
IHELG Monograph 90-8

Michael A. Olivas is Professor of Law, Associate Dean for Research, and Director of the Institute for Higher Education Law and Governance at the University of Houston.

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Research projects funded internally or externally

In modern higher education, few major decisions are made without considering the legal consequences, and while the core functions of higher education -- instruction and scholarship -- are remarkably free from external legal influences, no one would plausibly deny the increase of legalization on campus. We know surprisingly little about law's effect upon higher education, but virtually no one in the enterprise is untouched by statutes, regulations, case law, or institutional rules promulgated to implement legal regimes.

Indeed, our understanding of the relationship between higher education and the law is rudimentary, notwithstanding the cottage industry of books, case reporters, journals, treatises, and periodicals devoted to the topic and its arcane subspecialties. For example, there is a law review devoted to postsecondary legal issues (The Journal of College and University Law), a regular
newsletter devoted exclusively to the legal affairs of fraternities
(The Fraternal Law Newsletter), and a biweekly commercial service
(West's Education Law Reporter) that reprints leading cases,
including unpublished decisions. There is a splendid treatise
available, The Law of Higher Education[29], and an instructional
casebook, The Law and Higher Education[48]. Even with the
extensive research resources, synthetic scholarship in the area has
been a slow climb and has not advanced far beyond the early work
of M.M. Chambers, who in 1936 wrote The College and the Courts:
Judicial Decisions Regarding Institutions of Higher Education in
the United States (with E.C. Elliott) for the Carnegie Foundation,
the first of a series that stretched until 1976[12,19]. Such first
generation work has been continued, with modest analytic advances,
by several scholars who, aided by today's computerized legal data
bases, have collated cases for individual states, sub-fields
such as special education, and periods of time such as a
court-term[65]. Second generation studies have began to appear,
such as LaNoue and Lee's 1987 Academics in Court[33], with rich,
detailed studies of several higher education cases, including scores of interviews and access to institutional legal records. A K-12 example of this ethnographic legal approach is Rebell and Block's 1981 *Educational Policy Making and the Courts*[54], which examined in considerable detail the litigation record in several elementary and secondary education cases. In this research, the case record is thoroughly analyzed and rich interview data are obtained from the parties to the dispute. Most importantly, corollary social science theories have been incorporated to ground the inquiry, to frame the questions, and to propose research questions: Rebell and Block were influenced by Abram Chayes' public law litigation model[13], while LaNoue and Lee drew upon several public policy models, especially the work of Charles O. Jones[28] and Garry Brewer and Peter deLeon[7].

Higher education case studies have a more recent history, including Victor Baldridge's famous political analysis of New York University[3], and detailed studies of the rise of legalization in single states and in multi-state settings[22,25,31]. Yet despite
all these studies, virtually none have been large scale studies of the effect of legalization, research that would measure institutional capacity to implement legal rules, and measure it in a manner calibrated to balance institutional interests and the legal policy change. In short, how do institutions absorb legal requirements and how are they changed as a result? How is law implemented on campus?

This article offers a preliminary framework for measuring the effect of legal changes upon colleges, using implementation policy literature and Paul Sabatier's conceptual model [42, 59, 60] of policy change; this model will be used to examine three complex legal policies in effect upon campuses: immigration, intellectual property, and racial harassment. Clearly, each of these complex legal issues warrants its own substantial treatment, although in this article, the major features of the three will be discussed and contrasted for their fit within the theoretical framework. Finally, the theoretical significance and policy implications are examined. In truth, this approach is not as intrinsically
fascinating as simply reading some of these cases. The most lurid fiction or interesting potboiler cannot compare to some of the real-life cases that occur in college law: whose imagination is fertile enough to imagine the acrimonious faculty assusations of academic misconduct in the Dong case, or the chase scene of Stubblefield, where a faculty member is caught in flagrante delicto with a student after class [48, pp.285-287, 535-537]? While the topics that follow are not as sexy as the cases themselves, much can be learned about institutional behavior from synthesizing the generic cases that arise. The three areas that follow promise to produce many interesting cases for academic court-watchers.

Part I: The Three Cases in a Nutshell

Before elaborating the theoretical framework, it is necessary to explain the legal issues under consideration. None are new to campus, but recent legal developments have extended the reach by virtue of statutes, regulations, court cases, and institutional policies. Immigration, for example, is the province of the U.S. Congress, whose legislative treatment of foreign persons preempts
states from implementing their own immigration policies. Federal policy is primary, and Congress has recently enacted the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Amendments of 1990, which have made a substantial difference in how foreign students may enroll in the United States and how international scholars may be hired by U.S. colleges. Extensive regulations have been promulgated, and a variety of institutional policies have been enacted[35]. Data from a national study of immigration practices are reviewed, as are the findings of several immigration-related cases and state statutes. One state-wide study of immigration regulation is also analyzed for its individual campus practices.

Intellectual property, the complex world of patents, copyright, trade secrets, and trademarks has affected universities, especially research-oriented campuses who undertake to commercialize their faculty's laboratory results or inventions. Intellectual property policies for twenty major research institutions will be examined; one state case study will
be included to understand how that state's institutions responded to a state law that required all colleges to enact policies in this area.

And in the third example, the regulation of racial harassment, colleges have begun to enact conduct codes that protect students from harassment or that are designed to ensure freedom from hate-speech. State law has, to a small extent, been implicated in this movement, but it has been campus initiatives counterpoised with federal Constitutional considerations that characterize this legal dispute. Interestingly, although few court cases have actually arisen in the area, the campus initiatives appear to have been greatly influenced by recent legal scholarship, especially that of minority scholars[15,16,34,41]. Thus far, no law or regulation has required colleges to enact such rules. These rules have not been invoked very often, but they seem to have struck a nerve, as an extraordinary amount of national attention has been drawn to the issue, and a conservative backlash has developed, guised as assaults against "political correctness"[21,57]. These three legal
issues, then, provide a rich mix of federal, state, and institutional legal policy; mandatory and self-initiated, elective legal change; and institutional functions pertaining to admissions, research, and conduct.

**Case 1: Immigration**

Virtually every institution has international students, exchange visitors, or foreign national employees. In 1988-89, more than 360,000 foreign students studied in the United States, most of them on "F" (student) or "J" (exchange visitor) visas[27, Table 1]. While the number varies across fields, many U.S. science and engineering faculty are foreign-born and-trained; most major research institutions process hundreds of work permits and visas each year for their faculty and staff. Immigration is no stranger to college campuses, and while many of the technical details have been routinized, each labor certification and visa requires intricate detail, elaborate paperwork, and administrative nudging to negotiate the arcane process[35]. The laws are complex, the regulations contradictory and unclear, and the rules of the game
shifting and idiosyncratic.

Most faculty do not deal with immigration until they want to hire an international colleague, place a foreign research assistant, or recruit a prized overseas student. Or maybe a distinguished scholar is invited to campus for a lecture, and she is denied a visa because of her political or ideological views. These are the more common occurrences of immigration on campus. For all its pervasiveness on campus, immigration is like humidity: it is there, but you don't notice it until it is out of the normal range.

This immigration case study arises from one of the lesser-known characteristics of immigration, its use in public colleges as a criterion for determining whether the student is a state resident or non-resident for tuition purposes. Although one's first instinct may be to assume that all foreign students are non-residents, the exact determination is not quite as easy as it seems. First, residency rules themselves are very confusing, contradictory, and counter-intuitive[47]. For example, many states
have erected elaborate systems to determine who is and is not a resident, but employ psychological criteria or tests of intention even if a student meets all durational requirements. Therefore, even if the student has moved to the state, and resided continuously in that state for years, he or she could be denied resident status if the school determined that the reason for moving to the state was in order to attend school.

Within this confusing scheme, there are additional difficulties and inconsistencies. The governance of residency requirements varies among the states, as the following Table indicates.

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Although the institutions in Types I, II, and IV were intended by their legislatures to treat all students similarly, their administration of residency varies considerably. For example, in a 1989 study, Richard Padilla asked registrars and residency officials in one Type I state to review twelve "cases" of students, all drawn from real student transcripts; in such a state, all
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similar students should be treated similarly by all the institutions[59]. Using a very carefully controlled interview protocol, he could not get all the administrators to agree unanimously on any of the cases, save one where all would have denied residency; in five of the cases, no majority could conclusively agree on whether to deny or grant residency. Most tellingly, they split 5-4 on the case of a student who had been granted political asylum in the United States. In the case facts, the student had been in the state for six months as an applicant for asylum, and eight months more after receiving asylum status; under the state's law, he was entitled to be treated as a resident student. In two other immigration-related hypotheticals, facts were given for an undocumented student who was brought surreptitiously into the United States as a child by his parents; the other undocumented alien student had been an F-1 visa holder, but had left school in violation of his student status. He had lived and worked in the state for six years since leaving school, and owned a home in the state. Two officials voted non-resident
for the former, and seven would request more information, while for
the latter, seven voted non-resident and two would have sought
additional information. In neither case did any official agree to
grant residency, even though the law concerning undocumented
college students is vague enough to permit the granting of
residency status.

These cases point to another complexity, that of the
variegations of "foreign students," ranging from the more
traditional F-visa holder to other immigrant and non-immigrant visa
categories. In Texas, the Type I state where Padilla conducted his
study, the State specifies the possibility of obtaining residency
for foreign students who hold visas with A-1, A-2, G-1, G-2, G-3,
G-4, K, or OP -1 classifications,* or who have been classified as
refugees, asylees, parolees, conditional permanent residents, or
temporary residents (i.e., who are undergoing amnesty
reclassification). In addition, there is a special provision for
aliens who are a part of NATO forces, and a reciprocity agreement
for certain Mexican citizens to pay resident tuition. Moreover,
these provisions are not unique to Texas; a 1986 study of residency
* And presumably N-holders, who are long term G-holders.
exemptions found more than 70 different alienage provisions in the 50 states and D.C.\textsuperscript{[45,46]} As an additional twist, those public institutions in Type V states are each allowed to devise their own residency, hence alienage requirements. Thus, Eastern Michigan University treats A-visa holders (diplomats) one way for residency determination, while a dozen miles away, the University of Michigan does the opposite.

With this many variations of institutional policies and foreign students, it is little wonder that practices vary, even when state law requires all the institutions to use the same legislative criteria and treat similar students similarly throughout the jurisdiction. It is also little wonder that several cases have arisen to address these issues. On residency determinations, there have been nearly a dozen U.S. Supreme Court cases since 1970, including six on education residency, and scores of lower court decisions. California alone has had three cases on undocumented college students (with the students winning two and losing one); Arizona and Illinois have had cases and consent
decrees on the issue of undocumented students' ability to establish residency; the City University of New York changed its policy to avoid litigation; and many institutions have silently and without fanfare revised their practices to admit undocumented students and grant residence benefits[45,47]. Of course, some colleges have proven recalcitrant. One of Padilla's respondents reported that she would report out-of-status students to the INS if they showed up at her institution, a private, religiously-affiliated college in Texas, where officials are not even required to ascertain state residency[51].

Notwithstanding the many cases and increasing specificity of residency requirements as applied to foreign students, there is considerable lag time between the resolution of the cases in controversy and institutional policy changes. For example, in one Type I state, the legislature ignored the attorney general's opinion it had commissioned, and failed to correct a statewide practice concerning resident aliens, even though the U.S. Supreme Court had definitively ruled on the practice and struck it down as unconstitutional three years earlier[45]. Formal state
implementing regulations on this issue were finally promulgated almost five years after the decision, and formal residency booklets -- periodically revised to reflect policy changes -- did not reflect the new policy until nearly six years after the case was decided, although several registrars unofficially acknowledged the ruling within a year of the case. The state was not alone in its crawling pace; a 1986 study of this case found that nineteen Type I, II, and V states had not complied in their formal policies, and seven additional Type III and IV states had major institutions employing the discredited immigration practice[45].

Immigration reform, then, operates at a snail's pace in higher education, particularly in the area of admissions and residency policy. In part, this lag between formal law and implementation is due to the sheer complexity of the law, the need for attendant regulations, and the variability of institutional practices. In addition, immigration issues are rarely in the forefront of institutional life, and often the results only matter to the individual and a few institutional personnel most directly affected. A prominent member of the PLO denied a visa for
ideological reasons may galvanize campus activists, but an undocumented eighteen year old is unlikely to generate much sympathy or support; indeed, the student may wish the issue to remain unknown to a larger cadre, lest the matter come to the attention of the Immigration and Naturalization Service. Nonetheless, the internationalization of US higher education, both in the student body and faculty; highly publicized international incidents such as the 1968 massacre of Mexican students in Tlatoloco or the 1989 shooting of Chinese students in Tiananmen Square; and the legacy of IRCA, employer sanctions, and the need to complete I-9 forms for every personnel transaction all reveal the substantial reach of immigration law onto campus.

**Case 2: Intellectual Property**

Immigration in its residency determination context is predominantly the concern of students, while the second case issue, intellectual property, is more the province of faculty. Faculty researchers, particularly at major research institutions and in scientific, engineering, and medical programs, produce scientific discoveries and invent products or processes that may have
potential commercial value. As the amount of sponsored research has grown, many institutions have invested heavily in the administrative infrastructure to develop and exploit these discoveries, and expect to prosper both by the increased level of research support and its indirect overhead funds, and by the royalties from licensing the occasional discovery with patentable, commercial application\[14,24\]. Every school would love to have developed Vitamin D, sweet acidophilus milk, Gatorade, Retin-A, or a superconducting alloy. While relatively few faculty themselves are likely to become entrepreneurs, exploiting financial resources and maximizing their intellectual property, an increasing number of highly valued researchers will have consulting contracts with commercial firms or will be sought and sponsored by pharmaceutical, biotechnology, or other research corporations\[43\]. As one study of entrepreneurship in two major research institutions concluded, "If universities do not provide the flexibility needed to venture into business, faculty will be tempted to go to those institutions that are responsive to their commercialized desires\[56, p.____\]." One formal means of accomplishing these objectives is to enact
intellectual property regulations that govern the commercial exploitation of faculty inventions, usually including patents, trade secrets, and some copyrights that are produced on university time or with university resources.

Of course, law permeates this process, from the federal law concerning ownership of federally-funded research to the contracts governing employment and property rights to the actual protection of the laboratory products. In a recent study of faculty rights in intellectual property, Patricia Chew has written, "as schools are formulating their policies regarding faculty discoveries, they may consider the following issues: (1) the university's objectives and philosophy; (2) the scope of the policy (e.g., which employees, discoveries, and time periods are covered); (3) the rights and duties of the university as a whole, faculty inventors, university units such as the faculty inventors' departments, and research sponsors; (4) the relationship between these parties regarding such issues as ownership, rights associated with ownership (e.g., obtaining legal protection, income), participatory role in exercising these rights; and (5) the procedures used to implement
the policy (e.g., disclosure of inventions)[14, p.____]."

Chew analyzed the policies of the country's twenty largest research-funded institutions, as well as the policies employed by another ten major research universities. Drawing upon Reichman's work[56] in the legal issues of computer software, she characterized the range of institutional policy as supra-maximalist, maximalist, resource-providers, and faculty-oriented. The first three approaches to governing intellectual property are institution-driven, in what she terms an "industry practice." In the first category, a Supra-maximalist institution stakes out the broadest claim possible for its ownership of all faculty intellectual property produced by faculty in the course of their employment and while using university resources, but also for any inventions or patent rights from all faculty activities and for any inventions that may derive from sponsored research agreements with non-university funders. For example, the University of Pittsburgh policy "extends to those inventions that may arise in non-university facilities and outside the faculty's regular work" and even includes "nonpatentable discoveries that 'may have commercial
value or potential as revenue producers."

Another, more common approach is for the Maximalist institution to assert ownership from inventions that arise either "in the course of the faculty's employment [or] from the faculty's use of university resources." As Chew notes, this approach, while not as all-encompassing as that of the Supra-maximalist university, can affect virtually all a faculty member's intellectual production: Yale, for instance, includes claims to "teaching, research, and other intellectual and administrative activity by faculty." The University of Washington's policy is an example of a Maximalist practice, as it claims no rights if faculty's inventions are devised "entirely on their own time and without the use of University facilities."

The third category of institutions is the Resource Provider group that asserts a claim to faculty's intellectual property only if "significant use" of University time and facilities are employed. Of course, what constitutes "significant use" of resources is a matter of degree, as the range for Supramaximalist to Resource Provider is only a matter of degree and institutional
reach.

Each of the three university-oriented policies is premised upon the institution owning the intellectual property and bestowing a portion back to the faculty inventor. As Chew notes, in these three policies, "faculty rights, including the sharing of royalties, are given out of university benevolence and generosity. [However, this] presumption is contrary to the common law, which provides that faculty own their inventions[14, p. ____]." Others have pointed to this anomaly, and, indeed, to the uncertain legal and historical basis upon which copyright rests[8, 56]. While the law may be unsettled, and while universities may be overreaching due to faculty's limited knowledge of their options, most major institutions behave in the ways that maximize university ownership and profit participation.

However, there is another way, one that is faculty-oriented, or to assume that the researchers own their own intellectual property and the rights to exploit it commercially. Although there are complexities in the arrangements, Stanford, Minnesota, and Harvard are representative of this approach. Harvard, for example,
allows faculty the "first right to title," except in the development of medical or public health inventions or if there is specified "substantial university involvement." While God is in the details of the agreements between these institutions and their faculty, the industry practice is presumptively reversed, and the university takes only for specific, contracted conditions or if the faculty chooses not to or fails to protect and exploit the product.

In public institutions, there may also be applicable state law or regulation, over and above federal intellectual property provisions. In Texas, for example, the Legislature has recently enacted three pieces of legislation concerning intellectual property: a requirement that all public colleges have published intellectual property policies, approved by the Texas Coordinating Board; a provision amending conflict-of-interest statutes, to enable college employees to develop their intellectual property and participate in equity or business arrangements with companies exploiting the invention; and an exemption for college research with potential commercialization value from state open records legislation[64]. While none of the statutes or implementing
regulations specified or required a particular legal policy approach by Texas colleges, the four major public institutions each chose the maximalist route, leaning towards supramaximalist, even though each could have chosen the more faculty-oriented way. The University of Houston justified its choice of approach as a necessity under state law: "The University owns all rights to intellectual property created with University resources which is produced as part of your normal University responsibilities. This is a matter of State of Texas law and the existing law of most states. In keeping with a long-standing academic tradition nationwide, the University claims no ownership in textbooks, [or] literary, scholarly, or artistic works."

Case 3: Racial Harassment

Although minority populations in the United States continue to grow as a percentage of the entire population and especially as a percentage of the school-aged cohort, higher education enrollments seem to have peaked and, in some instances, are declining both numerically and as a percentage. For instance, there were fewer Mexican American law students enrolled in 1989
than in 1980, and fewer Puerto Rican law students than in 1984--
this despite the phenomenal growth of both groups in the
1980's[1,44,50]. Fewer black men took the doctorate in 1987 than
was the case in 1982[50, p.24]. Despite some improvements at the
undergraduate level, far less progress is evident than anyone would
have hoped for in the 1990's[38,50].

One reaction on some campuses to the modest rise of minority
undergraduate students has been the increase in racial violence,
particularly the racial harassment of minority students. Although
some commentators have disputed the existence of a problem,
insisting it is overstated, the harassment appears both to be more
frequent and more frequently reported. For example, a 1989
Chronicle of Higher Education article reported nearly 200
institutional incidents of racial harassment in the preceding two
years[40,20]. Alarmed by the widely - reported incidents, many
institutions have begun to react in different ways to address the
problem. At the same time, a veritable feast of scholarly law
articles has come forth, defining the contours of the
problem[4,5,10,26,32,36,49,52,62,63]. Although there are scholars
who write in the area of higher education and immigration as well as in intellectual property law, there has never been anything quite like this outpouring, in a brief period of time and by so many legal authors, particularly scholars of color[15,16,34,41]. Even the extraordinary scholarship occasioned by the Bakke case was more understandable, with the U.S. Supreme Court case galvanizing scholars to their commentary. However, there has only been one litigation blip on the racial harassment screen, Doe v. University of Michigan, a 1989 U.S. District Court opinion in which the judge struck down the University's racial harassment policy[17]. Thus, the many colleges that have established policies have done so without a definitive Supreme Court case requiring them to do so, and in the face of only one recent case on point, where the policy was found to be unconstitutional. This is clearly a different legal milieu than that of foreign student residency and intellectual property.

How have colleges responded? In order to review this question, a questionnaire was sent to the university attorneys of a public and private college in every state, Puerto Rico, and the
District of Columbia, requesting copies of their policies. In addition, nearly fifty other codes were studied, including those identified through the burgeoning scholarship on the topic[26]. In this fashion, over 100 policies were received and analyzed, as well as the statutes in a dozen states that regulate hate crimes. These policies fall along a continuum of doing virtually nothing (or in one instance, rescinding a policy that had been in place) to a model of heavily regulating proscribed racist harassment, with extensive and comprehensive detail. Table Two summarizes and describes the findings:

(Table Two about here)

Although some campuses have reacted relatively swiftly to promulgate racial harassment policies, there are still many institutions that have no such codes and no apparent plans to initiate them. When queried about their lack of a policy, several counsel conceded that administrators had considered enacting policies, but had decided not to do so either for fear of conceding the possibility of racial unrest or of not wanting to appear that they were violating the first amendment; most cited the University
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<th>No Current Policy on Racial Harassment</th>
<th>Tufts, Arkansas State, Nevada, North Dakota, Mississippi State, Nebraska, Iowa State, Dartmouth, West Virginia State, New Mexico, Boise State, Wake Forest, Alaska, South Carolina State, Goucher, Wyoming, Ohio State, Catholic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existing General Purpose Code, w/o Racial Reference</td>
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</tr>
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<td>Texas, Pennsylvania, Michigan, Brown, Wisconsin, Penn State, South Dakota, Emory, Florida State</td>
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* Some of these institutions (e.g., Catholic University) have nondiscrimination policies enacted before 1990, but do not reference racial harassment. These policies could be used in the event of a racial harassment incident, through general plenary language.*
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**Campus Regulation of Racial Harassment [Partial Listing]**

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of Michigan case as evidence of how a code would be treated in their legal situation. Several also indicated that their campuses would probably revisit the idea as more consensus grew, either in practice or through court cases, or if there were racial incidents on their campus. Several campuses readily conceded they had no formal policies, but had plans to use ad hoc or "residual authority" clauses if the need arose. One of the plans that would be dusted off and redeployed included a 1960's vintage student protest policy, "which worked for [the campus] apartheid sit-in."

A variation on this theme was those many campuses that had pre-existing policies regulating student behavior generically, without specific reference to racial harassment. Perhaps the quintessential example of this generic code is Stanford's original 1896 Fundamental Standard, which holds: "students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the rights of others as is demanded of good citizens. Failure to this will be sufficient cause for removal from the University." Because it is a private college, Stanford is not required to abide by First
Amendment jurisprudence. A public college example of a general-purpose code is that of the University of Minnesota:

**DISORDERLY CONDUCT ON THE CAMPUS:** threats to, physical abuse of, or harassment which threatens to or endangers the health, safety, or welfare of a member of the University community; breach of the peace; physically assaulting another; fighting; obstructing or disrupting teaching, research, administrative, and public service functions; obstructing or disrupting disciplinary procedures or authorized University activities; vandalism.
Most, if not all institutions reserve general good-of-the-enterprise regulations which, if not excessively vague or overbroad, could be pressed into service for this purpose.

The next approach is that of Stanford's recently-revised policy, which, since 1990, adds a gloss proscribing racial (and other) harassment, using a "fighting words" legal rationale:

Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.

This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

Speech or other expression constitutes harassment by personal vilification if it: a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of
their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin....

The number of colleges like Stanford that reconstitute either their own "Fundamental Standard" or their own "Interpretive Comments" is likely to increase, as the original behavioral standard will have been inculcated widely throughout the campus community, and will provide an agreed-upon basis for discussion. Although additional glosses or reconstituted language may appear modest, the acts of discussion and adding new meanings or coverage are more than mere wineskins.

Another approach is to draft new rules or policies without racial reference. Some few schools had no overarching student behavioral code, and the debate over racial harassment or sexual harassment moved the campus to adopt regulations, albeit with no specific racial predicate. On these campuses, the situation may not be ripe for a more detailed racial-reference policy, but some participants may view the exercise as an essential first step toward establishing such a precedent, one that may later ripen into a more comprehensive policy. Perhaps the history of sexual
harassment guidelines, now widespread across campuses and workplaces, will be instructive, as many of the more detailed and comprehensive policies currently in place began as more modest efforts[61].

At the most formalized end of this spectrum are those colleges with official codes, proscribing racial harassment; examples include the Universities of Texas, Michigan, and Wisconsin. Although each takes a different approach, they were drafted to be organic, i.e., to stand alone rather than exist as an appendix to a generic code, and to serve as a basis for regulating harassment based upon a variety of characteristics, including race. In addition to outlawing physical violence, the University of Texas relied upon a legal theory of intentional infliction of emotional distress and prohibited "racial harassment," defined as "extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress ...." The University of Wisconsin also employed this legal theory, but added a prohibition against
"[creating] an intimidating, hostile or demeaning environment for education, University related work, or other university-authorized activity." The University of Michigan's approach, which the District Court struck down, had employed a proscription on "stigmatizing or vilifying" individuals; after losing the case, the University amended its policy[36, pp. 194-200]. In sum, even within this group of proactive institutions that have taken an aggressive lead on combatting racial harassment on their campus, a wide array of legal theories and drafting strategies has been employed.

Part II: Implementation Theory

Malcolm Goggin and his colleagues, in Implementation Theory and Practice: Toward a Third Generation[23], distinguish between two generations of implementation research. First-generation research, which is "for the most part, detailed accounts of how a single authoritative decision was carried out, either at a single site or at multiple sites[23, p.13]" is characterized by Jeffrey Pressman and Aaron Wildavsky's 1973 Implementation[53]. Daniel Mazmanian and Paul Sabatier's 1983 book, Implementation and Public
Policy[42], is judged to be second generation, including "the development of analytical frameworks to guide research on the complex phenomenon of policy implementation[23, p.14]." To date, while their work has been widely tested and developed across many complex sectors, Mazmanian and Sabatier's approach has only been applied in one higher education setting, a comparative study of European college access policies[11]. Nevertheless, it has much promise for studying U.S. higher education, especially due to the rich possibilities for interstate comparison within the system of federalism that characterizes public postsecondary education. In addition, the large number of private colleges allows a comparison group not similarly bound by state law or constitutional provisions, although some legal precedents, such as federal grantmaking regulations, will treat public or private institutions the same.

Deborah McFarlane's recent employment of the Sabatier and Mazmanian model is a rich use of the Implementation Process Model, as she casts it in a statutory coherence light, the better to understand the efficacy of statutory law, i.e., legislation[39].
As she notes, this requires some inferences from the more generic model:

What are these levers at the disposed of the original policymakers? In the Sabatier and Mazmanian framework, these elements of statutory coherence include (1) precise and clearly ranked objectives, (2) incorporation of an adequate causal theory, (3) provision of adequate funds for implementing organizations, (4) hierarchical integration within and among implementing institutions, (5) favorable decision rules for implementing organizations, (6) commitment of implementing agencies/officials, and (7) opportunities for formal participation by supporters of statutory objectives. Indeed, the major contribution of that framework was its attempt to specify a number of legal objectives that could affect the implementation process. The statutory coherence hypothesis can be deducted from this model; that is, effective implementation is a function of the extent to which the above conditions are met (i.e., statutory coherence)[39, p.396].

To date, the Implementation Process Model has been employed to measure the effectiveness of implementation in several complex statutory schemes, including wetlands regulation[58], model cities legislation[42], conservation policy[37,58], equal educational opportunity programs[30], and federal family planning policy[39].

Tractability

The Implementation Process Model has a clear premise: that the problem area or issue is solvable to some degree by a series of policies and actions. Four variables measure the tractability of the problem: (1) technical difficulties, (2) diversity of
target group behavior, (3) target group as a percentage of the population, (4) the extent of behavioral change required. Additional variables in the higher education context could include institutional autonomy, or the degree of independence an institution has to undertake the change. Presumably, change mandated by statute, regulation, court case, or other source would have a bearing upon whether an institution undertook a change in legal policy. To an extent, whether a visible problem prompted consideration of the change would also affect an institution's independence or autonomy and contribute to the tractability: a measured, reflective pace may not produce the same result as change produced by a relevant and widely-reported incident.

Technical difficulty is the sheer complexity of the proscribed behavior, availability of data, range of acceptable alternatives, fluidity of the situation, and existence of tools to solve the problem. Diversity of target group behavior, or the variability of proscribed behaviors is a second feature of tractability, and the size and extent of the target population is a third criterion. If the change will only affect a small group, whose behaviors
resemble each others', then legal change will be more possible; conversely, a more intractable problem will exist if everyone is breaking the rules, and especially if they are doing so in different fashion. Fourth, the extent of behavioral change required is an obvious feature of tractability. Minor, modest changes in behavior are likely less difficult to inculcate than are massive shifts in policy or significant reversals in longstanding practice.

**Tractability: Technical Difficulties**

These features can be seen through the three cases of legal change, which vary in terms of their sheer complexity and degree of difficulty. In administering immigration residency changes, the technical difficulties are high, due to the complexity of federal immigration law, residency determinations, and inadequate state provisions. Where a clear legal opinion or operating instruction is available (e.g., a case directly on point, a negotiated consent decree, or a carefully-drafted systemwide policy manual), tractability will be higher than if such guidance or clarity are not available. In intellectual property, the technical
difficulties are medium range, as considerable legal drafting is required, first, to distinguish among patent, copyright, trademark, and other legal ownership issues and second, to determine the exact means and extent of institutional or faculty proprietorship. The concepts are relatively simple (particularly if "industry practice" is adopted), but the operationalizing can be quite technical. For the regulation of racial harassment, the actual technicalities of drafting are low for many codes (those that are not highly regulatory or detailed) but higher for more detailed, codified detailed, codified approaches. Perhaps the best analogy is that of the competitive diver, whose dives are judged both on execution and on their degree of difficulty. In this setting, simple legal changes, clear instructions, or well drafted rules are mere swan dives, elegant yet simple (and with a low degree of difficulty); more complex criteria, unclear reasoning, or major revisions have a correspondingly higher degree of difficulty in the execution.

Tractability: Diversity of Target Group Behavior and Size of the Group.
As a measure of how many target persons would be affected and how their behavior varies, immigration presents a relatively small challenge, as most institutions will attract relatively few undocumented students or foreign students with an arguable claim to residency. Persons holding F-visas, the largest category of international students, are ineligible for consideration in all states, consistent with federal law and major U.S. Supreme Court cases on point. Their circumstances will vary, and vary considerably, but this issue will be confined to a small number. One exception may be open or moderately-open admission institutions in major urban areas, who may see several dozen such applicants. In major research institutions, especially those with medical research programs, intellectual property concerns will affect many faculty and researchers[35], and will require a large sponsored-programs administrative infrastructure and grant/contract monitoring office[6]. In such universities, the affected group will be large and disproportionately powerful, both professionally and commercially, within the institution. Even so, the categorization and fungibility of intellectual property
arrangements will be only moderately complex, as there is a powerful institutional pressure to routinize the arrangements and not negotiate different deals for different labs. (Nonetheless, there will be 600 lb. gorillas in many institutions, requiring different rules and accommodations.) Depending upon how one defines the "target population" and proscribed behavior, the regulation of racial harassment could be an extensive reach or a modest one. Stated in terms of the majority of institutional responses, the target group is small (would-be harassers) and their range of sanctionable offense behaviors small to medium. Likely as not, the more detailed the regulations, the more likely that the range of proscribed behavior will be great. But this need not be so.

Tractability: Extent of Behavioral Change Required

The fourth criterion, the extent of behavioral change required, is likely small in all three of theses instances; in contrast, a major revision in campus alcohol policy or substance abuse regulations, where behavior is more ingrained and traditional, would be more difficult to implement on most campuses. For immigration purposes, a more expansive treatment of alien
students would not necessitate much change (unless the admissions personnel are adamantly opposed, so that compliance with a legal policy change required major attitudinal reversals). Intellectual property policies, once in place, would likely not exact major behavioral changes, although a massive overhaul of procedures -- particularly if they "took back" faculty benefits -- would probably cause upheaval. However, not all faculty are willing or able to bargain effectively, and most institutions are likely not to rock this boat by much. Racial harassment points a paradoxical picture, as there has been considerable reluctance to codify rules or concede the existence of a problem, reluctance disproportionate to the modest remedies adopted by most campuses. As much of the thoughtful literature on this issue reveals, the First Amendment is implicated in such regulation, and many principled objectives arise in defense of "free speech" or fears of censorship. However, it is not solely a First Amendment issue, as other commentators insist. Because this issue in the campus context is new and unresolved, it remains difficult, though not intractable.

Seen as a group, the three case studies vary in their
amenability to solution, in their reach on campus, and their maturity as issues, but they are not unsolvable, Gordian knots. Thoughtful officials and faculty have coped with each case, and have attempted to resolve their institution's unique problems. As a group, they present moderate difficulties, affect relatively few participants, and augur modest changes in behavior. Once institutionalized, the legal changes would be readily absorbed by the systems, even if not everyone was pleased with the outcome.

**Ability to Structure Implementation: (Independent Variables)**

The Implementation Process Model has seven "levers" that Mazmanian and Sabatier identify; it is these seven factors that McFarlane incorporated into the "Statutory Coherence" framework of the Model [39]: "policymakers can affect substantially the attainment of legal objectives by utilizing the levers at their disposal to coherently structure the implementation process[42, p.25]." This is the heart of the matter, the means by which university administrators can effectively structure the implementation of legal change in their institution. McFarlane measures coherence by assigning a zero (0) when the criterion is **negative** for coherence and a one (1) when the criterion is **favorable** for coherence.
Clear and Consistent Objectives

First, they can articulate clear and consistent objectives, "as a resource to actors both inside and outside the implementing institutions who perceive discrepancies between agency outputs and those objectives[42, p.25]." In the case studies, each of the three legal regimes reveals a clarity (or lack thereof) in its policy objectives by means of a target population, criteria for eligibility, and the service or benefit to be provided. In the immigration scenario, undocumented students were the target population (coherence = 1), certain legal durational and intentional criteria were to be applied according to state or institutional guidelines (coherence = 1), and admission or residency tuition benefits were the services (= 1). In intellectual property, the target population is a university's research faculty and staff (= 1); eligibility in research profits is restricted to those whose laboratory or field work yields potential profits through commercialization (coherence = 0); and the services to be provided are the administrative and development
assistance required to secure research resources and exploit profitable discoveries (= 0). In the regulation of racial harassment, the target population is would-be harassers, likely a small and elusive core group (= 0); eligibility for sanction is limited to those who transgress the behavioral standards set out by enacted codes (= 0); and the benefits accrue to members of the university community who have a means for regulating harassment against them (= 0).

However, unless these clear objectives are translated into high institutional priorities (or agency ranking), "the new directives are likely to be delayed and accorded low priority[42, pp.25-26]" when they compete with other new or enduring institutional initiatives. For example, granting admission or residency to undocumented students is not likely to spark much of a fire on most campuses, although one suit was brought by a UCLA admissions official who refused to admit these students (defying an earlier legal decision) and became something of a whistleblower[55]; this issue is likely to be a low institutional
priority (= 0). Intellectual property initiatives, derived from longstanding institutional research missions, would appear to have great priority and clarity. However, the increased attention (translated by a larger share of scarce financial resources or professional prestige) may appear to crowd out teaching missions (by reducing the contact between faculty and students) or distort the more traditional scientific pursuit of knowledge to less agreed-upon norms of commercial gain or industrial collaboration[43]. In a mature, research institution, this is probably a higher priority item (= 1). Racial harassment regulations may appear to some observers as a) too much attention to minority sensibilities or trendy political correctness, or b) a cosmetic diversion from attention to more serious issues of inequality for minority students. In either event, enacting a code shows a seriousness of institutional purpose (= 1). Thus, legal policy objectives can be specific or vague, as can institutional commitments (for example, presidential or trustee leadership). As a corollary, the more clear and concrete the originating authority,
the more precise the objectives and the more specific the institutional commitment. It need not be said that the specificity of institutional commitments does not necessarily translate into full fledged support. For example, even a crystal clear mandate could be unenthusiastically absorbed and consigned to low stature or mechanistically observed: to the present, the clear authority of Brown v. Board of Education[9] remains unfulfilled due for the most part to white intransigence and poor implementation ("with all deliberate speed").

Adequate Causal Theory

The second independent variable is the incorporation of an adequate causal theory, one that requires "1) the principal causal linkages between government interventions and the attainment of program objectives [to] be clearly understood, and 2) that the officials responsible for implementing the program have jurisdiction over a sufficient number of critical linkages to actually obtain the objectives[42, pp.26-27]." Measuring the feasibility of a legal objective, in this sense, requires a
determination whether the causal linkages are well understood or unclear, and whether or not the implementors have a sufficient scope of authority over enough administrative processes to effect the change.

These are slippery concepts, but through structured interviews and detailed case studies, they can be measured, even if imperfectly. For example, in his study of admissions officials and registrars, Padilla discovered exactly who had the institutional final say and what theory they used to make their decisions. Most, like this respondent, were secure in their judgments, were convinced that they knew their business and would faithfully execute the statutes or regulations (however complex or contradictory), and perceived themselves as virtually unreviewable:

I have complete discretion. No one will question me or look at a file. I could make a resident out of anyone if I wanted to. But I base [the classifications] on the laws, rules, and regulations [51, p.39].

In most instances, this will mean a highly specified theory (= 1).

Given the prevailing industry practice of institutions making the
intellectual property policy rules, the causal linkages or quid pro quo in this area are very well understood (= 1), although as Chew noted in her thorough study, if faculty better understood the legal claims which they could press, the status quo would be considerably different[14]. Because institutional officials often have final sign-off authority for grant applications, recalcitrant faculty may only have moderate bargaining authority within higher education, though the best faculty with the most to gain may leverage outside opportunity as a counter. The First Amendment only formally applies to public institutions, although many private colleges accord a high degree of free speech. With free speech norms on campus, there has not historically been much formal regulation of conduct, although an institution is free to place reasonable restrictions of time, place, and manner. For example, most colleges have detailed rules for recognition of student groups and for use of campus facilities, even for expressive activities (= 1).

Adequacy of Funding
A third dimension of coherence is the adequacy of funding, a criterion that will be particularly salient if there are genuine start-up and maintenance costs to a core program. This is especially so in a campus setting, where the institutional costs are labor-intensive and where there are relatively few economies of scale or production to be had. In these three cases, immigration issues are likely to be marginal costs, both in the undocumented student instance and in employment terms (= 1). It should cost no more to educate one qualified admissible student than another, and virtually every institution already has an office to process paperwork for international students and staff. In the case of non-resident tuition, an undocumented student reclassified to a resident student means some foregone tuition differential, but no greater than that forgone for any out-of-state student who reclassifies. For intellectual property, a higher priority accorded commercialized research likely means increased revenue over the long haul, although this is one of the more specialized and expensive investments an institution can make (= 0). A recent
survey of institutions with new technology transfer programs (less than five years old) showed an annual average budget of nearly $2 million, although more modest efforts are common[2]. There should be only modest financial costs for racial harassment policies (= 1), although startup staff or committee time may be extensive.

Hierarchical Integration

The fourth dimension, hierarchical integration, is the extent to which organizational complexity and heterogeneity will result in uneven implementation. This is a particularly important part of legal implementation in higher education, as to a degree each campus has its own unique legal culture, administrative complexity, governance rules, and layers of decisionmaking. This is seen in residency, where a Type I institution will have the same statute for all campuses, Types II and IV will have the same regulatory scheme for all institutions, and Types III and V will leave the rules to each individual institution[45,47]. In this model, Types III and V are less likely to be hierarchically integrated in the administration of residency rules, and greater variability is
introduced (= 0). For intellectual property, hierarchical integration is difficult to achieve due to the complexity of various funding arrangements, agencies, and industries (= 0). While the most mature offices are often modest size and streamlined in their patent prosecution procedures, it can be difficult to obtain coordinated action in a highly technical procedure that will involve multiple grants, research labs, and funding sources[2]. This is a highly specialized legal area, and a combination of in-house and outside hired counsel is common. In the administration of racial harassment rules, a traditional committee structure is often employed to adjudicate claims, in the tradition of higher education committee work (= 1). While highly decentralized, campus committee structures are usually well understood and widely participatory.

Favorable Decision Rules

The fifth policy variable is the extent to which a legal policy has decision rules favorable for implementation: "In addition to providing clear and consistent objectives, few veto
points, and adequate incentives for compliance, a statute can further the implementation process by stipulating the formal decision rules of the implementing agencies[39, pp.413-414]." For example, state legislation or regulation could spell out residency requirements, due process in hearing and appeal procedures, and exemptions, leaving little discretion to campus officials, or in the alternative, could issue vague guidelines and leave the implementing details to campuses. The former approach is more likely to result in uniform decision rules and outcomes, while in the latter, compliance is likely to emerge from many directions (= 1). Intellectual property rules have basic legal foundations, but campuses can adopt many permutations on the basic legal structure (= 1). Racial harassment codes have not yet reached a level of maturity, widely institutionalized across campuses. Thus, formal decision rules are evolving and will likely be incorporated into traditional campus committee structures (= 0).

Commitment of Implementors

The sixth element is whether the legal policy is assigned to
an implementing unit or official committed to the policy objectives, either an office created specifically for the policy or where preexisting goals are highly congruent with the new policy. Padilla's study of the residency determination process revealed a certain assuredness on the part of residency officials, and suggested an inflexibility or insensitivity towards students considered "foreign" or out-of-the-ordinary; this may be seen as not auguring well for effective or fair implementation of immigration changes[51] ( = 0). The situation for intellectual property administration is likely to be better, as it is likely to be housed in its own special unit and to have institutional support for implementation of its objectives [2] ( = 1). Racial harassment regulations are not likely to fit in well for many traditional academics; at least one highly codified program was assigned to student affairs administrators, viewed as more pro-minority student than were their counterparts in academic affairs, even though the academic placement would have gained more institutional prestige and resources ( = 0).
Extent to Which There is Formal Access by Outsiders

A final feature may not have immediate higher education application, the extent to which there is formal access by outsiders: 
"(a) the potential beneficiaries and target groups of the program, and (b) the legislative, executive, and judicial sovereigns of the agencies[42, pp.28-30]." Higher education has more permeable boundaries than do many public or private organizations, with various boards, advisory committees, and the like, and in every state, the branches of government play increasing roles in legalizing campuses. Therefore, there will be access for external groups. In immigration matters, the National Association of Foreign Student Advisors is the relevant professional organization; in intellectual property, there are several formal legal associations and administrator groups, as well as informal groups such as the Pajaro Dunes presidents, who have met to discuss technology transfer policy[14]; there is no organization for administering racial harassment codes, although the American Civil Liberties Union (ACLU) has opposed the use of
codes and provided counsel for the plaintiff in Doe v. University of Michigan[63]. Of course, there is a large number of higher education national associations that will take positions or issue reports on many facets of higher education policy. Formal access for all three legal regimes is likely to be high for relevant organized constituencies (= 1).

**Operationalizing the Model**

Using a binomial measure, it is possible to develop a composite legal coherence core, prorating the first variable so that each variable receives equal weight. In this fashion, it should be possible to measure legal coherence among policies, institutions, or states. Employing these measures, immigration policy is slightly more coherent than IP or Racial Harassment policies. For example, it is possible, using linear bivariate regression, to test whether there is a significant relationship between the coherence scores and the coefficients of variation. Measuring interstate family planning policy implementation, McFarlane found an .88 $r^2$ for her hypothesis, "An inverse
relationship should exist between measures of statutory coherence and interstate variation in implementation[39, p.417]." In addition, she found, through a Bonferroni test (significant to .05 alpha), significant differences among the coefficients of variation measuring the implementation of the four federal family planning programs she studied.

A table for legal policy coherence scores would look like this:

(insert Table 3 here)

Both McFarlane and Sabatier and Mazmanian acknowledge difficulties in scaling regulatory policies, and these three case studies showed how difficult it can be to boil down complex concepts to binomial measures[39,42]. Nonetheless, studies employing this model to measure higher education legalization and implementation of legal policies should be a substantial advance over our current understanding and practice.

Policy Implications

Understanding how legal initiatives become policy,
particularly complex regulatory or legislative initiatives, should contribute greatly to improving administrative implementation of legal change on campus. Even with the modest, early attempts suggested here, it is clear that some legal policies will be more readily adopted than will others. It is also clear that academic policymakers have substantial opportunities and resources to shape legal policy and smooth the way for legal changes on campus. Of course, no one can be expected to endorse all legal initiatives with equal enthusiasm, or to administer them as if they were all high institutional priorities. Not all will be. Some will be implemented only grudgingly. However, understanding the implementation of legal change will influence the amount of policy output produced, the distribution of policy outputs, and the overall extent of compliance achieved.

With an increase in legalization on campus, this type of "third-generation" implementation scholarship should improve both the theory and practice of administering complex legal change on campus. The considerable autonomy and deference accorded higher
education often translate into institutions designing their own compliance regimes for legislative and litigative change[18], and increased understanding of this complex phenomenon should increase this independence. As no small matter, higher education officials could begin to convince legislators that mandated legal change has a better chance of achieving the desired effects if institutions are allowed to design their own compliance and implementation strategies. This role could ease the sting so many campuses feel when another regulatory program is thrust upon them. It could also lead higher education officials to seek reasonable compliance rather than exemption, as occurs often in practice. As higher education becomes more reliant upon government support, and as colleges offer themselves for hire as willing participants in commercial ventures and as social change agents, legal restrictions are sure to follow. Understanding the consequences of legalization is an essential first step towards controlling our own fate.
References


13. Chayes, A. "The Role of the Judge in Public Law Litigation."


14. Chew, P.


[Compilation of previously published materials]


32. Lange, E. "Racist Speech on Campus: A Title VII Solution to a First Amendment Problem." *Southern California Law Review,* 64 (1990), 105-134.

33. LaNoue, G. and B. Lee. *Academics in Court: The Consequences*


40. Magner, D. "Blacks and Whites on Campus." Chronicle of


47. Olivas, M. "Administering Intentions: Law, Theory, and Practice in Postsecondary Residency Requirements."


56. Reichman,


64. Texas Education Code, Title 3: Higher Education. (Subchapter N: Intellectual Property Policy)

51.680. Review by Commissioner of Higher Education;

51.912. Equity Ownership, Business Participation;

51.914. Protection of Certain Information.