

GOVERNMENT REGULATION OF HIGHER EDUCATION: THE ELEPHANT IN THE MIDDLE OF THE ROOM

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I. INTRODUCTION	749
II. HISTORY AND PURPOSE OF GOVERNMENT REGULATION OF COLLEGES AND UNIVERSITIES.....	750
A. Federal Funding of Colleges and Universities to Advance a Specific Public Purpose	751
B. Laws and Regulations Imposed as Conditions on Funding But Designed to Promote Public Purposes Separate from the Purpose of the Funding Itself.....	754
C. Laws, Regulations and Court Decisions of General Scope with Unique Application to Colleges and Universities	756
D. Laws Relating to Governance.....	757
III. COSTS AND BENEFITS OF GOVERNMENT REGULATION OF HIGHER EDUCATION.....	758
A. Why Regulate? What are the Benefits to the Government and Public?	759
B. Why Not Regulate? What are the Costs to the Colleges and Universities?	760
C. Towards a Unifying Theory: An Approach to Balancing Costs and Benefits in Federal Regulation of Higher Education.....	761
IV. SUBJECT MATTER AREAS OF REGULATION.....	767
V. THE COMPLIANCE FUNCTION AND THE ROLE OF COUNSEL	785
A. Compliance Plans and Programs	786
B. Role of Counsel in Compliance.....	787

I. INTRODUCTION

Higher education is a regulated industry. Colleges and universities are regulated entities.¹ The law and governments touch virtually

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1. See Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 J.C. & U.L. 1, 1 (2002) (“Colleges and universities are among the most extensively regulated

everything colleges and universities do, frequently with a heavy hand. While other parts of our economy have been affected by sweeping deregulation, the experience of higher education is just the opposite. Colleges and universities may not yet be public utilities, but the trends are unmistakable.

These statements would have shocked college and university boards, presidents and faculty who governed our higher education institutions over the 300 plus years from the founding of Harvard College in 1636 until the late 1940s, when this story begins. For three centuries, higher education institutions thrived largely independent of federal regulation and control. Between 1945 and today, all of this changed. Institutional autonomy has been limited by requirements of institutional compliance. Deference has been diluted by oversight. Academic freedom has been constrained by a maze of federal regulations.

What is the history of governmental regulation of colleges and universities? How and why has it developed? What are the costs and benefits of regulation? How has government regulation changed the still new field of higher education law? What does it mean for lawyers who represent colleges and universities? What does it mean for the institutions themselves, including their missions and their varied and multiple constituencies?

This article attempts to address these questions. Part I is historical—what are the origins of and reasons for government regulation? Part II is analytical—what are the costs and benefits of government regulation of higher education; how are these interests balanced and evaluated? Part III is descriptive—it recounts certain college and university functions that are regulated, the applicable laws, and how they work. Finally, Part IV provides a very brief introduction to the relatively new field of “compliance.” Part IV addresses the question: How does a college or university comply with both the myriad of changing regulatory requirements that it faces and the changing role of college or university counsel who may be asked not just to advise and defend the institution but also to act as a kind of government agent—an in-house regulator—to ensure that the “entity client” follows the law?

II. HISTORY AND PURPOSE OF GOVERNMENT REGULATION OF COLLEGES AND UNIVERSITIES

With a few notable exceptions,² colleges and universities are created and organized under state law. As legal entities they have always been subject to applicable “law,” including state and federal constitutional, statutory or

enterprises in the nation.”).

2. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 1.3.3 (4th ed. 2006).

common law and the provisions of their founding documents. As such, they have always been regulated, or at least theoretically subject to regulation, by the laws of the jurisdictions where they are located and by whatever governmental entities, including courts, have had the authority to enforce the laws. To this limited extent, governments and laws have always affected, or had the potential to affect, colleges and universities. But the history described here relates not to the generic and largely theoretical application of general statutory and common law to colleges and universities. The subject of this paper is rather the laws, regulations and judicial decisions that uniquely apply to colleges and universities precisely because of what they are, and the special functions and missions they carry out—research, teaching of students, and governance of not-for-profit academic institutions—that set them apart from most other legal entities.

Government regulation of higher education in 2010 covers a wide range of activities at virtually all colleges and universities.³ Most regulatory activity can be divided into four categories: laws applied as a condition of funding that specifically promote and protect the government's interests and objectives in the research or other activities that it funds; laws and regulations that apply as a condition of funding but that promote a specific federal or public policy agenda separate from the direct purpose of the funding; laws of general application that apply to higher education institutions along with other entities, though the application of the laws to colleges and universities may be unique; and laws that regulate academic institutions based on their not-for-profit status. The history of regulation in each of these four areas varies one from another and helps to explain both the public benefits sought to be created by the regulations and the costs the regulations impose on colleges and universities.

A. Federal Funding of Colleges and Universities to Advance a Specific Public Purpose

1. Funding of Research to Promote New Discoveries and Products

The history of the American research university is usually traced to the late 1800s, when several American colleges and universities, beginning in 1876 with The Johns Hopkins University, began to adopt the German model in which universities sought to encourage research and to advance knowledge well beyond the education (or training) of undergraduates and professional students.⁴ Federal funding of research universities and the

3. See Campus Legal Information Clearinghouse (CLIC), Summary of Federal Laws Governing Independent Colleges and Universities, <http://counsel.cua.edu/fedlaw> (last visited Apr. 8, 2010) (providing access to a compilation of federal laws that apply to higher education).

4. See generally JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY: ITS*

resulting regulation of scientific research, however, did not begin until the immediate aftermath of World War II, when the government supported scientific research first in the area of national defense and then in medical research and health.⁵

Before World War II, the federal government had supported scientific research but for the most part it had done so directly through federal employees in federal laboratories.⁶ As a result of collaborations begun during the war, the government expanded its support of science by awarding grants to university scientists to carry out government projects at the universities themselves.⁷ This defense-related work continued and expanded in the late 1940s and 1950s and was expanded further in the early 1950s to include funding for medical research from the National Institutes of Health.⁸

The amount of federal funding of research at colleges and universities has exploded since it began in the late 1940s. Starting from virtually zero, federal funding for research at higher education institutions, in constant year 2000 dollars, increased to approximately \$6 billion in 1972, \$7.7 billion in 1980, \$11.87 billion in 1990, \$17.5 billion in 2000, and \$26 billion in 2005.⁹

Similarly, the scope of funding has expanded from defense to include medicine, basic science, agriculture,¹⁰ energy, environment, education,

RISE TO PREEMINENCE, ITS INDISPENSIBLE NATIONAL ROLE, WHY IT MUST BE PROTECTED 16–22 (2010) (“The combination of teaching and research became distinguishing feature of the [German] system. . . . Throughout much of the nineteenth century Americans interested in higher learning and the university were simply envious of what they saw in Germany. . . . The first American university to emphasize research rather than undergraduate teaching was Johns Hopkins, which opened its gates in 1876.”); JOHN THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 103–07 (2004) (discussing “the German ideal of advanced scholarship, professors as experts, doctoral programs with graduate students, and a hierarchy of study,” its influence on Johns Hopkins and the development of the “‘university’ model of federated units” in the United States in the nineteenth century).

5. See COLE, *supra* note 4, at 98–99; THELIN, *supra* note 4, at 271–74; WILSON SMITH & THOMAS BENDER, AMERICAN HIGHER EDUCATION TRANSFORMED 1940-2005 at 402–405 (2008). See also DAVID DICKSON, THE NEW POLITICS OF SCIENCE 7 (The University of Chicago Press 1988) (1984); ROGER L. GEIGER, KNOWLEDGE AND MONEY: RESEARCH UNIVERSITIES AND THE PARADOX OF THE MARKETPLACE 132–43 (2004); ROBERT M. ROSENZWEIG, THE POLITICAL UNIVERSITY: POLICY, POLITICS, AND PRESIDENTIAL LEADERSHIP IN THE AMERICAN RESEARCH UNIVERSITY 3–5 (1998).

6. COLE, *supra* note 4, at 88. THELIN, *supra* note 4, at 201, 271–72.

7. COLE, *supra* note 4, at 95–98; ROSENZWEIG, *supra* note 5, at 4–5.

8. COLE, *supra* note 4, at 98–99.

9. National Science Foundation, Division of Science Resources Statistics, Survey of Research and Development Expenditures at Universities and Colleges, <http://www.nsf.gov/statistics/srvyrdexpenditures> (last visited Apr. 8, 2010).

10. The federal government has supported state universities, including their agricultural activities, since the Morrill Act of 1862. Morrill Act of 1862, 7 U.S.C. § 301 (2006).

public health, aid to developing countries, and other areas.

Federal funding of research at colleges and universities is based on a contract model. The “Government promises to fund the basic science . . . and scientists [at colleges and universities] promise that the research will be performed well and honestly and will provide a steady stream of discoveries that can be translated into new products, medicines, or weapons.”¹¹ In order to ensure that the colleges and universities perform the work “well and honestly,” the government has adopted an increasing array of regulations. The “contract” has moved from one based in large part on trust to one based in greater part on regulation and oversight intended to insure that the government’s objectives are properly served. To determine “honesty,” for example, the government has adopted a framework to evaluate allegations of research and scientific misconduct and rules for determining conflict of interests. To determine that government money was in fact spent on the purposes for which it was provided, the government requires an effort-reporting system to determine that time is actually spent and properly allocated to each contract and an audit system to judge that expenses are properly incurred and attributed. The contract model thus uses compliance with regulations as a means to ensure that the purposes of the funding are met.

2. Funding of Financial Aid to Promote Access to Higher Education

In the waning days of World War II, the government began planning for the transition of military personnel to civilian jobs. One part of this program was the GI bill, originally passed in 1944.¹² “Over two million veterans went to college or university using the GI Bill,” and the federal government spent \$14.5 billion dollars on the education portion of the bill.¹³

The next big wave of federal support for access to higher education came in 1972 with the Pell Grant program, followed over the years with other federal loan and grant programs for financial aid.¹⁴ By 2009, the federal government budget supporting financial aid for students exceeded \$95 billion dollars.¹⁵

11. David H. Guston & Kenneth Keniston, *Introduction: The Social Contract for Science*, in *THE FRAGILE CONTRACT: UNIVERSITY SCIENCE AND THE FEDERAL GOVERNMENT* 1, 11 (David H. Guston & Kenneth Keniston, eds., 1994).

12. U.S. Dep’t of Veterans Affairs, GI Bill History, www.gibill.va.gov/GI_Bill_Info/history.htm (last visited Apr. 8, 2010).

13. KATHLEEN J. FRYDL, *THE G.I. BILL* 186, 310 (2009).

14. Federal Pell Grant Program, <http://www2.ed.gov/programs/fpg/index.html> (last visited Apr. 8, 2010).

15. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, DEP’T OF EDUC., FISCAL YEAR 2009* (2008), available at <http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/education.pdf>.

Federal money to support student access to education brought with it a slew of regulatory requirements which, as with research dollars, were intended both to ensure that the government's money was well spent and also that it was spent to further the government's purposes.¹⁶

B. Laws and Regulations Imposed as Conditions on Funding But Designed to Promote Public Purposes Separate from the Purpose of the Funding Itself

1. Research

As noted, the original “contract” between the federal government and college and university recipients of federal research monies was a simple one: the government provided the money in return for the institution's promise to undertake the research. Over time the government has added conditions to the contract under which the recipient promises to comply with various other laws and regulations. Some of these conditions and regulations (such as protection of human subjects and animals) relate to the funded research but are principally intended to promote secondary purposes. Many others—employment laws, student rights and protections—are simply expressions of unrelated federal policy to which the college or university must attest or certify as a condition of receipt of the federal money.

The National Council of University Research Administrators publishes a book entitled *Regulation and Compliance: A Compendium of Regulations and Certifications Applicable to Sponsored Programs* (“NCURA Compendium”).¹⁷ The 2007 edition lists over 90 different legal requirements applicable to recipients of federal grants and contracts,¹⁸ ranging from the relatively specific—the Byrd Amendment¹⁹ requiring recipients to hold an educational program on the United States Constitution on September 17 of each year – to general omnibus requirements which contain literally hundreds of other specific requirements.²⁰

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

17. JANE A. YOUNGERS, REGULATION AND COMPLIANCE: 2007, A COMPENDIUM OF REGULATIONS AND CERTIFICATIONS APPLICABLE TO SPONSORED PROGRAMS (NCURA 2007).

18. *Id.* at 193–96.

19. Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2005); Notice of Implementation of Constitution Day and Citizenship Day, 70 Fed. Reg. 29,727-01 (May 24, 2005).

20. For example, the Federal Acquisition Regulations include relatively new provisions relating to sex trafficking and codes of conduct. Federal Acquisition Regulations System, 48 C.F.R. § 1.101 ch. 1 (October 1, 1984), available at <https://www.acquisition.gov/far/current/pdf/FAR.pdf>. See also COUNCIL ON GOVERNMENTAL RELATIONS (COGR), MANAGING EXTERNALLY FUNDED RESEARCH PROGRAMS: A GUIDE TO EFFECTIVE MANAGEMENT PRACTICES (2009).

Not all of these requirements apply to every federal program. Some apply to grants and not contracts, or vice versa. Some apply only to grants or contracts with certain agencies. Figuring out which regulatory requirements apply to which grants or contracts is part of the regulatory maze through which colleges and universities must navigate.

As noted, some of these requirements are related to the actual work to be performed under the grant or contract, even though they may not serve the purpose or objective of the contract. For example, requirements related to the protection of human subjects and to the use of animals in research are inextricably intertwined with the research and are intended to ensure that the research is performed according to certain professional, ethical or scientific standards. Nevertheless, these purposes—which are highly laudatory and appropriate—are secondary to the reason the government has chosen to fund the research. These regulations are thus designed to promote secondary purposes (i.e. protection of human subjects or animals) that are above and beyond the objectives of the underlying research (i.e. medical advances or improved public health).

Many other laws and regulations that are the subject of certifications and assurances that are conditions to federal research grants and contracts have essentially nothing to do with the purpose of the contract or grant itself. Making these secondary laws a condition of the contract is simply a vehicle by which the government seeks to promote a particular public policy. Laws in this category include statutes and regulations related to anti-discrimination, privacy, safety and security, data dissemination, and a host of miscellaneous provisions such as “Buy American” acts and laws about smoke-free environments.²¹

2. Financial Aid

As with research monies, over time the government has added even more regulatory conditions to the receipt of federal financial aid monies beyond the primary requirement that the money be used as financial aid to support access to education. The best recent example is the Higher Education Opportunity Act of 2008 (“HEOA”),²² amending the Higher Education Act of 1965 (“HEA”).²³ Annually, colleges and universities who participate in federal financial aid programs must certify compliance with the HEOA, as amended, and the myriad of requirements that it imposes.

As with the conditions applied to research monies, some of these

21. See YOUNGERS, *supra* note 17, at 25–43 (anti-discrimination), 45–56 (privacy), 89–99 (safety and security), 101–11 (data dissemination), 159–60 (Buy American Act), 165 (smoke-free workplace).

22. Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

23. 20 U.S.C. §§ 1001–1161aa (2006).

conditions can be said specifically to promote the purpose of the financial aid programs to which they are appended—financial assistance and access to higher education. But many requirements of the HEOA are truly unrelated to these purposes of the federal funding and were apparently added to serve separate public purposes or to respond to separate special interests. The National Postsecondary Education Cooperative recently published a list of the “disclosure” requirements of the HEA and the HEOA that it considers “non-loan related.”²⁴ They list 31 such requirements, many of which have numerous sub-requirements.²⁵ These disclosure requirements cover a wide range of topics, including: privacy, diversity, the price of textbooks, copyright infringement, fire safety, and graduation rates.²⁶

C. Laws, Regulations and Court Decisions of General Scope with Unique Application to Colleges and Universities

The scope of laws and court decisions of general application that apply to colleges and universities is as broad as our entire legal system and is well beyond the scope of this paper. But the regulatory nature of these laws arises most significantly and problematically where general purpose laws have a particularly intrusive effect when applied to higher education institutions. Two broad examples illustrate this point.

1. Equal Opportunity and Non-discrimination

Beginning in the 1970s, federal laws prohibiting discrimination and promoting equal opportunity began to be applied to college and university admissions decisions, academic programs and faculty hiring.²⁷ While some of these laws did not apply uniquely to colleges and universities, they had the effect, for the first time, of bringing the federal government into academic decision-making at colleges and universities. Some of these laws apply to colleges and universities whether or not they are recipients of federal funding. Many have a unique impact on colleges and universities because of their educational missions and governance structures. Application of these laws to higher education in the 1970’s generated the first wave of concern on the part of colleges and universities that government regulation might threaten their missions, institutional autonomy and fundamental values.²⁸

24. NATIONAL POSTSECONDARY EDUCATION COOPERATIVE, INFORMATION REQUIRED TO BE DISCLOSED UNDER THE HIGHER EDUCATION ACT OF 1965: SUGGESTIONS FOR DISSEMINATION at A-1 (Nov. 2009), available at <http://nces.ed.gov/pubs2010/2010831rev.pdf>.

25. *Id.* at A-5 to A-29.

26. *Id.* at A-7, A-8, A-9, A-12, A-20 to A-22, A-23 to A-25.

27. *See infra* Part III.I.1.

28. *See* Ernest Gellhorn & Barry B. Boyer, *The Academy as a Regulated Industry*,

2. Court Decisions and the Rights Revolution

Court decisions in the 1960s and 1970s gave to students, particularly at public universities, rights against the colleges and universities they attended; they also gave to faculty rights at the schools where they teach.²⁹ These court decisions thus “regulated” academic decision-making at colleges and universities. They also caused an explosion of internal “preventive law” regulations as higher education institutions tried to avoid lawsuits by aggrieved students and faculty members. The result was a double whammy of regulation—court decisions imposed standards and created rights, and colleges and universities regulated themselves by adopting internal procedures that they were required to follow to avoid violating the new judicially created duties and obligations.

D. Laws Relating to Governance

Most colleges and universities are either public entities or private non-profit corporations organized under state laws. In either case, they are regulated at the state level. In addition, private non-profits are subject to regulation by the federal government incident to their 501(c)(3) status under the Internal Revenue Code.³⁰ In the last decade, there has been a sea-change in the increase of federal regulation of private colleges and universities based on their not-for-profit status.

Just as the federal government conditions the granting of federal monies on the acceptance by colleges and universities of the imposition of regulations, so also the government conditions 501(c)(3) status on acceptance of the imposition of a different set of requirements. Certain of these “rules” have been in existence for decades, though there has been a recent increase in federal oversight. This category includes unrelated business tax issues, rules of private inurement and rules relating to issuance of tax free bonds. With the recent changes in 2008 to the Form 990, the IRS has now established a kind of regulatory oversight over a new and wide ranging set of issues, many of which relate to governance.³¹ At present this Form 990 “regulation” is mostly informational—i.e., private non-profits must provide information to the federal government on a long

in GOVERNMENT REGULATION OF HIGHER EDUCATION 25, 48 (Water Hobbs ed., Ballinger Pub. Co. 1978). *See also* NATHAN GLAZER ET AL., BUREAUCRATS AND BRAINPOWER: GOVERNMENT REGULATION OF UNIVERSITIES 25 (Paul Seabury ed., Institute for Contemporary Studies 1979).

29. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION §§ 5.1, 8.1 (4th ed. 2006).

30. 26 U.S.C. § 501(c)(3) (2006).

31. Internal Revenue Service, Form 990 Redesign for Tax Year 2008 Background Paper (Dec. 20, 2007), *available at* http://www.irs.gov/pub/irs-tege/background_paper_form_990_redesign.pdf.

list of policies and practices. But the direction is clear—depending on the information submitted, the federal government may argue that an institution's governance policies are not consistent with 501(c)(3) status. Or, based on the information the IRS receives, it may choose to issue regulations or recommend legislation that would cover new areas that it perceives to be problematic or to further a specific policy. The topics on which colleges and universities must now report in the Form 990 (not all are new) include conflict of interest, overseas activities, gifts, non-discrimination, joint ventures, intermediate sanctions, relationships among trustees and officers, endowment, document retention, whistleblower policies, political contributions, lobbying and others.

III. COSTS AND BENEFITS OF GOVERNMENT REGULATION OF HIGHER EDUCATION

At a macro level, government regulation of higher education institutions creates a classic tension between understandable and laudable public purposes, on the one hand, and the resulting costs and loss of independent decision-making, on the other. Regulation of any business involves balancing such costs and benefits, but, for a variety of reasons, regulation of higher education institutions, particularly research universities and teaching colleges, poses unique issues. The effort in identifying, analyzing and weighing these costs and benefits necessarily varies by the activity being regulated. Why the government cares that its money is not wasted is different from why it cares that animals are not mistreated. Costs imposed by periodic audits of government contracts are different from costs imposed by second guessing academic judgments.

Cost-benefit analysis as a means to examine a prospective decision or a proposed law or regulation is not new. There is a body of literature discussing cost-benefit analysis of regulations as a methodology.³² Indeed, in 1993 President Clinton issued Executive Order No. 12866, amending a previous Executive Order issued by President Reagan, which requires a review and cost-benefit analysis of proposed regulations.³³ The Executive Branch has also created a high-level government office to undertake this analysis.³⁴

32. Tyler Cowen, *Using Cost-Benefit Analysis to Review Regulation* (draft book chapter of Jan. 15, 1998 on file with author and George Mason University) *available at* <http://www.gmu.edu/centers/publicchoice/faculty%20pages/Tyler/Cowen%20on%20cost%20benefit.pdf>.

33. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* <http://www.whitehouse.gov/OMB/inforeg/eo12866.pdf>.

34. For an example of cost-benefit analysis see a report on the Department of Education by the U.S. Government Accountability Office. Letter and Enclosure from Robert J. Cramer, Managing Associate General Counsel, U.S. Government Accountability Office, to the Hon. Tom Harkin, Chairman, U.S. Senate Committee on Health, Educ., Labor and Pensions and the Hon. George Miller, Chairman, House of

The analysis undertaken here does not attempt to apply cost-benefit analysis as a formal discipline to government regulations of colleges and universities. It does not attempt to count the same costs that the government may have counted in its analyses. Rather, the analysis that follows attempts to take a look at the costs and benefits of government regulation that does not necessarily track the methodology followed by the government. Although the article does not attempt to critique analyses that the government has undertaken, one of the premises of this article is that the government approach undercounts “costs” imposed on colleges and universities because it does not adequately consider the harm to educational mission, values and autonomy and does not properly consider whether the benefits to be achieved are truly in the public interest or could be obtained by less intrusive means, or both.

The purpose of Part II is to identify the recurring themes and the generic costs and benefits that arise uniquely from the regulation of higher education institutions. Part III will apply this analysis to specific subject matter areas.

A. Why Regulate? What are the Benefits to the Government and Public?

The government has a self-evident interest in assuring that “its” (taxpayer) money is well spent and not wasted as a result of fraud or mismanagement. The government also has an interest (some would say an obligation) to ensure that the specific public objectives—and, as noted, there are many—for the many different federal programs that fund activities at colleges and universities are in fact met: that good science is carried out, that students are helped, that health is promoted and that the national security is served. Finally, the government has an interest more broadly, quite apart from funding a particular activity, in ensuring that other, more generic public policies are served and promoted—e.g., non-discrimination, protection of the environment, safety, and privacy. Fundamentally, the reasons for government regulation fall into one of two buckets: accountability and furtherance of a specific public policy.

In analyzing the reasons for the increasing growth of regulation, certainly part of the explanation lies at the doorsteps of the colleges and universities themselves. One of the fundamental arguments colleges and universities have put forth against the need for regulation is that the institutions will self-regulate and take care of the problem, so there is no need for the government to step in. When this does not happen, and a school or group of schools fails to address an identified problem or is found

to have violated the law, it is natural for the public, and the government, to conclude that self-regulation does not work and regulatory oversight is necessary to achieve the perceived purpose (benefit) of the regulation.

Put another way, one of the most important strategies for colleges and universities in arguing against increased regulation is to adopt vigorous compliance and training programs and take other internal steps that decrease the need for “outside intervention.” In this way colleges and universities can take ownership of the “benefit” side of the equation to avoid the external costs of regulation. In an ideal world, college and university internal controls would in fact reduce incidents and crises that lead to a public outcry which in turn lead to regulation. And even when the inevitable problem occurs at a single school, if the college or university community can show that it has collectively taken aggressive actions to address the issue, the chances are better that government policymakers will conclude that new regulations are not justified. The point here is that the perceived benefits from regulation should include an analysis as to whether the same benefits can be achieved by self-regulation.

B. Why Not Regulate? What are the Costs to the Colleges and Universities?

To over-generalize, government regulation of higher education: (1) increases the administrative costs of operation, thus decreasing monies available to colleges and universities and their faculties to serve their missions of teaching and research; (2) interferes with institutional autonomy; (3) standardizes operations and thus decreases diversity of institutions; and (4) interferes with academic and scientific decision-making.

These “costs” are uniquely troubling to colleges and universities for several reasons. First, non-profit institutions are limited more than their for-profit counterparts in their ability to recoup regulatory costs by raising prices and, in part because of faculty tenure and traditions of academic freedom, in cutting costs. Second, many would argue that colleges, universities and individual faculty are in a better, more informed position than the government to make decisions about academic priorities and strategies, so the loss of autonomy and interference with academic decision-making hurts the quality of the decisions affected. Third, the loss of diversity in operations decreases the “marketplace” of approaches and styles and thus hurts the overall quality of the nation’s higher education institutions. Fourth, colleges and universities are marketplaces of ideas, and bureaucratic oversight through government regulation affects speech and implicates First Amendment issues.³⁵

35. Estelle A. Fishbein, *The Academic Industry—A Dangerous Premise*, in GOVERNMENT REGULATION OF HIGHER EDUCATION 57, 57–64 (Water Hobbs ed.,

C. Towards a Unifying Theory: An Approach to Balancing Costs and Benefits in Federal Regulation of Higher Education

No one method of analysis will answer the question, in any individual case, whether the benefits of regulation outweigh the costs. Is the regulation worth it? Is it wise? How does one balance measurable costs or benefits against subjective values and interests? The facts matter, and the specifics will always control the outcome. But it may be useful to suggest a framework for analysis so that policy makers and college and university officials have a common language or understanding as to how to think about and approach balancing the costs and benefits of existing and prospective regulation.³⁶

Any analysis must begin with an identification of the respective benefits sought to be achieved and the resulting costs that the regulations create. Next, we need to consider whether it is possible to quantify or measure these purposes and effects in ways that allow us to calculate whether the perceived benefits of regulation exceed the costs. Identification of the costs and benefits and quantifying or evaluating these interests merge together, so these first two steps frequently conflate into one. The final step in the process is to balance and weigh benefits, costs and interests. Because there will almost always be non-numerical interests—both costs and benefits—this final step usually requires a subjective evaluation of factors.

1. Identifying and Evaluating Costs and Benefits

Some interests can be measured in dollars. This is not to say that the numbers assigned are accurate, but that, setting aside the inevitable uncertainty of hypothetical and future-looking calculations, one can nevertheless agree that certain of the costs and benefits can be stated in terms of actual dollars. So, for example, an oversight system of reports, monitoring and auditing, such as exists for effort-reporting on federal grants, can be expected to prevent or “find” and correct a certain amount of misspending, stated as a percentage of the grant monies involved. This is a benefit of the effort-reporting regulations. The countervailing cost is what it costs the college or university and its faculty to do the reporting, monitoring and auditing: how much in out-of-pocket expenses, what

Ballinger Pub. Co. 1978). For a recent analysis of the scope of academic freedom, see Judith C. Areen, *Government as Educator*, 97 GEO. L.J. 945, 1000 (2009).

36. A 2006 Issue Paper released by Chairman Charles Miller of the Secretary of Education’s Commission on the Future of Higher Education provides “a few observations . . . regarding the current state of federal regulation of higher education,” from the perspective of a university official and shows the necessity of common understanding. Secretary of Education’s Commission on the Future of Higher Education, Issue Paper No. 15 (April 21, 2006), available at <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/parker.pdf>.

percentage of a faculty member's time, how many support staff, etc. These two "numbers" can be compared to decide if the regulation is "worth it."

Other interests, however, cannot be expressed in dollar terms. In our effort-reporting example, the governmental regulation that requires a faculty member to allocate all of her time to sponsored and unsponsored work has the effect of forcing a faculty member to make a substantive decision as to whether reading certain research is or is not related to a particular sponsored research project. This is an intrusive process that is academically artificial; the faculty member makes an academic decision to read certain articles as part of her academic research interests, but she is then forced to allocate effort between one project and another, sponsored or unsponsored, federal or private, and this not only costs the faculty member time—i.e., a percentage of salary that can be expressed as a number—but it also creates a risk that the government (or an internal university auditor) will disagree with what is in part an artificial, non-scientific decision. This "cost" is an infringement on individual faculty autonomy that is not easily expressed in dollar terms. This is not to say that this is an unreasonable requirement, but simply to note that it imposes a non-quantifiable cost.

Similarly, the government has an interest (i.e., the "benefit" to be achieved) in assuring the research that it funds is carried out in a way that serves the government's purpose in funding the research. The dollar value of this interest is presumably the dollar value of the grant, though one could add in secondary benefits such as bringing new products to market. When, however, the government imposes a regulatory requirement on the research to serve other public policy purposes—such as compliance with standards of human subject research, or animal protection, or protecting national security—these public policy purposes cannot be expressed in dollar terms. They are political choices made through the democratic processes of legislation and administrative regulation. They are certainly legitimate. But they are not quantifiable. By contrast, certain of the costs imposed on the colleges and universities from these regulations are to a significant extent quantifiable—how many employees staff the institutional review boards; what percentage of the scientists' time is spent complying with human subject requirements or national security interests or protection of animals?

The interests served by these "other" public policies—i.e., beyond the objectives of the specific federal funding—are completely valid interests that certainly can "justify" regulation. They are, however, non-quantifiable benefits that must be balanced against the quantifiable burdens imposed on the colleges and universities.

Regulatory action, whether legislative or administrative, is essentially the outcome of a political process. Elected representatives or executive branch officials who are, ultimately, responsible to an elected official, are charged with balancing the costs and benefits, including doing so where the

costs or the benefits are not necessarily quantifiable but are really just “judgment” calls reflecting the political balancing of interests. In the private sector, where businesses are regulated, one expects the affected businesses to hire lobbyists and to communicate with their representatives and the executive branch about those costs and benefits. Further, even after the legislation is passed or the regulation is adopted the private sector firm can challenge the regulation in court, and thus obtain a further review of the action.

Colleges and universities, however, are, in significant part, dependent on receiving the federal money which carries with it the regulatory burdens as a condition of receiving it. Although higher education certainly does “lobby” the government both directly and through associations, nevertheless, doing so is closer to “biting the hand that feeds you” than it is in the for-profit sector. Certainly this is true in the case of litigation. It may be a standard and accepted part of the regulatory process for utilities and chemical companies to sue to block environmental regulations. For colleges and universities to do so, however, carries with it a higher risk, real or perceived, that the government will react by withholding money. In other words, where the regulation is a condition of funding, the system is stickier and does not as easily allow for colleges and universities to express their concerns.

If these suppositions are true, the regulatory process as applied to higher education is an unfair fight. Or, more accurately, the system is imbalanced to credit the public policy purpose of the regulation (or the interest group served by the regulation) more than the costs (financial and otherwise) imposed on the recipients of funds.

An example may illustrate this point: Let us assume Congress is considering legislation that would require all colleges and universities that receive federal funds, whether research funds or financial aid assistance for students, to file quarterly reports with the federal government with the following information: (1) A description of all private consulting (under the school’s “day a week” consulting policy) performed by the institutions’ faculty, including time spent and dollars received; (2) for each faculty member who took a sabbatical, a description of what he or she did, including time spent and outcomes, and an evaluation of why the research justified the sabbatical; (3) a report on what all students who received degrees in the last five years are currently doing, including an assessment of how the school’s education achieved designated outcomes and helped the students in the workplace; and (4) a report on all efforts made by the school to further national security, including monitoring international students, tracking what the school’s professors and students do when they travel and study/research abroad, and all activities to cooperate with intelligence agencies who ask for help from the school and its faculty.

Most higher education institutions would react with varying degrees of

horror to these proposals, and they would argue against them in various ways. But would they testify strongly in opposition? Would they turn down the federal money to avoid being subject to any of the proposals that might pass in modified and limited form? Would they sue the federal government arguing that the legislation/regulations were unconstitutional? Would they be as aggressive as the insurance industry has been in the health care reform debate? Would higher education leaders make individual political donations that reflect opposition to these initiatives? Would the schools worry about their 501(c)(3) status if they were too far out in front in opposing these proposals?

At certain points in the history of the regulation of colleges and universities by the federal government, higher education leaders and their institutions have spoken out against certain laws, have expressed concerns about the effects of regulation, have lobbied against specific measures, and have even gone to court to fight particularly intrusive laws and regulations.³⁷ But for the most part, these examples have been at the extremes. In the day-to-day reality of regulatory flow, the current has been almost entirely in one direction. The public policy that supports regulation is usually sound; the out-of-pocket costs incurred in compliance are relatively minor compared to the funds received; the harm to non-monetary values of academic freedom and institutional autonomy are difficult to explain and impossible to measure; it is just prudent to go along. The result is regulatory creep, and before you know it, higher education institutions are no more than public utilities serving important public purposes that are dictated by others. Institutions with a proud tradition of independence and autonomy have become, in part, government laboratories operating under government supervision.

2. Balancing Costs and Benefits

Considering the need to balance objective costs and benefits against subjective ones, is a unifying theory for analyzing and weighing the costs and benefits of specific regulations possible? Put another way, faced with the uncertain, ambiguous, and ultimately subjective costs and benefits involved, and considering also the inherent and structural limitations on how colleges and universities can effectively participate in the process of developing and adopting (or opposing) new regulations, is it possible to construct an overall approach to analyzing new regulatory initiatives and deciding which are “good” and which should be resisted?

To a large extent, the answer is probably no. The individual situations differ too much, the facts matter too much, the interests vary too

37. See *Rumsfeld v. Forum for Academic and Inst. Rights*, 547 U.S. 47 (2006) (upholding the Solomon Amendment, 10 U.S.C. § 983).

much, and the costs and benefits are too difficult to categorize to adopt a unifying theory across multiple areas. However, in Part III this article looks at a set of subject matter areas in which colleges and universities are already subject to substantial regulation. Based on this review, it is possible at least to identify and describe some of the kinds of costs and benefits that must be considered and evaluated. This analysis is neither comprehensive nor complete, but it does start to identify factors and themes that may be useful in evaluating proposed legislation or regulations.

Even accepting all of the limitations of trying to force a single system of analysis on disparate areas, it may be possible to come up with a list of considerations that might, depending on the situation, be useful, at least as a starting point, in thinking about any specific proposed regulation and weighing the costs and benefits involved. Drawing from the area by area analysis that follows in Part IV, such a list might include the following:

(1) If the regulation is imposed as a condition of funding, is it intended to further the specific purpose of the funding (including the appropriate expenditure of the money), or is it intended in whole or in part to further a different public policy and the funding is just the vehicle for the regulation? As a general matter, the public benefits are more likely to be stronger in the former case, than in the latter, because the regulation and the funding serve the same purpose.

(2) Do the costs of a proposed regulation impose unique costs on colleges and universities that are different from, and greater than, costs imposed by the same regulation on for-profit entities? Regulations that arguably infringe upon institutional autonomy and touch on academic freedom (admittedly very subjective factors) are in this category and should be evaluated with greater scrutiny.

(3) Are the transaction costs of implementing regulations—committees, processes, lawyers, staff, reports, plans, compliance requirements, disclosures, etc.—disproportionately high as compared to the costs that are directly attributable to serving a specific public purpose? If so, the costs may more likely outweigh the benefits.

(4) Are the benefits served by proposed regulation promoted by a specific interest group or politician as opposed to a general public purpose? For example, regulations addressing discrimination in employment address a broad public purpose and may more likely outweigh costs of compliance; regulations that are promoted by a specific interest group (such as the peer-to-peer file sharing requirements in the HEOA),³⁸ while arguably

38. See Higher Education Opportunity Act, Pub. L. No. 110-315, § 493, 122 Stat.

beneficial, may impose costs that exceed the more limited public purpose.

(5) Does the proposed regulation create subjective costs that are difficult to measure but which affect the core mission of higher education? If out-of-pocket costs are minor, but important subjective interests of higher education are restricted (academic freedom, institutional autonomy, the faculty-student relationship, creativity in research), then policy makers should be cautious about putting too much weight on a numerical cost-benefit analysis.

(6) Are regulations in an area being amended and added to on a regular basis? The cumulative costs of compliance with changing requirements are significant and may exceed the benefit as initially defined.

(7) Are the regulations complex? The costs of compliance with complex regulations may exceed benefits, because they include transactions costs—such as training, clarifying, interpreting—that do not directly serve the public purpose.

(8) Do the regulations have unintended consequences? Costs of regulations include not just out-of-pocket costs of compliance, but secondary effects that need to be considered. For example, the costs of new reporting burdens on faculty include less time by the faculty member to perform research that serves the public interest.

(9) Do the regulations invite or allow government investigations and audits or private party litigation? Certainly audits and litigation can help achieve public purposes, but the greater the risk of litigation, the more time and money are spent by higher education institutions trying to build a record that can be used for defensive purposes, or just to settle a case without merit. Frequently these defensive efforts drain time and money from the very benefits sought to be achieved by the federal funding.

(10) Do the regulations directly serve a public purpose, or are they intended to collect information for study? The more a particular regulation fits in the latter category, the more likely the costs outweigh the benefits, since the benefits of data gathering are less direct and speculative and do not themselves further a public purpose.

IV. SUBJECT MATTER AREAS OF REGULATION

This Part identifies and briefly describes nine “subject” areas of college and university functions that are regulated by the federal government. This list is of course far from complete and discusses only certain areas of regulation from a much longer list. For each, the paper provides a cursory summary of the law, what it requires, and a brief analysis of certain of the costs and benefits of the regulations.

A. Research Misconduct

1. Laws and Regulations

The history of federal oversight of research misconduct at colleges and universities began in 1985. Following a series of high profile cases, Congress passed the Health Research Extension Act of 1985 which established the basic regulatory framework that is in place today.³⁹ The law requires higher educational institutions that receive federal funding to have an internal process for investigating scientific misconduct and it requires annual reporting to the federal government. The Public Health Service (“PHS”) adopted final regulations in 1989 that set out requirements governing how the colleges and universities’ procedures and policies should work.⁴⁰ The PHS also established the office that in 1993 became the Office of Research Integrity (“ORI”).⁴¹ These regulations were revised in 2005.⁴²

2. What is Required?

Colleges and universities that receive PHS funding must have research misconduct policies and procedures that meet federal requirements. Research misconduct is described as fabrication, falsification or plagiarism in research. If an allegation is made, the institution must first “assess” the allegation to decide whether the allegation fits within the definition. If it does, the institution conducts an “inquiry” to decide if sufficient evidence exists to undertake a full investigation. If the answer is yes, the institution must notify ORI and proceed with a formal “investigation.” Following the investigation the institution reports its findings to ORI.⁴³

39. Health Research Extension Act of 1985, 42 U.S.C. § 289a (2006).

40. Public Health, 42 C.F.R. § 50, subpt. A (subpart A was removed in 2005).

41. See Michelle M. Mello & Troyen A. Brennan, *Due process in Investigations of Research Misconduct*, 349 NEW ENG. J. MED. 1280, 1280–86 (2003).

42. Public Health Service Policies on Research Misconduct, 42 C.F.R. § 93.100 (2005).

43. 42 C.F.R. §§ 93.300–93.319 (2009).

3. Costs and Benefits

Research misconduct regulations are in the first category of government regulations, described above in Part II.A, because they go to the core of the government's purpose in funding. At the highest level, the contract between the government and the college or university is a payment for services, and if the researcher makes up data or copies it from others, the government's purpose is not met. The benefit to the government of the regulations, therefore, is directly tied to the purpose of the funding and can be measured by the amount of the funding that would be wasted by fraudulent research that can be prevented and detected by the regulations.

The cost to the university or college of regulations directed at research misconduct consists of staff and faculty time devoted to following the procedures dictated by the government. In essence, government regulation in this area consists primarily in outsourcing to the recipient of federal funds a process for deciding if the funds are spent on fraudulent research. The required procedures are fairly minimal, with a high degree of flexibility given to the institutions. Therefore, while research misconduct proceedings can be extremely time consuming and expensive in staff and faculty time, the "costs" are the direct result of a process necessary to respond to allegations of fraud. There is very little if any wasted or extra paperwork. Unless the government was to accept the full risk and cost of fraud in a federal program, the regulations in place seem to be a minimally invasive way to achieve a direct and reasonable government purpose.

Evaluating costs and benefits of the regulations in this area is relatively straightforward. The regulations directly serve the federal purpose in ensuring that its money is not wasted on fraudulent research, and the regulatory structure does not impose extra or unrelated costs or attempt to serve unrelated purposes. There has not been regulatory creep in this area, which remains essentially the same as when first implemented in the mid-1980s.

B. Conflict of Interest

1. Laws and Regulations

Concerns about conflicts of interest in government funded research at colleges and universities have existed for decades, but government regulation in this area is much more recent. College and university associations first issued a statement about such conflicts in 1964. The National Academy of Sciences sent a letter to study committee members asking for disclosure of financial interests in 1971 and college and university presidents and industry leaders met to discuss conflicts of interest and industry relationships at the Pajaro Dunes Conference in 1982. By the 1960s and continuing into the 1980s, many universities had adopted conflict of interest policies and the United States Public Health Services

(“PHS”) issued a policy statement suggesting that grant recipients should have a conflict of interest policy in 1987. But it was not until 1995 that PHS and the National Science Foundation first issued regulations requiring grantee institutions to identify interests of investigators, determine if a conflict of interest exists, manage or eliminate the conflict, and report to the granting agency. In 1998 the Food and Drug Administration (“FDA”) adopted regulations covering clinical trials that are used in seeking FDA approval of new drugs. The National Institutes of Health (“NIH”) is currently reviewing its conflict of interest regulations and is expected to issue new regulations soon.⁴⁴

Beyond regulation of conflicts of interest in college and university research, the government has regulated relationships between doctors and pharmaceutical companies, medical device companies and hospitals since the early 1970s. These regulations were expanded with the passage of the Stark Laws beginning in 1989.⁴⁵

As of early 2010, the formal regulation of conflicts of interest at colleges and universities remains limited to federally funded research and laws applicable more generally to hospitals and faculty physicians. However, a whole slew of possible new regulations of conflicts of interest are under review and consideration (whether by the government, accrediting bodies, or the institutions themselves), including expanding the regulation of conflicts of interest in research, regulating so-called institutional conflicts, restrictions on gifts and entertainment from the medical industry, prohibitions on ghostwriting, regulations on continuing medical education, and limitations on consulting.⁴⁶

In addition, following state and federal investigations into possible conflicts of interest in connection with federal financial aid, new federal regulatory requirements related to financial aid have been adopted.⁴⁷

2. What is required?

The current PHS regulations essentially outsource the management of conflict of interest issues in federally sponsored research to the institutions themselves. The institutions typically require applicants for federal research to disclose their financial interests to an internal office or

44. For a general discussion of conflicts of interest, including the historical background, see Institute of Medicine (IOM), *Conflict of Interest in Medical Research, Education, and Practice* 1, 23–43 (2009), available at http://books.nap.edu/openbook.php?record_id=12598 [hereinafter IOM Report].

45. *Id.* at 36–38.

46. For a discussion of some of the new developments see *id.* at 62–96.

47. For a guide that shows the regulatory impact of the new requirements in action, see INFORMATION FOR FINANCIAL AID PROFESSIONALS (IFAP), 2009-2010 FEDERAL STUDENT AID HANDBOOK, available at <http://ifap.ed.gov/fsahandbook/attachments/0910FSAHandbookIndex.pdf>.

committee; the institution reviews the interests and determines if there is in fact a conflict to be prohibited or managed; prohibits the conflicting arrangements or puts in place a management plan, as appropriate; and reports to the NIH that there is a conflict of interest and whether that conflict has been reduced, managed, or eliminated. The grantee institution does not report the details of the financial interest and the NIH has not historically second guessed or re-reviewed these management plans.

3. Costs and Benefits

Conflict of interest regulations fall into the middle category of the kinds of regulation described above in Part II.B. Unlike certain financial regulations and auditing and reporting requirements, they are not directly focused on helping the government ensure that the purposes of the funding are met, but they are intended to ensure that government money is spent in ways that do not undermine the federal purpose. Conflict of interest regulations do not focus on the end result—is the research biased, are the results faulty—but, rather, focus on process and appearances—are there financial interests involved that might affect the outcome and which therefore could create an appearance of the lack of objectivity. The benefits to the government are therefore hard to quantify. Clearly the purpose of conflict of interest regulations is more than legitimate, and no one would argue otherwise. On the other hand, the regulations only deal with risks, not a provable loss of objectivity. They do not directly save the government money or ensure that government purposes are met.

The costs, however, are real and measureable. Colleges and universities create standing committees to review possible conflicts of interest; they hire staff to handle the paperwork; they require researchers to fill out forms; they have enforcement mechanisms to ensure that the rules are followed; they respond to government inquiries; they maintain data bases; they undertake self-audits; they change their policies and procedures to meet new requirements; and, they require training, which costs time and money, etc. Although the details of these processes and procedures are not at present established by federal regulation, in order to comply with the reporting obligations, an institution and its faculty must in fact spend considerable time collecting, considering and managing the information about financial interests that is collected.

The difficulty is how to balance the benefits to the government of reducing the risk of the loss of objectivity—not the actual loss, since that is not prohibited or measured—against the actual out-of-pocket costs of time and money incurred by the higher educational institutions. Ultimately, this is a political judgment for public policy decision-makers to balance. But, the decision-makers do not bear the costs, institutions and researchers do, so the inherent imbalance between a laudatory purpose supported by political interests and a cost borne by others favors regulation every time.

Put another way, the pressure on public policy decision makers is to impose ever more stringent regulations; in that way, the “public” is protected, and no one can second-guess the decision-makers for lack of oversight. Colleges and universities could theoretically argue against this and demonstrate that the regulations impose excessive costs, but all too often this appears to be self-interested whining, so colleges and universities accept the regulations and spend even more money on compliance.

C. Human Subjects

1. Laws and Regulations

The ethical and scientific issues raised by human subject research have existed for centuries. Legal control and regulation of these issues in modern times has been debated since the Nuremberg Code of 1946.⁴⁸

Federal regulation of human subject research appears to date from 1962 with the passage of the Kefauver-Harris Drug Efficacy Amendment to the Federal Food, Drug and Cosmetic Act.⁴⁹ The amendment required informed consent from participants in clinical trials used to obtain approval of new drugs. In 1966, the NIH issued policies relating to human subjects research. On May 30, 1974, the Department of Health, Education and Welfare adopted regulations that for the first time put these policies into law.⁵⁰ Among other things, the regulations led to the establishment of Institutional Review Boards (“IRBs”). In July 1974, Congress passed the National Research Act, which established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The Commission issued the Belmont Report in 1978, which set out principles and guidelines that led to an informed regulation in 1981 on Department of Health and Human Services (“DHHS”).⁵¹ The regulations were revised in 1991 and became known as the Common Rule.⁵² There are also various more specific regulations applicable to special populations and circumstances.⁵³

48. Nuremberg Code, Office of Human Subjects Research, National Institutes of Health, <http://ohsr.od.nih.gov/guidelines/nuremberg.html> (last visited Apr. 21, 2010). *See also* WORLD MEDICAL ASSOCIATION DECLARATION OF HELSINKI, ETHICAL PRINCIPLES FOR MEDICAL RESEARCH INVOLVING HUMAN SUBJECTS (2008), *available at* <http://www.wma.net/en/30publications/10policies/b3/17c.pdf>.

49. 21 U.S.C. §§ 301 et seq. (2006). *See also* U.S. Department of Human & Health Services, Food and Drug Administration, This Week In FDA History – June 20, 1963, <http://www.fda.gov/AboutFDA/WhatWeDo/History/ThisWeek/ucml17831.htm> (last visited Apr. 21, 2010).

50. Protection of Human Subjects, 45 C.F.R. § 46 (2005), *available at* <http://www.hhs.gov/ohrp/documents/19740530.pdf>.

51. 45 C.F.R. §§ 45–46 (2005); 21 C.F.R. § 50 (2010).

52. *See* 45 C.F.R. § 46 (2005).

53. *See generally* ROBERT J. LEVINE, ETHICS AND REGULATION OF CLINICAL

2. What is Required?

The application of federal regulations to human subject research is extremely fact-intensive and complex. There are special considerations for different populations of subjects, complex issues of informed consent, evaluation of degrees of risk, requirements for disclosure of possible conflicts of interest, and many other issues. At the most general level, however, the regulations require institutions to establish IRBs to review and approve all proposed human subject research involving federal money.⁵⁴ The institutions must report any infractions to the Office of Human Subjects Research in the DHHS.⁵⁵ The government has the authority to shut down a research project, or indeed all of an institution's human subject research, if it finds violations.⁵⁶

3. Costs and Benefits

The benefits of government regulation are the protection of individuals, including their lives, health and safety. Although the benefits are as fundamental as any could be, they are not the purpose of the federal funding itself. In that sense they are secondary to regulations intended to support the very purpose of the funding, though no one would doubt their importance.

The costs of federal regulation are the time and expense that institutions incur to review and make appropriate decisions with respect to federally funded research involving human subjects. Because of the complexity of the requirements, and because of the stakes involved—risks not only to life and safety but also to continued federal funding—the costs are considerable. Many institutions spend millions of dollars annually to support the IRB processes and to ensure compliance with the regulations. There are also subjective costs caused by constraining institutional autonomy and academic and scientific judgments.

The balancing of costs and benefits in this area poses the classic challenge of how to judge the worth of fundamental human values such as life and safety as measured against the costs required, including both out-of-pocket costs and interference with academic and scientific judgments. It is unseemly to even suggest that financial costs might outweigh the

RESEARCH (2D ED., YALE UNIVERSITY PRESS 1988) (1986). *See also* ROBIN LEVIN PENSLAR, OFFICE FOR HUMAN RESEARCH PROTECTIONS, INSTITUTIONAL REVIEW BOARD GUIDEBOOK (1993), *available at* http://www.hhs.gov/ohrp/irb/irb_guidebook.htm.

54. Institutional Review Boards, 21 C.F.R. § 56.103 (2009); Protection of Human Subjects, 45 C.F.R. § 46.103 (2009).

55. Institutional Review Boards, 21 C.F.R. § 56.108 (2009); Protection of Human Subjects, 45 C.F.R. § 46.103(5) (2009).

56. Institutional Review Boards, 21 C.F.R. § 56.113 (2009); Protection of Human Subjects, 45 C.F.R. § 46.113 (2009).

protection of fundamental human values, and no college or university representative would do so. However, it is interesting to note the contrast between federal regulation of day-to-day clinical patient care—which is essentially non-existent and left almost entirely up to state malpractice laws—and its heavily regulated counterpart, human subject research. While no one would dispute the necessity for a high degree of effort to ensure compliance with fundamental ethical principles of human subject research, it is nevertheless true that government regulation drives up the cost of research, and this may have the effect of reducing resources available to improve the health, safety and welfare of all individuals. Government regulations may also discourage meritorious research projects—for example, in the social sciences—that have minimal effect on human safety.

D. Animals

1. Laws and Regulations

Animals have been used in medical research for centuries, but such use was not regulated in the United States until the passage of the U.S. Laboratory Animal Welfare Act in 1966.⁵⁷ The Act has been amended several times since then.⁵⁸ The US Department of Agriculture has issued regulations pursuant to the Act.⁵⁹ The Act applies to the humane treatment of animals in general, including in research. In addition, in 1985 Congress passed the Health Research Extension Act which required the DHHS to issue regulations governing the use of animals in research.⁶⁰ Under the 1985 Act, the Public Health Service issued its Policy on Humane Care and Use of Laboratory Animals.⁶¹

2. What is Required?

Institutions that receive PHS monies for research that involves the use of animals must provide an assurance to the Office for Protection from Research Risks that the institution complies with the Animal Welfare Act and the PHS Policy, and that it has appointed an appropriate oversight committee (an Institutional Animal Care and Use Committee, known as an

57. See 7 U.S.C. §§ 2131–56 (2006).

58. See *id.* § 2131.

59. Animal Welfare, 9 C.F.R. §§ 1–4 (2009).

60. Health Research Extension Act of 1985, Pub. L. No. 99-158, § 495, 99 Stat. 820, 875–77 (1985).

61. See OFFICE OF LABORATORY ANIMAL WELFARE, PUBLIC HEALTH SERVICE POLICY ON HUMANE CARE AND USE OF LABORATORY ANIMALS (2002), available at <http://grants.nih.gov/grants/olaw/references/PHSPolicyLabAnimals.pdf> [hereinafter PUBLIC HEALTH SERVICE POLICY].

“IACUC”). The IACUC must review and approve prior to submission all applications from the institution for new and continuing federal grants involving animals.

3. Costs and Benefits

The benefits that flow from regulating the use of animals in research by colleges and universities are the proper care and treatment of the animals. The regulations are intended to respect the lives of animals, ensure that the research provides a societal benefit, require consideration of alternatives, protect against needless pain and protect against malicious or other improper conduct. The regulations cover care and feeding, housing, transporting, monitoring, use and health checks.⁶²

The costs of animal welfare regulation include staffing costs, which are considerable since they require consultation and review by a veterinarian, and also significant facility costs to ensure that the cages and other physical facilities meet federal standards. In addition, the IACUC itself is regulated as the regulations require that the IACUC meet certain standards and work in certain ways.⁶³ Many major research universities have annual budgets for animal welfare and related compliance that amount to hundreds of thousands of dollars or more.

The purpose of the federal funding, to which the animal welfare requirements attach as a condition, is not to promote animal welfare. In that sense, these laws and regulations are intended to serve a secondary purpose beyond the purpose of the funding itself. As with human subject research requirements, this area of regulation requires balancing the non-monetary values of protecting animal welfare against the hard dollar costs of the regulation and the subjective effects of restricting academic and scientific judgments. A full analysis of the need or justification for the regulations would also require an analysis of what the conditions would be like in the absence of the federal requirements—in other words, how much of the regulatory burden is simply documenting and proving to the federal government that appropriate safeguards are in place? Finally, this area of regulation raises the issue of the tension between the academic or professional judgment by a faculty member or laboratory, on the one hand, and the sometimes conflicting view of the regulators, on the other. The regulations in this area thus infringe to some extent on the academic and institutional autonomy of the college or university and its faculty. Assessing whether this loss of autonomy and academic decision-making is justified by the benefits of regulation should be part of the decision-making process used by the regulators when they consider new regulations or

62. See 7 U.S.C. §§ 2131–56 (2006); Health Research Extension Act of 1985, Pub. L. No. 99-158, 99 Stat. 820 (1985).

63. PUBLIC HEALTH SERVICE POLICY, *supra* note 61, at 12–15.

changes to existing regulations.

E.Export Controls

1.Laws and Regulations

The federal government has regulated exports to protect national security since the earliest days of the nation. In modern times, the three most important laws with potential application to colleges and universities are the Export Administration Regulations (“EAR”) of the Department of Commerce,⁶⁴ the regulations of the Office of Foreign Assets Control (“OFAC”) of the Department of the Treasury⁶⁵ and the International Traffic in Arms Regulations (“ITAR”) of the Department of State.⁶⁶

The application of export control laws to colleges and universities did not become a significant concern until the mid-1980s, when the government began to be concerned that the results and products of research performed at colleges and universities might become available to enemies of the United States. Faculty and administrators at research universities, in turn, became concerned that these laws could infringe academic freedom and impair important basic research. The higher education community raised their concerns with the government and the discussions led to the issuance of National Security Decision Directive 189, the so-called “fundamental research exemption.”⁶⁷ The exemption applies to research activities in the United States. It does not apply to the actual export of banned or covered products or data overseas.

2.What is Required?

The EAR regulations require a license from the Department of Commerce to export products that are determined by the Bureau of Industry and Security to have possible military use or that may be used in terrorist activities.⁶⁸ There are more than 2,000 products on the list,

64. Export Administration Regulations, 15 C.F.R. §§ 730–74 (2009).

65. Foreign Assets Control Regulations, 31 C.F.R. § 500 (2009).

66. International Traffic in Arms Regulation, 22 C.F.R. §§ 120–30 (2009). *See* CAROL T. CARR, *NEGOTIATING THE MINE FIELD: THE CONDUCT OF ACADEMIC RESEARCH IN COMPLIANCE WITH EXPORT CONTROLS* (2006); JAMIE LEWIS KEITH, *MAY 2006 UPDATE ON DEVELOPMENTS IN “DEEMED” EXPORT CONTROLS IN THE UNIVERSITY CONTEXT* (2004-2006), *available at* http://web.mit.edu/osp/www/Export_Controls/index_files/JLK%20ExportUpdateMay06.pdf.

67. NSDD-189: National Policy on the Transfer of Scientific, Technical and Engineering Information (Sept. 21, 1985), <http://www.fas.org/irp/offdocs/nsdd/nsdd-189.htm> (last visited Apr. 8, 2010).

68. *See* Export Administration Regulations, 15 C.F.R. §§ 730–74 (2009).

including software, commodities, drugs, bacteria and technology.⁶⁹ The ITAR regulations require a license from the Department of State to export articles and services related to military use and defense.⁷⁰ The OFAC regulations require a license related to financial, travel and other transactions with certain embargoed countries, such as travelling or sending money to Cuba.⁷¹ For all three laws, it is illegal to engage in a covered transaction without a license from the administering authority.⁷² Overlaying the laws is the concept of “deemed exports,” which holds that making covered products or data available to a foreign national, even if exclusively done within the United States, is “deemed” to be an export (subject, however, in many, but not all, situations, to the fundamental research exemption).⁷³

In order to comply with these laws, which are extremely complex and technical and change on a regular basis, most research universities and other higher education institutions with overseas activities have established procedures to try to identify activity that may be covered, processes to review and evaluate such activities, and individuals in the institutions with the expertise to seek the necessary export licenses for any activity that is in fact covered. Because the laws apply to the activities of literally hundreds and sometimes thousands of individuals at a single institution, export control programs also include a heavy dose of training and monitoring.

3. Costs and Benefits

The purposes (i.e., “benefits”) of export control laws can be considered within categories 1 and 3 discussed in Parts II.A. and II.C. When applied to research conducted under federal grants, these laws are directly related to the purposes of the funding—the funding is to promote a particular national interest, and providing covered products and data to certain foreign countries and nationals may not be consistent with that purpose. However, the export control laws also apply to research and activities not funded with federal dollars. In these instances, export regulations are laws of general application that apply to colleges and universities in the same manner and for the same reason that they apply to industry.

The costs imposed on colleges and universities by these laws include the out-of-pocket expenses of operating a compliance program. These costs can be considerable for several reasons. First, the laws are complicated and difficult to understand and apply. Second, the application of the laws to

69. *See id.*

70. *See* International Traffic in Arms Regulation, 22 C.F.R. §§ 120–30 (2009).

71. *See* Foreign Assets Control Regulations, 31 C.F.R. § 500 (2009).

72. Export Administration Regulations, 15 C.F.R. §§ 730.7 (2009); Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (2009); International Traffic in Arms Regulation, 22 C.F.R. §§ 120.2 (2009).

73. Export Administration Regulations, 15 C.F.R. §§ 734.2(b)(2)(ii) (2009).

hundreds and thousands of faculty, staff and students is essentially “decentralized” throughout a college or university, and so consistency and accuracy in application is difficult to achieve. Third, the risks of non-compliance are so high—there have been several recent high profile cases where researchers have been found guilty of criminal conduct and served jail-time⁷⁴—that the costs to prevent violations are necessarily high to be commensurate with the risk.

Beyond the out-of-pocket costs of compliance, which parallel the costs faced by private industry, the costs of the regulations in this area also include limitations on educational programs and on the values of academic freedom and autonomy. OFAC regulations may prevent study tours to Cuba and exchange programs with Syria. EAR regulations may chill fundamental research and limit study protocols. To identify these costs is not to conclude that they necessarily outweigh the benefits to the government, but simply to note that public policy decision-makers, when they adopt and revise regulations intended to protect and preserve the national security—certainly a public policy of the highest importance—must also try to evaluate and weigh the real non-dollar harm caused to the academic enterprise. National security is also served by allowing researchers the freedom to explore new frontiers that sometimes lead to new means of fighting terrorism—perhaps large scale computing with massive amounts of data is a good example as well as understanding and establishing relations with the cultures and peoples of certain embargoed countries may be another. Regulations that impede this work must therefore be carefully analyzed to be sure they do not do more harm than good to the national interest.

F. Effort Reporting

1. Laws and Regulations

Effort-reporting is just one piece of a larger body of regulations relating to administration and expenditure of federal grants. Effort-reporting is the process by which institutions and the federal government determine that the salaries charged to a particular grant are reasonable and proportional in relation to the work the employee actually performed. Beyond effort-reporting, the federal government also regulates how equipment is purchased, sub-contracts are managed, overhead is calculated and many other facets of the general topic of grants administration.

Effort-reporting regulations are principally set out in the OMB’s

74. See, e.g., Sharon Weinberger, *From Ivory Tower to Iron Bars: Scientists Risked Jail Time for Violating Export Laws*, WIRED (Sept. 17, 2009), available at <http://www.wired.com/dangerroom/2009/09/from-ivory-tower-to-iron-bars-academics-risk-jail-time-for-violating-export-laws>.

Circular A-21, though there are other federal and agency-specific policy statements and circulars (e.g., A-110) that are relevant as well.⁷⁵ The Bureau of the Budget first issued A-21 in 1958.⁷⁶ In 1967, A-21 was amended to require detailed documentation of faculty efforts.⁷⁷ There have been many other changes over the years, including both changes in specific regulatory requirements and the perception of substantial increases in government audits, oversight, investigations and enforcement actions.⁷⁸

2. What is Required?

In 2007, the Council on Governmental Relations (“COGR”) issued a Policies and Practices summary that provides a very helpful overview of the regulatory requirements.⁷⁹ The regulations allow for some flexibility and different institutions have adopted different practices and procedures to comply with A-21. Under one common approach, individual researchers are required every six months to report (“after the fact”) to the institution the percentage of their overall effort (and therefore of their base salary) that they expended on each federal grant on which they were working during the reporting period.⁸⁰ The institution then charges the correct percentage of the individual’s salary to each grant. There are many variables, but among the difficulties is the need to determine which activities properly are or are not fairly and reasonably attributable to a grant and, if the researcher is working on several different sponsored projects, to determine the proper allocation between and among funding sources—public and private. In addition, the system creates an inherent internal conflict, because it relies on overall effort, not a standard work week. Therefore, if a faculty member works a fixed number of hours on a grant, the harder he or she works on other projects, the lower the percentage attributable and therefore chargeable to the grant.

3. Costs and Benefits

Effort-reporting is perhaps the clearest example of a federal regulation that falls squarely within category 1 identified in Part II.A—i.e., the purpose (namely, the benefit) of the regulation is to ensure that the money

75. Office of Management and Budget, Circular A-21, http://www.whitehouse.gov/omb/circulars_a021_2004/ (last visited Apr. 8, 2010); Office of Management and Budget, Circular A-110, http://www.whitehouse.gov/omb/circulars_a110/ (last visited Apr. 8, 2010).

76. Council on Governmental Relations, Policies and Practices: Compensation, Effort Commitments, and Certification 10 (Mar. 1, 2007), available at http://www.rsp.wisc.edu/effort/COGR_EffortPaper.pdf [hereinafter COGR Report].

77. *Id.*

78. *See id.*

79. *Id.*

80. *Id.* at 49.

the government provides is used directly and only for the purpose for which it was provided.

The direct out-of-pocket costs of compliance are two-fold. First, each researcher must fill out a form on a periodic basis to account for his or her time on each federal grant, and, second, the institution at different levels (departmental, central) must have procedures in place to review, monitor and maintain the records, and to make any changes to grant charges that may be necessary. In addition to the time researchers must spend in training, keeping records and filling out forms, the effort-reporting process is distracting from a researcher's core mission—to perform the research with integrity and efficiency and according to professional standards.

Beyond the direct costs of compliance, this is an area that has generated qui tam False Claims Act cases,⁸¹ with several reported settlements under which institutions have paid many millions of dollars to the federal government and qui tam plaintiffs. To the extent settlements exceed the amounts that were wrongly charged to the federal government, and include penalties, attorney's fees, or just payments to avoid the costs and risks of litigation, they represent additional out-of-pocket costs attributable to the regulations and the enforcement mechanisms. These litigation costs are an important component of the "transaction costs" of regulation in this area, both because settlements and attorneys fees may frequently exceed the value of any true harm, and because institutions necessarily engage in costly preventive measures that may cost the institutions more dollars than they save. If institutions are spending needless amounts to prevent or resolve claims (beyond any harm to the government), the public suffers because the institutions have fewer resources to devote to important research.

In balancing and weighing the costs and benefits in this area, decision-makers need to make judgments about the degree of oversight necessary to ensure that the public's interest is protected. As stated by the 2007 COGR Report, "The underlying theme of this paper is to remind decision-makers, leaders, and officials from the research community of the need to restore the balance between accounting oversight requirements and the necessary regulatory flexibility to produce good science."⁸²

G. Form 990

1. Laws and Regulations

The IRS has long had the authority to regulate 501(c)(3) corporations to determine whether they engage in activity inconsistent with their not-for-

81. See 31 U.S.C. §§ 3729–33 (2006).

82. COGR Report, *supra* note 76, at 5.

profit status.⁸³ In the first decade of the twenty-first century, however, the federal and state governments have increasingly exercised supervisory authority over the governance of colleges and universities.

First, reacting to corporate scandals in the for-profit world, in 2002 Congress passed the Sarbanes-Oxley Act with numerous requirements related to how for-profit corporations manage their affairs.⁸⁴ Certain of the Act's requirements apply to non-profit colleges and universities, including provisions related to whistleblowers and document retention or destruction.⁸⁵ Some states have also passed laws regulating the governance of non-profits, and state attorneys general also exercise authority over non-profits within their jurisdiction.⁸⁶

Second, in 2008, the IRS, perhaps reacting in part to congressional inquiries, amended IRS Form 990, an "informational" tax return that 501(c)(3) organizations are required to file on an annual basis, to include numerous provisions that relate to governance.⁸⁷ The new form was preceded by an IRS White Paper entitled "Governance and Related Topics – 501(c)(3) Organizations."⁸⁸ The White Paper set out governance standards that the IRS "recommended" that non-profit organizations follow. The revised Form 990 itself⁸⁹ has numerous new provisions requiring extensive information on a variety of topics. While the return is informational in form, it has a regulatory effect because of the IRS's supervisory authority over non-profit institutions.

Beyond the Form 990, the IRS also "regulates" not-for-profit colleges and universities through its rules on unrelated business income tax, tax exempt bonds, private inurement and intermediate sanctions.

2. What is Required?

The IRS Form 990 requires institutions to disclose information related to numerous discrete categories, including fundraising, political campaigning and lobbying, compensation, conflicts of interest and transactions with interested persons, document retention and destruction, whistleblower policies, a joint venture policy, the process for Board review and approval

83. See 26 U.S.C. § 501(c) (2006).

84. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

85. See, e.g., *id.* § 806, § 1102(c).

86. See, e.g., MASS. ANN. LAWS ch. 180 (LexisNexis 2005 & Supp. 2009); TEX. BUS. ORGS. CODE ANN. ch. 22 (Vernon 2008).

87. See Form 990 Redesign for Tax Year 2008 (Filed in 2009) (Forms and Highlights), <http://www.irs.gov/charities/article/0,,id=176637,00.html> (last visited Apr. 8, 2010).

88. Governance and Related Topics – 501(c)(3) Organizations (Feb. 4, 2008), http://www.irs.ustreas.gov/pub/irs-tege/governance_practices.pdf (last visited Apr. 8, 2010).

89. Effective beginning in 2008 (for organizations that use a July 1–June 30 fiscal year, it is applicable to FY 2009, ending June 30, 2009).

of the Form 990, tax exempt bonds, expenses of certain employees, foreign activities and other matters.⁹⁰ To collect this information, colleges and universities have instituted processes and procedures to ensure that they capture and collect the information, have the requisite policies and otherwise are in a position to provide the requested information to the IRS.

3. Costs and Benefits

The benefits the government hopes to achieve from the new Form 990 are presumably: (1) to collect information useful to the IRS in its enforcement activities to ensure compliance with tax-exempt status, and (2) to cause higher education institutions to improve their governance activities in ways that further the not-for-profit missions of the schools. Non-profits do not pay taxes based on the activities of their core missions, which are deemed to be sufficiently “public” to justify that status, so it is not unreasonable to consider non-profits as quasi-public entities serving a public purpose, thereby justifying some amount of public oversight.

The costs incurred by colleges and universities include the considerable staffing and administrative costs in collecting, analyzing and storing all of the information required by the IRS and the development of new policies that the IRS Form 990 suggests the institutions should have. Many institutions undoubtedly have been required to add staff to deal with the new requirements, or they have reassigned staff who could otherwise have worked on other projects to further the mission of the school. To the extent the new disclosure requirements force institutions to change their governance practices, there is a clear loss of institutional autonomy. One of the difficult public policy choices in this area is how to value the loss of autonomy and diversity that comes with increased oversight and federal standards.

H. Higher Education Opportunity Act of 2008⁹¹

1. Laws and Regulations

The Higher Education Act of 1965 (“HEOA”) was amended in 2008 to impose substantial additional regulatory requirements on institutions that participate in federal financial aid programs. Participating institutions must sign a Program Participation Agreement.⁹² This provision requires certifications of compliance with respect to use of Title IV funds.⁹³ It also

90. See Form 990: Return of Organization Exempt from Income Tax (2009), available at <http://www.irs.gov/pub/irs-pdf/f990.pdf>.

91. Higher Education Opportunity Act, Pub. L. No. 110–315, 122 Stat. 3078 (2008).

92. 20 U.S.C. § 1094(a) (2006).

93. *Id.*

requires certification of compliance with expanded disclosure requirements of 20 U.S.C. 1092.⁹⁴ Many of the new regulatory requirements went into effect in August 2008.⁹⁵ The Department of Education has issued regulations further implementing many of the provisions of the Act.⁹⁶

2. What is Required?

The Act currently requires⁹⁷ colleges and universities to make disclosures or otherwise take action regarding a laundry-list of areas, including campus crime reporting, college costs, graduation data, peer-to-peer file sharing, teacher preparation, textbooks, veterans, emergency procedures, missing students, disciplinary proceedings, and other matters.⁹⁸

3. Costs and benefits

Many of the requirements in the Higher Education Act of 1965, as amended, and the regulations promulgated under the Act, do in fact relate to the purpose of the law—to provide financial aid to students. Many of the new provisions, however, fall clearly within the second category of laws identified in Part II.B, in that they are conditions to participate in the financial aid programs but have as their purpose wholly unrelated public policies. To analyze the benefits of these miscellaneous provisions requires, therefore, an examination of each of the scores of specific unrelated provisions serving unrelated public purposes.

The costs imposed by the new requirements likewise can be analyzed only by going through each of the separate new requirements to determine the costs of compliance. Indeed, the scattershot nature of the regulations creates unique costs because compliance requires consultation with, and responses by, many different institutional officials. Perhaps recognizing the burdens the new law would impose on colleges and universities, Congress did add language to the HEOA that requires a review of regulations for their effect on colleges and universities, but the initial review appears to be limited to Title IV regulations, not the broader list described here.⁹⁹

94. *Id.* §§ 1092, 1094(a)(7).

95. *See* Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

96. *See, e.g.*, 74 Fed. Reg. 46,399, 46,399–401 (Sept. 9, 2009) (to be codified at 34 C.F.R. chap. IV).

97. Some requirements pre-date 2008. Some were added in 2008 and some were modified in 2008.

98. *See* Higher Education Opportunity Act, Pub. L. No. 110-315, § 493, 122 Stat. 3078, 3308–18 (2008).

99. 20 U.S.C. § 1098 (2006). *See also* ADVISORY COMMITTEE ON STUDENT FINANCIAL ASSISTANCE, HIGHER EDUCATION REGULATIONS STUDY, BACKGROUND PAPER, TITLE IV REVIEW PANEL, *available at* <http://www2.ed.gov/about/>

Regulations and laws that are imposed on colleges and universities as conditions of funding, whether related to research or financial aid, and which relate to public purposes other than the funding itself, are the most difficult areas of regulation to analyze from the viewpoint of costs and benefits. This is because each discrete area may not by itself be sufficiently problematic for the institutions to object to or spend significant resources to fight. For example, an interest group supported by lobbyists may push for more disclosure relating to peer-to-peer file sharing. Many institutions may choose to live with the resulting costs of compliance, because they have existing programs in this area and the new requirements incur relatively slight costs. The same may be said for each of 20 other areas. But when 20 new requirements are imposed, none of which relates to the purpose of the funding, and each of which is the result of separate, discrete lobbying efforts by special interest groups, the end result may be a sum of additional costs that exceed the discrete and limited benefits. Further, the sum of the costs imposed is greater than the sum of the parts because the new requirements are so disparate and unconnected that the process of coordinating compliance in many different areas across many different college or university functions is greater still.

I. Employment and Discrimination

1. Laws and Regulations

Federal employment and anti-discrimination laws apply to colleges and universities both directly as employers and, in some cases, indirectly as conditions of receipt of federal monies. The list of laws that regulate employment and, separately, discriminatory conduct at colleges and universities is long and the scope of the practices covered is wide. A partial and very incomplete list includes Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination based on race, color, religion, sex (including, by subsequent interpretation, sexual harassment) and national origin),¹⁰⁰ which was amended in 1972 to apply to colleges and universities, the Americans with Disabilities Act passed in 1990 (providing civil rights protection to individuals with disabilities and expanding implementation of sections 503 and 504 of the Rehabilitation Act of 1973),¹⁰¹ the Age Discrimination Act of 1975,¹⁰² Title IX of the Education Amendments of 1972 (prohibiting sex discrimination, including in athletics, but also prohibiting sexual harassment against students and other forms of discrimination in education by institutions receiving federal

bdscomm/list/acsfa/hersbackgroundpaper.pdf.

100. 42 U.S.C. § 2000d (2006).

101. 42 U.S.C. §§ 12101–12213 (2006).

102. 42 U.S.C. §§ 6101–6107 (2006).

financial assistance),¹⁰³ Title VI of the Civil Rights Act of 1972 (prohibiting race and national origin discrimination by any educational institution receiving federal funds)¹⁰⁴ and many others.

2. What is Required?

The requirements of the employment and discrimination laws that apply to colleges and universities are far beyond the scope of this paper. However, for purposes of the topic here—government regulation of colleges and universities—it is worth noting, without discussion, two specific areas, out of many, in which the application of these laws to colleges and universities pose unique problems.

First, as applied to academic employment decisions (i.e., hiring, promotion, tenure, and termination of faculty), federal employment laws can have the effect of allowing enforcement agencies and courts to intrude into the academic decision-making of colleges and universities. Since academic judgments are frequently subjective and involve the exercise of academic expertise and experience, this intrusion can raise concerns about academic freedom, institutional autonomy, interference with and second guessing of decisions relating to academic excellence, and other matters of internal college and university governance.¹⁰⁵ Particular areas of concern include lawsuits involving tenure and promotion decisions and the application of the ADEA to tenured faculty.

Second, Title IX and Title VI, noted above, have both been interpreted by the Supreme Court to provide a private right of action to students against colleges and universities.¹⁰⁶ As such, these statutes, which apply only to recipients of federal money, allow the federal government, through agencies and courts, to become involved in the relationships between students and institutions of higher education.

3. Costs and Benefits

The benefits to the public of federal anti-discrimination laws “regulating” colleges and universities are clear and strong—the prevention or punishment of discrimination. This is a moral imperative, and virtually all colleges and universities would embrace the purposes of these laws as important to and consistent with their missions. In addition, there are undoubtedly real financial costs caused by discrimination—loss of workplace productivity, inability to hire and retain the best people, financial harm to individuals, loss of morale, and others.

103. 20 U.S.C. §§ 1681-1688 (2006).

104. 42 U.S.C. § 2000d to d-7 (2006).

105. See GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* 20-50 (1987).

106. See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

The costs to colleges and universities created by federal employment and anti-discrimination laws are also real and substantial. Higher education institutions are required to hire lawyers, consultants and managers to prepare compliance plans, to collect and maintain data, to respond to federal audits, to defend EEOC complaints filed by individual grievants, to defend lawsuits, to settle claims (even those without merit to avoid the costs of litigation), to change practices and procedures to comply with new laws and requirements, and so forth. A large university easily spends hundreds of thousands of dollars a year, or more, on these expenses necessitated by federal laws and regulations.

When discrimination exists, and it certainly has existed and continues to occur on most college and university campuses in one form or another, the benefits of laws that allow for redress outweigh the costs of “defense.” In this area, at least, most college and university administrators would not try to “balance” financial costs against moral imperatives and principles of right and wrong. If conduct is discriminatory, the benefits of laws that make it illegal and allow it to be redressed exceed the costs incurred, almost by definition—no institution wants to try to justify discrimination on a cost/benefit analysis. Indeed, most institutions use the same laws—or at least the standards they set—as their own internal rules in disciplining faculty, staff and students accused of wrongdoing.

The problem, of course, is that there are real and significant transaction costs in deciding what is right and wrong, deciding whether certain conduct is discriminatory, and responding to a universe of issues and claims that, most college and university administrators would also agree, exceed the number that are “true” or “worthy.” It is also true that employment disputes and lawsuits that second guess academic judgments do, in fact, lessen university autonomy and, to a certain extent, restrict academic freedom. If the conduct is discriminatory, under appropriate legal standards, the benefits of laws that allow redress, by litigation or otherwise, are worth it. But if the conduct at issue is appropriate, or if the legal line-drawing is so ambiguous and gray as to be almost impossible of after-the-fact resolution, then the substantial costs borne by the college and university are, in a real sense, wasted. Money that could be better spent serving the institution’s mission, including, importantly, promoting non-discrimination and diversity, is spent building a record or defending claims that lack merit.

V. THE COMPLIANCE FUNCTION AND THE ROLE OF COUNSEL

A description of compliance programs at colleges and universities and the related topic of the changing role of higher education counsel in dealing with regulatory and compliance issues are large topics unto themselves and beyond the scope of this paper. However, both of these topics—compliance programs and the role of counsel—represent two of the more

significant effects on colleges and universities of the inexorable increase in federal regulation of higher education over the past decades. Therefore, Part V will provide a very brief summary, really just an introduction, to these two important consequences of increased government regulation.

A. Compliance Plans and Programs

As discussed in Part I, the increase in federal funding of higher education after World War II led over the next six decades to an ever-increasing growth in federal laws and regulations that apply to colleges and universities. With the new laws came new enforcement mechanisms. Some of these mechanisms are unique to the specific laws and regulations (such as the specific administrative and litigation remedies for employment discrimination under Title VII); some, such as the False Claims Act,¹⁰⁷ apply broadly to all federal programs under which higher education institutions receive federal dollars. Some enforcement provisions create private rights of action; others empower the federal government to enforce the new legal requirements, whether by litigation, administrative agency action, or the simple but devastating threat of discontinuing and/or denying federal funding.

The risks to colleges and universities that flow from violating, or just being accused of violating, federal laws and requirements are significant. Certainly they include the costs of defense, possible fines and penalties, required refunds, and payment of damages; but, they also include potentially huge and even more damaging reputational harm and threats to future funding, whether from donors or the government. College and university administrators have long been aware of these dangers, and preventive lawyering has long been practiced by college and university lawyers. Efforts to comply with the growing body of federal requirements are not a new field. Nevertheless, for a variety of reasons, the growth of formal compliance plans and programs at colleges and universities is a relatively recent phenomenon.

College and university compliance plans and programs have, as a general matter, followed and tracked similar efforts in the broader for-profit corporate community. Compliance plans for corporations are based fairly directly on the Federal Sentencing Guidelines, which set out standards and criteria for compliance programs that may be considered as mitigating factors for a corporation found to have violated criminal laws.¹⁰⁸ In 1991, the United States Sentencing Commission issued a set of standards to guide federal judges in sentencing organizations found to have violated criminal

107. 31 U.S.C. §§ 3729–33 (2006).

108. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2009), *available at* <http://www.ussc.gov/2009guid/GL2009.pdf> [hereinafter SENTENCING GUIDELINES].

laws.¹⁰⁹ The Guidelines were further amended in 2004. The corporate scandals of the early 2000s, including Enron and World Com, gave birth to the Sarbanes-Oxley legislation,¹¹⁰ which focused even more attention on corporate compliance plans. The Federal Sentencing Guidelines are now considered the gold standard against which to measure an effective compliance plan for purposes of all legal requirements, not just the criminal laws. Compliance policies, plans and programs are intended, broadly, to “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”¹¹¹

College and university compliance plans and programs can take many different forms. Broadly speaking, they typically include a compliance officer or committee, reporting obligations to the Board of Trustees, an identified list of subject matter areas that pose compliance risks, and a process for reviewing and evaluating existing compliance activities, including training, monitoring and auditing in each of the subject matter areas. The different models, challenges of developing an effective program in a decentralized academic environment, and a discussion of the major subject matter areas that compliance programs typically address at colleges and universities were the subjects of a recent legal education program presented by the National Association of College and University Attorneys.¹¹²

B. Role of Counsel in Compliance

Much has been written about the professional roles of lawyers who represent colleges and universities.¹¹³ The critical issues often revolve around “who is the client,”¹¹⁴ dealing with misconduct by institutional officials or the institution itself¹¹⁵ and confidentiality and the attorney-client privilege.¹¹⁶

109. See UNITED STATES SENTENCING COMMISSION, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES (2003), available at http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pdf.

110. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

111. SENTENCING GUIDELINES, *supra* note 108, at § 8B2.1(a)(2).

112. The materials developed for this program represent what is probably the single best source of information about how compliance programs work at colleges and universities. National Association of College and University Administrators Fall 2009 Workshop, College and University Compliance Programs: Obligations, Organization and Implementation (Nov. 11–13, 2009), <http://www.nacua.org/meetings/November2009/home.html> (last visited Apr. 8, 2010). For more information: full materials from the workshop are available by request from National Association of College and University Administrators.

113. See, e.g., Symposium, *Focus on Ethics and the University Attorney*, 19 J.C. & U.L. 4 (1993).

114. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (1998).

115. See, e.g., *id.* Rs. 1.2, 1.6, 1.13.

116. *Id.* R. 1.6. For examples of state laws see N.Y. C.P.L.R. 4503(a) (McKinney

The lawyer's role in compliance at colleges and universities raises all of these issues. More fundamentally, the college and university lawyer's role in dealing with regulatory requirements pushes the envelope of the traditional dichotomy between lawyer as counselor and lawyer as advocate. Compliance programs force college and university lawyers to consider a third role: lawyer as regulator.

A lawyer's traditional role includes advising and counseling a client on how to comply with the law, including federal regulations. If the college or university gets in trouble and is sued or investigated by the government or a private party, the lawyer's role also is to defend and protect the client with diligence and competence, consistent with the lawyer's duties to third parties and the administration of justice. But "compliance," as a relatively new function of colleges and universities, includes other kinds of duties and responsibilities. The requirements of an effective compliance plan include, as stated in the Sentencing Guidelines, that the college or university create an internal system to "prevent and detect" wrongful conduct, that the board "shall exercise reasonable oversight," that "[h]igh-level personnel of the organization [presumably including lawyers who, after all, are the experts on what must be complied with] shall ensure that the organization has an effective compliance and ethics program," that the college or university shall have "effective training programs," that the college or university "shall take reasonable steps to ensure that the organizations' compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct," that the college or university shall have in place "appropriate disciplinary measures," and that the organization "shall take reasonable steps to respond" to criminal conduct.¹¹⁷

All of these elements of a successful compliance program require the institution itself to enforce regulatory requirements and to identify and discipline cases of non-compliance. Further, to mitigate potential punishment, there are various federal regulations that encourage recipients of federal funds, including colleges and universities, to report wrongdoing that they self-identify. And even more significantly, some federal regulations affirmatively require self-disclosure to the government of wrongdoing identified by the recipient of federal funds. For example, self-disclosure is required for human subject research protocol violations, and at the formal "investigation" stage of a research misconduct case, when federal funds are involved, colleges and universities are required to notify ORI. The new amendments to the federal False Claims Act also allow a claim to be filed based on wrongful retention of federal funds, making disclosure (by returning funds) of any inadvertent over-billing a necessary

2007); CAL. EVID. CODE § 954 (West 2009); TEX. R. EVID. R. 503 (Vernon 2003).

117. See SENTENCING GUIDELINES, *supra* note 108, at § 8B2.1.

step in compliance activities.

For all of these reasons, a college or university lawyer involved in compliance at a college or university may be faced not infrequently with the need to play what is neither a counseling nor an advocacy role, but which is, rather, a regulatory or enforcement function. To some extent whether a lawyer is required to play such a role may be affected by the lawyer's position in the compliance process. So, if the lawyer is the compliance officer, or the compliance office reports to the lawyer, or if the lawyer serves on the compliance committee, then the lawyer will be faced directly with playing the regulatory/enforcement roles required by the Sentencing Guidelines.

But even if the compliance and legal functions are separate, which is probably somewhat more common in colleges and universities, still the lawyer is likely to be called on to give legal advice to the compliance function or to advise administrators faced with violations of laws and regulations by institutional officials. In these situations, the overlapping requirements of the Rules of Professional Conduct (Rules 1.2, 1.6 and 1.13), the substantive requirements of disclosure created by the specific regulations at issue, the potential harm to the institution if wrongdoing is not dealt with or, worse, covered up, and the institution's own compliance plan—based as it almost always is on the Sentencing Guidelines requirements noted above—will force the lawyer, at the very least, to consider whether he or she must take on a more active regulatory/enforcement role. For example, the lawyer must decide whether the institution should take action against an individual wrongdoer (even a high-level official) or whether the institution itself should acknowledge and disclose wrongdoing to the government. In doing so, the lawyer acts more like a regulator or an enforcer than a counselor or advocate.

As the number and scope of federal regulations continues to grow, the tensions created for college and university lawyers by these multiple and inconsistent professional roles will undoubtedly grow as well. Federal regulation of colleges and universities thus not only changes and constrains the historic roles and missions of colleges and universities, but it also changes the fundamental role of the college and university lawyer.