significant provisions of the HEA, which address student assistance, were intended to allow low-income individuals access to higher education by helping to offset the continually rising “college cost spiral.”<sup>194</sup> Congress also sought to educate greater numbers of skilled American workers to allow U.S. economic development to keep pace with other nations.<sup>195</sup>

Failure to become accredited by an agency recognized by the Secretary, failure to show that it is “making reasonable progress toward accreditation,” or the withdrawal of accreditation by such an agency, automatically renders an institution of higher education ineligible for participation in HEA programs.<sup>196</sup> Federal recognition is “considered essential or at least desirable by most agencies.”<sup>197</sup> The effect of accreditation on a college or university is recognized by the courts. In September 2009 a federal judge sitting in Atlanta granted a temporary injunction to the Paul Quinn College against the Southern Association of Colleges and Schools (SACS) to restrain SACS from revoking the College's accreditation (and thus access to federal funding).<sup>198</sup>

As the HEA demonstrates, the federal government exercises its spending power authority over higher education to establish accrediting agency recognition and other institutional eligibility prerequisites to receiving federal student assistance or institutional aid.

#### *(b) Relevant Amendments and Ongoing Concerns*

Since 1965, the HEA has been comprehensively amended and reauthorized eight times, most recently in 2008.<sup>199</sup> Enduring concerns over

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192. *See id.* at 94–95.

193. H.R. REP. NO. 89-621, at 2 (1965).

194. *See id.* at 20.

195. *See id.*

196. *Id.* at 42.

197. Martin, *supra* note 190, at 124.

198. Paul Quinn Coll. v. S. Ass'n of Colls. and Schs. Comm'n on Colls., Inc., No. 1-09-CV-2327 (N.D. Ga. Aug. 26, 2009) (granting the school's motion for preliminary injunction), available at <http://www.pqc.edu/PaulQuinnreinstatement.pdf>.

199. *See* The Higher Education Amendments of 1968, Pub. L. No. 90-575, 82 Stat. 1014; The Higher Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235;



how best to regulate institutional and programmatic quality have appeared repeatedly throughout recent amendment debates.

Since 1992, an ongoing debate has played out about the proper role of accrediting agencies in determining the quality of higher education institutions and programs. While the 1998 amendments did not significantly alter the role of accrediting agencies or the recognition criteria, statements made in a hearing before the House Subcommittee on Postsecondary Education, Training, and Life-Long Learning offer insight into some of the major issues under deliberation. Jeffrey Wallin from the American Academy for Liberal Education commented upon the difficulty of determining what constitutes “quality” in an education:

[O]ne of the difficulties here is when you look at a college and say, well, let’s see if it is a good college, how many students go to graduate school or how many get good jobs, [these questions are] very relevant on one hand; on the other hand, that has an awful lot to do with the students that get there in the first place. I mean, Princeton may be a great place, but even if it is not, it is still a good place to send your child, because they are going to do pretty well afterwards . . . . If you get beneath that, if you are trying to find out what the value added [in the education] is, what are the students learning or not learning, I don’t think there is an easy way . . . . But you have to have standards that you can measure. If you are going to talk about students’ writing, well, we have got to decide what that really means. If you want to talk about them being statistically literate, we have to decide what that means and do it within the context of maintaining the universities’ institutions and their perspectives.<sup>200</sup>

The concern with whether or not the accreditation process can accurately verify institutional quality continued through the 2008 reauthorization debate.

The 2008 reauthorization amendments—known as the Higher Education Opportunity Act (HEOA)—modified the program integrity provisions in Part H. First, the Act requires accrediting agencies to respect the missions

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The Higher Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081; The Higher Education Amendments of 1980, Pub. L. No. 96-374 94 Stat. 1367; The Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268; The Higher Education Amendments of 1992, Pub. L. No. 102-325 106 Stat. 448; The Higher Education Amendments of 1998, Pub. L. 105-244, 112 Stat. 158; The Higher Education Amendments of 2008, Pub. L. No. 110-315, 122 Stat. 3078.

200. *H.R. 6, The Higher Education Amendments of 1998, System Modernization Efforts at the Department of Education and Accreditation: Hearing Before the Subcomm. on Postsecondary Educ., Training and Life-long Learning of the H. Comm. on Educ. and the Workforce*, 105th Cong. 48 (1997) (statement of Dr. Jeffrey D. Wallin, President, American Academy for Liberal Education).

of educational institutions, including religious missions.<sup>201</sup> Second, it changed the existing accreditation due process standards by requiring agencies to have written accreditation standards and a conflicts of interest policy.<sup>202</sup> The Act also adds distance education oversight responsibilities, requirements to evaluate program growth and teach-out plans, credit transfer policies, and public disclosure requirements.<sup>203</sup> While the HEOA imposes additional requirements upon accrediting agencies, it also explicitly limits the Secretary's authority over these agencies.<sup>204</sup> The HEOA makes clear that the Secretary cannot establish criteria that specify the standards accrediting agencies must use to evaluate institutions.<sup>205</sup>

The 2008 Part H amendments are an attempt to focus the accreditation process upon the *quality* of education. Yet, since the amendments do not address the standards the agencies use to assess institutional quality and, in fact, expressly prohibit the Secretary from reviewing or directing the standards, the question of how to ensure that the accrediting process accurately measures educational quality persists. The ongoing concern over how to appropriately measure institutional or programmatic quality that permeated recent HEA reauthorization debates demonstrates that some stakeholders believe that the existing system is ripe for reform. Qualifications frameworks are an accountability measure that would address quality through prescribing standard, communally-determined student learning outcomes to be achieved by students at each degree level in general and within specific disciplines, regardless of the institution.

## 2. Spending Clause Authority

Under the congressional spending power stemming from Article I, Section 8 of the Constitution,<sup>206</sup> Congress could amend the eligibility requirements that serve as prerequisites to federal, state, institutional, and student aid under the HEA to require states and public institutions to demonstrate that they are involved in a collaborative national process of developing student learning outcomes for each degree level prior to

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201. DAVID P. SMOLE ET AL., CONGRESSIONAL RESEARCH SERVICE, THE HIGHER EDUCATION OPPORTUNITY ACT: REAUTHORIZATION OF THE HIGHER EDUCATION ACT 34 (Sept. 8, 2008), *available at* [http://assets.opencrs.com/rpts/RL34654\\_20080908.pdf](http://assets.opencrs.com/rpts/RL34654_20080908.pdf).

202. *Id.*

203. *Id.*

204. *See id.*

205. *Id.*

206. The language of the spending clause reads: “[t]he Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1. Most commentators turn to the phrase “provide for . . . [the] general welfare” as the constitutional basis for the power to spend. *But see* David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 216 (1995) (arguing that this emphasis is misplaced, and that Congress’s power to spend is authorized by the Necessary and Proper Clause and the “Property Clause” of Art. IV).

becoming eligible for federal aid.<sup>207</sup>

The Supreme Court's modern treatment of spending power challenges makes clear that as long as a statute does not violate a specific constitutional limit on federal power, the Court will defer to congressional judgments on spending power legislation.<sup>208</sup> In *South Dakota v. Dole*, the Court put forth a four-part test that persists as the modern framework of analysis for determining the validity of a federal spending power law.<sup>209</sup> Currently, it is this *Dole* test that is used to analyze the constitutionality of an HEA amendment placing further federal funding prerequisites upon states or institutions.<sup>210</sup>

The first *Dole* factor requires that the spending power must be used for the general welfare and the Court will not second-guess a congressional decision on this question.<sup>211</sup> Under this lenient general welfare standard, Congress could easily justify initiating national higher education reform intended to increase access to higher education, make the system more transparent and accountable, and foster U.S. competitiveness in higher education, among other readily available policy justifications.

The second *Dole* factor requires that the conditions placed upon the receipt of federal money be unambiguous in the statute, so that a recipient can make an informed choice of whether or not to accept a federal grant.<sup>212</sup> This factor could also be met through clear statutory language.

Third, the *Dole* test states that the conditions placed upon the federal funds must be reasonably related to the purpose for which the grant is offered.<sup>213</sup> The third factor may be trickier to satisfy, but with purposeful language placed throughout legislative consideration of an HEA amendment, Congress should be able to demonstrate that the development of common degree frameworks would have a wide-ranging positive impact on higher education.<sup>214</sup> Federal funds are issued for a variety of purposes,

207. The provisions listing conditions to the receipt of different types of federal aid are codified in various sections of Title 20, Chapter 28 of the United States Code.

208. See *Lawrence v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269–70 (1985) (stating that “[i]t is far from a novel proposition that pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar”).

209. 483 U.S. 203, 207–08 (1987).

210. The *Dole* test has been applied in numerous subsequent Supreme Court and lower federal court decisions examining the limits of the federal spending power. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting); *New York v. United States*, 505 U.S. 144, 167–72 (1992); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 279–81 (5th Cir. 2005).

211. *Dole*, 483 U.S. at 207.

212. *Id.*

213. *Id.*

214. In *Dole*, the Supreme Court suggested that Congress is not required to provide specific findings on the relatedness of the condition to the federal funding at issue, but only that the condition can be found to be “reasonably calculated” to serve the stated

and are intended to enhance access and quality in higher education share the same purpose as a common degree framework.

Finally, a statute will be invalidated under *Dole* if the conditions imposed violate an “independent constitutional bar.”<sup>215</sup> The Court defined “independent constitutional bar” to mean that Congress could not place restrictions on the receipt of federal funds that would “induce the States to engage in activities that would themselves be unconstitutional.”<sup>216</sup> It would be difficult for a challenger to argue that the development of a common degree framework by states and institutions was unconstitutional since higher education has traditionally operated under the direction of state and local government with significant institutional autonomy. For the reasons analyzed above, amendment of the HEA to condition federal funding upon the development of qualifications frameworks falls within the modern judicially-defined limits of the federal spending power.

### 3. Commerce Clause Authority

Federal legislation to encourage the development of a common degree framework could also be justified under the federal commerce power. Not only are students persons who move in interstate commerce as they transfer among institutions in different states, but the substantial commercial activity surrounding higher education would justify federal legislation under the commerce power.

Like the spending power, the commerce power is found in Article I, Section 8 of the Constitution.<sup>217</sup> Since Article I, Section 10 of the Constitution specifically prohibits states from restricting imports and exports and engaging in other activities pertaining to trade or foreign

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purpose. *See id.* at 208. The Supreme Court has not offered further guidance on the requirements of the third *Dole* factor, and in several cases that apply the test, a court seems to take for granted that conditions placed upon federal funding are reasonably related to the purpose behind the funding, without much discussion or guidance. *See, e.g., New York*, 505 U.S. at 167 (listing the third factor of the test and providing several examples of instances where the Court has upheld federal spending power statutes without applying the factor to the facts at hand). Yet, the Third Circuit does provide some guidance, interpreting the third *Dole* factor to require a “discernible relationship” between the funding condition and the congressional purpose behind the funding program. *See Koslow v. Pennsylvania*, 302 F.3d 161, 175 (3d Cir. 2002). The *Koslow* Court found that a clearly expressed congressional interest that was in some way directly furthered by the funding condition would suffice. *Id.*

215. *Dole*, 483 U.S. at 208. This aspect of the decision has been called into doubt by commentators who question allowing Congress to circumvent any restrictions on its regulatory power through an unlimited spending power ability to regulate state activity. *See also* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1933 (1995).

216. *Dole*, 483 U.S. at 210.

217. U.S. CONST. art. I, § 8, cl. 3 (stating Congress shall have the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

relations, states seem to lack a reserved power in these areas.<sup>218</sup> Thus, the Supreme Court has sometimes invalidated state legislation that seemingly regulates interstate commerce even if the issue has not been preempted by federal legislation—a judicially implied federal power known as the “dormant commerce clause.”<sup>219</sup> Other constitutional provisions have been found to limit the commerce power in past challenges, such as Tenth Amendment state autonomy principles.<sup>220</sup> These and other limitations on federal authority would undoubtedly be raised by those opposed to a new federal bill on higher education.<sup>221</sup> Yet, the Supreme Court’s current doctrine rejects these broad claims of state and local immunity from federal commerce power legislation.<sup>222</sup> Due to the explicit power laid out in the Constitution, the dormant power that has often checked state efforts to pass regulation affecting interstate commerce, and the Court’s unwillingness to entertain alternative constitutional defenses to federal legislative intervention under the commerce clause, the modern federal commerce power is a far-reaching authority.

*United States v. Lopez* sets forth the clearest modern framework for analysis of commerce power legislation.<sup>223</sup> As a preliminary matter, *Lopez* suggests the regulated activity must be economic or commercial in nature, or part of a broader class of activity that will have a cumulative and substantial impact on interstate commerce.<sup>224</sup> Congress is then free to regulate three types of economic or commercial activity so long as there is a rational basis for the regulation: “channels” of interstate commerce, such as highways or other modes of access to interstate mobility; “instrumentalities” of interstate commerce, or persons or objects affecting interstate commerce; and activities that “substantially affect” interstate commerce.<sup>225</sup>

Congress should be able to employ its expansive commerce power to

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218. JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 74 (3d ed. 2007).

219. *Id.* at 160.

220. *See, e.g.*, *New York v. United States*, 505 U.S. 144 (1992); *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976); *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

221. For examples of challenges to intervention with state and institutional autonomy, see *Printz v. United States*, 521 U.S. 898, 935 (1997) (explaining that when state sovereignty prevents the implementation of a federal regulatory scheme: “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program.”); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (delineating “the four essential freedoms” of a college or university, including who may teach, what may be taught, how it shall be taught, and who may be admitted to the college or university).

222. *See generally* *United States v. Lopez*, 514 U.S. 549 (1995).

223. *See id.*

224. *Id.* at 560–61.

225. *Id.* at 558–59.

regulate higher education under the *Lopez* framework. Under the first *Lopez* consideration, higher education is readily classifiable as economic or commercial.<sup>226</sup> Students are consumers of higher education, paying tuition in exchange for access to courses and other resources that will allow them to obtain a degree. Additionally, higher education institutions engage *directly* in interstate commerce through numerous activities such as out-of-state purchases, recruitment of students and faculty, and the manufacture of their “products”—the students they educate and release into the market.

Next, higher education activities fall under the “substantially affect” prong of the three types of allowable regulation.<sup>227</sup> As discussed previously, higher education inherently involves substantial economic and commercial activities that broadly impact the national economy.<sup>228</sup> Additionally, Supreme Court case law indicates that the movement of persons between states may be regulated as a class of activities that “substantially affect” interstate commerce.<sup>229</sup> Most higher education institutions cater to out-of-state students, faculty, and regular visitors to campus who participate in or reap the benefits of the institution, and activities that affect this movement may justifiably be subject to federal regulation. Thus, the *Lopez* framework indicates that Congress should have no difficulty identifying a rational basis for regulating higher education activity under the commerce clause authority.

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226. In fact, the *Lopez* court found that the “business” of elementary, middle, and high schools classifies as economic or commercial activity. *See id.* at 552. Courts have found that a diverse array of activity classifies as economic or commercial. *See, e.g.,* Hodel v. Virginia Surface Mining and Reclamation Ass’n, 452 U.S. 264 (1981) (intrastate coal mining); Perez v. United States, 402 U.S. 146 (1971) (intrastate extortionate credit transactions); Wickard v. Filburn, 317 U.S. 111 (1942) (consumption of homegrown wheat); United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997) (payment of child support).

227. For examples of activities that courts have found “substantially affect” interstate commerce, see *Gonzales v. Raich*, 545 U.S. 1 (2005) (home-grown marijuana); *United States v. Jeronimo-Bautista*, 425 F.3d 1266 (10th Cir. 2005) (local production of child pornography); *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000) (interfering with the operation of reproductive health clinics).

228. *See* Irena Macerinskiene & Birute Vaiksnoraitė, *The Role of Higher Education to Economic Development*, MANAGEMENT 2006 VOL. 2 (11) 82, 83, 88–89, available at [http://www.leidykla.eu/fileadmin/Vadyba/11/Irena\\_Macerinskiene\\_Birute\\_Vaiksnoraitė.pdf](http://www.leidykla.eu/fileadmin/Vadyba/11/Irena_Macerinskiene_Birute_Vaiksnoraitė.pdf) (arguing that “[a] competitive economy can only be based on a well-educated population” and citing studies showing that education has a significant impact on the availability of higher education).

229. An earlier line of cases addressing challenges to civil rights legislation suggested that racial discrimination in places such as restaurants and hotels substantially affected interstate commerce by inhibiting the free movement of persons among states. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress could find racial discrimination in restaurants that received a large amount of food served from out of state had a “direct and adverse effect” on interstate commerce); *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964) (holding the public accommodations provisions of the Civil Rights Act of 1964 to be valid under the Commerce Clause).

As discussed above, a common degree framework initiated through federal commerce power legislation could be achieved constitutionally. Furthermore, such legislation would promote the flow of interstate commerce in the United States. Inherent degree value created through universally-defined and understood student learning outcomes at each degree level has vast national economic development implications stemming from the expanded mobility opportunities that would result. Therefore, new federal legislation passed through the commerce power would offer an alternative to amending the HEA in order to implement a common degree framework.<sup>230</sup>

#### 4. The Role of Accrediting Associations in a Federal Approach

Under either an HEA amendment or freestanding federal legislation initiating a common degree framework, the accrediting agencies would function to assist and monitor the development of frameworks by institutions. The accrediting agencies might voluntarily amend their institutional review standards to align with the new condition placed upon federal higher education funding. However, in order to solidify the role of the accrediting agencies in the process, the Department of Education might need modestly expanded statutory authorization to direct accrediting agency activity.

As discussed previously, the Secretary of Education, as the chief federal officer presiding over higher education, recognizes accrediting agencies to ensure that they are fit to determine the quality of institutions and programs for purposes of federal programs under the HEA and elsewhere. Yet, the Secretary's existing statutory authority does not permit him or her to specify, define, or prescribe "the standards that accrediting agencies or associations shall use to assess any institution's success with respect to student achievement."<sup>231</sup> In order to facilitate the establishment of a common degree framework, the statutory recognition criteria codified in the Code of Federal Regulations would need to allow the Secretary of Education to have some control over the substance of the accrediting agencies' review standards.<sup>232</sup> With this authorization, the Secretary could advise accrediting agencies to look for the development of student learning outcomes in their reviews of institutions. The accrediting agencies would then reform their review standards to mandate the development of institutional frameworks aligning with a common degree framework.

A new federal legislative attempt to further regulate state education

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230. The political opposition such a bill would face renders its likelihood of passage very slim, as challengers would likely characterize the legislation as dramatic federal over-reaching in an area which has traditionally been relatively autonomous.

231. 20 U.S.C. § 1099b(g) (2008).

232. The criteria and procedures for accrediting agency recognition are listed at 34 C.F.R. § 602 (2009).

systems or individual institutions might be challenged as a subversion of state supremacy over higher education in violation of the Tenth Amendment, state sovereignty principles, and the institutional right to academic freedom.<sup>233</sup> In order to achieve a common degree framework through federal legislation, the authority for such legislation would need to preempt state and local power in the realm of higher education based on an explicit federal constitutional power, such as the spending power or the commerce power.<sup>234</sup> A common degree framework could legally be initiated by federal legislation through either the constitutional spending or commerce powers, but the collaborative, voluntary, and inclusive alternative initiated from within higher education previously described in Section B would be more attractive to most higher education stakeholders.

## V. CONCLUSION

American higher education is faced with many challenges. The system that has effectively educated millions and has advanced unparalleled innovation is now confronted with the need to dramatically increase the number of citizens with high-quality degrees. This challenge comes at a time when many students approach higher education inadequately prepared for its rigors. Meeting the challenge of increased degree attainment given the complexity of the system and the escalating costs of higher education will require creative thinking.

The United States is not the only country needing to increase higher education attainment levels, nor is it the only country looking at ways to improve and reform its higher education system. The Bologna Process is transforming higher education in Europe and beyond. This process provides the United States with an opportunity to learn from an effort to transform higher education and to use that information to reform our system to meet the needs of today's citizens.

To increase degree attainment and maintain quality, American higher education needs to develop a common degree framework that makes explicit what a student knows, understands, and is able to do at each degree level. It is important that the framework be national and transparent as to the mastery that is represented by each degree level. The United States

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233. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (explaining that when state sovereignty prevents the implementation of a federal regulatory scheme: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program."); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (delineating "the four essential freedoms" of a college or university, including who may teach, what may be taught, how it shall be taught, and who may be admitted to the college or university).

234. See *supra* Parts IV.D.1–3 (discussing enumerated federal constitutional powers).



needs to compete globally, and in order to do so effectively, it must prove that students—regardless of state or institution—will obtain a quality degree that employers will value. This framework will shift the focus from what is *taught* to what is *learned* and provides a mechanism for higher education to demonstrate to stakeholders—students, parents, employers, and policymakers—the value added of a degree. As new providers and programs surface to meet the increase in demand, stakeholders will be assured of the quality of these degrees. A common degree framework will ensure that all degrees represent actual learning.

American higher education has developed with little federal intervention, and this decentralized system has served the country and its citizens well. However, a need currently exists to change the status quo to significantly improve attainment levels and educational quality on a national scale. Development and implementation of a common degree framework is central to beginning a quality assurance effort, and a variety of ways exist in which that framework can be developed. In keeping with the current decentralized system, the most practical approach is for development to be voluntary. Under this voluntary approach, key leaders and stakeholders would develop the common degree framework and accreditors would build new quality assurance processes based on the framework. However, other implementation avenues exist should the voluntary approach prove unsuccessful. Higher education leaders might potentially look towards the states to develop uniform laws. Unfortunately, this process is long and has the potential to yield uncertain results. Ultimately if the voluntary approach fails, the federal government has the ability to enact legislation creating a common degree framework through either the Spending clause or the Commerce Clause.

The development of a common degree framework will not result in a standardization or homogenization of American higher education. Each institution and each program will retain total autonomy. However, a common degree framework *will* establish an agreed-upon core of learning principles for each degree awarded at a particular level and will provide a clear mechanism for defining quality. Further, the framework will allow for the creation of an innovative system that expands on work currently in progress, allowing students to accumulate learning from various education providers while continuing to pursue a high-quality degree.

American higher education has before it an invaluable opportunity—an opportunity to learn from what has been transforming higher education in other countries and to construct a system that will make possible the higher education system that is needed to sustain the United States in the future and allow it to thrive in a globally competitive society.

## APPENDIX A:

The effort to transform European higher education has been significant. Key milestones along the way to the development of the Bologna Process include:

*The Lisbon Recognition Convention, 1997.*<sup>1</sup> Twenty-nine countries agreed to a set of principles for mutual recognition of educational credentials from grade school to graduate school. This agreement is the only *legal* agreement that is part of the Bologna Process. The Convention was developed by the Council of Europe and UNESCO to facilitate mobility for persons and the recognition of their educational qualifications. The Convention agreed to use of the Diploma Supplement as the document that provides the specificity on what a degree represents—not just a listing of courses and grades. The Diploma Supplement is the main vehicle for recognition of educational credentials, as it has a standardized format and contains pertinent factual information. The United States signed the Convention Agreement on November 14, 1997, but has not ratified it. To date the Diploma Supplement is not used by U.S. institutions. This is the only legal instrument of the Bologna Process.

*The Sorbonne Declaration, 1998.*<sup>2</sup> Education ministers of France, Germany, Italy, and the United Kingdom agreed to design and lead a broad and cooperative reconstruction of basic terms of higher education to create a common European degree structure, to remove barriers to cross-border mobility, and to allow students to take advantage of the potential of the university systems throughout Europe. This meeting was the precursor to the creation of the Bologna Process.

*The Bologna Declaration, 1999.*<sup>3</sup> The education ministers from twenty-nine countries agreed to a process that would bring their higher education systems more transparency as to degree cycles, quality assurance practices,

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1. For the text of this convention and for a list of the countries and ratification dates, see Convention on the Recognition of Qualifications concerning Higher Education in the European Region, <http://conventions.coe.int/Treaty/en/Treaties/Html/165.htm> (last visited Apr. 1, 2010) and Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=1&DF=26/01/2010&CL=ENG> (last visited Apr. 1, 2010). See also European Higher Education Area, Participating Countries and Organisations, <http://www.ond.vlaanderen.be/hogeronderwijs/bologna/pcao/> (last visited Apr. 1, 2010).

2. Sorbonne Joint Declaration, Joint Declaration on Harmonisation of the Architecture of the European Higher Education System, [http://www.bologna-bergen2005.no/Docs/00-Main\\_doc/980525SORBONNE\\_DECLARATION.PDF](http://www.bologna-bergen2005.no/Docs/00-Main_doc/980525SORBONNE_DECLARATION.PDF) (last visited Apr. 1, 2010) [hereinafter Sorbonne Declaration].

3. The Bologna Declaration of 19 June 1999, Joint Declaration of the European Ministers of Education, [http://www.bologna-bergen2005.no/Docs/00-Main\\_doc/990719BOLOGNA\\_DECLARATION.PDF](http://www.bologna-bergen2005.no/Docs/00-Main_doc/990719BOLOGNA_DECLARATION.PDF) (last visited Apr. 1, 2010) [hereinafter Bologna Declaration].

and credit mechanisms so that students could move effortlessly throughout Europe. The goal was to create the European Higher Education Area, which would be attractive to students from all over the globe. The ministers planned for the Process to be fully implemented by 2010. However, it is for each signatory state to determine how it will implement the agreed action lines specified by the bi-annual ministerial conferences and the resulting communiqué (see Prague later). There is no over-arching legal authority; it has been said to be a “name and shame” approach through the use of self evaluation National Reports and the “Stocktaking” reports.

*The Lisbon Strategy, 2000.*<sup>4</sup> While not a part of the Bologna Process, the Lisbon Strategy is relevant to the higher education transformations occurring throughout Europe. The Strategy acknowledges that Europe will not be a world manufacturing leader, but instead must, to compete, be the most dynamic knowledge-based economy in the world. Higher education is critical to meeting this goal of truly becoming a knowledge-based economy.

*Prague, 2001.*<sup>5</sup> Beginning with this 2001 meeting in Prague, “communiqués” were published. At this meeting lifelong learning was added as a significant policy theme, and students were added to committees to allow them to actively participate in the Process.

*Berlin, 2003.*<sup>6</sup> The Berlin Communiqué established the qualifications frameworks at the national level and for the European Higher Education Area (EHEA) as core tools for the Process, and agreement was reached on the general construct of the European framework. A clear three-cycle degree structure—bachelor’s, master’s, and doctorate—was outlined. This links Bologna and the Lisbon Agenda as well as connects higher education to the European Union’s European Research Area that was launched in 2001.

*Bergen, 2005.*<sup>7</sup> This meeting added focus to the development and recognition of joint degrees and established as a priority the assessment and recognition of prior learning. Also, an additional policy strand was

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4. European Trade Union Confederation (ETUC), The European Union’s Lisbon Strategy, <http://www.etuc.org/a/652> (last visited Apr. 1, 2010).

5. Towards the European Higher Education Area, Communiqué of the meeting of European Ministers in charge of Higher Education (May 19, 2010), [http://www.bologna-bergen2005.no/Docs/00-Main\\_doc/010519PRAGUE\\_COMMUNIQUE.PDF](http://www.bologna-bergen2005.no/Docs/00-Main_doc/010519PRAGUE_COMMUNIQUE.PDF) (last visited Apr. 1, 2010).

6. Realising the European Higher Education Area, Communiqué of the Conference of Ministers responsible for Higher Education (Sept. 19, 2003), [http://www.bologna-bergen2005.no/Docs/00\\_Main\\_doc/030919Berlin\\_Communique.PDF](http://www.bologna-bergen2005.no/Docs/00_Main_doc/030919Berlin_Communique.PDF) (last visited Apr. 1, 2010).

7. The European Higher Education Area—Achieving the Goals, Communiqué of the Conference of European Ministers Responsible for Higher Education (May 19-20, 2005), [http://www.bologna-bergen2005.no/Docs/00-Main\\_doc/050520\\_Bergen\\_Communique.pdf](http://www.bologna-bergen2005.no/Docs/00-Main_doc/050520_Bergen_Communique.pdf) (last visited Apr. 1, 2010).

added—the “social dimension”—attracting disadvantaged students to higher education. Each country has its own definition of “disadvantaged student,” with the most common characteristics being geographically isolated students, students with disabilities, students from the working class, and immigrant students.

*London, 2007.*<sup>8</sup> The ministers agreed to enhance accreditation and quality assurance by supporting establishment of a register of quality assurance agencies.

*Leuven, 2009.*<sup>9</sup> The ministers agreed that there had been significant achievements in the areas of the three degree cycles, quality issues, qualification frameworks, and credits. In the immediate future, they agree that continued progress needs to be made in striving for excellence, the social dimension (access and widening participation), lifelong learning, and ensuring a student-centric approach. The importance of recognizing the student at the heart of higher education is a crucial facet of Bologna.

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8. European Higher Education in a Global Setting: A Strategy for the External Dimension of the Bologna Process, <http://www.ond.vlaanderen.be/Hogeronderwijs/bologna/documents/WGR2007/Strategy-for-EHEA-in-global-setting.pdf> (last visited Apr. 1, 2010).

9. The Bologna Process 2020—The European Higher Education Area in the new decade, Communiqué of the Conference of European Ministers Responsible for Higher Education (Apr. 28-29, 2009), [http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/Leuven\\_Louvain-la-Neuve\\_Communique\\_April\\_2009.pdf](http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/Leuven_Louvain-la-Neuve_Communique_April_2009.pdf) (last visited Apr. 1, 2010).

WHERE IN THE WORLD ARE YOUR  
EMPLOYEES? INSTITUTIONS AS GLOBAL  
EMPLOYERS:

EMPLOYMENT LAW CONSIDERATIONS IN THE  
AGE OF INTERNATIONAL PROGRAMS

KEVIN CRANMAN\* AND NATASHA BAKER\*\*

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### INTRODUCTION

Studying abroad has become an increasingly popular academic endeavor among United States college and university students. In the past decade, the number of American students studying internationally has more than doubled.<sup>1</sup> During the 2007–2008 academic year alone, more than 263,000 U.S. students studied abroad for credit.<sup>2</sup> Indeed, the educational importance of study abroad experience has been recognized by Congress, as demonstrated in the Senator Paul Simon Study Abroad Foundation Act of 2009.<sup>3</sup> As well, the popular press acknowledges the importance of such programs; in late 2007, the New York Times observed that “[f]or students,

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1. Press Release, Open Doors 2009, Americans Study Abroad in Increasing Numbers, Institute of International Education; <http://opendoors.iienetwork.org/?p=150651> (last visited Mar. 23, 2010).

2. *Id.*

3. As introduced in the Senate, the purposes of this Act are:

(1) to significantly enhance the global competitiveness and international knowledge base of the United States by ensuring that more United States students have the opportunity to acquire foreign language skills and international knowledge through significantly expanded study abroad;

(2) to enhance the foreign policy capacity of the United States by significantly expanding and diversifying the talent pool of individuals with non-traditional foreign language skills and cultural knowledge in the United States who are available for recruitment by United States foreign affairs agencies, legislative branch agencies, and nongovernmental organizations involved in foreign affairs activities;

(3) to ensure that an increasing portion of study abroad by United States students will take place in nontraditional study abroad destinations such as the People’s Republic of China, countries of the Middle East region, and developing countries; and

(4) to create greater cultural understanding of the United States by exposing foreign students and their families to United States students in countries that have not traditionally hosted large numbers of American students.

S. 473, 11th Cong. § 3 (2009).

international exposure . . . has become a must-have credential.”<sup>4</sup>

To keep up with the growing popularity of study abroad programs, U.S. institutions of higher education have been opening foreign campuses at a record rate.<sup>5</sup> For the purposes of this article, “foreign campus” means an educational institution (primarily higher education and/or higher education-based research) that is located outside the United States but is (i) owned by a U.S. institution and is recognized as part of that U.S. institution, and/or (ii) operated in conjunction with another institution of higher education. Establishing an academic program in another country is not a simple task, however, and should not be undertaken lightly. Opening a foreign campus requires negotiating a complex web of U.S. and foreign laws and regulations, cultural issues, and processes of often unfamiliar legal systems. Indeed, a variety of risks and challenges face those who make study-abroad programs available. Along with the usual day-to-day issues<sup>6</sup> of operating in

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4. Laura Pappano, *The Foreign Legions*, N.Y. TIMES ONLINE, Nov. 4, 2007, <http://www.nytimes.com/2007/11/04/education/edlife/studyabroad.html>. See also Kent Hoover, *U.S. Universities Expand Overseas Efforts to Keep Global Edge*, BUS. FIRST OF LOUISVILLE, Aug. 6, 2007, available at <http://bit.ly/9rnzvw>. Also noted by the press are unflattering situations regarding disputes with students and their institutions, often involving disputes over credit transfers and perks from vendors to colleges and universities (Diana Jean Schemo, *In Study Abroad, Gifts and Money for Universities*, N.Y. TIMES, Aug. 13, 2007, at A1, available at <http://nyti.ms/9dxv6w>), investigations into financial practices and management, including rebates, subsidized travel, and other value that may not be disclosed to students (Jonathan D. Glater, *Inquiry of Study Abroad Programs Grows*, N.Y. TIMES, Jan. 21, 2008, at A10 available at <http://bit.ly/aVm37q>), as well as claims by a graduate against her alma mater that the institution forced her to pay more tuition than her study-abroad program actually cost (Tamar Lewin, *Lawsuit Takes Aim at College's Billing Practices for Study Abroad*, N.Y. TIMES, Mar. 9, 2008, <http://nyti.ms/bbASLq>).

5. For further information and statistics on this growth, see DANIEL OBST, RAJKA BHANDARI, & SHARON WITHERELL, MEETING AMERICA'S GLOBAL EDUCATION CHALLENGE: CURRENT TRENDS IN U.S. STUDY ABROAD & THE IMPACT OF STRATEGIC DIVERSITY INITIATIVES, IIE Study Abroad White Paper Series (Issue 1, May 2007), available at [http://www.iienetwork.org/file\\_depot/0-10000000/0-10000/1710/folder/62450/IIE+Study+Abroad+White+Paper+I.pdf](http://www.iienetwork.org/file_depot/0-10000000/0-10000/1710/folder/62450/IIE+Study+Abroad+White+Paper+I.pdf). According to the authors:

IIE's study abroad directories (*IIE Passport: Academic Year Abroad* and *IIE Passport: Short-Term Study Abroad*) have provided U.S. students and advisors with study abroad program listings since 1950. The IIE Passport directories are the most comprehensive directories of study abroad programs for U.S. students. In 1986 the directories listed 2,005 programs. This number increased to 6,514 in 2006. This represents an increase of approximately 225 percent. During the same period, the number of U.S. students studying abroad increased by 327 percent. The most recent IIE Passport directories (2007 editions) include over 7,500 listings. These do not include the many campus-based initiatives open only to their students, nor the growing numbers of students enrolling directly in foreign university degree programs.

*Id.* at 7.

6. For example, tort issues, establishing contractual relationships, real estate matters, trade compliance (export control, trade sanctions), etc.

different countries, institutions must navigate a multitude of interrelated, overlapping labor provisions and other employment laws, regulations and workplace ordinances. An institution must not rush through this process simply to have a study abroad program as an angle for recruiting students, enhancing prestige, and attracting research investment. Rather, when opening a foreign campus or operating a study abroad program, institutions must carefully assess the applicable laws and regulations, particularly when sending American citizens to work abroad and when hiring foreign citizens (not to mention sending students who are U.S. citizens to such locations).<sup>7</sup> Many U.S. civil rights or non-discrimination statutes have extraterritorial reach and protect American citizens working abroad.<sup>8</sup> Starting with the Marcus Neff-J. H. Mitchell transactions that gave rise to *Pennoyer v. Neff*,<sup>9</sup> in his thorough and insightful article *The Extraterritorial Application of American Law: Preliminary Reflections*,<sup>10</sup> Professor John Robinson provides an impressively thorough review of the history, evolution, and current state of affairs with respect to the extraterritorial application<sup>11</sup> of American law. The foreign country in which your institution is operating a study abroad program may have complicated, or even counterintuitive, employment requirements for its citizens or for American workers in the jurisdiction.

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7. Indeed, many institutions partner with local entities for the purpose of ensuring compliance with foreign employment law requirements or for delegating employment-related responsibilities to a local entity with expertise. However, there are significant risks associated with this insofar as the institution then loses a measure of control over its staff.

8. Title VII of the Civil Rights Act of 1964, Pub. L. 89-554, 80 Stat. 378 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34 (2006); and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2006), provide protections for American citizens working outside the United States (in addition, of course, to the application of the laws inside the United States) for American companies or foreign employers controlled by a U.S. corporation. See *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3rd Cir. 1997), *cert. denied*, 522 U.S. 820 (1997).

9. 95 U.S. 714 (1878).

10. John H. Robinson, 27 J.C. & U.L. 187 (2000). Beginning with the dispute underlying the famed *Pennoyer* case and identifying the “flood of private international litigation” that will be created by the “vast increase in international business transactions characterized by the globalized economy,” *id.* at 203, Robinson sets out much to be considered as higher education transforms with, and as part of, our global economy. For additional information on the Neff-Mitchell and *Pennoyer*-Neff activities that gave rise to the famous civil procedure case, Prof. Robinson recommends Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH L. REV. 479 (1987).

11. See *id.* at 195–197 for a fine discussion of *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1991) (holding that there was no extraterritorial application, short of explicit Congressional authorization), and corresponding Congressional action in the Civil Rights Act of 1991 to address the limitations of *Aramco*.



Institutions opening a foreign campus or operating a study abroad program often realize the complexities of the labor and employment guidelines of other countries only after having decided to open a foreign campus, or after a problem arises. This article addresses many of the labor and employment legal implications of opening foreign campuses and sponsoring and staffing international programs.<sup>12</sup> Part I discusses the different types of arrangements that institutions utilize to develop study abroad programs for their students, including relationships with foreign institutions and establishing their own campuses abroad. Part II provides a methodology for determining which jurisdiction's (or, perhaps, jurisdictions') employment laws apply on a foreign campus. A comparison between U.S. employment laws and regulations and those of France (a popular study abroad choice for students attending U.S. colleges and universities) and the People's Republic of China (also an increasingly popular study abroad choice for students at U.S. colleges and universities, especially with its economic growth, the 2008 Summer Olympics in Beijing, and China's ongoing contributions to technology in Asia) is discussed in Part III. This article concludes that with a careful and strategic approach to opening and operating a foreign campus, U.S.-based institutions of higher education can reasonably manage risk, create more attractive programs, produce more efficient program management, and continue to grow and participate in global education and commerce.

#### I. THE INSTITUTION'S ROLE AS AN EMPLOYER

An institution's role as an employer varies in accordance with the type of study abroad program or foreign campus being operated. Administrators should consider their institution's ability to effectively manage the level of complexity associated with each type of arrangement.

The most basic arrangement is one in which an American institution partners with a foreign institution which, in turn, acts as host to American students. This arrangement is often called "direct enrollment," as it allows U.S. students to enroll directly in a foreign educational institution.<sup>13</sup> U.S. entities would do well to be mindful of their roles as good citizens and ambassadors of the United States, or at least, the higher education and research sector of the United States. As institutions of higher education maintain a presence abroad, they will interact with, conduct commerce in, and likely engage the services of governments and individuals in various

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12. This article does not address foreign entity formation, taxation, or immigration issues implicated when students and staff participate in study abroad programs. These issues require separate treatment and are beyond the scope of this article. In addition, one should also consider how foreign and domestic (both federal and state) welfare, social security, property, corporate/entity and other tax issues are implicated.

13. See, CIEE, Direct Enrollment and the Resident Advisor, <http://www.ciee.org/study/advisors/direct-enrollment.aspx> (last visited Apr. 16, 2010).

foreign countries. Considering how others perceive and receive the institution and its affiliates can help smooth the way for better relations between the colleges and universities and their partners abroad. A direct enrollment program does not generally require the American institution to send American employees abroad or to hire foreign citizens, although some program sponsors do hire student services and other personnel to assist their students when problems arise.

A more complex arrangement often occurs when an American institution operates a short term faculty-led educational program in a foreign country with its own staff or professors. Examples of this situation include a short term study abroad program or an inter-term trip led by one or more U.S.-based faculty. Because this arrangement requires the institution to have faculty or staff working abroad, this type of situation will often require an institution to review and analyze the extraterritorial reach of U.S. employment statutes, as well as the contractual rights or authority of the U.S.-based professors and staff on the program. If the American institution employs citizens of the country where the program is located, or of a third country (i.e., foreign nationals), in roles such as tour guides or professors, the foreign country's employment laws and regulations must also be followed with respect to those employees.

The most complex arrangement is one in which an American institution physically opens a foreign campus for student study abroad programs or research in that country. Because of the new campus's cross-border ties, establishing a foreign campus typically requires the American institution to adhere to certain U.S. employment laws and regulations (with respect to U.S. citizens it employs), as well as the laws of the jurisdiction of the international campus or research institution. Aside from local regulatory issues, institutions acting as employers abroad should also be aware of local market practices and local customs, both to avoid unnecessary disputes and to retain a qualified workforce.<sup>14</sup> Not paying sufficient

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14. For example, on the two-island nation of St. Kitts and Nevis in the West Indies:

The right to strike, while not specified by law, is well established and respected in practice. Restrictions on strikes by workers who provide essential services, such as the police and civil servants, were enforced by established practice and custom, but not by law. Foreign companies that recently opened reportedly discouraged workers from organizing . . . . The law provides for a 40- to 44-hour work week, but the common practice was 40 hours in five days. Although not required by law, workers receive at least one 24-hour rest period per week. The law provides for premium pay for work above the standard work week. There was no legal prohibition of excessive or compulsory overtime, although local custom dictated that a worker could not be forced to work overtime.

BUREAU OF DEMOC., LABOR, AND HUMAN RIGHTS, U.S. STATE DEPT., 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ST. KITTS AND NEVIS (Mar. 6, 2007),

attention to applicable regulations and local market practices can yield both legal disputes and a tarnished reputation. In turn, a tarnished reputation can impede the institution's ability to attract and hire qualified foreign employees, thereby rendering the institution's foreign campus inoperable (or, equally damaging, unable to generate sufficient operating revenue due to students' lack of interest in enrolling in a program with a public relations problem).

To further complicate matters, the applicability of employment laws may vary in accordance with the citizenship of the employee, thus precluding one-size-fits-all human resources policies. As well, the complex aspects of immigration law (both U.S. and foreign) need consideration for legal and practical reasons: nothing can ruin a program like having to cancel its events or classes because visas are not in place or an employee or contractor is barred from working in or returning to a country because of immigration-related problems.<sup>15</sup> Consequently, institutions of higher education acting as employers in foreign countries should periodically review each stage of the employment cycle—from their employment-related contracts and policies to specific employment practices and policies—to ensure not only compliance with all applicable laws, but also the successful management and retention of their employees.<sup>16</sup>

Despite the complexity of establishing a campus abroad or cooperative research arrangements, it is not impossible. In 2007 there were 7,500 study-abroad programs available for U.S. students.<sup>17</sup> As opening a foreign campus or research institution can be an invaluable benefit for an institution of higher education—often bringing with it an international footprint, increased prestige, broader networking, and global interaction and influence—the admittedly complicated intersection of American and foreign employment laws should not deter an institution from opening or operating such a program. Operating well-run study abroad programs allows institutions to act as “model” employers, who can effectively observe the labor laws, comply with tax requirements, and otherwise honor the local jurisdiction's employment laws. This allows for an improved

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available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78903.htm>.

15. As indicated *supra* note 12, this article does not address details regarding immigration issues, though such are relevant to travel and foreign work related activities.

16. For a general analysis of multi-jurisdictional employment issues, see Kevin Cranman & John F. Baum, *Ten Proactive Steps for the MultiJurisdictional Employer: A Global Approach to Your Employment Law Audit*, 25 ACC DOCKET 26, Mar. 2007. For examples of clauses and drafting for agreements for foreign employment engagement, see *Forming and Concluding Foreign Employment Relationships*, a presentation by John Briggs at the April 2007 NACUA meeting, available at <http://www.nacua.org/nacuanet/NACUAResourcePages/Docs/InternationalPrograms/BriggsOutline.pdf>.

17. OBST, BHANDARI, & WITHERALL, *supra* note 5, at 7.

perception of American institutions. In order to reap the benefits offered by international operations, an institution must approach such an arrangement from an educated standpoint, with full knowledge of the potential legal and liability risks and practical complications.<sup>18</sup>

In order to understand the full range of employment-related legal and liability issues, it is necessary to take an in-depth look at the arrangements that trigger extraterritorial application of American law or implicate the employment laws and regulations of the foreign jurisdiction involved.<sup>19</sup>

#### A. Study Abroad Programs: Which Laws Apply?

As previously noted, the applicable employment law may vary with the citizenship of the employee. For this reason, it is important to understand the sources of law that will govern the employee's terms and conditions of employment.

##### 1. U.S. Citizens

U.S. citizen employees, such as professors and administrators who are leading a study abroad program, remain subject to some U.S. employment laws and regulations while working abroad for their institution.<sup>20</sup> Their employment may also be governed by the express provisions of an employment contract, which, for clarity and good management practice, should address choice of law and choice of forum provisions, as discussed below.

Many federal employment statutes provide for extraterritorial application to ensure that U.S. citizens working abroad for U.S. employers receive the same benefits and rights that they would otherwise enjoy while

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18. See Susan Bradshaw, International Study, The University of Texas at Austin, *University Study Abroad Programs: A Guide to Faculty Liability Issues* (Apr. 19, 2002), available at <http://www.utexas.edu/internationalstudy/pdf/liabilityissues.pdf>, for a discussion on faculty liability issues in study abroad programs. See ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* (1999) for historical background and valuable information on tort liability with respect to colleges and universities.

19. Not addressed in this article, but extremely important, are issues regarding foreign entity formation. Some countries may require a local employment entity, so this type of planning is important. As well, related taxation implications, both in the foreign jurisdiction as well as in the United States, should be considered.

20. Although there is a "presumption against extraterritoriality," courts will often grant extraterritorial effect to federal statutes when evidence suggests that Congress intended the law to operate outside the United States. Timothy J. Darby, *Extraterritorial Application of U.S. Laws*, in 1B *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* at 34-4 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009).

working for that employer on U.S. soil.<sup>21</sup> For example, Title VII of the Civil Rights Act of 1964 prohibits certain types of employment discrimination.<sup>22</sup> In 1991, the U.S. Congress explicitly amended both Title VII and the employment provisions of the Americans with Disabilities Act to provide protection for U.S. citizens working abroad.<sup>23</sup>

Moreover, U.S. organizations that send U.S. employees abroad should also be aware of and guard against host country practices that might put the American employer at risk for liability under American equal employment opportunity laws. For example, a number of countries do not afford equal rights and opportunities to women in the same way that the U.S. does.<sup>24</sup>

Employers need to protect themselves from such liability by establishing clear policies and clear, accessible training programs and complaint procedures. Employers should also ensure that any complaint-reporting structure includes senior-level American employees, because employee complaints may stem, in part, from the cultural behavior or attitudes of host country employees. In addition, U.S.-based employers should periodically disseminate anti-discrimination and anti-harassment policies, provide employee and supervisor training, and audit both home territory and foreign workplaces on a regular basis to ensure that they comply with anti-harassment and discrimination laws.

## 2. Foreign Citizens

In general, the extraterritorial application of federal employment laws to U.S. citizens working for U.S. employers abroad does not apply to foreign nationals hired by the same employers operating abroad. For example, Title VII states that the prohibition on discrimination in employment based on race, color, religion, sex or national origin “shall not apply to an

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21. The U.S. Supreme Court held, in *Aramco*, 499 U.S. 244 (1991), that Congress has the authority to legislate employers of U.S. citizens who work outside the United States as long as Congress explicitly provides for the extraterritorial coverage in the statute.

22. 42 U.S.C. § 2000e-2(a) (2006) (“It shall be an unlawful employment practice for an employer . . . 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.”).

23. See e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1077–1978 (codified as amended at 42 U.S.C. § 12112 (2006)) (“If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under [Section 102 of the Americans with Disabilities Act of 1990] and is engaged in by such corporation shall be presumed to be engaged in by such employer.”).

24. For example, employment law in Saudi Arabia prohibits men and women from working together. LABOR AND WORKMEN LAW, art. 160, cl. 1 (1969), English translation available at [http://www.saudiembassy.net/about/country-information/laws/Labor\\_and\\_Workmen\\_Law-3of4.aspx](http://www.saudiembassy.net/about/country-information/laws/Labor_and_Workmen_Law-3of4.aspx).

employer with respect to the employment of aliens outside any [U.S.] State.”<sup>25</sup> Thus, a French national hired by a U.S. institution at its Paris, France, campus is not subject to U.S. employment laws, even though his or her employer is American. Instead, the law of the jurisdiction in which the institution is operating governs the terms and conditions of employment of foreign nationals in this area. As such, institutions must familiarize themselves with and comply with the employment laws, regulations, and customs in the foreign jurisdiction where they operate.<sup>26</sup> This obligation is best satisfied by consulting with local legal counsel in the country where the program is operating.<sup>27</sup>

An institution that employs foreign nationals for a study abroad program, at a foreign campus, or at a foreign research institute should have its employment policies and practices established or reviewed by legal counsel who has expertise in multi-jurisdictional employment issues and in managing an institution’s multi-jurisdictional workplace practices. In addition, institutions should engage local lawyers to educate themselves in regards to local market practices and particular legal traditions in the jurisdiction. In some places, cultural consultants may be helpful in advising on policies or plans to ease an employer’s (and an employee’s) transition to a new locale and its customs. Not only will the employer receive advice and comprehensive knowledge of the particular jurisdiction’s relevant laws, but implementing the consultant’s advice also can provide an extra layer of protection from exposure in a lawsuit by showing that the employer behaved reasonably (relying on expert advice), which may be especially important if there is an anti-American bias in the foreign locale. Communication between clients and lawyers for the purpose of obtaining legal advice may be covered by the attorney-client or legal professional privilege in certain jurisdictions and thus may be afforded protection from discovery in litigation in those jurisdictions.<sup>28</sup> Of course, it is necessary to determine the parameters of such privileges of the foreign jurisdiction in which the institution is operating in order to avoid misunderstandings and, perhaps, losing or minimizing the protection of the privilege; the privilege may even be waived by discussions or emails with or through colleagues in some jurisdictions.<sup>29</sup> In addition, institutions will

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25. 42 U.S.C. § 2000e-1 (2006).

26. For a focused discussion of how to effectively manage a multinational workforce, see Cranman & Blum, *supra* note 16.

27. See Cranman & Blum, *supra* note 16.

28. Joseph Pratt, Note, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company’s Confidential Information*, 20 NW J. INT’L L. & BUS. 145 (1999).

29. For example, the attorney-client privilege is not recognized for communications between in-house counsel and a corporate client in Austria, Belgium, France, Italy, Luxembourg, The Netherlands, and Sweden. The scope of the privilege is unclear in Denmark, Finland, Germany, Spain, and Switzerland. Mary C. Daley, *The*

also need to determine whether and to what extent their employment of third-party nationals (employees who are not U.S. citizens or citizens of the country in which the institution is operating) may impose additional obligations and requirements. Counsel should be consulted prior to engaging third-party nationals so as to ensure compliance with any potentially applicable laws or regulations.

### B. Resolving Disparity Between United States and Foreign Employment Laws

A key issue that confronts institutions of higher education at the outset of establishing an international program is determining what workplace standards to set for their employees in different locations. For example, does a U.S.-based institution want to establish a harassment policy that meets the minimum legal compliance standards of each particular country where it has a workforce? Or should an institution consider establishing a global policy that exceeds the highest standards of the law in any jurisdiction and raises the bar in doing global policy work? There are significant ramifications for each option.

#### 1. Different Standards in Each Jurisdiction

Establishing different workplace standards at different workplace locations may be difficult to enforce and logistically cumbersome because the institution has the burden of closely monitoring changes to the laws in each jurisdiction to ensure compliance. Different standards based on locale also present challenges in those cases where an employee from the home country is transferred abroad or transferred from one non-U.S. location to another. What impact would the employer's home territory employment laws have on those employees? Similarly, what impact does a multitude of different policies for each location have on those managers who supervise employees across several jurisdictions? For instance, under U.S. law an U.S.-based employer has a continuing obligation to protect its U.S. national employees against sexual harassment, even in countries where such protections are not afforded by local law.<sup>30</sup>

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*Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1103-04 (1997). See also Association of Corporate Counsel, *An Overview of the Legal Professional Privilege in EU Competition Investigations After the AKZO Judgment* (Oct. 4, 2007), available at <http://www.acc.com/advocacy/upload/accakzoimpact.pdf>, which reviews the Sept. 17, 2007 judgment of the European Court of First Instance of the Akzo Noble case. Also of interest may be Association of Corporate Counsel (ACC) support for, and other activities regarding, U.S. legislation to protect the attorney-client privilege in the corporate context, available at <http://www.acc.com>.

30. 42 U.S.C. § 2000e-1(b) (2000).

## 2. Standardized Policies

Whereas a more stringent standard set by a single global policy might be the answer to some of the challenges presented above, it also raises the bar in terms of the employer's obligations toward its employees in those jurisdictions where such protections (or protections at that level) are not offered or required by applicable law. One major criticism of standardized, one-size-fits-all, policies is that they do not recognize a particular workforce's unique cultural sensitivities or social conditioning. Institutions that choose to develop such policies must ensure that they are flexible enough to adapt to each jurisdiction's unique cultural climate.

### C. Contractual Provisions Governing the Terms and Conditions of Employment

#### 1. Choice of Law

A key issue for an institution operating in a foreign country is the choice of law under which disputes will be resolved.<sup>31</sup> Before any type of employment contract is prepared in any jurisdiction, an institution should decide its jurisdictional governing law. A properly drawn contract should contain a clause expressly stating which law governs in the event of a conflict so that all parties know which jurisdiction's law will be applied for interpretation and procedural administration when there are disputes. In most cases, parties may elect which law will apply to the interpretation and enforcement of their contracts.<sup>32</sup>

##### *a. Enforceability of Choice of Law Provisions Under U.S. Law*

United States courts generally uphold reasonable choice of law provisions in contracts.<sup>33</sup> In order to be deemed "reasonable," the choice of law specified should be one in which there is a clear relationship to either the institution, the employee, or the program.<sup>34</sup> The law chosen must

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31. For a discussion on the extraterritorial application of law, see Robinson, *supra* note 10.

32. See Martin Franzen, *Conflicts of Laws in Employment Contracts and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES*, (Roger Blanpain ed., 9th ed. 2007).

33. *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) ("But reasonable stipulations of choice of law are honored in contract cases, . . . and we do not see why the same principle should not apply in tort cases.") (citing RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 355-56 (2d ed. 1980)).

34. See *RESTATEMENT (SECOND) OF CONFLICTS* § 187(1) (1988) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice.").



be one in which a substantial portion of the making or performance of the contract occurs.<sup>35</sup> Though a boilerplate choice-of-law provision could be questioned by the courts because it was not bargained for by both parties, courts will generally enforce reasonable clauses that are part of standard form contracts.<sup>36</sup> An institution that establishes these parameters at the outset is less likely to have problems enforcing its rights under the contract if disputes arise.<sup>37</sup>

*b. Enforceability of Choice of Law Provisions under  
Foreign Law*

The enforceability of choice of law provisions in contracts with foreign employees will depend on the jurisdiction in which an institution is operating. For instance, the Rome Convention, which all member states of the European Union<sup>38</sup> have incorporated into their domestic legislation, expressly permits the parties to choose which governing law they wish to use.<sup>39</sup> The Convention provides that regardless of the choice of law, the employee must have at least the protection given by the law of the country in which he or she habitually performs his or her duties, “unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the law of the other country governs the contract.”<sup>40</sup>

As a general rule, if the institution hires employees with a strong local connection, most employers write the contract to contain a clause expressly stating that local law governs the contract; this adds clarity to the contract. If a particular country’s law is selected in a case where it clearly does not apply, such as a French employment contract that incorporates the laws of California, where the institution is located, the employer may trigger some antagonism from a local court called upon to interpret the contract.

## 2. Choice of Forum

Likewise, employment contracts entered into between an institution and nationals of a particular foreign country should contain a forum clause. Forum clauses contractually specify the forum in which a claim will be litigated. The choice of forum provision in the contract should state that

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35. *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 537 (Pa. Super. Ct. 1990).

36. *See, e.g., Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 54 (1995).

37. *See Vincent R. Johnson, Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309 (2006).

38. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Treaty of Rome].

39. Treaty of Rome, *supra* note 38, art. 6.

40. *Id.*

disputes shall be referred to a specific court of arbitration, such as the International Chamber of Commerce Court of Arbitration, the Inter-American Commercial Arbitration Commission, or the American Arbitration Association. Institutions may prefer to arbitrate employment disputes for a variety of reasons, including the perceived reduced expense of arbitration, the absence of a jury, and the ability through arbitration to keep matters out of the press or from becoming public record.

*a. Enforceability of Choice of Forum Provisions Under U.S. Law*

Under U.S. law, a choice of forum provision is generally enforceable as long as it does not place one of the parties at a substantial and unfair disadvantage or deny a party its day in court.<sup>41</sup> U.S. courts have upheld forum selection clauses:

[U]nless the party objecting to its enforcement establishes: (i) it is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.<sup>42</sup>

The reasonableness of a choice of forum provision for an employment contract between an employee (in this case, a faculty member, administrator, or staff member) and the institution would depend upon the location and citizenship of the parties at the time the claim is brought. For example, a forum clause requiring claims by an American professor, who may teach abroad occasionally but primarily resides in the United States, to be litigated in the U.S. state where the institution is located, where the professor resides, or where a substantial part of the contract is to be performed might be reasonable.<sup>43</sup> On the other hand, a provision requiring an American professor to litigate against a U.S. institution in a foreign country may be challenged, especially if the professor resides in a country far from the forum or in a country with an underdeveloped legal system.<sup>44</sup> These facts could render a forum so inconvenient as to deny the plaintiff a day in court.<sup>45</sup> When litigants live in different countries, however, one or the other will be disadvantaged by the choice of forum. In these circumstances, a provision that made the foreign locale of the employee the

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41. *Hadley v. Shaffer*, 2003 U.S. Dist. LEXIS 14106, at \*\*11–12 (D. Del. Aug. 12, 2003).

42. *Id.* at \*11.

43. *See Johnson*, *supra* note 37.

44. *Id.*

45. *Id.*

choice of forum in the contract might be considered reasonable.<sup>46</sup> In the context of business disputes, the United States Supreme Court has even upheld a neutral forum clause where neither party had a relationship to the forum.<sup>47</sup>

Before an institution incorporates a choice of law or choice of forum provision in an employment contract, the institution must conduct a specific comparison between American employment law and the law of the foreign jurisdiction in which it is operating a study abroad program. It should also consider the enforceability of such clauses in the relevant countries. As the comparison between American and French law below demonstrates, there can be significant differences that an institution must be aware of before selecting a jurisdiction for the forum clause.

## II. COMPARATIVE ANALYSIS OF EMPLOYER-INSTITUTIONS' OBLIGATIONS BY JURISDICTION

### A. Jurisdictions Selected for Comparison

To examine the obligations of an institution that is acting as a multi-jurisdictional employer, this article compares the major employment laws that are implicated when hiring American and French employees for a French study-abroad program. This comparison demonstrates the complex legal obligations that an institution faces when acting as a multi-jurisdictional employer. Both France and China offer an interesting comparison because their respective employment laws are quite complex and are significantly different from U.S. employment laws with respect to vacation, wages, and the use of employment contracts.<sup>48</sup> In addition, both France and China are consistently ranked as one of the top destinations for study-abroad students.<sup>49</sup>

#### 1. United States Federal Employment Laws

Federal employment laws in the United States are passed by Congress. As set forth below, there are various federal employment laws governing equal opportunity and non-discrimination, payment of wages, disabled employees, labor relations, and other terms and conditions of employment. The Equal Opportunity Employment Commission (EEOC) is charged with

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46. *Id.*

47. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

48. In France, labor law is governed by the French Labor Code (Code de Travail). In the People's Republic of China (PRC), the law is laid out in the Labor Code Law (LCL) and the Employment Promotion Law (EPL).

49. Institute of International Education, *Open Doors 2009 Fast Facts* (Nov. 16, 2009), [http://opendoors.iienetwork.org/file\\_depot/0-10000000/0-10000/3390/folder/78747/Fast+Facts+2009.pdf](http://opendoors.iienetwork.org/file_depot/0-10000000/0-10000/3390/folder/78747/Fast+Facts+2009.pdf). (France ranks 4th with 6.6% of all study abroad students traveling, while China ranks 5th with 5.0%).

promulgating regulations under Title VII of the Civil Rights Act of 1964,<sup>50</sup> the Equal Pay Act of 1963,<sup>51</sup> the Age Discrimination in Employment Act of 1967,<sup>52</sup> Title I and Title V of the Americans with Disabilities Act of 1990,<sup>53</sup> Sections 501 and 505 of the Rehabilitation Act of 1973,<sup>54</sup> and the Civil Rights Act of 1991.<sup>55</sup> The EEOC has five commissioners, each appointed for five-year, staggered terms. The President designates a Chair and a Vice Chair; the Chair is the chief executive officer of the Commission. The five-member Commission makes equal employment opportunity policy and decides whether to pursue litigation and whether and how to settle cases.<sup>56</sup>

Minimum wages and overtime pay are governed by the Fair Labor Standards Act, which is enforced by the U.S. Department of Labor.<sup>57</sup> The National Labor Relations Act governs labor relations and collective bargaining agreements. This federal act is enforced by the National Labor Relations Board.<sup>58</sup>

In addition to these federal employment laws, employment is also regulated via state employment codes, such as the California Labor Code. This article does not discuss the various state laws that govern an institution's employment relationship with its employees. Therefore, only the major federal employment laws will be contrasted with those of France and China.

## 2. France's National Employment Laws

French employment laws are passed by the French Parliament. Like the U.S., France has national employment laws that govern equal opportunity and non-discrimination, payment of wages, disabled employees, labor relations, and other terms and conditions of employment. They are completed by decrees, circulars, and other regulations adopted by the government to implement the laws. Most of these legal provisions are contained in the French Labor Code.<sup>59</sup>

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50. 42 U.S.C. §2000(a)-(h) (2006).

51. 29 U.S.C. §201 (2006).

52. 29 U.S.C. §§621-634 (2006).

53. 42 U.S.C. §§12101-12213 (2006).

54. 29 U.S.C. §§720-751, §§791-794e (2006).

55. 2 U.S.C. §601 (2006).

56. For general introductory material regarding the EEOC, see their website at [http://www.eeoc.gov/abouteeo/overview\\_laws.html](http://www.eeoc.gov/abouteeo/overview_laws.html).

57. 29 U.S.C. §204(a) (2006).

58. 29 U.S.C. §153(a) (2006).

59. The French Labor Code is formally known as *Code du Travail* (labor). An official English translation of the *Code du Travail* is available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072050&dateTexte=20100416>.

In addition, to the French Labor Code, employment in France is often governed by National Collective Bargaining Agreements.<sup>60</sup> These are agreements entered into between trade unions, on behalf of employees, and employers. In these agreements, the parties may define conditions of employment, probationary and notice periods, severance indemnities, working conditions, and the social benefits granted to the employees.

### 3. The People's Republic of China's National Employment Laws

The People's Republic of China (PRC) generally governs the employment of foreign workers through the Regulations on the Management and Employment of Foreigners in China (REMF) enacted on May 1, 1996.<sup>61</sup> The REMF states that "the labor administrations under the people's governments at the provincial, autonomous regional and municipal level, and those authorized at the prefectural level shall take charge of managing the employment of foreigners in China."<sup>62</sup> Further, the REMF states that employment contracts involving foreigners be issued in accordance with the governing laws—including the recently passed Employment Contract Law and the Employment Promotion Law.<sup>63</sup>

On January 1, 2008, the PRC enacted the Labor Contract Law (LCL).<sup>64</sup> Unlike controlling national employment laws in United States and France, the LCL itself does not specifically speak to issues concerning discrimination and equal opportunity for workers. Rather, the LCL's primary focus is on the "contract" between employers and workers.<sup>65</sup>

The LCL governs the "establishment of employment relationships . . . and the conclusion, performance, amendment, termination and ending of employment contracts."<sup>66</sup> The scope of the LCL does not extend to workers defined as civil servants or working personnel managed by the

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60. Salli A. Swartz, *Labor and Employment Law in France*, in INTERNATIONAL LABOR AND EMPLOYMENT LAW: A PRACTICAL GUIDE 65 (Phillip M. Berkowitz & Thomas Müller-Bonanni eds., 2006).

61. See Regulations on the Management and Employment of Foreigners (promulgated by the Ministry of Labor, et. al., Jan. 22, 1996, effective May 1, 1996) translated in [http://www.novexc.com/mang\\_employment\\_foriegn.html](http://www.novexc.com/mang_employment_foriegn.html) [*hereinafter* REMF].

62. See *id.* at art. 4.

63. See *id.* at art. 18.

64. It should be noted that, due to the relatively recent passage of the Labor Contract Law (LCL) and Employment Promotion Law (EPL), that some employment law in the PRC is unsettled.

65. Andreas Lanfss, *China in 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS* § 55-4 (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

66. See Labor Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2007, effective Jan. 1, 2008), art. 2, translated in [http://www.bjreview.com.cn/document/txt/2007-10/16/content\\_80896.htm](http://www.bjreview.com.cn/document/txt/2007-10/16/content_80896.htm). [*hereinafter* LCL].

PRC's Civil Servants Law. Significantly, the LCL requires negotiation between employer and employee (or his/her representative), stating that:

[e]mployers shall establish and improve labor rules and regulations, so as to ensure that workers enjoy their labor rights and perform their labor obligations. When an Employer formulates, revises or decides on rules and regulations or material matters concerning labor compensation, work hours, rest, leave, work safety and hygiene, insurance, benefits, employee training, work discipline or work quota management, etc. that have a direct bearing on the immediate interests of its workers, the same shall be discussed by the employee representative congress or all the employees.<sup>67</sup>

Issues of discrimination and equal opportunity are covered by the Employment Promotion Law (EPL), also effective as of January 1, 2008. The EPL articulates the PRC's view concerning the promotion of employment opportunities and the promotion of "social harmony and stability."<sup>68</sup>

## B. Comparison of Employment Issues By Subject Matter

In order to highlight the respective obligations imposed on employers by U.S. and French employment laws, it is important to compare apples with apples. The next section of the article compares specific substantive areas of employment law between the U.S. and France, such as the doctrine of at-will employment and the payment of wages.

### 1. The Doctrine of At-Will Employment

#### *a. United States*

In the United States, most employment relationships are at-will, as defined by state law.<sup>69</sup> At-will employment means that an employer may

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67. See *id.* Art. 4.

68. See Employment Promotion Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008), art. 1, translated in [http://www.baliprocess.net/files/China/China\\_employment%20promotion%20law\\_2008-eng.pdf](http://www.baliprocess.net/files/China/China_employment%20promotion%20law_2008-eng.pdf) [*hereinafter* EPL].

69. See 27 AM. JUR. 2D *Employment Relationship* §10 (2010) ("In fact, employment contracts are presumed to be at-will"). Workers may also be engaged as independent contractors. In the United States, whether a worker is actually an independent contractor is a fact-intensive issue that must be examined on a case-by-case basis. The applicable test may vary by federal law (e.g. the IRS 20 factor test, I.R.S. Rev. Rul. 87-41, 1987-1 C.B. 296) or state law (see, e.g., the multi-factor test posited in *S.G. Borello & Sons, Inc. v Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989)). Moreover, this relationship may vary in accordance with the foreign locale where an institution is operating. Institutions must exercise extreme caution when classifying workers as independent contractors and are advised to consult with

terminate an employee's employment at any time, with or without notice or cause.<sup>70</sup> Other than tenured faculty members, employees under written contract, and faculty members who are covered by a collective bargaining agreement, U.S. citizens who are working for a U.S.-based institution abroad will generally be employed at-will.<sup>71</sup> To the extent an institution wishes to establish the terms and conditions of employment for a U.S. citizen working abroad through the use of an employment contract, the institution must take care not to alter the at-will status of an American employee by the language of the contract, unless it specifically intends to do so. For example, in the case of an American citizen, the employee may be sent to work abroad for a semester. When drafting an employment contract for the semester, institutions must be careful to ensure that the contract does not guarantee employment for that semester. The contract may state the duration of potential employment (e.g. one semester), while reserving the right to discharge the employee at any time during the semester with or without cause.

*b. France*

In contrast to the United States, at-will employment is prohibited in France.<sup>72</sup> Instead, certain procedures must be followed before termination. In indefinite-term contracts, the French Labor Code and governing national collective bargaining agreements generally provide for a short trial period at the outset of employment, wherein either the employee or the employer can terminate the relationship for any reason.<sup>73</sup> After this trial period, any termination of the employment relationship requires notice.<sup>74</sup> The alternative to indefinite term contracts is fixed-term employment (an arrangement which is in the minority in France, and only permitted in certain statutory exceptions).<sup>75</sup>

There are two categories of dismissal under French Law, namely

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foreign counsel in order to determine whether such a classification is even permissible in the jurisdiction.

70. *Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56 (Cal. 2006).

71. Matthew W. Finkin, *United States*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS 33b-1 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) ("The legal context for individual employment relationships in the United States is provided by the historical common law doctrine of 'at-will employment.' This doctrine, enacted into statute in some jurisdictions, provides that, absent a contrary agreement between the parties, an employment contract for an indefinite period is terminable at the will of either party — with or without notice, and with or without cause.").

72. Swartz, *supra* note 6, at 66.

73. *Id.*

74. *Id.* at 68

75. *Id.* at 69.

dismissal for a personal reason and dismissal for an economic reason.<sup>76</sup> In both cases, there must be a real and serious ground and in case of litigation, written evidence will need to be disclosed.<sup>77</sup> The burden of proof lies with the employer.<sup>78</sup>

*c. China*

The PRC, unlike the U.S, does not recognize at-will employment. To the contrary, the LCL established certain measures that must occur prior to the termination of an employee.<sup>79</sup> The LCL requires all employment contracts, no matter their specific type, to contain certain information. The contracts *must* state the following:

- the name, domicile, and legal representative or main person in charge of the employer
- the name domicile and . . . other valid papers of the worker
- the term of the employment contract
- the job description and the place of work
- working hours, rest, and leave
- labor compensation
- social insurance
- labor protection and working conditions
- all other matters which laws and statutes require to be included in employment contracts.<sup>80</sup>

In the event that the employment contract fails to contain one of the necessary elements, the labor administration authority is authorized to require the inclusion of the missing term. If the failure to include a required term causes harm to the employee, the employer may be liable for damages.<sup>81</sup> Further, Article 12 of the LCL enumerates the three types of permitted employment contracts: fixed term, open-ended, and contracts that expire upon completion of a certain job.<sup>82</sup> A “fixed-term” employment contract is one where the concluding date of employment is established and agreed upon by the employer and worker.<sup>83</sup> An “open-ended” employment contract is a contract where the employer and worker have agreed that the

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76. Frederique Sauvage, *France*, in 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 4-16, 4-17 (William L. Keller & Timothy J. Darby, eds., 3d ed. BNA 2009).

77. *Id.*

78. *Id.*

79. See Labor Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2007, effective Jan. 1, 2008), art. 39, translated in [http://www.bjreview.com.cn/document/txt/2007-10/16/content\\_80896.htm](http://www.bjreview.com.cn/document/txt/2007-10/16/content_80896.htm).

80. See LCL, *supra* note 66, at art. 17.

81. See LCL, *supra* note 66, at art. 81.

82. See LCL, *supra* note 66, at art. 12.

83. See LCL, *supra* note 66, at art. 13.



contract does not have a definite date of conclusion.<sup>84</sup> The contract may be concluded when the employer and worker negotiate a consensus as to the conclusion date.<sup>85</sup> The LCL also permits contracts which “expire upon the completion of a certain job.”<sup>86</sup> Finally, the REMF mandates that an employment contract not exceed a term of five years, although the contract can be renewed upon completion of relevant provisions of the REMF<sup>87</sup>.

## 2. Discrimination & Harassment in Employment

### *a. United States*

The United States has three federal statutes that prohibit discrimination in employment: Title VII,<sup>88</sup> the Americans with Disabilities Act,<sup>89</sup> and the Age Discrimination in Employment Act.<sup>90</sup> Each of these statutes explicitly provides for extraterritorial application to American citizens working abroad.<sup>91</sup>

84. See LCL, *supra* note 66, at art. 14.

85. *Id.*

86. See LCL, *supra* note 66, at art. 15.

87. See REMF, *supra* note 61, at art. 18–19.

88. 42 U.S.C.A. §§ 2000e–2000e-17. (Title VII of the Civil Rights Act of 1964). Section 2000e-2, (a) provides that:

[I]t shall be an unlawful employment practice for an employer 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.

89. The Americans with Disabilities Act (ADA) provides that no covered employer “shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (2006).

90. The ADA provides:

It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

(2) to limit, segregate, or classify his employees 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 age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. §§ 623(a)(1)-(3)

91. The definition of “employee” under Title VII of the Civil Rights Act of 1964 was specifically amended by the Civil Rights Act of 1991 to state that “with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.” 42 U.S.C. § 2000e(f) (2006). The definition of “employee” under the ADA was specifically amended by the Civil Rights Act of 1991 to state that “with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.” 42 U.S.C. § 12111, as amended on Nov. 21, 1991, P.L.

*b. France*

French law prohibits discrimination on the basis of national origin, union membership, religion, sex, ethnicity, race, handicapped status, morals, pregnancy, age, surname, physical appearance, sexual orientation, or family situation.<sup>92</sup> Discrimination with regard to the payment of wages based on gender is also specifically prohibited by law.<sup>93</sup> In France, sexual harassment is both a criminal and civil offense;<sup>94</sup> a claim of sexual harassment may be asserted only when a person uses his or her position of authority to coerce a subordinate into having sexual relations.

*c. China*

The LCL does not contain any specific references to prohibitions against discrimination of any sort. The PRC's anti-discrimination law—the Employment Promotion Law—governs this area.<sup>95</sup> The EPL generally declares that all employment units, “in recruiting new employees . . . shall provide workers with equal employment opportunities and equitable conditions of employment, and shall avoid discriminatory employment practices.<sup>96</sup> The EPL enumerates specific groups of people that are singularly protected, including women,<sup>97</sup> workers of all ethnic groups,<sup>98</sup> “handicapped persons,<sup>99</sup> and rural workers.<sup>100</sup>

*d. Applying American Discrimination Law in a Foreign Country*

Institutions of higher education that employ Americans working overseas face a difficult task. On the one hand, they must diligently apply U.S. equal employment opportunity laws. On the other hand, depending on the requirements of the foreign country, they must also navigate and apply the foreign employment laws. For instance, the application of U.S. equal

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102-166, Title I, § 109(a), 105 Stat. 1077.)

92. C. TRAV. art. L. 122–45.

93. Law No. 83-635 of July 13, 1983, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1983, p. 2176.

94. Code Pénal, art. 222–23 states:

The act of harassing another by using orders, threats, constraint, or serious pressure in the goal of obtaining sexual favors, by someone abusing the authority conferred by its position, is punished by [a maximum of] one year of imprisonment” and a maximum fine of 100,000 francs.

95. See EPL, *supra* note 68, at art. 25.

96. See *id.* at art. 26.

97. See *id.* at art. 27 (The protection against discrimination does not extend to “certain types of work or positions designated by the state as unsafe for women.”).

98. See *id.* at art. 28.

99. See *id.* at art. 29.

100. See *id.* at art. 31.

opportunity law abroad must not cause the employer to “violate the law of the foreign country where the workplace is located” (the “foreign laws defense”).<sup>101</sup> However, the EEOC has narrowly circumscribed the foreign laws defense by mandating that the “foreign laws” in question must be statutes that have been enacted by a foreign government and not merely local custom.<sup>102</sup> The EEOC does not consider foreign practices and customs to be a valid basis for asserting the defense, even if those practices are legally binding.<sup>103</sup> As a result, institutions need to navigate these situations carefully, as the local custom and U.S. law may dictate two different approaches. To further complicate matters, there may be no applicable local statute. Additionally, to claim this defense employers must prove that compliance with both the foreign law and the U.S. non-discrimination law is impossible—that is, the employer must have tried using all possible means and failed to avoid a conflict between the foreign and U.S. laws.<sup>104</sup>

American institutions that send U.S. employees abroad should also be aware of and guard against host country practices that might put the American employer at risk for liability under American equal employment opportunity laws. As discussed earlier, employers should insulate themselves from liability at the outset by establishing and enforcing clear

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101. 29 U.S.C. § 623(a) (2006). See also U.S. Equal Employment Opportunity Commission, *Employee Rights When Working for Multinational Employers*, April 28, 2003, <http://www.eeoc.gov/facts/multi-employees.html>. See also Thomas Wang, Mahoney v. RFE/RFL – An Unexpected Direction for the Foreign Laws Defense, 30 VAND. J. TRANSNAT'L L. 379 (1997). See generally Gentry Locke Rakes & Moore LLP, *Application of U.S. Employment Laws to Workers Abroad*, Nov. 21 2006, <http://www.gentrylocke.com/showarticle.aspx?Show=242> (discussing FLSA, EPA, Title VII, ADA, ADEA, FMLA); David A. Lowe, *Sources of Legal Protection for American Workers Overseas*, 26 EMP. DISCRIMINATION REP. 14 (BNA Apr. 5, 2006).

102. Equal Employment Opportunity Commission, Policy Guidance: Analysis of the Sec. 4(f)(1) “Foreign Laws” Defense of the Age Discrimination in Employment Act of 1967, 2 EEOC COMPLIANCE MANUAL (CCH), p 2165 (Mar. 3, 1989), available at <http://www.eeoc.gov/policy/docs/foreignlaws-adea.html>.

103. *Id.* (“This element of the defense establishes that the “foreign laws” defense is available *only if* compliance with the ADEA would cause an employer to violate the laws of a foreign country at the situs of the workplace.”) (emphasis added).

104. The scope of the application of the “foreign law” defense is still somewhat unsettled. The EEOC’s restrictive interpretation of the foreign law defense was not followed by the D.C. Circuit in *Mahoney v. RFE/RL, Inc.*, which found that an American employer doing business in Germany did not violate the ADEA by following a mandatory retirement provision contained in a labor agreement that required employees to retire at age 65. *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995). The court determined that the collective bargaining agreement was a foreign “law” because it was legally binding. *Id.* at 450. However, in *Abrams v. Baylor College of Medicine*, the court held that excluding American Jews from rotation to Saudi Arabian destinations because of the perceived difficulty in obtaining visas for Jews due to the history of hostility between Jews and Arabs violated Title VII. *Abrams v. Baylor Coll. of Med.*, 581 F.Supp. 1570, 1579 (S.D. Tex. 1984).

and accessible complaint policies and procedures, and by taking the steps necessary to ensure that they are in compliance with applicable laws prohibiting discrimination and harassment.

### 3. Compensation & Benefits

Compensation, pay, or wage and hour issues are extremely rule-ridden and complex. Many jurisdictions have overlapping laws within them—such as the United States, where an institution of higher education must master two sets of laws: the individual state law and federal law. The complexity increases when an institution operates a study abroad program or a foreign campus, as the institution must also navigate the wage and hour laws of the foreign jurisdiction. A comparison of the relevant U.S. and French laws highlights this complexity.

#### *a. Minimum Wages*

##### *i. United States*

The federal Fair Labor Standards Act (FLSA) requires U.S. employers to pay employees a minimum wage of \$7.25 per hour.<sup>105</sup> Minimum wage requirements also are regulated by state<sup>106</sup> and local law.<sup>107</sup> The FLSA does not have extraterritorial application.<sup>108</sup> Thus, institutions of higher education do not have to comply with American federal, state, or city minimum wage laws when operating a foreign campus. However, the institution must take into account the wage laws of the jurisdiction in which it is operating a foreign campus. In addition, an institution must consider the effect that differential rates of pay for the same job will have on the

105. Fair Minimum Wage Act of 2007, 29 U.S.C. § 206 (2009).

106. For example, the 2008 minimum wage in California was \$8.00 per hour. Cal. Lab. Code § 1182.12 (Deering 2009). Since California's current law requires a higher minimum wage rate than does the federal law, all employers in California who are subject to both laws must pay the state minimum wage rate unless their employees are exempt under California law. California Department of Industrial Relations: Frequently Asked Questions, [http://www.dir.ca.gov/dlse/FAQ\\_MinimumWage.htm](http://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm) (last visited Dec. 18, 2009).

107. Effective January 1, 2008, the City of San Francisco's minimum wage rate was \$9.36 per hour. One year later, it was raised to \$9.79 per hour. S.F., CAL., ADMIN. CODE. § 12R.4 (2009).

108. 29 U.S.C. § 213(f) (2006). The FLSA exempts from coverage "any employee whose services during the workweek are performed in a workplace within a foreign country." *Id.* Legislative history indicates that Congress intentionally excluded U.S. workers employed abroad from coverage under the FLSA. *Torrico v. IBM*, 213 F. Supp. 2d 390, 398 (S.D.N.Y. 2002) (noting that the statute's legislative history "indicates that Congress concluded that application of the FLSA to foreign countries is usually inconsistent with local conditions of employment, the level of the local economy, the productivity and skills of indigenous workers, and is contrary to the best interest of the United States and the foreign areas.").

morale of its employees. For example, an American employee who earns minimum wage while working at a U.S.-based campus would probably not accept a job at the institution's foreign campus if the foreign jurisdiction's lower minimum wage is offered.

#### ii. France

The Salaire Minimum Interprofessionnel de Croissance, or SMIC, regulates minimum wage rates in France, which vary depending on the age of the employee.<sup>109</sup> The minimum wage is set annually in July. As of December 17, 2009, the minimum wage in France was 8.86 Euros per hour.<sup>110</sup> This translated to a minimum wage of \$11.83 per hour as of March 26, 2010.<sup>111</sup> An institution planning to operate in France must take into consideration the increased operating expenses that it will incur in order to comply with the local minimum wage requirements.

#### iii. China

In 2004, the PRC's Ministry of Labor and Social Security enacted a special regulation on minimum wage.<sup>112</sup> The regulation, which took effect March 1, 2004, divided wages into two types, one monthly and the other hourly, respectively applying to full-time and non-full-time workers.<sup>113</sup> The monthly minimum wage should take into account factors such as a worker and his dependents' minimum living cost, the urban resident consumption price index, social security and housing accumulation fund fees, average salary, economic development level, and employment situation.

The hourly minimum wage should take into account the local monthly minimum wage, retirement pension and medical insurance fees, working conditions and intensity, work stability, and welfare of non-part-time workers, according to the regulation.<sup>114</sup>

Different standards between areas within a single province, municipality, or autonomous region are allowed.<sup>115</sup> Provincial-level labor and social

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109. Sauvage, *supra* note 76, at 4-72.

110. National Institute for the Study of Economic Statistics, Minimum Wage (SMIC) Data, [http://www.insee.fr/fr/themes/tableau.asp?ref\\_id=NATnon04145&reg\\_id=0](http://www.insee.fr/fr/themes/tableau.asp?ref_id=NATnon04145&reg_id=0) (last visited Mar. 26, 2010).

111. American Express Travel Currency Converter, <http://corp.americanexpress.com/gcs/travel/us/corp/ctn/resources/currency.aspx> (last visited Mar. 26, 2010).

112. Provisions on Minimum Wages (promulgated by the Ministry of Labor and Social Security, Dec. 30, 2003, effective March 1, 2004) *translated in* <http://www.asianlii.org/cn/legis/cen/laws/pomw308/>. [*hereinafter* PMW].

113. PMW at art. 5.

114. PMW, *supra* note 112, at art. 6.

115. PMW, *supra* note 112, at art. 7.

security authorities are responsible for setting and adjusting the minimum wage standard, deciding its application, and related explanations. The authority should consult local trade unions, enterprise unions, or entrepreneur associations when setting the minimum wage standard and report it to the labor ministry, according to the regulation.<sup>116</sup> However, employers are not permitted to pay the foreigners they employ wages lower than the local minimum wage standards.<sup>117</sup>

### *b. Overtime Wages*

In addition to complying with the minimum wage laws, an institution must comply with the overtime laws of the jurisdiction in which it is operating a foreign campus. This is a very complex area of law and institutions are advised to consult with local counsel regarding the specifics of their jurisdiction. Part of the complexity arises from the various definitions of “overtime” used in each jurisdiction. As demonstrated below, there is a significant difference between the definitions of overtime under U.S., French, and Chinese law. This difference can translate into increased operating costs and can even impact the schedule and structure of an institution’s study-abroad courses.

#### *i. United States*

In the United States, the FLSA governs the payment of overtime wages.<sup>118</sup> Under the FLSA, covered nonexempt workers must receive overtime pay at a rate of not less than one and one-half times their regular rates of pay after forty hours of work in a work week.<sup>119</sup> State law also governs overtime compensation and may impose additional obligations on an employer. As set forth above, the FLSA is not subject to extraterritorial application.<sup>120</sup> Thus, regardless of the employee’s citizenship, an institution is not required to comply with U.S. federal or state overtime laws when compensating employees who are working in a foreign country.

#### *ii. France*

Overtime is not only governed by French laws and regulations; local customs and practices, as well as the culture of the local area, also dictate overtime pay. For example, under French law, many overlapping statutes regulate the duration of work by establishing limits on working hours. Several laws and regulations establish daily, weekly, and yearly maximums

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116. PMW, *supra* note 112, at art. 4.

117. See REMF, *supra* note 61 at art. 22.

118. 29 U.S.C. § 207 (2006).

119. 29 U.S.C. § 207(a)(1) (2006).

120. See Darby, *supra* note 20, at 34–82.

for work.<sup>121</sup>

No employee can be required to work more than six days per week so that all employees receive at least one day of rest per week.<sup>122</sup> This rest day is usually granted on Sundays. However, it may be granted on another day if the employer obtains specific authority from the French Labor Inspector, or if the employer is engaged in certain, identified activities.<sup>123</sup> If neither of these exceptions apply, an employer may be liable for criminal sanctions if its employees work on Sundays.<sup>124</sup> In most collective bargaining agreements, specific premiums are payable to the employees who work on Sunday.<sup>125</sup>

French law provides that no employee may work more than ten hours per day, as set forth in the European Union (EU) Working Time Directive (Directive).<sup>126</sup> It also provides that the working day of the employee may not be made up of more than two parts, and that any employee must have at least 11 hours per 24-hour day to rest.<sup>127</sup> This means that the 10 hours of effective work must be distributed over a 13 hour period each day.<sup>128</sup>

In accordance with EU texts, French law also provides that no employee may work more than 48 hours a week,<sup>129</sup> with an average working time of 44 hours a week over a period of 12 weeks, which can be increased up to 46 hours if an extended collective bargaining agreement applicable to the company so provides.<sup>130</sup>

On January 1, 2000, France mandated that the legal work week be capped at 35 hours.<sup>131</sup> This figure is not a maximum but is a threshold beyond which any time over 35 hours per week counts as compensable overtime.<sup>132</sup> Employers who breach the working time provisions may be subject to criminal sanctions.<sup>133</sup> Thus, the employer and/or the supervisor of the institution's French campus could be personally subject to criminal

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121. See, e.g. C. TRAV. art. L 3121-11 (regulating annual quota of overtime); C. TRAV. art. L 3121-10 (regulating weekly working hours); C. TRAV. art. L 3121-34 (regulating working hours per day).

122. Sauvage, *supra* note 76, at 4-74.

123. Swartz, *supra* note 60, at 68.

124. Sauvage, *supra* note 76, at 4-78.

125. *Id.* See C. TRAV., art. L 221-4. .

126. Council Directive 200/34, art. 17(b), 2000 O.J. (L 195) (EC) (amending Council Directive 93/104, 1993 O.J. (L 207) (EC)). See also Sauvage, *supra* note 76, at 4-78.

127. Council Directive 200/34, art. 17(b), 2000 O.J. (L 195) (EC) (amending Council Directive 93/104, 1993 O.J. (L 207) (EC)).

128. *Id.*

129. *Id.*

130. *Id.*

131. C. TRAV. art. L 212-1; Sauvage, *supra* note 76, at 4-74.

132. C. TRAV. art. L 212-5; Sauvage, *supra* note 76, at 4-76.

133. C. TRAV. art. L 212-10.

sanctions.

### iii. China

Article 17 of the LCL, which enumerates the required elements of an employment contract, addresses the issue of overtime.<sup>134</sup> Article 17 clearly contemplates that “working hours” and “labor compensation” shall be set forth in the contract. Article 30 is more specific in focus stating that “overtime pay [shall be made] in accordance with relevant state regulations.”<sup>135</sup> Further, employers may not compel workers to work overtime.<sup>136</sup>

If an employer fails to comply with the governing laws, the LCL allows for the individual worker to apply to their local People’s Court for a remedy.<sup>137</sup> The remedy consists of the issuance of an order to pay made by the governing Court. An employer can also be compelled, in the event they fail to properly compensate for overtime labor (or labor generally) or “arranges overtime without paying overtime” compensation, to pay the outstanding amount within a time specified by the labor administration authority.<sup>138</sup> If the employer fails to pay the amount within the specified time period, they are subject to a levy of damages that, at a minimum, consists of fifty percent of the amount payable and, at a maximum, one hundred percent of the amount payable.<sup>139</sup>

Formerly, the Labor Law of the People’s Republic of China, which is superseded by the LCL, specified that

[a]n employer shall pay the workers’ wages at a rate higher than that for normal working hours according to the following standards in one of the following cases: (1) To pay no less than 150 percent of the usual wage for working overtime; (2) To pay 200 percent of the usual wage for work during rest days if the rest could not be delayed to another time; (3) To pay 300 percent of the usual wage for working in statutory holidays.<sup>140</sup>

The recently enacted LCL does not contain specifics as to compensation since this is determined by the local rates.<sup>141</sup>

## 4. Privacy Related Issues and Obligations

Institutions must weigh carefully some of the privacy requirements

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134. See LCL, *supra* note 66, at art. 17.

135. See LCL, *supra* note 66, at art. 30.

136. *Id.*

137. *Id.*

138. See LCL, *supra* note 66, at art. 86.

139. *Id.*

140. See LCL, *supra* note 66, at art. 44.

141. See LCL, *supra* note 66, at art. 55.



imposed by different countries.<sup>142</sup> Privacy laws in certain jurisdictions, for instance, can significantly constrain the type of information to which an employer can have access or how one who has such information must treat it. For instance, significant differences exist between and among the U.S.,<sup>143</sup> Europe (with its European Union (EU) Data Protection Directive)<sup>144</sup>, and Asia<sup>145</sup> with respect to approaches to privacy.<sup>146</sup> Europeans have strong data protection legislation that punishes abusers,<sup>147</sup>

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142. For perspective on privacy and technology with respect to higher education, see Kevin A. Cranman, *Privacy and Technology: Counseling Institutions of Higher Education*, 25 J. C. & U.L. 69 (1998).

143. Note that there are laws at the federal level that address, in part, privacy issues or have application to privacy issues. See, e.g., The Family Education Rights and Privacy Act of 1974 (FERPA; also often known as the Buckley Amendment), 20 U.S.C. § 1232g (2006) (specific focus on educational records); The Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 (2006); The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006); The Economic Espionage Act of 1996 (EEA) (providing for criminal penalties for misuse of trade secrets of others), 18 U.S.C. § 1831 (2006). Tort law considerations on public disclosure of private facts will also be relevant (see, e.g., RESTATEMENT (SECOND) OF TORTS § 652(D) (cmt. D)). Finally, institutions should consider export control and compliance laws (see, e.g., Export Administration Act of 1979, 50 U.S.C. § 2401 (2006), Commerce Department Export Controls, <http://www.bis.doc.gov/licensing/exportingbasics.htm> (last visited Mar. 26, 2010); Export Administration Regulations (EAR) Database, [http://www.access.gpo.gov/bis/ear/ear\\_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html) (last visited Mar. 26, 2010); Department of the Treasury – Office of Foreign Assets Control (OFAC), <http://www.ustreas.gov/offices/enforcement/ofac/> (last visited Dec. 18, 2009).

144. Commission Directive 1995/51, 1994 O.J. (L 256) 49 (EC). Cf. Data Protection Act, 1998, c. 29 (Eng.).

145. Although China has some legislation that purports to address the protection of employee information (e.g., Art. 23 of Labor Contract Law of China, regarding the ability to include confidentiality provisions in labor agreements), China does not have what one might call a sophisticated infrastructure for the protection of information and data. See Bridget Treacy & Martin Abrams, *A Privacy Law for China*, COMPLINET, May 29, 2008, available at [http://www.hunton.com/files/tbl\\_s47Details/FileUpload265/2269/privacy\\_law\\_for\\_China.pdf](http://www.hunton.com/files/tbl_s47Details/FileUpload265/2269/privacy_law_for_China.pdf) (last visited Dec. 19, 2009) (noting that privacy will be added to the 5-year legislative plan in China in 2009, but little expectation for action in the near term). Treacy and Abrams report they understood that China was no longer planning to implement a privacy approach based on European law, because such was “seen as not being compatible with the type of entrepreneurial economy the Chinese desire.” *Id.*

146. For more on data protection, see Association of Corporate Counsel: The In-House Counsel Bar Association, InfoPAK, Data Protection – A Practical Guide to Personal Data Transfer Laws in Asia/Pacific Region, Canada, Europe, and the U.S., <http://www.acc.com/legalresources/resource.cfm?show=19659> (last visited Oct. 7, 2009).

147. For information (in a variety of languages) on EU Directive 95/46/EC (protection of individuals with regard to the processing of personal data on the free movement of such data), Directive 2002/58/EC (privacy and electronic communications), and retention of data generated or processed with the provision of publicly available electronic communications services or of public communications networks), see Privacy Law Index, [http://ec.europa.eu/justice\\_home/fsj/privacy/law/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/law/index_en.htm).

while U.S. law is not as protective. For example, the EU Directive requires that data controllers (a person or an entity that determines the purposes and means of processing personal data) must process and protect data according to specific rules.<sup>148</sup> Of particular interest is the sixth rule: “[d]ata that identifies individuals must not be kept longer than necessary.”<sup>149</sup> While that statement may make sense on its face, the complexities of information technology systems and automatic back-ups of databases may make such directives administratively or technologically difficult and expensive. Institutions will need to consider how to segregate, manage, use, protect, and then destroy information.

Seemingly simple steps like emailing payroll data to another office may violate privacy laws of certain territories. For example, the EU Data Protection Directive restricts data transfers to countries outside the EU which are not deemed to have an “adequate level of data protection.”<sup>150</sup> As well, data controllers “are required to inform you whenever they collect personal data about you, unless you have been previously informed.”<sup>151</sup> The foregoing notice process may, on its face, make sense, but it will require complex administrative and technological systems and processes. Indeed, the requirement seems similar to the U.S. requirement that health care providers, like pharmacies, notify patients and customers of the entity’s privacy policy and have the patients confirm such receipt at return visits. More problematically, there is no central legal authority that dictates what conduct is required of employers with offices in different locations. Formulating an effective document retention policy will depend on determining the organization’s unique human resource needs as well as

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148. See European Commission, Justice and Home Affairs, Data Protection in the European Union, [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/guide/guide-ukingdom\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/guide/guide-ukingdom_en.pdf) [Hereinafter Data Protection Guide]. The rules, according to the Data Protection Guide (developed for general consumption, as opposed to the specific statutory language), are:

Data must be processed fairly and lawfully. [Data] must be collected only for explicit and legitimate purposes and used accordingly . . . Data must be relevant and not excessive in relation to the purpose for which [it is] processed . . . Data must be accurate [and updated] . . . Data controllers are required to provide reasonable measures for data subjects to rectify, erase, or block incorrect data about them . . . Data that identifies individuals must not be kept longer than necessary. In addition, each Member State must provide a supervising authority including having a public register so the public has access to names of all data controllers and what type of data they process. Data controllers must notify supervisory authorities when they process data, and Member States may have a simplification process for this notice.

*Id.* at 6.

149. Data Protection Guide, *supra* note 148, at 6.

150. Christopher Kuner, *Membership in the U.S. Safe Harbor Program by Data Processors*, 7 PRIVACY & SECURITY LAW 723 (2008). See also Data Protection Guide, *supra* note 148.

151. Data Protection Guide, *supra* note 148, at 9.

applicable law. In a discussion of “home working,” employers should focus on five main risks: (1) data security (protecting personal data an employee processes at home; as well as also protecting employer’s commercial information when employee works at home); (2) data in transit (IT security in general, but particularly in regard to portable storage devices); (3) data retention and destruction (both in terms of employee education on these obligations and compliance with these requirements); (4) data breach (educate remote workers on handling data breaches in remote working situations); and (5) privacy (for example, attempts to monitor staff at home may violate the Human Rights Convention which safeguards a person’s home, family life, correspondence, and privacy).<sup>152</sup>

In order to comply with all of the applicable laws governing the privacy and retention of employee records, an employer must understand what information the organization collects, how this information is used, and to whom it is disclosed. Employers will also need to monitor evolving issues in document retention—such as employee privacy requirements and technology related issues relative to data privacy. In short, institutions of higher education operating programs overseas must review their policies and practices to ensure that they not only comply with all applicable laws in all relevant jurisdictions, but that they are practical and sensitive from an operational standpoint.

*a. U.S.*

Several U.S. statutes protect different aspects of the privacy of employees’ personal information. For example, employers are required under federal law to protect employees’ confidential medical or health information against unauthorized use and disclosure. The Health Insurance Portability and Accountability Act (HIPAA) and implementing regulations protect personal health information employers collect for health care plans.<sup>153</sup> Employers must safeguard such information and may not use it for employment-related purposes.<sup>154</sup> HIPAA does not preempt states from adopting laws that can be more stringent in protecting the privacy of individually identifiable health information.<sup>155</sup> Under the ADA, an employee’s medical history or health information must be maintained in separate medical files and must be treated as confidential medical information.<sup>156</sup>

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152. Bridget Treacy, *Data Protection and Home Working: Hidden Risks for Employers*, COMPLINET, Oct 23, 2008, available at [http://www.hunton.com/files/tbl\\_s47Details%5CFileUpload265%5C2365%5CTreacy\\_DPandHomeWorking\\_Complinet.pdf](http://www.hunton.com/files/tbl_s47Details%5CFileUpload265%5C2365%5CTreacy_DPandHomeWorking_Complinet.pdf).

153. 42 U.S.C. §1320d-6 (1996).

154. 45 C.F.R. § 164.502 (2009).

155. 42 U.S.C. § 1320d-7(a)(2) (2006).

156. 42 U.S.C. § 12112(d)(3)(B), (4)(C) (2006); 29 C.F.R. § 1630.14 (2009).

It is unlawful for an employer to publicly post or display an employee's social security number or to print it on employee identification cards, employee rosters, or mailing lists.<sup>157</sup> In addition, federal law prohibits interception and disclosure of oral communications in certain circumstances, and authorizes a civil action for violations.<sup>158</sup> Under the Electronic Communications Privacy Act (ECPA), the interception of wire or electronic communications and use or disclosure of information so obtained also is illegal.<sup>159</sup> The Stored Communications Act makes it unlawful to "intentionally access without authorization a facility through which an electronic communication service is provided . . . and thereby obtain . . . access to a wire or electronic communication while it is in electronic storage in such system."<sup>160</sup> The Computer Fraud and Abuse Act prohibits accessing certain computer systems without authorization and prohibits exceeding one's authorization in using such systems.<sup>161</sup>

Additionally, constitutional tort claims may also be asserted against private employers who allegedly act under color of state or federal law when invading certain privacy rights under the Fourth and Fourteenth Amendments of the United States Constitution.<sup>162</sup>

*b. France*

French law imposes much more stringent requirements on employers in protecting their employees' personal information than U.S. law. For example, under the French Labor Code, all information an employer requests from a job candidate or employee must be aimed at evaluating either the individual's capacity to perform the job for which he or she has applied or her professional abilities in general.<sup>163</sup> To that end, employers must inform all employment candidates of the methods and techniques that will be used in the hiring process.<sup>164</sup> This information must be given to the candidates before these methods and techniques are actually used.<sup>165</sup> Once a candidate is hired, all information that employees are asked to provide must serve the purpose of assessing their professional abilities, and only data that has a direct and necessary link to making this assessment may be

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157. 42 U.S.C. § 408(a)(8) (2006).

158. See 18 U.S.C. §§2511, 2520 (2006).

159. See 18 U.S.C. § 2511(1)(a) (2006).

160. 18 U.S.C. § 2701(a)(1) (2006).

161. Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006).

162. *Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498, 501 (9th Cir. 1996).

163. C. TRAV., art. L 121-6.

164. *Id.* at art. L 121-7.

165. *Id.* Discrimination rules are applicable in the hiring process; it is a criminal offense to exclude individuals on the basis of sex, morals, family situations, ethnic group, national origin, race, religious beliefs, pregnancy, and/or trade union activities. *Id.* art. L. 122-25.

collected.<sup>166</sup> Employers must declare the collection of personal data to the Commission for Computer Technology and Personal Freedom, an independent state agency whose purpose, in part, is to inform individuals about their privacy rights and to investigate matters involving the collection and processing of personal data.<sup>167</sup> The Commission requires employers to declare all data that reveal the identity of an individual, including software that checks workers' productivity, computerized systems of clocking in, and systems that keep records of the recipients of phone calls or emails.<sup>168</sup>

In addition to the requirement that employers must not collect any personal data without first informing the employee, the French Labor Code prohibits employers from keeping records or information on former employees.<sup>169</sup> After termination of employment, employers must destroy all information collected about former employees.<sup>170</sup>

French law also forbids employers from examining their employees' private correspondence, including employees' emails.<sup>171</sup> Employers may check that employees are not using their computers for private reasons, but have no right to read the contents of private messages.<sup>172</sup> However, employers may intercept emails and wiretap telephones if they can demonstrate that their actions are justified for security reasons.<sup>173</sup> In any case, employers are required to give notice to employees of any technique used to monitor their activities at work.<sup>174</sup>

Managing data collection, processing, and protection obligations is a significant responsibility. Presuming any given U.S. institution of higher education has a limited number of international operations, the institution may become familiar (and presumably master) the obligations of a specific jurisdiction. Whether one is considering an international operation or already has one, one should identify the locations where one operates or plans to operate; engage data compliance counsel with relevant expertise; and coordinate a team of people to assess the requirements and implement the plan. Such a team would likely include in-house counsel, information

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166. *Id.* at art. L 121-6.

167. For more information regarding the Commission for Computer Technology and Personal Freedom, see Computer Technology and Personal Freedom at <http://www.cnil.fr/english/> (last visited February 24, 2008).

168. Christophe Vigneau, *Information Technology and Workers' Privacy: The French Law*, 23 COMP. LAB. L. & POL'Y J. 351, 368 (2002).

169. C. TRAV., art. L 121-6.

170. *Id.*

171. C. PÉN. art. 226-1. It is a crime to intercept in bad faith any messages that are sent, forwarded, or received through a telecommunications system so as to use the contents or to disclose them to others under the 1991 Act on the confidentiality of correspondence. *Id.*

172. C. TRAV., art. L 122-35.

173. C. PÉN., art. 226-15.

174. C. TRAV., art. L 121-8.

technology, human resources and financial personnel (as much data, no doubt, will relate to these functions), senior management at the international site, liaison personnel between the sites, and other subject matter experts as appropriate.

### 5. Time Off and Leaves of Absence

Institutions of higher education operating in more than one jurisdiction need to recognize that there can be great disparities in the laws regulating employee time-off and leave. There also can be overlapping laws within a single jurisdiction, making the task of managing a multi-jurisdictional workforce particularly daunting. Is the institution a covered employer under a particular leave statute? Is the employee an eligible employee for purposes of obtaining a leave? Is there any notice requirement that triggers the leave? Does the employee have a right to time off and, if so, for how long? To what salary and benefits is the employee entitled? Is there job protection and for what duration? At what point in time can an employee be terminated? These are all questions that an employer should consider any time an employee is absent for an extended or unexcused period or requests some kind of leave. The institution must also determine within each jurisdiction that it is operating: (1) what rules and laws apply to the institutions; (2) what rules and laws apply to the employee; and (3) what rules and laws apply to the employee's specific issue. Understanding that there are significant differences in the substantive requirements of leave laws, the sources for such leaves, and processes for invoking leave is a critical first step in being able to develop and implement appropriate leave policies.<sup>175</sup> Only by having an understanding of the subtleties in each country's laws in this substantive area can an employer expect to successfully adapt its policies to each country's legal requirements.

#### *a. Vacation*

##### *i. U.S.*

The provision of vacation time to employees is not mandated by either federal or state law in the United States. Thus, U.S. employees are not legally entitled to vacation time or vacation pay. If employers choose to provide employees with paid vacation benefits, they are permitted to pay employees cash for all vacation time that was not used during the year at

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175. For example, in Europe, there is a lack of uniformity when determining how much leave an employee may take and under what conditions a leave can be taken. Some leaves are granted by statute, other by employer contract. *See, e.g.* Sauvage, *supra* note 76, at 4-80 to 4-84; Walter Ahrens & Mark S. Dichter, *Germany*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS §4-80-84 (employee leave in France); 5-100 to 5-104 (William S. Keller & Timothy J. Darby eds., 3d ed. 2009).

the end of the year.<sup>176</sup>

ii. France

In France, vacation time is mandated by the Labor Code.<sup>177</sup> Employees are entitled to five weeks of paid annual leave after one year of service.<sup>178</sup> Employees aged eighteen to twenty-one are entitled to thirty days of paid annual leave regardless of the amount of time they have worked for a company.<sup>179</sup> Additionally, employees must take at least twelve consecutive days of vacation between May 1 and October 31, and they may take as much as four weeks in a row.<sup>180</sup> An employer cannot offer cash payment in lieu of vacation, unless the employment contract has been terminated.<sup>181</sup>

iii. China

Neither the LCL nor EPL provide specific allowances for vacation leave. Rather, this issue is left to negotiation between the employer and the employee.<sup>182</sup>

*b. Sick/Medical Leave*

i. U.S.

The ADA prohibits employers from discriminating against a “qualified individual with a disability” with regard to employment practices or terms, conditions, and privileges of employment.<sup>183</sup> A disability can be either physical or mental.<sup>184</sup> The ADA also requires employers to provide “reasonable accommodation” to enable an otherwise qualified individual with a disability to perform the essential functions of the job, unless to do so would cause an employer “undue hardship” or pose unacceptable safety and health risks.<sup>185</sup>

Common examples of reasonable accommodations include leaves of absence, part-time or modified work schedules, and reassignment to a

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176. See, e.g., 27 AM. JUR. 2D *Employment Relationship* § 62 (2010); 30 C.J.S. *Employer–Employee* § 172 (2009).

177. C. TRAV. art. L 223.

178. Swartz, *supra* note 60 at 68.

179. C. TRAV. art. L 223.

180. *Id.*

181. *Id.*

182. See LCL, *supra* note 66, at art. 17 (“An employment contract shall specify the following . . . working hours, rest and leave.”).

183. 42 U.S.C. § 12115(a) (1990).

184. *Id.* at § 12102(1)(A).

185. *Id.* at § 12111(9)–(10).

vacant position.<sup>186</sup> “Undue hardship” means an “action requiring significant difficulty or expense” when considered in light of, among other factors: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facilities involved, number of persons employed, and the effect on expenses and resources or other impact upon the facilities’ operations; (3) the type of operations; (4) the availability of tax incentives; and (5) the amount of assistance available to the employer from outside agencies or organizations.<sup>187</sup>

Eligible employees who are unable to perform any substantial work as the result of a severe mental or physical condition that has lasted or will last twelve or more months are entitled to receive Social Security benefits<sup>188</sup> if they have earned a minimum amount of Social Security credits.<sup>189</sup>

The Family Medical Leave Act requires employers to provide eligible employees with twelve weeks of family or medical leave in a twelve-month period and to continue whatever health plan benefits it offers during the leave.<sup>190</sup> Employees may take this leave for their own serious health condition or for that of a spouse, child, or parent.<sup>191</sup>

## ii. France

Pregnant employees in France are entitled to leave work six weeks before the expected delivery date and remain absent until ten weeks after the date of delivery.<sup>192</sup> Both male and female employees are entitled to benefits related to the birth or adoption of a child on the same basis as employees on maternity leave.<sup>193</sup> Although French law does not require an employer to continue compensating an employee while he or she is on maternity leave, most collective bargaining agreements provide for paid leave. Regardless of whether paid leave is required by a collective bargaining agreement, employees receive payments from the social security fund in the amount of their net salary, subject to a tax.<sup>194</sup>

Additionally, every employee who becomes a father is entitled to

186. *Id.* at § 12111(9)(b).

187. For information on undue hardships, see 42 U.S.C. § 12112(b)(5)(A) (2006); 42 U.S.C. § 12111(10) (2006); 29 C.F.R. § 1630.2(p) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997). *See also* Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited Jan. 12, 2010).

188. 42 U.S.C. § 402 (2000).

189. 42 U.S.C. § 423(c) (2000).

190. 29 U.S.C. § 2601 (2000).

191. 29 U.S.C. § 2612(a)(1) (2000).

192. C. TRAV., art. L. 122-26.

193. *Id.*

194. *See* Abrams & Dichter, *supra* note 175, at 5-103 to 5-104.



paternity leave equal to eleven consecutive days to be taken within four months after the birth or adoption of a child.<sup>195</sup> If there are multiple births or health problems, the amount of leave pay may be increased.<sup>196</sup>

### iii. China

Neither the LCL nor EPL provide specific allowances for medical leave during the course of employment. Rather, it appears that this issue is left to negotiation between the employer and the employee.<sup>197</sup>

## 6. Intellectual Property Rights: Who Owns What?

### *a. Patents & Copyrights: Ownership & Assignment of Rights*

#### i. U.S.

As a policy matter in the United States, different higher educational institutions address intellectual property (IP) ownership and related issues differently. Many colleges and universities require employees to assign intellectual property created as part of their employment engagement to the college or university (or to a holding company created to own the IP created at that institution).<sup>198</sup> Institutions (or their IP holding companies) generally decide on a case-by-case basis whether to pursue commercialization of IP, or to license or assign it to the employee creator. There may be different applications with respect to copyright ownership and patent ownership. Sometimes, a copyright is licensed for no fee or assigned to the employee with respect to text books, because text books are usually not as lucrative, while an institution itself may be more likely to pursue monetization of a patent. IP issues are significant for institutions of higher education, particularly research institutions, because there is great opportunity for the creation and commercialization of meaningful innovations, both in the commercial and the research context. Institutions of higher education conduct research as part of their educational process,

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195. Law No. 2001-1246 of Dec. 21, 2001, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Dec. 26, 2001, at p. 20552.

196. *Id.*

197. See LCL, *supra* note 66, at art. 17.

198. See, e.g., Georgia Tech Research Corporation (GTRC), <http://www.gtrc.gatech.edu/>, which owns the IP created at the Georgia Institute of Technology, <http://www.gatech.edu/>; the University of Georgia Research Foundation (UGARF), <http://www.ovpr.uga.edu/ugarf/>, which owns the IP created at the University of Georgia, <http://www.uga.edu/>; Wisconsin Alumni Research Foundation for the University of Wisconsin (WARF), <http://www.warf.org>; the MIT Technology Licensing Office, <http://web.mit.edu/tlo/www/>, licenses the IP created at MIT; Stanford owns its IP and licenses it through the Stanford Office of Technology Licensing, <http://otl.stanford.edu> (last visited Jan. 12, 2010).

funded by both governmental agencies and industry. IP licensing is big business in U.S. higher education with organizations such as the Association of University Technology Managers (AUTM)<sup>199</sup> and the Licensing Executives Society (LES),<sup>200</sup> among others, existing to bring technology licensing professionals together and provide for the development of IP, license-able technologies, and licensing arrangements. Universities can generate significant revenue with IP and technology transfer programs (e.g., MIT, Stanford, Wisconsin Alumni Research Foundation). U.S. employers must ask: are there proper assignments of intellectual property from employee to employer? (for instance, the contract may contain references to “Work Made for Hire” copyright aspects<sup>201</sup> in the U.S. and moral rights in the EU).<sup>202</sup>

## ii. China

The intellectual property laws of China ostensibly foster “the development and innovation of science and technology for meeting the needs of the construction of socialist modernization.”<sup>203</sup> With regard to ownership of intellectual property as between employer and employee, the scheme used in China is similar to that used in the U.S.<sup>204</sup> For example, with regard to patents, an invention by an employee in execution of the tasks of his or her employer, or made by the employee using the material and technical means of his or her employer, is considered a “service invention-creation.” For this type of invention, the right to apply for a patent belongs to the employer. After the patent issues, the employer is considered the patentee (unlike in the United States, where the inventor is

199. For more information, see <http://www.autm.net/>.

200. For more information, see <http://www.usa-canada.les.org/>. In addition to the Licensing Executive Society (LES) USA/Canada, there are 31 other international licensing entities comprising LES International (LESI), <http://www.lesi.org/>.

201. For a general discussion of “Work Made For Hire” doctrine, see <http://www.copyright.gov/circs/circ09.pdf>. For general review of US Copyright Law, see <http://www.copyright.gov/title17/>. For general discussion on copyright issues with respect to higher education, see University of Texas System, Copyright Crash Course, <http://www.utsystem.edu/ogc/Intellectualproperty/cprtindx.htm> (last visited Nov. 3, 2007); see also Georgia Harper, Materials available through the Intellectual Property Virtual Scholar Program, University of Maryland University College, [http://www.umuc.edu/distance/odell/cip/ip\\_scholar\\_harper.shtml](http://www.umuc.edu/distance/odell/cip/ip_scholar_harper.shtml) (last visited Nov. 3, 2007).

202. For more on moral rights in the U.S., see The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A (1990).

203. Patent Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985, amended Aug. 25, 2000) art. 1, *translated in* WORLD INTELLECTUAL PROPERTY ORGANIZATION COLLECTION OF LAWS FOR ELECTRONIC ACCESS (CLEA), available at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=5001](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=5001). [*hereinafter* PL].

204. *Id.*

considered the patentee).<sup>205</sup> For a “non-service invention-creation,” the right to apply for a patent in China belongs to the inventor. After the application issues as a patent, the inventor is considered the patentee. Finally, with respect to an invention made by a person using the material and technical means of his or her employer, and where the employee and employer have entered into a contract that delineates ownership, the contract controls.<sup>206</sup> It is important to keep in mind, however, that where any invention, belonging to any Chinese state-owned enterprises or institutions, is considered to be of great significance to the interest of the State or the public interest, the government may decide that the patented invention should be exploited by the government for a fee payable to the patentee.<sup>207</sup> With regard to copyrights, the author of the copyrighted work in China is the citizen who has created the work. But, where a work is created for, and under the supervision and responsibility of a company or other organization, the company or organization is considered the author of the work.<sup>208</sup> In light of what many Westerners (at least, many Americans) may consider to be a “host country favorable” or “government favorable” or, even, “foreigner unfavorable” IP structure in China, and with so much sponsored research taking place at, with, and through colleges and universities, it is worth reviewing the risks of enforcing IP rights claims in China.<sup>209</sup>

### iii. France

In France, the right to a patent belongs to the inventor (or his or her assignee or legal successor).<sup>210</sup> However, inventions made by an employee (a) in the execution of an employment contract involving inventive work relating to his or her employment duties or (b) in the execution of studies or research activities which have been specifically entrusted to the employee are the property of the employer.<sup>211</sup> In the foregoing situations, the employee may be entitled to additional fees in connection with his or her inventive work. The conditions under which the employee may be entitled to additional remuneration for his or her inventive contribution are determined by the collective bargaining agreements, the company

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205. PL at art. 6.

206. *Id.*

207. PL at art. 14.

208. PL at art. 1.

209. Lulin Gao et. al., *Can Your Company Enforce Its Intellectual Property Rights in China*, 20 THE ACC DOCKET 52 (2006).

210. Law No. 96–1106 of December 18, 1996, Journal Officiel de la République Française [J.O.] [Official Gazette of France], December 19, 1996.

211. Law No. 94–102 of February 5, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], February 8, 1994.

agreements, and the individual employment contracts.<sup>212</sup> All inventions made by an employee, other than those made in furtherance of his or her employment duties as defined above, are the property of the employee-inventor. But, if the invention is made by an employee (1) in the execution of his normal employment duties; (2) in the execution of activities of the enterprise of the employer; (3) by making use of know-how, techniques or methods which are specific to the enterprise of the employer; or (4) by making use of data procured by the enterprise of the employer, the employer shall have the right to acquire the whole or part of the property, or to use the rights resulting from the patent protecting the invention. In this case, the employee is entitled to fair compensation to be agreed upon with the employer.<sup>213</sup>

The laws of France also provide for the protection of industrial designs or models: this can include the appearance of the whole or a part of a product resulting from the features of its lines, contours, colors, shape, texture, or materials, or of the product's ornamentation.<sup>214</sup> A "product" is considered any industrial or handicraft object, including parts intended to be assembled into a complex product, packaging or get-up, graphic symbols, and typographic characters, but excluding computer programs.<sup>215</sup> But, the registration of an industrial design or model does not prevent the owner from invoking copyright protection for the same design or model.<sup>216</sup> In France many designs and models (in particular those showing originality as required under copyright law) are protected by copyright, automatically and without registration, and it is possible by registering those designs or models under the design and model law to obtain double protection. With regard to ownership as between employer and employee, generally the same ownership scheme applies as that which applies to patents.<sup>217</sup>

#### *b. Confidentiality/Trade Secrets*

For any employer, achieving a competitive advantage by protecting the creation and maintenance of its proprietary or confidential trade secret information is critical. This age of employee mobility makes it more important than ever for multi-jurisdictional employers to have written policies, in place addressing issues such as trade secrets, proprietary or confidential information concerns, and ownership (presumably by the

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212. *Id.*

213. *Id.*

214. Law No. 2001-670 of July 25, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 28, 2001.

215. *Id.*

216. *Id.*

217. France, Industrial Designs and Models, *in* WOLTERS KLUWER LAW & BUSINESS 75 (discussing Intellectual Property Code 1992 as amended up to 2008).

employer) of intellectual property,<sup>218</sup> as well as agreements with employees memorializing their understanding of the organization's rights to the information, and the obligations to protect the integrity of such data, information, and creations. In the United States, though there is a Uniform Trade Secrets Act (UTSA),<sup>219</sup> and more than forty states and the District of Columbia have adopted the UTSA, trade secrets laws vary from state to state (indeed, among those who have and those who have not adopted the UTSA).<sup>220</sup> For jurisdictions that have not adopted the UTSA, the Restatement of Torts and its six factors of trade secrets apply.<sup>221</sup> For example, in Georgia, a trade secret is information that derives economic value from being kept secret and the owner exerts efforts to keep the information secret.<sup>222</sup> It is imperative that employers evaluate the subject information to determine whether the rules and procedures they currently have in place at each location adequately protect the information from disclosure. For example, is access to the trade secret controlled through disclosure on a "need to know" basis only? Are sensitive documents labeled "confidential" (or with a similar legend) and kept in a secure location? Are all employees required to sign a non-disclosure or confidentiality agreement before they commence employment? Are employees educated about, and periodically reminded of, the organization's policies and procedures regarding confidential information? Are the employees' obligations regarding confidentiality discussed at exit interviews? Are follow-up letters regularly sent to former employees who have had access to important confidential information? These are just some of the questions that the multinational employer should ask to assess whether its trade secrets and other confidential information are being properly protected.

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218. For examples of policies established by institutions of higher education regarding ownership of intellectual property, see Ohio University, Intellectual Property Ownership and Disposition and Employee Involvement in Research Commercialization, <http://www.ohio.edu/policy/17-001.html> (last visited April 19, 2010), University of Texas System, Intellectual Property Policy, <http://www.utsystem.edu/ogc/intellectualproperty/ippol.htm> (last visited April 19, 2010) Stanford University, Copyright Policy, Intellectual property, <http://fluid.stanford.edu/class/cee200/intellectual.htm> (last visited April 19, 2010), Massachusetts Institute of Technology, Patent and Copyright Ownership Policy Statement, <http://web.mit.edu/tlo/www/community/guide2.html#2.1> (last visited April 19, 2010), University of Florida, Intellectual Property Policy, <http://www.rgp.ufl.edu/otl/pdf/ipp.pdf> (last visited April 19, 2010).

219. See UNIF. TRADE SECRETS ACT § 1 (1985).

220. BRIAN M. MALSBERGER, TRADE SECRETS: A STATE-BY-STATE SURVEY (Samuel M. Brock, III & Arnold H. Pedowitz, eds. BNA Books, 2nd ed. 2003) (1997).

221. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

222. GA. CODE ANN. § 10-1-761 (2009). Accord CAL. CIVIL CODE § 3426 (West 1996); WASH REV. CODE ANN. § 19.108.010 (West 1998).

## i. U.S.

The Uniform Trade Secrets Act (UTSA) offers an established definition of a 'trade secret' and has been adopted by over forty states.<sup>223</sup> The UTSA defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique or process that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."<sup>224</sup> Misappropriation of an employer's trade secrets is an intentional tort under both common law and state statutes.

Additionally, breach of confidence is a recognized cause of action under state law. In California, for example, the courts recognize the cause of action based on the concept of an implied obligation or contract between the parties that confidential information will not be disclosed. Because the cause of action is based on an implied-in-law or quasi-contractual theory, it is a tort action.<sup>225</sup> A breach of contract claim can also be brought when there is a written confidentiality agreement in place between employer and employee. Because of the growing and continuing importance of the knowledge economy and of IP more employers have turned to the U.S. Computer Fraud and Abuse Act, in addition to state laws on trade secrets and to employment agreements, to enforce their rights and protect their information.<sup>226</sup>

## ii. France

France offers similar protection for trade secrets. French courts define trade secrets as secret manufacturing or industrial processes which are generally unknown by the competitors before their violation.<sup>227</sup> In order to be protected, the trade secrets must have a certain degree of originality or have a practical value and must be kept secret from competitors.<sup>228</sup>

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223. Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. PA. L. REV. 1649, 1676 n. 85 (2009).

224. UNIF. TRADE SECRETS ACT § 1 (1985).

225. *Berkla v. Corel Corp.*, 302 F.3d 909, 917 (9th Cir. 2002).

226. 18 U.S.C. § 1030 (2002). *See also* Thomas Gray, *Using the U.S. Computer Fraud Statute in Trade Secret Cases*, 6 INTELL. PROP. L. & BUS. 30 (2008).

227. Roger J. Millgram, *Commission Proposed Capital Punishment—By Definition—For Trade Secrets, a Uniquely Valuable Right*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 919, 938 n. 83 (2006).

228. *Id.*

### iii. China

China also offers protection for trade secrets.<sup>229</sup> China provides that an employer and employee may include in their labor contract confidentiality provisions concerning trade secrets and intellectual property related confidential matters of the employer.<sup>230</sup> Only an employer's senior management, senior technicians, and other personnel who are subject to confidentiality obligations may be subject to non-compete obligations.<sup>231</sup> If a worker has the obligation to keep trade secrets confidential, a non-compete provision may be agreed upon in a labor contract or confidentiality agreement, but such an agreement must stipulate that the employer will pay financial compensation to the worker on a monthly basis during the term of the non-compete period after the expiration or termination of the labor contract.<sup>232</sup>

## 7. Termination Issues

Despite hopes to the contrary, employment and related relationships sometimes end in complicated ways. Institutions should be aware of how termination issues are handled in the different jurisdictions where they operate. The reality of the current working world is that innumerable employees across the world are released from their jobs on a daily basis. Virtually every termination—regardless of whether it is a voluntary resignation, a for-cause discharge, reduction-in-force layoff, or some other form of termination—carries with it the possibility of subsequent litigation. Moreover, termination of employment is an area where both the substantive and procedural laws of each jurisdiction vary greatly. To be sure, treating the terminated employees fairly—and ensuring that they feel that they are being treated fairly—may be as important as compliance with laws, regulations, and policies. There can be great variations in the laws of different jurisdictions concerning issues such as: (1) grounds for termination; (2) procedures for termination; (3) notice requirements; (4) levels of compensation; (5) methods of enforcing employee rights; (6) payment and type of compensation due, if any; (7) severance requirements, if any; and (8) whether there is any judicial or administrative oversight of the termination process.

In most Member States of the EU, there are also special procedures for redundancies (i.e., economic layoffs). The procedures can be time-

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229. Law for Countering Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) art. 10 (P.R.C.); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81, art. 39 (1994).

230. See LCL *supra* note 66, at art. 23.

231. LCL at art. 24.

232. LCL at art. 23.

consuming and most require compensation. We note that in some jurisdictions, wrongful termination may subject organizations and their representatives to criminal penalties (in extreme cases, imprisonment) as well as civil sanctions. For example, in India, violation of the 1936 Payment of Wages Act and the 1948 Minimum Wages Act may be punishable by fines, imprisonment and the confiscation of the employer's property.<sup>233</sup>

Likewise, whether and to what extent severance pay is owed to an employee is a critical issue for multinational employers; an issue often dictated by requirements stemming from a variety of different sources, such as the law, public policy, or an employment contract. In Europe, there are mandated severance pay requirements depending on the nature of the termination. In the U.K., for example, a redundant employee who has been continuously employed for two years will be entitled a statutory redundancy payment.<sup>234</sup> The amount of the payment is based on the employee's length of continuous employment and gross average wages.<sup>235</sup> In addition, many organizations have enhanced employee severance pay rights such that an employee is entitled to receive substantially more than the legally mandated payment.<sup>236</sup>

Thus, because of the varying and overlapping degrees of protection within each legal system, as well as the enhanced benefits that may be granted through policy and contract, employers must spend time reviewing this area carefully—to understand which laws or policies apply in the context of each termination and to avoid the potential legal pitfalls. In addition, the multinational employer should, as part of its audit, spend time with persons from the following job categories to learn about how the discharge practices actually operate: (1) members of senior management, especially those involved in reduction-in-force activities; (2) mid-level managers who frequently make termination decisions; (3) employees who have complained about aspects of the employer's discharge system; and (4) members of the human resource staff at each site who are involved in employee termination decisions and procedures. Similarly, the employer should also examine a variety of documents generated during the process of discharging employees such as applicable government contracts, employment termination documents, applicable liability insurance policies, notes from exit interviews, and material from past legal challenges. In short, the multinational employer must not only understand the substantive and procedural law in this area, but also must understand, on a practical

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233. The Payment of Wages Act, No. 4 of 1936 § 20, India Code; The Minimum Wages Act, No. 11 of 1948 § 22A.

234. Paul Callaghan, *United Kingdom*, in INTERNATIONAL LABOR AND EMPLOYMENT LAWS §§8-93 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

235. *Id.*

236. *Id.* at §8-95.



level, how its policies are implemented.

*a. Severance and Unemployment Benefits*

i. U.S.

In the United States employers are taxed at both federal and state levels for unemployment insurance benefits. Terminated employees receive approximately thirty-five to forty percent of their back wages in unemployment compensation.<sup>237</sup> Most displaced employees can expect to receive benefits for six months, except in areas of high unemployment, where payments may continue for up to one year.<sup>238</sup>

ii. France

When an employee is laid off, the employer must provide notice of termination and severance payments.<sup>239</sup> For employees with less than two years of service, the minimum notice period is one month; employees with two or more years of service receive two months.<sup>240</sup> Executives are generally entitled to three months notice, regardless of length of service.<sup>241</sup> An employer may pay employees instead of providing such notice.

French employees also are entitled to mandatory severance payments. The minimum dismissal severance is one-tenth of the average monthly compensation per year of service for employees with two or more years of service, plus one-fifteenth compensation per year of service after ten years of service.<sup>242</sup> If the dismissal is for economic reasons, the severance payment is doubled.<sup>243</sup> Employees are also entitled to payment for any accrued, unused vacation.<sup>244</sup>

French employees are eligible to receive more generous unemployment pay and for a longer period of time than American workers. In France the level of unemployment benefits is determined nationally. French employees are paid a percentage of their salary plus a set number of Euros per day.<sup>245</sup> Workers in France can collect unemployment benefits from 122

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237. Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1035 (1995).

238. *Id.*

239. C. TRAV. art. L. 122-8.

240. *Id.*

241. *Id.*

242. *Id.* art. L. 122-2.

243. *Id.* art. L. 122-9.

244. *Id.* art. L. 223-14.

245. Law No. 2000-601 of June 30, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 1, 2000.

to 1,825 days, depending on age and length of service.<sup>246</sup>

### iii. China

The LCL provides specific requirements for the termination of employment. As described above, the LCL designates three types of employment contracts distinguished by the conclusion of the employment contract.<sup>247</sup> Notwithstanding these delineations, there are barriers to the termination of the employment contract. For example, an employer and a worker may terminate their employment contract if they so agree after negotiating such an outcome.<sup>248</sup> Further, the employee may terminate their employment contract upon thirty days' prior written notice to the employer.<sup>249</sup>

Significantly, in certain circumstances, an employee may terminate their employment if:

- (1) the Employer fails to provide the labor protection or working conditions specified in the employment contract;
- (2) the [E]mployer fails to pay labor compensation in full and on time;
- (3) the employer fails to pay the social insurance premiums for the worker in accordance with the law;
- (4) the rules and regulations of the employer violate laws or regulations, thereby harming the worker's rights and interests;
- (5) the employer used such means as deception or coercion, or took advantage of the other party's difficulties to cause him to conclude or amend the employment contract contrary to his true intent . . .<sup>250</sup>

Conversely, an employer may terminate an employment contract if the worker: (1) is proved during the probation period not to satisfy the conditions for employment; (2) materially breaches the employer's rules and regulations; (3) commits serious dereliction of duty or practices graft, causing substantial damage to the Employer's interests; (4) has additionally established an employment relationship with another Employer which materially affects the completion of his tasks with the first-mentioned employer, or he refuses to rectify the matter after the same is brought to his attention by the employer; (5) the employment contract is invalid due to the circumstance specified in the first paragraph of Article 26 hereof; or (6) has his criminal liability pursued in accordance with the law.<sup>251</sup>

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246. *Id.*

247. *See* LCL, *supra* note 66, at art. 13–15.

248. *See* LCL at art. 36.

249. *See* LCL at art. 37.

250. *See* LCL at art. 38.

251. *See* LCL at art. 39.

## 8. Non-Competition and Covenants Not to Compete

Likewise, it is critical for the multinational employer to understand which laws govern the practices that it wants to have restricted.

### *a. U.S.*

In the U.S., for example, state law governs restrictions on employee non-competition. The enforceability of non-competition agreements varies greatly among the fifty states.<sup>252</sup> The multi-jurisdictional employer must refer to the law of the correct jurisdiction. For this reason, multinational employers have found that contracts involving covenants not to compete can often fill in gaps left by unfair competition and other business torts. For this reason, in addition to being mindful of the applicable laws in this area—both statutory and common law—multinational employers should also look at their agreements to determine what additional protections and rights have been granted. The restrictive covenant issue is a reminder of the importance of considering and memorializing governing law.

### *b. France*

In France, as in the United States, covenants-not-to-compete are not prohibited *per se*, but they are unlawful if they create unlimited restraints on an employee's ability to work.<sup>253</sup> There are no statutes under the French Labor Code governing the validity of non-compete clauses.<sup>254</sup> Thus, the

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252. See, e.g., *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008) (holding that non-solicitation of customer or client clauses are unenforceable); *Lee v. Environmental Pest & Termite Control, Inc.*, 516 S.E.2d 76 (Ga. 1999) (illustrating that since post-employment non-compete covenants under Georgia law are difficult to enforce, one focuses on covenants not to disclose confidential information); Mari Myer, *Presentation at the State of Georgia Tech Law Section: NDAs and Covenants Not to Solicit*, H.B. 173, Gen. Assem., Reg. Sess. (Ga. 2009) (permitting Georgia courts to blue pencil (revise) restrictive covenant agreements, in order to narrow the scope of restrictions rather than invalidating the entire restriction). Because of Georgia Supreme Court case *Jackson v. Coker*, the matter must now be put to the voting public for an amendment permitting the Georgia General Assembly to implement the changes. 405 S.E.2d 253 (Ga. 1991). See also James J. Boutrous II, *Non-Competes: Choice of Law Matters*, Law360, March 26, 2009, [http://www.law360.com/registrations/subscription\\_upgrade?article\\_id=90937](http://www.law360.com/registrations/subscription_upgrade?article_id=90937) (offering that the "...need for up to date and comprehensive agreements with employees, which should include choice of law provisions in restrictive covenants . . . in most instances, courts will honor the parties' choice absent a compelling reason not to do so . . . [so that] businesses can be more secure in knowing beforehand what law will be applied." See also Claire Harrison, *Best Practices For Multistate Employers*, Law360, Mar. 1, 2009, <http://www.law.360> (with focus on Noncompetition Agreements (pages 1-2)).

253. John W. Ashbrook, *Comment, Employee Noncompetition Clauses in the United States and France*, 14 COMP. LAB. L. & POL'Y J. 47, 47-48 (1992).

254. *Id.* at 48-49.

validity of non-compete provisions is decided by case law.<sup>255</sup> Some French courts hold that a noncompetition clause unlimited in time is invalid. An unlimited time restriction may be considered irrelevant, however, if the employee's ability to find another job is not unduly hampered. Similarly, a covenant that is unlimited in area is sometimes enforced if its duration is short.

It is important to check if the collective bargaining agreement provides for certain conditions and draft the clause accordingly. The employer may release the employee from his non-compete obligation and therefore not pay any compensation. Moreover, unless otherwise provided in the employment agreement, an employee in France is permitted to refuse a substantial modification to his or her employment agreement. If the employer does not obtain the proper consent, there is a possibility that the employee may be able to claim that the employment contract was modified to his or her detriment, and bring a constructive discharge claim.<sup>256</sup>

### *c. China*

The LCL limits non-competition protections to senior management, senior technicians, and other personnel who have knowledge of trade secrets of the employer.<sup>257</sup> The scope, territory, and term of the competition restrictions shall be agreed upon by the employer and the worker, and such agreement shall not violate laws and regulations. The term, counted from the termination or ending of the employment contract, for which a person as mentioned in the preceding paragraph is subject to restrictions in terms of his working for a competing employer that produces the same type of products or is engaged in the same type of business as his current employer; or, in terms of his establishing his own business to produce products or engage in business competing with his current employer's products or business, shall not exceed two years.<sup>258</sup>

### III. CONCLUSION

As demonstrated in this article, American educational institutions that plan to open and operate, or already operate, a foreign campus face a myriad considerations in identifying, determining and applying relevant employment laws. Like many projects, proper planning and periodic reevaluation should help minimize risks and problems—and should improve the likelihood of success when the college or university serves as

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255. *Id.* at 48.

256. *See, e.g.,* Carole E. Scott, *Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France*, 7 *SAN DIEGO INT'L L.J.* 341 (2006).

257. *See* LCL, *supra* note 66, at art. 25.

258. *Id.*

an employer in a study abroad, international, or foreign campus, or cooperative research setting. It is imperative that the institution implement a thoughtful, strategic approach when planning for and operating a foreign campus in order to minimize the institution's risk of exposure.

# STUDENTS OR EMPLOYEES?

## THE STRUGGLE OVER GRADUATE STUDENT UNIONS IN AMERICA'S PRIVATE COLLEGES AND UNIVERSITIES

JOSH RINSCHLER\*

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### I. INTRODUCTION

Graduate students, especially in doctoral programs, generally receive

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compensation, tuition remission, or both in return for aiding in faculty members' research, grading papers or teaching classes.<sup>1</sup> These students inhabit a grey area in terms of American labor law. They perform work in return for some form of compensation, but unlike most employees, they do not perform this work primarily for wages, but instead apply their work towards a degree.

Historically, graduate students at private universities have not been considered employees for the purposes of unionization. As such, they are unable to organize, like workers in most other industries, in order to collectively bargain for wages, benefits and working conditions. This issue has taken on increasing importance as the higher education system, particularly at larger research oriented universities, has come to rely on the efforts of graduate students to an ever greater degree. Students have, understandably, complained that their efforts are under rewarded. One Brown student complained recently that she has had to teach a class of 102 students for a mere \$12,800 a year.<sup>2</sup> Such a meager stipend could result in an hourly wage far below the legal minimum.

In 2000, the National Labor Relations Board ("NLRB" or "the Board") overturned three decades of precedent addressing graduate student unionization in a case involving a graduate student union at New York University.<sup>3</sup> In deciding that some graduate students were employees under the National Labor Relations Act ("NLRA" or "the Act"), the NLRB appeared to open the floodgates to attempts to organize graduate students at the nation's universities. However, this window of opportunity was shut just four years later by the NLRB decision in *Brown University*.<sup>4</sup> In that case, the NLRB reverted to its prior doctrine which denied graduate students unionization rights under the theory that they were merely students and not employees as defined by the NLRA.<sup>5</sup> Since *Brown University*, the NLRB has stuck to this line of jurisprudence when the issue has come before it. However, this controversy seems likely to continue given the higher education system's dependence on graduate student work and the

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1. For example, the Graduate School at Brown "grants incoming doctoral students five years of guaranteed support, which includes a stipend, tuition remission, and a health insurance subsidy. All promises of student support are subject to students making satisfactory academic progress as determined by their programs of study." ADMISSIONS AND FINANCIAL AID, HISTORY DEPARTMENT, BROWN UNIVERSITY, available at <http://www.brown.edu/Departments/History/grad/grad-finaid.html> (last visited Jan. 8, 2008).

2. Robert A. Epstein, *Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus*, 20 ST. JOHN'S J. LEGAL COMMENT. 157, 186-90 (2005).

3. New York Univ., 332 N.L.R.B. 1205 (2000).

4. Brown Univ., 342 N.L.R.B. 483 (2004).

5. *Id.*

ever changing composition of the NLRB.<sup>6</sup>

While both the *NYU* and *Brown* decisions may have been politically motivated, the NLRB eventually settled on the right course. The *NYU* decision was a complete about-face from the NLRB's previous jurisprudence and was not warranted. In *Brown*, the NLRB returned to its time-tested, correct view that students are primarily students, not employees, and should not be eligible to form unions.<sup>7</sup> Part II of this note will briefly explain the governing law in the area and then provide an in-depth history of NLRB decisions related to attempts on the part of graduate students to form unions prior to the *NYU* decision. Part III will explore the change of course in *NYU*. Part IV will examine the NLRB's return to form in *Brown*. Part V will discuss the developments in this area since *Brown*. Part VI will consider the future for graduate student unions and argue that Congressional action is the best way to resolve the uncertainty in this area of the law.

## II. THE HISTORY OF GRADUATE STUDENT UNIONS BEFORE THE NLRB

### A. The NLRB—History and Structure

The NLRB was created in 1935 by the National Labor Relations Act, more commonly called the Wagner Act ("Wagner Act").<sup>8</sup> The Wagner Act was the second attempt by the Roosevelt Administration to federalize unionization laws and provide a nationwide uniform right to organize.<sup>9</sup> The Supreme Court struck down a previous attempt, the National Industrial Recovery Act ("NIRA"), earlier that year as exceeding Congress' authority under the Commerce Clause.<sup>10</sup> Slightly less ambitious than the NIRA, the NLRA still had as its goal the standardization of the nation's labor law.<sup>11</sup> Prior to this legislation, collective bargaining was regulated by a complex combination of state common law and a patchwork of judicial doctrines.<sup>12</sup> Under the specter of President Roosevelt's threat to increase the number of Supreme Court justices to fifteen, the NLRA was held constitutional in a landmark decision, *N.L.R.B. v. Jones & Laughlin Steel Corp.*<sup>13</sup>

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6. See *infra* text accompanying notes 21–22 on the method of selecting members of the NLRB.

7. *Brown Univ.*, 342 N.L.R.B. at 483.

8. Act of July 5, 1935, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)).

9. Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 103 (2005).

10. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

11. Hogler, *supra* note 9, at 104.

12. *Id.* at 103.

13. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).



The NLRB was created to oversee organization attempts across the nation and to remedy any abuses or other unlawful acts by employers or unions, functions it still performs today.<sup>14</sup> The Board's current structure is a result of the Taft-Hartley Amendments of 1947.<sup>15</sup> The Board is made up of five members who serve five year terms and are appointed by the President with the advice and consent of the Senate.<sup>16</sup> Members' terms are staggered so that a new member is appointed each year.<sup>17</sup> A General Counsel, also appointed by the President, investigates and prosecutes cases of unfair practices.<sup>18</sup> The Board hears appeals from unfair labor practice cases prosecuted by attorneys in field offices around the country in front of an NLRB administrative law judge ("ALJ").<sup>19</sup> In representation cases, when thirty percent of the workers within an appropriate bargaining unit have signed authorization cards demonstrating their interest in having a particular union represent the unit, the appropriate NLRB Regional Director will order an election. If a majority of a unit's members vote in favor of union representation, the Regional Director will certify the union as the unit's representative.<sup>20</sup> Both *NYU* and *Brown* came before the NLRB on appeal from a decision ordering an election based on a "showing of interest" by graduate students at these universities.<sup>21</sup>

Because members of the Board are political appointees, Board decisions are often criticized as politically motivated.<sup>22</sup> It is possible for each President to remake nearly the entire body within a single term. Like any other political appointment, it is likely that presidents will appoint those

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14. FACT SHEET, NATIONAL LABOR RELATIONS BOARD, available at [http://www.nlr.gov/about\\_us/overview/fact\\_sheet.aspx](http://www.nlr.gov/about_us/overview/fact_sheet.aspx) [hereinafter FACT SHEET]. Unions came under the NLRB's purview in 1947. *Id.*

15. 29 U.S.C. § 141 et seq (2006).

16. 29 U.S.C. § 153 (2006).

17. *Id.* Due to recess appointments and resignations by board members, the Board's membership is even less consistent than the statute would indicate. For a complete history of the Board's membership since its inception, see BOARD MEMBERS SINCE 1935, NATIONAL LABOR RELATIONS BOARD, available at [http://www.nlr.gov/about\\_us/overview/board/board\\_members\\_since\\_1935.aspx](http://www.nlr.gov/about_us/overview/board/board_members_since_1935.aspx) [hereinafter BOARD MEMBERS].

18. FACT SHEET, *supra* note 14.

19. *Id.*

20. For a general overview of NLRB procedures governing union certification, see PROCEDURES GUIDE, NATIONAL LABOR RELATIONS BOARD, available at [http://www.nlr.gov/publications/Procedures\\_Guide.htm](http://www.nlr.gov/publications/Procedures_Guide.htm) (last visited October 27, 2008).

21. Ryan Patrick Dunn, *Get a Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities are not "Employees" Under the National Labor Relations Act*, 40 NEW ENG. L. REV. 851, 867 (2006). A showing of interest occurs when thirty percent of the members of an appropriate bargaining unit have returned signed cards confirming their desire to have the union represent their collective interests with their employer. *Id.* See also 29 C.F.R. § 102.67 (2004).

22. See Epstein, *supra* note 2.

whom they believe will issue rulings consistent with their political principles and goals. The high rate of turnover makes Board decisions somewhat unpredictable and means a consistent NLRB jurisprudence can be difficult where controversial issues in labor law are implicated.<sup>23</sup>

Finally, the NLRB does not have jurisdiction over public sector employees with the exception of U.S. Postal Workers.<sup>24</sup> Thus, this note will only discuss cases which involve private colleges and universities, as that is the scope of NLRB decisions. As a result, graduate students at public colleges and universities have no federally guaranteed right to organize, although they may have rights under state law.<sup>25</sup>

## B. Early Cases

### 1. Cornell University

In its first several decades, the NLRB did not consider graduate students as employees eligible to form unions under the theory that private universities were not engaged in any sort of commercial activity.<sup>26</sup> The Board clearly stated this doctrine in a 1951 case involving Columbia University:

Columbia University is a non-profit educational corporation chartered by a special act of the Legislature of the State of New York. . . . Its income is derived almost completely from its endowment, from gifts, and from tuition and other payments made by students. The sole purpose of Columbia University is the promotion of education, and all of its activities are directed toward that end. Although the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute and the standards established by the Board for the normal exercise of its jurisdiction, we do not believe that it would effectuate the policies of the Act for the Board to assert jurisdiction here.<sup>27</sup>

Although the NLRA only exempted charitable hospitals, the Board

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23. See BOARD MEMBERS, *supra* note 17.

24. 29 U.S.C. § 152 (2006). “The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . .” *Id.*

25. Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW 243, 247 (2004). Currently fourteen states provide such a right: California, Florida, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Wisconsin. See FREQUENTLY ASKED QUESTIONS, THE COALITION OF GRADUATE EMPLOYEE UNIONS, available at <http://cgeu.org/faq.php> (last visited January 17, 2009).

26. Pollack & Johns, *supra* note 25, at 247

27. Columbia Univ., 97 N.L.R.B. 424 (1951).

asserted that the NLRA's legislative history supported its decision to decline to exercise jurisdiction over non-profit organizations where "the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."<sup>28</sup>

The Board changed course in the *Cornell* case, a case involving maintenance workers at Cornell and Syracuse Universities. Although this decision did not involve graduate students, the extension of NLRB jurisdiction to private colleges and universities made later cases involving graduate students possible.<sup>29</sup> The NLRB held that asserting jurisdiction over private universities was consistent with the NLRA's goal of regulating private commercial activity:

[T]he Board has declined to assert jurisdiction over non-profit universities if the activity involved was noncommercial and intimately connected with the school's educational purpose. However, an analysis of the cases reveals that the dividing line separating purely commercial from noncommercial activity has not been easily defined. . . . [C]harged with providing peaceful and orderly procedures to resolve labor controversy, we conclude that we can best effectuate the policies of the Act by asserting jurisdiction over non-profit, private educational institutions where we find it to be appropriate.<sup>30</sup>

With their newly asserted jurisdiction, the NLRB was able to rule on cases involving attempts by graduate students to unionize at private institutions of higher education.

## 2. Adelphi University

The *Adelphi* case, decided in 1972, involved an attempt by graduate students at Adelphi University, a private university in Garden City, New York, to join the faculty union in order to collectively negotiate their working conditions.<sup>31</sup> These students received free tuition, as well as a stipend ranging from \$1,200 to \$2,900, in exchange for duties, such as grading papers or helping with faculty research, for approximately twenty hours each week.<sup>32</sup> Because they sought to join the same bargaining unit as their faculty supervisors, the NLRB applied the "community of interest" test to decide whether the graduate students were eligible to become members of this union.<sup>33</sup> In order to certify an appropriate bargaining unit, the Board must be satisfied that all of the members have sufficiently similar

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28. *Id.* at 427.

29. *Cornell Univ.*, 183 N.L.R.B. 329, 334 (1970).

30. *Id.* at 331, 334.

31. *Adelphi Univ.*, 195 N.L.R.B. 639, 639 (1972).

32. *Id.*

33. *Id.* at 640.

interests. If groups within a unit have divergent interests, it will be difficult or impossible for a single labor organization to represent all of them.

The Board held that there was not a sufficient community of interest to merit including the graduate students in the faculty union.<sup>34</sup> One reason of particular importance was that the students' continued status as employees had little to do with their work as teaching or research assistants and everything to do with the continued satisfactory progress in their coursework.<sup>35</sup> This rationale would remain important in later decisions involving attempts by graduate students to form their own unions.<sup>36</sup>

Another important factor was the students' lack of any formal role in faculty decision making. The Board found that the graduate students were not faculty members, and as such, should not be included in their bargaining unit:

They do not have faculty rank, are not listed in the University's catalogues as faculty members, have no vote at faculty meetings, are not eligible for promotion or tenure, are not covered by the University personnel plan, have no standing before the University's grievance committee, and, except for health insurance, do not participate in any of the fringe benefits available to faculty members. Graduate assistants may be elected by the students as their representatives on student faculty committees. Unlike faculty members, graduate assistants are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned.

In view of the foregoing, we find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit. Accordingly, we shall exclude them.<sup>37</sup>

### 3. Other Early Cases

A quartet of cases from the early 1970's illustrates the NLRB's position on graduate students during this period—no community of interest, no unionization. As the NLRB began to formulate policy in this area, it needed to define exactly which members performing which job functions within the academic community qualified as workers to join a faculty union. As it did so, it clearly demarcated a line in the sand which excluded

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34. *Id.*

35. *Id.*

36. *See infra* Part II.C.3.

37. *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972).

students.

The first of these cases, *C.W. Post*, involved an election for a union which would represent faculty in negotiations with the C.W. Post Center, a college within the Long Island University system.<sup>38</sup> In its decision, the Board excluded students from the proposed bargaining unit.<sup>39</sup> More instructive was the Board's rationale in allowing a single "research associate" to join the bargaining unit.<sup>40</sup> This employee did not teach classes, but conducted research supported by a grant given to the University. Unlike the teaching assistants, he had already earned a doctoral degree. The Board found, based on his qualifications and the fact that "research associates" could receive tenure, that he had a sufficient community of interest with other faculty members.<sup>41</sup> This case crystallized the dilemma graduate students faced in trying to join faculty unions: different qualifications and different goals for collective bargaining meant that there was never a sufficient community of interest.

Interestingly, the NLRB never addressed whether teaching assistants qualified as employees under the NLRA. Because students continued to attempt to join faculty unions, the "community of interest" test repeatedly blocked the way. Such was the case just a few years after *Adelphi* when the Board considered another attempt by teaching assistants to join a faculty union at the College of Pharmaceutical Sciences in New York.<sup>42</sup> The Board rejected the graduate students' request to join the faculty unit, noting in the process that the teaching assistants were primarily students rather than employees.<sup>43</sup> This rationale had important consequences for future attempts to unionize graduate students.<sup>44</sup>

The NLRB found an additional rationale to exclude graduate students at Georgetown University the following year.<sup>45</sup> Teaching assistants there were denied membership in a university wide union which represented part-time employees.<sup>46</sup> Teaching assistants at Georgetown could have their

38. *C.W. Post Univ.*, 189 N.L.R.B. 904 (1971).

39. *Id.* at 908. "In accordance with the above, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: 'All professional employees employed at the Employer's C. W. Post Center, Brookville, Long Island, New York. . . but excluding. . . student assistants.'" *Id.*

40. *Id.* at 906-07.

41. *Id.*

42. *Coll. of Pharm. Sci. in the City of New York*, 197 N.L.R.B. 959 (1972).

43. *Id.* at 960. "We find that the teaching assistants are primarily students and do not share a sufficient community of interest with faculty members to warrant their inclusion in the unit." *Id.*

44. *See infra* Part II.C.

45. *Georgetown Univ.*, 200 N.L.R.B. 215, 216 (1972).

46. *Id.*

pay decreased based on their financial aid package.<sup>47</sup> This difference in the form of compensation further reduced the community of interest between teaching assistants and other university employees.<sup>48</sup> In addition, the Board found that the teaching assistants at Georgetown were only temporary employees since they only worked nine months a year.<sup>49</sup> This temporary status was another difference destroying any community of interest between the teaching assistants and other university employees.<sup>50</sup>

The following year, the Board denied organizing rights to several graduate students employed as residence assistants and bowling alley operators at Barnard College.<sup>51</sup> This decision is most notable for an amicus brief filed by Wheaton College which argued that graduate students were not “employees” under Section 2(3) of the NLRA.<sup>52</sup> The Board considered this argument moot since it denied the graduate students the right to join the Barnard College union due to a lack of community of interest.<sup>53</sup> However, this brief is the first instance of an argument that graduate students are not employees. It would not be the last.

These cases show the early difficulties graduate students had in gaining collective bargaining rights. In attempting to join faculty unions at their institutions, teaching and research assistants were fighting a battle they could never win. Their job descriptions, qualifications and pay structures were simply too different to allow graduate students to possibly have sufficient community of interests with tenured professors and other lifelong academics. Faculty members typically hold advanced degrees and are evaluated based on their teaching and research while graduate students are generally working towards such qualifications and are evaluated by faculty members based on their performance in coursework.

Importantly, the amicus brief filed in *Barnard* anticipated a new battlefield in the struggle for graduate student unionization: graduate students could avoid the community of interest test by forming their own union. University employers would, logically, counter that teaching and research assistants were students, not employees. The Board addressed such a case just a year later, when a group of physicists at Stanford attempted to form their own union.<sup>54</sup>

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Barnard Coll.*, 204 N.L.R.B. 1134 (1973).

52. *Id.* at 1135.

53. *Id.* at n.5.

54. *The Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

### C. The Mid-Seventies Cases

#### 1. Leland Stanford University

In 1974, the NLRB heard a case concerning a union election for a bargaining unit consisting of eighty-three research assistants in the physics department at Stanford University.<sup>55</sup> Unlike previous cases heard by the Board on the issue of graduate student unionization, the research assistants at Stanford did not seek to join the faculty union, but planned to start their own.<sup>56</sup> This, of course, meant the community of interest test, applied in previous cases, was not applicable because the research assistants did not seek to earn the right to collectively bargain by riding on the faculty's coattails.

Stanford argued, and the Board agreed, that the students were not employees under Section 2(3) of the Wagner Act.<sup>57</sup> The Board found the relationship between the research assistants and the University lacked several of the key characteristics inherent in the employer-employee relationship. For one thing, the money provided to the students was part of a package of financial aid meant to make graduate study at the university affordable to students from a wide variety of socioeconomic backgrounds.<sup>58</sup> The amount of the monies received bore no relation to the value of the student's services or the number of hours worked, another key difference from traditional wages.<sup>59</sup> Instead, the level of funding was set by the National Science Foundation Fellowship.<sup>60</sup>

Another important factor affecting the NLRB's decision was the fact that the University treated the research assistants like students, rather than employees:

[A]lthough RA's are paid through Stanford's payroll machinery, they do not share the fringe benefits of employees but do have the privileges enjoyed by other students. Thus they have the student health care and insurance, share in various campus activities, and may use student housing; they get no vacation, sick leave, or retirement benefits and have no schooling benefits for their children. Significantly, the payments to the RA's are tax exempt income.<sup>61</sup>

Finally, the Board found that all of these students were required to research whether they received financial aid or not, in order to receive

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 622.

59. *Id.*

60. *Id.*

61. *Id.*

required credit towards the completion of their degree.<sup>62</sup> This lent credence to the fact that the monies received for doing research were financial aid, rather than a wage paid in exchange for work performed, as in the traditional employer-employee relationship. This final part of the Board's analysis would appear again shortly in two cases involving medical interns.<sup>63</sup>

## 2. Cedars-Sinai Medical Center

In 1976, the Board dismissed a petition for an election among a unit of interns and residents at Cedar-Sinai Medical Center in Los Angeles.<sup>64</sup> Although this case did not involve graduate students working as teaching or research assistants, the Board further defined just who was and was not an employee under the Wagner Act.

The interns and residents at the Medical Center were similar to graduate students in that the program in which they were enrolled had both educational and practical elements.<sup>65</sup> Students, at first, spent most of their time in the classroom but their education became progressively "hands on" as they gained experience.<sup>66</sup> They were enrolled in programs ranging in length from one to five years (the average length was about two years) after which the majority went into private practice elsewhere.<sup>67</sup> For this they received a salary of \$20,000 per year.<sup>68</sup> As in most previous graduate student cases, the amount of this stipend was the same for each of the interns and was not in any way related to their experience or duties.<sup>69</sup> The Board considered it important that stipends were uniform and that the interns and residents most likely would not remain at the Medical Center after their programs.<sup>70</sup> The Board ruled that the primary purpose of the interns' and residents' work was educational.<sup>71</sup>

As such, the "primary purpose" test became the applicable test for graduate students' attempts at unionization. Here, the Board found that the interns and residents needed to complete their programs at the Medical Center in order to further their medical careers:

They participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An

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62. *Id.* at 622-23.

63. *See infra* Parts III-IV.

64. Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976).

65. Pollock & Johns, *supra* note 23, at 250.

66. Cedars-Sinai Med. Ctr., 223 N.L.R.B. at 251.

67. *Id.* at 253.

68. *Id.* at 255.

69. *Id.* at 253.

70. *Id.*

71. *Id.*



internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties.<sup>72</sup>

The students were not primarily motivated by a desire to earn a salary; the stipends enabled them to maintain a minimal standard of living while they completed their education.<sup>73</sup>

However, while the graduate students at Stanford produced work that only benefited them as they worked towards their degree, the interns and residents at Cedars-Sinai spent considerable amounts of time (sometimes up to 100 hours a week) providing patients with care.<sup>74</sup> Cedar-Sinai's primary business was providing patients with medical services.<sup>75</sup> The Board overlooked this distinction, finding that working directly with patients was the only suitable way of providing the students with the necessary education.<sup>76</sup> The Board also stressed that the students' compensation was not related to their performance or expertise with patients.<sup>77</sup> These facts marked "the fundamental difference between an educational and an employment relationship."<sup>78</sup> The Board decided that compensation and motivation were major factors in differentiating between a student and an employee.

The *Cedars-Sinai* decision came with a vigorous dissent, written by Member Fanning, an opinion that was far lengthier than the majority's decision.<sup>79</sup> The dissent began by accusing the majority of "exploit[ing] semantic distinctions between the terms 'students' and 'employees.'"<sup>80</sup> The dissent denied any need to differentiate between the interns' roles as students and employees and rejected the majority's "primary purpose" analysis.<sup>81</sup> There was no need to cast students exclusively as students or exclusively as employees. Member Fanning explained that Section 2(3) of the Wagner Act specifically excluded certain groups of workers from its provisions and "students" were not listed among the excepted groups.<sup>82</sup> The dissent also noted that the Supreme Court added managerial workers to the excluded list for policy reasons although managerial workers were not specifically excluded by the Wagner Act.<sup>83</sup>

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72. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976).

73. *Id.*

74. *Id.* at 255.

75. *Id.* at 251.

76. *Id.* at 253.

77. *Id.*

78. *Id.*

79. *Id.* at 254-59 (Manning, dissenting).

80. *Id.* at 254.

81. *Id.*

82. *Id.* at 254.

83. *Id.*

Member Fanning advocated common law principles for determining whether a particular worker is an employee under the Act.<sup>84</sup> Using this analysis, the interns and residents at Cedars-Sinai were employees because they performed work in exchange for compensation.<sup>85</sup> The interns had taxes withheld from their income and had sick leave, and the hospital was liable for any negligence they committed.<sup>86</sup> In addition, they received no grades and took no exams, instead spending the vast majority of their time at the Center providing patients with care.<sup>87</sup> Therefore, common law principles required a finding that the students were employees simply because they performed work in exchange for a salary:

The term “employee” is the outgrowth of the common law concept of the “servant.” At common law, a servant was a “person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right of control. . . . So that the conventional meaning of the word implies someone who works or performs a service for another from whom he or she receives compensation.”<sup>88</sup>

As Member Fanning acknowledged, the Supreme Court previously added managerial employees to the list of excluded classes of workers purely on policy grounds.<sup>89</sup> Arguments about policy would play a big role the next time this issue came before the Board.

### 3. St. Clare’s Hospital

Just a year later, the Board, again over a vigorous dissent from now Chairman Fanning, further explained and expanded its “primary purpose” jurisprudence in *St. Clare’s Hospital*.<sup>90</sup> This case involved an election for a bargaining unit consisting of interns and residents at a hospital.<sup>91</sup> In dismissing the petition for an election, the Board adhered to the “primary purpose” test:

[I]t is apparent that Cedars-Sinai has been viewed by many as an aberration in national labor policy, or, if not an aberration, at

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84. *Id.* at 255.

85. *Id.*

86. *Id.* at 255–56.

87. *Id.* at 256.

88. *Id.* at 254.

89. *Id.* There is long standing precedent for excluding managerial employees based on a perceived conflict of interest. Specifically, managerial employees’ role as “policy makers” for their employers creates a situation in which their interests will differ from those of lower level employees. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 270–90 (1974).

90. *St. Clare’s Hosp. and Health Ctr.*, 229 N.L.R.B. 1000 (1977).

91. *Id.*

least the initial step in a new direction. Nothing could be further from the truth. Cedars-Sinai is consistent with, and reflective of, longstanding national labor policy as developed and articulated by this Board.<sup>92</sup>

The majority explained that, in situations in which students were employed by their university in a role directly related to their educational program, policy considerations made it inappropriate for these students to be considered employees.<sup>93</sup> The Board was especially concerned about academic matters, such as curriculum and teaching methods, becoming the subject of collective bargaining.<sup>94</sup> In the case of medical interns, the possibility of hours being negotiated was particularly vexing to the majority.<sup>95</sup> Without a significant number of clinical hours, medical interns would receive an inferior educational experience. Medical interns who become doctors without benefiting from a significant amount of time practicing in clinical settings might not serve the best interests of the public because they would not be fully prepared to address the problems and situations that arise in everyday practice. Such a limitation could result in a vastly inferior educational experience, clearly contrary to the best interests of the public:

The subject of hours, for example, is of particular relevance when speaking of housestaff . . . Unfortunately, medical emergencies do not always conveniently occur between the hours of 9 a.m. and 5 p.m., Monday through Friday. Thus, the flexibility which medical educators need to schedule shifts, assignments, transfers, etc., in an educationally sound fashion could become bargainable should the housestaff be afforded collective-bargaining privileges.<sup>96</sup>

The superior knowledge possessed by instructors meant they were inherently in a position to best determine educational methods. Therefore, these methods should not be the subject of collective bargaining.<sup>97</sup>

Chairman Fanning again weighed in with a dissent which the majority criticized as showing “a fundamental misunderstanding of the policy considerations which underlie our conclusion in Cedars-Sinai that

92. *Id.* The Board’s ultimate basis for denying the petition was that organization seeking representative status was not a labor organization within the meaning of the Act because only students, not employees, participated in the Committee, as required by § 2(5) of the Act. *See* St. Clare’s Health and Hospital Ctr., 223 N.L.R.B. at 1002.

93. *Id.* at 1002.

94. *Id.*

95. *Id.* at 1003.

96. *Id.*

97. *Id.* “From the standpoint of educational policy, the nature of collective bargaining is such that it is not particularly well suited to academic decision making.” *Id.*

housestaff are ‘primarily students.’”<sup>98</sup> The dissent claimed that the majority was caught up in semantics and that it was against legislative intent for the Board to expand the group of excluded employees based on policy concerns.<sup>99</sup> Surely, Congress did not intend to create a “jurisdictional no-man’s land” into which housestaff would fall.<sup>100</sup> Chairman Fanning’s argument was undercut somewhat by his own admission in *Cedar-Sinai* that it was appropriate for the Supreme Court to add managerial employees to the excluded groups of workers for policy reasons.<sup>101</sup>

For the next two decades, *St. Clare’s Hospital* and *Cedar-Sinai* remained the landmark decisions in the area of graduate student unionization. However, the views of Chairman Fanning would eventually have their day.

#### D. The Tide Turns

##### 1. Boston Medical Center

Due to the high rate of turnover, the NLRB is a very fluid body; this is often reflected in its rulings.<sup>102</sup> It is possible to remake nearly the entire membership of the Board within a single presidential term. This is at least a partial explanation for the Board’s decision to reverse *Cedar-Sinai* and *St. Clare’s Hospital* in 1999 in the *Boston Medical Center* case.<sup>103</sup> By that time, the Board consisted entirely of President Clinton’s appointees.

*Boston Medical Center* involved very similar facts to its two predecessors. A unit consisting of interns and residents in a hospital sought an election.<sup>104</sup> The Board was persuaded to adopt the common law test enunciated by Member Fanning in his dissents in *Cedar-Sinai* and *St. Clare’s*.<sup>105</sup> Likewise, a recent Supreme Court case, *Sure-Tan, Inc. v. NLRB*,<sup>106</sup> influenced the Board, as the Court interpreted Section 2(3) as creating a “broad statutory definition” of “employee” subject only to narrow statutory exceptions.<sup>107</sup>

Applying the common law master-servant test, the Board found that the

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98. *Id.* at 1000.

99. *St. Clare’s Hospital and Health Ctr.*, 229 N.L.R.B. 1000, 1005-09 (1977) (Manning, dissenting).

100. *Id.* at 1005.

101. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 254 (1976). *See also supra* note 82 and accompanying text.

102. *See supra* notes 15–20 and accompanying text.

103. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999).

104. *Id.*

105. *See supra* Parts II.C.2-3.

106. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984).

107. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 160.

interns and residents were, in fact, employees under the Act.<sup>108</sup> They provided a service in exchange for compensation, a fact strongly indicative of an employer-employee relationship.<sup>109</sup> Since the residents did not receive any grades or take any exams, the Board concluded they were apprentices more than students, or more aptly named by the Board, “junior professional associates.”<sup>110</sup> Under the master-servant test, the most important factor was what the prospective employees do rather than their motivation for doing it.

Another important aspect at common law was the agency factor.<sup>111</sup> The existence of agency, or employer responsibility for acts of the employee, is indicative of a master-servant dynamic.<sup>112</sup> The Hospital was liable for acts of negligence committed by the interns and residents. The Board found it telling that the interns and residents spent nearly eighty percent of their time providing patient care.<sup>113</sup> This pointed to an employee-employer relationship under the master-servant test.

The Board, having read the Wagner Act expansively, had turned the previous jurisprudence on its head, at least with respect to medical interns and residents. One could now be a student without necessarily forfeiting one’s status as an employee. How this ruling affected teaching assistants and research assistants at research universities was still unclear. With the NLRB’s graduate student unionization jurisprudence in disarray, the stage was set for a possible sea change the next time the issue came before the Board.

### III. NEW YORK UNIVERSITY

*New York University* involved a union organizing campaign consisting of the majority of NYU’s 1,750 graduate students who worked as either research or teaching assistants.<sup>114</sup> The case took on a familiar tone, with the graduate students arguing they were employees under the Act while the University argued they were not.<sup>115</sup> Alternatively, the University argued that policy concerns should prevent certification of a graduate student union.<sup>116</sup> The Board relied heavily on *Boston Medical Center* in applying the common law master-servant test.<sup>117</sup> In applying that test, they reached

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108. *Id.* at 160–61. For a discussion of the master-servant test, see *supra* note 88 and accompanying text.

109. *Id.* at 160.

110. *Id.* at 161.

111. *Id.* at 160.

112. *Id.*

113. *Boston Medical Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999).

114. *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000).

115. *Id.*

116. *Id.*

117. *Id.*

the same conclusions as in *Boston Medical Center*, namely that student status did not require a forfeiture of one's right to organize.<sup>118</sup> The Board found that the students' relationship with their employers was typical of employer-employee relationships.<sup>119</sup> They provided services for the employer and were paid for it, just like any other employees at the University.<sup>120</sup>

The Board adopted an expansive and inclusive interpretation of the word "employee" in Section 2(3).<sup>121</sup> Using this analysis, there was no justification for excluding students, as students are not a group excluded by the language of the statute.<sup>122</sup>

The Board completely rejected any attempt to distinguish the working conditions of the graduate students at NYU from the interns and residents at Boston Medical Center.<sup>123</sup> While the interns spent nearly eighty percent of their time providing patient care, the graduate students spent a far smaller percentage of time providing services, such as teaching or grading, to the University.<sup>124</sup> The Board found this to be irrelevant because any time spent providing services to the University still constituted an exchange of services for compensation, the hallmark of an employer-employee relationship.<sup>125</sup>

NYU argued that the stipends provided to graduate assistants were financial aid, rather than wages.<sup>126</sup> Students who did not do any work as graduate assistants still received identical stipends.<sup>127</sup> The Board rejected this, noting that for those who did perform work for their stipends, there was still an exchange of work for compensation. The fact that similar stipends were provided to other students without labor was not a relevant consideration.<sup>128</sup>

The Board also rejected NYU's contention that the students received an educational benefit far in excess of the educational benefit received by the interns at Boston Medical Center.<sup>129</sup> Although the graduate students, unlike the interns, were still working towards a degree and received a large

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1205-06.

122. *Id.* at 1206.

123. *Id.* at 1206-07.

124. *Id.* at 1206.

125. *Id.*

126. *Id.* at 1206-07.

127. *Id.* When the University was particularly anxious to have a prospective student, it would offer stipends to that student without requiring work. Other students, whose undergraduate achievements may have been less stellar, would have been required to perform work for these stipends. *Id.*

128. *Id.* at 1207.

129. *Id.*

educational benefit, this did not change the fact that they provided labor for wages.<sup>130</sup> According to the Board, educational benefits did not override the students' status as employees.<sup>131</sup>

Applying the common law test meant these traditional arguments against graduate student unionization would no longer succeed. The Board also rejected NYU's policy arguments regarding unions' potential chilling effects on academic freedom.<sup>132</sup> These arguments had been of particular importance in pre-*Boston Medical Center* cases, particularly *St. Clare's Hospital*, as Board members were loathe to make a ruling which would allow students to bargain over subjects such as teaching methods, class hours, and curriculum.<sup>133</sup>

In virtually all graduate student unionization cases, the employer has issued dire warnings of the effect on education if graduate students were able to negotiate their working conditions. There has been a general fear that students would move beyond negotiating over common issues like hours, wages and benefits, eventually attempting to negotiate other conditions such as their own classes, grades, or professors.<sup>134</sup> The Board rejected that argument as well, noting that certification of a unit did not require the employer to reach an agreement with the union about any particular issue.<sup>135</sup> The Board put its faith in the abilities of both parties to confine collective bargaining to those areas where it was appropriate.<sup>136</sup> There was no reason to believe that graduate students would seek to collectively bargain in areas where they should not. This was a complete about-face from previous decisions, particularly *St. Clare's Hospital*, where the possibility of infringing on academic freedom was reason enough for the board to dismiss the petition.<sup>137</sup>

The Board's position regarding academic freedom was borne out by the eventual contract agreed between the union and NYU, which contained a clause stating that "[d]ecisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University."<sup>138</sup> However, nothing

130. *Id.*

131. *Id.* "Therefore, notwithstanding any educational benefit derived from graduate assistants' employment, we reject the premise of the Employer's argument that graduate assistants should be denied collective-bargaining rights because their work is primarily educational." *Id.*

132. *Id.* at 1208-09.

133. *See supra* Part II.C.3.

134. New York Univ., 332 N.L.R.B. at 1208-09. *See also* Epstein, *supra* note 2, at 186-90.

135. New York Univ., 332 N.L.R.B. at 1208-09. *See also* NLRB v. Jones & Laughlin Steel Corp., 301 N.L.R.B. 1, 45 (1937).

136. New York Univ., 332 N.L.R.B. at 1208-09.

137. *See supra* Part II.C.3.

138. Epstein, *supra* note 2, at 187.

prevented clauses like this one being negotiated away in future contracts. While nothing compels the university to agree to allow graduate students to influence teaching conditions, universities argue that, with the power of a union, graduate students may make inroads into academic freedom.

*New York University* and *Boston Medical Center* were a complete change of jurisprudence. The dissents of Member Fanning had finally seen their day, more than two decades later. However, the nature of the NLRB is change, given the constant turnover in its membership. The next change would not be long in coming.

#### IV. BROWN UNIVERSITY

In the wake of the *NYU* decision, graduate students at private colleges and universities across the country were able to organize and collectively bargain. When graduate students at Brown University attempted to form a union, the University argued that their situation was factually distinguishable from *NYU* because a far greater percentage of Brown's graduate students were research or teaching assistants.<sup>139</sup> The Board went far beyond that, however, reversing *NYU* and once again holding that graduate students were not employees under Section 2(3) of the Wagner Act.<sup>140</sup>

Now consisting of a majority less favorable to union causes, the Board reverted to the "primary purpose" test.<sup>141</sup> The Board also found the traditional arguments concerning academic freedom persuasive.<sup>142</sup> The union at Brown proposed to represent 450 teaching and research assistants in social science and humanities departments at the University.<sup>143</sup> The students received a stipend, the size of which did not vary based on duties or skill.<sup>144</sup> Many students received fellowships and therefore received the stipends despite not performing any duties for the University.<sup>145</sup> The majority cited *Leland Stanford* as the precedent which the Board had dutifully followed for more than a quarter of a century before *NYU*.<sup>146</sup> The lack of flexibility in compensation and the fact that this compensation was given to all students regardless of their work or financial need was telling in the opinion of the majority.<sup>147</sup>

The Board cited the fact that the relationship between students and the University was primarily educational rather than economic in concluding

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139. Brown Univ., 342 N.L.R.B. 483, 483 (2004).

140. *Id.*

141. Epstein, *supra* note 2, at 176.

142. *Brown Univ.*, 342 N.L.R.B. at 492.

143. *Id.* at 483.

144. *Id.* at 486.

145. *Id.*

146. *Id.* at 486–87. See *supra* Part II.C.1.

147. Brown Univ., 342 N.L.R.B. 483, 487 (2004).



that the traditional employer-employee framework was inappropriate.<sup>148</sup> Indeed, most of the students in the proposed bargaining unit would not have been able to receive their degree without completing a teaching requirement.<sup>149</sup> Thus, the *Brown* decision marked a return to the “primary purpose” test. According to the Board, graduate students attended Brown first and foremost to earn a degree. Because their positions were not available to non-graduate students, and they received income regardless of the work they performed, the Board found that they were primarily students, rather than employees.

The NLRB further noted that it was empowered to make policy determinations in interpreting the statute.<sup>150</sup> Previously, the Supreme Court had excluded managerial employees from protection under the Wagner Act although they are not among the groups specifically excluded in Section 2(3).<sup>151</sup> The Supreme Court did this because it was necessary in order to realize the goals of the legislation.<sup>152</sup> Thus, the Board determined it should do the same in interpreting the rights of graduate students to form unions since the Wagner Act was meant to cover economic, rather than educational, relationships.<sup>153</sup>

The Board relied heavily on its decision in *St. Clare’s Hospital*.<sup>154</sup> In particular, the majority’s decision issued dire warnings about the threat graduate student unions posed to academic freedom:

The concerns expressed by the Board in *St. Clare’s Hospital* 25 years ago are just as relevant today at Brown. Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants’ duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown.<sup>155</sup>

Finally, the majority criticized both the dissenting members and the *NYU* Board for overturning a quarter-century of precedent by allowing graduate

148. *Id.*

149. *Id.* at 488.

150. *Id.*

151. *Id.* See *supra* note 94.

152. *Brown Univ.*, 342 N.L.R.B. 483, 488 (2004).

153. *Id.* at 488. “We follow that principle here. We look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships. The Board’s longstanding rule that it will not assert jurisdiction over relationships that are ‘primarily educational’ is consistent with these principles.” *Id.*

154. *Id.* at 489–91.

155. *Id.* at 490.

student unionization. “Although the Board may not have been presented the precise facts of *NYU* in earlier cases, the dissent chooses either to ignore or simply to disregard what had been Board law regarding this category of students for over 25 years.”<sup>156</sup> The majority also noted that there had been little disruption caused by its consistent rulings prior to *NYU* denying graduate students collective bargaining rights.<sup>157</sup> Additionally, Congress never voiced any displeasure with the Board’s earlier line of decisions.<sup>158</sup>

In summary, the NLRB in *Brown* returned national labor policy in this area to exactly where it was prior to *NYU*. The Board decided that the “primary purpose” test was back. Students could not be both students and employees at the same time if their work was directly related to their educational goals. The Board firmly stated its belief that it had the right to interpret statutes so that legislative intent was realized and it made clear that these policy considerations were best served by denying graduate students organizing rights. Finally, the majority made it clear that it took seriously the potential threats to academic freedom posed by graduate student unions.

The current prospects for graduate student unions project a bleak picture. However, the outlook may change under the direction of the Obama Administration. Currently, the time period from 2000 to 2004 appears to be a brief interlude in an otherwise unbroken period where graduate students were denied union rights. Only time will tell what will happen next.

## V. POST-BROWN DEVELOPMENTS

### A. The Aftermath at NYU

Following the NLRB’s decision in *NYU*, the University was forced to negotiate with the newly formed graduate student union. The parties agreed to a contract in January 2002 that featured significant stipend increases as well as improved health benefits.<sup>159</sup> The contract did not give the students any say in academic decisions as the NLRB had feared.<sup>160</sup> Students at other universities began to sit up and take notice. A leader in the budding graduate student union movement at Columbia said, “Graduate students who are unsure of the impact a union will have can look at the N.Y.U. contract and see the concrete evidence of the benefits of

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156. *Id.* at 491.

157. *Id.* at 493.

158. *Id.*

159. Karen W. Arenson & Steven Greenhouse, *N.Y.U. and Union Agree On Graduate-Student Pay*, N.Y. TIMES, Jan. 30, 2002 at B3.

160. *See supra* note 129 and accompanying text.

unionizing.”<sup>161</sup>

After the *Brown* decision, NYU refused to continue recognizing the union and did not negotiate a new contract with it.<sup>162</sup> Graduate students went on strike, refusing to submit grades for the Fall 2005 semester.<sup>163</sup> “This issue is worth fighting for,” said Susan Valentine, a fourth-year graduate student in history at N.Y.U. and graduate student leader. “I really love teaching. I love being in graduate school. And it would not be possible for me without a fair salary and benefits that the union ensures.”<sup>164</sup> For its part, the University continued to insist that student agitation, via the union, infringed on academic freedom.<sup>165</sup>

The strike lasted for the remainder of the 2005–2006 school year, causing a great deal of angst on the part of undergraduate students, who were often left with canceled classes and a lack of instruction due to the unavailability of graduate assistants.<sup>166</sup> During the spring semester, many graduate assistants eventually returned to work, although the strike continued.<sup>167</sup> It took the end of the academic year and with it a thirty percent turnover in membership to break the deadlock.<sup>168</sup>

When the strike ended, the University still refused to voluntarily recognize the union.<sup>169</sup> NYU continued to insist that academic freedom had been infringed under the terms of the contract.<sup>170</sup> Union leaders and graduate students vowed to keep up the fight for union recognition on their campus.<sup>171</sup> Even today, the union’s website continues to insist “we will win.”<sup>172</sup> History shows that a change of outlook by the NLRB may be necessary in order to make that boast a reality.

#### B. Research Foundation at SUNY

Since the *Brown* decision, only one case of note involving graduate student unions has come before the Board. This case involved graduate students at the State University of New York (“SUNY”) who worked for a

161. Arenson, *supra* note 151, at B3.

162. Karen W. Arenson, *N.Y.U. Graduate Students Say They’ll Strike to Unionize*, N.Y. TIMES, Nov. 1, 2005 at B2.

163. *Id.*

164. *Id.*

165. *Id.*

166. Karen W. Arenson, *Strike by Graduate Students at N.Y.U. Enters Its Second Week*, N.Y. TIMES, Nov. 17, 2005 at B4.

167. Karen W. Arenson, *N.Y.U. Teaching Aides End Strike With Union Unrecognized*, N.Y. TIMES, Sept. 7, 2006 at B2.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. GRADUATE STUDENT ORGANIZING COMMITTEE AND UNITED AUTO WORKERS LOCAL 2110, available at <http://www.2110uaw.org/gsoc/> (last visited Jan. 8, 2008).

Research Foundation (“Foundation”) set up in order to provide additional research opportunities at the University.<sup>173</sup> The Regional Director applied *Brown* and dismissed the election petition, holding that the students were not employees under Section 2(3). The NLRB distinguished *Brown* and reinstated the petition for the proposed bargaining unit.<sup>174</sup>

Although all of the union’s potential members were students and their employment was dependent on their status as students, the Board found other factors distinguished their situation from that of the students in *Brown*.<sup>175</sup> Compensation was set at different levels depending on a student’s skill level and experience, and could be adjusted by the employer based on performance on the job.<sup>176</sup> Most importantly, the Foundation was a separate entity from SUNY. It did not grant degrees or teach students.<sup>177</sup> No credit was received for work performed and working at the Foundation was not a required part of any degree program.<sup>178</sup> It maintained its own payroll and human resources systems, distinct from the University, out of which the students were paid.<sup>179</sup> Accordingly, the students did not have a primarily educational relationship with the Foundation, although they did with the University. Thus, the students were employees under the “primary purpose” test.

Although this case did not deal with the same set of facts as previous cases involving graduate student unions, it still holds a degree of significance. First, despite still being dominated by a conservative majority, the Board declined to extend the “primary purpose” doctrine any further. On the other hand, faced with a possible opportunity to reverse *Brown*, the Board did not do so. This case indicates that the current state of the law in this area will remain in force at least until the composition of the Board is significantly changed.

### C. Attitude of Graduate Students

A survey carried out in 2004 by the Hofstra Labor and Employment Law Journal offers some insight into the attitude of graduate students around the country with regard to labor issues.<sup>180</sup> Although the format and method of the survey was less than perfect, it is instructive as to the concerns of

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173. Research Found. of the State Univ. of N.Y. Office of Sponsored Programs, 350 N.L.R.B. 197, 197 (2007).

174. *Id.*

175. *Id.* at 198.

176. *Id.*

177. *Id.* at 197.

178. *Id.* at 198-99.

179. *Id.* at 197.

180. Gerilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities* 21 HOFSTRA LAB. & EMP. L.J. 753 (2004).

potential members of graduate student unions.<sup>181</sup>

The survey showed that health care and wages were the primary issues of concern to graduate students.<sup>182</sup> This pokes some holes in the argument made by colleges and universities that students will seek to bargain over academic matters. For example, only 2.9% of graduate assistants chose “class size” as their most important issue.<sup>183</sup> Only 5.2% chose classwork, and less than 1% chose “class content.”<sup>184</sup> Again, this indicates that, if graduate student unions became a reality at these colleges and universities, students would look to bargain (at least initially) over issues such as wages and benefits. As one student stated: “[N]egotiating a living wage for graduate student teachers [is] the first step in recognizing the services of grad teachers and allowing graduate education to remain open to those of all income levels without forcing people into unmanageable debt.”<sup>185</sup> The survey also indicated that the vast majority of graduate students did not have any additional employment outside their assistant positions.<sup>186</sup>

#### VI. CONCLUDING THOUGHTS—WHERE TO NOW?

One of the primary lessons from the Board’s double reversal in *NYU* and *Brown* is the difficulty of applying a statute to a situation which was never envisioned by those drafting it. Both the “master-servant” test and the “primary purpose” test represent sincere attempts by Board members to interpret an ambiguous provision of the NLRA. In the absence of clarification from Congress, it remains very possible that the Board could change course again in the coming years.

The issue of graduate student unions looks likely to come up again within the next decade. Having had victory taken away from them in *Brown* just four years after winning the right to organize in *NYU*, advocates of unionization are unlikely to leave the matter where it presently stands. Currently, three of the five seats on the Board are vacant, meaning President Obama will be able to appoint a majority of the Board immediately.<sup>187</sup> Given the important role of organized labor in the Democratic Party, it appears likely that the appointees chosen may be more disposed to union interests.

Nevertheless, the Board has reason to be wary of reversing itself quickly. Constant reversals and re-reversals rob the law of predictability and undermine the Board’s integrity as its decisions look inherently

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181. *Id.* at 782-84.

182. *Id.* at 786.

183. *Id.* at 787.

184. *Id.* at 788.

185. *Id.* at 789.

186. *Id.*

187. BOARD, NATIONAL LABOR RELATIONS BOARD, *available at* [http://www.nlr.gov/About\\_Us/Overview/board/](http://www.nlr.gov/About_Us/Overview/board/) (last visited March 17, 2009).

political. Furthermore, evidence from the handful of public colleges and universities which have graduate student unions suggests they have not been the panacea supporters had hoped for.<sup>188</sup> For example, students at UC-Berkeley worked without a contract for seven years during the late 1980's and early 1990's.<sup>189</sup> Such a lengthy period represents the entire graduate career of most students. Generally, contracts which have been successfully negotiated by graduate student unions have resulted in modest increases in the wages and benefits for its members.<sup>190</sup> Unions may find it difficult to extract even these increases from colleges and universities at a time when endowments have rapidly decreased in value.<sup>191</sup>

On the other hand, evidence from public institutions as well as from NYU during the period it had a graduate student union, suggests that unionization does not result in the sky falling. It does not appear that public colleges and universities with graduate student unions had to greatly reduce the number of teaching and research assistants in the wake of unionization. The fears of colleges and universities that graduate student unions would attempt to bargain over class sizes and teaching methods have proved largely unfounded as well.<sup>192</sup> While it remains unclear what the effects of wider unionization by graduate students would be, the alarmist scenario predicted by NYU when it came before the Board has not materialized.

The issue of graduate student unionization seems likely to come up again in the near future. Another about-face from the Board, the third in a relatively short period of time, is a possibility. Colleges and universities and organized labor have invested considerable time and effort into this struggle. They should not be at the mercy of the whims of a politically motivated Board. Instead of allowing uncertainty to prevail in this area of the law, Congress should act. Congressional clarification would be the best solution and perhaps the only one likely to resolve the situation once and for all. Today's uncertainty exists because the roles of teaching and research assistants do not fit neatly within the categories created by the NLRA. Positions such as these simply did not exist in 1935. Congress now has it within its power to make its intent clear and clarify whether graduate students are "employees" under the NLRA. It should do so.

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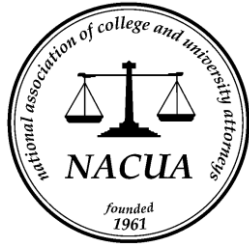
188. For an excellent, if slightly outdated, summary of the contracts negotiated by graduate student unions at public universities, see William C. Barba, *The Unionization Movement: An Analysis of Graduate Student Employee Union Contracts*, NACUBO BUSINESS OFFICER, Nov. 1994 at 35-43.

189. *Id.* at 40-41.

190. *Id.* at 37-40.

191. See Geraldine Fabrikant, *Colleges Struggle to Preserve Financial Aid*, N.Y. TIMES, Nov. 10, 2008 at F25.

192. The University of Wisconsin is an exception. State law requires bargaining over class sizes and educational planning. Barba, *supra* note 188, at 40.



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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

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