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LOVING THE SINNER: EVANGELICAL COLLEGES AND THEIR LGB STUDENTS

Elizabeth J. Hubertz

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Practices Governed by Scripture – The following behavioral expectations are binding on all members of the Gordon [College] community:

1. Those words and actions which are expressly forbidden in Scripture, including but not limited to blasphemy, profanity, dishonesty, theft, drunkenness, sexual relations outside marriage, and homosexual practice, will not be tolerated in the lives of Gordon community members either on or off campus. . . .

From The Faithful Within blog:

[The difficulties these [LGB] students face are a result of much more than just the college’s policy which prohibits ‘homosexual behavior.’ . . . The oppression they feel comes from a deeper message . . . one which does not affirm their value as contributing members of the community or even their lives.]

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and universities maintain sexual conduct codes that prohibit students from engaging in homosexual practice or behavior while enrolled. Even though these codes have attracted a certain amount of internet-fueled negative attention to the colleges, they are currently in force at more than 100 evangelical schools.

Evangelical college officials have not been reticent to argue that things should remain as they are. Since 2014, many evangelical colleges have sought exemptions from Title IX’s anti-discrimination provisions prohibiting discrimination in federally funded educational programs, believing that their sexual conduct codes might be threatened if Title IX’s anti-discrimination provisions were read to include sexual orientation as well as sex and gender identity.

3 See infra Parts II and IV.A. One word on nomenclature: In most publications and within the lesbian, gay, and bisexual community, one will see the initials “LGB” used to refer to those types of sexual orientation, along with “queer” and other labels. While a “T” for “transgender” is often included in the acronym, the experiences of transgender students are beyond the scope of this article. The term “sexual minorities” is used in social science literature and encompasses any non-heterosexual attraction, orientation, or identity. In the evangelical community, LGB persons are sometimes referred to as “homosexual,” as in Gordon’s policy, see supra note 1. It is also common for evangelicals to use the term “same-sex attracted” or “SSA” to refer to anyone experiencing sexual attraction to people of the same sex, whether or not that person also identifies as lesbian, gay, or bisexual. I use those terms accordingly.


5 See infra Part IV.A

signed a pre-emptive letter to Congress, asking it to prevent the IRS from eliminating the tax-exempt status of religious schools that maintain policies prohibiting same-sex marriage. In 2016, evangelical colleges in California successfully opposed a bill that would subject private religious colleges to some of the same non-discrimination standards as public colleges.

In opposition to any case law or statute that might compel a change in their sexual conduct codes, evangelical colleges have asserted their First Amendment right to institutional religious freedom. Institutional religious freedom is the authority of a self-governing religious institution to set internal policies based on religious precepts without interference from the government. The institution exercises this authority at a collective level on behalf of its constituents: the congregation members, parishioners, employees, students, or other institutional participants. While institutional religious freedom protects members against

See also infra Part II.B.


8 After Obergefell v. Hodges, 135 S. Ct. 2584 (2015) recognized same-sex marriage, the signatories fear a reprise of the IRS’s 1970s-era policy refusing to grant a section 501(c)(3) charitable organization tax exemption to religious schools that maintained policies prohibiting interracial marriage. See Bob Jones University v. United States, 461 U.S. 574, 605 (1983) (upholding elimination of exemption). See also infra Part II.C.

9 Biola University set up a website to rally opposition to what it described as “[a] threatening and overreaching bill” that would “substantially interfere with the ability of California’s faith-based colleges and universities to conduct themselves in a manner consistent with their beliefs.” See Biola Staff, Preserve Faith-Based Higher Education, BIOLA UNIV. (Oct. 3, 2016), http://www.opposesb1146.com/. See also Patrick McGreevy, Faith-Based Colleges say that Anti-Discrimination Bill would Infringe on their Religious Freedom, LA Times (Jun. 22, 2016). In August 2016, the bill was passed, as amended, and became law. See 2016 Cal. Legis. Serv. Ch. 888 (S.B. 1146), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1146. In the new version, religious schools are not subject to state anti-discrimination provisions, but are required to disclose to students whether they have exemptions from federal or state law, and report the same to the California Student Aid Commission. See id.

encroachment from outside forces, including secular laws that run counter to the institution’s religious beliefs, it also encompasses the right to make and enforce religious rules like the sexual conduct codes against members on an internal level.

In light of all this, it may be surprising that there are LGB students at any evangelical college at all. But there are, there have been for decades, and there most likely will be in the future. I should know—I was one of them. Although my time there was long ago, I have had something of a front-row seat in recent years through my participation in OneWheaton, an unofficial support group for LGBT+ students and alumni, along with their allies. There are somewhere between 50 to 60 of these unofficial evangelical college groups, most formed within the last six years. The groups vary in size and in direction; some have sought elimination of the sexual conduct policies, while others are more focused on offering encouragement and support to those who have lived with them. There are also unofficial student-only groups that have assembled for similar purposes.

In all the discussion of the institutions’ religious freedom, there has been little discussion of what some of the people most affected by the evangelical colleges’ sexual conduct codes—the students—might think. Does the institutional leadership speak for them? Do they have a stake in changing the codes’ requirements? Do their interests matter at all where religious liberty is concerned? Why do sexual minority students go to evangelical colleges in the first place? If they are unhappy, why don’t they just leave?

This article looks at those questions through the framework of

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11 See infra note 15.
12 I graduated from Wheaton in 1986. See infra Part III.B for my story.
13 There is also an umbrella organization, Safety Net, in which the groups take part. I have participated in and have given financial support to OneWheaton, although I have not held any official position with that group. The opinions expressed in this article are entirely my own and should not be attributed to Wheaton College, to anyone associated with Wheaton College, or to OneWheaton or anyone associated with that group.
14 See infra Part V.
15 “[Y]our sexual identity is not a tragic sign of the sinful nature of the world. You are not tragic. Your desire for companionship, intimacy and love is not shameful. It is to be affirmed and celebrated just as you are to be affirmed and celebrated.” Letter No. 1, ONEWHEATON, http://www.onewheaton.com/letter.html (emphasis original). Approximately 1,000 alumni signed the letter, ranging from graduates of the 1950s—the oldest gay alumnus who signed graduated in 1952—to current students.
16 The story of Biola Queer Underground, which began as a secret group of gay and lesbian students at Biola University (CA), is told in Rescuing Jesus. See DEBORAH JIAN LEE, RESCUING JESUS, 131–67, 228–62 (2015).
institutional religious freedom. Part II identifies evangelical colleges and the importance of the sexual conduct codes to institutional identity, and also provides an overview of the legal environment in which they currently operate. Part III explains how sexual minority students come to attend evangelical colleges, explaining not only how they arrive, but also why they stay. Part IV describes the operation of the sexual conduct codes and their effect on the sexual minority students who live with them. Finally, Part V looks again at institutional religious freedom, in consideration of voluntary association and third-party burdens.

II. EVANGELICAL COLLEGES AND RELIGIOUS FREEDOM

Evangelical colleges and universities are a subset of the many religiously affiliated colleges across the country and are among the most conservative. Evangelical Christians believe that homosexuality is a sin. This belief is non-negotiable for evangelical colleges; as it is central to their religious identity. As a result, evangelical colleges maintain sexual conduct codes which prohibit enrolled students from engaging in homosexual practice, behavior, activities, and relationships; from engaging in any sexual activity outside of a one-man/one-woman marriage; and in some cases, from advocating or promoting the idea that homosexuality is anything other than sinful.

For the most part, the colleges are free to do so. There is no federal statute prohibiting discrimination on the basis of sexual orientation in private religious educational programs.18 Accreditation agencies have exempted them from anti-discrimination provisions.19 Most states and

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17 There are of course a variety of Christian views on the ethics and morality of homosexuality, but not a variety of evangelical views. Some have suggested to me that Matthew Vines and David Gushee are counterexamples. See generally MATTHEW VINES, GOD AND THE GAY CHRISTIAN: THE BIBLICAL CASE IN SUPPORT OF SAME SEX RELATIONSHIPS (2014); DAVID P. GUSHEE, CHANGING OUR MIND: A CALL FROM AMERICA’S LEADING EVANGELICAL ETHICS SCHOLAR FOR FULL ACCEPTANCE OF LGBT CHRISTIANS IN THE CHURCH (2014).

18 But see infra Part II.B.

19 For example, the ABA, in its accreditation standards, allows law schools to have a religious purpose and to adopt policies for admissions that relate to that purpose, as long as they make those policies known to students before they “affiliate” with the school. This means, for example, a law school is not required to “recognize or support organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school.” American Bar Association, ABA Standards and Rules of Procedure for Approval of Law Schools 2015–2016, Standard 205(c) & Interpretation 205-2, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_2.authcheckdam.pdf. See also Valerie Wells,
municipalities do not include sexual orientation in their general anti-discrimination statutes.20 Where such laws exist, religious colleges have been successful in obtaining statutory exemptions from their provisions.21

The First Amendment allows religious institutions, including religious educational institutions, to operate and govern themselves according to their religious principles. This freedom means that religious institutions can set the rules for their internal functioning and that they can choose their ministerial employees without regard to secular law.22 Where their religious liberty is substantially burdened, they may be exempt from the requirements of laws that non-religious educational institutions must obey.23 But a strong governmental interest in the statute from which the institutions seek an exemption can outweigh institutional freedom.24 Religious institutions fear that such a governmental interest has presumptively materialized in the wake of Obergefell’s recognition of a constitutional right to same-sex marriage.

A. Identifying Evangelical Colleges and Universities

There are at least 900 religiously affiliated private institutions of post-secondary education in the United States, but only a fraction of these qualify as evangelical institutions.25 Of the 900 religious


20 Of the 100+ schools discussed below, most (79) were in states or municipalities that did not have any laws prohibiting discrimination on the basis of sexual orientation as of the time that their codes were surveyed for this article (June 2014). See Doug NeJaime, Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination, 100 Cal. L. Rev. 1169, 1190–95 (2014) (summarizing state laws).

21 See, e.g., MINN. STAT. § 363A.26(b) (2015) (religious educational institutions exempt from sexual orientation provisions of anti-discrimination law).


24 Id.

institutions, about 457 are either seminaries or Bible colleges that specifically train students for ministry within their religion. Schools sponsored or operated by Roman Catholic religious orders or other organizations within the Church make up another 287 of these institutions. Evangelical colleges fall within the remainder: the 200 or so four-year colleges that either have a historic association with a Protestant denomination, or non-denominational colleges that are associated in a more general way with the Protestant faith.

Not all Protestant colleges are evangelical. Some Protestant colleges have cut the ties with their founding denomination and are, at present, nearly indistinguishable from their secular counterparts. Others maintain some ties and are nominally Christian, perhaps having a college chaplain from the sponsoring denomination, but they hire faculty and staff without examination of religious background or current beliefs. In contrast, the evangelical colleges maintain strong ties to their denomination, or to founding principles, if non-denominational.

For purposes of this article, rather than attempting to parse each school’s evangelical bona fides, I have focused my attention on the 117 U.S.-based schools that are members of the Council of Christian Colleges and Universities (“CCCU”). These schools claim the evangelical name for themselves and the CCCU itself makes the determination of whether a college or university fits the definition. Based on my review of the list, I believe it is fair to say that these schools are solidly in the mainstream of evangelical faith-based higher education, and for the most part they are unquestionably evangelical.

The CCCU’s member schools enroll more than 400,000 students

26 Id.
27 See id. Although many Catholic colleges and universities have sexual conduct codes that are similar to those found at Gordon and other evangelical colleges, I do not discuss them in this paper. United States Catholic schools have different histories, theologies, structures, and cultures than their evangelical counterparts and they should be considered on their own terms.
28 See id.
29 I examined the policies as of June 2014, when the CCCU had 120 full members.
30 To belong to the CCCU, a school must be located in the United States or Canada and: (1) have a strong commitment to Christ-centered education; (2) be regionally accredited (U.S. only); (3) be a four-year institution with a broad curriculum based in the arts and sciences; (4) hire Christians for all full-time faculty and administrative positions; and (5) have sound finances. See Council for Christian Colleges and U., Members & Affiliates, http://www.cccu.org/members_and_affiliates. There are some surprising omissions from the list: Baylor University and Liberty University are not CCCU members even though they are among the most widely recognized evangelical Protestant colleges.
annually. Its member schools can be found in 32 states, from the West Coast to the Northeast, throughout the Midwest and in the Deep South. As of June 2014, California was home to 13 CCCU colleges—more than any other state—followed by Texas and Tennessee (eight each), and Illinois and Indiana (seven each). Like American evangelicalism itself, the CCCU is home to colleges and universities associated with the Anabaptist, Wesleyan/pietist, charismatic/Pentecostal, and Reformed traditions. Members come from a broad spectrum of white evangelical Protestant denominations as well as nondenominational or interdenominational churches and organizations. This relative theological ecumenicalism among membership was a deliberate choice that past CCCU leadership made: “By utilizing a flexible, irenic approach to evangelical boundaries and applying a truly ecumenical spirit, the CCCU has successfully united a kaleidoscopic group of schools in the pursuit of a common cause.”

What separates these evangelical colleges from their Protestant, but less religious, sisters is Christ-centered education. At a CCCU school, religious faith is integrated with academic learning through the development of an evangelical worldview, a “set of assumptions that frame a person’s understanding of reality.” The student will come to see the subject he or she studies—history, biology, sociology—through an evangelical lens, “faithfully relating scholarship and service to biblical truth.” Integration of faith and learning does not mean, of course, that every evangelical scholar who studies a subject will reach the same conclusions or that there is only one answer to every question.  

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32 See id.
33 See id.
34 The CCCU has a helpful infographic explaining the relationships among the Protestant denominations to which its members belong. See COUNCIL FOR CHRISTIAN COLLEGES & U., PROTESTANT FAITH TRADITIONS OF CCCU MEMBER INSTITUTIONS, http://www.cccu.org/~/media/CCCU_ProtestantFaithTree1.pdf.
36 See id. at 53–54.
37 Stephen Beers & Jane Beers, Integration of Faith and Learning, in THE SOUL OF A CHRISTIAN UNIVERSITY, 52, 55 (Stephen T. Beers ed., 2008). There are many models and methodologies one can use to accomplish this integration. Id. at 63–67 (describing three integrative strategies). Integration of faith and learning will also look different in the hard sciences than it does in the arts. Id. at 60.
posed in the course of academic study.\textsuperscript{39} It does mean that evangelical beliefs flow throughout the whole curriculum.

In addition, just as evangelical Christianity permeates all subjects taught, rather than being segregated in the religion department or nodded at in a once-a-week chapel service, the schools’ codes of conduct determine how one may spend a Friday night, and not just how one spends Sunday mornings.\textsuperscript{40} While codes of conduct can be found at all colleges, and reflect “higher education institutions’” way of informing students about the values of the academy as they affect the limits of student behavior,\textsuperscript{41} evangelical colleges’ codes of conduct are specifically “intended to promote Christian distinctives and values that are reflected in disciplined behavior.”\textsuperscript{42}

Some of these CCCU-institution rules are the same as those one might find at secular schools, such as prohibitions against stealing, or cheating on exams. Other rules are unique to evangelical colleges and are tied to the school’s mission statement or statement of faith. For example, students may be required to attend school-sponsored chapel or religious services on a near-daily basis.\textsuperscript{43} Students may also be subject to faith-based dress codes\textsuperscript{44} and prohibited from drinking, smoking,

\textsuperscript{39} I acknowledge that I am not doing justice to the concept as evangelical educators understand it. My point is simply that this is an important feature of evangelical education and one which is often very attractive to potential students and their families. See infra Part III.B. I also want to make it clear that an educational approach of integrated faith and learning does allow room for differing opinions on some (but not all) topics and that it does not always produce the kind of lockstep, rote thinking that those outside the faith often ascribe to graduates of these schools.\textsuperscript{40}

\textsuperscript{40} The codes of conduct found at the CCCU colleges echo the \textit{in loco parentis} philosophy of earlier generations in which “[c]ollege authorities stand \textit{in loco parentis} concerning the physical and moral welfare and mental training of the pupils.” DAVID R. HOEKEMA, \textit{CAMPUS RULES AND MORAL COMMUNITY} 22 (1994) (quoting Gott v. Berea College, 161 S.W. 204 (Ky. 1913)). As stand-ins for a student’s parents, colleges and universities had full authority to direct the behavior of students and to punish rule violators, and a higher responsibility for students’ well-being.\textsuperscript{41}

\textsuperscript{41} MICHAEL DANNELLS, FROM DISCIPLINE TO DEVELOPMENT: RETHINKING STUDENT CONDUCT IN HIGHER EDUCATION 49 (ASHE-ERIC Report series Vol. 25, No. 2 1997).


\textsuperscript{43} See, e.g., MISSOURI BAPTIST UNIVERSITY, \textit{STUDENT HANDBOOK}, at 112 (2012) (on file with author) (“Undergraduate Students . . . are expected to attend all chapel convocation programs. . . . A student who attends less than 50% of chapel convocation programs in any one semester loses one quality point and is in danger of being placed on disciplinary probation.”).

\textsuperscript{44} See, e.g., CALIFORNIA BAPTIST UNIVERSITY, \textit{STUDENT HANDBOOK}, at 18 (2013–14) (on file with author) (“the appearance of members of the campus community should be consistent with the mission and values of a Christian university . . . display of the following is
dancing, or gambling, also on religious grounds.\footnote{See \textit{e.g.}, \textit{TOCCOA FALLS COLLEGE, STUDENT HANDBOOK}, at 10 (2011–12) (on file with author) (“As a Christian institution, the college has sought to establish the standards and policies based on scriptural, moral, and ethical principles. . . . students agree to . . . refrain from the use or possession of alcoholic beverages, illegal drugs, and all forms of tobacco . . . .”); \textit{BRYAN COLLEGE, STUDENT HANDBOOK}, at 26 (2013–14) (on file with author) (“To encourage stewardship of God-given resources, gambling in all forms is prohibited.”).}

Gordon College’s sexual conduct code is an example of a faith-based rule. It is found in a section of the school’s Behavioral Standards, headed “Practices Governed by Scripture.”\footnote{See supra note 1, at 6.} The policy further describes the prohibited conduct as “acts which are expressly forbidden in Scripture.”\footnote{Id.} At other CCCU colleges, the Biblical basis for the sexual conduct policy is made even more explicit by citing chapter and verse after each prohibited item:

Palm Beach Atlantic University affirms the biblical understanding of sexuality: Sex is intended for producing offspring (Genesis 1:28) and for pleasure (Proverbs 5:18, 19; Song of Solomon). . . . Sexual relations outside of marriage are strictly forbidden (Exodus 20:14; Proverbs 5:1-11; 6:23-33; 7:5-27; 1 Corinthians 6:9). ‘Sexual immorality’ (both heterosexual and homosexual) is strongly prohibited in Scripture (Romans 1:26-28; 1 Thessalonians 4:3) because our bodies are ‘temples of the Holy Spirit’ (I Corinthians 6:13-20).\footnote{\textit{PALM BEACH ATLANTIC UNIVERSITY, THE NAVIGATOR}, at 34 (on file with author). See \textit{id.} at 23 (“[Chapel attendance] is a requirement for all full-time students, both undergraduate and graduate, who attend class during the daytime.”).}

Not every faith-based behavioral standard is treated the same. For example, some evangelical colleges have recently relaxed their longstanding prohibitions on drinking, smoking, and dancing.\footnote{Mark Oppenheimer, \textit{The First Dance}, N.Y. TIMES (Jan. 28, 2007), http://www.nytimes.com/2007/01/28/magazine/28dancing.t.html?pagewanted=all (explaining the relaxation of dancing policies at John Brown University, Wheaton College, and Cornerstone University, all CCCU schools).} In so doing, the colleges have acknowledged that these policies are not as central to the requirements of their faith as they had previously maintained, and that the policies could be safely jettisoned without giving up on Christ-centered education or losing their religious identity.\footnote{Wheaton College’s experience with these policies is instructive. In 2003, it abolished its long-standing policy that prohibited students from engaging in social dancing, and it also allowed faculty and staff to drink alcoholic beverages at their discretion, as long as undergraduates were not present. Richard N. Ostling, \textit{Wheaton College Oks Dancing but Won’t Get Swept off its Feet}, L.A. TIMES (Mar. 8, 2003), http://articles.latimes.com/2003/mar/}
revoke the membership of the schools that relaxed these rules and currently does not require member schools to prohibit drinking, smoking, or dancing in order to remain a member in good standing.

The CCCU and its members do not consider the sexual conduct codes to be in the same category. In 2001, the CCCU president convened an ad hoc task force on sexuality to “help each CCCU member institution address the highly divisive issue of homosexuality in a constructive manner consistent with our unique identities as Christians.” The Task Force generated a Report which reiterated the evangelical view that “[h]omosexual behavior represents a distortion of the creational intent of God” and ruled out any “gay affirming” policy lest the institution lose its religious identity.

For the CCCU schools, loss of religious identity is by no means an irrational fear. Many formerly religious schools have abandoned required adherence to creeds or statements of faith, mandatory chapel attendance, and religious behavioral standards. Evangelical educators largely view this history as a decline and fall, and are determined to avoid the slippery slope that ends in secularism. By tying the establishment of “gay-affirming” policies to what amounts to a death sentence for an evangelical college, the CCCU Report located such policies at the very core of Christ-centered education, making it difficult for any school so inclined to adopt a more LGBT-friendly approach.

The Obergefell decision recognizing same-sex marriage provided an opportunity for additional clarification. In its wake, two CCCU members, Goshen University (IN) and Eastern Mennonite University (VA), indicated that they would now hire faculty and staff who were in a

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08/local/me-religwheaton8. According to a person familiar with Wheaton’s history, “the tide shifted 10 or 20 years ago” so that drinking and dancing are now viewed as matters of personal discretion among evangelicals. Id. As then-college president Duane Litfin explained to the Wheaton community in a mailing: “a 1991 Illinois law forbids discrimination against employees who drink or smoke off the job unless that violates a ‘sincerely held religious belief.’ Wheaton acknowledges ‘the Bible nowhere requires abstinence’ and the bans were only traditions.” Id. See also NAOMI SCHAEFFER RILEY, GOD ON THE QUAD 183–84 (2005) (discussing same in connection with other schools).

51 COUNCIL FOR CHRISTIAN COLLEGES AND U., DRAFT REPORT OF THE AD HOC TASK FORCE ON HUMAN SEXUALITY, at 1 (Aug. 16, 2001), http://www.cccu.org/professional_development/resource_library/2002/report_the_ad_hoc_task_force_on_human_sexuality [hereinafter Draft Report]. The Report is labeled “Draft #3” but remained posted at the CCCU website as late as 2015, although it appears to have since been taken down.


same-sex marriage.\textsuperscript{54} In response, CCCU members Union University (TN) and Oklahoma Wesleyan University announced that they would withdraw from the CCCU because of the CCCU’s failure to “respond appropriately” to Eastern Mennonite and Goshen’s decisions.\textsuperscript{55} Goshen and EMU then withdrew from the CCCU in order to avoid “significant division” among the membership.\textsuperscript{56} The CCCU clarified its position:

[T]he CCCU has maintained the historic Christian view of marriage, defined as a union of one man and one woman, in its employment policies and student academic program conduct codes. As it relates to this topic, therefore, the CCCU only advocates for ‘principles of religious freedom, which allow Christian colleges to hire based on religion and to only employ individuals who practice sexual relations within the boundaries of marriage between a man and a woman.’\textsuperscript{57}

In the fall of 2016, the CCCU offered further clarification, adopting a tiered membership policy. In order to be a full voting member of the CCCU, a college must show a commitment to the “[h]istoric Christian belief[]” that intimate sexual relations are “intended for persons in a marriage between one man and one woman.”\textsuperscript{58} A school that recognizes same-sex marriage could be a “collaborative partner,” entitled to attend CCCU conferences and to participate in research, but not to have full voting membership.\textsuperscript{59}

In describing his institution’s disassociation with the CCCU, the president of Oklahoma Wesleyan University, Dr. Everett Piper, bluntly described the importance of the prohibition against homosexuality. When the CCCU president suggested to him that member schools could

\textsuperscript{54} See Eastern Mennonite U., EMU Updates Non-Discrimination Policy, http://emu.edu/president/policy/; see also Goshen College, Goshen College Board of Directors Updates Non-Discrimination Policy, https://www.goshen.edu/about/leadership/president/non-discrimination-policy-decision/. The policy for students remains unchanged at both schools.

\textsuperscript{55} Union University, Union U. Announces Withdrawal from CCCU, (Aug. 13, 2015), http://www.uu.edu/news/release.cfm?ID=2363. Union University, affiliated with the Southern Baptist Convention, stated that it would maintain its relationship with that body.


\textsuperscript{57} Id.

\textsuperscript{58} CCCU Board of Directors, CCCU Memberships and Collaborative Partnerships, Taskforce on CCCU Associational Status, at 3 (Sept. 15–16, 2016), https://world.wng.org/sites/default/files/assets/CCCU_task_force_report.pdf.

\textsuperscript{59} See id. at 4–5.
When the CCCU president suggested to him that member schools could agree to disagree, as they did with other theological disputes, he responded: “You’re not going to convince me that the volitional, behavioral act of sodomy or any other sexual act is on the same moral plane as speaking in tongues, baptism, and other doctrinal disagreements.”

That statement captures the importance of evangelical beliefs about homosexuality: churches and denominations have splintered over how and when to baptize believers, but those mere doctrinal disputes pale in comparison.

B. Institutional Religious Freedom

For many people, including the students, faculty, and administrative personnel at the evangelical colleges described above, individual religious freedom can be exercised by uniting with other believers to pray, worship, and live out a common vision of the faithful life. The First Amendment recognizes that these religious collectives can exercise religious freedom on an institutional basis, in the form of self-governance as well as in the ability to obtain exemptions from laws they and their members would otherwise have to obey.

First, the Supreme Court has recognized the freedom of churches to create their own rules of membership, belief, and behavior and to decide who speaks for them as a minister without interference from the government. In this context, the Free Exercise Clause “protects a religious group’s right to shape its own faith and mission,” while the Establishment Clause prevents the government from determining who can “minister to the faithful.” As interpreted, this means that neither the legislature nor the courts can intrude into institutional religious

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63 Id. at 706.
64 Id.
with a church’s governance of its own affairs. Courts must refrain from hearing cases that “directly or derivatively require the resolution of religious questions, such as disputes over theological doctrine, scriptural interpretation, or ecclesiastical law.” This hands-off policy applies not only to intra-church disputes about church property and to a church’s choice of ministers, but also encompasses a church’s authority to admit or expel members and to set standards for members’ behavior.

This doctrine is usually known as “church autonomy,” and most of the Supreme Court’s institutional religious freedom cases involve churches. In *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, the Court used the terms “religious group,” “religious institution,” and “religious organization,” to describe the entities that could claim a First Amendment right of autonomy to select their ministers. It did not define those terms, however, and it is unclear to what extent this kind of autonomy applies outside the church setting, and whether this kind of autonomy extends beyond the selection of ministerial employees.

Second, the Free Exercise Clause also protects generally the rights to claim an exemption from an otherwise applicable law where the exercise of religion would be substantially burdened if the adherent were to obey it. After *Employment Division Department of Human*

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66 *See*, e.g., *Dowd v. Society of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988) (court would not decide what obligations of religious society were toward its members); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 34–35 (D.D.C. 1990) (abstaining from deciding whether termination of membership was tortious).

67 *See* *Watson v. Jones*, 80 U.S. 679 (1871) (two factions of Presbyterians disputing ownership of church property); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 95–96 (1952) (property dispute between the Russian Orthodox Church in Russia and the North American branch).

68 *Hosanna-Tabor*, 132 S. Ct. at 705–06. The defendant in that case was a church and school and was considered exempt from the anti-discrimination provisions of the Americans with Disabilities Act of 1990 where its ministerial employees were concerned. While this might seem to have extended church autonomy beyond the church context, the defendant was described as “a member congregation of the Lutheran Church–Missouri Synod” and it appears to have been the church, rather than school personnel, that made the decision to fire the minister, even though the school employed her as a fourth grade teacher. *Id.* at 699–700.


Resources of Oregon v. Smith\textsuperscript{71} made it more difficult for believers to claim Free Exercise rights, these rights were expanded through statute. The federal Religious Freedom Restoration Act of 1993 (RFRA)\textsuperscript{72} provides that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . ,” unless Congress specifically exempts the statute or regulation from its coverage.\textsuperscript{73} Religious institutions, including the evangelical schools and colleges described above, are considered “persons” for purposes of asserting their rights under RFRA.\textsuperscript{74}

Unlike the constitutional immunity described above, in which certain internal church topics are entirely off-limits to governmental interference, courts deciding RFRA claims will balance competing religious liberty interests with the interests of the government in enacting the rule, law, or regulation. If a federal statute does “substantially burden” a religious institution, the government can enforce its statute or regulation only if it shows that the law, as applied to the burdened institution: “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.”\textsuperscript{75} \textit{Hobby Lobby} is the latest Supreme Court example of this balancing test at work.\textsuperscript{76} The Court found that the ACA regulations, which required that employees be able to obtain contraceptive devices free of charge in connection with employer-supplied health insurance plans,\textsuperscript{77}
substantially burdened the exercise of the employer’s religious belief that abortion is sinful. The majority assumed that the government had a compelling interest in “guaranteeing cost-free access to . . . contraceptive methods,” but ultimately concluded that there were other means of accomplishing the government’s objective that would not interfere with the employees’ ability to obtain contraception free of cost.

Third, writing the law or regulation itself in such a way that religious institutions are specifically exempted from compliance with the law or regulation also protects institutional religious freedom. Where students are concerned, Title IX is the most relevant example. It prohibits discrimination on the basis of sex in “education program[s] or activit[ies] receiving Federal financial assistance.” Title IX also contains a broad exemption for “an educational institution which is controlled by a religious organization” if the application “would not be consistent with the religious tenets” of the organization.

To invoke the Title IX exemption, a religious college need only request it from the Department of Education by “identifying the provisions of this part interpreted this to include “the full range of Food and Drug Administration (FDA)-approved contraceptive methods. . . .” 77 Fed. Reg. at 8725; 45 C.F.R. §147.130(a)(1)(iv). See also 29 C.F.R. §2590.715–2713(a)(1)(iv); 26 C.F.R. §54.9815–2713(a)(1)(iv).

Hobby Lobby, 134 S. Ct. at 2751. The regulations required the plaintiff corporations to arrange for insurance coverage for their employees that included coverage for contraceptives. Because the corporate owners believed that their employees’ use of the contraceptives could lead to what they believed to be abortions, the regulations if enforced would cause the owners to “engage in conduct that would seriously violate their religious beliefs” and impose a substantial burden on their “ability to conduct business in accordance with their religious beliefs.” Id. at 2788, 2775, 2778–79.

Id. at 2780. See id.

20 U.S.C. § 1681(a). Federal financial assistance includes participation in the federal student financial aid programs in Title IV. While there are some religious schools that have opted out of this program, such as Hillsdale College, Grove City College, and Patrick Henry College, none of the schools described above have foregone participation. See Iby Caputo & Jon Marcus, The Controversial Reason Some Religious Colleges Forego Federal Financial Aid, ATLANTIC (July 7, 2016), http://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forego-federal-funding/490253/ (listing schools; list based on information from a FOIA request to the Department of Education).

"controlled by a religious organization" means (1) the school trains students to be clergy; (2) the school “requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization”; or (3) the school’s official publications explicitly state that it is “controlled by a religious organization . . . or is committed to the doctrines of a particular religion and the religious organization appoints members of its board of trustees and contributes significant financial support.” See Assurance of Compliance with Title IX, 43 Fed. Register 15141 (1977).
Title IX exemption, a religious college need only request it from the Department of Education by “identifying the provisions of this part which conflict with a specific tenet of the religious organization.”

Since the beginning of 2014, 44 of the evangelical colleges described in Part II.A have applied for this exemption, stating that their institutional belief that homosexuality is a sin is in conflict with any law prohibiting discrimination on the basis of sexual orientation. Once the exemption

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84 See, e.g., Letter from J. Derek Halvorson, Ph.D., President of Covenant College, to Catherine Lhamon, Assistant Sec’y, Dep’t of Educ. (May 28, 2015), http://thecolo.mn/wp-content/uploads/2015/11/CovenantCollege.pdf. The Department of Education has also made the letters and the responses available to the public, after it received numerous requests for the information. See Office of Civil Rights, Religious Exemptions, U.S. DEP’T EDUC. (June 1, 2016), http://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/rel-exempt-pr.html.

85 See, e.g., Halvorson Letter, supra note 84. The OCR has not made a determination as to whether Title IX also encompasses discrimination on the basis of sexual orientation, although there are several reasons to think it might. For example, the OCR interprets Title IX to encompass discrimination on the basis of gender identity. See G.G. v. Gloucester Cty. Sch. Bd, 822 F.3d 709, 718 (4th Cir. 2016) (discussing OCR’s interpretation of its regulations), cert. granted in part, 137 S. Ct. 369 (2016). See also U.S. Dep’t Educ., Office of Civil Rights, Dear Colleague Letter – Transgender Students (May 12, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.


Finally, federal anti-discrimination legislation has been introduced which would amend Title IV and Title VI of the Civil Rights Act of 1964 to include LGBT persons. It would prohibit discrimination in public colleges and universities, but also in programs and activities receiving federal financial assistance. See Equality Act of 2015, S.1858, 114th Congress (2015). The bill does not create an exemption for religious actors or organizations and provides that RFRA may not be used either to challenge an action or as a defense to a claim brought under the Act, as amended. S. 1858, 114th Cong. § 1107. As of December 2016, the bill had not been
conduct policies even if Title IX eventually comes to include sexual orientation. 86 To date, no school has been denied an exemption. 87

State statutes have also carved out some specific exemptions to anti-discrimination statutes for religious institutions, along the lines of Title IX. Where such laws do exist, they either exempt religious educational institutions from their ambit or do not extend sexual orientation protections to educational institutions in general. 88 California, home to 13 of the evangelical schools described above, currently prohibits discrimination on the basis of sexual orientation at public colleges and universities, and at schools that receive state financial aid, but exempts religious colleges if their religious tenets are inconsistent with the law’s application. 89

C. After Obergefell

The above describes the legal environment in which evangelical colleges and universities have operated for the last 20 to 25 years; however, it has recently changed. In Obergefell, the Supreme Court invalidated state laws prohibiting same-sex marriage, enabling same-sex couples to marry in all 50 states. 90 The majority’s decision recognized the constitutional dimensions of same-sex marriage: “The Constitution promises liberty to all within its reach, a liberty that includes certain

86 For example, the exemption allows a school to “subject [a] person to separate or different rules of behavior, sanctions or other treatment.” See Letter from Catherine E. Lhamon, Assistant Secretary, to Dr. Lawrence Ressler, Ph.D., Interim President, East Texas Baptist University (May 4, 2015) (explaining that school is exempt from 34 C.F.R. § 106.31(b)(4)). See also Daniel Borgen, Jayce M. Carries on, Undeterred; George Fox Refuses to Change Course, PQMONTHLY (Oct. 15, 2014), http://www.pqmonthly.com/jayce-m-carries-undeterred-george-fox-refuses-change-course/20855 (transgender student’s Title IX administrative claim dismissed, school’s exemption upheld).

87 See Kif Augustine-Adams, Religious Exemptions to Title IX (Feb. 19, 2016), available at http://ssrn.com/abstract=2735173 (noting that as of February 2016, 253 exemptions had been granted and none denied).

88 None of these laws clearly applied to a religious college’s treatment of its enrolled students. The version of the District of Columbia Human Rights Act in effect during the 1980s was an exception. See Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1, 20 (D.C. 1987) (en banc) (anti-discrimination provision required Catholic university to grant gay rights groups the “tangible benefits” of “University Recognition,” but not official recognition). The statute, however, was amended shortly after the decision and exempted religious educational institutions from the sexual orientation provisions. See D.C. Stat. § 1-2520(3) (1981) (now D.C. Stat. § 2-1402.41).


specific rights that allow persons, within a lawful realm, to define and express their identity."91 After describing the importance of marriage as an institution, the Court held that “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”92 Denial of this fundamental right burdens the liberty of same-sex couples, and also “abridge[s] central precepts of equality.”93 Among other things, “[m]arriage remains a building block of our national community. For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.”94

At the same time, the opinion sought to assure religious believers that the government’s recognition of same-sex marriage would not interfere with their beliefs that same-sex marriage and same-sex relationships in general are wrong: “The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. . . .”95 That reassurance rang hollow, as Chief Justice Roberts pointed out in dissent:

The majority graciously suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage. The First Amendment guarantees, however, the freedom to ‘exercise’ religion. . . . Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage. . . .96

The chief justice suggested a couple of ways in which evangelical colleges might run afoul of Obergefell’s “new right.” First, if a college refused to provide the schools’ married student housing to same-sex students who are married while providing it to other students,97 the government might be able to challenge the school’s decision, using Obergefell for the proposition that according constitutional recognition to same-sex marriage is a compelling governmental interest that outweighs the substantial burden on the college. More than a year after the decision, this scenario has not yet materialized, at least as far as I have been able to discover. That is not to say that the question of

91 Id. at 2593.
92 Id. at 2599.
93 Id. at 2590.
94 Obergefell, 135 S Ct. at 2601.
95 Id. at 2607.
96 Id. at 2625 (Roberts, C.J., dissenting) (citations omitted).
97 Id. at 2626 (Roberts, C.J., dissenting).
recognition might not come up in some other way, perhaps if a married student were expelled or otherwise disciplined for violating the sexual conduct code.\textsuperscript{98}

Chief Justice Roberts also described a second possibility: the federal government could change its rules to disadvantage religious institutions that refused to acknowledge same-sex marriage.\textsuperscript{99} Justice Alito also raised this possibility at the \textit{Obergefell} oral argument:

\begin{quote}
JUSTICE ALITO: Well, in the \textit{Bob Jones} case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?

GENERAL VERRILLI: You know, I – I don’t think I can answer that question without knowing more specifics, but it’s certainly going to be an issue.\textsuperscript{100}
\end{quote}

The \textit{Bob Jones}\textsuperscript{101} decision upheld the IRS’ determination that a private religious university that maintained a policy against interracial marriage\textsuperscript{102} did not qualify as a charitable organization for purposes of obtaining a tax exemption under section 501(c)(3).\textsuperscript{103} The IRS changed its rule to make clear that charitable trusts could not have a purpose that was “illegal or contrary to public policy,” and that “[b]ased on the “national policy to discourage racial discrimination in education,” a private school that discriminated on the basis of race could not be considered “charitable,” even though the University’s religious beliefs required it to maintain the interracial marriage policy.\textsuperscript{104}

\begin{footnotes}
\textsuperscript{98} This has been an issue at non-CCCU evangelical colleges even before \textit{Obergefell}. Greg Horton, \textit{Student who Married Same-Sex Partner Expelled from Southwestern Christian University}, RELIGIOUS NEWS SERVICE (July 11, 2014), http://www.christiancentury.org/article/2014-07/student-who-married-same-sex-partner-expelled-southwestern-christian-university.

\textsuperscript{99} See \textit{Obergefell}, 135 S. Ct. at 2626 (“[T]he Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage.”).


\textsuperscript{101} 461 U.S. 574 (1983).

\textsuperscript{102} The University’s interracial marriage policy was similar to several types of the evangelical colleges’ sexual conduct policies discussed in Part IV.A. It prohibited not only being a partner in an interracial marriage, but also dating outside one’s race, affiliation with a group that promoted interracial marriage, and promoting or encouraging others to violate the university’s rule. \textit{See Bob Jones}, 461 U.S. at 580–81.

\textsuperscript{103} Id. at 579.

\textsuperscript{104} Id. Most importantly, the university made and lost the same kind of argument the evangelical colleges make to defend the sexual conduct codes; namely, that enforcement of the IRS rule would substantially burden the exercise of a sincerely held religious belief in the
\end{footnotes}
A ruling similar to the one in Bob Jones would leave the colleges free to maintain their sexual conduct codes – Bob Jones University maintained its policy against interracial marriage for years after the decision\textsuperscript{105} – but at a significant financial cost. It is also possible – unlikely, but possible – that the Department of Education could change its rules about granting exemptions, forcing evangelical colleges to choose between federal educational funding and keeping the parts of their sexual conduct codes that interfere with the right to same-sex marriage.\textsuperscript{106}

Evangelical colleges are fighting hard against the implications of Obergefell, arguing that the government does not (or at least should not) have a compelling interest in enforcing anti-discrimination laws and principles where they would substantially burden religious organizations’ exercise of their religious beliefs about the sinfulness of homosexuality. Even before the Obergefell decision, five evangelical colleges and other religious institutions asked Congress to protect them from the potential loss of their tax exemption that the decision in Obergefell might portend.\textsuperscript{107} Congress responded with the First Amendment Defense Act, which would prevent the IRS, and the federal government in general, from taking “discriminatory action against a person” because of their religious belief or moral conviction that sexual activity outside of an opposite-sex marriage is wrong.\textsuperscript{108} The bill lists the elimination of tax exemptions and the loss of accreditation as two of the discriminatory actions a governmental agency might take against a religious college like the CCCU schools.\textsuperscript{109}

III. THE SINNERS: WHO ATTENDS AND WHY

It should come as no surprise that evangelical colleges and


\textsuperscript{106} It is unlikely to happen any time soon, since the Department has yet to determine that Title IX prohibits discrimination on the basis of sexual orientation. Even so, Title IX’s language constrained the Department considerably more than the language of the Internal Revenue Code constrains the IRS.

\textsuperscript{107} McConnell Letter, \textit{supra} note 7.


\textsuperscript{109} \textit{Id.}
universities are not supportive of sexual minority rights. Polls indicate that white evangelical Protestants are among the groups most likely to oppose same-sex marriage, and one of the least likely to believe that society should accept homosexuality. In fact, polls indicate that a majority of young people associate evangelicals with anti-LGBT attitudes, including 80% of “young churchgoers.” Regarding the evangelical colleges specifically, every year The Princeton Review ranks 350+ “select” colleges, including a number of evangelical colleges and universities. Despite their other merits, those evangelical colleges are usually found on its list of the worst schools for LGBT college students. With these facts readily available, why do sexual minority students enroll at evangelical colleges?

A. Becoming a Student

Because the sexual conduct codes are readily available online to prospective students, students can be said to have at least constructive notice that adherence to the codes is required. Other schools more explicitly invoke consent, presenting their conduct policies to incoming students as a contract. By accepting a school’s offer of admission and paying tuition, the student accepts the contractual terms as described in the code of conduct, student handbook and/or any other relevant written

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112 The Barna Group, an evangelical polling organization, describes the results of one of its surveys: “Today, the most common perception is that present-day Christianity is ‘anti-homosexual.’ Overall, 91% of young non-Christians and 80% of young churchgoers say this phrase describes Christianity: ” A New Generation Expresses its Skepticism and Frustration with Christianity, BARNA (Sep. 27, 2007), http://www.barna.org/barna-update/article/16-teensnext-gen/94-a-new-generation-expresses-its-skepticism-and-frustration-with-christianity.


114 See infra Part IV.A. Admittedly, locating each college’s specific rule about homosexuality takes a little effort.
students as a contract. By accepting a school’s offer of admission and paying tuition, the student accepts the contractual terms as described in the code of conduct, student handbook and/or any other relevant written materials.\textsuperscript{115} In fact, some colleges go a step further than that, using a theologically freighted term – “covenant” – to describe the relationship between school and student.\textsuperscript{116} For example, the Crown College Community Covenant states:

As a body of believers at Crown College... [w]e desire to be a community whose belief and behavior is inextricably intertwined in order that we might reflect the kingdom of God to the world... As such we commit to the principles and standards of the Community Covenant and the expectations outlined in the Student and Employee handbooks... These principles and policies are binding for all who voluntarily choose to become part of the Crown College Community...\textsuperscript{117}

The contractual expectation is sometimes committed to writing and signed by the student as a condition of matriculation. It is a contract of adhesion, impervious to an applicant’s ability to bargain about terms of joining the student body. For example, Trinity International University (IL) and Eastern Nazarene College (MA) use this kind of contractual framing in their student application process:

The standards of the college are very demanding, beyond normal societal standards. In signing an application for admission, students assume the responsibility to maintain the Trinity Community Expectations as outlined below and others as announced.\textsuperscript{118}

ENC students have voluntarily chosen to attend a private, church-affiliated college, and thus accept the responsibility to honor the rules and regulations of ENC when they submit their application.\textsuperscript{119}

Other colleges require student acknowledgement of the policies upon

\textsuperscript{115}This fits comfortably within the understanding of student codes of conduct and other documents setting the terms of the student-university relationship. See \textit{Dannelly}, supra note 41, at 49.

\textsuperscript{116}Although the theological meaning is not easily condensed, the most important Biblical use of the word “covenant” refers to the relationship between God and humanity. See \textit{Crown College}, \textit{Crown College Community Covenant\textsuperscript{117}}, at 1 (2013–14) (on file with author).

\textsuperscript{118}\textit{Trinity International University, Community Expectations}, at 3 (2014), http://undergrad.tiu.edu/admissions/apply/community-expectations.dot.

College” that reads: “With my signature below I indicate my willingness to respect Tabor’s foundational principles and to abide by the community responsibilities and lifestyle expectations described in this covenant.”

The enrollment process thus far seems a fairly straightforward way of uniting oneself to a religious community and giving even more than “an implied consent to its governance.” The colleges make no effort to hide the fact that they require adherence to a code of conduct that includes a prohibition on certain sexual conduct. Even so, it does not seem to deter some sexual-minority students from agreeing to attend. To understand how and why these students find themselves in a position where they agree to avoid homosexual practice during their college years requires some understanding of what it means to be part of evangelical culture, and of how evangelical colleges fit within that culture.

B. Choosing a College

In general, students who attend evangelical colleges are more conservative, more likely to be regular churchgoers, and more likely to be interested in or accepting of a rule-based environment than the general college population. While students at evangelical colleges may not be required to be evangelicals, most of them are. In 2009, one report estimated that 77.5% of students at CCCU colleges were evangelical themselves or came from an evangelical background. In another study, somewhere between 66.9% and 87.9% of current students at 16 CCCU schools identified themselves as belonging to a Christian denomination (or as Christian non-denominational) that could be considered evangelical.

\[\text{REFERENCES}\]


121 Watson v. Jones, 80 U.S. 679, 729 (1871). See also Helfand, supra note 61, at 564.


123 A Catholic student could attend some evangelical colleges even though the same school would not hire a Catholic professor. See William C. Ringenberg, The Christian College and the Meaning of Academic Freedom 127 (2016). Some evangelical colleges do not require students even to be Christians. Id. (giving examples).


Sociologist Christian Smith famously described American evangelicalism as a thriving subculture that defines itself in relation to and in opposition to contemporary secular life. While in premodern times, religion may have functioned as a “sacred canopy” covering all of society and giving meaning to those beneath its shelter, today religions such as evangelical Christianity function like “sacred umbrellas”—“small, portable, accessible relational worlds – religious reference groups – ‘under’ which . . . beliefs can make complete sense.”\(^{126}\) A sacred umbrella allows a believer to engage with—metaphorically walk around in—the secular world while remaining protected from the worst elements of the outside climate. The metaphorical umbrella also clearly marks the border between the wet and the dry, between us and them.\(^{127}\)

For most students, decisions to attend an evangelical college are made from under the umbrella. An evangelical college offers the same protection under which they have grown up; an opportunity to acquire an education that encompasses secular thought and knowledge in a place where evangelical “beliefs make complete sense.” Based on my own experience, studies and surveys of CCCU students, and the stories of gay and lesbian alumni of evangelical schools,\(^{128}\) I have identified four reasons that explain the attendance of these students at a CCCU college: (1) parental and community pressure to attend; (2) lack of knowledge and understanding about sexuality, including one’s own sexuality; (3) mistaken belief about what the college experience would be like; and (4) desire to have one’s orientation “cured” or otherwise managed. These reasons aren’t necessarily mutually exclusive—a person’s parents could compel them to attend, but the person may also desire a “cure.” But each illustrates the truth that “[i]ndividuals do not always enter religious communities freely and they do not always stay because they want to.”\(^{129}\)

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\(^{127}\) See id. See also Lydia Bean, The Politics of Evangelical Identity 56–58 (2015) (using the umbrella metaphor; describing the role of strong boundaries in evangelical church communities).

\(^{128}\) I have collected CCCU student and alumni stories from websites sponsored by or related to the (unofficial) LGBT+ alumni groups of those colleges, as well as more formally published accounts of life as a same-sex attracted person at evangelical schools.

1. Parental and Community Pressure

Because many evangelical college students, including the gay and lesbian students, come from evangelical backgrounds, this background dominates the decision to attend. One appeal of the evangelical college is its reputation as a safe place to be evangelical and to grow and develop in faith. This factor may appeal not only to the student, but also to the student’s parents. Geneva College (PA), for example, makes a direct pitch to evangelical parents in its on-line brochure, *Worth the Price*.130 Noting that according to one study, more than half of students attending secular colleges will “no longer profess their faith” upon graduation, the brochure sympathizes with parents who do not want to see their “two decades of teaching children how to love and serve the Lord” undone in “four short years.”131 Attending an evangelical college allows students to remain in safe territory for at least four more years (and parents may insist on this for their children who attend college, especially if they are contributing to their child’s financial support).132

This is borne out to some degree in the stories gay and lesbian students and alumni tell about themselves. For example, Dan Sandberg, a gay student at Bethel University (MN), when asked why he still decided to attend the school after reading the covenant, responded that

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131 *Worth the Price*, supra note 130. It is something of a trope among evangelicals that attending a secular college will cause students to lose their faith, and there are shelves of books offering tips for staying true to one’s evangelical beliefs while away at school. See, e.g., J. BUDZISEWSKI, *HOW TO STAY CHRISTIAN IN COLLEGE* (2014); JONATHAN MORROW, *WELCOME TO COLLEGE: A CHRIST-FOLLOWER’S GUIDE FOR THE JOURNEY* (2008). This conviction that secularism will be embraced at a non-evangelical institution is not necessarily true. See Jonathan P. Hill, *Higher Education as Moral Community: Institutional Influences on Religious Participation During College*, 48 J. SCI. STUD. RELIGION 515, 518–19, 530 n.9 (2009) (discussing theories, comparing students at CCCU and secular institutions).
132 While all parents may have thoughts about where their children attend college, and some may be willing to use financial or other forms of coercion to make their wishes a reality, evangelical parental insistence on an evangelical college for Josh or Emily is on a different plane than parental insistence that Josh attend the parents’ alma mater or that Emily major in business and not interpretive dance. Both religion and sexual orientation are the kind of characteristics that are central to a person’s identity, as a matter of both law and psychology. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2593, 2596 (2015) (sexual orientation); Baskin v. Bogan, 766 F.3d 648, 655 (7th Cir. 2014) (religion); AMERICAN PSYCHOLOGICAL ASSOCIATION, *REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION*, chs. 2 & 6 (2009) (discussing generally interplay of identity, religion, and sexual orientation in context of orientation change therapy). The stakes for both parents and children are higher than if their disagreement about college were over a less fundamental trait, like a college major.
his parents made him attend. A reporter asked several Biola University students why they remained at school there:

Some [students] say their parents will only pay for Christian schooling. Others risk being abandoned by their families if they’re open about their sexuality. [Jason] Brown, co-leader of the Biola Queer Underground, said his family prohibited him from returning home after graduation because he’s gay. ‘I was homeless,’ Brown said. ‘I bounced around on some friends’ couches. (Right now) I’m living at a friend’s house in Chino.’

Even if the parents stop short of an ultimatum, closeted gay or lesbian high school students may not want to explain why an evangelical college would not be a good choice for them. Coming out to one’s evangelical parents as gay or lesbian can be a difficult experience under the best of circumstances, and those students risk the fate of Jason Brown. Others may simply want to please their religious parents. “When it came time to select a college, I was looking for a new home, a place that would make me ‘better’ in everyone else’s eyes. . . . ACU presented the opportunity to do just that. . . .”

Evangelical institutions, friends, and family may have surrounded the high school seniors who make the decision to attend an evangelical college. Walking out from underneath the sacred umbrella may be a step they are not ready to take. As a practical matter, many late teens are

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134 Jim Hinch, Gay Students Speaking Out at Christian Schools, ORANGE COUNTY REG. (June 28, 2013, updated Aug. 4, 2014) http://www.ocregister.com/articles/biola-514884-students-gay.html?page=1. Another Biola student, Will Haggerty, was offered a different bargain. He was given the choice between switching schools or ending his association with the Queer Underground; he chose to remain and his parents withdrew their financial support. LEE, supra note 16, at 159–60.
135 LGBT adolescents are overrepresented among homeless youth, with some estimating that up to 40% of homeless youth are LGBT. L.E. Durso & G.J. Gates, Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth who are Homeless or At Risk of Becoming Homeless, WILLIAMS INST., at 7 (2012), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf. The most common reason for being homeless involved rejection by family. Id. at 4, 9. See also Noah Brown, Nearly 40% of Homeless Youths are LGBT, and I’m Currently One of Them, GUARDIAN (Oct 23, 2015), http://www.theguardian.com/commentisfree/2015/oct/22/40-of-homeless-youths-are-lgbt-and-im-currently-one-of-them (describing how his Christian family disowned him after he came out to them).
financially reliant on their parents. This was my experience. I turned 17 the week after I started college and was not prepared economically, spiritually, or emotionally for the kind of independence that a break with evangelical life and culture would have required. Perhaps I was cowardly or timid for not striking out on my own, but the choice I faced then did not seem like much of a choice at all.

2. Lack of Knowledge and Understanding About Sexuality

My evangelical upbringing in the 1970s and 1980s did not encourage or welcome understanding of one’s sexuality whether one was heterosexual or not. I do not believe this background is unique to me, and that because of this kind of background, gay and lesbian students raised in evangelical homes may not have any idea that they are the homosexuals whose practice and behavior is prohibited at the school of their choice. I didn’t, and I made it through my college years encased in a protective coating of ignorance and denial. I am not alone. Here is Kendra Cassidy, who attended Cedarville University (OH):

I graduated from Cedarville University in 2002. . . . I did not realize I was gay while I was at Cedarville, and I cannot tell you how thankful I am for that. I know individuals who were aware of their orientation, and I know how much pain they went through during that time as they felt (accurately or not) that they would be judged and despised if they let even their close friends know of their feelings.  

Bonnie Vesilko:

On my very first day at Cedarville, I met a delightful fellow freshman. . . . He and I prided ourselves in being ‘just friends’ while others teased us for the next 4 years about how we were such a cute couple and expected us to invite them to a [sic] inevitable wedding. It wasn’t until after we graduated that we finally were able to vocalize even to each other that we both were indeed gay. The admission to each other was totally liberating.

I hope this reason for attendance is no longer widespread, and that resources available through the internet, as well as greater dialogue about sexuality issues within evangelical Christianity will enable more students like Bonnie to feel the “liberation” of comfort with one’s


\[\text{138 Bonnie Vesilko, \textit{Stories, supra} note 137.}\]
sexuality. And for those who remain shrouded in ignorance for their entire four years, life might not be so bad. But those young adults who come to acknowledge their sexuality during their college years can expect more difficulty—certainly more than they expected when they applied.

3. Mistaken Belief that it will be Manageable

Most LGB students at evangelical colleges, like most students at evangelical colleges, are serious about their faith and genuinely want the evangelical education they are being offered. In one study, 70.5% of students agreed that the college’s Christian identity was a very important factor in their decision to enroll. In Donna Freitas’s 2008 study of college dating, 81% of the evangelical college students acknowledged that they chose their college because of its Christian identity.

This is true for evangelical students who are also gay or lesbian. As Biola’s Jason Brown explained, he wanted to attend Biola “to explore my Christianity . . . I understood it would be conservative but I didn’t realize it would be so alienating.” Somewhat similarly, the students in the 2010 Wentz & Wessel study made the “assumption . . . that either their feelings of same-sex attraction would simply go away or that they could progress through their undergraduate experience without ever engaging in homosexual behavior”; they didn’t expect that their attractions would cause any problems.

If prospective students enjoyed being part of a church or parachurch youth group in high school, they may see an evangelical college as offering more of the same. For example, Rev. Darren McDonald commented that he hoped his time at Westmont College (CA) would be

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139 Davignon, supra note 125, at 23 (using data from survey involving 31 CCCU schools and more than 6000 undergraduates).
140 Id.
142 Hinch, supra note 134.
144 It isn’t unusual for high school students to look toward their churches for guidance; 47% of evangelical college students indicated that their church leaders were involved with their choice to attend a CCCU school. Noel-Levitz, supra note 122, at 18.
just like his high school youth group.\textsuperscript{145} In \textit{Queers in the Kingdom}, Scott Nelson describes his decision to attend Wheaton as a form of evangelical peer pressure. Although not raised in an evangelical home, during high school he found community in the youth group of a Chicago-area megachurch:

I’m surrounded by this wonderful community of people who don’t do drugs, and aren’t all about sex and don’t want to beat me up after school... When it came time to go to college, my youth pastor and all my Christian friends were saying, you have to go to a Christian college... .\textsuperscript{146}

In fact, at least in this case, his sexual orientation may have made him more susceptible to this form of peer pressure.

For other students, their sanguine attitude may be attributed to years of dissembling before college. Former student Noah Brown explains: “By the time I went away to school, I was used to censoring myself, so it didn’t feel like it would be so difficult to continue to do so at college.”\textsuperscript{147} Similarly, Biola student Tasha Magness “knew she was gay, but assumed she could stay in the closet until graduation... she already had a few closeted years under her belt. What was four more?”\textsuperscript{148}

When these students encounter difficulties, it is perhaps because they underestimate the total immersion of evangelical college life, even if they were members of evangelical families before college. The commitment involved in attending a youth group once or twice a week and going to summer camp is a degree of magnitude below the reality of evangelical college life, where one must share a dorm with other students of the same sex and one is expected to be “on” with religion all the time, particularly if the college is in a rural area or in a city far from where the student grew up.

Of course any student, gay or straight, could suffer from culture shock in making the transition, but the work of managing a stigmatized

\begin{footnotesize}
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\item[\textsuperscript{146}] QUEERS IN THE KINGDOM: LET YOUR LIGHT SHINE! 12:49-14:00 (Markie Hancock/Hancock Productions 2014). Scott and I attended Wheaton College together 30 years ago and he has been a close friend since. In addition, I provided legal assistance to Markie while she was filming “Queers in the Kingdom,” and received a credit in the film, and contributed to her Kickstarter. My picture appears briefly in the film at 12:24.
\item[\textsuperscript{147}] Brown, supra note 135.
\item[\textsuperscript{148}] LEE, supra note 16, at 63.
\end{itemize}
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identity or attraction adds another set of difficulties to the sexual minority student’s life that can be overwhelming. This is borne out in the experiences of some students described in Part IV.B below.

4. Desire for a Cure

Surveys of students at CCCU schools and other Christian colleges suggest that students who acknowledge an attraction to members of the same sex are likely to share the negative attitudes of their non-same-sex-attracted classmates toward sexual minorities. There are some students, however, who recognize in high school that they are gay or lesbian and opt for an evangelical college in hopes of fixing what they believe to be wrong with them. For example, Douglas Messinger describes his experience at Cedarville University:

Even before my first year, I remember visiting with my parents and thinking about all of the great things I could accomplish by being immersed in the Cedarville culture. I also remember thinking that this was my last chance to rid myself of those ‘sinful’ attractions toward my own sex. I was certain that those feelings I had when I saw a cute guy walk by was just another attack from Satan, and I had already spent a considerable amount of time in prayer asking God to take away those feelings and desires. I knew for a fact that going to Cedarville would help take away those wants.

Nate Krogh described his decision to attend an evangelical college:

I went to Wheaton for a number of reasons, one of them being a last ditch effort to immerse myself in a Christian environment to become straight. I came out to my parents in high school, went through therapy, and didn’t speak about it afterward. I was hoping that being at Wheaton would ‘flip the right switch’.


150 Janet B. Dean, Steven P. Stratton, Mark A. Yarhouse, & Michael D. Lastoria, Same-Sex Attraction, in Sexuality, Religious, Behaviors, Attitudes: A Look at Religiosity, Sexual Attitudes, and Sexual Behaviors of Christian College Students 9, 59, 61 (Michael D. Lastoria ed., 2011) (students who have experienced same-sex attraction are only slightly more accepting of same-sex sexual behavior than their peers). The survey respondents came from a group of colleges that included the CCCU.

151 Douglas Messinger, Stories, supra note 120.

152 Interview with Nate Krogh: From Wheaton to the Gay Christian Network, Untold
Although the possibility of a cure may seem unrealistic, it is worth noting that the belief in sexual orientation change is still relatively common within some sectors of evangelicalism. For example, in the 2011 study by Dean et al., 63.1% of the students agreed that a change in sexual orientation was possible. In the 2016 study by Wolff et al., 17% of the students reported that they had been the subject of a mental health professional’s change therapy. Evangelical culture has had a long involvement with sexual-orientation change groups and reparative therapy, and although this may be changing, it would not be surprising to find incoming students who believed that they could find a way to become “ex-gay” at an evangelical college.

Even if they were not hoping for a cure, gay or lesbian students may believe that they can integrate their orientation with their evangelical faith in a way that is acceptable to the college and other evangelicals. An anonymous student at Gordon College describes her experience:

By the time I got to Gordon, I believed that options left for me were to either to convert (funny, that word) to heterosexuality—as much as the thought inspired in me strange, virulent reactions—or to remain celibate for the rest of my life. Admittedly, these choices were hard to swallow. But if following Christ meant total surrender, then I’ll have to relinquish everything I have. Sexual preferences included.

... You see, Gordon was supposed to be safe. Here was a place where I would be held accountable by rules (on pain of possible expulsion), where my errant feelings would be kept in check. Like the conception of the original prison by the Quakers, here I was to come upon penance; except, in this case, my incarceration would be of my own voluntary choice.

This may work for students who decide for themselves that their
evangelical faith requires them to choose life-long celibacy and abstention from intimate same-sex relationships. Unfortunately, there is no way for anyone, either the student or the college, to know in advance whether an incoming student will fall into this group.

As discussed below in Part V, the consent of members to join a religious group and the ability of unhappy members to leave is a key component of institutional freedom. Consider the anonymous writer from Gordon above. In many ways her circumstances fits the paradigm of consent. She knew of and welcomed the existence of the sexual conduct code. She accepted its terms, even though she also knew that she could be expelled if she violated them. She enrolled hoping that the sexual conduct code would keep her in check, but at the same time, recognized that her college experience might be analogous to doing hard time. Since the anonymous author does not mention her circumstances, let’s assume that she is paying her own way to Gordon College, and that she faces no negative financial consequences from her family if she tells them she plans to attend another college.

Even so, if she transfers to another school, it will not be cost-free. It certainly involves increased effort and work on the student’s part, looking for another school and applying, moving back home, across town, or to another state entirely. It may involve increased tuition, perhaps because of the loss of a scholarship, or because the student loses credits in the transfer and must attend an extra semester or two to make up for the loss. While one can argue that it is only fair for the student who made what turned out to be a poor decision to bear those costs, it is not fair to ignore the costs altogether.

More importantly, as can be seen from the discussion of the CCCU in Part II.A, beliefs about homosexuality are border-defining for the evangelical community. Acknowledging (even if only to oneself) the impossibility of accepting the evangelical paradigm for sexuality in one’s life, whether that paradigm means becoming ex-gay or leading a life without intimate relationships, means leaving the evangelical community. “Just transferring” under these circumstances is not just transferring, even if one is still able to keep one’s orientation secret and one’s friends and family supportive.

Thus “[e]xit from a group might be very costly. One might have to forfeit property. One might have to move. One might need to acquire information about valuable alternatives . . . and what sacrifices one

\[157 \text{ See infra Part IV.C (discussing stories of Wesley Hill and Tyler Streckert).} \]

\[158 \text{ See discussion infra Part V.} \]
would have to make . . . .”159 To quote a minister who was suspended from his position after officiating at his son’s same-sex wedding: “I’ve been part of the Methodist Church for twenty years. I love this church, you know, except for this discriminatory law that we have. I love the church. . . You don’t just go and uproot yourself and your family out of a faith tradition.”160 For the sexual minority student, it may even carry with it a certain amount of psychological harm. While resolving the conflict between one’s sexual orientation and one’s religion normally reduces stress and improves mood and functioning, one study has indicated that when the resolution involves leaving one’s support system, religion, and culture, the positive mental health effects that resolution would otherwise bring are diminished, sometimes leading to an increased risk of suicide.161

IV. LOVING THE SINNERS, HATING THE SIN: LIFE ON CAMPUS

A. Sexual Conduct Codes

In order to discover the CCCU schools’ sexual conduct codes regarding homosexuality, I searched each school’s website to see what information was available publicly to a potential student.162 Of 117 CCCU school websites, 104 had an online policy or code prohibiting

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162 This included searches at each college’s website using the keywords student handbook, sexuality, sexual, code of conduct, gay, homosexual, and homosexuality seriatim until I found the policy. The searches were conducted during late May and early June 2014 and encompassed the schools that were CCCU members at the time. When I found documents, I downloaded them and also maintained the URL where I found them. While 13 schools did not have anything available online, I am reluctant to conclude they lack this kind of code, given its importance to the CCCU, and given the easily imaginable reasons for its non-appearance, including problems with website access and placement of information behind a password. The schools whose codes I could not find are William Jessup University (CA), Southeastern University (FL), North Park College (IL), Grace College (IN), Northwestern College (IA), Campbellsville University (KY), Roberts Wesleyan College (NY), Bluffton University (OH), Waynesburg College (PA), King University (TN), Trevecca Nazarene College (TN), Dallas Baptist University (TX), and Hardin Simmons University (TX). I have since learned that Southeastern and William Jessup maintain a “no homosexual practice” code, but because I could not find it at their websites, I have left them out of my analysis of the conduct policies.
homosexuality that I was able to locate. The information about the rules/policies discussed below comes from the 2013–14 student handbooks or from the schools’ codes of conduct, if those were a separate document.\footnote{An earlier study of a subset of the CCCU schools conducted in 2010 used the schools’ websites to compile information about the schools’ use of “language referring to prohibitions against homosexual behaviors, consequences of violating these policies, and the category in which these behaviors are placed in the student handbook/code of conduct, as well as geographic region, denominational affiliation, and student enrollment of the respective institutions.” See Joshua R. Wolff and Heather R. Himes, \textit{Purposeful Exclusion of Sexual Minority Youth in Christian Higher Education: The Effects of Discrimination}, 9 \textit{Christian Higher Educ.} 439, 444 (2010).} Although no schools allowed homosexual conduct, there were a number of differences in the way they went about prohibition. I have sorted them into four types:\footnote{One subset of these schools describes the prohibited category as “homosexuality.” On closer examination, as these colleges use the word, it may simply be an awkwardly worded ban on homosexual behavior. For example, San Diego Christian College’s policy provides: “Students will not participate in practices that are morally wrong according to Scripture such as . . . any form of homosexuality . . . .”}\footnote{\textit{See infra} Part IV.B.}

• Fifty-four schools (51.9% specifically) ban homosexual activities, acts, conduct, behaviors, or practice.

• Twenty-three schools (22.1%) prohibit all sexual activity outside of a heterosexual marriage relationship, but do not specifically mention homosexuality, same-sex relationships, or homosexual activity.

• Nine schools (8.7%) ban same-sex activities such as dating or relationships that are not specifically sexual in addition to banning homosexual acts and practices.

• Finally, 18 schools (17.3%) prohibit not just homosexual behavior, but advocating, promoting, or defending same-sex relationships or the “homosexual lifestyle.”

Violation of the rule can have serious consequences for the student, including expulsion.\footnote{See \textit{infra} Part IV.B.}  

Despite the potential seriousness of the consequences for the student, both the rules themselves and the schools’ disciplinary policies create substantial confusion as to what the consequences of a violation will be. What follows is a brief tour of the four kinds of prohibitions: policies banning homosexual practice, policies banning all sexual activity outside of heterosexual marriage, policies banning romantic same-sex relationships in addition to homosexual behavior, and policies banning advocacy of same-sex relationships.
1. Prohibitions on Homosexual Activity, Behaviors, Practice

The most commonly used language, found at more than half of the colleges, forbids students from engaging in homosexual behavior, acts/activities, or practice. In most cases, the precise practice, behavior, or activity is not defined. For example, the 2013–14 Student Handbook of Greenville College (IL) describes the school’s policy:

Scripture also prohibits certain behaviors and community members should avoid them. They include backbiting, cheating, dishonesty, drunkenness, gossip, immodesty of dress, lying, occult practices, profanity, sexual promiscuity (including adultery, homosexual behavior, pre-marital sex), theft, and vulgarity (including crude language).166

Although “homosexual behavior” is prohibited, it is not defined. While one might look to context for definition, its place within the paragraph provides little assistance. The ban on homosexual behavior is found in the middle of a list containing crimes (theft), wrongful conduct which might be a crime in some circumstances (dishonesty and lying that rise to the level of fraud, for example), academic misconduct which is not necessarily a crime (cheating), bad behavior that is not criminal (backbiting and gossip), and religious purity violations (profanity, immodesty of dress). Homosexual behavior in this context could be anything from a display of the infamous limp wrist to sodomy.

Greenville College’s ban on homosexual behavior is contained within the subcategory of “sexual promiscuity,” along with adultery and pre-marital sex. From this placement, one might assume that the homosexual behavior referenced relates to sexual behavior. Even so, that does not necessarily pin down the entire universe of homosexual behavior that students must avoid. It is certainly possible to engage in homosexual behavior (and pre-marital sex, for that matter) without being sexually promiscuous as that term is usually understood. By its grouping with pre-marital sex, one might assume that the homosexual behaviors prohibited are only sex acts themselves and that a student is free to engage in other amorous behavior.

The Greenville College Student Handbook also contains a separate provision defining “Sexual Misconduct.” It is:

166 GREENVILLE COLLEGE, STUDENT HANDBOOK, at 11 (2013–14) (on file with author). I do not mean to pick on Greenville; I could have used passages from the student handbooks/codes of conduct of Bethel College (MN), Houghton College (NY), or the University of Northwestern (MN), each of which also place a nearly identical ban on “homosexual behavior” in a list of infractions very similar to Greenville's.
Sexual activity which is inconsistent with biblical teaching such as sexual activity outside the bonds of marriage, sexual assault, sexual harassment, or the appearance of any one of these (e.g. staying overnight with a person). The touching or fondling of the genitals of another is considered by the College as inappropriate behavior for relationships outside of marriage.\(^{167}\)

The language limiting sexual activity to the “bonds of marriage,” as evangelicals use the term, refers to marriage between heterosexuals, and not to same-sex marriage. The mention of “touching or fondling of the genitals of another” in the next sentences, however, adds a layer of specificity. One presumes that the school wanted any students inclined to finely parse the phrase “sexual activity” so that it applies to only sexual intercourse to be on notice that any contact with another’s genitals is not allowed. At the same time, it could be construed to allow some displays of affection without regard to orientation.\(^{168}\)

Other schools specify that it is homosexual sexual behavior that is not allowed. Whitworth University (WA)’s policy limits the “genital sexual relationship” to heterosexual marriage, so that one might be able to infer that non-genital sexual/affectional relationships are therefore permitted outside of those bonds.\(^ {169}\) Goshen College (IN) prohibits “homosexual genital activity,” although it seems to suggest that pre-marital, extramarital, and homosexual activity that does not involve the genitalia is allowed: “We understand the Bible to teach that genital intercourse is reserved for a man and a woman united in a marriage covenant. . . . [T]his teaching also precludes premarital, extramarital, and homosexual genital activity.”\(^ {170}\)

2. Prohibitions on Sexual Relations Outside of Heterosexual Marriage

Twenty-three colleges have a policy limiting students’ sexual expression to the bounds of a heterosexual marriage without specifically prohibiting or even mentioning homosexuality, homosexual acts or behavior, or same-sex relationships. At some schools, these provisions are cast less as bans on extramarital sexual relationships and more as
paeans to the virtues of heterosexual marriage. Trinity Christian College (IL) states:

Human sexual activity as part of the creational order is to be expressed between a man and a woman and finds its culmination in intercourse between husband and wife. As children of God and as a Christian community seeking to live according to the Word of God, we affirm this standard of sexual conduct.171

At other schools, a ban on sexual relations outside of marriage can be found on a list with the other sexual offenses, without further comment. Calvin College’s code of conduct prohibits “[s]exual misconduct including, but not limited to, sexual relations outside marriage, involvement with pornography, internet cybersex or other internet sexual misconduct.”172 Still others emphasize the harmful consequences of sexual relations outside of heterosexual marriage in addition to prohibiting it. For example, Warner Pacific University (OR) warns that “[s]exual misconduct is detrimental to both relationships and to individual self-esteem; it also violates the caring nature of our community,”173 and The Masters College (CA) cautions that “sexual involvement outside of marriage is anything but an expression of real love.”174

For the most part, these “heterosexual marriage only” policies make it clear that they are about sexual relations outside of marriage, and not relationships, romance, or displays of affection.175 As written, the policies apply to gay and straight students alike, and would seem to allow both gay and straight students the chance to have boyfriends and girlfriends, to go on dates, and to walk around campus holding hands. Yet by most accounts, this does not happen.176

173 WARNER PACIFIC UNIVERSITY, STUDENT HANDBOOK, at 8 (2013–14) (including sexual relations outside of heterosexual marriage as sexual misconduct) (on file with author).
175 John Brown University (AR) is something of an exception here. The handbook tells students that the school expects “fidelity in marriage and chastity in singleness.” Students must therefore avoid sexual misconduct, which is fairly explicitly defined: “Sexual misconduct is generally defined as any touching of the genital area with or without clothes. This includes but is not limited to sexual intercourse, oral sex, mutual masturbation, and intimate touching.” This paragraph applies to heterosexual couples as well as same-sex couples. JOHN BROWN UNIVERSITY, STUDENT HANDBOOK, at 22 (2013–14) (on file with author).
176 I found one instance of a student who was publicly in a same-sex relationship with
3. Prohibitions on Same-sex Relationships, Affection and Dating

Roughly nine percent (8.7%) of schools also proscribe specific kinds of homosexual behavior or activities either in addition to or instead of the general prohibition. In most cases, these rules or policies cast a wider net and capture homosexual activities that are erotic or romantic even if not necessarily sexual. Azusa Pacific University’s Conduct Policies, found in the Judicial Affairs section of its website, present a good example. Policy 9.0 explains that a student “may not engage in a romanticized same-sex relationship.”177 This proscription is not part of its more generalized policy regarding inappropriate sexual behavior outside of marriage, which is a separate infraction.178

Three other schools—Vanguard University (CA), Cedarville University (OH), and Eastern Nazarene College (MA)—use similar language in their prohibitions.179 This language seems to imply two separate categories of same-sex behavior to be avoided: explicitly sexual behavior outside of marriage and romantic but not explicitly sexual behavior.

Other schools within the category proscribe “dating.” Williams Baptist College (AR) maintains its policy under the general heading “Guidelines for Behavior”:

[T]he values of the College community do not condone sexual impropriety, such as the use of pornography, pre-marital sex, adultery, co-habitation on or off campus, homosexual activity including same-sex dating behaviors, and all other sexual relations outside the bounds of marriage between a man and a woman.180

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178 See id.
180 WILLIAMS BAPTIST COLLEGE, STUDENT HANDBOOK, at 5 (2013–14) (on file with...
Same-sex dating behavior here seems to be considered a subset of “homosexual activity.” In every case, the rules ban consensual premarital heterosexual sexual activities, specifically including sexual intercourse, but possibly also include other specific sexual acts such as the touching of genitals mentioned in Greenville College’s handbook. Houston Baptist University prohibits “[i]nappropriate dating, living, or displays of affection.”\textsuperscript{181} This standard includes straight single students who are prohibited from dating married persons, and straight married students who are prohibiting from dating persons other than their spouse, but all “homosexual relations.”\textsuperscript{182} No explanation is offered that would further delineate inappropriate “living.” “Dating, living and displays of affection” by unmarried heterosexuals are apparently appropriate, as long as the affection is not displayed in public.

4. Prohibitions on Advocating, Promoting, or Defending Homosexuality or a Homosexual Lifestyle

The fourth category reaches far beyond any type of sexual or even romantic behavior, whether gay or straight. In addition to a general ban on homosexual acts, behavior or practice, 18 schools forbid their students from promoting, advocating, defending, advertising, inciting, encouraging, or celebrating homosexuality, homosexual practice or the homosexual lifestyle.\textsuperscript{183} Colorado Christian University’s policy offers a good example of the majority approach in this category. Its handbook first describes “sexual conduct/activity” as “any consensual behavior that occurs outside of the covenant of marriage,”\textsuperscript{184} including “homosexuality or behavior that exhibits a same-sex relationship.”\textsuperscript{185} Subsection b further defines “homosexual relationships” as “practicing (exhibiting behaviors of a same-sex relationship), defending or advocating a homosexual lifestyle.”\textsuperscript{186} While “practicing” is defined via

\textsuperscript{181} HOUSTON BAPTIST UNIVERSITY, STUDENT HANDBOOK, at § 4.6 (2012–13) (on file with author).
\textsuperscript{182} Id.
\textsuperscript{184} COLORADO CHRISTIAN UNIVERSITY, LIFE HANDBOOK, at 106 (2013–14) (on file with author).
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 108.
parenthesis to include “exhibiting behaviors of a same-sex relationship,” the handbook does not explain or give examples of what defending or advocating a homosexual lifestyle might entail.

Oklahoma Wesleyan University’s student handbook contains a broad prohibition. In the disciplinary section, under the heading “Major Violation,” the handbook describes the prohibited behavior first in general terms:

Sexual immorality, i.e. any compromise of marital heterosexual monogamy.
Behavior that promotes, celebrates, or advertises sexual deviancy or a sexual identity outside of the scriptural expectation of sexuality. 187

It then gives examples of “celebrating, promoting and advertising sexual immorality” which include “[p]osting statements on social media promoting and celebrating homosexuality, adultery, and fornication etc. [And] [c]oordinating groups promoting and or celebrating sexuality outside of the context of marital heterosexual monogamy or protesting against the established rules of OKWU community.”188 Howard Payne University (TX) adds another description of advocacy: “students are not permitted to participate in advocacy groups that promote understandings of sexuality that are contrary to these biblical teachings.”189

This kind of viewpoint prohibition would run afoul of the First Amendment if a public university enacted it, as the numerous cases involving speech codes make clear.190 Since all evangelical colleges are private, however, there is no First Amendment protection for student speech. Only California has extended free-speech protections to students at private colleges and universities, but that law does not apply to “private postsecondary educational institution[s] . . . controlled by a religious organization” if the law’s application would be inconsistent with “the religious tenets of the organization.”191 Private religious

188 Id. At the end of the section, the school reiterates the prohibition in more general terms and ties it to “the spirit of Scripture.” Id.
190 Speech codes prohibit student speech that is racist, sexist, otherwise discriminatory, disrespectful of other students, harassing, or simply uncivil in the eyes of college authorities. Challenges to these codes at public universities have been uniformly successful. See Azhar Majeed, Defying the Constitution: The Rise, Persistence and Prevalence of Campus Speech Codes, 7 GEO. J.L. & PUB. POL’Y 481, 486–94 (2009) (discussing the origins and legal history of speech codes).
colleges are for the most part free to place whatever restrictions on student speech they deem appropriate to their mission. 192

The breadth of these speech-related prohibitions potentially extends far beyond the sin of homosexuality. At least in theory, a heterosexual student could be guilty of a conduct violation if he or she joined Campus Pride, 193 as could a celibate gay student who placed a rainbow filter on his or her Facebook profile picture after the Obergefell decision. 194 Of greater concern is the chilling effect such a rule may have on students’ willingness to support their gay or lesbian classmates. As indicated below in Part IV.C, the environment at evangelical colleges for sexual minority students can be difficult, to say the least, and many of their problems stem from a lack of support from straight students as well as from the campus administration. While this negative environment cannot be attributed to the type of sexual conduct policy in place – colleges with all types of sexual conduct policies have non-supportive environments – a prohibition against promoting or defending homosexuality surely does not make it easier for straight allies who wish to be supportive. At the same time, the speech-related policies may more accurately reflect what the colleges hope to prohibit than do the conduct-only policies by requiring not just orthopraxy, in the form of celibacy and the avoidance of same-sex relationships, but also orthodoxy, believing and professing views in line with the schools’.

California—Simpson University—has adopted a sexual conduct policy that reaches this kind of student speech or association. It prohibits students from “incit[ing]” behavior that would violate the code of conduct. Simpson University, supra note 185, at 60.

192 Kelly Sarabyn, Free Speech at Private Universities, 39 J.L. & EDUC. 145 & n.4 (2010). Evangelical colleges fall into the categories of “ideological universities” which do not purport to offer their students and faculty academic freedom, and limit speech accordingly. Id. at 178–80. This is also the position of the Foundation for Individual Rights in Education, which generally opposes campus speech codes. See Sarah McLaughlin, Wheaton College Shows what a “Warning” School Looks Like, FIRE (Dec. 17, 2015), https://www.thefire.org/wheaton-college-shows-what-a-warning-school-looks-like/ (“FIRE believes that free speech is not only a moral imperative, but also an essential element of a college education. However, private universities . . . possess their own right to free speech, which allows them to prioritize other values above the right to free speech if they wish to do so.”).

193 CAMPUS PRIDE, https://www.campuspride.org/about/. (“The primary objective of Campus Pride is to develop necessary resources, programs and services to support LGBT and ally students on college campuses across the United States.”).

B. Administrative Consequences of Violation

What happens when a student at a CCCU school is caught violating the sexual conduct provisions of the code of conduct? That is a tantalizing question and it does not have a clear answer, largely because discipline takes place behind closed doors or in private campus judicial proceedings.

Although I have not attempted to catalog the kind of consequences imposed throughout the CCCU member schools, I was unable to find a school that did not promise some negative outcome if a student was found to have violated the sexual conduct policy. The Wolff & Hines 2010 survey of the sexual misconduct policies of 20 randomly selected CCCU member schools found that students could expect a range of potential consequences for violations of the sexual conduct policy, mostly serious: at 15 schools students could be suspended; at 14 schools, students could be expelled; and at 12 schools, students could be placed on probation. 195 Other potential measures included campus restrictions (10 schools) and referral to counseling (4 schools). 196

Here are some sample statements of the consequences of violations, chosen at random from the CCCU schools:

From Bethel College (IN):

These types of behaviors [violations of the sexual conduct policy] will result in disciplinary action that may lead to dismissal from the college (see substance abuse policy and student conduct and procedures). 197

Bethel’s substance abuse policy provides for immediate dismissal, unless the students turn themselves in and show a desire to change. 198

From Northwestern College (MN):

There are no set formulas or automatic sanctions for most violations. Students who violate college policy subject themselves to the full range of disciplinary sanctions including but not limited to expulsion. In reviewing each violation, the following variables will be considered: attitude, previous history, impact of

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195 Wolff & Hines, supra note 163, at 445.
196 Id.
198 Id. at 188.
the violation on the community, and specific circumstances.\textsuperscript{199}

The available penalties are: restitution/reconciliation; fines; disciplinary warning; disciplinary probation; disciplinary accountability; disciplinary suspension; and disciplinary expulsion.\textsuperscript{200}

Approaches to discipline vary. “There is a difference between student discipline that is categorized as keeping law and order and student discipline that serves the purpose of educating students to specific patterns of behavior and values.”\textsuperscript{201} The first approach—a punitive approach—is perhaps self-explanatory. An offending student must be disciplined for the good of the school and the community of students. The second approach—a “restorative” approach—encourages the violator to repent, cease the offending behavior, and remain within/rejoin the community. The focus is on developing the student’s moral compass, encouraging him or her to internalize the values expressed in the code and apply self-control.\textsuperscript{202}

Repentance is an important part of the conduct codes. Some schools offer amnesty to students who voluntarily seek counseling for their same-sex behavior before they are caught. The University of Mobile (AL) provides a good example of this approach:

The University of Mobile seeks to deal in a constructive and redemptive manner with all who fail to meet the standards of sexual purity set forth under the sexual misconduct guidelines. We will endeavor to assist the student or students involved by providing counsel, exploring resources, and working together alongside the student to guide them toward a lifestyle that values sexual purity. In addition, the University may impose appropriate sanctions against an individual. The objective in doing so is to use such sanctions as a catalyst for redemption in his/her life.\textsuperscript{203}

At first blush, the restorative approach to discipline seems kinder and gentler. But the restorative approach can veer off track when it includes

\textsuperscript{200} Id.
\textsuperscript{201} Emily Longshore, Student Conduct Codes at Religious Affiliated Institutions: Fostering Growth 14 (2015) (Master’s thesis, University of South Carolina), available at \url{http://scholarcommons.sc.edu/etd/3170}.
\textsuperscript{203} UNIVERSITY OF MOBILE, UNDERGRADUATE AND GRADUATE CATALOG AND STUDENT HANDBOOK, at 152 (2012–14) (on file with author).
forced counseling or reparative therapies designed to change a student’s orientation.

Some schools maintain a formal policy requiring students—or at least some category of students, like dorm Resident Assistants—to inform the administration about students they suspect of violating the sexual conduct rule. Corban University (OR) has a three-step policy that places responsibility on the offender’s fellow students. Corban students who become aware of a violation first must confront the offending student with his or her behavior, then must encourage the offending student to seek help from student affairs, and finally must inform student affairs about the offending student’s behavior. This is intended to foster community and encourage the development of internal self-regulation on the part of students. The Corban Handbook acknowledges:

This will probably not be an easy step for you to take, but it may be the most loving thing you could do. ‘Better is open rebuke than love that is hidden. Faithful are the wounds of a friend; but the kisses of an enemy are profuse.’ (Proverbs 27:5-6 ASV).

Again, while this requirement may be designed to build community, it may also cross the line, building isolation and fear instead.

In a rare public discussion of the issue, Terry Charek, Gordon College’s Dean of Student Life, said that despite the prohibition of homosexual behavior, no student has ever faced disciplinary action for being gay or lesbian. If a student were found to have violated the conduct code, the college would have a one-on-one discussion with them.

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204 Bethel (MN) is one of those schools. Huddalla, supra note 133.
205 See CORBAN UNIVERSITY, UNDERGRADUATE STUDENT HANDBOOK, at 13 (2013–14) (on file with author). One writer describes the policies of an evangelical school at which students are expected to confront other students with their wrongdoing:

With this model, we are asking individual community members to take responsibility and ownership of the community environment. By asking members to confront their fellow students, each member has a responsibility to do what is right, not only for the community, but also for the well-being of the offending student.

206 CORBAN UNIVERSITY, supra note 205.
and the student would have the option of attending a student group meeting to discuss the issue. According to Charek,

> It’s not designed to be a fixing group or one where people go to change their orientation . . . and it’s a private group. I honestly have no idea who is in it and what goes on within the group. I just know the expectations of the school would be that it could not actively advocate for the violation of the life and conduct statement.\(^{208}\)

Charek acknowledged the ambiguity of Gordon’s code of conduct; he confirms that “homosexual practice” includes having sex but not “identifying as a gay student” and is not sure whether “kissing [or] holding hands” would be a violation.\(^{209}\)

C. Sexual Minority Student Experiences at Evangelical Colleges

1. Surveys, Studies, and Structured Interviews

Studies of LGBTQ college and university students have shown that the sexual minority students experience discrimination, harassment, and marginalization throughout higher education.\(^{210}\) The very few studies or surveys describing the experiences of gay and lesbian students at evangelical colleges paint a similarly bleak picture. In a study of 104 same-sex attracted students at three unidentified CCCU colleges, 87% of the participants identified the campus culture as highly negative or negative toward homosexuality in general, and 96% identified the campus culture as highly negative or negative toward homosexual practice, with most of the negativity coming from students.\(^{211}\) When asked about homosexual persons, rather than “homosexuality” in general, the numbers dropped from 87% to 74%.\(^{212}\) Ninety-three percent of the participants, however, acknowledged the existence of “attitudes at their institutions that made it difficult for students who experience same-
sex attraction while they are a part of the campus community.” A follow-up study, conducted as part of a larger analysis of attitudes toward sexuality and religiosity among Christian college students, reached somewhat similar results. The author surveyed students from 19 unidentified Christian colleges, asking them about attitudes toward same-sex attracted persons on campus. In this survey, only 4.3% of the students agreed that “persons who identif[ied] themselves as experiencing SSA” were viewed positively on campus while 70.9% disagreed.

The authors take some comfort in the fact that most students surveyed did not identify faculty as the major source of the negativity and attributed most of the negative attitude to their fellow students. Fully 96% percent of the respondents heard their fellow students make derogatory remarks “putting down” same-sex attracted students, and of those, 87% indicated that their peers either agreed with the remarks or failed to challenge them. In fact, 59% of women and 87% of men reported hearing four or more derogatory remarks within the past year.

A senior at CCCU-member Southeastern University (FL) conducted a third survey and reached a similar result with regard to the overall climate that sexual minorities experience at her school. She surveyed both same-sex attracted and straight students, 83.9% of whom agreed that the overall majority campus attitude toward “individuals with SSA” was unacceptable to some degree, and less than 5% of whom agreed that it was in any way acceptable. The survey also found that nearly 78% of the respondents believed that same-sex attraction was morally unacceptable, but also believed that students were more likely

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213 Id. at 105.
214 Dean, supra note 150, at 57.
215 Id. at 9, 56–57.
216 Id. at 56–58. Nearly a quarter of the respondents either were unsure whether they agreed or disagreed with the statement (10.2%), or answered “I don’t know” (14.6%) to the question. Id.
217 Yarhouse, supra note 211, at 104.
218 Id. at 105.
219 Id. at 104.
220 Kristan M. (Legg) Whelan, A Call to Love: Campus Climate Concerning Individuals with Same-Sex Attraction (December 2013) (unpublished B.A. honors thesis), available at http://Firescholars.seu.edu/honors. The survey included 392 students, gay and straight, 89% of whom were raised in the church since childhood, and 97.9% of whom were practicing Christians. Id. at 23–24.
221 Id. at 26. 11.2% of the participants declined to answer the question.
222 Id. at 24.
than faculty, staff or the administration to have an accepting attitude toward same-sex attracted students.\footnote{Whelan, supra note 220, at 25.}

The most recent study involved 213 sexual minority students at “nonaffirming religiously affiliated universities (NARAU\textsubscript{s}).”\footnote{See Wolff et al., supra note 154, at 201. The “NARAU\textsubscript{s}” include Mormon, Catholic and mainline Protestant universities, as well as evangelical colleges, and may also include evangelical colleges outside the CCCU.} Thirty-seven percent of students indicated that they had been bullied or harassed at school because of their sexual orientation.\footnote{Id. at 205, 208. Wolff et al. note that a 2010 national survey found that 23\% of LGBTQ students at all colleges experienced bullying or harassment. Id. at 208.} Those students reported more symptoms of depression than other students, although no differences were found for social anxiety, negative identity or “outness.”\footnote{Id. at 208.} Seventeen percent of the students indicated that a mental health professional had attempted to change their sexual orientation, although a much larger percentage (47\%) reported that a mental health professional affirmed their identity.\footnote{Wolff et al., supra note 154, at 205, 210. Unlike the bullying, it is not clear whether the reparative therapy took place on campus or through a campus referral.} The sexual minority students were “at-risk for potentially significant concerns that could become the focus of clinical attention,” although, “as a whole, these symptoms did not rise to the diagnostic threshold for serious psychiatric pathology.”\footnote{Id. at 208.} While this at first appears encouraging, it means that the students showed “moderate” levels of depression, substance use, generalized anxiety, social anxiety, eating concerns, academic distress, hostility, and family distress, but not “high” levels when taken as a whole.\footnote{Id. at 7.}

Finally, there are two qualitative studies in which a very few students were interviewed in depth. The first, from 2010, included eight CCCU students who identified as gay or lesbian.\footnote{Wentz & Wessel, supra note 143, at 9.} These students encountered an unaccepting environment on campus, with each student “express[ing] that extremely negative perceptions of homosexuality were perpetuated within the general campus culture.”\footnote{Id. at 7.} The negative experiences took place in the dorms (especially the male dorms), in chapel, and for some of the students, in the classroom. The students also described the school handbook and policies as “overwhelmingly
CCCU students who identified as gay or lesbian. These students encountered an unaccepting environment on campus, with each student “express[ing] that extremely negative perceptions of homosexuality were perpetuated within the general campus culture.” The negative experiences took place in the dorms (especially the male dorms), in chapel, and for some of the students, in the classroom. The students also described the school handbook and policies as “overwhelmingly negative.”

The second, from 2015, involved eighteen current and former students who attended Christian colleges. While the participants indicated that they were primarily same-sex attracted, most (more than 66%) did not identify as gay or lesbian while in college. Their perceptions of campus life were generally more positive than those in the other studies/surveys. Half described the campus as being “open to discussion” of same-sex attraction. Seven out of 18 participants stated that they experienced compassion if they identified themselves as “struggling” with homosexuality. Only one-third described the campus environment as an “unsafe” place to acknowledge being gay.

2. Publicly Available Narratives

From the publicly available testimonies of LGB students and graduates of CCCU schools, one can assemble a more detailed picture of campus life. It is, of course, not the whole picture. Individual statements cannot possibly represent all experiences of sexual minority students. Most stories come from people who felt comfortable sharing their stories with a wide audience, even anonymously. Most were associated with student and alumni support groups, and were on the progressive end of evangelical belief, although I have also included

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230 Wentz & Wessel, supra note 143, at 9.
231 Id. at 7.
232 Id. at 11–12.
233 Mark A. Yarhouse, Holly Doolin, Kristina Watson, Melissa C. Campbell, Experiences of Students and Alumni Navigating Sexual Identity in Faith-Based Higher Education: A Qualitative Study, 14 GROWTH 16 (Spring 2015). It is not clear from the article that these were CCCU schools.
234 Id. at 19. Sixty-six percent did not adopt any sexual identity label, indicating that they were “Christian,” and two identified as heterosexual.
235 This may be a recent phenomenon. The only participant who was quoted described the openness as emerging within the last two years. Id. at 22.
236 Id.
237 Yarhouse et al., supra note 233, at 22.
238 See supra note 128.
most, their time at an evangelical college was a time of growth, including spiritual growth, even if that growth led them away from conservative evangelical beliefs.

Nonetheless, these stories support the largely negative picture of campus life that the above-mentioned studies and surveys have painted. Along with the qualitative studies, they enable the identification of specific aspects of the college community that were difficult for sexual minority students to handle.

a. Negative treatment by one’s peers

As indicated in the studies above, negative treatment from fellow students was a large part of the difficulties that sexual minority students experienced. In the 2010 Wentz & Wessel study, student Aaron explained: “You hear people say ‘faggot’ or making fun of gays...homophobia on this campus is pretty ridiculous.”239 In particular, the male dormitory atmosphere was described as problematic:

The actual people who are in the residence halls themselves, the students, literally have no inkling that there might be a gay person around them, so they just spout off every horrible thing you can say about gay people....

The following account provides another example:

This was a conversation that I heard time and time again in different forms while I was a student at Corban. Come to think of it, that conversation was better than the others I heard in the dorms: ‘What’s up you faggots?’ ‘I just don’t get why any dude would want to put his dick in another dude’s butt.’ ‘Why don’t they understand God made Adam and Eve, not Adam and Steve?’ ‘Dude, stop being so gay.’

Sam Taylor of Malone University (OH) describes his coming out on campus:

“I can tell you now; coming out at Malone was not easy. In fact, coming out anywhere is difficult. And I didn’t expect it to be a walk in the park. A handful of friendships went sour; some of the interactions with people in my dorm and in class became short and awkward; and I was branded with the cliché homophobic slurs we all know. On one occasion, I was even told that I am ‘not

239 Wentz & Wessel, supra note 143, at 7.
240 Id. at 12.
a real person’ because I am gay.”

Importantly, not every sexual minority student finds his or her interactions with fellow students to be unpleasant. Wheaton student Tyler Streckert publicly acknowledged his same-sex attraction in a signed posting on the campus forum wall and experienced “entirely positive responses” from faculty and students alike. Bethel student Jonah Venegas also described a positive experience: “None of my friends are awkward about it. They’re not trying to skirt around things,” Venegas said. “No one has treated me differently since they’ve found out . . . if I need to talk, they’ve been super willing to listen.”

b. Loneliness and depression

If there is one theme that sounds through nearly all accounts of evangelical campus life, it is that life as any kind of sexual minority is not easy because of the serious feelings of loneliness and depression.

The loneliness came out of not only being single when it seemed like half of the people I knew were getting engaged . . . but it also stemmed out of the loneliness that comes from not being able to talk to anyone about my attraction to guys. While I knew I wasn’t the only one on campus to experience same sex attraction, I hadn’t found anyone that I could talk to about it. . . . Someday the loneliness was so painful I wasn’t sure how I could make it through another day.

A student from Wheaton College explained:

Any guy that is seen hanging out with you on multiple occasions will have their sexuality questioned. For this reason, many of your friends will stop hanging out with you. . . . You will be extremely lonely.

Another student from Wheaton highlighted additional difficulties:

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244 Hudalla, supra note 133.
245 VOICELESS, supra note 136, at 49–52.
246 photograph of anonymous posting on Wheaton College Forum Board. (Copy on file with author.)
Half of my LGBTQ friends have dropped out due to psychological stress or worse. I have had friends try and commit suicide because of the messages the church sends LGBTQ people. The subsequent hopelessness is overwhelming.247

Dan Sandberg of Bethel University had this experience:

Because he’s an openly gay student, Sandberg said people have picked up their things and left to avoid sitting next to him. Male students have ignored his greetings because they’re afraid he’s trying to make a pass at them. He feels unwanted. ‘If this were a choice, do you think I would choose to be lonely, miserable and rejected by my family and friends?’ Sandberg said. ‘No. I would not choose to be that way.’248

Wesley Hill, a graduate of Wheaton College and a same-sex attracted Christian who accepts evangelical teachings on gay celibacy, is often held up as an example of how to integrate sexual orientation and belief. Yet Hill’s account of his years at Wheaton acknowledges the loneliness of keeping his homosexuality under wraps and the relief he felt at being able to confide in a trusted mentor.249 Tyler Streckert also acknowledges the loneliness and anxiety he felt before he disclosed his same-sex attraction.250

Suicide is a real possibility. AJ Mendoza’s story is ultimately positive—it was part of the “It Gets Better” project251—but he makes it clear that it got worse before it got better, abandoned by fellow students and the secular community alike:

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248 Hudalla, supra note 133, at 8.
249 See Wesley Hill, WASHED AND WAITING 31–37 (2010). Stan Jones, the then-current Provost of Wheaton College, offers Wesley Hill’s account as a contrast to Joshua Wolff’s. See infra note 269. Jones writes: “Hill found our community to be one in which . . . he could receive support as a . . . celibate gay Christian.” Although Jones acknowledges that Hill’s experiences at Wheaton were not entirely positive, Jones dismisses Hill’s description of the pain he experienced, noting that “such experiences are ubiquitous for sexual minority individuals.” See Stanton Jones, Please Tell, INSIDE HIGHER ED, (May 23, 2011), https://www.insidehighered.com/ views/2011/05/23/please-tell. Tyler Streckert’s experiences with Jones were different and less dismissive. See supra note 243 (describing interactions).
250 Streckert, supra note 243 (“That year I experienced so much digestive trouble that I took chamomile capsules and two antacids almost every day.”).
251 Sexual advice columnist Dan Savage started the “It Gets Better Project” in 2011 in response to a wave of gay and lesbian teen suicides. The project originally consisted of videos that older LGBT persons have made and directed at their younger counterparts, urging teenagers not to despair because “it gets better.” See http://www.itgetsbetter.org/.
My name is AJ Mendoza and I am going to be a senior at George Fox University. I’ve watched a lot of these It Gets Better videos and I’ve heard a lot of people say that college is the time when it’s going to get a lot better and you’re going to find a university that will be a lot more accepting. . . . I ended up at a university that maintains a policy against homosexuality and I know that there are a lot of you out there who are going right now to CCCU schools. And I know for myself that I felt a lot of times forgotten by the greater LGBT community. And so after two and a half years of being in that spot I decided to end my life this year.252

Mendoza credits his George Fox friends, supportive professors and counseling, a new church, helpful alumni, and the formation of an LGBT student group with his recovery: “So we started right now a club at our school, at George Fox called Common Ground. . . . It’s great, we have community there, we’re safe.”253

At my alma mater, suicide is part of a shared LGB history, uniting two generations. The film Queers in the Kingdom describes the 1987 suicide of Wheaton College student Stephen Thyberg.254 Thyberg’s suicide, and the suicide of Stephen Hampton in 2007, was on the minds of OneWheaton’s founders when they established the organization.255 Both students were gay, and in both cases, their orientation is believed to have played a role in their deaths.

c. **Fear of forced counseling**

Participants from the Wentz & Wessel study and the Southeastern survey were worried about being compelled to undergo some type of coercive counseling to treat their same-sex attractions.256 A fellow student outed student Zach to the administration, which told Zach that “[t]he only way you can stay is if you’re in counseling.”257 Although it is not clear that she was actually forced into counseling, student Katie explained that it was “demoralizing” to be told “You’re clearly

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253 Id.
254 See Queers in the Kingdom, supra note 146, at 0:0:35-40, 0:35-42.
256 Wentz & Wessel, supra note 143, at 8. As discussed above, see Dean, supra note 150, evangelical culture has had a significant association with several types of sexual orientation change therapy.
257 Wentz & Wessel, supra note 143, at 13.
disturbed and not fit." In the Southeastern University study, the author writes:

Many participants in the subpopulation of this study mentioned in the extended responses that they feared asking for help with their SSA because they knew they would be ‘forced’ into counseling/therapy. Some even went so far as to mention that they knew of others who had ‘come-out,’ were sanctioned to mandated counseling/therapy, and had undergone dramatic therapy procedures that caused them to become resentful towards the university and/or its administration.

d. The community

The parts of the student conduct code that suggest it is every student’s duty to call out violators of the community rules can lead to an atmosphere that is more police state than loving family. In *Pray the Gay Away*, Bernadette Barton describes life as an LGBT person in the small-town South: “under a panoptic gaze people feel that they are always being watched, even when they are not, so that they regulate their own behavior according to an imagined, external authority . . . .” But instead of a faceless state authority, “the Bible Belt panopticon . . . manifests through tight social networks of family, neighbors, church, and community members, and a plethora of Christian signs and symbols . . . .” It serves as a constant reminder to gay and lesbian residents that they should police themselves, that they should watch what they say and do or run the risk of ostracism, family strife, and economic consequences.

Life at an evangelical college can be experienced in much the same way, and not just by gay students. Heterosexual students describe the pressure that they feel to conform their sexuality to the community norm—chastity before marriage, a thrilling sexual life once safely in a heterosexual marriage—which is communicated and enforced through the evangelical college community:

Sex for these students is *never* a personal decision left to the discretion of the

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258 Id. at 11.
259 Whelan, *supra* note 220, at 35. The school’s code of conduct allows for “other sanctions” if a violation of its homosexual-practice rule is found to have occurred. *Id.*
261 *Id.* at 24.
262 *Id.* at 24, 29.
individual or couple. . . . Both a person’s partner and his or her larger faith community have the right, therefore, to demand respect for and obedience to God’s laws in these matters. They also have the right—the responsibility even—to call to account those who have transgressed those laws and to assist those who are struggling to follow them.263

Twenty-two percent of the evangelical college students in Freitas’s study “complained that their fellow students are overly judgmental, even watchful about sexual behavior, as if they are trying to catch people in sinful behavior . . . .”264 Freitas also noted that “[s]tudents are aware that officials at evangelical colleges see it as their duty to monitor male-female romantic relationships and to strictly enforce campus rules about visitation in the residence halls.”265

Sexual minority students face the same kind of judgment and scrutiny on a more intense level. The vagueness of the sexual conduct policies may lead students to overcorrect their behavior. Tasha Magness of Biola University (CA) began to experience panic attacks as college continued and she maintained secrecy about her orientation: “The sweat. The shaky hands. The slamming of her heart against her chest. Sometimes there was an urge to vomit. . . .”266 Whether the policies state it or not, students seem to believe that any indicator that one might be running afoot of the sexual conduct policy should be avoided because one’s fellow students might feel obligated to report it to the administration. Ken Smalley of Corban University (OR) and Zach from the Wentz & Wessel study both mentioned that their fellow students had “outed” them and that they found themselves in disciplinary discussions with the administration as a result.267 Bethel University (MN) requires RAs to report same-sex attracted students to the administration, without also requiring that the student have actually violated the code of conduct.268 This “fishbowl” environment can itself be distressing:

Despite the pain, confusion and the fear that I experienced, I don’t regret attending a private religious school where I got a good education and was loved unconditionally by many of those who knew me best. Still, I’ll never

263 Freitas, supra note 141, at 173.
264 Id. at 123–24.
265 Id. at 219.
266 Lee, supra note 16, at 79.
267 Ken Smalley ’11 – Gay, supra note 241; Wentz & Wessel, supra note 143, at 13. See also Johnson v. Lincoln Christian College, 501 N.E.2d 1380, 1382 (Ill. App. Ct 1986) (plaintiff was disciplined after a fellow student reported the plaintiff’s homosexuality to the administration).
268 Hudalla, supra note 133.
forget the worry, suffering, isolation and inner torment that came from knowing I could be dismissed in a heartbeat . . . because I was gay.269

A student from the Wentz & Wessel study added,

I had a friend last year [who worked for the school] . . . I’d always have to say, ‘I’m sorry, I’ll talk to you about it next year.’ . . . I can’t afford to tell the wrong person. I’d lose my [campus] job, I’d get fined, I’d get sent to counseling, there’s a whole list of things that would happen if the wrong person told the wrong person.”270

Fear of the disciplinary consequences increases the isolation that many students already feel, and it may drive them to conceal their same-sex attraction from all of their peers, even close friends. One study of students at CCCU schools documented a divide between sexual minority students’ public and private identities. While 67% of students who acknowledged some degree of same-sex attraction privately identified as other than heterosexual, only 15% publicly acknowledged a non-heterosexual identity.271 The Wentz & Wessel study also supports this: “[s]tudents actively worked to ensure they never accidentally said or did something which would reveal their homosexual identity.”272 The majority of the small sample of Southeastern University students agreed that as an SSA person they were “isolated, fearful, and unwanted among administration, faculty, staff, and students.”273 They feel

excluded, condemned, and hurt by the secret they are forced to keep . . . . Many fear the result of ‘coming out’ to their peers and/or professors, worrying that they will be rejected, scorned, or forced to attend mandatory counseling. This anxiety causes students to miss out on the opportunities that Christian colleges and universities offer . . . .274

The need for concealment also featured in individual students’ accounts:

My freshman and sophomore years, I knew that I was gay and believed there was nothing wrong with that, but I also knew that many, many people would disagree and I would face a lot of hostility and rejection, not to mention

269 Joshua Wolff, Where ’Don’t Ask, Don’t Tell’ Remains, INSIDE HIGHER ED (March 17, 2011) (describing his time at Biola University).
270 Wentz & Wessel, supra note 143, at 9.
271 Dean, supra note 150, at 10.
272 Wentz & Wessel, supra note 143, at 9.
273 Whelan, supra note 220, at 32.
274 Id. at 4.
evangelism and proselytism. . . . I did spend a lot of time being lonely, and I had to go to ridiculous measures to keep track of who knew what and what was safe to say to whom. It was exhausting and depressing.\textsuperscript{275}

As another student recalled,

I forced myself so deep into religion . . . . I even got a tattoo of a [B]ible verse that semester, further proving to myself and everyone else that I could be a 'good' Christian. The whole time, I worked towards hiding my feelings for other women. I adjusted my shower schedule around the other girls, forcing myself to say up until 3 am or wake up at 5 a.m.\textsuperscript{276}

Tyler Streckert detailed his experience, stating,

By far the worst aspect of my college experience was the dorm's group bathroom. At the beginning of the year, most shower stalls had two curtains. One hung past the entrance to the water spout, and the other hung a few feet farther out, past a small bench where we could put clothes and a towel. As the year progressed, some of the curtains would rip and fall down. I always tried to use an area with both curtains intact, because I feared falling into sin. Afraid of homosexual thoughts, I felt that I could not form close connections to the other men on my floor. Such a compulsive paradigm isolated me further from people who would have wanted to help.\textsuperscript{277}

Sam Taylor of Malone University (OH), who acknowledged his own orientation while enrolled, also recognized that his experience was not the only story:

And yet, there is another caption of the bigger picture – those who feel alienated and alone. Those who feel compelled to hide who they are. Those who feel that they are not welcome at our table for who they are.\textsuperscript{278}

The students who fear disclosure may overestimate the consequences of confiding in their peers or even in faculty. Most students mentioned the relief they felt when they were able to reveal themselves to others at college. The most common advice that alumni give to students, or that older students give to their younger selves, is to find a few people to trust:

\textsuperscript{275} Mr. Cellophane, \textit{VOICELESS}, \textit{supra} note 136, at 74.
\textsuperscript{276} Voice Five, \textit{VOICELESS}, \textit{supra} note 136, at 61–62.
\textsuperscript{277} Streckert, \textit{supra} note 243 (describing his life at college before publicly acknowledging his same-sex attraction).
\textsuperscript{278} Taylor, \textit{supra} note 242.
I can’t stress how essential it is for you to find people who love you and with whom you can be open and honest about your experiences. Depending on the nature of your school, finding these people might be difficult, but they exist. Even if you’re already out, though, it’s vital to find those certain people who will talk with you and listen to you for hours at a time, because your experience is going to be different from the majority experience, and those differences can make you feel isolated and alone if you can’t talk about them.279

The 2009 Yarhouse et al. study states that participants suggested that incoming freshmen who struggle with same-sex attraction “[t]alk to trusted friends and mentors” and avoid attempting to walk the path alone.280

In the Growth study, participants emphasized how important it is to carefully choose the people one tells about feelings of same-sex attraction.281 “I encourage you to find a group of friends who can be open and honest and listen and even if they are not 100% in support of it they will be willing to listen.”282

Even keeping this in mind, it is fair to say that for at least some sexual minority students, the campus environment at their evangelical college falls considerably short of welcoming. This is true even for students who adhere to the terms of their school’s code of conduct, who do not engage in sexual activity outside of heterosexual marriage, who are not dating people of the same sex, and who are not promoting or advocating homosexuality. It is true even for students who accept the evangelical view of homosexuality as a sin.283

279 Brent Bailey, An Open Letter to LGBT or Same Sex Attracted Freshmen at Christian Colleges and Universities, UNTOLD (Sep. 24, 2013), http://www.onewheaton.com/untold/oddmanoutletter/
280 Yarhouse, supra note 211, at 107.
281 Yarhouse, supra note 233, at 22, 24.
282 Id. at 24. See also id. at 23 (describing “pockets of safety” theme among answers); Hill, supra note 249, at 35–38 (describing relief at finding persons he could confide in).
283 For example, almost half of the same-sex attracted students who responded to the survey (14/30) in Whelan indicated they wanted to change their orientation. Whelan, supra note 220, at 27. These same students “voiced a devastatingly negative” account of life on campus where their sexuality was concerned. Id. at 32–33. See also Rockenbach & Crandall, supra note 210, at 68 (“the well-being of sexual minority students is not ensured simply by having a worldview that aligns with what would typically be the sexual ethic of a Christian college of university.”) Again, this is not the case in every instance. Streckert found the atmosphere at Wheaton much more positive after he openly admitted that he was same-sex attracted. Streckert, supra note 243.
V. LOVING THE SINNER: INSTITUTIONAL RELIGIOUS FREEDOM REVISITED

The foregoing sections have provided some basic background about evangelical colleges’ sexual conduct rules: why the schools have them, what the rules prohibit, how students negotiate compliance with them, and why sexual minority students attend colleges with sexual conduct codes. As a practical matter, this remains the status quo. No anti-discrimination statutes or ordinances forbid private religious colleges from maintaining sexual conduct codes. A recent attempt to change the status quo, in the form of California’s S.B. 1146, failed. Pending legislation that would expand federal law to include LGB nondiscrimination provisions has not passed, and the November 2016 election leaves the future uncertain. No college that has asked for a Title IX exemption has been denied one. The existence of Obergefell has not so far made much of a difference in college operations: none of the CCCU schools have changed sexual conduct codes applicable to students in response and neither the federal government nor anyone else has attempted to enforce Obergefell against private religious colleges.

Where does any of this leave us?

A. Religious Insiders, Religious Outsiders

As described above in Part II.A, evangelical colleges believe not only that homosexual activity is sinful, but also that they must maintain an enforceable sexual conduct code in order to make this theological belief manifest. They regard their rule-making authority—their ability to make their beliefs manifest—so important that they have sought to preserve it even at the expense of housing and employment discrimination protections. See Equality Act of 2015, S. 1858, 114th Cong. (2015). See also Alex Bollinger, What to Expect from the Trump Administration on LGBTQ Rights, LGBTQ NATION (Jan. 20, 2017), http://www.lgbtqnation.com/2017/01/expect-lgbt-rights-trump-administration/.

Another proposal, based on Utah’s LGB anti-discrimination statute and the academic work of Robin Fretwell Wilson, has recently been floated. Described as a compromise, the proposed legislation would extend LGBT anti-discrimination protections in jurisdictions where they have not yet been enacted while exempting some religious actors from the anti-discrimination provisions’ reach. See Kate Shellnut, Fairness for All: Evangelicals Explore Truce on LGBT and Religious Rights, CHRISTIANITY TODAY (Dec. 8, 2016), http://www.christianitytoday.com/ct/2016/december-web-only/fairness-for-all-evangelicals-explore-truce-lgbt-cccu-nae.html. If the legislation resembles Utah’s laws, it would also leave the status quo intact because religious colleges were explicitly exempted from Utah’s anti-discrimination provisions. See Utah Code § 34A–5–102(1)(j)(ii) (exempt from employment provisions); see also Utah Code § 57-21-3(2)(b) (exempt from housing provisions).

Some of the colleges seeking exemptions from Title IX specifically sought to preserve their rule-making and rule-enforcing authority from the incursion of contrary secular law. See,
to make and maintain sexual conduct codes applicable to community members—as an essential part of their religious freedom as an institution. There are many sins described in the Bible; deciding which sins the college will punish and which it will leave in God’s hands is at heart a theological determination, even if other, non-religious factors also come into play when the decision is made. Governmental interference with these theological determinations places a substantial burden on them as religious institutions.

How do college students become subject to this religious authority? Religious institutions are “valuable because they are borne out of the voluntary choices of their members . . . [and] created through the voluntary decisions of individuals to join together and pursue shared religious values.” It is “[t]his process of consent . . . [that] empowers religious institutions to promulgate rules to promote shared religious values.”

The colleges seem to operate under this consent-based framework. As described above in Part III.A, whether resting on the holy language of covenant or couched in the mundane language of contract, whether a physical signature is required or whether showing up at fall registration

\[ e.g., \text{supra note 9 and accompanying text (SB 1146). See, e.g., Letter from Gregg Chenowith, President of Bethel College (IN), to Catherine Lhamon, at 7–8 (May 1, 2015) (discussing need to discipline students for homosexual behavior as consequence of religious beliefs), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/request-2009-2016-combined.pdf (pdf pages 41–42).} \]

287 I have not seen evangelical colleges use this terminology, but Paul Horwitz describes religious institutions, including colleges and universities, as “jurisgenerative entities”: they make their own internal laws and enforce them against those within the sphere of their authority. See Horwitz, supra note 10, at 89. One could also read this as a type of “complicity claim.” In Hobby Lobby, the plaintiffs argued that their compliance with the ACA – providing their employees access to certain contraceptives through company-sponsored health insurance plans – would cause them to facilitate or participate in abortion if the contraceptives that their employees used worked successfully. Burwell v. Hobby Lobby, 134 S Ct. 2751, 2765–66 (2014). See Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity Based Conscience Claims in Religion and Politics, 124 YALE L. J. 2516, 2574–78 (2015). Along those lines, government-compelled recognition of a same-sex marriage would implicate the college in the homosexual sin being committed by the married couple, and failing to prohibit homosexual practice or the promotion thereof would also implicate the college in any sin that took place in the absence of a prohibition.


289 Helfand, supra note 61, at 542; Lund, supra note 288, at 1197; Laycock, supra note 10, at 1405 (“Voluntary affiliation with the group is the premise on which group autonomy depends.”).
is deemed acceptance of the sexual conduct code’s terms, the colleges provide notice of their sexual conduct codes and require from would-be students a demonstration of acquiescence to those provisions as a condition of attendance.290 In a happier world, all persons associated with the colleges, including all sexual minority students, would be in full agreement with their institutions’ sexual conduct codes. The burden of living with a “no homosexual practice” rule would be no burden to them, as it would be the students’ free and voluntary choice, and an exercise of their own religious beliefs. The students would willingly and cheerfully live in accordance without any negative consequences. Some students surely do.

But the need for enforcement of those rules internally hints at the more complicated reality. Despite the communication of the sexual conduct rules, sexual minority students continue to attend evangelical colleges. Some sexual minority students attend unwillingly, even if not quite involuntarily. Other sexual minority students misunderstand either their sexuality or their endurance until it is too late. And, if the consent is valid, then it is too late — too late to complain about the religious rules to which one agreed, too late to do anything but leave.

If a member’s “voluntary affiliation with the [religious] group is the premise on which group autonomy depends,”292 a religious group cannot coerce non-members into joining, and it cannot prevent members from leaving. Anyone who becomes unhappy with the direction of the group, or the rules it imposes, can move on by exercising their “right of exit.”293 Accordingly, “every insider has the right to leave, the right to become an outsider.”294 But “dissenters cannot use the coercive force of the government to compel a change in the church’s religious views, practices or governance.”295

Distinguishing between consenting insiders and non-consenting

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290 See supra notes 115–121.
291 See Stephen D. Stratton, Janet B. Dean, Mark A. Yarhouse, & Michael D. Lastoria, Sexual Minorities in Faith-Based Higher Education: A National Survey of Attitudes, Milestones, Identity and Religiosity, 41 J. PSYCH. & THEOL. 3, 4, 20 (2013). Stratton et al. make the point that the student body at evangelical colleges is more conservative and may appreciate the sexual conduct codes. But see supra note 283 (discussing Whelan and Rockenbach & Crandall).
292 Schragger & Schwartzman, supra note 10, at 960.
293 Id. at 959–61.
294 Lund, supra note 288, at 1203; Zoe Robinson, What is a “Religious Institution”? 55 B.C. L. Rev. 181, 228–29 (2014); In fact it is a constitutional right. Id.
295 Lund, supra note 290, at 1194. Lund acknowledges, however, that the line between insiders and outsiders is especially blurry in the educational context. Id. at 1203 (citing cases).
outsiders can be harder than it may seem. At one end of the spectrum, church members are generally insiders and are usually stuck with the consequences of the church’s self-governing rules under the doctrine of church autonomy. If a church member violates the church’s code of conduct, he or she can be disfellowshipped or shunned. The church can interfere with a member’s marriage. It can perform spiritual acts that inflict emotional or even physical harm.

Likewise, ministers are insiders who, one assumes, agreed to become ministers, and thus are not able to use secular law to change the terms of their religious employment. In Hosanna-Tabor, Ms. Perich claimed she was fired in violation of the Americans with Disabilities Act because her employer perceived her as a person with a disability who could not perform her job. Even if this was true, and Ms. Perich was terminated in violation of the ADA, it did not matter where enforcement of the ADA would result in “imposing an unwanted minister” on a religious organization.

At the other end of the spectrum, employees of for-profit corporations owned by religious persons appear to be non-consenting outsiders. Hobby Lobby recognized for the first time that owners of some for-profit businesses could operate stores selling secular goods based on religious principles, but nonetheless treated the employees as nonconsenting outsiders who did not share the owners’ religious beliefs. The same appears to be true of their customers. A prospective

296 See generally Watson v. Jones, 80 U.S. 679, 734 (1871) (faction of church members who lost claim of rights to church property in ecclesiastical decision could not review that decision in federal court). See also Angela C. Carmella, After Hobby Lobby: The “Religious For-Profit” and the Limits of the Autonomy Doctrine, 80 Mo. L. Rev. 381, 405–09 (2016) (discussing cases involving dissenting church members unable to challenge church’s decisions against them); Lund, supra note 288, at 1213–14 (“Many religions teach and do things that outsiders find outrageous.”).

297 Lund, supra note 288, at 1214 (discussing shunning).

298 Id. at 1199 n.92, 1205 (discussing cases).

299 Id. at 1211–12 (discussing allegedly negligent charismatic healing service). This principle was tested most seriously in the cases involving the Catholic Church’s liability for priests who molested the children in their parishes. See Ira Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 B.Y.U. L. Rev. 1789, 1833–84 (2004) (discussing church liability under various legal theories).


301 Id. at 700–01.

302 Id. at 706.


304 Hobby Lobby, 134 S. Ct. at 2765–66, 2781 n.37.
At the other end of the spectrum, employees of for-profit corporations owned by religious persons appear to be non-consenting outsiders. \(\text{Id.}\) at 706. \(\text{Hobby Lobby}\) recognized for the first time that owners of some for-profit businesses could operate stores selling secular goods based on religious principles, but nonetheless treated the employees as nonconsenting outsiders who did not share the owners’ religious beliefs. \(\text{Id.}\) United States v. Lee, 455 U.S. 252, 261 (1982); Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2781 n.37 (2014).

The same appears to be true of their customers. A prospective bride who phones a baker or a florist after seeing an advertisement or viewing a sample of their wares has not joined a church or waived any rights to non-discrimination she may have by inquiring about goods and services at a commercial business or place of public accommodation. \(\text{Id.}\) at 59. Other cases have involved florists and bakers who would not provide their goods and services to same-sex weddings. See Steve Sanders, RFRAs and Reasonableness, 91 Ind. L.J. 243, Winter 2016, at 262–64 (discussing cases).


In \(\text{Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ and Latter Day Saints}\), 483 U.S. 327 (1987), the church operating a gym could fire a janitor because he did not share the church’s faith. \(\text{Id.}\) at 339. Although in \(\text{Amos}\) the terminated janitor attempted to argue that he was an outsider and thus protected by the Establishment Clause, the Court
may sign or otherwise be subject to “morals clauses,”[311] which are at least somewhat akin to the sexual codes of conduct to which evangelical colleges’ students agree. And yet, in some cases, these employees can still claim the protections of the secular laws of employment, even over their employers’ objections.[313] This does not mean that an employee cannot be fired for violating the morals rules; they can.[314] But they can’t be fired for a reason that anti-discrimination laws prohibit, and they are allowed to claim in court that the alleged violation of the morals rules was a pretext for that kind of discrimination.[315] In other words, the employee’s consent to work for a religious employer was not consent to waive his or her civil rights.[316]

If anything, there are even fewer reasons to treat teenage and young adult students as insiders than there are to treat the adult employees of

[311] The “morals” requirements may be quite vague. Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 656 (6th Cir. 2000) (“by word and example, [the employee] will reflect the values of the Catholic Church”; affirmation did not mention premarital sex); Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410, 411 (6th Cir. 1996) (handbook said only that teachers must be “a Christian example for the students”).

[312] See supra Part IV.A.

[313] Title VII does allow some employment discrimination by religious employers – they are allowed to employ only fellow members of their faith. See supra note 307.

[314] See, e.g., Cline, 206 F.3d at 658. The employer could fire a teacher for violating its rule against engaging in premarital sex, as long as it enforced the rule against men and women alike. If the employer only fired female teachers who engaged in premarital sex, or only fired teachers who became pregnant, then it violated Title VII’s sex discrimination provisions. In pre-Obergefell days, it might have been possible for evangelical colleges to have maintained a sexual conduct code that prohibited all sex outside of opposite-sex marriage, and applied it equally to heterosexual and non-heterosexual students. After Obergefell, it is no longer possible to distinguish same-sex marriages from straight marriage in this manner. It would still be possible to maintain a sexual conduct code that prohibited any extramarital sex, but it would have to recognize in some fashion same-sex marriage.

[315] Id. See also Dias v. Archdiocese of Cincinnati, No. 1:11-cv-00251, 2013 WL 360355, at *1 n.1 (S.D. Ohio Jan. 30, 2013) (question of fact remained as to whether religious employer fired plaintiff because she was pregnant or because she had violated morals clause), appeal dismissed, No. 13-3759 (6th Cir. Aug. 30, 2013). Compare Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n, 132 S. Ct. 694, 709 (2012) (ministerial status of employee precluded Court entirely from considering minister-teacher’s claim she was fired because of a disability).

[316] These same factors are at work in the relationship of customers or clients to religious non-profits offering social or health-related services. Anti-discrimination laws have required Catholic adoption agencies to place children for adoption with same-sex couples, despite religious objections to so doing. Carmella, supra note 296, at 415–16 (discussing Catholic adoption agencies’ attempts to obtain exemptions from anti-discrimination laws that would require them to place children with same-sex couples). On the other hand, Catholic hospitals have statutory exemptions from providing their customers with medical services to which they object. See id. at 409 & nn. 165–66 (Catholic hospitals do not provide abortions or sterilization, citing cases).
religious schools as consenting insiders. As indicated in Part III.B, the extent to which sexual minority students’ enrollment can be described as a “voluntary decision[] . . . to join together and pursue shared religious values” is at a minimum problematic, given the pressures some students face. Those same pressures make it more difficult for those students to leave as well. Since adults do not waive their statutory anti-discrimination rights by agreeing to a morals clause, why should students waive their constitutional right to enter a valid marriage, especially when they may not understand themselves or the import of the sexual conduct rules when they enroll?

**B. Harm to Sexual Minority Students.**

Valid consent serves another purpose, working as a line of demarcation between those insiders who must reap the consequence of their decision to remain with a religious institution (church members) and those who may not be burdened with the religious choices of others (non-consenting outsiders). The First Amendment “gives no one the right to insist that in pursuit of their own [religious] interests others must conform their conduct to his own religious necessities.” Thus, while the Free Exercise Clause and RFRA allow a person (or institution) to obtain a religious exemption from generally applicable laws, the exemption cannot impose excessive burdens on third parties—those who do not benefit from the exemption or share the belief. In the paradigmatic example, an Amish employer’s request that he be exempt from paying Social Security taxes on his employees could not be granted, even though the employer’s exercise of his religious beliefs was impaired. If he were allowed the exemption, his non-religious competitors, who would still have to pay the tax, would be burdened, as

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317 Helfand, supra note 61, at 564.
319 Frederick Mark Gedicks & Rebecca G. Van Tassell, Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37, in The Rise of Corporate Religious Liberty 323 (1st ed., 2016). There are two schools of thought on the origins and import of the third-party burden issue. One finds that the Establishment Clause prevents a religious exemption from causing some level of third-party burdens. See id. at 329; Nancy L. Knaur, Religious Exemptions, Marriage Equality, and the Establishment of Religion, 80 UMKC L. Rev. 749, 78795 (2016). On the other hand, Hobby Lobby appears to suggest that it is part of the court’s inquiry into the government’s compelling interest in seeing the challenged statute enforced by least restrictive means. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 n.37 (2014).
320 See United States v. Lee, 455 U.S. 252, 261 (1982); see also Hobby Lobby, 134 S. Ct. 2781 n.37.
paradigmatic example, an Amish employer’s request that he be exempt from paying Social Security taxes on his employees could not be granted, even though the employer’s exercise of his religious beliefs was impaired. If he were allowed the exemption, his non-religious competitors, who would still have to pay the tax, would be burdened, as would his non-religious employees, who would receive lower Social Security benefits. An exemption would allow the employer to “impose the employer’s religious faith on the employees.”

In *Hobby Lobby*, the majority, while recognizing that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,” also recognized in dicta that not every third-party burden matters. If the burden to third parties is slight, or if there is a way to prevent the third-party burden that does not involve diminishing religious freedom, then, it seems, the third-party burden should not count for much, especially where the religious institution’s freedom is seriously infringed.

What is the burden that evangelical colleges’ continued maintenance of sexual conduct codes places on their sexual minority students? One school of thought finds there is no burden at all, as long as a gay or lesbian student is free to obtain an education elsewhere at a school that does not have a sexual conduct code. This argument is commonly made in support of religious wedding vendors and non-profit service providers: as long as a reasonably comparable alternative vendor or agency is available to the prospective customer, the customer has not been substantially burdened, or even burdened much at all. Having to obtain the goods or services from another place is more of a nuisance causing some level of third-party burdens. See id. at 329; Nancy L. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 80 UMKC L. Rev. 749, 787–95 (2016). On the other hand, *Hobby Lobby* appears to suggest that it is part of the court’s inquiry into the government’s compelling interest in seeing the challenged statute enforced by least restrictive means. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014).


Lee, 455 U.S. at 261.

See *Hobby Lobby*, 134 S. Ct. at 2871 n.37

See id. Because the majority found that *Hobby Lobby*’s claimed exemption from the ACA did not in fact burden its employees – they could receive cost-free access to birth control without involving their employer – the discussion of burdens was brief. The majority did not suggest how burdensome the third-party burden has to be before courts could legitimately take it into account. Scholars have attempted to fill the gap. Gedicks and Van Tassell, for example, argue that the third-party burden should be “material” in order to merit consideration. Gedicks & Van Tassell, *supra* note 319, at 337–38.
Another consequence that sexual conduct codes place on sexual minority students is the burden of being on the receiving end of discrimination, and the resulting injury to their dignity. This is the same kind of harm that African-Americans experienced when they were turned away from a lunch counter in the Jim Crow era; a message that they are less worthy of respect, and unequal in virtue to the refuser.325 This article’s epigraph affirms this: it isn’t “just the college’s policy which prohibits ‘homosexual behavior.’ . . . The oppression they feel comes from a deeper message . . . one which does not affirm their value as contributing members of the community or even their lives.”326

Yet some do not see this as much of a burden at all. For example, I have seen and heard informally the argument that any pain sexual minority students experience as a result of the sexual conduct rule is merely the inevitable consequence of being told hard biblical truths about their sin. In the academy, similar arguments are made against the concept of dignitary or stigma-producing injuries caused when the discrimination occurs as a result of religious beliefs. Marc DiGirolami writes that “[t]he argument from dignitary harm is, at bottom, an argument that these religious practices must be suppressed because they offend the customer turned away. That argument is at odds with the whole First Amendment tradition.”327 Sherif Girgis writes: “in a diverse society, religious liberty always creates moral stigma” . . . [in fact] “religious freedom is the ultimate source of moral stigma.”328

But such an argument ignores both the context and the severity of sexual minority experiences on evangelical college campuses. It is not just the potential unavailability of student housing for same-sex married students. It is a school atmosphere that is described as highly negative, negative, unacceptable, or unsafe.329 It is a campus climate that drives sexual minority students to loneliness, isolation, depression, and

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325 NeJaime & Siegel, supra note 287, at 2575–78.
326 See supra note 2.
329 Although there are certainly students who would disagree with the characterization, majorities of students, including straight students, used negative terms to describe the on-campus atmosphere. See supra notes 211, 216, 230–237, 245–248; Yarhouse, supra note 233.
The dignitary injury to sexual minority students goes far beyond mere knowledge that someone, somewhere disapproves of them, but is direct and personal, experienced on a near constant basis, and serious enough to cause psychological harm.

Evangelical colleges and universities, as religious institutions, have constitutional authority to self-govern, and the constitutional and statutory right to freely exercise their faith. They have defined the maintaining of sexual conduct codes prohibiting homosexual conduct or behavior as essential to the exercise of their faith and to their religious identity. Despite the existence of these codes, and the institutional beliefs, all evangelical colleges have, and most likely always will have, sexual minority students.

I do not believe it is possible for evangelical colleges to maintain their sexual conduct policies while eliminating the burden on their sexual minority students. On the other hand, there is a lot of room for improvement. If one takes seriously the colleges’ stated desires to “love the sinner” and to welcome gay and lesbian students, colleges could, consonant with their religious beliefs, take steps to reduce the burden their institutional free exercise imposes on their sexual minority students. Since 2011, a number of schools have allowed, even if not quite sponsored or recognized, support groups for sexual minority students. Colleges have worked at prevention of harassment through policies or disciplinary action. And at many schools, there are fellow students, staff, and professors who have found ways to support sexual minority students within the bounds of their faith.

Again, although lightening the third-party burden is within the colleges’ control, I do not believe it is possible to love the sinner and hate the sin. But I encourage evangelical colleges to try to prove me wrong.

330 See supra notes 245–255, 266–278.
331 I have not attempted to catalog all of the groups, but see, e.g., Kara Spoelstra, Haven Granted Club Status, THE FALCON ONLINE (Dec. 4, 2013), http://www.thefalcononline.com/2013/12/haven-granted-club-status/; AJ, supra note 252 (George Fox); EASTERN UNIVERSITY, CLUBS & ORGANIZATIONS, http://www.eastern.edu/student-life/student-programs/student-activities/clubs-and-organizations; Perkins, supra note 207 (describing group at Gordon). These groups are different than the unofficial groups mentioned above in the introductory section. See supra note 13 & accompanying text.
333 See supra notes 243–244, 250, 279–282.
VI. CONCLUSION

Evangelical colleges and universities believe that maintaining and enforcing sexual conduct codes prohibiting homosexual conduct or behavior are essential to the exercise of their faith and to their religious identity. Despite the existence of these codes, all evangelical colleges have, and most likely always will have, sexual minority students. Even when the codes prohibit only homosexual practice, the environment on campus is overwhelmingly negative for sexual minority students, placing a substantial burden on them, even when they conform their conduct to the codes’ requirements.
SHOOT NOW, ASK QUESTIONS LATER: HOW TECHNOLOGY-BASED STARTUPS DRAFTKINGS AND FANDUEL ARE CHANGING THE WAY WE DO BUSINESS

Andrea MacIver*

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I. INTRODUCTION

“We were really focused on how to get a business started, how to raise capital, how to find an office. We weren’t thinking along the lines of regulatory[.]”
— Janet Holian, Chief Marketing Officer at DraftKings.¹

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¹ Jason Schwartz, How DraftKings-Boston Love Affair may have Saved Daily Fantasy, ESPN (April 12, 2016), http://espn.go.com/espn/otl/story/_/id/15164559/how-draftkings-wooing-boston-helped-daily-fantasy-industry-nationwide. (”When [Jason] Robins and his co-
If you follow sports, or just happened to watch a professional football game in 2015, you know the names DraftKings and FanDuel. Both companies’ ads inundated the media in 2015, especially during the start of the NFL season, making “DraftKings” and “FanDuel” household names. This surge of media presence coincided with a massive influx of money from investors into both companies, which, to many, was a sign that DraftKings and FanDuel were here to stay. All the media attention and money exchanging hands in 2015, however, quickly put DraftKings and FanDuel on the radar of many—including attorneys general who began declaring daily fantasy sports illegal in their respective states. Illegal? What about the millions of users? The high-profile investors? The multi-million dollar daily fantasy sports industry? How was it that the legality of daily fantasy sports was only now being questioned?

As DraftKings’s Global Chief Marketing Officer Janet Holian conceded, when the founders started DraftKings, they were focused on...
getting their business up and running and simply were not thinking about laws and regulations that might affect the legal status of their company at some point down the road. The founders simply were not asking questions about the legality of their company and fantasy sports. Although some may argue that it would have been prudent to ask such questions and sort out any legal issues before entering the market, the fact that DraftKings and FanDuel did not do this until after entering the market and doing business for several years may be the saving grace for daily fantasy sports. This Article argues that, planned or unplanned, the fact that DraftKings and FanDuel are dealing with legal and regulatory hurdles several years after having entered the market is one of the reasons, if not the reason, why these companies will survive and continue to prosper in the future. In this way, DraftKings and FanDuel are changing the way we do business in the United States. While it is generally not advisable to “shoot now and ask questions later,” in the case of technology-based startups, DraftKings and FanDuel are teaching us that doing so just may be your best bet.

II. BACKGROUND

In the past decade, the United States has seen several technology-based startups enter the market and experience unparalleled growth and success—success that would not have been possible without advances in technology. Think Uber. Think Airbnb. Now DraftKings and FanDuel. From a substantive standpoint, “[t]hese companies offer a variety of Internet-based platforms and applications that create new ways for people to share goods and services with one another on a previously unimaginable scale.” From a procedural standpoint, which is the focus of this Article, these companies have entered the market rapidly with relative ease, grown exponentially, and then found

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9 See Schwartz, supra note 1.
12 See infra notes 27–32.
13 Kaplan & Nadler, supra note 11, at 103.
themselves encountering legal hurdles down the road—hurdles that traditionally would have been overcome before entering the market. In the cases of DraftKings and FanDuel, these companies entered the market and became very successful very early on, only to face one large, unavoidable question a few years later—was daily fantasy sports, the foundation of their business, legal? By shooting now—i.e. getting their product into the market rapidly—and asking questions later—i.e. determining the legal status of their businesses—DraftKings and FanDuel have set themselves up for success. They have entered the market with what many would argue is an illegal product, successfully done business for several years and, in doing so, prepared themselves to fight and overcome the legal battles that were inevitably waiting in their future.

A. Innovation and the Law

“[T]he cost of starting a company has never been lower[,]”\(^\text{15}\) and with products that are built upon technology, DraftKings and FanDuel have been able to launch their businesses with low overhead costs and, as a result, with relative ease.\(^\text{16}\) This use of technology has also allowed their businesses to enter the market so quickly that lawmakers have been forced to take a reactionary approach to determining whether the companies are legal and, if so, what regulations, if any, are warranted.\(^\text{17}\) Such a rapid launch into the market would not have been possible without the advances in technology that DraftKings and FanDuel

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\(^{14}\) See Joseph Shuford, "Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution," 16 N.C.J.L. & TECH. ON. 301, 334 (2015) (“Sharing economy companies have benefited from operating with near zero marginal cost, few regulations, and through social media systems.”).

\(^{15}\) George C. Lewis, The Cautionary Tale of Crocs and the New World of Instant Competition, 37 COLO. LAW. 39, 39 (Dec. 2008). Lewis also notes:

For startup companies, barriers to entry into the marketplace used to be physical—factories, distribution, mass-marketing campaigns, or even skilled employees. In the modern world of business, many duties can be subcontracted, and a startup no longer needs to pull together large amounts of capital for physical assets. Prototyping and manufacturing can be outsourced to any number of factories overseas. In many cases, FedEx, UPS, or DHL can take the place of traditional shipping departments. The Internet can be used as the primary marketing medium and even as the main distribution channel (consider online retail sites like Amazon, eBay and thousands of smaller, lesser-known companies).

\(^{16}\) See Shuford, supra note 14, at (“Sharing economy companies have benefited from operating with near zero marginal cost, few regulations, and through social media systems.”).

\(^{17}\) See infra notes 66–76.
capitalized upon.

Beyond just DraftKings and FanDuel, though, innovation and the law are rarely ever on the same page, with the law inherently lagging behind innovation. This reality is often one of the most challenging—and expensive—obstacles that innovative companies face. This is because “[i]nnovative ideas disrupt the traditional or expected [and] [i]n turn, these ideas are prone to generate litigation.” Such litigation often arises because “[m]any innovative companies are using technology to invade highly-regulated industries; [i]nnovators often apply the strategy of do first, seek forgiveness later; and [d]isruption often requires removing what is thought to be an essential component of an industry.” Despite the initial backlash that results from the law’s inherent lag behind innovation, it follows that “[a]s business models transform, laws and regulations must continue to evolve to address these novel issues.” In the end, the law will generally follow innovation. For daily fantasy sports operators like DraftKings and FanDuel, however, this is a process that is easier said than done.

**B. Daily Fantasy Sports: DraftKings and FanDuel**

While most people are probably familiar with season-long fantasy sports and have probably participated in, or know someone who has had

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18 Lucas E. Buckley, Jesse K. Fishman & Matthew D. Kaufmann, *The Intersection of Innovation and the Law: How Crowdfunding and the on-Demand Economy Are Changing the Legal Field*, Wyo. Law., Aug. 2015, at 38. Furthermore, “[a]tacking highly regulated industries, acting without permission, and tweaking essential components may be helpful strategies for creating a competitive edge and revolutionizing an industry. However, these same factors are, not surprisingly, magnets for litigation.” Id.

19 *Id.*

20 *Id.* As a result of this inherent conflict between innovation and the law, “[i]t sometimes seems as if the best way to identify a hot new company is to look at the legal trouble it is in.” Brett Ryder, *Shredding the Rules*, ECONOMIST (May 2, 2015), http://www.economist.com/news/business/21650142-striking-number-innovative-companies-have-business-models-flout-law-shredding (“The tension between innovators and regulators has been particularly intense of late. Uber and Lyft have had complaints that their car-hailing services break all sorts of taxi regulations; people renting out rooms on Airbnb have been accused of running unlicensed hotels; Tesla, a maker of electric cars, has suffered legal setbacks in its attempts to sell directly to motorists rather than through independent dealers; and in its early days Prosper Marketplace, a peer-to-peer lending platform, suffered a “cease and desist” order from the Securities and Exchange Commission.”) Id.

21 Buckley et. al., supra note 18, at 36.

22 See M. Christine Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J.L. & Tech. 59, 61 (2006) (“Fantasy football finally gained national attention in 1988 when well-known regional newspapers such as the *L.A. Times*, *N.Y. Daily News*, and *Chicago Sun-Times* ran pieces instructing readers on how to form their own fantasy football
participated in a league at one time or another, pay-to-play daily fantasy sports is new and its popularity has arisen in the last few years thanks to companies like DraftKings and FanDuel. In daily fantasy sports games, similar to regular, season-long fantasy sports, “contestants pick a team of professional players and are awarded points based off the stats the players on their team have during the length of the contest. The goal of fantasy sports is to have accumulated the highest point total in the allotted timeframe.”

In a nutshell, traditional “[f]antasy sports are contests where persons compete for cash or prizes based on a scoring system that takes into account the accumulated statistics of professional athletes chosen as part of a fantasy team.” Daily fantasy sports leagues, however, are different from traditional season-long fantasy sports leagues in a few ways, including “the length of the contest, how the contest is structured, and how players select their team.”

Despite being relatively new to the scene—or at least new in comparison to season-long fantasy sports—daily fantasy sports has taken off since its creation. The Fantasy Sports Trade Association has estimated that daily fantasy sports was responsible for $492 million in annual spending in 2012. Such growth has attracted many big-time investors. In 2015 alone, FanDuel raised approximately $361 million from investors such as Comcast Ventures, NBC Sports, and Time Warner Investments. Additionally, DraftKings raised approximately $375 million from investors such as Fox Sports, Major League Baseball, Major League Soccer, the National Hockey League, and the Kraft Group. Further, in 2015, daily fantasy sports was considered one of the fastest growing industries in the United States, with DraftKings reporting “revenue growth of 650% between fiscal years 2013 and 2014...
with user entry fees rising by 575% during that same time period.”30

“With projections for 2015 revenues ranging between $100 and $150 million, [it’s easy to see why] conglomerates have invested hundreds of millions of dollars into leading companies within the DFS industry.”31

Such growth, which has been predicted to continue exponentially,32 has recently been questioned in light of state lawmakers’ latest declarations that daily fantasy sports are illegal.33 Daily fantasy sports operators like DraftKings and FanDuel were able to enter the market under the premise that they were legal under the Unlawful Internet Gambling Enforcement Act (“UIGEA”) of 2006, which includes a “carve out” provision for fantasy sports.34 Under the UIGEA, which aims at outlawing Internet gambling, there is an exception for fantasy sports that states fantasy games are legal if the “winning outcomes reflect the relative knowledge and skill of the participants.”35 The UIGEA provides that “bet or wager” does not include:

(ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:
(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
(III) No winning outcome is based—
(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
(bb) solely on any single performance of an individual athlete in any single

31 Id.
32 Heitner, supra note 4 (“Eilers Research CEO Todd Eilers estimates ‘that daily games will generate around $2.6 billion in entry fees [in 2015] and grow 41% annually, reaching $14.4 billion in 2020.’”)
33 See Drape, supra note 5.
34 See Ehrman, supra note 24, at 88.
real-world sporting or other event.  

“The UIGEA was forced through Congress in the remaining minutes before an election recess,” with backing from America’s professional sports leagues, especially the NFL. Nonetheless, “[t]he rapid growth of daily fantasy sports presents challenges not contemplated by the online gambling regulations of UIGEA and a step into the unknown for media companies, marketers, sponsors and others looking to leverage this growing business.” Also, while it would appear that the exception in the UIGEA certainly paved the way for daily fantasy sports, the exception “does not make fantasy sports legal because they may still violate other state or federal laws; [rather] it merely guarantees that the government will not prosecute fantasy sports under the act.” It is for this reason that some say DraftKings and FanDuel “cagily drove an 18-wheel through [a] small opening in the law to create an industry that is on track to collect $4 billion in entry fees this year alone.” Nonetheless, questions remain as to whether daily fantasy sports is legal, since the UIGEA did not contemplate daily fantasy sports, and since states are free to adopt their own laws on gambling.

Despite the protections laid out in the UIGEA, it has become evident that states have in fact adopted their own laws on gambling and, under those state laws, have begun to question the legality of daily fantasy sports. “Under common law principles, prohibited lottery and gambling offenses generally involve activities in which each of the following elements is present: (1) the award of a prize, (2) determined on the basis of chance, (3) where consideration was paid.” While most states adhere to this general common law definition of gambling,
variance between the states has arisen when discussing the level of chance that each state allows before it considers an activity to be illegal gambling. These variances can be boiled down into three tests that state courts employ when determining whether an activity is illegal gambling.

A majority of states use the predominance test, which is also referred to as the dominant factor test. Under this test, in order to determine whether an activity is illegal gambling, courts must inquire “whether the outcome of the activity at bar is determined more by a participant’s skill or by uncontrollable chance.” Where the outcome of the activity is determined more by chance than a participant’s skill, it will be considered illegal gambling. In other words, under the predominance test, an activity will be considered “a game of skill if a player’s own ability controls at least 51% of a contest’s outcome.”

A minority of states use the material element test. Under this test “states classify a game as one of skill or chance by determining whether chance is a material element affecting the outcome of the game.” This means that even if skill is predominant in the game, it can still be deemed illegal gambling if chance materially affects the outcome of the game. For example, in New York, where the material element test is used, one court explained, “[a] ‘contest of chance’ is in turn defined under New York law as ‘any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.’” The material element test “is more subjective than the Dominant Factor test.”

A minority of states determine whether an activity is illegal gambling “by determining whether chance plays any role in influencing the outcome of a game. In these jurisdictions, if chance is present, a game is illegal gambling.” Only a few states currently employ this test, which is lucky for daily fantasy sports “[a]s virtually every game has

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44 See Meehan, supra note 30, at 15.
45 Id. at 15–16.
46 Id. at 16.
47 Id.
48 Meehan, supra note 30, at 16.
49 Id.
50 Id. at 17
51 United States v. DiCristina, 726 F.3d 92, 98 (2d Cir. 2013).
52 Cabot et. al., supra note 25, at 1205.
53 Meehan, supra note 30, at 18. This test is also sometimes referred to as the Gambling Instinct Test because it prohibits any activity that appeals to a participant’s gambling instinct. See Cabot et. al., supra note 25, at 1205.
some element of chance. . . .

Under current state laws, the survival of daily fantasy sports will depend on how much chance each state finds to be involved in the outcome of daily fantasy sports. On one end of the spectrum, the most favorable test for daily fantasy sports operators is the predominance test, whereas at the other end of the spectrum, the least favorable test is the any chance test. According to one author, evidence supporting the classification of DFS as a game of skill includes the following: (1) DFS requires many of the same skills as traditional fantasy sports, such as drafting players, using game theory and weighing risks and rewards; (2) there are many specific skills required to excel in DFS, such as employing advanced game theory in order to succeed and managing one’s bankroll; (3) professional sports leagues, including the MLB and NFL, are backing DFS as a game of skill; and (4) skilled DFS players consistently win. Conversely, evidence in support of classifying DFS as a game of chance includes: (1) the lack of control over players once the lineups have been set; and (2) the possibilities of “a freak injury, an unexpected change of the weather, or an unbelievably unlikely event [that] may occur during a given game. . . .”

After reviewing the laws of their respective states, a number of state attorneys general have come out and declared that daily fantasy sports are illegal in their states. Such declarations have resulted in litigation in each state to determine whether daily fantasy sports are legal or illegal in those states. The first attorney general to deem daily fantasy sports illegal in his state was Eric Schneiderman of New York.

55 See Ehrman, supra note 24, at 113. (“Under the various state laws, the answer is less concrete and does vary; however, in the majority of states daily fantasy sports are protected as games of skill. Some may contend that luck is still heavily involved with success in daily games, but long-term statistics validate the fact that more skilled players who devote more time to research and other planning consistently outperform other players, thus showing their skill. Compare this to the stock market, where even the best analysts are unable to beat the market, and the skill of these fantasy players becomes more evident.”).
57 Meehan, supra note 30, at 32–33.
58 Meehan, supra note 30, at 33–35.
59 Drape, supra note 5.
60 See id.
61 Walt Bogdanich, Joe Drape, & Jacqueline Williams, Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York, N.Y. TIMES (Nov. 10, 2015),
After declaring daily fantasy sports illegal in New York, Schneiderman sent cease-and-desist orders to daily fantasy sports providers DraftKings and FanDuel, which ordered that they cease their operations in the state of New York. 62 Although New York Supreme Court Judge Manual J. Mendez upheld the Attorney General’s cease-and-desist order, an Appellate Court judge essentially overturned the ruling a few hours later in “allowing [DraftKings and FanDuel] to continue to operate while their appeal [regarding the legality of daily fantasy sports] was being considered.” 63 The battle in New York is an important one for daily fantasy sports as “New York, with more than 1.2 million customers, is the largest market, and the companies will lose a combined $35 million to $40 million annually” if daily fantasy sports are deemed to be illegal there. 64 Further, being forced to stop operations in New York would devastate daily fantasy sports because of the inevitable loss of investors and business partners that would result, 65 and the potential precedent it could set for other states with laws that are similar to New York’s laws on gambling.

Separate from, yet concurrent to, the ongoing legal analyses occurring in state courts, however, is the larger and perhaps more important phenomenon of the state legislatures pushing to pass new state laws or amend old laws to exempt daily fantasy sports as forms of illegal gambling in their respective states. 66 If states pass new laws making daily fantasy sports legal, the skill versus chance debate will become moot in those states. “Attaining legality at the state level provides assurance to the industry that it may continue to grow and prosper without fear of persecution from the legal system.” 67

By way of example, the State Assembly in California has approved a bill that would allow daily fantasy sports to operate in California, so long as the state licenses the companies, which would require background checks, payment of an annual regulatory fee, and reporting of player winnings to be taxed. 68 The Senate Committee in Florida

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62 Id.
63 Drape, supra note 5.
64 Id.
65 Woodward, supra note 2.
66 See infra notes 68–80.
67 Meehan, supra note 30, at 36.
passed a similar bill, creating the “newly-minted Office of Amusements [which] would oversee fantasy leagues like DraftKings and FanDuel with the official blessing that they ‘do not constitute gambling[.]’”

According to Senator Joe Negron, the passage of such legislation is “common sense,” and he cannot not “imagine a situation where the legislature would want to make criminals out of millions of Floridians. . . .”

In Massachusetts, where DraftKings is headquartered, Attorney General Maura Healey has finalized “a broad set of consumer protection regulations that would ban players under 21 years of age and restrict the companies’ advertising practices, among other steps.” Indiana Senator Jon Ford has also authored a bill that would legalize daily fantasy sports, but make it illegal for anyone under the age of 18, or anyone directly involved in professional sports, to play. The bill would also exclude college games from being included on daily fantasy sports websites. According to Senator Ford, “these websites aren’t like playing a game at the casino, they’re skill based similar to horse racing.” In North Dakota, Attorney General Wayne Stenehjem has said that “his office will wait until the court rulings before taking a stance.”

This year, at least 30 states have introduced legislation to regulate daily fantasy sports games. Even New York, where the Attorney General took such a strong position in declaring daily fantasy sports illegal (based on the laws on the books at that time), the New York Assembly has passed legislation legalizing daily fantasy sports throughout the state of New York upon Governor Andrew Cuomo’s

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70 Id.
71 Woodward, supra note 2.
73 Id.
74 Id.
signature of the legislation. "Due to the large concentration of daily fantasy sports players in the state (about 10 percent of the national market), New York has always been at the center of the country-wide fantasy sports debate, and is seen as a model for other states in the country." 

Many states are pushing to make daily fantasy sports games legal, not because they do not believe the games are gambling (however they may define gambling), but because they see the support that daily fantasy sports has, they are aware of the benefit that daily fantasy sports can have for their states, and there is scant evidence that daily fantasy sports produced the social ills that states seek to protect their citizens from. Yet, as discussed in detail below, state lawmakers would not have been able to make these arguments had daily fantasy sports operators like DraftKings and FanDuel not entered the market before ensuring the legality of their companies, and it is for this reason that daily fantasy sports providers have been able to continue to prosper and grow even in the face of allegations that their products are illegal.

III. ANALYSIS

A. Shoot Now, Ask Questions Later: The Key To Success

DraftKings and FanDuel entered the market, were extremely successful for several years, and then hit a wall when the very product they were selling was declared illegal in several states. Arguably, determining whether daily fantasy sports was legal in each state probably should have been a prerequisite to each companies’ decision to do business there. Putting off answering these questions until after

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77 Fitz Tepper, New York has Passed a Bill Legalizing Daily Fantasy Sports, TECHCRUNCH (Jun. 18, 2016), https://techcrunch.com/2016/06/18/new-york-has-passed-a-bill-legalizing-daily-fantasy-sports/
78 Id.
79 See infra Part III.A.4.
80 See Bradley J. Steffen, Should the Kentucky Legislature Follow Montana’s Lead in Regulating Fantasy Sports?, 42 N. KY. L. REV. 511, 518 (2015) (“Fantasy sports are a very profitable industry, and states have been blind to see this as a potential revenue stream.”).
81 See infra notes 106–108.
82 DraftKings must have done some kind of state survey before they entered the market as they chose not to do business in certain states even before those states raised any type of objection to their operations. See DraftKing’s Terms of Use, DRAFTKINGS, https://www.draftkings.com/help/terms (“Legal residents physically located in any of the fifty (50) states and Washington, DC, excluding Alabama, Arizona, Delaware, Hawaii, Idaho,
doing business for several years, however, is a reason, if not the reason, daily fantasy sports companies like DraftKings and FanDuel will survive and continue to prosper exponentially. Taking this approach has allowed the companies to gain name recognition and brand loyalty; has given the companies a chance to build capital—by way of users and investors—to fund and weather the inevitable legal and regulatory storms that lie ahead; and has allowed the companies to operate for several years and establish the empirical evidence they need to make arguments in support of their existence in both the courts and before the state legislatures.

1. Name Recognition

By getting into the market early and growing as quickly as possible, DraftKings and FanDuel have capitalized on name recognition. While DraftKings and FanDuel are certainly not the only daily fantasy platforms out there, they have both become household names and, really, the face of the daily fantasy sports industry. In order to accomplish this, the companies entered the market early and followed their entrance into the market with a large-scale advertising campaign.

Name recognition is an invaluable asset to any company, not just technology-based startups. “Indeed, name awareness is the most critical factor in achieving success.” While most companies achieve name recognition by spending “vast sums of money and effort [] to attain recognition of a new brand[,]” it can also be achieved by being “the first company to offer a product or service.” Neither DraftKings nor FanDuel were the first daily fantasy sports websites to launch a daily fantasy sports product. They were, however, relatively early to the

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83 Rotogrinders, a website for all things daily fantasy sports, rates more than 15 daily fantasy sports platforms. See https://rotogrinders.com/reviews. “Fan Duel is the largest and most well known daily fantasy sports website today” and “DraftKings is the number 2 daily fantasy sports website in the U.S. by volume of players and daily games available.” Daily Roto, http://thedailyroto.com/ (last visited July 26, 2016).

84 See Swidey, supra note 3.


86 Id.

87 Id.

scene, and because they were also able to gain capital and support from high-profile investors early on, they were then, in turn, able to aggressively market their products in an effort to gain name recognition. Had DraftKings and FanDuel not taken the risky plunge as early as possible, one of the other 15 or so daily fantasy sports companies certainly would have.

2. Financial Means to Weather the Storm

By entering the market before answering questions about their legality, DraftKings and FanDuel were able to become profitable before being forced to face legal hurdles relating to their legality. DraftKings and FanDuel are currently engaged in litigation in a handful of states, which means they are accruing costly legal fees and expenses on a daily basis. These legal fees and costs alone could have crushed the startup companies in the early stages of development, making it impossible for them to get off the ground. With several financially successful years in the books, however, the companies now have the capital to fund these battles and take them on with full force.

89 Zack Hall, FanDuel vs DraftKings—Who’s Number 1 in Daily Fantasy?, LEGALSPO RTSREPORT (last visited Aug. 18, 2016), http://www.legalsportsreport.com/3832/fanduel-or-DraftKings/ (“At the stage of the daily fantasy sports industry, it’s DraftKings vs FanDuel, with every other operator battling for third.”).

90 “There are dozens of cases around the country against the fantasy sports industry. Some players complained companies promised them a winning chance only to use non-public information to bet against them. Big-bucks bettors were especially vulnerable, according to the lawsuits.” Reuven Blau, DraftKings Argues Fantasy Sports have been Legal for Years in Pending NY State Case, N.Y. DAILY NEWS (Feb. 22, 2016), http://www.nydailynews.com/news/national/DraftKings-argues-legality-fantasy-sports-ny-case-article-1.2540445; see also Joseph M. Hanna, Here We Go Again: DraftKings, FanDuel Face Another Lawsuit, SPORTS & ENTERTAINMENT LAW INSIDER (Nov. 6, 2015), http://sportslawinsider.com/herewe-go-again-DraftKings-fanduel-faceanother-lawsuit/ (“Since early-October, federal lawsuits have piled atop of daily fantasy sports (DFS) industry leaders DraftKings, Inc. and FanDuel, Inc. In total, there are now over 25 federal actions filed against the two companies. Most of the cases stem from allegations claiming the pair engaged in illegal gambling, unfair business practices, and insider trading. On November 2, 2015, however, a patent infringement case was filed in Texas against both DraftKings and FanDuel, in addition to Fox Sports.”).

91 DraftKings and FanDuel have since decided to merge in an effort to lessen the impact of the increasing legal fees, a decision that is now pending approval. Joe Drape, DraftKings and FanDuel Agree to Merge Daily Fantasy Sports Operations, NY Times, http://www.nytimes.com/2016/11/19/sports/draftkings-fanduel-merger-fantasy-sports.html?_r=0 (“The daily fantasy sports companies DraftKings and FanDuel have agreed to merge after a turbulent year in which both of their values plummeted as several attorneys general questioned the legality of their games in their states. The merger must be approved by..."
Concurrent with the rising legal costs and expenses, which is directly attributable to the legal uncertainty upon which daily fantasy sports may stand, DraftKings and FanDuel have also seen a drop in investments.\footnote{Woodward, supra note 2. ("Boston-based DraftKings collected about $500 million in a pair of investment rounds that were completed within weeks of each other this summer. The latter investment round, in early August, was worth about $200 million and valued the company at about $2 billion." “DraftKings Inc. recently raised about $70 million from investors, according to two people briefed on the terms, a sharp drop from the company’s previous investment rounds as it fights regulatory battles across the country.")} Had DraftKings and FanDuel tried to resolve the legal questions they now face prior to entering the market, it is likely that the companies would not have been able to attract the investors they were able to attract when the companies were operating and experiencing unparalleled and unfettered success.

Further, in an effort to promote their legality through new or amended legislation, DraftKings and FanDuel have hired lobbyists in many states to push for new laws that will declare daily fantasy sports legal: “[t]he Wall Street Journal reports that DraftKings and FanDuel, along with the Fantasy Sports Trade Association have spent upwards of $10 million, hiring 78 lobbyists in 34 states.”\footnote{Chris Moran, Fantasy Sports Lobby Spending Millions to Push New Laws to Protect DraftKings, FanDuel, CONSUMERIST (Feb. 16, 2016), http://consumerist.com/2016/02/16/fantasy-sports-lobby-spending-millions-to-push-new-laws-to-protect-draftkings-fanduel/} This is all capital the companies would not have had prior to entering the market or even in their first years of operating. As one author has stated, “[i]nnovative companies that put growth before legal niceties have money to spend on PR and lobbying.”\footnote{See Ryder, supra note 20.} This is undoubtedly the case for DraftKings and FanDuel.

3. Investors

As alluded to above, had DraftKings and FanDuel entered the market in the midst of battling state lawmakers and judges over the legality of daily fantasy sports, it would have been extremely difficult for the companies to attract investments from outsiders, especially at the level they were able to when there were no legal issues looming over their businesses.\footnote{See supra Part II} Why would anyone invest money in a company that could be on the brink of being declared illegal? Further, it follows that
without the track record that DraftKings and FanDuel were able to compile to show how many people would participate in daily fantasy sports or how daily fantasy sports could positively impact professional sports teams, advertising companies, and television networks by creating more engaged sports fans, DraftKings and FanDuel would not have had the selling points they relied on when they received massive investments from high-profile investors. As such, by entering the market and operating without impediments for several years, DraftKings and FanDuel were able to attract investors by showing a track record of success that could in turn positively impact investors.

4. Empirical Evidence to Support Their Existence

Perhaps most importantly, by entering the market before fully determining their legal status, DraftKings and FanDuel now have the concrete, empirical evidence to support their arguments for why they should be considered legal—evidence they would not have had if they tried to resolve these legal issues before entering the market. Not only is this empirical evidence being used in the courts to determine whether daily fantasy sports are activities of skill or chance, but lawmakers and lobbyists also use the evidence to support the creation of new laws or the amendment of old laws aimed at making daily fantasy sports legal.

With several years of business on the books, DraftKings and FanDuel now have evidence to show that people enjoy their services—really enjoy their services. According to the Fantasy Sports Trade Association, in 2016, there were 57.4 million people playing fantasy sports in the USA and Canada.96 With so many people paying to play for daily fantasy sports, it follows that companies like DraftKings and FanDuel, who have the most users, have been able to score millions of dollars from investors.97

DraftKings and FanDuel also now have evidence to show how their companies benefit the professional sports and media industries:

In making the real games (even the lame ones) more relevant, it has also made them more valuable to the professional teams hawking T-shirts and hats and to the media outlets selling commercials around game broadcasts. With customers caring about what happens not just with the steamrollers in Foxborough but also with the hapless squads in San Diego and Nashville,

96 Industry Demographics, FANTASY SPORTS TRADE ASSOCIATION, http://fsta.org/research/industry-demographics/.
97 See Heitner, supra note 4.
every self-respecting sports bar has no choice but to spring for the complete package of broadcasts for the NFL—and every other major sport.\footnote{See Swidey, supra note 3.}

As Kenny Gersh, EVP of Business at the MLB’s media branch, has stated: “Expanding our exclusive partnership with DraftKings will bring new and exciting ways for fans, particularly younger fans, to play daily fantasy baseball.”\footnote{See Heitner, supra note 4.} Data that the Fantasy Sports Trade Association has collected supports the claim that daily fantasy sports increases the interest in professional sports, with studies stating that 64\% of daily fantasy sports players watch more live sports because of daily fantasy sports, and 61\% of players read more about sports because of daily fantasy sports.\footnote{See Industry Demographics, supra note 96.} As such, “it no longer takes a prime-time game to engage a fan if, for example, DFS players now have an exciting reason to watch the Sixers play the Hornets on a Tuesday afternoon.”\footnote{See Heitner, supra note 4; Priyanka Boghani, Sports Leagues and Daily Fantasy: What’s at Stake?, FRONTLINE (Feb. 9, 2016), http://www.pbs.org/wgbh/frontline/article/sports-leagues-and-daily-fantasy-whats-at-stake/ (“TV ratings are another thing. People will watch games that they might not otherwise care about. If you have a fantasy player or two in it and you have some money riding on it, there’s definitely an interest in watching games that may not attract attention otherwise, or watching late in the game when it’s not that interesting because you’re a fantasy player and you have a financial stake in the outcome and how your players do.”).}

In addition, DraftKings and FanDuel now have evidence to support their argument that playing daily fantasy sports does not have the adverse side effects of traditional gambling. Social ills that have been found to exist when traditional gambling was made legal include the following: preying on more vulnerable populations, such as immigrants or the poor; an increase in youth crime, forgery and credit card theft, domestic violence, child neglect, problem gambling, and alcohol and drug offenses; an increase in suicide and divorce rates; a correlation to homelessness and an increase in rates of domestic violence.\footnote{See Holleman, supra note 22, at 74–75.} These ills, however, have not been found to exist when looking at daily fantasy sports.

[T]he public policy rationale for outlawing gambling simply does not apply to fantasy sports. Although some variation exists among sources of demographic information, the average fantasy sports player is a forty-one-year-old male who has a bachelor’s degree or higher, and makes almost $90,000 per year. They devote only $500 annually to their fantasy sports endeavors—an investment...
less than one percent of their annual income. Fantasy players are educated professionals who live in the suburban United States. On average, they have played fantasy sports for nine years and are involved in six leagues per year. They typically spend between one and a half and three hours each week managing their teams. They are typically sports fans who buy tickets to games and play fantasy football for enjoyment rather than to make a quick buck. The people who play fantasy sports are typically normal and well-adjusted people who do not allow this activity to have an impact on their daily lives. It seems that the majority of fantasy sports players do not fall into the vulnerable segment of society that the anti-gambling laws have sought to protect.103

Thus, because DraftKings and FanDuel have several years of operations in the books, there has been time to conduct studies regarding the adverse effects, if any, of playing daily fantasy sports. To the benefit of daily fantasy sports operators and those lawmakers seeking to pass laws to legalize daily fantasy sports in their states, the studies generally show no indication “that playing daily fantasy sports will lead to the same negative outcomes as traditional forms of gambling” since “the typical fantasy sports player plays for reasons not related to money.”104

Last, DraftKings and FanDuel now have evidence that they would not have had prior to entering the market to support their argument in the courts that daily fantasy sports are games of skill. In court documents filed in New York, DraftKings argued that daily fantasy sports are games of skill based on the following studies: (1) a study of daily fantasy baseball that showed “just 1.3% of contestants won 91% of the prizes”; (2) a University of Chicago professor of statistics and econometrics conducted a study and concluded that “it is overwhelmingly unlikely that the performance of any exceptionally performing contestant could be due to chance”; and (3) a study showed that “the top contestants outperformed the random lineups between 82% and 96% of the time, depending on the sport.”105 None of these studies could have been conducted had daily fantasy sports operators like DraftKings and FanDuel not entered the market before fully determining their legal status.

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103 Id. at 76.
104 Ehrman, supra note 24, at 112.
B. Uber and Airbnb: Other Beneficiaries of the Shoot Now, Ask Questions Later Approach to Starting a Business

While DraftKings and FanDuel have taken the shoot now, ask questions later approach to a new level—they entered the market with a potentially illegal product and used the approach to set themselves up for ultimate success—other companies, including Uber and Airbnb, have embraced the shoot now, ask questions later approach, and have succeeded

1. Uber

In 2009, Travis Kalanick and Garrett Camp founded Uber, a “smartphone-based app [that] connects drivers offering rides and passengers seeking them; passengers pay mileage-based fees through credit cards that the company keeps on file, and Uber then takes a percentage of each fare and gives the rest to drivers.”

In this way, Uber “provides riders with an alternative to taxi and livery services,” and generally at a fraction of the cost because Uber is not subject to the regulations with which the traditional services must comply. In essence, Uber has created “a functioning market for car-hire services that is governed largely by supply and demand.”

Uber currently operates in 170 cities around the world and has been responsible for “generating over 20,000 jobs a month, lowering DUI incidents, accidents and fatalities and improving local economies.” Uber has grown so popular and had such an impact on society that some have compared it to Google. As a result of its popularity, Uber has

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109 Id.

110 Rogers, supra note 107, at 89.

111 Posen, supra note 108, at 417.

112 Buckley, supra note 18, at 38; see also Siu, supra note 106. (Explaining that Uber users tend to prefer Uber over the traditional taxi service for the following reasons: “The service is more convenient than traditional cab companies; It offers an alternative for consumers who have become disenfranchised with traditional corporate service models offered by other transportation companies; Uber offers a higher level of customer service than traditional cab companies by employing drivers with pleasant personalities; The service
prospered financially. By the end of 2015, Uber was expected to hit an annual revenue rate of $10 billion.\textsuperscript{113} Since Uber keeps 20\% of every transaction, that means Uber will net approximately $2 billion of that $10 billion gross revenue.\textsuperscript{114} It has also been anticipated that Uber will grow another 300\% in 2016, and, if the company goes public within a few years of that, it is predicted that Uber could be valued at $50 to $100 billion.\textsuperscript{115}

In the face of financial growth and prosperity, however, Uber faced legal opposition from both the taxi industry, as well as some of the cities and states in which Uber operates.\textsuperscript{116}

Taxi drivers and taxi operators have challenged Uber on a number of grounds, including unfair competition, consumer fraud, and deceptive business practices. Uber drivers have challenged their classification as independent contractors (rather than employees) and have claimed that Uber does not provide its drivers their full gratuity. Uber riders have challenged Uber on grounds of violating the Americans with Disabilities Act and for assault and battery under the theory of \textit{respondeat superior}. In addition to these challenges, some states and municipalities have challenged Uber for violating local taxi ordinances. Yet other states and local governments have embraced Uber operations by passing ordinances that allow for Uber to operate as long as they comply with those ordinances. As a result of these various legal and regulatory challenges, there is a growing concern regarding how to properly regulate Uber, if at all.\textsuperscript{117}

As a result of regulatory concerns, or more appropriately stated the lack of regulations on Uber, some cities and states have gone so far as to ban Uber operations.\textsuperscript{118} Uber has also faced challenges abroad, with Hamburg and Berlin in Germany banning Uber for noncompliance with

allows customers to rate their drivers, which makes it easier for the company to hold drivers accountable and improve quality control; and Uber customers can monitor their driver on a screen to estimate when they’ll arrive – a far preferable alternative to waiting an indeterminate amount of time for a no-show taxi.”).

\textsuperscript{112} Shontell, \textit{ supra} note 10.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} Posen, \textit{ supra} note 108, at 408; Buckley, \textit{ supra} note 18, at 38–39 (“Ride-sharing platforms such as Uber and Lyft frequently face opposition from regulators and transportation lobbies due to the strict regulations placed on existing taxi services versus the open field on which Uber and Lyft seem to operate.”).
\textsuperscript{117} Posen, \textit{ supra} note 108, at 408.
\textsuperscript{118} Kosoff, \textit{ supra} note 10 (“Amid regulatory concerns, Nevada became the first US state to suspend Uber’s operations. Portland, Oregon is suing Uber after the service spent four days illegally operating in the city. Portland declared Uber an ‘illegal, unregulated transportation service.’”).
German laws. Additionally, Delhi and Thailand banned Uber operations after a man previously arrested for sexual assault was allowed to be an Uber driver after it was alleged that he beat and raped a female customer.

Despite these legal setbacks, however, Uber is continuing to grow and prosper. Uber is aiming for world dominance and, arguably, is well on its way. According to one author, “Uber continues to drive and thrive. They are growing explosively, and the company is changing the game.” Another author attributes Uber’s continued success to one simple fact; “Uber provides something of value: It gets you anywhere you need to go at a reasonable price.” In the case of Uber, it delayed dealing with its competition until after it had entered the market, and even though that raised some headaches down the road, Uber is expected to survive and continue to prosper into the future.

2. Airbnb

Similar to ride-sharing platform Uber, Airbnb, which Brian Chesky, Nathan Blecharczyk, and Joe Gebbia founded in 2008 in San Francisco, also entered the market and became very profitable only to find its business platform facing widespread opposition. Airbnb describes itself as “a trusted community marketplace for people to list, discover, and book unique accommodations around the world—online or from a mobile phone or tablet.” Since its creation in 2008, Airbnb has experienced exponential growth. As of 2015, Airbnb “hosts more than one million listings in over 190 countries and territories around the world.” In the spring of 2014, Airbnb was valued at $10 billion and

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119 Id.
120 Id.
121 Id. ("Despite all this, Uber is not down and out. In fact, Uber is doing extraordinarily well right now.").
122 Kosoff, supra note 10.
124 Kosoff, supra note 10.
126 Buckley, supra note 18, at 39.
128 Kaplan, supra note 11, at 104.
had received $776.5 million from investors, such as Y Combinator, Sequoia Capital, Keith Rabois, Andreessen Horoqitz, Ashton Kutcher, Founders Fund, and TPG Growth.129

Like Uber, however, in the wake of its exponential growth, Airbnb became the focal point of attacks from the hotel industry as well as city and state officials. 130 “While Airbnb’s popularity has grown, cities across the nation are struggling with how to regulate the impact of those short-term rentals and homestays.”131 Landlords have opposed Airbnb because rentals often violate housing laws.132 The hotel industry also opposes Airbnb, arguing that it “circumvents taxes that must be assessed on hotel room occupancy.”133 Airbnb’s response134 to this opposition is that it is not a hotel or lodging provider, but merely “a platform to connect a willing supply of lodging to a willing demand of guests

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129 Brown, supra note 11.
130 Krauss, supra note 125, at 369 (“The sharing economy is currently being attacked, facing a plethora of regulatory and legal challenges, which could destroy this fragile emerging marketplace.”).
131 Krista L. White, Leveling the Playing Field: Airbnb Starts Collecting Taxes on Buncombe County Rentals, MOUNTAIN XPRESS (Jun. 17, 2015), https://mountainx.com/news/leveling-the-playing-field-airbnb-starts-collecting-taxes-on-buncombe-county-rentals/; see also Dana Palombo, A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law, 4 AM. U. BUS. L. REV. 287, 297–98 (2015) (“NYC and San Francisco express opposing views on the benefits that Airbnb can have on their communities. NYC leans in a conservative direction, seeking to expel short-term rentals because of their potential to infringe on the current economic stability of the city. San Francisco is more liberal in its acceptance of the changes that Airbnb offers and the benefits that can arise from accepting short-term rentals in a restricted way... Airbnb continues to request that NYC alter its laws to allow Airbnb to collect taxes on rentals. Airbnb claims it could bring in sixty-five million dollars in hotel occupancy tax revenue for NYC and it reached out to Mayor Bill de Blasio for his endorsement. Critics argue that Airbnb hurts the hotel industry’s success by encroaching on its tourist base. The hotel industry argues that Airbnb is an ‘illegitimate enterprise,’ and it initially demanded that Airbnb pay hotel taxes. Hotels want a level playing field, arguing that Airbnb should have to comply with hotel regulations, or that they should be able to take advantage of Airbnb’s more lenient standards. Therefore, it was surprising when Airbnb’s attempt to pay taxes was met with opposition by the hotel industry, which claimed that if Airbnb pays taxes it would fall ‘under the umbrella of legality.’”).
132 Buckley, supra note 18, at 39; Palombo, supra note 131, at 308 (“In a recent New York housing court case, Gold Street Properties v. Freeman, an Airbnb host violated her lease and the MDA by renting her apartment short-term. The court allowed the host to stay in her apartment, as long as she removed her listing from Airbnb and cancelled future guest reservations. This case sets a precedent that may result in difficulties for landlords who want to evict tenants for breaching their leases by renting short-term. The holding in that case is not a slam-dunk for Airbnb, but it provides hosts with greater protection against immediate eviction for short-term renting.”) (citations omitted).
133 Buckley, supra note 18, at 39.
134 Id. at 41.
needing housing.”

Despite these attacks and setbacks for Airbnb, Inc. named Airbnb the 2014 company of the year. In doing so, Inc. explained:

Some might find it unsettling for Inc. to champion a company that continually disregards the rules. But that is often the cost of disruption. Not all laws are equal. Some make sense in a 21st-century context, some are vestiges of outdated regulatory regimes, and some are simply reflexive protectionism. With a few notable exceptions, prohibitions on economic activity between consenting adults do not long stand. Legislators and regulators may move slowly, but they are unlikely to completely block activities that people want. Arguably, this shift is already happening. Cities have started to legalize (and tax) Airbnb’s activities. The company, in turn, is altering how it operates. . . . If they can now evolve Airbnb from renegade into corporate citizen, then the future really is theirs.

Airbnb’s continued success on the consumer side of the business will fall on the company’s ability to provide “a better experience” for its users at a price that is substantially cheaper than area hotels. On the regulation side, Airbnb’s continued success will likely depend on its continued willingness to be reasonably regulated where it operates, as well as the acceptance of lawmakers to see that the company is bringing real financial benefits to the cities and states where it is operating. Like Uber, Airbnb delayed dealing with its competition and regulations imposed on its competition until it could no longer do so, and even though that has caused some setbacks, it appears that Airbnb will overcome those setbacks and continue to prosper down the road.

C. Is there an Alternative to the Shoot Now, Ask Questions Later Approach?

As new innovative companies continue to enter the market, the government must determine “how to regulate such innovation without

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135 Id.
136 Helm, supra note 125.
137 Brown, supra note 11 (“Yet in order to really compete with hotels, they had to do more than just offer a better experience. Another major advantage of Airbnb was that it tended to be substantially cheaper—generally 30-80% lower than area hotels.”).
138 Krauss, supra note 125, at 372.
139 One Airbnb-released study showed that its “services generated $632 million for New York City’s economy in 2012.” Id. at 368. Further, “because Airbnb renters spend less on rentals than they would on hotels, they can afford to stay longer and spend more money on food and shopping.” Id.
stifling it.”140 As we have seen with companies like Uber and Airbnb, “[r]egulators must determine if innovative new companies should be subject to the same regulations as others within a similar industry, if they should be completely unregulated, or if they should fall somewhere in the middle.”141 As a result, one author argues:

To help alleviate the legal woes facing the sharing economy and stave off future legal calamities that undiscovered innovation will certainly face, Congress should enact legislation to protect emerging markets. The goal is to provide a minimum standard for states to adopt that can provide an early regulatory foundation in the nascent stages of development. These laws will provide interim protection while giving each state time to pass individualized laws that cater more directly to the specific state and the entity to be regulated. The legislation’s focus should be on economic stimulus and the government’s role of safety, maintaining the right to regulate and inspect.142

While such legislation would be ideal in protecting new markets, given that the law inherently lags behind innovation,143 the passage of such legislation seems unlikely. What is more likely—and what DraftKings and FanDuel have shown is key to their success—is that more and more companies will embrace the shoot now, ask questions later approach when entering the market, especially when these companies are premised on innovations that the law has not yet been able to catch up to.

IV. CONCLUSION

Planned or not, one of the best decisions DraftKings and FanDuel made during the launch of their companies was putting off dealing with any issues regarding the legality of daily fantasy sports until they were absolutely forced to do so. By entering the market and undergoing several years of unfettered success, the companies were able to gain support from both users and investors, while simultaneously building capital resources—resources they eventually need to fight inevitable legal and regulatory battles. Had DraftKings and FanDuel tried to resolve their legal issues before entering the market or before experiencing success, it is very possible that the companies would not have been able to get their feet off the ground. As a result, DraftKings’s

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140 Posen, supra note 108, at 418.
141 Id. at 418–19.
142 Krauss, supra note 125, at 373.
143 See supra notes 18–21.
and FanDuel’s decision to “shoot now and ask questions later” on the issue of their legality, *while perhaps a risky bet for some*, has set them up for ultimate success.
FAMILY TAX LAW: IMPROVING THE ORGANIZATION OF THE INTERNAL REVENUE CODE BY CREATING A SUBDIVISION ON FAMILY TAX LAW

Richard J. Wood*

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I. INTRODUCTION

Both the Republican Party and the Democratic Party Platforms for 2016 call for major tax reform centered on family tax law issues. The Democratic Party Platform says that Democrats “will offer tax relief to hard working, middle-class families for the cost squeeze they have faced for years from rising health care, childcare, education, and other

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expenses.” The Republican Party Platform specifically calls for a reorganized, coherent Internal Revenue Code that includes family tax law reforms. This is not a new concept; the Republican Party’s 2016 platform is consistent with its 2012 platform:

Our goal is a tax system that is simple, transparent, flatter, and fair. In contrast, the current IRS code is like a patchwork quilt, stitched together over time from mismatched pieces, and is beyond the comprehension of the average citizen. A reformed code should promote simplicity and coherence, savings and innovation, increase American competitiveness, and recognize the burdens on families with children. It has been thirty years since the Internal Revenue Code was reorganized and reissued as the Internal Revenue Code of 1986. With both parties calling for reform of the Code to more effectively address family issues, this might be the time to suggest reorganizing the Internal Revenue Code to include one subdivision dedicated to family tax law.

Creating a subdivision in the Internal Revenue Code dedicated to tax rules that primarily affect families can achieve three important objectives. First, Congress will be better able to write rules that are clearer and more consistent than they would be without such a subdivision. Second, the subdivision will have the benefit of making it easier for the judiciary, administrators, and the public to interpret the rules. Finally, tax rules that affect families will be easier to find. As a result, the benefits that Congress intended will be more accessible for its intended beneficiaries.

The manner of communication embodied in the Internal Revenue Code has significant implications for the manner in which the law is drafted, interpreted, and located. In recent years, the Supreme Court has

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2 See 2016 Republican Platform, 1–2 (2016), https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf. As the Platform states, “The current tax code is rightly the object of both anger and mockery. Its length is exceeded only by its complexity. We must start anew . . . . It cannot be engineered from the top down, but must have a common sense approach, and be simplified.” Id. at 1.
been observed to rely less on legislative history and more on the language canons of statutory construction.\(^5\) Language canons of construction refer to either presumptions about the meaning of individual words or presumptions about larger structural considerations about the relationships between words, paragraphs, and sections.\(^6\) This article will address the latter.

II. TAXONOMIC OBJECTIVES

“In the communication of meaning there are two main elements: (1) the vehicle of communication specifically created and controlled by the author, and (2) the context within which that vehicle operates. No communication is complete without both.”\(^7\)

Title 26 of the United States Code,\(^8\) otherwise known as the Internal Revenue Code,\(^9\) is organized in a way that appeals to tax lawyers. It is divided into eleven subtitles lettered A through K.\(^10\) The subtitles are divided into chapters, subchapters, parts, and subparts that

\(^5\) See James J. Brudney & Corey Ditslear, The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law, 58 DUKE L.J. 1231, 1258 (2008–2009) (“[A] key theme across subject matter areas is that the Court’s reliance on legislative history has declined and its reliance on canons has increased . . . .”).

\(^6\) Id. at 1266 (“For these purposes, we have grouped language canons into two categories: (i) presumptions about the meaning attributed to individual words or the linguistic inferences to be drawn from how those words are included, omitted, or arranged in a single phrase or sentence; and (ii) presumptions about larger cohesion or structural integrity of the text, including especially the whole act rule and the related presumption against surplusage, and also presumptions about the relationship between words used more than once in different parts of the same statute or in similar statutes.”).

\(^7\) REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 103 (1975).

\(^8\) The definition for the term “code” is stated as the following:

The term “code” applies to almost any organized collection of enacted or administratively established laws. However, there are some important distinctions covered by the general term “code”. Unlike classical and European civil codes, most legal codes in the United States re-work statutes passed piecemeal by legislatures over a period of years. The repealed and obsolete provisions are omitted and amendments are inserted. A distinction can be made between collections that keep the language and structure of the original session laws and those codes that rewrite the session laws to improve clarity and impose an organizational structure.


\(^10\) See I.R.C. subtitles A–K.
provide organizational structure for sections on topics such as corporate distributions and adjustments, deferred compensation, banking institutions, and others. No division or subdivision of the Internal Revenue Code is organized around family law. Good classification and organization, otherwise known as taxonomy, is one way to improve the substance of the law as well as its accessibility. Taxonomic objectives include good drafting, good interpretation, and findability.

Good taxonomy achieves both clarity and consistency. “[T]he function of a code is principally to reorganize the law and to state it in a simpler form . . . In order to achieve clarity, it is frequently necessary to recast large numbers of sections and rearrange their sequence in order to form a unified and consistent chapter.”

One of the first objectives of good taxonomy is to maintain clear and consistent concepts across related code sections. This objective serves two masters: clarity of drafting and clarity of interpretation. Arrangement of sections within a code in a manner that makes it easier to navigate from one related section to another facilitates that goal. Words can be defined once for all sections contained within the boundaries of a given chapter or subchapter. This is clearer than repeating definitions that are identical in each of the sections to which they apply, and not incidentally more efficient, because it eliminates repetition of definitions in each section where they would be needed. In so doing, the likelihood of errors in repeating a definition are eliminated. Additionally, the reader can be confident that all of the nuances of interpreting a given definition will be transferable to all locations where the definition is incorporated by reference. Perhaps more importantly, the use of definitions across different code sections emphasizes changes in definitions where the drafters want to be more or less inclusive of the terms they use. I refer to this principle as “definition coordination.”

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11 I.R.C., ch. 1, subchap. C.
12 I.R.C., ch. 1, subchap. D.
13 I.R.C., ch. 1, subchap. H.
14 JUDI VERNAU, THE BUSINESS BENEFITS OF TAXONOMY 3 (October 2005), http://cm-mitchell.com/PDFs/WP-BusinessBenefitsTaxonomy.pdf (“Taxonomy has been described as ‘a systematic classification of a conceptual space’ . . . [that] provides a hierarchical structure . . . .”)
A. Clarity in Drafting

One example of the application of the principal of clarity of drafting through definition coordination in family tax law can be found in the relationship between section 21(b)(1)\(^{16}\) and sections 152(a) and (b).\(^{17}\) Section 21 creates a tax credit for expenses for household and dependent care services necessary for full employment.\(^{18}\) The subsection of section 21 that defines a qualifying individual for whom the dependent care services expenses are incurred is similar to the definition of dependents generally in section 152.\(^{19}\) The section 152 definition, however, is more restrictive and denies individuals who are dependents themselves from having dependents that they may claim on their tax returns.\(^{20}\) It also prohibits individuals who are married and file joint returns with their spouses from being dependents.\(^{21}\) Finally, section 152(d)(1)(B)\(^{22}\) prohibits individuals from being a dependent of another

\(^{16}\) Section 21(b)(1) provides:
(b) Definitions of qualifying individual and employment-related expenses.—For purposes of this section—
(1) Qualifying individual.—The term “qualifying individual” means—
(A) a dependent of the taxpayer (as defined in section 152(a)(1)) who has not attained age 13,
(B) a dependent of the taxpayer (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B)) who is physically or mentally incapable of caring for himself or herself and who has the same principal place of abode as the taxpayer for more than one-half of such taxable year, or
(C) . . . .

\(^{17}\) Sections 152 (a) and (b) provide:
(a) In general.—For purposes of this subtitle, the term “dependent” means—
(1) a qualifying child, or
(2) a qualifying relative.
(b) Exceptions.—For purposes of this section—
(1) Dependents ineligible.—If an individual is a dependent of a taxpayer for any taxable year of such taxpayer beginning in a calendar year, such individual shall be treated as having no dependents for any taxable year of such individual beginning in such calendar year.
(2) Married dependents.—An individual shall not be treated as a dependent of a taxpayer under subsection (a) if such individual has made a joint return with the individual’s spouse under section 6013 for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.
I.R.C. § 152(a)-(b) (2012).

\(^{18}\) See I.R.C. § 21.

\(^{19}\) See I.R.C. § 21(b)(1). See also I.R.C. § 152.

\(^{20}\) I.R.C. § 152(b)(1).

\(^{21}\) I.R.C. § 152(b)(2).

\(^{22}\) Section 152(d)(1) provides:
taxpayer if their gross income is equal to or greater than the exemption amount in effect under section 151(d).  

These three restrictions do not apply to dependents under section 21. Accordingly, the section 21 definition of qualifying individual subsumes the section 152 definition of dependent, but with easily drafted

(d) Qualifying relative.—For purposes of this section—
(1) In general.—The term “qualifying relative” means, with respect to any taxpayer for any taxable year, an individual—
(A) who bears a relationship to the taxpayer described in paragraph (2),
(B) whose gross income for the calendar year in which such taxable year begins is less than the exemption amount (as defined in section 151(d)),
(C) with respect to whom the taxpayer provides over one-half of the individual’s support for the calendar year in which such taxable year begins, and
(D) who is not a qualifying child of such taxpayer or of any other taxpayer for any taxable year beginning in the calendar year in which such taxable year begins.

I.R.C. §152(d)(1).

23 Section 151(d) provides:
(d) Exemption amount.—For purposes of this section—
(1) In general.—Except as otherwise provided in this subsection, the term “exemption amount” means $2,000.
(2) Exemption amount disallowed in case of certain dependents.—In the case of an individual with respect to whom a deduction under this section is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual’s taxable year begins, the exemption amount applicable to such individual for such individual’s taxable year shall be zero.
(3) Phaseout.—
(A) In general.—In the case of any taxpayer whose adjusted gross income for the taxable year exceeds the applicable amount in effect under section 68(b), the exemption amount shall be reduced by the applicable percentage.
(B) Applicable percentage.—For purposes of subparagraph (A), the term “applicable percentage” means 2 percentage points for each $2,500 (or fraction thereof) by which the taxpayer’s adjusted gross income for the taxable year exceeds the applicable amount in effect under section 68(b). In the case of a married individual filing a separate return, the preceding sentence shall be applied by substituting “$1,250” for “$2,500”. In no event shall the applicable percentage exceed 100 percent.
(C) Coordination with other provisions.—The provisions of this paragraph shall not apply for purposes of determining whether a deduction under this section with respect to any individual is allowable to another taxpayer for any taxable year.
(4) Inflation adjustment.—In the case of any taxable year beginning in a calendar year after 1989, the dollar amount contained in paragraph (1) shall be increased by an amount equal to—
(A) such dollar amount, multiplied by
(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting “calendar year 1988” for “calendar year 1992” in subparagraph (B) thereof.


24 See I.R.C § 21(b)(1).
differences that reflect what can be assumed to be the congressional view that the definition should be expanded in the context of a credit for household and dependent care services. By referring to the general definition of dependent under section 152, but specifically modifying the definition to include more individuals within the benefits conferred by section 21, Congress drafted definitions for both that can be easily seen as different but related to each other.

An example of a failure of clarity in drafting due to poor definition coordination can be found in the family education benefit provisions of the Code. There are three distinct education assistance strategies advanced in the Code. One strategy embraces exclusions from income for scholarships, college savings accounts, and student loan cancellation programs. A second strategy allows for deductions of amounts spent on education. The third strategy provides for education tax credits. Rather than existing in one subdivision, these strategies are codified in over a half dozen different code sections scattered across the Internal Revenue Code. In an attempt to connect the code sections, Treasury Regulation section 1.25A and IRS Publication 970 explain these provisions. The explanations are thorough, as IRS Publication 970 employs 97 pages of detailed prose, tables, and charts. Lack of definition coordination, however, has made the drafting and interpretation of these education provisions more difficult than necessary.

Treasury Regulation section 1.25A–2(d)(2)(ii) provides that: “Qualified tuition and related expenses include fees for books, supplies, and equipment used in a course of study only if the fees must be paid to the eligible educational institution for the enrollment or attendance of the student at the institution.” Notably, there is no distinction in the regulations between qualified expenses for purposes of the Hope Scholarship Credit as amended by the American Opportunity

25 See RICHARD J. WOOD, FAMILY TAX LAW 142–65 (2nd ed. 2010).
26 Id. at 165–71.
27 Id. at 171–81.
Scholarship credit of section 25A(f) and the Lifetime Learning Credit of section 25A(c).\(^{31}\)

Internal Revenue Service Publication 970, however, distinguishes between the two and explains that the definition of expenses that may be creditable for purposes of the American Opportunity Tax Credit include amounts paid for books that are required for instruction from sources other than the educational institution itself.\(^{32}\) Publication 970 goes on to explain that the definition of expenses that may be included for purposes of the Lifetime Learning Tax Credit include amounts paid for books that are required for instruction only if they are purchased from the educational institution itself.\(^{33}\) Practitioners easily overlook this subtle distinction. Thus, better taxonomy would highlight this distinction rather than forcing practitioners to rely on indirect mention of the distinction in section 25A(i)(3).

The difference in definitions of qualified tuition and related expenses comes from the language of section 25A(i)(3), which says: “For purposes of determining the Hope Scholarship Credit, subsection (f)(1)(A) shall be applied by substituting ‘tuition, fees, and course materials’ for ‘tuition and fees’.” \(^{34}\) Subsection (f)(1)(A), referred to above, says: “The term ‘qualified tuition and related expenses’ means tuition and fees required for the enrollment or attendance . . . at an eligible educational institution for courses of instruction of such individual’ at such institution.” \(^{35}\)

These provisions have been interpreted to require that textbooks purchased from outside vendors are creditable under the American Opportunity Tax Credit,\(^{36}\) but not under the Lifetime Learning Tax Credit.\(^{37}\) I do not disagree with that interpretation and will address the benefits of good taxonomy on interpretation later in this article. Instead,\(^{38}\)

\(^{31}\) See Treas. Reg. § 1.25A–1(b) (employing one definition of “qualified tuition and related expenses” for both the Hope Scholarship Credit and the Lifetime Learning Credit).

\(^{32}\) I.R.S. Pub. 970 at 13 (“[E]xpenses for books, supplies, and equipment needed for a course of study are included in qualified education expenses whether or not the materials are purchased from the educational institution.”).

\(^{33}\) Id. at 23 (“Student activity fees and expenses for course-related books, supplies, and equipment are included in qualified education expenses only if the fees and expenses must be paid to the institution for enrollment or attendance.”).

\(^{34}\) I.R.C. § 25A(i)(3) (2012).


\(^{37}\) Id. at 23.
I believe that the drafters could have written better provisions if definition coordination had been employed from the beginning.

The starting point for better taxonomy in this example would be a coherent definition section located within a subdivision dedicated to education expenses. The definition could have been included in one of the code sections addressing education expenses or it could have been a stand-alone code section such as section 222. Section 222(d) defines “Qualified tuition and related expenses.”

Section 222, however, is not located in a subdivision of the Code dedicated to other education tax benefits. Interestingly, section 222 is specifically coordinated with section 25A(f) but is silent with respect to coordination with section 25A(i). As section 222 states, “[t]he term ‘qualified tuition and related expenses’ has the same meaning given such term by section 25A(f).”

These differing and partially coordinated definitions would benefit from closer proximity and the sort of coordinated definition that can be observed in sections 21 and 152 as described above.

Section 222 could be a cornerstone for a set of sections that comprehensively address the tax benefits available for expenses paid in connection with education. The concerns reflected in section 222 are common to any tax provision that addresses higher education. Section 222(a) provides the simplest form of tax benefit—a deduction. Subsection (b) scales the benefit back for high income taxpayers. This

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39 Id.
40 See I.R.C. § 222(a) (“Allowance of deduction. In the case of an individual, there shall be allowed as a deduction an amount equal to the qualified tuition and related expenses paid by the taxpayer during the taxable year.”).
41 Section 222(b) provides:
   (b) Dollar limitations.—
   (1) In general.—The amount allowed as a deduction under subsection (a) with respect to the taxpayer for any taxable year shall not exceed the applicable dollar limit.
   (2) Applicable dollar limit.—
   (A) 2002 and 2003.—In the case of a taxable year beginning in 2002 or 2003, the applicable dollar limit shall be equal to—
      (i) in the case of a taxpayer whose adjusted gross income for the taxable year does not exceed $65,000 ($130,000 in the case of a joint return), $3,000, and—
      (ii) in the case of any other taxpayer, zero.
   (B) After 2003.—In the case of any taxable year beginning after 2003, the applicable dollar amount shall be equal to—
      (i) in the case of a taxpayer whose adjusted gross income for the taxable year does not exceed $65,000 ($130,000 in the case of a joint return), $4,000,
phase-out of tax benefits for high income taxpayers is very common in the Code and can be found in both the American Opportunity and the Lifetime Learning credits. Section 222(c) coordinates the deduction that subsection (a) allows with other education tax benefits. Subsection (d) contains definitions, special rules, and specific delegation of authority to the Secretary of the Treasury to draft regulations. Finally,
subsection (e) provides for the expiration of section 222 in its entirety. 45 To the extent that each of these issues are of concern with respect to any given tax benefit, a single location for foundational definitions would be more efficient and reduce error. Specifically, such a strategy would be more efficient through the elimination of duplicative language and less prone to error because copying errors would be eliminated.

The benefits of a subdivision dedicated to family tax law extend beyond the tax attributes of education expenses. Another good candidate for inclusion in a family tax law subdivision would be a foundational definition for dependent. The term dependent can be found in some of the code sections with the highest level of participation by average taxpayers—including the dependent care credit of section 21, the child credit of section 24, the earned income tax credit of section 32, and the medical expense deductions of section 213. 46 A coordinated definition section that embraced all of those provisions within a single definition that could be adjusted on an individual basis as needed would make

(A) In general.—A deduction shall be allowed under subsection (a) for qualified tuition and related expenses for any taxable year only to the extent such expenses are in connection with enrollment at an institution of higher education during the taxable year.

(B) Certain prepayments allowed.—Subparagraph (A) shall not apply to qualified tuition and related expenses paid during a taxable year if such expenses are in connection with an academic term beginning during such taxable year or during the first 3 months of the next taxable year.

(4) No deduction for married individuals filing separate returns.—If the taxpayer is a married individual (within the meaning of section 7703), this section shall apply only if the taxpayer and the taxpayer’s spouse file a joint return for the taxable year.

(5) Nonresident aliens.—If the taxpayer is a nonresident alien individual for any portion of the taxable year, this section shall apply only if such individual is treated as a resident alien of the United States for purposes of this chapter by reason of an election under subsection (g) or (h) of section 6013.

(6) Payee statement requirement.—

(A) In general.—Except as otherwise provided by the Secretary, no deduction shall be allowed under subsection (a) unless the taxpayer receives a statement furnished under section 6050S(d) which contains all of the information required by paragraph (2) thereof.

(B) Statement received by dependent.—The receipt of the statement referred to in subparagraph (A) by an individual described in subsection (c)(3) shall be treated for purposes of subparagraph (A) as received by the taxpayer.

(7) Regulations.—The Secretary may prescribe such regulations as may be necessary or appropriate to carry out this section, including regulations requiring recordkeeping and information reporting.

I.R.C. § 222(d).

45 I.R.C. § 222(e) (“Termination.—This section shall not apply to taxable years beginning after December 31, 2016”).

46 See I.R.C. §§ 21(b)(1)(A)–(B), 24(c)(1), 32(c)(3)(A), and 213(a) (2012).
drafting simpler than providing different definitions each time a new code section is introduced. Congress has included references to section 152 in each of those subsections, thereby implicitly recognizing the value of coordinated definitions. The drafting of those provisions, however, is not consistent. Section 21(e)(5) applies the section 152(e) definition of “child” for purposes of the credit for household and dependent care services necessary for gainful employment. 47 Section 24(c) also refers to section 152 but adds the word “qualifying,” thereby complicating the drafting. 48 Section 32(c)(3) is another variation on the term “qualifying child.” 49 Section 213(d)(5) coordinates the term

47 Section 21(e)(5) provides:

(5) Special dependency test in case of divorced parents, etc.—If—
(A) section 152(e) applies to any child with respect to any calendar year, and
(B) such child is under the age of 13 or is physically or mentally incapable of
caring for himself,
in the case of any taxable year beginning in such calendar year, such child shall be
treated as a qualifying individual described in subparagraph (A) or (B) of
subsection (b)(1) (whichever is appropriate) with respect to the custodial parent (as
defined in section 152(e)(4)(A)), and shall not be treated as a qualifying individual
with respect to the noncustodial parent.”

I.R.C. § 21(e)(5).

48 Section 24(c) provides:

(c) Qualifying child.—For purposes of this section—
(1) In general.—The term “qualifying child” means a qualifying child of the
taxpayer (as defined in section 152(c)) who has not attained age 17.
(2) Exception for certain noncitizens.—The term “qualifying child” shall not
include any individual who would not be a dependent if subparagraph (A) of
section 152(b)(3) were applied without regard to all that follows “resident of the
United States.

I.R.C. § 24(c) (2012).

49 Section 32(c)(3) provides:

(3) Qualifying child.—
(A) In general.—The term “qualifying child” means a qualifying child of the
taxpayer (as defined in section 152(c), determined without regard to paragraph
(1)(D) thereof and section 152(e)).
(B) Married individual.—The term “qualifying child” shall not include an
individual who is married as of the close of the taxpayer’s taxable year unless the
taxpayer is entitled to a deduction under section 151 for such taxable year with
respect to such individual (or would be so entitled but for section 152(e)).
(C) Place of abode.—For purposes of subparagraph (A), the requirements of section
152(c)(1)(B) shall be met only if the principal place of abode is in the United
States.
(D) Identification requirements.—
(i) In general.—A qualifying child shall not be taken into account under subsection
(b) unless the taxpayer includes the name, age, and TIN of the qualifying child on
the return of tax for the taxable year.
(ii) Other methods.—The Secretary may prescribe other methods for providing the
information described in clause (i).
“dependent” with section 152. The definition coordination between these code sections could be improved through more consistent use of terms and inclusion of the provisions within a subdivision dedicated to family tax law.

There are other opportunities for better definition coordination in family tax law. As discussed more fully later in this article, family law is a well-defined discipline that can be used to identify sections of the Internal Revenue Code that would benefit from shared definitions, shared interpretations, and shared location.

B. Clarity of Interpretation

Since the 1990s, cannons of statutory construction have replaced legislative history as the preeminent strategy in the Supreme Court’s construction of tax legislation. In their article comparing Supreme Court statutory construction analysis in tax law and workplace law, professors James J. Brudney and Corey Ditslear divide statutory construction canons into two groups—substantive canons and language canons. The former refers to presumptions such as the correctness of the Commissioner’s assessment or that tax exemptions should be narrowly construed. Language canons include presumptions about meaning attributed to words, inferences about word choices, and “presumptions about the larger cohesion or structural integrity of the text, including especially the whole act rule and the related presumption against surplusage, and also presumptions about the relationship between words used more than once in different parts of the same statute or similar statutes.”

Brudney and Ditslear explain that “We refer here to the presumption of statutory consistency (the same or similar terms in a statute should be interpreted the same way), the rule of in pari materia (similar statutory provisions in two comparable statutes should be

50 I.R.C. § 213(d)(5) (2012). (“Special rule in the case of child of divorced parents, etc.—Any child to whom section 152(e) applies shall be treated as a dependent of both parents for purposes of this section.”).
51 Brudney & Ditslear, supra note 5, at 1258 (“A key theme across subject matter areas is that the Court’s reliance on legislative history has declined and its reliance on canons has increased. . . .”).
52 Id. at 1239 (“[W]e follow the prevailing taxonomy that identifies language canons and substantive canons as the two basic categories.”).
53 Id. at 1240 n.27.
54 Id. at 1266.
applied in the same way). . . .”\textsuperscript{55} In pari materia is a statutory construction tool that uses known relationships between the concepts located in specific code sections to interpret the language of those sections:

The importance of selecting the position of an act within the entire body of a statutory enactment cannot be overemphasized. The new act will be interpreted in pari materia with existing law, and the location of the new statute in the code will necessarily be considered as an indication of which is the relevant legislation. For example, the problem of stream pollution is both a problem of conservation and public health, and yet the standards and interpretation applied to a stream pollution statute will vary extensively, depending upon whether it is considered as a conservation or a health measure.\textsuperscript{56}

Good taxonomy is the combination of good classification and good organization.\textsuperscript{57} The Internal Revenue Code follows the rule of good taxonomy in many respects. Partnership tax rules, for example, are classified together and organized in Title 26, Chapter 1, Subchapter K, Sections 701 through 777. While partnership questions may arise that require recourse to sections other than those found in Subchapter K, the vast majority of partnership tax questions can be resolved within the confines of that Subchapter.

Subchapter K illustrates how good taxonomy furthers all three taxonomic objectives. The first objective of good drafting is addressed above.\textsuperscript{58} Good interpretation based on efficient use of language is the second objective of good taxonomy. In other words, good classification and good organization will further the goals of, “clarity and continuity of expression, precision of style, and a logical development of regulation.”\textsuperscript{59} Findability, the third objective, is enhanced because most, if not all, of the sections needed to analyze partnership tax questions are located in close proximity to each other.\textsuperscript{60}

Subchapter K Part III, entitled Definitions, contains Section 761, entitled “Terms Defined.” Subsection 761(c) defines the term

\textsuperscript{55} Brudney & Ditslear, supra note 5, at 1266 n.115.
\textsuperscript{56} SINGER & SINGER, supra note 15, § 21.3.
\textsuperscript{57} Taxonomy, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/taxonomy (last visited Nov. 11, 2016) (taxonomy is defined as “classification” or “the process or system of describing the way in which different …things are related by putting them in groups.”).
\textsuperscript{58} See supra Part II.A.
\textsuperscript{59} SINGER & SINGER, supra note 15, § 21:1.
\textsuperscript{60} See infra Part II.C (for further discussion of findability).
“partnership agreement.” That term is then used in three other sections of Subchapter K. This simple device of a subsection within a larger subchapter devoted to the task of defining a term of art exemplifies good taxonomy. Singer and Singer have observed:

A definition should serve to shorten sections and simplify legislative expression. . . . This device not only saves a great deal of space and eliminates the repetition of long and cumbersome identifications, but more importantly it avoids the danger of minute discrepancies in descriptions which may confuse the interpretation and administration of the act.

Definitions are often limited to specific divisions of the Internal Revenue Code. For example, the phrase “[f]or purposes of this subchapter. . .” limits section 761(c). Other definitions in the Code are limited to other levels of organization.

Internal Revenue Code section 761(c) illustrates how Congress has used coordinated definitions to save space and avoid confusion in the interpretation and administration of partnership tax rules. As further developed below, the use of coordinated definitions would also be effective in family tax law.

Definition provisions that are consistent across multiple sections of the Code are but one way in which good taxonomy can further the goal of coherent rules that are substantively and stylistically consistent and therefore easier for the judiciary, administrators, and the public to interpret. Commentators and judges have long recognized the value of organizing rules into clearly structured expressions of public policy. When legislators follow organizational principles that place rules addressing a single topic together, the statutory construction maxim in pari materia permits a unified and coherent interpretation strategy:

Other statutes dealing with the same subject as the one being construed, commonly called statutes in pari materia, are another extrinsic aid useful in questions of interpretation.

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61 I.R.C. § 761(c) (2012) (“Partnership agreement.—For purposes of this subchapter, a partnership agreement includes any modifications of the partnership agreement made prior to, or at, the time prescribed by law for the filing of the partnership return for the taxable year (not including extensions) which are agreed to by all the partners, or which are adopted in such other manner as may be provided by the partnership agreement.”).
64 I.R.C. § 761(c) (2012) (part of subchapter K).
65 See, e.g., I.R.C. § 1(g)(3) (2012) (containing a definition that applies to a single subsection).
Statutes can be understood as *in pari materia* from either the perspective of the legislature or the meaning to the public. Statutes *in pari materia* vary in probative value depending on which criterion is adopted, and legislative and public awareness of a related act. For example, legislators ordinarily know more about tax statutes than members of the public, and so construction of a tax statute according to its public meaning could carry less weight than construction according to its legislative intent.66

The doctrine of *in pari materia* assumes that legislators know the law on matters related to those on which they intend to act. The Acts of Congress are not isolated rules but are meant to be read in context:

Whenever the House of Representatives, the Senate, or the President puts an imprimatur on an otherwise properly processed bill, that imprimatur supports, not the written document taken in isolation, but the document as conditioned by the surrounding context of relevant shared assumptions that it takes into account of and that together comprise the total communication.67

The drafting process takes context into account when it provides an orderly structure around which laws on a given topic are organized. For example,

Drafters often ignore the fact that their statutes will not stand alone, but will become part of an orderly and systematic code of laws. . . . The importance of selecting the position of an act within the entire body of statutory enactment cannot be overemphasized. The new act will be interpreted in pari materia with existing law, and the location of the new statute in the code will necessarily be considered as an indication of which is the related legislation.68

Congress employed good taxonomy under the doctrine of *in pari materia* when the laws concerning partnership tax were drafted and amended over the years. The organization of family tax law sections together under a single subdivision will achieve the similar goals of consistent and coherent interpretation. The example given above also illustrates the effect of good taxonomy on interpretation.69

The lack of a central definition for “qualified tuition and related expenses” made the drafting of variations in the rule more difficult, as explained above. That problem became magnified when the IRS was

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67 DICKERSON, *supra* note 7, at 124.
69 See *supra* Part II.A.
tasked with interpreting the term. Treasury Regulation § 1.25A-2(d)(1) and (2) provides:

(d) Qualified tuition and related expenses—(1) In general. Qualified tuition
and related expenses means tuition and fees required for the enrollment or
attendance of a student for courses of instruction at an eligible educational
institution.
(2) Required fees—(i) In general. Except as provided in paragraph (d)(3) of
this section, the test for determining whether any fee is a qualified tuition and
related expense is whether the fee is required to be paid to the eligible
educational institution as a condition of the student’s enrollment or attendance
at the institution.
(ii) Books, supplies, and equipment. Qualified tuition and related expenses
include fees for books, supplies, and equipment used in a course of study only
if the fees must be paid to the eligible educational institution for the enrollment
or attendance of the student at the institution.
(iii) Nonacademic fees. Except as provided in paragraph (d)(3) of this section,
qualified tuition and related expenses include fees charged by an eligible
educational institution that are not used directly for, or allocated to, an
academic course of instruction only if the fee must be paid to the eligible
educational institution for the enrollment or attendance of the student at the
institution.70

Example 2, which is given to help with interpretation of the regulation,
provides:

First-year students at College W are required to obtain books and other reading
materials used in its mandatory first-year curriculum. The books and other
reading materials are not required to be purchased from College W and may be
borrowed from other students or purchased from off-campus bookstores, as
well as from College W’s bookstore. College W bills students for any books
and materials purchased from College W’s bookstore. The fee that College W
charges for the first-year books and materials purchased at its bookstore is not
a qualified tuition and related expense because the books and materials are not
required to be purchased from College W for enrollment or attendance at the
institution.71

It would appear from the regulations that the IRS interpretation of
“qualified tuition and related expenses” for all purposes under section
25A would be the same. Yet, IRS Publication 970 clearly states that, for
purposes of subsection 25A(f) and the American Opportunity Tax
Credit, the definition of “qualified tuition and related expenses” does not

70 Treas. Reg. § 1.25A.
71 Id.
require that books be purchased from the institution in order for their expanse to be creditable. 72 In other words, the definition of “qualified tuition and related expenses” for the American Opportunity Tax Credit is not the same as it is for the Lifetime Learning Credit under section 25A(a)(2).

The distinction between the definition of “qualified tuition and related expenses” for purposes of the American Opportunity Tax Credit and all other places in the Code where the term appears is confirmed in the IRS Publication entitled “American Opportunity Tax Credit: Questions and Answers.”73 It provides:

Q3. How does the American opportunity tax credit differ from the Hope scholarship credit and Lifetime Learning credit?
A. Unlike the other education tax credits, the American opportunity tax credit includes expenses for course-related books, supplies and equipment that are not necessarily paid to the educational institution. It also differs from the Hope scholarship credit because it allows the credit to be claimed for four years of post-secondary education instead of two.

The distinction found in published IRS taxpayer advice, but absent from Treasury Regulations, appears to be based upon three words—“and course materials”—that were added to the section 25A(f) definition of “qualified tuition and related expenses” as section 25A(f)(i)(3) requires.75 If that is the reason for the distinction, then I am pleased that the IRS has interpreted those three words to expand the scope of expenses that can be counted for purposes of the American Opportunity Tax Credit. If, however, there were a subdivision of the Internal Revenue Code that addressed family tax law matters, and if within that subdivision there were a code provision, similar to section 222 but with broader application, the interpretative process could have been improved. In that case, a single definition would have applied to all education provisions of the Code, except where specified. This approach would permit the administrative, judicial, and practitioner interpreters to

72 See I.R.S. Pub. 970 at 13, 23.
74 Id.
75 I.R.C. § 25A(i)(3) (2012) (“For purposes of determining the Hope Scholarship Credit, subsection (f)(1)(A) shall be applied by substituting “tuition, fees, and course materials” for “tuition and fees.”).
be more confident that the drafters were aware of the differences they were creating.

One can imagine that the drafters of the American Opportunity Tax Credit were aware of the restrictive nature of the definition of “qualified tuition and related expenses” that was contained in the Lifetime Learning Credit, and wanted to relax the rule. But, in the absence of a structure that insures uniformity except under clearly defined and well-understood conditions, those charged with interpreting the rule are left with less confidence in the precise nature of the distinction that the drafters intended.

The IRS’s difficulty in interpreting the language of existing education tax credits can be seen in the lack of consistency between Treasury Regulation 1.25A and IRS Publication 970. Professors Brudney and Ditslear have shown that the Supreme Court is moving toward increasing reliance on structural cohesion canons such as in pari materia. 76 Both suggest that better taxonomy would elevate, or at least mitigate, tax legislation interpretation problems for the IRS and for all those interpreting the Code.

C. Findability

Findability refers to methods for locating information. 77 Search engines have been shown to be unsatisfactory in retrieving information because they often fail to find information that would be beneficial to the searcher. 78 One reason for that failure lies in the ignorance of the

76 See supra notes 51–55 and accompanying text.


78 VERNAU, supra note 14, at 2–3. As Vernau explains:

Three or four years ago many businesses were using search engines to enable them to solve problems of information access and retrieval. A search engine would crawl over unstructured data and return results based on text matching, word clusters, and other semantic techniques. While these methods do indeed play a valuable role as an option for retrieving information, they have significant limitations:

• Keyword search captures only 33% of relevant information (Source: Chris Wilkie, BBC Information and Archives, Sept 2002)
• “Most of the complaints we get are due to the way users search – they use the wrong keywords.” (Source: Must search stink?, Forrester, 2000)
• 40% of search failures come from customers and information providers using different terms.

Search engines assume that users know what they are looking for and can use very
searcher. Without an ability to find appropriate topics, it is hard to imagine how a searcher would know when to look for specific subtopics in a given set of data. Someone searching for education benefits in the Internal Revenue Code might not think to look under credits in order to find section 25A, then under deductions to find section 222, and then under qualified scholarships to find section 117. If, however, all of those provisions were located in a discrete subdivision of family tax law, the taxpayers would be more likely to uncover the education benefits.

The Internal Revenue Code is currently organized around many well-known, discrete, economic units other than families. If the taxpayer is a partnership, Title 26 Chapter 1 Subchapter K is where provisions related to that organization’s tax issues will be found. If the taxpayer is a corporation, Title 26 Chapter 1 Subchapter C would be a good place to start. If the taxpayer is a non-profit organization, then Title 26 Chapter 1 Subchapter F is applicable. Organizing those discrete economic units into subdivisions makes it easier to find provisions helpful across a range of tax issues. It is not necessary to know in advance that there might be a special definition or a discrete benefit available only for partnerships located somewhere in the Code. One can instead look at the table of contents of the subdivision and see exactly what tax provisions are available.

The IRS implicitly acknowledges this problem when it publishes guidance on topics of family law interest, such as IRS Publication 970. Sections of the Internal Revenue Code that are not organized close to each other are gathered in the publication under the heading of “Tax Benefits for Education.” If the Internal Revenue Code was reorganized to collect code sections organized around family law principals, there would be less need for the IRS to reorganize the appropriate sections in publications meant for taxpayer guidance, but which taxpayers may never see.

III. FAMILY TAX LAW

This brings us to one of the more difficult aspects of the reorganization advocated here: defining family tax law. The term family
law evokes a range of meanings. It may refer to defining personal ways of organizing intimate relations. It may also refer to defining broad public policy initiatives. Family law scholars have been debating the meaning of family law for as long as term has been in usage.

Professor Marjorie Kornhauser has argued that the concept of family should be eliminated from the Internal Revenue Code. 80 While there may be good doctrinal reasons for this view, it is unlikely to be adopted in the foreseeable future. Accordingly, this article will take the practical approach and assume that there is no political will for eliminating family law sections of the Internal Revenue Code.

The debate about the value of family law as a tax concept has historically turned on whether marriage should be viewed as a subset of contract law or as a status. 81 Professor Tessa R. Davis suggests that those two views are “inevitable features of the Code” and are likely to persist. 82 Professor Davis argues, very convincingly, that both the contractarian view and the status view of families are reflected in the Code. 83 Moreover, she sees the views as a strength that can be used to improve the Code. 84 Ultimately, whether contract principles or status principles are used to create sections of the Code devoted to family issues, the next question becomes how to organize those sections within the Code. This article will not address which sections of the Code fall

80 Marjorie E. Kornhauser, Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return, 45 HASTINGS L.J. 63, 108 (1993). “The joint return ought to be abolished. A system that treats each person as a separate taxable unit is more equitable, more consistent with basic tax principles, more efficient, and ultimately better able to accomplish social family goals.” Id.


82 Tessa R. Davis, Mapping the Families of the Internal Revenue Code, 22 VA. J. SOC. POL’Y & L. 179, 216 (2015). Professor Davis’s article comments on the two views of family:

These two conceptions of the family [contract and status]—one broad, recognizing individual autonomy, and one narrow, limiting autonomy in the interests of public welfare—are inevitable features of the Code. They aim at different problems—one the problem of discrimination, the other the problem of enforcement—and thus serve different and essential functions. If we are concerned about both problems, the solution does not lie in cutting the status family and kinship from the Code; herein lies the error of existing proposals.

Id.

83 Id. at 199.

84 Id. 231. (“Recognizing the roles both conceptions play—a status family for enforcement and a contract family for conveying benefits and combating discrimination—and the need for kinship in both—how can we deploy this functional insight to improve existing tax law?”).
under either of those two categories. Instead, using existing code sections, it will create a test for distinguishing family tax provisions from individual provisions. It will then assign some sections of the code to the family law category for inclusion in the subdivision on family tax law.

Professor Janet Halley has coined the term “Family Law Exceptionalism” to capture the unique qualities of family law that sets it apart from both contractual law and status-based ways of thinking of family law issues.\(^{85}\) Professor Halley’s view of family law is particularly relevant to issues associated with family tax law. Her view is that “the most important background rules against which all ongoing marriages buy homes and cars, take out loans, receive inheritances, give gifts, make investments, pay for college, suffer foreclosure, begin retirement, go onto Medicare, consume uninsured nursing and hospital care, and go bankrupt are not taught in the Family Law course.”\(^{86}\) Professor Halley’s observation that these fundamental rules of family law are left to other disciplines without recognition of their centrality to family law supports the view that the Internal Revenue Code should include a subdivision organized to address these transactions. A place to start in organizing a portion of the Code around family law principles emerges as a set of rules that concern family economic transactions.

Family economic transactions as a discriminator, without any more description, are over-inclusive. As a test, it would stretch to include provisions that address issues that are not dependent in any way upon family relationships for their resolution. In other words, business transactions that are unrelated to family transactions but happen to have family involvement might be within the broad language of family economic transactions, but should not be included in the definition of “family tax law.” Accordingly, the definition of family tax law should be refined to mean only those economic transactions that originate for family reasons and not for business reasons.

The rule is still over-inclusive because it sweeps in matters that are universal to any taxpayer regardless of the existence of a family. These might be called core concepts. “The fact that congressional tax policy is set forth almost exclusively within a single title of the U.S. Code does

\(^{85}\) Halley, supra note 81, at 20–21 (“‘Family law exceptionalism’ (FLE) will be my term for the extremely broad range of ideas and practices—legal, cultural, social, economic, ideological, aesthetic—that set marriage, reproduction, the family, childhood, sexuality, the home (the list could go on) aside from domains of life deemed to be more general, more political, more international, more economic (and again the list could go on indefinitely).”).

\(^{86}\) Halley, supra note 81, at 209 (emphasis in original).
not mean, however, that federal tax statutes are monolithic in nature. . . . Tax laws encompass diverse substantive issues, including core concepts such as defining taxable income.”

Basic provisions about the nature and scope of income under section 61 or the rate of tax imposed on incomes under section 1, are core concepts that can be excluded from the definition of family tax law. A workable definition might include rules governing economic transactions that originate for family reasons, but exclude rules applicable to every taxpayer regardless of personal relationships. If we eliminate core concepts such as defining income and economic transactions, then we are left with a group of sections of the Code that can be called “family tax law.”

Clare Huntington has said that family law “[s]hould be fundamentally oriented toward fostering strong, stable, positive relationships to prevent crises.” Coupling that with Professor Halley’s strategy of analyzing family law in terms of economics, we can identify tax provisions that could reasonably be included under the heading of family tax law.

The list of words that might be associated with family tax law, and therefore useful in a word search approach to family law, might include the obvious choices: family, spouse, parent, and child. Perhaps less obvious, but equally likely to uncover sections of the Code that address family law issues, might be: education, health or medical, home, property, divorce and many others. Even if a word search used this expanded list of words, it might miss credits or other tax-specific benefits that are not normally associated with family law.

An expansive word search with every possible combination of words is unlikely to be beneficial to the average family law practitioner for two reasons. First, a family law practitioner will likely not be familiar with the words used in the Internal Revenue Code to provide tax benefits. Words such as credit and deduction are not fungible, and use of either term requires a certain amount of training in order to understand their precise meaning. Second, code sections work together, and the location of one tax benefit section must often be coordinated with one or

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87 Brudney & Ditslear, supra note 5, at 1251.
91 See Halley, supra note 81, at 8–10 (describing the economic relationship between spouses and domestic relationships).
more other tax benefit sections that may not have been uncovered in a word search.92

Although important to families, this article will not address estate and gift tax rules located in chapters eleven and twelve of the Code. While there are many rules relating to family tax issues, estate and gift is already a discrete subdivision in Title 26. Those chapters have their own internal structures that make it unwise to break out some of those provisions and align them with family tax law rules. Breaking out sections of estate and gift tax in order to align them with family issues would leave very little of those chapters intact.

A. Entering Into an Adult Family Relationship

Instead of attempting a word search for family tax law sections of the Internal Revenue Code, it might be wise to turn to substantive areas of the Code that address economic transactions originating for personal or family reasons, and not for business reasons. The first such area might be the rules associated with entering into adult family relationships.93 These rules govern economic transactions that originate for family reasons, not business reasons, and are not rules applicable to every taxpayer regardless of personal relationships. Section 7703, which defines marriage, would naturally be included in the subdivision on family tax law.94 Even though Section 1 includes tax brackets that turn on marital status, it would not be included in the subdivision on family tax law because it is a core provision that is applicable to everyone, regardless of family relationships.95 Section 2, on the other hand, would be included in the subdivision on family tax law.96

Section 2 is directed toward the marital relationships that are reflected in section 1 and section 7703. These relationships include “surviving spouse,”97 “head of household,”98 and “certain married

93 See WOOD, supra note 25, at 25.
97 Section 2(a) provides:
(a) Definition of surviving spouse.—
(1) In general.—For purposes of section 1, the term “surviving spouse” means a taxpayer—
(A) whose spouse died during either of his two taxable years immediately preceding the taxable year, and
individuals living apart.99 Without these definitions, neither of those sections would be complete. Whereas section 1 is excluded because of its status as a core provision of the Code, section 7703 is well within the boundaries of a family tax law subdivision and would require coordination with the definitions of section 2 under the principal of definition coordination described above.

Sections 6015 and 66 provide relief for those spouses or former spouses where the normal rules of section 7703 would be too burdensome. The official heading for section 6015 is “Relief from joint and several liability on joint return,” but the section is also known as the

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(B) who maintains as his home a household which constitutes for the taxable year the principal place of abode (as a member of such household) of a dependent (i) who (within the meaning of section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) is a son, stepson, daughter, or stepdaughter of the taxpayer, and (ii) with respect to whom the taxpayer is entitled to a deduction for the taxable year under section 151.

For purposes of this paragraph, an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual.

(2) Limitations.—Notwithstanding paragraph (1), for purposes of section 1 a taxpayer shall not be considered to be a surviving spouse—

(A) if the taxpayer has remarried at any time before the close of the taxable year, or

(B) unless, for the taxpayer’s taxable year during which his spouse died, a joint return could have been made under the provisions of section 6013 (without regard to subsection (a)(3) thereof).

I.R.C. § 2(a).

98 Section 2(b) provides:

(b) Definition of head of household.—

(1) In general.—For purposes of this subtitle, an individual shall be considered a head of a household if, and only if, such individual is not married at the close of his taxable year, is not a surviving spouse (as defined in subsection (a)), and either—

(A) maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, of—

(i) a qualifying child of the individual (as defined in section 152(c), determined without regard to section 152(e)), but not if such child—

(I) is married at the close of the taxpayer’s taxable year, and

(II) is not a dependent of such individual by reason of section 152(b)(2) or 152(b)(3), or both, or

(ii) any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or

(B) maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151.

I.R.C. § 2(b).

99 I.R.C. § 2(c) (2012) states that “Certain married individuals living apart.—For purposes of this part, an individual shall be treated as not married at the close of the taxable year if such individual is so treated under the provisions of section 7703(b).”
“innocent spouse relief” provision” of the Code. These provisions are complex and contain rules that commentators have subjected to considerable analysis. Professor McMahon has written about the Tax Court and the IRS struggles with interpreting section 6015. Coordination of section 6015 within a subdivision on family tax law would provide the interpretative benefits of definition coordination and language cohesion with surrounding sections of the Code. Perhaps just as importantly, inclusion with section 66 concerning the treatment of

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100 I.R.C. §6015(a) (2012). Section 6015(a) provides:
(a) In general.—Notwithstanding section 6013(d)(3)—
(1) an individual who has made a joint return may elect to seek relief under the procedures prescribed under subsection (b); and
(2) if such individual is eligible to elect the application of subsection (c), such individual may, in addition to any election under paragraph (1), elect to limit such individual’s liability for any deficiency with respect to such joint return in the manner prescribed under subsection (c).
Any determination under this section shall be made without regard to community property laws.

101 See id. at 141–84 (discussing joint and several liability for spouses who file joint returns and the controversy surrounding it, and arguing that the current regime should be replaced with a system that respects joint filers’ agency); Jacqueline Clarke, (In)equitable Relief: How Judicial Misconceptions About Domestic Violence Prevent Victims from Attaining Innocent Spouse Relief Under I.R.C. § 6015(f), 22 AM. U. J. GENDER SOC. POL’Y & L. 825, 828–29 (2013–2014) (arguing in favor of more protections for innocent spouses who are joint and severally liable for deficiencies on joint returns, especially in cases of abuse and domestic violence).

102 Hunter McMahon, supra note 100, at 153. (“Although it is the Treasury Department and the courts that struggle to apply these facts-and-circumstances tests . . . it is other taxpayers who bear the cost of this relief. With the available information it is impossible to know exactly how much revenue is at stake in innocent spouse cases . . .”)

103 See I.R.C. § 66 (2012). Section 66 provides:
(a) Treatment of community income where spouses live apart.—If—
(1) 2 individuals are married to each other at any time during a calendar year;
(2) such individuals—
(A) live apart at all times during the calendar year, and
(B) do not file a joint return under section 6013 with each other for a taxable year beginning or ending in the calendar year;
(3) one or both of such individuals have earned income for the calendar year which is community income; and
(4) no portion of such earned income is transferred (directly or indirectly) between such individuals before the close of the calendar year, then, for purposes of this title, any community income of such individuals for the calendar year shall be treated in accordance with the rules provided by section 879(a).
community income where spouses live apart, and section 6402, concerning collection of debts and joint returns, the injured spouse rules

(b) Secretary may disregard community property laws where spouse not notified of community income.—The Secretary may disallow the benefits of any community property law to any taxpayer with respect to any income if such taxpayer acted as if solely entitled to such income and failed to notify the taxpayer’s spouse before the due date (including extensions) for filing the return for the taxable year in which the income was derived of the nature and amount of such income.

c) Spouse relieved of liability in certain other cases.—Under regulations prescribed by the Secretary, if—

(1) an individual does not file a joint return for any taxable year,
(2) such individual does not include in gross income for such taxable year an item of community income properly includible therein which, in accordance with the rules contained in section 879(a), would be treated as the income of the other spouse,
(3) the individual establishes that he or she did not know of, and had no reason to know of, such item of community income, and
(4) taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual’s gross income,
then, for purposes of this title, such item of community income shall be included in the gross income of the other spouse (and not in the gross income of the individual). Under procedures prescribed by the Secretary, if, taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either) attributable to any item for which relief is not available under the preceding sentence, the Secretary may relieve such individual of such liability.

(d) Definitions.—For purposes of this section—

(1) Earned income.—The term “earned income” has the meaning given to such term by section 911(d)(2).
(2) Community income.—The term “community income” means income which, under applicable community property laws, is treated as community income.
(3) Community property laws.—The term “community property laws” means the community property laws of a State, a foreign country, or a possession of the United States.

Id.  

104  See I.R.C. § 6402(d)(3) (2012). Section 6402(d)(3) provides:

(3) Treatment of OASDI overpayments.—

(A) Requirements.—Paragraph (1) shall apply with respect to an OASDI overpayment only if the requirements of paragraph (1) and (2) of section 3720A(f) of title 31, United States Code, are met with respect to such overpayment.

(B) Notice; protection of other persons filing joint return.—

(i) Notice.—In the case of a debt consisting of an OASDI overpayment, if the Secretary determines upon receipt of the notice referred to in paragraph (1) that the refund from which the reduction described in paragraph (1)(A) would be made is based upon a joint return, the Secretary shall—

(I) notify each taxpayer filing such joint return that the reduction is being made from a refund based upon such return, and
(II) include in such notification a description of the procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.
of the Code in a single, cohesive subdivision would better inform practitioners about the relief that is available to spouses who find themselves in difficult tax positions through the fault of their current or former spouses.

Section 66 applies in cases where both spouses would normally be responsible for the tax on the earnings of the other spouse in community property states, but due to estrangement the spouses have no benefit from that income. Section 6402 applies where one spouse owes a debt to an agency of the United States Government and has filed a joint return with a spouse who does not owe the debt. Section 6402 will allow the non-debtor spouse’s share of any refund to be exempt from any Government offset claims made in connection with the other spouses refund. Together, sections 66, 6015, and 6402 form a cohesive strategy for tax planning that may be missed if the taxpayer is unaware of the existence of provisions located at great numerical distance from each other.

Sections 2, 66, 6015, 6402, and 7703 are within the definition of family tax law because they contain rules governing economic transactions that originate for family reasons, but exclude rules applicable to every taxpayer regardless of personal relationships.

B. Other Adult Relationships and Children

Sections 151 and 152 may be seen as primarily concerned with parent child relationships, but adult relationships are also addressed in those sections. Section 151 provides for a personal exemption.

(ii) Adjustments based on protections given to other taxpayers on joint return.—If the other person filing a joint return with the person owing the OASDI overpayment takes appropriate action to secure his or her proper share of the refund subject to reduction under this subsection, the Secretary shall pay such share to such other person. The Secretary shall deduct the amount of such payment from amounts which are derived from subsequent reductions in refunds under this subsection and are payable to a trust fund referred to in subparagraph (C).

Id.

105 See supra note 103 (for text of Section 66).
106 See supra note 104 (for text of Section 6402).
109 I.R.C. § 151(a)–(c) (2012). Section 151(a)–(c) provides:
(a) Allowance of deductions.—In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.
Section 152 permits one taxpayer to claim the personal exemption of another person if he or she is a dependent of the taxpayer. A dependent need not be a child and can be someone unrelated to the taxpayer but who is dependent upon the taxpayer for his or her support.

As we have seen above, the definition of dependent is also important in other sections, including the Earned Income Credit of section 32, adoption expenses credit of section 23, child credit of section 24, the expenses for household and dependent care under section 21, the

(b) Taxpayer and spouse.—An exemption of the exemption amount for the taxpayer; and an additional exemption of the exemption amount for the spouse of the taxpayer if a joint return is not made by the taxpayer and his spouse, and if the spouse, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer.

c) Additional exemption for dependents.—An exemption of the exemption amount for each individual who is a dependent (as defined in section 152) of the taxpayer for the taxable year.

Id.

I.R.C. § 152(a) (2012) (“For purposes of this subtitle, the term ’dependent’ means—

(1) a qualifying child, or (2) a qualifying relative.”).

I.R.C. § 152(d) (2012). Section 152(d) provides:

d) Qualifying relative.—For purposes of this section—

(1) In general.—The term “qualifying relative” means, with respect to any taxpayer for any taxable year, an individual—

(A) who bears a relationship to the taxpayer described in paragraph (2),

(B) whose gross income for the calendar year in which such taxable year begins is less than the exemption amount (as defined in section 151(d)),

(C) with respect to whom the taxpayer provides over one-half of the individual’s support for the calendar year in which such taxable year begins, and

(D) who is not a qualifying child of such taxpayer or of any other taxpayer for any taxable year beginning in the calendar year in which such taxable year begins.

(2) Relationship.—For purposes of paragraph (1)(A), an individual bears a relationship to the taxpayer described in this paragraph if the individual is any of the following with respect to the taxpayer:

(A) A child or a descendant of a child.

(B) A brother, sister, stepbrother, or stepsister.

(C) The father or mother, or an ancestor of either.

(D) A stepfather or stepmother.

(E) A son or daughter of a brother or sister of the taxpayer.

(F) A brother or sister of the father or mother of the taxpayer.

(G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

(H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer’s household.

Id.
education credits of section 25A, and others. By grouping family tax law provisions together, definition coordination can be enhanced, leading to better drafting and better interpretation.

These provisions all meet the test for inclusion in a subdivision of the Code because they address transactions between related individuals arising out of those relationships. They are not core provisions of the Code, and they do not address economic issues that are unrelated to family considerations. Accordingly, sections 151, 152, 32, 21, 24, and 25A would be included in a newly formed subdivision on family tax law.

C. Education

Sections relating to the tax consequences or benefits associated with education are scattered across the Code. By concentrating them in a single family tax law subdivision, the above-described benefits of better drafting and interpretation are perhaps even less important than the benefit of enhanced findability. It has been my privilege to teach a course on family tax law in which family law practitioners have enrolled as students. My experience tells me that generally, family law experts are not sufficiently familiar with the current taxonomy of the Internal Revenue Code to be able to locate family tax law provisions that are organized under headings and topics unrelated to family law. Section 25A (Hope and Lifetime Learning Credits), for example, is located in Chapter 1, Subchapter A Determination of Tax Liability, Part IV – Credits Against Tax, Subpart A – Nonrefundable Credits. Section 222 (deduction for tuition) is located in Chapter 1, Subchapter B Computation of Taxable Income, Part VII – Additional Itemized Deductions for Individuals. Section 117 (scholarships) is located in Chapter 1, Subchapter B Computation of Taxable Income, Part III – Items Specifically Excluded From Gross Income. The location of these three education benefits is logical from the point of view of a tax professional; tax credits, deductions, and exclusions are all well-recognized taxonomic divisions in federal taxation. Those unfamiliar with federal taxation, however, might not think to look in those three subdivisions for sections that all address a single family law topic—education benefits. Reorganizing the sections under a single subdivision devoted to family tax law would facilitate the findability of the provisions for those unfamiliar with federal tax law.

See supra note 46 and accompanying text.
Moreover, sections 529\textsuperscript{113} and 530\textsuperscript{114} set aside amounts that will be used in the future to pay for education, allowing taxpayers to plan for the higher education needs of themselves and their families. Section 529 provides for Qualified Tuition Programs (GTPs), and section 530 creates Coverdell Education Savings Accounts (Coverdell Accounts), formerly known as Education Individual Retirement Accounts (Education IRAs).\textsuperscript{115} Both provide for establishment of trusts that will pay for education, and both provide that the earnings of the trust are generally tax-free.

Section 108(f) provides that student loans that are discharged without payment may be excluded from income if a taxpayer works for specified employers in specified professions.\textsuperscript{116} Without this provision, discharge of student loan liability without payment of the loan would constitute income under section 61(a)(12).\textsuperscript{117}

Section 221 allows taxpayers to deduct interest paid on qualified education loans.\textsuperscript{118} This is in addition to the benefit that section 222 confers, which permits the deduction of qualified tuition expenses.\textsuperscript{119} Both of those deductions are included in the calculation of adjusted taxable income under sections 62(a)(17) and 62(a)(18), respectively.\textsuperscript{120}

The education provisions of the Code meet the test for inclusion in a family tax law subdivision of the Code because they concern rules
governing economic transactions between and among related individuals arising out of those relationships. They are not core provisions of the Code, and they do not address economic issues that are unrelated to family considerations. Accordingly, sections 25A, 108(f), 221, 222, 117, 529 and 530 would be included in a newly formed subdivision on family tax law.

D. Family Health

Family health tax benefits are currently organized under several subdivisions of the Code. Sections 105121 and 106,122 which exclude from employee’s income the amounts that insurers pay for employees’ health care and that employers pay for accident and health insurance on behalf of employees, are located in Chapter 1, Subchapter B Computation of Taxable Income, Part III – Items Specifically Excluded From Gross Income. Section 223, which creates health savings accounts, is located in Chapter 1, Subchapter B Computation of Taxable Income, Part VII – Additional Itemized Deductions for Individuals.123 Authority for the deduction of medical and dental expenses is also located in section 213 of Chapter 1, Subchapter B Computation of Taxable Income, Part VII – Additional Itemized Deductions for Individuals.124

Some these provisions govern economic transactions between and among family members. Section 213(a) permits deducibility of medical expenses that individuals other than the taxpayer have incurred.125 The other provisions concern the manner in which the family pays for

121 I.R.C. §105(a) (2012) (“Except as otherwise provided in this section, amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer.”).

122 I.R.C. §106(a) (2012) (“Except as otherwise provided in this section, gross income of an employee does not include employer-provided coverage under an accident or health plan.”).

123 I.R.C. § 223(a) (2012) (“In the case of an individual who is an eligible individual for any month during the taxable year, there shall be allowed as a deduction for the taxable year an amount equal to the aggregate amount paid in cash during such taxable year by or on behalf of such individual to a health savings account of such individual.”).

124 I.R.C. § 213(a) (2012) (“There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof), to the extent that such expenses exceed 10 percent of adjusted gross income.”).

125 Id. (permitting deductible for spouse and dependent).
medical care. Section 213 originates in economic transactions between and among family members arising because of the family relationship. Section 105, 106, and 223 support section 213, and are therefore included within the family tax law subdivision.

E. Family Home

The purchase and sale of a family home are transactions that can be seen to arise out of the family relationship but might be better associated with non-family tax law. Section 163 concerns the deductibility of amounts paid as interest on loans. The general rule of section 163(h) is that personal interest is not deductible.\footnote{126}{In the case of a taxpayer other than a corporation, no deduction shall be allowed under this chapter for personal interest paid or accrued during the taxable year.” I.R.C. § 163(h) (2012).} There is an exception under subsection 163(h)(2) for interest paid in connection with a qualified residence.\footnote{127}{I.R.C. § 163(h)(2) (2012). Section 163(h)(2) provides: (2) Personal interest.—For purposes of this subsection, the term “personal interest” means any interest allowable as a deduction under this chapter other than—(A) interest paid or accrued on indebtedness properly allocable to a trade or business (other than the trade or business of performing services as an employee), (B) any investment interest (within the meaning of subsection (d)), (C) any interest which is taken into account under section 469 in computing income or loss from a passive activity of the taxpayer, (D) any qualified residence interest (within the meaning of paragraph (3)), (E) any interest payable under section 6601 on any unpaid portion of the tax imposed by section 2001 for the period during which an extension of time for payment of such tax is in effect under section 6163, and (F) any interest allowable as a deduction under section 221 (relating to interest on educational loans).} Many taxpayers who own their own homes take advantage of this provision; and for that reason, it could be seen as a subset of family tax law. Subsection 163(h), however, is a part of a much larger group of rules associated with interest on all types of obligations and, therefore, should remain associated with interest rather than family tax law.

The sale of a family home, unlike the deductibility of interest on a residence, is not part of a larger subdivision in the Code other than family tax law. Section 121 provides for the exclusion of certain amounts of gain on the sale of a principal residence from gross income.\footnote{128}{I.R.C. § 121 (2012). Section 121 provides: (a) Exclusion—Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer’s principal residence for periods aggregating 2 years or more. (b) Limitations} Excludability of gain on a residence turns on family law
(1) In general—The amount of gain excluded from gross income under subsection (a) with respect to any sale or exchange shall not exceed $250,000.

(2) Special rules for joint returns—In the case of a husband and wife who make a joint return for the taxable year of the sale or exchange of the property—

(A) $500,000 Limitation for certain joint returns—Paragraph (1) shall be applied by substituting "$500,000" for "$250,000" if—

(i) either spouse meets the ownership requirements of subsection (a) with respect to such property; (ii) both spouses meet the use requirements of subsection (a) with respect to such property; and (iii) neither spouse is ineligible for the benefits of subsection (a) with respect to such property by reason of paragraph (3).

(B) Other joint returns—If such spouses do not meet the requirements of subparagraph (A), the limitation under paragraph (1) shall be the sum of the limitations under paragraph (1) to which each spouse would be entitled if such spouses had not been married. For purposes of the preceding sentence, each spouse shall be treated as owning the property during the period that either spouse owned the property.

(3) Application to only 1 sale or exchange every 2 years—Subsection (a) shall not apply to any sale or exchange by the taxpayer if, during the 2-year period ending on the date of such sale or exchange, there was any other sale or exchange by the taxpayer to which subsection (a) applied.

(4) Special rule for certain sales by surviving spouses—In the case of a sale or exchange of property by an unmarried individual whose spouse is deceased on the date of such sale, paragraph (1) shall be applied by substituting "$500,000" for "$250,000" if such sale occurs not later than 2 years after the date of death of such spouse and the requirements of paragraph (2)(A) were met immediately before such date of death.

(5) Exclusion of gain allocated to nonqualified use

(A) In general—Subsection (a) shall not apply to so much of the gain from the sale or exchange of property as is allocated to periods of nonqualified use.

(B) Gain allocated to periods of nonqualified use—For purposes of subparagraph (A), gain shall be allocated to periods of nonqualified use based on the ratio which—

(i) the aggregate periods of nonqualified use during the period such property was owned by the taxpayer, bears to (ii) the period such property was owned by the taxpayer.

(C) Period of nonqualified use—For purposes of this paragraph—

(i) In general—The term “period of nonqualified use” means any period (other than the portion of any period preceding January 1, 2009) during which the property is not used as the principal residence of the taxpayer or the taxpayer’s spouse or former spouse.

(ii) Exceptions—The term “period of nonqualified use” does not include—

(I) any portion of the 5-year period described in subsection (a) which is after the last date that such property is used as the principal residence of the taxpayer or the taxpayer’s spouse, (II) any period (not to exceed an aggregate period of 10 years) during which the taxpayer or the taxpayer’s spouse is serving on qualified official extended duty (as defined in subsection (d)(9)(C)) described in clause (i), (ii), or (iii) of subsection (d)(9)(A), and (III) any other period of temporary absence (not to exceed an aggregate period of 2 years) due to change of employment, health conditions, or such other unforeseen circumstances as may be specified by the Secretary.

(D) Coordination with recognition of gain attributable to depreciation—For purposes of this paragraph—paragraph (A) shall be applied after the
issues such as the filing of joint returns and ownership, as well as use of the residence by the family unit.\textsuperscript{129} Accordingly, section 121 will share definitions with other family tax law sections and should therefore be grouped in a family tax law subdivision.

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\textsuperscript{129} See id.
F. Family Income

For millions of families, the Earned Income Tax Credit of section 32 is the most important section in the “family income” category.\footnote{See Chuck Marr et al., \textit{EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children’s Development, Research Finds}, CENTER ON BUDGET AND POLICY PRIORITIES, at 1, http://www.cbpp.org/research/federal-tax/eitc-and-child-tax-credit-promote-work-reduce-poverty-and-support-childrens (“The Earned Income Tax Credit (EITC) and Child Tax Credit (CTC), which go to millions of low- and moderate-income working families each year, provide work, income, educational, and health benefits to its recipients and their children, a substantial body of research shows.”).} The credit is complex and turns on definitions of qualifying children and definitions associated with other family tax law provisions. Sections 151 and 152 are referred to five times in subsection 32(c)(3) alone.\footnote{See I.R.C. § 32(c)(3) (2012) (emphasis added). Section 32(c)(3) provides: (3) Qualifying child (A) In general—The term ‘qualifying child’ means a qualifying child of the taxpayer (as defined in section 152(c), determined without regard to paragraph (1)(D) thereof and section 152(e)). (B) Married individual—The term ‘qualifying child’ shall not include an individual who is married as of the close of the taxpayer’s taxable year unless the taxpayer is entitled to a deduction under section 151 for such taxable year with respect to such individual (or would be so entitled but for section 152(e)). (C) Place of abode—For purposes of subparagraph (A), the requirements of section 152(c)(1)(B) shall be met only if the principal place of abode is in the United States. (D) Identification requirements—(i) In general—A qualifying child shall not be taken into account under subsection (b) unless the taxpayer includes the name, age, and TIN of the qualifying child on the return of tax for the taxable year. (ii) Other methods —The Secretary may prescribe other methods for providing the information described in clause (i).} Closer coordination between those sections through placing them in a single subdivision of the Code would yield the benefits of better drafting, better interpretation, and better findability.

The second family income section is section 104, concerning, \textit{inter alia}, the exclusion from gross income for amounts paid on account of workers compensation, physical injury, and accident insurance.\footnote{I.R.C. § 104(a) (2012). Section 104 provides: (a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—(1) amounts received under workmen’s compensation acts as compensation for personal injuries or sickness; (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness; (3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includable in the gross income of the employee, or (B) to the extent such amounts (other than amounts attributable to contributions by the employer which were not includable in the gross income of the employee) are by law includable in the gross income of the employee).} This
section is internally coordinated with section 213, concerning the deductibility of medical expenses, and would, therefore, be logically placed within the same subdivision as section 213. As discussed above, section 213 would be included within any new subdivision on family tax law.

G. Dissolution and Divorce

Sections 71 and 215 concerning the deductibility of alimony that one spouse pays incident to divorce or separation and that the recipient spouse includes in income, are central to any discussion of family tax law issues. Terms such as spouse, former spouse, spousal support, separation agreement, child, and dependent, inter alia, are all family law terms and would benefit greatly from definition coordination.

There are three areas of primary concern in good tax planning associated with divorce—spousal support (also known as alimony), child support, and property division. These “three topics cannot be isolated from each other and must . . . be . . . viewed together” in order to fully understand the tax consequences of divorce. Many taxpayers seek to manipulate these three labels in order to maximize the tax benefits available to both parties. When thinking about the tax consequences of divorce, it is helpful to think of the benefits of shifting income from the former spouse with high income to the other former spouse with low income. This strategy reduces the combined tax burden of both former spouses when viewed together and allows the high income former

employee, or (B) are paid by the employer); (4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980; (5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2)).

Id. 133

134 See supra Part III.D.

135 I.R.C. § 71(a) (2012) (“Gross income includes amounts received as alimony or separate maintenance payments.”).

136 I.R.C. § 215 (2012) (“In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable year.”).

137 WOOD, supra note 25, at 321.

138 See id. at 326.
spouse to pay more alimony to the other spouse than would have otherwise been possible.\textsuperscript{139}

Sections 71 and 215 are, therefore, good candidates for inclusion in a family tax law subdivision of the Internal Revenue Code, as they concern rules governing economic transactions between taxpayers that arise out of the relationship between the taxpayers.

\textbf{H. Other Related Sections}

Section 262 specifically denies deductions for “personal, living, or family expenses.”\textsuperscript{140} The section contains no definition of family expenses and would benefit from definition coordination with other family tax law provisions. It is also a general rule that limits deductibility of expenses associated with families.\textsuperscript{141} Accordingly, its findability would be enhanced if it were included in a family tax law subdivision of the Code.

Retirement tax issues such as annuities under section 72,\textsuperscript{142} individual retirement accounts under section 408,\textsuperscript{143} and the taxability of social security benefits under section 86\textsuperscript{144} are all at least tangentially related to the economic well-being of the family. Their taxability, however, does not turn on family relationships and are therefore not necessarily within the purview of a subdivision of the Code for family tax law.

\textbf{IV. IMPLEMENTATION OF A FAMILY TAX LAW SUBDIVISION OF THE CODE}

As discussed above, the last reorganization of the Internal Revenue Code occurred under President Ronald Reagan in 1986.\textsuperscript{145} It was meant

\textsuperscript{139} See id. at 319.

\textsuperscript{140} I.R.C. § 262 (2012) (“(a) General rule.—Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(b) Treatment of certain phone expenses.—For purposes of subsection (a), in the case of an individual, any charge (including taxes thereon) for basic local telephone service with respect to the 1st telephone line provided to any residence of the taxpayer shall be treated as a personal expense.”).

\textsuperscript{141} I.R.C. § 262(a).


\textsuperscript{143} See I.R.C. § 408(d)(1) (2012) (individual retirement accounts generally included in income).


\textsuperscript{145} See supra note 4 and accompanying text.
to be a comprehensive overhaul of the entire body of American Income taxation.\footnote{\textit{A Complete Guide to the Tax Reform Act of 1986}, 11 (Harold A. Grossman et al. eds., 1986) ("It's the most drastic overhaul of taxes in the last 40 years. The new law has something for every taxpayer. It's so all-encompassing that, from now on, the tax law will be called The Internal Revenue Code of 1986.").} Prior to the 1986 overhaul, the Internal Revenue Code of 1954 replaced the Internal Revenue Code of 1939.\footnote{See Internal Revenue Code of 1954, Pub. L. 591, ch. 736, 3 (1954) ("An Act To revise the internal revenue laws of the United States. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) CITATION.—(1) The provisions of this Act set forth under the heading ""Internal Revenue Title"" may be cited as the 'Internal Revenue Code of 1954'. (2) The Internal Revenue Code enacted on February 10, 1939, as amended, may be cited as the 'Internal Revenue Code of 1939.' ) (emphasis in original).} In the thirty years since the last reorganization of the Code, family law has emerged as a discrete area of legal specialization. As mentioned above, there is currently a political will to address family law issues in the context of federal tax reform.\footnote{See supra notes 1–3 and accompanying text.} Implementation of the proposal to create a family tax law subdivision will require identification of existing sections of the Code that should be included within the subdivision. This article has identified those sections. Next, it will be necessary to determine where in the Code to place the subdivision. This includes placing the subdivision at the appropriate level of the existing organization. The subdivision may be a subchapter, part, or subpart of the Code. This will require knowledge about both family law and the organizational structure of the entire Internal Revenue Code.

There is already an organization with the knowledge necessary to accomplish the second part of that task. Reorganizing the Internal Revenue Code will require collaboration between those familiar with family law and those familiar with the organization of the Internal Revenue Code. The Office of the Law Revision Counsel ("OLRC") will be charged with the latter responsibility.

\section{Classification of Laws in the United States Code}

The OLRC is responsible for organizing and maintaining the structural integrity of the United States Code ("U.S. Code").\footnote{See 2 U.S.C. § 285(b) (2012). The functions of the Office of Law Revision Counsel are as follows: (1) To prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove
OLRC classifies laws that are generally applicable and not temporary for placement within the U.S. Code. The U.S. Code is divided into two important types of law: positive law and non-positive law. The OLRC’s use of the term “positive law” differs in meaning from its other well-established jurisprudential meaning of legislative rather than natural law. Positive law, as used by the OLRC, refers to an entire title ambiguities, contradictions, and other imperfections both of substance and of form, separately stated, with a view to the enactment of each title as positive law. (2) To examine periodically all of the public laws enacted by the Congress and submit to the Committee on the Judiciary recommendations for the repeal of obsolete, superfluous, and superseded provisions contained therein. (3) To prepare and publish periodically a new edition of the United States Code (including those titles which are not yet enacted into positive law as well as those titles which have been so enacted), with annual cumulative supplements reflecting newly enacted laws. (4) To classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law. (5) To prepare and submit periodically such revisions in the titles of the Code which have been enacted into positive law as may be necessary to keep such titles current. (6) To prepare and publish periodically new editions of the District of Columbia Code, with annual cumulative supplements reflecting newly enacted laws, through publication of the fifth annual cumulative supplement to the 1973 edition of such Code. (7) To provide the Committee on the Judiciary with such advice and assistance as the committee may request in carrying out its functions with respect to the revision and codification of the Federal statutes.”

See Peter G. LeFevre, The United States Code: Its Accuracy, Accessibility, and Currency, 38 ADMIN. & REG. L. NEWS 10, 10 (2012–2013) (“On average, between 5,000 and 7,500 pages of new law is enacted during a two-year Congress. Each of these laws is carefully read by a team of lawyers at the OLRC. For each provision of the bill, the OLRC must decide whether it should go into the Code (general and permanent provisions only), and if so, where. This is the process of ‘classifying’ a law and results in a law’s Code classifications. Once the classifications are finalized, the OLRC begins actual text editing and preparation of editorial material that provides information about the source of Code sections, their arrangement, the references they contain, and their history.”).


When used with respect to the United States Code—as in positive law codification or a positive law title of the Code—the term “positive law” has a special and particular meaning. In general, however, especially in legal philosophy, the term “positive law” is used more broadly. There is overlap to be sure. But the meaning of the term as used generally is not identical to the meaning of the term as used with respect to the Code, and the distinction must be understood to avoid confusion. In general, the term “positive law” connotes statutes, i.e., law that has been enacted by a duly authorized legislature… In both positive law titles and non-positive law titles of the Code, all of the law set forth is positive law (in the general sense of the term) because the entire Code is a codification of Federal statutes enacted by Congress, and not of preexisting natural law principles.
of the U.S. Code that has been enacted in its totality. Non-positive law refers to the provisions that are compilations of statutes that the OLRC has organized into the U.S. Code. The distinction between positive and non-positive law has both legal significance and editorial significance. Non-positive law provisions in the U.S. Code are only prima facie evidence of the law, whereas positive law provisions of the U.S. Code constitute evidence of the law itself.

The distinction between when a provision provides only prima facie evidence of the law and when a provision constitutes evidence of the law itself has been important and has potentially been a source of embarrassment. In Royer’s, Inc. v. United States, for example, the Commissioner relied on the U.S. Code, which incorrectly included a provision that had been eliminated prior to final enactment of the law. The court ruled that the statutes at large, rather than the U.S. Code, provided proof of the law and the taxpayer prevailed.

For purposes of this discussion, however, the distinction between positive law and non-positive law is less significant than that of the OLRC’s editorial authority. Title 26 of the U.S. Code is non-positive

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153 See id. (“Within the context of the Code, the term ‘positive law’ is used in a more limited sense. A positive law title of the Code is a title that has been enacted as a statute.”).

154 See id. (“Non-positive law titles of the Code are compilations of statutes. The Office of the Law Revision Counsel is charged with making editorial decisions regarding the selection and arrangement of provisions from statutes into the non-positive law titles of the Code. Non-positive law titles, as such, have not been enacted by Congress, but the laws assembled in the non-positive law titles have been enacted by Congress.”).

155 See 1 U.S.C. § 204(a) (2012). Section 204(a) states in relevant part:

The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: Provided, however, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

Id.

156 Royer’s, Inc. v. United States, 265 F.2d 615, 618 (3d Cir. 1959) (“The last two or three lines of the paragraph would support [the Commissioner’s] conclusion. But, says the taxpayer, when this statute was amended in 1942 this paragraph which was in the House bill was eliminated by the Senate and the conference agreed to the elimination.”).

157 Id. (“[N]o one denies that the official source to find the United States laws is the Statutes at Large and that the Code is only prima facie evidence of such laws . . . . It seems quite clear to us that the regulation when looked at in light of the statute, as the statute stands after the 1942 amendment, does, as the taxpayer says, add an additional requirement which Congress did not put there. The regulation is, therefore, necessarily invalid.”).
law. 158 

Non-positive law is subject to limited editorial discretion under the supervision of the OLRC. 159 This is not to suggest that the OLRC could reorganize provisions of the Internal Revenue Code on its own. The OLRC could, however, provide guidance to Congress, based on the goals of coherent drafting, and aid in interpretation, based on efficient use of language and ease of navigation (otherwise known as findability).

The first priority of the OLRC is accuracy. 160 For purposes of this discussion, accuracy can be assumed. The OLRC lists two other priorities for non-positive law organization. The first is “consistent drafting style and consistent word choices.” 161 The second is to “enable the reader to navigate more easily within the [U.S.] Code.” 162 These are the reasons that compel the conclusions that the I.R.C should be amended to further these goals in a family tax law subdivision, and that the OLRC may play an important role in showing Congress the way to accomplish that reorganization.

Word choice is one of the two language canons that Professors Brudney and Ditslear discussed in their article on statutory

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159 See Detailed Guide to the United States Code Content and Features, OFFICE OF THE LAW REVISION COUNSEL, http://uscode.house.gov/detailed_guide.xhtml#second (“The basic unit of every Code title is the section, and the way in which Code sections are composed can differ depending on whether the section is in a positive or non-positive law title. In a positive law title, all the sections have been enacted as sections of the title and appear in the Code in the same order, with the same section numbers, and with the exact same text as in the enacting and amending acts. In other words, a positive law title is set out in the Code just as enacted by Congress. In a non-positive law title, the text of a Code section is based on the text of a section of an act as enacted by Congress, but certain editorial changes are made to integrate the section into the Code.”).  

160 See LeFevre, supra note 151, at 10. Further, “[t]he Code is the responsibility of the Office of the Law Revision Counsel (OLRC). During my many years at the OLRC, the accuracy of the Code was always the highest priority of the Office. It’s not hard to see why. By law, the printed Code is evidence of the laws it contains in every federal and state court and public office.” Id.

161 Positive Law Codification, supra note 152 (“The non-positive law titles contain various laws enacted far apart in time during a span of more than a century. Laws in non-positive law titles reflect drafting styles and word choices in use at the time of enactment. Positive law codification provides an opportunity to restate the laws using a consistent drafting style and consistent word choices.”).

162 Id. (“When a provision of a statute is included in a non-positive law title, certain technical changes are made in the wording and organization to integrate the provision into the Code. These changes enable the reader to navigate more easily within the Code, but they can make navigating between the statutes and the Code more complicated, particularly when amendments and cross references are involved. With positive law codification, the organization and wording of the Code are exactly as enacted by statute, so there are no editorial changes to complicate the transition between statute and Code.” (citation omitted)).
interpretation. The second language cannon they discussed concerns “presumptions about the larger cohesion or structural integrity of the text.” Brudney and Ditslear apply these canons to better understand the Supreme Court’s interpretation of the Code. Taken together, the two statutory canons further the goals of better drafting and better interpretation.

Coherent drafting will include better findability through the use of a subdivision organized around family tax law. In the words of the OLRC, “[w]hen a provision of a statute is included in a non-positive law title, certain technical changes are made in the wording and organization to integrate the provision into the Code. These changes enable the reader to navigate more easily within the Code….”

V. CONCLUSION

“Traditionally statutes have been unreadable, indefinite, confusing, and misleading.” Better taxonomy can remedy that problem. The role of the OLRC will be critical in any congressional attempt at reorganizing the Internal Revenue Code.

“In its role as custodian of the Code, the OLRC decides where laws go.” The benefits of aggregating sections of the Internal Revenue Code that concern matters that arise out of family relations include better drafting, better interpretation, and better findability. Sections of the Internal Revenue Code that address family law issues are scattered throughout Chapter One of the Code. This article has identified those sections that might be organized into a family tax law subdivision. In determining whether a section of the Internal Revenue Code is a good candidate for inclusion in such a subdivision, the applicable test is whether the section contains rules governing economic transactions between and among related individuals arising as a result of those relationships.

This article does not specify where a subdivision on family tax law should be located in the Internal Revenue Code. No opinion is offered on whether the subdivision should be a chapter, subchapter, part, or subpart. That can safely be left to the experts at the OLRC. It seems

163 Brudney & Ditslear, supra note 5, at 1266.
164 Id.
165 Id.
166 Positive Law Codification, supra note 152 (citation omitted).
168 Tress, supra note 8, at 144.
likely, given the thirty years since the last major revision, that the Internal Revenue Code will be considered for major revision soon, and the OLRC will be called upon to help Congress organize the new Internal Revenue Code. When it does, perhaps it will consider the advantages described in this article in organizing a subdivision dedicated to family tax law.
TWO, FOUR, SIX, EIGHT; WHAT CAN WE NOW REGULATE? THE REGULATORY MENTALITY AND NCAA SATELLITE CAMPS (ET AL)

Josephine (Jo) R. Potuto*

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Regulation, whether by rule or statute,\(^1\) gets a bad rap:

- “There are two things you don’t want to see being made—sausage and legislation.”\(^2\)

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• “One of the greatest delusions in the world is the hope that the evils in this world are to be cured by legislation.”

• “Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws.”

• “Errors do not cease to be errors simply because they’re ratified into law.”

• “You see, that’s the whole point of being in government. If you don’t like something you simply make up a law that makes it illegal.”

Despite their bad rap, rules are as much a part of life as breathing. Governments need rules. So do corporations, partnerships, and universities. Any group joined together for a common purpose needs rules, including, for that matter, parents with children. Rules embody group values, effectuate policy, order activities, govern conduct, promote evenhanded treatment, sanction transgressions, provide safety nets, and advance efficiency. All these are defensible, worthwhile, even laudatory goals. So, rules are not the culprit. Instead, it is the regulatory mentality that rightly deserves caustic critique.

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5 The quote is attributed to E.A. Bucchianeri. E.A. Bucchianeri, GOODREADS, https://www.goodreads.com/work/quotes/16351434-brushstrokes-of-a-gadfly (last visited Nov. 6, 2016).

I. THE REGULATORY MENTALITY

As used in this article, the regulatory mentality is the belief that the cure for any problem is to adopt a rule. The regulatory mentality repeatedly tackles yesterday’s problems, problems that affect only a few, problems that are perceived rather than real, and problems that are part of a larger context, which in its entirety should be addressed. Post-adoption evidence that a rule has failed to achieve its intended purpose, or that it has produced unexpected negative consequences worse than the problem it was adopted to solve, does not dissuade the regulatory mentality. When confronted with rule failure, the regulatory mentality never attributes it to limits in what rules can accomplish. Instead, it finds fault in the language or conceptualization of a rule and believes that things will be righted in the next rendition, or the one after that.

The regulatory mentality assumes a static world, not one in which people adjust behavior to changed circumstances. It thereby overstates a rule’s projected long-term positive impact. The regulatory mentality also understates the consequences of perpetually changing the scope, tenor, and projected impact of a rule, including a resultant inability to fully evaluate how it actually works before again changing it. In areas of potential litigation, this leads to a dearth of data to defend a rule’s purposes, parameters, and consequences.

The regulatory mentality too often seeks perfect solutions in a world that does not offer them, eschewing the aphoristic wisdom that “the perfect is enemy to the good.” Not only is perfection a chimera in a world bound by finites, it is doubly so when groups make decisions.

Members of a group have different backgrounds, experiences, values, priorities, issues they want addressed, and proposed solutions. By definition, a majority vote means there is at least one conflicting

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7 Or the one after that.


9 The crisis that led to the U.S. Steel case is just one of a host of available examples. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The case directly addressed the scope of presidential power in the context of a steelworkers’ strike during the Korean War. Its background involved a difference between Congress and the President regarding how to resolve labor crises. There also were corresponding differences in how to solve the particular crisis in the steel industry, with one side advocating caps on prices, and the other advocating limits on strikes and other union activities to achieve wage increases. See also Ken Gormley, Foreword: President Truman and The Steel Seizure Case: A Symposium, 41 DUQ. L. REV. 667 (2003).
(albeit losing) viewpoint. In addition, the majority position itself likely embodies compromise among supporters. Those who compromise get something they think is good enough, rather than everything they want. With a regulatory mentality, however, there is only a temporary regulatory hiatus before we venture forth once again.

A particularly pernicious attribute of the regulatory mentality is a fixation on “the small stuff”—discrete issues and problems that are more easily tackled, whether they need tackling or not. Regarding the small stuff, the regulatory mentality is perpetually in motion, producing rules and more rules, many of which to no purpose. Its unending scurry to adopt rules to fix every small problem continues unabated in group settings. The fact that groups change members only exacerbates the regularity of regulatory tinkering.

The perpetual motion of the regulatory mentality, however, gives way when problems to be addressed are large, complex, or multifaceted. We tout the example of the wise ant who prepared for a cold winter, while the foolish grasshopper frittered away time. Nevertheless, when faced with large and complex matters, most of us are grasshoppers until a crisis is obviously and imminently upon us. Democratic systems are slow to make major moves, as procedural fairness, inclusive decision-making, and compromise take time. While speed leads to ill-considered policy, a fixation on potential negative consequences can produce policy stagnation.

Ironically, the regulatory mentality is a two-edged sword. On the one side, it produces substantial overregulation of the small stuff, nonstop regulatory tinkering, a large body of rules, and a cumbersome administrative structure to monitor and enforce rules compliance. On the other side, it is overly slow to tackle large policy questions.

Although regulatory systems cover different subject areas, they are all cut from the same cloth. The NCAA, in particular, exhibits all the above-described attributes of a regulatory mentality and suffers from all the attendant consequences. In addition, the fact that the NCAA regulates athletic competition complicates its efforts to achieve a sensible, stable, coherent, efficient, and streamlined regulatory system. A discussion of the regulatory mentality in the context of an NCAA

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10 Winston Churchill is reported to have said that “[d]emocracy is the worst form of government, except for all the others.” Churchill himself attributed the quote to another in a speech he gave in the English House of Commons on Nov. 11, 1947. WINSTON CHURCHILL, CHURCHILL, BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 573 (Richard M. Langworth ed., 2011).
example, therefore, provides a sharp focus to examine the regulatory mentality, and to analyze how and why it goes wrong.

II. THE NCAA AND THE REGULATORY MENTALITY

The NCAA is a national private association of colleges and universities with three divisions and over 1,200 members.\(^{11}\) Division I is comprised of nearly 350 colleges and universities,\(^ {12}\) and the 32 conferences to which they belong.\(^ {13}\) It is divided into the Football Championship Subdivision (FCS),\(^ {14}\) the Football Bowl Subdivision (FBS),\(^ {15}\) and schools that do not sponsor football.\(^ {16}\) The FBS has 125 institutions in ten conferences—those referred to as the Autonomy 5, or A5 conferences\(^ {17}\) (Big Ten,\(^ {18}\) SEC,\(^ {19}\) Pac 12,\(^ {20}\) ACC,\(^ {21}\) and Big 12\(^ {22}\)), and those referred to as the Group of 5\(^ {23}\) (Mountain West,\(^ {24}\) Sun Belt,\(^ {25}\)

\(^{11}\) There are 1,121 colleges and universities, 99 athletic conferences, and 39 affiliate members of the NCAA. *What is the NCAA*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Nov. 6, 2016).


\(^{13}\) See NCAA Bylaw § 4.3.4.

\(^{14}\) FCS football teams play in a post-season NCAA championship.

\(^{15}\) FBS football teams comprise the traditional college football powers. The NCAA has never administered their post season. They compete in post-season bowl games, and now, for some of the more elite teams, in a football championship administered by the FBS conferences. See Governance, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/governance (last visited Nov. 6, 2016).

\(^{16}\) NCAA Bylaws § 20.01.2. See §§ 4.1 (a), (b), (c), 4.3.

\(^{17}\) Alternatively, these conferences are referred to as the Power 5 Conferences. See, e.g., Jason Kirk, *Every College Football Conference Should Scrap Divisions. Here’s the Whole Power 5 Plan.*, SB NATION (June 16, 2016), http://www.sbnation.com/collegefootball/2016/6/16/11935718/ncaa-conferences-divisions-scheduling. A5 institutions also include independent institutions, Notre Dame and Brigham Young.


\(^{19}\) The SEC is the Southeastern Conference. See SEC, http://www.secfootball.com (last visited Nov. 6, 2016).

\(^{20}\) The Pac 12 is the Pacific 12 Conference. See PAC 12, http://pac-12.com (last visited Nov. 6, 2016).

\(^{21}\) The ACC is the Atlantic Coast Conference. See ACC, http://www.theacc.com (last visited Nov. 6, 2016).

\(^{22}\) The Big 12 is the Big 12 Conference. See Big 12, http://www.big12sports.com (last visited Nov. 6, 2016).

Conference USA, AAC, and MAAC). FBS institutions are public and private, non-sectarian and religiously affiliated, large land grant universities with big budgets and big endowments, and small liberal arts colleges. Some FBS institutions offer extensive graduate and professional programs; others concentrate exclusively on undergraduate education.

In 2014, the NCAA Division I governance structure was revamped. Under the revamped structure, A5 institutions have autonomy to act unilaterally in certain defined legislative areas. The restructuring included the creation of a 40-member Division I Council.

The expectation of restructuring was that the Division I Council, comprised of “practitioners” with direct experience and expertise in collegiate athletics, would take charge of day to day policy making.

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24 The Mountain West is the Mountain West Conference. See MOUNTAIN WEST, http://www.themwc.com (last visited Nov. 6, 2016).
26 The C. USA is Conference USA. See CONFERENCE USA, http://conferenceusa.com (last visited Nov. 6, 2016).
27 The AAC is the American Athletic Conference. See AAC, http://theamerican.org (last visited Nov. 6, 2016).
28 The MAAC is the Midatlantic Athletic Conference. See MAAC, http://www.maacsports.com (last visited Nov. 6, 2016).
29 For a list of FBS conferences, see NCAA Bylaw § 4.2.1 and the websites of the conferences listed therein. For a list of FBS member schools, see the websites of the FBS conferences listed supra notes 18–28. The diversity of these institutions will be evident from reviewing the lists.
30 This was the third such reorganization of Division I since 1978. See, e.g., Potuto et al., supra note 1, at 6 n.25.
31 See NCAA Bylaws §§ 5.02.1.1, 5.3.2.1.2.
33 There is no definition of “practitioners” in the NCAA Division I Manual. Varsity intercollegiate athletics is athletics competition in which students who are varsity athletes compete. In theory, practitioners are both athletic administrators and faculty athletic representatives (“FARs”). FARs are faculty members with a campus athletic oversight role. Of the 40 Council members, however, only three are FARs. See NCAA DIVISION I COUNCIL, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1COUNCIL (last visited Nov. 6, 2016). For a discussion of the potential impact of Council (and committee) membership on the satellite camp issue, see infra note 150 and accompanying text. By contrast, FARs comprised 20 percent of the members of the precursor Division I governance structure. Ironically, the reduction of the faculty role coincided with increasingly vocal and strident claims that there is no longer a collegiate model of athletics, and that those who compete in football and men’s basketball are professionals, not students. See generally RESTORING THE BALANCE: DOLLARS, VALUES, AND THE FUTURE OF COLLEGE SPORTS 16–
The Division I Board, comprised of university presidents, would formulate the NCAA strategic plan, chart overarching, broad policy directions, and approve the NCAA budget. In turn, it was expected that NCAA rules would better articulate and encapsulate effective solutions to athletic issues, and do so in a more streamlined, responsive, and timely way.

A. The Division I Legislative Process

The NCAA Division I Council is a representative body. The Council adopts rules through a formal process intended to generate optimally informed voting decisions. Prior to a Council vote, a proposal is (1) published in the Publication of Proposed Legislation (“POPL”), (2) reviewed by relevant NCAA committees and interest groups, (3) evaluated and discussed at each institution, and (4) discussed and voted on by institutions at their respective athletic
conference meetings. Each athletic conference chooses its Division I Council representatives. Conferences differ whether a Conference vote binds their representatives or whether their representatives may exercise discretion. Even when no formal Conference rule binds them, the larger the vote majority within the Conference, the more the expectation that its Council representatives will vote their Conference position. Football issues are specific to the FBS and FCS respectively, and are voted on by Council members from the FBS and FCS. The kerfuffle over satellite camps was an FBS issue.

B. Competition and Regulation

Athletic competition requires relatively evenly talented teams if games are to be competitive and interesting for athletes and fans. Winning depends on having more on-the-field talent than the competition. On-the-field talent depends on off-the-field success in recruiting and retaining the most athletically talented players. The individual interest of each NCAA athletic program is to win, which means exploiting every competitive edge. That individual interest is in

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40 NCAA processes also include an interpretative process to consider a bylaw’s scope and effect. The interpretative function vests in the Division I Board of Directors and Council, with operational authority to bind members in the Division I Interpretations Committee. NCAA Bylaw § 5.4.1 (Interpretations of Constitution and Bylaws); NCAA Bylaw § 21.7.6.5. The author currently is a member of the Interpretations Committee. Interpretations Committee decisions are subject to appeal to the Division I Legislative Committee. As the satellite camps issue heated up, the Division I Interpretations Committee limited the opportunity for coaches to advertise their participation in a satellite camp:

[A] member of the institution’s coaching staff who is employed at a noninstitutional camp or clinic may only promote or endorse such a camp or clinic by permitting the camp or clinic to use his or her quotations and/or pictures in its promotional materials . . . . It is not otherwise permissible for an institution or an institution’s coaching staff member to produce and/or post noninstitutional camp or clinic promotional material . . . .


41 See infra note 114 and accompanying text.

42 NCAA Bylaw § 5.3.2.6.1.1. See NCAA Proposal 2015–59, Recruiting—Camps and Clinics—Location Restriction and Employment at Camp or Clinic—Institutional or Noninstitutional, Privately Owned Camps/Clincs – FBS (2016) (on file with author).

43 Fans in the major sports pay to attend. Broadcast revenues depend on the number of eyes on the screen.

44 Coaches are hired, compensated, and fired based on win-loss records. Therefore, it is a small wonder that they are particularly susceptible to seeking every competitive edge in NCAA bylaws, no matter how small. According to the National Association of Basketball
direct conflict with the collective interests of all competitors to have competitive games and a competitive season. Competitors seeking a competitive edge for themselves, and seeking to avoid a competitive advantage for others, vote on the NCAA rules designed to maintain an evenly competitive environment.

Competitive advantage in recruiting talented players can come from the presence of natural conditions such as warm weather, or beaches or oceans near a recruiting university. Differences in a university’s profile and mission can also affect a university’s competitive advantage. For example, high admission requirements impede the opportunity to admit talented athletes with academic deficiencies.

Although rarely mentioned as a factor, competitive advantage (or fear of competitive disadvantage) influences NCAA rules voting.

Coaches, recruiting violations, no matter how minimal, may induce a prospect to sign with a school. See Kevin Henderson & Dan Pierce, Division I College Head Basketball Coaches Summit Convenes in Chicago, NAT’L ASS’N OF BASKETBALL COACHES (Oct. 15, 2003), http://www.nabc.org/sports/m-baskbl/spec-rel/101503aaa.html (explaining that secondary—i.e., minor—recruiting violations require “stiffer penalties” as they influence “a recruit’s decision to attend one school over another”); NCAA PUBLIC INFRACTIONS REPORT: INDIANA UNIVERSITY, BLOOMINGTON 5 (Nov. 25, 2008). It does not matter that there are many, and more significant, factors to induce prospects to enroll—including who the coaches are, team competitive strength, facilities, support services, number of players who go on to professional sports careers, and institutional academic reputation.

Rules can ameliorate these advantages. The advantage of beaches in enticing prospects to enroll, for example, theoretically (and nonsensically) could be offset by a rule that prohibits enrolled players from going to the beach.

In theory, schools with comparatively high admissions requirements could revise their standards to match NCAA minimum academic eligibility requirements, but this would require wholesale abdication of institutional academic standards—the equivalent of the tail wagging the dog. In lieu of wholesale abdication, many institutions adjust admissions standards for athletes, on the theory that there is a performance component to what they do that warrants different treatment (equating athletes to students in majors such as theater arts and music). There are limits regarding the extent to which adjustments may be made, however, as it is exploitative to admit prospects whose academic predictors are so much below an institution’s academic standards as to suggest little or no chance to handle the academic work and graduate. See Ross v. Creighton U., 957 F.2d 410 (7th Cir., 1992). In four years at Creighton, Ross, a basketball student-athlete, completed ninety-six credits of academic work with a D average; many of these credits did not count toward the 128 required to graduate. Id. at 412. Ross left Creighton with fourth grade language skills and seventh grade reading skills. Id.

Institutional differences also drive different perspectives on rules enforcement. Schools with well-heeled boosters (or in competition with schools with well-heeled boosters) may differently perceive the need for vigorous rules enforcement to keep boosters in check. The problem of booster influence in major football programs has spawned a myriad of NCAA infractions cases. See, e.g., NCAA PUBLIC INFRACTIONS REPORT: UNIVERSITY OF ALABAMA, TUSCALOOSA 1 (Feb. 1, 2002); Associated Press, Report: Miami Ignored Shapiro Acts, ESPN
Consider two examples—NCAA initial eligibility standards and the collegiate baseball schedule. Schools with comparatively high admissions standards would benefit if the NCAA had similarly high initial eligibility rules so that athletes inadmissible at their schools could not compete at a rival school that could admit them. The baseball competition season begins in February, with three weeks of practice preceding the first game. Schools in cold climates would benefit from a later start date, as it would mean that they would not need to compete on the road for the first three or four weeks of a season.

Discussions regarding both NCAA eligibility and the onset of the baseball season advanced noncompetitive arguments. Regarding high initial eligibility rules, one side argued that they avoided exploitation of students with no realistic opportunity to graduate while the other side countered that they denied opportunity to students from disadvantaged backgrounds. Regarding the baseball season, northern schools focused on the negative academic impact of student-athletes missing a significant amount of class time at the start of the academic year, while southern schools countered that a later start either meant interfering with exam schedules or isolating baseball as a college sport by extending its season beyond the end of the spring term. For both NCAA initial

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48 NCAA Bylaws §§ 17.2.2, 17.2.3.


51 See Potuto et. al, supra note 1, at 14 n.52. A grant from the Knight Commission funded the research project on Intercollegiate Athletics and evaluated several years of NCAA Division I proposals, both for their projected impact and also with regard to which schools supported or opposed reform. Attempts to reform baseball covered many years.

eligibility rules and the onset of the baseball season, the arguments were valid, but the arguments presented were not the only, nor perhaps even the prime, reasons for the respective policy stances. Impact on competitive position played a major role.

Institutional resources committed to athletics fuels competitiveness. In turn, differences in resources are a major factor in institutional policy and Division I voting. In perceived defense of a level playing field, schools with more limited resources seek to cabin initiatives that cost money because they cannot afford them and fear falling further behind in the competition for talented prospects.

The end result is a heavily regulated Division I and fertile ground for the regulatory mentality. See a problem? Adopt a rule. See something that annoys someone, especially a coach? Adopt a rule. Worry that someone may get a competitive advantage? Adopt a rule. Worry that your institution will lose competitive ground? Adopt a rule.

Enter satellite camps.

III. ANATOMY OF A BYLAW

Athletic camps provide skill instruction to prospective student-athletes. Under NCAA rules, prospective student-athletes are students who have begun ninth grade, whether they have interest or ability in varsity athletic competition. NCAA Bylaw § 13.02.13 (or, for men’s basketball, when starting seventh grade. NCAA Bylaw § 13.12.1.1.1.). Prospects are a subset of prospective student-athletes, who are recruited to compete in intercollegiate athletics. I use all three terms interchangeably in this article.

for fewer games, which would have addressed the noncompetitive factors that both sides mentioned.

53 A5 athletic programs include Washington State, with a $54 million athletic budget, NCAA 2014–15 Finances, USA TODAY SPORTS, http://sports.usatoday.com/ncaa/finances(last visited Nov. 28, 2016); the University of Texas, with a $183 million athletic budget, id; Nebraska, which receives neither state aid nor student fees and contributes money to the campus, id; and Rutgers, which has subsidized athletics to the tune of $28 million annually. Kelly Heyboer & Ted Sherman, Rutgers Athletics Ran Nearly $28 Million Deficit Last Year, Report Shows, NJ.COM (May 14, 2013), http://www.nj.com/rutgersfootball/index.ssf/2013/05/rutgers_athletics_ran_28_milli.html. At a major A5 football power, athletes have fancy lounge areas and locker rooms, full academic support services, nutritionists, dieticians, weight trainers, strength and conditioning specialists, sports psychologists, and a host of others. For the estimated cost of such services, see Josephine R. Potuto, William H. Lyons & Kevin N. Rask, What’s in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student Athletes, 92 OR. L. REV. 879, 897–98 nn.83–86 (2013–14). Major football powers also have mega-millionaire donors like Oregon’s Phil Knight and Oklahoma State’s T. Boone Pickens.

54 NCAA Bylaw § 13.02.13 (or, for men’s basketball, when starting seventh grade. NCAA Bylaw § 13.12.1.1.1.). Prospects are a subset of prospective student-athletes, who are recruited to compete in intercollegiate athletics. I use all three terms interchangeably in this article.
own and operate institutional athletic camps. Satellite camps are athletic camps that are held somewhere other than on an institution’s campus. Until 2007, NCAA rules permitted coaches in all sports to administer their own satellite camps or work in those that others administered.

A. Football Satellite Camps: Stage One

Greg Schiano was the head football coach at Rutgers University from 2001 to 2011. He conducted Rutgers satellite football camps in Florida. Florida student-athletes began coming to Rutgers to compete. Not coincidentally, Rutgers climbed the national rankings of recruiting classes, boasting a top ten class in 2006. Also, not coincidentally, the NCAA football satellite camp bylaw was amended.

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55 NCAA Bylaw § 13.12.1.1. A camp is an institutional camp if owned or operated by any athletic department employee, id.; coaches are the most likely to own or operate camps. A camp is specialized when it is specific to one sport or provides instruction specific to that sport. NCAA Bylaw § 13.02.2.2. It is diversified when it does not emphasize a particular sport. NCAA Bylaw § 13.02.2.1. Institutional camps may be used to promote a sport, create goodwill in a community, provide additional income to coaches, help youngsters enhance their skills, and provide a recreational and exercise outlet for youngsters. Virginia Tech University surveyed 55 institutions regarding the benefits and challenges of administering camps and clinics. Virginnia Tech, Power 5 Survey of Athletic Camp and Clinic Activity (on file with author). Most institutions registered a profit from camps and clinics. Profits went to support salaries, general operations, and marketing. In one-third of the cases, profits supported recruiting initiatives. Id. at 8.


59 There were 21 Florida student-athletes on the 2006 Rutgers roster. Lee Jenkins, Florida Connection Aids Rutgers’s Success, N.Y. Times (Nov. 14, 2006), http://www.nytimes.com/2006/11/14/sports/ncaafootball/14rutgers.html?_r=0.

Beginning in 2007, institutions could hold football camps only on their own campus or within a 50-mile radius from campus. The rationale statement accompanying the 2007 bylaw revision stated that the intent was to offset the “unwanted development” of “hosting institutional camps or clinics in different regions of the country.” Two things made the development “unwanted.” First was the cost—“remote camps or clinics come at a great expense to institutional or personal resources.” Second, satellite camps were used for recruiting and “camps or clinics should not be hosted for recruiting purposes.”

Under the 2007 bylaw revision, football coaches could still work at satellite camps that they or their institution neither owned nor operated. The SEC and ACC, however, adopted conference rules that prohibited their coaches from doing so.

61 NCAA Bylaw § 13.12.1.2. Geographical limits also were placed on basketball camps. They were restricted to an institution’s campus and a 100-mile radius from it. Id.
63 Id. Note that cost matters only because it offsets the recruiting advantage otherwise available to high-resourced athletic programs.
64 Id.
65 Oklahoma State Head Coach Mike Gundy spawned a precursor satellite camps issue for the Big 12 Conference while recruiting in Texas. At the initiation of the University of Texas, the Big 12 Conference for a while had a rule that restricted coach satellite camp work to camps within their own states. Scott Wright, Big Value or Wasted Time? Satellite Camps Have Long Been Debated in Big 12, NEWSOK (July 22, 2016), http://newsok.com/article/5510789.
66 The ACC’s policy regarding satellite camps states:
CAMPS. Football coaching staffs may not conduct, attend, or be involved with any football camps/clinics, including camps/clinics for non-prospect aged individuals, during the months of June and July or any calendar week (Sunday through Saturday) that includes days of those months off their institution’s campus. . . . Coaches may attend coaching clinics off their institution’s campus at any time only when there are no prospective student-athlete’s [sic] enrolled in the clinic. On-field graduate assistant coaches are permitted to work one off-campus camp per year (institutions are not permitted to provide expenses to work the camp) for the advancement of their coaching career. . . . Waivers may be granted by the Commissioner when warranted.

 Camps. Until May 29, 2016, SEC football coaching, strength and conditioning, and administrative staffs may not conduct, attend, or be involved in any way with football camps off their institution’s campus, except: 1. On-field graduate assistant coaches, at their own expense, may work one off-campus camp per year for the advancement of their coaching career. 2. Fellowship of Christian Athletes camps are exempt from this regulation.
Then in 2014, Penn State Head Football Coach James Franklin drew attention when he worked in Georgia State and Stetson camps.\textsuperscript{67} Matters reached a fever pitch the next year when Michigan Head Football Coach Jim Harbaugh worked in 11 camps in seven states.\textsuperscript{68} Other coaches announced plans to follow suit.\textsuperscript{69} A simmering controversy erupted, with the SEC leading the charge to keep coaches at home.\textsuperscript{70}

\textbf{B. Football Satellite Camps: Stage Two}

In 2015, the Division I Council, and A5 institutions in particular, concluded that a comprehensive review of football recruiting was needed, not a piecemeal resolution of isolated issues.\textsuperscript{71} The Council directed the 16-member (12 voting) Football Oversight Committee\textsuperscript{72} to

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\textsuperscript{68} Josh Moyer, \textit{Jim Harbaugh Responds to Other Coaches’ Criticism of Satellite Camps}, \textit{ESPN} (June 17, 2015), http://espn.go.com/college-football/story/_/id/13098573/jim-harbaugh-michigan-wolverines-says-satellite-camps-ok-my-america. Harbaugh’s involvement was widely perceived as the factor that precipitated the Oversight Committee and Council action. Rittenberg, \textit{supra} note 36.


\textsuperscript{72} Division I Football Oversight Committee, NCAA, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1FBOVERSIGHT (last visited Oct. 30, 2016). Division I has sports-specific committees that report directly to the Division I Council. One such committee is the Football Oversight Committee.
conduct a review. The Football Oversight Committee has nine FBS voting members. With the exception of a student-athlete representative, all voting members are athletic administrators. Despite the directive to undertake an overall review, in March 2016 the Football Oversight Committee took up the satellite camps issue and recommended a legislative change to prohibit coaches from working in them. On April 8, 2016, the Division I Council acted on the recommendation and prohibited coach participation. On April 28, the Division I Board reversed the Council decision and reinstated the original bylaw that permitted coaches to work in satellite camps.

The Football Oversight Committee and Council votes coincided with the controversy about satellite camps, which played out in increasingly outspoken and confrontational public comments by head coaches and SEC Commissioner Greg Sankey, among others. Opponents of coach participation in satellite camps made comments on

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73 Johnson, supra note 71. A subcommittee of the Football Oversight Committee was assigned the specific task of reviewing camps and clinics. Id.
74 Division I Football Oversight Committee, supra note 72.
75 Id.
79 The kerfuffle over satellite camps was not the first time that a proposed football rules change encountered public criticism, even derision. In 2014, Alabama Head Football Coach Nick Saban led the charge to regulate hurry-up offenses in FBS football by requiring a ten second hiatus before the ball could be hiked to start a new play. Matt Murschel, Bret Bielema, Nick Saban Argue Hurry-Up Offenses Put Players in Danger, ORLANDO SENTINEL (July 25, 2013), http://articles.orlandosentinel.com/2013-07-25/sports/os-sec-offense-defense-player-safety-0725-20130725_1_bret-bielema-defensive-players-gus-malzahn. The Football Rules Committee considered the proposal. Each sport has a rules committee which recommends rules changes to the Playing Rules Oversight Panel. See NCAA Bylaws §§ 21.1, 21.1.4. The proposal gathered steam even though several experts said there were no hard data to support Saban’s injury claim or that the particular rule change was not an effective solution. Jon Solomon, What does Science say about Football Injuries from Hurry-up Offenses?, AL.COM (Feb. 13, 2014), http://www.al.com/sports/index.ssf/2014/02/what_does_science_say_about_h_u.html; David Ching, Rules Chairman: We Need Solid Proof, ESPN (Feb. 18, 2014), http://www.espn.com/college-football/story/ _id/10478887/ncaa-football-rules-committee-troy-calhoun-backtracks-slowdown-pro. After much public derision of the proposal, and after head coaches who run the offense began speaking up, the Football Rules Committee declined to support the rule change. George Schroeder, NCAA Football Rules Committee Drops Slow-Down Proposal, USA TODAY (Mar. 5, 2014), http://www.usatoday.com/story/sports/ncaaf/2014/03/05/college-football-rules-committee-pace-of-play/6036617/.
the record, suggesting that only the purest of motives impelled their opposition. They raised the specter of interests outside the academic environment influencing camp administrators and prospects. They worried that there was inadequate monitoring of camp administration, and that sponsors and promoters not subject to NCAA rules could receive and spend money in illicit ways, including paying prospects to attend their schools. They also grounded their opposition in the fact that satellite camps were becoming recruiting vehicles. In that vein, SEC Commissioner Greg Sankey said camps effectively extended the recruiting calendar.

Whatever the articulated reason for their opposition, virtually all opponents hailed from SEC or ACC schools. In addition to Sankey, the opponents included Joe Alleva, the athletic director at Louisiana State University; Clemson Head Football Coach Dabo Swinney; North Carolina Head Football Coach Larry Fedora; and Alabama Head Football Coach Nick Saban. Opposition stemmed from the cost of travel to attend the camps and the coaches spending too much time off

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80 See Roger Groves, The Nick Saban Jim Harbaugh War of Words Is Much Deeper Than That, FORBES (May 31, 2016), http://www.forbes.com/sites/rogergroves/2016/05/31/the-nick-saban-jim-harbaugh-war-of-words-is-much-deeper-than-that/#3636da834e83; See also Murschel, supra note 34.

81 See Groves, supra note 80. Their influence is widely condemned as infecting men’s basketball.

82 Harris Pastides, South Carolina President and then chair of the Division I Board of Directors, alluded to third party influences in explaining the Board action: “We share the Council’s interest in improving the camp environment, and we support the Council’s efforts to create a model that emphasizes the scholastic environment as an appropriate place for recruiting future student-athletes.” Ban on Satellite Camps Rescinded, NCAA Announces, DAYNEWSUPDATE (Apr. 28, 2016), http://daynewsupdates.com/ban-on-satellite-camps-rescinded-ncaa-announces-nbcsports-com/.

83 Russo, supra note 34.


campus\textsuperscript{86} to the detriment of their quality of life, their on-campus responsibilities to student-athletes, and the administration of their programs.\textsuperscript{87} Some coaches even doubted that satellite camps offered additional and useful opportunities for prospects to be seen and evaluated.\textsuperscript{88}

Supporters of satellite camps also advanced every argument except competitive edge. They noted that satellite camps permitted coaches, including those from Group of 5 institutions, to get to know a large number of prospects who either could not afford to visit their schools or had no interest in doing so, hoping a major FBS or even an A5 program would recruit them.\textsuperscript{89} At the same time, satellite camps were touted as a cost-effective\textsuperscript{90} way to be seen for prospects from high schools that might fly under the collegiate recruiting radar screen or prospects whose talent level failed to spur a collegiate coach to visit and evaluate them.\textsuperscript{91} The University of Mary Hardin-Baylor, for example, runs camps across Texas.\textsuperscript{92} One camp can have as many as 1,000 prospects attend.\textsuperscript{93}

\textsuperscript{86} Jim Harbaugh, Michigan Head Football Coach, attended at least 38 camps in 22 states. The tab for Michigan coaches to attend 2016 satellite camps was $350,000. A high-resourced school such as Michigan can afford it. Travis Durkee, Michigan AD Defends Incredibly Expensive Jim Harbaugh Tour, SPORTING NEWS (June 17, 2016), http://www.sportingnews.com/ncaacollegefootball/news/michigan-jim-harbaugh-satellite-camp-tour-costs-expenses-warde-manuel/18f6aexek7m61q988461q979.

\textsuperscript{87} Murschel, supra note 34.

\textsuperscript{88} These included Dabo Swinney and Larry Fedora. Carter, supra note 56.

\textsuperscript{89} Rittenberg, supra note 36; Kevin McGuire, NCAA Could be Taking Steps toward Standardizing Satellite Camps, YARDBARKER (June 18, 2016), http://www.yardbarker.com/college_football/articles/ncaa_could_be_taking_steps_toward_standardizing_satellite_camps/s1_13156_21133816.


\textsuperscript{92} Brandon Chatmon, Mike Gundy’s Vision for “Mega Camps,” has become Reality, ESPN (June 6, 2016), http://www.espn.com/blog/big12/post/_/id/112560/mike-gundys-vision-for-mega-camps-has-become-reality.
Several student-athletes said that they obtained an athletic scholarship, or the opportunity to play at a Division I school, only because of their attendance at a satellite camp.\(^94\) One student-athlete described the ban as “stripping the opportunity from a lot of young kids that don’t have the chance to get out there and see some of these programs and get one-on-one coaching with some of these coaches across the country.”\(^95\)

Just as the major opposition to satellite camps came from the SEC and ACC, supporters hailed primarily from the Big Ten Conference and schools outside the A5. They included Michigan Head Football Coach Jim Harbaugh, Ohio State Head Football Coach Urban Meyer, Memphis Head Football Coach Mike Norvell, and Nevada Head Football Coach Brian Polian.\(^96\) High school football coaches—those expected to be among the most concerned about the scholastic influence giving way to outside interests—also supported satellite camps, both because they offered their athletes more of a chance for a college athletic scholarship, and also because they were a cost-efficient way for many coaches to see their athletes.\(^97\) Oklahoma State Head Coach Mike Gundy summed up satellite camps as the “Wal-Mart theory,” where prospects could evaluate coaching styles and their rapport with coaches, and coaches could assess player attitude and their attention to instruction, in one location.\(^98\)

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\(^{95}\) Id. See Russo, *supra* note 34.


\(^{97}\) See Goul, *supra* note 94.

\(^{98}\) Chatmon, *supra* note 92.
C. Stage Three: The Council Speaks and the Board Responds

Members of the FBS Council adopted a satellite camp proposal that limited coaches to working only on their own institutions’ campus. According to its rationale, the proposal was intended to “address a practice that is circumventing the intent of the ... recruiting calendar established by the American Football Coaches Association.” Also mentioned were non-scholastic influences and the effect of “significant financial gains” for camp sponsors that “influences recruiting in a way that is inconsistent with recruiting rules.”

The Division I Council has weighted voting. For FBS issues, each vote by an A5 Conference representative counts as two. The vote to amend the football satellite camp bylaw was adopted on a 10 to 5 vote. Opposed were the Big Ten (2 votes), AAC, Conference USA,

99 There were two FBS-specific proposals before the Division I Council to change the satellite camp rule for football programs. The broader of the two, Proposal 2015–59, was adopted. The ACC sponsored it. The SEC sponsored Proposal 2016–60. It would have permitted coaches to host camps not only in their states, but in another state if within a 50-mile radius. Schroeder & Uthman, supra note 84; Zach Barnett, UCLA AD Dan Guerrero Explains why he Voted for Satellite Camp Ban, NBC SPORTS (Apr. 21, 2016), http://collegefootballtalk.nbcsports.com/2016/04/21/ucla-ad-dan-guerrero-explains-why-he-voted-for-satellite-camp-ban/comment-page-1/.

100 The pertinent portions of the proposal read as follows:

In bowl subdivision football, an institution’s coach or noncoaching staff member with responsibilities specific to football may be employed (either on a salaried or volunteer basis)... only at his or her institution’s camps or clinics held on its campus or in facilities regularly used for the institution’s practice and/or competition. ... It is not permissible for a football coach or noncoaching staff member with responsibilities specific to football to be employed at another institution’s camp or clinic or at a noninstitutional, privately owned camp or clinic, including a camp or clinic conducted by a local sports club.


101 Id.

102 Id.

103 NCAA Bylaw § 4.3.4.1; NCAA, NCAA DIVISION I COUNCIL POLICIES AND PROCEDURES 26 (on file with author).

104 NCAA Bylaws §§ 4.3.4, 4.3.4.1; Mitch Sherman, NCAA Bans Satellite Camps Effective Immediately, ESPN (Apr. 8, 2016), http://www.espn.com/college-football/story/ _/id/15162704/ncaa-bans-satellite-camps-effective-immediately.

and the MAAC.\textsuperscript{106} In support were the SEC (2 votes), ACC (2 votes), Big 12 (2 votes), Pac 12 (2 votes), Mountain West, and Sun Belt.\textsuperscript{107} If the Pac 12 and Sun Belt representatives had voted the way the majority in their conferences voted, the amendment would have failed on an 8 to 7 vote.\textsuperscript{108}

The Division I Board reversed the Council and reinstated the original bylaw permitting coaches to work in satellite camps.\textsuperscript{109} The Board directed “a broad assessment of the FBS recruiting environment,” including “potential modifications to camps and clinics participation.”\textsuperscript{110} This, of course, was the Council’s original position when it directed an overall review of football recruiting. As a result, the Board returned the satellite camp issue to status quo ante.\textsuperscript{111}

The rush to revise the football satellite camps bylaw, and the quick reversal, was described as “stunning and silly,”\textsuperscript{112} even sanctimonious.\textsuperscript{113} The focal point for making the process look bad was the Pac 12. In their Conference vote, Pac 12 institutions voted 11-1 to retain the opportunity for football coaches to work in satellite camps, with UCLA the lone dissenter.\textsuperscript{114} The Pac 12 vote was not necessarily a vote on the merits but, instead, was a vote to wait for a comprehensive review.\textsuperscript{115} Despite the Pac 12 vote, at the Division I Council, UCLA Athletic Director Dan Guerrero, the Pac 12 representative, voted to ban coach participation.\textsuperscript{116} Pac 12 Commissioner Larry Scott went public to


\textsuperscript{107} Sherman, supra note 104.

\textsuperscript{108} See infra notes 114–118 and accompanying text.


\textsuperscript{111} See Goul, supra note 94.

\textsuperscript{112} Rittenberg, supra note 34.

\textsuperscript{113} Id.


\textsuperscript{115} Id.

\textsuperscript{116} Schroeder & Uthman, supra note 84.
say that Pac 12 rules required the Pac 12 Council representative to vote
the Pac 12 position when the Pac 12 vote was clear.\footnote{117 Dinich, supra note 114.}

Although the Pac 12 got the most publicity over its vote, it was not
the only conference with voting issues. The Sun Belt Conference
representative also voted in support of the proposal even though a
majority in his conference supported the status quo.\footnote{118 Rittenberg, supra note 36.}

In the midst of all this, the Department of Justice expressed interest
in whether the attempted ban on coach participation in satellite camps
implicated antitrust laws by its apparent limit on schools marketing
themselves.\footnote{119 Patrick Rishe, The NCAA’s Reversal of Satellite Camp Ban a Victory for Free Market
Competition, FORBES (Apr. 28, 2016), http://www.forbes.com/sites/prishe/2016/04/28/the-
ncaa-reversal-of-satellite-camp-ban-a-victory-for-free-market-competition/#c479a4c15e21.}

The impact on opportunities for coach evaluations of
prospects and, in turn, for prospects to have information by which to
evaluate their college and scholarship options, prompted the Justice
Department’s interest.

The satellite camp kerfuffle raised concerns about whether the
revamped Division I governance structure would, or could, achieve its
stated goals.\footnote{120 Rittenberg, supra note 36.} The experience was described as a less than encouraging
first foray of the revamped structure.\footnote{121 Russo, supra note 34.} As Pittsburgh Athletic Director
Scott Barnes put it, “We finally got the practitioners on the council and it
was overturned by the board that is composed mostly of
presidents . . . That’s contrary to what we – NCAA Division I Athletics –
have been working so hard [on]. Our first crack and the Board of
Directors rescinds it.”\footnote{122 Murschel, supra note 34.} Others, like Notre Dame Athletic Director Jack
Swarbrick, believed it was too soon to tell.\footnote{123 Id.} A few believed that the
handling of the satellite camps issue showed that the process worked.
Northwestern Athletic Director and Council chair Jim Phillips argued
that the experience demonstrated that the new structure embodied the
nimbleness and ability to act quickly, which was a goal of the Division I
revamp.\footnote{124 Russo, supra note 34.} SEC Commissioner Greg Sankey argued that the camp’s

\begin{footnotes}
\item[117] Dinich, supra note 114.
\item[118] Rittenberg, supra note 36.
\item[119] Patrick Rishe, The NCAA’s Reversal of Satellite Camp Ban a Victory for Free Market
Competition, FORBES (Apr. 28, 2016), http://www.forbes.com/sites/prishe/2016/04/28/the-
ncaa-reversal-of-satellite-camp-ban-a-victory-for-free-market-competition/#c479a4c15e21.
\item[120] Rittenberg, supra note 36.
\item[121] Russo, supra note 34.
\item[122] Murschel, supra note 34.
\item[123] Id.
\item[124] Russo, supra note 34.
\end{footnotes}
issue was sufficiently separate from other football recruiting issues and that prompt resolution was necessary to halt the “unhealthy direction” in which satellite camps were headed.125

Neither side in the satellite camp debate mentioned competition interests as a prime and underlying reason why they supported or opposed the opportunity for coaches to work in the camps. One has only to look at which schools, and Conferences, supported or opposed camps to conclude that competitive interests played a large part. Coaches in the recruit-rich states where SEC schools are located, like Texas,126 need not leave their geographic areas to recruit and are anxious to stop coaches from other areas “poaching” in their territory.127 Coaches in the less-populated Midwest or on the west coast, where football is not the passion it is in the South, want an expanded recruiting base to facilitate seeing and evaluating prospects.128 An additional impetus to ban coaches from satellite camps was Michigan Head Football Coach Jim Harbaugh’s participation.129 Michigan is regarded as a viable candidate to win a national football title, and Harbaugh appeared to delight in tweaking the SEC.130

125 Schroeder & Uthman, supra note 84.
127 Duffy, supra note 126. Reardon, supra note 70.
130 Jourdan Rodrigue, Satellite Camps Went ‘Viral’ this Summer, but are they Worth it?, CENTRE DAILY TIMES (Aug. 6, 2016), http://www.centredaily.com/sports/cleg/psu-football/article94143702.html. The SEC is perceived to be particularly sensitive to what Harbaugh does. In what appears to be a response to another of his ventures, the SEC sought a rule preventing coaches from taking teams to other (warmer) locales to practice over spring break. Angelique S. Chengelis, Harbaugh’s Spring Break Trip Draws Response from SEC, DETROIT NEWS (Feb. 9, 2016), http://www.detroitnews.com/story/sports/college/psu-collegefootball/2016/02/09/harboughs-spring-break-trip-draws-response-sec/80073660/. At the January 2017 A5 legislative session, the A5 voted to preclude offseason practices during a vacation period to be held away from campus. Mitch Sherman, Power 5 Conferences Vote to Stop off-Campus Practices, ESPN (January 20, 2017), http://www.espn.com/college-football/story/_/id/18518579/power-5-conferences-vote-stop-campus-practices-vacation-periods. Michigan Head Coach Jim Harbaugh has one last laugh here—he is taking his team to Italy this spring break. Des Bieler, Jim Harbaugh Taking Michigan Wolverines to Italy for
In some way or another, most of what institutions do has a recruiting, or player retention, purpose. The over-the-top facilities at the University of Oregon are just one example. Schools have numerous staff employed in recruiting-related activities, including breaking down film, analyzing prospect data, and creating fancy graphics to send to prospects. The NCAA, however, officially eschews a recruiting element in camps and clinics. Instead, the stated purpose is to advance youth sports, teach football, and assist with skills training. NCAA bylaws specify that an institutional camp may not be reserved for elite athletes only, but instead must be open to all students. Bylaws also limit how an institution may promote a camp and those who teach in it.

In describing the environment of satellite camps as “a mess,” Big 12 Commissioner Bob Bowlsby said camps are about “meeting players and meeting families and meeting middlemen.” To suggest there is no recruiting element is to deny reality. As one observer saw it, “The SEC’s legislative crusade against satellite camps was the most transparent, cynical, foolish waste of time that college athletics has seen. And given the history of the NCAA, that’s saying something.”

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132 For a partial list of such items, see supra note 53; Wolken, supra note 126.

133 Id.


135 NCAA Bylaw § 13.12.1.3.

136 The Interpretations of NCAA Bylaw §§ 11.3.2.8 (promotion of student-athletes and teams), 13.4.3.1 (recruiting advertisements), and 13.4.3.1.1 (nonathletic institutional advertisements) has led to an interpretation permitting institutions to sell advertising space to high schools in their media guides, but not if the advertisements mention high school athletic programs. Pac-12 Compliance, August 9, 2016 – HS Advertisements, COMPLIANCE CORNER (Aug. 10, 2016), http://compliance.pac-12.org/rules-revelations/august-9-2016-hs-advertisements/.

137 Wolken, supra note 134.

138 Wolken, supra note 126.
D. Why Did It Happen?

It took just a few weeks to proceed from rejection to reinstatement of the football satellite camp bylaw that permitted coaches to work in satellite camps. During that time, the Division I Council abruptly took up the discrete issue of coach participation at satellite camps despite its earlier conclusion that an overall comprehensive review of football recruiting was needed. During that time, a Division I Council whose practitioner members were expected to see the broader policy implications of decisions and to avoid knee-jerk reactions nonetheless rushed to judgment on satellite camps. During that time, a revamped Division I governance structure in which the Division I Board was to have a purely oversight role ended with practitioners requesting that the Board undo what the practitioners just did.

The treatment of satellite camps took center stage even though much more pressing issues were on the Division I Council’s plate. The FBS, and particularly the institutions in the A5, face challenges both external and internal. A partial list includes litigation of all shapes and sizes, student-athlete unionization efforts, runaway spending,
student-athlete crimes and behavior issues, coach behavior issues, and concussions and other health-related issues. Yet, satellite camps drove immediate action. Why? The reasons are endemic to the regulatory mentality, enhanced by the competitive environment in which NCAA rule making takes place.

First, all the other challenges facing the FBS are broad and far-ranging, and much more difficult to resolve. The satellite camp issue, by contrast, was a discrete problem, foursquare within the comfort range of the regulatory mentality. Small wonder that, with elephants falling on the heads of FBS institutions from all directions, the schools galvanized to shoot a mosquito.

Second, the satellite camp issue concerned football, the cash cow in both the FBS, and certainly the A5, and also the sport that garners the most donor, fan, and media attention. Issues related to football get heightened scrutiny. University presidents, trustees, and athletic

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directors in these schools act at their peril if they are perceived as being hostile to what their football teams need.

Third, coaches are sensitive to any matter that appears to give them or their competitors a competitive boost. It does not matter how much of a competitive boost, or even if there actually is one. What matters is that coaches think there is. Passions run high when winning games appears to be at stake.

Fourth, head football coaches have clout. They have access to the media, to donors, and often to institutional Boards of Regents/Trustees to air their complaints. They are paid more than university presidents and are heard when other coaches might not be. The fanfare accompanying Michigan Head Football Coach Jim Harbaugh’s increasingly aggressive entry into the recruiting territory of schools in other conferences, and the likelihood that other coaches would follow suit, got the attention of the football coaches in these recruit-rich areas. And they spoke up.

Fifth, the makeup of the Football Oversight Committee and Division I Council likely played a part. All the voting members of the Oversight Committee come from the athletics side of the campus. The Council has three FARs among 40, and only one in the FBS voting bloc. Faculty by training and inclination are skeptical. They rely on research and validated data to drive decisions. Their skill set runs to measured analysis and considered evaluation. FAR status outside the athletic department distances them from athletic pressures, including those that head coaches bring to bear. Their skepticism might have added to the voices raising questions and highlighted the fact that quick resolution was not prudent.

Sixth, while the satellite camps Council vote was precipitous and ill-advised, and while the proposed solution may have been ill-considered, there is a real problem in football recruiting that needs to be resolved. The influence of nonscholastic interests on football rightly is a critical concern. The experience in men’s basketball demonstrates what may happen when nonscholastic interests are involved. Youth basketball has been described as “a cesspool for corruption and deceit

149 See supra note 33.
150 Had there been full discussion of the satellite camps issue in the Conferences, or had there been FARs on the Oversight Committee, the FAR influence might have been more apparent. By the time the matter reached the Council, representatives were less free to act because, for some at least, Conferences had taken positions.
151 See Wolken, supra note 134.
152 Id.
and conflicts of interest.” The worry that football might follow suit was a major provoking factor in the decision to engage in a comprehensive review of football recruiting. Seven on seven football is one piece of the whole. Another is revising the rules that dictate when a prospect may commit to an institution. Satellite camps are yet another piece. Had there been no underlying issue with merit, it is unlikely that the effort to separate the satellite camp matter from the overall football recruiting review would have had legs to it.

E. No Deliberation but No Emergency

Although the fast progress of the satellite camp issue from Football Oversight Committee to Council vote suggests an emergency, there was none either in fact or in process. The Division I Council has internal policies to deal with situations that need to bypass the regular legislative cycle because they are considered to be emergencies.


156 NCAA Bylaw § 5.3.2.1.1. The Council may jump the regular legislative cycle if it decides a matter qualifies as an emergency or a proposal is noncontroversial; for either to happen at least 75 percent of those voting must support. See e-mail from Brian Shannon, 1AFAR Representative on the NCAA Division I Council, to Jo Potuto, Professor of Law, U. Neb. C. of Law (Aug. 18, 2016) (on file with author) (describing Council Policy and Procedures Manual). Shannon is the 1AFAR representative on the Council. See Michelle Brutlag Hosick, Board appoints Council, NCAA (Dec. 2, 2014), http://www.ncaa.org/about/
camp proposal voted on by the Division I Council had been introduced into the 2015 legislative cycle.\textsuperscript{157} Along with other recruiting proposals, it was put on hold when the Council directed an overall review of football recruiting. That decision was not conclusive on later Council action.\textsuperscript{158} Because football recruiting issues were expected to be deferred, it is unlikely that FBS Conferences engaged in considered discussion of satellite camps at their Fall meetings. Nonetheless, Council consideration of the proposal at its April meeting formally did not jump the regular legislative process. In consequence, there was no need to designate the proposal as emergency for there to be a vote.

Most agree that reform is needed regarding the participation of football coaches in satellite camps. Even so, rushing to a resolution in the face of the Division I Council decision to undertake a holistic review of football recruiting was a mistake. Rushing to a resolution without considering the alternatives and without considering how camps fit into the bigger recruiting picture was also a mistake. The rush to judgment also had unintended consequences. Prime among them was the likelihood that fewer FCS, Division II, and Division III institutions could host camps because the camps rely on the participation of coaches from A5 programs to attract prospects.\textsuperscript{159} It is difficult to credit the argument that preventing coach participation in satellite camps for Summer 2016 was an emergency that overrode the factors pointing to a more considered approach.

 Nonetheless, the Council’s mistake in acting does not automatically mean that the Board should have reversed the Council decision. No


\textsuperscript{158} See infra note 167 and accompanying text.

\textsuperscript{159} See Goul, supra note 94.
legislative solution can attend perfectly to all the interests at play. A particular balance of interests always has detractors. On the merits, the revised satellite camps bylaw was not clearly wrong. If the Board were to reverse whenever it disagreed with a Council decision, then it would substitute its judgment for the practitioners on the Council—the very result the revamped structure was intended to avoid.

Miscues identified after the fact with Conference voting in the Pac 12 and Sun Belt Conferences were embarrassing to NCAA voting processes, but such miscues typically are not fodder for after-the-fact remedy. Voters are expected to have their houses in order on the front end, not ask for a redo. A potential trigger for Board intervention might have been the threat of Justice Department action should the Board not have reversed the Council. Not only is there no evidence that the Justice Department would have acted, but there also is no evidence that a possible legal risk impelled the presidents to act.

The effort to achieve perfect justice tailored precisely to differences in the facts of each case risks both the loss of consistent application of a rule across a breadth of cases, as well as a blurring of a rule’s scope and meaning because of variances in how it is applied. The same conundrum is at work in the debate between adherence to process, and the results it brings, and punting process to achieve an arguably better result on the merits. The best protection for consistency, predictability, and confidence in unbiased decision making is adherence to process, but process is singularly unsexy.

It is difficult to blame the Division I Board for reacting as it did, however. All indications are that the Board was prepared to play an oversight role but received requests from various actors to review and fix what was wrought. Two conferences publicly questioned their Council votes. Conferences outside the FBS may have had insufficient opportunity to raise concerns. The Football Oversight Committee and Council votes caused furor that made the satellite proposal difficult for the Board to ignore. The Board also faced the near certainty that a new

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160 Clear error is the general standard for reversal of most judge fact findings. E.g., Fed. R. Civ. P. 52 (a)(6); Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).
162 It is believed, for example, that Big Ten Commissioner Jim Delany played a behind-the-scenes role to prompt Board action. See Mitch Sherman, What’s the End Game for Satellite Camps? Look to Jim Delany for Insight, ESPN (May 3, 2016), http://www.espn.com/blog/bigten/post/_/id/132778/whats-the-end-game-for-satellite-camps-look-to-delany-for-insight.
legislative proposal—or, more likely, several—would have been introduced into the 2016–17 legislative cycle to remedy some of the consequences of the just adopted revised satellite camps bylaw. This likely would have occurred even in the absence of the overall review of football recruiting issues that was taking place. With the overall review underway, another revision was near certain. The April Council vote was widely criticized and ridiculed. Although on its merits a new, more nuanced Council proposal adopted in 2017 might have been received favorably, the fact that a new revision came immediately on the heels of 2016 Council action almost certainly would have led to more ridicule of NCAA processes. All things considered, the Board action appears to have been the most prudent course.

The way the Board acted, moreover—not simply to reverse, but to reverse pending a comprehensive Council review of football recruiting—ameliorates against the concern that the Board action signaled a relinquishment of its oversight role. In other words, the Board still left the operational decision in the hands of the practitioners on the Council. When an oversight body has serious questions about the merits of a decision or how it came about, then it is an appropriate, perhaps even obligatory, exercise of oversight to remand to operational decision makers and request that they take a second look.

IV. REMEDYING THE FOOTBALL SATELLITE CAMP ISSUE

There are several possible ways that coach participation in satellite camps might be handled. In the short run, the perceived competitive disadvantage that SEC and ACC coaches suffered was resolved when each conference lifted its ban prohibiting their coaches from participating.163 In the long run, the treatment of satellite camps was rolled into the comprehensive revision of football recruiting.

One critical component in reform of satellite camps is to give up the charade that they do not involve recruiting, thereby permitting reforms directed at regulating the recruiting element.

There was a general consensus that reform of satellite camps should acknowledge that they involve recruiting and that there should be limits

on which satellite camps a coach might attend.\textsuperscript{164} The current proposal limits coach participation in satellite camps to those administered by NCAA institutions and is limited to two 15-day periods.\textsuperscript{165}

V. REMEDYING THE REGULATORY MENTALITY

The satellite camp experience aptly underscores the regulatory mentality’s “see a problem; write a rule” treatment of discrete issues of precise and small magnitude. Part of the fascination with such problems is their seeming ease of solution. The result is that frequently a rule is adopted before a problem is fully analyzed. As with satellite camps, these quick fix solutions rarely include a thorough assessment of potential ramifications beyond the particular problem. In turn, there is little possibility of reaching an optimal resolution.

As the NCAA satellite camp rulemaking experience also aptly underscores, a quick fix solution to a discrete problem is unlikely to be nuanced. Division I rules regulate conduct at 125 very diverse institutions. Even with the close attention and participation of all stakeholders, Division I rules may be ill adapted to legitimate, but outlier, differences among institutions. Because the quick fix phenomenon removes from the legislative process a full opportunity for close attention and broad input, it aggravates the possibility of an ill fit for some institutions. It also undermines confidence that the balance reflected in a rule represents the considered judgment of stakeholders; that it is the optimum that may be achieved. The end result is both distrust and more dissatisfaction with the balance struck. As discussed earlier in this Article, the regulatory mentality has a penchant to revise and tinker as more and more unanticipated consequences become apparent. The quick fix not only gives rise to more such consequences but the distrust that the rule’s adoption process engendered increases the clamor to make changes.

A frenetic jumping bean approach to rule revision makes NCAA processes look haphazard and silly. It prompts comments that the NCAA does not know what it is doing. It generates criticism that special


interests—i.e., the major football powers—control rulemaking. It leads to distrust of any policy solution reached. All of the criticism is lethal in an association in which competitors must work together, and sometimes against their own interests, to achieve the common good.

The NCAA regulatory mentality produces a serious problem in rules compliance and enforcement. Campus compliance oversight is made more difficult when there are a multitude of rules to monitor, particularly when they cover the same general question, but differ in their treatment sport to sport or subject area to subject area. The spate of new proposals every year requires work to keep up with them, their particular consequences, and how they impact behavior under other rules. The multitude of rules, particularly on minor topics, can lead to a scofflaw, or at least cavalier, attitude about rules compliance. It also gives seeming legitimacy to coach complaints that there are so many, and so many nuanced, rules that it is unfair to punish them when they commit a violation. The sheer number of rules increases the workload of compliance officers. It leads to the need for more rules education, as well as more requests for rules interpretation, and more waiver requests. The NCAA also is tagged with a “Big Bad Intrusive Brother” label that ill serves it, particularly in litigation.

Every legislature and rulemaking body at times has insufficient information from which to make decisions, but makes them nonetheless. Every legislator and rule maker at times devotes insufficient attention to proposals. In at least two ways, these phenomena are exacerbated in NCAA rulemaking. First, those with fulltime jobs doing something else adopt NCAA rules. Faculty teach; coaches coach; administrators run programs. Some of these individuals have little interest in rulemaking or little expertise in developing or evaluating policy. Even those with expertise and interest may not be fully engaged, and no one is fully engaged all the time. Often, proposals are not analyzed and vetted until immediately before a vote is to be taken, at which point it is difficult to revise proposal language or to harmonize competing proposals on the same subject. Second, Council representatives are expected, if not obliged, to vote their Conference positions, even though those positions may have been taken much earlier at a time when full information was unavailable.

The Division I Council has internal operating rules to handle emergency and noncontroversial legislation.\textsuperscript{167} It should adopt additional rules to thwart end-runs around Council decisions to stay consideration of a proposal. An obvious way to handle these would be to specify that a proposal may be “unstayed” only if it meets Council criteria for emergency proposals. Another useful internal operating rule would be to permit reconsideration of a bylaw only after a two-year (or three- or four-year) hiatus from its last consideration, unless the reconsideration is noncontroversial or is needed to deal with an emergency situation. Because a prior legislature cannot bind a later one, Council internal rules cannot guarantee that the Council will adhere.\textsuperscript{168} In other words, the Council by majority vote, could waive an internal operating rule. Even if not followed perfectly, however, internal rules likely will control the great majority of situations. At the very least, they create a barrier to action and provide cover to those feeling pressure from coaches or others to act more precipitously than is prudent.

A second reform would be to have more FARs on committees and the Council. As representative of their respective Conferences, FARs would be expected, or required, to vote as their Conferences voted on proposals.\textsuperscript{169} Their impact still could be felt on the front end, however, before policies are translated into legislative proposals and before Conferences vote on them. There also may be situations at the margin where even at the back end FAR presence could help. For example, there occasionally arise motions to table a proposal because of significant issues that surfaced during Council debate that were not discussed at earlier Conference sessions.

Yet another reform might be to create a Division I Czar selected from the ranks of the Division I conferences. Were institutions and conferences willing to empower a Czar with authority akin to a commissioner of a professional league, a Czar might enforce some restraints and impose some discipline.

All these reforms, however, only knit at the periphery of the regulatory mentality. As an exercise of rational thought, we know that we are neither omniscient nor infallible. That should mean a degree of acceptance of the less-than-perfect. But our reactions at a more visceral

\textsuperscript{167} NCAA Bylaw § 5.3.2.2.1.1.
\textsuperscript{168} This is known as legislative entrenchment. For a full discussion, see United States v. Winstar Corp., 518 U.S. 839, 872–92 (1966). See also Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 YALE L.J. 1665, 1665 (2002).
\textsuperscript{169} See supra note 117 and accompanying text.
level tell a different story. Consider our after-the-fact reaction to tragedies. Often we seek someone to blame, or search for the moment when, with greater foresight, the tragedy could have been avoided, rather than accept that it is part of the human condition that some circumstances are out of our control and that we cannot prevent every occurrence of human error. Consider the penchant of conspiracy theorists to see every failure as evidence of behind-the-scenes manipulation, not of the limits of what humans can achieve. We also find it difficult to regulate only when solving a problem is critical to sound administration. Instead, we persist in mandating solutions that are reasonable and sensible, but hardly critical.\textsuperscript{170} Even were we always correct at the front end in identifying the reasonable and sensible, we still end with overregulation. It clearly is in the NCAA DNA to believe that every sensible policy choice needs to be adopted as prescribed policy.

Using the regulatory mentality mode of operation to curtail its excesses is doomed. Ultimately, the only cure for the regulatory mentality is to turn away from it.

The A5 began a move in this direction in its 2016 first effort to limit the athletic time demands on student-athletes.\textsuperscript{171} Rather than use legislation to specify conduct (the regulatory mentality), the A5 time management proposals set criteria that must be met and then left it to institutions to devise their own plans to meet the criteria. The legislation permits institutions to revise plans as needed (and documented), requires an institution’s president and FAR to review the plan annually,\textsuperscript{172} and specifies that repeated or serious failures to meet the criteria constitute NCAA violations.

The A5 time demands proposals are a modest first step away from the regulatory mentality. They recognize that a one-size-fits-all regulatory approach ill fits many. The framework offers far reaching benefits if applied widely.

In the end, it is far easier to describe, diagnose, and criticize the regulatory mentality than to prescribe effective remedies for it, and it is far easier to prescribe effective remedies than to get regulators to

\begin{itemize}
  \item \textsuperscript{170} The United States Constitution sets minimum requirements on what states must do to meet constitutional strictures. It does not dictate best policy, optimum policy, or even good policy choices.
  \item \textsuperscript{171} NCAA Bylaw § 5.3.2.1.2(k).
  \item \textsuperscript{172} Another control to assure appropriate plan creation and implementation is that all subject areas with impact on student-athletes and coaches would have the participation of student-athletes and coaches in formulating a plan to achieve compliance.
\end{itemize}
undertake treatment. A law college colleague and I once conversed with a United States senator, who shall go unnamed, regarding repeated congressional efforts to solve a particular policy issue, which shall go unspecified. The senator described each statutory attempt as creating results that were new, and, in his mind, as pernicious as the problem the statutory attempts were designed to solve. When asked whether the repeated failures had persuaded him that the policy issue was not susceptible to legislative solution, he said, “No; the problem is we just haven’t gotten it right yet.” After further discussion, he was asked to identify a statute that he considered a success. After a little thought, he said, “the legislation governing senate pages.”

Thus spake the regulatory mentality. 173 It remains to be seen whether an association embedded in the regulatory mentality can heal itself.

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173 The text is a play on words based on a work by Frederick Nietzsche. FREDERICK NIETSCHE, THUS SPAKE ZARATHUSTRA (1891), http://philosophy.eserver.org/nietzsche-zarathustra.txt (“Thus spake Zarathustra”).
THE OBAMA ADMINISTRATION’S NEW “REPAYE” PLAN FOR STUDENT LOAN BORROWERS: NOT MUCH HELP FOR LAW SCHOOL GRADUATES

Gregory Crespi∗

ABSTRACT

In response to President Obama’s 2014 directive, the Department of Education (“DOE”) has promulgated a new income-based student loan repayment option, labeled the Repay As You Earn Plan (“REPAYE Plan”). The REPAYE Plan allows for the enrollment of up to six million student loan borrowers who are not eligible for enrollment in the more generous Pay As You Earn Plan (“PAYE Plan”) because of their pre-October 1, 2007 federal student loan debts. I estimate in this article that approximately 72,000 of those six million persons are law school graduates. I also estimate, however, that 60.8% of those 72,000 law school graduates, approximately 43,800 persons, have already enrolled in either the Income-Based Repayment Plan (“IBR Plan”) or the Income-Contingent Repayment Plan (“ICR Plan”) and the large majority of those enrollees are not likely to change to REPAYE Plan enrollment. In addition, most of those among the remaining group of about 28,200 PAYE Plan-ineligible law school graduates who have not already enrolled in either the IBR or ICR Plans, if they later do decide to enroll in a federal loan repayment Plan, will choose to enroll in the old IBR Plan rather than in the new REPAYE Plan because of the REPAYE Plan’s harsh spousal income inclusion rules.

Law school graduates who graduated in 2015 or afterwards will almost all be eligible for the more generous PAYE Plan, and they will have no reason to consider REPAYE Plan enrollment. The largest group of REPAYE Plan law school graduate enrollees in 2016 and afterwards

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will be those few pre-2015 law graduates who have previously enrolled in either the old IBR or ICR Plans, and who also expect to have relatively modest spousal incomes over the coming two decades, and who consequently will, in some instances, be able to reduce their monthly repayment obligations by switching over to the REPAYE Plan even given the new spousal income inclusion rules. For the REPAYE Plan to be made more broadly attractive for other law school graduates, especially for those more recent and future graduates who will almost all be eligible for PAYE Plan enrollment, the required repayment period for law school graduates would have to be reduced from 25 years to 20 years, and the spousal income inclusion rules eliminated, so as to match the generous PAYE Plan terms.

The DOE can make such amendments to the REPAYE Plan rules under existing statutory authority without additional Congressional authorization. But the DOE’s response to comments made regarding their original proposed REPAYE rules indicate that such amendments are unlikely. This DOE resistance to such amendments is likely because of the lost governmental revenue implications, and also because of opposition from those persons within the DOE and elsewhere who regard the existing PAYE Plan’s terms as too generous to high-debt graduate school borrowers, and who would not want to see those terms made available to a broader group of law school graduate borrowers.
I. INTRODUCTION

There currently are several federal income-related student loan repayment options available that offer terms that are more favorable to borrowers than are the terms of the standard 10-year amortization schedule for federal student loans. In 1993 Congress established the first of these options, the Income-Contingent Repayment Plan (the “ICR Plan”). Congress has since supplemented the ICR Plan with several

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additional income-related repayment options, including the original Income-Based Repayment Plan (the “old IBR Plan”), which was made available for borrower enrollment on July 1, 2009,\(^2\) the Pay As You Earn Plan (the “PAYE Plan”) that opened for enrollment on December 21, 2012,\(^3\) and an amended and more generous version of the Income-Based Repayment Plan (the “new IBR Plan”), which became available on July 1, 2014.\(^4\) Since 2009 many borrowers have taken advantage of one or another of these new Plans.\(^5\) Enrollments in the two IBR Plans, and especially in the PAYE Plan, are now growing at a striking rate and are likely to continue to grow rapidly in the coming years;\(^6\) although there will probably be very few if any new enrollments in the more restrictive and essentially superseded ICR Plan.\(^7\)

There are, however, a number of borrowers who do not meet the “new borrower” eligibility criteria of the PAYE Plan\(^8\) or of the new IBR


\(^3\) See generally Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Loan Program, 77 Fed. Reg. 212, 66,088 (Nov. 1, 2012) (codified at 34 C.F.R. pt. 685.209(a) (2012)). The PAYE Plan is perhaps best regarded as simply an administrative acceleration to December 21, 2012, under the authority of the statute enacting the earlier Income-Contingent Repayment Plan, see supra note 1, of the implementation of the “new IBR” plan that under 2010 Congressional legislation, see infra note 4, was set to go into effect on July 1, 2014 for those IBR-eligible persons who were also “new” borrowers as of that latter date, see Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2201–2213, 124 Stat. 1029, 1081 (2010).

\(^4\) Health Care and Education Reconciliation Act §§ 2201–2213.

\(^5\) According to Department of Education (“DOE”) statistics, at the start of the first quarter of 2016, there were 600,000 persons enrolled in the ICR Plan, 910,000 enrolled in the PAYE Plan, and 3,050,000 enrolled in the combined old and new IBR Plans. U.S. Dep’t EDUC., Direct Loan Portfolio by Repayment Plan, https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/DLPortfoliobyRepaymentPlan.xls. These DOE statistics are aggregate figures for all Plan enrollees and do not separate out law graduate enrollees from other enrollees.

\(^6\) Id. Enrollment in the IBR Plans grew from 910,000 at the start of the third quarter of 2013 to 3,050,000 by the start of the first quarter of 2016, a 235% increase in two and one-half years. Enrollment in the PAYE Plan grew from only 40,000 at the start of the third quarter of 2013 to 910,000 by the start of the first quarter of 2015, a 2,175% increase from a small base over that time period! Id. Three years after the PAYE Plan was established it continues to grow rapidly, increasing in enrollments from 770,000 to 910,000 during the final quarter of 2015, an 18.2% increase in just one quarter. Id.

\(^7\) Enrollment in the ICR Plan has been essentially static over the last few years, declining from 630,000 at the start of the second quarter of 2013 down to 600,000 by the start of the first quarter of 2016. See U.S. Dep’t EDUC., supra note 5.

Plan\textsuperscript{9} and, consequently, can enroll only in the less generous old IBR or ICR Plans. To address this concern President Obama in 2014 announced his intention to have the Department of Education (“DOE”) take administrative action to make available to a broader group of student borrowers a new loan repayment option with essentially the same terms as those of the PAYE Plan.\textsuperscript{10} The new loan repayment plan was to be made available to up to an estimated five million people with pre-October 1, 2007 outstanding federal student loans who did not meet the existing PAYE Plan or new IBR Plan eligibility criteria (hereinafter referred to as “old borrowers”).\textsuperscript{11} The DOE, after subsequent rulemaking negotiations conducted with selected outside parties, on April 30, 2015 took a major step towards implementing the President’s directive with the promulgation of proposed rules for a Revised Pay As You Earn Plan (the “REPAYE Plan”).\textsuperscript{12} The DOE then subsequently on July 9, 2015 issued a Notice of Proposed Rulemaking with regard to the REPAYE Plan.\textsuperscript{13} Those proposed rules received extensive public comments, and, on October 27, 2015 the DOE approved the rules in essentially the same form as proposed, with the final rules being published in the Federal after October 1, 2007, and who have received a disbursement of a federal student loan after October 1, 2011. In addition, only Federal Direct Loans and consolidated Federal Family Education Loans are eligible for PAYE Plan repayment. \textit{Id.\textsuperscript{9}} See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Loan Program, 77 Fed. Reg. 121, 66,112 (Nov. 1, 2012) (codified at 34 C.F.R. pt. 685.209(a) (2012)). (Establishing that the new IBR Plan is available only to those IBR-eligible borrowers who are also “new” borrowers as of July 1, 2014, in that they had no outstanding Federal Direct Loans or Federal Family Education Loans at that time).

\textsuperscript{10} See generally Presidential Memorandum for the Secretary of the Treasury and the Secretary of Education, \textit{Helping Struggling Federal Student Loan Borrowers Manage their Debt}, 79 Fed. Reg. 33,843 (June 9, 2014) \textit{[hereinafter Helping Struggling Student Loan Borrowers].}\textsuperscript{11} \textit{Helping Struggling Student Loan Borrowers, supra note 10; Press Release, Office of the Vice President, Factsheet: Making Student Loans More Affordable} (June 09, 2014), https://www.whitehouse.gov/the-press-office/2014/06/09/factsheet-making-student-loans-more-affordable. The DOE, in its \textit{Notice of Proposed Rulemaking}, 80 Fed. Reg. 131, 39,608–41 (July 9, 2015), later stated that six million borrowers would be eligible for the REPAYE Plan. \textit{Id. at} 39,627. The DOE did not, however, provide supporting data or analysis for this new figure. I will hereinafter utilize the DOE’s new estimate of six million old borrowers that are not eligible for the PAYE or new IBR Plans that are now eligible for the REPAYE Plan.


\textsuperscript{13} 80 Fed. Reg. 131, 39,608–41 (July 9, 2015).
Register on October 30, 2015. The REPAYE Plan became available for borrower enrollment starting on July 1, 2016.

In this short article, I will focus on the impact of the new REPAYE Plan upon one particular group of old borrowers, law school graduates (“law graduates”). I estimate that approximately 72,000 of the estimated six million old borrowers who are not eligible for PAYE Plan enrollment, but who are now eligible for the REPAYE Plan, are law graduates. Law graduates are a significant group here because they often have very large combined undergraduate and law school debts—by 2014 averaging approximately $160,000 for the approximately 85% of

15 Id. at 67,204.
16 Let me explain the basis for this estimate. The Department of Education has estimated that six million “old borrowers” that are not eligible for the PAYE Plan will be eligible for REPAYE Plan enrollment. See Notice of Proposed Rulemaking 80 Fed. Reg., 39,608-41. The DOE, however, has not yet broken down the composition of those six million old borrowers by the type of degrees awarded, or by the year in which those degrees were awarded. For 2012–13, the latest year for which comprehensive degree-awarded statistics are available, there were a total of 3,774,000 Associate’s Degrees, Bachelor’s Degrees, Master’s Degrees and Doctoral Degrees awarded, of which 46,776 were JD or LLB law degrees. See The Condition of Education 2015, Inst. Educ. Sci., at 200–05 (2015); 2013 Law Graduate Employment Data, Am. Bar Ass’n (2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_graduateEmployment_data.authcheckdam.pdf. Approximately 1.2% (46,776/3,774,000) of the total number of degrees awarded in the 2012–13 academic year were three-year law degrees. Absent more detailed and degree-specific data, I will generalize from this statistic and also assume that approximately 1.2% of the six million old borrowers who are now eligible for REPAYE Plan enrollment—approximately 72,000 persons—will be law graduates. This is concededly a relatively crude estimation procedure. To the extent that a larger proportion of law graduates take out federal student loans than the proportion of persons earning degrees generally, which is very likely given the relatively large size of law school tuition fees, my estimate will to that extent underestimate the number of old borrower law graduates made newly eligible for REPAYE Plan enrollment. On the other hand, to the extent that the six million persons made eligible for the REPAYE Plan include persons who took out student loans but did not obtain a degree, my estimate will to that extent overestimate the number of old borrower law graduates made newly eligible for REPAYE Plan enrollment. Any estimation errors that stem from one or the other of these two causes will therefore fortunately offset one another, at least to some extent.
17 The average level of undergraduate debt incurred by persons who borrow to partially finance their undergraduate studies is approximately $30,000. See Jeff Appel, Deputy Under Secretary, U.S. Dept. of Educ., Opening Remarks at the Pay As You Earn (PAYE) Extension Negotiated Rulemaking Committee Meetings (Feb. 24, 2015). I will assume that law graduates who have borrowed to finance their law studies have on average also borrowed this $30,000 amount to finance their undergraduate studies, although it is possible that prospective law students receive on average somewhat more parental financial support for their
recent law graduates who now graduate with loan debts—and also because the much less favorable employment prospects for new attorneys since the 2008 financial crisis will probably mean that many law graduates likely will be able to earn only relatively modest incomes for a number of years even if they are able to obtain full-time legal positions.

One would think that law graduates who are ineligible for the PAYE Plan or the new IBR Plan would benefit from an alternative loan repayment option that offers terms that are, in some ways, more

undergraduate education than do other undergraduate students. As for law school loans, the ABA has estimated the average amount borrowed by law students who took out loans to finance their 2012–13 law school studies was $32,289 for those attending public law schools, and $44,094 for those attending private law schools. 2013 ANNUAL QUESTIONNAIRE ABA APPROVED ANNUAL AMOUNT BORROWED: FALL 2013, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_fall_avg_amt_brwd.xls. A simple, unweighted average of these public and private school amounts is $38,192. This amount is actually a very conservative average loan amount estimate because enrollments in (on average) more expensive private law schools in 2014–15 significantly exceeded enrollments in public law schools by a ratio of 76,282 to 41,802, REPORT OF THE ABA TASK FORCE ON THE FINANCING OF LEGAL EDUCATION, AM. BAR ASS’N, at 16 (June 17, 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf. Multiplying this average 2012–13 law school loan amount estimate by three for the three years of law school from 2011–12 through 2013–14 gives an overall sum of $114,576. Now if this $114,576 of law school loans is taken out on a regularly-spaced basis during the three years of law school then approximately an average of two years will elapse between the taking out of a loan and the borrower’s later enrollment in the IBR or PAYE Plan, typically six months after law school graduation. I estimate the weighted overall interest rate for these combined undergraduate and graduate student loans to be about 6.44%. See Gregory Crespi, Should We Defuse the ‘Tax Bomb’ Facing Lawyers Who Are Enrolled in Income-Based Student Loan Repayment Plans?, 68 S.C. L. REV. (forthcoming 2017) (provides a detailed discussion of this calculation). At this estimated 6.44% annual interest rate, which accrues during law school and is added to the debt to be repaid even though the debt repayment obligations do not begin until six months after graduation, another, approximately, $14,757 ($114,576 x 0.1288 = $14,757) will be added to the average borrower’s debt. In arriving at these calculations, I do not consider the possible minor additional impact of accrued pre-Plan enrollment interest on the undergraduate loans of a later law graduate. Adding up these three debt balances ($30,000 + $114,576 + $14,757) yields a total estimated average law graduate debt at the time of Plan enrollment in 2014 of $159,333. For the sake of analytical convenience I will round this estimate up to $160,000.


19 AM. BAR ASS’N, supra note 16 (stating that more than 10% of law graduates are still unemployed nine months after graduation, and another roughly 17% of those employed are in school-funded positions or employed in jobs that do not require a law degree).
generous than the terms that have been available to them since mid-2009 under the old IBR Plan. The DOE has estimated that two million of the estimated six million old borrowers not eligible for the PAYE Plan, but now made eligible for the REPAYE Plan as of July, 2016, will enroll in that Plan. The DOE has also estimated that the overall cost of the REPAYE Plan to the U.S. Treasury from 2016 through 2025 will be $15.3 billion.

As I will discuss below, I have concluded that while the new REPAYE Plan may be an attractive option for some old borrowers, specifically those with only undergraduate loans outstanding, or those who are unlikely to have substantial spousal income over the coming decades, or both, that Plan will not be an attractive option for the large majority of old borrower law graduates. I am skeptical regarding the DOE’s estimate that REPAYE Plan enrollments will approach one-third of all of those old borrowers who do not qualify for PAYE Plan enrollment. For reasons that I will discuss later, I am absolutely certain that the rate of REPAYE Plan enrollment among the approximately 72,000 old borrower law graduates will be significantly less than one-third of that number. Unless the rules governing the REPAYE Plan are significantly amended, both with regard to the length of the required repayment period for persons with graduate school loans and with regard to the inclusion of spousal income in determining the required repayment amounts, relatively few law graduates will find this new Plan to be to their advantage.

In Part II of this article, I will describe in more detail the recent evolution of the several federal student loan repayment Plans. I will then outline the terms of the new REPAYE Plan and compare those terms to the terms of the PAYE Plan and both the old and new IBR Plans.

In Part III, I will discuss why relatively few law graduates are likely to enroll in the REPAYE Plan, and why most of those law graduates that do enroll in that Plan will be persons who had previously enrolled in the old IBR or ICR Plans and who will now elect to change to the REPAYE

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21 Id. The DOE unfortunately did not provide supporting data or analysis for this estimate as to the number of likely REPAYE Plan enrollees or as to the precise basis for this cost estimate in either its Notice of Proposed Rulemaking or in its final REPAYE rules. One knowledgeable commentator has stated that these DOE cost estimates are presented in an “opaque way” in that Notice. See Frank Pasquale, Democratizing Higher Education: Defending and Extending Income-Based Repayment Programs, 28 LOYOLA CONSUMER. L. REV. 1, 11 (2015).
22 See supra note 16.
Plan in 2016 or shortly thereafter. I will also discuss what specific amendments to the REPAYE Plan would be necessary in order to make it an attractive loan repayment option for a broader group of law graduates, and why such amendments are unlikely. Part IV will present a brief conclusion.

II. EVOLUTION OF THE INCOME-BASED REPAYMENT PLANS FROM THE ICR PLAN THROUGH THE REPAYE PLAN

Since 2009 the federal government has offered a growing number of relatively generous loan repayment options for persons who have incurred federally-provided or federally-guaranteed student loan debt. In 2007 Congress established what I refer to as the old IBR Plan, which opened for enrollment on July 1, 2009. The Plan provides eligible borrowers with loan repayment and debt forgiveness terms which are substantially more attractive than the terms of the much less generous 1993 effort to offer borrowers an income-related loan repayment option through the Income-Contingent Repayment Plan. Most importantly, the old IBR Plan requires enrollees to make monthly payments that are only equal to 15% of the difference between the enrollee’s adjusted gross income and 150% of the poverty level income for a family of the enrollee’s family size (this difference is hereinafter referred to as the enrollee’s “discretionary income”), no matter how large their debt.


24 See generally Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, § 4021, 107 Stat. 346 (1993). The Income-Contingent Repayment Plan requires borrowers to make repayments of 20% of their discretionary income, and requires those repayments to be made for 25 years before the remaining debt is forgiven, and allows married borrowers who file separate tax returns to use only their own income and not their spouse’s income to determine the size of their repayment obligation. U.S. DEP’T EDUC., supra note 1. For further discussion of the Income-Contingent Repayment Plan, see generally Schrag, supra note 1, at 764–74. The number of persons making loan repayments under the Income-Contingent Repayment Plan decreased slightly from 630,000 in the third quarter of 2013 to 600,000 in the first quarter of 2016, showing that there have been few, if any, new enrollments in that Plan over the two and one-half years that the more generous loan repayment Plans have been available. U.S. DEPT. EDUC., supra note 5.

25 20 U.S.C. § 1098e(a)(3). It is critical to understand that the IBR Plan severs the usual linkage between the size of the debt incurred and the size of the required repayments, dramatically altering borrower incentives. This repayment requirement is subject to the caveat that if an enrollee no longer has a “partial financial hardship”—in that the size of his required monthly repayment under the 15% of discretionary income formula has grown to where it exceeds the amount that he would have owed to repay his debt under a standard 10-year repayment schedule—the enrollee will only, for the remainder of the required repayment
Additionally, the old IBR Plan does not require a married enrollee who files a separate tax return from that of their spouse to include their spouse’s income in calculating the size of their monthly repayment obligation. The Plan also adds to the enrollee’s debt obligation, but does not capitalize into interest-earning principal, any unpaid loan interest that accrues during periods of negative amortization when the loan repayments are not sufficient to cover the interest owed on the debt. Under the old IBR Plan any debt remaining after twenty-five years of repayments is forgiven, but the Internal Revenue Code treats that forgiven debt as taxable cancellation of indebtedness income in the year that it is forgiven, triggering potentially substantial tax liability.

The original terms of the old IBR Plan were made substantially more generous for some but not all IBR Plan-eligible borrowers through the issuance of the DOE’s PAYE rules, effective December 21, 2012, thereby creating the PAYE Plan as a second loan repayment option. The most important differences between the PAYE Plan and the old IBR Plan are that PAYE Plan enrollees are required to make payments of only 10% of their discretionary income, rather than 15% as under the old period (or until the debt is fully repaid), have to make payments equal to that required by a standard 10-year repayment schedule for the original amount of loan debt. 20 U.S.C. § 1098e(b)(6)(A). 26 U.S.C. § 1098e(d).

27 20 U.S.C. § 1098e(b)(3). This point is subject to two caveats. First, for the first three years after enrollment the federal government will pay any accrued unpaid interest due on subsidized Direct Loans. 20 U.S.C. § 1098e(b)(3)(A). Second, if an enrollee at some point no longer has a “partial financial hardship,” then at that time any accrued unpaid interest will be capitalized into loan principal and will bear interest for the remainder of the required repayment period (or until the debt is fully repaid). See Health Care and Education Reconciliation Act §§ 2201–2213; 20 U.S.C. § 1098e(b)(3)(B)(ii).
29 20 U.S.C. § 61(a). Internal Revenue Code § 108 provides some exclusions of cancellation of indebtedness from gross income, in particular the exclusion of student loan debts forgiven after the borrower completes 10 years of qualifying public service employment. 26 U.S.C. § 108. None of these exclusions, however, apply to debts forgiven under the old IBR Plan. 26 U.S.C. § 108(f)(1). For an extensive discussion of the multi-billion dollar tax liability consequences for Plan law graduate enrollees of this Internal Revenue Code provision, see generally Crespi, supra note 17.
30 See generally Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Loan Program, 77 Fed. Reg. 212, 66,088 (Nov. 1, 2012) (codified at 34 C.F.R. Section 685.209(a) (2012)). The PAYE Plan is perhaps best regarded as simply an administrative acceleration to December 21, 2012, under the authority of the statute enacting the earlier Income-Contingent Repayment Plan, see supra note 3 and accompanying text, of the implementation of the “new IBR” plan that under 2010 Congressional legislation, see Health Care and Education Reconciliation Act §§ 2201–2213, was set to go into effect on July 1, 2014 for those IBR-eligible persons who were also “new” borrowers as of that latter date.
IBR Plan, and now must make those payments for only 20 years, rather than 25 years, before any remaining unpaid debt is forgiven. Debt forgiven under the PAYE Plan is again treated as taxable cancellation of indebtedness income under the Internal Revenue Code. As I have previously noted, however, not all persons who are eligible to enroll in the old IBR Plan are also eligible for the PAYE Plan, nor are all federal loans that are eligible for repayment under the old IBR Plan also eligible for repayment under the PAYE Plan. In 2010 legislation, Congress made the terms of the old IBR Plan more generous in a manner that matches the 10% of discretionary income and 20-year repayment period terms of the later-implemented PAYE Plan, but these more generous terms are only available for those IBR Plan-eligible persons who are also “new borrowers” as of July 1, 2014, thereby establishing yet another loan repayment option which I will hereafter refer to as the “new IBR” Plan. Most law graduates, however, will not be able to make use of the new IBR Plan until at least 2017.

Let me now turn to the additional loan repayment option that the new REPAYE plan creates. As I have noted, designated DOE officials and outside negotiators who participated in a negotiated DOE rulemaking process in accordance with a Presidential directive agreed to

\[\text{References}\]


32 Id.


35 Only Direct Loans and consolidated Federal Family Education Loans are eligible for PAYE Plan repayment. See id. at 66,088.


37 Id. This new IBR Plan is available only to those IBR-eligible borrowers who are also “new” borrowers as of July 1, 2014 in that they had no outstanding Direct Loans or Federal Family Education Loans at that time.

38 The first group of law graduates who will be able to make use of the new IBR Plan to repay all of their law school loan debts will be those persons who first enrolled in law school in 2014 with no prior undergraduate federal loan debts, and then took out their first federal student loans in the fall of 2014 for the 2014–15 academic year, and who then graduate from law school three years later in 2017. Most law graduates who take out law school loans, however, also borrow to finance their undergraduate studies. Those law graduates who first took out undergraduate loans in their freshman year in the fall of 2014 will not graduate from law school and will not be able to enroll in the new IBR Plan until 2021.
a draft of the proposed rules that would govern the REPAYE plan on April 30, 2015. After public comments were received on these proposed rules the final REPAYE rules were agreed to on October 27, 2015, and they are in essentially the same form as those proposed rules. They were then published in the Federal Register on October 30, 2015. These rules allow for borrower enrollment starting July 1, 2016.

Some technical conforming amendments to certain other DOE rules that relate to the other IBR Plans or to the PAYE Plan accompanied the REPAYE Plan’s substantive rules, but the REPAYE Plan importantly leaves open as options for eligible borrowers the ability to enroll in any of these other Plans under their existing terms. In other words, the REPAYE Plan only adds another debt repayment option to the existing menu of choices, rather than replacing or altering any of these other Plans. The DOE could have attempted to have the new REPAYE Plan rules also apply prospectively to any new enrollees in the PAYE Plan or in either or both of the IBR Plans, but chose not to do so. I do not know why the DOE made this decision, but it was probably done for both legal and political reasons.

As a legal matter, the DOE could have drafted the REPAYE Plan rules to not only apply to REPAYE Plan enrollees but also to apply prospectively to future PAYE Plan enrollees under the discretion given to the DOE by the legal authority conferred by the statute creating the Income-Contingent Repayment Plan, and in reliance upon which the PAYE Plan rules were issued. If this sweeping step had been taken,

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39 The REPAYE Plan is the result of a rulemaking process that was initiated to implement President Obama’s June, 2014 directive to the DOE to substantially expand the eligibility for the PAYE Plan to also include a large group of millions of old borrowers that are eligible for enrollment in the old IBR Plan but that were not previously eligible to enroll in the more generous PAYE Plan, and to focus the benefits of the new REPAYE Plan on struggling borrowers. See Helping Struggling Student Loan Borrowers, supra note 10 and accompanying text. See also Jeff Appel, supra note 17.
30 See Final REPAYE Rules, supra note 14, at 67,204.
31 Id.
32 See supra note 11.
33 See Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 131, 39,608, 39,617 (July 9, 2015) (codified at 34 C.F.R. pt. 685) (“The Department of Education has stated that it was committed to adding the REPAYE plan to the existing choices of income-driven repayment plans and believed that the current Pay As You Earn repayment plan should be retained until proposed reforms can be implemented that would establish a single income-driven repayment plan targeted to struggling borrowers.”).
however, the resulting increase in repayment obligations for hundreds of thousands or even millions of future PAYE Plan enrollees over the years because of the REPAYE Plan’s spousal income inclusion rules would have far outweighed any benefits conferred on the smaller group of new REPAYE Plan enrollees—particularly for law graduate enrollees. This doubtless would lead to serious political controversy and would have badly undercut President Obama’s increased access to higher education objectives; goals which motivated his original call for DOE action in 2014 to establish a new loan repayment option for borrowers. 45 It would not only have been likewise politically controversial but also legally problematic for the DOE to attempt to have the REPAYE Plan rules also apply prospectively to future old IBR Plan and new IBR Plan enrollees without first obtaining additional Congressional authorization for such action. This is because separate statutes establish each of the two IBR Plans, statutes that are different from the statute establishing the Income-Contingent Repayment Plan and authorizing the subsequent PAYE Plan and REPAYE Plan rules. But by proposing the REPAYE Plan only as a new Plan that leaves unaltered and available for borrower enrollment all of the previously existing Plans, the DOE has avoided these legal and political controversies.

The REPAYE Plan differs in important ways from each of the existing Plans. I will discuss the most important differences with regard to law graduates. First, the REPAYE Plan rules embrace the PAYE Plan and new IBR Plan provisions that require enrollees to make payments of only 10% of their discretionary income, rather than the substantially larger 15% of discretionary income that is required under the old IBR Plan. 46 Second, they do not include the restrictive PAYE Plan or new IBR Plan new borrower eligibility criteria, thereby making eligible for enrollment a large group of approximately six million old borrowers who are not eligible for enrollment under the PAYE Plan or the new IBR Plan, 47 including an estimated 72,000 law graduates. 48 Third, the REPAYE Plan will require a loan repayment period of 25 years prior to debt forgiveness, matching the old IBR Plan’s 25-year repayment period requirement, for those enrollees who have taken out graduate or

45 5(d)(1)(D) of the Higher Education Act, 20 U.S.C. § 1098e). An attempt to have the stricter REPAYE rules apply retroactively to prior PAYE Plan enrollees, however, would certainly encounter serious legal resistance based on contract law principles.
46 See Helping Struggling Student Loan Borrowers, supra note 10.
47 See supra note 12.
48 See supra notes 8–9.
49 See supra note 16.
professional school loans (and perhaps also undergraduate loans) rather than only undergraduate loans, while requiring only a 20-year loan repayment period prior to debt forgiveness, matching that repayment period imposed by the PAYE and new IBR Plans, for those enrollees who have taken out only undergraduate loans.\textsuperscript{49}

Fourth, only one-half of the unpaid loan interest that accrues for enrollees during those periods of negative amortization when their required repayments are not sufficient to pay the interest owing on their loans will be added to their debt, rather than all of that unpaid interest as is now done under the IBR and PAYE Plans.\textsuperscript{50} Fifth, the REPAYE Plan does not cap the required monthly repayments at the amount that would have been due under the standard 10-year amortization schedule, unlike the PAYE Plan and the IBR Plans, so that a high-income enrollee could wind up paying larger monthly amounts than under that standard

\textsuperscript{49} See supra note 12. The initial DOE proposal that the REPAYE negotiators considered had a 20-year repayment period for borrowers whose loan debt was $57,500 or less, and a 25-year repayment period for borrowers whose loans exceeded this amount. During the April 28–30, 2015 negotiations, however, primarily because of concerns about creating a sharp “cliff” at this loan amount that would create perverse borrower incentives to inefficiently limit the amount of loan debt this original loan size restriction was changed to the current provision that imposes a 20-year repayment period for borrowers with only undergraduate loans, and a 25-year repayment period for borrowers with graduate or professional school loans (and perhaps also undergraduate loans), regardless of the size of the loans involved. Michael Stratford, Income-Based Repayment Expansion Advances, INSIDE HIGHER ED (May 1, 2015), https://www.insidehighered.com/news/2015/05/01/federal-rule-making-panel-oks-plan-expand-income-based-repayment-program. That earlier $57,500 loan limit would have essentially excluded most law graduates from participation in the Plan. This current REPAYE rules provision, however, creates another discontinuous “cliff” where even $1 of graduate school loan debt will extend an enrollee’s debt repayment period on all of their prior undergraduate debts for five additional years, thereby creating a strong and inefficient disincentive to enroll in graduate school. In my opinion it would make far more sense for the DOE to simply impose different length repayment periods for undergraduate versus graduate school loans, a fairly straightforward administrative matter, thus avoiding creating any perverse disincentives with regard to loan amounts or graduate school loans, although this approach would admittedly have some modest lost revenue implications with regard to enrollees with only graduate school debts, as compared to the current proposed rule.

\textsuperscript{50} See supra note 12. Under the PAYE and IBR Plans there are provisions under which the federal government will pay any unpaid interest accruing on subsidized Direct Loans for the first three years after enrollment. 20 U.S.C. § 1098e(b)(3)(A); 34 C.F.R. § 685.209(a)(2)(iii). Such subsidized loans, however, have not been made available to law students since 2012, and were never available for more than a relatively small proportion of typical law student loan debt, so I will ignore this minor unpaid interest accrual complication in my later illustrative calculations. This particular REPAYE Plan provision to charge borrowers with only one-half of any unpaid interest also raises a potential issue as to whether the forgiveness of the remainder of the unpaid interest creates a tax liability for the enrollee in the year that it is not paid. See infra Part III.
6 Sixth, debt forgiven at the end of the required repayment period is regarded as taxable cancellation of indebtedness income under the Internal Revenue Code, as it is under all of the other Plans (although not under the related but more restrictive in eligibility Public Service Loan Forgiveness Plan). Finally, and very importantly, the REPAYE Plan’s rules require all married enrollees, even those who file separate tax returns from those of their spouse, to use the couple’s combined income for calculating the size of the required monthly repayments, rather than as is now permitted under the IBR and PAYE Plans for a borrower who files their taxes separately to utilize their income alone for those calculations.

III. THE VERY LIMITED IMPACT OF THE REPAYE PLAN FOR LAW SCHOOL GRADUATES

For several reasons that I will discuss below I believe that relatively few law graduates are likely to enroll in the new REPAYE Plan in 2016 or thereafter. Most of those few law graduates that do enroll in the REPAYE Plan will be persons who have previously enrolled in either the old IBR Plan or the ICR Plan who then will switch over to this new Plan in 2016 or shortly thereafter. The repayment period and spousal income inclusion provisions of the REPAYE Plan would each have to be significantly amended for the Plan to become a more broadly attractive option for law graduates, particularly for the rapidly growing proportion of law graduates each year who will qualify as new borrowers with regard to PAYE Plan enrollment. Such amendments are unlikely to occur. I will explain each of these points.

A. The PAYE Plan is a Much Better Alternative than the REPAYE Plan for PAYE Plan-Eligible Law School Graduate Borrowers

The PAYE Plan offers significantly better terms for any law graduate who is eligible for enrollment in that Plan than does the REPAYE plan. Both Plans require repayments of only 10% of discretionary income, but the PAYE Plan requires enrollees to make only 20 years of repayments before any remaining debt is forgiven.
while the REPAYE Plan requires law graduates to make repayments for 25 years before debt forgiveness. Those additional final five years of REPAYE Plan repayments will be based on the law graduate enrollee’s mid- or late-career salary, and for many enrollees these repayments could be quite substantial in amount. In addition, under the REPAYE Plan an enrollee must include their spousal income in determining their discretionary income and the size of their required repayments, while under the PAYE Plan an enrollee can use only their income alone for this purpose if they file a separate tax return from that of their spouse, which is easy to do. The combined PAYE Plan benefits of the substantially shorter repayment period and, for many married enrollees, the exclusion of significant spousal income will far outweigh the one minor REPAYE Plan advantage over the PAYE Plan of only accruing one-half of unpaid interest during periods of negative amortization into the enrollee’s debt obligation, as opposed to accruing all of that unpaid interest into the debt as is done under the PAYE Plan. As a result of the superior PAYE Plan terms it is likely that only those law graduates who are not eligible for enrollment in the PAYE Plan, because they have taken out federal student loans prior to October 1, 2007, will even consider REPAYE Plan enrollment. The DOE recognizes this point but understates its significance, certainly with regard to law graduate borrowers.

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56 See id. at 67,208 The advantages of filing separately will in some instances be somewhat reduced because the filing of separate tax returns by an enrollee and their spouse may subject them to less favorable tax brackets for their incomes and may force them to forego certain deductions or credits available only on joint returns. Additionally, they may encounter some complications regarding their ability to file tax returns separately for PAYE Plan repayment purposes if they reside in a community property state which attributes a spouse’s income to the enrollee regardless of their federal tax filing status.
57 See Notice of Proposed Rulemaking, 80 Fed. Reg. at 39,627 (“Therefore most borrowers who would be eligible for the PAYE repayment plan or the Income Based Repayment (IBR) Plan as provided for new borrowers after July 1, 2014 would stay in those plans. Many of the borrowers who would choose the REPAYE plan would be from earlier cohorts who were ineligible for the PAYE plan or the IBR Plan for new borrowers after July 1, 2014.”) (Emphasis added.)
B. Most Law School Graduates who are Not Eligible for PAYE Plan Enrollment but who Will be Eligible for REPAYE Plan Enrollment Have Already Enrolled in Either the Old IBR Plan or the ICR Plan

The main group of law graduates who may seriously consider REPAYE Plan enrollment in 2016 or afterwards will be the approximately 72,000 old borrower law graduates who are not eligible for the PAYE Plan, and who are now eligible for the REPAYE Plan. These will primarily be persons who earned their law degrees in 2014 or earlier, and who also took out undergraduate or graduate school federal or federally-guaranteed student loans prior to October 1, 2007. By 2015, however, most of that year’s law school graduates had first started law school in the fall of 2012 and had started their undergraduate studies four years earlier in the fall of 2008, and therefore did not incur any federal student loan debts prior to October 1, 2007. Those law graduates were eligible for enrollment in the more generous PAYE Plan and would have no reason to consider 2016 REPAYE Plan enrollment. By 2016, and in the following years, even fewer new law graduates each year—the proportion rapidly approaching 0%—will have incurred any pre-October 1, 2007 federal student loan debts. Even in the first few years after the REPAYE Plan is available for enrollment, few 2015 or later law graduates will have any reason to consider that option, and the number of REPAYE Plan law graduate enrollments will quickly dwindle to an insignificant number. Most of the REPAYE Plan law graduate enrollments that will ever take place will occur in late 2016 or shortly thereafter among those members of this initial group of approximately 72,000 law graduates who completed law school in 2014 or earlier, and who also have outstanding pre-October 1, 2007 loans, and therefore are not eligible for the PAYE Plan.

58 See supra note 16.
59 See Final REPAYE Rules, 80 Fed. Reg. at 67,208. Those law students who graduated from law school in 2014 or earlier, and who also took out student loans throughout their four undergraduate years, as is common, will often have pre-October 1, 2007 loan debts and will therefore be ineligible for PAYE Plan enrollment.
60 Among law students who graduated from law school in 2016, persons who took five rather than four years to complete their undergraduate education, from the fall of 2008 through 2013, or who took a year off after receiving their four-year undergraduate degree in 2012 before enrolling in law school in the fall of 2013, would also qualify for PAYE Plan enrollment.
61 See supra note 16.
Those 2014 and earlier law graduates that are now eligible for REPAYE Plan enrollment as of July, 2016, however, all have been eligible for enrollment in the IBR Plan since late-2009 (they were permitted to enroll at any time six months or more after their law school graduation), and they have all been eligible for ICR Plan enrollment since 1994. I estimate that approximately 60.8% of those 72,000 old borrowers, PAYE Plan-ineligible law graduates, approximately 43,800 persons, have already enrolled in one or the other of these two Plans. Any REPAYE Plan law graduate enrollees in 2016 or thereafter, who were not previously enrolled in the old IBR or ICR Plans, will be drawn from the remaining small pool of approximately 28,200 2014 or earlier law graduates who are not eligible for PAYE Plan enrollment and who have thus far declined to enroll in another Plan.

C. The Old IBR Plan is a Better Alternative than the REPAYE Plan for Most Law School Graduates

Even among this relatively small group of 28,200 2014 or earlier law graduates who are not eligible for PAYE Plan enrollment, and who have not enrolled in either the old IBR or ICR Plans, most of those persons, if they do eventually choose to enroll in a Plan, are likely to select the old IBR Plan rather than the new REPAYE Plan.

Both the old IBR Plan and the REPAYE Plan require law graduate enrollees to make 25 years of loan repayments. The REPAYE Plan, however, has the advantage over the old IBR Plan in that it requires that the enrollee make repayments of only 10% of their discretionary income, while the old IBR Plan requires larger repayments of 15% of discretionary income. In addition, under the REPAYE Plan the federal government will forgive one-half of any unpaid accrued interest during

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62 By first quarter of 2016 3,050,000 persons had enrolled in the old IBR Plan, see supra note 5. I estimate that 1.2% of these old IBR Plan enrollees are law graduates, see supra note 16, for a total of about 36,600 (3,050,000 x .012) old IBR Plan law graduate enrollees. In addition, there were 600,000 persons enrolled in the ICR Plan by the end of 2014, and I similarly estimate that 1.2% of these enrollees, a total of 7,200 (600,000 x .012) enrollees, were law graduates. So by my estimate 36,600 + 7,200 = 43,800 law graduates—a full 60.8% of the estimated 72,000 law graduates that are not eligible for PAYE Plan enrollment and that will now be eligible for REPAYE Plan enrollment—have already enrolled in either the old IBR Plan or the ICR Plan.

63 72,000 – 43,800 = 28,200. See supra note 62.


periods of negative amortization, while under the old IBR Plan it does not do so. On the other hand, and very importantly, under the REPAYE Plan a married enrollee is required to include any spousal income in determining their size of their discretionary income, which could increase those required repayments quite substantially, whereas an old IBR Plan enrollee does not have to do this if they file a separate tax return.

The financial aspect of the choice between these two Plans can be fairly precisely analyzed. If a prospective Plan enrollee has a spouse whose future adjusted gross income is expected to increase the family’s discretionary income by less than 50% each year, on average, the REPAYE Plan will then require on average smaller monthly repayments than will the old IBR Plan. But if the expected spousal adjusted gross income will on average increase the family’s discretionary income by more than 50% each year, however, the old IBR Plan will prove more advantageous, assuming that the enrollee files a separate tax return. As a rough rule of thumb, if the enrollee’s spouse’s expected annual adjusted gross income will average more than about 30% to 35% of the enrollee’s adjusted gross income over the entire required repayment period, REPAYE Plan repayment requirements (which are based upon discretionary income rather than upon adjusted gross income) will increase sufficiently so that the old IBR Plan will be more advantageous to the enrollee.

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66 See id. at 67,205.
68 If an enrollee’s spousal income increases the family’s discretionary income by exactly 50%, then the REPAYE Plan’s required repayments of 10% of that larger family’s discretionary income will be exactly equal in size to the required repayments made under the old IBR Plan’s requirement of 15% of the amount of discretionary income based only on the enrollee’s adjusted gross income. If the spousal income increases the family’s discretionary income by less than 50%, there will be some benefit to old IBR Plan enrollees of switching to the REPAYE Plan. Some, but not all, of the savings in lower repayments that an old IBR enrollee might obtain by switching to the REPAYE Plan, however, may be offset by a larger debt forgiveness tax liability obligation eventually imposed because of a larger amount of debt forgiven, although the amount of additional tax liability imposed will be limited by the more favorable REPAYE unpaid interest accrual provisions. If, on the other hand, an old IBR Plan enrollee has sufficient spousal income that their payments would be increased by switching to the REPAYE Plan, the preferable choice would be for that person to remain enrolled in the old IBR Plan, although the financial advantage of doing so would be reduced somewhat by the REPAYE Plan’s more favorable unpaid interest accrual provisions. For detailed discussion of the tax liability aspects of the different Plans, see generally Crespi, supra note 17.
69 As an illustration of this point, consider a person who enrolls in the old IBR Plan in 2016 with a $75,000/year adjusted gross income, about the average income for a new law
It is likely that many law graduates have or eventually will have relatively well-educated spouses who will be working full-time for a number of years and will earn fairly substantial incomes, often as much or more than 30% to 35% of the enrollee’s income. As a result, many if not most of this group of approximately 28,200 potential REPAYE Plan law graduate enrollees that are old borrowers not eligible for the PAYE Plan, and who have not previously enrolled in either the old IBR Plan or the ICR Plan, will probably choose the old IBR Plan over the new REPAYE Plan if they do elect to enroll in a Plan in 2016 or thereafter, although it is difficult to predict exactly what the relative enrollment proportions between these two Plans are likely to be among those enrollees. In 2017 and afterwards, as I have discussed, a larger and larger proportion of new law graduates each year will be eligible for PAYE Plan enrollment, rapidly approaching 100% eligibility, and the relative merits of the old IBR and REPAYE Plans will consequently become irrelevant to a larger and larger proportion of law graduates each year who will choose the more advantageous PAYE Plan if they do enroll in a repayment Plan. The annual number of old IBR Plan and REPAYE Plan enrollments will therefore quickly dwindle to insignificance after 2016.

D. Some Old IBR Plan and ICR Plan Law School Graduate Enrollees Will Switch to the REPAYE Plan

As I have discussed above, for several reasons probably only a few of the approximately 28,200 or so law graduates who are not eligible for
PAYE Plan or new IBR Plan enrollment, and who first became eligible for REPAYE Plan enrollment in July of 2016 and who have not previously enrolled in either the old IBR or ICR Plans, will enroll in the REPAYE Plan. It is likely, however, that some fraction of the approximately 43,800 law graduates not eligible for PAYE Plan enrollment that I have estimated have enrolled in either the old IBR or ICR Plans by the end of 2015; and that some fraction of any additional persons who have enrolled in one of these two Plans during the first six months of 2016, will not expect to have significant spousal income over the coming two decades. As a way of reducing their monthly payments, these old IBR or ICR Plan enrollees may elect to change their Plan enrollment in 2016 or later from their current Plan to the REPAYE Plan in order to take advantage of the REPAYE Plan’s lower 10% of discretionary income monthly repayment. The enrollee’s payments will then decline by as much as one-third if they have no spousal income at all and were enrolled in the old IBR Plan, and by as much as one-half if they were enrolled in the ICR Plan and again had no spousal income at all.

I do not have the detailed estimates of family income profiles for old IBR or ICR-enrolled attorneys for the first 25 years of their careers that would be necessary for me to estimate with any confidence the proportion of these old IBR or ICR Plan law graduate enrollees that will have sufficiently low expected spousal incomes to motivate them to switch to the new REPAYE Plan. Conceivably several thousand or perhaps even ten thousand or more out of what I have estimated to be about 43,800 such old IBR or ICR Plan law graduate enrollees may switch to the new REPAYE Plan in 2016 or soon thereafter. These persons changing Plans will clearly be the largest group of law graduates who will benefit from the implementation of the REPAYE Plan.

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70 See supra notes 56–57.
71 See supra notes 56–57.
72 There is one complication here worth noting. If old IBR or ICR Plan enrollees switch to the REPAYE Plan any unpaid interest that has accrued under their old Plan will now be capitalized and will subsequently accrue additional interest for purposes of the REPAYE Plan. This is not likely to be a problem for ICR Plan enrollees whose required repayments of 20% of discretionary income will generally more than cover the interest owing on their loans, but some old IBR Plan enrollees with a lower 15% of discretionary income repayment requirement and larger debts may have fairly significant amounts of unpaid accrued interest in 2016, and this may deter to some extent their changing to the REPAYE Plan.
73 10%/15% = .667.
74 10%/20% = .50.
75 See supra note 62.
although I doubt that the REPAYE Plan’s rules for expanded borrower eligibility were formulated with these existing old IBR and ICR Plan law graduate enrollees in mind. I would expect that the large majority of old IBR or ICR Plan law graduate enrollees changing to the REPAYE Plan enrollment will have taken place during the second half of 2016 at the first opportunity for those persons to realize the potential savings. With that being said, some old IBR or ICR Plan enrollees who do not switch to the REPAYE Plan in 2016 might do so at a later date if there are subsequent changes in the current income or future income prospects of their spouses that would now make the REPAYE Plan alternative more attractive than continuing with their existing Plan.

E. What Amendments to the REPAYE Plan Rules Would be Necessary to Make that Plan Attractive to a Broader Group of Law School Graduates?

As I have noted above, each year from 2015 onwards a greater and greater proportion of new law graduates, rapidly approaching 100%, will have no pre-Oct.1, 2007 outstanding student loans and will be eligible for PAYE Plan enrollment. Therefore, any amendments to the REPAYE Plan that would make it a more attractive option than the old IBR Plan, but that would still leave the REPAYE Plan as an inferior choice to the PAYE Plan, would not suffice to induce significant numbers of law graduates to enroll in the REPAYE Plan. For example, eliminating the requirement that spousal income be included in establishing the size of the required repayments, while still leaving the required repayment period at 25 years for law graduates, would also still leave the REPAYE Plan an inferior choice to the PAYE Plan for those law graduates that are eligible for that latter Plan with its shorter 20-year repayment period. Similarly, reducing the length of the required repayment period for law graduates to 20 years to match the PAYE Plan requirements, while leaving in force the REPAYE Plan’s spousal income inclusion rules, would still leave the REPAYE Plan an inferior choice to the PAYE Plan for those law graduates who expected to have any spousal income at all over the following two decades.

Consider, however, if the REPAYE Plan’s rules were significantly amended to both reduce the repayment period for law students to the same 20 years now required under those rules for undergraduate loan-only borrowers, and to eliminate the inclusion of spousal income in determining the size of repayment obligations. If this were to happen, the REPAYE Plan would be slightly more attractive than the PAYE Plan
for prospective Plan enrollees who are eligible for either Plan, since it would now match the key required repayment amount and repayment period length of the PAYE Plan, and it would still have a more favorable unpaid interest accrual provision than that of the PAYE Plan. Those changes would also make the REPAYE Plan much more advantageous than either the old IBR Plan or the ICR Plan for those old borrowers that have enrolled in one or another of those Plans and that are not eligible for enrollment in the PAYE Plan, since it would reduce the length of the required repayment period by five years, and would also reduce the size of the required repayments by one third for old IBR enrollees, and by one-half for ICR enrollees.

If such amendments were made to the REPAYE Plan rules this would have several major effects that would be beneficial for many law graduates. First, consider those approximately 28,200 or so 2014 or earlier law graduates that I have estimated are not eligible for PAYE Plan enrollment, and are also not enrolled in the old IBR or ICR Plans. If those persons do decide to enroll in a Plan they would then enroll in the REPAYE Plan rather than in the now inferior old IBR Plan. Second, many if not virtually all current old IBR or ICR Plan law graduate enrollees would promptly switch over to the REPAYE Plan since they could thereby significantly reduce the size of their repayment obligations, by one-third for the old IBR Plan enrollees and by one-half for the ICR enrollees, and also reduce the length of their required repayment period by five years, without any significant offsetting drawbacks.\(^6\) Third, probably most of those many law graduates who are eligible for PAYE Plan enrollment would instead enroll in the now roughly comparable REPAYE Plan that would be slightly preferable because of its more favorable negative amortization interest accrual provisions; provisions that are particularly important to high-debt law graduates.\(^7\) Finally, there would even be some switching of PAYE Plan enrollees to the REPAYE Plan, again because of the now essentially identical repayment terms and the REPAYE Plan’s more favorable treatment of unpaid interest during periods of negative amortization.\(^8\) The REPAYE Plan would become the preferred loan repayment alternative for all law graduates seeking an income-based loan repayment option, and enrollments in that Plan would likely grow very rapidly.

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\(^6\) But see supra notes 73–74.
\(^7\) See generally Crespi, supra note 17.
\(^8\) See Final REPAYE Rules, 80 Fed. Reg. at 67,205.
I am not optimistic, however, that such amendments to the REPAYE Plan that would make it this attractive to law graduates will be made. My pessimism is based on several reasons. First of all, some prominent commentators have criticized the IBR Plans and especially the PAYE Plan on distributional grounds, arguing that those Plans are too generous to high-debt graduates of law school and other graduate school programs, relative to the much smaller payment reduction and debt forgiveness benefits that those Plans offer undergraduate borrowers with much smaller loan debts.79 Those critics regard the REPAYE Plan’s 25 year rather than 20 year required repayment period for graduate student borrowers and its spousal income inclusion rules as two needed corrections to the overly generous PAYE Plan provisions, and measures that would not introduce unintended distortions of incentives.80 Second, such amendments to the REPAYE Plan that would make it so attractive to law graduates and to other high-debt graduate school borrowers would of course be costly to the Treasury in terms of reduced student loan repayments and greater amounts of forgiven debt, particularly with regard to the many old IBR Plan or ICR Plan enrollees who would change Plans in order to reduce the size of their repayments—by one-third for old IBR enrollees and one-half for ICR enrollees—and to shorten their repayment periods by five years.81

79 See Jason Delisle & Alexander Holt, A Student Loan Blind Spot, WASH. POST (Feb. 20, 2015), https://www.washingtonpost.com/opinions/the-22-billion-student-loan-blind-spot/2015/02/20/c3413e82-b6f5-11e4-aa05-1ce812b36d22_story.html. In its Notice of Proposed Rulemaking for the REPAYE Plan, the DOE took the position that requiring REPAYE Plan borrowers to include spousal income in determining their required repayment amounts was “more equitable” than not doing so, despite the contrary provisions of the ICR, IBR, and PAYE Plans that do not require the inclusion of spousal income, see Notice of Proposed Rulemaking, 80 Fed. Reg. at 39,618, suggesting that the DOE is also of this view.

80 See, e.g., Delisle & Holt, supra note 79. The original version of the REPAYE Plan proposed for discussion by the DOE had a stringent $57,500 cap on the amount of loan debt that could be repaid under the Plan. This cap is a different sort of restriction on graduate school borrowers that would have essentially excluded many high-debt law graduates from participating in the REPAYE Plan. See supra note 12. The cap was later dropped in favor of the longer 25-year repayment period imposed upon enrollees with graduate school debt.

81 The DOE appears to be quite sensitive to the lost governmental revenue implications of any relaxation of the REPAYE rules relating to graduate school borrowers, particularly given their lost revenue estimates for 2016–25 of $15.3 billion with the REPAYE Plan as now proposed. See Notice of Proposed Rulemaking, 80 Fed. Reg. at 39,627. In negotiations, the DOE rejected a compromise proposal as having “unacceptably high” costs to taxpayers. The compromise proposal would have reduced the required repayment period to 20 years for only the undergraduate loans taken out by a borrower who had also taken out loans for graduate or professional studies. See Notice of Proposed Rulemaking, 80 Fed. Reg. at 39,622. Such a measure would of course have far smaller lost revenue implications that would involve reducing the repayment period to 20 years for all loans taken out by graduate or professional
Those persons favoring such significant amendments of the REPAYE Plan rules that would greatly favor law graduates and other high-debt graduate and professional school borrowers, however, can argue that the DOE has not proposed the REPAYE Plan as a measure that will prospectively displace the IBR or PAYE Plans for future enrollees, as those persons critical of the generosity of the PAYE Plan provisions might favor, but has merely provided another alternative Plan. As the rules now stand this will be a choice that, as I have demonstrated, will be an irrelevant alternative that almost all law graduates—except for those few old IBR Plan or ICR Plan law graduate enrollees with relatively small spousal incomes who may elect to change their Plan enrollment—will ignore. Given that the DOE has made the choice to allow the existing PAYE Plan and IBR Plans to continue to be available for law graduates alongside the new REPAYE Plan, a plausible argument can be made that the two substantial modifications that I suggest to the REPAYE Plan rules would be the fairest and most consistent way to proceed. The modifications would allow the shrinking pool of old borrowers among the new law graduates that are not currently eligible for PAYE Plan enrollment to enter into loan repayment arrangements on virtually the same generous PAYE Plan-type terms that are now available to all post-October 1, 2007 borrowers, arguably school borrowers.

The amount of revenue that the government would lose by such major changes in the REPAYE Plan rules as I here suggest are rather difficult to estimate. One complication is that some fraction of the loan repayment revenues that are lost each year by the federal government when old IBR or ICR enrollees switch over to the REPAYE Plan under these amended terms for the remainder of their required repayment period would be recaptured by the government at the time of debt forgiveness, since with the smaller repayments and shorter repayment period many REPAYE Plan law graduate enrollees would have a significantly larger amount of debt forgiven when they qualified for debt forgiveness, and therefore would owe substantially more in federal and state income taxes on that larger forgiven debt. For a comprehensive discussion of the tax liability aspects of all of the different Plans, see generally Crespi, supra note 17.

Although the DOE’s comments in their Notice of Proposed Rulemaking suggest that they regard the REPAYE Plan and all of the other existing Plans as merely stopgap measures until reform legislation is adopted that replaces all of the existing Plans with a single income-driven repayment Plan that is closely modeled upon the REPAYE Plan’s “struggling borrower”-oriented required repayment period and spousal income inclusion provisions. See Notice of Proposed Rulemaking, 80 Fed. Reg. at 39,617.

Although a likely DOE response to this argument would be that while consistency of treatment does promote fairness, the terms that should consistently be applied would more closely resemble the restrictive proposed REPAYE Plan terms than the more generous PAYE Plan terms.
implementing the goals sought by the Obama Administration’s original directive.

Since the REPAYE Plan is being promulgated as a DOE administrative action under the DOE’s existing legislative authority under the 1993 statute establishing the ICR Plan, the DOE can make these two suggested amendments to those Plan rules without the need for further Congressional action. 84 This is a major advantage for achieving such changes given the current highly partisan Congressional gridlock, particularly with regard to proposals with significant governmental revenue implications. Such a substantial change in the federal student loan repayment framework that these two suggested REPAYE Plan amendments would bring about, however, would certainly lead to Congressional efforts to amend the ICR statute to preclude such action. Such efforts to preclusively amend that statute might again founder due to the gridlock situation, although in this case the blockage would likely result from Democratic opposition rather than the currently more common Republican resistance to legislative initiatives.

Even though the Obama Administration (or the Trump Administration that took office in January of 2017) could probably force DOE implementation of such significant REPAYE Plan amendments as I here suggest over Congressional opposition, I do not expect that such amendments to the REPAYE Plan rules will be made. This is partly because of the political criticism and Congressional resistance such amendments would engender, and partly because of the substantial resulting lost federal revenues, already estimated by the DOE as $15.3 billion for the 2016–25 period for the REPAYE Plan, even absent these two liberalizing amendments that I have suggested, which would significantly increase this cost. 85 In fact, I suspect that alternatives to the current REPAYE Plan rules along the general lines that I have suggested of more closely replicating the PAYE Plan’s generous terms were vigorously discussed at the highest policy levels of the Obama Administration and then rejected, both prior to the promulgation of the original draft REPAYE rules and again after receiving comments to this effect regarding those proposed rules.

The REPAYE Plan rules are likely to remain as they are (although the broad direction that DOE student loan policy will take under the

84 It can also be argued that such amendments are consistent with the Congressional intent expressed in the 1993 statute that created the ICR Plan. Pasquale, supra note 21, at 8 n.25.

Trump Administration is very uncertain), and in their current form they will not benefit many law graduates, and few if any recent law graduates. The small number of law graduates who may benefit from the availability of the new Plan will be those few old IBR or ICR Plan enrollees who are not eligible for more generous PAYE Plan enrollment, who also have relatively small current and expected future spousal incomes. These persons may choose to shift their Plan enrollment to the REPAYE Plan, thereby saving enough from the reduction in the required repayment percentage of their disposable income under that Plan to more than offset the effect of their spousal income now being included in their disposable income calculation.

IV. CONCLUSION

In response to President Obama’s directive, the DOE has proposed a new student loan repayment option, labeled the REPAYE Plan, which allowed enrollment as of July 1, 2016 for up to six million student loan borrowers who are not eligible for enrollment in the generous PAYE Plan. I estimate that approximately 72,000 of those six million persons are law graduates. I also estimate, however, that 60.8% of those 72,000 law graduates, approximately 43,800 persons, have already enrolled in either the old IBR Plan or the ICR Plan. Most of those among the remaining group of about 28,200 PAYE Plan-ineligible law graduates who have not already enrolled in a Plan, if they later do decide to enroll, will enroll in the old IBR Plan rather than the new REPAYE Plan because of the latter Plan’s restrictive spousal income inclusion rules.

The largest group of REPAYE Plan law graduate enrollees in 2016 and thereafter will be those relatively few old IBR Plan or ICR Plan enrollees who have or who expect to have relatively modest spousal incomes over the coming two decades, and who consequently will be able to reduce their monthly repayment obligations by switching over to the REPAYE Plan. For the REPAYE Plan to be made more broadly attractive to other law graduates, especially to the rapidly growing proportion of law graduates each year who are eligible for PAYE Plan enrollment, soon to approach 100%, the required repayment period would have to be reduced to 20 years and the spousal income inclusion rules eliminated so as to more closely match the PAYE Plan’s terms.

Some commentators who responded to the originally proposed rules called for such a significant amendment to the REPAYE Plan’s rules. The DOE rejected these suggestions, however, probably largely because of the lost governmental revenue implications, and probably also
because of opposition from persons both within and outside the DOE who regard the existing PAYE Plan’s terms as too generous to high-debt graduate school borrowers, and who do not want those generous terms made available to a broader group of law graduate borrowers at the taxpayer’s expense.
Note

“I’M NOT A REGULAR MOM . . . I’M A COOL MOM”¹: AN ARGUMENT FOR BROADER CIVIL SOCIAL HOST LIABILITY IN CONNECTICUT

Krystyna D. Gancoss

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¹ MEAN GIRLS (Paramount Pictures 2004).
I. INTRODUCTION

The national minimum legal drinking age in the United States is twenty-one years old, but minors’ illegal consumption of alcohol remains a prevalent issue. Underage drinking is estimated to account for between 11% and 20% of the total alcohol market in the country. In addition, alcohol is a factor in the deaths of an estimated 4,358 individuals under the age of twenty-one each year—including 1,580 deaths from motor vehicle crashes. In one study, a reported 21.6% of

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3 Mark R. Hinkston, Social Host Liability for Underage Drinking, 81 WIS. LAW., no. 6, June 2008 (“Few people dispute that underage drinking is a serious problem with potentially drastic consequences.”); see also Richard M. Scherer, Jr., Grab A Drink and Pass the Blame: An Argument Against Social Host Liability, 77 DEF. COUNS. J. 238, 238 (2010) (“While every state has set a minimum drinking age of twenty-one, underage persons continue to drink.”).
5 Fact Sheet, Underage Drinking, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM
tough question arises: who should be held responsible for any resulting
damages when minors drink—the consumer of the alcohol, the provider
of the alcohol, or both? Then, even after finding out who to hold liable,
an equally difficult question remains: does liability extend to injuries to
the drunken individual, third persons, property, or all of the above?7

Holding individuals responsible for underage drinking is easier said
than done. Upon arriving at the scene, law enforcement officials are
often unable to prove who has provided the alcohol at underage drinking
parties.8 Even if there is some evidence, it is usually not enough to hold
property owners civilly liable under Connecticut’s current standard.9 In
the absence of a clear rule, the question of liability falls to the courts and
the legislature. Indeed, over the past several decades, many states
responded to increasing pressures to address this issue, and a movement
arose whereby states have expanded the scope of civil liability and
strengthened criminal sanctions for accidents resulting from
intoxication.10 Holding adults responsible for underage drinking in this
manner—through laws that impose criminal and civil liability—is
referred to as social host liability.

Social host liability laws hold non-commercial persons responsible
for the consumption of alcohol by certain individuals defined within the
law on the property that the non-commercial persons own, lease, or
otherwise control.11 In the states that recognize social host liability,
either a statute or case law imposes a “civil duty on social hosts across
the relevant state that can be enforced through litigation brought by

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7 Social Host Liability Law & Legal Definition, US LEGAL,
liability in some states is limited to injuries suffered by third parties. In other states, a social
host is also liable for injuries sustained by the drunken guest.”).

8 See also Social Host, MOTHERS AGAINST DRUNK DRIVING (MADD),
http://www.madd.org/underage-drinking/the-power-of-parents/high-school-parents/social-host/
(last visited Sept. 14, 2015). (“Law enforcement officials are typically not able to
determine who provided the alcohol when they arrive on the scene of a teenage drinking party.
Therefore, laws that prohibit furnishing alcohol to youth under 21 years old can be hard to
enforce.”).

9 See Ely v. Murphy, 540 A.2d 54, 58 (Conn. 1988) (holding that a break in the chain of
proximate causation does not, as a matter of law, insulate a person who provides alcohol to
minors for liability from ensuing injury and the matter of proximate cause of the injury and
ensuing damages is a question of fact.).

10 Derry D. Sparlin, Jr., Social Host Liability for Guests Who Drink and Drive: A Closer

11 Social Host Laws in a Nutshell, PAC. INST. FOR RES. & EVALUATION,
http://www.prev.org/Safer-Toolkit/Toolkit%20attachments/Party%20Patrols/Alcohol%20
control%20policies/20%20Social%20Host%20laws%20in%20a%20nutshell.pdf (last visited
Sept. 15, 2016).
injured private parties seeking monetary damages against the host."12 A social host is any individual "who hosts a social gathering where alcohol is served."13 More specifically, social host liability typically applies to "adults who knowingly or unknowingly host underage drinking parties on property that they own, lease or otherwise control."14 This term includes parents who are away from home when their children host a party, parents who are present for the party even if they deny knowledge of any alcohol consumption, and non-familial owners and tenants of property.15

Stricter social host liability laws can act as an effective deterrent to property owners for hosting, or negligently failing to prevent, underage drinking on their premises.16 Indeed, Connecticut has recognized the positive effect of stricter liability. Effective October 1, 2012, Connecticut increased the criminal penalties for property owners who recklessly, or with criminal negligence, permit underage drinking on their premises.17 Prior to 2012, the penalty imposed consisted of a maximum fine of five hundred dollars, imprisonment for less than a year, or both.18 Under the new law, however, violators may be charged

12 Scherer, Jr., supra note 3, at 239.
13 Id.
14 Brochure, Social Host: Your Role in Making a Difference, MOTHERS AGAINST DRUNK DRIVING (MADD) (2008), http://www.madd.org/underage-drinking/the-power-of-parents/high-school-parents/social-host/socialhostbroch.pdf [hereinafter MADD Brochure]. Another general definition is: "alcohol providers other than commercial vendors such as bars or liquor stores." See also Hinkston, supra note 3, at 8.
15 MADD Brochure, supra note 14.
16 Id.
17 Pursuant to Section 30–89a, “Permitting minor to illegally possess liquor in dwelling unit or on private property or failing to halt such illegal possession. Penalty”:
No person having possession of, or exercising dominion and control over, any dwelling unit or private property shall (1) knowingly, recklessly or with criminal negligence permit any minor to possess alcoholic liquor in violation of subsection (b) of section 30-89 in such dwelling unit or on such private property, or (2) knowing that any minor possesses alcoholic liquor in violation of subsection (b) of section 30-89 in such dwelling unit or on such private property, fail to make reasonable efforts to halt such possession. For the purposes of this subsection, “minor” means a person under twenty-one years of age.
Any person who violates the provisions of subsection (a) of this section shall be guilty of a class A misdemeanor.
CONN. GEN. STAT. § 30–89a (2014).
18 The previous version of Section 30–89a stated:
(a) No person having possession of, or exercising dominion and control over, any dwelling unit or private property shall (1) knowingly permit any minor to possess alcoholic liquor in violation of subsection (b) of section 30–89 of the general statutes, as amended by this act, in such dwelling unit or on such private property,
with a Class A misdemeanor, which carries the risk of a fine of up to $2,000, as well as up to one year in prison. Further, the social host does not need to have actual knowledge that minors are consuming alcohol in order to be found guilty. Yet, despite the stricter criminal standard imposed, it is still fairly easy for parents and other adult hosts to avoid civil liability.

While Connecticut has made significant progress with deterring underage drinking, there is more that can be done. Currently, no statute exists in Connecticut that establishes a civil cause of action against social hosts. There is case law recognizing a civil cause of action, but it is not as effective as it could be in application. The Connecticut Supreme Court has held that social hosts may be civilly liable for the damages that result from knowingly permitting minors to consume alcohol. The problem is that, under the court-imposed standard, property owners are able to claim ignorance of the events taking place on their premises in order to avoid civil liability. This creates an anomalous result: property owners may be charged criminally for permitting minors to illegally possess alcohol on their property, or for failing to halt such possession, under Section 30–89a, but they can escape civil liability if the plaintiff fails to establish proximate cause—a question of fact.

In a state that imposes such strict criminal penalties on social hosts, the civil penalties should arguably be more stringent. Even though the criminal penalties act as a deterrent, there is evidence that civil liability is more efficient for this purpose. Thus, until Connecticut strengthens its civil liability, “parents and teenagers will continue to abuse underage

or (2) knowing that any minor possesses alcoholic liquor in violation of subsection (b) of section 30–89 of the general statutes, as amended by this act, in such dwelling unit or on such private property, fail to make reasonable efforts to halt such possession. For the purposes of this subsection, “minor” means a person under twenty-one years of age. (b) Any person who violates the provisions of subsection (a) of this section shall, for a first offense, have committed an infraction and, for any subsequent offense, be fined not more than five hundred dollars or imprisoned not more than one year, or both.


19 CONN. GEN. STAT. § 30–89a (2014); CONN. GEN. STAT. § 53a–36 (2012); CONN. GEN. STAT. § 53a–42 (2012).

20 CONN. GEN. STAT. § 30–89a (2014) (recklessness or criminal negligence is sufficient).


22 Ely v. Murphy, 540 A.2d 54, 58 (Conn. 1988).

23 See CONN. GEN. STAT. § 30–89a (2014); Ely, 540 A.2d at 59.

24 See infra Part V.D (citing statistics showing that criminal penalties are not as effective as civil).
drinking without paying a sufficient price.”25 To create a more consistent application of social host liability, the Connecticut legislature should enact a statute allowing for a civil cause of action that imposes stricter liability against social hosts than the current standard recognized under Connecticut case law.

II. HISTORY: FROM COMMERCIAL VENDORS TO PRIVATE HOSTS

Originating as a common law negligence doctrine, social host liability governs the duties, or lack thereof, that social hosts owe to their guests and the general public.26 At common law, social guests were not held liable to a guest or a third party for damages that resulted from the guest’s voluntary intoxication.27 “The reason generally given for the rule was that the proximate cause of the intoxication was not the furnishing of the liquor [by the donor], but the consumption of it by the purchaser or donee.”28 In other words, individuals were solely responsible for any damages that resulted from their voluntary intoxication, as people cannot become intoxicated unless they choose to drink the liquor furnished to excess.29 Yet, growing concerns about the dangers of drunk driving, and more specifically, the consumption of alcohol by minors, led to a significant departure from the common law rule.30 Many states began imposing civil liability on persons who wrongfully furnish liquor to minors that causes intoxication and results in injury.31 Thus, a remedy

27 Id.
28 Ely, 540 A.2d at 57.
29 Id. at 56–57.
30 Slepchuk, supra note 26, at 933.
31 An example of the typical language used in a civil statute is:

Any person who sustains injury or property damage, or the estate of any person killed, as a proximate result of the negligence of an intoxicated minor shall have, in addition to any other cause of action available in tort, a cause of action against:

(1) A social host who allowed the minor to consume alcoholic liquor in the social host’s home or on property under his or her control;
(2) Any person who procured alcoholic liquor for the minor, other than with the permission and in the company of the minor’s parent or guardian, when such person knew or should have known that the minor was a minor; or
(3) Any retailer who sold alcoholic liquor to the minor. The absolute defenses found in section 53-180.07 shall be available to a retailer in any cause of action brought under this section.
now exists, not recognized at common law, which provides a cause of action to persons who an intoxicated person injures against the person who sold or furnished the alcohol. These causes of actions initially developed through the courts’ and legislatures’ introduction of dram shop liability.

A. Dram Shop Acts

Dram shop acts govern the liability of commercial establishments that serve alcoholic beverages, such as bars and liquor stores, though dram shop statutes in some states also extend liability to private individuals. Departing from the common law rule of nonliability,

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33 Id.

34 A dram shop act is “a statute allowing a plaintiff to recover damages from a commercial seller of alcoholic beverages for the plaintiff’s injuries caused by a customer’s intoxication.” Dram-Shop Act, BLACK’S LAW DICTIONARY (10th ed. 2014) (Dram shop act is also termed “civil-liability act” or “civil-damage law”). See also Dram Shop, BLACK’S LAW DICTIONARY (10th ed. 2014) (a dram shop is “a place where alcoholic beverages are sold; a bar or saloon.”). “Dram shop” is an archaic term that was coined as reference to the English unit of liquid—a “dram.” Eric J. Handelman, Proof of Tavern Keeper’s Liability Under Dram Shop Act, 137 AM. JUR. PROOF OF FACTS 3d 195, 202 (Originally published in 2013).

35 BLACK’S LAW DICTIONARY, supra note 34.

36 See, e.g., Vermont’s Dram Shop Act, which states: (1) Except as set forth in subdivision (2) of this subsection, nothing in this section shall create a statutory cause of action against a social host for furnishing intoxicating liquor to any person without compensation or profit, if the social host is not a licensee or required to be a licensee under this title. However, this subdivision shall not be construed to limit or otherwise affect the liability of a

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dram shop acts began as part of a campaign for temperance during the nineteenth and early twentieth centuries to “cut off the supply of liquor rather than attempt to reform the individual drinkers.” While many states repealed the acts after the end of Prohibition in 1933, the 1970s brought about a revival of the statutes. By 1988, thirty-seven state legislatures had adopted dram shop acts. In keeping the statutes limited to commercial liability, some states, including Indiana, Maine, and Connecticut, adopted dram shop acts with language specifically excluding social hosts from civil liability, thereby limiting the cause of action to commercial sellers. Connecticut’s Dram Shop Act states:

If any person, by such person or such person’s agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of two hundred fifty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of two hundred fifty thousand dollars, to be recovered in an action under this section, provided the aggrieved person or persons shall give written notice to such seller of such person’s or persons’ intention to bring an action under this section.

social host for negligence at common law.
(2) A social host who knowingly furnishes intoxicating liquor to a minor may be held liable under this section if the social host knew, or a reasonable person in the same circumstances would have known, that the person who received the intoxicating liquor was a minor.

7 VT. STAT. § 501 (2016).
37 Sparlin, Jr., supra note 10, at 584. See also Sipes, supra note 21, at 3–4 (explaining that Wisconsin enacted the first dram shop act in 1849, imposing strict liability for injuries to third parties caused by intoxicated individuals).
39 Id.
40 Sipes, supra note 21, at 4.
41 Id.
42 French, supra note 38, at 1066–67.
43 CONN. GEN. STAT. § 30–102 (2007). Section 30–102 further provides:
Such notice shall be given (1) within one hundred twenty days of the occurrence of such injury to person or property, or (2) in the case of the death or incapacity of any aggrieved person, within one hundred eighty days of the occurrence of such injury to person or property. Such notice shall specify the time, the date and the person to whom such sale was made, the name and address of the person injured or whose property was damaged, and the time, date and place where the injury to person or property occurred. No action under the provisions of this section shall be brought but within one year from the date of the act or omission complained of. Such injured person shall have no cause of action against such seller for negligence in the sale of alcoholic liquor to a person twenty-one years of age or older.
Other states, however, have held that both sellers and givers of alcohol can be held civilly liable under their respective dram shop acts, including Illinois, which “provided a cause of action ‘against any person . . . who . . . by selling, or giving, intoxicating liquors . . . caused the intoxication.’”\(^44\) Thus, the applicability of dram shop laws largely depends on whether the language in the statute applies to just “the sale of liquor” or to “the gift of liquor” as well.\(^45\)

Dram shop acts seek to promote safety through deterring the irresponsible furnishing of liquor.\(^46\) Making the threat of liability greater than the potential financial profit deters commercial vendors from irresponsibly selling alcohol to intoxicated patrons who pose a hazard to others.\(^47\) It is now widely recognized that liquor providers have a “duty to not over-serve customers.”\(^48\) Liability, however, is typically only imposed where the alcohol is furnished to adults who are visibly intoxicated or to minors who are not of the legal drinking age.\(^49\) Further, it is important to note that the underlying purpose of the acts is to protect the general public from the dangers that arise from “serving alcohol to minors and intoxicated patrons,”\(^50\) as this consideration led to the recognition of social host liability.

B. Recognizing the Existence of Social Host Liability

With the introduction of dram shop acts, the common law doctrine of nonliability became the minority rule with respect to commercial sellers,\(^51\) but private individuals were still not held liable. Thus, as alcohol-related accidents continued to occur, many argued in favor of imposing liability on private individuals similar to the liability imposed on commercial vendors.\(^52\) Several jurisdictions\(^53\) do have some form of

\(^{14}\) Id. Under the Connecticut statute, the plaintiff must prove: “(1) the sale of the alcoholic liquor; (2) that the sale was to an intoxicated person; and (3) that the intoxicated person caused injury to another’s person or property as a result of his or her intoxication.” Hayes v. Caspers, Ltd., 881 A.2d 428, 441 (Conn. App. 2005).

\(^{45}\) French, supra note 38, at 1067.

\(^{46}\) Id.

\(^{47}\) Handelman, supra note 34, at 202.

\(^{48}\) Id. at 202–03.

\(^{49}\) Id. at 197.

\(^{50}\) Handelman, supra note 34, at 202.

\(^{51}\) Sparlin, Jr., supra note 9, at 583–84.

\(^{52}\) Id. at 585.

\(^{53}\) Different states’ treatment of social host liability regime is explored in greater detail in Part III, infra.
social host liability for injuries that a third party sustains—either through “rules, regulations, constitutional provisions, or legislative enactments”\(^{54}\)—but there is a large divide in opinion as to whether, and in what way, such liability should fall on “social hosts who serve liquor gratuitously to [social] guests”\(^{55}\) who then injure another.

A few states have dram shop acts with language that is broad enough to encompass social host liability in addition to commercial vendor liability.\(^{56}\) Other states rely on common law negligence principles to hold social hosts liable for third parties that an intoxicated minor injures,\(^{57}\) with only a few jurisdictions imposing such a duty if the guest is an adult.\(^{58}\) For example, courts from California, Massachusetts, and New Jersey have allowed “persons injured because of the negligence of intoxicated adult guests” to bring a common-law negligence claim against the social hosts who served the adult guests.\(^{59}\) Where civil liability is not imposed by the legislature, courts typically justify creating liability in the absence of a statute on two grounds: first, “the traditional common law rule can be altered to fit the needs of a modern society”; and second, “a criminal violation of an alcohol beverage

\[^{54}\text{Raymond, Jr., supra note 32.}\]

\[^{55}\text{Sparlin, Jr., supra note 10, at 585. A social guest is one “who is invited to enter or remain on another person’s property primarily for private entertainment as opposed to entertainment open to the general public.” Social Guest, BLACK’S LAW DICTIONARY (10th ed. 2014).}\]

\[^{56}\text{Robert W. Gomulkiewicz, Recognizing the Liability of Social Hosts Who Knowingly Allow Intoxicated Guests to Drive: Limits to Socially Acceptable Behavior, 60 WASH. L. REV. 389, 391 (1985). For an example of a state’s dram shop act that has broad language, see GA. CODE § 51–1–40(a) (2016) (stating that a person who “willfully, knowingly, and unlawfully sells, furnishes, or serves alcohol” to a person under the legal drinking age may be held liable for damages suffered by third parties resulting from that person’s intoxication). For an example of a state that explicitly disclaims applicability of a dram shop act to a social host, compare Beeson v. Scoes Cadillac Corp., 506 So.2d 999, 1000 (Ala. 1987) (limiting Alabama’s dram shop act to commercial vendors and holding that social hosts are not liable for negligently furnishing alcohol).}\]

\[^{57}\text{Martin A. Dolan & Karen Muñoz, Social Host Liability for Underage Drinking: The “Voluntary Undertaking” Theory After Bell v. Hutsell, 100 I.L.L. B.J. 140, 143 (2012) (“The Illinois Supreme Court’s decision in Wakulich, which held that there is no liability for social hosts who furnish alcohol to guests absent a voluntary undertaking, remains correct for adult guests.”).}\]

\[^{58}\text{Gomulkiewicz, supra note 56, at 391. See also Kenneth F. Lewis, Pennsylvania’s Limitations on Social Host Liability: Adding Insult to Injury?, 97 DICK. L. REV. 753, 754 (1993) (“[M]ost states, including Pennsylvania, still do not allow a claim against a social host who serves an intoxicated adult guest who then drives and injures a third party in an automobile accident.”).}\]

control act provides a legal basis for implying a civil cause of action. 60

In 1971, Oregon became the first state to hold a social host liable for the acts of an intoxicated person. 61 In Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, the Oregon Supreme Court held that a social host may have a duty in certain circumstances to restrict a guest’s further access to alcoholic beverages, especially where the host has reason to know that the intoxicated person will do something unreasonable. 62 Situations where the host typically has “reason to know” include where the guest is already severely intoxicated, the guest is known to the host as unusually susceptible to the effect of alcohol, or the guest is a minor. 63

Wiener consisted of an action to recover damages resulting from an automobile accident that occurred following a party on October 10, 1964 that the defendant, Gamma Phi Chapter of Alpha Tau Omega Fraternity, hosted at Country Squire Recreation Ranch. 64 The complaint alleged “that with the full knowledge, consent and permission of the owners and operators of the Ranch the fraternity caused beer and other alcoholic drinks . . . to be served or made available to David Michael Blair,” a minor. 65 After consuming a large quantity of alcohol, Blair departed the Ranch in his automobile, with the plaintiff and other guests as passengers. 66 While en route, the intoxicated minor drove into a building, causing the plaintiff, a passenger, to sustain injuries. 67

In addressing the negligence complaint, the Wiener court noted that, while “ordinarily, a host who makes available intoxicating liquors to an adult guest is not liable for injuries to third persons resulting from the guest’s intoxication,” there are circumstances that give rise to a duty to deny a guest further access to alcohol, including the age of the guest. 68 Since Blair was a minor, the fraternity, as a host of the party, could be, and was, held liable for negligently furnishing the alcohol to Blair who

60 Sipes, supra note 21, at 7.
61 See Gomulkiewicz, supra note 56, at 391 (explaining Oregon’s precedential decision).
63 Id.
64 Id. at 19–20.
65 Id. at 20.
67 Id.
68 Id. at 21. In specifically addressing the age of the intoxicated guest, the court notes: “Also included might be young people, if their ages were such that they could be expected, by virtue of their youth alone or in connection with other circumstances, to behave in a dangerous fashion under the influence of alcohol.” Id.
then injured a third party.\textsuperscript{69} It is notable that the dissent in \textit{Wiener} criticized the majority’s holding that a defendant will not be found liable unless she or he has “directly served” the alcohol.\textsuperscript{70} Indeed, the dissent pointed out that “even in the absence of concerted action, two or more persons whose negligence combines to produce a single injury are joint tortfeasors, and any or all may be held liable by the injured party.”\textsuperscript{71} The dissent, then, advocated for an even stricter imposition of liability and would have held all defendants jointly liable regardless of whether they actually served the liquor.\textsuperscript{72}

Following the lead of the Oregon court, other jurisdictions began to impose liability on social hosts who furnish alcohol to minors, with some taking the majority’s more restrictive view and others taking the dissent’s broader view.\textsuperscript{73} Even where social host liability is recognized, courts typically distinguish between the furnishing of beverages to adults versus to minors.\textsuperscript{74} States that are unwilling to impose liability on social hosts where adult guests cause the injuries typically adhere to one of three rationales: (1) traditional principles of common law; (2) issues of social policy; or (3) deference to the legislature.\textsuperscript{75}

\textbf{C. Narrowing the Scope: Social Host Liability for Intoxicated Minors}

While many states will not hold a social host liable for the actions of an adult guest,\textsuperscript{76} it is more widely recognized that social hosts should be held liable where the intoxicated individual is a minor. The rationale behind social host liability for the intoxication of minors is that minors are a “special class that legislatures [and courts] have specifically sought

\begin{itemize}
\item \textsuperscript{69} \textit{Id.} at 23.
\item \textsuperscript{70} \textit{Wiener}, 485 P.2d at 24 (McCallister, J., dissenting).
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} E.g., the Rhode Island Supreme Court held that a social host who either provides alcoholic beverages to minors or has actual knowledge of the consumption of alcohol by minors owes a duty of care to protect them. Martin v. Marciano, 871 A.2d 911, 915–16 (R.I. 2005). The South Carolina Supreme Court held that a social host may be liable to a third party who an underage guest injures, if the minor consumed alcohol that the host provided. Marcum v. Bowden, 643 S.E.2d 85, 89–90 (S.C. 2007).
\item \textsuperscript{74} See Sipes, \textit{supra} note 21, at 9.
\item \textsuperscript{75} See 1–12 Liquor Liability Law § 12.06.
\item \textsuperscript{76} New Jersey is an example of a state that holds social hosts liable for the injuries that intoxicated, adult guests cause. N.J. STAT. § 2A:15–5.6 (1988). In contrast, many other states do not confer liability unless the intoxicated guest is a minor. See infra Part III.A.2 for further discussion of these civil laws.
\end{itemize}
to protect from the dangers of alcohol."

Indeed, legislatures commonly distinguish between minors and adults in the application of their statutes. An example is the "age of consent" imposed on a variety of activities: "engaging in sexual intercourse; using contraception; marrying with and without parental consent; driving an automobile; voting; purchasing or possessing tobacco or alcohol, etc." As the legal drinking age is twenty-one years of age, the law does not permit minors to make the choice to drink. Because the minor cannot legally make this decision, the minor’s "act of drinking, or even drinking and driving and crashing, does not break the chain of proximate causation because such acts are foreseeable by a reasonable social host." In addition to the minor being liable, liability often extends to the adult who is deemed to have known better than to permit a minor to consume alcohol.

III. DIFFERING APPROACHES TO SOCIAL HOST LIABILITY: A STATE-BY-STATE ANALYSIS

States take a number of different approaches to social host liability. Some states find that violation of a criminal statute is proof that a parent or adult has "acted unreasonably, resulting in negligence"

77 Bernat, supra note 25, at 991.
79 Id.
81 Houchens, supra note 78, at 281.
82 Id.
83 As a general example of the different approaches:
- Iowa’s new Social Host Law applies to adults who permit anyone under 18 to drink on their property, not under 21.
- Connecticut’s revised and far stricter Social Host Law went into effect October 1, 2012.
- Illinois’ revised and broadened law went into effect January 1, 2013.
- Mississippi’s new state-wide Social Host Law went into effect July 1, 2011.
- Oklahoma’s state-wide Social Host Law (Cody’s Law) went into effect November 1, 2011.
- While California doesn’t have a criminal code version of a Social Host Law, in 2010 the Governor signed AB 2486, the Teen Alcohol Safety Act, part 1714 of California’s Civil Code.
- Delaware added a phrase — criminalizing "allowing" persons under 21 years of age to drink — to their existing Title 4 Alcoholic Liquors code.

per se.”84 Other states impose only civil liability, with no criminal sanctions available.85 Still others merely impose a common-law duty to not “unreasonably” distribute alcohol to minors.86 Some eliminate the availability of a civil cause of action altogether, and social hosts in those states may only be found guilty of a misdemeanor.87 Finally, a few states have chosen not to specify any form of civil or criminal liability in statutes.88 Thus, while the legal drinking age of twenty-one applies nationwide, the liability for assisting minors in breaking this law varies widely. The inconsistency in application of social host laws raises the following questions: first, why do so many different combinations of criminal liability and civil liability exist; and second, what is the rationale behind each approach?

A. Civil Liability v. Criminal Liability

At the core, the crucial difference between civil liability and criminal liability for social hosts is that “civil remedies can only be brought by private parties to provide monetary compensation for the injured party, whereas criminal charges are brought by a prosecutor and serve the public interest and not just private parties.”89 Further, under many civil social host laws, “knowledge of the party or of the occurrence of underage drinking at the party is not required in order to impose response costs against the host or property owner.”90 In contrast, “knowledge” typically is a component of a criminal proceeding for furnishing alcohol to minors.91 Presumably, states take these differences into account when deciding to recognize criminal liability, civil liability, both, or neither.

84 Bernat, supra note 25, at 991–92. An example is the statute in Ohio, which “creates a duty for social hosts to refrain from furnishing alcohol to a person under the legal drinking age, and violation of that duty is negligence per se.” 1–12 Liquor Liability Law § 12.06 (citing OHIO REV. CODE § 4301.69(A)).
85 Jared Wachtler, Are New York’s Social Host Liability Laws Too Strict, Too Lenient, or Just Right?, 27 TOURO L. REV. 309, 325 (2011). New York is one of the few states to take this route. The unique New York standard that governs whether a social host will be liable to a third party is “one of the more concrete and structured standards,” as it uses a three-factor approach in determining liability. Id.
86 Bernat, supra note 25, at 991–92.
87 E.g., California and Texas. Id. at 990–92
89 Wachtler, supra note 85, at 332.
90 PAC. INST. FOR RES. & EVALUATION, supra note 11, at 3.
91 Id.
impose response costs against the host or property owner."\textsuperscript{90} In contrast, “knowledge” typically is a component of a criminal proceeding for furnishing alcohol to minors.\textsuperscript{91} Presumably, states take these differences into account when deciding to recognize criminal liability, civil liability, both, or neither.

1. Criminal Social Host Liability

Many states impose criminal liability on individuals who furnish alcohol to minors. More specifically, thirty states have enacted criminal statutes that impose a penalty—a fine, jail time, or both—for knowingly providing alcohol to an individual who is under twenty-one years of age.\textsuperscript{92} These states include: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, and Wyoming.\textsuperscript{93} Those who choose not to impose criminal liability follow the common law reasoning for nonliability.\textsuperscript{94}

Most criminal statutes contain similar language. An example of the typical language used is found in Maryland’s criminal statute entitled “Furnishing for or allowing underage consumption.”\textsuperscript{95} Section 10–117

\textsuperscript{90} PAC. INST. FOR RES. & EVALUATION, supra note 11, at 3.

\textsuperscript{91} Id.

\textsuperscript{92} Morton, supra note 31. See also Wachtler, supra note 85, at 335. While New York is one of the thirty-eight states that has laws holding social hosts civilly liable, there are twelve states, plus the District of Columbia, that do not hold social hosts civilly liable at all for injuries to third parties that occur as a result of an intoxicated minor. Id. These states include Arkansas, California, Delaware, Hawaii, Kansas, Kentucky, Maryland, Oklahoma, South Dakota, Tennessee, West Virginia, and Virginia. Interestingly, five of the states that do not impose civil liability on social hosts are states that have laws imposing criminal liability—Kansas, Arkansas, Hawaii, Maryland, and Oklahoma. Id.

\textsuperscript{93} Morton, supra note 31.

\textsuperscript{94} See supra Part II (reasoning that it is the individual’s intoxication that is the proximate cause of any injuries, not the furnishing of the alcohol by a social host).

\textsuperscript{95} MD. CODE, CRIM. LAW § 10-117 (2009). Another example is Arizona’s statute, which states:

A person who is of legal drinking age and who is an occupant of unlicensed premises is guilty of a class 1 misdemeanor if both of the following apply: 1. The person knowingly allows a gathering on such unlicensed premises of two or more persons who are under the legal drinking age and who are neither: (a) Members of the immediate family of such person. (b) Permanently residing with the person. 2. The person knows or should know that one or more of the persons under the legal drinking age is in possession of or consuming spirituous liquor on the unlicensed premises.
Section 10–117(a), “Prohibited—Furnishing alcohol,” and it states:

Except as provided in subsection (c) of this section, a person may not furnish an alcoholic beverage to an individual if: (1) the person furnishing the alcoholic beverage knows that the individual is under the age of 21 years; and (2) the alcoholic beverage is furnished for the purpose of consumption by the individual under the age of 21 years.96

Section 10–117(b), “Prohibited—Allowing possession or consumption of alcohol,” then states:

Except as provided in subsection (c) of this section, an adult may not knowingly and willfully allow an individual under the age of 21 years actually to possess or consume an alcoholic beverage at a residence, or within the curtilage of a residence that the adult owns or leases and in which the adult resides.97

Though they all cover the same basic concept—the prohibition on furnishing alcohol to minors—some of the statutes allow for a more narrow application than others. For example, California’s statute applies specifically to “parents” or “legal guardians,” with no reference to other potential social hosts.98 Illinois is another state that specifically applies

(b) Unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage is a class A person misdemeanor, for which the minimum fine is $1,000. If the court sentences the offender to perform community or public service work as a condition of probation, as described in subsection (b)(10) of K.S.A. 21-6607, and amendments thereto, the court shall consider ordering the offender to serve the community or public service at an alcohol treatment facility.


97 MD. CODE, CRIM. LAW § 10–117(b). In addition, Section 10–117(c) contains the exceptions to the preceding subsections:

(1) The prohibition set forth in subsection (a) of this section does not apply if the person furnishing the alcoholic beverage and the individual to whom the alcoholic beverage is furnished: (i) are members of the same immediate family, and the alcoholic beverage is furnished and consumed in a private residence or within the curtilage of the residence; or (ii) are participants in a religious ceremony. (2) The prohibition set forth in subsection (b) of this section does not apply if the adult allowing the possession or consumption of the alcoholic beverage and the individual under the age of 21 years who possesses or consumes the alcoholic beverage: (i) are members of the same immediate family, and the alcoholic beverage is possessed and consumed in a private residence, or within the curtilage of the residence, of the adult; or (ii) are participants in a religious ceremony.

MD. CODE, CRIM. LAW § 10–117(c).
98 California’s law states:
to parents or guardians. Additionally, it is important to note that some of the criminal statutes expressly state that the provisions shall not be interpreted to create a civil cause of action. For example, Kansas’s statute, Section 21–5608, states: “The provisions of this section shall not be deemed to create any civil liability for any lodging establishment, as defined in K.S.A. 36–501, and amendments thereto.” Despite these minor variations, states’ criminal statutes generally contain similar language.

2. Civil Social Host Liability

The underlying policy for imposing civil social host liability is that

(a) A parent or legal guardian who knowingly permits his or her child, or a person in the company of the child, or both, who are under the age of 18 years, to consume an alcoholic beverage or use a controlled substance at the home of the parent or legal guardian is guilty of misdemeanor if all of the following occur: (1) As the result of the consumption of an alcoholic beverage or use of a controlled substance at the home of the parent or legal guardian, the child or other underage person has a blood-alcohol concentration of 0.05 percent or greater, as measured by a chemical test, or is under the influence of a controlled substance. (2) The parent knowingly permits that child or other underage person, after leaving the parent’s or legal guardian’s home, to drive a vehicle. (3) That child or underage person is found to have caused a traffic collision while driving the vehicle. (b) A person who violates subdivision (a) shall be punished by imprisonment in a county jail for a term not to exceed one year, by a fine not exceeding one thousand dollars ($1,000), or by both imprisonment and fine.

CAL. BUS. & PROF. CODE § 25658.2 (2014).

99 Illinois’s law states:

It is unlawful for any parent or guardian to knowingly permit his or her residence, any other private property under his or her control, or any vehicle, conveyance, or watercraft under his or her control to be used by an invitee of the parent’s child or the guardian’s ward, if the invitee is under the age of 21, in a manner that constitutes a violation of this Section. A parent or guardian is deemed to have knowingly permitted his or her residence, any other private property under his or her control, or any vehicle, conveyance, or watercraft under his or her control to be used in violation of this Section if he or she knowingly authorizes or permits consumption of alcoholic liquor by underage invitees. Any person who violates this subsection (a-1) is guilty of a Class A misdemeanor and the person’s sentence shall include, but shall not be limited to, a fine of not less than $500. Where a violation of this subsection (a-1) directly or indirectly results in great bodily harm or death to any person, the person violating this subsection shall be guilty of a Class 4 felony. Nothing in this subsection (a-1) shall be construed to prohibit the giving of alcoholic liquor to a person under the age of 21 years in the performance of a religious ceremony or service in observation of a religious holiday.

235 ILL. COMP. STAT. § 5/6–16(a–1) (2014).

100 See KAN. STAT. § 21–5608 (2011) (Kansas is one of the states that does not have a civil statute for social host liability).
it is an added incentive to help prevent drunk driving and other alcohol-related incidents involving minors. The studies have shown that holding social hosts criminally liable, with no civil liability, is not “as effective as either the criminal and civil liability approach (i.e. Massachusetts) or simply the civil liability approach (i.e. New York).” The fact that only thirty states impose criminal liability on social hosts, while thirty-five states have imposed some form of civil liability further supports this statistic. Indeed, the states that impose civil liability include: Alaska; Arizona; California; Colorado; Connecticut; Florida; Georgia; Idaho; Illinois; Indiana; Iowa; Maine; Massachusetts; Michigan; Minnesota; Montana; Nebraska; New Hampshire; New Jersey; New Mexico; New York; Nevada; North Carolina; North Dakota; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; Tennessee; Utah; Vermont; Washington; Wisconsin; and Wyoming. Thus, it would seem that states have found civil liability to be a more effective deterrent than criminal liability.

In choosing to impose civil liability, states must decide whether to do so via statute or case law. States such as New York and New Jersey have used statutes to create a cause of action. New York’s statute creates a civil liability cause of action against social hosts who negligently furnish alcohol to minors under the legal drinking age. As Section 11-100, entitled “Compensation for injury or damage caused by the intoxication of a person under the age of twenty-one years,” states:

Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully

101 Scherer, Jr., supra note 3, at 238 (“Alcohol is the most widely used substance of abuse among America’s youth, more than both tobacco and illicit drugs.”).
102 Wachtler, supra note 85, at 335.
103 Morton, supra note 31.
104 N.Y. GEN. OBLIG. LAw § 11–100 (2010). The statute further provides:
2. In case of the death of either party, the action or right of action established by the provisions of this section shall survive to or against his or her executor or administrator, and the amount so recovered by either a husband, wife or child shall be his or her sole and separate property.
3. Such action may be brought in any court of competent jurisdiction.
4. In any case where parents shall be entitled to such damages, either of such parents may bring an action therefor; but that recovery by either one of such parties shall constitute a bar to suit brought by the other.

Id.
furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years.  

In contrast to Tennessee, New Jersey’s statute applies even to adult guests. The New Jersey act provides the “exclusive civil remedy for personal injury or property damage resulting from the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages,” and it sets out conditions under which liability may be found.

While New York and New Jersey impose civil liability via statute, other states, such as Tennessee and Illinois, use case law. In Biscan v. Brown, the Tennessee Supreme Court held that a social host who knowingly permitted minors to consume alcohol had a duty to exercise reasonable care to prevent the minors from harming third persons or themselves. Thus, Tennessee requires “actual knowledge” on the part of the social host.

In contrast, Illinois imposes a “voluntary duty” requirement instead of an “actual knowledge” requirement. Illinois has carved out an exception to the common law rule of nonliability where the guest is a minor under the legal drinking age, as long as there has been a voluntary undertaking by the social host. That is, while it may be difficult to “sue a hands-off social host in Illinois who merely allows underage

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105 Id.
107 The conditions for the statute to apply are as follows:
A person who sustains bodily injury or injury to real or personal property as a result of the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages may recover damages from a social host only if: (1) The social host willfully and knowingly provided alcoholic beverages either: (a) To a person who was visibly intoxicated in the social host’s presence; or (b) To a person who was visibly intoxicated under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another; and (2) The social host provided alcoholic beverages to the visibly intoxicated person under circumstances which created an unreasonable risk of foreseeable harm to the life or property of another, and the social host failed to exercise reasonable care and diligence to avoid the foreseeable risk; and (3) The injury arose out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host.
N.J. STAT. § 2A:15–5.6(b).
109 Id. at 482.
110 Dolan & Muñoz, supra note 57, at 143.
111 Id. at 140.
drinking,” a social host that voluntarily undertakes a duty to prevent the
minors from consuming alcohol is a different story.\textsuperscript{112} There are both
pros and cons to the “voluntary undertaking” requirement. It does make
holding a social host liable more difficult than just a mere “knowledge”
requirement. On the other hand, it provides an alternate theory of
liability against social hosts in the circumstances in which a voluntary
undertaking may have been demonstrated. Regardless, the burden
remains high, and “[e]vidence of affirmative acts by the defendant and
reliance on those acts by the plaintiff are crucial in successfully
adducing such a duty.”\textsuperscript{113} As demonstrated further below, some states
leave the civil liability decision to the courts while others implement
laws through the legislature.

\textbf{B. Categorizing the Approaches}

Despite the wide variance, states’ approaches can be grouped into
distinguishable categories: (1) criminal liability (statute) and civil
liability (statute); (2) criminal liability (statute) and civil liability (case
law); (3) no criminal or civil liability; (4) criminal liability (statute) but
no civil liability; and (5) civil liability (statute or case law) but no
criminal liability. Below is a categorization of the different combinations
of approaches that each of the fifty states has applied.

1. Social Host Liability – Criminal Statute and Civil Statute

The following states’ legislatures have enacted statutes that impose
both criminal and civil liability: Alabama; Alaska; California; Illinois;
Maine; Massachusetts; New Jersey; Oregon; Utah; Wisconsin; and
Wyoming.\textsuperscript{114}

2. Social Host Liability – Criminal Statute and Civil Case
Law

The following states have a criminal statute, as well as case law
creating a civil cause of action against social hosts: Arizona;
Connecticut; Florida; Michigan; New Hampshire; Ohio; Pennsylvania;
Rhode Island; South Carolina; Tennessee; and Washington.\textsuperscript{115} Ohio and

\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 143.
\textsuperscript{114} Morton, \textit{supra} note 31.
\textsuperscript{115} \textit{Id.}
Pennsylvania have done so on the basis of negligence per se. In Arizona, the legislature has explicitly immunized social hosts who serve guests over the age of twenty-one, but there is case law allowing for a civil cause of action if the guest is under the legal drinking age.

3. No Social Host Liability – Neither Criminal nor Civil

Several states do not recognize criminal liability or civil liability, including: Delaware; the District of Columbia; Kentucky; Louisiana; and West Virginia. Typically, the rationale is that the social host’s furnishing of the alcohol is not the cause of the injury.

4. Criminal Social Host Liability, No Civil Social Host Liability

The following states have a statute that imposes criminal liability, but no civil liability: Arkansas; Kansas; Maryland; Mississippi; Missouri; Oklahoma; South Dakota; and Virginia.

5. Civil Social Host Liability, No Criminal Social Host Liability

The following states have not enacted any criminal penalties, but

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116 See, e.g., Mitseff v. Wheeler, 526 N.E.2d 798, 800 (Ohio 1988) (stating that a statutory violation of the law forbidding the provision of alcohol to minor is considered negligence per se); Douglas v. Schwenk, 479 A.2d 608, 611 (Pa. Super. Ct. 1984) (stating that violation of the statute setting the drinking age at twenty-one-years-old is considered negligence per se).
117 Arizona’s statute explicitly states:
A person other than a licensee or an employee of a licensee acting during the employee’s working hours or in connection with such employment is not liable in damages to any person who is injured, or to the survivors of any person killed, or for damage to property, which is alleged to have been caused in whole or in part by reason of the furnishing or serving of spirituous liquor to a person of the legal drinking age.
ARIZ. REV. STAT. § 4–301 (2016).
118 See Estate of Hernandez v. Arizona Bd. of Regents, 866 P.2d 1330 (Ariz. 1994) (holding that there is no statutory immunity protection for non-licensees who furnish alcohol to a minor).
119 Morton, supra note 31.
120 Slepchuk, supra note 26, at 933 (discussing the common law rule of nonliability).
121 Morton, supra note 31. Virginia courts reason that minors who engage in adult activities are held to the same standard as adults; therefore, adult hosts are not liable for the actions of minors regardless of whether the adult hosts provide alcohol to their minor guests. See Teape v. Ampuero, 73 Va. Cir. 7, 8–9 (2006).
they have chosen to establish a civil cause of action via statute: Colorado; Georgia; Idaho; Indiana; Iowa; Minnesota; Montana; Nebraska; Nevada; New Mexico; New York; North Dakota; Texas; and Vermont. In addition, North Carolina has imposed a civil cause of action via case law, but it does not recognize criminal liability.

IV. SOCIAL HOST LIABILITY IN CONNECTICUT

Connecticut adheres to the common law rule of nonliability for social hosts who serve alcohol to adult guests. The Connecticut Supreme Court established this standard in the 1980 case of Kowal v. Hofher. In Kowal, the plaintiff brought suit against a restaurant under the dram shop act, common-law negligence, and gross negligence and wanton and reckless conduct, alleging that the provision of alcohol to an intoxicated patron led to the death of the plaintiff’s decedent. The complaint alleged that the restaurant served an already intoxicated individual, who then proceeded to negligently drive, thereby causing an accident that resulted in the death of plaintiff’s decedent. The Supreme Court addressed the question of whether the plaintiff’s remedies were limited to those provided under the dram shop act, or whether the plaintiff was also entitled to relief under negligence theories. The court defined “wanton misconduct”:

Wanton misconduct is more than negligence, more than gross negligence. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of action. Willful misconduct is intentional misconduct, and wanton misconduct is reckless misconduct, which is the equivalent of willful misconduct.

The court held that there was a justification for greater consequences

122 Morton, supra note 31.
123 See Hart v. Ivey, 420 S.E.2d 174, 176–78 (N.C. 1992) (recognizing that a social host may be held liable for furnishing alcohol to a person the host knew or should have known was intoxicated and would soon thereafter drive an automobile). Interestingly, North Carolina is one of the few states that recognizes a duty on the part of social hosts to adult guests, under the rationale that adult drunk drivers can be just as dangerous as drunk minors. Id. at 177.
124 Kowal v. Hofher, 436 A.2d 1 (Conn. 1980) (stating that there is no cause of action in negligence under the common law, but one may be available for wanton and reckless conduct).
125 Id. at 1–2.
126 Id. at 1.
127 Id. at 2.
128 Kowal, 436 A.2d at 4.
where the conduct was intentional or reckless, and therefore, there can be a legal cause of action for the reckless or wanton provision of alcohol to an adult, but not for mere negligence.\textsuperscript{129} Thus, there is no common law cause of action in negligence for the provision of alcohol to an adult guest that causes injury to himself, another, or property; a vendor or a social host may be liable, however, for injuries that result from the wanton or reckless provision of alcohol to an intoxicated adult.\textsuperscript{130}

While liability may only be found for adult guests if the provision of alcohol is wanton or reckless, there are other avenues of liability for the provision of alcohol to minors. Connecticut has a criminal statute imposing liability on individuals who provide alcohol knowingly, recklessly, or with criminal negligence—to a person under the legal drinking age of twenty-one.\textsuperscript{131} Connecticut case law also allows for a civil cause of action, based in negligence theories, for injuries that an intoxicated minor causes if the host had knowledge that the person was under the legal drinking age.\textsuperscript{132} Despite the different avenues of liability, however, it is often difficult to hold a social host liable for the actions of the intoxicated minor.

\textbf{A. Criminal Liability}

Connecticut recently enacted a statute, effective October 1, 2012 and amended in 2014, which strengthened social host liability law in Connecticut. Pursuant to Section 30–89a, “Permitting minor to illegally possess liquor in dwelling unit or on private property or failing to halt such illegal possession. Penalty”:

(a) No person having possession of, or exercising dominion and control over, any dwelling unit or private property shall (1) knowingly, recklessly or with criminal negligence permit any minor to possess alcoholic liquor in violation of subsection (b) of section 30–89 in such dwelling unit or on such private property, or (2) knowing that any minor possesses alcoholic liquor in violation of subsection (b) of section 30–89 in such dwelling unit or on such private property, fail to make reasonable efforts to halt such possession. For the

\textsuperscript{129} \textit{Id.} at 3.
\textsuperscript{130} \textit{Id. See also} Raymond, Jr., \textit{supra} note 32 (listing the courts that have precluded “the holding of social hosts liable for injuries suffered by third parties as a result of the negligence of intoxicated adult guests.” Some of these include: Alabama, California, Ohio, Pennsylvania, and Texas.).
\textsuperscript{132} See Ely v. Murphy, 540 A.2d 54, 58–59 (Conn. 1988) (recognizing a civil cause of action in Connecticut).
purposes of this subsection, “minor” means a person under twenty-one years of age.
(b) Any person who violates the provisions of subsection (a) of this section shall be guilty of a class A misdemeanor.133

Under the previous statute, anyone who “knowingly” provided alcohol could be held criminally liable.134 Therefore, while “the earlier law did not penalize property owners for underage drinking that occurred on their property without their knowledge and did not implement the misdemeanor for offenders,”135 the new law allows violators to be charged with a class A misdemeanor—which carries the risk of a fine of up to $2,000 as well as up to one year in prison—if the alcohol was given “recklessly” or “with criminal negligence” in addition to “knowingly.”136

The new law was enacted to help prevent parents from escaping liability by claiming that they had no knowledge that alcohol was

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133 CONN. GEN. STAT. § 30–89a (2014) (emphasis added).
134 Pursuant to the older version of Section 30–89, effective from 2006 to 2012:
(a) No person having possession of, or exercising dominion and control over, any dwelling unit or private property shall (1) knowingly permit any minor to possess alcoholic liquor in violation of subsection (b) of section 30–89 in such dwelling unit or on such private property, or (2) knowing that any minor possesses alcoholic liquor in violation of subsection (b) of section 30-89 in such dwelling unit or on such private property, fail to make reasonable efforts to halt such possession. For the purposes of this subsection, “minor” means a person under twenty-one years of age.
(b) Any person who violates the provisions of subsection (a) of this section shall, for a first offense, have committed an infraction and, for any subsequent offense, be fined not more than five hundred dollars or imprisoned not more than one year, or both.

CONN. GEN. STAT. § 30–89a (2006) (emphasis added). In addition, the version in effect from 2012 to 2014 stated:
(a) No person having possession of, or exercising dominion and control over, any dwelling unit or private property shall (1) knowingly, recklessly, or with criminal negligence, permit any minor to possess alcoholic liquor in violation of subsection (b) of section 30-89 in such dwelling unit or on such private property, or (2) fail to make reasonable efforts to halt such possession. For the purposes of this subsection, “minor” means a person under twenty-one years of age.
(b) Any person who violates the provisions of subsection (a) of this section shall be guilty of a class A misdemeanor.

136 Id.
present when they are arguably should have known. More specifically, law enforcement and community groups opined that the previous statute was ineffective after two Ridgefield minors died in two separate car accidents in 2011 after drinking alcohol at “house parties where parents were thought to be present but there wasn’t sufficient evidence that either of the homeowners knew that underage drinking was occurring.” In response, the Ridgefield Police chief and several residents approached Representative John Frey about increasing the criminal penalties under the law, which ultimately led to a successful amendment to the current criminal statute under Representative Frey’s sponsorship.

Thus, under Section 30–89a, criminal penalties exist for social hosts that permit underage drinking on their premises “recklessly or with criminal negligence.” Social hosts can now be held liable for minors’ consumption of alcohol on their premises under the rationale that they either knew or should have known that the drinking was taking place. For example, even if parents are not present while their teenager and friends drink alcohol, the parents can be held liable because they “‘recklessly’ left their teen home alone and should have known she

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137 Id.
140 CONN. GEN. STAT. § 30–89a (2014). Criminal negligence is defined in Section 53a–3(14):
A person acts with “criminal negligence” with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

141 CONN. GEN. STAT. § 30–89a (2014).
would break their house rules while they were [away].”

Though some may argue that this new law places too much responsibility on parents to prevent their children from breaking the law, the updated statute is a step in the right direction toward cracking down on underage drinking.

Though the statute is still fairly new, two unpublished opinions have already cited the law. In Karzoun v. Rapo, the court first lays out the standard in Connecticut, which is that “in order to hold a defendant liable as a social host for negligently providing alcohol to a minor, the defendant must have either purveyed or supplied such alcohol.” The court notes that C.G.S. § 30–89a establishes a Class A misdemeanor for permitting a minor to possess alcohol on premises under the control of the defendant, but it requires such act to be done “‘knowingly, recklessly, or with criminal negligence.’ Moreover, this is a criminal, not a civil, standard of conduct.”

The court found that the criminal statute did not apply to the circumstances of the case, thereby rejecting plaintiff’s contention that the defendants failed to “prohibit or prevent the consumption of alcoholic beverages by Rapo at the premises when in the exercise of reasonable care.” The court ultimately held that the plaintiff’s contention went beyond the reach of the social host doctrine, “which requires the active involvement of the defendants in the provision of the alcohol.”

In Wolf v. Middlesex, the plaintiff brought suit to recover for injuries that he sustained when he was assaulted at a party on the defendants’ property. The opinion focuses on removing attorneys from a case pursuant to the Rules of Professional Conduct, so its direct relevance to the topic of criminal liability is debatable. It does, however, mention the statute. Moreover, the defendant in the case, who had previously denied having violated Connecticut General Statutes § 30–89a, admitted that he had violated this statute through his knowledge that minors possessed alcohol at the Diamond Ledge Road property, or that he should have known and failed to make reasonable efforts to halt such

\[142\] Epstein, supra note 138.
\[144\] Id. at *3 n.5.
\[145\] Id. at *4 n.5.
\[146\] Id. at *4.
possession.\footnote{Id. at *3.}

The limited mention of the criminal statutes in cases, though, provides further support for enacting a civil statute that can more readily address the liability of social hosts.

B. Civil Liability

In Connecticut, the general rule is that “no tort cause of action lies against one who furnished, whether by sale or gift, intoxicating liquor to a person who thereby voluntarily became intoxicated and in consequence of his intoxication injured the person or property either of himself or of another.”\footnote{Pike v. Bugbee, 974 A.2d 743, 750 (Conn. App. 2009)} The rationale is the same as that of the common law rule of nonliability—the proximate cause of the intoxication is the donee’s consumption of the alcohol, not the donor’s furnishing of the alcohol.\footnote{Id.} Thus, following the common law rule exempting social hosts from liability, Connecticut generally does not recognize a cause of action for furnishing liquor to a person who becomes voluntarily intoxicated and injures another or property. Connecticut courts recognize an exception, however, based on negligence theories, for injuries to a third party where the liquor is furnished to a minor.\footnote{1–12 LIQUOR LIABILITY LAW § 12.06 (2015) (citing Ely v. Murphy, 540 A.2d 54 (Conn. 1988)).} In\textit{ Ely v. Murphy}, the Connecticut Supreme Court held that “a social host may be found liable to the minor served for the minor’s own injuries sustained as a result of his or her own voluntary intoxication” and may also be liable to innocent third-parties injured as a result of the minor’s intoxication.\footnote{Slepchuk, supra note 26, at 942–43.} Even though \textit{Ely} allows for civil liability, cases subsequent to \textit{Ely} typically hold that the plaintiffs have failed to state a claim against parents or other adults for common-law social host liability because they cannot prove the requisite level of knowledge in order to impose liability.\footnote{Pike, 974 A.2d at 748–49.}

1. \textit{Ely v. Murphy}

In\textit{ Ely v. Murphy}, the Connecticut Supreme Court held that social hosts are estopped from arguing that the minor’s behavior was an
intervening cause preventing them from being held liable for injuries to persons or property.\footnote{154}{Ely v. Murphy, 540 A.2d 54, 57 (Conn. 1988).} In \textit{Ely}, the defendant parents acted as social hosts for a high school graduation party at their home, even purchasing twelve half kegs of beer for the event.\footnote{155}{Id. at 55.} The legal drinking age at the time was nineteen, but the guests ranged from fifteen-years-old to nineteen-years-old.\footnote{156}{Id. at 55.} The police arrived at 11 p.m., three hours after the party began, “in response to neighbors’ complaints of erratic driving and teenage drinking.”\footnote{157}{Id. at 55-56.} The parents assured the police that they would take the keys of those who were driving so that no one would drive while intoxicated,\footnote{158}{Ely, 540 A.2d at 55.} thereby assuming a duty to supervise. The parents, however, failed to collect the keys of all partygoers who were driving, and one of the guests did drive while intoxicated. At approximately 3:30 a.m., Thomas Foley, an eighteen-year-old guest, “stagger[ed] into his mother’s station wagon,” and proceeded to drive away.\footnote{159}{Id. at 59.} While still within one hundred yards of the parents’ driveway, Foley’s vehicle “struck Christopher Ely, another guest, fatally injuring him.”\footnote{160}{Id. at 57.} Given the circumstances of the case, the court held that the “proximate cause of the injury and ensuing damage” was a question of fact that should have reached the jury.\footnote{161}{Id. at 55.}

In reaching its decision, the court first acknowledged that the state already recognized criminal liability for furnishing alcohol to a minor.\footnote{162}{Id. at 55-56.} Under General Statutes Section 30–86, with limited exception, “the social host who delivers liquor to a minor,” may be criminally liable.\footnote{163}{Id.} The court, however, considered the possibility that the criminal liability alone may not be sufficient, especially since voluntary intoxication is a principle more aptly applied to adults than minors.\footnote{164}{Id.} The court noted the “continuing and growing public awareness and concern that children as a class are incompetent by reason of their youth and experience to deal with the effects of alcohol”—even citing the fact that the legislature has upwardly amended the drinking age three times within six years.\footnote{165}{Id.}
The court further noted that the legislature has acknowledged in many other contexts that minors should not be held to the same degree of responsibility assigned to adults because minors are at a “disability.”\(^{166}\) Because minors have been placed in a special class, “logic dictates” that their actions cannot constitute an intervening cause to insulate social hosts from liability.\(^{167}\) Social hosts will not be held per se liable under this rationale, but they will be barred from arguing that the actions of the minor constituted an intervening cause sufficient to break the chain of proximate causation.\(^{168}\) Therefore, under \textit{Ely}, it is possible for social hosts to be held civilly liable for the actions of an intoxicated minor.

2. Bohan v. Last

\textit{Bohan v. Last} demonstrates that social host liability cases subsequent to \textit{Ely} have required that the furnisher of the alcohol have actual knowledge that he is providing alcohol to a minor.\(^{169}\) In \textit{Bohan}, the Connecticut Supreme Court held that, “unless purveyors of alcohol knew or had reason to know that the person to whom they supplied the alcohol was a minor, they have no common law duty to the third party victims of the minor’s intoxication.”\(^{170}\) In appropriate circumstances, however, the furnisher will be liable for his negligent provision of alcohol to the minor.\(^{171}\) The \textit{Bohan} court expanded \textit{Ely} slightly by holding that “purveyors of alcohol to minors may be liable to such minors or to third parties, even if those purveyors were not social hosts, subject to the limitation that the purveyors knew or had reason to know that the minor was not old enough to consume alcohol legally.”\(^{172}\)

The court pointed out that this liability does not stem from the “custodial control over” or “special relationship with” the minor, but rather from the negligent provision itself.\(^{173}\) “Negligent provision” refers to providing alcohol to a person that the supplier either knows or should have known is a minor.\(^{174}\) Therefore, liability will be imposed only

\(^{166}\) \textit{Ely}, 540 A.2d at 57.
\(^{167}\) \textit{Id.} at 58.
\(^{168}\) \textit{Id.} at 58–59.
\(^{169}\) \textit{Bohan v. Last}, 674 A.2d 839, 844 (Conn. 1996).
\(^{170}\) \textit{Id.} at 844–45.
\(^{171}\) \textit{Id.} at 844.
\(^{173}\) \textit{Bohan}, 674 A.2d at 844.
\(^{174}\) \textit{Id.}\n
where the host actually provides the alcohol. 175 Bohan follows the holding of Ely, then, in making it a requirement that the host actually furnish alcohol to a minor. 176 Thus, while social hosts must refrain from intentionally supplying minors with alcohol, the Bohan court declined to “engraft strict liability on this common law duty.” 177

3. Pike v. Bugbee

Connecticut courts have also been careful to hold social hosts liable only where the intoxicated minor himself has caused the injury. 178 That is, it is not enough to show that minors were present and consuming alcohol; there must also have been a resulting injury to the intoxicated minor or a third party that the intoxicated minor caused as a result of the social host furnishing the liquor. 179 In Pike v. Bugbee, the defendants’ son hosted a party at their residence while they were not present, where there was underage drinking, and at which the plaintiff was stabbed in the abdomen and chest area. 180 The court noted that Ely has recognized an exception to the common law rule of nonliability where alcohol is furnished to a minor. 181 It further noted that the exception was intended to “ensure that a social host or purveyor of alcohol remains liable to the minor served or to innocent third parties thereafter injured if the damages were proximately caused by the service of alcohol and the minor’s consumption of it.” 182 The court ultimately held that the plaintiff failed to establish that those involved in his assault were minors. 183 Therefore, there was no cause of action under the theory of social host liability.


The more recent case of Pawlowski v. Delta Sigma Phi Fraternity, Inc. demonstrates that no civil liability will be found, unless the plaintiff can prove that the defendant had actual knowledge of the party or

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175 Id.
176 Id.
177 Bohan, 674 A.2d at 844.
179 Id.
180 Id. at 746.
181 Id. at 750.
182 Pike, 974 A.2d at 751.
183 Id.
supplied the alcohol to a minor guest. In *Pawlowski*, 18-year-old Steven Pawlowski was struck and killed by a car after he attended a fraternity party at a private residence. Plaintiffs, the decedent’s parents, alleged that defendant Melville, a Quinnipiac University student who was a member of the fraternity and resident of the party location, served alcoholic beverages to their underage son. Plaintiffs further alleged that Melville knew or should have known that Pawlowski was a minor, and the negligent and reckless provision of alcohol caused Pawlowski’s death. The court granted Melville’s motion for summary judgment, holding that the defendant did not owe “a duty to Pawlowski as either a social host or a purveyor of alcohol.” Specifically, the court believed that Melville did not owe a duty to Pawlowski because he was not aware that there was a party at his residence, he did not invite any of the guests, and he did not purchase the alcohol that was consumed at the party. Therefore, since it could not be proven that Melville actually hosted the party, he could not be held liable as a social host.

C. Identifying the Problem with Connecticut’s Civil Social Host Liability Standard: Ongoing Difficulty in Enforcement

Even though Connecticut case law does provide third parties with a negligence cause of action against social hosts for injuries sustained as a result of the social host’s provision of alcohol to a minor, a trend of nonliability continues to prevail. This trend results from Connecticut’s civil social host liability standard. That is, to recover under a negligence theory, the plaintiff must meet all of the elements of the tort: duty, breach, causation, and injury. Not only does the plaintiff bear the burden of proving these elements, but Connecticut precedent also requires that a defendant either purvey or supply a minor with alcohol. As the cases described above illustrate, it is often difficult to prove the requisite level of knowledge required in order to hold property owners, or social hosts, liable for the underage drinking that takes place on their

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185 *Id.* at 412.
186 *Id.*
187 *Id.* at 412–13.
188 *Pawlowski*, 35 A.3d at 416.
189 *Id.*
190 *LaFlamme v. Dallessio*, 802 A.2d 63, 67 (Conn. 2002).
premises; therefore, even if the property owner negligently permits underage drinking on their premises, where they should have been aware or at least reasonably suspected that it was taking place, they cannot be held liable. Thus, the problem reveals itself: Connecticut’s current standard for civil liability against social hosts is not as effective as it could be. As a result, broader civil liability should be imposed on social hosts in Connecticut in order to effectively deter them from providing underage guests with alcohol.

V. A LEGISLATIVE CALL TO ACTION

Connecticut already recognizes both criminal and civil liability against social hosts where the guests are minors.192 Therefore, opponents to stricter liability may see a legislative call to action as futile. That is, since Connecticut already has case law193 that allows for a social host to be held liable for providing a minor with alcohol, some may argue that a statute is not necessary. It is abundantly clear, however, that the current scheme is ineffective because property owners can easily escape civil liability if they claim they had no knowledge of, and no reason to suspect, underage drinking on their premises, which is demonstrated in the decisions of cases applying the current standard.194 Indeed, it is clear that under Connecticut’s civil social host liability standard, lack of knowledge equates to lack of responsibility. To resolve this incongruity, the Connecticut legislature should enact a law that holds social hosts civilly liable for failing to prevent minors from consuming alcohol on their premises if it is even reasonably foreseeable that minors would be drinking on the premises. It is only fitting that the legislature broaden civil social host liability, rather than the courts, because the Connecticut legislature has recently strengthened the criminal penalties against social hosts who permit minors to drink on their premises. The legislature should continue with the course of action it has already taken and extend its movement into the realm of civil liability.

192 See Ely v. Murphy, 540 A.2d 54, 57–58 (Conn. 1988).
193 See supra Section IV.B (discussing civil liability in Connecticut).
194 See supra Section IV.B. (describing how several cases subsequent to Ely have not held that the defendants have the requisite level of knowledge in order to hold them liable for underage drinking).
A. The Underlying Goal: Protecting America’s Youth and Preventing Underage Drinking

Strengthening civil social host liability through imposition of a statute can better accomplish the goals of deterring underage drinking and preventing alcohol-related injuries. Under the proposed civil social host liability standard, if social hosts fail to take reasonable steps to prevent minors from consuming alcohol on their premises, such as keeping liquor locked away, they should be held civilly liable for any damages that result if the minor becomes intoxicated and causes injury. Thus, similar to Connecticut’s criminal social host liability standard, social hosts will be held liable civilly if they knowingly, recklessly, or negligently provide alcohol to minors, or if they fail to take reasonable steps to prevent minors from consuming alcohol on their premises.

The primary goal of implementing laws that hold social hosts liable for hosting underage drinking parties is to deter underage drinking. As discussed previously, the legislature has placed children in a special class, deeming them “incompetent by reason of their youth and inexperience to deal responsibly with the effects of alcohol.” In opposition to that statement, many would argue that adults aged eighteen to twenty could handle the responsibility of drinking, despite the current national drinking age being set at twenty-one. Admittedly, it is wrong to assume that age always correlates with responsibility; there are eighteen-year-olds who may drink in a more responsible manner than forty-year-olds do. Since the national drinking age is twenty-one, however, there is some indication that people under the age of twenty-one are too irresponsible to successfully deal with the effects of alcohol. Therefore, in an effort to combat underage drinking, legislatures and courts have enacted social host laws that assign responsibility to adults who allow minors to drink alcohol at social gatherings.

Studies support the argument that civil social host laws deter underage drinking. For example, one study, conducted using data from 50 California cities, suggests a correlation between the reduction in underage drinking and strict social host laws. The study concluded:

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196 Murphy, 540 A.2d at 57.
197 Morton, supra note 31.
198 Mallie J. Paschall et al., Relationships Between Social Host Laws and Underage Drinking: Findings From a Study of 50 California Cities, 75 J. OF STUD. ON ALCOHOL &
“Local SH [Social Host] policies that include strict liability and civil penalties that are imposed administratively may be associated with less frequent underage drinking in private settings, particularly among adolescents who have already initiated alcohol use.”\(^{199}\) Thus, broader civil liability in Connecticut could result in a similar outcome.

Further, while some may argue that the “actual knowledge” standard is a sufficient way to accomplish the goal of deterring underage drinking without unfairly holding hosts liable for underage parties that they have no knowledge of,\(^{200}\) that standard has already proven inadequate through its application to recent cases.\(^{201}\) It is true that in many cases law enforcement officials report that underage drinking occurs on private property while the adult responsible for the property is not present or cannot be shown to have furnished the alcohol.\(^{202}\) This, however, presents an even stronger argument for broadening liability. Lack of knowledge may discourage adults from actively preventing underage drinking on their premises out of fear that they will learn of a party and be held liable if they do not prevent it. Pennsylvania recently adopted a “substantial assistance” requirement that goes beyond the “actual knowledge” requirement, and it has been criticized for not holding as many people liable as the previous actual knowledge standard.\(^{203}\) Therefore, if lack of knowledge is no longer an excuse, there

\(^{199}\) Id.


\(^{201}\) See Connecticut case law, *supra* Part IV.B.

\(^{202}\) See APIS, *supra* note 195.


The narrow confines of Pennsylvania’s actual knowledge standard, as applied by Pennsylvania’s lower courts, contrast sharply with the broader “substantial assistance” standard applied by the United States Court of Appeals for the Third Circuit when determining Pennsylvania social host liability law. The “substantial assistance” test, as defined by the Third Circuit, requires a thorough analysis of a social host’s knowledge and conduct to determine if the host substantially assisted in a minor guest’s consumption of alcohol. The Third Circuit’s “substantial assistance” test includes situations where a social host’s conduct increases the risk of harm to a minor or when a social host creates a hospitable environment for consuming alcohol. Colleges who would previously have been liable under the broad scope of the Third Circuit’s test may now escape liability under Pennsylvania’s narrow “actual knowledge” standard.

Id.
is more of an incentive to help actively prevent underage drinking.

B. The Effect of a Statute Imposing Broader Liability

A statute is the most adequate avenue for accomplishing the deterrent effect. The legislature has already demonstrated its commitment to increasing liability against social hosts, as the recent increases in criminal penalties evidence.204 Therefore, it makes sense for the legislature to pick up where it left off, and update the current standard. In effect, the statute will best deter social hosts from assisting minors in illegally consuming alcohol.

1. The “Cool Mom” isn’t so “Cool”

Broadening civil social host liability prevents parents and other adults from contributing to the underage-drinking epidemic in the United States. In general, parents especially “can play a big role in shaping young people’s attitudes toward drinking.”205 In many situations, underage drinking is foreseeable. For example, if parents allow their high school children to throw a party on their premises, they may suspect that alcohol will be served, even if they do not furnish it themselves. Arguably, they “should have known” of the possibility that minors would consume alcohol and should take steps to prevent the illegal consumption.

Despite the obvious benefits of a broader standard, only a minority of states have imposed stricter social host liability for parents who actively host and supervise underage drinking parties.206 They argue that the law should not extend to those parents who “supervise” the parties.207 As noted above, however, one study revealed that 21.6% of underage drinkers admitted that a parent, guardian, or other adult family

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204 See supra Part IV.A (discussion of variance in criminal liability statutes among the states).
205 See NIAAA Fact Sheet, supra note 5.
206 See, e.g., Randall supra note 200, at 964. Randall explains the minority view:
Florida, along with a small minority of states, has decided to extend liability to social hosts that allow house parties where minors drink alcohol, whether the host’s or an independent supply. However, the state’s legislature and judiciary have not gone far enough to establish a policy that penalizes negligent parents and homeowners, or to reward hosts who take proactive measures to ensure the protection and safety of minors who do drink.

Id. 207 Id.
member provided them with the alcohol.\textsuperscript{208} Thus, if the laws were to exclude parents who “supervise,” this statistic would presumably rise and incidents of underage drinking would increase. As a result, the purpose of social host liability, which is to prevent injuries resulting from underage drinking, would be rendered useless.

A Connecticut statute addresses the liability of parents for the actions of their children in other contexts.\textsuperscript{209} Under Connecticut General Statute Section 52–572(a):

\begin{quote}
The parent or parents or guardian . . . of any unemancipated minor or minors, which minor or minors willfully or maliciously cause damage to any property or injury to any person . . . shall be jointly and severally liable with the minor or minors for the damage or injury to an amount not exceeding five thousand dollars, if the minor or minors would have been liable for the damage or injury if they had been adults.\textsuperscript{210}
\end{quote}

On its face, Section 52–572(a) is limited to “willful or malicious conduct” by the minor.\textsuperscript{211} This language is inapplicable to drunk driving in a social host liability case, but it does serve as further evidence that parents should be held responsible for the actions of their minor children in some situations. Along a similar line of reasoning, the broader civil social host liability proposed in this note would make parents liable for the conduct of their children.

\section*{2. Non-Familial Property Owners aren’t so “Cool” Either}

Property owners in general—not just parents—should not be able to turn a “blind eye” to underage drinking on their premises, and broader civil liability is the method that can prevent this. Again, opponents of civil liability argue that imposing liability on social hosts who have actual knowledge punishes those who host parties and supervise, while it rewards those who turn a blind eye.\textsuperscript{212} In these circumstances, ignorance

\begin{footnotes}
\item[208] Prevalence of Underage Drinking Fact Sheet, supra note 4 (citing Substance Abuse and Mental Health Services Administration (2011); Results from the 2011 National Survey on Drug Use and Health: Volume I. Summary of National Findings (Office of Applied Studies, NSDUH Series H-41, HHS Publication No. SMA 11-4658)).
\item[209] See, e.g., Pike v. Bugbee, 974 A.2d 743, 748–49 (Conn. 2009) (stating that this statute typically applies in cases of vandalism).
\item[210] CONN. GEN. STAT. § 52–572(a) (2016).
\item[211] Id.
\item[212] “The existing statutory scheme from which Florida’s social-host policy is derived immunizes those parents who can maintain plausible deniability as to the consumption of alcohol by their underage guests, while subjecting to both civil and criminal liability those
\end{footnotes}
really is bliss because it allows for a property owner to disclaim any actual knowledge, and thereby avoid liability, for underage drinking on their premises. Even though this argument is typically used against civil liability, it actually works in favor of civil liability as well. Connecticut’s current standard for civil liability does require actual knowledge.\(^{213}\)

Under broader liability, however, the anomalous result of punishing those who “supervise” while rewarding those who do not supervise is resolved. Indeed, with broader liability, all hosts are held equally liable for their illegal provision of, or prevention of, alcohol to minors.

Some have argued that, while broadening social host liability may act as a more effective deterrent, it misapplies tort principles. That is, if there is no direct causal link between the social host’s actions and an injury caused by the guest, there is no proximate cause.\(^{214}\) In response, the Connecticut Supreme Court held that a social host may not argue that he is not the proximate cause of a third party’s injuries in order to disclaim liability. Instead, by illegally furnishing alcohol to a minor, the social host essentially gives up his right to assert lack of proximate cause. Thus, the removal of the defense of “lack of proximate cause” has essentially already incentivized preventing underage drinking. By broadening civil liability through a statute, as proposed in this note, the legislature would be continuing along the same line of reasoning that the \textit{Ely} court cited.

\textbf{C. Insurance Implications: Who Really Pays for Increased Liability?}

If property owners may be held liable for damages as a result of underage drinking on their premises, homeowners’ policies could be negatively impacted as a result of the probable increase in adverse judgments against social hosts. This argument is easily rebutted,

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parents who attempt to supervise this inherently dangerous behavior.” Randall, \textit{supra} note 200, at 964.
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\(^{214}\) See Scherer, Jr., \textit{supra} note 3, at 246. Scherer states:

The imposition of social host liability also misapplies common law tort principles. A claim of negligence generally requires that (a) the defendant owed a duty to use due care; (b) the defendant breached that duty; (c) the defendant’s conduct caused harm to the plaintiff; and (d) the breach was the proximate cause of the resulting injury. Social host liability fails to follow this standard, imposing instead a legal duty onto the host and failing to consider alternative proximate causes.

\textit{Id.}
\end{quote}
however, by the fact that “most homeowner insurance policies [already] provide some coverage for social host liability claims.”215 Those policies that do cover social host liability typically increase premiums to mitigate the expected damages.216 Arguably, any increase in premiums is a small price to pay for coverage, should a social host be found liable for an underage drinking-related incident. Indeed, “even if the negligent host loses her home due to insufficient or nonexistent insurance—a risk present in all tort liability—the loss is not disproportionate to the loss of life of one who is innocent of any wrongdoing.”217 Further, accounting for the potential liabilities that social hosts may incur through higher insurance premiums is no different than the increases to car insurance that cover damages that drunk drivers cause. Thus, even if there is a negative impact on insurance, it is not sufficient to overcome the benefits of imposing a stricter standard against social hosts. As the increased liability takes hold, instances of underage drinking-related accidents should decrease. Accordingly, the impact on insurance policies, if any, given that many policies already account for social host liability, is inconsequential.

D. Why Increasing Criminal Penalties Alone is Insufficient

In light of the policy considerations surrounding the issue, broader civil social host liability is necessary because Connecticut’s increased criminal penalties alone will not serve as an effective deterrent. Statistics show that criminal sanctions are not as effective of a deterrent as civil liability.218 One study noted that it is very difficult to prove charges against social hosts for several reasons, including: “(1) the difficulty in determining when the party that caused the injury became intoxicated, (2) social host liability cases typically involve mostly circumstantial evidence, and (3) the difficulty in finding reliable eyewitnesses that are willing to testify against their peers.”219 Thus, the standard of proof in

215 Dolan & Muñoz, supra note 57, at 142. See also Jacob R. Pritcher, Jr., Is it Time to Turn Out the Lights? Social Host Liability Extended to Third Persons Injured by Intoxicated Adult Guests: Beard v. Graff, 801 S.W.2d 158 (Tex. App.-San Antonio 1990, Writ Granted) (En Banc), 22 TEX. TECH L. REV. 903, 930 (1991) (“[A] social host’s homeowners’ insurance will probably cover any liability. Thus, the social host should be able to spread any loss through insurance coverage.”).
216 Pritcher, Jr., supra note 215, at 930 n.234.
217 Id. at 931 (internal quotation marks omitted).
218 Wachtler, supra note 85, at 334.
219 Id. at 332–33.
criminal cases presents a struggle, even where there is a strict standard, as there is in Connecticut. It is equally true, however, that it is hard to hold individuals civilly liable where the case law requires “actual knowledge,” as Connecticut’s law does.

In addition, there are significant economic costs associated with underage drinking that can be best addressed through civil causes of action. In 2012, the National Highway Traffic and Safety Administration (“NHTSA”) reported that “10,322 people died in drunk driving crashes and an additional 290,000 individuals were injured.”220 Not only were there many injuries, but also substantial economic costs. An estimated $199 billion is spent each year as a result of drunk driving accidents.221 Since the economic cost to society could be large, it is only fair that those responsible for serving the alcohol to a minor, or for failing to reasonably prevent minors from consuming alcohol, should bear the financial burden. Therefore, Connecticut should adopt a stricter civil social host liability statute that does not require “actual knowledge.”

VI. RECOMMENDATION: THE CONNECTICUT LEGISLATURE SHOULD ADOPT A CIVIL SOCIAL HOST LIABILITY STATUTE

While the Connecticut legislature has recently increased criminal penalties, civil liability has shown to be a more effective deterrent at preventing underage drinking than criminal penalties in several ways. First, its effectiveness is evident from the studies showing that strict civil liability leads to a reduction in underage drinking because property owners are encouraged to take steps to actively prevent the minors from drinking on their premises.222 Second, the preference for civil liability, apparent from the fact more states recognize civil causes of actions than criminal penalties,223 demonstrates that it may be a more effective deterrent against social hosts. Third, without the assistance of parents and other adults, it is more difficult for minors to obtain alcohol, and civil liability incentivizes preventing minors from gaining access to

221 Id.
222 See supra Part V.D (citing statistics showing that criminal penalties are not as effective as civil).
223 See supra Part III (showing that more states have civil laws than criminal laws against social hosts).
liquor. Finally, the legislature has set the legal drinking age at twenty-one because minors are special class who must be protected from the danger of alcohol, and stricter civil liability places more responsibility on the adults who are in a position to protect minors, as the legislature intended. All in all, the benefits of imposing broader social host liability seem to outweigh the risk of, as some would argue, “unfairly” holding adults responsible for the actions of minors.

Thus, a statute imposing stricter liability is necessary, even though there is already case law recognizing a civil cause of action. Under Connecticut precedent, it is difficult to prove “actual knowledge” of the minor’s consumption of alcohol in order to hold a property owner liable. Indeed, broader civil liability makes sense in the context of social host liability for the consumption of alcohol by minors. While the risk of a fine or the risk of a year in jail—if found guilty criminally—might deter a property owner from hosting parties, the additional risk of being held more strictly liable civilly, for some unknown financial amount, would arguably add to the deterrent effect. Lack of knowledge should not equate to lack of responsibility for property owners. Therefore, to better deter underage drinking, the Connecticut legislature should adopt a statute imposing civil liability on social hosts, regardless of whether they have actual knowledge of the occurrence of underage drinking.

224 See supra Part V.B (citing statistics that a large portion of minors obtain alcohol from their parents or other supervisory adults).
225 See supra Part II.C (discussing the legislature’s rationale for raising the drinking age from eighteen to twenty-one).
226 See supra Part IV.B (discussing Connecticut case law).