

The Rise of Non-Legal Legal Influences Upon Higher Education

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The legalization of higher education is an unmistakable trend, one that has drawn commentary, although relatively modest scholarship, given the centrality and importance of the phenomenon. Alexis de Tocqueville's observation of over 150 years ago, that persons in the United States take all their disputes to court eventually was once untrue of higher education, which gave rise to relatively little litigation in the 19th century. Even in the first half of the 20th century, only a small number of college cases arose, leaving plaintiffs such as the hapless Miss Anthony without real remedy when she was dismissed, on the grounds that she "was not a typical Syracuse girl."

But the last half of the 20th Century saw a torrent of cases directed at or brought by colleges, so much so that any regular observer of these must rely upon a cottage industry of publications to track the thousands of cases each year. There is a law review that focuses solely upon college law (The Journal of College and University Law, a refereed journal/law review hybrid), commercial reporters that report and analyze litigation throughout the circuits and states (West's Education Law Reporter, the Education Law Association's Monthly Reporter, and Synthesis, a commercial reporter, among many others), and

specialized newsletters (e.g. The Fraternal Law Newsletter and Education Daily) that report cases and developments in great detail. A mature treatise (The Law of Higher Education, in its third edition) and casebook (The Law and Higher Education: Cases and Materials on Colleges in Court, in its second edition, with supplements) form a set of useful bookends. There are listservs, CD-ROMS, commercial materials, Continuing Legal Education (CLE) courses, national associations, and all the earmarks of a maturing field of study and area of practice.

Part I

Early studies of higher education law trace back to M.M. Chambers, a non-lawyer who, by himself and with E.C. Elliott, actually counted college cases in the courts for the Carnegie Foundation for the Advancement of Teaching. That he could actually undertake such a Herculean task without computerization probably indicates just how few cases there actually were. His multi-volume series appeared from 1936's The College and The Courts: Judicial Decisions Regarding Institutions of Higher Education in the United States, with periodic supplements until 1976. By then, he turned his full attention to Grapevine, another gargantuan task, which gathered state appropriation data on a national basis. (Thus, he straddled the harbor with legs on both the law and finance banks of higher education, a veritable Great Wonder of the College World.)

This is first-generation scholarship, largely supplemented today by computerized data bases and search engines, which bring to your desk almost any case or factoid one might require. Very few people do this kind of old fashioned scholarship today, although some do variants in its smaller subfields such as special education or for treatise or casebook purposes. Another such example is journal articles that carefully examine the annual terms of courts and their college cases.

Second generation scholarship would include the study of many cases within a social science framework, such as the estimable 1987 book by George LaNoue and Barbara A. Lee, Academics in Court, where they conducted detailed case studies of important college employment cases, using public policy theories by Charles O. Jones and Garry Brewer and Peter deLeon. Other examples include comprehensive studies of college legal issues using implementation theory, communications theory, political theory, and other theoretical approaches to understanding this phenomenon. In short, there is a movement afoot to place the legalization of colleges into larger frameworks, all the better to understand how legal change is absorbed by the college body politic, and to measure how institutions are changed as a result.

While this is a growing shelf of books and articles, it is still a relatively small shelf, perhaps a Higher Education Law Three Feet Shelf, slightly more if you include K-12 education law books, as I do

in my law school office. This scholarship has examined the increase in court cases, statutes, and regulations governing higher education, both directly and as a large part of the rise of the modern administrative state. While this is a large and important topic, the studies over the last 25 years have generally focused upon the formal mechanisms of courts, legislatures, and administrative agencies as the major actors in this legalization of the academy. In parallel fashion, there has been a substantial rise in non-governmental and non-legal actors, ones that form a parallel universe of “legalization” influences that regularly and substantially affect the higher education sector. The forces, which include, among others--- insurance carriers, sole-source contract actors, regional and specialized accreditation groups, regional consortia, and donors---exert tremendous private sector force upon colleges and universities. Less scholarship has charted these influences, in part because they often come on cat’s feet and are not formal, broadscale legal assaults, and in part because their rise is a feature of the widespread globalization of higher education and increased complexity of the modern day organization. In addition, these influences arise directly due to higher education’s largely successful self-portrayal of the college sector as salient and essential to the liberal state, and its central role in the economy and polity of modern nation-building.

Part II of this chapter is devoted to the heart of the matter -- case studies of non-legal factors in college governance, ones that, even in their non-legal form give rise to legal or quasi-legal characteristics.

That is, they take on the cloak of legal regimes, because they dictate a policy response and constitute the complex features of statutory/litigative/regulatory requirements. While I have chosen to delve into four cases, chosen for their illustrative value and distinctiveness, I could as easily have picked from another dozen scenarios. For example, I worked up details on several possible cases, and then deleted them due to length considerations: university/corporate research parks, the role of donors in determining policy, the marketing of intellectual property and patentable discoveries, and the commercialization of academic science all illustrate my thesis that campuses are affected in substantial and nonlegal ways by large scale development, ones that are not strictly statutory / regulatory / litigative but which mimic legalization.

Another topic I considered was the effects of higher education's increased globalization, but I did not follow through on this case study, inasmuch as a formal immigration regime is implicated, with its labyrinthine statutory and regulatory components. The USA PATRIOT Act and its retrenchment in light of 9/11/01's deprivations by air school students enrolled in F-1 or M-1 status also complicate this case, in ways not yet fully evident. I do not believe I exaggerate when I refer to these influences as a "parallel universe," and I hope that my highlighting these items in a systematic way advances the topic. In the final part, I summarize and suggest additional cases for consideration in this vein.

Part II: Four Case Studies in Search of a Theory

A. Insurance Carriers

The first time I heard of insurance carriers wagging the dog was in conjunction with an event that easily remains my most unpleasant professional experience – a deanship search in which I was a finalist. For a variety of reasons, only two of which I sketch here, and only for the sake of context, I vividly remember two events: lunch and the university’s insurance carrier. As it happens, I am both diabetic and allergic to mayonnaise. Accommodating these two lifestyle/health issues is a relatively simple, quotidian task -- I time my medications very carefully every day and am vigilant for the possible existence of mayo. And until you have a food allergy, you never realize how many foods carry whatever it is that you are allergic to. (My mother has an allergy to grains of all sorts, and has to inspect salad dressings, vinegars, and all kinds of breadings to avoid gluten. Mine is easier, as I just avoid most creamy mixes unless I am reassured of the contents by the chef.)

On that day, as I readied myself to give the customary lunch talk where dean candidates share their vision of the school’s future and elaborate upon their own philosophy of deaning, I noted that they had served a series of salads and sandwiches, all of which appeared to have mayonnaise in them. While there was some fruit, which I took, there wasn’t much, as it appeared

only to be a garnish. Even so, about a half hour into my session, I was still very hungry. A friend on the faculty must have noticed that I had not eaten, and she pushed her plate towards me, whereupon I took and ate a few grapes. Several weeks later, when I was not invited back for the position (the search was then re-started), word leaked to me that one faculty member had actually commented upon my table manners, apparently fearing that I might embarrass myself with some donor by picking food off their plate!

The second thing I remember about the campus is that the board of this private college had reconsidered its admissions policies for both the undergraduate and professional schools, following the recent Hopwood decision, which banned the use of race in public colleges in its Circuit (the Fifth). But what was memorable to me was that in my interview discussion with the president, he asked me whether I agreed with the campus decision to discontinue the modest use of race in admissions. I said I did not agree that Hopwood extended to private colleges in the Fifth Circuit, and that before the time, such institutions had never felt themselves bound by Title VI or Texas Attorney General Opinions. He then asked me whether it would make a difference in my view --which I had written about and had been widely quoted as saying -- if the campus insurance carrier had required them to do so? Under the mistaken assumption that he wanted my actual

opinion on this issue, I said that insurance carriers cannot be allowed to determine college policy.

I didn't say this in any mean or harsh way, but his face reddened and he obviously took offense at my response. Indeed, my memory of the exchange is so fresh and clear that I have sought a venue to write about this exact topic. Hence, this chapter.

The more I have investigated the issue of campus carriers determining college policy in significant ways, the more troubled I have become at the insidious and corrosive way the practice has developed. As this review of cases and practice will show, almost no major litigation goes forward without carrier consultation, at large and small and public and private and elite and open door institutions. I have even discovered that some insurance carriers reserve the right to first-chair claims against college policies. To illustrate this universe, I will give several examples of the role of insurance in higher education, a survey that is not entirely self-evident or intuitive. In addition, I will review a number of cases that show the failure of the insurance regime, where carriers or colleges have gone to court to settle their disputes. Finally, I suggest some principles that I believe should drive the relationship, especially for the campus governance implications.

Like other large commercial enterprises, colleges undertake risky business in the normal course of daily activities, whether it is on the employment side (firing an employee for cause), the

auxiliary side (a student hurts herself in a college dining room), or the instructional side of the house (a lab fire in class hurts a student who is mixing chemicals for a lab experiment). In addition to relying upon Sec. 1983, the Eleventh Amendment, and other federal or state sovereign immunity provisions, colleges enact liability/risk management regimes to limit their exposure.

Most major institutions have offices of risk management or have personnel in HR or legal offices whose responsibilities are predominantly managing risk. There are several organizational schemes for managing risk: risk avoidance, risk control, risk transfer (insurance), and risk retention. While these are each pure “types,” they also exist in hybrid or mixed formats in virtually every college.

Risk avoidance is the most drastic type of risk management, as it is the removal of the risky behavior or occasion. As an example, some athletic departments have eliminated high towering formations by cheerleaders, in anticipation of multiple, foreseeable injuries from the collapse of a complex cheerleading maneuver involving tumbling and climbing upon one another. In Rendine v. St. John’s University, exactly this disaster occurred, but the plaintiff lost on an assumption-of-risk theory. Closing a science department or program due to inadequate facility safety would be another example. In one recently-publicized incident a college fired a faculty

member who refused to move out of his lab and clear it of dangerous chemicals and papers. The college acted to remove the environmental risk in the building.

Risk control is a subset of risk-avoidance, or risk-avoidance-lite. Rather than completely eliminating the risky program or activity, risk control addresses or ameliorates the risky aspects by modifying or altering the behavior. For example, rather than firing the recalcitrant faculty member, the college might have cordoned off the lab and itself removed the most hazardous materials. Or the institution that barred high-tower maneuvers by cheerleaders could have restricted them to “one-boost” formations, rather than the “four-high” formations that were over twenty feet high, students perched on one or another’s shoulders. Retrofitting or venting a building might be employed rather than closing a science program that has become dangerous.

The third type of risk management is transferring the risk, predominantly by purchasing insurance, entering into hold-harmless or indemnification arrangements, or by employing releases or waivers. The most common insurance vehicles are general liability policies that cover the usual injury or property damage claims, and directors and officers policies that indemnify institutional personnel from civil rights or damage claims.

These are the major forms of managing risk, both for foreseeable and unforeseeable harms that might befall an institution. In the summer of 2001, my own institution (the University of Houston) suffered terrible storm damage from Tropical Storm Allison, including severe harm to the UH Law Center and to 95 of the campus' 105 buildings. The Law Center, which has approximately 1/3 of its square footage underground, had so much water come in from above (the rain) and below (collapsed utility tunnels) that we had to relocate to the basketball arena for nearly four months ("Luxury" boxes become less-luxurious in such a situation) and to bulldoze nearly 200,000 volumes of ruined library books, journals, and microfiche. Over a year later, our buildings partially rebuilt, we are still negotiating /fighting with the federal agency, FEMA, for our full share of the insurance funds, which have many restrictions upon them. Any car-owner or homeowner who has had an accident knows the cycle of claims-adjustments-negotiations-restoration inherent in an insurance policy; college claims are writ large.

In addition to these complex reimbursement issues, there are issues over who is indemnified under a policy, and in what circumstances. For instance, in Chasin v. Montclair (N.J.) State University, a professor sought reimbursement over court costs and a claim against her that arose in a grading dispute. When she lost in court, she sought such reimbursement, which the

carrier refused to pay, insisting that she acted against the advice of college counsel and the provost in the matter. The court disagreed with her, noting that the original issue was governed by statute and that she had violated institutional policy in the matter. In situations like this, the insurance carrier carries great weight.

The hands of colleges are strengthened when they employ insurance carriers to “pool” the risks and purchase group insurance from companies that are organized as mutual risk retention groups or as reciprocal risk retention groups. In this fashion, the policyholders can maintain some control over their risks while smoothing out the costs. Colleges can even purchase very specialized or tailored policies to cover their own unique exposure and risks.

Colleges can also attempt to transfer risk by employing releases or waivers to receive themselves of any liability, but these are both awkward and questionable. Some states will not allow such attempts at risk-transferring to the individual parties. For example, in Emory University v. Washington v. Porubiansky, the Georgia Supreme Court voided a risk transfer practice at Emory University’s Dentistry Clinic, where patients were required to waive all liability before dental treatment. The Court held that doing so violated public policy. Sometimes, courts will void

insurance policies or indemnification agreements that cover institutions for gross negligence, on the grounds that covering such behavior serves as no deterrence to the behavior.

The final area of risk management is risk retention, or self-insurance, where colleges set aside their own funds to cover a specific risk that is too expensive to insure against, or where the risk is uninsurable. An example of this is a period of time where a large public university was negotiating with an HMO and could not get reasonable coverage for catastrophic illnesses, so it set aside a fund to cover that single risk. After a year where several employees died of AIDS, officials decided they could no longer fund the risk internally. Choosing very large deductibles is another form of self-insurance. The FEMA coverage I mentioned earlier is for 75% of the loss UH suffered from Tropical Storm Allison. At the Law Center, this “self-help” portion, which translated into lower rates for the whole institution, meant that we had to come up with \$12-\$15 million ourselves.

This cook’s tour of insurance options, while it included court cases that resolved issues among parties, shows the extent to which policies and risk management as a guiding principle are decidedly non-legal and are designed to reduce litigation by reducing the occasions of litigation. Of course, this option is expensive and administratively time consuming; I have been engaged in

“legal audits” over the years, where extensive research and administrative review were employed to reduce risks and litigation. Being engaged in such audits is almost like being prepared to go to trial. And the time spent on a serious preventive regime is often enormous. Each year, I am obligated to undertake training and formal, tested certification on equal employment law, sexual harassment guidelines, and hazardous material disposal, as required by state law of all state employees. Prior to these training programs being computerized so that they are web-based and able to be completed at any time, dozens of people would crowd into classrooms at off-peak hours to listen to trainers provide the information and administer tests. We may be educators, but we do not want to be on the receiving end of instruction. (And I fear law professors were among the worst offenders, especially about the training on legal matters.) Over the years, I have conducted legal workshops and training programs for hundreds of employees, both at my institution, other colleges and continuing legal education (CLE) venues. In the aggregate, these self-help measures can total millions of dollars for large institutions. In addition to these enormous training costs, other compliance costs were enormous, such as staff time and time taken to determine policy for risk management, actual costs for changes (often translating into additional personnel), and additional communications, supervisory, and materials costs.

One cost not often calibrated is the cost to governance, particularly when the carrier tail wags the college dog. I have been involved in one way or the other with a dozen or more lawsuits involving my own institution -- ranging from a disgruntled applicant to students denied resident status for paying in state tuition -- as a defendant, participant fact witness, expert witness, or legal consultant to the Attorney General's lawyer trying the cases. In one particularly vexing case, I was defended by a former student of mine who had taken my Higher Education Law Seminar, and who was working for the state AG's office; she successfully defended UH in the case. But I have also seen an institution settle cases when the insurance carrier determined it should do so, and have spoken with insurance counsel more than once, when they were contemplating a course of action that would force the university's hand or bend it to their will. Sometimes the discussions have been formal and above board, such as "We are willing to settle this for X amount or lower, and the professor is fully indemnified for his share" or "Let's try this case, because we won't be pushovers" or "Let's appeal, and hope we get a better judge at the next level." I have heard discussions that have involved all these options, which were part of the overall trial strategy, where coverage was an issue, but not the driving issue.

I have also heard the opposite, and it is these cases and others like them that scare me:

“We’ll cover the D & O’s [directors and officers], but we’re cutting Dr. X loose,” or “We cannot have an admissions policy like that,” or (to a private college board) “Hopwood says we cannot have a scholarship program/recruiting program that goes into minority high schools” when Hopwood said no such thing and does not control private colleges. Earlier, I mentioned one private college’s carrier requiring the college to cut back on its admissions and scholarship policies, both of which met the Bakke test of giving only slight and targeted assistance to underrepresented minority admittees.

Although this operating procedure surprised and troubled me, it is enough of a practice that a useful insurance primer took note:

In the event that the college or university is presented with a claim and the insurance company is notified, a question that often arises is who controls the defense and settlement of the claim: the insurance company or the college or university?

Primary standard form CGL [Comprehensive General Liability] insurance policies generally provide that the insurance company may control the defense of the policyholder, including the selection of defense counsel, and negotiate a settlement.

In theory, the insurance company and the college or university policyholder have similar interests in the quick and efficient resolution of claims, and the policyholder is willing to let the insurance company control the litigation and settlement. The theory continues that the policyholder's interests will be adequately served by such an arrangement, because insurance companies have a fiduciary duty to their policyholders, including a duty of good faith and fair dealing in connection with their obligations. Moreover, counsel hired by the insurance company also has an independent duty to represent the policyholder's interest.

In practice, however, the interests of the policyholder and the insurance company are frequently at odds. Differing visions of what constitutes an adequate defense or a reasonable settlement cause tension to develop between the policyholder and its insurance company. Conflicts first arise when the insurance company and the policyholder disagree about the choice of counsel to handle the defense of claims, and most frequently when they disagree about whether or not to settle a claim. Insurance companies usually refuse to pursue counterclaims or third party claims even though the policyholder may believe that "the best defense is a good offense."

It is one thing for an insurance carrier to litigate aggressively or to play hardball in order to protect its policyholders, but it is another thing entirely to act as the ultimate decisionmaker on institutional policies and to become the arbiter of bona fide institutional behavior. A good example of this occurred in Andover Newton Theological School v. Continental Casualty Co., a complex case over whether or not the school's insurance carrier was obligated to pay for a jury verdict on a faculty member dismissed in violation of federal age discrimination laws. The merits of this case are complex, and not at issue here, but the carrier refused to pay the jury verdict on the grounds that to do so would allow policyholders like the School to behave badly and not put into place preventive measures to make certain that discrimination did not occur.

Of course, colleges can lose a given case without rampant institutional malfeasance or misbehavior. Universities are, on the whole, pretty law abiding. So much so that the feedback loop of litigation to campus practice is usually quite good. My guess is that Andover Newton Theological School never violated mandatory retirement laws again, after this case, so the institution will not be a reckless law breaker, causing the carrier to pay out for many cases of the same sort. More likely, it is like the University of Texas Law School in Hopwood, violating

Bakke a quarter century later by getting sloppy and complacent with admissions procedures, rather than flagrant flouting of any law.

Thus, withholding coverage by the carrier to force a college's hand is not only often against a jurisdiction's public policy, but it is not efficacious in its regulating of institutional behavior. Moreover, the carrier was paid to provide coverage, and in not doing so, may not fulfill its contractual obligation to the policyholding institution. Insurance, with all its complexities, is the premier example of nonlegal legal influences upon campuses.

B. Accreditation

As it happens, this is an area where I have a lot of first hand experience, as I have been on fifteen site inspection teams for law schools, chaired my law school's self study committee to ready for an inspection, and serve on the ABA Section on Legal Education and Admission to the Bar Council, which determines accreditation status and policy for the 180 ABA-accredited law schools and other law schools seeking such accreditation. Before I became involved in these activities, I never fully appreciated the extensive web of accreditation, and I have moved fully from being the outside critic to becoming the insider critic and defender. (Not yet fully housebroken, though, as my Council colleagues would be happy to report.) Along with the six

regional accrediting agencies, which oversee the undergraduate institutional accreditation process, the specialized professional accreditation process is the major quality-control and consumer protection function of campus governance.

To be sure, the process is not unanimously viewed this way, as critics view this function as either too much (intrusion into institutional affairs and collusion with the accredited units to extort resources from central administrators) or too little (the criteria are elitist and drive historically black institutions away from their traditional functions by requiring excessively – high criteria). But it is the process employed by federal and state governments to ascertain quality and eligibility for student financial aid; it is this certification process at the undergraduate level and licensure at the professional level that drive accreditation.

Governments use accreditation standards to fulfill eligibility for governmental student financial assistance or veterans programs, while occupational licensing authorities (such as state bars and state supreme courts) use accreditation as an entrance criterion for admission to professional licensure (such as medicine, law, pharmacy, etc.).

Many court cases have arisen over accreditation issues, and since the important 1970

Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools

case, which upheld the authority of a regional accrediting body to determine its own rules, courts have given great leeway to such bodies. There have been actions to rein in accrediting bodies, such as the Department of Justice decision to limit the authority of the ABA to review faculty salaries, due to antitrust implications.

However, at the end of the day, accreditation remains a powerful collegial influence upon colleges at all levels of the institution – implicating governance, curriculum, expenditure decisions, and other facets. I have chaired two ABA site inspections where the inadequacy of the facility was at issue, both of which resulted in new building programs, and one of which dragged on in negotiations for almost a decade. Indeed, once the decision was made by one institution to move off campus into a nearly commercial facility that had closed, the law school’s neighbors sued to enforce an agreement that had been reached to expand the existing campus facility, located adjacent to their property. They had contested the original agreement for nearly eight years in municipal courts and boards.

Notwithstanding all the hours billed over legal battles (ABA sources have indicated that the DOJ consent decree and related litigation cost well over \$2 million), accreditation is an important non-legal legal dimension. It is the highest form of self-regulation, where institutions

agree to submit themselves to highly stylized inspections and thorough self study. The process is highly regulatory, with detailed criteria, elaborate rules, and comprehensive data gathering and analysis. It is time consuming, often requiring full time faculty and staff involvement. It is consultative, with most self studies necessitating scores of committees, internal reports, and external constituency meetings. It triggers eligibility for state and federal funding, which itself can spawn litigation. But at heart it is the process by which we judge ourselves, hold ourselves up for public inspection, and commit resources to implement. Done right, it is a salutary and renewing enterprise.

C. Consortia

This is an interesting facet of higher education in which institutions affiliate with others like themselves in order to facilitate exchanges of personnel, students, facilities, and other resources. At the most formal end of the scale, colleges form athletic conferences, where institutions choose to affiliate, to share athletic schedules, to organize tournaments, and to participate in the larger network of national athletic competitions, including championships. As in the instance of accreditation, antitrust activities may be implicated in the complex arrangements. In NCAA v. University of Oklahoma, for example, a detailed history of the National Collegiate

Athletic Association is recounted, including the establishment of a rival consortium (the College Football Association), which had negotiated its own college football television contract. The district court had found that the NCAA constituted a “classic cartel,” and the U.S. Supreme Court agreed, enabling the rival CFA to pursue its own interests. Since the 1984 decision, there has been a shift in individual athletic conference cooperative arrangements as well, with the most powerful university programs going their own way in choosing or creating new conference arrangements or in negotiating media broadcast contracts.

Examples include the decision of the University of Texas and Texas A&M University abandoning the Southwest Conference to join the Big 12 Conference. With these two schools pulling out, the Southwest Conference collapsed, scattering its members to several other affiliations. And many dollars are at stake. In 1995, CBS paid the NCAA \$1.75 billion for an eight year contract to cover the men’s annual basketball championship tourney (“March Madness”). Some schools have such power that they can go it alone, as Notre Dame has done, refusing to abide by the NCAA’s football contract. Notre Dame, a truly national football institution, chose to negotiate its own televised football games on network and cable channels, so

it does not have to share revenue with other conference members or compete for a conference title to be considered for postseason bowl games.

It is interesting to note that in intercollegiate athletics, many of the detailed regulations have been drafted essentially to protect the institutions from their own excessive wrongdoing and from each other's wrongdoing in recruiting high school minors. Perhaps the best example is the highly codified NCAA rules governing athletic college recruiting, and the invocation of the "death penalty" for institutions (such as Southern Methodist University) found to have engaged in massive and extraordinary improprieties. Essentially, the institutions agree to self-police and to submit to private, collective oversight.

That college athletics have legal implications is inarguable. In an extraordinary document issued by a Special Committee of Methodist Bishops, concerning illegal payments to athletes and numerous violations of NCAA regulations by Southern Methodist University, detailed evidence of substantial wrongdoing was made public in 1987. The Report included a pattern of rules violations, recruiting abuses, cash payments to athletes, NCAA sanctions, collusion by trustees and administrators to "keep the lid on," decisions by the President of the Board (who resigned to become Governor of Texas) to continue illegal payments, an agreement to bribe a disgruntled

former employee who threatened to go public, public disclosures of the payments, deceptions towards the faculty NCAA representative, a “strategy of containment and cover-up,” a plan for one person to become the scapegoat, and other improprieties that the Bishops termed “embarrassing and offensive in many instances.” A Trustee said in 1985:

members of the Board would have been naïve not to have known that SMU players were being paid. [The trustee] was right. The evidence was everywhere. It was abundant and it was longstanding. But the Board of Governors members were content to win football games, to trust the leadership and look the other way. The institutional attitude and response to the NCAA allegations and investigations were symptomatic of the Board of Governors’ attitude toward football in general: “Whatever was happening in the SMU football program was no better but no worse than what was happening in every other major college program.” They told themselves that the other schools in the Southwest Conference and the NCAA were after SMU. They reasoned that SMU had been down so long, its competitors simply could not stand to see SMU win. “Everybody’s doing it, why pick on SMU?”—that was the Board of Governor’s stance. That translated into a combative, adversarial relationship with the NCAA and its investigation. The Board of

Governors was guilty of more than neglect. Their attitude was one of acquiescence in the actions of a small group of leaders on the Board. As with many of the active participants in this drama, the other members of the Board were able, through their passivity, to deny direct knowledge or direct participation in wrong-doing. The entire Board of Governors, as a Board, was at fault. All members of that Board share some measure of responsibility for the payments to players at SMU and the consequences of that course of action.

On the other end of the spectrum, colleges engage in consortia and inter-institutional arrangements so as to maximize cooperation and to share programs. This softer side of consortial agreements is designed to share resources and reduce overlap. For example, the Cornell Higher Education Research Institute (CHERI) has undertaken extensive surveys to chart tuition-reciprocity agreements among public research and doctoral institutions of the 149 such Carnegie classification universities; almost half the responding institutions indicated participation in a tuition reciprocity program -- either by a formal consortium arrangement or by a simple student exchange mechanism. Consortium agreements are groups of institutions banding together to waive residency requirements for specialized curricula, such as pharmacy, optometry, and

veterinary medicine. The Southern Regional Education Board administers such a program for fifteen southern states, the Academic Common Market, which allows students who are residents of one member state without a program of study to enroll at in-state residency rates in another member state's institution. Other examples include the Midwest Student Exchange Program, the New England Regional Student Program, the Western Interstate Commission for Higher Education, and WAMI (a small agreement among the states of Washington, Montana, and Idaho). Many other states have border agreements where students who reside in a border area can attend other contiguous border programs across state lines. For instance, Wisconsin and Minnesota have such an agreement. There are also more informal arrangements such as various student exchange programs that allow students to swap institutions for short periods at home tuition rates. The Tuition Exchange, for instance, allows students whose parents teach at one institution to attend another institution in a reciprocal fashion. If I teach at Rice and my daughter gets Rice tuition free as a benefit, I can arrange for her to attend Grinnell in exchange. The Tuition Exchange administers this program for over 500 private colleges who offer family enrollment as an employment benefit.

In addition, there are programs legislatively carved out to “rent” places for students in other, non-regional states. Several states contract each year with the University of Houston, which has one of fewer than two dozen Optometry schools in the U.S.. Each year, a complex tuition agreement is administered to underwrite non-resident tuition for such sender states; certainly this arrangement is less expensive than starting up a new Optometry program in the home state.

This vast array of arrangements requires an infrastructure to administer and oversee the many exchanges and migrations that occur, yet the idea is simplicity itself. Most of these programs are not widely known, although impressive websites reveal the widespread options they represent. See www.wiche.edu/sep/wue.htm or www.tuitionexchange.org for examples. There are almost too many other individual examples to count. For example, even though the University of Houston responded to the CHERI survey that it had no reciprocity agreements in 2001, the year of the study, UH Law Center is home to NACLE, the North American Consortium on Legal Education, which hosts U.S. – Canada – Mexico exchanges and programs among nine member Law Schools (three in each country). In addition, UH has a comprehensive exchange with Monterey Tech, in Monterey, Mexico, (Chapa-O’Quinn Program), set in motion by philanthropy from a UH law alumnus who established the program with money from a major law case won for

his Mexican client. Virtually every U.S. institution has some such similar arrangement with a foreign counterpart college.

Consortial arrangements, from the NCAA to Chapan-O'Quinn, are good examples of how institutions interact, form strategic alliances, and share resources. While they occasion litigation, they are, at bottom, agreements to share, and thus are indications of non-legal, legal arrangements.

D. Sole Source Goods and Services

The rise of universities as places of commerce can be seen in the recent history of collective bargaining. The National Labor Relations Act (NLRA) governs faculty collective bargaining in private institutions. In 1951, the National Labor Relations Board decided that colleges would not fall under NLRA jurisdiction, as their mission was “noncommercial in nature and intimately connected with the charitable purposes and educational activities.” This refusal to assert jurisdiction remained in force until 1970, when the NLRB reversed itself in the Cornell University case (which also included Syracuse University). After reviewing the development of labor law trends and higher education finance in the twenty years that had passed, the Board noted, “we are convinced that assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce to insure the orderly,

effective and uniform application of the national labor policy.” The Board set a \$1 million gross revenue test for its standard, a figure that today covers even the very smallest institutions.

Indeed, it appears quaint by today’s standards that a mere \$1 million would be the threshold for engaging in commerce, for colleges are incontestably commercial institutions, spawning an entire literature on colleges as economic development engines, multiplying many times over the state’s investments in higher education. In college towns such as College Station, Ithaca, Iowa City, West Lafayette, or Amherst, institutions of higher education are the predominant employers to the extent that the locales are, in many respects college/company towns.

On campus, I walk through a student union building, and feel overwhelmed by the commercialization of campuses, particularly student affairs. Of course, the student newspaper today contained 16 pages, and by my count there are over 75 ads, including two full pagers touting travel and computer specials. (This does not include the want ads or classifieds, which would have brought the total to well over 100.) There are two vans blocking the driveway, one for a phone carrier company, and one for a credit card company. Free, or seemingly-free teeshirts are widely available. Soft drink and bottled water vending machines are arrayed in several places, but they are compliments of the vendors, so they all stock only one brand (and its subsidiaries that

include juices and other beverages). There are six fast food or coffee franchises competing with the college's own cafeteria service, which is subcontracted to a food vending service, which in turn leases counterspace to several national chains of donut shops and bagel stores. They cater meals in the various meeting rooms and throughout campus. There is a bank, a branch of a local bank, and two of its ATM's. There are magazine racks with dozens of takeaway papers and magazines. The kiosks are peppered with commercial flyers, lost dog notices, various announcements. The barber shop has merged with the beauty salon, and now offers tanning and massage services. Portable carts offer travel, posters, earrings, CD's, other student goods and services. There are over a dozen stores or venues, ranging from a pool hall and bowling alley to an herbal wellness center. The bookstore dominates the facility, and it is operated by a national chain that specializes in campus center bookstores. But it is only incidentally a book-store, as it is filled with more clothes, office supplies, souvenirs and other goodies than it is with books. You can buy anything it sells with a campus account card or a campus-affinity credit card, which donates a portion of each purchase to the institution. You can even pay tuition, room, and board by use of this card, and many students do so. You can mail, fax, email, compute with these cards.

These campus casbahs are the heart of virtually every campus, more so than even the traditional heart, the library, although libraries themselves are morphing into multi-service facilities as well, with coffee bars, printing facilities, and computer services -- each of them a cost center auxiliary service. And don't get me started on the retrofitting of college dorms to accommodate today's electronic and audio toys. Dorms today resemble electronic stores as much as sleeping facilities. Speaking of sleeping, my campus has a full service hotel and conference facility on campus, with a professional school of hotel and restaurant management to serve them.

Now this is not an example of the decline of western civilization: indeed, I wish I could get a fresh vente decaf with half and half in even more places, and most mornings I would kill for a good breakfast taco. But the NLRB would have no hesitation in declaring colleges to be commercial operations.

Neither would the Internal Revenue Service. The IRS has recently issued regulations to govern these developments on campus, unrelated business income. There is no special tax treatment on campus single-source contracts, such as ones agreeing to use Nike or Adidas athletic apparel for all athletic teams in exchange for free gear and payment, or to provide only Coca Cola or its corporate beverages in campus vending machines. However, if the campus agrees to

perform additional services, these relationships may result in being taxable. The rule is that the taxable activity not be a function of the college's core mission and that the relationship produce a "substantial return benefit." For example, some institutions receive fleets of cars for various functions, including perquisites for high administrative or athletic officials, and then the coach appears in car ads for the dealership, and the college allows car advertisements to be filmed on campus. These transactions would likely be characterized as "unrelated business income taxation." As campuses enter into more of these commercial partnerships, many legal issues arise in the areas of contracting regulations, taxation, conflict-of-interest and procurement regulation, and governance generally, especially as so many commercial activities occur in corporate contexts where trustees or institutional officials may have their own personal or professional ties.

A special note of concern about credit cards and college students. One of my nephews lived in our vacation house for a year while he attended the College of Santa Fe, and for a summer he housesat intermittently in our Houston home while we were in Santa Fe. We started getting credit cards (both pre-approved and applications) by the score. The count is now well over 100, and it is like Mickey Mouse as the sorcerer's apprentice in Fantasia. This young man, with a negative net worth (debts to his truck dealer, his student loan processor, and his Uncle Michael)

has had over \$100,000 worth of credit extended to him, just at my address along, and two years later. Robert Manning's excellent book on this topic (Credit Card Nation) has a very insightful chapter on college student debt issues, where he caustically describes the lending practices of credit card companies and the collusive role that colleges play, both in selling directory information and in providing exclusive and comprehensive access to student data for marketing purposes. He is particularly scornful of the affinity cards which pose a conflict of interest for colleges, especially when the institutions get a percentage of all sales. In the traditional credit card transaction, the vendor pays a percentage to the card company. That some students pay their tuition, room, and board on credit cards is a very questionable practice. Student loans are a variation of T-Bills and expenses, and are subsidized while the student is in school; credit cards are accumulating 20% interest in many cases, and are not subsidized or deferred. This is a dreadful choice for students to make, and colleges should not facilitate or prosper from students making the wrong choice. This is a shameful practice, a non-legal one to be sure, but shameful all the same.

Part III: Conclusion

As I sit here among the stacks of books and papers I consulted for this writing project, I realize that this is an unusual take on college governance, a subject I have studied in the twenty five years since I wrote my PhD dissertation on the subject. In those days, issues seemed clearer to me, in large patches of black and white; today, I confess it is the greys that intrigue me. And to consider non-legal influences has taxed my legal analytical skills, where I read cases and statutes carefully and apply legal reasoning. Rather, what impresses me about this particular project is how the non-legal issues have so cleverly mimicked and aped their legal counterparts. The four examples I chose – insurance, accreditation, consortia, and sole-source service providers – all have legal implications, but arise in contexts other than statutes or cases. Each is a deeply inbedded and complex subject that is absorbed into institutional legal regimes, a parallel universe that colleges and universities must absorb and implement in order to control.

Even though I am a law professor and scholar who tracks these legal issues on campus, I often find myself the least litigious person in the room. Rather, I find litigation a sure sign that all other avenues of resolution have failed, so I try to consider all dispute resolution alternatives. This

is a helpful guide in considering the many non-legal legal issues that arise on campus, and I offer final thoughts on considering these issues.

* Non-legal issues such as I have discussed here will ripen into traditional legal issues if special care is not taken. Thus, preventive practices such as risk assessment and institutional audits are useful practices. Rehearsing for the sure-to-come storm damage might very well have prevented the massive restoration my campus had to undertake. More expensive, pressurized “submarine” doors would have held flood waters at bay, had they been installed. Fewer electrical and utilities mechanisms would have been constructed underground (not to mention libraries). Pumps and portable buildings would have been more accessible, and a hazmat plan would have been in place. Weekend emergency plans would have been in place, and implemented.

* Undertake regular audits of programs for risk assessment and review. Most higher education professionals are networked or have access to helpful national affinity organizations. Presidents have ACE, lawyers NACUA, CFO’s NACUBO, professors AAUP, just to cite a few. As a part of membership, members can get excellent technical assistance, training and continuing education, publications, and other useful services. The

listservs I see suggest to me that virtually no problem arises that your counterpart hasn't encountered. Use the resources available to your office or profession.

* Consider how non-legal regimes are implemented. It is clear to me over much time that many issues or initiatives founder in the implementation stages, undermining the original policy. There is an extensive literature on this subject, including its importance in higher education. Institutional leaders can ensure important policies are fully institutionalized by paying attention to how they are planned and implemented.

* Governance scholarship and higher education research should note the many non-legal influences that arise on campus. Attention to these should be paid.

Even in this very preliminary inquiry, I have learned several things, not all of which I had anticipated. First, it is hard to separate the various strands of complex governance matters. Any comprehensive insurance regime, for instance, is sure to cause many ripples in college administration. No one sets out deliberately to make bad decisions, but sometimes we make them due to poor information or poor analysis of the data we do have. In addition, there are strategic techniques from implementation theory that can be employed to improve the likelihood that

policies, once decided upon, will actually be carried out efficaciously. Finally, higher education is embedded in a real world, so larger world events will eventually affect colleges and universities, just as 9/11 has led to immigration reform controls, international student requirements, and a comprehensive student data tracking system. Town-gown relationships may not always be perfect, but we live in the town more than ever, and probably for the better.