

NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

The Association's purpose is to improve the quality of legal assistance to colleges and universities by educating attorneys and administrators on legal issues in higher education. NACUA accomplishes this goal through its publications, conferences, and workshops. NACUA also operates a clearinghouse for references through which attorneys share knowledge and work products on current legal problems. With its headquarters in Washington, D.C., NACUA monitors governmental developments having significant legal implications for its member institutions, coordinates the exchange of information concerning all aspects of law affecting higher education, and cooperates with other higher education associations to provide general legal information and assistance.

Accredited institutions of higher education in the United States and Canada are the primary constituents of NACUA. Each member institution may be represented by several attorneys, any of whom may attend NACUA meetings, perform work on committees, and serve on the Board of Directors.

NACUA 2014–2015 Board of Directors

Chair

Thomas G. Cline Northwestern University

Chair-Elect

L. Lee Tyner, Jr. University of Mississippi

Secretary

Jerry D. Blakemore Northern Illinois University

Treasurer

Leanne M. Shank Washington and Lee University

Immediate Past Chair

William J. Mullowney Valencia College

Members-at-Large

2012-2015

Ellen M. Babbitt Wisconsin Lutheran College
Franczek Radelet P.C.
Monica C. Barrett Rutgers, The States University of
New Jersey

Robert B. Donin Dartmouth College
Robin L. Parker Miami University
J.P. Sherry Los Rios Community College District
Sandhya Subramanian Oberlin College

2013-2016

Charles K. Barber The George Washington University
Janine P. DuMontelle Chapman University
Amy C. Foerster Bucknell University
Ted A. Mallo University of Akron
Stephen J. Owens University of Missouri
Madelyn F. Wessel Virginia Commonwealth University

2014-2017

Natasha J. Baker Dominican University of California
Hirschfeld Kraemer
Traevana Byrd Ithaca College
Christopher W. Holmes Baylor University
Michael R. Pfahl Kent State University
M. Kristina Raattama Florida International University
Sankar Suryanarayan Princeton University



UNIVERSITY OF NOTRE DAME

The Law School

Notre Dame Law School, the oldest Roman Catholic law school in the United States, was founded in 1869 as the nation's third law school. The Notre Dame program educates men and women to become lawyers of extraordinary professional competence who possess a passion for justice, an ability to respond to human need, and a compassion for their clients and colleagues. Notre Dame Law School equips its students to practice law in every state and in several foreign nations. The school raises and explores the moral and religious questions presented by the law. The learning program is geared to skill and service. Thus, the school is committed to small classes, especially in the second and third years, and emphasizes student participation.

In order to further its goal of creating lawyers who are both competent and compassionate, Notre Dame Law School is relatively small. The Admissions Committee makes its decisions based on a concept of the "whole person." The Law School offers several joint degree programs, including M.B.A./J.D. and M.Div./J.D. Notre Dame Law School is the only law school in the United States that offers study abroad for credit on both a summer and year-round basis. Instruction is given in Notre Dame's own London Law Centre under both American and English professors. The Center for Civil and Human Rights, which is located on the home campus, adds an international dimension to the educational program that is offered there. Notre Dame Law School serves as the headquarters for the *Journal of College and University Law*.

University of Notre Dame Officers of Administration

President

John I. Jenkins, C.S.C.

Provost

Thomas G. Burish

Executive Vice President

John F. Affleck-Graves

The Law School Officers of Administration

Dean

Nell Jessup Newton

*Associate Dean for Library and Information
Technology*

Edmund P. Edmonds

*Associate Dean for Faculty Research and
Development*

Mark McKenna

Associate Dean for Experiential Programs

Robert Jones

Associate Dean for Academic Affairs

Lloyd Hitoshi Mayer

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Editorial Board 2014–2015

Barbara A. Lee, <i>Chair</i> Rutgers, The State University of New Jersey	Jeff Farrar Tennessee Board of Regents	Lauren M. London Eastern Michigan University
William E. Thro, <i>Vice Chair</i> University of Kentucky	Janet Elie Faulkner Northeastern University	Joan L. Lucas Mississippi State University
Nathan Adams Holland & Knight, LLP	Julie K. Freeman Lake Erie College of Osteopathic Medicine	Bridget M. Maricich University of Virginia
B. Riku Ahluwalia Lourdes University	Laverne Lewis Gaskins Board of Regents of the University of Georgia	Jennifer M. Mone Hofstra University
Maria C. Anderson Montclair State University	Geraldine Gauthier State University of New York	Susan C. O'Brien Nevada System of Higher Education
Karen Baillie Carlow University	Kenneth Ginsberg Hodges University	Daniel A. Ojeda California State University
Jack Bernard University of Michigan	Scott Goldschmidt The Catholic University of America	Michael A. Olivas University of Houston
Meredith Bollheimer Mercyhurst University	Rita A. Hao University of California	Anita L. Pelletier University of Rochester
Richard S. Boothby Southern West Virginia Community and Technical College	Peter J. Harrington University of Rhode Island	Kathy Purnell Western Michigan University
Robert J. Brown Cleveland State University	Jeffrey L. Hirsch Hirsch Roberts Weinstein LLP	Smruti Radkar University of the District of Columbia
Joanna Carey Cleveland University of North Carolina at Chapel Hill	Lisa Hoebelheinrich University of Kansas	Tejuana A. Roberts Princeton University
Thomas G. Cline, <i>ex officio</i> Northwestern University	William P. Hoye, <i>Faculty Editor</i> Institute for International Education of Students	John H. Robinson, <i>Faculty Editor</i> University of Notre Dame
Jennifer Cobb Board of Regents of the State University of Georgia	Derek Ishikawa Pomona College	Vincent Sampson American Association of Community Colleges
Scott A. Coffina Lake Forest College	Trevor Johnson Wheaton College	Kathleen Curry Santora, <i>ex officio</i> National Association of College and University Attorneys
Robert A. Colon Rochester Institute of Technology	Melia C. Jones The Texas A&M University	James F. Shekleton South Dakota Board of Regents
Pamela W. Connelly University of Pittsburgh	Peter A. Jones Syracuse University	L. Lee Tyner, <i>ex officio</i> University of Mississippi
Guilherme M. Costa University of Idaho	Catherine Jorgens Carroll University	Nicholas G. Vaskov Nevada System of Higher Education
Jerry M. Cutler Montclair State University	James D. Jorgensen University of Iowa	Katherine Weathers Saint Louis University
Jane E. Davis City University of New York	Jamie Lewis Keith University of Florida	Charlotte F. Westerhaus-Renfrow Higher Ed Consultants LLC
Emily E. Eineman The Florida State University	Mark Lemire State University of New York	Paul Parsons, <i>Staff Liaison</i> National Association of College and University Attorneys

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Editorial Staff 2014-2015

Faculty Editors
WILLIAM HOYE
PROFESSOR JOHN ROBINSON

Assistant Editors
TIM FLANAGAN
CATHERINE PIERONEK

Editor in Chief
KAITLYN L. BEAUDIN, CALIFORNIA

Exec. Managing Editor
BRENDAN T. GIBSON,
GEORGIA

Exec. Articles Editor
GREGORY L. CHAFUEN,
VIRGINIA

Exec. Production Editor
TREVOR S.M. STEVENS,
NEW MEXICO

Exec. Solicitations Editor
CARA SWINDLEHURST, MICHIGAN

Senior Articles Editors
MATTHEW L. JONES, PENNSYLVANIA
DIVA KASS, CALIFORNIA
MITCHELL J. MOXIMCHALK, PENNSYLVANIA
STEPHEN M. TURNER, NEW JERSEY

Solicitation Editors
MARGARET A. HAYES, ILLINOIS
SARAH K. QUINN, ILLINOIS

Notes Editor
LAURA E. ZELL, PENNSYLVANIA

Technology Editor
MICHAEL T. PUZA, INDIANA

Managing Articles Editor
KATHRYN HAUFF, NORTH DAKOTA

Articles Editors
JAMIE I. CHANG, CALIFORNIA
ANDREW T. KOESTER, ILLINOIS
AMY C. MILLER, WISCONSIN

MAUREEN M. NICK, ILLINOIS
MEGHAN A. RIGNEY, MARYLAND

International Liaison
EMMA SIRIGNANO,
VIRGINIA

Production Editor
ALAN D. TUCKER,
UTAH

Sources Editor
RUSSELL G. WARD,
FLORIDA

Journal Staff
ERIK J. ADAMS, WASHINGTON
ABIMBOLA A. ADEGBOYE, LAGOS
MONICA BONILLA ROMERO, MEXICO
CHRISTINA BRUNTY, CALIFORNIA
ANTHONY BUI, CALIFORNIA
SUSAN E. ESQUIVEL, ILLINOIS
ALEX FOSTER-BROWN, OREGON
EMILY T. HOWE, VERMONT
ELISSA K. KERR, BRITISH COLUMBIA
NATALIA KRUSE, MINNESOTA
MARK J. MAKOSKI, MICHIGAN
MATTHEW G. MUNRO, NEBRASKA
MIGUEL C. NAGUIT, MICHIGAN

KESSA PALCHIKOFF, CALIFORNIA
SAISRUTHI PASPULATI, CALIFORNIA
GREG RCHTOUNI, CALIFORNIA
DAVIS RHORER, JR., LOUISIANA
MEAGAN E. ROSE, MARYLAND
SARA N. SHIRZAD, CALIFORNIA
ABIGAIL THOMAS, INDIANA
JENNIFER THOMPSON, NEW JERSEY
STEPHANIE D. TORRES, CALIFORNIA
NEAL S. VAN VYNCKT, NORTH CAROLINA
MICHELLE L. VIZZI, NEW YORK
MICHAEL A. ZIENTARA, INDIANA

Faculty Administrative Assistant
DEBBIE SUMPTION

The Journal of College and University Law
(ISSN 0093-8688)

The *Journal of College and University Law* is the official publication of the National Association of College and University Attorneys (NACUA). It is published three times per year by the National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036 and indexed to *Callaghan's Law Review Digest*, *Contents of Current Legal Periodicals*, *Contents Pages in Education*, *Current Index to Journals in Education*, *Current Index to Legal Periodicals*, *Current Law Index*, *Index to Current Periodicals Related to Law*, *Index to Legal Periodicals*, *LegalTrac*, *National Law Review Reporters*, *Shepard's Citators*, and *Legal Resource Index* on Westlaw.

POSTMASTER: Send changes of address requests to the *Journal of College and University Law*, P.O. Box 780, Law School, Notre Dame, IN 46556. Postage paid at Washington, D.C., and at additional mailing offices.

**Copyright © 2015 by National Association
of College and University Attorneys**

Cite as — J.C. & U.L. —

Library of Congress Catalog No. 74-642623

Except as otherwise provided, the *Journal of College and University Law* grants permission for material in this publication to be copied for use by non-profit educational institutions for scholarly or instructional purposes only, provided that 1) copies are distributed at or below cost, 2) the author and the *Journal* are identified, and 3) proper notice of the copyright appears on each copy.

ABOUT THE JOURNAL AND ITS EDITORS

The *Journal of College and University Law* is the only law review entirely devoted to the concerns of higher education in the United States. Contributors include active college and university counsel, attorneys who represent those institutions, and education law specialists in the academic community. The *Journal* has been published annually since 1973 and now boasts a national circulation of more than 3,800. In addition to scholarly articles on current topics, the *Journal of College and University Law* regularly publishes case comments, scholarly commentary, book reviews, recent developments, and other features.

In 1986, the Notre Dame Law School assumed publication of the *Journal*, which had been published at the West Virginia University College of Law from 1980–1986.

Correspondence regarding publication should be sent to the *Journal of College and University Law*, Notre Dame Law School, P.O. Box 780, Notre Dame, IN 46556, or by email to JCUL@nd.edu. The *Journal* is a refereed publication.

The views expressed herein are attributed to their authors and not to this publication, the National Association of College and University Attorneys or the Notre Dame Law School. The materials appearing in this publication are for information purposes only and should not be considered legal advice or be used as such. For a special legal opinion, readers must confer with their own legal counsel.

The Journal of College and University Law

Published three times per year in cooperation with the Notre Dame Law School (University of Notre Dame), the *Journal of College and University Law* is the only national law review devoted exclusively to higher education legal concerns. Issues generally include articles of current interest to college and university counsel, commentaries on recent cases, legislative and administrative developments, book reviews, student comments, and occasional papers from the Association's Annual Conference. All NACUA members receive the *Journal* as a benefit of membership.

Publications, Subscriptions, and Orders for Back Copies

To inquire about subscriptions to the *Journal of College and University Law* or to obtain a single issue of the current volume, contact the *Journal* directly at Notre Dame Law School, P.O. Box 780, Notre Dame, IN 46556, or by email at JCUL@nd.edu.

Orders for back issues of the *Journal* can be obtained from William S. Hein and Company Inc., 1285 Main Street, Buffalo, NY 14209-1987, (800) 828-7571. Back issues of the *College Law Digest* are available from the NACUA National Office, Suite 620, One Dupont Circle, N.W., Washington, DC 20036.

Correspondence relating to editorial and membership matters should be addressed directly to the Association's national office in Washington, DC.

The Journal of College and University Law, 1973–2015

	Volume 41 (2014-2015) Subscription: \$75.00 Per Issue: \$29.50	
Volume 40 (2013-2014) Subscription: \$75.00 Per Issue: \$29.50	Volume 39 (2012-13) Subscription: \$75.00 Per Issue: \$29.50	Volume 38 (2011-12) Subscription: \$75.00 Per Issue: \$29.50
Volume 37 (2010-11) Subscription: \$75.00 Per Issue: \$29.50	Volume 36 (2009-10) Subscription: \$67.00 Per Issue: \$27.00	Volume 35 (2008-09) Subscription: \$67.00 Per Issue: \$27.00
Volume 34 (2007-08) Subscription: \$67.00 Per Issue: \$27.00	Volume 33 (2006-07) Subscription: \$64.00 Per issue: \$23.00	Volume 32 (2005-06) Subscription: \$64.00 Per issue: \$23.00
Volume 31 (2004-05) Subscription: \$64.00 Per issue: \$23.00	Volume 30 (2003-04) Subscription: \$64.00 Per issue: \$23.00	Volume 27-29 (2000-03) Subscription: \$61.00 Per issue: \$17.00
Volume 26 (1999-2000) Subscription: \$57.00 Per issue: \$16.00	Volume 25 (1998-99) Subscription: \$55.00 Per issue: \$15.00	Volume 24 (1997-98) Subscription: \$52.50 Per issue: \$14.00
Volume 23 (1996-97) Subscription: \$50.00 Per issue: \$13.50	Volumes 21-22 (1994-95) Per volume bound: \$47.50 Per issue: \$11.50	Volumes 17-20 (1990-94) Per volume bound: \$47.50 Per issue: \$11.50
Volumes 14-16 (1987-90) Per volume bound: \$47.50 Per issue: \$11.50	Volumes 12-13 (1985-87) Per volume bound: \$47.50 Per issue: \$11.50	Volumes 5-11 (1977-85) Per volume bound: \$35.00 Per issue: \$8.50
Volumes 1-4 (1973-77) Per volume bound: \$30.00 Per issue: \$8.50		

College Law Digest, 1971-1982

Volumes 10-12 (1980-82) Per volume bound: \$35.00	Volumes 1-2 (1971-72) The set, bound: \$25.00
Volumes 3-9 (1973-79) Per volume bound: \$25.00	Volumes 1-12 (1971-82) The set, bound: \$290.00

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Volume 41

2015

Number 1

ARTICLES

Academic Compliance Programs: A Federal Model with Separation of Powers

Nathan A. Adams, IV 1

A recent survey of academic institutions reveals remarkable consensus about the compliance risks that they face and the essential elements of an effective compliance program, but when it comes to actual compliance programming post-secondary institutions differ markedly. At least two-thirds of all academic institutions report that they still have no formal compliance function planned or chief compliance officer, and the remainder report predominately decentralized structures. To address the continuing compliance deficit and accommodate historic institutional norms related to independent inquiry and scholarship, this Article suggests that post-secondary institutions incorporate the familiar concepts of federalism and separation of powers into their compliance programs, where academic departments become the federal elements of academic governance and the administration, faculty, and students become the branches of the Academy's compliance structure.

Trimming the Deadwood: Removing Tenured Faculty for Cause

J. Royce Fichtner & Lou Ann Simpson 25

This paper explores the legal concept of tenure and the “adequate cause” standard that allows for the termination of tenured faculty. It then analyzes reported U.S. court decisions to determine whether tenure gives faculty members free reign to be insubordinate employees, ineffective teachers, or incompetent researchers. It concludes by finding that reported case law firmly supports the termination of deadwood tenured faculty.

Trans* Issues for Colleges and Universities: Records, Housing, Restrooms, Locker Rooms, and Athletics

Troy J. Perdue

45

As society reassesses its understanding of gender, young transgender persons are feeling more comfortable living their trans identity openly. Higher education institutions increasingly need to address the practical concerns of young trans students, often with little direction from the law, institutional policy, or governmental guidance. This article addresses the current status of the law on transgender issues in the context of higher education (specifically Title IX), and offers some practical solutions for colleges and universities in the key areas of records, housing, restroom and locker room access, and athletics.

College Athletes as Employees

Robert T. Zielinski

71

This article surveys the history of the National Labor Relations Board treatment of students who perform services for the university which they attend. The survey describes the different rationales that could be employed by the Board in determining whether Division I Football players are “employees”, and if so, whether they will be granted collective bargaining rights. Finally the article discusses the ramifications of the Board’s choice of rationale will have on other types of student-employees and provides some practical guidance on steps institutions should consider until a final decision is made.

“Shared” Governance? New Pressure Points in the Faculty/Institutional Relationship

Ellen M. Babbitt, Ann H. Franke & Barbara A. Lee

93

Over the past several decades, many colleges and universities have been charting new paths – expanding educational opportunities to new formats, topics, and locales. At the same time, governments, accrediting bodies, and members of the public are taking a hard look at the effectiveness of America's higher education system. In the process, governments and accreditors have developed heightened expectations, and imposed heightened legal and regulatory requirements, on institutions of higher learning. Administrators and faculty struggle to find the optimal allocation of their respective responsibilities. Which new areas lie primarily within the faculty’s expertise and responsibility, and which are primarily administrative in nature? This article examines three major areas that illustrate these challenges: (1) academic

freedom and its relationship to assessment and accreditation; (2) faculty rights and responsibilities in distance education, establishment of campuses in other countries, and non-traditional offerings; and (3) the integration of compliance with traditional notions of faculty rights and responsibilities.

ESSAY

Through the Eyes of Higher Education Attorneys: How Department Chairs are Navigating the Waters of Legal Issues and Risk Management

Carol L.J. Hustoles & Louann Bierlein Palmer 117

Legal and risk management issues substantially impact the operations of colleges and universities, which face escalating compliance requirements in an increasingly litigious environment. This study used an online survey to obtain input from higher education attorneys across the U.S. regarding their perceptions of frequency and time spent on legal assistance for department chairpersons, chairs' level of difficulty handling legal and risk management issues, matters having highest adverse impact on institutional legal liability and risk management efforts, and issues which are most essential for chair training. Overall, this research provides the first systemic study on higher education attorneys' experiences on how academic department chairpersons are dealing with issues actually or potentially impacting institutional legal liability and risk management.

NOTE

The Effect of Federal Funding Restrictions for Embryonic Stem Cell Research on Colleges and Universities: The Need for Caution when Ethical Objections to Research are Raised

Amy Miller 147

This note explores the history of government intervention into em-bryonic stem cell research. In particular, this paper focuses on how the decisions of the federal government have threatened research being done at colleges and universities, both because educational institutions are the primary source of basic research into the possibilities of em-bryonic stem cells, and because colleges and universities receive most of their research funding from the federal government. In the end, I argue that, while it is necessary for government officials to take ethical considerations into account when deciding whether to fund scientific research, it is important to also consider the effects such decisions have on educational institutions.

BOOK REVIEW

Review of Suzanne Mettler's *Degrees of Inequality*

Stanley N. Katz 179

ACADEMIC COMPLIANCE PROGRAMS: A FEDERAL MODEL WITH SEPARATION OF POWERS

NATHAN A. ADAMS, IV*

I. COMPLIANCE THREATS	3
A. Human Resources	3
B. Athletics and Title IX Compliance.....	4
C. Information Security	5
D. Research, Grant Administration, and Medical Billing	6
E. Financial Aid and HEOA.....	8
F. Public safety.....	9
G. General.....	10
Table 1a. Compliance Threats	10
Table 1b. Compliance Threats	11
II. COMPLIANCE PROGRAM ELEMENTS	11
A. Clear Compliance Objectives	11
B. Demarcated Responsibilities.....	12
C. Reporting	13
D. Adequate Resources and Technology	13
E. Auditing, Monitoring, and Investigating.....	14
F. Consequences for Violations	15
IV. COMPLIANCE PROGRAM MODELS	16
A. Separation of Powers	16
Table 2: Separation of Powers.....	17
1. The Administration	17
a. Board of Trustees and President	17
b. Compliance Committee and Officers.....	18
2. Faculty and Staff	20
3. Students.....	21
B. Federalism.....	21

* Nathan A. Adams, IV is a Partner at Holland & Knight LLP. He is a board-certified education lawyer in the State of Florida, former Chair of the Florida Bar's Education Law Committee, and provides compliance counsel to postsecondary institutions. He serves on the advisory board for The Journal of College and University Law.

V. CONCLUSION23

In a recent survey, two-thirds of academic institutions recognized that compliance and regulation are among the top three most challenging legal issues on their campuses.¹ A majority of the institutions also agreed on the nature of the legal threats that they face. Nevertheless, one-third of institutions reported that they have no formal compliance function planned or developed.² Eighty percent of the institutions have no chief compliance officer with responsibility for overall compliance.³ With respect to the compliance programs already deployed, the most frequently reported structure was totally decentralized without designated compliance officers,⁴ enforced by disaggregated academic bodies related to different schools, departments, or divisions.

Decentralization and age-old institutional norms related to independent inquiry and scholarship, in addition to budgetary cut-backs, are at the crux of the postsecondary compliance deficit. Just a few decades ago, colleges and universities were essentially unregulated entities. Their independence, and that of their faculty, was itself a hallmark of the academic enterprise. But in the intervening years, academic institutions have begun to accept millions in federal funds in the form of student financial aid, research grants, Medicare, Medicaid, and direct appropriations.⁵ The potential for administrative, faculty, and student negligence, and misconduct in the use of those funds and interactions with students has now become plenary.

Postsecondary institutions have no real choice but to adapt to the new regulated environment. The extent to which state and federal authorities and private litigants have ramped up civil and criminal enforcement of enhanced laws and regulations to combat misconduct is now widely known. From False Claims Act (FCA) and Title IX lawsuits to simple negligence and privacy lawsuits, there has never been a time more important than this to have an effective and comprehensive compliance program. This Article suggests that the best way for postsecondary institutions to accommodate their historic academic character and norms to the new regulatory environment is to incorporate the familiar concepts of federalism and separation of powers into their compliance programs. In this context, the federal elements are academic departments and the branches of the academy include administration, faculty, and students.

1. NAT'L ASS'N OF COLL. & UNIV. ATTORNEYS [hereinafter NACUA], 2013 NACUA COMPLIANCE SURVEY 12 (2013).

2. *Id.* at 13.

3. *Id.* at 12.

4. *Id.* at 14 (35.4%).

5. See Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 752–55 (2010).

I. COMPLIANCE THREATS

A recent survey by the National Association of College and University Attorneys (NACUA) reveals a remarkable consensus among postsecondary institutions, public and private, about the greatest compliance risks that they face. As a whole, they identify their highest risks as human resources (HR), information security, Title IX, athletics, public safety (i.e., Clery Act), financial aid, research, the Americans with Disabilities Act (ADA), grant administration, and environmental health and safety.⁶ After human resources, priorities shift among postsecondary institutions by Carnegie classification, size of operating budget, and student enrollment, but this appears to be primarily related to the additional activities undertaken by larger institutions, rather than any disagreement over the importance of the risk categories per se.

A. Human Resources

HR is a paramount risk for most types of postsecondary institutions. Former and disgruntled employees may state claims under federal, state, and local discrimination laws including sexual harassment and ADA claims, which are separately prioritized in the NACUA survey, not to mention whistleblower, tenure, and promotion claims.⁷ Associate and baccalaureate colleges and universities were the only two types of postsecondary institutions to rank HR as a secondary or tertiary concern. The reason may be that associate colleges and universities typically have predominately part-time and adjunct professors, and baccalaureate colleges and universities ordinarily have a relatively small, homogenous workforce.⁸ Regardless, HR is one of the few areas that most colleges and universities address through some type of centralized compliance effort, reaching across all institutional departments and functions under central oversight in an HR-related or legal office inclusive of input from units of the institution, as in a federal style of government.

One reason may be that, beginning in 1998, the U.S. Supreme Court began to recognize the existence of the “effective compliance” affirmative defense in sexual harassment cases.⁹ The defense allows an employer to avoid punitive damages when the employer has adopted and implemented

6. NACUA, 2013 NACUA COMPLIANCE SURVEY 46 (2013).

7. After *Garcetti v. Ceballos*, 547 U.S. 410 (2006), First Amendment claims are less of a problem for public institutions because they may be dismissed if adverse action is taken against a public employee speaking out within the scope of employment.

8. NACUA, 2013 NACUA COMPLIANCE SURVEY 37–8 (2013).

9. D. Frank Vinik et al., *The “Quiet Revolution” in Employment Law & Its Implications for Colleges and Universities*, 33 J.C. & U.L. 33, 34 (2006) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

effective policies and procedures to address complaints of workplace harassment and discrimination.¹⁰ Since 1998, several more defenses have arisen. Therefore, in HR, like many other areas, a compliance plan can cabin or even avoid discrimination claims when it incorporates strong anti-discrimination policies, regular training of staff, and reporting and investigation protocols.¹¹

B. Athletics and Title IX Compliance

Postsecondary institutions with the largest operating budgets (\$1 billion or more) prioritize athletics and information security as the next threats, and then grant administration and, related to HR, sexual harassment.¹² Institutions classed by Carnegie classification as doctorate-granting colleges and universities share basically the same concerns.¹³ The prominent placement of athletics is not surprising. Some of the most serious ethical lapses in colleges and universities in recent years have occurred in NCAA athletic programs. Child sex abuse in the locker room at Pennsylvania State University is the most tragic.¹⁴ But reports are now commonplace that tutors complete work and exams for players, athletes receive unexplained grade changes and cash and sexual inducements, directly or indi-

10. *Faragher*, 524 U.S. at 806 (declaring the defense established if the plaintiff unreasonably failed to avail self of “a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense”); *Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001).

11. Naturally, compliance planning cannot eliminate all HR risks. As an example, whistleblowers can earn protected status in some states by reporting conduct to a fellow employee that never occurred which even if it had occurred would not have been illegal, as long as the whistleblower subjectively believed the conduct occurred and violated the law. Colleges and universities cannot guard against this type of imagined unlawful conduct. Under federal law, colleges and universities have more guardrails in place, including a requirement that the would-be whistleblower: (1) undertake some level of due diligence into the alleged unlawful conduct, (2) demonstrate that the claimed conduct objectively violates the law, and (3) report to a person with authority to remedy the problem. But even federal courts have become more permissive. In these circumstances, the best colleges and universities can do is require HR to be notified of all reports of claimed wrongdoing and approve any adverse action against staff members.

12. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

13. *Id.* at 35.

14. See FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (July 12, 2012) [hereinafter FREEH REPORT], available at http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf. Alleged misconduct with minors has not been limited to college and university athletic programs either. See Jon Lender et al., *UConn Professor Subject of Sexual Misconduct Investigation*, HARTFORD COURANT, July 16, 2013, http://articles.courant.com/2013-07-16/community/hc-uconn-investigation-0716-20130715_1_law-firm-sexual-misconduct-investigation-allegations (music professor).

rectly, and colleges and universities design specialized courses for athletes. A wide spectrum of schools are allegedly involved from Division I schools¹⁵ to Division III schools.¹⁶

Title IX compliance, prioritized separately from athletics by some schools, shows up as a top-three risk for even the smallest postsecondary institutions because it impacts both competitive and intramural sports programs. The U.S. Department of Education recently leaked a list of fifty-five colleges and universities under investigation for Title IX violations.¹⁷ An effective compliance program provides schools with a defense against Title IX liability, which includes injunctive relief and even damages.¹⁸ Thus, as an example, a federal appeals court denied relief to plaintiffs who sought class-wide injunctive relief over and above a university compliance program that the Office of Civil Rights of the United States Department of Education considered adequate.¹⁹

C. Information Security

Likewise, information security is a primary concern of postsecondary and other types of institutions. Employee misconduct and criminal activity have led to major privacy breaches at colleges and universities. For example, the University of Connecticut notified patients in November 2013 that employees inappropriately accessed the medical records of 164 patients.²⁰

15. See Paul Myerberg, *Report: Serious Academic Misconduct was Common at Oklahoma State*, USA TODAY, Sept. 11, 2013, <http://www.usatoday.com/story/sports/ncaaf/2013/09/11/oklahoma-state-sports-illustrated-report-part-2-academic-misconduct/2797433/>; *Report: SI Documents Misconduct in OSU's Football Program*, TAHLEQUAH DAILY PRESS, Sept. 8, 2013, http://www.tahlequahdailypress.com/sports/osu_sports/report-si-documents-misconduct-in-osu-s-football-program/article_a34affbf-23b3-5552-817d-d4709a64e58c.html; Brett Friedlander, *UNC Admits to "Academic Misconduct" in Football Program*, ACC INSIDER (Aug. 26, 2010), <http://acc.blogs.starnewsonline.com/15121/unc-admits-to-academic-misconduct/>; Brad Wolverton, *Alleged Academic Fraud at U. of North Carolina Tests NCAA's Reach*, CHRON. OF HIGHER EDUC., Sept. 7, 2012, <http://chronicle.com/article/Alleged-Academic-Fraud-at-U/134270/>; Steve Eder, *N.C.A.A. Admits Mishandling Miami Inquiry*, N.Y. TIMES, Jan. 23, 2013, <http://www.nytimes.com/2013/01/24/sports/ncaa-admits-misconduct-in-miami-investigation.html>; Randy Ludlow et al., *Ohio State Football: NCAA Penalties Could be Severe*, COLUMBUS DISPATCH, Apr. 25, 2011, <http://www.dispatch.com/content/stories/sports/2011/04/25/0425-ohio-state-faces-severe-sanctions.html>.

16. *Report: E&H Athletic Department under NCAA Investigation*, TIMES NEWS (Feb. 27, 2014), <http://www.timesnews.net/article/9073833/report-eandh-athletic-department-under-ncaa-investigation>.

17. For a list of colleges and universities under Title IX investigation, see <http://images.politico.com/global/2014/05/01/list.html>.

18. See *Grandson v. Univ. of Minn.*, 272 F.3d 568 (8th Cir. 2001).

19. *Id.* at 573.

20. *Patients Notified of Privacy Breach*, UCONN HEALTH, <http://www.uhc.edu/>

Several college and university medical centers have experienced similar breaches.²¹ Data breaches on campuses involving personal information for students and staff are also commonplace.²² Some data privacy breaches are even linked to grade changes; for example, at Santa Clara University data breaches led to grade changes of at least sixty undergraduate students from 2000–2011.²³ Both large and small institutions are subject to data privacy breaches involving staff, students and donors, but the type and amount of information available to research and medical institutions is obviously more substantial.

D. Research, Grant Administration, and Medical Billing

Research, grant administration, and medical billing are primarily, if not exclusively, concerns of colleges and universities and affiliated hospitals of research institutions. State and federal authorities have in recent years filed a multiplicity of lawsuits against them, claiming that they violated the conditions of research grants,²⁴ and Medicare and Medicaid.²⁵ A number of these lawsuits have resulted in sizable recoveries for the federal government; for example, against the University of Medicine and Dentistry of New Jersey (\$8.3 million),²⁶ Yale University (\$7.6 million),²⁷ Northwest-

breach/ (last visited Nov. 5, 2014).

21. See, e.g., Jeff Goldman, *University of Pittsburgh Medical Center Acknowledges Privacy Breach*, ESECURITY PLANET (Nov. 29, 2013), <http://www.esecurityplanet.com/network-security/university-of-pittsburgh-medical-center-acknowledges-privacy-breach.html>; Patrick Ouellette, *Saint Louis University Notifies 3,000 Patients of Data Breach*, HEALTHIT SECURITY (Oct. 8, 2013), <http://healthitsecurity.com/2013/10/08/saint-louis-university-notifies-3000-patients-of-data-breach/>; *University of Pittsburgh Medical Center Privacy Breach Prompts Warning to Patients*, PHIPRIVACY.NET (Nov. 27, 2013), <http://www.phiprivacy.net/university-of-pittsburgh-medical-center-privacy-breach-prompts-warning-to-patients/>.

22. *Worst "EDU" Privacy Breaches of 2011–2012*, N.C. STATE UNIV. (June 29, 2012), <http://oit.ncsu.edu/unit-sc/worst-edu-privacy-breaches-of-2012>; *Chronology of Data Breaches*, PRIVACY RIGHTS CLEARINGHOUSE, http://www.privacyrights.org/data-breach-asc?order=field_breach_date_value_1& (last visited Nov. 5, 2014).

23. Graham Cluley, *FBI Investigates Santa Clara University Hack Which Changed Exam Grades*, NAKEDSECURITY (Nov. 16, 2011), <http://nakedsecurity.sophos.com/2011/11/16/fbi-investigates-santa-clara-university-hack-draft/>; see also David F. Carr, *Hacking Higher Education*, INFORMATIONWEEK (Apr. 24, 2013), <http://www.darkreading.com/security/hacking-higher-education/d/d-id/1109684?>.

24. See, e.g., Isaac Arnsdorf, *Yale to Pay \$7.6 Million to Settle Grant Investigation*, YALE DAILY NEWS, Dec. 23, 2008, <http://yaledailynews.com/blog/2008/12/23/yale-to-pay-7-6-million-to-settle-grant-investigation/>.

25. United State *ex rel.* Erickson v. Univ. of Wash. Physicians, 339 F. Supp. 2d 1124 (W.D. Wash. 2004); Complaint, Pollak v. Bd. of Trs. of the Univ. of Ill., No. 1-99-cv-00710, 2003 U.S. Dist. Ct. Pleadings 8199, at *5 (N.D. Ill. Nov. 25, 2003).

26. News Release, U.S. Dep't of Justice, *UMDNJ to Pay More than \$8 Million to Settle Kickback Case Related to Cardiology Program* (Sep. 30, 2009),

ern University (\$3 million),²⁸ Weill Medical College at Cornell University (\$2.6 million),²⁹ and New Jersey University Hospital (\$2 million).³⁰ But an even greater concern for institutions with total operating budgets of \$500 to \$999 million are animal and human subject research regulations.³¹

The False Claims Act (FCA) prohibits a person from “knowingly present[ing], or caus[ing] to be presented [to an officer or employee of the United States Government], a false or fraudulent claim for payment or approval.”³² The FCA provides for damages equal to “3 times the amount of damages which the Government sustains,” in addition to a “civil penalty.”³³ In several cases, courts have ruled that the damages sustained equal “the full amount of grants awarded to the defendants based on their false statements.”³⁴ With literally thousands of students, researchers, research assistants, professors, and administrative staff as potential relators of receiving and administering federal assistance, there could hardly be a more challenging compliance environment. A compliance plan enables institutions to rebut claims that they reacted recklessly or possessed the requisite intent to violate the FCA and, thus, is a critical defense.³⁵ The very existence of a

<http://www.justice.gov/usao/nj/Press/files/pdf/2009/umdnj0930%20rel.pdf>.

27. Arnsdorf, *supra* note 24.

28. Joe Carlson, *Northwestern to Pay Nearly \$3 million to Settle Claims against Cancer Researcher*, MODERN HEALTHCARE (July 30, 2013), <http://www.modernhealthcare.com/article/20130730/NEWS/307309966>.

29. Paul Basken, *Cornell’s Medical College Pays \$2.6-Million in Federal Fraud Case*, CHRON. OF HIGHER EDUC., Mar. 11, 2009, <http://chronicle.com/article/Cornells-Medical-College-Pays/42548/>.

30. John Commins, *Feds Settle \$2 Million Medicaid Fraud Case with NJ Hospital*, HEALTH LEADERS MEDIA (June 10, 2009), <http://www.healthleadersmedia.com/content/LED-234328/Feds-Settle-2-million-Medicaid-Fraud-Case-with-NJ-Hospital.html>; *see also* Jacques Couret, *Emory University to Pay \$1.5 Million to Settle False Claims Act Case*, ATLANTA BUS. CHRON., Aug. 28, 2013, <http://www.bizjournals.com/atlanta/news/2013/08/28/emory-university-pays-15m-to-settle.html>; Kelsey Volkmann, *Updated: Saint Louis University to Pay \$1M to Settle Fraud Case*, ST. LOUIS BUS. J., July 9, 2008, <http://www.bizjournals.com/stlouis/stories/2008/07/07/daily29.html?page=all>; Jon Campisi, *DOJ, Univ. of Pittsburgh Medical Center Settle False Claims Act Allegations for \$957K*, PA. REC. (Aug. 2, 2013), <http://pennrecord.com/news/10934-doj-univ-of-pittsburgh-medical-center-settle-false-claims-act-allegations-for-957k>; *Baylor University Medical Center to Pay \$907,000 to Settle False Claims Act Charge*, CORP. CRIME REP. (Nov. 27, 2012), <http://www.corporatecrimereporter.com/news/200/baylorfalseclaims11272012/>.

31. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

32. False Claims Act, 31 U.S.C. § 3729(a)(1)(A) (2014).

33. *Id.* at § 3729(a)(1)(G).

34. *See United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 88 (2d Cir. 2012).

35. Roberto Bracerias, *The False Claims Act and Universities: From Fraud to Compliance*, C. & U.L. MANUAL § 8.6.1 (Mass. Cont’g Legal Educ. 2012); *accord* Kathryn Ehler-Lejcher, *The Expansion of Corporate Compliance Guidance for Health*

compliance plan also shows good faith that may affect the government's decision whether to pursue a case.³⁶

E. Financial Aid and HEOA

After HR, postsecondary institutions with the smallest operating budgets (less than \$100 million) identify financial aid as the next biggest threat, followed by the ADA, accreditation, and, related to financial aid, Higher Education Opportunity Act (HEOA) compliance.³⁷ Institutions classed as baccalaureate colleges and universities have similar priorities,³⁸ and even the largest postsecondary institutions are concerned about financial aid and HEOA compliance further down their priority list. In between are institutions with \$200 million to \$499 million operating budgets and institutions classed as AA colleges and MA colleges. These institutions prioritize (besides HR) financial aid, HEOA compliance, ADA, Title IX, and accreditation.³⁹ By size of student enrollment, a roughly similar pattern emerges, except that the largest schools worry more about financial aid and the smallest institutions about HEOA compliance.

In recent years, state and federal authorities have aggressively prosecuted claimed violations of financial aid laws, such as Title IV under the FCA, "little [state] FCAs," and other statutes,⁴⁰ leading to sizable recoveries especially against for-profit institutions and, most recently, the bankruptcy and forced sale of Corinthian Colleges.⁴¹ In many lawsuits, state attorneys general and students have claimed that they were misled with false promises about placement rates and salaries in their prospective fields of employ-

Care Entities, 25 WM. MITCHELL L. REV. 1339, 1379–80 (1999).

36. Ehler-Lejcher, *supra* note 35, at 1380.

37. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

38. *Id.* at 34.

39. *Id.* at 34, 58.

40. See *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006) (false certification of compliance with regulation forbidding higher education institutions to pay contingent fees to recruiters to qualify under Title IV); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), *cert. denied*, 550 U.S. 903 (2007) (false promises of compliance with incentive compensation ban to qualify under Title IV); *United States ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 646 (C.D. Cal. 2007) (false statements made to accreditation agency to qualify under Title IV); *United States ex rel. Gatsiopoulos v. Kaplan Career Inst.*, No. 09-21720-CIV, 2010 WL 5392668, at *1 (S.D. Fla. Dec. 22, 2010); *United States ex rel. Powell v. Am. Intercontinental Univ., Inc.*, No. 1:08-CV-2277-RWS, 2010 WL 2245574, at *3 (N.D. Ga. June 2, 2010).

41. Dawn Gilbertson, *Apollo Group Settles Suit for 78.5 Mil*, ARIZ. REPUBLIC, Dec. 15, 2009, <http://www.azcentral.com/business/articles/2009/12/14/20091214biz-apollo1215.html>; Kevin Carey, *Corinthian Colleges is Closing. Its Students May be Better Off as a Result*, N.Y. TIMES, July 2, 2014, http://www.nytimes.com/2014/07/03/upshot/corinthian-colleges-is-closing-its-students-may-be-better-off-as-a-result.html?_r=0.

ment.⁴² In reaction, the United States Department of Education issued new “gainful employment,” misrepresentation and omission, and incentive compensation rules.⁴³

The HEOA also requires institutions to take steps to curb the illegal distribution of copyrighted materials and illegal file sharing. In 1983, the Association of American Publishers shocked the academy when it sued New York University, nine of its professors, and a local copy center for violating the Copyright Act by copying large sections of books for their courses without obtaining the permission of the authors.⁴⁴ Colleges and universities hurried to implement compliance protocols, but the advent of e-learning, electronic file sharing, and e-publishing has led to new types of alleged violations. For example, three academic publishers sued Georgia State University, claiming extensive copyright infringement in the posting of book excerpts to e-reserves and learning management systems.⁴⁵ HEOA requires institutions to certify to the Secretary of Education that they have developed plans to effectively combat the unauthorized distribution of copyrighted material.

F. Public safety

Public safety, including Clery Act compliance, is not the priority that it was in the immediate aftermath of the tragic events at Virginia Tech,⁴⁶ but institutions with operating budgets in the range of \$500 to \$999 million still rank it as the next biggest threat.⁴⁷ The Clery Act requires institutions that participate in federal financial aid programs to (1) collect and report to the campus community and federal government statistics for certain campus-related crimes, (2) publish and enforce certain policies regarding crime and safety, and (3) have policies in place requiring institutions to take specific

42. See Gayland O. Hethcoat II, *For-Profits Under Fire: The False Claims Act as a Regulatory Check on the For-Profit Education Sector*, 24 LOY. CONSUMER L. REV. 1, 2–3 (2011), available at <http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1024&context=lclr>; Complaint, *Casey v. Fla. Coastal Sch. of Law, Inc.*, Case No. 12-03990CA40, at *3–*5 (Fla. Cir. Ct. Feb. 1, 2012); Alan Feuer, *Trump University Made False Claims, Lawsuit Says*, N.Y. TIMES, Aug. 24, 2013, <http://www.nytimes.com/2013/08/25/nyregion/trump-university-made-false-claims-lawsuit-says.html>.

43. Student Assistance General Provisions, 34 C.F.R. § 668 (2011).

44. *NYU Professors Charged with Copyright Law Violation*, HARVARD CRIMSON, Feb. 16, 1983, <http://www.thecrimson.com/article/1983/2/16/nyu-professors-charged-with-copyright-law/>.

45. Jennifer P. Lorenzetti, *Recent Copyright Cases: What You Need to Know*, FACULTY FOCUS (June 20, 2013), <http://www.facultyfocus.com/articles/distance-learning/recent-copyright-cases-what-you-need-to-know/>.

46. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2013) [hereinafter Clery Act].

47. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

actions when incidents occur.⁴⁸ Revised regulations are expected in November 2014, in light of statutory changes affecting the content of annual security reports (ASRs).⁴⁹

G. General

A summary of the risk priorities that postsecondary institutions report is set forth in **Table 1a** and **Table 1b**. There are obviously dozens more compliance risks that postsecondary institutions must confront from governance, health care, and insurance to export controls, conflicts of interest, and public ethics violations. This Article aspires not to identify all of the subject matter for compliance planning, but only the most important ones as far as colleges and universities are concerned. We turn next to the compliance program elements that should be deployed to meet these challenges.

Table 1a. Compliance Threats

Aggregate	Large Institutions	Ph.D. Institutions	Medium Institutions
HR	HR	HR	HR
Financial aid	Athletics Information security	Athletics	Financial aid HEOA compl
HEOA compl	Grant admin. Sexual harassment	Grant admin.	Title IX
Athletics	Financial aid Envtl health & safety Medical billing Research Time & effort reporting	Information security Research	Accreditation Athletics
Title IX Information security		Financial aid	Conflicts of interest Envtl. health & safety
Grant admin Research		Sexual harassment HEOA compl. Envtl health & safety	
Accreditation			

48. Clery Act, 20 U.S.C. § 1092(f) (2013).

49. Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to the Staff of U.S. Dep't of Educ. (Oct. 26, 2010), *available at* <http://www.ed.gov/ocr/letters/colleague-201010.html> [hereinafter Dear Colleague Letter].

Table 1b. Compliance Threats

AA Colleges	MA Colleges	Small Institutions	BA Colleges
Financial aid	HR	HR	HEOA compl
HR/ADA	Title IX	Financial aid	Title IX
Accreditation HEOA compl Title IX	Financial aid	ADA Accreditation HEOA compl.	Financial aid HR Accreditation
	Accreditation HEOA compl ADA	Donors & gifts Governance Grant admin Information security Program integrity rules Title IX	Donors & gifts Information security Student finances ADA Tax
	Information security		
	Sexual harassment		

II. COMPLIANCE PROGRAM ELEMENTS

Postsecondary institutions agree on their compliance risks. Consensus about the essential elements of an effective compliance program also exists following the publication of influential protocols and rules such as the *Federal Sentencing Guidelines for Organizations*.⁵⁰ These elements include: (1) clear compliance objectives; (2) clearly demarcated responsibilities; (3) adequate resources and technology; (4) ongoing internal auditing, monitoring, and investigations; and (5) consequences for violations. A compliance program that materially fails in one or more of these areas is unlikely to prevent the types of scandals that they are intended to address and may not qualify an organization under the *Federal Sentencing Guidelines* for downward departure from standard sentences or fines.

A. Clear Compliance Objectives

Effective compliance programs begin with a set of brief compliance objectives, prepared through a collaborative effort that incorporates input

50. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL Ch. 8 (2012); *see also* Draft OIG Compliance Program Guidance for Recipients of PHS Research Awards, 70 Fed. Reg. 71,312–71,320 (Nov. 28, 2005) [hereinafter Draft OIG Guidelines], *available at* <http://www.gpo.gov/fdsys/pkg/FR-2005-11-28/pdf/E5-6548.pdf>; Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2012); DIV. OF GRANTS COMPLIANCE AND OVERSIGHT, NAT'L INSTS. OF HEALTH, A FEDERAL PERSPECTIVE ON COMPLIANCE, *available at* http://grants1.nih.gov/grants/compliance/compliance_2003_regional_seminar.ppt (presentation); COUNCIL ON GOVERNMENTAL RELATIONS, MANAGING EXTERNALLY FUNDED RESEARCH PROGRAMS: A GUIDE TO EFFECTIVE MANAGEMENT PRACTICES (July 1, 2009), *available at* http://www.cogr.edu/Pubs_EffectiveManagement.cfm; UNIV. RISK MGMT. & INS. ASS'N, ERM IN HIGHER EDUCATION (Sept. 2007), *available at* http://www.urmia.org/library/docs/reports/URMIA_ERM_White_Paper.pdf.

from all levels of the organization, and applies generally to all personnel.⁵¹ Balkanized codes of conduct developed in isolation cannot influence the fabric of an institution's culture in the same way. Broadly, the purpose of a compliance program is to ensure compliance with federal and state laws, industry regulations, and private contracts into which an institution has entered.⁵² But consistent with these broad purposes, the compliance team should articulate the compliance objectives in a manner most conducive to the institution's mission, providing examples of best practices, so that a "values-based compliance structure" is built.⁵³ Then, the various departments of an institution must be held accountable to apply them in a manner that makes sense for that program and the college or university's various interest groups, so that there is no question whether anticipated conduct within a department is permitted.

B. Demarcated Responsibilities

Effective compliance programs assign responsibilities to management and staff for each institutional risk and require periodic reports from responsible persons about what has been done to mitigate risk.⁵⁴ The *Federal Sentencing Guidelines* anticipate that specific individuals within an organization with direct access to governing authority will be delegated day-to-day operational responsibility for the compliance and ethics program, and report periodically to high-level personnel.⁵⁵ For smaller organizations, the *Federal Sentencing Guidelines* alternatively recognize that the governing authority itself will discharge the organization's compliance and ethics efforts.⁵⁶ Regardless, all staff working for a college or university should clearly understand its compliance-related expectations.⁵⁷

51. Pamela Bucy Pierson & Anthony A. Joseph, *Creating an Effective Corporate Compliance Plan: Part II*, 72 ALA. LAW. 284, 286 (2001).

52. SOC'Y OF CORPORATE COMPLIANCE & ETHICS, THE COMPLETE COMPLIANCE AND ETHICS MANUAL § 8B2.1(b)(1) – (7) (2004); U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)–(7) (2006).

53. THOMAS A. BUTCHER & WILLIAM R. KAUFFMAN, COMPLIANCE: A PRACTICAL PROTOCOL FOR THE ENTIRE CAMPUS (AND BEYOND. . .) 6 (2008); NAT'L COUNCIL OF UNIV. RESEARCH ADM'RS & ATL. INFO. SERVS., INC., *Research Compliance*, in SPONSORED RESEARCH ADMINISTRATION: A GUIDE TO EFFECTIVE STRATEGIES AND RECOMMENDED PRACTICES 1505:5 (2010) [hereinafter NCURA GUIDE], available at http://www.utexas.edu/research/osp/resources/ncura_documents/research_compliance_chapter_1500.pdf.

54. See Draft OIG Guidelines, 70 Fed. Reg. at 71,313 (Nov. 28, 2005); NCURA GUIDE, *supra* note 53, at 1505:9, 1505:11.

55. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(C) (2012).

56. *Id.* at § 8B2.1 cmt. n.2(C)(iii).

57. NCURA GUIDE, *supra* note 53, at 1505:4. Staff must also understand what data to include in their reports to management.

C. Reporting

Effective compliance programs require staff to report misconduct. Most academic institutions already satisfy at least this requirement of an effective compliance program.⁵⁸ For prevention and detection of violations to work, staff must know the proper avenues through which to ask questions and report possible problems or violations, be confident that the institution will investigate the warnings rather than ignore them, and be sure that they will not be retaliated against for their reports.⁵⁹ Avenues for anonymous and confidential reporting should be included.⁶⁰

D. Adequate Resources and Technology

Compliance programs that are little more than paper tigers, consisting of manuals on shelves or protocols in handbooks, are the worst kind. Enron had such a compliance program. Paper programs set the floor for the standard of care that the institution says it meets, but typically does not. In contrast, effective compliance programs are adequately resourced and complemented with sufficient technology to monitor compliance as benchmarked against similarly-sized institutions.⁶¹ They conduct periodic training and dissemination of the compliance policies by communicating compliance standards, roles, and responsibilities to all institutional agents, and motivating compliance.⁶²

Extensive training of employees is part of the *Faragher* affirmative defense against punitive damages.⁶³ Conversely, courts have considered the

58. LAWRENCE WHITE, BRIEFING: RESULTS OF NACUA'S 2013 COMPLIANCE SURVEY 16 (2013) (three-quarters of respondents maintain a "hotline" or similar mechanism for reporting compliance problems to the institution).

59. Draft OIG Guidelines, 70 Fed. Reg. at 71,313 (Nov. 28, 2005); NCURA GUIDE, *supra* note 53, at 1505:9.

60. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (2012); BUTCHER & KAUFFMAN, *supra* note 53, at 13.

61. PETER HARRINGTON & TOM SCHUMACHER, ESTABLISHING AN EFFECTIVE COMPLIANCE PROGRAM, COMPLIANCE RISK ASSESSMENTS, AND THE ROLE OF GENERAL COUNSEL 6 (2006), *available at* ecommons.med.harvard.edu/ec_res/nt/A6963478-B33E-4576-BA7C-B16087604B93/Establishing_an_Effective_Compliance_Program.doc; UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(C) (2012).

62. HARRINGTON & SCHUMACHER, *supra* note 61, at 11; BUTCHER & KAUFFMAN, *supra* note 53, at 12; NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS, MEETING THE CHALLENGES OF ENTERPRISE RISK MANAGEMENT IN HIGHER EDUCATION 7 (2007) [hereinafter NACUBO REPORT], *available at* http://www.ucop.edu/enterprise-risk-management/_files/agb_nacubo_hied.pdf; J. Derek Kearl, Note, *Establishing a Culture of Compliance: Applying Corporate Compliance Principles to a University Setting*, 2004 B.Y.U. EDUC. & L.J. 353, 364 (2004); Ehler-Lejcher, *supra* note 35, at 1403.

63. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

failure to train staff adequately as evidence of reckless disregard.⁶⁴ As an example, the Seventh Circuit criticized the University of Wisconsin for failing to train the two primary decision makers, a dean and associate dean, who laid off four employees over age forty in the basics of age discrimination law.⁶⁵ Affirming the liquidated damages award, the court stressed “leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an ‘extraordinary mistake’ from which a jury can infer reckless indifference.”⁶⁶ Likely, it did not help that colleges and universities have a unique advantage when it comes to training staff.

E. Auditing, Monitoring, and Investigating

No compliance program is complete without auditing, monitoring, and investigation.⁶⁷ Sarbanes-Oxley requires senior corporate officials to certify review of compliance reports on a quarterly and annual basis.⁶⁸ At least annually, postsecondary boards of trustees should receive an update on the compliance program, including Clery Act reports, audit reports, NCAA (financial and program self-assessment) reports, tax returns (including Schedule J), accreditation agency letters, reports of wrongdoing, reports of disciplinary action, and reports of new risk areas. Internal audits under the direction of compliance officers and external audits under the direction of counsel or state officials, such as the Auditor General, are also important to test the strength of internal controls.⁶⁹

Auditing and monitoring via financial and electronic means are important, but there is also no substitute for promptly and carefully investigating reports of suspected noncompliance when there is a specific, credible report of it.⁷⁰ When noncompliance is confirmed, institutions should evaluate any related gaps in their compliance protocols, and take corrective action.⁷¹ In this manner, investigations can lead to continuous improvement

64. Vinik et al., *supra* note 9, at 54.

65. EEOC v. Bd. of Regents of the Univ. of Wis. Sys., 288 F.3d 296, 304 (7th Cir. 2002).

66. *Id.* (quoting Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 778 (7th Cir. 2001)).

67. HARRINGTON & SCHUMACHER, *supra* note 61, at 12; Pierson & Joseph, *supra* note 51, at 287, 291; Kearl, *supra* note 62, at 365; Ehler-Lejcher, *supra* note 35, at 1408.

68. Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (2012); 17 C.F.R. § 229.601 (2014).

69. See HARRINGTON & SCHUMACHER, *supra* note 61, at 12; THE INST. OF INTERNAL AUDITORS, THE ROLE OF INTERNAL AUDITING IN ENTERPRISE-WIDE RISK MANAGEMENT (Sep. 29, 2004), available at http://www.ucop.edu/enterprise-risk-management/_files/role_intaudit.pdf; MATTIE & CASSIDY, *infra* note 83, at 11, 21.

70. HARRINGTON & SCHUMACHER, *supra* note 61, at 12; Pierson & Joseph, *supra* note 51, at 291.

71. HARRINGTON & SCHUMACHER, *supra* note 61, at 12; Pierson & Joseph, *supra*

of the compliance program.⁷² Institutions should report back to employees on the results of investigations, as well as document them, so that they know their allegations were taken seriously. Without this feedback, the employees are more likely to initiate litigation against the school. Legal counsel plays a critical role in this process.⁷³

F. Consequences for Violations

Last, consequences for breaches of compliance programs are critical to their success.⁷⁴ According to the *Federal Sentencing Guidelines*, an organization exercises due diligence in its compliance program when its standards “have been consistently enforced through appropriate disciplinary mechanisms, including . . . discipline of individuals responsible for the failure to detect an offense” and “[a]dequate discipline of individuals responsible for an offense. . . .”⁷⁵ The only thing worse than not having a compliance plan is having one that is devoid of consequences.⁷⁶ Knowledge is a dangerous thing.⁷⁷ In recent years, this has been most evident in sexual harassment Title IX lawsuits when colleges and universities acted with deliberate indifference to knowledge of alleged sexual harassment and took no remedial measures to address it.⁷⁸ When individuals with assigned responsibilities violate compliance protocols, repercussions must follow swiftly, surely, and oftentimes publicly after due process to reinforce the message that the institution is serious about compliance.⁷⁹

note 51, at 291.

72. NCURA GUIDE, *supra* note 53, at 1505:10.

73. HARRINGTON & SCHUMACHER, *supra* note 61, at 13.

74. *Id.*; UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.5 (2012); Kearn, *supra* note 62, at 366–7; Ehler-Lejcher, *supra* note 35, at 1407.

75. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(k)(6) (2003).

76. *See* Ehler-Lejcher, *supra* note 35, at 1389.

77. *See* Kearn, *supra* note 62, at 366.

78. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 275 (1998) (noting that when a school acts with deliberate indifference to its knowledge of alleged sexual harassment and takes no remedial measures to address harassment, the school may be liable for damages under Title IX); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173 (10th Cir. 2007) (describing evidence that university football coach knew of serious risk of sexual harassment and assault during college football recruiting efforts, that coach knew a prior sexual assault had occurred during recruiting visits, and that coach nevertheless maintained an unsupervised player-host program to show high school recruits a “good time”, creating a fact issue as to whether the risk of such an assault during recruiting visits was so obvious as to amount to deliberate indifference).

79. Due process requires providing the accused with the opportunity to respond to charges, confront witnesses, put on evidence, and appeal rulings.

IV. COMPLIANCE PROGRAM MODELS

We might have expected that consensus about the risks and elements of a compliance plan would lead to common postsecondary compliance programs. But with at least two-thirds of all academic institutions reporting that they have no formal compliance function, planned or developed, or chief compliance officer,⁸⁰ something else is obviously getting in the way. Divergence in resources and, relatedly, the size of postsecondary institutions are commonly mentioned reasons; these may certainly affect the character and sophistication of a compliance program, but its existence is another matter. The *Federal Sentencing Guidelines* do not excuse any institution from having a compliance plan, but recognize a difference between “small” and “large” ones, and state that the former may satisfy compliance objectives “with less formality and fewer resources than would be expected of large organizations.”⁸¹

The failure of institutions to implement compliance programs at all or successfully may have the most to do with the nature of the programs that they propose to implement. Common to most academic institutions, with the exception of for-profit institutions, are the fiercely independent norms of academic freedom and institutional autonomy. Interference with the pursuit of academic excellence even as it relates to the expenditure of research funds, internal governance (including the legislative role played by faculty) and the system of tenure raise raw sensitivities. Hierarchy is less pronounced or accepted in the academy than in the corporate setting. Administration and students commonly have different interests. We think this is at the root of opposition to postsecondary compliance programs. A compliance program that better accommodates traditional academic interests, norms, and structure by incorporating familiar aspects of separation of powers and federalism would stand the greatest chance of acceptance and success.

A. Separation of Powers

The three branches of power within the academy that any postsecondary compliance program must address are the administration, faculty/staff, and students. Pursuant to the classic separation of powers doctrine, constraints on the authority of each branch are critical to ensure that no branch supersedes another branch. A compliance program can provide for a type of separation of powers as shown in **Table 2**, consistent with faculty governance norms relating to academic policy and student input.

80. NACUA, 2013 NACUA COMPLIANCE SURVEY 12–14 (2013).

81. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.2(C) (2012).

Table 2: Separation of Powers

Administration	Faculty/Staff	Students
Proposes and vetoes compliance objectives, policies, procedures, and standards of conduct	Adopts compliance objectives, policies, procedures, and standards of conduct	
Budgets, appropriates, and spends compliance resources	Spends compliance resources	Spends compliance resources
	Reports non-compliance	Reports non-compliance
Investigates, monitors, audits, and prosecutes reports of non-compliance	Monitors noncompliance and participates in judicial review of those prosecuted.	Monitors noncompliance and participates in judicial review of those prosecuted.
Appoints institution-wide compliance officers	Appoints departmental compliance officers	Appoints student liaisons

1. The Administration

No postsecondary institution has an excuse for failing to involve the board of trustees and, its primary agent, the office of the president in compliance planning. Compliance protocols recognize that both are critical to ensuring postsecondary institutional compliance.⁸² For example, the Sarbanes-Oxley Act places responsibility for an institution's compliance program on senior management and the audit committee of the board of directors.⁸³ Likewise, the *Federal Sentencing Guidelines for Organizations* places overall responsibility for a compliance program on senior corporate managers. Moreover, multifarious causes of action, such as breach of fiduciary duty and the FCA, are powerful incentives in their own right for boards of trustees and the office of the president to implement effective compliance programs. In small institutions, their compliance roles will be even more direct than in large ones.

a. Board of Trustees and President

It is the president's job to regularly and effectively articulate compliance objectives and the importance of the compliance function to ensure trickle-

82. See, e.g., HARRINGTON & SCHUMACHER, *supra* note 61; BUTCHER & KAUFFMAN, *supra* note 53; NACUBO REPORT, *supra* note 62, at 10–12; JOHN A. MATTIE & DALE L. CASSIDY, ACHIEVING GOALS, PROTECTING REPUTATION: ENTERPRISE RISK MANAGEMENT FOR EDUCATIONAL INSTITUTIONS 1, available at <http://regents.universityofcalifornia.edu/regmeet/july08/a7a.pdf> (last visited Nov. 16 2014); NCURA GUIDE, *supra* note 53, at 1505:11, 1505:13, 1505:15.

83. Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m) (2012).

down through the entire organization.⁸⁴ The president bears day-to-day responsibility to monitor, audit, and ensure that all of the school's departments are compliant. The president proposes the annual institutional budget, including the resources that will be spent on compliance, including compliance personnel. His office is ultimately responsible to prosecute non-compliance. In turn, the board of trustees has a responsibility to hold the president accountable for this by developing related metrics focused on compliance, and annually reviewing the president's performance against them. The board must assess whether management is appropriately exercising its judgment to avoid situations such as occurred at the Pennsylvania State University, where the school's four most powerful people concealed Gerald A. Sandusky's activities from the Board of Trustees.⁸⁵

a. Compliance Committee and Officers

Below the office of the president, consensus is hard to find about the proper executive organizational structure to promote compliance.⁸⁶ Large for-profit corporations seeking to comply with these requirements have turned to a compliance committee and individual compliance officers designated by substantive areas.⁸⁷ Under Sarbanes-Oxley, the qualified legal compliance committee, sometimes called the audit committee (1) consists of at least one member from the audit committee or, if none, a committee of directors who are not employed by the company and who are not "interested persons" and two or more members of the issuer's board of directors who are not employed by the issuer; (2) has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation; (3) has been authorized by the board of directors to inform the Chief Legal Officer and CEO of any reports of evidence of a violation (unless futile), to determine whether an investigation is necessary, to report information, where necessary, to the audit committee or to the full board, to initiate an investigation, and to retain expert personnel; and (4) is authorized to recommend implementation of an appropriate response and to vote to notify the SEC when the issuer fails to implement a

84. BUTCHER & KAUFFMAN, *supra* note 53, at 8.

85. FREEH REPORT, *supra* note 14, at 14; *see also* David Jones, *Report Recommends More Oversight of Rutgers Athletic Department after Scandal*, CHI. TRIB., July 22, 2013, http://articles.chicagotribune.com/2013-07-22/news/sns-rt-usa-rutgerscoach-20130722_1_mike-rice-athletic-director-tim-pernetti-rutgers-board.

86. *See, e.g.*, NCURA GUIDE, *supra* note 53, at 1505:13 ("[T]here are alternative ways of approaching the development of a research compliance program based on whether the institution is centralized or decentralized.").

87. Draft OIG Guidelines, 70 Fed. Reg. at 71,313 (Nov. 28, 2005); MATTIE & CASSIDY, *supra* note 82, at 17; HARRINGTON & SCHUMACHER, *supra* note 61; Ehler-Lejcher, *supra* note 35, at 1401-02.

recommended appropriate response.⁸⁸

An advantage of the compliance committee for corporations is that it provides an avenue for an attorney representing an issuer to fulfill her obligation to report evidence of a material violation.⁸⁹ The attorney can be satisfied that, once she makes the report, her ethical and statutory responsibility to report claimed wrongdoing is complete.⁹⁰ In this manner, the committee helps the company avoid unnecessary federal reporting to the SEC or other agencies, and ensures that the attorney does not gain undue influence over institutional decisions through up-the-ladder reporting.⁹¹ The attorney for the issuer typically prefers this arrangement because there is no need, or even pressure, to embarrass a client, no risk of alienating other clients, and no pressure to evaluate the response received from up the ladder to determine if it is an “appropriate response.”⁹² Similar advantages are available to the postsecondary compliance officer and/or lawyer and other reporters as a result of establishing a compliance committee.

Most research institutions have adopted something like an audit committee or multiple audit committees.⁹³ A postsecondary compliance committee typically is comprised of institutional stakeholders representing key departments or functions of the college or university.⁹⁴ The chair may be legal counsel, a provost/academic vice president, business officer, or some other professional.⁹⁵ Central committees should not be oversized and should be staffed by a chief compliance or risk officer with day-to-day responsibility for overseeing and coordinating the compliance program by working together with the unit compliance officers.⁹⁶ Naturally, this is the body that also ensures (at least indirectly) prosecution of compliance plan violations.

Postsecondary institutions that have not adopted a compliance committee often have a (1) centralized independent compliance officer (8.2%); (2) legal office as compliance office (11.8%); or (3) decentralized interdepend-

88. 17 C.F.R. § 205.2(k) (2014).

89. Jeffrey I. Snyder, Note, *Regulation of Lawyer Conduct under Sarbanes-Oxley: Minimizing Law-Firm Liability by Encouraging Adoption of Qualified Legal Compliance Committees*, 24 REV. LITIG. 223, 243 (2005).

90. *Id.*

91. *Id.* at 243–44, 247.

92. *Id.* at 245.

93. See Leah Guidry, *Research Compliance — Is This the Missing Piece in My Compliance Program?*, J. HEALTH CARE COMPLIANCE 5 (Mar.–Apr. 2010), available at http://www.huronconsultinggroup.com/Insights/Perspective/Life_Sciences/~/_media/Insights-Media-Content/JHCC_ResearchCompliance.pdf.

94. BUTCHER & KAUFFMAN, *supra* note 53, at 9.

95. *Id.*

96. See HARRINGTON & SCHUMACHER, *supra* note 61, at 6–7; see also NACUBO REPORT, *supra* note 62, at 11–12.

ent compliance officers (13.3%).⁹⁷ Even in the central committee model, the chief compliance officer and/or compliance officers engage in the day-to-day monitoring, education, feedback, execution, and enforcement.⁹⁸ Other than the president, the chief compliance officer should be the executive primarily responsible for advancing compliance efforts across the institution.⁹⁹ Accordingly, the chief compliance officer should have a reporting relationship to the compliance committee (if there is one), president, and board of trustees.¹⁰⁰

2. Faculty and Staff

The Administration, including the chief compliance officer and compliance committee, wields tremendous power. Faculty, staff, and students may come to resent the compliance team as inconsistent with academic freedom. If they do not actively oppose it, they may nevertheless undermine the compliance program by failing to make it relevant or to observe it. The compliance program may become largely irrelevant to the actual operation of the institution. Consequently, false claims may go largely undetected for long periods. Sexual harassment and discrimination may not be reported. Simultaneously, there will be under-reporting in this sense and over-reporting in the sense that faculty and staff may also tend to make specious reports of supposed violations of the plan outside designated reporting channels because they do not fully understand the compliance plan.

The antidote to this is turning to the faculty and staff in their ordinary legislative capacity to adopt compliance objectives, policies, procedures, and standards of conduct that they can support, tailor to their departments, and then help monitor for compliance. In this manner, the compliance plan may bolster morale, rather than undermine it.¹⁰¹ Institutions should also invite faculty to participate in the annual budgetary process to be sure that necessary and adequate compliance resources are brought to bear. They may identify departmental compliance positions that should be created for previously unknown liability risks. Departmental chairs will be in a position to spend compliance resources and are likely to do so more effectively if they have assisted on the front end of the budgetary cycle. To ensure that faculty members are satisfied that prosecutions under the compliance pro-

97. NACUA, 2013 NACUA COMPLIANCE SURVEY 14 (2013); JENNIFER E. KIRKLAND, NACUA, CREATING EFFECTIVE COMPLIANCE PROGRAMS AT SMALLER INSTITUTIONS OR ON A LIMITED BUDGET: MODELS AND PROCEDURES 2 (2009), available at <http://www.higheredcompliance.org/compliance/resources/xv-09-11-11.doc>.

98. BUTCHER & KAUFFMAN, *supra* note 53, at 11.

99. See NCURA GUIDE, *supra* note 53, at 1505:15.

100. Accord NACUBO REPORT, *supra* note 62, at 12; Pierson & Joseph, *supra* note 51, at 286.

101. See Ehler-Lejcher, *supra* note 35, at 1382.

gram are just, it also makes sense to include them in the standard judicial process that the accused will receive.

3. Students

Students are the weakest leg of the academic power structure, but by no means irrelevant. The Student Council will have meaningful compliance proposals relevant to students that should cut down claims. Students are one of the populations that compliance plans are intended to protect (e.g., from sexual harassment and assault) and to protect against (e.g., hacking). They are natural monitors, and may be in the best position to identify certain public safety, athletic, financial aid, information privacy, intellectual property, and student handbook vulnerabilities and violations. Graduate students and research assistants are also privy to how federal grant money is expended. Student Councils will, typically, already appoint liaisons to recommend policies and receive student reports and complaints. This function should be expanded as part of an integrated compliance plan. Student Councils will also spend some compliance resources, making its involvement on the budgetary side also more likely to advance the compliance agenda. In many institutions, students also participate in the judicial review process when faculty and students are charged with negligence or misconduct.

B. Federalism

Federalism is another way to distribute power and avoid irrelevant compliance policymaking. The maxim “all politics is local” has some relevance even to compliance programs. Unless a compliance program has departmental relevance, it is unlikely to succeed. Many totally centralized compliance models fail here. For example, the centralized independent compliance officer (with or without a centralized compliance committee) or centralized compliance committee has institution-wide jurisdiction and most likely reports directly to the president and/or governing board or its audit committee, but risks becoming isolated if it lacks a representative component.¹⁰² The centralized independent compliance office is unlikely to reach to the grass roots to avoid false claims, copyright infringements, violations of export controls, scientific misconduct, or self-dealing; to appreciate bona fide differences between schools or departments; to address misconduct among students; or to adequately protect academic freedom. Due to its lack of representativeness, this office will have difficulty impacting the institution’s culture.¹⁰³ Yet NACUA reports that the centralized

102. NACUBO REPORT, *supra* note 62, at 8.

103. The legal office as compliance office model suffers from this same disadvantage. It accounts for about 12% of all deployed postsecondary compliance models.

model accounts for about 27% of all postsecondary institutions.¹⁰⁴

At the opposite extreme is a totally decentralized compliance program with or without designated compliance officers. NACUA reports this is the predominate postsecondary model (roughly 49%).¹⁰⁵ This decentralized model effectively diffuses power, as did the Articles of Confederation, but without any unifying governance structure it is also unlikely to succeed in many circumstances. When there are compliance officers as part of the decentralized compliance program (13.3%),¹⁰⁶ they are typically housed within independent departments reporting to their respective offices, the legal office, or a vice-president or provost.¹⁰⁷ Real collaboration is rare. The greatest divide ordinarily exists between a college or university hospital or athletic department and the main campus, followed by a divide between the hard sciences and social sciences.

Naturally, expanding the number of compliance officers risks inconsistency, failed cross-communication, independence, and accountability problems such as occurred at the Pennsylvania State University, which relied exclusively upon departments to monitor their own compliance issues.¹⁰⁸ In an interdependent compliance office model, the strength and autonomy of the office to which the compliance officers or other persons report will vary tremendously.¹⁰⁹ Whereas the medical school and financial aid office may be adequately protected in certain respects, other departments may have virtually no compliance protocols, monitoring, or audits. Moreover, the protocols are unlikely to have even the barest type of integration and will generally not deal with student misconduct.

The model with the best chance of ensuring effective compliance among all members of the college and university community must involve a representative element, yet with sufficient central oversight and authority to advance the institution's interests. A central committee complemented by compliance officers assigned by school, department, functional unit, and interest group (e.g., faculty and students) would best serve this purpose. The committee should report directly to the governing board or its audit

NACUA, 2013 NACUA COMPLIANCE SURVEY 14 (2013). The legal officer model attempts to maximize the benefit of the attorney-client privilege, but may actually create conflicts of interest for the legal staff.

104. NACUA, 2013 NACUA COMPLIANCE SURVEY 14 (2013).

105. *Id.*

106. *Id.*

107. A permutation of this model is one involving decentralized compliance responsibilities without designated compliance officers. Instead, compliance officers are assigned to various deans, directors, committees, legal counsel, or others. KIRKLAND, *supra* note 97, at 2.

108. See JEFFREY M. KAPLAN, JOSEPH E. MURPHY & WINTHROP M. SWENSON, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES § 8.11 (1995); FREEH REPORT, *supra* note 14, at 31.

109. BUTCHER & KAUFFMAN, *supra* note 53, at 9.

committee and office of the president.¹¹⁰ In the event of multiple committees, all should have representation on a central oversight committee. Funding should come directly from the office of the president to avoid dependency on the departments that the committee oversees. The committee should meet regularly to review compliance activities across the campus, make recommendations for improvements, receive, review, and investigate compliance issues, and report to the governing board and president. Such a central committee has multiple advantages such as an institution-wide and comprehensive view of the school's primary goals and interests, a better vantage point to spot institutional risks that lower-level units or interest groups may subjugate to parochial concerns, the authority necessary to elevate matters, and the potential for constituent buy-in through the representativeness of the committee.

Naturally, college, school, departmental, and interest group input remain critical to an effective and balanced compliance program in a large institution. The trouble in postsecondary academic institutions is not that the input occurs, but that it too often eclipses central oversight and is not integrated. The various departments and offices within a college or university are closest to the regulatory and legal issues that they face. Faculty and students know best how the rules will impact them. A central committee is most apt to ensure coherent observance of institution-wide interests, but school units are best suited to apply those policies in independent disciplines. Faculty and staff are in the best posture to tease out the rules that will achieve the most beneficial results. Likely, both know their unit's particular weaknesses in areas as diverse as grant administration and medical billing, and have suggestions for the training and monitoring protocols that will best address them. Moreover, they are better positioned to protect academic freedom than a central entity. Accordingly, unit compliance officers should work together with a central committee to shape an institution's strategic compliance plan and enforcement mechanism, potentially utilizing common audit personnel.

V. CONCLUSION

Effective postsecondary compliance programs are now not merely advisable, but indispensable. They detect and avoid litigation; improve the speed and quality of responses to reports of negligence, misconduct, and even emergencies; deter governmental prosecution; minimize and avoid liability; and reduce fines and criminal violations. We might have expected that consensus about the importance of compliance plans and related risks and elements would lead to common postsecondary compliance programs, but most institutions continue to go without them and the programs that are

110. HARRINGTON & SCHUMACHER, *supra* note 61, at 6.

in place vary considerably in their effectiveness. To address the unique norms and characteristics of the academy, this Article suggests that a compliance program that is federal in character and incorporates separation of powers has the best chance of succeeding in the college and university context because it allows for the input of decentralized units and autonomous staff while assuring central oversight.

TRIMMING THE DEADWOOD: REMOVING TENURED FACULTY FOR CAUSE

J ROYCE FICHTNER*
LOU ANN SIMPSON**

I. INTRODUCTION	25
II. DEFINING ACADEMIC TENURE	26
III. TERMINATION FOR CAUSE.....	31
A. Common Arguments Challenging For-Cause Termination Decisions	32
IV. CASE LAW SUPPORTING THE TERMINATION OF DEADWOOD FACULTY	37
A. Teaching.....	37
B. Research	38
C. Insubordination.....	40
D. Disruptive Interactions with Colleagues.....	42
V. CONCLUSION.....	43

I. INTRODUCTION

Many criticize the concept of academic tenure in higher education.¹ Some claim “guarantees of life employment” set up an “impenetrable barrier”² that reduces accountability and leads to a surplus of deadwood in higher education.³ In the words of one scholar, academic tenure serves to

* Associate Professor of Business Law, Drake University. B.A., University of Northern Iowa; J.D., Drake University Law School. The author would like to thank Julie Alvina Fichtner for her assistance on this project.

** Professor of Business Law, Drake University. B.S.B.A., Drake University; J.D. Drake University Law School.

1. James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 160 (2000).

2. *Id.* at 172; Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J.C. & U.L. 331, 332 (1995) (“Critics contend that tenure erects an impenetrable barrier to removing the teacher who cannot teach, the scholar who cannot publish or the poor university citizen.”).

3. Fishman, *supra* note 1, at 187 (defining deadwood broadly as “anything use-

protect “the inert, the barely competent, the perfunctory reciter of ancient lessons, and the one-time scholar who now devotes his best energies to more lucrative pursuits.”⁴ An oft-repeated anecdote recounts the professor who has used the same yellowed lecture notes for decades, works only a handful of hours per week, and has not published anything since achieving tenure.⁵

This article explores whether tenure actually creates an impenetrable legal barrier that burdens higher education by protecting deadwood faculty. It does so by analyzing whether U.S. courts truly give such deference so that tenured faculty members are free to be insubordinate employees, poor colleagues, ineffective teachers, and inept researchers.⁶ It concludes by finding that reported case law provides little cover for such activities and, instead, provides numerous examples of academic institutions successfully terminating tenured faculty for deadwood behaviors. In short, this article finds that courts routinely uphold the rights of institutions to dismiss deadwood tenured faculty so long as the institutions follow specified pre-termination procedures and there is substantial evidence to prove the alleged behavior.

II. DEFINING ACADEMIC TENURE

More than ninety percent of American public and private colleges and universities have a tenure system.⁷ However, these systems are far from uniform and no two systems of tenure are alike.⁸ Despite their differences, tenure systems share two general goals: (1) to provide economic security to make the profession attractive to talented individuals, and (2) to protect a faculty member by safeguarding academic freedom.⁹ The first goal is practical. Tenure entices individuals of ability to academia by providing a suf-

less and burdensome” or more specifically as “an underperforming faculty member who has not attained the promise demonstrated when considered for tenure.”); Robert W. McGee, *Academic Tenure: Should It Be Protected By Law?*, 20 W. ST. U. L. REV. 593, 598 (1993) (“One of the problems with tenure is that it forces universities to retain deadwood.”).

4. ROBERT M. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* 240 (1955).

5. Melanie Wood & Christine Des Jarlais, *When Post-Tenure Review Policy and Practice Diverge: Making the Case for Congruence*, 77 J. HIGHER ED. 561, 561 (2006).

6. This article will not consider cases of financial exigency or moral turpitude.

7. *Johns Hopkins Univ. v. Ritter*, 689 A.2d 91, 93 (Md. Ct. Spec. App. 1997).

8. *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 430 n.9 (Pa. 2001); *Hennessey v. Nat’l Collegiate Athletic Ass’n*, 564 F.2d 1136, 1142 (5th Cir. 1977) (“[T]he court is mindful that there are great variations among—and even within—institutions in the granting and meaning of tenure.”); see *Worzella v. Bd. of Regents*, 93 N.W.2d 411, 414 (S.D. 1958) (noting tenure’s “vaporous objectives, purposes, and procedures are lost in a fog of nebulous verbiage.”).

9. AAUP 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), available at <http://www.aaup.org/file/principles-academic-freedom-tenure.pdf>.

ficient degree of economic security.¹⁰ Tenure affords “the benefit of job security that offsets the negative salary differences between those who choose an academic, as opposed to a professional or business, career.”¹¹ The second goal is a loftier goal.¹² As described by one scholar, academic freedom exists to ensure that society has “the benefit of honest judgment and independent criticism which otherwise might be withheld because of fear of offending a dominant social group or transient social attitude.”¹³ In *Sweezy v. State of New Hampshire*, the U.S. Supreme Court dramatically described the significance of academic freedom:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹⁴

In general, tenure protects academic freedom by ensuring that faculty cannot be summarily dismissed or sanctioned at will.¹⁵ As discussed below, institutions must have adequate reasons to dismiss tenured faculty and the faculty member facing termination must have the opportunity to refute the reasons for dismissal.

In popular culture, academic tenure is often thought of as a guarantee of lifetime employment.¹⁶ But this description is clearly untrue. Even the American Association of University Professors (AAUP), an organization that exists to champion academic freedom and economic security for university faculty,¹⁷ admits that tenure “accurately and unequivocally defined,

10. *Id.*

11. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U.L. REV. 67, 70 (2006).

12. *See Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

13. CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES AND THE LAW* 4 (1959).

14. 354 U.S. 234, 250 (1957).

15. ARVAL A. MORRIS, *DISMISSAL OF TENURED HIGHER EDUCATION FACULTY: LEGAL IMPLICATIONS OF THE ELIMINATION OF MANDATORY RETIREMENT* 9 (1992); Adams, *supra* note 11, at 70. *But see* Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs after Garcetti v. Ceballos?*, 40 CAP. U.L. REV. 265, 265–66 (2012) (noting the doctrine of academic freedom and the associated protections formerly afforded to faculty member speech have been greatly eroded since 2006).

16. MORRIS, *supra* note 15, at 7.

17. The AAUP’s full mission “is to advance academic freedom and shared gov-

lays no claim whatever to a guarantee of lifetime employment.”¹⁸ The AAUP notes that tenure is merely a statement of formal assurance that “the individual’s professional security and academic freedom will not be placed in question without the observance of full academic due process.”¹⁹ As described by one scholar, “tenure essentially requires fairness before one is dismissed from a position, thereby giving expectation of continued employment.”²⁰ U.S. courts also reiterate that tenure does not constitute a guarantee of life employment.²¹ As noted by the Supreme Court of Washington, it “is not a license for activity at variance with job related procedures and requirements” and it does not “encompass activities which are internally destructive to the proper function of the university or disruptive to the education process.”²² While there may be an expectation of continued employment, faculty can still be terminated for cause.²³

Tenure can also have a very different meaning in private, as opposed to public, institutions. Tenured faculty in public institutions have a “property interest” in continued employment via state statutes and the Fourteenth Amendment, but faculty in private institutions may²⁴ only have a contractual interest in continued employment.²⁵ In private institutions, tenure is

ernance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education’s contribution to the common good.” *Mission*, AAUP, <http://www.aaup.org/about/mission-description> (last visited Oct. 15, 2014).

18. William Van Alstyne, *Tenure: A Summary, Explanation and “Defense”*, 57 AAUP BULL. 328, 328 (1971). One common legal definition is “a status granted, usually after a probationary period, which protects a teacher from dismissal except for serious misconduct or incompetence.” *Drans v. Providence Coll.*, 383 A.2d 1033, 1039 (R.I. 1978).

19. Van Alstyne, *supra* note 18, at 328.

20. Fishman, *supra* note 1, at 162.

21. *Am. Ass’n of Univ. Professors v. Bloomfield Coll.*, 322 A.2d 846, 853 (N.J. Super. Ct. Ch. Div. 1974), *aff’d*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975) (“Although academic tenure does not constitute a guarantee of life employment . . . it denotes clearly defined limitations upon the institution’s power to terminate the teacher’s services.”).

22. *Stastny v. Bd. of Trs.*, 647 P.2d 496, 504 (Wash. Ct. App. 1982).

23. *Lyman v. Swartley*, 385 F. Supp. 661, 665 (D. Idaho 1974) (“Tenure as a legal right means a reasonable expectation of continued employment so long as that employment is performed properly.”). Union employees and civil servants have similar employment protections. Fishman, *supra* note 1, at 173; Van Alstyne, *supra* note 18, at 329.

24. See John M. Badaglia, Comment, *The Decline of Tenure: The Sixth Circuit’s Interpretation of Academic Tenure’s Substantive Protections*, 44 SETON HALL L. REV. 905, 919–29 (2014) (discussing decisions with opposite rulings on the issue of whether the undefined contractual term “tenure” implies a continuing employment relationship in private institutions).

25. *Perry v. Sindermann*, 408 U.S. 593, 598–99 (1972); *Stensrud v. Mayville*

defined by the contract between the faculty member and the institution.²⁶ When interpreting this contract, courts look to the individual employment contract,²⁷ the faculty handbook,²⁸ and sometimes, if incorporated by reference, the AAUP's original definition of tenure as set forth in its 1940 Statement of Principles of Academic Freedom²⁹ or similar standards set forth by an applicable accrediting agency.³⁰ It is important to note the Sixth Circuit has recently ruled that, absent specific language in the contract, the term tenure does not imply any expectation of employment beyond the current academic year.³¹ However, this interpretation is the sub-

State Coll., 368 N.W.2d 519, 521 (N.D. 1985); *Trimble v. W. Va. Bd. of Dirs.*, 549 S.E.2d 294, 301 (W. Va. 2001) (“Indeed, it is well-settled, and we so hold, that a tenured teacher [in a state institution] has a protected property interest in his/her position, which raises constitutional due process considerations when a teacher is faced with termination of his/her employment.”).

26. *Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558, 562 (6th Cir. 2012); *Gray v. Mundelein Coll.*, 695 N.E.2d 1379, 1386 (Ill. App. Ct. 1998) (finding the terms of faculty manual controlled over “custom and usage” evidence relating to the circumstances under which the defendant could terminate tenure). Tenured professors dismissed from private institutions may seek legal recourse through an action for breach of contract. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 660 (5th ed. 2013) (noting that tenure is a contractual right defined by the terms of the contract); *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 428 (Pa. 2001); *Fishman*, *supra* note 1, at 169.

27. *Figal v. Vanderbilt Univ.*, No. M2012-02516-COA-R3-CV, 2013 Tenn. App. LEXIS 656, at *21 (Tenn. Ct. App. Sept. 27, 2013) (“As outlined above, the terms of Vanderbilt’s contract with Dr. Figal are contained in the faculty manual, the college rules, and the memoranda generated at the time of her reappointments.”).

28. *Otero-Burgos v. Inter Am. Univ.*, 558 F.3d 1, 10 (1st Cir. 2009) (“The parties agree that IAU’s Faculty Handbook sets forth the terms of Otero-Burgos’s tenure contract.”). At most institutions, the handbook describes the standards the institution will employ to determine whether a tenured faculty should be terminated and the procedures to be used in effecting that decision. Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 282–84 (1977).

29. *CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW* 93 (Joseph Beckham & David Dagley eds., 2005); *see, e.g., Krotkoff v. Goucher Coll.*, 585 F.2d 675, 678 (4th Cir. 1978); *Adamian v. Jacobsen*, 523 F.2d 929, 932 (9th Cir. 1975); *Hill v. Talladega Coll.*, 502 So.2d 735, 737 (Ala. 1987); *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 846 (D.C. Cir. 1975); *Karlen v. N.Y. Univ.*, 464 F. Supp. 704, 707 (S.D.N.Y. 1979); *Drans v. Providence Coll.*, 410 A.2d 992, 994 (R.I. 1980). Some institutions directly or indirectly incorporate the AAUP policy. NORMA M. GOONEN & RACHEL S. BLECHMAN, *HIGHER EDUCATION ADMINISTRATION: A GUIDE TO LEGAL, ETHICAL, AND PRACTICAL ISSUES* 104 (1999).

30. *Branham*, 689 F.3d at 562 (noting the employment agreement could have incorporated standards from the American Bar Association); *see also Browzin*, 527 F.2d at 845–46 (using recommended regulations promulgated by the American Association of University Professors to determine contractual rights); *Bason v. Am. Univ.*, 414 A.2d 522, 525 (D.C. 1980) (using the bylaws of the Association of American Law Schools to interpret contractual term).

31. *Branham*, 689 F.3d at 562–63.

ject of some dispute,³² and at least one other court has found that the term does, by itself, imply indefinite employment absent circumstances justifying termination for cause.³³

In public institutions, the tenure system is defined by the aforementioned sources plus applicable statutes and administrative regulations.³⁴ As a result, tenured faculty at public institutions have a protectable property interest in continued employment,³⁵ limited by college or university policy, that gives additional protections set forth by statute and the Fourteenth Amendment.³⁶ In public institutions, a successful legal challenge could result in both monetary damages and reinstatement of the terminated faculty member.³⁷ In private institutions, reinstatement is unlikely because many courts are reluctant to order specific performance of a personal services contract.³⁸

32. Badagliacca, *supra* note 24, at 919–29 (discussing decisions with opposite rulings on the issue of whether the undefined contractual term “tenure” implies a continuing employment relationship in private institutions).

33. *Collins v. Parsons Coll.*, 203 N.W.2d 594, 597–98 (Iowa 1973).

34. *See Cohen v. Bd. of Trs.*, 867 F.2d 1455, 1460–61 (3d Cir. 1989) (delineating tenure contractual terms in New Jersey statutes); KAPLIN & LEE, *supra* note 26, at 614; *see also Developments in the Law*, *supra* note 12, at 1099–1100.

35. *See Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972) (noting Wisconsin tenure statutes could create a property interest in tenure); *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972) (finding the statute and the college’s unwritten common law created a “de facto” tenure system which created a property interest that obligated the college to grant the professor a pre-termination hearing); *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974) (holding that a tenured public employee’s property interest is defined by the terms of the statute that created the property interest); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 517 (10th Cir. 1998); *Moore v. Warwick Pub. Sch. Dist.*, 794 F.2d 322, 328–30 (8th Cir. 1986); *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 507 n.2 (8th Cir. 1986); *Stermetz v. Harper*, 763 F.2d 366, 367 (8th Cir. 1985); *O’Neal v. City of Hot Springs Nat’l Park*, 756 F.2d 61, 62–63 (8th Cir. 1985); *Miller v. Dean*, 552 F.2d 266, 268 (8th Cir. 1977); *Fisher v. Snyder*, 476 F.2d 375, 376–77 (8th Cir. 1973). Any protection attributable to the Fourteenth Amendment is limited to terminations for constitutionally impermissible reasons, such as arbitrary or capricious decisions, or terminations based on race, religion, or earlier exercise of freedom of expression. *Kirschenbaum v. Northwestern Univ.*, 728 N.E.2d 752 (Ill. App. 1st Dist. 2000); *Johnson v. Bd. of Regents*, 377 F. Supp. 227, 238 (W.D. Wis. 1974), *aff’d mem.*, 510 F.2d 975 (7th Cir. 1975); *cf. Rozman v. Elliott*, 335 F. Supp. 1086, 1088 (D. Neb. 1971) (discussing a Fourteenth Amendment issue involving non-tenured faculty member); Timothy B. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J.C. & U.L. 419, 421–22 (1984).

36. As stated by one court, tenure at a public institution “does not grant any greater rights, either substantive or procedural, than the policy that defines the term.” *Kirschenbaum*, 728 N.E.2d at 762.

37. MORRIS, *supra* note 15, at 29.

38. *Id.*

III. TERMINATION FOR CAUSE

Tenure systems generally protect tenured faculty from arbitrary dismissal by limiting terminations to instances of “adequate cause” or circumstances of financial exigency within the institution.³⁹ This requirement of a specified cause for dismissal has been called “the heart of the tenure system.”⁴⁰ The AAUP describes adequate cause very broadly, noting that such dismissal “will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”⁴¹ In 1973, a joint commission on academic tenure in higher education recommended that adequate cause in faculty dismissal proceedings should be limited to “(a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual’s fulfillment of his institutional responsibilities.”⁴² Institutions typically provide a more detailed list of behaviors that constitute adequate cause.⁴³ Common examples include incompetence or dishonesty in teaching or research, substantial and manifest neglect of duty, insubordination by refusal to abide by legitimate and reasonable directions from administration, improper personal conduct such as moral turpitude or criminal conduct that impairs the faculty member’s ability to fulfill institutional responsibilities, and physical or mental inability to perform assigned duties.⁴⁴ Less common examples include “malicious gossip or public verbal abuse”⁴⁵ and “[f]ailure to maintain the level of professional excellence and ability demonstrated by other members of the faculty in the department or division of the institution.”⁴⁶

39. 1940 STATEMENT OF PRINCIPLES, *supra* note 9, at 4 (stating tenured professors “should be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigencies.”); *see also* KAPLIN & LEE, *supra* note 26, at 616.

40. *Developments in the Law*, *supra* note 12, at 1094.

41. Committee A on Academic Freedom and Tenure, *Recommended Institutional Regulations on Academic Freedom and Tenure*, ACADEME July–Aug. 2013, at 61, 71 n. 15, available at <http://www.aaup.org/sites/default/files/RIR2013.pdf>. “Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members of their professional capacities as teachers or researchers.” *Id.* at 65.

42. COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *FACULTY TENURE; A REPORT AND RECOMMENDATIONS* 75 (William R. Keast & John W. Macy eds., 1973).

43. *See* BISWANATH SHAW, *ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION* 62–65 (1971) (finding twenty-five different grounds for termination at approximately forty different universities).

44. *Morris v. Clifford*, 903 F.2d 574, 576 n.4 (8th Cir. 1990) (citing *UNIVERSITY OF NORTH DAKOTA FACULTY HANDBOOK*).

45. Larry G. Gerber & Larry D. Watson, *Academic Freedom and Tenure: Stillman College (Alabama)*, ACADEME, Mar.–Apr. 2009, at 94.

46. TENN. CODE ANN. § 49-8-302(7) (2014).

If a faculty member engages in such activities, the institution may terminate his or her employment. The following section highlights the major legal arguments proffered by faculty terminated for deadwood behavior.

A. Common Arguments Challenging For-Cause Termination Decisions

Beyond the occasional claim of pre-textual discrimination⁴⁷ or retaliation for exercise of free speech⁴⁸ or academic freedom⁴⁹ most legal challenges to the termination of deadwood tenured faculty center on arguments alleging procedural violations or lack of evidence to support the allegations of for-cause behavior.⁵⁰

At private institutions, tenure provisions incorporated into the employment contract typically detail a specific pre-termination process outlining how a tenured professor can be terminated for cause.⁵¹ A terminated pro-

47. *See, e.g.*, *Bidasaria v. Cent. Mich. Univ.*, No. 12-2030, 2013 U.S. App. LEXIS 19649, at *5 (6th Cir. March 25, 2013) (alleging the stated reasons for termination—missing classes and missing faculty preparation week—were merely a pretext for discrimination based on national origin).

48. *See, e.g.*, *Harris v. Bd. of Trs.*, 542 N.E.2d 261, 267–68 (Mass. 1989) (dismissing tenured faculty member's claim that his termination was prompted by the exercise of free speech, rather than the stated reasons of hostile relations with students and colleagues).

49. *MORRIS*, *supra* note 15, at 30.

50. Some terminated faculty members have argued that the institution's definition of adequate cause lacked enough specificity so as to provide adequate notice that certain behaviors would justify termination. In one case, a terminated faculty member claimed the institution's definition of adequate cause—"failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime involving moral turpitude"—was unconstitutionally vague. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1127 (3d Cir. 1992). The Third Circuit rejected this argument, noting that such language was specific enough for any "ordinary person using his common sense and general knowledge of employer-employee relationships." *Id.* at 1137. Numerous appellate decisions demonstrate that courts seem unwilling to apply the vagueness doctrine in this context. *See Stastny v. Bd. of Trs.*, 647 P.2d 496, 504 (Wash. 1982); *Garrett v. Matthews*, 474 F. Supp. 594, 597 (N.D. Ala. 1979) (upholding the revocation of tenure).

51. *See, e.g.*, *Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558, 563–64 (6th Cir. 2012); *McConnell v. Howard Univ.*, 818 F.2d 58, 66–67 (D.C. Cir. 1987). The 1940 Statement of Principles on Academic Freedom and Tenure calls for the following due process safeguards:

Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompa-

fessor may argue that the institution did not precisely follow the specified pre-termination process and therefore breached the employment contract.⁵² For example, in *Branham v. Thomas M. Cooley Law School*, a tenured law professor refused to teach a course in constitutional law, citing her preference to teach a course in criminal law.⁵³ The Dean abruptly dismissed her, ignoring the process set forth in her employment contract that required a pre-termination hearing by her colleagues.⁵⁴ The tenured professor filed suit and the court determined that the institution had breached the employment agreement by not following the dismissal process as outlined in her employment contract and ordered that she be given a pre-termination hearing.⁵⁵

In public institutions, the procedural argument often centers upon the minimum standards for due process as set forth by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*.⁵⁶ In *Loudermill*, the Court stated that the terminated public employee is entitled to oral or written notice of the charges and a “pre-termination hearing” that gives the employee the opportunity to present “his side of the story” before the termination takes place.⁵⁷ The goal of the hearing is to provide “an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the

nied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher’s own or from other institutions.

1940 STATEMENT OF PRINCIPLES, *supra* note 9, at 4. Some private institutions have termination procedures that are fundamentally less than these suggested standards. Linda L. Carroll & John C. Shelley, *Academic Freedom and Tenure: Charleston Southern University*, ACADEME, Jan.–Feb. 2001, at 63.

52. *Branham*, 689 F.3d at 563–64. *See generally* Fishman, *supra* note 1, at 170–71.

53. *Branham*, 689 F.3d at 561.

54. *Id.*

55. *Id.*; *see also* Lyman v. Swartley, 385 F. Supp. 661, 665 (D. Idaho 1974) (“Here, the Board, without affording plaintiff any opportunity to respond, determined, unilaterally, that cause for discharge existed and purported to terminate the employment. This action deprived plaintiff of a valuable property right without due process of law in violation of the safeguards provided by the United States Constitution.”). The school then held a pre-termination hearing and the panel of her peers recommended dismissal. *Branham*, 689 F.3d at 561. The district court then entered final judgment against the terminated professor. *Id.* The terminated professor’s subsequent appeal was unsuccessful. *Id.*

56. 470 U.S. 532 (1985).

57. *Id.* at 542–48. The court found due process “requires ‘some kind of a hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” *Id.* at 542. Also, due process requires any “post-termination administrative procedures as provided by the [state] statute.” *Id.* at 548.

employee are true and support the proposed action.”⁵⁸ However, the Court noted that something less than a full evidentiary hearing is sufficient.⁵⁹

Subsequent courts have expanded upon the *Loudermill* holding. For example, the Eighth Circuit concluded that due process proceedings for a tenured professor require: (1) notice in sufficient detail to permit the professor to refute the charges; (2) names of those whose charges constitute the basis for the termination and the facts upon which they rely; (3) reasonable time to prepare and an opportunity to present a defense; and (4) an impartial tribunal.⁶⁰ Other courts specify that the institution must ultimately provide a final statement of the grounds for termination.⁶¹ If this final statement does not provide a clear statement of the reasons for dismissal and the evidence supporting those reasons, the statement does not constitute sufficient due process.⁶² This final requirement cuts to the heart of most judicial challenges—whether there was enough substance, or evidence behind the allegations, to prove there was adequate cause for dismissal.⁶³ Tenured faculty members have a substantive due process right to be free from discharge for arbitrary and capricious reasons or “reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact.”⁶⁴ A review-

58. *Id.* at 545–46. The details governing the operation of this hearing are vague, but as stated by one Federal District Court Judge, there “is not a single case authority known to this court . . . that suggests that this particular brand of procedural due process requires the incorporation by reference of both the Federal Rules of Evidence (particularly, the hearsay rules in Rules 801-804), and the Federal Rules of Civil Procedure (particularly, the discovery rules under Rules 26 through 37).” *Fong v. Purdue Univ.*, 692 F. Supp. 930, 950 (N.D. Ind. 1988).

59. *Loudermill*, 470 U.S. at 545. This hearing can still be burdensome and time consuming for the institution. *See, e.g., Bowling v. Scott*, 587 F.2d 229, 230 (5th Cir. 1979) (noting that during the course of the termination proceedings the hearing committee met fourteen times, heard evidence from twelve witnesses and were presented with 175 evidentiary exhibits).

60. *Riggins v. Bd. of Regents*, 790 F.2d 707, 712 (8th Cir. 1986) (quoting *King v. Univ. of Minn.*, 774 F.2d 224, 228 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986)); *see also Levitt v. Univ. of Tex.*, 759 F.2d 1224, 1228 (5th Cir. 1985) (noting the impartial tribunal must have “some academic expertise and an apparent impartiality toward the charges.”). In *Chung v. Park*, 377 F. Supp. 524 (M.D. Pa. 1974), dismissal proceedings were characterized as comporting with the “bare minima of ‘due process’” when the faculty member was given a lengthy hearing during which he was “fully able to cross-examine his accusers, subpoena witnesses, present evidence, and, in effect, demand a full accounting from the college as to whether the decision . . . to fire him was supported.” *Id.* at 529.

61. *See, e.g., Potemra v. Ping*, 462 F. Supp. 328, 332 (E.D. Ohio 1978).

62. *Clarke v. West Va. Bd. of Regents*, 279 S.E.2d 169, 177 (W. Va. 1981).

63. *See Newman v. Burgin*, 930 F.2d 955, 962–63 (1st Cir. 1991) (recognizing an arbitrary decision that significantly affects a tenured professor’s employment status may violate substantive due process).

64. *Morris v. Clifford*, 903 F.2d 574, 577 (8th Cir. 1990) (recognizing tenured professor’s due process right to be free from discharge for “arbitrary and capricious” reasons); *see GOONEN, supra* note 29, at 102 (“The substantive due process protection

ing court will not determine *de novo* whether it would have terminated the faculty member.⁶⁵ Instead, the review is deemed as one of substantial evidence.⁶⁶ Quite simply, if the termination decision was based on substantial evidence, then the court will affirm the decision.⁶⁷ What constitutes “substantial evidence” can vary among jurisdictions. For example, an oft-cited definition by the U.S. Supreme Court states that “substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶⁸ The Kansas Supreme Court defines substantial evidence as that “which possesses relevance and substance and which furnishes a substantial basis of fact from which the issue can reasonably be resolved.”⁶⁹ The Supreme Court of North Dakota describes the analysis as “whether a reasoning mind reasonably could have determined that the factual conclusions reached [by the hearing panel] were proved by the weight of the evidence.”⁷⁰ A constant refrain among definitions is that the evidence must not point to only one conclusion; the mere fact that differing opinions could be reached based on the same facts does not mean that the decision was inappropriate.⁷¹

provided by the Fourteenth Amendment guarantees that the reasons for terminating a tenured faculty member at a public institution are not over broad, arbitrary and capricious or otherwise impair a constitutional right.”)

65. *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 508 (8th Cir. 1986); *King*, 774 F.2d at 227; *see Wood v. Strickland*, 420 U.S. 308, 325–26 (1975).

66. *Agarwal*, 788 F.2d at 508 (“The district court correctly held that a court’s role is limited to examining the record of University proceedings to determine whether there was substantial evidence to support its determination.”); *King*, 774 F.2d at 227 (“It is, of course, not for the District Court or for this Court to determine *de novo* whether we would terminate [him] based on the evidence presented during the [University’s due process] hearings . . .”); *MORRIS*, *supra* note 15, at 24.

67. *Agarwal*, 788 F.2d at 508.

68. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Court goes on to note that “[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.” *Id.* at 230.

69. *Haddock v. Bd. of Educ.*, 661 P.2d 368, 372 (Kan. 1983) (quoting *Kelly v. Kansas City*, 648 P.2d 225, 230 (Kan. 1982)); *see Morton v. Mooney*, 33 P. 2d 262, 265–66 (Mont. 1934) (“Substantial evidence is such as will convince reasonable men and on which such reasonable men may not reasonably differ as to whether it establishes the plaintiff’s case, and, if all reasonable men must conclude that the evidence does not establish such case, then it is not substantial evidence.”).

70. *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163, 169 (N.D. 2004) (“Because a *de novo* review of Peterson’s breach of contract claim would render the Board’s administrative review procedures meaningless . . . we are persuaded that the proper standard for courts to review a substantive Board decision dismissing a tenured faculty member for cause is determining whether a reasoning mind could have reasonably determined that the factual conclusions were supported by, as the policy manual provides, clear and convincing evidence.”).

71. *Id.* at 173; *Bernold v. Bd. of Governors*, 683 S.E.2d 428, 432 (N.C. Ct. App. 2009) (“Our task is not to comb the record for evidence that would support a different outcome from that reached by the Board, but rather to look for substantial evidence to

A review of reported case law reveals only a handful of instances where a tenured professor successfully challenged the institution's decision to terminate for alleged deadwood behaviors. In *State ex rel. Richardson v. Board of Regents*, the court determined that innocuous statements of disagreement with the University President did not constitute insubordination so as to justify adequate cause for dismissal.⁷² In *Trimble v. West Virginia Board of Directors*, the West Virginia Court of Appeals determined that a tenured professor's refusal to use a new computer software program to create his syllabus did not constitute sufficient insubordination to justify his dismissal especially in light of his previous "unblemished" record at the University.⁷³ In the context of a private institution, the court in *McConnell v. Howard University* determined that there was sufficient evidence to have a trial on the issue of whether the professor "neglected" his duties when he refused to teach a class that contained a student who openly called him a racist.⁷⁴ The *McConnell* case also provides an example of how a tenured professor successfully argued that the private institution did not follow the termination procedures set forth in its own employment contract.⁷⁵ Finally, in *State ex rel. Ball v. McPhee*, the Wisconsin Supreme Court reversed a termination of a tenured professor at a public institution because of numerous improprieties that resulted in an unfair pre-termination hearing.⁷⁶ These improprieties were notable. First, one of the members of the Board of Regents both prosecuted the case and took part in the ultimate decision to terminate.⁷⁷ Second, multiple witnesses at the hearing openly admitted they were afraid to testify in favor of the professor because of possible reprisals.⁷⁸ When the witnesses asked if they would be protected from such reprisals, they were given no such assurances.⁷⁹ Third, the University lost some of the professor's evidentiary exhibits, while the University's exhibits

support the decision.").

72. 269 P.2d 265, 275-76 (Nev. 1954).

73. 549 S.E.2d 294, 304 (W. Va. 2001) (ordering back pay and reinstatement). The Court noted "constitutional due process is denied when a tenured public higher education teacher, who has a previously unblemished record, is immediately terminated for an incident of insubordination that is minor in its consequences." *Id.*

74. *McConnell v. Howard Univ.*, 818 F.2d 58, 60 (D.C. Cir. 1987).

75. *Id.* at 66-67; see *Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558, 561 (6th Cir. 2012) (noting in the procedural history of the case how the tenured professor had been previously granted a remand for a proper pre-termination hearing).

76. 94 N.W.2d 711, 717-22 (Wis. 1959); see also *Morris v. Clifford*, 903 F.2d 574, 579 (8th Cir. 1990) (holding a professor's substantive due process claim against university personnel in their individual capacities should not be dismissed on pretrial summary judgment).

77. *McPhee*, 94 N.W.2d at 721-22.

78. *Id.* at 720.

79. *Id.*

were preserved for appeal.⁸⁰ Finally, the Board provided no factual findings to justify its decision and merely indicated that the allegations of misconduct were sustained.⁸¹

A thorough review of reported case law reveals that these cases are truly outliers. The vast majority of reported decisions suggest that when an institution terminates a tenured faculty member for poor teaching, incompetent scholarship, insubordination, or disruptive interactions with fellow employees, courts are highly unlikely to overturn that decision.⁸²

IV. CASE LAW SUPPORTING THE TERMINATION OF DEADWOOD FACULTY

The following sections identify case law related to each of the aforementioned types of deadwood behavior. Although the sections are divided into specific categories of behavior, it should be noted that in nearly every instance there was evidence to support termination for more than one type of deadwood behavior.

A. Teaching

Courts routinely affirm terminations of tenured faculty based on allegations of incompetent teaching.⁸³ Beyond consistently poor course evaluations⁸⁴ and broad claims of poor teaching,⁸⁵ more specific examples of allegations that have withstood legal challenge include faculty members that failed to cover the assigned course material,⁸⁶ spent an inordinate amount of time on non-pertinent matters and routinely showed irrelevant films,⁸⁷ failed to meet classes as scheduled,⁸⁸ and failed to observe office hours.⁸⁹

80. *Id.* at 721.

81. *Id.* at 717–18.

82. *See generally* ROBERT M. HENDRICKSON, *THE COLLEGES, THEIR CONSTITUENCIES, AND THE COURTS* 46–47 (1991); MORRIS, *supra* note 15, at 23.

83. MORRIS, *supra* note 15, at 23 (“Courts are particularly loathe to find violations of ‘substantive’ due process of law and to substitute their decisions for final dismissal decisions made by college or university officials whenever the sole question in a dismissal case is one of professional competence or responsibility, and especially so when institutional decisions solely involve questions concerning what constitutes adequate teaching or research.”).

84. *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 508 (8th Cir. 1986).

85. *King v. Univ. of Minn.*, 774 F.2d 224, 226 (8th Cir. 1985); *Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218, 221 (E.D.N.C. 1976); *Chung v. Park*, 377 F. Supp. 524, 526 (M.D. Pa. 1974); *Peterson v. N.D. Univ. System*, 678 N.W.2d 163, 166 (N.D. 2004).

86. *Riggin v. Bd. of Trs.*, 489 N.E.2d 616, 619 (Ind. Ct. App. 1986); *Saunders v. Reorganized Sch. Dist.*, 520 S.W.2d 29, 35 (Mo. 1975).

87. *Riggin*, 489 N.E.2d at 626.

88. *Id.* at 619 (“frequently failed to meet classes as scheduled, at the prescribed hour or for the prescribed length of time”); *Peterson*, 678 N.W.2d at 166 (ending a class one month early); *McKenna v. Bowling Green State Univ.*, No. 13-4054, 2014

Other examples include faculty who refused to answer questions inside or outside of class,⁹⁰ those who were belligerent, rude, and unprofessional in class,⁹¹ those who retaliated against students,⁹² and those who were uncompassionate and inflexible in administering classroom policies.⁹³ One professor was terminated for refusing to follow assigned course content and for simply asking the students to memorize the glossary of a textbook.⁹⁴ Another professor was terminated after he gave a majority of the students failing grades, although he claimed the students had “conspired to flunk the course to harass” him.⁹⁵

Occasionally, arguments that attempt to blur the lines between poor teaching and the professor’s right to control the content and method of instruction have found some traction with appellate courts.⁹⁶ However, courts have been able to distinguish between academic freedom and poor teaching.⁹⁷ In total, available case law shows that courts are willing to support an institution’s decision to terminate for incompetent teaching, so long as the decision is supported by substantial evidence of poor teaching behavior.⁹⁸

B. Research

One of a professor’s most important roles in society is the promotion of research that would not otherwise take place in the private sector.⁹⁹ The

U.S. App. LEXIS 11200, at *1 (6th Cir. June 13, 2014); *see Skehan v. Bd. of Trs. of Bloomsburg State Coll.*, 358 F. Supp. 430 (M.D. Pa. 1973) (nonrenewal of untenured faculty member).

89. *Riggin*, 489 N.E.2d at 619; *Garrett v. Matthews*, 474 F. Supp. 594, 597 (N.D. Ala. 1979) (upholding the revocation of tenure).

90. *Jawa*, 426 F. Supp. at 222; *Potemra v. Ping*, 462 F. Supp. 328, 330 (E.D. Ohio 1978); *Peterson*, 678 N.W.2d at 173 (refusing to respond to student questions).

91. *Potemra*, 462 F. Supp. at 330; *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 506 (8th Cir. 1986).

92. *Cameron v. Ariz. Bd. of Regents*, 1 CA-CV 10-0323, 2011 Ariz. App. Unpub. LEXIS 1129, at *3 (Ariz. Ct. App. Aug. 30, 2011).

93. *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 48–50 (Tenn. 1993).

94. *Saunders v. Reorganized Sch. Dist.*, 520 S.W.2d 29, 32 (Mo. 1975).

95. *Potemra*, 462 F. Supp. at 331.

96. *See* STEVEN G. POSKANZER, *HIGHER EDUCATION LAW: THE FACULTY* 73–80 (2002) (noting case law where courts have found that the style of teaching falls within the definition of academic freedom); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 330 (D.N.H. 1994) (“Academic freedom permits faculty members freedom to choose specific pedagogic techniques or examples to convey the lesson they are trying to impart to their students”); GOONEN, *supra* note 29, at 102.

97. *Riggin v. Bd. of Trs.*, 489 N.E.2d 616, 629 (Ind. Ct. App. 1986) (citing *Petrie v. Forest Hills Sch. Dist. Bd. of Educ.*, 449 N.E.2d 786 (Ohio Ct. App. 1982)).

98. *Lovain*, *supra* note 35, at 423.

99. H. Lorne Carmichael, *Incentive in Academics: Why is there Tenure?*, 96 J. POL. ECON. 453, 455 (1988).

job security provided by a tenure system allows faculty to investigate topics and matters that may not ultimately result in a scholarly article or other output¹⁰⁰ and to take chances with their research without fear that failure will lead to termination.¹⁰¹ However, as described above, most tenure programs explicitly list incompetent research as a specific example of adequate cause for dismissal.¹⁰² The natural question is, what makes one an incompetent researcher? Three cases offer guidance in this area. In the first, the institution's decision to terminate for failing to engage in research or scholarly activities for at least ten years was upheld on appeal.¹⁰³ In the second, "undocumented" and "inadequate" research was one of many reasons listed for the termination.¹⁰⁴ In the last, an institution terminated a tenured faculty member for failing to seek and obtain outside funding despite numerous warnings to do so.¹⁰⁵ These rulings suggest that a lack of objective evidence of research output qualifies as incompetence. A question not addressed is whether a court would support an institution's determination that a tenured faculty member's research output was of such an inferior quality that it constitutes incompetent research. A review of decisions where faculty members have sought to reverse the institution's decision to deny them academic tenure suggest that courts may be unwilling to overturn an institution's finding of research incompetence.

Courts give strong deference to an institution's decision not to grant tenure based upon a subjective peer evaluation of the strength of the applicant's scholarly research.¹⁰⁶ As noted in *Pomona College v. Superior Court*, courts realize the importance of not over-stepping their bounds when it comes to reviewing a specific faculty member's research record in the context of granting or denying tenure:

100. Fishman, *supra* note 1, at 182–83.

101. *Id.*

102. *Morris v. Clifford*, 903 F.2d 574, 576 n.4 (8th Cir. 1990) (citing UNIVERSITY OF NORTH DAKOTA FACULTY HANDBOOK); *Committee A*, *supra* note 41, at 65 ("Adequate cause for a dismissal will be related, directly and substantially, to their fitness of the faculty member in his professional capacity as a teacher or researcher."); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1128 (3d Cir. 1992) ("failure to maintain standards of sound scholarship"); *COMMISSION ON ACADEMIC TENURE*, *supra* note 42, at 75 ("demonstrated incompetence or dishonesty in teaching or research"); *TENN. CODE ANN. § 49-8-302(1)* (2014) ("[i]ncompetence or dishonesty in teaching or research").

103. *Riggin v. Bd. of Trs.*, 489 N.E.2d 616, 625–26 (Ind. Ct. App. 1986).

104. *King v. Univ. of Minn.*, 774 F.2d 224, 225–26 (8th Cir. 1985).

105. *Wiest v. State*, No. 89, 953, 2003 Kan. App. LEXIS 281, at *1 (Kan. Ct. App. Nov. 7, 2003).

106. *Goswami v. DePaul Univ.*, No. 12 C 7161, 2014 U.S. Dist. LEXIS 46509, at *4 (N.D. Ill. Apr. 7, 2014) ("As we shall see, all the cases hold that assessments of 'scholarship' by universities are inherently subjective and not measurable by objective criteria."); *see Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984) ("[T]here is no common unit of measure by which to judge scholarship").

Only one group of people is suited to undertake the responsibility of making these decisions: the candidate's academic peers who are knowledgeable about the candidate's chosen field of study and about the particular needs of the institution. These academic peers, unlike nonacademics, are equipped to evaluate the candidate's teaching and research according to their conformity with methodological principles agreed upon by the entire academic community. They also have the knowledge to meaningfully evaluate the candidate's contributions within his or her particular field of study as well as the relevance of those contributions to the goals of the particular institution.¹⁰⁷

While there is an obvious distinction between denying one's application for tenure and revoking tenure, at least one court seems to suggest the distinction is not so great. In *Gutkin v. University of Southern California*, a tenured faculty member argued that a jury, rather than a panel of academic peers as directed in his tenure contract, had the proper academic expertise to determine whether there was adequate cause to terminate his employment for cause. The court flatly rejected this argument, specifically referencing the above quoted language from *Pomona College* and additionally stating that "such a determination still requires an assessment of whether the professor's conduct is consistent with or contrary to academic norms, which only academic peers, not lay jurors, are qualified to determine."¹⁰⁸ The court also noted that "[i]f a college or university has the 'essential freedom' to determine for itself 'who may teach'—as both this court and the United States Supreme Court have held—that necessarily includes the determination whether a faculty member who has tenure should be dismissed."¹⁰⁹ Though this decision dealt with whether it was appropriate for a tenured professor to refuse to teach certain courses, it still highlights that courts are unwilling to overturn cause determinations that have already been deemed appropriate by a panel of the terminated professor's peers.

C. Insubordination

Courts also consistently hold that tenure does not give a faculty member any special right to interfere in the efficient operation of his or her own educational institution.¹¹⁰ As described above, many faculty policies specifi-

107. *Pomona Coll. v. Superior Court*, 53 Cal. Rptr. 2d 662, 668 (Cal. Ct. App. 1996).

108. *Gutkin v. Univ. of S. Cal.*, 125 Cal. Rptr. 2d 115, 123 (Ct. App. 2002).

109. *Id.*

110. *Trimble v. W. Va. Bd. of Dirs.*, 549 S.E.2d 294, 302 (W. Va. 2001) (indicating tenure does not give a professor any "special privileges or immunities to interfere in the efficient operation of an educational institution"); see *Baughman v. Unified Sch. Dist.*, 10 P.3d 21, 24 (Kan. Ct. App. 2000); see also *Brooks*, *supra* note 2, at 357–58

cally list insubordination or neglect of duties as specific types of adequate cause for termination.¹¹¹ As noted by one court, “case law which defines ‘insubordination’ in the college or public school context is rather meager,”¹¹² but at least one court has defined it as “willful disregard of express or implied directions or such defiant attitude as to be equivalent thereto.”¹¹³ Acts of insubordination reflected in reported termination decisions include refusing to teach assigned courses,¹¹⁴ develop new courses,¹¹⁵ hold appropriate office hours,¹¹⁶ submit required reports,¹¹⁷ attend required faculty workshops,¹¹⁸ attend commencement,¹¹⁹ follow institution grading policies,¹²⁰ and serve on committees or participate in departmental affairs.¹²¹

On occasion, terminated faculty members argue that termination for insubordination is an infringement of their First Amendment right to free speech.¹²² Courts are alert for evidence of pre-textual dismissals,¹²³ but

(noting how insubordination quickly leads to a focus away from advancing academic goals to a competition to determine who will win the battle between faculty and administrator).

111. *Morris v. Clifford*, 903 F.2d 574, 576 n.4 (8th Cir. 1990) (citing UNIVERSITY OF NORTH DAKOTA FACULTY HANDBOOK).

112. *Butts v. Shepherd Coll.*, 569 S.E.2d 456, 458 (W. Va. 2002).

113. *State ex rel. Richardson v. Bd. of Regents*, 269 P.2d 265, 276 (Nev. 1954).

114. *See, e.g., Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558 (6th Cir. 2012) (private institution); *Smith v. Kent State Univ.*, 696 F.2d 476, 477 (6th Cir. 1983) (claiming to teach a course he had taught in the past would “somehow lower his standing among the academic community”); *Riggin v. Bd. of Trs.*, 489 N.E.2d 616 (Ind. Ct. App. 1986); *Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218 (E.D.N.C. 1976). In *Sabinson v. Trustees of Dartmouth College*, 999 A.2d 380 (N.H. 2010), the Supreme Court of New Hampshire dismissed a tenured professor’s claim that he had a contractual right to teach specific courses. *Cf. Cussler v. Univ. of Md.*, 430 F. Supp. 602, 608 (D. Md. 1977) (noting that faculty members must “adapt their schedules to conform [to] the needs of the department and the capabilities of other faculty members” as “[n]o faculty member has a vested right in any course”).

115. *See, e.g., Josberger v. Univ. of Tenn.*, 706 S.W.2d 300, 305–06 (Tenn. Ct. App. 1985).

116. *See, e.g., Heflin v. Kansas City*, 224 P.3d 1201, 1204–05 (Kan. App. 2010).

117. *See, e.g., Bates v. Sponberg*, 54 F.2d 325 (6th Cir. 1976); *Garrett v. Matthews*, 474 F. Supp. 594 (N.D. Ala. 1979) (upholding the revocation of tenure while noting the faculty member’s failure to comply with his superior’s request to supply a list of publications, failure to post and keep office hours, and failure to open mail from his supervisor).

118. *See, e.g., Shaw v. Bd. of Trs.*, 549 F.2d 929 (4th Cir. 1976).

119. *Id.*

120. *See, e.g., Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218, 221–22 (E.D.N.C. 1976) (rejecting plaintiff’s civil rights challenges as well).

121. *See, e.g., Bernold v. Bd. of Governors*, 683 S.E.2d 428, 429–30 (N.C. App. 2009); *Potemra v. Ping*, 462 F. Supp. 328, 330 (E.D. Ohio 1978).

122. *Johnson v. Lincoln Univ.*, 776 F.2d 443 (3d Cir. 1985).

123. *See, e.g., Daulton v. Affeldt*, 678 F.2d 487 (4th Cir. 1982) (nonrenewal of non-tenured professor); *Rampey v. Allen*, 501 F.2d 1090 (10th Cir. 1974) (nonrenewal of non-tenured professor); *Endress v. Brookdale Cmty. Coll.*, 364 A.2d 1080 (N.J. Su-

rarely find free speech violations in cases of alleged insubordination.¹²⁴ One court noted that a faculty member “does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct were verbalized,”¹²⁵ while another court noted that “bickering and running disputes with colleagues does not constitute a form of protected speech under the First Amendment.”¹²⁶ Similar arguments pertaining to academic freedom are also rarely persuasive.¹²⁷

D. Disruptive Interactions with Colleagues

Courts have long recognized the importance of a faculty member’s working relationship with his or her colleagues.¹²⁸ Case law indicates that courts are willing to uphold terminations if the faculty member’s actions are disruptive to the institution and its efficient operation.¹²⁹ Examples of affirmed terminations in this area include faculty members who have threatened and harassed peers,¹³⁰ refused to cooperate with administrators,¹³¹ disrespected the department dean and refused to cooperate with faculty and students,¹³² refused to cooperate with colleagues concerning teaching assignments and class scheduling,¹³³ or exhibited continuous increasing

per. Ct. App. Div. 1976) (nonrenewal of non-tenured professor). *See generally* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (defining the parameters of protected speech for high school teacher employed by state).

124. Lovain, *supra* note 35, at 428–29.

125. Chitwood v. Feaster, 468 F.2d 359, 361 (4th Cir. 1972) (dismissal of non-tenured faculty); *see* Phillips v. State Bd. of Regents, 863 S.W.2d 45, 51 (Tenn. 1993) (finding no merit to free speech violation when statements consisted of complaints about her supervisor rather than matters of public concern).

126. Jawa v. Fayetteville State Univ., 426 F. Supp. 218, 230 (E.D.N.C. 1976).

127. *See, e.g.*, Saunders v. Reorganized Sch. Dist., 520 S.W.2d 29, 35 (Mo. 1975).

128. Gregory M. Heiser, *Because the Stakes Are So Small: Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 KAN. L. REV. 385, 388 (2004); Adams, *supra* note 11, at 92 (“Tenured faculty members have a duty of collegiality in the fulfillment of their job responsibilities, specifically teaching, scholarship, and service.”). Moreover, collegiality is a foundation principle for tenure deriving from the notion of faculty self-governance.

129. Bernold v. Bd. of Governors, 683 S.E.2d 428, 432 (N.C. App. 2009) (“Petitioner relies on his argument that ‘lack of collegiality’ cannot constitute incompetence; however, he cites no authority that disruptive behavior cannot constitute incompetence.”); Bowling v. Scott, 587 F.2d 229, 230 (5th Cir. 1979) (“acts inimical to the efficient functioning of the Department of English.”); Heiser, *supra* note 128, at 388.

130. Fong v. Purdue Univ., 692 F. Supp. 930, 941–42 (N.D. Ind. 1988).

131. Kelly v. Kan. City. Kan. Cmty. Coll., 648 P.2d 225, 229–31 (Kan. 1982); Jawa, 426 F. Supp. at 224; *see also* Phillips v. State Bd. of Regents, 863 S.W.2d 45, 48 (Tenn. 1993) (“[l]ack of professional behavior towards peers, administrators, and staff”).

132. Johnson v. Alabama Agric. & Mech. Univ., 481 So. 2d 336, 336–37 (Ala. 1985).

133. Riggin v. Bd. of Trs., 489 N.E.2d 616, 620 (Ind. Ct. App. 1986).

patterns of controversy with other professional areas of the college.¹³⁴ Similarly, inadequate service to the college or university is occasionally listed amongst other reasons for termination.¹³⁵

V. CONCLUSION

Despite claims to the contrary, the tenure system does not create an impenetrable legal barrier that gives faculty members free reign to be ineffective teachers, incompetent researchers, insubordinate employees, and bad colleagues. The adequate cause standard gives academic institutions policing powers to both monitor and terminate underperforming tenured faculty.¹³⁶ Taxpayers and education consumers are not forced to subsidize academic incompetence. Judicial precedent shows how an institution providing a sufficient pre-termination hearing that produces substantial evidence of incompetence has little to fear from a judicial review of the termination decision.¹³⁷ Conversely, reported case law does not suggest that institutions are free to terminate tenured faculty for vindictive or petty reasons. Courts will not ignore the procedural and substantive safeguards of academic tenure. Courts will be quick to enforce the terminated professor's tenure rights in those rare instances where a tenured faculty member with a previously unblemished record is hastily terminated for a minor transgression,¹³⁸ or the institution utilizes a pre-termination hearing with

134. *Phillips*, 863 S.W.2d at 48 (“[I]ack of professional behavior towards peers, administrators, and staff”).

135. *Bernold v. Bd. of Governors*, 683 S.E.2d 428, 429–30 (N.C. App. 2009); *King v. Univ. of Minn.*, 774 F.2d 224, 225–26 (8th Cir. 1985); *Riggin*, 489 N.E.2d at 625–26; *Potemra v. Ping*, 462 F. Supp. 328, 330 (E.D. Ohio 1978).

136. *See Brooks*, *supra* note 2, at 357–58.

137. *MORRIS*, *supra* note 15, at 23 (“All American courts, whether federal or state, afford a considerably large amount of deference to personnel decisions made by institutions of higher education, including decisions involving dismissals of tenured faculty members, especially in cases that do not also involve any additional claims of constitutional rights such as academic freedom or free speech, or claims of violations of other constitutional or legal rights such as rights to due-process procedures.”). *But see McConnell v. Howard Univ.*, 818 F.2d 58, 69 (“[W]e do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many area of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases. The parties can supply such specialized knowledge through the use of expert testimony.”).

138. *Trimble v. W. Va. Bd. of Dirs.*, 549 S.E.2d 294, 305 (W. Va. 2001) (determining that a tenured professor's refusal to use a new computer software program to create his syllabus did not constitute sufficient insubordination to justify his dismissal especially in light of his previous “unblemished” record at the University); *see State ex rel. Richardson v. Bd. of Regents*, 269 P.2d 265 (Nev. 1954) (finding innocuous statements of disagreement with the University President did not constitute insubordination so as to justify adequate cause for dismissal).

glaring improprieties¹³⁹ or ignores the pre-termination hearing process altogether.¹⁴⁰

139. *State ex rel. Ball v. McPhee*, 94 N.W.2d 711, 719-22 (Wis. 1959).

140. *Lyman v. Swartley*, 385 F. Supp. 661, 665 (D. Idaho 1974).

TRANS* ISSUES FOR COLLEGES AND UNIVERSITIES: RECORDS, HOUSING, RESTROOMS, LOCKER ROOMS, AND ATHLETICS

TROY J. PERDUE*

I. LANGUAGE ISSUES	46
II. TITLE IX AND TRANSGENDER STATUS.....	48
A. Legal Protections.....	48
B. From Title VII to Title IX.....	50
III. RECORDS.....	53
A. Campus Records.....	54
IV. HOUSING.....	55
A. Religious Exemption	55
B. OCR-Arcadia Settlement Agreement	56
V. RESTROOMS	57
A. Case Law.....	58
1. Gender identity (and not birth sex) may be sufficient criterion for restroom access.	58
2. Birth sex (and not gender identity) may be sufficient criterion for restroom access.	58
B. Developing Policy	59
VI. LOCKER ROOMS.....	60

* Associate General Counsel, East Tennessee State University; J.D., University of Tennessee, 1999; B.S., Palm Beach Atlantic University, 1992). This Article was presented at the National Association of College and University Attorneys’ Annual Conference in Denver, Colorado in 2014. I’d like to thank my co-panelists from the conference, Drew Levasseur, Director of Transgender Rights Project, and Dr. Genny Beemyn, Director of the Stonewall Center at University of Massachusetts, Amherst, for their assistance bringing these important issues to the college and university legal community. I would like to thank my friend and colleague, Dr. Hilary Malatino, Assistant Director of the Women’s Study Program at East Tennessee State University, for her feedback and support in working through practical implications of current gender theory. I also would like to thank Lisa K. Williams, Assistant Counsel at East Tennessee State University, for her substantive contributions and superior editing skills in the preparation of these materials.

A. Applying a Gender-Identity Policy.....	62
B. Identifying Gender.....	63
VII. ATHLETICS.....	65
A. NCAA.....	65
B. NAIA.....	67
C. NJCAA.....	68
D. Intramurals.....	68
VIII. CONCLUSION.....	69

I. LANGUAGE ISSUES

The concerns of transgender persons and related issues are raising awareness in both the public and in higher education, and for many of us there is new language to learn. The language is ever evolving but it helps to have a common vocabulary. Here are a few terms and their meanings in the context of transgender issues. These are not exhaustive and are a bit simplified, but they should work as references for this article.¹

Transgender, Trans, Trans* – *Transgender* is an umbrella term for people whose gender identity or gender expression is different from those typically associated with their assigned sex at birth. *Trans* and *Trans** are shorthand expressions for transgender.² Note that transgender persons may or may not decide to alter their bodies hormonally and/or surgically, so their identity as a transgender person is unrelated to physical alterations, such as surgery or hormone therapy.³

Trans man/trans male – A term for a transgender person who currently identifies as a man. *Female to male* and *FTM* are also used.

Trans woman – A term for a transgender person who currently identifies as a woman. *Male to female* and *MTF* are also used.

Gender – One’s internal, personal sense of being a man or a woman.⁴ For transgender persons, their birth sex and their own internal sense of gender identity do not match.

1. These definitions are based primarily on those provided by the National Center for Transgender Equality. See *Transgender Terminology*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, (Jan. 2014), available at http://transequality.org/Resources/TransTerminology_2014.pdf. GLAAD provides an additional source for these and related definitions. See *GLAAD Media Reference Guide – Transgender Issues*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Nov. 6, 2014).

2. *Gender-variant* or *gender non-conforming* are also used, and will be used synonymously with *transgender* in this paper.

3. *A Word about Words*, GENDER SPECTRUM, available at <https://www.genderspectrum.org/images/stories/08%20a%20word%20about%20words.gender.pdf>.

4. Or neither gender, both genders, or no gender.

Genderqueer/genderfluid – *Genderqueer* is a term used by some individuals who identify as neither entirely male nor entirely female. *Genderfluid* describes individuals with a flexible range of gender identity or expression that may change, even from day to day, such as identifying as a female at times and a male at other times, or a combination.⁵ These terms will be used as rough equivalents for persons whose gender is not identifiable solely or exclusively within the male and female categories.

Gender Expression – This term describes the external manifestation of one’s gender identity, usually expressed through “masculine,” “feminine,” or gender-variant behavior, including clothing, hairstyle, voice or body characteristics.

Sexual Orientation – *Sexual orientation* describes an individual’s enduring physical, romantic, and/or emotional attraction to another person. Although gender, birth sex and sexuality are all interrelated, they are distinct. So, for example, a transgender person can be heterosexual or homosexual (or bisexual or asexual or any other way of describing people’s sexual attraction(s)).

Sex – Sex is the classification of people as male or female. At birth, infants are assigned a sex based on a combination of bodily characteristics including: chromosomes, hormones, internal reproductive organs, and genitals.⁶ Generally, this paper will use the term *birth sex* to refer to persons’ sex assigned at birth.⁷

Transition – This term refers to the process of beginning to live in one’s gender self-identify rather than one’s birth sex. Transition can be social, legal and medical, but may not be all three aspects or all three aspects at the

5. *Transgender Terminology, supra* note 1.

6. NCTE doesn’t define “sex.” This definition is provided by GLAAD. The medical community typically defines sex and gender, distinctively. “Sex is biologically determined, whereas gender is culturally determined.” Shuvo Gosh, *Gender Identity*, MEDSCAPE, <http://emedicine.medscape.com/article/917990-overview> (last visited Nov. 5, 2014). Current gender theory and many in the trans community hold that sex is not binary, male, or female, but is a spectrum. Thus, the terms “sex” or “biological sex” for individuals are, at best, inaccurate. With this in mind, the term “birth sex” will be used.

7. For clarity, this paper may occasionally use the term “biological sex” instead of “birth sex.” As noted, we will use “birth sex” for the sex assigned to persons at birth. However, in common usage, court opinions, and in policies, the term “biological sex” frequently does not mean “the male or female designation assigned to a person at birth” – so “birth sex” is inaccurate. Rather, “biological sex” refers to a person’s biology or physiology. When using “biological sex,” a court or institution is frequently not attempting to identify a person’s assigned sex but is attempting to describe the person’s physical characteristics, i.e., whether they are “male” or “female bodied.” In those instances, this paper will follow the court or policy’s usage of the term “biological sex” to refer to typical male or female physiology that seems to be the underlying intent of the policy, argument or concern. In all other cases, “birth sex” will be used.

same time.⁸

II. TITLE IX AND TRANSGENDER STATUS

Public awareness of the lives and concerns of transgender persons has increased markedly over the past few years. As a number of public figures have come out as transgender and have been recognized in high-profile fields, a more accurate understanding of the transgender experience is presented in public media. Society is reassessing its understanding of gender and the concerns of transgender persons and, in turn, the courts are grappling with how such reassessment should be expressed in the law. A limited number of court decisions have been issued but a consensus on legal principles has not yet been established.

Although distinct from sexual orientation and from birth sex, gender identity is frequently “bundled up” with sexual orientation and birth sex in popular conceptions. The law, however, is struggling to determine if and how gender identity is distinguishable from these other concepts.⁹ To date, a number of federal courts and agencies under federal law, as well as state courts and administrative agencies under state and local law, have begun to recognize protections for transgender persons,¹⁰ while other federal and state courts have declined to do so.¹¹

A. Legal Protections

Thus far, nearly all of the case law relating to gender identity has been in the employment context. As early as the 1970s, federal courts have wrestled with establishing a framework for addressing the rights of transgender persons in the workplace. Though court analyses vary from considerations of the status of transgender persons as a class to evaluations of personal characteristics that subject transgender persons to gender stereotyping, courts have typically evaluated plaintiffs’ claims within the framework of

8. For example, transitioning often includes changing one’s first name, dressing and grooming differently (social transition), but may not include taking hormones or having surgery (medical transition), or changing identity documents, such as drivers’ licenses and Social Security records (legal transition).

9. For an excellent analysis on the state of the law for gender identity protection under Title VII, see Francine T. Bazluke & Jeffrey J. Nolan, *Because of Sex: The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361 (2005).

10. *E.g.*, *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600 (Me. 2014).

11. *E.g.*, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Hispanic Aids Forum v. Estate of Joseph Bruno*, 792 N.Y.S.2d 43 (App. Div. 2005).

sex discrimination (on the “basis of sex”) under Title VII.¹²

The federal appellate courts for the Sixth and Ninth circuits have each held that gender identity is a protected status as sex discrimination under Title VII.¹³

In *Smith v. City of Salem*,¹⁴ a transgender firefighter sued under Title VII for sex discrimination based on gender stereotyping. The Sixth Circuit asserted that prior court rationales that read Title VII as barring discrimination based only on biology or anatomy, but not on self-identified gender, were “eviscerated” by the *Price Waterhouse*¹⁵ decision. The court held that “sex discrimination” encompasses discrimination because of gender non-conforming conduct, including birth males presenting as females.¹⁶ Less than one year later, the Sixth Circuit reaffirmed *Smith* and held that transgender persons are a protected class under Title VII.¹⁷

In *Schwenk v. Harford*,¹⁸ a trans female prisoner filed a claim for sex discrimination under a state statute. The Ninth Circuit held that the state statute was analogous to Title VII and that Title VII prohibited discrimination “because one fails to act in the way expected of a man or woman . . . [specifically, Title VII] prohibit[s] discrimination based on gender as well as sex.”¹⁹ Thus, discrimination based on biology as well as self-identified gender is impermissible in the Ninth Circuit under Title VII.²⁰

However, not all federal courts have come to the same conclusion of including gender identity as impermissible discrimination “because of sex” under Title VII. In *Ulane v. Eastern Airlines*, the Seventh Circuit looked to congressional intent and held that “sex” under Title VII meant “biological sex” and not gender identity.²¹ Similarly, in *Etsitty v. Utah Transit Authority*, the Tenth Circuit held that Congress intended Title VII to apply tradi-

12. *E.g.*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Harford*, 204 F.3d 1187 (9th Cir. 2000); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008); *see also infra* Section II (discussing these three cases in more detail).

13. Adding to the matrix of laws limiting gender discrimination, in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the Eleventh Circuit held that termination of an employee because of her *transition* from male to female was impermissible discrimination under equal protection principles. *Id.* at 1317.

14. 378 F.3d 566 (6th Cir. 2004).

15. In the seminal case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that gender stereotyping – discrimination based on a person’s conformity to societal expectations of gender – is impermissible discrimination under Title VII.

16. *Smith*, 378 F.3d at 573.

17. *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005).

18. *Schwenk v. Harford*, 204 F.3d 1187 (9th Cir. 2000).

19. *Id.* at 1202.

20. *But see* *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x 492 (9th Cir. 2009) (accepting employer’s assertion of safety reasons in denying trans female access to women’s restrooms as sufficient rationale to defeat *prima facie* case).

21. 742 F.2d 1081, 1085 (7th Cir. 1984).

tional concepts of “male and female” in disallowing sex discrimination.²²

Where the *Smith* and *Schwenck* courts read *Price Waterhouse* to disallow biology as the defining determinant of “sex” under Title VII, and the *Ulane* and *Etsitty* courts have held, contrarily, that biology is the defining determinant of “sex” under Title VII, a D.C. district court has held that even if biology is a permissible component of “sex” under Title VII, *transitioning* between one sex and another is protected.

In *Schroer v. Billington*,²³ a trans female applied for a job while presenting as a male. She was initially accepted but was then denied employment after informing the employer of her intent to transition to being a woman. In an insightful analogy, the district court reasoned that an employer could not avoid a discrimination claim under Title VII by arguing that it held no bias against Jews and Christians, but only “converts” from one religion to the other. In like manner, the court held that discrimination based on a change in a person’s sex is discrimination “because of sex” under Title VII.²⁴

The EEOC has also taken, and is enforcing, the position that gender identity and expression are protected under Title VII.²⁵

B. From Title VII to Title IX

Title IX analyses frequently follow Title VII,²⁶ so many transgender rights advocates are encouraged by the successes in the employment context of some federal jurisdictions and are applying similar arguments and rationales in the education context under Title IX²⁷ with occasional suc-

22. 502 F.3d 1215, 1222 (10th Cir. 2007).

23. 577 F. Supp. 2d 293 (D.D.C. 2008).

24. *Id.* at 303-09 (discriminating based on plaintiff’s plan to undergo transition “was literally discrimination ‘because of . . . sex.’”).

25. *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012) (affirming protections for transgender employees, stating, “Title VII prohibits discrimination based on sex whether motivated by hostility, desire to protect persons of a certain gender. . .or the desire to accommodate other people’s prejudices or discomfort.”).

26. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992) (concluding that Title VII precedent was the basis for recognizing a Title IX private cause of action for sexual harassment). The court’s holding is in line with this reasoning, but doesn’t explicitly connect Title VII to Title IX within the opinion. *Id.*

27. *See, e.g.*, Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301 (2013); Erin Buzuvis, “*On The Basis Of Sex*”: *Using Title IX to Protect Transgender Students From Discrimination in Education*, 28 WIS. J.L. GENDER & SOC’Y 219 (2013); Katherine Kraschel, Note, *Trans-cending Space in Women’s Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 HARV. J.L. & GENDER 463 (2012); Tina Sohaili, Note, *Securing Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students*, 20 LAW & SEX. 79 (2011).

cess.²⁸ Although frequently complying with state discrimination laws and not Title IX precedent, some scholastic districts have begun including gender identity protection in their policies and decisions, and, in a number of high profile instances, transgender students have had success in obtaining protection and equal access in scholastic institutions.²⁹

According to Campus Pride, approximately 730 colleges and universities are also including gender identity (and frequently, gender expression) as protected categories in their policies.³⁰ Although Title IX has not historically been understood to include gender identity, the U.S. Department of Education Office of Civil Rights (OCR) issued a Dear Colleague Letter (“DCL”) in 2010 that addressed sexual harassment and bullying under Title IX and also attempted to provide guidance to institutions on the proper inclusion of gender identity (and transgender rights, generally) in higher education.³¹

Subsequently, in April of 2014 the OCR issued a *Questions and Answers on Title IX and Sexual Violence* (April 2014 Q&A).³² Although specifically addressed to sexual harassment and sexual violence the April 2014 Q&A included the following: “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. . . .”³³ On December 1, 2014 the OCR issued guidance addressing Title IX and gender segrega-

28. *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

29. See, e.g., Judy Harrison, *Maine Supreme Court Rules in Favor of Transgender Girl in Orono School Bathroom Case*, BANGOR DAILY NEWS, Jan. 30, 2014, <https://bangordailynews.com/2014/01/30/news/bangor/maine-supreme-court-rules-in-favor-of-transgender-girl-in-orono-school-bathroom-case/>; Sadie Whitelocks & Alex Greig, *Transgender Child, 6, Wins Civil Rights Case to Use the Girls Restroom at School in Colorado*, THE DAILY MAIL, June 24, 2013, <http://www.dailymail.co.uk/news/article-2347149/Coy-Mathis-Transgender-child-6-Colorado-wins-civil-rights-case-use-girls-bathroom-school.html>; Ruben Vives, *Transgender Teen to Play on Azusa High’s Girls’ Softball Team*, L.A. TIMES, Feb. 14, 2014, <https://latimes.com/local/lanow/la-me-ln-azusa-teen-first-transgender-softball-team-20140214,0,3667420.story>.

30. See *Colleges and Universities with Nondiscrimination Policies that Include Gender Identity/Expression*, CAMPUS PRIDE, <http://www.campuspride.org/tpc-nondiscrimination/> (last visited Nov. 17, 2014).

31. Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to the Staff of U.S. Dep’t of Educ. (Oct. 26, 2010), available at <http://www.ed.gov/ocr/letters/colleague-201010.html> [hereinafter Dear Colleague Letter]. The OCR also affirmed its position that such discrimination is impermissible gender/sex stereotyping.

32. *Questions and Answers about Title IX and Sexual Violence*, DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

33. *Id.* at 5.

tion in single-sex classrooms and extracurricular activities.³⁴ In *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (“December 2014 Q&A”), the OCR asserted its position on gender identity inclusion under Title IX by stating:

All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX [and] a recipient [of federal funding] generally must treat transgender students consistent with their gender identity in all aspects. . . of single-sex classes.³⁵

Despite the seemingly narrow application of the April 2014 Q&A to sexual violence and the December 2014 Q&A to single-sex classrooms and extracurricular activities (typically in secondary schools), the OCR is clearly signaling its intention to protect transgender students. Unambiguously, in the Q&As and the DCL, the OCR is asserting its position that discrimination on the basis of gender identity and gender expression is discrimination “on the basis of sex” under Title IX.

This, then, is the legal landscape that higher education institutions are navigating. Multiple federal appellate courts (and some state courts) have recognized transgender rights in the employment context, while other federal appellate courts have explicitly declined to recognize such rights. The OCR has taken the position that transgender rights are protected under Title IX; however, such a position is merely “guidance” at present, and it is not clear how this policy is to be applied in the context of transgender access versus sexual harassment, which is the primary framing of the DCL, or sexual violence, which is the primary framing of the April 2014 Q&A.³⁶ It is also unclear whether the OCR contemplates exceptions or limitations to gender identity inclusion for private and religious institutions³⁷ or in light of state laws that are inconsistent with the OCR’s position.³⁸

34. *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

35. *Id.* at 25.

36. *Id.* at 8. Only one sentence in the DCL seems to go beyond the context of harassment: “Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.” *Id.*

37. Recently, the OCR has issued religious exceptions for religiously-affiliated institutions from providing transgender protections under Title IX. See Scott Jaschik, *Freedom of Religion or Free to Discriminate?*, INSIDE HIGHER ED (July 14, 2014), <http://www.insidehighered.com/news/2014/07/14/two-legal-cases-illustrate-growing-tensions-over-rights-transgender-students#sthash.NdB5hG7v.dpbs>.

38. See, e.g., Lance Richardson, *Should Sex Reassignment Surgery Be Required for Transgender High School Athletes?*, SLATE (Feb. 21, 2014), http://www.slate.com/blogs/outward/2014/02/21/virginia_s_transgender_high_school_athlete_policy_should_not_require_sex.html (detailing how the Virginia scholastic ath-

Given this landscape, the aim of this paper is to provide workable approaches to transgender issues where it can, and to highlight both practical and legal concerns when addressing these issues on campus.

III. RECORDS

Students routinely are required to identify themselves by name and sex on forms and documents. Transgender students identifying themselves by a gender other than their birth sex frequently adopt a name consistent with their self-identified gender. So which sex or gender, and which name, should a student use? This seemingly simple “document” problem can create unintended, but distressing, results.

Consider a recent confrontation on a college campus.³⁹ A trans female student was exiting a women’s restroom on her college campus when she was approached by a campus security officer and asked for ID to verify that she was a female student.⁴⁰ The officer began questioning the woman in the public hallway and called for backup.⁴¹ Four officers arrived and the student was questioned for 20 minutes before being escorted off campus.⁴² If the institution had a records policy that provided the student with a clear means of identifying herself for institutional purposes, this unfortunate event may not have occurred.⁴³

Presently, any number of government records are subject to differing rules from multiple agencies.⁴⁴ State and federal agencies are taking multitudinous positions on the changing of records.⁴⁵ Some states explicitly dis-

letics league policy requires participation based on birth sex or sex reassignment surgery); see also Lucinda Shen & Sarah Chaney, *University of North Carolina System bans gender-neutral housing*, DAILY TAR HEEL (Aug. 9, 2013), <http://www.dailytarheel.com/article/2013/08/5205267e7af4d>.

39. Nicole Hensley, *Female Transgender Student Suspended for Using Women’s Bathroom*, N.Y. DAILY NEWS, Apr. 4, 2014, <http://www.nydailynews.com/news/national/transgender-student-suspended-women-bathroom-article-1.1746243>.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* It should be noted that in this particular case, a good ID policy may not have been enough. The applicable state has made clear its position on gender-identity protections, and it is unclear that the student timely provided her ID.

44. See, e.g., Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373 (2013).

45. For example, the U.S. Department of State implemented a passport policy allowing transgender people to change the birth identified on their passports upon presentation of a physician’s certification of gender transition, even if they have not undergone any hormonal treatment or surgery. *New Policy on Gender Change in Passports Announced*, U.S. DEP’T OF STATE (June 9, 2010),

allow changes to gender markers on governmental records, such as birth certificates,⁴⁶ while others require changes to governmental records upon meeting certain criteria.⁴⁷ Addressing these problems is beyond the scope of this article and is likely impossible. However, institutions may still be able to assist their students in this area.

A. Campus Records

A possible first step that bears minimal legal entanglements and accommodates the needs of transgender students is to address *campus records*. Institutions may want to work with their Registrar and Student Affairs Offices to establish a simple, one-stop procedure for students to change their name and/or gender on all of their campus records and documents.⁴⁸ Institutions may want to address the tension between campus records and governmental records that are outside of institutions' control through policy language such as the following:

The school shall maintain a mandatory permanent pupil record that includes a student's legal name and legal gender. However, to the extent that the school is not legally required to use a student's legal name and gender on other school records or documents, the school shall use the name and gender preferred by the student.⁴⁹

Additional options are set out in the *Promising Practices for Campus Records and Documents* created by the Pennsylvania State University LGBT Student Resource Center.⁵⁰ At a minimum, institutions should evaluate what institutional records can (and cannot) be changed to reflect a person's gender self-identification, and under what conditions the institu-

<http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm>.

46. *E.g.*, OHIO REV. CODE ANN. § 3705.15 (LexisNexis 2006); IDAHO CODE ANN. § 39-250 (2005).

47. *E.g.*, VT. STAT. ANN. Tit. 18, § 5112 (2011) (requiring an affidavit of gender transition from physician); MO. REV. STAT. § 193.215(9) (2006) (requiring a court order following surgery).

48. Genny Beemyn, *Ten Strategies to Improve Trans Inclusiveness on Campus*, in BEST OF THE BEST: AN OFFICIAL QUEER GUIDE TO HIGHER EDUC. (Alyson ed., 2006), available at <http://www.umass.edu/stonewall/uploads/listWidget/8764/improve%20trans%20inclusiveness.pdf>.

49. GAY LESBIAN & STRAIGHT EDUCATION NETWORK, *Model District Policy on Transgender and Gender Nonconforming Students* (2014), available at <http://www.umass.edu/stonewall/uploads/listWidget/25135/Model%20District%20Trans%20Policy.pdf>.

50. Emily Johnson & Allison Subasic, *Promising Practices for Inclusion of Gender Identity/Gender Expression in Higher Education*, PENN. STATE UNIV. LGBT STUDENT RESOURCE CENTER (2011), available at http://www.hendrix.edu/uploadedFiles/Student_Life/Student_Activities/Workshop%20Materials.pdf.

tion will (or will not) alter those records.

IV. HOUSING

Institutional housing departments typically assign on-campus housing based on students' birth sex.⁵¹ Most institutions then place the students in sex-segregated dormitory buildings, floors or rooms.⁵² Consequently, transgender students commonly have trouble finding suitable or appropriate housing options. Some institutions have created gender-neutral or gender-inclusive housing, as well as gender-neutral floors and/or suites, to address transgender students' needs.⁵³ Many institutions address this tension on a case-by-case basis upon the request of the individual student.

A common strategy is to provide individual or single-room housing for the transgender student. This may frequently be a positive outcome for a transgender student, but for a transgender student wishing to room with friends or with fellow students of the same gender, this option is unhelpful and may result in litigation.

A. Religious Exemption

Consider a recent occurrence at George Fox University. In preparation for returning to college for his sophomore year, a transgender male student approached student housing officials about rooming with his male friends.⁵⁴ The university has only sex-segregated housing on campus and the student did not want to live in individual housing.⁵⁵ The university met with the student and the student's parents multiple times and eventually decided that it could not accommodate the student on campus but would allow him to use off-campus housing to room with male friends.⁵⁶ The student subsequently filed a complaint with the Department of Education

51. David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51 (2011).

52. There have been a rising number of schools allowing coed dorm rooms over the past few years. Michelle R. Smith, *Colleges are Allowing Coed Dorm Rooms*, USA TODAY, Mar. 2, 2008, http://usatoday30.usatoday.com/news/education/2008-05-02-coed-rooms_n.htm.

53. *Colleges and Universities that Provide Gender-Inclusive Housing*, CAMPUS PRIDE, <http://www.campuspride.org/tpc-gih/> (last visited Apr. 25, 2014). But, some states explicitly disallow gender-inclusive housing. *E.g.*, Shen & Chaney, *supra* note 38.

54. Bob Heye, *Transgender Student Files Sex Discrimination Complaint against George Fox University*, KOMO NEWS NETWORK (Apr. 6, 2014), <http://www.komonews.com/news/local/Transgender-student-files-sex-discrimination-complaint-against-George-Fox-254042331.html>. See discussion *infra* Section VI (outlining the "identity plus" model that could describe George Fox University's model).

55. *Id.*

56. *Id.*

against the university.⁵⁷ In this instance, the claim was denied following the university's application and the OCR's recognition of a religious exemption from trans protections under Title IX.⁵⁸ The same religious exemption has been requested and issued for a number of religiously-affiliated institutions.⁵⁹

In light of the OCR's assertion, the DCL and the Q&As that gender identity is a protected category under Title IX, the position of the OCR for all institutions without such an exemption appears predictable: institutions must allow the trans students to live on campus in housing facilities associated with their self-identified gender. A recent settlement with Arcadia Unified School District, discussed below, confirms this expectation as well as sets forth the OCR's expectations for institutions to provide support for trans students and training for staff and students regarding trans rights under Title IX. Without such an exception, institutions would likely need to litigate such matters in order to establish their right to make contrary housing decisions.

B. OCR-Arcadia Settlement Agreement

In July of 2013, the OCR reached a settlement with the Arcadia Unified School District of Arcadia, California over the District's treatment of a transgender male middle school student ("Arcadia Settlement").⁶⁰ The District was prohibiting a transgender male student from using the boys' restrooms and locker rooms at school.⁶¹ Additionally, while on a school-sponsored camping trip, the District housed the student in a cabin alone with an adult chaperone rather than with the gender with which the student identified (male).⁶² The settlement agreement required the District to allow the transgender student to participate in all sex-segregated school activities consistent with his self-identified gender, including restrooms, locker rooms and housing.⁶³

57. *Id.*

58. *See Transgender Student and Housing at George Fox University*, GEORGE FOX UNIV., <http://www.georgefox.edu/transgender> (last visited Apr. 25, 2014); *see also* Nick DeSantis, *Christian College Wins U.S. Exemption in Dispute with Transgender Student*, CHRON. OF HIGHER EDUC., July 14, 2014, *available at* <http://chronicle.com/blogs/ticker/u-s-grants-christian-college-exemption-in-housing-dispute-with-transgender-student/81757>.

59. *See GLSEN Calls on Dept. of Ed. for Further Title IX Guidance*, GAY LESBIAN & STRAIGHT EDUCATION NETWORK, <http://glsen.org/article/glsen-calls-dept-ed-further-title-ix-guidance> (last visited Nov. 10, 2014).

60. Resolution Agreement, Arcadia Unified School District, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), *available at* <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

61. *Id.*

62. *Id.*

63. *Id.*

The DCL and the April 2014 Q&A make clear that the OCR's position applies equally to institutions of higher education.⁶⁴ In the Arcadia Settlement, the OCR has moved beyond the harassment and bullying concerns it addressed in the 2010 DCL and sexual violence addressed in the April 2014 Q&A and is now addressing equal access based on gender identity.⁶⁵ Moreover, the OCR has further asserted its position that accommodations resulting in the segregation of the student *in contravention of the student's wishes* are impermissible.⁶⁶

So, until the courts clarify the inclusion of gender identity under Title IX and the extent of those protections, while addressing transgender needs on a case-by-case basis is generally useful and fitting, in light of the Arcadia Settlement and the George Fox University OCR filing, institutions should carefully consider the risks of OCR investigations and subsequent litigation when these situations arise.

Proactive measures, including such useful practices as staff training and publicizing the contact information of trans-knowledgeable individuals within Housing and Student Affairs Offices, can be found in the *Promising Practices* attachment and at CampusPride.org.⁶⁷

V. RESTROOMS

The most common daily difficulty for a transgender student on campus is restroom usage. An inclusive policy for restroom access might very well be the most practical benefit an institution can provide to its transgender students. These students frequently face discomfort and sometimes harassment, no matter which restroom they choose – the one matching their birth sex or the one corresponding to their gender identity.⁶⁸

As noted above, a trans female student exiting a women's restroom was publicly questioned by campus police and then escorted off campus.⁶⁹ Though few are arrested or subjected to extensive interrogations in public, transgender students are recurrently shamed, shunned, or harassed when

64. See generally Allie Grasgreen, *Equal Access at All Levels*, INSIDE HIGHER EDUC. (July 29, 2013).

65. Resolution Agreement, *supra* note 60.

66. *Id.* at II.A.1. See generally, Katherine A. Womack, Comment, *Please Check One - Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1378–79 (May 2010).

67. E.g., Karen M. Williamsen-Garvey & Steve Wisener, *8 Steps to Improve Campus Housing for LGBT Students*, CAMPUSPRIDE, <http://www.campuspride.org/tools/8stepstoimprovestudenthousing/> (last visited Apr. 25, 2014).

68. See generally Jill D. Weinberg, *Transgender Bathroom Usage: A Privileging of Biology and Physical Difference in the Law*, 18 BUFF. J. GENDER L. & SOC. POL'Y 147 (2010).

69. Hensley, *supra* note 39.

using public restrooms. Many trans students choose to avoid sex-specified restrooms, including foregoing using any restroom, to avoid these difficulties. A common problem on institutional campuses is older buildings with only sex-specific restrooms, especially in high-use spaces such as classrooms, student centers, and dining areas.

While some states have enacted legislation specifically protecting gender identity, including the provision of adequate restroom access, the majority have not. In the absence of legislation, the courts have been asked to address the issue of restroom access.

A. Case Law

Much of the case law arising from claims for access to restrooms has arisen in the employment context. As noted above, employment discrimination based on transgender status under Title VII has been the most fertile ground for claims for gender identity protections. In relatively recent cases, higher courts have taken two different, somewhat inconsistent, approaches.

1. Gender identity (and not birth sex) may be sufficient criterion for restroom access.

In *Cruzan v. Special School District*, a case heard by the United States Court of Appeals for the Eighth Circuit, a female teacher alleged that the school district discriminated against her on the basis of her religion and her sex by allowing a transgender co-worker to use the women's faculty restroom.⁷⁰ The court determined that the plaintiff failed to express a bona fide religious belief, and didn't suffer an adverse employment action because of it. More importantly, the court held that the plaintiff failed to meet the requirements for a hostile work environment claim based on sex discrimination. The court stated, "To make this showing, Cruzan had to establish the school was 'permeated with discriminatory intention, ridicule, and insult.'"⁷¹ Based on the totality of the circumstances – including Cruzan's access to other restrooms and the absence of any claim of inappropriate conduct by the transgender co-worker—the court held that allowing a transgender employee to use the bathroom associated with his or her gender identity does not create a hostile work environment.⁷²

2. Birth sex (and not gender identity) may be sufficient criterion for restroom access.

In *Goins v. West Group*, the Supreme Court of Minnesota denied a claim

70. *Cruzan v. Special Sch. Dist.*, No.1, 294 F.3d 981 (8th Cir. 2002).

71. *Id.* at 984.

72. *Id.*

of sexual orientation discrimination under the state human rights law that protected sexual orientation from employment discrimination.⁷³ Goins, a trans female employee, had consistently used the female restrooms while at work. After receiving complaints, the employer mandated that restroom use must be consistent with a person's "biological gender."⁷⁴ When Goins complained, the employer provided a single-occupancy restroom. The court held that relegation to a single-occupancy restroom was not a sufficient basis for a hostile work environment claim.⁷⁵ Following *Goins* reasoning, a New York district court has held that a restroom designation based on biological sex, rather than gender identity, is not discriminatory.⁷⁶

In a 2007 case, *Etsitty v. Utah Transit Authority*, an employer terminated a trans female employee after discovering that she was using female restrooms. Etsitty brought a claim under Title VII, asserting that she was terminated (1) because of her sex, and (2) because she failed to adhere to traditional gender norms.⁷⁷ Citing a long line of cases, the Court of Appeals for the Tenth Circuit held that ". . . discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."⁷⁸ Summary judgment was granted to the defendant employer.

B. Developing Policy

Institutions have taken varying paths when developing restroom policies. Most institutions do not have a specific policy, but in practice require students to use restrooms consistent with their birth sex, or their self-identified gender provided no third party complaints. With the publically questioned student as an example, continuing with this approach is rife with legal concerns for institutions. In the past, institutions attempting to accommodate

73. 635 N.W.2d 717 (Minn. 2001).

74. *Id.* at 721.

75. *Id.* at 723. The court further held that "[t]o conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature. We believe, as does the Department of Human Rights, that the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender." *Id.*

76. In *Hispanic Aids Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005), a group of transgender plaintiffs brought a claim under state and city human rights laws, alleging that they were excluded from bathrooms based on their gender identities. The court determined that the individuals were not excluded from all restrooms, but were restricted to the restrooms corresponding to their biological sex, like every building tenant. *Id.* at 47-48.

77. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (detailing how the plaintiff based much of her claim on the "sex stereotyping" line of reasoning found in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

78. 502 F.3d 1215, 1221 (10th Cir. 2007).

transgender students have allowed access to restrooms consistent with gender identity only after an individual has proved some level of gender reassignment surgery or hormone therapy. This requirement places demanding and potentially unwanted requirements on transgender students. Gender reassignment surgery is a long process involving hormone therapy, significant cost, and substantial health risks.⁷⁹ Another option commonly employed by institutions is allowing access to facilities consistent with an individual's government issued ID, or possibly an institutionally issued ID. A policy based on governmental IDs (and institutional IDs that mirror governmental ID only) creates a potential equal protection claim, but is likely a more legally secure position.

When possible, institutions may want to consider converting existing restrooms to single-stall ("family"-style) restrooms or to gender-neutral restrooms, and publishing a map or website locating these restrooms. Other options are available in Pennsylvania State University's *Promising Practices* and *Recommended Best Practices for Supporting Trans Students*.⁸⁰

VI. LOCKER ROOMS

Locker rooms, even more than restrooms, present difficulties for transgender students. Where most bathrooms have individual stalls, locker rooms often do not provide such privacy. Although contested by some transgender advocates,⁸¹ this comparative lack of privacy in the locker

79. See Libby Adler, *T: Appending Transgender Equal Rights To Gay, Lesbian And Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 607 (2010).

80. *Promising Practices for Inclusion of Gender Identity/Gender Expression in Higher Education*, PENN. STATE UNIV. LGBT STUDENT RESOURCE CENTER, <http://www.umass.edu/stonewall/uploads/listWidget/25137/promising-practices.pdf> (last visited Nov. 10, 2014); *Suggested Best Practices for Supporting Trans* Students*, CONSORTIUM OF HIGHER EDUC. LGBT RESOURCE PROF'LS, http://www.lgbtcampus.org/index.php?option=com_content&view=article&id=81:suggested-best-practices-for-supporting-trans—students&catid=21:press-releases&Itemid=124 (last visited Nov. 10, 2014); see also, Daniella A. Schmidt, Note, *Bathroom Bias: Making the Case For Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155 (2013); Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010).

81. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-segregated Facilities for Transgender Students*, 28 WIS. J. L. GENDER & SOC'Y 301, 317 (2013). Such advocacy seems to emphasize the needs of the transgender student's privacy while simultaneously dismissing any privacy rights in gender conforming students, i.e., "[b]eing forced to use gender-inappropriate or segregated facilities is humiliating for [transgender] students" and "instills extraordinary anxiety about how they are seen and treated by peers." *Id.* at 306. However, gender-conforming persons' anxiety about their bodies being seen by others including gender-non conforming persons is "rooted in unfortunate cultural bias and stereotypes regarding transgender people." *Id.* at 317. Moreover, if the mere knowledge of the nature of a person's anatomy is a constitutionally protected privacy interest, it seems legally incongruous that visual assessment by others is not.

rooms counsels against treating locker rooms and bathrooms by the same policy. Specifically, the existence of nudity and the lack of privacy in locker rooms present distinct challenges for both transgender persons and institutions.⁸²

To the extent possible, creating individualized spaces in locker rooms, like those available in most restrooms, provides privacy for all students.⁸³ Importantly, it reduces the risk of harm, embarrassment or harassment to the transgender student, and also nullifies the most powerful argument (privacy) by potentially objecting students.⁸⁴ When this is possible, a clear benefit is the ability of the institution to avoid the seemingly impossible task of balancing different individual's interests. When creating such individualized spaces is not possible, institutions must make policy choices regarding access to sex-segregated spaces by gender non-conforming students.

Higher education institutions are “all over the board” in addressing access to locker rooms and similar spaces – from no policies to written policies with birth or biological sex requirements to written policies of full inclusion based on self-identity. Some school districts and other scholastic agencies are at the forefront of crafting policies to follow state or local law requirements, or OCR settlements, such as the Arcadia Settlement.⁸⁵ Some have enacted a broad policy of transgender inclusion based solely on gender self-identity;⁸⁶ others have required inclusion based on gender self-

82. See, e.g., *Compliance Guidelines to Prohibit Gender Identity Discrimination*, CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION, <http://sf-hrc.org/compliance-guidelines-prohibit-gender-identity-discrimination> (last visited on Apr. 25, 2014).

83. The model policy of GLSEN for school districts proposes that increased privacy be provided to *any* student, regardless of the underlying reason. “Any student – transgender or not – who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, a[n] . . . office in the locker room, or a nearby health office restroom), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students) In no case shall a student be required to use a locker room that conflicts with the student’s gender identity.” *Model District Policy*, *supra* note 49, at 8–9.

84. “These facilities not only serve the needs of transgender students, but also parents with children of a different gender than themselves, people with disabilities who require the assistance of an attendant of a different gender, and anyone desiring greater privacy.” Brett-Genny J. Beemyn, TRANSGENDER L. & POL’Y INST., *Ways that U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students*, available at <http://www.transgenderlaw.org/college/guidelines.htm>.

85. See discussion *infra* Section IV(B) (discussing OCR-Arcadia Settlement Agreement); see also Dear Colleague Letter, *supra* note 31.

86. “A transgender student should not be required to use a locker room or restroom that conflicts with the student’s gender identity.” *Transgender Student Guidelines*, N.Y.C. DEP’T OF EDUC.,

identity with exceptions or on case-by-case bases.⁸⁷

Self-identity policy. Some institutional determinations regarding the standard that will be used to establish self-identity may need to be made but, once established, granting access under a broad gender “self-identity” policy is fairly straightforward in application, if not in consequences. Under such a policy, a university would allow access to locker rooms in the same manner it allows access to other university facilities and activities, based solely on gender self-identity.

Identity-plus policy. A gender self-identity policy with either exceptions or additional considerations, an “identity-plus” policy, would require an institution to establish the exceptions to the general policy of access or the factors that it would apply in granting access on a case-by-case basis. Common factors used in the establishment of exceptions or in a case-by-case analysis under an identity-plus policy might include: the requesting student’s preference, protecting all students’ and facility users’ privacy, protecting the safety of the students involved, the availability of private space for the transgender students or other students and facility users, the presence of children, the relative importance of sex-segregation to particular areas (such as areas with the high likelihood of nudity or harassment), and consistency with other institutional policies (such as equal opportunity to participate for all students, or religious traditions of the institution).

A. Applying a Gender-Identity Policy

In late 2012, a seventeen-year-old girl was using the locker rooms at the local college as part of her high school swim club. When she entered the sauna area of the locker rooms, she encountered a person sitting in the sauna with male genitalia exposed. She immediately reported the incident to the facilities director of the college’s recreation center.⁸⁸

Under a self-identity policy, the facilities coordinator would presumably need to determine the gender identity of the person, and then allow a self-identifying female to use the facilities regardless of physical anatomy or the discomfort of others. This position would consider any discomfort of the public irrelevant (if not irrational) in such circumstances. The benefit of the self-identity policy is that it provides the greatest accommodation to

<http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm> (last visited April 25, 2014).

87. “If an individual’s gender identity does not fit within the binary framework of man/woman or the person is in the process of transitioning to a different gender, participation in a particular gender designated activity will be handled on a case by case basis.” *Intramural Participant’s Guide*, UNIVERSITY OF MASSACHUSETTS, AMHERST, <http://www.umass.edu/campusrec/intramurals/participantsguide/index.html#III> (last visited Nov. 10, 2014).

88. Police Report, Evergreen State College Police Services (Sept. 27, 2012) (on file with author).

gender non-conforming persons. Moreover, this is the current position of the OCR.⁸⁹

Under an identity plus policy, the university would need to determine the gender identity of the person, and then determine whether an exception applied. If an exception did not apply, the university would then attempt to balance identified interests. Clearly, performing a balancing test on the spot, as the facilities coordinator would have to do (though maybe not alone), could be quite difficult. The case-by-case approach is the most common approach⁹⁰ in higher education institutions and will likely be successful in most cases, as the institution and the student work through options. However, much like the housing situation at George Fox University, this approach makes institutions susceptible to an OCR complaint.

B. Identifying Gender

As shown by this example, under both self-identity and identity-plus policies an institution will need to determine the gender of an individual.⁹¹ The institution should determine, specifically, what criteria it will use to recognize the gender identity of students. Common standards include: “genuinely asserted,” “consistently asserted,” and “consistently and exclusively asserted” gender, as well as “sex/gender assigned at birth.”⁹² These can be thought of as most inclusive to least inclusive, respectively.

A “genuinely asserted” gender standard would require limited evidence of gender identity. Supposedly, some informal documentation (such as an ID), the affirmations of family or friends, or possibly the gender expression

89. See Dear Colleague Letter, *supra* note 31.

90. Campus Pride identifies only seven institutions with self-identity (“trans-inclusive intramural”) policies. Colleges and Universities with Nondiscrimination Policies, *supra* note 30.

91. The issue of identification is fraught with difficulties. Having a consistent, thought-out policy on gender identity records would be a very good first step, allowing the student to quickly and easily identify themselves, such as providing a student ID. Note, however, that requesting that a student identify their gender is, itself, contentious. Burdensome requirements for identification verification could easily move the “self-identity” policy to an “identity plus” policy. See controversy surrounding Central Piedmont Community College student, Andraya Williams where Williams’ lawyer “questioned why a student should be quizzed about her gender and asked for identification for using a bathroom.” Scott Jaschik, *Questioned for Being Transgender?*, INSIDE HIGHER EDUC., <https://www.insidehighered.com/news/2014/04/02/debate-central-piedmont-over-transgender-student-rights> (last visited Nov. 13, 2014).

92. Board of Education Administrative Regulation 5163a, SFUSD, http://www.sfusd.edu/en/assets/sfusd-staff/_site-wide/files/Non-Discrimination%20for%20Students%20and%20Employees%20AR%205163a.pdf (last visited Apr. 24, 2014); Memorandum from Ray Avila, Assoc. Superintendent for Pacifica Sch. Dist., to Wendy S. Tukloff, Superintendent for Bd. of Trs. School District, (Nov. 20, 2013), available at <http://www.pacificasd.org/boardpackets/2013/11-20-13/11b.pdf>.

of an individual could each be sufficient evidence of gender. A standard of “consistently asserted” gender would seemingly require a bit more evidence over some period of time, and seems to imply an exclusive commitment to either a male or female gender identity.⁹³ A “consistently and exclusively asserted” standard would seem to formalize the requirement of a commitment to a single gender identity by including an “exclusive” requirement which may not acknowledge ambiguous gender expressions, such as genderqueer and genderfluid identities. Finally, “sex (or gender) assigned at birth” (or its corollary, sex/gender identified on a particular document, such as a birth certificate) is clearly the most restrictive and least ambiguous, and thus the easiest to administer.

It is important to note that these standards are not sufficient in themselves. Each institution would need to determine what factors it will consider when evaluating conformity with the given standard. Factors may include: how long a student has asserted a particular gender identity, what documentation from a medical or other care provider (if any) will be required,⁹⁴ or whether the gender identity is consistently asserted across all or multiple settings.⁹⁵

A Model Policy recommended by GLSEN for school districts proposes that increased privacy be provided to *any* student, regardless of the underlying reason.⁹⁶ When this is possible, a clear benefit is the ability of an institution to avoid the seemingly impossible task of balancing different individual’s interests. As with other access issues, institutions should think through the risks and stakeholder interests when determining their policy.

93. *But see generally*, Julia Baird, *Neither Male nor Female*, N.Y. TIMES, Apr. 6, 2014, <http://www.nytimes.com/2014/04/07/opinion/neither-female-nor-male.html?hp&ref=opinion>.

94. We will presume that medical transition would never be required except, if at all, in limited circumstances in athletics. *See infra* Part VII: Athletics. Thus, we understand supporting documentation from a care provider would likely involve evidence from a medical doctor, therapist, social worker, counselor or possibly a religious minister of students’ sincerely held belief that they understand themselves to be the self-identified gender. To the extent such documentation is one factor among others, the students’ parents or even self-identification (e.g., in instances of estrangement from parents) may be sufficient in light of other factors.

95. For example, what if a student chooses to identify for social purposes as a female, but as a male for athletics and for work? *See, e.g., infra* Part VII: Athletics; *see also infra* notes 105–06.

96. “Any student – transgender or not – who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, a[n] . . . office in the locker room, or a nearby health office restroom), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students). . . In no case shall a student be required to use a locker room that conflicts with the student’s gender identity.” *Model District Policy*, *supra* note 49, at 8–9.

VII. ATHLETICS

Various athletic organizations have dealt with transgender athletes' participation in athletics. There appear to be three distinct approaches taken: (1) gender self-identity plus body modification and hormone treatment (the International Olympic Committee approach), (2) gender self-identity plus consideration of biological sex and hormone usage (the NCAA approach), and (3) gender self-identity alone (the scholastic approach).⁹⁷ In the higher education context, the latter two approaches are of special concern for colleges and universities.

A. NCAA

The National Collegiate Athletics Association has both recommendations and policies for the inclusion of transgender athletes in competitive athletics over which it has authority. The policies of the NCAA are set out in the *NCAA Policy on Transgender Student-Athletes Participation*⁹⁸ (NCAA Transgender Handbook), and state, in part:

1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.⁹⁹
2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

Any transgender student-athlete who is not taking hormone

97. See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 21–28 (2011).

98. NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES (Apr. 2010), available at http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [hereinafter NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES.]

99. NCAA rules regarding mixed teams is beyond the scope of these materials, but one significant effect is that the team may not be eligible for championship title recognition. For example, a women's basketball team with a non-transitioning trans woman student-athlete would be deemed a "mixed team," and would be ineligible for a women's NCAA championship. *Id.* at 13; see also NAT'L COLLEGIATE ATHLETIC ASS'N, 2014-15 NCAA DIVISION I MANUAL, Art. 18 & 20, *et seq.* (2014) [hereinafter NCAA DIVISION I MANUAL].

treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.¹⁰⁰

- A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men's or women's team.
- A trans female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women's team.

This policy enables a transgender man who is not taking testosterone to compete on a women's team. Though he identifies as a man, he is female-bodied and has no unfair competitive advantage over non-transgender women. He may instead choose to compete on the men's team. However, because of testosterone production, a male-bodied transgender woman who is not taking estrogen may not compete on a woman's team.¹⁰¹ Whether a transgender student-athlete is competing on a men's or women's team, his or her gender identity should be respected by using the name and pronouns that student has chosen.¹⁰²

How does this look practically? In 2011, Kye Allums competed as a self-identified male on the George Washington University women's basketball team.¹⁰³ This was permissible because Allums was (1) assigned female at birth (and identifying as male), and (2) not taking male hormones. Taking each in turn, regarding his assigned sex, if he had been assigned male at birth (and identifying as a male), then, as is common, he would be required to play on the men's team. Regarding hormones, if he was assigned male at birth and was legally taking male or female hormones, he could only play on the men's team. If he was assigned female at birth and was taking male hormones, then he may play on the men's team, but not on the women's team.¹⁰⁴

100. By "assigned birth gender" the NCAA means the sex designation on a student's birth certificate. Since some states allow amendment of assigned sex on birth certificates, there is some ambiguity about birth certificates that have been amended, especially as the standards for amendment (e.g., physical or hormonal requirements) many vary among states. Those cases should be submitted to the NCAA's Office of Inclusion for determination.

101. NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 13.

102. *Id.* at 21.

103. Erik Brady, *Transgender Male Kye Allums on the Women's Team at GW*, USA TODAY, Nov. 4, 2010, http://usatoday30.usatoday.com/sports/college/womens-basketball/atlantic10/2010-11-03-kye-allums-george-washington-transgender_N.htm?csp=digg.

104. The taking of male hormones in these examples is presumed to be *legally* permitted, e.g., prescribed and taken under a doctor's care.

Compare this to an institution's intramural policy, discussed below, that states, "On sex-segregated teams, a student will compete on the team associated with the student's *consistently asserted gender identity*." The likely outcome would be that a trans male, such as Allums, would need to compete on the men's intramural team, regardless of hormone treatment or birth sex.¹⁰⁵

Note that the NCAA policies do not address a number of possible scenarios, such as treatment of genderqueer, socially (but not physically) transitioned,¹⁰⁶ or partial-medically transitioned student-athletes. For example, a trans female may elect to have an orchiectomy to remove both testes but choose not to take either hormone (testosterone) suppressors or estrogen. The NCAA's policy would disallow this athlete from competing on the women's team unless she was taking the testosterone suppressors (for one year or more). If an institution encounters a similar scenario, the school should contact the NCAA for a definitive answer given its particular facts.

In discussions regarding transgender athletes, the NCAA's Office of Inclusion emphasized that its committee would look to the underlying purpose of its rule (transgender inclusion balanced with competitive fairness) in deciding these cases. So, in this example, the student-athlete's lack of testes might be reviewed as an equivalent of "hormonal suppression" under the formal policy, thus allowing the transgender athlete to play on the women's team.

B. NAIA

In late 2013, the Gender Equality Committee of the National Association of Intercollegiate Athletics (NAIA) submitted a Transgender Policy recommendation to the NAIA Council of Presidents. As of the date of this paper, the NAIA does not have a policy directly addressing the eligibility

105. One objection to this result might be that such a policy is unnecessarily restrictive on trans students, effectively creating a disparate impact. See PAT GRIFFIN & HELEN J. CARROLL, *ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER ATHLETES* 22 (2010), available at <http://www.nclrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf>. However, recognizing the self-identity of an individual may mean requiring the individual to commit, within the context of athletics, to the student's self-identified gender. In most circumstances, this is exactly what trans students are committed to doing. Note, however, that is not always the case. *E.g.*, "Allums said he would like to receive the treatments but had held off because he did not want to jeopardize his spot on the team." Katie Thomas, *Transgender Man is on Women's Team*, N.Y. TIMES, Nov. 1, 2010, <http://www.nytimes.com/2010/11/02/sports/ncaabasketball/02gender.html>.

106. For example, a socially transitioned student-athlete who is declining or delaying medical transition. See *supra* note 105; see also NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 11 (quoting a Bates College trans male athlete who chose "to forego any medical transitioning to remain on [the] women's team.").

status of transgender student-athletes.

C. NJCAA

The National Junior College Athletic Association (NJCAA) policy is similar to the NCAA's policy. A transgender male student-athlete "who has received a medical exception for treatment with testosterone for gender transition" may compete on a men's team but is no longer eligible to compete on a women's team. A transgender female student-athlete "being treated with testosterone suppression medication for gender transition" may continue to compete on a men's team but may not compete on a women's team until completing one calendar year of documented testosterone-suppression treatment. The NJCAA is otherwise silent.¹⁰⁷

D. Intramurals

Intramural athletics occupy a unique position somewhere between the NCAA's acknowledgment of biological distinctions in highly competitive intercollegiate sports and the inclusion-focused policies of interscholastic sports. Are intramural athletics more like NCAA competitions or more like high school sports?

Interscholastic institutions have been at the forefront of transgender inclusion in athletics and in school activities, generally. This may be the result of a confluence of causes: new state statutes including gender identity and/or expression, OCR's 2010 announced position and subsequent enforcement efforts, and an increase in the number of gender non-conforming students asserting rights to facility access or activity participation.¹⁰⁸

A number of states have passed gender-identity legislation and/or guidelines that establish the right of transgender athletes to participate on sex-segregated teams consistent with their gender-identities and not their birth sex.¹⁰⁹ In resolving the tension between inclusion and competitive fairness,

107. See *Eligibility Rules of the National Junior College Athletic Association*, NAT'L JUNIOR COLL. ATHLETIC ASS'N (effective Aug. 1, 2014), available at http://www.njcaa.org/njcaaforms/140714_2_Eligibility%20Pamphlet%2014-15.pdf.

108. E.g., Ruben Vives, *Transgender Teen to Play on Azusa High's Girls' Softball Team*, L.A. TIMES, Feb. 14, 2014, available at <http://latimes.com/local/lanow/la-me-ln-azusa-teen-first-transgender-softball-team-20140214,0,3667420.story> (reporting on high school baseball player switching to girls' softball team).

109. E.g., 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West) (to be codified at CAL. EDUC. CODE §221.5); 2014 *Constitution and Bylaws*, CALIFORNIA INTERSCHOLASTIC FEDERATION at 300(D), available at http://www.cifstate.org/governance/constitution/300_Series.pdf; *Proposed Bylaw 300(D) Gender Identity Participation*, CALIFORNIA INTERSCHOLASTIC FEDERATION (Nov. 1, 2012), available at <http://www.cifccs.org/meetings/Documents%20Winter/2012-2013/gender%20identity%20participation.pdf>; WIAA HANDBOOK: ELIGIBILITY, WASH. INTERSCHOLASTIC ACTIVITIES ASS'N §18.15.0 (2013), available at <http://www.wiaa.com/ConDocs/Con1287/Eligibility.pdf>. *But see*,

these policies prioritize inclusion based on the lack of substantial physiological differences in young athletes and the inclusive principles overriding scholastic education.¹¹⁰

Along with Title IX's acknowledgement and sometimes support of sex distinctions, institutions may want to assess the nature of their respective intramural programs. Are they participation focused, akin to interscholastic competition? Or are they highly competitive sex-segregated associations that necessitate biological distinctions on the basis of competitive fairness?

Some scholastic and higher education institutions have attempted to balance these interests, and their policies may be useful. Bates College is one such example. The college allows participation of trans students in intramural sports solely in accordance with their self-identity, but includes the NCAA approach (inclusion plus hormone usage) for both NCAA and club sports.¹¹¹ Similarly, one Canadian school district requires inclusion on the basis of self-identity, "subject to safety considerations."¹¹² For institutions whose intramural programs are focused more on participation, the scholastic model may be preferable.

VIII. CONCLUSION

Although the law is currently unsettled, institutions can avoid costly litigation and serve their transgender students by taking proactive, accommodating measures akin to other civil rights protections. Institutional counsel should make themselves aware of any state and local laws applicable to their institutions, and any case law applicable in their respective federal circuit. As transgender issues continue to increase on campuses, including those mentioned in this article, institutional counsel should be ready to ad-

e.g., Wisconsin and Virginia policies, respectively, which are similar to the NCAA policy in valuing competitive equity. *Transgender Participation Policy*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, http://media.wix.com/ugd/2bc3fc_95ec28cdb3ee4df89ee624229b9caa48.pdf (last visited Apr. 25, 2014); Richardson, *supra* note 38; *but c.f.*, Transgender Student Guidelines, *supra* note 86 (noting where New York City requires participation with "consistently asserted" identity in sports but allows for case-by-case exceptions for "competitive athletic activities and contact sports").

110. See Elizabeth M. Ziegler & Tamara Isadora Huntley, *It Got too Tough to Not Be Me: Accommodating Transgender Athletes in Sport*, 39 J.C. & U.L. 467, 470 (2013); see also, Resolution Agreement between the Arcadia Unified School District, U.S. Dep't of Educ., Office for Civil Rights, & U.S. Dep't of Justice, Civil Rights Div. (July 23, 2014) (addressing access for all extracurricular activities according to self-identified gender).

111. *Transgender Inclusion Policies*, BATES COLL., <http://athletics.bates.edu/transgender-inclusion-policies> (last visited Nov. 13, 2014).

112. "Transgender and transsexual students . . . shall, subject to safety considerations, be permitted to participate in any gender-segregated activities in accordance with their consistently asserted gender identity, if they so choose." EDMONTON PUB. SCH., SEXUAL ORIENTATION AND GENDER IDENTITY ADMINISTRATIVE REGULATION (Nov. 13, 2012), available at <http://www.epsb.ca/ourdistrict/policy/h/hfa-ar/>.

vise their policymakers, help lead institutional discussions and, hopefully, propose positive resolutions.

COLLEGE ATHLETES AS EMPLOYEES

ROBERT T. ZIELINSKI*

I. WHAT HAS HAPPENED SO FAR.....	72
II. THE BOARD’S VARYING TREATMENT OF STUDENT EMPLOYEES OVER TIME.....	78
III. POSSIBLE BOARD RESOLUTIONS AND THEIR IMPLICATIONS	85
IV. PRACTICAL ADVICE.....	90

Spring 2014 saw the first ever attempt to form a union among Division I college athletes, specifically the football team at Northwestern University in Evanston, Illinois. The National Labor Relation Board’s (“NLRB” or “Board”) Regional Director ordered an election, and the ballots have been cast.¹ The result remains unknown, as the ballots are sealed and uncounted, awaiting full NLRB review of the basic finding that the scholarship football players can be considered employees for purposes of the National Labor Relations Act (“NLRA”). While much of the media attention focused on whether the union will win or lose the election,² the issue of much greater concern to institutions of higher education should be whether the student football players are found to be employees for purposes of the NLRA, and the rationale employed by the Board in reaching its result. Employee status under the NLRA comes with a suite of rights that adhere regardless of whether the employees ever join or become represented by a union.³ Thus, should the Board hold the Northwestern football players to

* Partner, Miller Canfield, Chicago, IL.

1. Alejandra Cancino & Teddy Greenstein, *Northwestern Football Players Cast Ballots in Union Vote*, CHI TRIBUNE, Apr. 25, 2014, http://articles.chicagotribune.com/2014-04-25/business/chi-northwestern-players-vote-on-union-today-20140425_1_peter-sung-ohr-college-athletes-players-association-northwestern-football-players.

2. *Id.* See also, e.g., Mason Levinson, *Northwestern Players Complete Union Vote; NLRB Review Under Way*, BLOOMBERG (Apr. 25, 2014), <http://www.bloomberg.com/news/2014-04-24/northwestern-football-players-vote-on-union-as-appeal-proceeds.html>; Ben Strauss, *Waiting Game Follows Union Vote by Northwestern Players*, N.Y. TIMES, April 25, 2014, http://www.nytimes.com/2014/04/26/sports/northwestern-football-players-cast-votes-on-union.html?_r=0.

3. As discussed more fully below, the National Labor Relations Act defines “employee” somewhat tautologically as including “any employee.” Despite the broad

be employees, the relationship between the student-athletes and the institution would be fundamentally changed, regardless of the outcome of the election. How extensive those changes might be, and the degree to which they will apply outside of Division I football to other athletes and other non-athlete students will depend on the rationale employed by the Board in reaching its result.

The question of how to categorize students who also perform services for their college or university lies along a fault line that has divided the NLRB ever since the 1970's, when it first asserted jurisdiction over institutions of higher learning.⁴ In that time, the Board has gone back, forth and back again on the status of students as employees, employing a diverse set of rationales in reaching the particular results. The cases have involved graduate assistants, interns/residents, student janitors and others. The result and rationale of Northwestern will have consequences for all sorts of student employees, not just athletes. This note will seek to explain the basis of the Regional Director's decision, and then review the different rationales used by past boards to find that students either were or were not employees entitled to bargain with the college or university to which they arguably render a service. Finally the note will explore how the consequences of the Board's decision will vary depending on the rationale employed.

I. WHAT HAS HAPPENED SO FAR

On Tuesday, January 28, 2014, the College Athletes Players Association ("CAPA") filed a representation petition with the NLRB seeking to be recognized as the union bargaining agent for players on the Northwestern University football team.⁵ CAPA currently limits its membership to schol-

language, the Board and courts have historically excluded various categories of employees such as those deemed "managerial" or "confidential" employees. See *infra* note 94.

4. Prior to 1970, the Board discretionarily refused to exercise jurisdiction over private, not-for-profit colleges and universities unless the activities involved were clearly of a commercial and non-educational nature. *Trustees of Columbia University*, 9794 N.L.R.B. 424 (1951). In 1970, the Board held that changes in the nature of higher education and its influence on interstate commerce justified asserting jurisdiction over colleges and universities generally. *Cornell University*, 183 N.L.R.B. 329 (1970).

5. Under the NLRA, a Union seeking to represent a group of employees files a petition with the NLRB for a government supervised election. To file a valid petition, the union needs to have proof that at least 30% of the employees in the unit wish to be represented by the union for purposes of collective bargaining. If an election is held, a union needs to obtain affirmative votes from 50% plus one of the bargaining unit members who actually vote. An employer has two choices in response to the Petition. It can either agree to have the election and then stipulate to a date and location and other particulars, or it can challenge the bona fides of the petition on limited grounds. *Conduct Elections*, NAT'L LABOR RELATIONS BD., <http://www.nlr.gov/what-we-do/conduct-elections> (last visited Nov. 17, 2014). In this instance, Northwestern refused to agree to a Board supervised election, and the case was sent to a hearing before

arship athletes who participate in the Football Bowl Subdivision and Division I men's basketball. CAPA's materials claim an interest in bargaining about non-economic issues such as safety, improving health care, graduation rates, revision of NCAA amateurism rules and due process rights.⁶ It has stated an intention to limit its focus to the two sports mentioned.⁷ After a hearing, the Regional Director of Region Thirteen ordered an election to be held, finding that the athletic scholarship players, but not walk-on players who received need or academically based financial aid, are employees for purposes of the Act.⁸ Northwestern has appealed the determination to the full NLRB in Washington, and that appeal is pending.⁹

On March 26, 2014, NLRB Regional Director Peter Sung Ohr of the Chicago Regional NLRB office (Region 13) held that the players established that they were employees for purposes of the NLRA, and ordered that an election be held.¹⁰ The decision further held that the roughly thirty walk-on football players were not employees,¹¹ and should be excluded from the bargaining unit. The Regional Director ordered an election in which only athletic grant-in-aid recipients who still had remaining eligibility to play as of the date of the election would vote.

Ohr started with the NLRA's definition of "employee," which rather tautologically states: "The term 'employee' shall include any employee . . . unless this subchapter explicitly states otherwise . . ." ¹² Ohr then cited to the Supreme Court's decision in *National Labor Relations Board v. Town & Country Electric, Inc.*¹³ for the proposition that the statutory language

the Regional Director of the Chicago Office of the National Labor Relations Board. The basis of Northwestern's challenge is that the football players cannot be considered employees as defined in the NLRA. It made secondary arguments to the effect that CAPA is not a "labor organization" within the meaning of the Act, that the unit sought was improper because it excludes non-scholarship players, and that the players are at most "temporary employees." N.W. Univ., Case No. 13-RC-121359, (Post-Hearing Brief of Respondent Northwestern University, 2014), mynlrb.nlr.gov/link/document.aspx/09031d45816473d.

6. COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA), <http://www.collegeathletespa.org/>, (last visited Oct. 17, 2014).

7. *Id.*

8. N.W. Univ., Case No. 13-RC-121359 (Decision and Direction of Election 2014), mynlrb.nlr.gov/lmk/document.aspx/09031d4581667b6f (hereinafter "Decision and Direction").

9. N.W. Univ., Case No. 13-RC-121359 (Request for Review of Decision and Direction of Election 2014), mynlrb.nlr.gov/link/document.aspx/09031d4581699517 (hereinafter "Request for Review").

10. Decision and Direction, *supra* note 8.

11. *Id.* at 17. The football team is composed of about 112 players, of which 85 received full grant-in-aid athletic scholarships after being recruited by the coaching staff. The remaining 27 are deemed "walk-ons" who may or may not receive need based or academically awarded financial aid.

12. 29 U.S.C. § 152(3) (2012).

13. 516 U.S. 85, 94 (1995).

should be interpreted consistently with common law definitions of “employee.” Ohr distilled the cases to mean that “an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”¹⁴

Ohr found each of these criteria to be met with regard to the scholarship players.¹⁵ The central pillar of Ohr’s decision is his conclusion that the athletic grant-in-aid received by the player is properly considered compensation to the player¹⁶ for a service rendered to the University, as opposed to a form of financial aid akin to a need-based or academic merit scholarship.¹⁷ In reaching the conclusion, Ohr relied heavily on the substantial value of the scholarship, the revenue generated to the University, the time commitments of the Players¹⁸ and the high degree of control exercised by the coaching and athletics staff.¹⁹ Together, Ohr concluded that these factors

14. Decision and Direction, *supra* note 8, at 13.

15. *Id.* at 14.

16. Per NCAA rules, the scholarships may pay for tuition, fees, room and board, and books up to the University’s cost of attendance. NCAA Division I Manual (Jan. 2014) Rule 15.02.5. In Northwestern’s case, these were valued at approximately \$61,000 per academic year (\$76,000 if the player takes summer classes). Most of the amount is in the form of tuition/room and board charge remission. Book reimbursement is paid in cash as may be a housing/food allowance of between \$1,200 and \$1,600 per month for players who live off-campus. All players are required to live on campus during their first two years, so the housing and food stipends are available only to juniors, seniors, and fifth year red-shirts. The amount of the food and housing stipend is limited per NCAA rules. In addition, de minimis payments may be made for family emergency travel and on a need basis to acquire appropriate clothing for team events/travel. Again, the amounts are limited per NCAA rules.

17. Decision and Direction, *supra* note 8, at 14.

18. *See* Decision and Direction, *supra* note 8, at 5–9. The decision describes in detail the time players devote to the football program and the coaching staff’s control of the players’ schedule. Players start with a training camp in August. During Summer camp in August, players devote 50 to 60 hours a week to football related activities. During the playing season, the team plays 12 games, and players devote 40 to 50 hours a week to football related activities. If the team qualifies for a Bowl game, the players continue to spend the same amount of time in preparation for the game. During the Winter and Spring non-playing seasons, Ohr found that players spend between 12 and 20 hours per week on football activities. Players have nine “discretionary” weeks a year in which they are not required to participate in any football related activities. Throughout this time, a players’ schedule was also highly regulated by the coaching staff with medical check-ins, training table attendance for meals, film sessions and the like all scheduled for the player.

19. *See* Decision and Direction, *supra* note 8, at 12. The team has a Handbook applicable to all players, which sets forth specific rules and regulations applicable to the players. The Handbook requires that freshman and sophomore players live on campus, that any players living off-campus have their leases approved by the football department, that any outside employment be approved by the football department, and that all players provide access to their social media sites to the department. Additionally, players are prohibited from swearing in public and “embarrassing” the team. The players are also subject to strict drug and alcohol policies, random drug tests, and anti-

made the player's football activities sufficiently separate and distinct from the player's educational activities such that they were more properly classified as work performed for the University rather than an integral part of the player's role as a student.²⁰

The crux of the decision is Ohr's finding that the scholarship aid was payment in return for the player's providing services to the University.²¹ This conclusion has two elements. First, that playing football provided a service akin to an employee performing work that is incorporated into a product or service sold by the employer.²² Second, that the economic benefit (free education, housing, etc. during their matriculation) received by the players was in exchange for the services being provided.²³ Ohr found that playing football was providing a service to the University based on two factors.²⁴ First he pointed out that the football program generated \$235 million in gross revenue to the university over a nine-year period through television revenue, ticket sales and other sources.²⁵ Second, Ohr relied on what he characterized as the less quantifiable benefits to the University of having a high profile football program: "Less quantifiable but also of great benefit to the Employer is the immeasurable positive impact to Northwestern's reputation a winning football team may have on alumni giving and increase in number of applicants for enrollment at the University."²⁶

Ohr found the needed "bargained for exchange" in the athletic tender letters, characterizing them as a contract of hire.²⁷ Particularly important to Ohr was the fact that the athletic scholarship was terminable upon the player's voluntarily quitting the football program or for serious violation of team rules.²⁸ Second, Ohr relied on the fact the players were recruited to the University specifically for their athletic ability as further evidence that

hazing and anti-gambling policies.

20. See Decision and Direction, *supra* note 8, at 18.

21. Decision and Direction, *supra* note 8, at 13.

22. *Id.*

23. *Id.*

24. *Id.* at 12–, 13.

25. *Id.* The exact amount of net revenue was a matter of debate between the parties, just as it is on college and university campuses throughout the country.

26. *Id.* at 12.

27. Decision and Direction, *supra* note 8, at 13.

28. *Id.* CAPA conceded that only two players had their scholarships revoked in the prior five years, and that unlike many schools, Northwestern granted the scholarship for four years regardless of injury or level of actual play. It was undisputed that the amount of the scholarship was equal for all players and not dependent on the amount of playing time or quality of the "services" rendered. Ohr found the threat of revocation for cessation of football activity was sufficient to establish that the scholarship was given in exchange for the "service" of playing football performed by the player.

the athletic scholarship was in return for performing services.²⁹ Third, Ohr found that the restrictions imposed on the players' ability to earn additional income due to the time commitment of playing football and NCAA regulations made the players highly dependent on the University. He considered this dependence as further evidence of an employment relationship.³⁰

Northwestern's principle argument was based on the NLRB's decision in *Brown University*.³¹ In *Brown*, the NLRB held by a 3-2 majority that graduate assistants who taught classes, assisted with research or performed unspecified administrative duties were not employees under the NLRA, despite their receipt of economic benefits similar to those received by the Northwestern football players.³² The Board focused on determining whether the nature of the relationship between Brown University and the graduate assistants was primarily educational or economic. Each of the graduate assistants received tuition remission and a cash stipend between \$12,800 and \$14,000 per year. The stipend was paid both in years in which the graduate students served as teaching/research assistants or proctors and in years in which the graduate students were not providing any services. The Board based its decision on several factors; emphasizing in particular (1) the fact that all of the graduate assistants were also students; (2) that Brown made the tuition remission and stipends available only to persons who were enrolled students; (3) that much, but not all of the duties performed under the stipend were related to the academic program in which the student was enrolled; and (4) the stipends/aid received was similar to the payments made to graduate students (fellows) who were not required to perform teaching, research or administrative duties, but simply to either take classes or work on their dissertations.³³ The Board acknowledged that the graduate assistants might well meet the common law test of employment in years in which they performed services, but rejected the union's argument that the NLRA's coverage had to be extended to all common law employees.³⁴

Ohr held *Brown* to be both irrelevant and distinguishable.³⁵ Ohr held *Brown* inapplicable because he considered the players' football activities to be wholly "unrelated" to their academic studies, whereas, he considered the Brown graduate assistants' teaching and research duties to be "inextricably related to their graduate degree requirements."³⁶ Ohr went on to hold that

29. *Id.* at 13.

30. *Id.* at 14.

31. 342 N.L.R.B. 483 (2004).

32. *Id.* at 492.

33. *Id.* at 488--89.

34. *Id.* at 490.

35. Decision and Direction, *supra* note 8, at 15.

36. *Id.* at 15.

even if applicable, *Brown* was distinguishable because the scholarship football players were not primarily students. While conceding that only enrolled students in good standing could play on the football team, Ohr held that this was insufficient to establish an integral link to student status or that the relationship was primarily one of student-educator rather than employee-employer.³⁷ Rather, Ohr held that the amount of time spent on football related activities, which he characterized as exceeding time spent on academics during certain portions of the year, precluded a finding that the scholarship players were “primarily students.”³⁸ He further relied on the fact that football related activities were not directly tied to the students’ academic program as they received no course credit for playing football and the coaching staff who supervised the football related activities were not faculty.³⁹ Finally, Ohr found that unlike *Brown*, the financial emolument received by the players was qualitatively different than the aid received by those who performed no services for the University in that the players’ aid was specifically tied to their continuing to play football.⁴⁰

Northwestern filed, and the Board accepted, its petition for review of Regional Director Ohr’s determination.⁴¹ The Board invited briefing on the subject from interested parties, asking amici to address the following six questions:

- What is the proper test to determine if grant-in-aid football players are employees within the meaning of the Act?
- Should *Brown* be reaffirmed, modified or overruled?
- What policy considerations should inform the Board’s decision?
- How should the Board consider the existence or absence of decisions regarding student athlete employee status under other federal laws?
- The extent, if any, to which employment discrimination provisions of Title VII, in comparison to Title IX should be considerations.
- If the players are found to be statutory employees, to what extent should outside constraints, such as

37. *Id.*

38. *Id.* at 16. Ohr did not address how this rationale would affect the status of the 40 or so walk-on football players who were subject to all of the same scheduling demands and time commitments as the scholarship players. Rather, he held that their lack of compensation excluded them from the definition of an employee, and thus they could have no bargaining rights under the statute.

39. *Id.* at 17.

40. *Id.* at 18.

41. Request for Review, *supra* note 9.

NCAA rules, affect the bargaining obligations imposed and alternatively whether the Board should discretionarily preclude employee-players from bargaining units while extending other protections of the act to the players as it does with confidential employees?⁴²

Amicus briefs were due on June 26, 2014, and the case is now under advisement.⁴³ No deadline for a ruling has been set or exists under the NLRA.

II. THE BOARD'S VARYING TREATMENT OF STUDENT EMPLOYEES OVER TIME

The issue of how to treat students who also perform services for the institution they attend has been the subject of several decisions by the Board dating back to the 1970's, when the Board first asserted jurisdiction over colleges and universities. The history of those decisions reflects the divisive nature of the issue and the results do not present a clear or coherent pattern. The results change with the composition of the Board and tend to pull on several different strands of thought.

The earliest decisions resulted in findings that students who also worked for the educational institution which they were attending had a primarily educational interest in the relationship, and thus would either not be considered employees or would be excluded from bargaining units. In one of its earliest decisions, *Adelphi University*,⁴⁴ the Board held that graduate teaching assistants and research assistants had to be excluded from a bargaining unit composed of regular faculty members and librarians.⁴⁵ All of the graduate assistants were also students at the University. Each was expected to commit at least twenty hours per week to supervising undergraduates in labs, grading papers or teaching classes. The graduate assistants received stipends and tuition remission which together exceeded some part-time faculty salaries. The Board noted that although the graduate assistants performed some faculty functions, they lacked many hallmarks of regular faculty, such as participation in faculty votes.⁴⁶ Ultimately the Board concluded that the graduate students "are primarily students" and excluded them from the unit because they lacked a community of interest.⁴⁷ The

42. N.W. Univ., Case No. 13-RC-121359 (Notice and Invitation to File Briefs 2014), mynlrb.nlr.gov/lmk/document.aspx/09031d4581705014.

43. N.W. Univ., Case No. 13-RC-121359 (Grant of Extension 2014), mynlrb.nlr.gov/lmk/document.aspx/09031d458175fd5.

44. 195 N.L.R.B. 639 (1972).

45. *Id.* at 640.

46. *Id.*

47. *Id.*

Board did not address the question of whether the graduate students in *Adelphi* were employees, as it does not even appear to have been presented.⁴⁸

A few years later, in *Stanford University*,⁴⁹ the Board ruled that research assistants in the Stanford physics department were “primarily students” and thus not employees within the meaning of the NLRA.⁵⁰ There, the research assistants were all graduate students working toward a Ph.D. They were provided a mix of stipends, loans, teaching and research assistantships that together added to the same amount for each research assistant. The Board noted that much of the work done by the research assistants was accepted in partial satisfaction of degree requirements and often formed the basis of the student thesis.⁵¹ The Board distinguished a separate category of research associates, who were already organized into a union and were seeking to organize the assistants.⁵² The Board noted that the associates already had terminal degrees, were not simultaneously students working toward a degree and worked largely at the direction of senior researchers to advance projects undertaken by the University under grants or contracts.⁵³ By contrast the Board found the research assistants were “seeking to advance their own academic standing and were engaging in research as a means of achieving that advancement.”⁵⁴ The Board then equated the research assistants at Stanford to the graduate assistants at *Adelphi* and held that they were not employees under the NLRA. “In sum, we believe these research assistants are like the graduate teaching and research assistants who we found were primarily students in *Adelphi University*. We find therefore that the research assistants are primarily students, and we conclude they are not employees within the meaning of Section 2(2) of the Act.”⁵⁵

The Board’s next major decision regarding “students” as employees came in *Cedars-Sinai Medical Center*.⁵⁶ There, the Board held that medical residents, interns and fellows at the hospital (“housestaff”) were engaged in a primarily educational endeavor and therefore not employees of the Hospital. The housestaff received monetary compensation and some fringe benefits. They spent a significant amount of time in minimally or unsupervised care of patients, which generated revenues for the Hospital.

48. In *Adelphi*, it was the employer who proposed adding the graduate students to the unit proposed by the Union. Thus, a challenge to their employee status would have been unlikely. *Id.*

49. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

50. *Id.* at 623.

51. *Id.* at 621-22.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Leland Stanford*, 214 N.L.R.B. at 621.

56. *Cedar-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).

The Board majority rested its holding on the conclusion that the housestaff “participate in these programs not for the purpose of earning a living; instead they are there to pursue [a] graduate medical education[]” at Cedars-Sinai and “that their status is therefore that of students rather than of employees.”⁵⁷ The majority pointed to the role of accrediting agencies in setting content requirements for the resident and intern programs, that the internships and residencies were integral parts of the licensing/certification procedures, that compensation was based on covering living costs during the completion of the program rather than quality or quantity of work performed, and that the housestaff selected programs based on the quality of the training available rather than financial rewards.⁵⁸ By contrast, the dissent pointed out that all of the housestaff already had terminal degrees, received no grades or degrees from the Hospital and analogized any education received by the housestaff to the normal learning curve of any new member of a trade or profession.⁵⁹ Thus, the minority would have found that regardless of any educational purpose, the basic relationship was an employment entitling the housestaff to bargaining rights under the Act.

In the same year as *Cedars-Sinai*, the Board decided *San Francisco Art Institute*,⁶⁰ the case that is perhaps most akin to the football players’ situation. There, the institution provided some of its students with tuition remission, a small salary or a combination of both in return for the students performing twenty to thirty-five hours per week of janitorial work around the school. The Board, by a 3-2 vote, declined to hold an election in a proposed bargaining unit consisting of the student janitors. The Board sidestepped the question of whether the student-janitors were “employees.” Instead, the Board majority held that because the employment tenure was limited to the period of enrollment at the school and because “students are concerned primarily with their studies rather than with terms of their part-time employment,” it would not effectuate the purposes of the act to recognize such a bargaining unit or allow collective bargaining on behalf of the student janitors as a group.⁶¹ The majority distinguished cases in which students working on a seasonal or part time basis were included in bargaining units of other full-time regular employees on the grounds that those cases involved students working for a third party commercial enterprise, and not for the institution at which they were students.⁶² The majority opinion was implicitly influenced by the notion that the primacy of the academic relationship, together with the inherently limited term of the em-

57. *Id.* at 253.

58. *Id.*

59. *Id.* at 256.

60. 226 N.L.R.B. 1251 (1976).

61. *Id.* at 1252.

62. *Id.*

ployment, reduced the significance of bargaining over wages and other terms of the janitorial employment to the point that it should be deemed outside the Act's main purpose of reducing industrial strife.⁶³ The dissent, by contrast, found no reason to differentiate between the students in their roles as janitors, and janitors working for a commercial cleaning company.⁶⁴

A year later, in *St. Clare's Hospital*,⁶⁵ the Board majority tried to clarify the basis of its holding in *Cedars-Sinai*, and harmonize the various decisions that preceded it. The majority posited four different types of student employment scenarios that would lead to different considerations under the Act, three of which are relevant here. The first was situations in which students are employed by commercial third parties to perform work unrelated to their field of study.⁶⁶ The Board posited that no special considerations of unit placement or coverage by the Act were presented.⁶⁷ The second scenario was a situation in which the student works for the institution he or she attends, but in a capacity unrelated to the course of study.⁶⁸ The Board conceded that this scenario was very close to a regular employment relationship, but nonetheless stated that extension of bargaining rights to the students, either as part of a larger unit or in a unit composed entirely of student employees, was inappropriate under the Act.⁶⁹ The Board supported this conclusion by noting that "in these situations, employment is merely incidental to the student's primary interest of acquiring an education, and in most instances is designed to supplement financial resources."⁷⁰ The Board further noted that because continuation of the employment is normally dependent on maintenance of the student relationship, the interconnectedness of the two and the inherently transitory nature of the employment render collective bargaining inappropriate.⁷¹ The third scenario consisted of students performing work for the institution at which they were enrolled and which had a direct relation to the student's education program.⁷² In such cases, the Board held bargaining would never be appropriate.⁷³

63. *Id.*

64. *Id.* at 1254--55.

65. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000 (1977).

66. *Id.*

67. *Id.* at 1001.

68. *Id.*

69. *Id.*

70. *Id.* at 1001.

71. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. at 1001.

72. *Id.* at 1002.

73. *Id.* at 1002-03. The fourth scenario involved situations in which student's work for a third party commercial entity as part of their educational program e.g. clinical education and internships. *Id.*

The general policy of denying bargaining rights to students doing work at the institution in which they were enrolled remained the Board's position for the next two decades and the Board was not called upon to seriously revisit the issue until the 1990s. The later decisions reversed course, either overturning the older precedent or finding grounds of distinction. In *Boston Medical Center Corporation*,⁷⁴ the Board, again by a 3-2 vote, overruled *Cedars-Sinai* and held that interns, residents, and clinical fellows were all employees who could obtain collective bargaining rights through a board sponsored election.⁷⁵ The facts of *Boston Medical* and *Cedars Sinai* are indistinguishable. The change in result reflects a change in attitude and membership of the Board. In *Boston Medical*, the Board emphasized that the housestaff spent eighty percent of their time in direct delivery of care to the Hospital's patients and received compensation in the form of stipends, vacation pay, sick pay, and fringe benefits such as health and dental insurance. The majority held that these facts alone brought the housestaff within the broad common law definition of an "employee."⁷⁶ Since neither "students" nor "housestaff" are expressly excluded from the statutory definition of "employee," the majority then considered and rejected various reasons for making a policy-based exception. The majority specifically rejected arguments that imposition of collective bargaining would threaten academic freedom if the Hospital were required to bargain about items such as rotation assignments that were set by the accrediting associations.⁷⁷ The majority rejected these concerns, finding them premature, and suggested that the "intelligence and ingenuity" of the bargaining parties should avoid any issues.⁷⁸ The majority further suggested that in appropriate future cases, limits on the scope of permissible bargaining in student units could be considered.⁷⁹ In the course of rejecting any basis for an exception, the majority clearly held that student and employee status were not mutually exclusive categories: "while they may be students learning their chosen medical craft, [housestaff] are also employees within the meaning of Section 2(3) of the Act."⁸⁰

Following *Boston Medical*, a three-member panel of the Board decided *New York University*.⁸¹ There, the Board held that graduate students who received stipends in addition to tuition remission, and who performed as teaching and research assistants, should be considered employees eligible

74. 330 N.L.R.B. 152 (1999).

75. *Id.* at 168.

76. *Id.* at 160--61.

77. *Id.* at 163--64.

78. *Id.* at 164--65.

79. *Id.*

80. *Bos. Med. Ctr. Corp.*, 300 N.L.R.B. at 152.

81. 332 N.L.R.B. 1205 (2000).

for collective bargaining rights under the Act.⁸² In reaching the decision, the Board did not overturn *Stanford*. Instead, the Board found that the NYU teaching assistants' duties involved primarily delivering education to undergraduate students, which was the essence of the service provided by the University.⁸³ The Board further relied on the fact that the number of Teaching Assistant (T.A.) positions was driven by the University's need for the service, that is undergraduate enrollment levels, rather than the number of graduate students in need of financial aid.⁸⁴ The majority emphasized that the graduate assistants at NYU received no direct academic benefit from their teaching duties, suffered no adverse academic consequence if they taught poorly, were paid through NYU's regular payroll system, and, though still "enrolled" at NYU, had completed their course work and were completing dissertations.⁸⁵ Citing to *Boston Medical*,⁸⁶ the Board rejected the notion that the mere fact that the teaching assistants were simultaneously students of the institution called for any special consideration, thereby rejecting arguments based on academic freedom and the potential for bargaining to intrude on purely academic matters. The Board did however hold that certain graduate students, who were classified as research assistants or graduate assistants in the Sackler Institute, were not employees.⁸⁷ The Board found that these two groups were largely engaged in research to be used in their dissertations and thus were not providing a service to the University.⁸⁸

A mere four years after the *New York University* decision, the Board reversed course yet again. In *Brown University*,⁸⁹ a reconstituted Board, by a 3-2 margin, overruled *New York University*, and held that graduate assistants who performed undergraduate teaching, assisted with research or worked as "proctors" performing miscellaneous administrative duties, were "primarily students" and thus not employees under the act.⁹⁰ The majority's focus in *Brown* was the inseparability of the individual's role as a student from the role as a T.A. or proctor. The Board majority emphasized that being an enrolled student was a threshold requirement of obtaining and keeping one of the positions and that the number of positions and the amounts paid as a stipend were calibrated to the costs of being a student and not the value of the services performed.⁹¹ The *Brown* majority found

82. *Id.* at 1206.

83. *Id.* at 1219.

84. *Id.*

85. *Id.* at 1206, 1207, 1214, 1219.

86. *Id.* at 1208.

87. *N.Y. Univ.*, 332 N.L.R.B. at 1221

88. *Id.* at 1220--21 n.10.

89. 342 N.L.R.B. 483 (2004).

90. *Id.* at 487--88.

91. *Id.* at 488.

further support in the fact that over sixty percent of the students who received T.A. positions were required to engage in teaching to earn their degree, and the majority of the T.A.s were doing work that arguably related to their field of study.⁹² The majority held that in light of the integral relation between the work performed and “student” status, collective bargaining would inherently interfere with academic freedom.⁹³ Finally the majority believed that allowing potential bargaining over academic matters was fundamentally inconsistent with the Act’s basic premise of encouraging industrial peace by balancing the rights of management and labor.⁹⁴

As a group, these decisions are striking in several regards. First, while all of the majority opinions claim to reach the result most consistent with the Act and the policies behind it, they also concede that the question of student status as employees and bargaining rights involves policy choices over which the Board has some discretion.⁹⁵ Each side can point to Supreme Court decisions that support a non-literal interpretation of the “employee” definition and the discretionary withholding of bargaining rights from certain classes of employees that are not expressly excluded by the statute.⁹⁶ Likewise, while both sides claim to find support in Supreme Court decisions, none of those decisions involving application of the definition of “employee” shed any real light on the issue of students who also perform services for the institution they attend, let alone compel a particular result.⁹⁷

92. *Id.* at 488–98. These facts were not essential to the holding as a sizable number of the members of the proposed unit were “proctors” who were engaged in miscellaneous tasks not necessarily directly connected to teaching or their educational program. *Id.* at 485 & n. 24.

93. *Id.* at 490.

94. *Id.* at 489.

95. *See, e.g., Bos. Med. Cent. Corp.*, 330 N.L.R.B. at 152, 164 (majority characterizes its holding as a “reasonable” interpretation of the Act); *Id.* at 168 (Member Hurtgen in dissent noting while it may be permissible to treat housestaff as employees under the Act, it is not compelled).

96. *See, e.g., Nat’l Labor Relations Bd. v. Bell Aerospace*, 416 U.S. 267 (1974) (excluding non-supervisory managerial employees from protections of the Act); *Nat’l Labor Relations Bd. v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (approving Board policy of excluding confidential employees from bargaining units, despite lack of explicit exclusion by statute); *Nat’l Labor Relations Bd. v. Yeshiva Univ.*, 444 U.S. 672 (1980) (applying managerial exception to tenured university faculty).

97. Other than in the context of distinguishing employees from independent contractors, the question of who is an “employee” has arisen with surprising infrequency. The Supreme Court has decided only three such cases beyond those cited in n. 96. *NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995) (holding that union salts, i.e. persons seeking employment for the purpose of organizing a non-union employer’s workforce from the inside, did not lose their employee status due to divided loyalty); *Sure-Tan v. Nat’l Labor Relations Bd. Nat’l*, 47 U.S. 883 (1984) (holding that undocumented workers remain employees for purposes of the Act, although status might affect

Second, all of the cases seem to agree that purely educational relationships and matters should be beyond the scope of collective bargaining. However, they differ in how purely educational the relationship needs to be before an exemption from employee status and bargaining will be found appropriate. All of the decisions focus on each party's purpose in entering into the relationship, the characterization of any economic benefit granted to the putative employee, the degree to which the "work" performed can be said to benefit the institution, and how those three factors intersect with the purposes and requirements of the Act. The earlier decisions, rejecting employee status, tend to proceed from an unstated assumption that a single either/or characterization of the entire relationship is necessary, with the predominant purpose governing the outcome. The later decisions, with the exception of *Brown*, are more comfortable with a dual status of individuals being both students and employees. These decisions tend to segregate out the economic and employee-like aspects of the relationship from the more traditionally academic aspects, and make the decision by consideration of the economic aspects of the relationship alone. This is seen most clearly in *San Francisco Art Institute*.⁹⁸ There the Board, by looking to the entirety of the relationship, determined that the art student janitors were "primarily students." Thus, despite the lack of relation between their janitorial duties and their academic work, the Board could reasonably consider the job and the pay received as a form of financial aid, rather than as compensation for work done.⁹⁹ It would seem clear that application of *Boston Medical* or *New York University* would lead to an opposite result.

III. POSSIBLE BOARD RESOLUTIONS AND THEIR IMPLICATIONS

How the Board ultimately resolves the issue, and how that affects other private colleges or universities, will ultimately depend on which strains of the various past rationales the Board uses to support its outcome or whether it strikes out on a new path. The Board has at least three possible paths that it may pursue. First, it might simply overrule *Brown* and reinstate *New York University*. Second, it could adhere to *Brown*, with some modification. Third, it might attempt a middle course that resolves the tensions reflected by the sharp swings in the Board's treatment of student employees over time. The path selected will dictate the likelihood of unionization in other sports and may well affect organizing among other student groups.

For example, one potential limit on how far bargaining rights might extend to sports beyond FBS Football and Division I Basketball is the distinc-

remedies available); *Allied Chem. & Alkali Workers Local Union No.1 v. Pittsburgh Plate & Glass Co.*, 404 U.S. 157 (1971) (holding that retirees are not employees covered by the bargaining obligations of the Act).

98. *San Francisco Art Inst.*, 226 N.L.R.B. 1251 (1976).

99. *Id.*

tion between revenue and non-revenue sports. If the Board were to follow the *New York University* type of analysis this distinction would be less important and lead to broader bargaining rights. *New York University* focused on how the duties performed by the graduate assistants related to the institution's business purposes and whether the funding received was in return for the service provided (i.e. where the T.A.s largely taught and graded undergrads; teaching undergraduate students was the institution's essential product and they were paid for their role in producing it).¹⁰⁰ The Board did not even mention whether the particular classes taught were operating at a positive or negative net revenue to the institution. Under such an approach, the fact that a particular sport raises or does not raise significant revenue on its own would arguably be immaterial. The Board would not want to create a precedent linking employee bargaining rights to whether the employer was profitable. The fact that the putative employer chooses to engage in the activity is sufficient to establish that it was viewed as having a benefit to the employer, and thus anyone "paid" to participate in that activity would be an employee with bargaining rights. The logic would run that the institution saw business value in having a quality sports program (e.g. the intangibles of which Regional Director Ohr wrote) was willing to pay at least some athletes with scholarships to achieve the result and, at least as to the athletic endeavor, exercised sufficient control to make the athletes employees and not independent contractors. This line of analysis would lead to a finding that essentially all athletic scholarship students were employees with collective bargaining rights.

By contrast, an approach which incorporated the primarily educational versus primarily economic concepts of *Brown* and its predecessors would not find collective bargaining rights or would find them only in limited cases of revenue sports and perhaps only revenue sports at institutions that lived up to the negative "sports factory" stereotype. In this sort of approach, the Board would need to look at the overall relationship and the parties' motivation for entering into it to ascertain whether it was primarily educational or primarily of an economic character. The key question would become whether the students were playing football primarily as a part of obtaining an education as opposed to playing football as an end in itself. A fact scenario like Northwestern would present a very close case. The substantial economic benefit of the specific program to the institution is undeniable.¹⁰¹ However, given the graduation rates, the adherence to general student admission criteria, and the nature of the "compensation" provided, it would be hard to deny that the typical football player is using the football program as a means to an educational end, rather than as a

100. N.Y. Univ., 332 N.L.R.B. 1205, 1206-07 (2000).

101. Decision and Direction, *supra* note 8, at 13.

more typical job by which to support himself¹⁰² In other programs, where the student aspect of the relationship might be shown to be less substantial, by demonstrating very low graduation rates, assignment to non-substantive classes or majors or the other parade of abuses that motivate many of the commentators favoring union status, this approach could lead to a primarily employee finding and bargaining. In non-revenue sports, the absence of a material financial benefit to the institution would likely lead to a conclusion that the institution was providing an augmentation of its educational service to the student-athlete, rather than the student-athlete providing a service to the institution. Therefore, bargaining would be unwarranted.

These same differences could affect the extension of bargaining rights based on unit composition issues. As noted above, Regional Director Ohr held that the twenty-seven non-athletic scholarship players were clearly not employees and thus not eligible to vote or to be represented for purposes of bargaining like the eighty-five athletic scholarship recipients.¹⁰³ As one moves away from FBS football and Division I basketball, the number of allowed athletic scholarships and its equivalencies diminishes in absolute numbers and in proportion to the overall roster.¹⁰⁴ While it might be intuitively appealing to assume that this would decrease the likelihood of the Board extending bargaining rights to the team, traditional labor law is anything but intuitive. Under the *New York University* line of analysis, any disproportion in the number of athletes who were athletic aid recipients and walk-ons would be unlikely to affect the Board's extension of bargaining rights to the athletes deemed to be employees. *New York University* directly rejected an argument that, because most of NYU's graduate students received stipends without having to perform T.A. work, no bargaining rights should be extended to those that did.¹⁰⁵ Board precedent also contains examples of bargaining units in which employees were greatly outnumbered by non-employee volunteers.¹⁰⁶ By contrast, a purely *Brown* approach would likely view the level of "non-employee" players as strong evidence

102. The bulk of the compensation provided is in the form of tuition remission, good only at Northwestern. The only cash compensation is a housing/food allowance of \$1,200-\$1,600/month available only to those players who elect to live off campus after completing their second year.

103. Decision and Direction, *supra* note 8, at 17; *see also, supra* note 11.

104. Compare NCAA Division I Manual (January 2014) Rule 15.5.6 page 206, allowing 85 scholarships for Football Bowl Subdivision team and 63 scholarship equivalencies for Championship Division football teams; with NCAA Division II 2013-2014 Manual, Rule 15.5.2.1 (page 15249) allowing 36 scholarship equivalencies for football. These same rules establish the number of allowed scholarship equivalencies within each NCAA Division for particular sports.

105. N.Y. Univ., 332 N.L.R.B., at 1206-1207, 1215.

106. *See e.g.* WBAI Pacifica Foundation, 328 N.L.R.B. 1273 (1999) (the Board issued a unit clarification order excluding 200 unpaid staff, who were essentially volunteers, from a unit that contained only 25 paid staff).

supporting a finding that the overall relationship of athletes in the sport to their college or university was "primarily educational" and thus deny bargaining.

Finally, one has to consider the possibility that the Board will strike out on a completely different path in recognition that neither the purely student nor purely economic employee model fits this situation very well. The seesawing the Board has done in the past reflects dissatisfaction with both approaches. The *New York University* approach leads to treating a relationship that undeniably has academic aspects requiring special consideration no differently than that between factory operatives and their employer. On the other hand, the *Brown* approach gives such deference to the educational aspect of the relationship that the significant economic ramifications of the relationship are ignored. The Board's invitation to briefing suggests exactly this possibility. Specifically in question 6, the Board asked for briefs as to whether any bargaining obligation should be limited due to external constraints like NCAA rules or whether the employees should be excluded from bargaining units as are "confidential" employees.¹⁰⁷ The first half of the question suggests that the Board at least acknowledges the difficulty of simply applying collective bargaining rules to the economic aspects of the athletes' relations with their schools, and perhaps some level of discomfort certifying a union that says it does not want to bargain about wages and other forms of compensation. Typically unions bargain over wages, hours, and other terms and conditions of the employment. The compensation found by Ohr is composed exclusively of scholarship amounts which by NCAA rule are limited to cost of attendance, with no room for additions.¹⁰⁸ Thus, the main topic of most collective bargaining, compensation, would be off-limits to the bargaining parties here.¹⁰⁹ The Board could attempt to resolve this problem by recognizing a bargaining obligation, but restricting the topics on which bargaining would be required in school-athlete negotiations to non-economic matters or to matters that did not conflict with NCAA obligations. The Board already divides the general bargaining obligation by topics into mandatory, permissive, and prohibited subjects of bargaining, and the Board could theoretically carve out a special set of rules to cover student employees. While this might have some facial appeal, the problems of such an approach would be legion. The Board is un-

107. Confidential employees are "those employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations." *Nat'l Labor Relations Bd. v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 189 (1981), quoting *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956).

108. Decision and Direction, *supra* note 8, at 14.

109. Indeed, a union that pushed for compensation in amounts greater than that allowed by NCAA rules could effectively cause their programs to be severely sanctioned by NCAA.

likely to want to create a precedent that would allow employers to limit their bargaining obligations by contracts with a third party or trade association. It is easy to see how this loophole once opened could be abused. However, requiring the college or university to bargain over demands for benefits beyond those allowed by NCAA rules (e.g. pay for players) would be futile in that accession to the demands by the institution could quickly lead to loss of ability to compete in the NCAA and the end of the program. It is unlikely that the Board would want to open these Pandora's boxes.

The second aspect of the question with its reference to "confidential" employees does however suggest a viable and interesting idea for a compromise resolution that the Board might explore. Under existing Board law, "confidential" employees are individuals who are clearly employees under the Act, but who work in positions that have access to confidential and sensitive information about the employer's labor relations and, particularly, its bargaining.¹¹⁰ The most common example would be the executive assistant to the V.P. of Labor Relations. These employees have generally been excluded from collective bargaining, despite their clear status as employees.¹¹¹ In the case of confidential employees, the basis of the exclusion is that their inclusion in a bargaining unit with other employees would divide their loyalty and give the union an unfair advantage. The Board has relied on these same concerns to deny confidential employees representation in a separate unit of only confidential employees. Despite their lack of a right to bargain collectively, the Board holds that confidential employees remain entitled to the other rights granted to employees under the Act.¹¹² These include the protections extended to employees who engage in other concerted activity for mutual aid and protection, as well as the provisions prohibiting discrimination and retaliation for engaging in such activities.¹¹³

110. Hendricks, 454 U.S. at 170.

111. *Id.*

112. *Peavey Co.*, 249 N.L.R.B. 853, n.3 (1980). The Board's position has met with mixed reception in the Courts of Appeal. Compare: *Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir. 1970) (Enforcing Board order to reinstate confidential employee who respected picket line set up by bargaining unit employees) and *Nat'l Labor Relations Bd. v. Poultrymen's Serv. Corp.*, 138 F.2d 204, 210 (3d Cir. 1943) with, *Peerless of America v. Nat'l Labor Relations Bd.*, 484 F.2d 1108, 1112 (7th Cir. 1973) and *Nat'l Labor Relations Bd. v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971) (each holding that confidential employees, like supervisors, have no rights as employees under the Act). The rationale used in *Peerless* and *Wheeling*, that the legislative history to the 1947 amendments to the Act dictate that confidential employees be deemed non-employees for all purposes, was undermined in *Hendricks County Rural Electric*, where the Supreme Court held that the 1947 Amendments did not resolve this issue 454 U.S., at nn. 10 and 19.

113. The current Board has taken an expansive view of these protections for employees who are not in collective bargaining units represented by a union, particularly in the area of policies limiting or chilling employee expression regarding their employer or issues that might be of concern to other employees. See, e.g., *Triple Play Sports*

“What” you may ask, “could any of this have to do with college football players?” The answer to that question is found in *San Francisco Art Institute*. There, as in *Adelphi*, the Board avoided a direct holding that the students in question were not employees, by holding instead that requiring collective bargaining on their behalf was inconsistent with the purposes of the Act.¹¹⁴ Should the Board use *San Francisco Art Institute* to create a new category of employees akin to confidential employees, the result would be an interesting hybrid of typical industrial relations and a student governance model. Because the athletes would not be includible in any bargaining unit, they would not be able to elect a third party union to negotiate a collective bargaining agreement on their behalf. However, their status as “employees,” without any further action on their part, would entitle them to the Act’s other protections that extend to employees generally. Thus, they would be free to work in concert, without employee interference, to discuss and resolve grievances with the institution, to strike in support of their proposed resolutions, and be free from discrimination or retaliation for having engaged in the joint activities. Such a compromise result, while probably a long-shot, would be consistent with the Obama Board’s prioritization and interest in the Act’s protection of worker rights, regardless of union membership/representation, over employer rights or the rights of unions as institutions.

If the players are held to be employees, then they will have all of the rights mentioned above even if it turns out that they have voted against union representation. Many forget that the panoply of rights summarized above (generally referred to as Section 7 rights) adhere to all statutory employees, whether they belong to a union or not. The need to take into account Section 7 rights with regard to some or all of an institution’s student athletes will create a much bigger adjustment for athletic departments than will the potential need to sit across a bargaining table every few years with a player rep from CAPA.

IV. PRACTICAL ADVICE

For now, there may not be a great deal that institutions of higher learning can do proactively, given the uncertainty of the result, the potentially varying rationales that might come out, and the possibility of congressional action to dictate a result. However, the cautious college or university may want to start to think through a few matters.

First, the essential element of employee status, regardless of the rationale

Bar & Grille, 361 NLRB No. 31 (2014) (holding that employer social media policy prohibiting “inappropriate” discussions was overly broad and a violation of unorganized employees’ rights); Durham School Services, 360 NLRB No. 85 (2014) (restrictions on employee access to facilities and communication thereon violated Act).

114. S.F. Art Inst., *supra* note 98, at 1254.

adopted by the Board, will remain a finding that the scholarship aid is a form of payment given in return for the performance of the athletic services. Thus, an institution that wishes to minimize the risk of its athletes being considered employees should look to see if it can decouple the grant in aid from athletic performance while staying in compliance with its NCAA Division and athletic conference rules. If athletes on a team received scholarships that were terminable only by academic personnel for academically/disciplinary related reasons generally applicable to all students, it would be near impossible for the Board to find employee status. While reaching that paradigm may be impossible, the closer one approaches it the less likely one's athletes will be found to be employees. Thus, placing more active control of athletic aid in the hands of financial aid administrators and faculty committees would, in a future case, undercut a finding that the scholarship is a payment for athletic services. Short of offering a major in "Football Science" in which academic credit is given for playing and studying the game, this is probably the best one can do to support an argument that the academic nature of the relationship so dominates that the athlete should not be found to be an employee.

Second, an institution may want to start reviewing its policies and treatment of athletes as a group in light of the Board law regarding the Section 7 rights of employees generally. Now that CAPA's election petition has put the issue on the table, an alternative route to obtaining employee status for athletes would be for a player to claim that some aspect of his/her treatment constituted interference with Section 7 rights. A necessary predicate to such a claim would be a decision as to whether the athlete was an employee who had such rights to begin with. Avoiding conduct that would be an overt violation of Section 7 rights could help you avoid being a test case. In addition, should the Board allow bargaining for all or some college or university athletes, the Board will sometimes rely on an employer's historic pattern of violations to order union recognition and bargaining without an election.¹¹⁵

Third, institutions should be attuned to changes being proposed by their NCAA Division and conferences or state legislatures. The issue has captured enough public attention that action by public institutions appears likely in several states.

115. *See, e.g., Nat'l Labor Relations Bd. v. Gissel Packing Co.*, 395 U.S. 575 (1969).

“SHARED” GOVERNANCE? NEW PRESSURE POINTS IN THE FACULTY/INSTITUTIONAL RELATIONSHIP

ELLEN M. BABBITT*

ANN H. FRANKE**

BARBARA A. LEE***

“Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego.”¹

I. INTRODUCTION.....	94
II. ACADEMIC FREEDOM IN THE CONTEXT OF ASSESSMENT AND ACCREDITATION.....	95
A. Background.....	95
B. Existing Law and Standards.....	99
C. Looking Ahead.....	102
III. THE FACULTY ROLE IN MANAGING THE ACADEMIC PROGRAM – DISTANCE LEARNING, ESTABLISHING OVERSEAS PROGRAMS AND CAMPUSES, AND NON-TRADITIONAL OFFERINGS	103
A. Background.....	103
B. Existing Law and Standards.....	107
C. Looking Ahead.....	108
IV. INSTITUTIONAL COMPLIANCE AND TRADITIONAL FACULTY RIGHTS AND RESPONSIBILITIES.....	109
A. Background.....	109
B. Existing Law and Standards.....	110
C. Looking Ahead.....	113
V. RECOMMENDATIONS.....	114

* Partner, Franczek Radelet P.C., Chicago, IL.

** President, Wise Results LLC, Washington, D.C.

*** Professor of Human Resource Management, Rutgers University, Piscataway, NJ; Counsel, Edwards Wildman Palmer LLP, Morristown, NJ.

1. Demers v. Austin, 746 F.3d 402, 413 (9th Cir. 2014).

I. INTRODUCTION

This article examines the impact of recent changes in colleges and universities on the relationship between faculty and institutions. Over the past several decades, many colleges and universities have been charting new paths—expanding educational opportunities to new formats, topics, and locales. At the same time, governments, accrediting bodies, and members of the public are taking a hard look at the effectiveness of America’s higher education system and asking profound questions: Is higher education fulfilling its purpose?² Is tuition too high?³ Why don’t more students complete college degrees?⁴ In the process, governments and accreditors have developed heightened expectations for—and imposed heightened legal and regulatory requirements upon— institutions of higher learning.⁵ It hardly needs be added that all such trends continue and the pace of change is accelerating.

These changes, both internal and external, bring new challenges for institutional governance. Administrators and faculty struggle to find the optimal allocation of their respective responsibilities. Which new areas lie primarily within the faculty’s expertise and responsibility, and which are primarily administrative in nature? What are the most useful models for consultation? This article examines three major areas that illustrate these challenges: (1) academic freedom and its relationship to assessment and accreditation; (2) faculty rights and responsibilities in distance education, establishment of campuses in other countries, and non-traditional offerings; and (3) the integration of compliance with traditional notions of faculty rights and responsibilities.

We assume that readers come with a working understanding of some major concepts. These include shared governance, faculty senates, and institutional decision-making. We will mention both regional and specialty accreditation. With respect to academic freedom, readers will find helpful an appreciation of the distinction between faculty academic freedom and institutional autonomy (sometimes called institutional academic freedom).⁶

2. See RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2010).

3. See Amy Phillips, *Is College Worth the Money?*, WASH. TIMES (Dec. 14, 2011), <http://communities.washingtontimes.com/neighborhood/60-second-attention-span/2011/dec/14/college-worth-money/>.

4. See Katherine Mangan, *2 Groups Describe Efforts to Push More Community-College Students toward Degree Completion*, CHRON. HIGHER EDUC. (Apr. 22, 2013), <http://chronicle.com/article/Groups-Describe-Efforts-to/138731/>.

5. See, e.g., Eric Kelderman, *Obama’s Accreditation Proposals Surprise Higher-Education Leaders*, CHRON. HIGHER EDUC. (Feb. 13, 2013), <http://chronicle.com/article/Obamas-Accreditation/137311/>.

6. For a discussion of individual and “institutional” academic freedom, see WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 7.1 (5th

Familiarity with the changing demographics of faculty, especially the increasing reliance on adjunct and other contingent faculty, will also serve the reader well.⁷

II. ACADEMIC FREEDOM IN THE CONTEXT OF ASSESSMENT AND ACCREDITATION

A. Background

Assessment is a relatively modern concept in American colleges and universities, while accreditation has deeper historical roots. Both have potentially significant impact upon academic freedom.

Starting in the 1970s, public concern developed over the value of higher education.⁸ By the mid-1980s, reformers called for learner-centered education and greater feedback to students, faculty, and institutions. The assessment movement took hold as states began to tie college and university funding to performance measures such as student retention, graduation rates, and even student learning. Accrediting organizations introduced standards for institutions to assess student outcomes.

Assessment shifts the discussion of college and university quality from a teaching to a learning focus. Outputs, rather than inputs, become the value proposition. Faculty play a traditional role in evaluating student work—from routine grading in introductory courses to review of a graduate student’s doctoral dissertation. Assessment, in this sense, is a central faculty responsibility. As external actors begin to mandate assessment, however, faculty concern may increase. Critics have argued that mandated assessment, which is directed primarily to undergraduate studies, smacks of standardization, the scourge of “teaching to the test,” and the risk of government intervention:

[I]ncreased public attention has been turned toward various plans for externally mandated assessments of learning outcomes in higher education. Some of the plans have been instituted on short

ed. 2013).

7. Further information is available from many sources, including Association of Governing Boards of Universities and Colleges, www.agb.org; American Association of University Professors, www.aaup.org; and the NACUA resources pages under the topics academic freedom and governance, <http://www.nacua.org/services/lrsindex.asp> (membership required). *See also* KAPLIN & LEE, *supra* note 6. For a very good 2014 publication on the subject of shared governance, see STEVEN C. BAHLS, *SHARED GOVERNANCE IN TIMES OF CHANGE: A PRACTICAL GUIDE FOR UNIVERSITIES AND COLLEGES* (2014).

8. *See* NORTHERN ILLINOIS UNIVERSITY OFFICE OF ASSESSMENT SERVICES, *HISTORY OF EDUCATIONAL ASSESSMENT* (2014), <http://www.niu.edu/assessment/manual/history.shtml#A>. The history, in turn, draws from MARY E. HUBA & JANN E. FREED, *LEARNER-CENTERED ASSESSMENT ON COLLEGE CAMPUSES: SHIFTING THE FOCUS FROM TEACHING TO LEARNING* (1999).

notice and with little or no participation by faculty members who, by virtue of their professional education and experience, are the most qualified to oversee both the details and the implications of a particular plan. Often these plans are the result of external political pressures, and may be accompanied by budgetary consequences, favorable or unfavorable, depending on the actual outcomes the mandated schemes purport to measure.⁹

The threat to academic freedom arises as external mandates begin to influence the faculty member's planning and delivery of course content. These are central faculty prerogatives (though, as noted in the following section, not unlimited ones). Recent reports suggest that standardized testing may be waning in popularity as a measure of institutional outputs. One expert has observed, "[t]he standardized tests of generic skills being touted today are simply not capable of fulfilling the dreams of policy makers who want to assess and compare the capacities of institutions (and nations) to improve college student learning."¹⁰

More fundamental though, than the precise tools for assessment would be the issue of the faculty's role in developing them.¹¹ Should legislators, accreditors, or administrators take the lead? What is, or should be, the faculty's contribution? A promising recent example of an internally-designed assessment tool comes from Sarah Lawrence College, where a faculty committee worked with the dean to develop a system of in-depth narrative evaluations of individual students' progress. The evaluation covers six areas of critical ability, such as the capacity to think analytically and independently. The areas evaluated transcend course content, and the narratives track each student's progress over time.¹² An internally-

9. AM. ASS'N OF UNIV. PROFESSORS, MANDATED ASSESSMENT OF EDUCATIONAL OUTCOMES (1991), *available at* <http://www.aaup.org/report/mandated-assessment-educational-outcomes>.

10. Dan Berrett, *Colleges Back Away from Using Tests to Assess Student Learning*, CHRON. HIGHER EDUC. (Apr. 21, 2014), <http://chronicle.com/article/Colleges-Back-Away-From-Using/146073>.

11. As one faculty advocate has observed:

If the professoriate is not successful in shaping this continuing discussion, and soon, by applying its arsenal of cross-curricular and networking skills to saying what will be measured and how those measures are to be used, there will be no end of "experts" who will gladly offer their services. Without the longstanding tradition of collegial peer review, the road to direct federal authority would be a fait accompli.

Greg Gilbert, *The Rise of the Professoriate*, AM. ASS'N UNIV. PROFESSORS (undated), www.aaup.org/issues/accreditation/resources-accreditation. Gilbert quotes Stephen Brint: "For the next generation of college teachers, the price could be steep if the current generation stares resolutely into the sand while the accountability movement gains force." *Id.*

12. See Dan Berrett, *Looking to a New Tool to Prove a College's Value*, CHRON. HIGHER EDUC. (May 7, 2014), <http://chronicle.com/article/A-College-Looks-to-a->

generated assessment method will not provide policy makers with a vehicle for global comparisons. It will, if developed in close collaboration with faculty, respect academic freedom and institutional autonomy.

Accreditation is another piece of the puzzle. Accrediting bodies are, to varying degrees, responsive to public calls for accountability and assessment.¹³ Accreditation may serve as a lever to drive institutional change in these areas.¹⁴ Yet, as a former provost has observed, ill-conceived accreditation requirements for assessment may threaten academic freedom, and faculty should resist these intrusions:

[I]t's time for college and university faculty to start paying attention to this seemingly dry issue [of accreditation]. Further, it's time they joined the effort by administrators and accreditors to resist the government's increasing intrusion into accreditation. That intrusion endangers both academic freedom and the unique American system of separation of the academy from the state.

Over the past 50 years, we have universalized American higher education so as to make it available to more people than ever before. But a major result of that has been expanding government control, which has only grown in intensity lately as state and federal governments have demanded that accreditors pay more attention to institutional accountability. Congress and the U.S. Department of Education are spelling out the meaning of all sorts of educational issues—even matters as basic as what constitutes a three-credit course.

Many faculty members have only a vague idea of the extent of government intrusion into academic life. Some refuse to believe that it will get worse, while others see the endless new rules as some campus administrative scheme to control their behavior.

...

New/146407/.

13. See, e.g., Eric Kelderman, *Teacher Accrediting Group Vows to Turn Teacher Education 'Upside Down'*, CHRON. HIGHER EDUC. (Feb. 28, 2012), <http://chronicle.com/article/Teacher-Accrediting-Group-Vows/130951/>.

14. As a general matter, the federal role in accreditation remains a topic of current political debate. Proposals range from fine-tuning the accreditation system to severing the link between federal financial aid eligibility and accreditation. E.g., U.S. DEP'T OF EDUC. NAT'L ADVISORY COMM. ON INSTITUTIONAL QUALITY AND INTEGRITY, ACCREDITATION POLICY RECOMMENDATIONS: HIGHER EDUCATION ACT REAUTHORIZATION (2012), available at www2.ed.gov/about/bdscomm/list/naciqi-dir/2012-spring/teleconference-2012/naciqi-final-report.pdf. Certain controversial position papers written under the prior administration have been archived on the U.S. Department of Education website. See also, Vickie Schray, *Assuring Quality in Higher Education: Recommendations for Improving Accreditation* (U.S. Dep't of Educ. Commission on the Future of Higher Education Issue Paper No. 14), available at www2.ed.gov/about/bdscomm/list/hiedfuture/reports/schray2.pdf.

. . . Academic leaders have failed to make clear to the faculty the role that accreditation plays, not just in quality assurance but in the preservation of a self-governed system of higher education—a unique American phenomenon. Most countries have a centralized education ministry. In the United States, a voluntary, responsible, and participatory accreditation system is the major tool we have to preserve, in the face of sweeping societal and political changes, such core values as academic freedom and institutional independence.¹⁵

Accreditation standards, while newly responsive to assessment, have long sought to protect academic freedom. Each regional accrediting body has adopted standards on academic freedom.¹⁶ But, just as faculty members sometimes overstate the reach of academic freedom, accrediting bodies (ironically) may do so as well. The Western Association of Colleges and Schools, for example, imposes a requirement that may surprise institutional administrators and lawyers: The institution publicly states its commitment to academic freedom for faculty, *staff*, and students, and acts accordingly. This commitment affirms that those in the academy are free to share their convictions and responsible conclusions with their colleagues and students in their teaching and writing.¹⁷

Apparently, in the eyes of WASC, all staff, including legal staff, should enjoy academic freedom, which is a peculiar expansion of the concept.

While issues of assessment and accreditation may only rarely arise in the day-to-day legal work of college and university lawyers, they can generate strife between faculty and administrators, as well as between institutions and the broader public. These issues also have the potential to reshape American colleges and universities.¹⁸

15. Milton Greenberg, *Accreditation and Faculty*, CHRON. HIGHER EDUC. (April 19, 2012), <http://chronicle.com/article/article-content/131577/>.

16. The American Association of University Professors (AAUP) has collected references to shared governance and to academic freedom in the standards and policy statements of the six regional accrediting agencies. See, e.g., AM. ASS'N OF UNIV. PROFESSORS, REGIONAL ACCREDITATION STANDARDS CONCERNING ACADEMIC FREEDOM AND THE FACULTY ROLE IN GOVERNANCE (Mar. 2008), available at <http://www.aaup.org/report/regional-accreditation-standards-concerning-academic-freedom-and-faculty-role-governance>.

17. W. ASS'N OF SCH. AND COLLS., DEFINING INSTITUTIONAL PURPOSES AND ENSURING EDUCATIONAL OBJECTIVES Standard 1.3 (2013) (emphasis added), available at <http://www.wascsenior.org/resources/handbook-accreditation-2013/part-ii-core-commitments-and-standards-accreditation/wasc-standards-accreditation-2013/standard-1-defining-institutional-purposes-and-ensuring-educational-objectives>.

18. For a different analysis of the relationship between academic freedom and assessment, see ASS'N AM. COLLS. & UNIVS. BD. DIRS., STATEMENT ON ACADEMIC FREEDOM AND EDUCATIONAL RESPONSIBILITY, 1 (2006), available at www.aacu.org/about/statements/documents/academicfreedom.pdf:

There is, however, an additional dimension of academic freedom that was not

B. Existing Law and Standards

Whenever a governance dispute occurs between faculty and administrators, or between faculty and external regulators, faculty may assert an academic freedom right to be involved in decisions that affect their work and welfare. But the contours of academic freedom are widely misunderstood; faculty may believe that the doctrine gives them ultimate authority over curricular and workplace decisions, while administrators and others may believe that the doctrine only applies to classroom speech. Neither extreme is correct. Although academic freedom provides significant protections to faculty and has a rich history in judicial decisions, institutional policies, and “academic custom and usage,”¹⁹ it does have boundaries.

Many wrongly assume that academic freedom is a constitutional right that applies to all colleges and universities. Two fundamental flaws undermine this assumption. First, the United States Constitution applies only to *public* colleges and universities. It prohibits government, including public colleges and universities, from infringing free speech. A private institution is not an arm of the government. Second, the Constitution does not mention academic freedom.

All this being said, the relationship between First Amendment free speech and academic freedom is not always clear and is still evolving. The Supreme Court has construed the First Amendment’s protection of free speech as extending some protection for academic freedom.²⁰ Moreover, the Supreme Court and lower federal courts continue to interpret the interplay between freedom of speech and academic freedom, adjusting doctrines over time. Most recently, for example, the Supreme Court in *Garcetti v. Ceballos* stated that employees at publicly-funded organizations (including colleges and universities), do not have Constitutionally-protected free speech rights if the speech at issue is related to their job

well developed in the original principles, and that has to do with the responsibilities of faculty members for educational programs. Faculty are responsible for establishing goals for student learning, for designing and implementing programs of general education and specialized study that intentionally cultivate the intended learning, and for assessing students’ achievement. In these matters, faculty must work collaboratively with their colleagues in their departments, schools, and institutions as well as with relevant administrators. Academic freedom is necessary not just so faculty members can conduct their individual research and teach their own courses, but so they can enable students—through whole college programs of study—to acquire the learning they need to contribute to society.

19. “Academic custom and usage” is a term used to denote the unwritten but common understandings that members of academe share. For a discussion of this concept, see KAPLIN & LEE, *supra* note 6, at § 1.4.3.3.

20. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); see also *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

responsibilities.²¹ The Court left open the impact of the decision on faculty teaching and research, over which institutions exercise only limited supervision. Perhaps inadvertently, the Court excluded faculty governance from the topics for future consideration.

For faculty who work at public colleges and universities, *Garcetti* may well be a step backward. Prior to *Garcetti*, when a court was asked to decide whether a faculty member's speech was protected by the First Amendment, that court first would determine whether the speech was a matter of "public concern."²² If the speech was not a matter of public concern—but was instead a matter related to the private interest of the faculty member—it was not protected. If, on the other hand, the court determined that the speech was a matter of public concern, the court then balanced the faculty member's free speech interests against the college's interest in maintaining an efficient workplace or educational environment. *Garcetti* has added a threshold consideration: if the speech is related to the faculty member's work responsibilities, then it may be unprotected and the *Pickering* analysis not even conducted. Only if the faculty member's speech is not related to his or her job responsibilities does the *Pickering* analysis clearly come into play.

Although some lower federal courts have fashioned an "academic exception" to *Garcetti* when the speech at issue has involved classroom or pedagogical speech,²³ speech related to governance may not fit into this exception.²⁴ In a recent example, the head of a department within the University of Illinois College of Medicine claimed that he suffered retaliation for speech critical of various administrative policies; he further claimed that his speech should be exempt from the limitations of *Garcetti* because it was "related to academic scholarship or classroom instruction."²⁵ Ultimately, the United States Court of Appeals for the Seventh Circuit disagreed, concluding that the speech at issue was within the scope of the plaintiff's job responsibilities and was thus unprotected by the First Amendment.

But in another case, *Adams v. University of North Carolina at*

21. 547 U.S. 410 (2006). *But see* Lane v. Franks, 134 S. Ct. 2369 (2014), in which the Court ruled unanimously that a public employee who alleged that he was dismissed in retaliation for testifying truthfully in a criminal court proceeding was protected by the First Amendment because his job duties did not include testifying in court.

22. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

23. *See* Adams v. Univ. Of North Carolina-Wilmington, 640 F.3d 550 (4th Cir. 2011); *see also* Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).

24. *See generally* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945 (2009). *But see* Demers, 746 F.3d 402.

25. *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010) (quoting *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

Wilmington,²⁶ the United States Court of Appeals for the Fourth Circuit ruled that a professor’s publications were unrelated to his teaching or other university duties, and thus *Garcetti* did not apply. And in *Demers v. Austin*,²⁷ yet another Court of Appeals (in that instance, the Ninth Circuit) ruled that a professor’s proposal to restructure a school of communications, and a proposed book criticizing his university, were a form of scholarship and thus exempt from *Garcetti*. The professor alleged that he had received lower performance evaluations as retaliation for his writings, while the university asserted that his evaluations were lower because he had not published in refereed journals and had disregarded university rules about meeting his classes. The court found that, although the writings at issue were part of the professor’s official duties, they were “academic speech” and thus exempt from the *Garcetti* doctrine. The court said:

We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*.²⁸

Concluding that the writings at issue were matters of public concern, the court reversed the lower court’s award of summary judgment in favor of the university.

Given the sharp contrast among the outcomes in *Abcarian*, *Adams*, and *Demers*, how and when *Garcetti* will be applied to faculty speech remains uncertain. While the speech in *Demers* appears directly related to governance, the court characterized it as “teaching and academic writing.” In contrast, the speech in *Abcarian*, also involving governance matters, was characterized as work-related and thus exempt from First Amendment protection. In other post-*Garcetti* cases, speech about faculty hiring²⁹ and the use of funds from a research grant³⁰ were considered job-related and thus within the *Garcetti* precedent. And although some commentators believe that the outcomes in *Adams* and *Demers* may signal judicial willingness to apply an “academic exception” to *Garcetti*,³¹ it is by no means certain that courts will uniformly adopt this perspective in future litigation.

26. *Adams*, 640 F.3d at 550.

27. *Demers*, 746 F.3d at 402.

28. *Id.* at 412.

29. *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

30. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

31. Thomas Sullivan & Lawrence White, *For Faculty Free Speech the Tide is Turning*, CHRON. HIGHER EDUC. (Sept. 30, 2013), <http://chronicle.com/article/For-Faculty-Free-Speech-the/141951>.

Although the faculty's role in institutional governance is typically a matter of policy and, perhaps, of contract (as set forth, for example, in a collective bargaining agreement or faculty handbook), faculty at "mature" colleges and universities expect to participate in faculty hiring and promotion, student admissions, curriculum content, evaluation of student academic performance, and graduation requirements.³² The level of participation may range from consultation to control, depending on the issue and the institution. As noted above, the regional accrediting associations expect the faculty to have a role in institutional governance; institutions found to provide inadequate opportunities for faculty to participate in governance may face criticism or probation from accrediting bodies.³³

Faculty who are dissatisfied with their governance role have used the accreditation process to attempt to increase their power. For example, when the Middle States Commission on Higher Education placed Kean University on probation in 2012, one of the Commission's concerns was that the university could not demonstrate "an institutional climate that fosters respect among students, faculty, staff, and administration."³⁴ The faculty had long been critical of the university's president and his alleged unwillingness to afford faculty a significant role in governance.

C. Looking Ahead

Although some faculty members may resist the forms of student assessment championed by accrediting agencies, the courts are unsympathetic to those faculty members whose "resistance" takes the form of insubordination.³⁵ While academic freedom may afford faculty the right to participate in governance, it is the institution's prerogative to decide whether to implement certain forms of student assessment and outcome measures. Given the power of accrediting associations, whose imprimatur is required for an institution to participate in the federal student financial aid programs, faculty participation would be appropriate in determining *how* student assessment may be accomplished, but not *whether* it will happen.

32. See, e.g., *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). The amount and extent of the faculty's role in governance is presently the litmus test for their coverage by the National Labor Relations Act for the purpose of collective bargaining.

33. See, e.g., Nick DeSantis, *UVA's Accreditor Says Sullivan Ouster Has "Raised Questions" About Compliance*, CHRON. HIGHER EDUC. (June 25, 2012), <http://chronicle.com/blogs/ticker/uva-s-accreditor-says-sullivan-ouster-has-raised-questions-about-compliance/44813>.

34. Kelly Heyboer, *Kean University Officials Vow to Keep School's Accreditation*, NEWARK STAR LEDGER (July 10, 2012), http://www.nj.com/news/index.ssf/2012/07/kean_university_officials_vow.html.

35. See, e.g., *Wirsing v. Bd. of Regents*, 739 F. Supp. 551 (D. Colo. 1990).

III. THE FACULTY ROLE IN MANAGING THE ACADEMIC PROGRAM – DISTANCE LEARNING, ESTABLISHING OVERSEAS PROGRAMS AND CAMPUSES, AND NON-TRADITIONAL OFFERINGS

A. Background

Academic programs have been spreading—over the internet, to new overseas campuses, and to new subject-matter areas. To what extent do faculty members effectively manage these developments? To what extent *should* they?

The basic efficacy of the faculty voice in academic decision-making is a matter of ongoing debate. In many institutions, the numbers of part-time and adjunct faculty have grown, while tenure-track and tenured positions have declined.³⁶ In other words, fewer faculty members have full-time, economically stable relationships with their institutions. Moreover, at many institutions, resources are in decline, increasing the potential for internal conflict.³⁷ Such factors can have a real impact on shared governance.

One senior professor, discouraged by what he perceived as consistent administrative disregard of faculty opinion, concluded, “It takes years of rank and the bittersweet experience of extensive committee service to realize that faculty influence on the operation of the university is an illusion, and that shared governance is a myth.”³⁸ In a similar vein, the AAUP recently argued that the health of shared governance is precarious:

In today’s universities, while faculty may have effective control over their own courses and research, their sphere of influence on other academic matters has been eroded through the administration’s application of the goals and managerial practices of the corporate business model. Moreover, faculty loss of influence over programmatic and other academic matters reduces faculty influence even in their individual academic course content and research.³⁹

36. AFT HIGHER EDUC., AM. FED’N OF TEACHERS, AMERICAN ACADEMIC: A NATIONAL SURVEY OF PART-TIME/ADJUNCT FACULTY (Mar. 2010), *available at* http://www.aft.org/sites/default/files/aa_partimefaculty0310.pdf.

37. *See* JOHN QUINTERNO, THE GREAT COST SHIFT: HOW HIGHER EDUCATION CUTS UNDERMINE THE FUTURE MIDDLE CLASS 2 (2012), *available at* http://www.demos.org/sites/default/files/publications/TheGreatCostShift_Demos_0.pdf.

38. John Lachs, *Shared Governance Is a Myth*, CHRON. HIGHER EDUC. (February 6, 2011), <http://chronicle.com/article/Shared-Governance-Is-a-Myth/126245/>.

39. Brief for the American Association of University Professors as Amicus Curiae Supporting Petitioner Union at 9, Pac. Lutheran Univ. and Serv. Emps. Int’l Union, Local 925, N.L.R.B. No. 19-RC-102521, at *9 (2013), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d45816702fd>.

This argument arose in a recent test of faculty rights under the National Labor Relations Act to form a union at a private university. The American Council on Education (ACE), participating as *amicus* in the same matter, painted a very different picture. ACE cited research showing that, in recent decades, faculty have maintained—or even gained—internal influence over their institutions:

[F]aculty participation in governance of academic matters increased over time. In 1970, faculties determined the content of curriculum at 45.6% of the institutions, and they shared authority with the administration at another 36.4%. By 2001, faculties determined curriculum content at 62.8% of the institutions, and they shared authority at 30.4%. In 1970, faculties determined the appointments of fulltime faculty in 4.5% of the institutions, and they shared authority at 26.4%. By 2001, faculties determined appointments of full-time faculty in 14.5% and shared authority in 58.2% of the institutions. (Quoting Judith Areen, “Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance,” 97 GEO. L.J. 945, 966 n.99 (2009).)⁴⁰

Others have suggested that the picture is more nuanced, with shared governance remaining most effective at the leading research universities. Moody’s Investors Service endorsed this view in a 2012 report issued after resolution of the University of Virginia’s leadership crisis. (The governing board had dismissed the president on scant notice. A huge outpouring of faculty support for the president led to her reinstatement two weeks later). Moody’s sees value in shared governance, while predicting more governance upheavals to come:

For the U.S. higher education sector overall, we expect governance and leadership clashes to increase in coming years as the sector’s ability to grow revenues dwindles, and its emphasis shifts to new operating efficiencies and cost containment

. . . .

Ironically, the clash between the president and some members of the University of Virginia board, highlights the stabilizing effects of the counter-intuitive “shared governance” model still in place at leading U.S. universities. Under this model, which is dramatically different from top-down corporate governance models, as well as electorally-driven government models, the tenured faculty, and to a lesser extent the alumni, students and

40. Brief of the American Council on Education et al. as Amici Curiae Supporting Respondent University at 18, Pac. Lutheran Univ. and Serv. Emps. Int’l Union, Local 925, N.L.R.B. No. 19-RC-102521, at *18 (2013), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458166ffa8>.

donors, have a powerful role to play in major university decision-making.

....

More university governance controversies are likely in coming years as the sector adapts to tougher economic realities. The faculty's implicit governing role remains especially strong at research universities, such as UVA, which are dependent on star "principal investigator" research faculty to attract grants and private gifts. However, the faculty's power is on the wane at the large majority of public and private US colleges and universities which operate with small endowments, weak selectivity, and high dependence on student tuition and/or state funding. Many universities are reducing the percentage of faculty that have tenure, a form of nearly guaranteed employment. This reduction erodes the implicit power of faculty and typically strengthens the hand of the board and president to deal with economic challenges quickly.....⁴¹

The report reiterated Moody's negative outlook for most colleges and universities, except for market-leading institutions, which have a stable outlook.⁴²

Specific issues and disputes illustrate the contrasting views of faculty and administrators toward their respective authority. The area of online learning offers salient examples. As recently as this year, it has been described as "the new frontier where the traditional rights of faculty members and the quality of instruction are up for grabs." The authors added:

In the rush to online education, faculty members have been signing contracts that abrogate the ownership of their classes, erode their collective interests, and threaten the quality of higher education. No standard (let alone best) practice has yet emerged, and faculty members are largely in the dark about what is at stake.⁴³

41. Virginia Dispute Highlights Governance Stress and Economic Threats Facing US Higher Education, MOODY'S INVESTORS SERV. 1-2(July 2, 2012), available at <http://chronicle.com/blogs/ticker/files/2012/07/UVA.pdf>.

42. Virginia Dispute Highlights Governance Stress and Economic Threats Facing US Higher Education, MOODY'S INVESTORS SERV., (July 2, 2012), available at <http://chronicle.com/blogs/ticker/files/2012/07/UVA.pdf>.

43. Colleen Lye & James Vernon, *The Erosion of Faculty Rights*, CHRON. HIGHER EDUC. (May 19, 2014), <http://chronicle.com/blogs/conversation/2014/05/19/the-erosion-of-faculty-rights/>. For an excellent legal analysis of intellectual property rights and online courses, see the 2013 NACUA conference outline, Megan W. Pierson, Robert R. Terrell, & Madelyn F. Wessel, "Massive Open Online Courses (MOOCs): Intellectual Property and Related Issues", which can be downloaded from the NACUA

Administrative decisions about online learning can evoke faculty concern. The media reported, for example, a 2013 controversy at San Jose State University.⁴⁴ The faculty took issue with the president's selection of online learning technology without, they felt, sufficient input from the faculty members who would need to teach using that technology and be significantly affected. Similar examples exist elsewhere.

Moreover, global academic ventures, particularly those involving buildings or entire campuses, have been another area of governance controversy. A notable example arose from the partnership between Yale University and the National University of Singapore (Yale-NUS) to develop the first liberal arts college in Singapore. According to press accounts, Yale's president took the position that faculty approval for the plan was unnecessary because Yale-NUS is a new institution not offering Yale courses, curricula, or degrees. Faculty concerns addressed not only their asserted right to be consulted but also Singapore's climate for civil rights, nondiscrimination, and political liberties.⁴⁵ Despite faculty protests, the Yale-NUS is open and accepting student applications.⁴⁶ Disputes about overseas programs may lead to unexpected outcomes. George Washington University, for example, recently shelved plans to open a campus in China, allegedly because the faculty senate did not approve of the plan.⁴⁷ And several faculty groups at New York University voted "no confidence" in President John Sexton, in part because of their belief that he disdains the faculty's governance role and has opened NYU campuses in Abu Dhabi and Shanghai without sufficient faculty consultation.⁴⁸ Similarly, Duke University's plans for a branch campus in China generated faculty concerns over the faculty role in designing and approving the project, the project's financing, and China's climate for academic freedom.⁴⁹

Closer to home, institutional plans for enrollment growth can raise similar questions about faculty input. Common examples include high

Legal Resources section at www.nacua.org.

44. Steve Kolowich, *Angered by MOOC Deals, San Jose State Faculty Senate Considers Rebuff*, CHRON. HIGHER EDUC. (Nov. 18, 2013), <http://chronicle.com/article/Angered-by-MOOC-Deals-San/143137/>.

45. Karin Fischer, *Yale Faculty Registers Concern about Campus in Singapore*, CHRON. HIGHER EDUC. (April 6, 2012), <http://chronicle.com/article/Yale-Faculty-Registers-Concern/131448/>.

46. Yale-NUS College, <http://www.yale-nus.edu.sg/> (last visited Nov 17, 2014).

47. *George Washington U. Won't Build China Campus*, INSIDE HIGHER ED (Feb. 4, 2014), <http://www.insidehighered.com/quicktakes/2014/02/04/george-washington-u-wont-build-china-campus>.

48. Jack Stripling, *Behind No-Confidence Vote at New York U., a Torn Faculty*, CHRON. HIGHER EDUC. (Mar. 12, 2013), <http://chronicle.com/article/Behind-No-Confidence-Vote-at/137873/>.

49. Ian Wilhelm, *Duke's China Plan Sparks Doubts on Campus*, CHRON. HIGHER EDUC. (May 25, 2011), <http://chronicle.com/article/Dukes-China-Plan-Sparks/127640/>.

school-to-college bridge programs, night classes for working adults, and satellite campuses convenient to underserved populations. An administration might proceed without soliciting faculty input, at the peril not only of incurring faculty opposition but also of missing advice from the campus constituency most knowledgeable about academic issues.

B. Existing Law and Standards

Accrediting associations require that an institution’s international programs or branch campuses meet all of the association’s accreditation standards, even if the program is operated jointly with another organization that is not accredited.⁵⁰ The institution’s self-study process, required by accrediting associations, must include attention to the overseas programs and/or campuses.⁵¹ Presumably, the same requirements that faculty participate in developing, evaluating, and delivering domestic programs would also apply to those programs delivered overseas. And, while the strength or weakness of the faculty’s governance role in the development of overseas campuses is seldom a legal issue, it is of great significance to the faculty, and they have not been silent in the face of institutions’ expansions overseas.

With respect to online learning and distance education, faculty participation has been more robust at many institutions because faculty create the course content, even if the institution chooses the web-based “platform” and the outside vendor that will supply the infrastructure for online learning. Accrediting associations require faculty involvement in curriculum development for distance or online learning, just as they do for traditional face-to-face learning.⁵² They also require the institution to provide technical support and training for faculty who teach using the online format.⁵³

Faculty ownership of curriculum content is a major flash point in the faculty governance/institutional autonomy arena. Faculty who have taught in traditional formats have typically assumed, whether the assumption was based upon tradition or an explicit policy, that they “owned” the content of the courses they developed—even though, technically, their course content is a “work made for hire” and would, in non-academic contexts, belong to

50. For example, the Middle States regional accrediting association requires that programs offered outside the United States meet the same standards that the institution itself must meet. MIDDLE STATES COMM’N ON HIGHER EDUC., INTERNATIONAL PROGRAMS OFFERED BY ACCREDITED INSTITUTIONS at 2, *available at* <https://www.msche.org/documents/P5.1-InternationalPrograms.doc>.

51. *Id.*

52. NATHAN LINDSAY, DECIPHERING DISTANCE LEARNING ACCREDITATION: A BALANCE OF OBSTACLES AND OPPORTUNITIES 7 (2006), ERIC Doc. No. 53909, *available at* <http://files.eric.ed.gov/fulltext/ED493909.pdf>.

53. *Id.*

their employer.⁵⁴ Institutions have typically not claimed ownership of course content, and there is little to no litigation on the subject. Ownership of the content of online courses, however, may be a different matter in that the institution may have invested resources—both human and financial—in the faculty member’s development of online course content through the hiring of technical support staff and investment in technology,⁵⁵ and thus may assert full or joint ownership of the content.

Some institutions address potential points of conflict with faculty by entering into a separate agreement with faculty who create online course content. The AAUP has released a “Statement on Distance Education,” which recommends that all faculty rights and prerogatives, such as academic freedom, faculty approval of courses and curricula, and the right of the instructor to select course materials, be the same in both traditional and online course formats. The Statement allocates to the faculty member or a faculty body the right to “exercise control over the future use and distribution of recorded instructional material and to determine whether the material should be revised or withdrawn from use.”⁵⁶ Given the potential for conflict, and the revenues that successful online education can attract, it is wise for institutions to adopt a written policy that specifies (i) the circumstances in which the institution will claim ownership or co-ownership, (ii) how royalties or licensing fees, if any, will be allocated, and (iii) whether the faculty member has a right of first refusal to update, revise, or assign a different instructor to the course.⁵⁷

C. Looking Ahead

With respect to distance learning, the institution, or one of its sub-units, holds the ultimate prerogative to decide whether and how to offer course content. Theoretically, at least, faculty can be required to teach online and to modify course content to fit the online format. However, some institutions have found that creating separate units, segregated from the core faculty disciplines, to focus on distance education has not produced the expected profits; several, including Temple University, New York

54. For a discussion of the “work made for hire” doctrine, see KAPLIN & LEE, *supra* note 6, at § 14.2.5.6.1.

55. Audrey Latourette, *Copyright Implications for Online Distance Education*, 32 J.C. & U.L. 613, 630 (2006).

56. AAUP, Statement on Distance Education (Mar. 1999), available at <http://www.aaup.org/report/statement-distance-education>. See also Donna Euben, “Faculty Rights and Responsibilities in Distance Learning” (2000), available at <http://www.aaup.org/faculty-rights-and-responsibilities-distance-learning-2000>.

57. For suggested approaches to such policies, see Michael Klein, “The Equitable Rule”: *Copyright Ownership of Distance-Education Courses*, 31 J.C. & U.L. 143 (2004).

University, and Columbia University, have closed these units.⁵⁸ Given the requirements of accrediting associations that faculty be centrally involved in creating, teaching, and evaluating online and distance learning, it would seem that the top-down approach is less successful than incentivizing faculty to adopt new technology and methods of delivering learning to their students.

IV. INSTITUTIONAL COMPLIANCE AND TRADITIONAL FACULTY RIGHTS AND RESPONSIBILITIES

A. Background

The compliance obligations of college and university institutions have increased substantially in recent decades.⁵⁹ Federal and state governments show little reluctance to adopt and impose additional requirements for record keeping, data reporting, and even institutional operations. A review of the Higher Education Compliance Alliance database illustrates the scope of federal regulation in areas as diverse as export controls, political campaigns, and campus safety.⁶⁰ Some compliance obligations encroach on faculty endeavors. Mandated training, for example, reduces the time available for core responsibilities.⁶¹ Other obligations, such as grant administration requirements, student disability accommodations, or occupational safety mandates, may directly affect how faculty perform their responsibilities.

As the messengers of compliance obligations, administrators may face faculty resistance. “This session is brought to you by the Supreme Court,” explained one campus counsel at the beginning of employment discrimination workshops she conducted after the United States Supreme

58. Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L.J. 73, 117 (2002).

59. For a discussion of the increase in federal compliance requirements in recent years, see Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 786–88 (2010).

60. HIGHER EDUC. COMPLIANCE ALLIANCE, <http://www.higheredcompliance.org> (last visited Nov. 25, 2014).

61. For example, employers in California must provide training on sexual harassment to certain employees. Under California law, “Employers with 50 or more employees must provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of assuming a supervisory position. Thereafter, covered employers must provide sexual harassment training and education to each supervisory employee once every two years.” *Sexual Harassment*, CAL. DEPT. OF FAIR EMP’T & Hous., http://www.dfeh.ca.gov/Publications_StatLaws_SexHarrass.htm (summarizing training requirements and liability of employers under 2014 Cal. Legis. Serv. Ch. 306 (A.B. 2053) (West)).

Court issued its related 1998 decisions in *Faragher* and *Ellerth*.⁶² In one instance, a prominent molecular biologist at the University of California, Irvine refused to take discrimination training required under state law. After an extended standoff in which the institution placed him on unpaid leave and he threatened to move to another university, the professor eventually relented.⁶³ In short, faculty may be individually or collectively resistant to fulfilling compliance obligations.

B. Existing Law and Standards

Several of the federal civil rights laws have a direct impact on faculty autonomy, particularly in the classroom. For example, students with disabilities are protected by both the Americans with Disabilities Act⁶⁴ and Section 504 of the Rehabilitation Act,⁶⁵ and they are entitled to reasonable accommodations to enable them to benefit from their educational experience. At many institutions, a central office, often unconnected to the “academic core,” reviews documentation of students’ disabilities and makes decisions concerning the types of accommodations needed in the classroom. Such accommodations may include alternate testing formats or additional time for tests, the use of technology (such as recording a professor’s lecture or asking the professor to wear a microphone), or copies of the professor’s notes for students with learning disorders.

Although a LexisNexis search did not uncover litigation by faculty asserting academic freedom justifications for failure to comply with an accommodation request by a student (or by the disability services office), the potential conflict between faculty hegemony in the classroom and the institution’s accommodation requirements has not gone unnoticed.⁶⁶ Faculty may assert intellectual property concerns and resist requests to tape their lectures, or they may refuse to provide lecture notes or to write important concepts on white or blackboards for students who have difficulty receiving information aurally. And because neither the ADA nor Section 504 considers accommodations that fundamentally alter the academic requirements of a course to be reasonable,⁶⁷ students must still be able to meet the academic and technical standards of the course or

62. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

63. The situation is described in greater detail in Ann Franke, “Getting on the Same Page: Educating Our Clients – How and Why to Educate Department Chairs, Deans, and Other Very Smart People,” NACUA Outline at 14 (Annual Conference, June 27-30, 2010).

64. 42 U.S.C. §§ 12101-12213 (2009).

65. 29 U.S.C. § 794 (2002).

66. *See, e.g.*, David Cope, *Disability Law and Your Classroom*, ACADEME (Nov.-Dec. 2005), at 37-39.

67. 28 C.F.R. § 36.302(a) (2011).

program⁶⁸ or meet the essential eligibility requirements of the academic program.⁶⁹ For that reason, faculty members may still consider whether the requested accommodation(s) interfere with their pedagogical goals or the content of their course.

Federal courts and the Office for Civil Rights (OCR), housed within the U.S. Department of Education, have weighed in on the issue of whether a university has a right to reject proposed accommodations that conflict with course requirements or learning objectives.⁷⁰ But OCR has found legal violations in cases where faculty failed to implement previously agreed-upon accommodations,⁷¹ or where the institution lacked a grievance procedure to address a faculty member’s refusal to allow an accommodation requested by the student.⁷²

One area of recent litigation pitting faculty pedagogical choices against the needs of students with disabilities arose in the context of access by visually-impaired students to course websites or e-readers. Faculty who have adopted technology for classroom use, for both standard courses and online learning, have found that some of the technology is not accessible to student with visual impairments. The National Federation of the Blind (NFB) filed several complaints against universities with the U.S. Department of Justice and the OCR. A complaint against Penn State University in 2010 filed with OCR claimed that the university’s course-management software, library catalog, and the websites of some academic departments were not accessible to blind students. That dispute was settled in 2011.⁷³

In 2011, the NFB filed complaints with the U.S. Department of Justice, alleging that the use of Google Apps by Northwestern and New York Universities disadvantaged visually impaired students because the software that students used to turn written words into spoken words was incompatible with the Google software.⁷⁴ Two other organizations

68. 34 C.F.R. §104.3(l)(1) (2011).

69. ADA Title II, 28 C.F.R. § 35.104 (2014).

70. *See Hoffman v. Contra Costa Coll.*, 21 Fed. Appx. 748 (9th Cir. 2001) (college had no obligation to require professor to allow student access to notes during examination); *see also Univ. of Akron*, OCR Case No. 15-02-2049, 103 L.R.P. 11607 (2003) (professor’s refusal to allow an open book take home examination was reasonable because memory and recall were essential course objectives).

71. *San Jose City College*, OCR Case No. 09-97-2093, 12 N.D.L.R. ¶ 193 (1997).

72. *California State University, Los Angeles*, OCR Case No. 09-03-2197, 28 N.D.L.R. ¶302 (2004).

73. Settlement between Penn State University and National Federation of the Blind (2011) (No. 03-11-2020), ACCESSIBILITY AND USABILITY AT PENN STATE UNIVERSITY, *available at* <http://accessibility.psu.edu/nfbpsusettlement>.

74. Press Release, Nat’l Fed’n of the Blind, Chris Danielson, National Federation of the Blind Asks Department of Justice to Investigate Schools Across the Country (Mar. 15, 2011), *available at* <https://nfb.org/node/1000>.

advocating for individuals with visual impairments sued Arizona State University, charging that visually impaired students could not use electronic textbooks that the school had distributed on Amazon Kindles. The lawsuit was settled, and the university agreed to “strive to use devices that are accessible to the blind.”⁷⁵ Similar complaints against other institutions (for example, Reed College, Pace University, and Case Western University) involving e-readers were settled by the Department of Justice;⁷⁶ the institutions now require only those e-readers that are accessible to visually impaired students.

The Departments of Justice and Education issued a joint “Dear Colleague” letter on June 29, 2010, which specifically addresses the limitations of the Kindle DX model that these institutions had adopted for classroom use. This letter states that the use of such technology is “unacceptable” when it is not accessible to all students.⁷⁷

Another federal civil rights law, Title IX of the Education Amendments of 1972,⁷⁸ imposes obligations on institutions that may impact faculty governance concerns. For example, the “Dear Colleague” Letter released by the Office for Civil Rights in April of 2011⁷⁹ advises that an investigation of a sexual assault claim should be completed within sixty days. If an institution uses a committee on which faculty sit to determine whether an incident of alleged assault or harassment has violated the institution’s discrimination policy, the work of that committee may not be completed within the required sixty day period, particularly if the investigation occurs during the summer or during semester breaks. This situation can pose problems if the faculty handbook, collective bargaining agreement, or other institutional policy reserves to the faculty the responsibility for fact-finding or for recommending sanctions, particularly if the accused is a faculty member. For example, the AAUP’s “Sexual Harassment: Suggested Policy and Procedures for Handling Complaints”⁸⁰

75. Charles Huckabee, *Arizona State U. and 2 Groups for the Blind Settle Lawsuit over Kindle*, CHRON. HIGHER EDUC. (Jan. 11, 2010), <http://chronicle.com/blogs/wiredcampus/arizona-state-u2-groups-for-the-blind-settle-lawsuit-over-kindle/20439>.

76. See Press Release, Dept. of Justice, Justice Department Reaches Three Settlements Under the Americans with Disabilities Act Regarding the Use of Electronic Book Readers (Jan. 13, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crt-030.html>.

77. Joint “Dear Colleague” Letter: Electronic Book Readers, U.S. Dept. of Educ., Office of Civil Rights (Nov. 16, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html>.

78. 20 U.S.C. §§ 1681 *et seq.* (2014).

79. “Dear Colleague” Letter: Campus Sexual Assault, Office of Civil Rights (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

80. AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 244-46

provides that, if a complaint is lodged against a faculty member, a faculty committee should determine “the merits of the allegation.”⁸¹ This requirement may, in practical terms, require the institution to contemplate either a departure from the OCR’s recommended Title IX compliance protocols or a departure from the expectations or even the contract rights of faculty.

C. Looking Ahead

Increasing federal and state government compliance requirements have the potential to shift the responsibility from faculty bodies to administrators for making recommendations or decisions concerning accommodations for students with disabilities or fact-finding concerning complaints against faculty. This has already happened in the realm of academic accommodations for students with disabilities, in that many institutions have decided that administrators trained to understand the medical or psychological accommodation needs of students should make at least the initial determination of what accommodations are necessary (and reasonable). Indeed, institutions that lacked expertise in this area found themselves liable for violations of the Americans with Disabilities Act or Section 504.⁸² Similarly, courts have ruled that a lengthy delay in addressing a student’s sexual harassment claim against a faculty member could be evidence of “deliberate indifference,” which would expose the institution to Title IX liability.⁸³

Commentators are bemoaning the reduction in the proportion of college and university employees who are full-time faculty members, noting the increase in the number of administrators as compliance responsibilities skyrocket.⁸⁴ This shift seems inevitable, given the present climate of increasing compliance responsibilities; it will continue to exacerbate the often-strained relationships between faculty and institutional leaders as faculty see their role in governance decline.

(10th ed., 2006).

81. *Id.* at 245.

82. *See, e.g.*, *Guckenberger v. Boston Univ.*, 957 F. Supp. 306 (D. Mass. 1997).

83. *See, e.g.*, *Hayut v. State Univ. of New York*, 352 F.3d 733 (2d Cir. 2003) (although lengthy delay in this case was attributable to the student’s decision to wait to report the harassment until the end of the semester, the court stated that deliberate indifference could be found in a case where the delay was lengthy and unjustified.) *See also* *Oden v. Northern Marianas College*, 284 F.3d 1058 (9th Cir. 2002).

84. BENJAMIN GINSBERG, *THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS* (2011) (using data compiled by the U.S. Department of Education, Ginsberg states that between 1975 and 2005, the number of full time faculty in the U.S. increased by 51 percent, while the number of administrators increased by 85% and the number of professional staff increased by 240%).

V. RECOMMENDATIONS

Despite the recent high profile clashes between faculty bodies and administrators or trustees, and recognizing that compliance requirements are unlikely to diminish and will probably continue to increase, how can faculty and administrators (and boards) navigate these troubled waters? While acknowledging the structural and political difficulties that complicate collegial governance, we believe that there are strategies that can be used to help minimize the conflict and respond to the demands of external entities, whether governmental, political, or ideological. Below is a series of recommendations we offer for the reader's consideration.

1. Engage in a dialogue with faculty *before* a serious dispute arises about faculty roles in accreditation, assessment, non-traditional educational offerings, and the other "pressure points" identified above. Discussions held in times of (relative) calm may bear fruit in times of crisis.
2. Create standards, jointly agreed upon by the administration and the faculty, regarding the types of issues on which the administration will seek advice from representative faculty bodies.
3. Review the current structure of faculty governance committees or joint faculty/administration committees. Analyze which are working, which are useful, and which may be obsolete or not workable as currently configured. Also analyze whether other committees or structures may be needed. This review can and should be undertaken cooperatively with the faculty.
4. Avoid creating "busy work" for faculty committees; there is too much real work being left undone to waste human resources and faculty expertise.
5. For administrators, give serious consideration and deference to faculty recommendations, particularly those involving areas that are commonly termed the faculty's "primary responsibilities." Where the administration decides not to follow faculty recommendations, particularly in areas of primary faculty responsibility, consider discussing these differences or decisions with the appropriate faculty members or committees. This is consistent not only with the approach advocated in the AAUP's *Statement on Government* but it may also help the institution make sound decisions.
6. Share budget information with faculty as appropriate to the particular budgetary process at issue. Make the

faculty responsible for planning how new initiatives being proposed by the faculty will be funded through a joint effort between the faculty and the administration.

7. Encourage faculty participation not only in institutional governance but also in the accreditation process, including communication and negotiation with accrediting agencies as appropriate.
8. Talk with the faculty not only about the volume of compliance obligations that colleges and universities now face (which often does not resonate with faculty) but also more specifically about the faculty's role in ensuring compliance. Some of the faculty's resistance to "compliance" stems from lack of understanding of the faculty's role (and a fear stemming from that lack of understanding).
9. Share general information on the compliance obligations of colleges and universities. For example, introduce faculty leaders to the Higher Education Compliance Alliance website, created by NACUA in partnership with other groups.⁸⁵
10. Many faculty handbooks and related policies are seriously in need of updated definitions and procedures. While many institutions postpone faculty handbook revision initiatives, fearing the scheduling delays and potential disagreements that they may bring, a faculty handbook revision process (if properly managed) may offer invaluable opportunities for a dialogue with the faculty about new compliance requirements and challenges.

85. HIGHER EDUC. COMPLIANCE ALLIANCE, *supra* note 60.

THROUGH THE EYES OF HIGHER EDUCATION ATTORNEYS: HOW DEPARTMENT CHAIRS ARE NAVIGATING THE WATERS OF LEGAL ISSUES AND RISK MANAGEMENT

CAROL L. J. HUSTOLES*
LOUANN BIERLEIN PALMER**

I. INTRODUCTION.....	118
II. PROBLEM STATEMENT AND RELATED LITERATURE	119
III. METHODOLOGY	123
IV. RESPONDENT DEMOGRAPHICS	125
A. Table 1: Higher Education Attorney Respondents by Geographic Region.....	126
V. LEGAL ISSUE RESULTS.....	127
A. Frequency of Legal Assistance.....	127
1. Table 2: Frequency of Legal Assistance to Department Chairs	128
B. Amount of Time Spent on Legal Assistance.....	129
1. Table 3: Annual Number of Hours of Time Spent on Legal Assistance Provided for Department Chairs.....	130
C. Department Chairs' Level of Difficulty with Legal Issues.....	131
1. Table 4: Chairs' Level of Difficulty with Legal Issues	131
D. Potential Adverse Impact on Liability and Risk	

* Vice President for Legal Affairs and General Counsel at Western Michigan University. Dr. Hustoles received her J.D. from The University of Michigan Law School and her Ph.D. from Western Michigan University. Deep appreciation is expressed to her advisor and co--author Dr. Louann Bierlein Palmer, NACUA, all NACUA attorneys who participated in this survey, and to all who have added to the body of knowledge about higher educational leadership through this survey and in countless other ways.

** Professor in the Department of Educational Leadership, Research and Technology at Western Michigan University, and serves as the program coordinator for their educational leadership Ph.D. program. Dr. Bierlein Palmer has spent over two decades working with national and state policy leaders and educators on a number of K--12 and higher education reform initiatives.

Management.....	133
1. Table 5: Potential Adverse Impact on Institution's Legal Liability or Risk Management Efforts	133
E. Essential Areas for Chair Training Given Limited Resources	134
1. Table 6: Essential Issues for Chair Training to Reduce Legal Liability and Improve Risk Management.....	135
VI. DISCUSSION AND FINDINGS	136
A. Table 7: At a Glance: Comparing All Issues by Ranks and Means.....	137
B. Findings by Variables	138
C. Other Findings between Legal Issue Variables and Categories.....	142
VII. CONCLUSIONS	145
APPENDIX.....	146

I. INTRODUCTION

Sexual harassment complaints. Tenure and promotion denials. Privacy rights. State and federal laws, regulations, and potential penalties. Claims of discrimination based upon race, religion, age, national origin, or disability. Copyright, fair use, patents, and other intellectual property issues. Faculty work performance, non-collegiality, and disciplinary issues. Academic freedom versus management rights. Drug and alcohol abuse. Student discipline and academic misconduct. Adhering to requirements of the Family Educational Rights and Privacy Act of 1974. Plagiarism proliferation. Conflict of interest and commitment. Contracts, policies, and rule-making. Free speech and association rights. Criminal acts and misuse of institutional or grant resources.

What these difficult matters have in common is that they are legally-related problems and issues faced by those working in colleges and universities, and which actually or potentially impact institutional legal liability and risk management efforts.¹ Higher education administrators frequently deal with issues that raise legal and risk management questions, and many programs and services in higher education involve the law or risk management in some manner. "Boon, bane, or something in between," legal considerations have a tremendous impact on the day-to-day operations of universities and

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

colleges—an impact that is likely to continue growing as lawyers, legal requirements, and lawsuits have now become established components of American higher education.²

II. PROBLEM STATEMENT AND RELATED LITERATURE

The volume and complexity of higher education legal issues have increased tremendously in the past few decades.³ Legal issues permeate various levels of leadership and play a significant role in the work of central administration and academic leaders at the college and university dean and department chair levels. While central administration deals with those issues on a macro or organizational level, department chairs and other academic administrators often face them at the micro level through their interactions with faculty and students.

Indeed, one crucial position within the framework of a university's administration is the head of an academic department, generally referred to as a "chairperson" or "chair."⁴ Since chairs need to represent both administrative and faculty perspectives, this in-between status leads to potential conflict and raises questions on how they should act.⁵

Glee Whitsett noted that chairs bring varying levels of administrative and leadership skills with them when they take on their roles as department heads.⁶ For example, a new chair might be appointed directly from the rank of a faculty member, suddenly taking on a supervisory position with authority to direct and manage other faculty members who were previously peer colleagues. Whitsett further pointed out that some chairs hold their department leadership positions for many years and possess considerable experience wielding institutional clout and influence, while others serve as chairs for relatively short periods of time and later return to faculty ranks. Because chairs are mid-level academic leaders, they are often in the center of controversy, conflict, and debate. Thus, a chair frequently

2. STEVEN G. POSKANZER, *HIGHER EDUCATION LAW: THE FACULTY* (2002).

3. Kathleen C. Santora & William A. Kaplin, *Preventive Law: How Colleges Can Avoid Legal Problems*, *CHRON. HIGHER EDUC.*, Apr. 18, 2003, <http://chronicle.com/article/Preventive-Law-How-Colleges/6289>.

4. JOHN W. CRESWELL ET AL., *THE ACADEMIC CHAIRPERSON'S HANDBOOK* (2008); ALAN T. SEAGREN ET AL., *THE DEPARTMENT CHAIR: NEW ROLES, RESPONSIBILITIES AND CHALLENGES* (1993); BARBARA E. WALVOORD ET AL., *ACADEMIC DEPARTMENTS: HOW THEY WORK, HOW THEY CHANGE* (2000).

5. SEAGREN ET AL., *supra* note 4.

6. Glee Whitsett, *Perceptions of Leadership Styles of Department Chairs*, 41 *C. STUDENT J.* 274 (2007).

serves as a facilitator, negotiator, and coalition builder.⁷

Chairs should know what authority they have to direct persons to cease certain conduct, to understand institutional rules, and to understand the extent of their legal powers in their role as department heads.⁸ For many chairs, legal mandates and lawsuit threats in the academic environment are viewed as offensive obstacles to the exercise of experienced academic judgment, leading them to avoid dealing with legal issues. However, the more reasoned approach indicates that the complexities of the law permeate academic life and need to be understood and managed.⁹

Institutions of higher education are also increasingly recognizing the need to integrate risk management into every facet of campus life.¹⁰ Robert Bickel and Peter Lake point out that the range of laws with which institutions of higher learning must comply have become more complicated than they once were, and that courts are imposing business--like responsibilities on them.¹¹ Failing to assess operational risks and to constructively address them with risk management processes can create vulnerability to claims and litigation, which drains contingency funds and stretches limited resources.¹² Kaplin and Lee likewise agree that legal counsel for the institution should be involved in all aspects of risk management.¹³

Indeed, higher education attorneys have expounded upon the need for *proactively* working with and training college and university clients to *avoid* claims and lawsuits, rather than just assisting their clients to *react to and defend against* claims and lawsuits already filed.¹⁴ Preventive law involves both administrators and legal counsel in a continual process of setting legal parameters, pinpointing alternatives to circumvent problems, and sensitizing administrators to legal issues and the importance of recognizing and dealing with them in early

7. Vicki J. Rosser et al., *Academic Deans and Directors: Assessing Their Effectiveness from Individual and Institutional Perspectives*, 74 J. HIGHER EDUC. 1 (2003).

8. ALLAN TUCKER, CHAIRING THE ACADEMIC DEPARTMENT: LEADERSHIP AMONG PEERS (2d ed. 1984).

9. ENHANCING DEPARTMENTAL LEADERSHIP: THE ROLES OF THE CHAIRPERSON (John B. Bennett & David J. Figuli eds., 1990).

10. Elizabeth F. Farrell, *Colleges' Risk Managers Face a Rising Tide of Litigation*. CHRON. HIGHER EDUC., Nov. 16, 2001, at A29-A31.

11. ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (1999).

12. Brett A. Sokolow, *Risk Management in the Community College Setting*, NEW DIRECTIONS FOR COMMUNITY COLLEGES 125, 85-95 (2004).

13. KAPLIN & LEE, *supra* note 1.

14. KAPLIN & LEE, *supra* note 1; Paul Ward & Nancy Tribbensee, *Preventive Law on Campus*, 35 CHANGE 16, 20 (2003).

stages.¹⁵ Noting that since the 1980s, the preventive law approach has become increasingly valuable to higher education institutions, Kaplin and Lee have suggested a teamwork relationship be developed between administrators and legal counsel for preventive law to work best and to make better institutional policy decisions.¹⁶

Despite the abundance of literature regarding risk management, the duties of chairs and their involvement in matters that have legal ramifications, and the role of higher education attorneys, legal concerns have often been virtually ignored by authors writing about the role and duties of chairs. For example, although Seagren et al. studied the chair's role extensively back in the 1990s, legal issues and institutional risk management were not addressed in their checklist of roles and responsibilities of the chair.¹⁷ Although Gmelch and Mishkin, writing at the same time as Seagren et al., expounded about department chairs' functions and needed leadership skills, the role of legal issues or risk management fitting into the broader picture of departmental governance was not readily apparent in the discussion.¹⁸ Walvoord et al., writing a few years after Seagren et al. and Gmelch and Mishkin, discussed how academic departments work and how they change, but omitted how legal issues or risk management can impact department chairs' decisions and actions.¹⁹

Even more obvious is the deficiency of research specifically addressing the questions of how department chairs deal with legal or risk management issues confronting them. For example, in developing their "handbook" for department chairs, Creswell et al. interviewed 200 chairs from seventy colleges and universities and presented fifteen strategies for developing a department, exercising leadership, and reaching out to faculty.²⁰ Yet the impact of legal issues or risk management as to a chair's functions and duties was apparently not a specific factor researched or discussed in this study.

Further, there is a dearth of research data about the perceptions of higher education attorneys who work with counsel chairs regarding legal and risk management issues. Only two studies could be identified. In 2005, Richard Ludwick examined the role of legal counsel in the decision---making process of presidents at small, private colleges.²¹ In

15. KAPLIN & LEE, *supra* note 1.

16. KAPLIN & LEE, *supra* note 1.

17. SEAGREN ET AL., *supra* note 4.

18. WALTER H. GMELCH & VAL D. MISKIN, *LEADERSHIP SKILLS FOR DEPARTMENT CHAIRS* (1993).

19. BARBARA E. WALVOORD ET AL., *ACADEMIC DEPARTMENTS: HOW THEY WORK, HOW THEY CHANGE* (Adrianna J. Kezar, ed., 2000).

20. CRESWELL ET AL., *supra* note 4.

21. Richard L. Ludwick, *The Role of Legal Counsel in the Decision---Making*

the same year, Manuel Rupe gathered data on higher education attorneys' perceptions regarding academic freedom and challenges to it.²² While these studies certainly contribute to the body of knowledge regarding higher educational leadership, they focused on subjects other than the spectrum of legal issues impacting higher education governance, leadership effectiveness, institutional legal liability, or risk management.

To this end, the study was designed to obtain input from higher education attorneys—professionals who represent and provide legal services for their college and university clients regarding *their* perceptions and experiences of how adequately chairs are dealing with the multitude of legal and risk management issues confronting them in their department chair roles.²³

Specific research questions included:

- 1) What types of legal issues do higher education attorneys most often provide assistance to department chairs?
- 2) How much time do higher education attorneys spend on such legal issues when providing assistance to

Process of Presidents at Small, Private Colleges (Dec. 2005) (unpublished P.h.D. dissertation, University of Oregon) (on file with Dissertation Abstracts International UMI no. 3201691).

22. Manuel R. Rupe, *Higher Education Attorneys' Perceptions Regarding Academic Freedom and Challenges to Academic Freedom* (Dec. 2005) (Ph.D. dissertation, Western Michigan University) (on file with Dissertation Abstracts International UMI no. 3197564).

23. Importantly, this study was not also sent to department chairs. The reason for not doing so is that this particular research study was to obtain data *only* from higher education attorneys on *their* perspectives and experiences—a particular group that the literature shows is rarely studied quantitatively in the educational leadership field. However, the following recommendation was provided in this study:

As a final recommendation for further research, it would be quite intriguing and beneficial to the field of higher educational leadership to conduct a study that mirrors this one in scope and type of questions, but that instead surveys *department chairs* and *their* views and experiences about seeking legal assistance from higher education attorneys. Such a study could also attempt to discover what differences there might be in department chairs' responses, and if different findings resulted regarding any statistically significant relationships in responses depending upon the variable of unionized faculty or chairs themselves. Comparing the results of such a study to the findings of my study would be quite revealing and constructive to both department chairs and higher education attorneys, leading to a more comprehensive understanding of the others' roles, as well as ideas on how to better interact with each other toward the goal of bettering the colleges and universities they serve.

department chairs?

- 3) What types of legal issues do higher education attorneys see department chairs having the most difficulty handling?
- 4) What types of legal issues do higher education attorneys perceive as having the greatest impact upon institutional legal liability and risk management efforts?
- 5) For what types of legal issues do higher education attorneys believe department chair training is most essential?

III. METHODOLOGY

Our study used a non---experimental, cross---sectional quantitative survey approach with a population of higher education attorneys derived from membership in the National Association of College and University Attorneys (NACUA). NACUA is a national professional organization of higher education attorney members. At the time of the study, NACUA included more than 700 institutions with over 1,600 campuses, represented by over 3,800 attorneys.²⁴ Primarily, NACUA's member institutions are non---profit, regionally accredited institutions of higher education in the United States²⁵, but with a few members from Canada and further abroad.

NACUA gave permission to the researchers to send an electronic email survey and follow up email reminders to other NACUA members through the association's listserv (NACUANET).²⁶ As described on NACUA's website, there were about 2,000 NACUA member attorneys subscribed to this service at the time of the study, and all were sent an email survey request. All types of higher education attorneys were included to obtain a wide range of experiences and perceptions of their relationships with chairs.

The survey instrument was developed by the researchers, and

24. At the time of this article, NACUA reported members as including 700 institutions, encompassing more than 1,800 campuses and 4,100 attorney representatives. See *Membership*, NACUA, <http://www.nacua.org/membership/index.asp> (last visited Dec. 7, 2014).

25. *About NACUA*, NACUA, <http://www.nacua.org/aboutnacua/index.asp> (last visited Dec. 7, 2014).

26. For additional information, see Carol L. J. Hustoles, *Through the Eyes of Higher Education Attorneys: How Department Chairs are Navigating the Waters of Legal Issues and Risk Management* (June 1, 2012) (Ph.D. dissertation, Western Michigan University), available at <http://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1037&context=dissertations>.

incorporated closed-ended questions, using Likert scales, as well as open-ended inquiries.²⁷ The survey asked participants about their perceptions and experiences regarding seventeen legal issues (thirteen faculty-related and four student-related) confronting department chairs.²⁸ An initial pilot study was conducted with higher education attorneys representing public universities. Confidentiality of individual responses was assured and protected, and all Human Subjects Institutional Review Board (HSIRB) protocols were followed.²⁹

General descriptive statistics were performed to describe the sample that participated in the survey. The ordinal data from the Likert-scaled closed-ended questions were analyzed using descriptive

27. Hustoles, *supra* note 26, at 47.

28. The survey asked participants about their perceptions and experiences regarding 13 faculty-related legal issues and four student-related legal issues confronting department chairs. The faculty-related issues were:

- (a) Sexual harassment by faculty
- (b) Other discrimination claims by faculty (e.g., age sex, race, disability, religion)
- (c) Non-collegiality, intimidation, other interpersonal problems by faculty
- (d) Tenure or promotion issues
- (e) Alcohol or drug abuse by faculty
- (f) Misuse of institutional or grant resources
- (g) Faculty work performance issues (e.g., absenteeism, ineptness, failure to deliver course content)
- (h) Conflict of interest or conflict of commitment (e.g., faculty doing non-college or university work)
- (i) Research misconduct
- (j) Agreements, contracts, and/or grants involving faculty (including contract review)
- (k) Academic freedom or controversial expression of speech
- (l) Intellectual property rights
- (m) Federal and state regulatory compliance.

The student-related issues were:

- (a) Discrimination claims by students
- (b) Grade appeals, academic probation, or dismissal issues
- (c) Family Educational Rights and Privacy Act (FERPA) issues
- (d) Parent complaints and requests.

It may be questioned why athletic legal compliance and risk management issues were not addressed in this study. Based upon the experience of the researcher, Dr. Hustoles, the answer is that department chairs do not normally deal with athletic legal compliance and risk management issues. Rather, athletic compliance issues are ones which other academic administrators and units generally handle. Accordingly, the survey questions were formulated based on those issues that department chairs themselves would generally face in the regular course of their roles and duties.

29. Hustoles, *supra* note 26.

statistics of frequencies, percentages, means, and standard deviations. To address other aspects of our study, multivariate analysis of variance were performed to examine any differences among various demographic groups.³⁰ Open-ended responses were reviewed and categorized.

Considering the great number of higher education attorneys in NACUA, the response rate may initially be perceived as low. The invitation to participate in the survey, with two follow up invitations, were just three single messages among the many received by higher education attorneys each day. As noted earlier, higher education attorneys have a wide variety of tasks and issues to deal with on a daily basis, and it is difficult to keep up with all the demands of their clients.³¹ Thus, some attorneys, with so many other professional responsibilities and tasks, simply may not have had the time or inclination to participate in this survey. Moreover, the study had the constraints of specific time limits in which to respond. This may not have worked for some of the NACUA attorneys' schedules. In addition, NACUANET subscribers have the option of disabling their accounts so they can post and search messages, but will not receive messages. Thus, the precise number of NACUANET subscriber higher education attorneys who saw and considered the invitations to participate in the survey is not known.

Nevertheless, researchers also have concluded that low response rates alone are not necessarily suggestive of bias.³² Rather, "low" rates of return are *not* biasing when respondent characteristics are representative of non-respondents.³³ Due to the commonalities of the duties and responsibilities of higher education attorneys, the respondent characteristics in this study arguably are representative of the non-respondent attorneys.

IV. RESPONDENT DEMOGRAPHICS

Responses were received from 297 higher education attorneys from across the United States, representing about a 15% response rate if indeed all 2,000 attorneys within the listserv actually received the

30. *See id.*

31. SANTORA & KAPLIN, *supra* note 3; Kathleen C. Santora & Edward N. Stoner, *What Would You Do?* 35 CHANGE 44 (2003).

32 Linda J. Sax et al., *Assessing Response Rates and Nonresponse Bias in Web and Paper Surveys*, 44 RESEARCH IN HIGHER EDUCATION 409, 409-432 (2003) (citing J.A. Krosnick, *Survey Research*, 50 ANN. REV. PSYCHOL. 537, 537-567 (1999), & D.A. Dillman, *The Design and Administration of Mail Surveys*, 17 ANN. REV. SOCIOL. 225, 225-249 (1991)).

33. Sax et al. *supra* note 32, at 412.

survey.³⁴ Table 1 shows the geographic regions for the respondent attorneys throughout the United States, revealing that the largest groups of participants were from the East North Central Division 3 (21.5%) and from the South Atlantic Division 5 (23.9%).³⁵

A. Table 1: Higher Education Attorney Respondents by Geographic Region

Region	N	%
(1) New England (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont)	27	9.1
(2) Middle Atlantic (New Jersey, New York, Pennsylvania)	35	11.8
(3) East North Central (Indiana, Illinois, Michigan, Ohio, Wisconsin)	64	21.5
(4) West North Central (Iowa, Nebraska, Kansas, North Dakota, Minnesota, South Dakota, Missouri)	21	7.1
(5) South Atlantic (Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia)	71	23.9
(6) East South Central (Alabama, Kentucky, Mississippi, Tennessee)	8	2.7
(7) West South Central (Arkansas, Louisiana, Oklahoma, Texas)	29	9.8
(8) Mountain (Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, Wyoming)	20	6.7
(9) Pacific (Alaska, California, Hawaii, Oregon, Washington)	20	6.7

34. Hustoles, *supra* note 26, at 59.

35. *Id.* at 60.

Country other than the United States	2	0.7
Total responding to this demographic question	297	100.0

Attorneys were asked to report approximately how many years they practiced as a higher education attorney. Responses ranged from under one year to over forty years, and included: 0---7 years (30.3%), 8---15 years (27.8%), 16---23 years (21.3%), 24---31 years (13.8%), and 32 or more years (6.8%).³⁶

Respondents were also asked to indicate the capacity in which they served as higher education attorneys most often in the past three years. Results included: Attorney serving in an in---house General Counsel office (85.5%), Outside legal counsel in a private law firm or practice (5.7%), Attorney at college or university serving in a non---attorney role (4.4%), Attorney serving in a State system (2.4%), and Attorney serving in an Attorney General Office/Department (2.0%).³⁷

Finally, respondents were asked to identify the different types of higher education institutions they represented most often in the past three years. The greatest number and percentage of those whom responded served public four (4) year doctoral/research institutions (44.6%), followed by not---for---profit private four (4) year doctoral/research institutions (24.3%), public four (4) year institutions (non---doctoral, non---research) (13.2%), not---for---profit private four (4) year institutions (non---doctoral, non---research) (9.5%), and public two (2) year institutions (7.1%).

V. LEGAL ISSUE RESULTS

For each of the seventeen issues, respondents were asked to rate them for five aspects: how *frequently* they provide such assistance to department chairs; *the amount of* time spent on such assistance; issues for which department chairs have the *most difficulty*; issues perceived as having the *greatest impact* upon institutional legal liability and risk management efforts; and issues for which higher education attorneys believe department chair training is *most essential*.

A. Frequency of Legal Assistance

Survey participants were asked to estimate the frequency (i.e., how often) yearly they provided legal assistance for their institutions' department chairs. A 4---point Likert scale was utilized ranging from

36. *Id.*

37. *Id.* at 61.

1 being never to 4 meaning very frequently (12+ times per year). Table 2 summarizes the resulting data, as ranked from highest to lowest means.

Responses showed that contracts and grants was the faculty---related issue attorneys worked on most frequently for chairs ($M = 3.0$), followed closely by the issue of state and federal compliance ($M = 2.87$). Higher education attorneys reported that they worked least frequently for department chairs regarding the faculty---related issues of misuse of institutional or grant resources ($M = 1.66$), research misconduct ($M = 1.63$) and alcohol or drug abuse ($M = 1.60$).

Participant higher education attorneys indicated that FERPA questions were the student---related issue that they worked on most frequently with department chairs ($M = 2.70$).

1. Table 2: Frequency of Legal Assistance to Department Chairs

Rank	Issue	N	N (%)				SD	M
			[1]	[2]	[3]	[4]		
<i>Faculty Issues</i>								
1	Contracts/ Grants	295	32 (10.8)	68 (23.1)	64 (21.7)	131 (44.4)	1.1	3.00
2	State/Fed Compliance	293	24 (8.2)	89 (30.4)	81 (27.6)	99 (33.8)	.98	2.87
3	Intellectual Property	293	44 (15.0)	137 (46.8)	60 (20.5)	52 (17.7)	.95	2.41
4	Discrimination	292	52 (17.8)	163 (55.8)	68 (18.2)	9 (3.1)	.72	2.12
5	Interpersonal Problems	289	61 (21.1)	154 (53.3)	61 (21.1)	13 (4.5)	.77	2.09
6	Performance Problems	292	61 (20.9)	155 (53.1)	65 (22.3)	11 (3.8)	.76	2.09
7	Tenure and Promotion	291	72 (24.7)	149 (51.2)	55 (18.9)	15 (5.2)	.81	2.04
8	Conflict of Interest	292	64 (21.9)	173 (59.2)	42 (14.4)	13 (4.5)	.74	2.01
9	Sexual Harass/ Faculty	292	68 (23.3)	191 (65.4)	30 (10.3)	3 (1.0)	.61	1.89

10	Academic Freedom	293	76 (25.9)	188 (64.2)	25 (8.5)	4 (1.4)	.62	1.85
11	Misuse of Resources	294	114 (38.8)	167 (56.8)	13 (4.4)	0 (0.0)	.56	1.66
12	Research Misconduct	293	125 (33.4)	154 (52.6)	12 (4.1)	2 (0.7)	.60	1.63
13	Alcohol or Drug Abuse	289	124 (42.9)	160 (55.4)	3 (1.0)	2 (0.7)	.55	1.60

Student Issues

1	FERPA questions	294	33 (11.2)	94 (32.0)	96 (32.7)	71 (24.1)	.96	2.70
2	Grade/academic issues	294	60 (20.4)	135 (45.9)	83 (28.2)	16 (5.4)	.82	2.19
3	Harassment by students	294	51 (17.3)	155 (52.7)	73 (24.8)	15 (5.1)	.77	2.18
4	Parent complaints	293	70 (23.9)	130 (44.4)	74 (25.3)	19 (6.5)	.86	2.14

Note. Likert Scale = [1] Never, [2] Occasionally (1-5 times/year), [3] Often (6-11 times/year), [4] Very Frequently (12+ times/year).

B. Amount of Time Spent on Legal Assistance

Because the *number* of times higher education attorneys work with clients on any given issue does not necessarily equate to the *amount* of time spent on that same type of issue, survey participants were also asked to estimate the average amount of time yearly they spent providing legal assistance for their institutions' department chairs.³⁸ A 4-point Likert scale was utilized ranging from 1 being no time, to 4 being an extensive amount of time (over 150 hours per year). Table 3 summarizes the resulting data, as ranked from highest to lowest means.

Responses again showed that contracts and grants (M = 2.98) and federal and state compliance (M = 2.87) were those for which the most time was spent. Those faculty-related issues that required the least amount of their time were research misconduct (M = 1.79) and alcohol or drug abuse (M = 1.63).

Regarding student-related issues, participants reported similar

38. *Id.* at 68.

amounts of time working for chairs on FERPA questions ($M = 2.41$), discrimination or harassment by students ($M = 2.34$), and grade appeals, academic probation, and dismissal ($M = 2.25$). The attorneys reported that parent complaints and requests took the least amount of their time ($M = 2.02$), with 69 (24.4%) and 147 (51.9%) indicating that these student issues took “no time” or “minimum time” per year.

1. Table 3: Annual Number of Hours of Time Spent on Legal Assistance Provided for Department Chairs

Rank	Issue	N	N (%)				SD	M
			[1]	[2]	[3]	[4]		
<i>Faculty Issues</i>								
1	Contracts/ Grants	285	26 (9.1)	61 (21.4)	91 (31.9)	107 (37.5)	.98	2.98
2	State/Fed Compliance	283	26 (9.2)	75 (26.5)	92 (32.5)	90 (31.8)	.97	2.87
3	Discrimination	283	48 (17.0)	111 (39.2)	103 (36.4)	21 (7.4)	.85	2.34
4	Intellectual Property	283	48 (17.0)	120 (42.4)	85 (30.0)	30 (10.6)	.88	2.34
5	Sexual Harass/ Faculty	282	60 (21.3)	127 (45.0)	87 (30.9)	8 (2.8)	.78	2.15
6	Tenure and Promotion	282	70 (24.8)	124 (44.0)	74 (26.2)	14 (5.0)	.84	2.11
7	Performance Problems	283	60 (21.2)	142 (50.2)	72 (25.4)	9 (3.2)	.77	2.11
8	Interpersonal Problems	283	60 (21.2)	142 (50.2)	73 (25.8)	8 (2.8)	.76	2.10
9	Conflict of Interest	284	57 (20.1)	167 (58.8)	50 (17.6)	10 (3.5)	.72	2.05
10	Academic Freedom	283	73 (25.8)	177 (62.5)	29 (10.2)	4 (1.4)	.63	1.87
11	Misuse of Resources	283	102 (36.0)	143 (50.5)	32 (11.3)	6 (2.1)	.72	1.80
12	Research Misconduct	281	115 (40.9)	119 (42.3)	37 (13.2)	10 (3.6)	.80	1.79

13	Alcohol or Drug Abuse	281	121 (43.1)	145 (51.6)	14 (5.0)	1(0.4)	.60	1.63
<i>Student Issues</i>								
1	FERPA questions	284	32 (11.3)	125 (44.0)	106 (37.3)	21 (7.4)	.79	2.41
2	Harassment by students	285	48 (16.8)	113 (39.6)	103 (36.1)	21 (7.4)	.84	2.34
3	Grade/Academic Issues	284	57 (20.1)	118 (41.5)	90 (31.7)	19 (6.7)	.85	2.25
4	Parent complaints	283	69 (24.4)	147 (51.9)	60 (21.2)	7 (2.5)	.75	2.02

Note. Not all participants responded to all items. Likert Scale = [1] No time, [2] Minimal Amount of Time (1–25 hours/year), [3] Modest Amount of Time (26–150 times/year), [4] Extensive Amount of Time (over 150 hours/year).

C. Department Chairs’ Level of Difficulty with Legal Issues

Survey participants were next asked to rate the level of difficulty they perceived department chairs have in dealing adequately with legal issues involving faculty and students. A 6---point Likert range scale was utilized: 1 meaning not a difficult time through 6 being extremely difficult. Respondents were asked to choose “not applicable” only if they had never provided legal counsel to chairs on that particular legal issue. Ranked from highest to lowest means, Table 4 summarizes the resulting data.

The ranked means show that the four faculty---related legal issues with which attorneys believed chairs had the most difficulty were related to state and federal compliance (M = 3.74), non---collegiality interpersonal problems (M = 3.56), discrimination (other than sexual harassment) (M = 3.60), and sexual harassment by faculty (M = 3.41).

The student---related legal issue attorneys believed chairs had the most difficulty with was discrimination and harassment by students (M = 3.41).

1. Table 4: Chairs’ Level of Difficulty with Legal Issues

R a n k	Issue	N	N (%)						SD	M
			[N/A]	[1]	[2]	[3]	[4]	[5]		

1	State/Fed Compliance	273	19 (7.0)	8 (2.9)	25 (9.2)	52 (19.0)	72 (26.4)	64 (23.4)	33 (12.1)	1.6	3.74
2	Interpersonal Problems	274	44 (16.1)	9 (3.3)	12 (4.4)	29 (10.6)	66 (24.1)	64 (23.4)	50 (18.2)	2.0	3.66
3	Discrimination	274	42 (15.3)	5 (1.8)	14 (5.1)	40 (14.6)	64 (23.4)	77 (28.1)	32 (11.7)	1.9	3.60
4	Sex. Harassment by Faculty	275	47 (17.1)	6 (2.2)	20 (7.3)	31 (11.3)	55 (20.0)	75 (27.3)	41 (14.9)	2.0	3.56
5	Performance Problems	275	47 (17.1)	3 (1.1)	27 (9.8)	44 (16.0)	52 (18.9)	72 (26.2)	30 (10.9)	1.9	3.41
6	Intellectual Property	275	37 (13.5)	12 (4.4)	28 (10.2)	60 (21.8)	67 (24.4)	48 (17.5)	23 (8.4)	1.8	3.25
7	Conflict of Interest	275	35 (12.7)	10 (3.6)	44 (16.0)	58 (21.1)	58 (21.1)	53 (19.3)	17 (6.2)	1.7	3.17
8	Contracts/Grants	275	19 (6.9)	17 (6.2)	46 (16.7)	81 (29.5)	75 (27.3)	31 (11.3)	6 (2.2)	1.4	3.07
9	Tenure and Promotion	274	51 (18.6)	8 (2.9)	26 (9.5)	51 (18.6)	79 (28.8)	44 (16.1)	15 (5.5)	1.8	3.06
10	Academic Freedom	272	55 (20.2)	15 (5.5)	37 (13.6)	58 (21.3)	66 (24.3)	29 (10.7)	12 (4.4)	1.8	2.74
11	Research Misconduct	272	70 (25.7)	26 (9.6)	39 (14.3)	29 (10.7)	42 (15.4)	40 (14.7)	26 (9.6)	2.1	2.63
12	Alcohol/Drug Abuse	269	81 (30.1)	15 (5.6)	30 (11.2)	39 (14.5)	42 (15.6)	39 (14.5)	23 (8.6)	2.1	2.58
13	Misuse of Resources	272	63 (23.2)	18 (6.6)	55 (20.2)	42 (15.4)	47 (17.3)	37 (13.6)	10 (3.7)	1.8	2.53

Student Issues

1	Harassment by students	273	48 (17.6)	4 (1.5)	18 (6.6)	48 (17.6)	58 (21.2)	67 (24.5)	30 (11.0)	1.9	3.41
---	------------------------	-----	--------------	------------	-------------	--------------	--------------	--------------	--------------	-----	------

2	FERPA questions	27 2	36 (13 .2)	15 (5.5)	51 (18.8)	78 (28.7)	65 (23.9)	19 (7.0)	8 (2.9)	1.5	2.77
3	Academic Issues	27 3	43 (15 .8)	15 (5.5)	55 (20.1)	73 (26.7)	57 (20.9)	26 (9.5)	4 (1.5)	1.6	2.66
4	Parent complaints	27 4	57 (20 .8)	12 (4.4)	44 (16.1)	67 (24.5)	67 (24.5)	20 (7.3)	7 (2.6)	1.7	2.59

Note: Likert Scale = [Not Applicable ("N/A")]; [1] Not difficult – [6] Extremely difficult.

D. Potential Adverse Impact on Liability and Risk Management

Survey participants were asked to rate the level of adverse impact they believed chairs' failure to adequately account for legal concerns for faculty---related legal issues could have on institutional legal liability or risk management efforts. A 6---point Likert scale was utilized: 1 being "no adverse impact" through 6 being an "extremely adverse impact." Ranked from highest to lowest means, Table 5 summarizes the resulting data.

The faculty---related legal issues attorneys believed could have the most adverse impact were sexual harassment by faculty (M = 4.96), discrimination (other than sexual harassment) (M = 4.89), and state and federal compliance (M = 4.88). The top student---related legal issue was discrimination or harassment by students (M = 4.92).

1. Table 5: Potential Adverse Impact on Institution's Legal Liability or Risk Management Efforts

Rank	Issue	N	N (%)					SD	M	
			[1]	[2]	[3][4]	[5]	[6]			
<i>Faculty Issues</i>										
1	Sexual Harassment by Faculty	249	6 (2.4)	4 (1.6)	21 (8.4)	38 (15.3)	73 (29.3)	107 (43.0)	1.2	4.96
2	Discrimination	249	6 (2.4)	4 (1.6)	22 (8.8)	42 (16.9)	81 (32.5)	94 (37.8)	1.2	4.89
3	State/Federal Compliance	250	6 (2.4)	9 (3.6)	21 (8.4)	36 (14.4)	78 (31.2)	100 (40.0)	1.3	4.88
4	Misuse of Resources	245	9 (3.7)	20 (8.2)	24 (9.8)	38 (15.5)	63 (25.7)	91 (37.1)	1.5	4.63
5	Research Misconduct	244	13 (5.3)	25 (10.2)	31 (12.7)	59 (24.2)	50 (20.5)	66 (27.0)	1.5	4.25
6	Contracts/	247	7	22	52	65	65	36	1.3	4.08

	Grants		(2.8)	(8.9)	(21.1)	(26.3)	(26.3)	(14.6)		
7	Tenure and Promotion	248	11 (4.4)	23 (9.3)	50 (20.2)	74 (29.8)	48 (19.4)	42 (16.9)	1.4	4.01
8	Intellectual Property	249	9 (3.6)	30 (12.0)	54 (21.7)	76 (30.5)	53 (21.3)	27 (10.8)	1.3	3.86
9	Alcohol or Drug Abuse	243	57 (20.1)	167 (58.8)	50 (17.6)	10 (3.5)	50 (17.6)	10 (3.5)	1.4	3.67
10	Interpersonal Problems	249	7 (2.8)	44 (17.7)	57 (22.9)	78 (31.3)	43 (17.3)	20 (8.0)	1.3	3.67
11	Conflict of Interest/ Commitment	249	10 (4.0)	38 (15.3)	65 (26.1)	82 (32.9)	27 (10.8)	27 (10.8)	1.3	3.64
12	Performance Problems	249	7 (2.8)	53 (21.3)	62 (24.9)	71 (28.5)	40 (16.1)	16 (3.6)	1.3	3.53
13	Academic Freedom	246	15 (6.1)	55 (22.4)	62 (25.2)	68 (27.6)	30 (12.2)	16 (6.5)	1.3	3.37
<i>Student Issues</i>										
1	Harassment by students	247	3 (1.2)	8 (3.2)	21 (8.5)	39 (15.8)	79 (32.0)	97 (39.3)	1.2	4.92
2	Academic Issues	246	6 (2.4)	36 (14.6)	73 (29.7)	78 (31.7)	35 (14.2)	18 (7.3)	1.2	3.63
3	FERPA questions	248	15 (6.0)	62 (25.0)	82 (33.1)	44 (17.7)	31 (12.5)	14 (5.6)	1.3	3.23
4	Parent complaints	246	9 (3.7)	67 (27.2)	84 (34.1)	49 (19.9)	23 (9.3)	14 (5.7)	1.3	3.21

Note. Likert Scale = [1] No Adverse Impact - [6] Extremely adverse impact.

E. Essential Areas for Chair Training Given Limited Resources

Survey participants ranked how essential chair training is for various legal issues in order to help reduce legal liability and improve risk management efforts. A 6---point Likert scale was utilized: 1 as “not essential” through 6 as “extremely essential.” With means of 5.46 and 5.36, respectively (close to the top ranking of “extremely essential”), the two faculty---related legal issues most essential for chairs to receive training were related to discrimination: sexual harassment by faculty and discrimination other than sexual harassment. In fact, 167 (65.7%) and 146 (57.7%) of those responding rated these issues a “6” (extremely essential). The top student---related legal issue also was discrimination or harassment by students (M = 5.27). Table 6 summarizes all resulting data, from highest to lowest mean.

1. Table 6: Essential Issues for Chair Training to Reduce Legal Liability and Improve Risk Management

Rank	Issue	N	N (%)						SD	M
			[1]	[2]	[3]	[4]	[5]	[6]		
<i>Faculty Issues</i>										
1	Sexual Harassment by Faculty	254	1 (0.4)	0 (0.0)	9 (3.5)	27 (10.6)	50 (19.7)	167 (65.7)	.87	5.46
2	Discrimination	253	1 (0.4)	0 (0.0)	10 (4.0)	3 (12.3)	65 (25.7)	146 (57.7)	.90	5.36
3	State/Fed Compliance	252	1 (0.4)	8 (3.2)	26 (10.3)	47 (18.7)	74 (29.4)	96 (38.1)	1.1	4.88
4	Misuse of Resources	252	9 (3.7)	20 (8.2)	24 (9.8)	38 (15.5)	63 (25.7)	91 (37.1)	1.3	4.63
5	Research Misconduct	253	7 (2.8)	16 (6.3)	35 (13.8)	60 (23.7)	61 (24.1)	74 (29.2)	1.4	4.48
6	Tenure and Promotion	253	6 (2.4)	9 (3.6)	47 (18.6)	61 (24.1)	67 (26.5)	63 (24.9)	1.3	4.43
7	Conflict of Interest/ Commitment	252	6 (2.4)	24 (9.5)	45 (17.9)	74 (29.4)	60 (23.8)	43 (17.1)	1.3	4.14
8	Interpersonal Problems	252	3 (1.2)	21 (8.3)	49 (19.4)	87 (34.5)	50 (19.8)	42 (16.7)	1.2	4.13
9	Contracts/ Grants	252	4 (1.6)	15 (6.0)	29 (11.5)	57 (22.6)	64 (25.4)	83 (32.9)	1.2	4.11
10	Intellectual Property	252	6 (2.4)	19 (7.5)	54 (21.4)	81 (32.1)	58 (23.0)	34 (13.5)	1.2	4.06
11	Performance Problems	253	3 (1.2)	33 (13.0)	58 (22.9)	75 (29.6)	49 (19.4)	35 (13.8)	1.3	3.94
12	Alcohol or Drug Abuse	249	13 (5.2)	37 (14.9)	59 (23.7)	72 (28.9)	32 (12.9)	36 (14.5)	1.4	3.73
13	Academic Freedom	254	18 (7.1)	40 (15.7)	75 (29.5)	64 (25.2)	27 (10.6)	30 (11.8)	1.4	3.52
<i>Student Issues</i>										
1	Harassment by students	255	1 (0.4)	4 (1.6)	16 (6.3)	32 (12.5)	52 (20.4)	150 (58.8)	1.1	5.27
2	Academic Issues	253	5 (2.0)	24 (9.5)	61 (24.1)	79 (31.2)	49 (19.4)	35 (13.8)	1.3	3.98
3	FERPA questions	254	6 (2.4)	36 (14.2)	62 (24.4)	65 (25.6)	50 (19.7)	35 (13.8)	1.3	3.87

4	Parent complaints	252	13 (5.2)	65 (25.8)	72 (28.6)	64 (25.4)	20 (7.9)	18 (7.1)	1.3	3.27
---	----------------------	-----	-------------	--------------	--------------	--------------	-------------	-------------	-----	------

Note. Likert Scale = [1] Not Essential - [6] Extremely essential.

VI. DISCUSSION AND FINDINGS

Viewing all aspects of this study as a whole, Table 7 provides an encompassing “at a glance” look at these variables in context of their rankings for both faculty--- and student---related issues. For this table, the faculty---related and student---related variables are presented in a single list to reveal the totality of these factors from the perspectives of the higher education attorney respondents.

Due to the enormous financial and other damaging consequences that legal liability and insufficient risk management can have on an institution, the table focuses *first* on data relating to attorneys’ views on the level of *potential or actual adverse impact chairs’ failure to adequately account for legal concerns could have on institutional legal liability or risk management efforts*. The rank and means in this category are ranked from highest to lowest adverse impact, with “1” being the highest potential adverse impact and “17” being the lowest for the variables. The variables for the other four categories of data are also presented in this order.

A. Table 7: At a Glance: Comparing All Issues by Ranks and Means

LEGAL ISSUE	Rank (Means)	Rank (Means)	Rank (Means)	Rank (Means)	Rank (Means)Time
F is Faculty-Related Issue S is Student-Related Issue	Adverse Impact on Liability or Risk Mgmt. ^a	Essential for Chair Training ^b	Chairs' Level of Difficulty ^c	Frequency of Legal Assistance ^d	Spent on Legal Assistance ^e
F -Sexual Harassment by Faculty	1 (4.96)	1 (5.46)	4 (3.56)	13 (1.89)	6 (2.15)
S -Discrim./Harass. Student Claims	2 (4.92)	3 (5.27)	6 (3.41)	6 (2.18)	4 (2.34)
F -Discrimination (non- sex.har.)	3 (4.89)	2 (5.36)	3 (3.60)	8 (2.12)	4 (2.34)
F -State/Federal Compliance	4 (4.88)	4 (4.88)	1 (3.74)	2 (2.87)	2 (2.87)
F -Misuse Inst./Grant Resources	5 (4.63)	5 (4.63)	17 (2.53)	15 (1.66)	13 (1.80)
F -Research Misconduct	6 (4.25)	6 (4.48)	14 (2.63)	16 (1.63)	14 (1.79)
F -Contracts/ Grants	7 (4.08)	10 (4.11)	9 (3.07)	1 (3.00)	1 (2.98)
F -Tenure and Promotion	8 (4.01)	7 (4.43)	10 (3.06)	11 (2.04)	8 (2.11)
F -Intellectual Property Rights	9 (3.86)	11 (4.06)	7 (3.25)	4 (2.41)	4 (2.34)
F -Alcohol or Drug Abuse	10 (3.67)	15 (3.73)	16 (2.58)	17 (1.60)	15 (1.63)
F -Non-collegiality Problems	11 (3.67)	9 (4.13)	2 (3.66)	9 (2.09)	9 (2.10)
F -Conflict of Interest/Commit.	12 (3.64)	8 (4.14)	8 (3.17)	12 (2.01)	10 (2.05)
S -Grade appeals, prob., dismissal	13 (3.63)	12 (3.98)	13 (2.66)	5 (2.19)	5 (2.25)
F -Problem Work Performance	14 (3.53)	13 (3.94)	5 (3.41)	10 (2.09)	7 (2.11)
F -Academic Freedom/ Speech	15 (3.37)	16 (3.52)	12 (2.74)	14 (1.85)	12 (1.87)
S -FERPA Questions	16 (3.23)	14 (3.87)	11 (2.77)	3 (2.70)	3 (2.41)
S -Parent Complaints/Requests	17 (3.21)	17 (3.27)	15 (2.59)	7 (2.14)	11 (2.02)

^a Likert Scale = [1] No Adverse Impact – [6] Extremely adverse impact

^b Likert Scale = [1] Not Essential – [6] Extremely essential

^c Likert Scale = [1] Not difficult – [6] Extremely difficult

^d Likert Scale = [1] Never, [2] Occasionally (1–5 times/year), [3] Often (6–11 times/year), [4] Very Frequently (12+ times/year).

^e Likert Scale = [1] No time, [2] Minimal Time (1–25 hours/year), [3] Modest Time (26–150 hours/year), [4] Extensive Time (over 150 hours/year)

B. Findings by Variables

Within this section, each of the seventeen variables are addressed in the order they appear in Table 7, discussing their relative rankings and comparing these findings to what others have *observed* regarding these issues in the literature. Note that such observations by others were usually not based on formal research per se, but the expert observations of those in the field.

The legal issue of *sexual harassment by faculty* was ranked by respondent attorneys as the *top* issue not only having the most actual or potential adverse impact upon legal liability or risk management efforts (mean of 4.96) but also being the most essential for chair training (mean of 5.46). (Note that sexual harassment is one type of discrimination). This finding is not surprising, as it supports observations by Kaplin and Lee that sexual harassment has recently been given considerable attention and that it usually/ordinarily violates both state law and federal law (Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972).³⁹

Following close behind with means ranging from 4.89–5.27, the second and third top legal issues having the most actual or potential adverse

impact upon liability or risk management efforts, as well as most essential for chair training, were *student claims of discrimination and harassment* and *faculty---related discrimination other than sexual harassment*. This likewise is an understandable finding, considering the extensive number of claims and litigation resulting from these issues and it is supported by the tremendous amounts of legal cases in the courts and governmental agencies, as well as information and guidelines provided by the U. S. Equal Employment Opportunity Commission.⁴⁰ The finding is further buttressed when taking into account the numerous types of discrimination, including based on race, color, sex, national origin, disability, and religion.⁴¹

Respondent attorneys rated these three discrimination---related legal issues highest in their concerns regarding institutional adverse impact, liability, and risk management, and fairly high for level of difficulty

39. KAPLIN & LEE, *supra* note 1; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (Jul. 2, 1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.); Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 20 U.S.C. §§ 1681-88 (2012).

40. *Laws & Guidance*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/index.cfm> (last visited Dec. 7, 2014).

41. *Discrimination by Type*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/index.cfm> (last visited Dec. 7, 2014); KAPLIN & LEE, *supra* note 1.

(mean of 3.56). Yet, incongruously, the means for the other two categories (1.89 and 2.15) reflected that these issues were relatively low as to the frequency and amount of time they spent providing legal assistance for chairs.

The very closely ranked fourth and fifth legal issues for both adverse impact and importance of chair training with a mean of 4.88 was *state and federal compliance*, and with a mean of 4.63, *misuse of institutional or grant resources*. These findings are supported by others who have expounded on how institutional compliance requirements in many areas have steeply increased in recent years,⁴² together with how auditors, governmental agencies, and the public have been scrutinizing and challenging research and other expenditures of colleges and universities.⁴³ The frequency and time spent by attorneys for state and federal compliance rated second highest (with means of 2.87 in both categories), yet in contrast was very low (means of 1.66 and 1.80) for misuse of institutional or grant resources.

The legal issue of *research misconduct and faculty plagiarism* rated sixth highest in concern by respondent attorneys for adverse impact and being essential for chair training (means of 4.25 and 4.48). This still fairly high concern for institutional adverse impact on liability and risk management, together with perceived need for chair training, is supported by others, including Kaplin and Lee.⁴⁴ They have pointed out that research misconduct can lead to termination of tenure, employment discipline or dismissal, dilution of the public trust, and consequences to the institution itself.⁴⁵ Nevertheless, once more, attorneys reported much lower rankings as to chairs' level of difficulty (mean of 2.53) and frequency and time spent on assistance (means of 1.63 and 1.79) for the research misconduct and plagiarism legal issue.

Contracts, agreements, and grants (including contract review) (means of 4.08 and 4.06) was the next highest ranked for actual or potential adverse institutional impact and chair training. Notably, this legal issue was rated *first* for frequency and time spent in legal assistance (means of 3.00 and 2.98). The literature supports this

42. Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749 (2010); Jennifer E. Kirkland, *Creating Effective Compliance Programs at Smaller Institutions or on a Limited Budget: Models and Procedures* (Nov. 2009), available at <http://www.highered.compliance.org/compliance/resources/xv---09---11---11.doc>.

43. Lynn Mcguire, *Federal Research Grant Funding at Universities: Legislative Waves from Auditors Diving into Overhead Cost Pools*, 23 J.C. & U.L. 563 (1997); *Higher Education Law at a Glance*, NACUA, <http://www.nacua.org/messages/higheredlawataglance.pdf> (last visited Oct. 9 2014).

44. KAPLIN & LEE, *supra* note 1.

45. *Id.*

finding, since chairs are involved in numerous types of contractual issues, and potential financial or other legal consequences for institutions can ensue due to chairs' entering or breaching contracts, or failing to meet grant obligations.⁴⁶

Next, the legal issue of *tenure and promotion* was ranked eighth with a mean of 4.01 on potential adverse impact for legal liability and risk management, and seventh (mean of 4.43) for essentialness of chair training. The finding is not unexpected with the abundant literature about this issue as it applies to chairs with criteria for tenure and promotion varying among institutions, and with probable legal challenges to negative decisions in which chairs play a significant role.⁴⁷ Attorneys report "middle ranges" of means (from 3.06 for chairs' level of difficulty, to 2.04 and 2.11 for frequency and time spent) though.

The legal issue involving *faculty alcohol or drug abuse* was ranked tenth for potential adverse impact on liability and risk management efforts (mean of 3.67), with a similar mean of 3.73 for essentialness of training. This could be anticipated considering the legal ramifications and compliance requirements for the institution pointed out by others.⁴⁸ Apparently chairs do not find this to be the type of legal issue for which they seek legal counsel, however, since respondent attorneys rated this issue relatively low for chairs' level of difficulty (mean of 2.58), frequency of legal assistance (mean of 1.60), and amount of time spent on legal assistance (1.63).

The legal issue of *faculty non---collegiality and interpersonal problems* was ranked the same as for alcohol and drug abuse, also with a mean of 3.67 for adverse impact, and was actually ranked higher (ninth) with a mean of 4.13 as its being essential for chair training. Interestingly, it ranked *second* for attorneys' views on the difficulty of this issue for chairs. This finding is supported by the work of others such as Weeks, who related that fractious relationships can become so serious that they develop into major differences regarding curriculum and program philosophy, and if left unaddressed, can lead to serious harm to the department, faculty, students, and the institution.⁴⁹ Connell, Melear, and Savage also argue that collegiality should be considered for all important employment decisions, due to the contractual and other

46. BENNETT & FIGULI, *supra* note 9; KAPLIN & LEE, *supra* note 1.

47. See DANIEL W. WHEELER ET AL., THE ACADEMIC CHAIR'S HANDBOOK (2d ed., 2008); KAPLIN & LEE, *supra* note 1.

48. David J. Figuli, *Legal Liability: Reducing the Risk, in* ENHANCING DEPARTMENTAL LEADERSHIP: THE ROLES OF THE CHAIRPERSON 141 (John B. Bennett & David J. Figuli eds., 1990); KAPLIN & LEE, *supra* note 1.

49. KENT M. WEEKS, MANAGING DEPARTMENTS: CHAIRPERSONS AND THE LAW (1999).

legal issues that arise from inability to get along and work well with colleagues.⁵⁰ This issue was ranked in the middle range (means of 2.09 and 2.10) as to attorneys' frequency and time spent on legal assistance.

The legal issue of *faculty conflict of interest and of commitment* was not far behind in rankings similar to collegiality problems in all categories, with means of 3.64, 4.14, 3.17, 2.01, and 2.05, respectively. Thus, this issue sits in middle ranges of survey responses. Considering the rise of research collaborations and potential for faculty personal financial gains and divided loyalties leading to increasing awareness, need to handle conflicts of interest and commitment and the potential debilitating effects and legal consequences, this issue was obviously not overlooked in the eyes of higher education attorneys.⁵¹

Student grade appeals, academic probation, and dismissals was another legal issue also in the middle ranges of rankings in the first three categories (means of 3.63, 3.98, 2.66, 2.19, and 2.25, respectively), yet it was the *fifth* highest issue that attorneys reported for frequency and time spent on legal assistance. As Tucker noted, with students frequently lodging complaints with chairs due to matters that affect their academic success or failure, there could be substantial legal risk in chairs' dealing with these matters informally or outside of institutional procedures and rules.⁵² Considering the vast number of students in each college and university, each with an individual set of circumstances and plea, the findings from the survey as to attorneys' views for this legal issue are quite understandable.

The issue of *faculty work performance problems* was ranked a little less important in the eyes of participant attorneys as to adverse impact on legal liability and risk management (mean of 3.37), essentialness for chair training (mean of 3.94), frequency of legal assistance (mean of 2.09), and time spent on legal assistance (mean of 2.11). Attorneys reported a higher level of difficulty of chairs, though, ranking it fifth with a mean of 3.41. This finding is consistent with the observations of Boice, who described the problems chairs have in "coping with difficult colleagues" and providing suggestions to chairs in this regard.⁵³ The disparity of rankings seem to reflect that attorneys recognize or have had discussions with chairs regarding issues with problematic faculty in their departments, but that these matters do not seem to cause

50. Mary Ann Connell et al., *Collegiality in Higher Education Employment Decisions: The Evolving Law*, 37 J.C. & U.L. 529 (2011).

51. KAPLIN & LEE, *supra* note 1.

52. TUCKER, *supra* note 8.

53. Robert Boice, *Coping with Difficult Colleagues*, in *ENHANCING DEPARTMENTAL LEADERSHIP: THE ROLES OF THE CHAIRPERSON* 132 (John B. Bennett & David J. Figuli eds., 1990).

nearly as great of impact on potential legal liability or risk management, or take up as much time in providing legal counsel.

The issue of *academic freedom and faculty speech controversy* was also ranked toward the lower end in rankings, but in the middle ranges of means in responses by attorneys (means of 3.37, 3.52, 2.74, 1.85, and 1.87). The literature reflects wide ranges of views on the scope and meaning of academic freedom.⁵⁴ Rupe previously conducted a nationwide research survey of higher education attorneys seeking and reporting their views on academic freedom, illustrating the importance of this legal issue.⁵⁵ Thus, it is not surprising that this issue falls in the middle ranges of rankings relative to attorneys' views in all five categories of questions.

The student---related legal issues of *Family Education and Privacy Act (FERPA) questions* and *parent complaints and requests* for the most part fall toward the lower end of rankings and means, with the exception that attorneys reported that FERPA questions were the *third highest* issue in the frequency and amount of time they spent assisting chairs.⁵⁶ This anomalous finding is actually not that surprising when considering that chairs generally know about, but do not fully understand, the intricacies of students' federal privacy rights concerning their educational records. Also, the interpretation of FERPA has changed over time with U.S. Department of Education enforcement actions and issuance of advisory letters, and the courts issuing rulings about FERPA.⁵⁷ Respondent attorneys apparently recognized that the adverse impact on liability and risk management efforts is not as severe as it is for the other legal issues. Chairs, though, apparently seek assistance from attorneys on FERPA matters fairly often, perhaps due to parental demands and complaints about their children's academic status that chairs realize they should not be discussing.

C. Other Findings between Legal Issue Variables and Categories

Results of responses for any particular type of legal issue can be viewed in relation to any of the other legal issues, and also specifically

54. *1940 Statement of Principles on Academic Freedom and Tenure*, AMERICAN ASS'N OF UNIV. PROFESSORS (10th ed. 2006), available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS (THE REDBOOK) (10th ed. 2006), available <http://www.aaup.org/reports---publications/publications/redbook>; KAPLIN & LEE, *supra* note 1; TUCKER, *supra* note 8; WEEKS, *supra* note 49.

55. Rupe, *supra* note 22.

56. Family Educational and Privacy Act of 1974, 20 U.S.C. § 1232g (2012).

57. KAPLIN & LEE, *supra* note 1.

in relation to any of the survey question categories. Listed here are some of these findings between variables and categories that we found especially noteworthy.

For example, before commencing this study, we would have hypothesized that the legal issues that took up most of attorneys' time in assisting chairs would have been the same ones they viewed as having the most adverse effect on liability and risk management, or for which they felt chairs needed the most training (such as legal issues involving discrimination). Nonetheless, our data revealed striking differences in the eyes of higher education attorneys among those issues that they reported *in frequency and time in providing legal assistance*, compared to those issues that had the *most potential or actual adverse effect on legal liability or risk management* and those for which they believed *chairs needed the most training*. For this study, the issues reported by higher education attorneys as being highest in the frequency and amount of *time to assist department chairs* were issues of: (1) agreements, contracts and grants (including contract review) involving faculty, (2) state and federal compliance, and (3) FERPA questions. In contrast, the top three faculty---related legal issues that attorneys reported as having the highest adverse impact on institutional legal liability or risk management efforts, as well as how essential it was for *chairs to receive training*, were (1) sexual harassment by faculty, (2) discrimination and harassment claims by students, and (3) discrimination other than sexual harassment, with the very close fourth category of state and federal compliance.

A second interesting comparison finding was that the top three legal issues attorneys reported *chairs found to be the most difficult* were (1) state and federal compliance, (2) faculty non---collegiality and interpersonal problems, and (3) discrimination other than sexual harassment. This would seem to indicate that chairs struggle hardest with not only issues that involve stringent legal mandates, but also those that involve the personal interrelationships of, and problems stemming from, the faculty in their departments.

A third interesting comparison is that attorneys ranked misuse of institutional or grant resources as fifth highest in the categories of *most adverse impact* and *essentialness for chair training*, yet relatively low for *level of difficulty and time spent on legal assistance*, and for *frequency of legal assistance*. Does this signify that chairs were handling these legal issues better than attorneys may have otherwise expected due to their complexity and potential financial and public scrutiny ramifications?

Fourth, similar ratios were found relative to research misconduct. Attorneys ranked this issue sixth in terms of *institutional adverse impact* and *the need for chair training*, yet they ranked it quite low in

terms of chairs' *level of difficulty and time spent on legal assistance*, and *frequency of legal assistance*. Does this signify a lack of comprehension by chairs on just how problematical research misconduct can be for the college or university? Or does it mean that chairs are doing well in recognizing and dealing with issues of research misconduct in their departments? Or does it mean that there just are not that many issues of research misconduct that confront chairs?

A fifth item of note is that, notwithstanding how important the issues of academic freedom and "free speech" are to faculty members, it ranked toward the bottom for all categories in attorney responses.⁵⁸ Does this mean that chairs, having one foot in the role of faculty member and the other as administrator, are of the same mind as the faculty in their department, thereby resulting in few legal controversies in attorneys' institutions regarding these issues? Or does it mean that the time of higher education attorneys is stretched so extensively in doing "triage" in responding to all the legal issues and client problems in their institutions, academic freedom and speech controversy are of a lesser priority for them?

A sixth comparison worth noting is that besides FERPA issues, attorneys ranked the student-related legal issue as to grade appeals, probation, and dismissals relatively high for the time and frequency spent working for chairs, yet much lower for *institutional adverse impact* and for how essential it was to train chairs for this issue. Could this mean that chairs are not utilizing limited attorney time as effectively as they should, or that chairs instead should be consulting other university administrators for assistance for these student academic legal issues?

Seventh, attorneys ranked the issue of intellectual property rights as fourth for *frequency and time spent providing legal assistance*, and that this legal issue ranked seventh in *chair difficulty*. Still, their rankings also showed rankings in the bottom half of issues relative to *adverse impact on liability or risk management* and for *essentialness for chair training*. Is this, then, another issue on which chairs' confusion or lack of knowledge leads to taking a disproportionate amount of attorney time in consultation when their time would be more effectively directed to assisting and training on other issues with higher adverse impact on legal liability or risk management efforts? All of the above observations and questions, and many more, could be fertile ground for future research.

58. 1940 *Statement of Principles on Academic Freedom and Tenure*, *supra* note 54; POLICY DOCUMENTS AND REPORTS (THE REDBOOK), *supra* note 54.

VII. CONCLUSIONS

As noted previously, the legal and risk management considerations with which higher education administrators must frequently deal have a significant impact on the operations of colleges and universities.⁵⁹ In these times of economic challenges and budget cuts on every level, it is extremely important for higher education institutions to work with legal counsel to proactively prevent claims and lawsuits, rather than just reacting to and expending large amounts of financial and human resources in defending against them.⁶⁰ Our study provides additional information from the higher education attorneys who observe and provide assistance to one of the most crucial academic administrative positions on campus—that of the department chair.⁶¹

This study's findings could be used to help administrators and attorneys explore ways in which department chairs could be more effectively supported by the attorneys who serve them. For instance, training could be provided on those issues that attorneys nationwide are reporting as top issues, including sexual harassment by faculty, other forms of discrimination, discrimination and harassment claims by students, and state and federal compliance issues. Such findings could thus be used in practicing preventive law, reducing institutional potential legal liability, and improving risk management efforts by way of identifying those issues that are most essential for chair training.

In short, this study adds new additional bricks to the educational leadership wall of knowledge. Our data, obtained from the largely untapped research resource of higher education attorneys, can catalyze thinking and discussion within institutions as to ways that higher education attorneys might assist in developing new or more effective ways to enable academic administrators to be successful in their respective leadership roles.

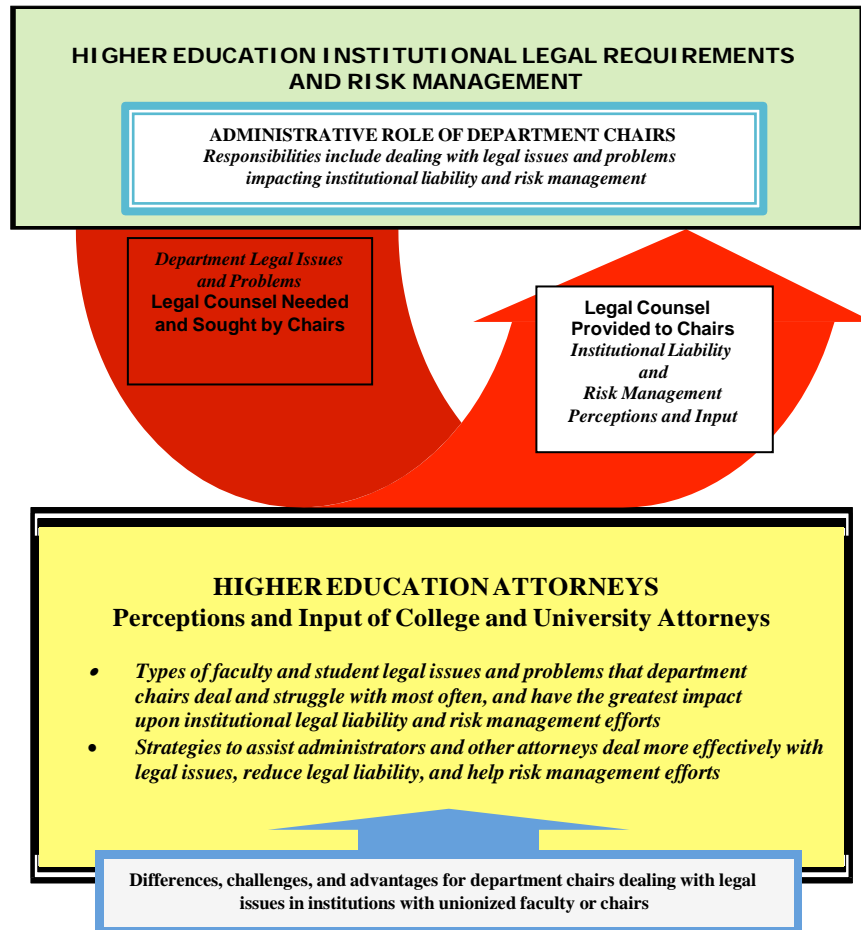
59. KAPLIN & LEE, *supra* note 1; POSKANZER, *supra* note 2.

60. KAPLIN & LEE, *supra* note 1; WARD & TRIBBENSEE, *supra* note 14.

61. CRESWELL ET AL., *supra* note 4; SEAGREN ET AL., *supra* note 4.

APPENDIX

Conceptual Framework for Study: Perceptions and input from higher education attorneys on department chairs dealing with institutional legal issues and risk management.



THE EFFECT OF FEDERAL FUNDING RESTRICTIONS FOR EMBRYONIC STEM CELL RESEARCH ON COLLEGES AND UNIVERSITIES: THE NEED FOR CAUTION WHEN ETHICAL OBJECTIONS TO RESEARCH ARE RAISED

AMY MILLER*

ABSTRACT.....	147
I. INTRODUCTION.....	148
II. AN OVERVIEW OF THE SCIENCE BEHIND EMBRYONIC STEM CELL RESEARCH.....	151
III. THE HISTORY OF GOVERNMENT INTERVENTION INTO RESEARCH INVOLVING EMBRYOS	157
IV. THE ETHICAL AND SCIENTIFIC DEBATE OVER EMBRYONIC STEM CELL RESEARCH.....	163
V. REACTION OF THE SCIENTIFIC COMMUNITY TO THE LIMIT ON FEDERAL FUNDING FOR EMBRYONIC STEM CELL RESEARCH AND ITS EFFECT ON COLLEGES AND UNIVERSITIES	167
VI. PRESIDENT OBAMA’S DECISION TO LIFT THE RESTRICTIONS ON FEDERAL FUNDING FOR EMBRYONIC STEM CELL RESEARCH.....	172
VII. CONCLUSION	176

ABSTRACT

This note explores the history of government intervention into embryonic stem cell research. In particular, this paper focuses on how the decisions of the federal government have threatened research being done at colleges

* Candidate for Juris Doctor, Notre Dame Law School, 2015; Bachelor of Arts, Legal Studies, University of Wisconsin-Madison, 2009. I would like to thank Professors O. Carter Snead and John H. Robinson for lending their knowledge and expertise to the writing of this note. I would like to thank the staff of the *Journal of College and University Law* for their efforts through the editing process. Finally, I would like to thank my husband Chris for his hard work and unwavering support; without him none of this would be possible.

and universities, both because educational institutions are the primary source of basic research into the possibilities of embryonic stem cells, and because colleges and universities receive most of their research funding from the federal government. In the end, I argue that, while it is necessary for government officials to take ethical considerations into account when deciding whether to fund scientific research, it is important to also consider the effects such decisions have on educational institutions.

I. INTRODUCTION

In 1998, researchers at the University of Wisconsin devised a method to extract and replicate embryonic stem cells from human embryos, allowing scientists to research the array of possibilities of embryonic stem cells for curing diseases and alleviating other medical conditions.¹ An ethical problem, however, had to be faced in that the harvesting of embryonic stem cells required the destruction of the embryo from which the cells were harvested.² The fact that embryos needed to be destroyed in order to harvest stem cells struck some members of the population and government as ethically wrong.³ Debates among academics, politicians, and religious groups over the ethical implications of embryonic stem cell research and what kinds of governmental intervention, if any, were appropriate revealed that, while many recognized the potential that embryonic stem cell research presented for helping those with serious medical conditions, others worried that destroying embryos for research dehumanized the embryos and that this would have a negative effect on attitudes towards the value of human life.⁴

Prior to the discovery of techniques for the extraction and replication of embryonic stem cells, the science of in vitro fertilization had already stirred political debate and government intervention into scientific research involving embryos.⁵ In 1995, in response to ethical questions regarding embryonic research, Congress added the Dickey-Wicker amendment to the National Institutes of Health (NIH) appropriations bill.⁶ The amendment

1. James A. Thomson et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, 282:5391 *SCIENCE* 1145 (1998).

2. *Sherley v. Sebelius*, 644 F.3d 388, 390 (D.C. Cir. 2011).

3. See Erin P. George, *The Stem Cell Debate: The Legal, Political and Ethical Issues Surrounding Federal Funding of Scientific Research on Human Embryos*, 12 *ALB. L.J. SCI. & TECH.* 747, 782, 791 (2002).

4. See *infra* Section IV (discussing the ethical and scientific debate over embryonic stem cell research).

5. Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 *MINN. J.L. SCI. & TECH.* 505, 509 (2005).

6. Balanced Budget Downpayment Act, Pub. L. No. 104-99, §128, 110 Stat. 26, 34 (1996).

prohibits the NIH from funding research in which human embryos are destroyed.⁷ The NIH is the primary source of federal funding for all research projects in the areas of medical and life sciences throughout the United States and, therefore, has a substantial impact on the kinds of scientific research being done throughout the country.⁸

After the discovery of an extraction and replication method for embryonic stem cells, the Clinton administration interpreted the Dickey-Wicker amendment to mean that federal funding would be permitted only in cases where embryonic stem cells had already been extracted before the funded project began.⁹ Because the embryo had already been destroyed and the stem cells could be replicated using scientific techniques that posed no risk to any other embryo, this kind of research would not involve the destruction of a human embryo.¹⁰

In 2001, President Bush directed his administration, along with the NIH, to fund only research on embryonic stem cell lines that had been derived prior to August 9, 2001.¹¹ This limited the ability of colleges and universities to obtain federal funding for embryonic stem cell research and limited the variety of stem cells that could be researched by these institutions using federal funds. Many of the stem cell lines that had been derived prior to August 9, 2001 were not viable for scientific research, thus compounding the problem of limited resources for colleges and universities seeking to participate in embryonic stem cell research.¹² Because colleges and universities depend largely on the federal government for funding for their research activities,¹³ their research was essentially limited to the stem cell lines that President Bush had deemed acceptable. While states and private industry do provide some funding to academic scientific research, this funding is minimal compared to the amount of federal funds provided for such research.¹⁴

7. *Id.*

8. George, *supra* note 3, at 773–74; *see also* NATIONAL SCIENCE FOUNDATION, NSF 14-312, FEDERAL FUNDS FOR RESEARCH AND DEVELOPMENT: FISCAL YEARS 2011-2013 (July 2014), *available at* <http://www.nsf.gov/statistics/nsf14312/pdf/nsf14312.pdf>.

9. Robert E. McGough, Comment, *A Case for Federal Funding of Human Embryonic Stem Cell Research: The Interplay of Moral Absolutism and Scientific Research*, 18 J. CONTEMP. HEALTH L. & POL'Y 147, 165 (2001).

10. *Id.*

11. *See* President George W. Bush, Stem Cell Address to the Nation (Aug. 9, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html>.

12. *See infra* Section VI (discussing the reaction of colleges and universities to President Bush's restrictions on federal funds for embryonic stem cell research).

13. CHRISTINE M. MATTHEWS, CONG. RESEARCH SERV., R41895, FEDERAL SUPPORT FOR ACADEMIC RESEARCH, (Oct. 18, 2012), *available at* <https://www.fas.org/sgp/crs/misc/R41895.pdf>.

14. *Id.*

In 2009, President Obama relaxed the restrictions on federal funding for embryonic stem cell research, allowing federal funding for a wider variety of embryonic stem cell lines.¹⁵ Part of the President's reasoning behind this decision was his recognition of the substantial scientific potential that embryonic stem cell research offers.¹⁶ President Obama's decision has allowed embryonic stem cell research to move at a faster pace than during the administration of President George W. Bush, with more stem cell lines being added to those available for federal funding.¹⁷ The reaction of the scientific community to this decision was very positive because it opened the door for scientists at academic institutions to work with a much broader set of resources.¹⁸ The period of restrictive funding for new stem cell line research had made scientific research at educational institutions more cumbersome and less diverse than it might otherwise have been, causing that research to become more limited.

The case of stem cell research shows that when facing ethical objections to scientific research, government officials should move cautiously and should carefully consider the effects that restrictions will have on science and medical technology, on those suffering from various, sometimes untreatable, medical ailments, and particularly on colleges and universities as sources of scientific and medical research. Much of the current literature on embryonic stem cell research focuses on the ethical debate regarding that research and on the steps different congresses and presidential administrations have taken in response to new scientific discoveries.¹⁹ There is little literature, however, focusing on the effect these decisions have had on colleges and universities, the main source of this country's basic scientific research.²⁰ Embryonic stem cell derivation and replication was discovered at a public university and the stem cell bank is located at that public university.²¹ Because colleges and universities are a primary source for scientific and medical research and development, and because these institutions rely heavily on federal funds for their research projects,²² it is important to look at the effects the federal government's decisions regarding embryonic stem

15. Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009).

16. *Id.*

17. See Katherine Goodman, Note, *Stem Cell Research Becoming Less Restrictive*, 6 NO. 4 ABA SCITECH LAW 7, 8 (Spring 2010); see also *NIH Human Embryonic Stem Cell Registry*, NATIONAL INSTITUTES OF HEALTH, available at http://grants.nih.gov/stem_cells/registry/current.htm (last visited Oct. 2, 2014).

18. Goodman, *supra* note 17, at 9.

19. See, e.g., McGough, *supra* note 9, at 150; George, *supra* note 3; Goodman, *supra* note 17, at 7.

20. Matthews, *supra* note 13, at 14.

21. McGough, *supra* note 9; *WiCell Receives \$16 Million NIH Grant to Create National Stem Cell Bank*, UNIV. OF WISCONSIN-MADISON NEWS (Oct. 3, 2005), <http://www.news.wisc.edu/11616>.

22. Matthews, *supra* note 13, at 7.

cell research have had on these educational institutions. The effect of government intervention into the funding of embryonic stem cell research on colleges and universities will illustrate the need for government officials to move cautiously when deciding whether to fund scientific and medical research based on ethical objections to that research.

II. AN OVERVIEW OF THE SCIENCE BEHIND EMBRYONIC STEM CELL RESEARCH

In 1998, researchers at the University of Wisconsin, headed by Dr. James Thomson, discovered a method to successfully extract, culture, and sustain embryonic stem cells.²³ To derive embryonic stem cells, researchers must extract pluripotent cells from an embryonic blastocyst.²⁴ The process of formation of an embryonic blastocyst occurs as follows: when a sperm fertilizes an egg, the two create a single totipotent cell.²⁵ The totipotent cell then divides into two identical totipotent cells, which continue to divide over and over again.²⁶ After approximately four days, the totipotent cells begin to specialize and form a hollow sphere called a blastocyst.²⁷ The blastocyst consists of an outer layer of cells that develops into the placenta and other supportive extra-embryonic tissues, and an “inner cell mass” which becomes the embryo.²⁸ The cells in the inner mass are known as pluripotent cells, which can develop into virtually any type of tissue.²⁹ The ability to develop into almost any tissue is what makes these kinds of cells so important and promising to scientific and medical researchers.³⁰ It is from this inner mass of pluripotent cells that embryonic stem cells are extracted and cultured, and future stem cell lines are derived.³¹

While pluripotent cells have the ability to form into most tissue types, these cells cannot, on their own, develop into a human being.³² Totipotent stem cells are the only stem cells from which a human being can develop.³³ They have the ability to form extra-embryonic membranes and other tissue required to support fetal growth in the womb, in addition to having the ability to form all post-embryonic tissue and organs needed for full develop-

23. Thomson, *supra* note 1.

24. McGough, *supra* note 9, at 154.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Stem Cell Information: Glossary*, NATIONAL INSTITUTES OF HEALTH, <http://stemcells.nih.gov/info/pages/glossary.aspx> (last visited Oct. 1, 2014).

29. McGough, *supra* note 9, at 154.

30. *Id.* at 155.

31. *Id.* at 154.

32. George, *supra* note 3, at 777.

33. *Id.* at 756.

ment.³⁴ Any totipotent cell could, in principle, develop into a human being if placed in a woman's uterus.³⁵ Again, pluripotent stem cells do not have the same ability to form into a human being on their own.³⁶ Instead, pluripotent stem cells can form into any type of cell in the human body, depending on the kind of cell the pluripotent cells are placed with.³⁷ The inability of pluripotent cells to form into a human being on their own has been a large part of the reason the NIH has funded the use of embryonic stem cells for research, despite some legislation, like the Dickey-Wicker amendment, that may indicate that Congress intended the contrary.³⁸ Because pluripotent cells cannot themselves become a human being, they are not considered "organisms" for the purposes of legislation, and therefore funding scientific research on them is usually regarded as allowable.³⁹

To date, embryonic stem cells used in research have been exclusively collected from embryos that were created for the purpose of in vitro fertilization by couples who are unable to conceive by natural means.⁴⁰ In vitro fertilization involves the creation of an embryo outside of the body.⁴¹ To begin the process of in vitro fertilization, eggs are extracted from a woman during a laparoscopy.⁴² The eggs are then placed in a Petri dish and combined with sperm in order to fertilize the eggs and thus create embryos.⁴³ The embryos remain in the Petri dish until some of them are implanted into a woman's uterus in the hopes that they will attach to the uterine wall and gestate normally and fully into a child.⁴⁴ There are often surplus embryos, however, left over from the in vitro procedure, either because there are problems with the embryos, which make them unsuitable for implantation, or because couples have created excess embryos as an insurance policy against the low success rate of in vitro fertilization.⁴⁵ When, for whatever reason, there are surplus embryos from an in vitro fertilization procedure, there are a number of things that can happen to them. The leftover embryos can be voluntarily donated by the couple for scientific research, be destroyed, be kept cryogenically frozen with the couple paying the expense,

34. *Id.* at 756–57.

35. *Id.* at 757.

36. *Id.*

37. *Id.*

38. *See infra* Section II (discussing the Dickey-Wicker amendment and subsequent interpretation).

39. *See infra* Section II (discussing the NIH's interpretation of the Dickey-Wicker amendment).

40. George, *supra* note 3, at 750, 777 n. 242.

41. *Id.* at 750.

42. *Id.*

43. *Id.*

44. *Id.* at 750–51.

45. *Id.* at 751

or be given by the couple to another couple for use in their attempt at in vitro fertilization.⁴⁶ Today, both members of the couple are required to give full and informed consent before their embryos can be used in scientific research projects.⁴⁷

A major source of ethical conflict in embryonic stem cell research is that, in order to derive embryonic stem cells, the embryo must be destroyed.⁴⁸ Because isolating the embryonic stem cells requires removing the “inner cell mass” of the blastocyst (the cells that will become the embryo), the embryo is destroyed in the derivation process.⁴⁹ Destroying an embryo, however, at this stage is different from destroying a fetus in an abortion process.⁵⁰ A blastocyst is a small ball of about 150 cells that is smaller than the size of a pinhead and completely lacks any features that would be recognized as human.⁵¹ Further, blastocysts are sometimes fatally flawed, and therefore the chances of the blastocyst reaching the stage of viability (where the child can live outside of the womb with artificial aid) are far lower than the chances of a healthy growing fetus reaching that stage.⁵² And, once embryonic stem cells have been extracted from the blastocyst, the cells are able to replicate in a culture indefinitely, so there is no need to destroy another embryo to derive more cells.⁵³ Regardless of these facts, many have objected to embryonic stem cell research because they fear that the destruction of embryos for research will devalue human life.⁵⁴

Once the inner pluripotent mass of the blastocyst is extracted, there will be around thirty stem cells that will then be placed in a culture, where the cells will continue to divide differentiating into new cells, thus forming a “stem cell line” of identical cells.⁵⁵ An individual embryonic stem cell may then be removed from the line without disrupting either the cells’ multiplication process or the ultimate durability of the line.⁵⁶ The removed cell may then be used by scientists in a research project.⁵⁷

Embryonic stem cells are important to scientific and medical research

46. *Id.*

47. National Institutes of Health Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170, 32,171 (July 7, 2009).

48. *Sherley v. Sebelius*, 644 F.3d 388, 390–91 (D.C. Cir. 2011).

49. *Id.* at 390.

50. Joshua Whitehill, *Patenting Human Embryonic Stem Cells: What is so Immoral?*, 34 BROOK. J. INT’L L. 1045, 1045–46 (2009).

51. *Id.* at 1046.

52. *Id.*

53. *Sherley*, 644 F.3d at 390.

54. *See infra* Section IV (discussing the ethical and scientific debate over embryonic stem cell research).

55. *Sherley*, 644 F.3d at 390.

56. *Id.*

57. *Id.*

because they have the ability to develop into virtually any tissue type.⁵⁸ “Since many diseases are caused from the death of dysfunctional cells or the death of a single cell type, it is believed that the introduction of healthy stem cells into the body may restore the lost function.”⁵⁹ Stem cell research has the potential for practical medical application, including the potential for treatments that might ease or entirely eliminate the pain caused by “cardiovascular diseases, autoimmune diseases, diabetes, osteoporosis, cancer, Alzheimer’s disease, Parkinson’s disease, severe burns, spinal cord injuries and birth defects.”⁶⁰ Embryonic stem cells also have numerous potential applications outside of disease treatment, including helping to better understand human development, improving gene therapy, expanding testing and development of new drugs, and generating cells and tissue to be used in transplantation.⁶¹ There are currently over 100,000 people waiting for organ transplants in the United States, mostly due to the fact that one or more of their organs are failing.⁶² Embryonic stem cells provide the potential to remove some people from this waiting list by repairing their failing organs by providing a renewable source of healthy cells and tissues to repair the organs.⁶³ In addition, embryonic stem cells could be used to prevent the recipient’s negative immune response, a response that can cause a large number of organ transplants to fail.⁶⁴

Aside from embryonic stem cells, all animals — including humans — that have passed the gestational stage have adult stem cells.⁶⁵ These stem cells can be extracted from certain tissue of adults with minimal intrusion.⁶⁶ Extraction of adult stem cells is much less controversial than extraction of embryonic stem cells, because the extraction does not require the death of any organism.⁶⁷ Adult stem cells differ, however, from embryonic stem cells in that adult stem cells are able to replicate into only a limited number of other types of cells, while embryonic stem cells have the virtually unlimited potential to replicate into any kind of cell.⁶⁸ “Adult stem cells are said to be ‘Multipotent’, meaning they are limited in what cells they can turn into.”⁶⁹ Another reason that adult stem cells do not have the same scientific

58. George, *supra* note 3, at 756.

59. *Id.*

60. McGough, *supra* note 9, at 157.

61. *Id.*; see also George, *supra* note 3, at 758.

62. Shannon McGuire, Note, *Embryonic Stem Cells: Marrow of the Dickey Matter*, 11 J. HIGH TECH. L. 160, 160 (2010).

63. *Id.* at 161.

64. *Id.*

65. Whitehill, *supra* note 50, at 1051–52.

66. George, *supra* note 3, at 785.

67. *Id.* at 787–88.

68. *Id.* at 757.

69. *Id.*

research potential as embryonic stem cells is that adult stem cells do not have the ability to replicate indefinitely, and will eventually lose their ability to replicate entirely.⁷⁰ The vast majority of available data indicates that “[a]dult stem cell therapies will complement, but cannot replace, therapies that may be eventually obtained from [embryonic stem] cells.”⁷¹ Many scientists agree that embryonic stem cells, rather than adult stem cells, are the best resource for stem cell research and therapy because they are pluripotent and because they have a much higher capacity to replicate in a culture than adult stem cells.⁷²

There has been movement in science to formulate methods of deriving pluripotent cells without having to destroy an embryo, thus avoiding the most common ethical barrier to stem cell research. In addition to embryonic stem cells and adult stem cells, researchers have recently devised a method for reprogramming somatic (body) cells into pluripotent cells.⁷³ In 2006, scientists in Japan discovered that manipulating four genes in somatic cells caused them to revert to a pluripotent state.⁷⁴ This manipulation, however, was done through viruses which would implant their own DNA into the cells, causing an increased risk for genomic abnormalities, most notably cancer.⁷⁵ While new methods have been devised to induce pluripotent stem cells, they are not as reliable as the viral method.⁷⁶ Further, induced pluripotent stem cells (iPSCs) are not as viable for research as em-

70. McGough, *supra* note 9, at 158.

71. *Id.*

72. Anne Clark Pierson, *Sherley v. Sebelius: Circuit Court Allows Federal Funding of Embryonic Stem Cell Research to Continue for Now*, 38 J. L. MED. & ETHICS 875, 875 (2010).

73. See Kazutoshi Takahashi & Shinya Yamanaka, *Induction of Pluripotent Stem Cells from Mouse Embryonic and Adult Fibroblast Cultures by Defined Factors*, 126 CELL 663–76 (Aug. 25, 2006), available at [http://www.cell.com/cell/fulltext/S0092-8674\(06\)00976-7](http://www.cell.com/cell/fulltext/S0092-8674(06)00976-7).

74. *Id.*

75. See Mira C. Puri & Andras Nagy, *Concise Review: Embryonic Stem Cells Versus Induced Pluripotent Stem Cells: The Game Is On*, 30 STEM CELLS 10, 10–14 (Dec 28, 2011), available at <http://onlinelibrary.wiley.com/doi/10.1002/stem.788/full>; see also Jiing-Kuan Yee, *Turning Somatic Cells into Pluripotent Stem Cells*, 3 NATURE EDUCATION 25 (2010), available at <http://www.nature.com/scitable/topicpage/turning-somatic-cells-into-pluripotent-stem-cells-14431451>.

76. See Yee, *supra* note 75. The scientists note:

“[m]any alternative gene delivery strategies — including the use of episomal vectors, nonintegrating viral vectors, transient DNA transfection, transposons, and protein transduction — can overcome this problem [of viral DNA transfer]. A general principle common to all these strategies is the transient expression of the four transcription factors at sufficient levels to trigger the initiation of the cell reprogramming event without permanent integration of the four genes into the host genome. Although these strategies work for the most part, the efficiency of generating iPS cell lines is significantly reduced compared with the approach of retroviral and lentiviral vectors.”

bryonic stem cells. Because the cells must first go through the process of development into somatic cells, and then go through the process of reprogramming, iPSCs have a greater chance of genomic instability than embryonic stem cells and will oftentimes be inconsistent and variable, and are likely to show premature deterioration when placed with other cells.⁷⁷ This makes iPSCs unsuitable for transplantation therapies, and less useful than embryonic stem cells in other research areas.⁷⁸

Another movement in science to avoid ethical issues with stem cell research has been to find a way to derive embryonic stem cells without destroying the embryo. In 2006, scientists at Advanced Cell Technology, located in Worcester, Massachusetts, used a single-cell biopsy procedure, similar to the procedure done for preimplantation genetic diagnosis, which does not harm the embryo.⁷⁹ They then attempted to produce embryonic stem cell lines from that single cultured cell.⁸⁰ While the scientists were able to create only two viable stem cells lines from numerous procedures, they did prove that the concept of generating embryonic stem cell lines without harming embryos was feasible.⁸¹ In a second set of experiments, the scientists were able to increase the likelihood of generating embryonic stem cell lines with the biopsy procedure using different culturing methods.⁸² This second set of experiments also included experiments showing that the embryos biopsied were able to fully develop and that other embryonic stem cells were not necessary to culture new embryonic stem cell lines from the biopsy procedure.⁸³ This new method of deriving embryonic stem cell lines may help ease many of the ethical concerns over human embryonic stem cell research, since in this process embryos need not be destroyed in order to derive their stem cells.

These new movements in science have been helpful, but have not completely avoided the ethical problems of embryonic stem cell research. For example, the method used by the researchers at Advanced Cell Technology has been patented by their company, making it impossible for other scientists to use the method.⁸⁴ Therefore, scientists who wish to use embryonic

77. See Puri & Nagy, *supra* note 75, at 12; see also Kazim H. Narsinh et al., *Comparison of Human Induced Pluripotent and Embryonic Stem Cells: Fraternal or Identical Twins?*, 19 MOLECULAR THERAPY 635, 635–38 (2011), available at <http://www.nature.com/mt/journal/v19/n4/full/mt201141a.html>.

78. See Yee, *supra* note 75.

79. Irina Klimanskaya et al., *Human Embryonic Stem Cell Lines Derived from Single Blastomeres*, 444 NATURE 481, 481–85 (2006), available at <http://www.nature.com/nature/journal/v444/n7118/full/nature05142.html>.

80. *Id.*

81. *Id.*

82. Young Chung et al., *Human Embryonic Stem Cell Lines Generated without Embryo Destruction*, 2 CELL STEM CELL 113, 113–17 (2008).

83. *Id.*

84. See Rebecca Taylor, *Embryonic Stem Cell Technique that Doesn't "Harm"*

stem cells for research must still derive the cells from embryos via the method created at the University of Wisconsin, which requires embryo destruction.⁸⁵ There is also concern that the process used to remove the single cell from the blastocyst may still cause harm to the embryo.⁸⁶ And induced pluripotent stem cells, while having some scientific uses, are still flawed in ways that make them less useful to research than embryonic stem cells.⁸⁷ While they are more useful in scientific research, embryonic stem cells are controversial because of ethical and religious concerns that the destruction of embryos for scientific research devalues human life, dehumanizes embryos, and may encourage abortions.⁸⁸ These concerns have led to legislative and executive intervention into research involving human embryos.

III. THE HISTORY OF GOVERNMENT INTERVENTION INTO RESEARCH INVOLVING EMBRYOS

It is important to note that the extent to which the federal government has intervened in the realm of scientific research involving human embryos has been either to fund or not to fund such research with federal money.⁸⁹ There have never been any serious proposals by the federal government to prohibit research in which embryos are destroyed.⁹⁰ At the state level, South Dakota has criminalized embryonic stem cell research,⁹¹ Indiana has made it a crime to use a human embryo created with an ovum provided to a fertility or similar clinic for stem cell research,⁹² and other states have criminalized the use of embryos for something other than their authorized use or without consent of the donor.⁹³ While the federal government has not criminalized human embryonic stem cell research, withholding federal

Embryos is Problematic, LIFE NEWS.COM (Jan. 16, 2013), <http://www.lifenews.com/2013/01/16/embryonic-stem-cell-technique-that-doesnt-harm-embryos-is-problematic>.

85. *Id.*

86. *Id.*

87. See discussion *supra* Section II (noting that use of viruses in deriving induced pluripotent stem cells leads to genomic abnormalities and the process of reprogramming the cells multiple times leads to genomic instability, making iPSCs less suitable for research than embryonic stem cells).

88. See discussion *infra* Section IV (detailing the ethical and scientific debate over embryonic stem cell research).

89. See Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007); Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (March 9, 2009).

90. *The Stem Cell Debates*, THE NEW ATLANTIS 9, 16 (Winter 2012), available at http://www.thenewatlantis.com/docLib/20120125_TNA34Report.pdf.

91. S.D. CODIFIED LAWS § 34-14-16 (2000).

92. IND. CODE § 35-46-5-3 (2014).

93. See LA. REV. STAT. ANN. § 14:101.2 (1999); CAL. PENAL CODE § 367g (West 2011); MICH. COMP. LAWS ANN. § 777.13k (West 2013).

funding from certain kinds of research can have the effect of retarding that research, especially when the research is done in institutions that rely on federal funding for research, such as colleges and universities.⁹⁴

Federal funds for scientific research are distributed by the National Institutes of Health (NIH).⁹⁵ The NIH is composed of twenty-seven institutes and centers with a budget of over \$20 billion a year.⁹⁶ The NIH and seven other agencies make up the Public Health Service, which is controlled by the Department of Health and Human Services.⁹⁷ “[T]he goal of the NIH research is to acquire new knowledge to help prevent, detect, diagnose, and treat disease and disability. . . .”⁹⁸ While conducting its own research, the NIH also determines how to allocate federal funds for medical and scientific research.⁹⁹ Since 1995, Congress has included a provision known as the Dickey-Wicker amendment in the annual appropriations bill for the Department of Health and Human Services.¹⁰⁰ Dickey–Wicker prohibits the NIH from funding: “(1) the creation of a human embryo or embryos for research purposes; or (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 C.F.R. 46.208(a)(2) and [section 498(b) of the Public Health Service Act] 42 U.S.C. 289g(b).”¹⁰¹ The risk standard under 45 C.F.R. 46.208(a)(2) referred to by the amendment is that the risk to the fetus from the research must not be greater than minimal,¹⁰² and the risk standard for fetuses in utero under section 498(b) of the Public Health Service Act is that the research must not pose an added risk of suffering, injury, or death to the fetus.¹⁰³

The history surrounding the passing of the Dickey-Wicker amendment suggests the Congress passed it in most part to prevent President Clinton from acting, based on an NIH report recommending federal funding for research using embryos, to fund research on embryos that had been created for in vitro fertilization.¹⁰⁴ In vitro fertilization, first successfully used in

94. See *infra* Section VI (discussing the reaction of colleges and universities to the restriction on federal funding of embryonic stem cell research).

95. George, *supra* note 3, at 774.

96. *Id.* at 773.

97. *Id.* at 774.

98. *Id.* at 773–74.

99. *Id.* at 774.

100. *Sherley v. Sebelius*, 644 F.3d 388, 390 (D.C. Cir. 2011).

101. Balanced Budget Downpayment Act, Pub. L. No. 104-99, §128, 110 Stat. 26, 34 (1996).

102. 45 C.F.R. § 46.204 (2013).

103. 42 U.S.C. § 289g(b) (2012).

104. *Sherley*, 644 F.3d at 388, *referencing* O. Carter Snead, *Science, Public Bioethics, and the Problem of Integration*, 43 U.C. DAVIS L. REV. 1529, 1546 (2010) (describing the history of conflict between the political branches on the issue of human embryo

1978, made possible the fertilization of a human ovum outside of the body.¹⁰⁵ This unique situation brought into question the moral status of the embryo.¹⁰⁶ In response to those questions, the Carter administration created an Ethics Advisory Board for the Department of Health Education and Welfare (now the Department of Health and Human Services).¹⁰⁷ Any federal funding for research on embryos that were fertilized in vitro was required to be approved by the Board.¹⁰⁸ The Board concluded that the moral status of the embryo was entitled to profound respect, but not respect of the same magnitude as persons.¹⁰⁹ Presidents Reagan and George H.W. Bush, who succeeded President Carter in office, refused to fund the Ethics Advisory Board in order to prevent any federal funding of IVF embryo research from being approved.¹¹⁰ Then, in 1993, at President Clinton's urging, Congress passed the NIH Revitalization Act, which eliminated the Board approval requirement.¹¹¹ President Clinton then directed the NIH to make recommendations regarding federal funding of research on human embryos, which the NIH did in a report in 1994.¹¹² The report recommended allowing broad federal funding for research involving human embryos.¹¹³ In response, Congress added the Dickey-Wicker amendment to the NIH Appropriations Bill in 1995.¹¹⁴ The amendment has been reauthorized every year since then.¹¹⁵ As previously stated, the Dickey-Wicker amendment prohibited federal funding of research involving the destruction of human embryos.¹¹⁶ However, this amendment could not have been passed with human embryonic stem cell research in mind, because, in 1995, researchers at the University of Wisconsin had not yet discovered their method for derivation of embryonic stem cells from human embryos.

Some scholars have questioned the effectiveness and appropriateness of

research).

105. Moses, *supra* note 5, at 509.

106. *Id.*

107. *Id.* at 539.

108. *Id.* at 539.

109. Report and Conclusions: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer, 44 Fed. Reg. 35,033, 35,056 (May 4, 1979).

110. Moses, *supra* note 5, at 539.

111. National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, § 121, 107 Stat. 122, 133 (1993); *see also* O. Carter Snead, *Science, Public Bioethics, and the Problem of Integration*, 43 U.C. DAVIS L. REV. 1529, 1545 (2010).

112. Snead, *supra* note 111, at 1546.

113. NATIONAL INSTITUTES OF HEALTH, REPORT OF THE HUMAN EMBRYO RESEARCH PANEL (Sept. 1994).

114. Balanced Budget Downpayment Act, Pub. L. No. 104-99, §128, 110 Stat. 26, 34 (1996); *see also* Snead, *supra* note 111, at 1546.

115. Snead, *supra* note 111, at 1546.

116. Balanced Budget Downpayment Act §128.

the Dickey-Wicker amendment.¹¹⁷ For instance, certain scholars worry about Dickey-Wicker's status as an appropriations rider.¹¹⁸ Appropriations riders are used as a means of affecting substantive laws and policies, but such riders are created through a process that does not include committee expertise, which is necessary when the House or Senate creates substantive policy or law.¹¹⁹ In fact, appropriations acts are not even codified, as they are only temporary and must be renewed each year.¹²⁰ Appropriations riders meant to affect substantive policy create problems for the other branches of government, such as the judiciary, who are tasked with interpreting the meaning of the rider, because the riders have no legislative history to look to.¹²¹ Scholars also worry that Dickey-Wicker is regulating an area of research that the amendment predates, namely human embryonic stem cell research.¹²² At the time Dickey-Wicker was passed, Congress was concerned only with in vitro fertilization.¹²³ Because human embryonic stem cell derivation had not yet been discovered at the time Dickey-Wicker was first passed, scholars argue that it was not meant to apply to embryonic stem cell research.¹²⁴ They believe that it makes little sense to allow the Dickey-Wicker amendment, a temporary appropriations rider, to determine the issue of federal funding for an area of research which it predates and which it could not have contemplated at the time at which it became law.¹²⁵

The Dickey-Wicker amendment prevented the federal funding of research involving human embryos from the time of its passing in 1995 until January of 1999, when Harriet Rabb, general counsel for the Department of Health and Human Services, issued an opinion about the consequences of the Dickey-Wicker amendment.¹²⁶ Rabb determined that pluripotent stem cells do not fall within the definition of "human embryo" under the amendment based on the amendment's characterization of a human embryo

117. See Nicholas J. Diamond, *The Flaws of Stem Cell Legislation: Sherley, Brüstle, and Future Policy Challenges Posed by Induced Pluripotent Stem Cells*, 14 MINN. J.L. SCI. & TECH. 259 (Winter 2013).

118. *Id.* at 277; see also Neal E. Devins, *Regulation of Government Agencies through Limitation Riders*, 1987 DUKE L. J. 456 (1987) (arguing that the appropriations process is not the proper vehicle for substantive policymaking).

119. Diamond, *supra* note 117, at 277–78.

120. See *Frequently Asked Questions and Glossary*, OFFICE OF THE LAW REVISION COUNSEL, available at <http://uscode.house.gov/faq.xhtml> (last visited Oct. 2, 2014).

121. Diamond, *supra* note 117, at 278.

122. *Id.*; see also McGuire, *supra* note 62, at 177 (“To apply a regulatory law that was enacted before the research protocol was even discovered is not practical nor is it favorable for scientific research and advancement.”).

123. See *supra* Section III (noting that Dickey-Wicker was passed in 1995, prior to the discovery of embryonic stem cell derivation).

124. Diamond, *supra* note 117, at 280; McGuire, *supra* note 62, at 177.

125. Diamond, *supra* note 117, at 280; McGuire, *supra* note 62, at 178.

126. Snead, *supra* note 111, at 1546.

as an “organism.”¹²⁷ Rabb concluded that previously extracted embryonic stem cells are not covered by the amendment because they lack the capacity to develop into an “organism” on their own when implanted in a uterus.¹²⁸ This interpretation of the amendment allows for federal funding of stem cell research after the cells have been extracted from an embryo. Because the embryo has already been destroyed to extract the stem cells, the government would not be funding research in which an embryo is destroyed.

However, in 2001, President Bush, in an address to the nation, stated that he had decided to limit federal funding of embryonic stem cell research to the stem cell lines which had been extracted prior to August 9, 2001.¹²⁹ President Bush’s decision was further explained by subsequent NIH papers, which stated that no research on new stem cells lines derived from human embryos would be allowed to be funded, and that the NIH had identified only sixty-four stem cell lines that were available for federal funding.¹³⁰ Furthermore, President Bush’s new policy required that federally fundable embryonic stem cell research must have received the fully informed consent of the embryo donors, the research must have used embryos that were created for reproductive purposes in excess of clinical need, the research institution in question must have given no financial incentive to the donors, and that institution was not allowed to use embryos that were created for purely research purposes.¹³¹

When President Bush made funding available for embryonic stem cell research in 2001, it was the first time federal funding was available for such research.¹³² This is not surprising when one considers the timing of the discovery of embryonic stem cell line derivation techniques. University of Wisconsin researchers first announced their discovery of a derivation method in late 1998.¹³³ Then-President Clinton quickly confronted the issue of funding (particularly the Dickey-Wicker amendment) by instructing general counsel for the Department of Health and Human Services to interpret the amendment with regard to federal funding of research like embry-

127. Memorandum from Harriet S. Rabb, General Counsel of the Department of Health and Human Services, to Harold Varmus, Director of the National Institutes of Health (Jan. 15, 1999).

128. *Id.*

129. Bush, *supra* note 11.

130. *National Institutes of Health (NIH) Update on Existing Human Embryonic Stem Cells*, NATIONAL INSTITUTES OF HEALTH (Aug. 27, 2001) available at <http://stemcells.nih.gov/policy/statements/pages/082701list.aspx>.

131. J. Mark Waxman et al., *The Stem Cell Legislative Process*, 17 HEALTH LAW 23, 24 (2005).

132. See *The Stem Cell Debates*, *supra* note 90, at 12.

133. See Terry Devitt, *Wisconsin Scientists Culture Elusive Embryonic Stem Cells*, UNIVERSITY OF WISCONSIN-MADISON NEWS (Nov. 6, 1998), <http://www.news.wisc.edu/3327>.

onic stem cell research.¹³⁴ Counsel came up with an interpretation in January of 1999, laying the framework for federal funding of embryonic stem cell research.¹³⁵ However, Clinton's term as president ended just two years later, with President Bush taking office in January 2001.¹³⁶ Several months later, President Bush made his announcement regarding his policy choice on federal funding of embryonic stem cell research.¹³⁷

The Bush administration originally identified sixty-four stem cell lines that would be available for federally funded research after August 9, 2001,¹³⁸ but, as it turned out, only twenty-one of those lines were viable for scientific research.¹³⁹ Therefore, President Bush's decision to limit federal funding to existing stem cell lines ultimately limited the available cells for scientific and medical research to twenty-one lines. It is axiomatic that restricting the raw materials available for research will limit that research. While the stem cell lines that were available for federal funding under President Bush's policy have yielded scientific discoveries,¹⁴⁰ it is impossible to say what other discoveries could have been achieved had federal funding of other stem cell lines not been prohibited. In 2004, scientists at Harvard noted that the stem cell lines approved by President Bush "vary considerably in their usefulness for research and the extent of their characterization."¹⁴¹ Consequently, the Harvard scientists decided to create new stem cell lines that could more easily be manipulated by scientists for research purposes.¹⁴² In the end, the scientists created 17 new stem cell lines, but noted that their cell lines could not be used in research funded, even in part, by federal funds.¹⁴³

President Bush's decision to limitedly fund embryonic stem cell research brought to the forefront the ethical and scientific debate over the benefits

134. McGough, *supra* note 9, at 164.

135. *See supra* Section III.

136. *See The Presidents*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents> (last visited Nov. 17, 2014).

137. Bush, *supra* note 11.

138. Waxman, *supra* note 131, at 24.

139. *See* Janet Kelly, *All NIH Human Embryonic Stem Cell Registry Lines Now Deposited at NSCB*, UNIVERSITY OF WISCONSIN-MADISON NEWS (Jan. 12, 2009), <http://www.news.wisc.edu/16120>

140. At the University of Wisconsin, the university press indicated that during this time more than a dozen newsworthy discoveries came from embryonic stem cell research being done at that university alone. *See* Terry Devitt, *Research on Human Embryonic Stem Cells Marks 10-Year Milestone*, UNIVERSITY OF WISCONSIN-MADISON NEWS (Nov. 6, 2008), <http://www.news.wisc.edu/15920> (detailing the many discoveries of stem cell research conducted at University of Wisconsin-Madison over a decade).

141. Chad A. Cowan et al., *Derivation of Embryonic Stem-Cell Lines from Human Blastocysts*, 350 NEW ENG. J. MED. 1353, 1353-56 (2004), available at <http://www.nejm.org/doi/full/10.1056/NEJMSr040330>.

142. *Id.*

143. *Id.*

and dangers of embryonic stem cell research. It is to that debate that I now turn.

IV. THE ETHICAL AND SCIENTIFIC DEBATE OVER EMBRYONIC STEM CELL RESEARCH

At the heart of the debate over the permissibility of embryonic stem cell research is the conflict between the potential benefits the research could achieve for scores of people suffering from various ailments and the ethical importance of maintaining the human dignity of embryos.

Much of the argument for funding stem cell research involves the promise the research holds for curing disease and relieving pain and suffering.¹⁴⁴ It is easy to understand this side of the argument; while an embryo is a tiny, faceless mass of cells, “[t]he cause for curing disease has a human face, the face of a loved one or neighbor, bent under the suffering of an incompletely understood or treated disease.”¹⁴⁵ It is also important to note that the fate of many of the embryos on which research is done is uncertain at the time they are donated.¹⁴⁶ As of March 2014, no one knows exactly how many IVF embryos sit frozen in cryogenic storage, but estimates range from hundreds of thousands to a million.¹⁴⁷ While some of those embryos had the chance of being “adopted” by individuals seeking reproductive assistance, adoption is not common and many will be frozen for an undetermined period of time until they die and are discarded.¹⁴⁸ Thus, most of the frozen embryos have no chance of being born, and it is argued that using those embryos for research such as embryonic stem cell research, which has such potential for good, is a much better fate for them than simply staying frozen until they die.¹⁴⁹

Many in the academic and political world have recognized the possibilities that embryonic stem cells present for medical research of many diseases and disabilities. Proponents of embryonic stem cell research argue that this research promises the possibility of clinical application in medical fields such as the “autologous repair of tissues and organs that would otherwise require transplantation, restoring vital functions at the cellular level, gene therapy through implantation, and *in vivo* and *in vitro* growth of ge-

144. THE PRESIDENT’S COUNCIL ON BIOETHICS, MONITORING STEM CELL RESEARCH, Recent Developments in the Ethical and Policy Debates 56 (January 2004).

145. *Id.* at 58.

146. *Id.* at 59.

147. Paul Ford, *Determining the Fate of Frozen Embryos*, CNN (Mar. 24, 2014), <http://www.cnn.com/2014/03/24/living/frozen-embryos-elle-relate>.

148. THE PRESIDENT’S COUNCIL, *supra* note 144, at 85.

149. *Id.* at 85 n. 114 (pointing to the testimony of Michael West before the Labor, HHS, and Education Subcommittee of the Senate Appropriations Committee in December, 2001).

netically 'corrected' cells."¹⁵⁰ Furthermore, embryonic stem cell research promises to improve "methods of screening new drugs for toxicity and efficacy" without requiring clinical testing on humans.¹⁵¹

Lawmakers have also taken note of the benefits that embryonic stem cell research promises for the medical field. In his urge for support of stem cell research in 2005, Representative Castle stated that "[t]his is not the time to allow bad science or ideology to get in the way of doing what is right for the people of this country and of the world. There are 110 million people in the United States of America who potentially could be helped by embryonic stem cell research."¹⁵² Representative Moore also voiced his support for enhancing stem cell research by stating that "[r]ecent scientific research has suggested that embryonic stem cells hold immense potential to successfully treat many serious medical conditions including diabetes, Parkinson's Disease[,] and cancer," and that "the oversight which will come with broad federal support will result in better and more ethically controlled research in the field than if funding was from private sources alone."¹⁵³ Both representatives recognized the medical potential that stem cell research promises, and added that federal support of that research would allow for greater oversight by the government to keep the research within ethical limits.¹⁵⁴

Others fear, however, that allowing embryonic stem cell research to continue uninhibited would morally devalue human life and that such research violates the moral duty to protect human life.¹⁵⁵ The general opposition to embryonic stem cell research is concerned that an increase in embryonic research will lead to an increase in abortions by devaluing human life.¹⁵⁶ "The main argument that is maintained by religious and pro-life groups is the fact that the embryos and fetuses are human beings worthy of respect. Most religious organizations believe that life begins at conception, thus it would be immoral and unethical to destroy embryos for scientific research."¹⁵⁷ Furthermore, some members of the President's Council on Bioethics argued that by allowing embryo destruction for stem cell research, policymakers open the door for scientists to resort to more extreme methods, such as using later-stage embryos or fetuses, if they prove more useful

150. Christopher Ogolla, *Reversing the United States Policy on Human Embryonic Stem Cell Research: A Case of Science, Law and Policy, or Just Plain Politics*, 35 T. MARSHALL L. REV. 91, 92 (2009).

151. *Id.* at 92.

152. 151 CONG. REC. 3775 (2005) (statement of Rep. Castle).

153. 152 CONG. REC. 15852, 15868 (2006) (statement of Rep. Moore).

154. 151 CONG. REC. 3775 (2005); 152 CONG. REC. 15852, 15868 (2006).

155. Ogolla, *supra* note 150, at 92.

156. George, *supra* note 3, at 782 (noting that religious and pro-life groups feared allowing embryonic stem cell research would morally devalue human life).

157. *Id.*

for research.¹⁵⁸

In general, government officials have opted for the “special respect” approach to human embryos, arguing that embryos are not afforded the same moral standing as a fully developed human, but are entitled to some degree of respect above being treated as a mere object or means to an end.¹⁵⁹ This view generally leads not to prohibition of research on embryos, but to scrutiny of the reasons for which embryos will be used in scientific research, the circumstances under which the embryos are obtained, and other similar factors.¹⁶⁰ The Ethics Advisory Board to the Department of Health, Education and Welfare in 1979, the NIH Embryo Research Panel in 1994, and the National Bioethics Advisory Commission in 1999 all proffered the “special respect” approach with regard to research involving human embryos.¹⁶¹

All of these ideals helped motivate President Bush’s decision in 2001 to limit the federal funding of stem cell research.¹⁶² When addressing the nation with regard to this decision, President Bush stated that “I’m a strong supporter of science and technology, and believe they have the potential for incredible good—to improve lives, to save life, to conquer disease. Research offers hope that millions of our loved ones may be cured of a disease and rid of their suffering. . . . [L]ike all Americans, I have great hope for cures.”¹⁶³ While acknowledging the promise of medical benefits that embryonic stem cell research contained, President Bush also indicated his concern about protecting the value of human life by stating,

I also believe human life is a sacred gift from our Creator. I worry about a culture that devalues life, and believe as your President I have an important obligation to foster and encourage respect for life in America and throughout the world. And while we’re all hopeful about the potential of this research, no one can be certain that the science will live up to the hope it has generated.¹⁶⁴

Later, in 2007, President Bush vetoed legislation to expand federal funding for embryonic stem cell research.¹⁶⁵ He clarified his beliefs and motives in restricting federal funding for embryonic stem cell research through Executive Order 13,435, *Expanding Approved Stem Cell Lines in Ethically*

158. THE PRESIDENT’S COUNCIL, *supra* note 144, at 86.

159. *Id.* at 82–83.

160. *Id.* at 83.

161. *Id.*

162. Patrick J. Fleis, Comment, *Stemming the Stem Cell Setback*, 7 MARQ. INTELL. PROP. L. REV. 205, 207 (2003).

163. Press Release, Office of the Press Secretary, *President Discusses Stem Cell Research* (Aug. 9, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html>.

164. *Id.*

165. Ogolla, *supra* note 150, at 92.

Responsible Ways.¹⁶⁶ The Order stated that its purpose was to “establish moral and ethical boundaries to allow the Nation to move forward vigorously with medical research, while also maintaining the highest ethical standards and respecting human life and human dignity.”¹⁶⁷ The order also made it clear that “no life should be used as a mere means for achieving the medical benefit of another.”¹⁶⁸ The order expressed President Bush’s belief that “human embryos and fetuses [are]. . .members of the human species” and, therefore, could not be used as mere commodities or as means to an end.¹⁶⁹

In response to this decision by President Bush, Senator Hillary Clinton said that his Order was “just one example of how the President puts ideology before science, politics before the needs of our families—just one more example of how out of touch with reality he and his party have become.”¹⁷⁰ Senator Clinton’s response shows how strongly those who support stem cell research feel about the importance of its potential scientific benefits and that they do not believe that ethical objections based on the moral status of the embryo should stymie that research.

Focus by embryonic stem cell research opponents on the moral status of the embryo has caused the debate over stem cell research to be conflated with the debate over abortion.¹⁷¹ This conflation of issues can be seen in members of the general population’s ideas about what an embryo looks like. In 2003, Professor Irving Weissman approached people at random on the street in California and asked them to draw an embryo.¹⁷² Most respondents, he said, drew a fetus with a face, indicating that they believed embryos to be equated with fetuses developed to the point that they had a face.¹⁷³ However, scientists generally realize that the issue is embryonic stem cell research, not abortion or reproductive rights. Some react with surprise that something as small and, under a microscope, “dull-looking” as an embryonic stem cell can cause so much debate.¹⁷⁴ The cells themselves seem almost “inconsequential” when viewed through the microscope, and pale in comparison to the faces of the suffering men, women, and children that could be helped by stem cell technology.¹⁷⁵ Therefore, during the time

166. Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007).

167. *Id.* at 34,592.

168. *Id.*

169. *Id.*

170. Ogolla, *supra* note 150, at 93.

171. Janet L. Dolgin et al., *Attitudes about Human Embryos, Embryonic Stem Cell Research, and Related Matters*, 37 HOFSTRA L. REV. 319, 320 (2008).

172. Steven Kotler, *The Final Frontier*, L.A. WEEKLY (Jan. 30, 2003), <http://www.laweekly.com/2003-02-06/news/the-final-frontier/>.

173. *Id.*

174. *Id.*

175. *Id.*; see also THE PRESIDENT’S COUNCIL, *supra* note 144, at 81.

that federal funding for human embryonic stem cell research was restricted, many scientists hoped for the removal of the funding limitations, so that they could continue their research and work to find cures for diseases.¹⁷⁶

V. REACTION OF THE SCIENTIFIC COMMUNITY TO THE LIMIT ON FEDERAL FUNDING FOR EMBRYONIC STEM CELL RESEARCH AND ITS EFFECT ON COLLEGES AND UNIVERSITIES

The scientific community reacted with alarm in 2001, when President Bush decided to limit the embryonic stem cells that would be eligible for federal funding. Some scientists, like Roger Pedersen of the University of California at San Francisco, were so concerned about the new restrictions on federal funding for embryonic stem cell research that they decided to move their research out of the United States.¹⁷⁷ Also, because of the relative infancy of the stem cell field at the time of President Bush's restriction on federal funding, uncertainty existed as to what could be expected from the stem cell lines that were in existence at such an early stage in the embryonic stem cell field.¹⁷⁸ Many stem cell researchers wished to continue to study embryonic stem cells using the most scientifically viable lines (which often did not include the 21 approved lines) and, therefore,

[r]esearch institutions that wished to conduct research using both pre-2001 and post-2001 embryonic stem cell lines had to either set up elaborate accounting systems or else construct completely separate facilities in order to assure that no federal dollars were indirectly used to support research outside of National Institutes of Health (NIH) guidelines.¹⁷⁹

If a lab used any unapproved lines, they had to go to extreme lengths to separate their research so that federal funds were not used in any way on the unapproved lines.¹⁸⁰ As told by Ali H. Brivanlou, a researcher at Rockefeller University, "You can imagine what it meant not to be able to carry a pipette from one room to another. . .[t]hey even had to repaint the walls to ensure no contamination by federal funds."¹⁸¹

The academic world was extremely concerned with President Bush's decision because academic institutions depend on the federal government for funding of their "basic" research. In 1945, Vannevar Bush, who was then

176. Kotler, *supra* note 172.

177. Fleis, *supra* note 162, at 208.

178. Fleis, *supra* note 162, at 212.

179. *Issues and Legislation*, WISCONSIN STEM CELL NOW (2008), available at <http://www.wistemcellnow.org/issues-and-legislation>.

180. Nicholas Wade, *New Stem Cell Lines Open to Research*, N. Y. TIMES, December 3, 2009, http://nytimes.com/2009/12/03/science/03stem.html?_r=0.

181. *Id.*

the Director of the Office of Scientific Research and Development, wrote an influential report to President Franklin Roosevelt in which he argued that government funding for basic research is essential in order to continue enjoying technological progress.¹⁸² Bush defined “basic research” as research “performed without thought of practical ends [that]. . . results in general knowledge and an understanding of nature and its laws” and added that “[b]asic research leads to new knowledge [and]. . . provides scientific capital.”¹⁸³ Bush argued that “a nation which depends on others for its new basic scientific knowledge will be slow in its industrial progress and weak in its competitive position in world trade.”¹⁸⁴ In order to continue to foster basic research, Bush argued, colleges and universities need funding support from the government.¹⁸⁵ He argued that colleges and universities were “uniquely qualified by tradition and by their special characteristics to carry on basic research.”¹⁸⁶ The characteristics that made colleges and universities qualified for basic research include the fact that these institutions “are charged with the responsibility of conserving the knowledge accumulated by the past, imparting that knowledge to students, and contributing new knowledge of all kinds” and that scientists in these institutions are free from the adverse pressures of convention, prejudice or commercial necessity and are therefore able to act with security and personal intellectual freedom.¹⁸⁷ Bush noted that industry is inhibited from engaging in basic research because of preconceived goals, by its own standards, and by the constant pressures of commercial necessity.¹⁸⁸ Therefore, Bush argued, colleges and universities need to be supported by public funds so that they could continue to provide basic research for the increasing demands of industry.¹⁸⁹

Colleges and universities continue to be the primary sources of basic research, which is still widely considered to be essential to creating new industries and promoting technological advancements.¹⁹⁰ In fiscal year 2008, 56% of basic research was being done at colleges and universities.¹⁹¹ This kind of research is not heavily undertaken by the private sector because it is

182. Vannevar Bush, *Science, The Endless Frontier: A Report to the President on a Program for Postwar Scientific Research*, OFFICE OF SCIENTIFIC RESEARCH AND DEVELOPMENT (July 5, 1945), available at <http://www.nsf.gov/od/lpa/nsf50/vbush1945.htm>.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Bush, *supra* note 182.

188. *Id.*

189. *Id.*

190. MATTHEWS, *supra* note 13, at 7.

191. *Id.*

often not cost-effective.¹⁹² In the educational setting, however, basic research can meld harmoniously with the educational missions of colleges and universities.¹⁹³ Therefore, we must depend on colleges and universities to advance basic research and to continue to create new technologies and areas of industry.

Educational institutions require funding in order to participate in scientific and technological research. While laboratories at academic institutions receive funding for research from their own institutions, from industry, and from the state, most of their research funding comes from the federal government.¹⁹⁴ In fiscal year 2011, federal funding accounted for over 60% of all research and development funding at colleges and universities.¹⁹⁵ By comparison, institutional funding accounted for about 19% of research funding, while industry provided approximately 5% of the total funding for academic research.¹⁹⁶ The rest of the funding for research at colleges and universities comes from the states and other sources.¹⁹⁷ The government-run National Institute of Health (NIH) spends over twenty-three million dollars per year to advance the sciences, most of which otherwise would not have gone to research being done at academic institutions.¹⁹⁸ So, it is clear that the federal government provides a large amount of funding to educational institutions, which tend to be less driven by profit-making motives than private industry. Basic research, done mostly by academic institutions, provides a footing on which private industry can develop, and the federal government's funding allows for a good balance between basic and applied research to be maintained.¹⁹⁹

An example of the balance between academic and private research, and the effects President Bush's order had on this balance, can be seen in the interaction between the University of Wisconsin's Wisconsin Alumni Research Foundation (WARF) and Geron, a private corporation also engaging in stem cell research. In 1999, WARF negotiated a commercial license with Geron Corporation with regard to several of WARF's patented stem cell lines.²⁰⁰ In return for the commercial license, Geron funded a large por-

192. *Id.*

193. *Id.* at 2.

194. *Id.* at 7.

195. NATIONAL SCIENCE FOUNDATION, NSF-13-325, HIGHER EDUCATION RESEARCH AND DEVELOPMENT: FISCAL YEAR 2011 (2013).

196. *Id.*

197. *Id.*

198. Fleis, *supra* note 162, at 220.

199. Matthews, *supra* note 13, at 2; *see also* Fleis, *supra* note 162, at 218.

200. Matthew Herder, *In (or out of) the Marketplace of Ideas: WARF v. Geron and Lessons for Canada*, 11 DALHOUSIE L.J. 196, 197 (2002); *see also* Fleis, *supra* note 162, at 222.

tion of the University of Wisconsin's research on those lines.²⁰¹ In 1999, WARF set up a non-profit corporation called WiCell Research Institute Inc. (WiCell), which offered to distribute embryonic stem cell technology to public researchers.²⁰² Around the time of President Bush's Order in 2001, and possibly because of the limit of stem cell availability that the order was about to impose, Geron claimed exclusive rights to all the stem cell lines, along with eleven additional cell types.²⁰³ WARF, now realizing that research for new embryonic stem cell lines had been slowed, or possibly even eliminated by President Bush's order, wished to negotiate with other entities, including the NIH, with regard to its stem cell lines.²⁰⁴ Four days after President Bush's address, WARF filed a complaint against Geron in the U.S. District Court for the Western District of Wisconsin, asserting that Geron did not have exclusive rights to the stem cell lines, and that WARF was free to negotiate with other companies with regard to those lines.²⁰⁵ On January 9, 2002, WARF and Geron reached a new licensing agreement allowing WARF to grant research rights to public researchers on existing stem cell patents, thus resolving the lawsuit.²⁰⁶

Through this example we can see that academia and industry were at one time working together, but later had to reevaluate their position with regard to intellectual property rights of stem cells in the wake of President Bush's order, since new stem cell lines, which could possibly hold new intellectual patent rights, could not be developed as easily with a limit on federal funding.²⁰⁷ A limitation on the amount of raw materials to work with in embryonic stem cell research made members of both industry and academia more hesitant when negotiating agreements regarding those raw materials.²⁰⁸ This episode suggests that the restriction placed on federal funding for embryonic stem cell research limited the federal funding available to act as a mediating factor between industry and academia, and also had a profound

201. Fleis, *supra* note 162, at 222.

202. Herder, *supra* note 200, at 199. The history of WiCell itself indicates that it was created in order to preserve stem cell technology in the face of possible limiting regulations. *About WiCell*, WICELL, available at <http://www.wicell.org/home/about-wicell/about-wicell.cmsx> (last visited Oct. 2, 2014) (“[r]ecognizing the potential of these unique cells, and aware that regulations surrounding their use in a university setting were unclear, the Wisconsin Alumni Research Foundation established WiCell in 1999 as a safe haven for the advancement of stem cell research in the politically charged environment of the time.”).

203. Herder, *supra* note 200, at 198–99; *see also* Fleis, *supra* note 162, at 222.

204. Fleis, *supra* note 162, at 222; *see also* NIH Update on Existing Human Embryonic Stem Cells, *supra* note 130.

205. Complaint, Wisconsin Alumni Research Fund v. Geron Corp., No 01-C-0459 (W.D. Wis. Aug. 13, 2001); *see also* Herder, *supra* note 200, at 199.

206. Herder, *supra* note 200, at 200.

207. Fleis, *supra* note 162, at 227.

208. *Id.* at 223.

effect on the relationship between the two sectors.

Members of the academic community tend to behave in ways that foster collaboration and community interests.²⁰⁹ An example of the attitude of community collaboration that exists in the academic world can be seen in the response of the University of Wisconsin to the stem cell limitations imposed by President Bush. In September 2001, shortly after President Bush's executive order, the University of Wisconsin entered into an agreement with NIH to share with NIH the existing, approved stem cell lines held by the University of Wisconsin.²¹⁰ This was meant to allow NIH to continue embryonic stem cell research while maintaining the standards for embryonic stem cells set by President Bush.²¹¹ Then, in 2005, the NIH gave the University of Wisconsin \$16 million to create a national stem cell bank.²¹² Part of the purpose of this bank was to allow academic researchers easier and cheaper access to approved stem cell lines while maintaining their ability to patent their discoveries.²¹³ At the time of the bank's creation there were twenty-one viable approved stem cell lines.²¹⁴ In order to fill the bank with all twenty-one lines, collaboration between universities and private research companies was required.²¹⁵ These included stem cells lines given to the University of Wisconsin by the University of California, San Francisco,²¹⁶ Cellartis AB, a biotechnology company based in Sweden, Novocell, a U.S. based company, ES Cell International in Singapore, and Technion, a company in Israel.²¹⁷ In 2009, this collaboration reached fruition when the National Stem Cell Bank at the University of Wisconsin gathered all twenty-one approved lines of embryonic stem cells.²¹⁸ This allowed scientists from nonprofit and academic institutions anywhere in the world to request and receive approximately six million of the human embryonic stem cells in the bank for a fee of only \$500.²¹⁹ With easy, cheap

209. Fleis, *supra* note 162, at 205; *see also* Bush, *supra* note 182.

210. News Release, National Institutes of Health, *National Institutes of Health and WiCell Research Institute, Inc., Sign Stem Cell Research Agreement* (Sept. 5, 2001), <http://www.nih.gov/news/pr/sep2001/od-05.htm>

211. *Id.*

212. *WiCell Receives \$16 Million NIH Grant to Create National Stem Cell Bank*, UNIV. OF WISCONSIN-MADISON NEWS (Oct. 3, 2005), <http://www.news.wisc.edu/11616>.

213. *Id.*

214. *National Stem Cell Bank Announces Addition of New Cell Lines*, UNIV. OF WISCONSIN-MADISON NEWS (Sept. 19, 2006), <http://www.news.wisc.edu/14090>.

215. *Id.*

216. *Id.*

217. Janet Kelly, *All NIH Human Embryonic Stem Cell Registry Lines Now Deposited at NSCB*, UNIV. OF WISCONSIN-MADISON NEWS (Jan. 12, 2009), <http://www.news.wisc.edu/16120>.

218. *Id.*

219. *Id.*

access to all approved and viable lines of embryonic stem cells, the academic world provided itself with a great opportunity for continued collaboration and community access to resources and information, in keeping with the norm of community-based behavior that exists in academia.

To further illustrate the fact that academic institutions tend to work in ways that are more collaborative and community-based, consider the following. As mentioned earlier, in 2004, scientists at Harvard, noting the difficulty of scientific manipulation of existing stem cell lines, created seventeen new lines.²²⁰ The scientists created the lines not for profit, but to provide their fellow scientists with more viable raw material for research projects.²²¹ The desire to share information and raw materials, not the desire to make profit, inspired the scientists to engage in a complex project.

Because federal funding for a great deal of embryonic stem cell research was unavailable after President Bush's funding decision, academic institutions found themselves in need of state and private, philanthropic funding. Luckily for the University of Wisconsin, their prominence in the field of embryonic stem cell research allowed them to get large amounts of funding from both state and private sources. For instance, the State of Wisconsin invested \$750 million in biomedical research at the university, much of which went to funding stem cell research.²²² The University of Wisconsin's stem cell research team was also able to obtain a \$1.25 million grant from the W.M. Keck Foundation of Los Angeles to further their research into stem cells.²²³ However, for other, smaller, and less well known colleges and universities attempting research on embryonic stem cells, generating funding from sources other than the federal government may have been much more difficult, especially considering the fact that the federal government provides a majority of the funds for scientific research at these institutions.

VI. PRESIDENT OBAMA'S DECISION TO LIFT THE RESTRICTIONS ON FEDERAL FUNDING FOR EMBRYONIC STEM CELL RESEARCH

In 2009, President Obama issued an executive order lifting the restrictions on federal funding for embryonic stem cell research.²²⁴ In lifting these restrictions, President Obama did not use moral rhetoric, but instead

220. Cowen et al., *supra* note 141.

221. *Id.*

222. Terry Devitt, *Wisconsin Poised to Invest \$750 Million in Biomedical Research*, UNIV. OF WISCONSIN-MADISON NEWS (Nov. 20, 2004), <http://www.news.wisc.edu/10446>.

223. *Team Receives \$1.25 Million Grant for Stem Cell Research*, UNIV. OF WISCONSIN-MADISON NEWS (Feb. 3, 2005), <http://www.news.wisc.edu/10654>.

224. Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009).

pointed to the potential of stem cells in medical applications.²²⁵ The reason given by President Obama in issuing the order to lift the restrictions imposed by President Bush was that “[r]esearch involving human embryonic stem cells and human non-embryonic stem cells has the potential to lead to better understanding and treatment of many disabling diseases and conditions.”²²⁶ Obama noted that medical and scientific advances in the field of embryonic stem cell research over the previous several years had been encouraging, and that these advancements had led to widespread agreement in the scientific community that embryonic stem cell research should be supported by federal funds.²²⁷ The purpose of President Obama’s order was to remove prior limitations placed on scientific inquiry into the potential of embryonic stem cells by the Bush administration, to expand NIH financial support for the exploration of human stem cell research, and, by so doing, “to enhance the contribution by America’s scientists to important new discoveries and new therapies for the benefit of humankind.”²²⁸ The president placed three general restrictions on embryonic stem cell research that the NIH could fund: the research had to be done responsibly, the research had to be scientifically worthy, and the research had to be permitted by law.²²⁹ When signing his executive order, President Obama noted that:

This Order is an important step in advancing the cause of science in America. But let’s be clear: promoting science isn’t just about providing resources - it is also about protecting free and open inquiry. It is about letting scientists like those here today do their jobs, free from manipulation or coercion, and listening to what they tell us, even when it’s inconvenient - especially when it’s inconvenient. It is about ensuring that scientific data is never distorted or concealed to serve a political agenda - and that we make scientific decisions based on facts, not ideology.²³⁰

In other words, President Obama found it important not only for the federal government to support scientific research through the provision of funds, but also to allow the scientific community an opportunity to inquire into previously unexplored areas without the fear of backlash from the government based on an ideologically driven policy. Obama wished to curtail the

225. Diamond, *supra* note 117, at 282.

226. Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009).

227. *Id.*

228. *Id.*

229. *Id.*

230. Remarks of President Barack Obama – As Prepared for Delivery Signing of Stem Cell Executive Order and Scientific Integrity Presidential Memorandum, OFFICE OF THE PRESS SECRETARY (Mar. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-As-Prepared-for-Delivery-Signing-of-Stem-Cell-Executive-Order-and-Scientific-Integrity-Presidential-Memorandum/.

impact of the ethical concerns that had previously inspired prior federal policy with regard to new scientific research.²³¹

Even after President Obama's order lifting the restrictions on funding for embryonic stem cell research, the funding permitted by law was still limited by the Dickey-Wicker amendment.²³² The NIH guidelines promulgated in response to President Obama's order specifically state that, in accordance with Dickey-Wicker, no NIH funding may be used to support the *derivation* of stem cells from human embryos.²³³ However, the NIH's interpretation of the Dickey-Wicker amendment does allow for federal funding of *research* done on embryonic stem cells that have already been derived.²³⁴

Specifically, the NIH's guidelines provided that, for the purpose of the guidelines, "human embryonic stem cells (hESCs)' are cells that are derived from the inner cell mass of blastocyst stage human embryos, are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers."²³⁵ Although hESCs are derived from embryos, such stem cells are not themselves human embryos.²³⁶ Institutions applying for NIH funds for research on human embryonic stem cells "may use hESCs that . . . were created using in vitro fertilization for reproductive purposes and were no longer needed for this purpose, were donated by individuals who sought reproductive treatment. . . and who gave voluntary written consent for the human embryos to be used for research purposes. . . and where certain requirements can be assured through documentation."²³⁷ These "certain requirements" are: (1) that all options pertaining to the embryos no longer needed for IVF which are available in the health care facility where IVF treatment was sought were explained to the individual(s) who sought reproductive treatment, (2) that no payments of any kind were offered for the donated embryos, (3) that policies or procedures, or both, were in place at the health care facility where the embryos were donated such that neither consenting nor refusing to donate embryos for research would affect the quality of care provided to potential donor(s), and (4) that there was a clear separation between the prospective donor(s)'s decision to create human embryos for reproductive purposes and the prospective donor(s)'s decision to donate human embryos for research purposes.²³⁸ Finally, it was required that, during the consent process, the donor(s) were informed of certain information re-

231. See Diamond, *supra* note 117, at 283.

232. See Ogolla, *supra* note 150, at 98.

233. Pierson, *supra* note 72, at 876.

234. *Id.*

235. National Institutes of Health Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170 (July 7, 2009).

236. *Id.* at 32,171.

237. *Id.* at 32,174.

238. *Id.*

garding the use of embryos in embryonic stem cell research.²³⁹ While the new guidelines allowed federal funding for research on more embryonic stem cell lines than were available previously, the guidelines still placed many restrictions on which embryonic stem cells may receive federal funding for research.

The NIH's guidelines were upheld by the D.C. Circuit in *Sherley v. Sebelius*, a case in which researchers on adult stem cells brought a claim that embryonic stem cell research violated the Dickey-Wicker amendment.²⁴⁰ The court concluded that it did not, and included in its reasoning the NIH's guidelines' statement that

“(s)ince 1999, the Department of Health and Human Services (HHS) has consistently interpreted [Dickey–Wicker] as not applicable to research using hESCs, because hESCs are not embryos as defined by Section 509. This longstanding interpretation has been left unchanged by Congress, which has annually reenacted the Dickey Amendment with full knowledge that HHS has been funding hESC research since 2001. These guidelines therefore recognize the distinction, accepted by Congress, between the derivation of stem cells from an embryo that results in the embryo’s destruction, for which Federal funding is prohibited, and research involving hESCs that does not involve an embryo nor result in an embryo’s destruction, for which Federal funding is permitted.”²⁴¹

The court and the NIH realized that Congress must have impliedly agreed with the guidelines set by the NIH in 1999, as Congress never took steps to override those guidelines with legislation.²⁴²

The decision of President Obama to lift the restrictions on available embryonic stem cell lines, and the NIH's subsequent guidelines, has made it much easier for colleges and universities to do research on embryonic stem cells and to obtain funding for such research.²⁴³ As early as December 2009, the NIH had approved thirteen new stem cell lines to be added to the

239. *Id.* The potential donors were required to be informed that the embryos would be used to derive hESCs for research, what would happen to the embryos in the derivation of hESCs for research, that hESCs derived from the embryos might be kept for many years, that the donation was made without any restriction or direction regarding the individual(s) who may receive medical benefit from the use of the hESCs, that the research was not intended to provide direct medical benefit to the donor(s), that the results of research using the hESCs may have commercial potential, and that the donor(s) would not receive financial or any other benefits from any such commercial development. *Id.* at 32,174–75.

240. 644 F.3d 388 (D.C. Cir. 2011).

241. National Institutes of Health Guidelines for Human Stem Cell Research, *supra* note 235, at 32,173.

242. *Sherley*, 644 F.3d at 388, 391.

243. Goodman, *supra* note 17.

NIH guidelines, with another ninety-six lines awaiting approval.²⁴⁴ Although most of the embryonic stem cell research in the United States was still being done using the Bush-approved lines in late 2009, in 2010 at least 8% of embryonic stem cell research was being done on stem cell lines made available only by lifting the Bush restrictions.²⁴⁵ The NIH has now approved two-hundred and ninety-two new stem cell lines since President Obama's decision to lift the restrictions in 2009.²⁴⁶ While President Obama has opened the door for embryonic stem cell research to move forward by removing ethically based policy objections to funding that research, many researchers are still trying to find a way to obtain embryonic stem cells without having to destroy an embryo, thus avoiding the moral debate altogether.²⁴⁷

VII. CONCLUSION

The decision of President Bush to limit the availability of federal funding for embryonic stem cell research — a decision which was motivated by moral and religious considerations — had the foreseeable effect of limiting the research that could be done by colleges and universities into embryonic stem cells. The decision also had the effect of limiting the variety of embryonic stem cells available as materials for research that was federally funded in any way, thereby limiting the research that could be done. Embryonic stem cell research promises the possibility of great medical benefits to millions of people suffering from various diseases and disabilities, and colleges and universities are the primary source for basic research into this new frontier of scientific development. Stifling academic research into embryonic stem cells for ethical reasons may have had the effect of preventing many people from obtaining possible cures for their diseases or therapies to reduce their pain.

This is not to say that ethical considerations should not be taken into account when shaping public policy regarding scientific inquiry. While ethical considerations are necessary for preventing questionable, and even at times immoral, use of scientific inquiry, these considerations must be factored in with consideration of not only potential benefits of scientific inquiry, but also the effect of policy on one of the key sources of scientific inquiry, namely colleges and universities. As the primary source of basic

244. *Id.*

245. The Stem Cell Debates, *supra* note 90, at 35.

246. NIH Human Embryonic Stem Cell Registry, NATIONAL INSTITUTES OF HEALTH, available at http://grants.nih.gov/stem_cells/registry/current.htm (last visited Oct. 2, 2014).

247. See *supra* Section II (discussing the science behind embryonic stem cell research). Two new areas of research are discussed: attempting to induce adult somatic cells to a pluripotent state, and attempting to derive embryonic stem cell lines without having to destroy the embryos from which they are derived. *Id.*

research and with a significant percentage of their research budgets coming from the federal government, colleges and universities deserve consideration in the policy debate over scientific inquiry. As research continues, scientists will undoubtedly continue to pursue issues that are laden with ethical problems. While it is important to address ethical questions and maintain standards of ethics in scientific inquiry, the important place of colleges and universities in the process of scientific progress suggests that these institutions be given a seat at the table at which those ethical questions will be addressed.

REVIEW OF SUZANNE METTLER'S *DEGREES OF INEQUALITY*

STANLEY N. KATZ*

This is a book concerning politics rather than law, but it is well worth reviewing in a journal devoted to the relationship between higher education and law. Suzanne Mettler, the author of *Degrees of Inequality*, is a distinguished young scholar at Cornell University, and one of the leading political scientists who study the politics of higher education.¹ She is an unabashedly liberal analyst of higher education policy who is also one of the resident higher education experts at the Century Foundation in New York City. This book is clearly based on serious scholarship, but it makes no pretense of policy neutrality—it is a *cri de coeur* against the direction that federal higher education policy has taken since about 1980. I confess that I am in agreement with Mettler's findings, so any reader who supports the for-profit higher education industry, state defunding of public higher education or the reinstatement of federal student aid funding through the banking industry might want to stop reading at this point.

Mettler's narrative of federal higher education policy is one of decline, but of course the downward course of the narrative does not really begin until, roughly, the election of Ronald Reagan. Starting with the Northwest Ordinance of 1787 and continuing through the 1862 Morrill Act that initiated the federal land grant university system, the nascent American system of national government identified education as a driver of democracy and found ways to provide significant material support for higher education. Despite the fact that the Framers bypassed education as a right (and as a function of the federal government), the states entrenched it as a right and slowly built the institutions of public elementary, secondary, and tertiary education that were considered fundamental to their democratic development.

The federal government over its first century and a half did relatively little for higher education, but in 1944 Congress enacted what was popularly

* Woodrow Wilson School, Princeton University

1. SUZANNE METTLER, *DEGREES OF INEQUALITY* (2014).

called the "GI Bill,"² thus initiating a policy of federal financial support on the assumption that higher education should be available to all Americans. Previously, a very small percentage of the relevant age cohort was able to afford (and inclined to seek) post-secondary education, but since the GI Bill, the percentage of those attending colleges or universities of one sort or another has grown exponentially. More importantly for the book under review, the federal government has become a major player in education policy (mainly through its funding mechanisms), and higher education policy has become one of the most important (and controverted) areas of American politics.

Mettler knows what she is talking about when it comes to education data. Those of you who follow these matters will be familiar with the general picture, which shows a tremendous increase in the number of students in public higher education, starting with the era of the GI Bill. This process was accelerated by the first of the Higher Education Acts³ and the National Defense Education Act,⁴ both enacted in the mid-1960s, which used a Cold War rationale to justify federal investment in higher education. The result was a huge growth in the number of colleges and universities, especially in the public sector, with a corresponding significant increase in the percentage of the youth cohort seeking college degrees. The United States became the international leader in higher education, both in quality and quantity, at this time.

But the picture began to change dramatically in the 1980s, and it changed even more radically in the 1990s with respect to equality of access to higher education. A great many young Americans were still entering our colleges and universities, but they were too frequently those whose families could afford much of the cost of their tuition and fees. We were failing to attract first-generation college students since federal tuition support had not kept up with the costs of higher education. The irony was that it made even more economic sense for a high school graduate to attend college or university (and a higher proportion of the population was graduating from high school), but the neediest students were being shut out of economic opportunity because of the rising price of tuition. The key factor in this process was not so much declining federal financial support (although the relative level of support was declining) as the declining state investment in state colleges and universities, which caused (and is causing) them to raise tuition levels and increase the proportion of out-of-state students (who pay much higher tuition than in-state students). Mettler argues, convincingly,

2. The Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1944).

3. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

4. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).

that “the vast majority of states have declined to uphold their end of the bargain” that the federal government and state had forged after World War II to combine and coordinate their support of public higher education.⁵

These developments are reasonably well-known, but Mettler effectively demonstrates a less-noticed but crucial phenomenon. This is what she terms the “privatization” of public higher education, which follows from the shifting of the cost of higher education to students and their families through rising tuition levels. “As a result, ‘public’ education has become, in reality, increasingly ‘private’ in its actual funding . . . through a system that is inherently regressive.”⁶

The problem is not that the public universities and colleges are shutting their doors; rather, they are becoming something different than what they have always been—they are being transformed into institutions that are, in reality, increasingly private. As state support atrophies and tuition escalates as a result, their inclusivity is becoming limited to those who can afford the rising costs.⁷

This process is also further stratifying public higher education as the “value of their offerings increasingly pales compared to those at private nonprofit institutions—for students who can afford them. Increasing costs, large classes taught by adjuncts, and limited enrollments also discourage students from completing their degrees.”⁸

Mettler’s subtitle is therefore “How the Politics of Higher Education Sabotaged the American Dream.” Her question is why, following the expansive initiatives of the Great Society, federal policy should have largely turned against Johnson’s dream of universal public higher education? How did we get from the point, only fifty years ago, in which millions of Americans believed that a college degree was the path to advancement and prosperity, to one in which that path seems distant or even unattainable?

The short answer to this question, according to Mettler, is that the increased polarization of partisan politics shifted what she calls the “polycscape” (I would call it the opportunity structure for political action) in national politics and shifted the incentives of the two political parties with respect to education policy.⁹ At the same time, for a variety of reasons, the political leverage of the country’s monied interests gave the “plutocracy” a dramatically enhanced influence over national policy formulation. Nowhere was this process more evident than in higher education policy. To demonstrate this point, Mettler focuses on two crucial policy areas—

5. METTLER, *supra* note 1, at 195.

6. *Id.* at 122.

7. *Id.* at 129.

8. *Id.* at 129–30.

9. *Id.* at 14.

federal student loans and for-profit higher education corporate interests. She sees these two policy areas as producing not only business-friendly environments, but outcomes that raised the cost and lowered the quality of higher education for the neediest Americans. It is in this sense that Mettler thinks that post-Reagan American politics have sabotaged the American dream.¹⁰

The history of federal student loans is complex, and readers of this journal will probably be familiar with it. The story begins with funding for veterans in 1944, but broadens exponentially with the emergence of the Pell grant program of grants for low-income students in 1972. But Ronald Reagan was determined to cut back on federal expenditures in education. His first budget introduced a number of restrictions that had the effect of limiting what nearly forty years of prior federal efforts had produced as national policy to aid poor students obtain a college education. The level of Pell grants was reduced and, equally important, student loans, subsidized through the nation's private banking system, became the fallback mode of education financing for most students.

By the 1990s, when bipartisan education funding policy was still possible, agreement was reached that the federal government should engage in "direct" lending, with the Treasury making loans to students' colleges and universities, eliminating subsidies to the banks. President Clinton proposed to change federal student loans to the direct lending model in 1993, but a concerted effort by the banking industry succeeded in limiting the range and slowing the introduction of the new process. Mettler sees this as the end of traditional education policy formulation, and the beginning of an era in which what she terms "the plutocracy" emerged as crucial in framing and enacting education policy.

[T]he lenders' powerful role in that struggle turned out to be a preview of what was to follow, as they came to dominate the debate over student aid policy—dictating developments concerning student loans and consuming so much of policymakers' attention that consideration of other policy alternatives could not even receive a hearing. With lenders setting the policy agenda, plutocracy flourished as the twenty-first century began.¹¹

The problem, according to Mettler, was not just that the private commercial sector influenced policy outcomes, but that the policies they favored were systematically biased in favor of "the privileged."¹²

Perhaps the best example of the out-of-control character of the loan program is the story of the Clinton administration's efforts to take Sallie Mae

10. *Id.* at 5.

11. METTLER, *supra* note 1, at 73 .

12. *Id.* at 75.

private—on the grounds that this government-created lending agency was in fact behaving like a large private bank, worth \$45 billion and listed on the New York Stock Exchange. Clinton did not require any public benefit from the newly private corporation, although (as Mettler does not note) it did in effect spin off the Lumina Foundation (with its \$770 million endowment, derived from Sally Mae profits), which has become a major factor in national education policy, supporting the Obama administration’s “college completion” agenda with its own well-funded programs. Obama has strenuously supported the direct loan policy, against the sturdy pressure of the banking industry. Sallie Mae created a political action committee in 1998 and has emerged “as the top donor within the entire finance and credit industry.”¹³ Further, Sally Mae became the nation’s largest student loan company, its stock rose well in excess of market averages, and its CEO (in 2006) was the highest paid American executive in terms of total compensation. Higher education policy was by now well worth fighting over if you were in the education “business.”

A related policy development, one that also emerged in the Clinton years, was that of tax credits to offset family tuition payments. The appeal of this policy in a period of budget tightening was obvious, since it did not require new appropriations by the Congress. It not only created a situation in which the federal government lost revenues (\$5.4 trillion in 2000), but it also created a situation in which the beneficiaries are not the poorer students who were originally intended to benefit from federal tuition aid, but rather those families wealthy enough to take advantage of the tax credits. Mettler cites this as another example of how education policy lost its relationship to its long-standing political objectives. It was increasingly determined by both the political necessities of a polarized and paralyzed national political system and the political clout of entrenched plutocratic interests (in this case the banking and financial industry).¹⁴

The emergence of the current for-profit higher education industry is an even better example of how political dysfunction and the political influence of money have combined to subvert the original intentions of higher education law, and produce benefits for private sector investors rather than needy students. There has been a significant for-profit segment of higher education ever since World War II, though it was for decades relatively small in terms of the market segment served, based on traditional educational technologies. The sector was strongly supported by the Democratic Party as the champion of working people. But everything changed for these “trade schools” in the 1990s, as the Internet and information technology made possible the commercialization and massification of on-line learning. The for-profits quickly expanded exponentially as businesses, and soon became

13. *Id.* at 79.

14. *Id.* at 85.

a special concern of the market-oriented Republican Party. Many Democrats continued to support the sector since so many of its students were blue collar and/or minorities.

This part of the story really begins with the 1972 reauthorization of the Higher Education Act, when Democrats expanded student aid institutional eligibility to proprietary schools (just as the GI Bill had). The aim was to broaden access to higher education, and Congress required that proprietary institutions be able to demonstrate that they were preparing students for “gainful employment in a recognized occupation”¹⁵ in order to qualify for federal aid. This language was not seriously enforced, however, and only in the Obama administration have there been efforts (strenuously opposed by the industry) to give it teeth. The result has been that an increasing percentage of Pell grant dollars has flowed to the for-profit sector over the past couple of decades, as enrollments in their institutions has mushroomed. A number of political action committees have been formed, beginning with one created by the Apollo Group (think the University of Phoenix) in 1998, since the overwhelming source of funding for the sector is now the federal government. Almost all restrictions on for-profit eligibility for federal student aid were lobbied out of legislation. The direction in which things were headed was clearly indicated by the decision of George W. Bush’s administration to appoint a lobbyist for the for-profits as Assistant Secretary for Postsecondary Education. And the industry spent more and more to protect its investment in favorable legislation:

During the 2007-2008 election season . . . the Apollo Group played a prominent role. Not only did it lead the for-profit colleges in campaign contributions, but by donating over \$11 million, it ranked twenty-eighth among *all* organizations and businesses nationwide. It spent approximately twice as much as Goldman Sachs, JP Morgan Chase, Bank of America, Time Warner and Walmart . . . and three times as much as the US Chamber of Commerce.¹⁶

The taxpayer, in other words, now footed the bill for proprietary online education, the sector which has by far the lowest completion rates and the highest loan default rates in higher education. From Mettler’s point of view, the fox was now in charge of the hen house.

Degrees of Inequality argues forcefully, and with considerable evidence, that American higher education has moved dramatically away from the egalitarian direction in which it was headed in the aftermath of World War II and the legislation of the Great Society. Mettler considers the system in

15. Education Amendments of 1972, Pub. L. No. 92-318, § 417B(c)(3)(a), 86 Stat. 236, 260 (1972).

16. METTLER, *supra* note 1, at 110.

crisis, but hers is not the crisis perceived in the press (“high tuition, high student loan debt, and weak employment prospects for graduates”).¹⁷ Rather, the fact is that:

[F]ew students who attend elite private nonprofit schools and flagship publics . . . pay full fare and even if they do, what they pay and borrow in student loans usually amounts to a valuable investment . . . Despite considerably lower price tags at the public universities and colleges that three out of four American students attend, there soaring tuition is a dire problem. . . . The worst problems of tuition and student loan debt occur at for-profit colleges, which charge far more than the publics and at which nearly all students borrow and, on average borrow far higher amounts than those in other sectors.¹⁸

The result has been to create what Mettler calls a “caste system,”¹⁹ with the benefits of higher education flowing mostly to those who can afford them financially, and the disadvantages accruing to those who can least afford them.

Her argument is that the crisis is “fundamentally political”:

We have plenty of higher education policies created in the past but they function less well than they once did, generating unintended consequences or deteriorating due to their own design features or the impact of other policies on them. In short, they require updating and maintenance. Public officials should be fully capable of these tasks. The problem is that the political system today has grown dysfunctional. It is paralyzed by polarization that inhibits even these routine activities. In the rare instances when government functions, it takes on the character of a plutocracy . . .²⁰

Mettler’s (very well-informed) view is that the basic elements of higher education policy were legislated in what was then the normal partisan political environment of the post-war era. They were compromises between the two major policies that shared a great deal in their approach toward post-secondary education. The larger environment for education policy was jerry-built in such a manner that it was never fully a “system,” but it functioned in such a way that the larger goal of extending educational opportunity for most Americans was realistic (if unfulfilled). However, with the dramatic polarization of our politics in the 1980s, and especially after 1994, it became impossible for the two congressional political parties to converge

17. *Id.* at 189.

18. *Id.*

19. *Id.* at 190.

20. *Id.*

on policy goals. At the same time, for a variety of reasons, money and lobbyists came to influence the policy process to such an extent that education policy became just another example of “industry capture” of the legislative and administrative process. The result, which we have to live with today, is a set of policies that work to the advantage of those institutions and groups that stand most to benefit from them. The traditional beneficiaries of federal support of higher education are thus not only left out in the cold, but placed at an even greater disadvantage than in the post-war period.

The only good news in Mettler’s account²¹ is that the Obama administration has improved the federal student aid situation. The Post-9/11 GI Bill increases indexing of benefits and direct lending in Pell grants. But, given her underlying political analysis, it is hard to understand why such successes should have taken place. Mettler herself makes clear that she does not think they have changed the underlying flaws in federal policy:

Yet even during this momentous period when reformers triumphed over decades of legislative paralysis, polarization still made policy maintenance and development less effective than they could have been otherwise.²²

Still, the Obama successes are examples of situations in which the plutocrats did not prevail, and in which egalitarian policy goals were at least partially achieved. That doesn’t give liberals much to brag about, but perhaps it is grounds for mild optimism.

In the last chapter of *Degrees of Inequality*, “Restoring the Public Purposes of Higher Education,”²³ Mettler makes a series of suggestions as to how the country can “make a top priority of enabling the least advantaged Americans who wish to attend college and are qualified applicants to enroll and emerge better off as a result.”²⁴ She has a number of plausible directions in which education policy could move: we can build on earlier regulatory platforms, limit the profits that the proprietary institutions can receive from the federal government and limit the for-profits in other ways. But it is very hard to see why any of these proposals are likely to be legislated in the near term. Anticipating my objection, she suggests changing the Senate’s filibuster rule, instituting reforms to “limit the advantage that powerful interests have over ordinary Americans” and finding ways “to amplify the voice of ordinary Americans in the policymaking process and bring it to the attention of lawmakers.”²⁵ Wouldn’t it be nice to see those changes take place? Everyone who thinks they will, please raise your hand. . . .

I find *Degrees of Inequality* compelling as a critique of how federal edu-

21. METTLER, *supra* note 1, at 158–59.

22. *Id.* at 160.

23. *Id.* at 189.

24. *Id.* at 193.

25. *Id.* at 198–99.

cation policy has gone wrong. Mettler provides convincing data on the extent to which those policies that in the 1960s plausibly sustained the dream of upward socio-economic mobility through higher education now have perversely reinforced existing social privilege, thereby undermining the basis for that noble dream. It must surely be true that political polarization and the re-emergence of political plutocracy (money has always spoken in American politics) have undermined traditional federal education policies. But Mettler's analysis uses an ax rather than a scalpel, and surely oversimplifies a complex and multi-causal process. Further, she does not really explain why the Obama administration has had some success in bucking the negative trends she describes. More disappointing, the analysis really does not provide a single plausible ground for optimism that we can achieve better policy outcomes going forward. However, if she succeeds in convincing Americans of good will that the egalitarian dream of public education is disappearing, perhaps we can muster the political will to seriously engage the problem. That alone makes me happy to recommend this deeply serious book to those who care about public higher education.

INSTRUCTIONS FOR AUTHORS

The *Journal of College and University Law* is a publication of the National Association of College and University Attorneys (NACUA) and the Notre Dame Law School. It is a refereed, professional journal specializing in contemporary legal issues and developments important to postsecondary education.

The *Journal* publishes articles, commentaries (scholarly editorials), book reviews, student notes, and student case comments. Experts in the law of higher education review all manuscripts.

Manuscripts should be double spaced and submitted electronically via a Microsoft Word document, or typewritten on 8½" × 11" paper. Set-off quotations should be double-spaced. Footnotes should reflect the format specified in the nineteenth edition of A Uniform System of Citation (the "Bluebook"). A paragraph on the title page should provide the position, the educational background, the address and telephone number of the author. Each author is expected to disclose in an endnote any affiliation or position—past, present, or prospective—that could be perceived to influence the author's views on matters discussed in the manuscript.

Decisions on publication usually are made within four weeks of a manuscript's receipt. Student editors, an outside reviewer, and a Faculty Editor edit articles accepted for publication. The *Journal* submits editorial changes to the author for approval before publication. The Faculty Editor reserves the right of final decision concerning all manuscript changes. When an article is approved for publication, *the Journal* requires a signed License Agreement from its author(s), pursuant to which NACUA must be granted the first right to publish the manuscript in any form, format or medium. The copyright to the article remains with the author, while NACUA retains all rights in each issue of the *Journal* as a compilation.

The *Journal* welcomes electronic submissions. To submit electronically, authors should send a version of their article in Microsoft Word, a cover letter, and a current curriculum vitae to the *Journal* staff at JCUL@nd.edu.

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

This country has witnessed great changes and challenges in education law during the past decade: judicial decisions have changed student and faculty rights and their relations with institutions; colleges and universities have entered an era of severe financial constraints with many legal ramifications; and Congress has dictated new procedures and requirements for serving members of protected classes. The professionals who deal with education law need a resource to keep current on this burgeoning body of law.

The *Journal of College and University Law* is such a resource and, in fact, is the only law review devoted totally to the concerns of higher education. If you do not subscribe at present, or if you receive your subscription online and want to receive a hard copy of each issue, send in the application below—and please pass the subscription information on to someone you know who may benefit from the *Journal*.

.....

Mail subscription to:

The Journal of College and University Law
Notre Dame Law School
Box 780
Notre Dame, IN 46556

Volume 41 One year subscription (3 issues) for non-NACUA members: \$75.00 for NACUA members: \$37.50 International: \$85.00 Single issue costs Domestic: \$29.50 International: \$29.50 <input type="checkbox"/> Payment enclosed Make checks payable to the Journal of College and University Law
--

Name: _____

Institution/Business: _____

Street: _____

City: _____ State: _____ Zip: _____

Membership in the National Association of College and University Attorneys (NACUA) includes an online subscription to the *Journal*. NACUA members are eligible to subscribe to print editions of the *Journal* at a 50% discount from the regular subscription fee. For information on joining NACUA, write: NACUA, Suite 620, One Dupont Circle, N.W., Washington, DC 20036.