

# FIFTY YEARS OF HIGHER EDUCATION LAW: TURNING THE KALEIDOSCOPE

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## I. INTRODUCTION

Colleges and universities today are probably the most heavily regulated organizations in the United States in terms of the number and types of statutes and judicial precedents with which they must comply. They are subject to common law (contracts, torts, property); state and federal statutory law that governs employers; state and federal regulation of many of their functions, such as the conduct of research and how their funds are spent; and for publicly-funded institutions, state and federal constitutional law as well. Even those with nonprofit status may have tax liability for unrelated business income, be subject to zoning and other local or regional land use requirements, and even face potential liability under state lobbying laws. The number and diversity of sources of legal regulation continues to expand as students, employees, policymakers, and special interest groups find new ways to influence or to hold colleges and universities accountable

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for their actions.

This expansion of the scope of regulation of higher education—by all three branches of state and federal government—began at about the same time that the National Association of College and University Attorneys was founded in 1960.<sup>1</sup> The Higher Education Act of 1965<sup>2</sup> created an expansive set of federal programs to provide financial aid to students and to help low-income students prepare for college or university. The Civil Rights Act of 1964<sup>3</sup> required nondiscrimination on the part of any entity receiving federal funds, but compliance was slow and, in many instances, begrudging.<sup>4</sup> The civil rights movement spawned legal struggles over student access to institutions from which they were previously excluded<sup>5</sup> and the desegregation of public systems of higher education,<sup>6</sup> and saw the recognition of due process rights for students facing discipline at public institutions.<sup>7</sup> The 1970s saw the protections of Title VII of the Civil Rights Act of 1964 extended to employees of higher education institutions,<sup>8</sup> and the passage of Title IX of the Education Amendments of 1972<sup>9</sup> and the

1. Prior to 1960, most of the legal issues faced by colleges and universities involved state control of higher education, loyalty oaths for faculty, intellectual property issues, property law issues, laws applicable to fundraising, and accreditation. See THOMAS E. BLACKWELL, *COLLEGE LAW: A GUIDE FOR ADMINISTRATORS* (American Council on Education, 1961).

2. Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended at 20 U.S.C. § 1070)

3. Pub. L. No. 88-352, 78 Stat. 241 (1964).

4. Jacqueline A. Stefkovich & Terrence Leas, *A Legal History of Desegregation in Higher Education*, 63 J. NEGRO EDUC. 406 (1994).

5. See, e.g., *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962).

6. Litigation concerning the desegregation of formerly *de jure* segregated systems of public higher education in Alabama and Tennessee began in 1968. See *Ala. State Teachers Ass'n v. Alabama Pub. Sch. and Coll. Auth.*, 289 F. Supp. 784 (D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969); *Sanders v. Ellington*, 288 F. Supp. 937 (D. Tenn. 1968). Desegregation litigation related to public higher education in Tennessee ended in 2001. See *Geier v. Sundquist*, 128 F. Supp. 2d 519, 521 (M.D. Tenn. 2001). Desegregation litigation concerning Alabama's public system of higher education ended in 1995. See *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995). Similar litigation took place in Mississippi and Louisiana as well. For a history of desegregation litigation in public higher education, see generally JEAN PREER, *LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION* (Greenwood Press 1982). See also JOHN B. WILLIAMS, *RACE DISCRIMINATION IN PUBLIC HIGHER EDUCATION: INTERPRETING FEDERAL CIVIL RIGHTS ENFORCEMENT, 1964-1996* (Praeger Publishers 1997). For a thorough review of the cases involving the desegregation of public higher education, and a moving personal commentary on the era of desegregation, see Mary Ann Connell, *Race and Higher Education: The Tortuous Journey Towards Desegregation*, 36 J.C. & U.L. 945 (2010).

7. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961).

8. Institutions of higher education were brought under the ambit of Title VII by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

9. 20 U.S.C. § 1681 (2006).

Rehabilitation Act of 1973.<sup>10</sup> Although it would take several decades for either Title IX or Section 504 to be vigorously enforced, their impact was felt on college or university campuses throughout the United States as colleges and universities began to respond to their requirements. The speed and complexity of the new sources of regulation have increased ever since, and have forever changed the role of the attorney who represents colleges and universities.

In 1960, few attorneys practiced “higher education law,” and few colleges and universities used attorneys on a regular basis—either as in-house or outside counsel.<sup>11</sup> Beginning in the early 1970s and throughout that decade, scholars began synthesizing the legal principles developed in litigation involving colleges and universities.<sup>12</sup> These works were intended for use by students studying the “new” area of higher education law, by administrators, and by a developing cadre of “university counsel.” The first treatise on higher education law, written by William A. Kaplin, was published in 1978.<sup>13</sup> The number of university counsel and the length of the books devoted to the explication of higher education law expanded throughout the next three decades.<sup>14</sup>

In 2010, the National Association of College and University Attorneys has 3,677 members, nearly 72 percent of whom work as full-time

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10. 29 U.S.C. § 794 (2006).

11. Early books discussing court cases involving colleges and universities were written primarily for administrators, not for attorneys, and were sponsored by the Carnegie Corporation of New York. See M. M. CHAMBERS, *THE COLLEGES AND THE COURTS*, Preface (Illinois State University 1972). A series of volumes called *The Colleges and the Courts*, most of which were written by M. M. Chambers, was published beginning in 1936; six such volumes were published prior to the seventh, cited above. An eighth was published in 1976 by Illinois State University. The Carnegie Foundation for the Advancement of Teaching supported the research and publication of the first six volumes.

12. KERN ALEXANDER & ERWIN S. SOLOMON, *COLLEGE AND UNIVERSITY LAW*, at iii (Michie 1972) (combines analysis of legal principles with selected cases, written for “students and practicing administrators”); JOHN S. BRUBACHER, *THE LAW AND HIGHER EDUCATION: A CASEBOOK* (Fairleigh Dickinson Univ. Press 1971) (two-volume collection of edited cases without accompanying analysis); JOHN S. BRUBACHER, *THE COURTS AND HIGHER EDUCATION* (Jossey-Bass 1971) (descriptive discussion of student, faculty and business issues); HARRY T. EDWARDS & VIRGINIA DAVIS NORDIN, *HIGHER EDUCATION AND THE LAW*, at viii (Institute for Educational Management, Harvard Univ. 1979) (casebook with introductory analysis and notes and questions, written for “students and practitioners.”). Other works focused more narrowly on specific issues related to higher education. See, e.g., WALTER C. HOBBS, ED., *GOVERNMENT REGULATION OF HIGHER EDUCATION* (Ballinger Publishing Co. 1978).

13. WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING*, at viii (Jossey-Bass 1978) (intended for “administrators and legal counsel”).

14. For example, the first edition of KAPLIN, *supra* note 13, contains 500 pages of text and indices. The fourth edition of the work, published in 2006, contains 1,726 pages.

employees of their institutions.<sup>15</sup> The last five decades have seen enormous change in higher education itself. Some changes have been caused by new discoveries and new ideas (such as the internet or affirmative action), while other changes have come from developments in the law, both from legislatures and the judiciary. The interplay of these changes has had profound effects on the role of the higher education attorney and the way that we interact with all of higher education's stakeholders.

The overall increase in litigation<sup>16</sup> in the United States is mirrored in higher education, as individuals who disagree with a decision—whether it be admissions, employment, or student discipline—challenge the decision in court under an expanding array of legal theories. For example, courts have found an implied right of individual action under Titles IX<sup>17</sup> and VI,<sup>18</sup> and Section 504,<sup>19</sup> all of which specify enforcement by administrative agencies, but are silent on individual enforcement. In addition, courts have recognized students' rights to challenge disciplinary decisions<sup>20</sup> and academic decisions with behavioral attributes (for example, cheating, misconduct during an internship or other "academic" activities)<sup>21</sup> using Constitutional<sup>22</sup> and contract theories<sup>23</sup>—"rights" that in earlier days were rejected by courts.<sup>24</sup>

This explosion of sources and types of laws affecting higher education makes one wonder if there is a body of "higher education law" anymore. Today, courts in most lawsuits treat a college or university defendant just

15. As of October 2009, the National Association of College and University Attorneys had 729 member institutions comprising 1,653 campuses, and 3,677 individual member attorney representatives. Of those individual member attorney representatives, 2,634, or 71.6 percent, were in-house counsel. Personal communication with Haleema Burton, Manager, Membership and Outreach Services, NACUA.

16. According to one source, litigation in federal courts increased by nine percent in 2008 over the previous year. Law360 Litigation Almanac, *available at* <http://www.law360.com/litigation/almanac2009>. In the federal appeals courts, appellate filings increased by 27 percent between FY 1997 and FY 2006. According to the same source, filings in federal district courts fluctuated over that ten-year period, but contract claims and products liability claims increased substantially. *A Decade of Change in the Federal Courts Caseload: Fiscal Year 1997–2006*, THE THIRD BRANCH VOL. 39, NO. 11 (Admin. Office, U.S. Courts Office of Pub. Affairs, Washington, D.C.), Nov. 2007, *available at* <http://www.uscourts.gov/ttb/2007-11/decade/index.html>.

17. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 679 (1979).

18. *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983).

19. *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

20. *Goss v. Lopez*, 419 U.S. 565 (1975).

21. *See, e.g., Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 928 (Tex. 1995).

22. *Id.* at 930.

23. *See, e.g., Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 239 (D. Vt. 1994).

24. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 261 (1934).

as they would any other business entity.<sup>25</sup> The law has evolved in many respects from treating the institution with deference,<sup>26</sup> to either ignoring the differences<sup>27</sup> or proclaiming that there are none.<sup>28</sup> Colleges and universities are simultaneously being treated like elementary and secondary educational institutions<sup>29</sup> and like businesses,<sup>30</sup> depending on the topic and the type of legal challenge. When courts defer to the “expertise” of academics in certain types of legal claims, is this “academic deference” or merely another name for the “business judgment” rule as applied to an academic organization?<sup>31</sup>

The role of the college or university attorney has changed over the past five decades from primarily transactional (such as real estate, purchasing contracts, occasional premises liability claims) to counseling (development of policy), risk management (reviewing current and proposed policies and decisions for potential litigation risk), and defense against actual or

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25. For a discussion of the apparent decline of academic deference, see AMY GAJDA, *THE TRIALS OF ACADEME* (Harvard Univ. Press 2009).

26. See, e.g., *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978); see also Robert M. O’Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010).

27. See, e.g., *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 346–47 (1st Cir. 1989).

28. See, e.g., *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 550 (3d Cir. 1980) (“The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility . . . . Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands.”); see also *Nova Se. Univ. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000) (“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.”).

29. See, e.g., *Hosty v. Carter*, 412 F.3d 731, 734–35 (7th Cir. 2005) (en banc) (“Only when courts need assess the reasonableness of the asserted pedagogical justification in non-public-forum situations does age come into play . . . . To the extent that the justification for editorial control depends on the audience’s maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.) To the extent that the justification depends on other matters—not only the desire to ensure ‘high standards for the student speech that is disseminated under [the school’s] auspices’ . . . but also the goal of dissociating the school from ‘any position other than neutrality on matters of political controversy’ . . . there is no sharp difference between high school and college papers.”) (alterations in original) (citation omitted)).

30. See, e.g., *Hamilton Chapter of Alpha Delta Phi v. Hamilton Coll.*, 128 F.3d 59, 60 (2d Cir. 1997) (private college was subject to antitrust jurisdiction and potential liability for alleged attempt to “monopolize” local market for student room and board. The college later was awarded summary judgment. 106 F. Supp. 2d 406 (N.D.N.Y. 2000)).

31. See Robert M. O’Neil, *supra* note 26.

potential legal claims. Many institutions employ lawyers as administrators for positions outside the counsel's office (for example, the director of the office dealing with accommodation requests from disabled students, or the director of public safety, or the head of human resources). With multiple decision-makers and complicated legal responsibilities, college and university attorneys may find it difficult to remember who the client is. Is it the board of trustees? The president? The institution as a corporate entity? The dean who is accused of discrimination in a tenure denial?

It is beyond the scope of this article to identify all of the social, technological, and cultural changes over the past five decades that have made their mark on higher education and have shaped the practice of higher education law. In an attempt to build a framework to help understand the scope and nature of these changes, this article identifies ten broad areas of change that have affected the practice of higher education law over the past fifty years. Some of these changes were caused by legal developments, while others were stimulated by social or technological change. A few important legal issues are identified for each area; readers will surely think of additional issues of significance. For each of these areas, the article will look backward as well as forward, attempting to summarize how we got to where we are now, and where we seem to be going.

## II. COMMUNICATION AND ACCESS TO INFORMATION

The advent of the internet has changed the way business is done, and higher education is no exception. In addition to using email and web pages for conducting routine business, colleges and universities use the Web for student and staff recruitment, for public relations purposes, for access to institutional library holdings, and a multitude of other important functions. Students submit applications via the web, faculty write letters of recommendation via email, and private information, such as Social Security numbers and student financial data, are maintained on institutional servers (or sometimes on individual laptop computers).

Use of the internet to recruit and admit students, or to send letters of reference, has resulted in litigation in fora far from the state in which an institution is located. Depending on the nature of the claim, courts may exercise personal jurisdiction over an individual or institution located in another state.<sup>32</sup> Faster and more accessible communications with distant

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32. See, e.g., *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) (ruling that Arizona could exercise personal jurisdiction over the vice president of a Canadian university who allegedly defamed a former professor at that institution who was applying for a position at an Arizona university); see also *Wagner v. Miskin*, 660 N.W. 2d 593 (N.D. 2003) (allowing the North Dakota courts to exercise jurisdiction over a defamation claim brought against an out-of-state student by a professor). But see *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (affirming trial

individuals and campuses has facilitated collaborative research as well as partnerships between institutions of different nations, and has exposed U.S. institutions to more litigation about compliance with both U.S. law and the laws of the nation at the other end of the computer communication.<sup>33</sup> Student use of the internet for social networking may expose them to legal liability<sup>34</sup> or the loss of a degree, job or scholarship,<sup>35</sup> and the college or university to unwelcome publicity, particularly if the institution attempts to regulate or punish students for allegedly inappropriate use of social networking sites.<sup>36</sup> Attempts by public institutions to regulate the content of student speech—either “live” or in web postings—have, for the most part, resulted in liability for the institution under First Amendment theories.<sup>37</sup> The widespread use of computer servers (or laptops) to store

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court’s refusal to assert jurisdiction over faculty members employed by Harvard University, despite the fact that Harvard hosted the website on which the defendants had posted an article that allegedly defamed the plaintiff); *Scherer v. Curators of the Univ. of Mo.*, 152 F. Supp. 2d 1278 (D. Kan. 2001) (holding that a rejected law school applicant could not sue the University of Missouri in federal district court in Kansas, despite the fact that the university recruited Kansas citizens through its website).

33. For example, export control regulations have been used to limit the transfer of research results between U.S. scholars and scholars in nations that the U.S. government believes may support terrorism. *See, e.g.*, U.S. Dep’t of State International Traffic in Arms Regulations (ITAR), 15 C.F.R. §§ 120–130 (2010); U.S. Dep’t of Commerce Export Administration Regulations (EAR), 15 C.F.R. §§ 730–774 (2010). In 2008, a professor at the University of Tennessee was convicted of violating the export control regulations when he shared defense-related articles with two of his graduate students and took sensitive information on his laptop computer to China. Richard Monastersky, *Professor’s Conviction on Export Violations Alerts U.S. Universities*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 8, 2008, available at <http://chronicle.com/article/Universities-Heed-Professor/1141>. Some countries require foreign institutions wishing to offer courses or degree programs to first receive the permission of the country’s ministry of education. For the requirements in Singapore, see Ministry of Education: Singapore, List of External Degree Programmes (EDPs), <http://www.moe.gov.sg/education/private-education/edp-list> (last visited April 10, 2010).

34. *See, e.g.*, *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008) (high school student had created a false MySpace profile for the school principal that stated that he was a pedophile and bisexual). The court ruled that discipline was appropriate and that the conduct was not protected by the First Amendment. *Id.* at \*26.

35. *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. Dec. 3, 2008) (student removed from student teaching and denied a degree in education after using Facebook page to criticize her supervisor and post a picture of her drinking what appeared to be an alcoholic beverage) The court ruled for the university. *Id.* at \*37–41. *See also* Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 HOFSTRA LAB. & EMP. L.J. 395 (2008); Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J. L. & TECH. 1 (2007).

36. *See, e.g.*, *Yoder v. Univ. of Louisville*, No. 3:09-CV-205-S.2009, WL 2406235, at\* 7 (W.D. Ky. Aug. 3, 2009) (court ordered university to reinstate nursing student who had been academically dismissed for discussing topics on a social networking site that included references critical of her patients).

37. *See, e.g.*, *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). *See*

sensitive financial or other personal information has attracted hackers, exposed weaknesses in institutions' information systems, and created potential liability for institutions of higher education under state and federal data privacy laws.<sup>38</sup> The internet has made distance learning easier and less expensive to offer, and has allowed "diploma mills" and other questionable organizations selling degrees on the Internet to reach potential purchasers.<sup>39</sup>

Increased access to information via the Internet has also provided students—and faculty—with more opportunities to claim the work of others as their own, leading to charges of academic misconduct.<sup>40</sup> The Internet also provides a platform for scholarly disputes, which occasionally result in defamation claims or accusations of misappropriation of the ideas or work of others, which can embroil the institution in disputes over intellectual property rights.<sup>41</sup>

These advances in the speed and sophistication of communication and information access pose challenges for the higher education legal practitioner. In some respects, oversight needs to be closer—of the security of data, of partnerships with distant organizations to ensure compliance with the laws of many nations, and of student and faculty compliance with the norms of academic research and inquiry. In other respects, these communication advances have led to the need for institutions to step back somewhat from the control of the *content* of student and faculty postings on web pages or in emails. Using a team approach to managing these issues—with the university counsel advising the data security team or the committee reviewing a claim of student or faculty academic misconduct—is an important component of risk management; the speed and penetration of electronic communication is likely to increase, and higher education's dependence on this form of engaging with others, both inside and outside of the institution, is irrevocable.

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generally WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION*, §§ 8.5.2, 9.6.2 (4th ed. 2006).

38. See Jeffery R. Young, *Mistakes, Not Hackers, Are to Blame for Many Data-Security Glitches on Campus, Report Says*, CHRON. HIGHER EDUC. (Wash., D.C.) Feb. 12, 2008, available at <http://chronicle.com/article/Mistakes-Not-Hackers-Are-/494>.

39. Thomas Bartlett, *Government Raids a Diploma Mill*, CHRON. HIGHER EDUC. (Wash., D.C.) Sept. 2, 2005, at A39. The former executive vice chancellor of St. Regis University, Richard J. Novak, agreed to plead guilty to wire and mail fraud and to violations of the Foreign Corrupt Practices Act. Thomas Bartlett, *Fake University Paid Bribes for Credentials*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 31, 2006, at A14.

40. Sara Lipka, *Colleges Sharpen Tactics for Resolving Academic Integrity Cases*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 10, 2009, available at <http://chronicle.com/article/Colleges-Sharpen-Tactics-fo/16451>.

41. See, e.g., Robin Wilson, *U. of Rhode Island Professor Finds Peril in Publishing on the Internet*, CHRON. HIGHER EDUC. (Wash., D.C.), June 18, 2004, available at <http://chronicle.com/article/U-of-Rhode-Island-Professo/16464>.



## III. DIVERSITY OF STUDENTS AND EMPLOYEES

In 2008, the most recent year for which data was available, there were 19,102,800 individuals enrolled in U.S. colleges and universities as undergraduates or graduate and professional students.<sup>42</sup> With respect to domestic students, 63.3 percent were white, 13.5 percent were black, non-Hispanic, 11.9 percent were Hispanic, 6.8 percent were Asian, and one percent were American Indian.<sup>43</sup> Another 3.5 percent were nonresident aliens (international students).<sup>44</sup> Across racial and ethnic categories, 42.9 percent of the students at all levels in 2008 were men, and 57.1 percent were women.<sup>45</sup> These figures demonstrate the great diversity of students at U.S. colleges and universities, and help explain the increased conflict on campus over issues related to access, attrition, and resources available to students.

Born during the civil rights movement of the 1960s,<sup>46</sup> affirmative action in admissions was challenged in the 1970s in cases involving admission to professional schools. Although the U.S. Supreme Court sidestepped the issue in *DeFunis v. Odegaard*,<sup>47</sup> it confronted the issue squarely in *Regents of the University of California v. Bakke*.<sup>48</sup> And although the Court in that case invalidated the practice of reserving a number of places in an incoming class for minority applicants, Justice Powell's finding in *Bakke* that under different circumstances, the use of race as a factor in making admission decisions could be constitutional formed the basis twenty-five years later for the validation of affirmative action in *Grutter v. Bollinger*.<sup>49</sup> *Grutter* did not end the debate over affirmative action; this area of law and political action remains one of the most controversial—and unsettled— aspects of institutional attempts to respond to the educational and social needs of an increasingly diverse society.<sup>50</sup> Counsel must balance the

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42. THOMAS D. SNYDER AND SALLY A. DILLOW, DIGEST OF EDUCATION STATISTICS 2009, tbl. 187, *Enrollment, staff, and degrees conferred in postsecondary institutions participating in Title IV programs, by type and control of institution, sex of student, type of staff, and type of degree: Fall 2007 and 2007-08*, available at [http://nces.ed.gov/programs/digest/d09/tables/dt09\\_226.asp](http://nces.ed.gov/programs/digest/d09/tables/dt09_226.asp).

43. *Id.*

44. *Id.*

45. *Id.*

46. For a thorough and thoughtful overview of the civil rights movement and its impact on colleges and universities, see James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties and the Well-Judged University*, 36 J.C. & U.L. 875 (2010).

47. 416 U.S. 312, 320–21 (1974).

48. 438 U.S. 265 (1978).

49. 539 U.S. 306 (2003). For an extensive discussion of affirmative action in admissions, see Jonathan Alger, *From Desegregation to Diversity and Beyond: Our Evolving Legal Conversation on Race and Higher Education*, 36 J.C. & U.L. 983 (2010).

50. Indeed, on the same day the Court issued a companion decision to *Grutter*,

institution's zeal to achieve a diverse student body with careful attention to the limits of permissible action under the web of court rulings and, in some states, laws forbidding the use of race in making admissions decisions to public institutions.<sup>51</sup>

Women have become the majority of undergraduates on most college or university campuses, and are becoming an increasing proportion of graduate and professional students as well.<sup>52</sup> Changing attitudes toward the legitimacy of women as students, faculty, and members of historically male-dominated professions<sup>53</sup> have led to increased attention to the prevention of and appropriate response to sexual harassment and sexual assault. Title IX has been interpreted to permit a student to sue a college or university for damages resulting from harassment by an employee<sup>54</sup> and, in some cases, by a fellow student,<sup>55</sup> or to file a claim with the Education Department's Office for Civil Rights.<sup>56</sup> An institution that responds slowly or that appears to underestimate the seriousness of the alleged incident faces both legal and political exposure.<sup>57</sup> College and university counsel

*Gratz v. Bollinger*, 539 U.S. 244 (2003), in which it found unlawful the admissions process for undergraduates at the University of Michigan. The Court spoke again on affirmative action in assignments to public schools in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). And finally, the Court struck down a city's attempt to disregard test results for firefighters seeking promotions because of the racial gap in test scores. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

51. For a discussion of state law limitations on affirmative action, see KAPLIN & LEE, *supra* note 37, at § 8.2.5.

52. For example, in 2005, approximately 47 percent of all J.D. students were women. American Bar Association, First Year and Total J.D. Enrollment by Gender 1947-2008, <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf>. In 2007, approximately 43 percent of all medical students were women. Association of American Medical Colleges, U.S. Medical School Applicants and Students 1982-83 to 2007-08, <http://www.aamc.org/data/facts/charts/1982to2007.pdf>.

53. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia Military Institute could not bar women from admission under Equal Protection Clause). For a case involving the attempt of a male to attend a public women's college, see *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

54. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

55. See, e.g., *Simpson v. Univ. of Co., Boulder*, 500 F.3d 1170 (10th Cir. 2007); *Williams v. Bd. of Regents of the Univ. System of Ga.*, 477 F.3d 1282 (11th Cir. 2007).

56. For a discussion of the authority of the Office of Civil Rights over claims filed under Title IX, see KAPLIN & LEE, *supra* note 35, at §13.5.3.

57. For example, at the University of Iowa in 2008, a student and her parents claimed that the university had mishandled her complaint of an alleged assault by a member of the football team. In response, the Board of Regents commissioned a study by an independent firm that was very critical of the university's handling of the case; two vice presidents were dismissed as a result. Libby Sander, *News Analysis: In Athletics-Related Scandals, Damage Control is Elusive*. CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 29, 2008, available at <http://chronicle.com/daily/2008/09/4777n.htm>; see also *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1296-97 (11th Cir. 2007) (court cited university's slow response to student

are increasingly involved in advising and monitoring the institution's response to claims of harassment or assault in order to minimize the risk of litigation and to ensure that the college or university's policies are followed carefully.

Twenty states and the District of Columbia have added sexual orientation and, in fifteen states and the District of Columbia, gender identity or expression, to the list of characteristics which may not be used in making decisions about students or employees.<sup>58</sup> Even in states that have not protected these groups, many institutions have added these categories to their nondiscrimination statements. Protections for individuals in these categories have clashed with the views and practices of some student religious groups, and have resulted in litigation over access to recognition and funding at public institutions for student organizations that violate the institution's nondiscrimination policy by refusing membership or leadership opportunities to individuals on the grounds of sexual orientation or gender identity.<sup>59</sup>

The increasingly diverse student body has also raised the profile of religion on campus. Students who wish to honor their religious beliefs on a secular campus have pushed their institutions to provide accommodations, such as places to wash one's feet before praying and rooms reserved for prayers at particular times of the day.<sup>60</sup> Faculty face challenges from students on religious grounds when they assign certain books to be read or essay topics to be discussed.<sup>61</sup> Public institutions in particular must

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complaint of sexual assault by fellow students as potential evidence of deliberate indifference under Title IX analysis).

58. Discrimination on the basis of sexual orientation is forbidden by law in both public and private sector employment in the following states: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and Washington D.C. Lambda Legal Quick Facts Index Page, <http://www.lambdalegal.org/news/quick-facts/page-34411924.html> (last visited Apr. 10, 2010). Discrimination on the basis of gender identity or expression is prohibited in California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. *Id.*

59. *See, e.g.,* *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (law school's refusal to recognize student group that excluded students from membership or leadership positions on the basis of sexual orientation likely violated the group's First Amendment rights of expressive association and free speech). *But see* *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Kane*, 319 Fed. App'x 645 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 795 (2009) (university's rule requiring all student organizations to admit any student as a member is viewpoint neutral and does not violate the First Amendment).

60. Tamar Lewin, *Universities Install Footbaths to Benefit Muslims, and Not Everyone Is Pleased*, N.Y. TIMES, Aug. 7, 2007, at A10.

61. Donna Euben, *Curriculum Matters*, ACADEME, Nov.-Dec. 2002, at 86. *See* *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (requirement that Mormon student recite allegedly offensive language in drama class was potential free speech and

balance the religious exercise needs of their students against the legitimate pedagogical goals of the faculty, while being careful to avoid Establishment Clause problems.<sup>62</sup> Institutional counsel may find themselves in the middle of debates between religiously conservative students and faculty who believe that academic freedom trumps a student's "sensitivity" to dealing with particular topics or ideas.

The right of a student with a disability to academic and living accommodations is a subject that occupies the time and resources of many college or university staff and institutional counsel.<sup>63</sup> Two federal laws<sup>64</sup> and state law regulate the institution's response to requests for accommodation. Of particular concern in recent years has been the clash between an institution's concerns for the safety of students, including a student with a psychiatric disorder, and the student's right to accommodation unless he or she is a "direct threat" to him- or herself or to others. Institutions that use involuntary withdrawals or other strategies to remove at-risk students from campus face Office for Civil Rights investigations and potential sanctions.<sup>65</sup> Programs that require students to participate in an internship or some other form of off-campus hands-on learning experience also face challenges when a student's disability limits the ways that he or she can participate in that portion of the educational program.<sup>66</sup>

Diversity also affects the institution's relationship with its faculty and staff. In 2005, it was obvious that the diversity of the full-time teaching faculty in U.S. colleges and universities was disproportionate to the diversity of the students they taught. Of the 675,624 full time faculty teaching in U.S. colleges and universities that year, 59 percent were men

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free exercise violation).

62. Barbara A. Lee, *Religion in the Classroom: Legal Issues*, in ENCOUNTERING FAITH IN THE COLLEGE CLASSROOM 105, 105–115 (Miriam R. Diamond, ed., Stylus Publishing 2008).

63. See Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843 (2010).

64. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended in 29 U.S.C. § 794).

65. Barbara A. Lee & Gail E. Abbey, *College Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349 (2008).

66. These issues have been particularly difficult for medical school residents with disabilities, who face academic dismissal if they cannot satisfy their residency requirements. See, e.g., *Wong v. Regents of the Univ. of Cal.*, 379 F.3d 1097, 1100–01, 1110 (9th Cir. 2004) (discussing deterioration in academic performance during clinical clerkships and concluding that "Wong is not substantially limited in a major life activity, so he does not qualify for the special protections the Acts provide for someone who is 'disabled.'").

and 41 percent were women.<sup>67</sup> American Indians constituted 0.5 percent of all full time faculty, Asians were 7 percent, blacks were 5.2 percent, Hispanics were 3.4 percent, and whites were 78 percent of all full time faculty.<sup>68</sup> Despite this disproportion, affirmative action in faculty hiring remains a controversial issue,<sup>69</sup> and one that the Supreme Court has not spoken on since *Johnson v. Transportation Agency, Santa Clara County*<sup>70</sup> was decided in 1987. And discrimination claims are not unusual when a faculty member is denied tenure.<sup>71</sup>

An area of increasing complexity—and litigation—is the accommodation of employees with disabilities.<sup>72</sup> For faculty with impairments that interfere with their ability to teach, accommodations may be difficult to create; these issues are particularly troublesome for probationary faculty on a time-limited tenure track who may need a reduced teaching load or more time to complete their research program.<sup>73</sup> Research that demonstrates that women with children are less likely to receive tenure or to publish as much as their male colleagues has stimulated calls for revising tenure policies to allow for longer probationary periods for faculty—both women and men—who become parents before they achieve tenure.<sup>74</sup> With the advent of the EEOC’s guidelines on “caregiver discrimination,”<sup>75</sup> counsel can expect more claims from employees—both faculty and staff—who believe that a negative employment decision was

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67. U.S. DEPARTMENT OF EDUCATION, EMPLOYEES IN POSTSECONDARY INSTITUTIONS, FALL 2005 AND SALARIES OF FULL-TIME INSTRUCTIONAL FACULTY, 2005–06, NCES 2007-150 7 (2007).

68. *Id.*

69. *See, e.g., Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 722 (7th Cir. 2005) (discussing the effect of affirmative action in discrimination cases and concluding that in the specific case circumstantial evidence of racial discrimination was present).

70. 480 U.S. 616, 642 (1987) (voluntary affirmative action plan with limited goals did not violate Title VII of the Civil Rights Act of 1964).

71. For a discussion of the increase in litigation over denials of tenure, and suggestions for preventing litigation over tenure decisions, see Ann Franke, *Making Defensible Tenure Decisions*, ACADEME, Nov.–Dec. 2001, 32.

72. *See* Laura Rothstein, *supra* note 63.

73. *See generally* Barbara A. Lee & Judith Malone, *Accommodating Faculty with Disabilities: Legal and Policy Issues* (Paper presented for the 28th National Conference on Law and Higher Education, Center for Excellence in Higher Education Law and Policy, Stetson University College of Law, Feb. 19, 2007), available at <http://justice.law.stetson.edu/excellence/HigherEd/archives/2007/AccommodatingFaculty.pdf>.

74. *See, e.g.,* Mary Ann Mason, *Is Tenure a Trap for Women?*, CHRON. OF HIGHER EDUC. (Wash., D.C.) Apr. 22, 2009, available at <http://chronicle.com/article/Is-Tenure-a-Trap-for-Women-/44814/>.

75. EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, NO. 115-002 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

influenced by their responsibilities as a parent or the individual responsible for elder care.

The impact of diversity—or the institution’s desire to enhance diversity—has particular implications for the college or university attorney. The attorney needs to help guide faculty and administrators through the legal minefield and uncertain legal status of various attempts to increase student and employee diversity. Training of search committees, careful attention to the makeup of candidate pools, and identification of pedagogical justifications for selection decisions will involve the attorney in a rich and complex debate with members of the higher education community.

Since discrimination law has evolved over the decades since Title VII was first applied to higher education in 1972, and additional laws have been enacted that add categories of protection,<sup>76</sup> discrimination law’s focus on individual rights has pitted the individual against the institution and has shifted the discourse from broad definitions of merit to more mechanistic methods of evaluating who “deserves” to be admitted to a college or university or hired as an employee.<sup>77</sup> The law of affirmative action in admissions has been clarified to some extent by *Grutter*<sup>78</sup> and *Gratz*,<sup>79</sup> but the implementation of these precedents has not been smooth and, in fact, has led to additional attempts to outlaw affirmative action through ballot initiatives.<sup>80</sup> Whether the philosophical makeup of the U.S. Supreme Court will change in the next decade, and whether a future court would have the opportunity and the interest in hearing cases challenging affirmative action, cannot be predicted, but it *is* predictable that our colleges and universities will continue to become more diverse and that legal challenges related to this diversity will continue.

#### IV. EXPANSION OF EMPLOYMENT LAW

Over the last fifty years, state legislatures and Congress have created new rights for employees. Although higher education was exempt from Title VII of the Civil Rights Act of 1964 until 1972,<sup>81</sup> claims of employment discrimination are now routine at many institutions.

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76. See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

77. For a discussion of the theory of discrimination and the problems of using monolithic definitions of “merit,” see DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 13–33, 95–96 (Harvard Univ. Press 2008).

78. 539 U.S. 244 (2003).

79. 539 U.S. 306 (2003).

80. For a discussion of these ballot initiatives, see Alger, *supra* note 49.

81. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

Whistleblower laws, both state and federal,<sup>82</sup> have stimulated claims against colleges and universities, particularly in the area of alleged research fraud or other types of research misconduct<sup>83</sup> as well as alleged violations of the Higher Education Act's prohibition on payments for recruiting students.<sup>84</sup> Laws created for employees of business organizations, such as the Family and Medical Leave Act,<sup>85</sup> also apply to colleges and universities, and may complicate staffing of courses. Complex questions about whether employment tax or workers' compensation laws apply to medical residents or residence hall advisors require counsel's assistance and policy clarification (or change).<sup>86</sup> And the termination of a staff member is viewed no differently when it occurs at a college or university from when it occurs at a private sector business establishment.<sup>87</sup>

A trio of federal laws has given employees—particularly women—weapons to challenge perceived discrimination on the basis of sex. Title VII of the Civil Rights Act of 1964,<sup>88</sup> first applied to colleges and universities in 1972,<sup>89</sup> enabled women to challenge not only failures to hire, promote, or tenure, but sexual harassment in the workplace as well. Scholars have concluded that white women have been the primary beneficiaries of Title VII generally,<sup>90</sup> although one study found that women faculty prevailed only twenty percent of the time when they challenged tenure denials using discrimination theories.<sup>91</sup> Title IX of the Education

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82. See, e.g., CONN. GEN. STAT. §§ 31-51m (2009) (Connecticut); N.J. STAT. ANN. § 34:19-3 (2009) (New Jersey); N. Y. LAB. LAW § 740(2) (2009) (New York); see also False Claims Act, 31 U.S.C. § 3729 (2006). For a discussion of the application of the False Claim Act to institutions of higher education, see Rachel Perkins, *Federal Funding and Fraud: The False Claims Act in Higher Education after Main v. Oakland City University*, 35 J.C. & U.L. 747 (2009).

83. See, e.g., *Univ. of Houston v. Elthon*, 9 S.W.3d 351 (Tex. App. 1999) (professor sued under Texas Whistleblower Act, Tex. Gov't Code Ann. §§ 554.001-009, alleging ethical violations by faculty colleagues).

84. See, e.g., *United States ex rel. Bott v. Silicon Valley Colls.*, 262 Fed. App'x 810 (9th Cir. 2008) (dismissing a qui tam claim under the False Claims Act because relators had not provided specific evidence to indicate that staff salary increases were based solely upon success in recruiting students); see also *Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005) (reversing the dismissal of a qui tam claim because relator had sufficiently pleaded facts that could lead the court to conclude that the university had knowingly made a false statement in order to obtain payment of a false claim).

85. 29 U.S.C. § 2601 (2006).

86. For a discussion of these issues, see KAPLIN AND LEE, *supra* note 37, at §§ 13.3.4, 4.6.6.

87. O'Neil, *supra* note 26.

88. 42 U.S.C. § 2000e (2006).

89. Equal Employment Opportunity Act of 1972, P.L. No. 92-261.

90. See John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH L. REV. 2583 (1994).

91. GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* (University of Michigan Press, 1987).

Amendments of 1972<sup>92</sup> provided women faculty and staff with another way to claim employment discrimination, retaliation, or both.<sup>93</sup> Women faculty have had mixed success in challenging alleged pay discrimination under the Equal Pay Act,<sup>94</sup> although some cases have resulted in classwide pay adjustments.<sup>95</sup>

Women faculty and staff have also benefitted from the courts' application of state and federal nondiscrimination law to claims of sexual harassment in the workplace. Beginning with *Meritor Savings Bank v. Vincent*,<sup>96</sup> the U.S. Supreme Court and state courts have expanded the protections against harassment to women (and men) in the workplace. Title IX, which prohibits sex discrimination and harassment against students (among others), has been interpreted far more narrowly by the U.S. Supreme Court, and student claims of harassment, whether by faculty or by peers, are far more difficult to maintain and prove than complaints by employees of workplace harassment.<sup>97</sup> Nevertheless, these laws have made important contributions to gender equity on American college campuses.

Tenure denials frequently lead to breach of contract, denial of due process or discrimination claims (or all three).<sup>98</sup> Litigation surrounding denials of tenure or promotion has resulted in a somewhat more open process, particularly in those states whose open public records acts give candidates for promotion or tenure access to their personnel files.<sup>99</sup> Attempts to discipline or dismiss faculty for misconduct also frequently

92. 20 U.S.C. § 1681 (2006).

93. For a discussion of the limits of Title IX in challenging sex discrimination in employment, see KAPLIN & LEE, *supra* note 37 at 386–389.

94. *See, e.g.,* Donnelley v. Rhode Island Board of Governors for Higher Education, 110 F.3d 2 (1st Cir. 1997) (court ruled that salary differentials between male and female faculty were a result of market factors, not discrimination). *But see* Siler-Khodr v. Univ. of Texas Health Science Center San Antonio, 261 F.3d 542 (5th Cir. 2002) (individual faculty member awarded back pay after jury verdict that institution had discriminated against her in paying her substantially less than equally qualified male faculty).

95. For a review of pay discrimination claims in academe, see Donna R. Euben, *Show Me the Money: Pay Equity in the Academy*, ACADEME, July-Aug. 2001, 30.

96. 477 U.S. 57 (1986).

97. For a discussion of the application of Title IX to student claims of harassment by either faculty or peers, *see* KAPLIN & LEE, *supra* note 37, at §§ 9.3.4 (harassment by faculty) and 8.1.5 (harassment by peers).

98. For a discussion of litigation challenging tenure denials, *see* KAPLIN & LEE, *supra* note 37, at §§ 6.6.3, 6.7.2.2, and 6.7.3. *See generally* STEVEN G. POSKANZER, HIGHER EDUCATION LAW: THE FACULTY (Johns Hopkins University Press 2002).

99. For a case involving the interpretation of a state open records law with respect to a faculty member's tenure file, *see* State *ex rel.* James v. Ohio State Univ., 637 N.E.2d 911 (Ohio 1994). The Supreme Court refused to recognize an "academic freedom privilege" when the EEOC subpoenaed the confidential tenure files of a plaintiff claiming sex discrimination in a tenure denial. *Univ. of Penn. v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990).



lead to internal grievances and appeals and to legal challenges.<sup>100</sup> While courts still defer in many cases to the academic judgment of faculty and administrators making tenure or promotion decisions,<sup>101</sup> public institutions have a stronger defense as a result of the decision of the U.S. Supreme Court in *Garcetti v. Ceballos*,<sup>102</sup> in which the Court ruled that any speech that was related to a public employee's job responsibilities was not protected under the First Amendment and thus could serve as the justification for discipline or discharge.<sup>103</sup> Academic freedom-based cases brought by faculty against public colleges and universities since *Garcetti* have resulted in victories for the institution and have raised concerns among faculty and administrators that academic freedom has been weakened as a result.<sup>104</sup>

Beginning in the late 1960s, faculty unionization arrived on some college or university campuses, both private and public. Although unionization began to spread throughout private four-year colleges or universities during the 1970s, the decision of the U.S. Supreme Court in *NLRB v. Yeshiva University*<sup>105</sup> in 1980 brought private college or university unionization among faculty to a virtual standstill. Between 1980 and 2010, there were twenty-eight published NLRB or court opinions involving challenges to faculty unionization, of which ten resulted in victories for the faculty union.<sup>106</sup> Public university systems in Northeastern, Midwestern,

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100. Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J.C. & U.L. 241 (2006).

101. Robert M. O'Neil, *supra*, note 26; *see also* KAPLIN & LEE, *supra* note 37, at § 6.4.2.

102. 547 U.S. 410 (2006).

103. *Id.*

104. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 974 (2009); *see also* AAUP, *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, available at <http://www.aaup.org/AAUP/comm/rep/A/postgarcettireport.htm>. For a thorough and thoughtful discussion of the evolution of academic freedom jurisprudence and the unanswered questions that remain, *see* Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791 (2010).

105. 444 U.S. 672 (1980).

106. At private institutions that are not "Yeshiva-like," the NLRB and reviewing appellate courts have refused to apply the managerial exclusion to faculty. *See generally* *NLRB v. Fla. Mem'l Coll.*, 820 F.2d 1182 (11th Cir. 1987); *Kendall Mem'l School v. NLRB*, 866 F.2d 157 (6th Cir. 1989); *NLRB v. Cooper Union for Advancement of Sci.*, 783 F.2d 29 (2d Cir. 1986); *Loretto Heights Coll. v. NLRB*, 742 F.2d 1245 (10th Cir. 1984); *St. Thomas Univ.*, 298 N.L.R.B. 280 (1990); *Marymount Coll. of Va.*, 280 N.L.R.B. 486 (1986); *Montefiore Hosp. & Med. Ctr. & N. Y. State Fed'n of Physicians & Dentists*, 261 N.L.R.B. 569 (1982); *Bradford Coll. & Milk Wagon Drivers & Creamery Workers Union, Local 380*, 261 N.L.R.B. 565 (1982). Faculty have been found to be "managerial," and thus unable to unionize at various colleges and universities. *See generally* *Point Park Univ. v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006); *Boston Univ. Chapter, AAUP v. NLRB*, 835 F.2d 399 (1st Cir. 1987);

and Western states are heavily unionized (both faculty and staff).<sup>107</sup> Graduate students have also unionized at a number of colleges and universities, although the latest ruling from the National Labor Relations Board has slowed the momentum considerably.<sup>108</sup> This area of the law is in flux as the makeup of the NLRB changes depending upon which political party is in power, and the status of graduate students under the National Labor Relations Act could change in the near future.

The presence of unions on campus has resulted in greater use of formal grievance procedures, resistance to “merit pay” for faculty and staff, and less flexibility for administrators with respect to the allocation of institutional resources.<sup>109</sup> Discipline and termination decisions may be slower and more subject to internal challenges. Counsel are more likely to be involved before these decisions are finalized to ensure that policies and contracts have been followed. They are also likely to be involved in negotiations with the union to ensure that mandatory bargaining subjects are addressed but that managerial rights are preserved where possible.<sup>110</sup>

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NLRB v. Lewis Univ., 765 F.2d 616 (7th Cir. 1985); Sacred Heart Univ., Case No. 34-RC-1876 (2001); Sage Colls., Case No. 3-RC-11030 (2001); LeMoyné-Owen Coll. v. NLRB, 345 N.L.R.B. 1123 (2005); Manhattan Coll., 1999 NLRB LEXIS 903 (Nov. 9, 2001); Elmira Coll., 309 N.L.R.B. 842 (1992); Lewis & Clark Coll., 300 N.L.R.B. 155 (1990); Univ. of Dubuque, 289 N.L.R.B. 349 (1988); Livingstone Coll., 286 N.L.R.B. 1308 (1987); Univ. of New Haven, 267 N.L.R.B. 939 (1986); Fairleigh Dickinson Univ. & Fairleigh Dickinson Univ. Council of Am. Ass’n of Univ. Professors Chapters, Case No. 22-RC-7198 (1986); Am. Int’l Coll., 282 N.L.R.B. 189 (1986); Ithaca Coll. & Ithaca Coll. Faculty Ass’n, 261 N.L.R.B. 577 (1982); Thiel College & Thiel Coll. Chapter, Am. Ass’n of Univ. Professors, 261 NLRB 580 (1982); Duquesne Univ. of the Holy Ghost and Duquesne Univ. Law Sch. Faculty Ass’n, 261 N.L.R.B. 587 (1982); Coll. of Osteopathic Med. & Surgery, 265 N.L.R.B. 295 (1982). Additional challenges to faculty unionization have involved the constitutional clash between federal regulation (by the NLRB) and a college’s religious autonomy. *See, e.g.*, Carroll Coll. v. NLRB, 558 F.3d 568 (D.C. Cir. 2009).

107. American Association of University Professors, Collective Bargaining Chapters, <http://www.aaup.org/AAUP/about/cbc/colbargainchap.htm>; National Education Association, [www.nea.org/assets/docs/HE/ORGCOLL.pdf](http://www.nea.org/assets/docs/HE/ORGCOLL.pdf). *see* Joan Moriarty and Michelle Savarese, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education 3–73 (National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, January 2006).

108. *See* Brown Univ. & Int’l Union, United Auto., Aerospace & Agricultural Implement Workers of Am., 342 N.L.R.B. 483 (graduate student assistants are students, not employees, and are not protected by the NLRA). *But see* The Research Found. of the City Univ. of N.Y. & Prof’l Staff Congress of N.Y., 350 N.L.R.B. 201 (research foundations do not grant academic degrees and thus student assistants were employees and protected under the NLRA); The Research Found. of the State Univ. of N.Y. Office of Sponsored Programs & Local 1104, Comm’n Workers of Am., AFL-CIO, 350 N.L.R.B. 197.

109. Ray A. Howe, *The Collective Bargaining Process and the Potential for Productive Outcomes*, in *MANAGING THE INDUSTRIAL LABOR RELATIONS PROCESS IN HIGHER EDUCATION* (Daniel J. Julius, ed., Coll. & Univ. Pers. Ass’n 1993).

110. For a discussion of mandatory, permissive, and illegal subjects of collective

Unions on campus increase the need for counsel's advice and participation.

Another issue of great importance to both faculty and institutional leaders is the status of academic freedom. Once thought to be primarily the province of the faculty,<sup>111</sup> jurisprudence beginning in the 1950s,<sup>112</sup> and continuing to recent times,<sup>113</sup> suggests that the college or university may have greater academic freedom protections than do individual faculty, particularly in a dispute between a faculty member and institutional leaders about whose academic freedom holds the trump card.<sup>114</sup> Conflicts over whether an accommodation requested by a student encroaches upon the individual academic freedom of a professor, questions about whether academic freedom protects a faculty member whose course assignment offends a student for political or religious reasons, or concerns that requiring collegiality as a criterion for tenure or promotion somehow abrogates one's academic freedom involve counsel in debates that are central to faculty concerns about individual autonomy. Each of these issues has potential legal consequences and requires counsel to play a nuanced role in protecting both the institution and the doctrine of academic freedom.

Employment law has evolved rapidly since the early 1970s and is likely to continue to do so. The struggle over the proposed "Employee Free Choice Act,"<sup>115</sup> despite the dominance of the Democrats in Congress as this article is written, provides an interesting example of Americans' continued focus on individual rights and lack of interest in collective representation. Current pressures to expand individual rights include attempts to convince Congress to protect individuals from discrimination on the basis of sexual orientation or gender identity<sup>116</sup> and expansion of the Family and Medical Leave Act to require a certain amount of paid leave and time off for parenting responsibilities.<sup>117</sup> The issues on the horizon in

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bargaining, see KAPLIN & LEE, *supra* note 37, at §4.5.4.

111. For a general history of the origins and development of academic freedom, see THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION (Walter P. Metzger, ed., Arno Press, 1977). For an overview of the development of academic freedom jurisprudence in the context of the First Amendment, see J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251 (1989).

112. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

113. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc).

114. For an analysis of academic freedom jurisprudence and the failure of courts to clarify "what academic freedom protects and who can invoke its protections," see Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 841 841 (2010). For a discussion of "institutional academic freedom," and a criticism of that concept, see KAPLIN & LEE, *supra* note 37, at § 7.1.6.

115. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009). For a summary of the debate about this bill—in Congress and the media—see <http://www.opencongress.org/bill/111-h1409/show>.

116. H.R. 3017, 111th Cong. (2009); S. 1584, 111th Cong. (2009).

117. Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (2009).

employment law have already been addressed on many college or university campuses; in some respects, the law lags behind the reality of employment policies and practices on campus.

#### V. DISPUTE RESOLUTION ON CAMPUS

Mechanisms for resolving disputes on campus have developed and grown more complex in the past fifty years. Prior to *Goss v. Lopez*<sup>118</sup> and its progeny, “dispute resolution” for charges against students may have consisted of a brief meeting with an administrator at which the student was told of a decision to discipline or expel without recourse. *Goss* and similar cases spurred the creation of hearing boards to conduct fact-finding and recommend sanctions against students for violations of a campus code of conduct or for academic dishonesty. Particularly at public colleges and universities, counsel helped shape the design of the process but typically did not participate in the hearings themselves. Even today, many institutions do not permit students to be “represented” by attorneys at student discipline hearings unless they face potential criminal liability.<sup>119</sup>

Student challenges to disciplinary actions typically involve claims of denial of due process (at public institutions) or contract claims (at both public and private institutions). Reviewing courts are usually deferential to institutional decisions involving “purely” academic judgments,<sup>120</sup> such as grading decisions or the determination that a student has not met the academic requirements of a program of study.<sup>121</sup> They are not deferential, however, to decisions involving student conduct, explaining that no special academic expertise is required to determine the factual basis of whether a student’s behavior violated a code of conduct.<sup>122</sup> In cases that have a mixture of “academic” and behavioral issues, such as cheating or

118. 419 U.S. 565 (1975).

119. Edward N. Stoner II and John Wesley Lowery, *Navigating Past the Spirit of Insubordination: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004); see also D.R. Richmond, *Students’ Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289 (1989).

120. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

121. See, e.g., *Olsson v. Bd. of Higher Educ. of the City of N.Y.*, 402 N.E.2d 1150, 1152–53 (N.Y. 1980) (explaining why courts should defer to academic judgments in grading disputes); see also *Horowitz*, 435 U.S. 78 and *Ewing*, 474 U.S. 214.

122. See *Horowitz*, 435 U.S. at 87 (“[S]tate and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter . . . . ‘Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a quite different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.’” (quoting *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095, 1097 (1913))).

plagiarism, the courts tend to require greater due process protections and are not as quick to defer to academic judgment.<sup>123</sup> The ever-present threat of a court challenge to the decision to suspend or expel a student encourages counsel's participation in the design of campus hearing systems and the training of hearing boards, most of which include students. Some campuses have engaged attorneys on a part-time basis to chair the hearing board to ensure that due process and policy compliance are respected.

Despite the fact that courts tend to defer to academic judgments, institutions tend to give students the opportunity to challenge negative academic decisions. This is particularly important if the student claims to have a disability, whether the claim is asserted before or after the negative academic decision is made. The ADA's requirement that a college or university consider a reasonable accommodation for a disabled student prior to separating the student from the institution suggests that appeal rights are a good risk management strategy.<sup>124</sup> Given the increasing number of challenges to academic dismissal by students with disabilities, particularly those involving medical or law schools,<sup>125</sup> the involvement of counsel in developing appeal systems and reviewing the process used to make academic dismissal decisions can prevent, or at least reduce, legal liability.

As noted above, unionization has brought formal grievance systems to campus, but even nonunionized campuses frequently use a faculty grievance committee to hear claims from faculty who are denied promotion or tenure or who are disciplined or dismissed. The use of these grievance systems slows down decision making, and may not result in agreement by the faculty panel that the sanction desired by the administration is justified or reasonable. But institutions that have such grievance systems and follow their policies carefully are more likely to see their decisions upheld, even if the administration disagrees with the recommendation of the faculty panel and imposes a sanction over its objections.<sup>126</sup> College and university counsel tend to be involved in the preparation of administrators for participating in these hearings, and in training the members of the hearing board. In addition to their utility in helping the institution deflect legal liability when the procedures are followed, faculty hearing panels are an important component of shared governance on campus.

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123. See, e.g., *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995) ("Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct.").

124. See, e.g., *Singh v. George Washington Univ. School of Med. & Health Scis.*, 508 F.3d 1097 (D.C. Cir. 2007).

125. For a review of student challenges to dismissal on the grounds that they had not been accommodated by institutions (primarily in schools of medicine or law), see Lee and Abbey, *supra* note 65.

126. See Euben and Lee, *supra* note 100.

The boom in litigation has convinced many institutions of higher education to turn to alternate dispute resolution mechanisms such as mediation and arbitration. Arbitration may be the final internal step in the grievance system for faculty, particularly at unionized colleges and universities. One advantage of arbitration is that the arbitration agreement (in a collective bargaining agreement or institutional policy) must specify what power the arbitrator has to fashion remedies should the arbitrator find that the institution has violated a contract or policy. Although some collective bargaining agreements permit the arbitrator to award tenure,<sup>127</sup> most restrict the arbitrator to determining whether any procedural violations occurred.<sup>128</sup> Arbitration awards are very difficult to overturn in court,<sup>129</sup> and counsel tend to be heavily involved in preparing administrators for arbitration hearings and representing the institution's interests at the hearing.

A more informal type of alternate dispute resolution—mediation—is gaining popularity on campus as a risk management strategy.<sup>130</sup> Although certain types of disputes, such as allegations of sexual harassment, should not be mediated,<sup>131</sup> disputes between roommates, faculty colleagues, or supervisors and subordinates may be resolved informally, privately, and without the cost and publicity of litigation. Counsel may be asked to train employees to be mediators, or may identify neutral mediators from outside the institution. Another form of dispute resolution involves a campus ombuds, who is an employee trained to resolve disputes informally and confidentially.<sup>132</sup>

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127. *See, e.g.*, *Cal. Faculty Ass'n v. Sup. Ct. of Santa Clara County*, 75 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998).

128. Despite the fact that it is unusual for an arbitrator to be given the authority to award tenure as a remedy for a contractual violation, faculty denied tenure sometimes attempt to attack the substance of a tenure denial by claiming procedural violations. *See, e.g.*, *Am. Ass'n of Univ. Professors, Univ. of Toledo Chapter v. Univ. of Toledo*, 797 N.E.2d 583 (Ohio Ct. Com. Pl. 2003) (court refused to overturn arbitrator's award denying plaintiff's grievance as a result of her tenure denial).

129. The U.S. Supreme Court, in the cases known as the "Steelworkers Trilogy," has ruled that arbitration awards are not reviewable by courts unless the arbitrator has exceeded the authority given to her or him by the contract, has engaged in misconduct, or the outcome of the award violates some important principle of public policy. *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior and Gulf Navigation*, 363 U.S. 574 (1960).

130. William C. Warters, *MEDIATION IN THE CAMPUS COMMUNITY: DESIGNING AND MANAGING EFFECTIVE PROGRAMS* (Jossey-Bass 1999).

131. U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, *REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES* (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

132. For information on the use of ombuds in higher education and relevant publications, see The International Ombudsman Association Home Page, <http://www.ombudsassociation.org> (last visited Apr. 12, 2010).

The growth in popularity of dispute resolution mechanisms that serve as substitutes for litigation has highlighted counsel's role as a trainer of hearing panel members and a party to discussions about the creation and revision of policy on campus. Counsel are increasingly being asked to review policies, not only for legal compliance, but for the policy's usefulness and clarity as a guide for decision-makers. Dispute resolution is "private law" in that the parties—or in nonunionized settings, the employer—designs the process and determines what types of disputes will be resolved outside of court. The courts are expanding the role of alternate dispute resolution,<sup>133</sup> and it is likely that more colleges and universities will adopt informal or formal systems as a mechanism for either avoiding litigation or simplifying it when it occurs.

## VI. STUDENT SAFETY

The nature of an institution's duty to its students in the area of safety has undergone multiple transformations over the past fifty years. The doctrine of *in loco parentis*, in which the college or university assumed the role of the parent "concerning the physical and moral welfare and mental training of the pupils"<sup>134</sup> began to wane in the late 1960s as students assumed a more aggressive role in opposing the Vietnam war and joined the civil rights struggle. Shortly after the Twenty-Sixth Amendment, ratified in 1971, lowered the voting age to eighteen, many states lowered the age of majority, making virtually all college and university students legally adults. This new "adult" status gave students the right to enter contracts, consent to (or refuse) medical treatments, declare financial independence, or establish legal residence apart from their parents. It also spurred institutions to treat these students as adults and to abandon certain restrictions such as curfews, limits on access to residence halls after certain hours, or, on some campuses, single-sex residence halls.<sup>135</sup>

The demise of *in loco parentis* led some courts to characterize a college or university as a "bystander" with respect to its duty to students. In an influential case, *Bradshaw v. Rawlings*,<sup>136</sup> a student was seriously injured in an automobile accident when he rode home with an intoxicated fellow

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133. The U.S. Supreme Court has approved the use of arbitration for employment disputes, including those involving claims of discrimination. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). For a discussion of alternate dispute resolution in higher education, see KAPLIN & LEE, *supra* note 37, § 2.3.

134. *Gott v. Berea Coll.*, 161 S.W. 204, 206 (Ky. 1913).

135. For an overview of the demise of *in loco parentis* and the subsequent shift in judicial attitude toward institutional liability for injuries to students, see ROBERT D. BICKEL AND PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE?* (Carolina Academic Press, 1999).

136. 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1979).

student from an off-campus social event sponsored by the college or university. The court refused to find the college or university liable for his injuries.<sup>137</sup> Although a faculty advisor knew that beer would be served and cosigned the check used to purchase it, and the college had a regulation prohibiting the consumption of alcohol on campus or at off-campus events sponsored by the college, the court rejected the student's claim that the college had undertaken to protect him from the type of injury he sustained. The court noted that students had demanded to be treated as adults, and this reduced the college's legal duty to protect them.<sup>138</sup>

*Bradshaw* influenced the decisions of courts throughout the 1980s and 1990s,<sup>139</sup> and the "bystander" theory protected colleges and universities from liability for injuries to students, particularly when the conduct of the student appeared to have contributed to the injury. The courts applied traditional landlord-tenant law to student claims of injury in residence halls or other campus buildings, ruling that colleges and universities had a duty to protect students only from foreseeable risks.<sup>140</sup> Students were considered invitees in these buildings, and thus if they were injured by the negligence of employees, traditional tort law theories applicable to invitees were used.<sup>141</sup>

More recently, however, courts have been applying the "special relationship" doctrine to students injured as a result of the alleged negligence of college or university employees. For example, in *Nova Southeastern University, Inc. v. Gross*,<sup>142</sup> the Florida Supreme Court found that the university had a special relationship with a student who had been sexually assaulted at an off-campus internship site because the university required her to complete an off-campus internship and had recommended the site. University personnel, furthermore, knew that the location of the internship had been the scene of a prior assault. The court ruled that because another assault was foreseeable, the university had a duty to warn

137. *Id.*

138. *Id.* at 139.

139. See, e.g., *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987) (affording "bystander" status to the institution when conduct by students—either their own or that of another student—was the cause of the injury); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986). *But see Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) (university shared liability with student who injured a fellow student).

140. *Vangeli v. Schneider*, 598 N.Y.S.2d 837 (N.Y. App. Div. 1993) (university provided sufficient security and intruder's access by climbing a two-story exterior metal grate was not foreseeable). *But see Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983) (risk of intruder gaining access to residence hall was foreseeable when security precautions were minimal); *Miller v. State*, 478 N.Y.S.2d 829 (N.Y. App. Div. 1984) (same).

141. *Pitre v. La. Tech Univ.*, 673 So. 2d 585 (La. 1996) (university not liable for injuries to student paralyzed while sledding on campus because a reasonably prudent invitee would have recognized the danger).

142. 758 So. 2d 86 (Fla. 2000).



Gross of the potential danger of that site.<sup>143</sup> And in *Kleinknecht v. Gettysburg College*,<sup>144</sup> the court held that a special relationship existed between the college or university and a student athlete who died of a heart attack while engaged in lacrosse practice because of the college's sponsorship of the team and the potential for injury. The court ruled that the potential for life-threatening injuries was foreseeable; thus the college's failure to provide facilities for emergency medical treatment was unreasonable.

In recent years, courts have been asked to determine whether a special relationship exists between the institution and a student who engages in self-destructive behavior. Although rulings in these cases have been inconsistent on the issue of special relationship,<sup>145</sup> courts seem more willing to find a special relationship if college or university staff were aware of the student's history of self-destructive behavior and did not, in the court's view, address it sufficiently. On the other hand, an institution that attempted to address a student's apparent suicide threat by barring him from the campus and charging him with a violation of the student code of conduct was sued by the student.<sup>146</sup> The case was settled, and the university promised to change its policies in dealing with at-risk students.<sup>147</sup>

At-risk students who are barred from campus or restricted in other ways tend to file claims with the Office for Civil Rights because they are resolved more quickly in that way than through a lawsuit.<sup>148</sup> Given the fact that one quarter of all adults in the U.S. have a diagnosed or diagnosable mental disorder,<sup>149</sup> and that some forms of mental illness in adults typically

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143. *Id.* at 87–89.

144. 989 F.2d 1360 (3d Cir. 1993).

145. *See e.g.*, *Jain v. State*, 617 N.W.2d 293 (Iowa 2000) (no special relationship existed between university and self-destructive student because university's failure to warn parents did not increase the risk of his committing suicide); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657 (Mass. Super. Ct. November 20, 2006) (student's use of heroin, and subsequent overdose, were not foreseeable and thus no special relationship existed). *But see Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002) (finding a special relationship to protect student from harming himself because college staff knew of his suicide threats, previous self-inflicted injuries, and history of emotional problems).

146. Brittany Levine, *University, Nott Reach Settlement*, DAILY COLONIAL, Nov. 1, 2006, available at <http://www.dailycolonial.com/go.php?p=3&s=3334>. For background on the Nott situation, see Eric Hoover, *Dismissed for Depression*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 24, 2006, at A44.

147. Levine, *supra* note 146.

148. For a review of Office of Civil Rights claims related to mandatory (involuntary) student withdrawals, see Lee & Abbey, *supra* note 65.

149. NATIONAL INSTITUTE OF MENTAL HEALTH. THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA (2008), <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml>. Approximately six percent of U.S. adults suffer from a "serious mental illness." *Id.*

first manifest themselves in late adolescence,<sup>150</sup> this area of student affairs requires the active involvement of counsel in dealing with the student's behavior and in determining what course of action to take if the student poses a danger to himself or herself or to others. Insufficient caution may lead to physical harm and consequent legal liability; overcaution may also lead to legal liability. Counsel's participation in these issues is critical to walk the narrow line between the two abysses.

In 1990, Congress passed the Crime Awareness and Campus Security Act,<sup>151</sup> otherwise known as the "Clery Act" after Jeanne Clery, a student murdered on a university campus. The law requires the collection and reporting of data on several categories of crime occurring on campus or on property owned or controlled by the college or on property owned or controlled by student organizations recognized by the institution.<sup>152</sup> The interpretation of this law occupies the time and attention of counsel, not only because of the need to prevent Clery Act violations, but because publicizing these data can create public relations problems for the institution. The Clery Act regulations also require colleges and universities to provide timely warnings to students and others on campus about crimes that could pose a threat to individuals on campus.<sup>153</sup> Helping to determine which incidents qualify for the "timely warning" is another important role for the college or university counsel.

Recent legal disputes have increased the institution's potential legal liability while, in some respects, making students and others on campus potentially less safe. For example, several states have "concealed carry" gun laws. Although some state laws do not affect the ability of colleges and universities to prohibit guns anywhere on campus,<sup>154</sup> the Utah Supreme

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150. National Institute of Mental Health, *Mental Illness Exacts Heavy Toll, Beginning in Youth* (June 6, 2005), <http://www.nimh.nih.gov/science-news/2005/mental-illness-exacts-heavy-toll-beginning-in-youth.shtml>. Three quarters of all lifetime mental illness begin at or before age twenty-four; half begin by age fourteen. Mood disorders, such as depression, bipolar disorder, or schizophrenia, tend to begin in late adolescence. *Id.*

151. Pub. L. No. 101-542, §§ 201–205, 104 Stat. 2381, 2384–87 (1990).

152. This latter category of "property" could include fraternity or sorority houses as long as the Greek organization is "recognized" by the institution. *Id.* § 204(f)(5)(A)(ii), 104 Stat. at 2386.

153. For a case involving a claim that an institution's "timely warning" about a student who committed an assault was defamatory, see *Havlik v. Johnson & Wales Univ.*, CA 05-510 ML, 2007 U.S. Dist. LEXIS 34690 (D.R.I. May 11, 2007) (defamation claim rejected).

154. See e.g., *DiGiacinto v. The Rector and Visitors of George Mason Univ.*, Dkt. #CL-2008-14054 (Fairfax Co. Cir. Ct. Aug. 14, 2009) (rejecting students' claim that a regulation prohibiting "the possession or carrying of a weapon by any person other than a police officer in academic buildings, administrative office buildings, student/resident buildings, dining facilities or while attending sporting, entertainment or educational events on the University property" violated the Second Amendment and distinguishing *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008)); *Students for Concealed Carry*

Court ruled in 2006 that Utah's gun laws do not permit the University of Utah to prohibit guns on campus.<sup>155</sup> And laws requiring that convicted sex offenders register and that the state provide public access to the list of such individuals<sup>156</sup> mean that colleges and universities have to be vigilant, in order to prevent potential legal liability, in checking the sex offender status of students and employees, particularly those with access to residence halls, day care centers, or other locations where the presence of such an individual could be particularly dangerous.

Student safety issues pose important legal and public relations issues for institutions of higher education and their counsel. The significant number and breadth of laws regulating the relationship between colleges and universities and their students, and the application of common law tort theories to institutions as landlords and places of public access make this area of the law lively and conflict-ridden. Courts are simultaneously holding colleges and universities to the same legal standard as other landlords or controllers of places of public accommodation with respect to premises liability law, while finding a "special relationship" between the college and at-risk students when it comes to other forms of negligence law. While it is unlikely that the *in loco parentis* doctrine will re-emerge, a form of shadow "in loco" law seems to be developing with respect to the college's duty to deal with troubled students.

## VII. INTERNATIONAL & GLOBAL EXPANSION

Rapid communications via the Internet and the globalization of business and culture have spurred greater numbers of faculty and students to participate in academic programs and research abroad. Some institutions require students to have some form of credit-bearing academic experience abroad.<sup>157</sup> Others have created "branch" campuses in other countries,

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on *Campus v. Regents of the Univ. of Colo.*, Case No. 2008CV6492 (Colorado District Ct., Colorado Springs, April 29, 2009) (rejecting the claims of a student group that the University of Colorado's prohibition on the possession of "firearms or other weapons" anywhere on a campus of the university by all individuals except certified law enforcement personnel violated the state constitution as well as the Colorado Concealed Carry Act).

155. *Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006). In 2007, the Utah legislature amended Utah Code § 53B-3-103 of the Laws of Utah to authorize boards of trustees of public colleges and universities in Utah to "make a rule that allows a resident of a dormitory located at the institution to request only roommates who are not licensed to carry a concealed firearm." 2009 Utah Laws 523-24.

156. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006). The law requires registered sex offenders to notify an institution of higher education at which the individual is an employee, student, or "carries on a vocation" that he or she is a registered sex offender. *Id.* § 14071(j).

157. Karin Fischer. *All Abroad! Overseas Study Required*, CHRON. HIGHER EDUC. (Wash., D.C.), June 20, 2008, available at <http://chronicle.com/article/All-Abroad->

either on their own or in partnership with institutions in that country.<sup>158</sup> The number of international students choosing to study in the United States remains substantial,<sup>159</sup> and U.S. regulations restricting the transfer of information across national borders<sup>160</sup> have influenced, but have not stemmed, the amount and nature of cross-border research by collaborators who may have only “met” via the Internet.

Given the increasing numbers of students who choose to study abroad, for a semester, for a summer, or an entire year, college and university counsel have an additional focus for their risk management concerns. In addition to the perennial issue of the quality of the student’s academic experience, counsel are concerned about the safety of their students in residences abroad, in the communities in which partner institutions are located,<sup>161</sup> and in the training and judgment of faculty advisors who direct these programs locally.<sup>162</sup> And although the application of U.S. nondiscrimination laws to students from U.S. colleges and universities while they are studying in another country remains unsettled,<sup>163</sup> ensuring

Overseas-Study-/13923.

158. Beth McMurtrie, *Overseas Programs Increasingly Sharing Risks with Host Countries*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 10, 2006, available at <http://chronicle.com/article/Overseas-Programs-Increasin/19693>.

159. Institute of International Education, *International Students on U.S. Campuses at an All-Time High*, November 17, 2008, available at <http://opendoors.iienetwork.org/?p=131590>.

160. See, e.g., Dep’t of State International Traffic in Arms Regulations (ITAR), 15 C.F.R. §§ 120-130 (2009); Dep’t of Commerce Export Administration Regulations (EAR), 15 C.F.R. §§ 730-774 (2009). Both of these regulations limit the type of research and information that U.S. citizens may share with individuals in certain nations that may be linked to terrorism.

161. See, e.g., *Bloss v. Univ. of Minn.*, 590 N.W.2d 661 (Minn. Ct. App. 1999) (university was not negligent in obtaining housing or providing transportation for student studying in Mexico because its efforts to instruct students on safety issues were reasonable).

162. Karin Fischer, *Trip Cut Short by Medical Evacuations Illustrates Potential Problems for Some Study-Abroad Programs*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 14, 2007, available at <http://chronicle.com/article/Troubles-at-U-of-Washingto/214>.

163. Generally, there is a presumption against the extraterritorial application of U.S. laws unless Congress specifically addresses that issue in the legislation. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). However, some lower courts have ruled that civil rights laws based on Congress’ spending power may be applied extraterritorially. For example, a federal trial court has ruled that Title IX applies to alleged discrimination against students from U.S. institutions during their study abroad program. *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002). Another federal trial court ruled that Section 504 of the Rehabilitation Act applied extraterritorially to a student from a U.S. college studying in Australia. *Bird v. Lewis & Clark Coll.*, 104 F. Supp. 2d 1271 (D. Ore. 2000), *aff’d*, 303 F.3d 1015 (9th Cir. 2002). The U.S. Court of Appeals did not address that issue in affirming the lower court’s ruling on the student’s other claim. See also Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws:*

nondiscrimination for women students in countries in which women do not have equal rights, or attempting to accommodate students with disabilities in communities and buildings designed long before access was required by law, can be a challenge.<sup>164</sup> Considering the potential for legal liability under at least two sets of laws—those of the United States and those of the host country—these programs pose numerous and intricate challenges for college and university attorneys.

An increasing number of U.S. institutions are establishing campuses in international locations.<sup>165</sup> In addition to the risk management issues touched upon above, college and university attorneys face complex issues related to property law, the need to register the academic programs offered at the international site with the host country's ministry of education (and abide by its regulations), tax issues for faculty teaching in the program (both U.S. and local citizens), and immigration issues, to name but a few.<sup>166</sup> Retaining local counsel is considered a "must," particularly in the early stages of establishing a foreign campus.<sup>167</sup> Cultural differences may also complicate the negotiation of agreements or the interpretation of what the U.S. institution believed was the intent of an agreement with a foreign partner institution.

As noted above, the federal government regulates the exchange of data and research results deemed to be of potential interest to terrorist groups and the governments that support them.<sup>168</sup> Institutions whose faculty members participate in such research need specialized legal advice to ensure compliance with these regulations. Institutions employing foreign nationals may need to obtain an export license from the relevant agency.<sup>169</sup>

As a result of the September 11, 2001, terrorist attacks, international students have had more difficulty obtaining visas for study in the United States, and federal requirements for monitoring their status and academic

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*Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291 (2003).

164. *King v. Bd. Of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002).

165. Beth McMurtrie, *Rapid Growth in Establishment of International Branch Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 2, 2009, available at <http://chronicle.com/article/Rapid-Growth-Occurs-in-Esta/48275>.

166. CLAIRE H. TOPP, DOING BUSINESS OVERSEAS: ISSUES AND GUIDANCE ON LEGAL STRUCTURES, TAX IMPLICATIONS AND COMPLIANCE WITH UNITED STATES LAWS, available at <http://www.nacua.org/nacuanet/NACUAResourcePages/Docs/InternationalPrograms/Topp.doc>; see also Bertrand M. Harding, Jr. *Federal Tax Issues Raised by International Study Abroad Programs*, 27 J.C. & U.L. 207 (2000).

167. Peter May, *Foreign Counsel Identification Guidelines*, available at [http://www.nacua.org/documents/ForeignCounselGuidelines2007\\_PeterMay.doc](http://www.nacua.org/documents/ForeignCounselGuidelines2007_PeterMay.doc).

168. See discussion *supra* note 33.

169. Jamie Lewis Keith, *The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies*, 30 J.C. & U.L. 239 (2004).

performance have increased. Despite these tighter restrictions, the number of international students attending U.S. colleges and universities in the 2007–08 academic year was 623,805, a record enrollment, and seven percent higher than the previous year.<sup>170</sup> Colleges and universities have been required to increase their staff and ensure that they are well informed about the ever-changing federal regulations dealing with international students. And researchers are noting an increasing number of international students with mental health issues,<sup>171</sup> which has implications not only for an institution's psychiatric services (if they offer them) but potential state law and FERPA issues related to confidentiality of these students' medical records.<sup>172</sup>

The obvious potential for legal liability on a variety of fronts makes the area of international and global programming and research one of great concern for college and university counsel. Counsel have found that aggressive risk management and a well-enforced set of policies and requirements for departments that wish to offer study abroad programs are essential, as well as training for both the faculty advisors and for the students who will participate in these programs. The simultaneous expansion of global activity (and growth of international law in an attempt to deal with this expansion) and the federal government's regulation of data exchange with international partners is likely to continue, at least while threats of global terrorism continue.

#### VIII. FEDERAL REGULATION

It is difficult, and perhaps impossible, to think of an area of higher education that is not touched by federal regulation,<sup>173</sup> and, in fact, each of the sections in this article touches upon various forms of federal regulation. Students may receive federal student financial aid, and all students' privacy is protected by federal law.<sup>174</sup> If they act as research subjects, they are protected by federal regulations,<sup>175</sup> and, at public institutions, their due

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170. Institute of International Education, *International Students on U.S. Campuses at an All-Time High*, November 17, 2008, available at <http://opendoors.iienetwork.org/?p=131590>.

171. Karen Birchard, *Educators Suggest "Mental Health First Aid" for International Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 27, 2008, available at <http://chronicle.com/article/Educators-Suggest-Mental-H/253>.

172. Nancy E. Tribbensee and Steven J. McDonald. *FERPA and Campus Safety*, 5 NACUA NOTES NO. 4 (Nat'l Ass'n of Coll. & Univ. Attorneys, Washington, D.C.) Aug. 6, 2007, <http://www.nacua.org/documents/ferpa1.pdf>.

173. For a more thorough review of federal regulation of higher education than is possible within the scope of this article, see Steven Dunham, *Government Regulation of Universities: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749 (2010).

174. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2006).

175. For a discussion of the federal laws and regulations requiring review by

process, equal protection, and first amendment rights are protected as well.<sup>176</sup> They are protected against race, sex, disability, and age discrimination in access to and evaluation in academic programs.<sup>177</sup>

Federal laws and regulations affect faculty and staff as well. Federal employment laws protect them from discrimination,<sup>178</sup> provide access to leaves of absence for medical or family needs,<sup>179</sup> protect their rights when returning from military duty,<sup>180</sup> and protect their pensions,<sup>181</sup> among others. Federal copyright<sup>182</sup> and patent<sup>183</sup> laws protect faculty (and in many cases the institution) against misappropriation of intellectual property.

With respect to those areas of federal regulation of potentially the greatest concern for college and university counsel (in addition to employment, which is discussed in Part IV of this article), the federal regulation of research must be highly ranked. Institutional Review Boards (IRBs) must approve all research proposals submitted for possible funding by federal agencies; on many campuses, all proposed research—whether by faculty or students—that uses human subjects must receive IRB approval before the project begins.<sup>184</sup> Counsel are heavily involved in training and working with IRBs in order to ensure compliance with the regulations of those federal agencies that fund research. If animals are used as research subjects, counsel must ensure that institutional animal care and use committees (IACUCs) function properly.<sup>185</sup> Colleges and universities are under increasing pressure to identify and eliminate conflicts of interest by faculty engaging in research,<sup>186</sup> an area of substantial sensitivity on the part of the faculty and concern on the part of the college and university counsel and various members of Congress.<sup>187</sup> Accounting for, and ensuring, the

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Institutional Review Boards of research proposals involving human subjects, see KAPLIN & LEE, *supra*, note 37, at §13.2.3.2.

176. *Id.* at §§ 1.4.2.1, 1.5.

177. *Id.* at § 13.5.

178. *See id.* at Ch. 5, § 6.4.

179. Family and Medical Leave Act, 29 U.S.C. § 2601 (2006).

180. Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4304(A)(I) (2006).

181. Employee Retirement Income Security Act, 29 U.S.C. § 1001(b) (2006).

182. Copyright Act, 17 U.S.C. § 101 (2006).

183. Patent Act, 35 U.S.C. § 101 (2006).

184. For a discussion of the federal laws and regulations requiring review by Institutional Review Boards of research proposals involving human subjects, see KAPLIN & LEE, *supra* note 37, at §13.2.3.2.

185. Animal Welfare Act, 7 U.S.C. § 2131 (2006); 9 C.F.R. § 2.31 (2008).

186. Peter J. Harrington. *Faculty Conflicts of Interest in an Age of Academic Entrepreneurialism: An Analysis of the Problem, the Law and Selected University Policies*, 27 J.C. & U.L. 775 (2001). For an extensive discussion of the federal regulation of research, see Dunham, *supra* note 173.

187. Jeffrey Brainard, *Senator Grassley Pressures Universities on Conflicts of*

appropriate expenditure of external research grant funds is also an important legal issue to which counsel must be attentive.

The problem of misconduct in research is a perennial one, and the gravity of charges of such misconduct—which can irrevocably alter or end a career even if the charges are disproven—ensures a role for counsel in the investigation of the charges and the disposition of the complaint.<sup>188</sup> Legal issues related to charges of research misconduct run the gamut from those personal to the accused (such as defamation, possible Constitutional claims at a public institution, or discrimination claims) to federal charges against both the faculty member and the institution as the custodian of the funds and the guarantor of their appropriate use.<sup>189</sup> In recent years, the federal government has become more aggressive in investigating and punishing alleged research misconduct,<sup>190</sup> and counsel is involved in every aspect of these claims.

In addition to these areas of federal regulation, colleges and universities, as places of “business,” are subject to the same federal laws that regulate businesses, such as a variety of environmental protection laws<sup>191</sup> and the Occupational Safety and Health Act.<sup>192</sup> Particularly for those institutions with science laboratories or research projects that involve substances regulated by the federal government (including, for example, dangerous chemicals, nuclear materials, possible toxic substances), the alphabet soup of federal regulatory agencies is an ever-present concern, and counsel is attentive to the legal risks posed by the substances that are on campus, their use, storage, and disposal.

Federal student aid is another substantial area of federal regulation, particularly for institutions that participate in the direct lending program.<sup>193</sup> Institutions have been sanctioned for violations of federal student aid regulations,<sup>194</sup> or failure to collect defaulted student loans,<sup>195</sup> among other

*Interest*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 8, 2008, at A12.

188. Debra M. Parrish, *Research Misconduct and Plagiarism*, 33 J.C. & U.L. 65 (2006).

189. *Id.*

190. *Id.*

191. *See, e.g.*, Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (2006).

192. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2006).

193. Title IV, Higher Education Act of 1965, 20 U.S.C. § 1070 and its subsequent reauthorizations. For a brief review of federal student financial aid programs, *see* KAPLIN & LEE, *supra*, note 37, at §8.3.2.

194. David Moltz, *All Play and No Work*, INSIDE HIGHER ED, Sept. 3, 2009, available at <http://www.insidehighered.com/news/2009/09/03/georgetown> (Georgetown University required to repay federal Work-Study funds as a result of inaccurate recordkeeping for students working for baseball team. The university was also sanctioned by the NCAA, placed on probation for three years, and required to vacate all wins from games in which the players who were improperly paid



claims. The college or university counsel may even need to brush up on—or engage outside counsel for—bankruptcy litigation to deal with borrowers who default on their student loans.<sup>196</sup>

The breadth of federal regulation of higher education, and its persistent expansion into virtually every area of higher education, suggest that these trends will only continue. Short of forgoing all federal student financial aid, as a few colleges have done, it is unlikely that counsel can successfully limit the impact of federal regulation on the institution's operations.<sup>197</sup> This breadth and complexity have greatly complicated the role of counsel and have highlighted the importance of well-informed advice and preventive law.

#### IX. HIGHER EDUCATION AS “BIG BUSINESS”<sup>198</sup>

The image of a college or university as a small island in a bucolic setting—or even as an enclave in the midst of a large city—no longer describes higher education, if it ever did. Colleges and universities—and their counsel—are heavily involved with entrepreneurial activities in collaboration with a variety of organizations, both for-profit and non-profit, both domestic and foreign, and both academic and nonacademic. “Transactional law” is being practiced more frequently on campuses as institutions enter partnerships to develop residence halls,<sup>199</sup> build research parks or “incubators,”<sup>200</sup> develop land that they own into profit-making businesses,<sup>201</sup> or enter agreements to transfer technology developed within

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participated.)

195. See, e.g., *Canterbury Career Sch., Inc. v. Riley*, 833 F. Supp. 1097 (D.N.J. 1993).

196. For a discussion of the application of bankruptcy law to student loan defaults, see KAPLIN & LEE, *supra* note 37, at §8.3.8.1.

197. Dunham suggests that there are strong disincentives for institutions of higher education and their leaders to lobby against greater federal regulation or to protest it when it is imposed. See Dunham, *supra* note 173.

198. In addition to their responsibility to comply with laws and regulations related to their business activities, trustees and institutional officers must comply with their duties as fiduciaries and their accountability for acting in the best interests of the institution. For a thoughtful discussion of these issues, see Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 J.C. & U.L. 691 (2010).

199. See, e.g., Larry D. Harris, *The University Edifice Complex: Emerging Trends In Construction: Construction Delivery Systems: A Comparative View*, Presentation at Advanced Workshop sponsored by National Association of College and University Attorneys, March 12, 1999.

200. Purdue University, *Purdue Research Park Receiving National Acclaim*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 7, 2009, available at <http://chronicle.com/campusViewpointArticle/Purdue-Research-Park-Receiveiv/44>.

201. Paul Fain, *Land-Rich Universities Weigh New Options for Real-Estate Development*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 7, 2009, available at <http://chronicle.com/article/Land-Rich-Universities-Weig/944>.

the institution for manufacture or implementation in a commercial context.<sup>202</sup>

Counsel—either in-house or retained for expertise in transactional law—are, or should be, heavily involved in shaping these collaborative partnerships. Risk management and transfer are perennial concerns for all parties involved. Academic freedom for faculty researchers when a private business may wish to limit publication or dissemination of research results can make for difficult negotiations, but protecting academic freedom is critical to the preservation of knowledge transfer. Faculty entrepreneurs may strike out on their own to form partnerships or begin their own businesses with investments from private sector firms whose priorities may not match those of academe. These faculty “start-ups” may distract the faculty member from teaching or other institutional responsibilities, and could lead to a violation of the institution’s conflict of interest or conflict of commitment policies. Disputes over ownership of intellectual property<sup>203</sup> may ensue, even if the partnership agreement has been carefully drafted to anticipate such problems.

Over the past decades, intercollegiate athletics, particularly at those schools that participate in Division One of the National Collegiate Athletic Association, has become “big business” with concomitant big regulation and even bigger legal problems.<sup>204</sup> Litigation involving the NCAA’s power over intercollegiate athletics has included antitrust law,<sup>205</sup> federal constitutional law,<sup>206</sup> state laws protecting due process rights, vis-à-vis the NCAA, of institutions and their student athletes,<sup>207</sup> common law,<sup>208</sup> and

202. Mark L. Gordon, *University Controlled or Owned Technology: The State of Commercialization and Recommendations*, 30 J.C. & U.L. 641 (2004).

203. See, e.g., *Bd. of Tr. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 583 F.3d 832 (Fed. Cir. 2009) (dismissing the university’s patent claim against Roche, finding that Stanford did not establish its ownership of the patent in dispute).

204. For a discussion of the evolution of the law governing intercollegiate athletics, including Title IX litigation and NCAA oversight, see KAPLIN & LEE, *supra* note 37, at §§ 10.4 and 14.4.

205. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (NCAA plan for regulating the televising of football games by members institutions violated the Sherman Antitrust Act because it was a restraint of trade). But see *Banks v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 850 (N.D. Ind. 1990), *aff’d*, 977 F.2d 1081 (7th Cir. 1992); *Gaines v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 738 (M.D. Tenn. 1990) (NCAA eligibility rules were not a restraint of trade because NCAA gained no commercial advantage from them).

206. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988) (NCAA requirement that University of Nevada-Las Vegas sever ties to the basketball coach, Tarkanian, was not state action and thus did not violate Tarkanian’s constitutional rights).

207. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633 (9th Cir. 1993) (state statute regulating the process to be used in imposing sanctions on players or coaches was an invalid restraint on interstate commerce and interfered with the contractual relationship between the NCAA and its members).

federal discrimination law,<sup>209</sup> among others. Risk management issues abound on campuses when thousands of fans arrive to watch sporting events,<sup>210</sup> as well as resulting from injuries to players during practice or games.<sup>211</sup> Financial aid for student athletes, and its removal if the student violates team rules or the student code of conduct, may lead to litigation.<sup>212</sup> The fact that athletics teams travel to other campuses, other states, and sometimes other countries, can result in legal claims against the home or the visiting institution if a student is injured.<sup>213</sup> Disputes over the hiring and firing of coaches,<sup>214</sup> and the contents of their often lucrative contracts,<sup>215</sup> absorb the time and energy of the college or university attorney. Even the decision to enter or leave a particular athletic conference can lead to litigation.<sup>216</sup> Intercollegiate athletics is a popular pastime for alumni, community members, and in some cases, a national television audience, but its potential for legal problems does not allow the

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208. See, e.g., *Phillip v. Fairfield Univ.*, 118 F.3d 131 (2d Cir. 1997) (NCAA owed no contractual duty to student denied a waiver of NCAA academic eligibility requirements).

209. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999) (NCAA not a recipient of federal funds and thus not subject to Title IX of the Education Amendments of 1972). *But see* *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114 (E.D. Mo. 1998) (NCAA is a place of public accommodation and thus is subject to Title III of the Americans with Disabilities Act).

210. See, e.g., *Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999) (injury to football fan when fans lunged for football kicked into the stands was foreseeable; university had duty to protect her from injury).

211. See, e.g., *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (college had duty to have emergency medical treatment services available in event that student athlete was injured during practice).

212. See, e.g., *Conard v. Univ. of Wash.*, 814 P.2d 1242 (Wash. Ct. App. 1991) (nonrenewal of student athletes' scholarship on grounds of "serious misconduct" was not a breach of contract).

213. See, e.g., *Kavanagh v. Trs. of Boston Univ.*, 795 N.E.2d 1170 (Mass. 2003) (injury to visiting student athlete by basketball player from home team was not foreseeable and thus university was not vicariously liable).

214. Libby Sander and Paul Fain. *Coaches' Contracts are Fertile Ground for Conflict*, CHRON. HIGHER. EDUC. (Wash., D.C.), June 4, 2009, available at <http://chronicle.com/article/Coaches-Contracts-Are-Fert/44424>.

215. See, e.g., *Cremens v. Atlanta Journal*, 405 S.E.2d 675 (Ga. 1991) (state public records law required university and coaches to disclose outside outcome). *But see* *Univ. Sys. of Md. v. The Baltimore Sun Co.*, 847 A.2d 427 (Md. 2004) (coaches' employment contracts with state university must be disclosed, but contracts with third parties for commercial endorsements not subject to the state open public records act).

216. For example, several universities sued the Atlantic Coast Conference (ACC), the University of Miami, and Boston College for conspiracy when those institutions and Virginia Tech decided to leave the Big East football conference for the ACC. The Attorney General of Connecticut filed the lawsuit in Connecticut Superior Court in June of 2003. The case was settled in 2005, with the remaining members of the Big East sharing a settlement reported to be approximately five million dollars. *Big East, ACC Settle Dispute on Realignment*, WASHINGTON POST, May 4, 2005, at D2.

college or university attorney to be a mere spectator.

Many other issues related to the “big business” of higher education may occupy the time of the higher education attorney. Some institutions have the authority to issue bonds to raise the funds to build residence halls or other facilities.<sup>217</sup> Even if the attorney engages a special bond counsel for the purpose of structuring the bond issue and evaluating its financial risks, the long term legal implications of issuing the bonds are the province of the college or university counsel. Some large institutions have their own transportation systems because their campuses are either very large or they need to transport students and faculty between campuses.<sup>218</sup> Some institutions own and manage their own airport,<sup>219</sup> elementary and secondary schools,<sup>220</sup> fire departments, or farms—all of which have their own risk management and regulatory issues that must be addressed.

The diversity of business operations in which a college or university is involved is far broader than that of some large global conglomerate companies, and it is very likely that the legal staff at the college or university is considerably smaller than that of its corporate counterpart. Even if a new activity makes sense from a pedagogical or academic perspective, it may have a serious downside from a risk management or legal compliance perspective. Counsel may have to assist institutional leaders, and possible faculty champions of expensive and risky new ventures, to evaluate the cost and legal complexity of the fruits of their entrepreneurial imaginations.

#### X. ACCOUNTABILITY PRESSURES FROM STATE AND FEDERAL GOVERNMENTS

Whether or not an institution is “public,”<sup>221</sup> state and federal governments demand accountability in a variety of ways from colleges and universities. Private institutions, as well as public, are subject to the federal

217. State law controls the authority of a college or university to issue bonds. *See, e.g.*, 53 PA. CONS. STAT. § 8005 (2009) (classification and authority to issue bonds and notes).

218. For example, both Ohio State University and Rutgers University have an extensive system of bus transportation available to students, staff, and the public because of the large size of their campuses.

219. For example, the University of Illinois owns and operates an airport. *See* University of Illinois Urbana-Champaign, Willard Airport Homepage, <http://www.flyemi.com>.

220. Many institutions own and operate day care centers or schools; one of the best known is the University of Chicago Lab Schools. *See* The University of Chicago, Laboratory Schools Homepage, <http://www.ucls.uchicago.edu/about-lab/index.aspx>.

221. The decline in the proportion of funding provided by state legislators to “public” colleges and universities raises the issue, which is beyond the scope of this article, of how low the proportion of state support can drop before a “public” institution no longer belongs in that category.

regulation of research discussed in Part VIII of this article, as well as in Stephen Dunham's article in this issue.<sup>222</sup> Both types of institutions must meet the requirements of recognized accrediting associations in order for their students to be eligible to receive federal student financial aid.<sup>223</sup> Federal law regulating intellectual property, immigration, the environment, and employment affects both public and private institutions, albeit, in some cases, in different ways. Both private and public institutions may be subject to state regulation if they have hospitals,<sup>224</sup> day care centers, or schools,<sup>225</sup> and to alcoholic beverage control laws if the campus has a restaurant or bar that serves alcohol.<sup>226</sup>

But public institutions have experienced a much greater increase in governmental scrutiny at the state level than have private colleges and universities. The great increase in state regulation of public higher education has occurred just as the amount of public funding for these institutions is declining. Ethics rules first developed to curtail the alleged excesses of state legislators are now applied to faculty and staff at the state's colleges and universities.<sup>227</sup> Legislatures in some states are requiring tuition caps in exchange for state appropriations for higher education.<sup>228</sup> Open public meetings and open public records laws in some states require meetings of presidential search committees to be open to the public,<sup>229</sup> and have generated litigation pitting the privacy rights of

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222. See Dunham, *supra* note 173.

223. For a discussion of the interplay between accreditation and federal student financial aid, see KAPLIN AND LEE, *supra* note 37, at §14.3.

224. For an overview of state regulation of hospitals and health care at colleges and universities, see KAPLIN AND LEE, *supra* note 37, at §12.5.5.

225. State law regulates both public and private schools. See, e.g., N.J. STAT ANN. Title 18A (Education) (2009).

226. States regulate alcohol sales through alcohol control boards. For a list of these boards and their method of control, see The Marin Institute, State Alcohol Control Boards, [http://www.marininstitute.org/alcohol\\_policy/state\\_alcohol\\_control.htm](http://www.marininstitute.org/alcohol_policy/state_alcohol_control.htm).

227. See, e.g., Jennifer Ruark, *Colorado Judge Blocks New Ethics Rules*, CHRON. HIGHER. EDUC. (Wash., D.C.), June 15, 2007, available at <http://chronicle.com/article/Colorado-Judge-Blocks-New-E/6708> (ethics rules for public employees, including college faculty, would prohibit faculty from receiving Nobel Prize monetary award or their children from receiving certain scholarships); see also John Gravois, *2 Professors Sue Over Ethics Test*, CHRON. HIGHER. EDUC. (Wash., D.C.), Feb. 16, 2007, available at <http://chronicle.com/article/2-Professors-Sue-Over-Ethic/34148> (faculty who took state-mandated ethics test "too quickly" were threatened with loss of their jobs).

228. See, e.g., Megan Eckstein, *To Put Brakes on Tuition, Arkansas Caps Public College Spending on Scholarships*, CHRON. HIGHER. EDUC. (Wash., D.C.), Mar. 2, 2009, available at <http://chronicle.com/article/To-Put-Brakes-on-Tuition-A/42500>; see also Josh Keller, *Moody's Warns About State Tuition Caps*, CHRON. HIGHER. EDUC. (Wash., D.C.), Apr. 6, 2007, available at <http://chronicle.com/article/Moodys-Warns-About-State-T/7582> (bond ratings of public institutions could drop if they have less flexibility to use tuition to offset declines in state support).

229. See, e.g., *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274 (Minn. 2004) (state's Open Meeting Law and Data Practices Act applied to the

FERPA<sup>230</sup> against the “right” of the press to attend student disciplinary board hearings or at least to learn of the outcomes of these proceedings.<sup>231</sup> Decisions made in the state capital, often by legislators who are unfamiliar with the missions of their higher education institutions and the constraints they face, add to the kaleidoscope of legal, policy, and political issues that the college or university counsel must address. It is unlikely that these issues will either disappear or recede; it is quite likely that additional issues will emerge as political leaders seek to exercise control over public higher education in their state.

#### XI. INFLUENCE OF EXTERNAL GROUPS ON HIGHER EDUCATION

A final area of law—or perhaps more appropriately labeled political action—that counsel are increasingly dealing with is attempts by issue-oriented groups external to the higher education system to influence the decisions of colleges and universities. While these efforts have been most visible regarding affirmative action in college admissions,<sup>232</sup> external interest groups have attempted to influence tenure decisions,<sup>233</sup> the recognition and funding of student organizations,<sup>234</sup> admissions to public

university’s search for a new president).

230. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2006).

231. See, e.g., *Red and Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993) (state open public meetings law requires university to permit members of the public, including media, to attend student disciplinary board hearings).

232. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) in which the Center for Equal Opportunity contributed to the litigation costs for the plaintiffs, and *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which the National Association of Scholars and the Pacific Legal Foundation contributed to the litigation costs for plaintiffs. Advocacy organizations such as the American Civil Rights Institute have supported ballot initiatives in a variety of states to forbid the use of race or gender preferences in college admissions and other public programs. See American Civil Rights Institute Homepage, <http://www.acri.org>.

233. See, e.g., Dan Rabinowitz and Ronen Shamir, *Who Got to Decide on Nadia Abu El-Haj’s Tenure?* ACADEME, Jan.-Feb. 2008, available at <http://www.aaup.org/AAUP/pubsres/academe/2008/JF/Feat/rabi.htm> (discussion of the efforts of an alumna living on the West Bank in Israel to intervene in and prevent the tenuring of an anthropology professor, Nadia Abu El-Haj, who was granted tenure at Barnard College)

234. See *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (enjoining Southern Illinois University’s law school dean from refusing to recognize a religiously-affiliated student organization that would not allow gays to be members or hold office; refusal to recognize violated the group’s First Amendment rights of speech and association). *But see* *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, 319 Fed. App’x 645 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3340 (U.S. 2009) (law school’s refusal to recognize religiously-affiliated student organization did not violate First Amendment because it was content neutral). The national Christian Legal Society and the Alliance Defense Fund Center for Academic Freedom represented the plaintiffs in the Hastings case, which is currently before the U.S. Supreme Court. According to its website, the Alliance Defense Fund is “a legal alliance of Christian attorneys and like-

universities,<sup>235</sup> and, in some cases, reading assignments or the performance of plays on campus.<sup>236</sup> Some of these external entities have bankrolled or initiated litigation, and the results have been mixed for the autonomy of colleges and universities.

One of the most active “watchdog” groups, one that has not hesitated to sue on behalf of students, is the Foundation for Individual Rights in Education (FIRE).<sup>237</sup> It has funded litigation challenging “hate speech” codes<sup>238</sup> and sexual harassment policies.<sup>239</sup> It has also pressured various colleges and universities to modify harassment and hate speech policies by threatening litigation.<sup>240</sup> If one of these external advocacy organizations takes an interest in policies or practices at a particular college or university, the institutional counsel is deeply involved in working with institutional leadership, including its public relations office, to develop a strategy to deal with the media attention that is sure to accompany that “interest.”

A related type of advocacy group that may attempt to influence institutional policy and practice is conservative religious or political organizations. Such organizations have sued public institutions in an attempt to halt the performance of plays that the group believes are sacrilegious,<sup>241</sup> and have attempted to influence curricular content on some

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minded organizations defending the right of people to freely live out their faith. Launched in 1994, ADF employs a unique combination of strategy, training, funding, and litigation to protect and preserve religious liberty, the sanctity of life, marriage, and the family.” Alliance Defense Fund, About ADF, <http://www.adfmedia.org/Home/About>. In the case against Southern Illinois University, Gregory S. Baylor, of Religious Liberty Advocates, located in Springfield, VA, represented the plaintiffs. In both cases, the Foundation for Individual Rights in Education submitted an *amicus* brief.

235. Kathryn Masterson, *U. Illinois President Resigns in Wake of Admissions Scandal*, CHRON. HIGHER. EDUC. (Wash., D.C.), Sept. 23, 2009, available at <http://chronicle.com/article/U-of-Illinois-President-Re/48587> (trustees of University of Illinois at Urbana-Champaign pressured campus administrators, including chancellor, to admit students with political ties).

236. Euben, *supra* note 61; see also *Linnemeir v. Ind. Univ.-Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1034 (N.D. Ind. 2001) (plaintiff taxpayers objected to the content of a play that was to be performed on the campus of a public university. Court denied plaintiffs’ motion to enjoin presentation of play with religious themes because such presentation was not establishment of religion; theater at public university was a limited public forum, so content restrictions were not permitted).

237. Foundational for Individual Rights Homepage, <http://www.thefire.org>.

238. According to FIRE’s website, it has sponsored successful litigation related to “hate speech codes” against Shippensburg State University (PA), Texas Tech University, SUNY Brockport, and Citrus College (CA). FIRE, Case Archive, <http://www.thefire.org/cases/all>

239. *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

240. For a list of the “cases” that FIRE has focused on, using tactics that include litigation and political advocacy, see FIRE, Case Archive, <http://www.thefire.org/cases/all>.

241. *Linnemeir*, 155 F. Supp. 2d 1034.

campuses.<sup>242</sup> Several institutions have been sued by student organizations affiliated with the Christian Legal Society when institutions refuse to recognize religious student organizations whose exclusionary membership requirements run afoul of the institutions' nondiscrimination policies.<sup>243</sup> The decision of the U.S. Supreme Court in *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>244</sup> has expanded the types of student organizations that expect recognition and allocations from student activity fees, and has necessitated the involvement of the college or university attorney in resource allocation decisions when the use of student fees is at issue.<sup>245</sup>

A perennial source of external attention is the scrutiny of the individuals or entities that provide funding for the college or university—whether it is donors to private institutions or state legislators who vote on funding for public institutions. Although these individuals and organizations are often more of a political concern than a source of potential legal liability, the institution's counsel may become involved in strategizing on how to respond to, or potentially avoid, requests that either violate institutional policies or, in some cases, suggest potential violations of state or federal ethics laws and regulations. Pressure from state legislators to make favorable admissions decisions for certain applicants received substantial press attention in one state and led to the resignation of the president of the state's flagship university.<sup>246</sup> Donors who are dissatisfied with the way the institution is, or is not, spending the proceeds of the donation may demand the return of the funds.<sup>247</sup> Some of these “political” pressures and conflicts may have legal consequences, and the college attorney is deeply involved in problem-solving and litigation avoidance strategizing.

The increase in pressure and scrutiny from external organizations seeking to impose their agenda on colleges and universities highlights the significance of the counsel's role as an advisor on institutional strategy as well as being the institution's chief legal advisor. This may not be a role

242. See, e.g., David Glenn, *Private Effort to Create Courses Draws Praise—and Charges of ‘Buying’ Curricula*, CHRON. HIGHER. EDUC. (Wash., D.C.), July 13, 2009, available at <http://chronicle.com/article/Private-Effort-to-Create-Co/47052>.

243. *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Christian Legal Soc’y Chapter of Univ. of Cal.; Hastings Coll. of the Law v. Kane*, 319 Fed. App’x 645 (9th Cir. 2009).

244. 515 U.S. 819 (1995).

245. See *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000) (public university must allocate mandatory student activity fees in a neutral manner).

246. Kathryn Masterson, *supra* note 235.

247. *Robertson v. Princeton Univ.*, Dkt. #C-99-02, N.J. Super. Ch. Div. (Dec. 12, 2008). A son of a donor to Princeton University sued the university, alleging that the funds had not been used for their intended purpose and that the funds had not been managed appropriately. The case was settled in December of 2008. Princeton University, *Robertson Lawsuit Overview*, <http://www.princeton.edu/robertson/about>.



that the college attorney anticipated or desired, yet it is a critical one.

## XII. WHERE IS HIGHER EDUCATION LAW GOING?

This analysis of the growth and development of the law that affects colleges and universities suggests that, in many respects, there is no “body” of higher education law. Although courts tend to defer to “academic” judgments, they still review some of them on the merits and occasionally reverse those they find unsupported.<sup>248</sup> Many college or university functions have counterparts in business or government, and challenges to decisions related to those functions often do not recognize the missions or special circumstances of these institutions. The scope and breadth of federal and state regulation, with new laws being created seemingly without regard to their effect on college or university operations, suggests that the college or university counsel may frequently need specialized assistance in order to address the plethora of legal issues that even relatively small institutions face.

The explosion of litigation and regulation has occurred in an environment in which stakeholders of colleges and universities seem unwilling to accept negative decisions or outcomes, and feel compelled to challenge them, either through regulatory agencies or in court. Even in areas in which academe has traditionally been viewed as authoritative, such as the evaluation of student academic performance or employee merit, legal challenges abound. And the fact that colleges and universities tend to prevail in most of these disputes is of small comfort to the attorneys and staff that must divert institutional resources to respond to these legal challenges.

The last five decades have seen even more change than could have been anticipated by the small group of college and university attorneys who formed NACUA in 1960. One wonders whether higher education law will continue to expand at the rate of the last fifty years; if so, an increasing proportion of institutional resources will be required to respond to or prevent legal challenges. Although the outcome of legal developments over the next five decades is uncertain, there is one certainty—that college and university attorneys will continue to need the type of mutual assistance and collaboration that is the hallmark of the National Association of College and University Attorneys, and that has characterized the organization since its inception.

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248. *See, e.g.*, *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (court rejected college’s attempt to sanction faculty member for alleged verbal sexual harassment of students in class); *see also* *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) (same). In both of these cases, a faculty grievance committee had determined that the content of the professors’ classroom speech and assignments was inappropriate and violated the institution’s policy against sexual harassment—an academic judgment.