INTERESTS IN CONFLICTS: A LEGAL ANALYSIS OF UNIVERSITY CONFLICTS OF INTEREST

by

MARK S. KAVANAUGH, JR.

(Under the direction of Sheila Slaughter)

ABSTRACT

Since the passage of Bayh-Doyle, universities increasingly participate in academic capitalist behaviors as they seek to connect to and increase revenue from various markets. This behavior leads to increasingly close relationships between universities and industry. In addition, academic capitalism has influenced faculty governance, structures, and incentives as institutional managers increasingly seek to monitor, manage, and control faculty work. Another result of the new behavior is an increased problem with conflicts of interest. Universities employ individual and institutional conflict of interest policies and procedures in order to mitigate and manage these conflicts. In general, the conflicts policies rely on voluntary disclosure and institutional management in order to properly function. High level trustees or trustees often are required to disclose potential conflicts to each other for management. Faculty members and researchers must disclose their individual conflicts to institutional managers so that these administrators can mandate management. Regardless of the specific policies and procedures, institutional and individual conflicts of interest can become litigious. Such litigation may come about for various reasons. For example, at the institutional level, a trustee or administrator may ignore the conflicts policy so that they may increase individual or corporate wealth. Accordingly, they may sue or be sued for damages incurred due to their non-compliance. In addition, a faculty member

may be punished by a university for having an undisclosed conflict or alleging that a colleague or administrator has an undisclosed conflict of interest. The disciplined faculty member may sue alleging a violation of their Freedom of Speech, defamation, or intentional interference with a contract. This study examines case law where university conflicts of interest are a major issue. In doing so, the study utilizes academic capitalism and managed professionals as primary theoretical and conceptual lenses. The study concludes that university administrators are strategically managing faculty work and conflicts of interest management is a part of that phenomenon. In addition, traditional conflict management (e.g. case-by-case disclosure and management) does not prevent conflicts of interest from becoming litigious, at either the institutional or individual levels.

INDEX WORDS: Academic capitalism, Faculty, Conflicts of interest, Managed professionals, Higher education, Higher education law

INTERESTS IN CONFLICTS: A LEGAL ANALYSIS OF UNIVERSITY CONFLICTS OF INTEREST

by

MARK S. KAVANAUGH, JR.

B.A., Louisiana State University, 2001

J.D., Louisiana State University, 2004

A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial

Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2009

© 2009
Mark S. Kavanaugh, Jr.
All Rights Reserved

INTERESTS IN CONFLICTS: A LEGAL ANALYSIS OF UNIVERSITY CONFLICTS OF INTEREST

by

MARK S. KAVANAUGH, JR.

Major Professor: Sheila Slaughter

Committee: James C. Hearn
J. Douglas Toma
Libby Morris

Electronic Version Approved:
Maureen Grasso
Dean of the Graduate School
The University of Georgia
December 2009

ACKNOWLEDGEMENTS

This study is the product of many people, only some of whom I can thank adequately through the space provided.

To my heart: Leslie Atchley, you have given me the strength to complete this project. You have also given me your love, advice, and knowledge. I cannot thank you enough, except to say this paper, and all of its fruits, are dedicated solely to you. For it is you why I wake and work. I love you.

To my committee: Sheila Slaughter, my Major Professor, you have worked with me since the very beginning. Through even trying times, you have given me more knowledge than you can imagine, helped to illuminate my mind and informed my research. I can only hope to continue your research and make you proud. Jim Hearn, your quiet counsel and insightful comments have helped form this paper and future projects. Douglas Toma, as the legal expert on this paper, you have helped solidify critical portions of the analysis and helped to ensure I stayed on the correct path. Libby Morris, who signed up for this committee without precondition and who has done far more for me and my academic career than I will ever know.

To my friends: Theresa Wright, Patrick Crane, Lisette Montoto, Anthony Jones, Angela Bell, Austin Lacy, Allison McWilliams, Patton MacMorran and every member of the HESS society. You have given me counsel, engaged me in debates, made me laugh, and answered silly questions. This journey would have been difficult, if not impossible, without your friendship and I feel lucky to have met each and every one of you. Whether we were coaching soccer, playing video games, sharing a pint, or dressing in costumes you all have been great friends and colleagues. I look forward to many more years together.

To my family: Nancy Yoder, my mother, who taught me the importance of an education, unselfishly worked several jobs to bring her family out of poverty, and to this day gives me pride, wisdom, and counsel. Mark Kavanaugh, my father, who taught me discipline, pride, and an appreciation for doing what is right. Douglas Yoder, my step-father, who stepped in at a critical time in my life and accepted four rebellious children as his own. Jake, Sara, Molly, Patrick, and Carl, my siblings, who are always only a phone call away and ready to provide love, wit, or a great reminder of where my loyalties always lie. Finally, to Laveau, your quiet counsel has answered far more questions than asked.

To the National Institutes of Health: thank you for funding the grant that is the basis of this study. I hope that you continue to fund studies of this nature and help to continue to illuminate research misconduct and conflicts of interest. To the Institute of Higher Education, and specifically Heather Lotane and Anne Jarvis: thank you for everything. You have all gone far beyond the call of duty to help me grow, learn and proceed in my academic career. Without you, I would have been lost. Finally, to Cutters Pub, where much of this paper was developed. I raise my glass to you.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS....................iv

CHAPTER

1. INTRODUCTION TO CONFLICTS....................1

Purpose....................1

Need for the Study....................5

Research Questions....................12

Significance of the Study and Limitations....................13

2. LITERATURE REVIEW AND THEORITICAL BASE....................15

Theoretical Basis and Literature Review....................15

Academic Capitalism....................15

Managed Professionals....................18

Empirical Research....................21

3. METHODOLOGY....................36

Rationale for a Legal Design....................36

Data Collection Procedures....................37

Validity and Ethical Consideration....................39

Legal Research Methods....................39

4. INSTITUTIONAL CONFLICTS OF INTEREST....................42

Theoretical Approach....................44

Methodology....................45

Analytical Scheme....................45

Trustee Liability 48

Institution as a Firm 53

Sand and Gravel 97

Quid Pro Quo Exchanges 103

Conclusion 109

5. INDIVIDUAL CONFLICTS OF INTEREST 112

Methodology 118

First Amendment 119

Defamation 142

Intentional Interference with a Business 147

Dual Employment 150

False Claims Act 155

Conclusion 160

6. CONCLUSIONS AND RECCOMENDATIONS 163

Overall Conclusions 163

Implications 168

Future Research 176

APPENDIX 1 180

REFERENCES 181

CASE LAW 186

CHAPTER 1
INTRODUCTION TO CONFLICTS

Purpose

The purpose of this legal study is to describe and analyze the ways in which case law interpret and influence institutional and individual conflicts of interests relevant to university-industry collaboration. Conflicts of interest and commercialization of academic research are growing concerns within higher education. In a ten year span, from 1995 to 2005 over 1.5 million patents were granted to U.S. universities (National Science Foundation, 2008). As a result, many universities are seeing increased returns on intellectual property licenses (Association of University Technology Managers, 2005). The number of startup companies associated with universities, either through equity or licensing agreements, is also escalating. Faculty members often hold employment or management positions within these startup companies creating a situation where multiple and conflicting duties may be owed. Faculty may also be paid by industry for consulting or researching various drugs, possibly creating individual conflicts of interest.[1] Administrators and trustees can withhold relevant information in order to impact the potential stock price of an associated startup or faculty can refuse to disclose their

[1] For example, "Baystate Medical Center in Springfield, Mass., has asked several anesthesiology journals to retract the studies, which appeared between 1996 and 2008, the Wall Street Journal reports. The hospital says its former chief of acute pain, Scott S. Reuben, faked data used in the studies. Some of the studies reported favorable results from use of Pfizer's Bextra and Merck's Vioxx, both painkillers that have since been pulled from the market. Others offered good news about Pfizer's pain drugs Lyrica and Celebrex and Wyeth's antidepressant Effexor XR. Doctors said Reuben's work was particularly influential in pain treatment and that they were shocked by the news." Pfizer had funded some of Reuben's research and had also paid him to speak on behalf of its medicines. "It is very disappointing to learn about Dr. Scott Reuben's alleged actions," Pfizer said in a statement to WSJ. "When we decided to support Dr. Reuben's research, he worked for a credible academic medical center and appeared to be a reputable investigator." Sarah Rubenstein, A New Low in Drug Research: 21 Fabricated Studies at http://blogs.wsj.com/health/2009/03/11/a-new-low-in-drug-research-21-fabricated-studies/

industry funding. Similarly, structures such as institutional review boards or offices of scientific integrity may not, for reasons associated with conflicts of interest, uphold their responsibilities as monitors of ethical research (Campbell, 2007). These actions compound the conflict of interest already at issue. Conflicts of interest are typically governed by a university conflict of interest policy, a state statute governing conflicts, or a corporate charter provision. These mechanisms often require disclosure and administrative management of the potential conflict. The questions then become: how do courts, through judicial interpretation address conflicts of interest lawsuits, university management of conflicts of interest, and what is the impact on faculty members' autonomy due to institutional conflict management?

The primary types of conflicts of interest that are relevant in this study are institutional and individual. The Association of American Universities (AAU) defines institutional conflicts of interest as those: "which may occur when the institution, any of its senior management or trustees, or a department, school, or other sub-unit, or an affiliated foundation or organization, has an external relationship or financial interest in a company that itself has a financial interest in a faculty research project"[2] (Johns, Barnes, & Florencio, 2003). Instead of focusing on the faculty researcher, institutional policies govern the behavior of administrators at the department chair level and above. For the purposes of this paper there are three types of institutional conflicts of interest: *sand and gravel*, *university as a firm*, and *quid pro quo exchanges,* each of which may involve behavior of individuals at the department chair level and above (Slaughter, Feldman, and Thomas, 2009). In *sand and gravel* conflicts, "(t)he office puts individuals in a position to seek improper financial gain for themselves or their families and friends" and this behavior is often regulated by state statutes or a corporate charter (Slaughter, Feldman, and

[2] http://www.aau.edu/research/COI.01.pdf

Thomas, 2009, p. 6). Public universities are subject to general state conflict of interest statutes and private universities are subject to state charitable organization statutes or the provisions of their own corporate charters. The *university as a firm* conflicts "arise primarily when universities are involved in commercialization activity…based on faculty research… and (t)here is potential for researchers and university officials to manipulate share prices by withholding information or grandstanding" (Slaughter, Feldman, and Thomas, 2009, p. 5). *Quid pro quo exchanges* are when "a unit within the university or the university as a whole has an exchange relationship with industry brokered by university managers through which industry provides various forms of support in return for access to the university's name or its products, or other forms of favorable treatment" (Slaughter, Feldman, and Thomas, 2009, p. 6). The taxonomy developed by Slaughter, Feldman, and Thomas (2009) provide the framework for categorizing how judges and legislators influence and interpret each type of institutional conflict.

Individual conflicts of interest policies usually govern behavior at the faculty/researcher level. The AAU defines individual conflict of interest as "situations in which financial considerations may compromise, or have the appearance of compromising, an investigator's professional judgment in conducting or reporting research"[3] (Cho, Shohara, Schissel, and Rennie, 2000 and Thompson, 1993). Cho, et. al. (2000) point out that there is concern that the potential financial gain may impact a researcher's ability to conduct quality, truthful research. Universities, often in compliance with federal regulation, require that faculty members disclose their conflicts. This then, requires universities to manage the disclosed conflicts. The disclosure and management process becomes very complex as institutional actors then review and analyze the conflicts in order to provide adequate oversight. The case law in this study helps highlight to

---

[3] http://www.aau.edu/research/COI.01.pdf

what extent university conflict management is effective and how it is impacting faculty autonomy. Similarly, the case law showcases what incentives or disincentives faculty have to participate in the process. For example, what do faculty risk by disclosing their various revenue streams to the university or what can happen if a faculty member alleges that a colleague has an undisclosed conflict? Finally, an analysis of individual conflicts cases sheds light on how universities may differentiate management between individual conflicts depending on if the institution may benefit as a result of the conflict. For example, if an institution may receive additional revenue from faculty members in a conflicted situation (e.g. secondary employment) how does management of that conflict differ from one where the institution will not receive a benefit?

Many universities and their professional organizations take the stance that conflict of interest management, through disclosure and oversight is the best way to address individual and institutional conflicts of interest. To date, there has been no study of how judges interpret the conflicts of interest and to what extent these decisions impact faculty autonomy. There has also been little research conducted on exactly what types of conflicts become litigious or why some become litigious and others do not. For example, given the complex and often conflicting nature of institutional and individual conflicts of interest, at what point does an inter-university matter move from institutional management to the courtroom? This study addresses these gaps in the literature.

Specifically, this study focuses on case law decided since 1980 concerning universities and conflicts of interest, at both the individual and institutional levels. For the purposes of the institutional conflict section, it will also include a discussion of AAU conflicts policies as they are the elite, trendsetting institutions. The AAU members are leading the commercialization

effort, have a significant number of startups, receive millions of dollars in licensing revenue annually, and therefore, are a group whose policies are appropriate for this type of study (Slaughter, Feldman, and Thomas, 2009). However, the institutional conflicts section is not be limited to AAU universities but will include any and all institutions named in institutional conflict lawsuits.

For purposes of the individual conflicts of interest section, this paper includes a discussion of legal issues associated with the lawsuits, specifically the First Amendment, academic freedom, defamation, the False Claims Act and dual employment. Instead of being analyzed by the policy taxonomy, the individual conflicts cases are categorized according to what type of legal issue is argued. For example, all cases decided under the First Amendment are grouped together as are all cases involving the False Claims Act, defamation, intentional interference with a contract, dual employment, and nepotism. The study's results provide scholars and practitioners with a significant amount of new information related to legal issues associated with commercialization and conflicts of interest.

Need for the Study

There is a significant need for more study into university commercialization and specifically the conflicts of interest that occur within the commercialization process. A legal analysis of conflict of interest cases help to provide crucial missing information so that higher education scholars and policymakers can conduct better research and implement better policies. There have been no studies directed at understanding how the judicial branch interprets conflict of interest policy language when it is related to university-industry relationships or how interpretations of federal regulations or state statutes impact conflicts of interest policies. Similarly, there have been few studies concerning how conflict of interest management, whether

institutional or individual, impacts faculty autonomy. This study addresses these gaps in the literature.

There are several important pieces of information that are highlighted by this legal analysis. For example, who seeks redress when conflicts of interest are alleged or mismanaged and to what extent are faculty, administrators, or trustees protected by qualified immunity/indemnification or the institution by sovereign immunity?[4] Other questions that are answered are: what are the specific facts that can bring about conflicts of interest litigation and, perhaps most interestingly, how is faculty autonomy impacted by these decisions, including cases that impact an individual's First Amendment rights? Further, how do the cases impact universities' ability to manage faculty work, either through increasing administrators' managerial authority or providing incentives/disincentives for faculty to participate in commercialization? Case law is highly fact intensive and the courts' opinions will help shed significant light on how a conflict of interest forms, is managed, and what happens to cause the management to become litigious. Perhaps most importantly, such an analysis sheds light on specifically how universities and faculty are attempting to manage the conflicts of interest. Pertinent questions include: if faculty and university administrators are the ones who can profit as well as the ones who manage, can adequate management really occur? In addition, what do judges and lawmakers say about this type of self-management? Additionally, some scholars categorize faculty violation of a conflicts policy as moral turpitude worthy of tenure revocation and this study would shed light on how often (or if) conflict related tenure revocation has occurred and become litigious (Poskanzer, 2002).

[4] Public institutions may be protected from liability under the doctrine of sovereign immunity while private institutions may be protected under their state's charitable organization statute. To what extent either is protected when a conflict of interest occurs, however, is unknown.

Important for this study and the larger discussion of university-industry collaboration is the idea that there is a significant amount of industry money crossing into and out of academic institutions, university affiliated companies, and university employed individuals. Also important is the fact that research conducted with this money may bring about questionable results or improper influence over the research. Boyd and Bero (2000) states that about $1.5 billion industry dollars flow into academic institutions and as many as 28% of life sciences faculty report receiving funding from private sponsors. Boyd and Bero (2000) also cites studies that show an association between single-source sponsorship of clinical research and publication of results favoring the sponsor's product. A similar study shows that unfavorable results of economic analyses of oncology drugs are less likely to be reported when the study is funded by a pharmaceutical company (Boyd and Bero, 2000). Lesser, et. al. (2007), in a study of nutrition related scientific articles, found "that scientific articles about commonly consumed beverages funded entirely by industry were approximately four to eight times more likely to be favorable to the financial interests of the sponsors than articles without industry-related funding" (Lesser, et. al., 2000, p. 44). Boyd and Bero (2000) further states, "(f)aculty researchers receiving research support from industry are also more likely to restrict their communication with colleagues than faculty not receiving industry sponsorships, and many faculty who receive gifts from corporate sponsors are subject to prepublication review or data use restrictions" (Boyd and Bero, 2000, p. 2209). These and other studies call into question normative assumptions of faculty behavior, specifically the idea of a disinterested search for the truth. Other studies indicate similar results. Krimskey et. al. (1996) found that 34% of articles published in 14 leading biology and medical journals in 1992 had at least 1 lead author with a financial interest in a company with activities related to the published research, although virtually all of these interests were undisclosed in the

articles (Cho et. al. 2000). Similarly, Cho et. al. (2000) states that "there is a growing body of literature showing that faculty who have industry ties are more likely to report research results that are favorable to a corporate sponsor, are more likely to conduct research that is of lower quality, and are less likely to disseminate their results to the scientific community" (Cho et. al., 2000, pp. 2203-2204). In a study of corporate conflicts of interest, Hayward and Booker (1998), using resource dependency theory found auditor ratings were more favorable when important resources were at stake, "especially when the ratings were timely for corporate finance" (Hayward and Booker, 1998, p. 17). These and other articles show that a primary professional interest, namely research integrity, is being called into question by academic-industry collaborations and the associated individual conflicts of interest. Similarly, institutional integrity may be compromised by conflicts of interest, especially when the structures designed to manage them (e.g. IRBs or administrators/trustees) may abdicate their oversight role in favor of ensuring the success of potentially profitable research. The extent to which these issues become litigious and the specific facts that led to the litigation are examined in this study.

Commercialization and conflicts of interest are becoming more important in higher education because they are increasingly being institutionalized and becoming permanent fixtures on research university campuses. The institutionalization of university-industry relationships can be "characterized by the creation of technology transfer offices, the review of university missions, and the standardization of contracts, patent support and the development of public relations strategies" (Crespo, 2007, p. 84). Crespo (2007) also suggests that there are three phases of institutionalization of university-industry relations beginning with faculty development of practical applications and ending with the consolidation of a collaborative network between university and industry. There is clearly an increased cooperation between industry and

academia, bringing increased university bureaucratization in order to manage the cooperation. The results of this collaboration can involve state funded research foundations or similar arms-length organizations designed to facilitate the movement of university created knowledge to the market and, arguably to get around relevant conflicts of interest statutes, policies, and regulations.

Another outgrowth of this institutionalization is what Gary Rhoades calls Managed Professionals and increased administrative control over faculty work (Rhoades, 1998 and Rhoades, 2000). The result of this control is found in McSherry (2001) where conflicts of interest disclosures are described as a "threat" or a "nuisance" and indicative of administrative interference with both the progress of science and faculty autonomy (McSherry, 2001, p. 156). Lipton, Boyd, and Bero (2004) verifies this position in their study where they found faculty members held "complex often contradictory" feelings about academic-industrial relationships (Lipton, Boyd, and Bero, 2004, p. 85). Their study, of 1,971 (779 respondents) faculty members at 9 University of California campuses, resulted in very interesting findings concerning faculty members understanding of conflicts of interest policies and procedures. They found that "only 8% described the federal, state, and campus regulations accurately" (Lipton, Boyd, and Bero, 2004, p. 89). With regard to impacting their own research, "about 80% of the respondents felt their campus' COI policy had neither helped nor hindered their research endeavors" (Lipton, Boyd, and Bero, 2004, p. 90). The authors also found that several themes emerged from their data. One such theme suggested that faculty members should self-regulate their own conflicts of interest. A second theme, interestingly, related to the irrelevance of the policies for faculty members who are not engaged in sponsored research or who do not have financial ties with their sponsors. The authors note a significant problem with the findings, in that "given the overall

poor level of understanding that many faculty have about the details of the policies…assumptions about their irrelevance are troubling" (Lipton, Boyd, and Bero, 2004, p. 99). Faculty misunderstanding of university, state, and federal policy raises significant potential for litigation related to conflicts of interest. For example, if a faculty member believes that the policies are not relevant or if he does not understand the procedures involved he may fail to abide by those policies. This may result in discipline. As a result of that discipline, the faculty member may sue. This litigation serves as the basis for this study.

Campbell (1997) studies internal equity issues and how researchers in fields away from the market (compared to those closer to the market) feel about a market based reward structure. While she did not find any significant negative feelings, she noted the "unrealistic" expectations faculty members held regarding adherence to traditional norms while also engaging in activity with industry (Campbell, 1997, p. 374). Given this increasing tension, these "unrealistic" expectations may manifest themselves in realistic problems when (not if) some explode and result in litigation. A study of the factual allegations in court cases provides evidence of this threat to autonomy, additional proof of the institutionalization of commercialization, and the impact that significant financial returns have on the management of conflicts. It, as well, helps to provide evidence of the result of unrealistic expectations as faculty members are torn between traditional academic norms and engaging with industry.

Federal policy, through 42 CFR Section 50, dictates uniform responsibility for attempting to address the concerns related to academic research integrity. Such uniformity in policy, however, results in significant variation in practice (Lo, Wolf, and Berkeley, 2000 and McCrary, et. al., 2000). Specifically, federal policy dictates that "the institution is responsible for determining whether the investigators' financial interests would have a 'direct and significant'

effect on the design or reporting of the research…" (Boyd and Bero, 2000, p. 2212). This means that the university is the entity primarily responsible for recognizing and managing conflicts of interest. Grant recipients of federal funding, specifically NIH and NSF "are required to disclose to their institutions annual income in excess of $10,000 or equity ownership exceeding 5 percent in a company whose financial interests would reasonably appear to be affected by the research" (Cho, et. al., 2000, p. 206). One criticism against this federal rule is that the CFR regulation "is limited in scope because it requires disclosure only to institutional officials, not to the public" (Cho, et. al., 2000, p. 2204). This policy was designed with the intent of "making possible conflicts of interest among investigators known to their specific institutions and federal funding agencies" (Boyd, Lipton, and Bero, 2004, p. 206) but does very little to inform the public or peers of the conflict. Such a disclosure policy will not adequately address institutional conflicts, specifically where the organization can profit from research results primarily because it requires that the institution prohibit itself from engaging in activity that may bring significant revenue. This is an unrealistic expectation. Another criticism against the federal regulation is that studies show the policy's income and equity requirements do not catch a majority of potential individual conflicts. For example, any conflict of interest that occurs but is under the $10,000 or 5% threshold would not be disclosed under federal law (Boyd, Lipton, and Bero, 2004). State law and institutional policy, however, often supplement federal policy and some have a lower threshold for disclosure. States often have different statutes regulating different groups (e.g. trustees, administrators, or faculty) and even different institutions within the same state can have different conflict policies and procedures. This can lead to problems when scholars attempt to research the impact of conflict of interest policies and procedures because any additional

requirement beyond the federal prescriptions would require case-by-case, institution and state specific analysis.

Overall, it is fairly clear from the literature above that commercialization of academic research is increasing, as are individual and institutional conflicts of interest. Higher education scholars accordingly are putting more research into understanding this phenomena and a legal analysis is an important piece of this research. This analysis sheds light on how individual conflict management is impacting faculty autonomy and specifically issues related to the First Amendment and academic freedom. It also shows how individual conflicts of interest may be strategically managed by the institution, utilizing judicial deference given to universities. This strategic management is conducted in order to maximize revenues on "good" conflicts (those that bring revenue) while eliminating "bad" conflicts (those that compete with the institution's interest). Finally, this analysis showcases the problematic nature of traditional institutional conflict management, which relies on disclosure and management. As will be noted, the individuals responsible for management (trustees, administrators, or institutional review boards) are often not even able to recognize the various conflicts of interest at issue, much less are they able to manage them.

Research Questions

The questions involved in this study primarily revolve around case law, state statutes, federal regulations, and individual/institutional conflicts of interest policies. The first two questions break down the conflicts into institutional and individual, examine how courts have treated them, and what types of facts bring about the litigation. The third question examines the impact that these decisions and institutional bureaucracies have on faculty autonomy as the institution seeks to maximize revenue and efficiency. The final question is highly fact intensive

as I examine how individual conflicts of interest become litigious. Specifically, this study examines the facts accepted by the courts in order to determine if there is a pattern of management policies or procedures that are more likely to lead to litigation.

Overall, the questions that will be answered in this study are:

1) How do judges, through case law, address individual conflicts of interest?

2) How do judges, through case law, address institutional conflicts of interest?

3) What impact does university management of individual conflicts have on faculty autonomy?

4) Using the facts of the individual cases, how do universities manage conflicts of interest and what causes management to result in litigation?

Significance of the Study and Limitations

As noted above, this study is significant because it addresses several important policy based issues, primarily university commercialization and conflicts of interest in a way that previous studies have not. Further, this study is useful to policymakers, scholars, and practitioners in that it presents specific conflicts of interest, the management of those conflicts, and how the management failed, thus resulting in litigation. This study also addresses the impact that conflict management has on faculty autonomy and specifically notions of academic freedom and the First Amendment. Related to faculty autonomy, this study also reviews the cases to determine what, if any, incentives or disincentives are present to ensure faculty's participation in conflict management.

There are several limitations that must be addressed. As with any legal study, the primary requirement is that there is case law relevant to the subject. Universities, as with many organizations, do not like to be sued and will often settle out of court prior to any lawsuit being filed or before any verdict is rendered. Similarly, individual faculty may not like to report a

fellow colleague's unreported conflict of interest. Thus, this study is limited to instances where a suit has actually been filed and judgment has been rendered. Another limitation is the change that occurs in state law which, over time can alter the ways in which universities do business with private industry. Thus, while there is be some discussion of state law and university policy, one should conduct further investigation to determine if any of these have changed before assuming that the legal analysis contained within the paper is applicable within their state. Finally, I accept the facts as they are accepted or reported in the opinion. These may be different than the facts as they actually occurred or how one party perceived them to occur. However, given that they are the facts on which the decision was based, they are relevant for a discussion of case law.

CHAPTER 2
LITERATURE REVIEW AND THEORITICAL BASE

In general, "research on entrepreneurship has largely fallen into two camps –an individual focus that emphasizes the motivations, experiences, and attributes of entrepreneurs, and a structural perspective that underscores the circumstances that afforded opportunities or access to resources and environments rich with institutional support" (Colyvas and Powell, 2007, p. 223). Research into technology transfer and specifically conflicts of interest has increased over recent years due largely to press reports, political interest, and the increasing institutionalization of academic-industrial relationships. Academic capitalism is prominent in the answering all four research questions as this is theory that helps to explain how universities are engaging various markets. Rhoades' managed professionals concept is used to analyze individual conflicts within questions three and four as this helps to explain managerial encroachment on faculty autonomy.

Academic Capitalism

The theory of academic capitalism is the primary theory that is used in this study, for both individual and individual conflicts of interest. This theory, utilizing a strategic choice method of organizations (Peterson in Gumport, 2007) analyzes the blurring boundaries between markets, states, higher education and networks of actors who move among these boundaries (Slaughter and Rhoades, 2004). These networks, "that link institutions as well as faculty, administrators, academic professionals and students to the new economy" tied with "new investment, marketing and consumption behaviors" are the focus of academic capitalism

(Slaughter and Rhoades, 2004, p. 15). Close to the market departments often participate in market or market-like activity to increase personal and institutional prestige as well as to gain access to new resources.[5] This behavior is encouraged by state and federal legislation. For example, between 1997-2002 "approximately half of the states have adjusted their conflict of interest laws so that universities, as represented by administrators, and faculty, as inventors and advisors, can hold equity positions in private corporations even when those corporations do business with universities" (Slaughter and Rhoades, 2004, p. 17, citing Schmidt, 2002). This study will examine whether or not these changes have resulted in more litigation as well as the extent to which university members are active participants in commercialization and litigation. Interestingly, however, conflicts of interest policies attempt to limit what is perceived as too close a relationship between academe and corporations, despite the fact that "a successful patent program demands faculty and institutional market involvement" (Slaughter and Rhoades, 2004, p. 105). The question becomes, when individual, institutional, and corporate interests combine, how do conflicts of interest policies, as one of the only mechanisms for limiting behavior, address the potential problems? The (once perceived) boundaries between academe and the market are becoming little more than imaginary lines in laboratories where academic work takes place on one side, corporate work on another and the line of demarcation is no longer easily definable. Interestingly, authors note that "(t)he proliferation of conflict of interest language and rules in the policies is another indication of the death of disinterestedness" (Slaughter and Rhoades, 2004, p. 103). A disturbing trend within this context is that several states have exempted intellectual property contracts between universities and industry from freedom of information requests (Schmidt, 2002), thus making discovery and analysis of these agreements,

[5] This perception is different from previous theories which often portrayed academia as a victim of university commercialization and not as a leading proponent.

including the relevant networks, difficult, if not impossible. The theory is not limited to university research, but is also used to explain all market-like behavior, including that directed toward the students, communities and faculty members. It is, however, the most pertinent theory with which to discuss individual and institutional conflicts of interest within the commercialization of research.

The most attractive and relevant parts of this theory, for the purposes of conflict of interest, is the focus that it places on networks that cross the traditional public-private boundaries and the emphasis it places on the increasingly fuzzy nature of those boundaries. Faculty, administrators, and members of industry who make up a significant portion of the individuals involved in academic-industrial relationships are involved in these networks. "Interstitial organizations" are often created to help enable academic-industry agreements (Slaughter and Rhoades, 2004, p. 306) and are included in these networks. Boundaries between academe and industry are no longer dictated by the employer/employee relationship or governed by Mertonian norms, but instead, are amorphous networks of people and organizations. In fact, the very idea that universities and the states are emphasizing ownership of intellectual property, so that it can be bought or sold, is directly opposed to several Mertonian norms. Conflict of interest policies provide the limits of acceptable university/faculty involvement with industry and therefore are important to study. They are, however, often drafted by institutions or organizations (universities, its administrators, or legislators) that have a potentially significant financial interest in the success of a university's commercialization efforts. The fuzzy nature of academic-industrial boundaries means that a legal analysis proves very useful in order to determine how organizations and individuals (e.g. trustees, administrators, faculty, or interstitial organizations)

become involved in conflicts of interest, how the conflicts and people are managed, and who are the winners and losers when institutional management occurs.

Similarly, academic capitalism rightfully disagrees with the traditional notion of organizational theory and its required focus on “the” or “these” organizations. Conflicts of interest do not always occur between two separate organizations (e.g. university and a private company) but can also occur within interstitial organizations. This changes the analysis from examining the behavior of boundary spanning organizations to examining individual behavior within those (or the intermediary) organizations, or both. A legal study examines the individual and organizational behavior through a fact intensive analysis of case law. A legal study also highlights the extent to which universities and faculty members are actively participating in market and market-like activities. Through examining case facts, the resulting decision, and the impact that the conflict policy has on the decision this study examines how universities are utilizing law to maximize commercial activity and in turn maximize the management of their faculty members.

Managed Professionals

In his 1998 book Managed Professionals, Gary Rhoades discusses the concept of faculty as managed professionals. This idea, in concert with academic capitalism, is used to address individual conflict of interest case law. Although his specific book is devoted to a study of unionized faculty, the principles it contains concerning the restructuring of academic labor are relevant to the application and analysis of judicial decisions. Through the process of academic capitalism and an increasingly complex organization, managing professionals are becoming an institutionalized part of academic life. Courts primarily utilize the employer/employee relationship when adjudicating university related issues and this allows universities and

administrators significant deference when it comes to many traditionally academic decisions. This increased managerial discretion leads to faculty becoming more and more managed and this study will showcase how judicial decisions concerning individual conflicts of interest increase the authority that administrators and new bureaucratic structures have on faculty work.

A major premise of the managed professionals concept is that the terms of faculty labor are being renegotiated as managers reorganize colleges and universities. One of the primary causes of the renegotiation is an increased emphasis on efficiency and revenue generation as university managers reallocate time and resources to strengthen the institution's ties to various markets (Rhoades, 1998). Through this process administrators have sought, and largely received greater flexibility to reconfigure and control the academic workforce. Also impacting faculty autonomy is the increasingly complex nature of the academic organization. Faculty do not often have control over the budget, salary ceilings, or employment policies yet they are subject to them as employees. Relevant to the discussion of academic capitalism, faculty are usually required to assign to the institution their rights in all intellectual property created at their institution or funded with federal dollars. This requires that non-faculty monitor, control and manage faculty research. Recent legal and technical developments in fields like biotechnology, micro-computing, and software allow universities to more quickly get faculty created property to the market, providing yet another incentive to control and monitor faculty work (Rhoades, 1998). The issue primarily boils down to the idea that universities, in an effort to increase revenue and prestige, are allocating resources to specific areas within the institution so that administrators may maximize efficiency and accountability and this largely results in increased management of individual faculty members.

The managed professionals concept is very relevant for a discussion of legal cases related to individual conflicts of interest. Primarily, it must be remembered that legally, faculty are salaried employees of the employer university. This means that, at least as far as the law is concerned, they are managed professionals who must abide by the contracts and regulations that accompany their employment. Universities, as the employer, have significant discretion in dealing with employees, employment structures, and personnel processes. Courts often are deferential to the institution when it comes to decisions concerning these issues. University administrators may strategically utilize this judicial deference in order to more closely manage faculty members. Such strategic use will infringe on traditional academic notions such as academic freedom, the First Amendment right to free speech, or control over faculty time/work. It also may result in administrators quashing undesired activity (such as that which does not bring revenue to the university or becomes problematic for revenue generation) while allowing similar activity that does bring in revenue to continue.

Both theories play out in the data as it becomes clear that state statutes and university policies designed to limit dual employment only do so when that secondary employment is contrary to the interests of the state. The limitation has nothing to do with the individual conflict of interest at issue but simply, whether the conflict is in line with or opposed to the interests of the state or the institution. Similarly, the various prongs associated with First Amendment case law give universities, and all public employers, significant deference to determine the potential disruptive impact of the speech and ability to control what an employee says within her official duties as a faculty member. When the issues of conflict of interest and official duties meet in a First Amendment case, the university, as the employer, is allowed significant deference to control what the employee says pursuant to her official duties. If the university finds the

statements problematic then it may then sanction the employee, including and up to termination. Whether or not faculty members acknowledge it, they are managed professionals and this becomes clear within the analysis of individual conflict of interest cases, specifically those related to dual employment and First Amendment/academic freedom claims.

Empirical Research

Much of the empirical work on conflicts of interest is descriptive statistics about potential conflicts of interest, data withholding, or variation within management and disclosure of conflicts. While primarily descriptive, this work provides tangible evidence of the existence of conflicts of interest and tensions on traditional academic norms. The empirical research demonstrates the chain of events in academia imparted through conflicts of interest. Specifically, the research utilizes survey and interview data of faculty to illuminate conflicts, both institutional and individual, how the conflicts are managed by university and federal policy, and the impact of the conflicts on faculty's normative behavior.

Impact of Individual Conflicts of Interest

The first empirical studies demonstrate the significance of individual conflicts of interest and how university policies seek to manage those conflicts. Campbell et. al. (2002) studied data withholding among academic geneticists at the 100 universities with the most NIH research funding. Genetics is an academic area that is close to the market, and therefore should be a good area for study regarding potential conflicts of interest arising from university industry collaboration. The study concluded that, "(d)ata withholding occurs in academic genetics and it affects essential scientific activities such as the ability to confirm published results. Lack of resources and issues of scientific priority may play an important role in scientists' decisions to withhold data, materials, and information from other academic geneticists" (Campbell et. al.,

2002, p. 473). Specifically, “(g)eneticists requesting biomaterials from another academician after a publication were most likely to report having a request denied (35%) compared with requesting sequence information (28%), pertinent findings (25%) phenotype information (22%) and additional information regarding laboratory techniques not included in the publication (16%)” (Campbell et al, 2002, p. 478). The reasons that geneticists gave for withholding information varied fairly widely. Overall, 80% said too much effort was required, 64% to protect a junior person’s ability to publish, 53% for own publishing, 45% financial cost of information transfer, 28% because the recipient would not reciprocate, 27% to honor the requirements of an industrial sponsor, 23% to preserve patient confidentiality, 21% to protect the commercial value of the results. It is arguable that the 27% who abided by the requirement of an industrial sponsor or the 21% who wanted to preserve the commercial value of the research are encroaching on potentially problematic conflicts of interest, at least regarding traditionally normative behavior of university faculty. Notably, “other life scientists were significantly less likely than geneticists to report that data withholding detracted from the progress of their research and the overall level of progress in their scientific field” (Campbell et. al., 2002, p. 478). This does not mean that data withholding does not occur, but only that it does not act as an impediment to others.

Other studies verify that university-industry relationships are compromising traditional academic values and impacting motivations for academic work. Crespo (2007) conducted 28 interviews in 2003 with Canadian university researchers and 5 interviews with TTO officers in order to investigate university industry relationships using a combination of contingency theory and strategic analysis. His analysis provides evidence that university industry collaboration influences faculty motivations and normative behavior. Crespo describes an “entrepreneurial

ethos" taken on by faculty members who have relationships with industry and that these scholars varied in their motivations with one major generality arising from the data, which was "the respondents cite the commitment to ensure quality training for their students and the importance of technological transfer for society" (Crespo, 2007, p. 68). Industry and the monetary investments of industry can also provide motivation for these faculty members as determinants of what research is important or needed by the market. Instead of seeing managing professionals as controlling and limiting academic autonomy, Crespo's respondents felt "technology transfer offices seek to manage the centrifugal forces that tend to veer away from the university's traditional mission and to resolve the problems and conflicts that arise from their presence" (Crespo, 2007, p. 77). Faculty members in their negotiation with industry handled issues related to publication delays and while the delays remain an "irritant" they did not appear to be a significant detriment to these faculty members (Crespo, 2007, pp. 78-79). Finally, faculty members saw the potential benefits of spin-offs (such as new funding to parent research teams as well as renewed research questions) as outweighing the risks associated with the time and cost of managing the new companies. Notably, institutions still address these start-up companies on a case by case basis and there is little in the way of systemic policies or procedures to deal with start-up companies, particularly companies who are (in part) owned by the university. Crespo (2007) and Campbell (2002) provide evidence that individual conflicts of interest are taking place on university campuses and that these conflicts are impacting the way faculty members perceive and conduct their work (see also Krimsky, 1999 and Krimsky, 2003).

Impact of Institutional Conflicts of Interest

In order to help understand institutional conflicts of interest, Campbell, et. al. (2003) sent a questionnaire to over 4,000 medical school faculty members at 121 medical schools to

understand the characteristics of medical school faculty members who serve on institutional review boards in U.S. academic health centers. Although IRBs do not necessarily manage institutional conflicts of interest, this study indicates that conflicts of interest are prevalent within IRB members. Overall, 11% reported they served on an IRB in the three years before the study. (73% male, 81% white.), 94% of IRB members conducted some research in the three years before the study,71% reported conducting clinical research, and 47% served as industrial consultants to industry (Campbell, et. al., 2003, p. 831). Campbell defines institutional review boards as "organizational bodies whose primary mission is to protect human subjects by reviewing clinical research protocols before implementation, approving changes in ongoing research protocols, and responding to adverse events" (Campbell, et. al., 2003, p. 831). Institutional Review Boards have a wider jurisdiction at universities rather than just over human subjects. In many institutions, IRB approval is required for even social science research or use of individual data in aggregation. Interestingly, even though Campbell, et. al. (2003) did not explore financial ties through equity, bonuses, and ownership, they found that nearly half of faculty members associated with university IRBs are consultants to industry. Given that research shows the existence of individual and institutional conflicts of interest, one must then investigate how those conflicts are managed, with specific attention to university policies and procedures. More recent studies suggest that close contact with industry also occurs at the department chair level.

Campbell, et. al. (2007) conducted a national survey of medical school department chairs in order to determine their contacts with industry. The author state, "(t)he attitudes and experiences of department chairs are significant because they manage the primary organizational structure of medical schools and teaching hospitals" (Campbell, et. al., 2007, p. 1779). The case-

law data indicate that, in some schools, department chairs also have the authority to manage faculty members' individual conflicts of interest. The survey's "response rate for clinical chairs was 66.6% (300 out of 450 eligible) and 66.8% for chairs of nonclinical departments (159 out of 238 eligible)" (Campbell, et. al., 2007, p. 1781). The results of the study suggest that many medical school department chairs are involved in relationships with industry. Specifically, "in the year before the survey, chairs had served at a rate of 27% for each category as a paid consultant for a company, as a member of a scientific advisory board, or both; 7% as an officer or executive of a company; 9% as a founder of a company; 11% as a member of a board of directors of a company; and 14% on a speakers' bureau" (Campbell, et. al., 2007, p. 1781). The study also found that "(c)linical chairs were significantly more likely than nonclinical chairs to have served on a speakers' bureau (21% vs 2%)" (Campbell, et. al., 2007, p. 1781). The study also analyzed the compensation received by the department chairs from industry. They found that, "(t)wenty-eight percent of respondents received personal compensation for participating in a meeting, 21% for their own university-based research, 19% for speaking at a CME event, and 16% for travel to attend professional meetings. Furthermore, 6% reported owning equity in companies, and 3% reported receiving personal compensation for writing papers or reports (Campbell, et. al., 2007, pp. 1781-1782). Similar to the variation in participation, there was variation in the types of compensation received by chair. Specifically, "of these various types of relationships, clinical chairs were significantly more likely than nonclinical chairs to have participated as a faculty member or as a speaker for CME activities (26% vs 6%,). Conversely chairs of nonclinical departments were significantly more likely than clinical chairs to receive payments as a result of royalties, licenses, and milestone recognition (20% vs 7%)" (Campbell, et. al., 2007, p. 1782). Problematic for institutional conflicts of interest is the finding that,

"(w)hen considered together, 60% of department chairs had some form of personal relationship with industry" (Campbell, et. al., 2007, p. 1782). At the department level, the study found that "67% of departments… (have) relationships with industry" (Campbell, et. al., 2007, p. 1783). These relationships may impact individual decision making and, as noted in the case law, are often the foundations of conflict of interest litigation.

Conflict of Interest Management

Boyd and Bero (2000) reviewed positive financial conflicts of interest disclosures at the University of California at San Francisco (UCSF) from 1988 to 1999 "to assess the extent to which faculty researchers have personal financial relationships with the sponsors of their research, the nature of those financial relationships and efforts made at the institutional level to address disclosed financial relationships and perceived conflicts of interest" (Boyd and Bero, 2000, p. 2209). UCSF researchers are required to disclose conflicts of interest at levels much lower than federal requirements, $250 in interest instead of $10,000 as set by the NIH and NSF (Boyd and Bero, 2004). Boyd and Bero's 2000 study showed, "(t)hrough October 1999, there were 488 positive disclosures from 225 researchers and 37% of researchers (83/225) had more than 1 positive disclosure; 1 had 28 positive disclosures and most had fewer than 4….the number of positive disclosures increased most dramatically in the last 6 years of the 1990s" (Boyd and Bero, 2000, p. 2211).[6] Throughout the study period, 34% of disclosed relationships involved paid speaking engagements (range, $250-$20,000 per year), 33% involved consulting agreements between researcher and sponsor (range, <$1000-$120,000 per year), 32% involved the investigator holding a position on a scientific advisory board or board of directors, 14% involved equity ownership, and 12% involved multiple relationships (Boyd and Bero, 2000).

[6] Positive disclosures refer to disclosures that implicated a conflict of interest.

The conflict of interest advisory committee recommended managing these perceived conflicts of interest in 26% of the cases, including recommending sale of stock, refusing additional payment for talks, resigning from a management position, or naming a new principal investigator for a project (Boyd and Bero, 2000, p. 2209). As for conflict resolution and management, only 8 cases caused the committee to refuse the research funding, and the committee, after receiving, clarification of NIH regulations later overturned one. Notably, the decision to manage the conflicts increased during the study period, from 15% (1980-1984) to 18% (1990-1994) to 43% (1994-1999) (Boyd and Bero, 2000). While this may not be generalizable to every other research university it does provide tangible evidence that conflicts of interest management has increased in recent years and, arguably has become institutionalized. Clearly, how these conflicts are managed, as well as the policies governing that management, are becoming ever more important. This study will examine how this management becomes litigious as well as how changes in law influence this management.

Cho et. al. (2000) reviews conflict of interest policies at the top 100 research institutions that received the most NIH funding in order to help understand the conflict management process. In her study, Cho was specifically looking for "process for disclosure, review and management of conflicts of interest and specified management strategies or limitations, according to the institutions' faculty/staff conflict of interest policies" (Cho, et. al., 2000, p. 2203). Policy content varied widely across institution. Specifically, Cho, et. al. found: 55% (49) required disclosures from all faculty, 45% (40) required them only from principal investigators or those conducting research, 19% (17) specified limits on faculty financial interests in corporate sponsors of research, 12% (11) specified limits on permissible delays in publication, and 4% (4) prohibited student involvement in work sponsored by a company in which the faculty mentor had

a financial interest. Problematic in these findings are that less than 20% of the policies actually specified ***what*** a conflict of interest is and most left that decision up to a committee or administrator. About 1/3 of the policies (36%) provided specific examples of behavior that was not considered a conflict. Generally, this involved receiving payment for: directorships in organizations unrelated to professional responsibilities; receiving royalties for scholarly work; paid consulting (within institutional limits); professional associations, and providing expert testimony for courts or legislatures (Cho, et. al., 2000). Activities that were generally prohibited by policy were excessive consulting, using university facilities or the university name in consulting, moonlighting, using confidential information for personal benefit, accepting personal gifts from companies with which the university does business, and negotiating agreements with companies in which the individual has a financial interest (Cho, et. al., 2000). Related to publication delay, 11 (12%) of the policies specified a time limit for delay of publication (or presentation of research) to allow review by corporate sponsors or for patents to be filed. This maximum delay ranged from 0-12 months with 8 institutions limiting delays to 3 months or less. Faculty governed by policies without such a clause likely negotiated a maximum delay period in their own individual contracts with industry. Of interesting note, particularly to researchers who study the difference between public and private universities was the finding that "about twice as many private as public institutions had specific limits on publication delay and limits on financial interests in corporate sponsors of research…" even though these differences were not statistically significant (Cho, et. al., 2000, p. 2205).

Research into this topic could help indicate if the difference is due to private schools being in a better negotiation position or if public universities are willing to involve themselves in conflicts of interest in order to keep up with the Harvards. Further expanding on Cho's research

is the idea that while most universities have conflicts of interest policies, many of the policies do not affirmatively state what a conflict of interest is, and only provide scant examples of behavior faculty members should avoid. This is highly problematic given that the reward structure in universities is centered on research and potentially severe measures (loss of funding or interest in personal property) may be implemented by the decision of a single committee. Further, the power to define a conflict of interest allows the university to strategically manage certain individual conflicts of interest. This allows universities to manage faculty, their speech, and their work in order to maximize university profits and prestige. In addition, the primary method of individual conflict management is disclosure to the institution, thus providing the university with the information necessary to strategically manage faculty conflicts.

In a similar project, Boyd, Lipton, and Bero (2004) studied the policies and procedures associated with faculty conflict of interest at 7 of the 9 University of California system schools. Specifically, they reviewed positive financial disclosures from 7 schools from 1996 to 2001. As a group, all "UC investigators are obligated to disclose virtually all of their research related financial disclosures over $250" (Boyd, Lipton, and Bero, 2004, p. 207). Each campus is required "to appoint a committee to review new financial disclosures and to advise the vice chancellor of research of potential conflicts of interest" (Boyd, Lipton, and Bero, 2004, p. 208). The membership of the conflicts' committees varies by university, but "(e)ach conflict of interest committee comprises faculty members and administrators" with participation from a member of the Contracts and Grants Office, Legal Affairs, or Technology Transfer Offices, or the Institutional Review Board. One of the 7 campuses provides for participation from the outside community, with 2 members not affiliated with the specific school (Boyd, Lipton, and Bero, 2004, p. 208). Despite having a similar process across all institutions, "…across campuses,

committees have variable information available to them as they make their evaluations" (Boyd, Lipton, and Bero, 2004, p. 208). This variance was largely due to supplemental information that was required by some campuses but not by others. As for the results, the number of "disclosures varied widely from a low of 15 to a high of 560" which could have been due to the different types and amount of information available to each committee (Boyd, Lipton, and Bero, 2004, p. 209). Specifically related to the four medical campuses analyzed, "the proportion of positive disclosures related to clinical trials (versus other types of research) ranged from 3.4 percent (7 out of 207) of disclosures to29.6 percent (98 of 331) (Boyd, Lipton, and Bero, 2004, p. 209). The financial relationships held by individual faculty members' associated with industry varied across industry type. Roughly 1/3 of the companies were pharmaceutical, 27.5% were biotechnology corporations, 8.3% were education or non-profit organizations, 7.9% were electronics companies, and 5% were computer companies. This highlights the importance of close to the market departments and emphasizes notions of academic capitalism. Conflicts revolved around several types of financial issues and included 54.4 % receiving payment for consulting, 37.7 % were equity holdings, 14.4 % were for talks, 12.7% for scientific advisory board membership, 11.9 % for membership on a board of directors, and 7.3 % for being the company's founder. This supports previous findings regarding faculty members' associations with industry. Important for state and institutional policymakers is the fact that almost 70% of the disclosures that involved multiple relationships with industry were under the $10,000 threshold set by the federal government and would not have been collected but for state and local requirements.

Bekelman, Phil, and Gross (2003) reviewed 1664 studies on financial conflicts of interest in biomedical research of which 37 met the inclusion criteria. They did so in order to review

quantitative studies on how financial conflicts are interest are managed and the impact of those conflicts. Of the 37 eligible studies, 10 addressed the extent of financial relationships, 23 addressed the impact of financial relationships, 8 addressed the management of financial relationships, and 4 addressed multiple objectives.

Of the 10 studies documenting the extent of financial relationships, 8 were cross sectional studies. These studies suggested that 23-28% of academic investigators in biomedical research receive funding from industry. A 1998 study shows 43% of investigators also receive research related gifts. About 1/3 of investigators at academic institutions have some financial ties with industry. A 1992 analysis of 789 medical journal articles found 34% were written by lead authors with relevant personal financial interests in the research. A 1986 survey reported that 46% of life science companies support academic research, going upward to 92% by 1996. AUTM, in 1999, reported that 124 of its 183 (68%) members held equity in businesses that sponsor research performed at the institution. Twenty-seven institutions held equity in more than 10 startups (Bekelman, Phil, and Gross, 2003).

Overall, 23 studies researched the impact that financial ties with industry have on academic research. Eleven of the 23 concluded that industry sponsored research yields pro-industry conclusions. Seven studies investigated delays in publishing. In a 1994 survey of life science companies, 58% required investigators to keep information confidential for more than six months so that industry could file for patents. Another study supports this finding that industry sponsored faculty were more likely to report delays. Other surveys suggest that somewhere between 12%-34% of academic researchers have been denied access to research results. Further, faculty members with industry relationships are more than twice as likely as

those without such funding to take commercial considerations into account when choosing research topics.

Management of financial conflicts of interest was examined in 8 studies. A 2000 analysis of 17 federal agencies reported that only 4 had policies governing extramural researchers. Similarly, 4 studies of academic institutions found significant variation in policies. A survey of 250 institutions found management of conflicts was almost universally discretionary. This type of discretion can easily lead to litigation, especially when there is significant money and prestige involved and no set policies or procedures.

Louis, et. al., (2001) examined the differences in entrepreneurial behavior between clinical and non-clinical faculty in life sciences with industry relationships and any linkage between entrepreneurship and secrecy. A difference between clinical and non-clinical roles can be seen as non-clinical faculty are involved in the beginning of the development process (patents, start ups, or holding equity) while clinical faculty are at the end (testing and reviewing products). Clinical research, as well, is more likely to be supported by industrial research funds. Within the sample, all 847 respondents had received research support or financial compensation with firms who have ties to their expertise. Non-clinical faculty are more likely to hold equity in the company with which they are most involved as well as to be more likely than clinical faculty to be involved with a company that owns or licenses a patent based on the faculty member's work (Louis, et. al., 2001). While non-clinical faculty say that their research has resulted in a patent application, clinical faculty are more likely to have done research that has resulted in a product under review or marketed. As far as funding, clinical faculty receive more grant and contract money from industry and see industry involvement as more important than non-clinical faculty.

Clinical faculty are also more likely to say commercial application and industry funding influence their choice of research topics.

Secrecy when industry is involved is also an issue. Cited studies show that 27% of clinical faculty and 43% of non-clinical faculty said they have been denied requested information and/or materials (Bekelman, Phil, and Gross, 2001). This is similar to other research conducted on confidentiality within academic-industry relationships, which often comes about due to sensitive trade secrets, potential patent applications, or other pecuniary information.

Ehringhaus, et. al., (2008) conducted a survey of medical schools in order to analyze institutional conflicts policies. Overall, "(r)esponses were received from 86 (69%) of 125 accredited US allopathic medical schools surveyed" Ehringhaus, et. al., 2008, p. 668). The study found that "(t)hirty (38%) survey respondents have adopted an ICOI policy covering financial interests held by the institution, 29 (37%) are working on adopting an ICOI policy covering financial interests held by the institution, and 20 (25%) are not working on adopting such a policy or do not know" (Ehringhaus, et. al., 2008, p. 668). This means that, as of the date of the survey, over 60% of the respondent medical schools did not have institutional conflicts policies. The authors go a step further and analyze what types of relationships are covered by the various policies. For the policies governing institutional relationships, "24 (80%) respondents have adopted policies that cover royalties, 22 (73%) cover milestone payments, 27 (90%) cover equity in nonpublicly held companies, 23 (77%) cover equity in publicly held companies, and 22 (73%) cover receipt of substantial gifts from potential commercial sponsors of research" (Ehringhaus, et. al., 2008, p. 668). Unsurprisingly, there were more policies covering institutional level individual conflicts of interest. Specifically, the study noted medical schools adopted "policies for senior officials (55 [71%]), midlevel officials (55 [69%]), IRB members

(62 [81%]), and governing board members (51 [66%]); … with adoption of policies being worked on for senior officials (9 [12%]), midlevel officials (12 [15%]), IRB members (6 [8%]), and governing board members (2 [3%]) (Ehringhaus, et. al., 2008, p. 668). This study helps to verify that medical schools have not implemented adequately institutional conflicts of interest policies. This is especially problematic given the Slaughter, Feldman, and Thomas (2009) finding that, when implemented, many institutional policies do not manage adequately the institutional conflicts at issue. As such, there should be ample litigation concerning institutional conflicts of interest.

The above literature paints a picture suggesting that there may be significant areas where litigation around conflicts of interest may be prevalent. These may include lawsuits between universities and current/former faculty members, between universities and corporate partners, and between faculty members of the same institution. In turn, these lawsuits will likely be governed by conflicts policies, state statutes, federal regulations, or corporate contract provisions. This study examines these lawsuits and the authorities governing the interpretation of the lawsuits in order to provide a more complete picture of commercialization and conflicts of interest in higher education.

All of the above research showcases that conflicts of interest are occurring and are problematic. They do not, however, address many of the factual allegations within the conflicts or study litigation that results because of conflicts. This study analyzes how judges address institutional and individual conflicts of interest, the impact of university management of individual conflicts on faculty autonomy, factually how administrators manage conflicts, and what causes conflict management to result in litigation. In order to answer these questions, this study uses concepts from academic capitalism and managed professionals. Academic capitalism

requires that this study review boundary spanning organizations and individuals as well as institutional action (and actors) as universities participate in market activities. Managed professionals requires that the study analyze faculty members as professionals who are being managed by non-faculty administrators who will utilize laws, regulations, and policies to more closely manage faculty in order to maximize institutional revenue in intellectual property. Using these concepts, I find that universities are engaging in market activity and utilizing court decisions and laws in order to maximize their revenue. In addition, conflict management should differ by the type (and amount) of benefit received by the university. This means that if the university receives revenue from a faculty member's conflicted situation, it is managed differently than a conflict that does not bring in additional revenue. I also find that faculty members are increasingly managed by administrators as management seeks to more closely monitor faculty work in order to maximize university revenue. This results in faculty autonomy, including faculty speech, being increasingly squashed by institutional management. Courts will likely provide universities, as employers, the autonomy necessary to monitor and manage faculty actions, thus playing an important role in making faculty managed professionals.

CHAPTER 3
METHODOLOGY

Rationale for a Legal Design

There are several justifications for conducting a legal analysis. I am a trained attorney and I have the expertise necessary to conduct this type of legal analysis. My previous training has provided me the ability to conduct legal research and to analyze statutes, regulations, and case law as well as the legal ins and outs of policy language. I have, as well, studied under many of the leading commercialization of higher education scholars. They, through both classes and work assignments, helped to provide me with the skills necessary to understand the complexity of commercialization, its impact on normative behavior, and have set the stage so that a legal analysis may be possible.

A legal analysis, as noted above, provides information not before collected to higher education scholars and policy makers and is therefore, an important missing piece within the literature. The information includes factual patterns that indicate management failures that lead to litigation, how changes in law impact conflicts of interest policies, and an analysis of how judges interpret and enforce conflicts of interest policies, statutes, and regulations. It also showcases to what extent conflicts of interest resolution, whether institutional or individual is impacting faculty autonomy or traditional notions of academic work. This includes a discussion of university behavior as they utilize individual conflict management in order to meet their own strategic ends, regardless of the actual conflict of interest at issue. Furthermore, the fact patterns

illuminate the often unseen interstitial organizations, managing professionals, and other structures and individuals designed to facilitate commercial activity or manage faculty work.

Data Collection Procedures

In order to come determine which cases were related to university and conflicts of interest, I utilized Lexis-Nexis Academic. Within the advanced search toolbar, I entered the terms "conflict of interest" and "university."[7] In order to limit my returns to less than 3000 results (the maximum allowable by Lexis) I entered date restrictions in 10 year increments. For example, my first search for case law was limited to "the last ten years" and returned 2,340 total results. My next date limitations were from October 1, 1988 to October 29, 1998 (returning 1,377 results) and January 1, 1980 to October 1, 1988 (715 results). Overall, my search results returned 4,432 total cases with the terms "conflicts of interest" and "university" for cases decided between January 1, 1980 and October 29, 2008.[8] I also conducted a search for law review articles using the same terms and utilized all relevant cases in those articles (14 cases). After reviewing the facts and law of the cases, I narrowed the results down to those that specifically spoke to university related conflicts of interest. I then read each case and separated them into two categories based upon what type of fact pattern was at issue within each case. The two overarching categories were individual conflicts of interest and institutional conflicts of interest.

I collected 14 legal cases that address institutional conflicts of interest. I then categorized these cases according to the typologies listed in the Slaughter, Feldman, and Thomas (2009)

---

[7] This also returned cases with terms such as "conflicts with the interest of", "conflict of interest" or other terms similar to "conflicts of interest."

[8] One of the reasons for such a large number of returns is because for all cases, Lexis-Nexis provides the name of the college or university for each attorney representing the various parties. This means that my results included case law unrelated to university conflicts of interest because I captured cases where at least one attorney graduated from a university and the case mentioned conflict of interest. Westlaw provided similar results.

paper. The specific typology of the cases is: 3/14 are *sand and gravel*, 9/14 are *university as firm*, and 2/14 are *a quid pro quo exchange*. The finding that most of the legal cases involving institutional conflicts focus almost exclusively on fact patterns where the institution is acting as a firm is highly interesting given the Slaughter, Feldman, and Thomas, (2009) paper noting that most AAU universities do not have adequate *institution as firm* policies. This presents a situation, predicted by academic capitalism, where the type of conflict that is most likely to lead to university profits is not properly managed by university policy, and thus may end in litigation. Also relevant for academic capitalism is the importance of interstitial organizations and interlocking directorships. Of the 14 total institutional conflict cases, 8/14 involved interstitial organizations and 6/14 involved interlocking directorships.[9]

I utilized the same methodology from the institutional conflict of interest section in order to collect the individual conflicts cases. Due to my interest in the legal issues related to conflicts of interest, I organized the individual conflicts of interest cases according to what type of claim was made by the plaintiff (usually a researcher/faculty member).[10] Overall, there were 15 cases related to individual conflict of interest. Of the 15 cases, 4/15 related to the First Amendment, 3/15 related to defamation, 1/15 related to intentional interference with a profession, 1/15 related to a False Claims Act, 5/15 were related to dual employment and 1/15 was related to nepotism. In the analysis, I first address the cases where the First Amendment was relevant to the discussion. This requires an initial analysis of First Amendment case-law, including a brief discussion of academic freedom. I then address the cases related to defamation, intentional

[9] As will be explained below, two cases involved both interstitial organizations and interlocking directorships and they were therefore, counted in both categories.
[10] I did not utilize the Slaughter, Feldman, and Thomas (2009) taxonomy for individual conflicts cases. Instead of categorizing conflicts according to that paper, I used the legal issue at bar in the specific individual conflicts case.

interference with a profession and the False Claims Act, each in turn. Finally, I address several dual employment cases and discuss their importance and relevance to the conflict story.

Validity and Ethical Considerations

Validity in this study is assured by the fact that the information that is examined is public in nature, thus readily available to any future researchers, and the accuracy of the computer programs used to search for statutory and case law. Westlaw and Lexus-Nexus are computer programs designed to facilitate swift and accurate searches for case-law or statutory authority. They are used by attorneys and judges nationwide to research legal precedent and are updated on a daily basis. Overall, there is very little substantive difference between the two programs and although I am more familiar with Westlaw, I utilize both programs to ensure that I capture all relevant cases and statutes.

There are no significant ethical considerations in this study. All of the information that I am using is public and therefore, all individuals and facts have been throughouly discussed and are publically available. As well, there are no children, minors, or incapacitated individuals involved in this study and therefore, there is no one who is at risk to be harmed by this research. While it may be possible that some universities do not want court decisions and conflicts policies to be made more public than they already are, I see this as no justification to alter my research plans. For the same reasons (publically available and no at risk participants), I do not consider the case-law factual analysis to be problematic either.

Legal Research Methods

The methodological approach taken in this study consists of a legal analysis with specific emphasis on analyzing state statutes, federal regulations, and judicial rulings concerning university conflict of interest. All three sources (statutes, regulations and cases) are primary

sources of law (Mersky and Dunn, 2002). In order to analyze a statute adequately, "researchers must not merely find the statutes applicable to a problem, but must also find information that will help determine what the statutes mean and how they should be applied" (Mersky and Dunn, 2002, p. 8). First, the researcher should determine the "plain meaning" of the words of the statute and next apply principles of statutory interpretation to its text (Mersky and Dunn, 2002). For example, a "cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes" (Kim, 2008).[11] In essence, a researcher should not cherry pick words in a statute, but instead, read it in context with the statute as a whole, surrounding statutes, and legislative intent. Next, the researcher should determine how courts have interpreted and applied the statute "in extending the law to subjects not expressly covered…"by the statute's text (Mersky and Dunn, 2002, pp. 7-8). For the purposes of this paper, I review some state statutes related to conflicts of interest (for both public and private universities), the relevant cases, and, if necessary, analogous cases where the statute has been applied to factual situations similar, but not identical to that which takes place in university-industry collaboration. Relevant federal regulations are also examined. The Code of Federal Regulations (CFR) "is a codification of rules and regulations…in which all regulations and amendments in force are brought together by subject" (Mersky and Dunn, 2002, p. 262). These regulations are "statements of general or particular applicability made by an agency and are designed to implement, interpret, or prescribe law or policy" (Mersky and Dunn, 2002, p. 259). For the purposes of this paper, 42 CFR Part 50 is a relevant federal regulation describing the policies and procedures related to conflict of

[11] For a more complete discussion of statutory interpretation, see Kim, Y. Congressional Research Service, Report for Congress, *Statutory Interpretation: General principles and recent trends*, August 31, 2008 available at http://www.fas.org/sgp/crs/misc/97-589.pdf

interest for research funded by the NIH or NSF. Case law interpreting these statutes and regulations are also examined. "Researchers and the courts are expected to turn to established judicial authorities and rules of law as the foundation for formulating legal arguments and issuing opinions." (Mersky and Dunn, 2002, p. 21). In order to access these cases, I use online legal research services Westlaw and/or Lexis Nexus. These services "affords several advantages over paper research" especially with regard to access to recent cases, unique search terms, and overall accumulation of information (Kuntz, et. al., 1996, p. 160). Some of these advantages include daily updates of new cases, easy to use search systems, the cases are sorted by the deciding court, and a brief synopsis of many cases.

CHAPTER 4
INSTUTIONAL CONFLICTS OF INTEREST

In the wake of the near meltdown of America's financial sector, policymakers and politicians have held uncounted hearings to determine to which industry blame belongs. In one hearing, concerning the credit rating agencies and their conflicts of interest, Rep. Christopher Shays (R-Conn.), said "When the referee is being paid by the players, no one should be surprised when the game spins out of control."[12] In this context, Representative Shays is referring to the practice where credit rating agencies were paid by the financial entities for providing ratings on what proved to be highly questionable securities. Senator Charles Grassley (R-Iowa), in the wake of various investigations about scientific misconduct and conflicts of interest, including the now famous Nemeroff/Emory[13] scandal, has proposed the Physicians Payment Sunshine Act that would "force universities to play more of a policing role" concerning faculty related conflicts of interest.[14] [15] A fundamental problem with this approach, however, is that it assumes universities are independent and able to manage faculty's conflicts of interest. It further assumes institutions do not have their own conflicts and that these conflicts are not interwoven with or opposed to the conflicts of employed faculty members. As discussed in Slaughter, Feldman, and Thomas, (2009) universities' institutional conflict of interest policies do not adequately manage

---

[12] http://www.washingtonpost.com/wp-dyn/content/article/2008/10/22/AR2008102202311.html
[13] Dr. Nemeroff, former head of Emory's psychology department, allegedly collected $2.5 million from 2000-2007 from pharmaceutical companies, including money from the maker of anti-depressant drug Paxil, but only disclosed $1.2 million to the NIH. He did all of this despite being chief scientist on a $9.3 million grant from the National Institutes of Health to study depression.
[14] Monasterky, R., The Chronicle of Higher Education, October 31, 2008 "Hidden Payments to University Researchers Draw New Fire"
[15] For additional information on the Physicians Payment Sunshine Act see: Steinbrook, R. (2008) Disclosure of Industry Payment to Physicians. *New England Journal of Medicine*. 369:6: pp. 559-561

institutional conflicts, particularly those where the university can financially benefit. These institutional conflicts indeed, in the words of Representative Shays, create situations where the referee is being paid by the players.

This section of the dissertation provides a description of the types of institutional conflicts of interest, the theoretical approach used to interpret the data (case law), and discusses the cases through the lens of each theory. It also includes a brief discussion of trustee liability at private universities because such liability provides a legal limitation on the behavior of the highest ranking institutional officials. As well, the relevant trustee liability cases point to the increased business-like nature of charitable organizations, and thus private universities, and help to frame the rest of the paper. Finally, this section provides suggestions for policymakers and future researchers concerning the mitigation and study of institutional conflicts of interest.

Institutional conflicts of interest generally are situations where institutional integrity may be called into question with regard to the financial holdings of the institution or economic interests of non-researcher, institutional officials. They specifically refer "to situations in which research, teaching, or service are compromised because external financial or business relationships held at the *institutional level* may bring financial gain to units or the institution in form of increased revenues, whether payments or donations, or when external financial relationships have the potential to influence decision making regarding these activities" (Slaughter, Feldman, and Thomas, 2009, p. 4). In response to federal regulations, media reports, and lawsuits, universities are creating institutional conflict of interest policies that, at least arguably attempt to manage the various conflicts that occur. In a recent study, Slaughter, Feldman, and Thomas (2009) collected and analyzed institutional conflict of interest policies from the 60 U.S. AAU universities. The 53 AAU universities that are members of the

Association of University Technology Managers (AUTM) captured 79% of the total licensing revenues and accounted for almost 60% of the startups in 2006 (Slaughter, Feldman, and Thomas, 2009) and thus the data represents the polices of elite and trend setting institutions. Slaughter, Feldman, and Thomas (2009) provide three categories of institutional conflict of interest policies and this typology will serve as the basis for the grouping of legal cases in this section. Specifically, the typology is: "*sand and gravel* in which an officer acts to maximize his or her own self interest; *university as firm* in which institutional officers are economic actors who manage university technology transfer activities to maximize commercial interest; and *exchanges* in which institutional officers engage in broad, unspecified *quid pro quo* arrangements with industry" (Slaughter, Feldman, and Thomas, 2009, p. 4). The Slaughter, Feldman, and Thomas, (2009) study found: 12 of the institutional conflicts policies were minimal, 14 *were sand and gravel*, 9 were "modestly elaborated" *university as firm*, and 8 were elaborated "*university as firm*". The lack of elaborate policies should be of little surprise given that universities and their decision makers stand potentially to make significant financial gain for the institution by engaging in close contact with industry. This study helps to elaborate the complex fact patterns that arise when universities participate in commercial activity. It , as well, showcases the problems behind traditional conflict management and reliance on a case-by-case managerial approach.

Theoretical Approach

Academic capitalism provides the primary theoretical lens for the institutional conflicts of interest section of this study. The theory suggests that commercial activity is driving institutions to use their market position in order to acquire new resources and prestige. It seeks to explain how universities are connecting to various markets. As universities and markets

interact, this facilitates new circuits of knowledge as information or resources pass between the boundaries. Each legal case will help to illuminate these boundaries and specifically the rules that dictate the ways in which knowledge or resources are transferred or allocated. Conflicts of interest policies attempt to limit what is perceived as too close a relationship between academe and corporations, despite the fact “a successful patent program demands faculty and institutional market involvement” (Slaughter and Rhoades, 2004, p. 105) and this study will examine when these relationships or rule changes become litigious.

Methodology

I collected 14 legal cases that address institutional conflicts of interest. The specific typology of the cases is: 3/14 are *sand and gravel*, 9/14 are *university as firm*, and 2/14 are *a quid pro quo exchange*. The finding that most of the legal cases involving institutional conflicts focus almost exclusively on fact patterns where the institution is acting as a firm is highly interesting given the Slaughter, Feldman, and Thomas (2009) paper noting that most AAU universities do not have adequate institution as firm policies. This presents a situation, predicted by academic capitalism, where they type of conflict that is most likely to lead to university profits is not properly managed by university policy, and thus may end in litigation. Also relevant for academic capitalism is the importance of interstitial organizations and interlocking directorships. Of the 14 total institutional conflict cases, 8/14 involved interstitial organizations and 6/14 involved interlocking directorships.[16]

Analytical Scheme

Within each case I followed an analytical framework concentrating on the specific fact pattern with emphasis on university and market actors and structures. It must be remembered

[16] As will be explained below, two cases involved both interstitial organizations and interlocking directorships and they were therefore, counted in both categories.

that each of these cases involve complex fact patterns with transaction built upon transaction, each with its own unique mix of conflicting interests. This complex framework includes actions of trustees or administrators as they act as economic managers for the institution, another organization or themselves. Their actions, as the ground zero for the conflicts of interest, are analyzed. These transactions are complicated by the fact that university trustees and administrators are often covered by liability insurance and/or indemnification agreements and this becomes highly relevant in litigation. This liability insurance, often termed "Directors and Officers" insurance or errors and omissions coverage "typically covers claims for wrongful acts without bodily injury such as employment claims, student discipline, and due process" (Kaplan and Lee, 2006, p. 152). Another way to limit individual liability is through indemnification. Indemnification "refers to an arrangement whereby one party (for example, the institution) agrees to hold another party (for example, an individual officer or employee) harmless from financial liability for certain acts or omissions of that party that cause damage to another..." (Kaplan and Lee, 2006, p. 153).[17] These agreements, as seen in the case law, are means by which trustees or administrators are protected from individual liability. This potential freedom from liability increases administrative flexibility and may cover lawsuits associated with trustee/administrator conflicts of interest.

Policies and procedures implemented to limit conflicts of interest are, where applicable, also analyzed along with organizations that facilitate the conflicts. The discussion of policies and procedures designed to limit conflicts primarily include conflicts policies and Institutional

[17] "In brief synopsis, the mechanism of a typical indemnification will shift to the institution the responsibility for defense and discharge of claims asserted against institutional personnel individually by reason of their acts or omissions on behalf of the institution, if the individual believed in good faith that his actions were lawful and within his institutional authority and responsibility. That standard of conduct is, of course, very broadly stated; and the question of whether or not it is satisfied must be determined on a case-by-case basis" Kaplan and Lee (2006) citing R. Aiken, "Legal Liabilities in Higher Education: Their Scope and Management" (Part I), 3 *J. Coll. & Univ. Law* 121, 313 (1976).

Review Boards. IRBs and conflicts policies are designed to manage what is determined to be too close a relationship between the institution and the market. While IRBs and conflicts policies attempt to limit the relationship, other entities (often university created) are designed to facilitate university/market transfers. The case law indicates that many conflicts of interest involve interstitial organizations (such as technology transfer offices, equity firms or startup companies) or banking institutions as they link universities to various markets. In order to create these links, universities and these entities engage in joint venture agreements, loan agreements, and other contracts. These agreements not only complicate an already complex fact pattern but also help to delineate the rights and responsibilities of each party. They also provide a concrete example of the tensions at work between academic capitalism and university conflicts of interest management.

Due to the complex ties of the transactions and conflicting interests, it is often impossible for trustees or administrators to consider adequately ethical implications of their actions or the actions of others. Without being able to consider the ethical nature of their behavior, trustees and administrators will default to considering simply whether their conduct is legal. This standard, much lower than the ethical standard, will allow trustees and administrators to participate in transactions that may be considered highly unethical yet legal. This framework helps to present each case in a similar manner in order to simplify complex, often contradictory factual patterns.

After addressing the individual fact pattern at issue in each case, I will apply academic capitalism to the specific facts at hand. Academic capitalism helps to explain how universities connect to various markets and the conflicts cases showcase specifically how this connection occurs. For example, each of the cases is in some way the establishment of a rule or a rule change that facilitates the transfer of knowledge or money from universities to a market or visa-

versa. These rule changes will manifest themselves in the cases where the court determines "this" action is acceptable, "that" action is not acceptable, and in awarding various parties discretion over how to operate market-based activities.

Trustee Liability[18]

Trustee liability is important for the larger discussion of legal cases because case law provides a bright line rule that trustees can use in order to help guide their behavior. A discussion of trustee liability also highlights the unique nature of university trustees and how and why courts are treating university trustees like corporate directors instead of like traditional not for profit trustees. In *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries,* et al, a.k.a. the Sibley Hospital case, 381 F. Supp. 1003 (D.D.C. 1974) the United States District Court of the District of Columbia provides "the most widely accepted standard" of trustee liability for a not for profit charitable organization (Harpool, 1998, p. 466). This is relevant to a discussion of university conflicts because most private universities are legally classified as charitable organizations (Kaplan and Lee, 2006). The plaintiffs, a certified class of hospital patients, alleged that hospital trustees "conspired to enrich themselves and certain financial institutions with which they were affiliated by favoring those institutions in financial dealings with the Hospital, and that they breached their fiduciary duties of care and loyalty in the management of Sibley's funds" (*Stern*, p. 1007). The plaintiffs claimed that the defendant trustees engaged in a conspiracy to enrich themselves at the expense of the Hospital by pointing to fact that the trustees held interlocking director positions with the financial institutions where significant amounts of the Hospital's money was deposited. The relationship was complicated

[18] For a more in-depth discussion on trustee liability see: Harpool (1998) Minimum Compliance with Minimum Standard: Managing Trustee Conflicts of Interest, *Journal of College and University Law*, v24 n3 pp. 465-487and the Law and Higher Education, Kaplan and Lee (2006).

because the hospital's deposits were gaining little or no interest once it was deposited in the banks. The plaintiffs also claimed the individual trustees breached their fiduciary duty of loyalty in the management of the hospital's funds.

Although the court determined that there was no conspiracy among the trustees, due largely to the lack of any express agreement concerning the placement of the Hospital's business, the court found that "each of the defendant trustees has breached his fiduciary duty to supervise the management of Sibley's investments" (*Stern*, p. 1013). In this holding, the court discusses the unique nature of charitable organizations and whether corporate or trust principles should apply to trustee liability.[19]

The court recognized that while both trustees and corporate directors can be held liable for loses, the required degree of care for each type of directorship varies. Citing treatises concerning corporate and trust management the court notes "(a) trustee is uniformly held to a high standard of care and will be held liable for simple negligence, while a director must often have committed gross negligence or otherwise be guilty of more than mere mistakes of judgment" (*Stern*, p. 1013). The Sibley court further said that "board members of most large charitable corporations fall within the corporate rather than the trust model, being charged with the operation of an ongoing business" as opposed to, like a trustee, being charged with only the management of the trust fund (*Stern*, p. 1013 citing *Beard v. Achenbach Mem. Hospital Ass'n*, 170 F. 2d. 859, 862 (10th Cir; 1948.). Concerning plaintiff's allegations of non-management, the court states that the role for trustees of charitable corporations is similar to the corporate role in that "directors should at least be permitted to delegate investment decisions to a committee of

---

[19] This corporate standard was affirmed or supported in: *Corporation of Mercer v. Smith*, 371 S.E. 2d. 858 (Ga. 1988), Samuel and *Jessie Kenney Presbyterian Home v. Washington*, 24 P. 2d 403 (Wash. 1933) and *Fowle Memorial Hospital v. Nicholson* 126 S. E. 94 (N.C. 1925).

board members, so long as all directors assume the responsibility for supervising such committees by periodically scrutinizing their work" (*Stern*, pp. 1013-1014). A director or charitable trustee who abdicates this supervisory role may be found liable for mismanagement. This means that that the trustees of private universities will, because of the complex nature of universities, be held to a corporate standard for liability, which is a lower standard than those that accompany traditional trust principles. They are, therefore, less likely to be held liable for acts that would, under a trust concept, impute individual liability. This corporate standard, while providing the flexibility to engage the market, presents significant opportunity for institutional conflicts of interest to arise, ferment, and become problematic.

The plaintiffs also alleged that the trustees engaged in self-dealing activity through agreements with the financial institutions with which the trustees had a financial interest. The court notes that "such transactions (where corporate or trust directors place funds under their control into a bank having an interlocking directorship with their institutions) will be subjected to the closest scrutiny to determine whether or not the duty of loyalty has been violated" (*Stern*, p. 1014). For example, "a deliberate conspiracy among trustees…to enrich the interlocking bank at the expense of the trust or corporation would…constitute such a breach and render the conspirators liable for any losses" (*Stern*, p. 1014 citing *Bentz v. Vardaman Mfg, Co*., 210 So. 2d. 35; 1968). Once again, the court noted the difference between traditional trust and corporate standards for liability. Specifically, the opinion states, "(t)rustees may be found guilty of a breach of trust even for mere negligence in the maintenance of accounts in banks with which they are associated…while corporate directors are generally only required to show entire fairness to the corporation and full disclosure of the potential conflict of interest" (*Stern*, p. 1014). The court, once again, chose to utilize the corporate standard of behavior for trustee liability and

relies upon disclosure as the primary means to manage conflicts of interest.

In its holding, the court determined that a trustee of a charitable hospital organized under the District of Columbia's Non-Profit Corporation Act defaults on the fiduciary duty to manage the fiscal and investment affairs if a preponderance of the evidence shows:

> (1) while assigned to a particular committee of the Board having general financial or investment responsibility under the by-laws of the corporation, he has failed to use due diligence in supervising the action of those officers, employees, or outside experts to whom the responsibility for making day-to-day financial or investment decisions has been delegated; or
> (2) he [sic] knowingly permitted the hospital to enter into a business transaction with himself or with any corporation, partnership or association in which he then had a substantial interest or held a position as trustee, director, general manager or principal officer without having previously informed the person charged with approving that transaction of his interest or position and of any significant reasons, unknown to or not fully appreciated by such persons, why the transaction might not be in the best interests of the hospital; or
> (3) except as required by the preceding paragraph, he actively participated in or voted in favor of a decision by the Board of any committee or subcommittee thereof to transact business with himself or with any corporation, partnership or association in which he then had a substantial interest or held a position as trustee, director, general manager or principal officer; or
> (4) he otherwise failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care (*Stern*, p. 1015).

The court, applying these standards, found that each trustee breached his fiduciary duty to supervise the management of the hospital's investments. The evidence used to support this finding is that each trustee was elected to either the Investment or Finance Committees and none of them examined or supervised the hospital's investments and primarily used the defendant's own testimony against them. As for self-dealing, the court finds "it is clear that all of the

defendant trustees have, at one time or another, affirmatively approved of self-dealing transactions" (*Stern*, p. 1016).[20]

The lower (corporate) standard is evident in the court's final order. The plaintiffs' request that the defendant trustees be subject to harsh sanctions was denied because "the trustees here stand in a different status (corporate)…and the proof does not in any way necessitate sanctions as harsh as those suggested" (*Stern*, p. 1018). The plaintiff's request for damages/sanctions was based on a presumption the trustees were liable under the trust standard. When the court chose to apply the corporate standard for liability, the harsh sanctions that accompany trust violations were no longer applicable. The court, therefore ordered the trustees to adopt policies governing investment of the Hospital's assets, disclose affiliations with any financial organization doing business with the Hospital, communicate with each other concerning business conducted between banks and the Hospital, conduct audits including a written summary of business conducted between the banks and Hospital, and that each trustee shall read the order of the court.

It is clear that this decision and its progeny are predictable by academic capitalism in several important respects. Primarily, the opinion privileges market activity by allowing university trustees to interact with the market with very little oversight. In doing so, the case law provides private university trustees with a significant amount of autonomy because of the business-like nature of their enterprises. The cases acknowledge that trustees are more akin to CEOs than traditional trust managers and their universities are more similar to business operations than not for profit enterprises. The additional discretion that comes with being a

[20] See also: *Bakalis v. Board of Trustees of Comm. College District No 504,886*, F. Supp. 644 (N.D. Ill. 1995), *Student House Inc. v. Board of Regents of Regency Universitie*s, 254 M.E. 2d. 496 (Ill. 1969) and Kaplan and Lee (2006).

CEO, as opposed to a trust manager, allows university trustees to interact with the market in ways that are impermissible under traditional trust law. This means that conflicts of interest are permissible, so long as they are managed, (e.g. disclosed) and interactions between trustees and the market will be measured on a scale that allows the discretion for increased collaboration. For the purposes of academic capitalism, the new rule established in this case is that trustees of private universities will be held to the corporate standard of liability (e.g. the lower standard) when conflicts of interest are at issue. This rule privileges trustees by allowing them to be involved in conflicts of interest so long as they disclose to each other the nature of the conflict at issue.

Institution as Firm

Institution as a firm conflicts cover certain behavior taken by the university as a whole, high level administrators, or other non-research personnel. Specifically, the definition of an *institution as a firm* conflict is when "institutional administrators act as corporate rather than academic managers... (and) become economic actors, seeking to maximize revenues (Slaughter, Feldman, and Thomas, 2009, p. 5). Examples of institutions acting as firms include licensing intellectual property, holding equity in companies, creating and financing spin-offs, and forming interlocking directorships with corporate entities in which the university has an interest. These conflicts are also the type that may provide the most profit to universities and their administrators through negotiation of licensing revenue, paid interlocking directorships, equity positions, and loan agreements. Examples of potential conflicts can be quickly gathered simply by conducting a Google news web search for "university conflicts of interest." These include situations where universities invest with banking institutions affiliated with trustees or administrators, the university taking an equity stake in companies (in exchange for licensing an

intellectual property), or university officials engaging in contract negotiations where one or more individuals sits on both sides of the table.

Using academic capitalism, there are several types of fact patterns that emerge from the data. Perhaps the most obvious scenario is one where a university or university official seeks to engage with market actors in order to, among other things, increase personal or university revenue. The relationships between industry and universities are often forged through interstitial organizations whose primary responsibility is to facilitate the transfer of intellectual property or information from one organization to another. As noted through the cases below, nearly every one of the *institutions as firm* cases involved an interstitial organization.[21] Similarly, academic capitalism suggests that university officials may involve themselves in interlocking directorships with industries with which they or the institution have an economic interest. Finally, academic capitalism forwards the idea that universities view legal behavior as acceptable behavior, regardless of the behavior's ethical implications. The primary reason behind this idea is due to the complex nature of the agreements and conflicts. The complex fact patterns create situations where administrators and management are unable to determine ethical action and therefore default to the lower legal standard. As noted in the case law, this changes the appropriate question from 'what *should* the institution/individual do" to "what *can* the institution/individual do."

Data

Of the 14 cases collected for this section of the dissertation, 9 proved to be *institution as firm conflicts cases*. In analyzing the cases, I utilize the analytical scheme laid out earlier in the

[21] For the purposes of this paper, interstitial organizations are defined as entities that emerged after the passage of Bayh-Dole and facilitate university products or consumers to various markets. This includes but is not limited to technology transfer, economic development, or intellectual property/copyright management offices.

paper. It must be remembered that the fact patterns themselves are highly complex, with overlapping agreements, laws, and conflicting interests. The first analysis in each case discusses the actions of the trustees or administrators which led to the conflicts. This may involve a discussion of indemnification or insurance and the relevant policies or state law governing the issue will be addressed. Also, in almost every case an interstitial organization or banking entity plays an important role in facilitating academic capitalist behavior. They, therefore, become a part of the conflicts story and often are a centerpiece to the overall discussion. Finally, the policies and procedures as defined in Slaughter, Feldman, and Thomas (2009) paper are presented in order to illuminate the problems with traditional conflict management and assumptions that cannot stand against such complex transactions.

Overall, the cases paint a picture where university actors become involved in questionable commercial activities and are often unable to understand competing interests, much less maintain an adequate separation of these interests. These cases also suggest a problem with the fundamental assumption of conflict management in that, if universities and university decision makers are involved in conflicts of interest, how are they able to adequately manage them?

In an interesting *institution as a firm* conflict case, *Harris vs. Howard University, Inc.,* 28 F. Supp. 2d. 1 (D.D.C. 1998) presents a factual pattern that resulted from a university vice-president's position on the board of a failing bank. This case, legally a matter of indemnification, is highly relevant because it relates to an interlocking directorship between a university trustee and a failed bank.[22] It is an *institution as a firm* conflict because the University had an interlocking directorship with a bank in which it deposited a significant amount of money.

[22] For a discussion of interlocking directorships between corporations and university trustees see; Playing the Board Game, Pusser, Slaughter, and Thomas, *The Journal of Higher Education*, Vol. 77., No. 5 (September/October 2006).

In this case, there is an additional conflict between university administrators as indemnification of an administrator will cost the institution a significant amount of money.

As noted above, indemnification is an agreement between a trustee/administrator and the institution whereby the institution agrees to provide a legal defense or otherwise hold the individual harmless for losses incurred because of damage to a third party. Specifically, the doctrine "refers to an arrangement whereby one party (for example the institution) agrees to hold another party (for example, an individual officer or employee) harmless from financial liability for certain acts or omissions of that party that cause damage to another..." (Kaplan and Lee, 2006, p. 153). These types of agreements may have an effect on the behavior of trustees/administrators as they engage in academic capitalist activities. As universities and potentially taxpayers pick up the tab for damages, indemnification agreements essentially allow high level university managers to engage in behavior with little regard to potential litigation and its costs. In this case, Harris as the former trustee is suing Howard University seeking indemnification by requesting an order that Howard pay him money he lost due to the FDIC's investigation of a bank that failed while Harris was a director.[23]

Harris claims that, as Vice President for Business and Fiscal Affairs and Treasurer of Howard University, "he served on United National Bank's board at the request of the University president…to represent the University's interests as a major depositor and stockholder in UNB, and to implement the University's policy of supporting banks in the minority community" (*Harris*, p. 4). The University claims that Harris is not entitled to indemnification because he "did not serve on the UNB Board at the request of the University and was not an officer or

[23] Many indemnification issues are handled without court order. For example, Howard could have chosen to provide Harris indemnification that would have likely resulted in Howard negotiating and settling with the FDIC at no cost to Harris. However, due to disagreements with legal requirements of when and how to apply indemnification, Harris settled with the FDIC and then sued in order to recoup his damages from Howard.

managing agent of Howard University after June 30, 1987" and because "he failed to satisfy the standard of care required by the Bylaws" (*Harris,* p. 4).[24] While the indemnification issue is one of interest to the legal community, the fact pattern that emerges from this case, specifically related to the internal discussions of the Howard Board of Trustees concerning conflicts of interest, is primarily what is relevant for this study.

In 1991, Office of the Comptroller of Currency declared UNB insolvent, appointed the FDIC as receiver, and considered assessing civil penalties against Harris for regulatory violations. They ultimately decided not to pursue Harris at this time. In 1994, however, the FDIC again threatened actions against Harris. Specifically, the claims were related to "losses incurred on eighteen loan participations purchased by UNB, and losses incurred by UNB in 1986 and 1987 in connection with an indirect automobile loan program…" (*Harris,* p. 4). Harris then sought indemnification from the University, which was denied, and in December of 1995, Harris agreed to settle with the FDIC for $80,000 but admitted no wrongdoing. Harris then filed suit against Howard seeking $80,000 plus defense costs in connection with all investigations resulting from his directorship with UNB.

In 1971, the president of Howard University was contacted by members of the Nixon administration who requested that Howard seek one or more local financial institutions in which to deposit its funds. This was related to the administration's policy of assisting minority controlled businesses. Later that year, the Board of Trustees agreed to use UNB as a depository bank and approved the location of a UNB branch on campus. Also in 1971, Harris was elected

[24] "During certain periods relevant to this case, the Bylaws of Howard University Board of Trustees required the University to indemnify and provide counsel to an officer or managing agent of the University against claims arising out of service by that individual as a director of another corporation if he served on that other corporations' Board at the request of the University. However, the Bylaws only extended indemnification under those circumstances to the extent permitted by law and only if the officer or managing agent acted in good faith for the purpose which (he) reasonably believed to be in the best interest of the University" (*Harris*, pp. 3-4).

to the UNB board.[25] In 1973, in light of the *Sibley Hospital* decision, the Howard Board of Trustees "had a lengthy and detailed discussion concerning the question of possible conflicts of interest" (*Harris,* p. 5).[26] Harris then submitted his resignation to the UNB Board effective March 13, 1974. In 1975, however, Harris rejoined the Board. He wrote the University president informing him that he had been offered a director's seat and requested that the president sign the letter, which the president did. For Harris, this documented that the university president had knowledge of his service on the bank's board. Later that year, the University's Budget and Finance Committee recommended that Harris be permitted to accept the appointment, a recommendation which was approved by the full board several days later. Harris retired from Howard in 1987 and served on the UNB Board until 1990. This is relevant because assuming Harris' actions were covered by the indemnification agreement there is an additional question as to whether the agreement covered actions taken after his employment with the university terminated.

The University and Harris both presented evidence that backed up their various opinions regarding the nature of Harris' service on the UNB Board and whether it was for private or public purposes. The court ultimately held that "the question of Harris's service on the UNB Board remains an extremely close one…based on the evidence presented, Harris was serving at the request of the University in his official capacity as Vice President and Treasurer" and is therefore entitled to indemnification under the policy until his retirement from the University in

[25] "It is stipulated that Harris accepted the UNB position in 1971 without obtaining any prior written approval from the Howard University Board of Trustees and that, in 1971 (the president) did not make any written communication to Harris requesting that Harris serve on UNB's Board as a Howard representative" (*Harris,* p. 5).
[26] This discussion fairly clearly denotes the persuasive power of case law and the influence that a decision can have on the behavior of similarly situated individuals. See also, James Jorgensen and Lelia Helms, Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance, *The Review of Higher Education*, Fall 2008 Vol. 32 No. 1, pp. 1-24.

1987. For the period between 1987 and 1990 Harris was not a managing agent of the University and therefore was not covered under the policy.[27]

There are many interests in this case, some good, some questionable, and many conflicting with each other. For example, Howard University has a legitimate social interest in assisting minority communities and minority owned businesses. Howard's leaders, however, complicate this socially good action by conducting it to receive political capital with the Nixon administration. In addition, the interests are further complicated by Harris acting as a director on the bank's board. Although Howard's leadership desired to have a person overseeing the university's deposits, Harris' appointment created a situation whereby one may not know what interest are being served by his tenure on the bank's board. For example, while Harris was on the board, was he serving his own interests, the institution's, the bank's, the Nixon administration's or someone else's? Clearly, Harris and the university's interests were opposed when he sued seeking indemnification. In addition, ultimately the bank failed, likely causing Howard to lose some of its deposits and surely not helping the minority business (thus defeating part of both Howard's and the Nixon administration's interests).

This case is predictable by academic capitalism in several important respects. Primarily, the case showcases the type of action that occurs at the boundaries of university-industry relationships. In this case, under the guise of assisting minority businesses, the university allowed one of its trustees to be a director of a bank in which the university deposited its money. They allowed this relationship despite the fact that the *Sibley Hospital* case was decided during this time and directly affected the decision making of Howard's trustees. In addition, the case illustrates how important it is for universities to monitor institutions with which they have

[27] The remainder of the case discusses whether or not Harris's behavior concerning certain loans was outside the standard of care and therefore exempted from the policy.

deposits. The university, through Harris, was able to ensure oversight over its deposits and thus receive information from the bank in exchange for depositing its money there and appointing Harris as a director. Interestingly, this oversight proved fairly useless given that the bank failed and Howard was forced to pay for part of Harris' defense costs related to his association with the failed bank.

The *Harris* decision creates several new rules related to academic capitalism. Primarily, it showcases that universities may be held liable for certain market actions taken by its trustees. This privileges trustees and institutions who wish to engage in interlocking directorships as it allows the university, and potentially the taxpayer, to foot the bill for potential liability. Here, Howard is liable for the defense costs associated with Harris' actions undertaken with the permission of institutional managers and for public purposes. The case also decides, however, that the individual trustee (and not the institution) will be liable for damages when the person is not employed with the university. The latter rule is not surprising given that a primary purpose behind indemnification is to protect employees from employment related actions and without the employee/employer relationship this purpose cannot be met. The practical result of these rules is that university leaders may engage the market and be protected (by either the institution or the taxpayer). This ruling privileges trustees by potentially protecting them from personal liability when they engage in interlocking directorships. In addition, it fairly clearly denotes the rules about when a trustee, as opposed to an institution, will be held liable for losses incurred when a university engages in an interlocking directorship.

Another *institution as a firm* conflict exists in the case of *Alvin v. Suzuki*, 227 F. 3d. 107 (3rd Cir. 2000). Alvin, a tenured professor at the University of Pittsburgh started and operated two pharmaceutical companies that competed with university based commercial activities. He

alleges that "he was deprived of his Fourteenth Amendment right in the property of his tenure without due process of law" when the University terminated his tenure in the Pharmacology Department and transferred him to a tenured position in the Dental School without his permission or a hearing (*Alvin,* p.110). He also alleges that "he was deprived procedural due process when the University refused to respond to his complaints that (the Medical School Dean) had unfairly ordered him to stop all research projects" because of a conflict of interest (*Alvin,* p. 114). The court held that because Alvin did not comply with the grievance procedure set forth in the faculty handbook, he was not deprived of due process.[28] Unlike other cases, this matter is not specifically related to a piece of intellectual property, but instead focuses on personnel and (mis) management issues when university faculty members compete with the university. The specific facts of the case paint an intriguing picture of an institutional conflict of interest and not only an inability to manage the conflict, but arguably purposeful mismanagement. Although the primary issue is whether Alvin was denied due process, the case facts provide a look at one university's conflict of interest management process.

In 1982, Alvin organized Pharmakon, Inc. (PKI) and shortly thereafter rented space from the University in order "to provide specialty drug services and high tech drug research to medical organizations, the government and the private sector" (*Alvin*, p. 111). Alvin claims that PKI flourished and began to threaten the commercial activities of the Medical Center and other university owned laboratory services. This is an interesting argument because, at least theoretically, the public sector (universities and university owned entities) is not supposed to compete with members of the private sector. It does, however, highlight the problems that can be associated with success in mixed public/private arenas. Because of this success,

[28] Alvin did not comply with the procedures concerning both his tenure transfer claim and the conflict of interest claim. Ultimately, this failure to follow the guidelines cost him this legal action.

administrators from the Medical Center and labs "began to pressure UPitt to eliminate or purchase PKI. However, when UPitt presented a takeover package to Alvin and PKI, they were not interested" (*Alvin,* p. 111). Alvin contends that the University and its laboratories engaged in anti-competitive behavior, including soliciting PKI's existing and prospective consumers and misrepresenting the licensed status of PKI. These actions, according to Alvin, threatened the existence of PKI and, in 1991 caused him to create Pharmakon, R & D (PRD), a partnership between himself and the Clinical Pathology Facility.[29] It was during this time period, from 1991-1995, that Alvin alleges the University deprived him of a salary increase, denied him the use of research facilities and laboratories, refused to allow him to bring foreign scholars to work on his research, denied him administrative services and support, and that the University refused to process his conflict of interest statements because he refused to discontinue his commercial activities.[30]

In 1995, the Dean of the Medical School informed Alvin that he was to suspend all research because his conflicts of interest statement was not going to be approved. Specifically, the Dean wrote Alvin saying "he would not approve Alvin's conflict of interest statement…(because) there was an apparent conflict of interest because of Alvin's involvement with PKI (but did not detail its nature)" (*Alvin*, p. 114). The Dean also informed Alvin that it was "Alvin's burden to prove that his PKI activities did not create a conflict with his obligations to the University" and forbade him from participating in any research activity without the written approval of the Director of Research (*Alvin,* p. 114). Alvin communicated with the Provost by

[29] PKI sold and leased equipment to the CPF and PRD. The Clinical Pathology Facility was an incorporated entity. Searches on the internet, through Hoovers.com and other engines do not produce any additional information on the company.

[30] The court notes "It is undisputed that in 1995, the Dean of UPitt's SDM, ordered Alvin to cease all research projects, on the ground that he was researching in violation of UPitt's policy on conflict of interest. However, according to Alvin, the Dean refused to reveal the basis for this conflict of interest charge" (*Alvin,* p. 112).

mail concerning the appeals process but ultimately determined that "matters pertaining to the conflict of interest issues which have been raised about me within the University of Pittsburgh are involved in my pending litigation against the University and others. I believe that it is necessary and appropriate to follow the litigation path, in part because of my inability to obtain full, fair and due process within the University" (*Alvin,* p. 115). Alvin then ended any appeal process with the University and only pursued litigation.[31]

Although the primary issue in this case is whether Alvin was denied due process, the fact pattern provides an interesting look into the inner workings of a university's conflict of interest management process. Perhaps most interesting is the allegation that the Dean informed Alvin that his conflicts statement would not be accepted, yet did not detail the reasons. If a high level administrator is aware of a faculty member's conflict of interest yet refuses to disclose "why" or "how" there is a conflict, then how can management be effective? Also interesting is that he told Alvin it was his burden to show that there was no conflict with the university. Once again, this places faculty scientists squarely at odds with university administrators concerning commercial activity. It is as if the universities require the researchers to be successful but not "too successful" as to threaten the other commercial ventures of the institution. If communication and disclosure are important to a successful technology transfer organization, situations like Alvin's provide a strong disincentive to faculty to be open with administrators. Finally, this case showcases that if a faculty member forgoes the institutional grievance process, he or she will lose their due process lawsuit. While many other cases have held similarly in the past, academic

[31] This is similar to *Aune v. University of North Carolina at Chapel Hill* (120 N.C. App. 430; 1995) where a former associate dean alleged he was terminated in retaliation for reporting various conflicts of interest occurring at the University. The court determined that he was not terminated for reporting the conflicts, but was instead terminated for poor performance and because he was unable to work well with others.

scientists should recognize that even though they must utilize a system built by the institution, this step is required if they are to be successful in litigation against that institution.

There are several interests in this case, some of which conflict with one another. Clearly, Alvin has an interest in receiving due process, the primary reason behind his lawsuit. In addition, he has an interest in continuing his research and commercial activities. The university also has an interest in Alvin's commercial activities, if for no other reason than to continue receiving rent from him and his companies.[32] In addition, however, the university also has an interest in the profitability of its other commercial ventures, including those that are competing with Alvin's companies. The Dean, meanwhile, has an interest in his own continued employment, which requires that he properly manage the faculty members (including Alvin) under this authority. In this case, the Dean believed that it would be best to manage Alvin by prohibiting future commercial activity. This, however, is contrary to the university's interests in Alvin's research because he (the Dean) did not inform Alvin of ways in which Alvin could remedy the conflicts problems and continue his commercial research activities. Overall, it is clear that the Dean's actions conflict with the university's interests, which conflict with Alvin's interests, which conflict with the Dean's actions. It is highly unlikely that an institutional conflict of interest policy can be utilized to properly manage a fact pattern as complex as the one in this case.

Much of this case is predicable by academic capitalism. First of all, this case shows how complex issues can become when multiple university owed/operated/affiliated entities compete with one another. This competition is inevitable, however, when a university attempts to profit

[32] In addition, the university may have an interest in the commercial success of Alvin's inventions. The facts of this case, however, are not developed enough to determine the specific relationship between Alvin, his companies, and the university.

from as many entities as possible. In addition, the university managers sought to strategically manage the conflicts at issue. This is evident through the way that the Dean addressed Alvin's alleged conflicts. Had the Dean simply wanted the conflict addressed, he would have informed Alvin of the conflict and instructed him on how it should be managed. This is, however, not what occurred. Instead of taking that approach, the Dean sought to strategically manage the conflict and suggested that Alvin was suspended from conducting research, until such a time that he (Alvin) discovered the conflict and determined how it should be managed. This, obviously, is not the most efficient or effective way to manage technology commercialization. The decision, however, validates the rule that administrators (in this case the Dean) can strategically manage a researcher's conflict. If the researcher does not go through the university approved channels in order to challenge the wrongful implementation of strategic management, then the faculty member will not have a due process claim in the courts. This requires that faculty subject themselves to grievance policies and procedures that they often have no input in creating when challenging a decision that can benefit an administrator or their institution. This requirement privileges institutional decision makers as they are the ones who manage the conflicts and determine the grievance procedures that faculty members must use.

Another institute as a firm conflict case arises from a close relationship between loan lenders and education institutions and an attempt by the federal government in regulation. In *Student Loan Marketing Association v. Riley,* 112 F. Supp. 2d.38 (D.D.C. 2000) Sallie Mae and the Department of Education argued over alleged "inducements" provided by Sallie Mae to Dr. William M. Scholl College of Podiatric Medicine (Scholl College)[33]. Specifically at issue "is whether to uphold the Secretary's decision that (Sallie Mae) has violated the anti-inducement

[33] The Dr. William M. Scholl College of Podiatric Medicine was established in 1912. In 2001, it became part of the Rosalind Franklin University of Medicine and Science in Illinois.

provision of the Higher Education Act of 1965…which prohibits a lender from offering directly or indirectly, points, premiums, payments, or other inducements, to any educational institution or individual in order to secure applicants for loans" (*Riley,* p. 39). After several administrative hearings, the Department found Sallie Mae violated the provision and ordered that it be limited from participating in the Scholl College loan program. Sallie Mae appealed the ruling.

At issue are several agreements made between Sallie Mae and Scholl College related to the College's student loan program. Under the April 1995 Agreement, Sallie Mae processed student loan applications and performed loan origination activities on behalf of the College and then charged the College fees "at commercially acceptable rates" (*Riley,* p. 40). The agreement also stated that Scholl College was to sell loans made under the agreement to the plaintiff. In return for each loan portfolio Sallie Mae purchased, it agreed to pay Scholl College 100% of the principal balance and accrued interest plus an amount of up to 2.50% over par value…" (*Riley,* p. 40). In July, 1995 the parties executed another agreement whereby Sallie Mae agreed to make "advances of up to twenty million dollars to Scholl College to finance Scholl College's lending activities through March 1998" (*Riley,* p. 40). Importantly, Sallie Mae "charged a higher interest rate to Scholl College than it charged to most other school lenders that are…" clients (*Riley,* p. 40). The Secretary, in reversing an administrative law judge's decision, found that Sallie Mae was the actual lender because of the responsibilities performed under the contract.[34] The Secretary then found that "payments made by Sallie Mae (the actual lender) to Scholl College (an educational institution) constitute improper inducements made to secure loan applications" in violation of the Higher Education Act (*Riley*, p. 41). Sallie Mae appealed the finding and sought

[34] The Secretary based the decision largely on the concept of "a clear intent to separate the role of the lender and the school and the need to ensure that borrowers receive full and complete information from their school, it is appropriate for the Department (of Education) to ignore the form of Scholl College's role under the contracts…" (*Riley,* p. 41).

to set it aside as arbitrary, capricious, an abuse of discretion and otherwise contrary the law based primarily on the Secretary's finding that Sallie Mae was the actual lender.

The Court reversed the Secretary's decision and found that there is no legal or factual basis for recasting Sallie Mae as the actual lender. Since the Secretary's position (that a violation occurred) is dependent on classifying Sallie Mae as the actual lender, this finding is determined to be an abuse of discretion by the Court. The Court states that the Secretary "has cited no statutory, regulatory, or legislative support for the conclusion that schools should not act as lenders…There is also no legislative history to support the claim that Congress intended to limit graduate and professional schools in their role as lender in the way defendant suggests" (*Riley*, p. 43). Important for academic capitalism is the fact that "nothing in the statue or regulations prohibits a school lender from establishing a relationship with a third party servicer that takes the form of the arrangement that exists between plaintiff and Scholl College, even if the arrangement effectively renders the school lender a mere marketer of loans" (*Riley,* p. 44). A university does not lose its status as original lender when it delegates duties and responsibilities to a third party.

This case is relevant for conflicts of interest for several reasons. Primarily, it shows that as early as 2000 the federal government was becoming concerned with the increasingly close relationships between lending banks and universities and attempted to manage these relationships prior to the much publicized "student loan scandal."[35] It also highlights the increasingly capitalist relationships between lenders and universities, where lenders are effectively paying universities to issue their loans to students regardless of whether these loans

[35] "It's all part of a growing scandal, in which lenders gave colleges and top officials money and perks — sometimes based on how many students signed up for their loans." Myers, L., Student financial aid scandal grows. NBC News available at http://www.msnbc.msn.com/id/18598574/

are in the best interest of the particular student. Working from the conservative assumption of less regulation, these relationships likely increased under the Bush administration at least until publicity regarding the student loan scandal forced all parties to step back. This issue raises far more ethical problems than those associated with the *Harris* or similar cases primarily because this is the university effectively profiting from student loan packages used by its students. This leaves the student with a loan package that may not be the best (s)he could have received while the university and lender increase their own profits. Such a position makes students little more than consumers of a student loan market controlled by the institution and bank. Finally, this case shows how federal regulations (and likely other laws) can be circumvented with the appropriate agreements and contracts. Due largely to the form of the agreement between Sallie Mae and Scholl College (e.g. a legal technicality), the Department of Education was unable to prevent this type of arrangement from occurring, regardless of the eventual consequences (e.g. that the lender and university may have too close a relationship). Given that such a large sum of money is on the line it should not be surprising that both lenders and universities are collaborating and profiting off of loans provided to students, especially when the student is often not provided complete information regarding the university-lender relationship.

Like many of the other cases, there are varying interests at work, some of which conflict with one another. Scholl College has an interest in ensuring that students continue to enroll in its programs. This means that they also have an interest in students receiving reasonable student loan packages that can help finance the education received at the College. In addition, Sallie Mae (and its managers) has an interest in maximizing profits and paying dividends to its shareholders. In order to maximize profit, it enters into agreements with institutions such as Scholl College whereby the lender essentially has a captive market of students, many of whom

need student loans to receive an education. The federal government, through the Department of Education, has an interest in ensuring that the federal rules and regulations are followed. This may be especially so when politically hot button topics such as student finances, conflicts of interest, and corporate power (e.g. lender donations to policymakers) are at stake. When framed in this way, it is fairly easy to see how some of these interests conflict with each other. For example, Scholl College's interests in providing students with a fair student loan package conflicts with its interests in profiting from lender agreements with Sallie Mae. In addition, the federal government's interests conflict when it allows lenders to contract with universities to make and service student loans but does not enforce statutes because of the form (as opposed to the substance) of the contract. Despite the apparent contradictions however, most of this is predicable by academic capitalism.

Academic capitalism explains how universities connect to various markets, and in the *Riley* case, the market is making and servicing student loans. The rule established by this case is that lenders and universities may engage in contracts whereby a lender is, in substance the actual maker of the student loan. This rule is established despite a federal regulation prohibiting a lender from being an "actual lender" in the student loan process. This clearly privileges market activity between lenders and universities. The conflicts of interest regulation cited by the Department of Education was not specific enough to prevent the type of conduct that it was drafted to prevent. This indicates that, similar to laws attempting to regulate the internet, the technology and facts on the ground advance at a quicker rate than the laws attempting to regulate them. As with other cases in this study, the conflict of interest at issue is too complicated for the policy, regulation, or entity to manage.

In an *institution as a firm* conflict of interest case heard in 2001, Kennedy Krieger Institute, Inc., a research institute associated with Johns Hopkins University was sued by two separate parties in negligence actions "involving children who allegedly developed elevated levels of lead dust in their blood while participating in a research study with…KKI, Inc." (*Grimes v. Kennedy Krieger Institute, Inc.,* 366 Md. 29, 782 A.2d 807; 2001, p. 818).[36][37] This is an institutional conflict because the Kennedy Krieger Institute is affiliated with Johns Hopkins University and thus the university may have received revenue from any successful research venture.[38] It is also an institutional conflict because of the manner in which Johns Hopkins' Institutional Review Board reviewed and approved the research protocol. In addition, although the specific legal relationship between JHU and KKI is unknown, one can assume that there was at least some type of relationship between the two given that the KKI researchers were subject to Johns Hopkins' IRB. The appeals court, in reversing the trial court's granting of defendant's motion for summary judgment, ruled that "(s)uch research programs normally create special relationships and/or can be of a contractual nature, that create duties. The breaches of such duties may ultimately result in viable negligence actions" (*Grimes*, p. 819). While the potential

[36] This case was heard after the district court granted a motion for summary judgment in favor of KKI, Inc. In remanding the case, the court does not address damages or relief because the evidence necessary to establish them has not been presented and is not an issue before the appellate court.
[37] For additional information about this case, see Bozeman and Hirsch (2006). Science ethics as a bureaucratic problem: IRBs, Rules, and Failures of control. *Policy Sciences,* Springer, vol. 38(4), pp. 269-291, December
[38] While this paper was being drafted, I sent a list of questions to KKI, Inc and Johns Hopkins University in order to clarify the relationship between the two entities. The questions were emailed on April 6, 2009. As of the date of publication, no response had been received. The questions are: 1. At the time this study was approved and conducted, what was the legal relationship between Kennedy Krieger and Johns Hopkins University?
2. Were the researchers involved in this study at KKI employed by Johns Hopkins? If so, in what capacity were they employed? 3. As related to the research conducted at issue in the Grimes case, was there any revenue or profit sharing between KKI and Johns Hopkins? 4. What was the ultimate resolution of the case? 5. Were there any damages levied against KKI and if so, how much? If the issue was settled out of court, how much did KKI agree to pay the plaintiffs? 6. Is it possible for me to get a copy of any and all reports issued by the Johns Hopkins Institutional Review Board concerning this matter?

legal liability itself is problematic for KKI and JHU, it is the institutional conduct that is most disturbing for the larger higher education community.

The research study at issue was funded by state and federal environmental agencies and its goal was “to document the longevity of various lead base paint abatement strategies, factored in terms of reducing lead exposure in house dust and the children’s blood levels” (*Grimes*, p. 819). The various abatement strategies were chosen in order to find the balance between economic efficiency and safe levels of lead exposure. The study consisted of five test groups, each group consisting of 25 houses. The first three groups were houses with significant amounts of lead dust present and each group receiving assigned amounts of maintenance and abatement (group 1 received $1,650.00 of repair, group 2 received $3,500.00, and group 3 received $6,000.00-$7,000.00 of repair). The fourth group formerly had lead paint but had since received a complete abatement. The fifth group was new homes that had never had a presence of lead dust, effectively providing a control group. The study sought to test the effectiveness of various levels of abatement as determined by the varying levels of lead dust in children’s blood. The property owners, in return for allowing their properties to be used in the study and agreeing to limit potential renters to families with healthy, young children, were assisted by KKI in applying for grants or loans to perform abatement consistent with the levels in the study. The participants/subjects, meanwhile, were given $5.00 for the first questionnaire they answered, $15.00 for subsequent questionnaires and “the dust, soil, water, and blood samples would be tested for lead at the Kennedy Krieger Institute at no charge…” (*Grimes*, pp. 825-826). Importantly, in both cases, “the consent form did not contain a clear disclosure that the researchers contemplated that, as a result of the experience, the child subjects might, and perhaps were anticipated to, accumulate some level of lead contamination of their blood,” and that the

children's blood would be one way to test the effectiveness of the various abatement procedures (*Grimes*, p. 828). This process was approved despite the fact that the "IRB first and foremost think about patient rights and safety" (McKinney and Korn, 2005, p. 6). Legally, the primary issue is one of informed consent. The facts, however, provide an example of an institutional conflict and how a university attempts to manage it.

Perhaps the most interesting part of the opinion is where the court admonished the defendants, Johns Hopkins, and the university's Institutional Review Board. The court states "the researchers and their Institutional Review Board apparently saw nothing wrong with the research protocols that anticipated the possible accumulation of lead in the blood of otherwise healthy children as a result of the experiment, or they believed that the consents of the parents of the children made the research appropriate" (*Grimes*, p. 813). The court is clearly appalled by the research protocols that subject children to elevated levels of lead in their blood. The court also notes that the problem of unethical research may be more far reaching that the facts in the case. For example, they state, "…as is suggested by some commentators as being endemic to the research community as a whole, infra, the IRB involved here, the Johns Hopkins University Joint Committee on Clinical Investigation, in part, abdicated that responsibility, instead suggesting to the researchers a way to miscast the characteristics of the study in order to avoid the responsibility inherent in non-therapeutic research involving children." (*Grimes*, p. 813). Not only did the Johns Hopkins IRB approve research that would raise the level of lead in children's blood but the members also informed the researchers of how to avoid regulatory oversight. As a result of this abdication, the court notes,

> It is clear to this Court that the scientific and medical communities cannot be permitted to assume sole authority to determine ultimately what is right and appropriate…The IRBs are primarily in house organs. In our view, they are not

> designed, generally, to be sufficiently objective enough in the sense that they are as sufficiently concerned with the ethicality of the experiments they review as they are with the success of the experiments….The conflicts are inherent. This would be especially so when science and private industry collaborate in search of material gains (*Grimes*, pp. 813-814).

This description is relevant because the court effectively describes IRBs as interstitial organizations (e.g. designed to facilitate the transfer of property or knowledge) instead of as an organization mitigating or preventing improper or unethical research. Further, the description notes the problems associated with relying on researchers or administrators (e.g. those who can profit from the research) as the sole arbiters of what is proper or improper research. Important for academic capitalism is the concept that the individuals or organizations designed to mitigate undue market influences on university research are instead facilitating those transfers, regardless of the ethical implications.

In discussing the appropriate disclosure the court notes a major difference between medical practice and medical research, but only hints at the institutional conflict of interest at issue. Specifically, in medical research, the court notes, "the experiment is driven by the investigator's dedication to the advancement of knowledge, and often by a commitment to those who have funded the research, it is also driven by society's interest in future benefits that will flow from medical discoveries" (*Grimes*, p. 838). The next question is what happens when these interests (advancement of knowledge, commitment to industry, and future societal benefits) conflict with one another? Clearly, the court recognizes that financial gain can influence research on an individual level, but it does not discuss the impact of financial incentives on institutional decision makers other than the Institutional Review Board. The opinion is largely limited to the conflicts that occur in an informed consent relationship between the researcher and the subject. The court notes that "there is always a potential substantial conflict of interest on the

part of researchers as between them and the human subjects used in their research. If participants in the study withdraw from the research study prior to its completion, then the results of the study could be rendered meaningless. There is thus an inherent reason for not conveying information to subjects as it arises, that might cause the subjects to leave the research project. That conflict dictates a stronger reason for full and continuous disclosure" (*Grimes*, pp. 850-851). While the court concentrates on disclosure and ensuring scientists provide test subjects with adequate information regarding the study, there is only limited discussion on the impact that research funding has on research methodology or outcome. Specifically, when the court refers to Institutional Review Boards as "in house organs" and designed to be more concerned with experimental success than ethicality, this suggests that the court is highly aware of the problems associated with IRBs and conflict management. In this case, it is clear that the court agrees the IRB abdicated its responsibility as a manager of ethical research, which, given the conduct of the research, is an obvious conclusion.

While the case is legally one of informed consent, the facts presented provide an example of the type of unethical behavior in which universities participate in the name of commercialization. In this case, Johns Hopkins University, through one of its affiliates approved and engaged in research that purposefully put children's health at risk without providing adequate disclosure concerning that risk. Further JHU's own Institutional Review Board gives the research team suggestions on how to get around regulations concerning human subjects research. This clearly presents a problem concerning the assumptions of conflict management in that, the group of people with the clear mandate to manage the conflicts not only abdicates this responsibility, but gives advice on how to avoid oversight. While the court notes that the scientific community, including institutional review boards, cannot be solely responsible for the

management of university research, unless or until an aggrieved person files a law suit, no one other than "in house organs" may know the nature of the conflicts at issue. This leaves the public, scholars, and researchers still reliant on institutional review boards, university management, and similar flawed mechanisms designed to protect them from harm in the name of science.

The specific interests at stake are difficult to determine due in part to Johns Hopkins and KKI's non-response to inquiries concerning their relationship. It is possible, however, to discuss several of the general interests at issue. The researchers, KKI, and Johns Hopkins all had legitimate social interests in helping to investigate the impact of lead paint on children and economically efficient ways to provide abatement.[39] In addition, given that there was government funding JHU likely received some money for overhead. JHU's IRB had an interest in ensuring that the researchers affiliated with the institution conducted their research in an ethical manner. The IRB members also have an interest in the investments and financial interests of their institution (McKinney and Korn, 2005). The subjects (both children and parents) had an interest in receiving full and honest information regarding the research project and the impact that it may have on their health. The problem in this case is that clearly, the interests of the researchers (in conducting the research) and the subjects (in receiving information) conflict. This is because if a parent knew that the level of lead in her child's blood would rise, she may not consent for her child to be a participant in the study. In this case, fully informing the subjects may have resulted in too few people agreeing to participate in the research. The informed consent conflict is complicated by the fact that the IRB offered suggestions to the researchers

[39] For an alternative version of the interests see, Bozeman, B. (2002). Public-Value Failure: When Efficient Markets May Not Do. *Public Administration Review* 62, 2: pp. 145-161.

concerning how to miscast their research agenda in order to avoid oversight. This action implicates Johns Hopkins in the unethical research and, more so than simply being affiliated with KKI, makes the University a party to elevating the lead content of children's blood.

Academic capitalism helps to explain the factual pattern behind the *Grimes* case and in particular, the failure of JHU and KKI to respond to questions. Specifically, commercialization and the pursuit of revenues often require secrecy, whether in the form of trade secret protection or refusal to comment on potentially problematic issues. In this case, both KKI and JHU are private entities and not required to respond to Freedom of Information Act requests or any other request for information. This secrecy makes analyzing and responding to the types of problems difficult because researchers and policymakers do not have access to relevant information. This type of behavior is predictable by academic capitalism because as universities pursue outside revenue, they will move away from traditional notions of social good, including sharing information among and between scholars. The principle established by KKI and JHU's refusal to respond to my questions suggests that secrecy will be utilized even when public lawsuits are analyzed. In addition, the inability of the IRB to manage adequately the research protocol showcases problems with traditional conflict management and overreliance on "in house organs." As universities continue to engage the market, with only in house organs providing oversight, there will likely be more situations where potential financial revenue causes the organs to abdicate their oversight responsibility. In addition, the case illuminates the divide between what scientists and the public (via the court) consider ethical behavior. For example, the IRB, JHU, and KKI researchers presumably all felt that this research protocol was ethical and the potential benefits outweighed the costs. The families and court, however, felt that the research was legally and ethically dubious, regardless of the potential benefits. This case, because it does

not note damages against either KKI or JHU, privileges those entities by allowing them to engage the market with little concern for potentially unethical research protocols. In addition, because KKI and JHU are allowed to ignore requests for information they are privileged by the ability to keep such unethical conduct secret.

In another *institution as a firm* conflict case, the Eastern District of Louisiana discusses a university's duty to disclose to an inventor ongoing negotiations and licensing opportunities of the inventor's patent.[40] In *Peyman v. The Johns Hopkins University,* 2001 WL 238197, (E.D La 2000), the plaintiffs' claim that Johns Hopkins "intentionally, negligently, and wrongfully failed to disclose the negotiations with PhotoVision…in order to obtain further renewal of the Licensing Agreement without paying any additional consideration to plaintiffs"…and also claim that Johns Hopkins has benefited "from the License Agreement with PhotoVision and has failed to pay royalties...pursuant to the Assignment Agreement" (*Peyman,* p. 5). They claim that JHU had a duty to disclose ongoing negotiations and "had Johns Hopkins told the plaintiffs that the reason it wanted to extend the Assignment Agreement was to finalize a license agreement, plaintiffs would likely have asked about the terms of the license and certainly would have raised the price of the patent assignment or negotiated corporate support for themselves, thereby reducing Johns Hopkins profit" (*Peyman,* p. 5). This is an *institution as a firm* conflict because of the interests the university had in licensing the product, including the potential to receive a significant amount of future research money. This interest, maximizing the profit from a

[40] US Patent 4,891,043 ("Systems for Selective Release of Liposome Encapsulated Material via Laser Radiation") lists the University of Illinois as the patent assignee on January 2, 1990, the patent's issue date. In the original patent assignment agreement between the three doctors and Johns Hopkins the parties agreed to split the royalties as: 30% for each doctor and 10% to JHU. After disbursement, the Patent Assignment notes "Dr. Zeimer (the non-plaintiff inventor) will be responsible for distributing the appropriate share to the University of Illinois pursuant to his Patent Assignment Agreement with The Board of Trustees of the University of Illinois." (*Peyman,* p. 2). From the facts of the case, it appears as if the University of Illinois assigned its rights in the patent to Dr. Zeimer and the other doctors, who then assigned the rights to JHU. The responsibilities of JHU under the assignment agreements as to the plaintiff doctors are the issue before the court.

licensed patent, conflicts with the institutional, contractual, and ethical duties to provide full information to the inventors. The decision to not inform the inventors showcases the institutional desire to maximize profits regardless of ethical considerations.

In 1990, the plaintiffs, along with another doctor, obtained a patent for technology they invented while working at the University of Illinois. The two plaintiffs, shortly thereafter moved to New Orleans, Louisiana and the third inventor became employed with Johns Hopkins. In 1994, the inventors assigned their patent rights to Johns Hopkins for two years. In 1996, the plaintiffs agreed to extend the arrangement for an additional two years. Prior to the 1998 extension, Johns Hopkins negotiated with PhotoVision, Inc. to license the patent for commercialization, signed in February of 1999. The 1999 agreement between JHU and PhotoVision stated PV would provide "research support payments to (the third inventor) and Johns Hopkins (as well as a) provision that PhotoVision would negotiate with JHU as a preferred research laboratory" (*Peyman,* p. 4). Plaintiffs did not learn of this agreement until May of 1999. While the Patent Assignment granted JHU "full authority to negotiate the licensing terms" of the patent, the agreement also provided that the plaintiffs "may desire to independently approach any future licensee for corporate support to further reduce to practice or make improvements to the invention claimed in the patent" (*Peyman,* p. 5). Given that this case was heard on summary judgment, there is not a significant legal discussion. The court, however, held that "there is ambiguity in the Patent Assignment Agreement regarding 'what and when' Johns Hopkins had to disclose to the plaintiffs so that the plaintiffs could "independently approach any future licensee (i.e., PhotoVision) for corporate support to future reduce to practice or make improvements to the invention…" (*Peyman,* p. 5). The court then remanded the case so that the trial court could determine what, specifically, Johns Hopkins had to disclose to the inventors.

This case is a good example of institutional decision makers utilizing faculty's intellectual property to gain more resources and research funding, yet putting the inventors in a position where the institution can withhold information in order to maximize profit. Not only does this create a situation where significant animosity can grow between institutional decision makers and scientists, it can also undermine the necessary disclosures that make commercial activity possible. For example, an inventor can, due to the institutional action in this case, rightfully be wary that any disclosed invention will be herded away by the university and any licenses or profits may be negotiated without the scientist's knowledge. This situation ends with the scientist having created a new commercial patent, yet potentially being uniformed by the university when it comes to licensing or putting the patent to use.

There are several interests at stake in this case, most of which are addressed by the various patent agreement signed by the parties. As the initial patent assignee, the University of Illinois has an interest in profiting from the patent and thus an interest in the patent becoming commercially viable. Due to the wording of the patent assignment (that the non-plaintiff inventor be responsible for distributing Illinois its share) the University also has an interest in ensuring that he does so in an honest manner. The two plaintiffs also have an interest in receiving royalties from the invention. In addition, they have an interest in ensuring that Johns Hopkins University informs them of any negotiations underway concerning the commercial potential of the patent. This is an important interest because it serves as the basis for this suit and impacts how they negotiate for royalties from JHU. Dr. Zeimer, the third inventor/non-plaintiff, also has several interests, some of which are opposed to those of his co-inventors. For example, he has an interest in the contract between PhotoVision and JHU because that contract provides research support for him. In addition, Dr. Zeimer may have an interest in maximizing the profit

to his new employer, JHU, thus influencing him to not inform his co-inventors of JHU's agreement with PhotoVision. Johns Hopkins' primary interest is related to the profitability of the invention. This includes maximizing profit related to the contract with PhotoVision, including becoming a preferred research laboratory and ensuring continued industry support. JHU also has interest in maximizing the profit in the assignment from the three inventors. This means that the institution has a disincentive to inform the inventors of the ongoing negotiations with PhotoVision so that they (the inventors) will not request a higher royalty payment or increased income related to the use of their patent. Any additional income that the inventors receive will reduce JHU's revenue and the institution has a significant interest in keeping that revenue as high as possible.

Academic capitalism helps to explain how the University of Illinois, Johns Hopkins University, PhotoVision, and the three inventors engage in business with one another and the new circuits and boundaries created by their interaction. In this case, the market is for intellectual property and specifically the patent filed by the three inventors and initially assigned to the University of Illinois. Eventually, the market became much more complex, ultimately involving another institution (JHU), a private corporation (PhotoVision), and additional contracts. Also interesting is the fact that the boundaries shifted with the movement of the various parties. For example, the patent at issue went to JHU with one of the inventors and the lawsuit was heard in Louisiana, the two other inventors state of residence. This is interesting because neither JHU nor Louisiana had anything to do with the patent's discovery or initial assignment. Finally, the case showcases the concept that universities will do what they are legally allowed to do in order to maximize profits regardless of the ethical implications of the action. For example, in this case, Johns Hopkins did not believe that it was legally obligated to

inform the other inventors of the ongoing negotiations with PhotoVision despite the fact that providing them this information would have been the ethical thing to do. Once again, this suggests that the question is not how *should* universities behave but instead how *can* universities behave. This decision, however, privileges the plaintiff scientists by potentially requiring Johns Hopkins to negotiate with them regarding the licensing agreement with PhotoVision. As a result of this case, it is likely that Johns Hopkins and other institutions re-worded their licensing agreements in order to prevent this type of situation from occurring again.

In *Antorietto v. Regents of the University of California,* 2002 WL 1265552, (Ca. 4th Cir. App. 2002) California's 4th Circuit Court of Appeals addressed a conflict of interest issue that involved a university foundation. Foundations are important entities because they often are the front line facilitators of university's intellectual property and as private entities are not subject to open records requests, thus providing secrecy to public-private collaboration. The plaintiff, Thomas Antorietto sued the University of California after he was terminated from his position as Foundation treasurer and management services officer for the School of Medicine at the University's San Diego campus.

The facts in this case paint an intriguing picture of problems that can be associated with foundations and other arms-length entities created by universities. In 1975, Antorietto was hired by the Regents to serve as management services officer at the medical school on UCSD's campus. In 1976, he took an unpaid position as treasurer for the Medical Education and Research Foundation, "an independent non-profit corporation set up to provide continuing education at UCSD and to facilitate clinical research by UCSD medical staff" (*Antorietto*, p. 1). Starting in 1980, he was compensated for his position at the Foundation. During the 1980s and through 1995, the Foundation "administrated the majority of the clinical trials conducted by

university medical staff at UCSD", "accepted donor funds on its own behalf", and "reimbursed UCSD for actual costs incurred in conducting its clinical trials, but did not pay any general facility overhead costs attributable for its use of the facilities" (*Antorietto*, p. 1). Everything appeared to be going well until 1995, when the Regents, responding to an allegation of misuse of resources at another campus, ordered an audit of all "support groups" on all campuses.

Initially, the Foundation refused to hand over documents or allow the university access to its books because its leaders felt that it was not a "support group" but the Chancellor ordered an investigation and the findings are the primary issue in this lawsuit. The draft audit's findings caused the Chair of the School of Medicine to place Antorietto on administrative leave and prohibit him from engaging in any university business. While the audit was continuing, Antorietto initially refused to respond to any of the auditors' questions regarding his work for the Foundation. Eventually, however, he was ordered to do so. In June, Antorietto was notified that he was going to be terminated. In November of that year, the final audit report came down. The report "concluded that Antorietto negotiated University service agreements without authority, violated statutory conflict of interest rules, conducted School of Medicine business while on leave, and advised a private sponsor to deposit with the Foundation funds the donor intended to benefit UCSD"[41] (*Antorietto*, p. 2). Antorietto then filed suit in October of 1997.

The court fairly easily addresses Antorietto's claims, affirms the defendants' motion for summary judgment, and accordingly dismisses the plaintiff's suit. Specifically, the court dismisses his claims because "Antorietto failed to exhaust his administrative remedies, he lacked any property or liberty interest in continued employment, and the defendants' liability was barred by statutory and common law immunities" (*Antorietto*, p. 1). The interesting fact issue,

[41] The opinion does not state exactly what facts trigged the conflicts allegation.

however, is that this case helps point to potential trouble that can occur between a foundation and a university. Specifically, considering that most foundations are legally set-up as private non-profit entities, they are exempt from Freedom of Information Act requests and wield a large amount of discretion. Conflicts of interest, such as those of Antorietto, will go unnoticed unless or until a university or administrator chooses to act. This requires that the situation become "bad enough" for the university to act against an entity which it created to help with the facilitation of scientific research. This case also helps to highlight the fact that foundations, by themselves, cannot monitor or mitigate their own conflicts of interest and those in power at these organizations may attempt to subvert others (even the university) from getting involved in their business.

As with similar cases, the *Antorietto* decision involves multiple and often conflicting interests. Antorietto clearly has an interest in continuing his employment with UCSD's Foundation. In addition, he also has an interest in not having the Foundation classified as a "support group" and thus subject to institutional oversight. UCSD, through its managers, has an interest in maintaining an effective and ethical workplace, including prohibiting an employee from conducting business outside the scope of his authority or violating state conflicts of interest rules. This workplace also includes the UCSD's Foundation. The University's position is somewhat surprising given that arm's length organizations (such as the UCSD Foundation) are set up specifically to separate the institution from certain activity (e.g. commercial activity). It appears, from UCSD noting that the Foundation is a "support group" and subject to oversight, that it wants the Foundation to be separate for certain (e.g. profit generating and secrecy) activities and a part of the university for other activities (institutional oversight). The rule established by the university's decision to classify the Foundation as a support group suggests

that it wants to maintain oversight of the organization yet also wants it to not be subject to public information laws designed to inform the taxpayers, policymakers, or academics. This position clearly privileges the university and its managers.

This case helps to highlight the potential problems that a university may be forced to address as it attempts to maximize revenue. As more and more universities create arms-length organizations and give these entities more authority (over contracting, negotiation, commercialization, or development) it becomes difficult for the institutions to control the actions that go on there. In addition, these entities are often beyond the scope of Freedom of Information Act requests and therefore, avoid research or questions that may shed light on some of their practices. This effectively allows universities, through foundations, to participate in, and potentially profit from, market activity while shielding themselves from publicity or liability. This case proves very interesting in that it suggests that arms length entities may remain private entities (and thus outside the scope of FOIA requests) yet also be institutional "support groups" of state universities and subject to university oversight.

In *Oliver v. Boston University, et. al*. a group of minority shareholders sued Boston University and other parties challenging transactions of Seragen, Inc., a biotechnology company "nurtured and controlled" by Boston, 2006 WL 1064169 (Del.Ch.2006). This is an *institution as a firm* conflict because Boston University (BU) had extensive financial relationships with the research company, including stock transactions, equity agreements, and loan guarantee contracts. In addition, many BU trustees were also conflicted as some were personally invested in and loaned money to the company in which their university had a significant equity and loan stake. Overall, this case presents a highly complicated series of transactions and conflicts designed

primarily to ensure the profitability of university administrators and the corporation in which they were financially invested.

In August of 1987, Boston University purchased a controlling interest in Seragen for $25 million and shortly thereafter appointed several individuals (also defendants in this suit) to the company's board.[42] The other named defendants relevant to the discussion of conflicts of interest are: John Silber, a former Chancellor and trustee of BU and director of Seragen, Leon Hirsch a trustee of BU and noted as a BU affiliate in Seragen's public filings, Gerald Cassidy a director of Seragen, paid consultant to BU and friend of Silber, and Kenneth Condon, BU's treasurer and member of Seragen's board. Clearly, the high ranking administrators were conflicted between their fiduciary duties to Seragen and BU, and their own financial investments. This initial investment caused the Massachusetts Attorney General to investigate the relationship between the University and the company. This investigation resulted in BU agreeing "to use best efforts to reduce significantly its financial exposure resulting from the Seragen investment and its financial commitment to Seragen" while also providing monthly updates to the Attorney General's office (*Oliver*, p. 2). Seragen thereafter went public in 1992 and BU established an oversight committee "to manage the University's investment" in Seragen (*Oliver*, p. 2).

Almost immediately, the company encountered financial troubles. Seragen, in a push to raise additional capital, entered into an agreement with Eli Lilly and Company where Seragen received $10 million with a prospect of an additional $45 million. By 1995, however, Seragen was again in a cash crunch and BU agreed to be the lead guarantor on an $11.8 million loan.

[42] Seragen had allegedly developed a new class of proteins. Until 1987, BU only had a minority interest in the corporation. It is presumable, due that the patents and inventions related to the proteins, therefore, were created at Boston University.

Two other defendants (Hirsch and Cassidy) guaranteed an additional $12 million. This transaction, according to the plaintiffs, "marked the beginning of the end for Seragen's minority shareholders because they believed that it was at this juncture that BU first caused Seragen to avoid the public equity markets in favor of the Loan Guarantee Transaction which prevented a significant dilution of BU's interest in Seragen" (*Oliver*, p. 3). If Seragen issued more stock in the company, as an alternative to the Loan Guarantee, BU "as a large investor…would suffer significant losses" (*Oliver*, p. 3). This means that if Seragen issued additional stock, it would dilute the stock owned by Boston University. Alternatively, it would force BU to purchase more stock in order to ensure it kept its majority stake in the company. If, instead, Seragen was loaned money (instead of selling stock) BU would not lose its majority stake and Seragen would receive the capital that it needed to continue operations.

Defendant Silber "informed the members of BU's Executive Committee of the importance of maintaining BU's majority position in Seragen, but also he stated that to do otherwise would leave them in breach of their duties to BU", seemingly with no worries about the duties that BU's Seragen directors owed to Seragen and Seragen's other common stockholders (*Oliver*, p. 3). Clearly, Silber and other interested parties sought to ensure BU's interests (and perhaps their own) with little regard for the interests of other shareholders, the company, or the public at large. Interestingly, for the Loan Guarantee Transaction, both BU and Seragen were represented in the transaction by the same law firm. Silber stated that he did not believe "there was any conflict of interest because the interest of (BU) and the interest of the stockholders of Seragen was one and the same" (*Oliver*, p. 7). In this case, it is apparent that the individual defendants had significant difficulty in recognizing the various, and competing interests that were at work in these transactions. This was complicated by their own personal

investments in the company, creating not only an inability to recognize conflict, but a suggestion that their own interests are the only ones being served.

Shortly after the Loan Guarantee, Seragen officials received a letter from NASDAQ threatening to delist the company because, due to the Loan Guarantee, the company did not meet net tangible asset requirements.[43] In response to the letter, as well as in response to the general financial problems faced by Seargen, the company's leaders initiated a set of complicated stock transactions (Series A and B transactions) where "Seragen received no new money (and) the transaction only served to reclassify the debt from the Loan Guarantee Transaction to equity" (*Oliver*, p. 10). Only months later, NASDAQ officials sent another letter threatening delisting. In response, the Seragen Board voted to issue Series C shares to BU in return for an additional $5 million investment. BU, to satisfy NASDAQ, irrevocably waived the right to have Seragen buy back any of these new shares that did not convert because of the conversion limit. BU and its trustees, by this point, placed so much money with Seargen that it became necessary to take all measures necessary to ensure that the company would not fail.

In late 1996, after the Series C transactions, Seragen hired a new chief executive officer whose primary plan was to reduce Seragen's cash burn rate, sell the physical plant, and raise capital by restructuring stock. The new CEO's first major act was to sell Seragen's operating division to Marathon Biopharmaceuticals, LLC, an entity created by BU expressly for the purpose of this sale, for $5 million. Under this agreement, the BU Board of Trustees agreed to enter into a services agreement where BU would fund operating expenses for two years, up to a total of $18 million, and Seragen retained the right to re-purchase the facility. Once again, BU and its trustees, in order to rescue a financially failing company, created a new company and

[43] The company attempted to convince NASDAQ officials that the loan obligation was actually an equity stake in the company, but this effort proved fruitless.

loaned out an additional five million dollars. Finally in 1998, an agreement was reached with pharmaceutical company Ligand where it agreed to acquire Seragen and Marathon for $75 million.

The plaintiffs, all minority shareholders, filed suit contending that the BU defendants breached their fiduciary duties to Seragen concerning the Series A, B, and C transactions as well as in the approval of the Accord Agreement with Ligand. Specifically, they allege that "the issuance of the Series B and Series C shares allowed BU and its affiliates to solidify their control over Seragen at the expense of the minority shareholders" (*Oliver*, p. 26). In discussing potential liability, the court notes:

> Six directors served on Seragen's Board at the time of the merger with Ligand. Silber and Condon were high ranking employees and trustees of BU. BU was a participant in the Series B, Series C, and the Marathon transactions. It was a major player in negotiating the Accord Agreement. Cassidy was closely affiliated with BU as an adviser and later as a trustee-and he personally participated in the Series B transaction and the Accord Agreement. Accordingly, these three directors were deeply conflicted with respect to the Accord Agreement and all other transactions at issue involved BU and their personal interest. …Thus, there was not a majority of the Seragen board free of control by BU, and five out of the six directors (either personally or because of their relationships with BU) had a substantial stake in the outcome of the negotiation of the Accord Agreement (*Oliver*, pp. 27-28).

The court, in finding that there was no process to protect the interests of minority shareholders held that the BU defendants breached their duty of loyalty and were liable for damages. In awarding damages, the court stated "the common shareholders of Seragen suffered actual damages of $4,809,244 and nominal damages of one dollar" and defendants BU, Silber, Condon,

and Cassidy are jointly and severally liable with legal interest from the date of the merger as well as plaintiffs' costs (*Oliver*, p. 35).[44]

There are many interests at play in this case, more so than perhaps any other case in the data. Boston University (as well as Massachusetts taxpayers) had a significant monetary interest in Seragen. The University, and the taxpayers, owned a majority stake in the corporation, had outstanding loans to the company, and therefore had an incentive to see it succeed and ultimately provide monetary returns to the state or the institution. According to the BU defendant trustees, the University also had an interest in ensuring that it retained majority ownership in the company and this interest was substantial enough to enter into a multi-million dollar loan agreement. In addition, BU had an interest in alleviating the Attorney General's concerns about its investments in the company. The other defendants (Silber, Hirsch, Cassidy, and Condon) had conflicting interests. In their capacity as trustees or administrators of Boston University, they had interests in ensuring that the University was run in an effective, efficient, and ethical manner and in accordance with relevant laws or regulations. In their capacity as directors to Seragen, they had interests to run a profitable company. As lenders to Seragen, these same individuals also had an interest in being paid back and eventually making a profit off of their loans to the company. Finally, the minority shareholders (plaintiffs in the suit) had an interest in being treated fairly and ensuring that the company's leadership abided by the legally required fiduciary duties.

This case is explained by academic capitalism as it helps to illustrate the tangled and complicated transactions that can result when high level administrators become conflicted as they seek to maintain or increase corporate and personal profitability. The market in this case is

[44] There is no note of indemnification at issue in this case. The holding that all defendants were jointly and severally liable means that the judgment may be enforced against any individual defendant, or all defendants, for the entire amount owed.

biotechnology and specifically the intellectual property owned by Seragen. Once enough money becomes invested in this market, people may dedicate significant time and resources in order to simply stop the losses or in futile attempts to regain an initial investment. As well, the trustees' inability to distinguish between the various interests and/or acknowledge their own conflicts demonstrates a fundamental problem with relying on trustees, administrators, or institutional actors to properly manage institutional conflicts. Finally, this case highlights the importance of the appearance of profitability. Even though the individual defendants recognized and understood the continual cash crunch that Seragen was in, they wanted to continue being listed on NASDAQ, suggesting that the appearance of liquidity was more important than actually having liquidity. While such behavior is expected of corporate directors, it is not generally expected that university trustees are actively engaging in practices that formerly were limited to Wall Street.

Hybrid Conflict: Institution as a Firm and Individual Conflict

In a pair of cases involving the University of California and *institution as a firm* conflicts, the 4th Circuit Court of Appeals in California dealt with a university owned fertility clinic where certain physicians were alleged to have stolen patients' eggs and embryos and unlawfully implanted them into other patients. The opinion in the second case notes that the Center for Reproductive Health (the entity at issue in both cases) was owned and operated by the University. For the purposes of the first case, I assume that CRH was owned and operated by the university. In the first case, *Stone v. The Regents of the University of California,* 77 Cal. App. 4th 736 (Cal. App. 4th Cir. 1999) the Regents appealed from a District Court ruling ordering them to provide a legal defense for Sergio Stone in a civil action. In reversing the District Court's order, the Appeals Court held that the Regents did not abuse their discretion when they decided to deny

Stone a defense.

The underlying civil suit arose while Stone was a partner at the Center for Reproductive Health (CRH). This is an *institution as a firm* conflict because CRH's offices were on the UC-Irvine campus, the University provided space, administrative services, non-physician medical and support staff, and the patients were charged an administrative fee to cover the cost of these services. Important for the case at bar, the University also provided professional liability insurance "for the faculty of the department of obstetrics and gynecology (which included Stone)" …"while working within the course and scope of their University employment..." including "the management of private patients in the facilities which have previously been approved by the University…" (*Stone,* p. 739). In 1995 a former patient sued Stone and others alleging "their eggs, sperm, and embryos were implanted in another woman without their knowledge or consent" (*Stone,* p. 740).

Prior to the filing of the suit, two UC-Irvine employees working at CRH notified the University regarding improper financial and medical activities that were taking place within the Center. Pursuant to this complaint, the University investigated the allegations. While the University's investigation was taking place, the physicians, including Stone, refused to cooperate and did not provide the university with charts, records, patient consent forms or patients to interview. Meanwhile, the U.S. Department of Health and Human Services notified the University of a complaint of research misconduct at CRH regarding failure to obtain "proper approval and authorization for human subject research" (*Stone,* p. 740). Once again, the physicians refused to cooperate.[45] After the University was notified of the plaintiffs' impending suit against Stone, he requested that the Regents provide him a defense under the professional

[45] In 1995 the Regents sued Stone to obtain the documents. The record does not state the outcome of this litigation.

liability policy. The Regent's response stated that they "reserved the right to withdraw that defense at any time" and would withdraw that defense "if it turned out Clay (the plaintiff) was a private patent of Stone's at CRH" because the matter would have occurred outside the scope of his employment. Alternatively the Regents said that the defense would be denied because "the allegations of fraud, concealment, and use of the Clays' eggs and sperm without consent…amounted to actual fraud…(and) a corrupt scheme to defraud patents of their eggs" (*Stone,* p. 741). The Clays' suit was filed in September of 1995 and shortly thereafter, the Regents decided not to defend Stone. The Regents "took the position the conduct alleged was outside the scope of employment, was intentional and fraudulent," and "an actual conflict of interest existed between Stone and the university, because the physician failed to give the university requested medical records" which it had a right to posses (*Stone,* p. 742).

The Appeals Court concluded that the District Court erred when it determined the Regents acted arbitrarily when they refused to provide a defense to Stone under Government Code section 995.2.[46] The Appeals Court stated that there was "substantial evidence to support the Regents' decision the conduct alleged in the Clays' suit took place, Stone participated, and his actions were outside the scope of employment" (*Stone,* p. 747). In making this determination the court notes that:

> (S)cope of employment is a question of fact, but all that can be required of the Regents when asked for a defense under the statutory scheme is that their decision be within the range of reason. It was. We cannot say as a matter of law it is typical of the risks of a medical school faculty practice that a physician, for 18 years a tenured professor, with a renowned and successful fertility clinic, would be part of a scheme to enrich himself by using a patient's eggs without her consent. Put in terms of the forseeability test[47], this is such startling and unusual

[46] "The Regents could refuse to provide Stone with a defense if they determined that any one of the three excluding situations existed: conduct outside the scope of employment; conduct involving actual fraud, corruption or malice, or a conflict of interest." (*Stone, p.* 746).

[47] The forseeability test refers to whether the employer should be held liable for the tortuous acts of its employees.

> conduct that we cannot say, as a matter of law, it would be fair to impose these risks on a university (*Stone,* p. 748).

Once again, the institution finds itself participating in and potentially profiting from highly unethical conduct. Interestingly in this case, however, is the fact that the physicians associated with the clinic refused to participate in the university investigation into the alleged misconduct that took place. Even more interesting is the fact that the university classified this disagreement as a conflict of interest between it and the physicians and partly based the decision to not provide him with a defense base on this conflict. Finally, the court bases its decision on the opinion that the physician's reported conduct was "startling and unusual", yet some studies suggest that when profit and ethical scientific research conflict with each other it is ethical science that loses. As such, this conduct may be neither unusual nor startling.

In this case, Stone, the University, the trustees, CRH, and the patients all had separate and conflicting interests. The University, as owner and operator of CRH, had an interest in its profitability so long as that profitability came from effective and legal work practices. There is a tension, however, between the University and CRH concerning CRH's (including Stone) refusal to participate in an initial investigation. This sets up a situation, similar to that in *Antorietto*, where universities desire arms-length (or certain types of intermediary organizations) to bring in revenue or conduct certain business yet they also want the organizations to be subject to university regulations and authority. One should not expect a company who is given wide latitude to willingly subject itself to the rules and regulations of another organization. Stone, as a physician within the CRH had an interest in maximizing his personal revenue and continuing his employment. As related to this specific case, he had an interest in receiving a defense from University as it was related to damages incurred while he was employed by the institution. The

trustees had an interest in not providing this defense as it would undoubtedly cost the institution a significant amount of money and potentially connect them (even more) with an employee who stole fertilized eggs.

The second case, *Unruh-Haxton et al v. Regents of the University of California,* 162 Cal. App. 4th 343 (Cal. 4th Cir. 2008), also involves egg stealing allegations and the Center for Reproductive Health. This is also an institution as a firm case because the court notes that CRH "was owned and operated by the Regents of the University of California (and) affiliated with the University of California Irvine Medical Center" (*Unruh-Haxton,* p. 350). The actual place where the treatments took place was located in the Garden Grove Hospital and Medical Clinic., owned by American Medical International, Inc. (later sold to Tenet Healthcare). Importantly, "the doctors, the Regents, and the Medical Center entered into a joint venture agreement to share the profits of" CRH. (*Unruh-Haxton,* p. 350). In their allegations, eight former patients to the clinic claim that after they received a fertility drug "some women were told their eggs were unsuitable for fertilization, and some women were told their eggs had been fertilized and the pre-embryo had been frozen for her future use. The patents alleged the doctors were lying and in fact stole their eggs and pre-embryos. The doctors sold some of the genetic material for research and implanted some pre-embryos into different women, possibly resulting in live births. None of the women in this case consented to have their eggs or pre-embryos donated or used for any purpose other than for their own fertility treatment and their own desire to have a child" (*Unruh-Haxton, p.* 350). The legal issue is whether the plaintiffs are time-barred from bringing their complaints because they received their treatment in the late 1980s and there were significant newspaper

articles (and other publications) noting the physicians' conduct as early as 1995.[48] The plaintiffs allege they were unaware they were potential victims until 2000 and filed their complaints within a year of discovering their claims.

The plaintiffs allege that the Regents should be liable for the physicians' actions under the *respondent superior* doctrine, a doctrine that states an innocent employer may be liable for an employee's torts committed while acting in the scope of his employment. The court notes that "the employer may therefore be vicariously liable for the employee's tort-even if it was malicious, willful, or criminal-if the employee's act was an outgrowth of his employment, inherent in the working environment, typical of or broadly incidental to the employer's business, or, in a general way, foreseeable from his duties" (*Unruh-Haxton,* p. 368). The court then notes the *Stone* decision where they found that the Regents did not abuse their discretion in determining that the tortuous conduct was outside the scope of his employment. In this case, however, they "are unable to determine whether the wrongful conduct was 'foreseeable' or an 'outgrowth' or 'typical' in the fertility treatment business" and they "cannot say as a matter of law the doctors' work and their wrongful conduct was so attenuated that a jury could not reasonably conclude the act was unforeseeable or outside the scope of employment." (*Unruh-Haxton,* p. 370). Clearly something has transpired between the *Stone* decision and this case that has made the court question the opinion that a physicians' conduct of this nature is so "startling and unusual" as to preempt the forseeability test. Ultimately the court determined that the statute of limitations did not begin to run solely by the media reports and, therefore, this action was remanded back to the District Court for further proceedings.

[48] Presumably, the newspaper articles and other publications were as a result of the allegations made in the Stone case above.

The plaintiffs also claim that the Regents and the Medical Center should be liable for the physicians' actions because they were all involved in a joint venture concerning the Fertility Clinic. The court notes "there are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise" (*Unruh-Haxton,* p. 370). The defendants concede two elements of the test, namely an agreement to finance and profit from the fertility clinic and allocation of management responsibilities. The remaining test, whether or not the wrongful acts were committed in connection with the joint venture is beyond the scope of the appeal, but the court concludes "the complaints' alleged facts (are) sufficient to support a cause of action under a joint venture theory of liability" (*Unruh-Haxton,* p. 371).

Joint venture agreements create significant problems when considering conflicts of interest. For example, in this case, the University of California is profiting from unethical behavior (the taking and implanting of eggs) yet, according to traditional conflict management, it is expected to control and regulate the profitable conduct of its affiliate. It is not only practically impossible for UC managers to regulate all of its faculty's conduct, it should not be expected that it will regulate the conduct that provides a revenue stream back to the university. Therefore, this joint venture agreement clearly shows that traditional notions of conflict management (disclosure and case-by-case management) fail on two fronts. First of all, there is a logistical impossibility in gathering and analyzing the information necessary to make an adequate and ethical determination. It is unrealistic to expect a number of professionals (physicians) to disclose all financial information to a committee or group. In addition, it is impossible to believe that this group, employed by the same institution that can profit, can fully analyze and mitigate all

potential conflicts problems from the disclosed information. Second, this position assumes that the University of California, even if provided all relevant information, would be willing and able to end a potentially significant resource stream. The fact that there was a joint venture agreement clearly suggests that there is an institutional conflict of interest at work. Whether or not more universities utilize these agreements in order to maximize profits remains to be seen. Academic capitalism however, suggests that joint venture agreements are going to become much more popular as the knowledge economy and financial rewards derived from it become increasingly institutionalized.

In explaining how universities connect to various markets, academic capitalism takes joint venture agreements into consideration as a way to expand the boundaries of the connecting entities. Practically, this means that as universities seek to engage certain markets, in these cases the fertility market, they will utilize joint venture agreements in order to do so. The *Unruh-Haxton* decision suggests that while it is legal for universities to engage in joint venture agreements, they risk facing liability when something goes wrong. They may, however, begin to require arms-length entities (such as research foundations) to enter into joint venture agreements, as opposed to the institution, in order to help alleviate some of this potential liability. In addition to the potential legal ramifications of joint venture agreements, universities that choose to engage in these contracts must also deal with the ethical complications of being associated with people like Dr. Stone, who may bend rules and regulations in order to maintain or increase revenue.

Sand and Gravel Conflict

Sand and gravel conflicts of interest have, for the most part, always been a potential problem in higher education or any other enterprise where procurement of goods is a necessity. Specifically, this type of conflict is where an officer acts to maximize his or her own self-interest

and (t)hese conflict are made possible because of the individual's position as a university officer (Slaughter, Feldman, and Thomas, 2009). In their study, Slaughter, Feldman, and Thomas (2009) found that 14 of the 44 AAU institutional policies were *sand and gravel* policies designed to prohibit/manage these conflicts. In the current study, 3/14 cases are *sand and gravel* in nature.[49]

A fairly simple *sand and gravel* conflict is evident in *In re: Beychok and Wolf Baking Company, Inc*., 495 So. 2d. 1278 (La.1986) where the Louisiana Supreme Court held that a member of the University's Board of Supervisors (BOS) violated the state ethics code when a company he owned entered into contracts with a state university. The facts of the case are as follows. Sheldon Beychok began serving on the Louisiana State University Board of Supervisors in 1978. He also served as president, CEO, and majority stockholder in Wolf Baking Company and received compensation from the company for services rendered. From January 1, 1981 to December 31, 1984 Wolf Baking Company, after receipt of sealed competitive bids, entered into contracts with LSU for the sale of food to the University. These contracts were worth $219,088.00. Some of the contracts were renewed in 1985 and the university purchased additional products valued at $27,758.00. In August of 1984, the BOS sought an opinion from the state Commission on Ethics for Public Employees concerning the "propriety of members of the board entering into contracts for the sale of goods and services to LSU" (*Beychok,* p. 1280).

The Commission considered the request and concluded that relevant statutes prohibited members of the board from entering into business transactions with LSU.[50] The Commission also held that "Beychock had violated….(the statues) by virtue of having received compensation

[49] The Sibley Hospital case is classified as *sand and gravel*.
[50] The specific statutes are: R.S. 42:1111C(2)(d), 1112B(2) and (3) and 1113B.

(his salary) from Wolf Baking Company during the time that these transactions took place and having participated… in the food service contracts" (*Beychok,* p. 1280). They also found "Wolf Baking Company had violated (the statues) by entering into contracts with LSU" (*Beychok,* p. 1280). As a result of these findings, the Commission ordered that all contracts between the company and the university be discontinued and the university refrain from entering into future contracts with members of its governing authority. Beychok and Wolf Baking Company appealed the decision and the court of appeals reversed, holding that the statutes provided exceptions "by allowing an entity controlled by a public servant to contract with the public servant's agency when the contract has been awarded by sealed competitive bid" (*Beychok*, p. 1280). The Commission applied for writs and the Supreme Court of Louisiana took the case.

The primary issue on appeal is whether one of the statutes contains an exclusion allowing public servants to contract with their agencies so long as the contract is awarded under a sealed competitive bidding process. The Supreme Court held that no such exclusion existed. Specifically, the opinion states "Board members cannot share in contracts with their boards, even if the contract was obtained because it was the lowest sealed competitive bid" (*Beychok,* p. 1282). In concluding its opinion, the court returned to the legislative intent of the ethics legislation. The opinion notes:

> …to protect against both actual and perceived conflicts of interest between the private interests and public duties of public servants, the state established objective rather than subjective standards. These standards do not require that there be actual corruption on the part of the public servant or actual loss by the state. The legislature has reasonably decided that board members should not do business with the agency governed by the board (*Beychok,* p. 1283).

This case helps to highlight the traditional conflict governed by *sand and gravel* conflicts policies, a conflict of procurement. This type of conflict, as evidenced by the fairly simple court

opinion, is fairly easily handled because it is not complex. For example, if it is against public policy or ethics legislation for a trustee to contract with the university then the fact pattern will primarily consist of whether the trustee has an economic interest in the contracting company, whether the trustee sits on a university's board, and whether the contracting company is providing goods/services to the university. As universities continue to engage in capitalistic behavior, however, simple *sand and gravel* policies are not designed to address the complex situations that arise when trustees/supervisors attempt to line their own pockets at the expense of the university. Another *sand and gravel* case highlights problems with more complex fact patterns.

In an insurance lawsuit concerning unethical conduct by a university trustee, Jarvis Christian College sued National Union Fire Insurance Company of Pittsburgh, Pennsylvania seeking payment on a "School Leaders Errors and Omissions Policy" for the "wrongful acts" of trustee Jerrell Cosby, 197 F. 3d. 742 (5th Cir. 1999). Unlike many other conflict of interest cases, the primary issue at bar is whether or not the defendant insurance company is required to pay on a policy for losses incurred by the College due to Cosby's actions as trustee. The court, after reviewing the facts and policy language, determined that the insurance company did not have to pay. This case, unlike the fairly simple fact pattern in *Beychok*, illustrates a much more complex *sand and gravel* institutional conflict.

The specific facts which led to the demand on the policy are as follows. Cosby, while he was Jarvis Christians' treasurer and chairman of the finance committee, recommended investing in a small company called Action Funding, Inc. This was a new company and it had reported a negative net worth on its most recent tax return. Cosby, despite making the investment proposal to the finance committee and full Board of Trustees, did not disclose that he had a 49%

ownership interest in and was a director and salaried employee of Action Funding. The Board of Trustees voted to invest $2 million of Jarvis' endowment funds (roughly 15% of the funds that were reserved for nontraditional investments) into the company. Somewhat later, Action Funding, Inc. failed and Jarvis' board learned of Cosby's involvement with the company. He was shortly thereafter asked to resign from Jarvis' Board of Trustees.

In an earlier suit, the College successfully sued Cosby and Action Funding for misrepresentation and false statements in connection with the $2 million transfer from Jarvis to Action. The jury found that Cosby breached both the duty of care and duty of loyalty owed to Jarvis and awarded Jarvis damages against him in the amount of $1,815,000 and against Action Funding for $2,015,000. Jarvis never received any payment from either defendant. The College then made a written demand on National Union to pay on the policy under the "wrongful acts" provision of the insurance policy. The insurance company denied the College's claim because the definition of "wrongful acts" did not include actions such as those by Cosby, and further that the "fraud or dishonesty" and "personal profit or advantage" exclusions prohibited payment. Although the appeal primarily concerns interpretation of an insurance policy, this case is of important note because it sheds light on the different types of claims that can arise under a *sand and gravel* institutional conflict of interest.

In its defense, National Union says that "any claim arising out of the gaining in fact of any personal profit or advantage to which the Insured is not legally entitled" is excluded from coverage. The transfer of $2 million from Jarvis to Action Funding, in their minds, created a personal profit or advantage for Cosby. The appellate court held that the infusion of cash provided Cosby and Action a "distinct business advantage" even though neither he nor his company actually saw a profit. The court also held that Cosby was not legally entitled to the

transfer because he breached his fiduciary duty of loyalty to the College.[51] For these reasons, the court held that National Union was not required to pay on the policy.

This case is instructive for several reasons. Primarily, it shows that *sand and gravel* conflicts are much more complicated than simple procurement of goods/services and also include endowment investments and securities purchases. For example, many of the policies and procedures designed to manage *sand and gravel* conflicts of interest are trapped by their temporal limitations. What this means is that while institutional *sand and gravel* conflicts of interest have grown to include investments, banking relationships, contracts, and securities; the policies and procedures used to mitigate the conflicts are designed to control conflicts related to procurement, a much less complex issue. With the conflicts themselves becoming much more complex, along with the managing policies and procedures remaining fairly simple, this will inevitably allow conflicts to slip through the management cracks such as what occurred with Jarvis Christian.

This case shows that even small colleges are becoming highly involved in non-traditional investments and it should be little/no surprise to see other small colleges following the elites in investing in hedge funds, or similar high risk-high return securities. Finally, it is important to note that the actions that ultimately cost the college $2 million were undertaken by an individual who, according to practice, is responsible for managing university conflicts of interest. If the managers cannot even manage their own conflicts (including simply researching investments) then how can they be expected to manage others?

---

[51] The court cites *GNG Gas Systems, Inc. v. Dean* 921 SW2d 421. 426 (Tex. App. 1996)"for the proposition that when a corporate officer or director diverts assets of the corporation to his own use, he breaches a fiduciary duty of loyalty to the corporation, and the transaction is presumptively fraudulent and void as being against public policy." For this reason, Cosby and Action Funding were not legally entitled to the $2 million. Other cited cases indicate "that a fiduciary is not legally entitled to any profit or advantage he gains as a result of a breach of duty or trust" (p. 748).

Taken together, *Sibley*, *Beychok*, and *Jarvis Christian* help to showcase the increasingly complex nature of *sand and gravel* conflicts of interest at universities. While many conflicts policies clearly address conflicts of interest related to procurement (such as in *Beychok*) when interlocking directorships with banks (*Sibley*) or endowment investments (*Jarvis Christian*) become an issue, the fact patterns may prove to be too complex for the appropriate policies. This is predictable by academic capitalism in that the conflict policies are not adequate to address properly complex *sand and gravel* conflicts, especially with complex interactions with the market. In addition, these cases showcase the increasingly complex ways in which revenue generation is spanning the boundaries between institutions and various markets, so much so that conflicts policies cannot ensure oversight. Finally, these cases highlight the problems associated with traditional conflict management in that this management system requires trustees (those who are most likely to profit from *sand and gravel* conflicts) to disclose these conflicts. Two of the three cases (*Jarvis Christian* and *Sibley*) suggest that trustees occasionally are unwilling to disclose these types of conflicts, thus defeating an important assumption of traditional conflict management.

Quid Pro-Quo Exchange

Slaughter, Feldman, and Thomas (2009) found zero AAU conflicts policies which addressed *quid pro-quo exchanges* between the institution or institutional leaders and industry. *Quid pro-quo exchanges* are defined as "exchanges in which institutional officers engage in broad, unspecified … arrangements with industry" (Slaughter, Feldman, and Thomas, 2009, p. 4). An example of this type of conflict is: "Apotex, a Canadian pharmaceutical corporation had promised University of Toronto a multi-million dollar gift, and the university initially did not support Oliveri, a professor and researcher when she attempted to report negative findings about

deferipron, an Apotex product" (Slaughter, Feldman, and Thomas, 2009, p. 6). These types of agreements can create a situation where the university is primarily acting in its own self-interest or the interest of the decision makers instead of the public good. As with the other types of conflicts, these arrangements can often also undermine a university's credibility as an impartial entity. In this study, 2/14 cases are *quid pro-quo* conflicts.

In a *quid pro-quo- exchange* conflict of interest case, the United States indicted a New Jersey state legislator and medical school dean alleging that the two defrauded the State of New Jersey. In *United States vs. Bryant,* 556 F. Supp. 2d. 378 (D.N.J. 2008) the defendants are charged with 20 counts of violating federal statutes related to a *quid pro quo exchange* where Gallagher (the Dean of the School of Osteopathic Medicine) and Bryant (a State Senator of New Jersey) "engaged in a scheme to defraud the New Jersey public of Bryant's honest services", solicited and accepted a corrupt thing of value, defrauded the New Jersey Division of Pension and Benefits, defrauded the School of Medicine and the University of Medicine and Dentistry of New Jersey of honest services and money and fraud involving an organization receiving federal funds (*Bryant,* p. 383). The primary issues on appeal are not related to the conflicts of interest, but instead are related to statutory intent of the alleged offenses and severance of the defendants' respective trials. The conflicts issue, however, presents an example of a *quid pro quo exchange* relationship and is relevant for that matter.

The factual allegations suggest that the two defendants engaged in a scheme whereby the Senator, in exchange for acquiring legislative votes supporting the Medical School, received a no-show job from the Dean, essentially resulting in the Senator receiving a salary for a job at which he was not required to work. In 2002, at the beginning of the scheme, Bryant arranged meetings between Gallagher and members of the legislature in order to help Gallagher become

Dean of the School of Medicine. He was appointed in May of 2002 to interim dean and in November the permanent dean. Meanwhile, the New Jersey Governor created a Commission of Health Science, Education, and Training that recommended that "Rutgers University, UMDNF, and the New Jersey Institute of Technology merge into a single university system. This recommendation, if adopted, directly threatened the independence of SOM (School of Medicine) as well as future funding for SOM" (*Bryant,* p. 384). The primary way in which the SOM was threatened was that if consolidated with other institutions, it would lose authority, voice, and independence. It was at this time that the government alleges the defendants agreed to and engaged in their *quid pro quo* scheme.

Bryant, in exchange for a no-show position as Program Support Coordinator agreed to advocate on behalf of the School of Medicine, including protecting the School's interests in light of the committee's recommendation of merging. The indictment goes on to allege that the Dean "made it falsely appear that…Bryant was assuming a legitimate and bona fide position and that there had been a competitive process leading to…Bryant's selection" and Bryant "falsely stated to the SOM staff that his position at SOM had been approved by the Office of Legislative Services..." when he had never actually received an opinion from the OLS (*Bryant,* p. 385). Bryant received payment for this position from 2003 to 2006. In exchange for this position, Bryant is alleged to have "used his State Senate staff to arrange meetings between Gallagher and members of the Senate Budget and Appropriations Committee"…. "(direct) changes in the New Jersey state budget to benefit UMDNJ and SOM" and "represented, appeared for, and negotiated on behalf of SOM with state agencies, and used his official position to influence those agencies to take action favorable to SOM" (*Bryant,* pp. 385-386).

This situation presents possibly a worst case scenario for a university and its institutional leaders and demonstrates the incredible lengths that some people are willing to go in order to ensure certain arrangements are not modified. In this situation, the status-quo to be maintained is the independence of the Gallagher's school. If the governor's proposal was allowed to proceed, Gallagher and others would lose the independence with which they have become accustomed. The lack of other *quid pro quo exchange* conflicts is likely explainable by several factors. Primarily, many are contractual arrangements between two parties and will be presumed legal so long as public policy is not violated. These contracts also are negotiated between the parties and are often entered into only after all parties involved make sure that they are getting what they desire, whether it is resources or access to intellectual property. Another reason may be because these agreements often remain confidential, thus limiting their exposure to lawsuits or public comment. As well, conflicts such as that in the *Bryant* case are potentially few and far between because of the criminal sanctions that accompany bribery and theft of honest services. It does, however, point out that relationships between the state and universities can often result in conflicts of interest and unethical decision making by one or more parties.

Another *quid pro-quo exchange* case is *United States v. Vrodlyak,* 536 F. Supp. 2d. 899 (E.D. Ill. 2008) where the federal government indicted a Chicago attorney for bribery, mail fraud, and wire fraud in connection with a kickback scheme involving a medical school, real property, and a trustee. The defendant filed a motion to dismiss the indictment and the court, after considering the arguments of both sides, denied the defendant's motion.

The relevant facts are described in the government's indictment. In 2002, the Finch University of Health Science/Chicago Medical School acquired the Dr. William M. Scholl School of Podiatric Medicine. This sale also involved a piece of real property located in Chicago.

Later in the year, the Medical School decided to sell that property. Stuart Levine, a member of the Medical School's board of trustees and chair of the real estate commission, was responsible for overseeing the sale. The indictment alleges that Levine spoke with Vrdolyak about the proposed sale and the two agreed that "Vrodolyak would identify a buyer for the property and that Levine would use his position as a trustee to ensure that Vrdolyak's buyer secured the property from the Medical School. In exchange for his efforts, Levine would receive a kickback" (*Vrodlyak,* p. 902). Vrdolyak told Levine that Smithfield Properties Development, LLC was interested in purchasing the property and Levine and Smithfield began negotiations. Meanwhile, Levine instructed other agents of the Medical School not to pursue other offers and reject any inquiries in the property. In March of 2003, Levine convinced the Medical School Board to vote to sell the property to Smithfield for $9.5 million. He helped convince the board by speaking in favor of and voting for the purchase. In May, however, the Medical School learned that other people were interested in the property and were willing to pay upwards of $15 million to get it.[52] Levine shared the information about the competing offers to both Vrodolyak and Smithfield after which Vrodolyak told Levine that Smithfield was willing to match the $15 million offer. Levine and Vrodolyak then agreed that Levine, using his authority as trustee, would ensure the Board voted in favor of the offer. In return, Smithfield would compensate Vrdolyak who would pass a portion of that to Levine. The agreement was voted upon in June of 2003 and finalized in November. For his services, Levine and Smithfield agreed to pay Vrdolyak 10% of the purchase price (or $1.5 million) as a finder's fee. Vrdolyak and Levine then discussed how part of that money would secretly be transferred to Levine, as they both knew Levine had not disclosed his interest in the transaction to the Medical School's Board.

[52] The other board members only learned of the other offers after a prospective purchaser sent a $15 million offer to each trustee.

Legally, the issue is primarily one concerning the sufficiency of the indictment and application of the specific charges to the facts, however the facts provide yet another way in which trustees/administrators can involve themselves in institutional conflicts of interest. The facts also help to emphasize the complex nature of some of these agreements and the fact that they can involve third party, allegedly trustworthy, attorneys or other professionals. Unlike the *Bryant* case, which is essentially a fairly simple matter of a no-show job, this case involves real estate purchases and multiple parties. As such, at issue is not simply a potential 5 or 6 figure job, but instead, millions of dollars.

Interestingly, the two *exchange* conflicts cases were only brought about through federal criminal indictments, meaning that both involved significant criminal conduct perpetrated by high ranking individuals associated with a university. It is notable that there are no *exchange* cases related to the transfer of intellectual property. This is likely because universities do not want those cases to go public and therefore, they are settled before they ever go to trial. In *Bryant*, the matter was fairly simple and related to awarding a no-show job in exchange for political votes to help a medical school. In *Vrodolyak,* the facts were slightly more complex because it involved a third party real estate company and kickbacks associated with a transfer of real property. This transaction was complicated by the fact that the seller university did not incur any damages by the sale and therefore the defendants' actions could have been overlooked but for the actions of the federal government. Regardless, given that Slaughter, Feldman, and Thomas (2009) found that no university conflict of interest policies governed this type of conflict, one must wonder how many of these conflicts go unnoticed by the federal government and are allowed to continue.

Conclusion

There are notable patterns that emerge from the case data and many of these are predicted by academic capitalism. This study helps to identify the fact that colleges and universities, including non-elite institutions, are actively involving themselves in market activities. They are not, as some theories assume, simply being acted upon by outside forces. Instead, universities and their leaders are making decisions and taking actions that allow them to more effectively identify and capitalize on their respective markets. Whether the situation is at the University of California, Johns Hopkins, Howard University, or Jarvis Christian College, higher education institutions are actively seeking to utilize their market power in order to acquire more resources and protect their financial interests. In addition, they are willing to engage private industry in order to do so.

Universities are engaging industry through interstitial organizations and interlocking directorships and these relationships are often the center of conflicts of interest. In fact, 12/14 cases involved either an interlocking directorship (8/14) or an interstitial organization (6/14)[53]. All 14 cases included some type of unethical behavior, ranging from procurement issues to purposively endangering children's lives. This finding is notable because as universities continue to interact with industry, they will continue to form these types of relationships. Further, as found in the Slaughter, Feldman, and Thomas (2009) study university conflicts of interest policies are often not elaborate enough to manage adequately these types of very complex conflicts. Until these policies begin taking into account trustee conflicts and interstitial organizations, they will likely continue to fail to manage adequately institutional and administrative behavior. The finding that many conflicts of interest, particularly those that lead

[53] *Oliver* and *Antorietto* are counted as both an interlocking directorship and interstitial organization because of the nature of the university's ties to the organization.

to litigation, take place within these interlocking directorships or interstitial organizations verifies many of the fundamental positions of academic capitalism.

Perhaps the most intriguing pattern that comes from the data is the idea that those who are responsible for managing conflicts of interest can have significant difficulty in even identifying the conflicts, much less can they properly manage them. For example, the trustees in the *Oliver* case were clearly unable to distinguish between the duties owed to the university, themselves, minority shareholders, and others in their continued attempts to capitalize a failing company. In the *Grimes* case, it is also clear that the Institutional Review Board, the body most responsible for ethical research, not only failed to ensure reliable and safe research but provided suggestions to the researchers to get around protocols governing human subjects research. Further, the trustees in both the *Sibley Hospital* and *Jarvis Christian* cases failed to ensure that the investments their institutions were involved in were conflict free and in the institution's best interest. If decision makers and managers are unable to distinguish between or ethically manage institutional conflicts then one must question to what extent institutional conflicts policies or IRBs are effective controls against conflicts of interest.

Another pattern that emerges from the data concerns the legal yet unethical conduct of universities and their decision makers. For example, in a January 1, 2009 New York Times article concerning revenue sharing between credit card companies and colleges, this concept is put succinctly when "(u)niversity officials say that their agreements with card issuers comply with the law and bring in valuable revenue."[54] The question is not: *should* universities be making credit cards available to already debt laden students, or *should* universities be participating in directorships with industry in which they have a financial interest? The question,

[54]Glater, J., The Debt Trap. New York Times, December, 31, 2008. Available at: http://www.nytimes.com/2009/01/01/business/01student.html

instead is simply *can* universities do these things? And if they *can*, they will. Such behavior should not be surprising when the public, policymakers, and judges expect and to a certain extent require university officials to act as business persons or chief executive officers. Taken together, these forces create tendencies where what is legal behavior is acceptable and what is acceptable is legitimated regardless of the ethical implications or consequences of the behavior.

Overall these cases present information rarely before studied in higher education research and shed new light on market activities, relevant organizations, and fundamental flaws of traditional conflict management. The data suggests that universities are actively interacting with industry in order to gather new resources and maintain a watchful eye over investments and deposits. These interactions are encouraged by state and federal regulation and then legitimated by court decisions such as the *Sibley Hospital* case. Institutional Review Boards, the primary body limiting conflicts of interest, may be little more than "in house organs" with more of an interest in the research and its profitability than with the ethical nature or safety of the protocols. Trustees, meanwhile, take on multiple obligations and responsibilities and are not adequately able to determine where conflicts can arise, much less are they able to manage these conflicts. In their never ending search for more money and prestige, universities are an active participant in commercial activities, while institutional decision makers often turn a blind eye to, or participate in, questionable relationships and unethical conduct so long as profit or prestige may be realized. The idea that universities are bastions of ethical, unbiased research and activities, assuming it ever existed, is no longer. Instead, what is left is a situation where "the referee is being paid by the players" and spectators such as the public, students, and faculty are left on the sidelines.

CHAPTER 5
INDIVIDUAL CONFLICTS OF INTEREST

Individual conflicts of interest relate to situations where a researcher is compromised, or appears to be compromised, by their financial holdings or financial relationships with outside entities. As noted in the literature review, individual conflicts of interest and the influence they have on research results have been very well documented. What has not been well researched is how individual conflicts of interest are addressed in the court system. Similarly, little research has been conducted analyzing how faculty autonomy may be impacted by these decisions. This chapter addresses these gaps in the literature.

In order to understand many of the points in this chapter, one must be familiar with general conflict of interest management policies. It is beyond the scope of this paper to discuss each and every possibility for university conflict management, however there are general guiding principles that are outlined to provide the reader with a basic understanding of conflict policies and procedures. As an example, the University of Georgia's conflict of interest policy defines a conflict of interest as: a situation that "arises when an employee or an employee's spouse or dependent child has a significant financial interest…in an outside funding source, which interest could directly and significantly affect decision making in the design, conduct, or reporting of externally funded instruction, research, or service activities performed on behalf of the University."[55] Conflicts are managed through disclosure, often to a conflict of interest committee. Specifically, UGA's policy "requires disclosure of all activities that involve a

---

[55] University of Georgia's Conflicts of Interest Policy, found at http://74.125.113.132/search?q=cache:GzoR37qS08gJ:www.ovpr.uga.edu/docs/policies/research/Conflicts-of-Interests.doc+university+of+georgia+conflicts+of+interest&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a

significant financial interest on the part of each individual employee, his/her spouse, or his/her dependent children so that real or apparent conflicts of interest and/or commitment may be managed, reduced, or eliminated."[56] What these two statements mean is that a faculty member must disclose to the conflicts committee all of his/her significant financial interests, which would create a real or apparent conflict of interest by the activity (research, teaching or service) being funded. For example, if a faculty member receives payment for speaking from a pharmaceutical company and then receives a grant to conduct research on a drug owned by that company, he or she must disclose that to the conflicts committee. The committee is then charged with "identification and management, mitigation, or elimination of specific conflicts of interest and conflicts of commitment."[57] The committee (appointed by the University President) may manage the conflicts by requiring public disclosure, research monitoring, divesture of the conflicting resources, or any number of other ways. The conflicts review process must take place annually during a multi-year grant or each time a new grant is obtained.

As with any complicated process, there are several ways that the conflict of interest management process can become problematic for the university or the faculty member. For example, a faculty member may receive money for speaking at an industry conference on a topic on which she is considered an expert. She may then receive a grant from private industry to study more about that topic. Assuming that she discloses her conflict of interest, the committee will review and manage it. If she does not disclose the conflict, this may bring about two types of problems. The first is an undisclosed conflict of interest and violation of institutional policy.

---

[56] University of Georgia's Conflicts of Interest Policy, found at http://74.125.113.132/search?q=cache:GzoR37qS08gJ:www.ovpr.uga.edu/docs/policies/research/Conflicts-of-Interests.doc+university+of+georgia+conflicts+of+interest&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a

[57] University of Georgia's Conflicts of Interest Policy, found at http://74.125.113.132/search?q=cache:GzoR37qS08gJ:www.ovpr.uga.edu/docs/policies/research/Conflicts-of-Interests.doc+university+of+georgia+conflicts+of+interest&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a

The second, connected to the first, is what to do when another faculty member alleges that her colleague did not disclose the conflict. If she does disclose the conflict, then the conflict committee will manage it. This management may be dependent on individual personalities, politics, or financial considerations of the institution or its members. This variation in management may bring about additional problems, which would be inconsistent or improperly influenced oversight. Any of these situations may result in litigation. That litigation is the subject of this chapter.

Individual conflicts of interest provide a flashpoint to examine the impact that academic capitalism and managing professionals[58] have on faculty work and autonomy. This includes both the disclosure and the management processes. As faculty members are required to disclose potential conflicts to managers and these managers often decide how to manage the conflicts faculty members give up significant autonomy in this process. An examination of the cases showcases what impact traditional conflict management has on faculty work and autonomy. This impact also includes providing incentives and disincentives for faculty to participate. Similarly, those faculty members that disclose activities that are against university priorities may be subject to different rules or regulations than those who disclose activities that bring the university additional revenue. An examination of individual conflicts cases helps to bring this issue into focus. The primary reason for the connection between individual conflicts cases and a loss of faculty autonomy is that any time a professional is required to disclose what (s)he does with outside time to someone else means that they are effectively subjugating themselves to the authority and discretion of the one receiving the report. For example, there are cases where

[58] Gary Rhoades book Managed Professionals refers to faculty members (the professionals) and how they are increasingly being managed and controlled by non-faculty managers. When I use the term "managing professionals", I am referring to the individuals who manage and control faculty work.

faculty member's First Amendment right to freedom of speech is negatively impacted due to the timing or disruptive nature of their disclosures to managers. In addition, non-faculty member administrators may treat similar conflicts of interest differently based upon the impact that the conflicts have on university revenue or priorities. This results in strategic management of conflicts according to the priorities of the university or administration and not the faculty or the public. The cases presented highlight the loss of faculty autonomy through the conflicts of interest disclosure and management processes.

There are two primary frameworks that guide the analysis of individual conflicts cases. First, academic capitalism continues to be utilized as it helps to explain mechanisms related to commercial activity and the importance of revenue generation from university activities. It also explores the impact that administrative control over faculty work has on individual faculty members and on faculty autonomy as a whole. Similarly, Gary Rhoades concept from Managed Professionals helps to frame the impact that capitalist activities have on faculty. It places specific emphasis on the loss of faculty autonomy to new, understudied bureaucratic structures and professionals. Taken together, academic capitalist policies and procedures, such as increasing technology transfer activities or appropriating faculty intellectual property becomes so complex that managing professionals (such as TTO staff, incubator directors, or patent attorneys offices) are created and funded to help facilitate the transfer of the property to the appropriate market. Over time, these managing professionals may squeeze faculty autonomy into a place where faculty's time is accounted for, work is appropriated, and speech may be quashed.

The concept of managed professionals is a direct outgrowth of capitalistic behavior on the part of universities. In this situation, the professionals that are being managed are university faculty. Those managing are part of new bureaucratic structures often, but not necessarily,

associated with market-based university activities. They include, but are not limited to, technology transfer office personnel, part-time faculty, research oversight administration, institutional review boards, and business incubators. Through institutional policies, court decisions, and the increased use of market based concepts, the managers are becoming an institutionalized part of the new university. Some of the growth in managing professionals has come from business oriented concepts such as economic efficiency and productivity while others are a result of an increasingly complex organization. This growth impacts faculty work. As Rhoades notes, "(a)s institutions increasingly emphasize productivity and efficiency, and as they increasingly move toward a market orientation, they lay greater claim to faculty's time as full-time employees" (Rhoades,1998, p. 212). Much of the institutional actions regarding these new claims on faculty work and time have come through institutional policy or the courts and they have been encouraged and supported governmental authorities (Rhoades, 1998). Private industry, as a major recipient of commercial products also supports means by which a faculty member's intellectual property can more quickly get to the market. In addition to the changes in policy, court decisions, and government support, "the rules and technologies have changed, the opportunities have expanded, the stakes have gone up, and higher education institutions have become more aggressive claimants to the products of faculty's intellectual property" (Rhoades, 1998, p. 214). As they have become more aggressive in acquiring and marketing intellectual property, it has put faculty on the defensive concerning traditional and customary notions of faculty autonomy and academic freedom. The cases selected for this portion of the study highlight this tension.

Courts have, for the most part, given universities a significant amount of deference when it comes to academic decisions and these decisions often limit faculty autonomy. Courts,

therefore, have added to the rise of the managed professional phenomenon. Colleges utilize this judicial deference to more closely monitor and manage faculty. This closer management, as seen through the case law below, results in lawsuits where faculty members allege that their rights have been violated due to university discipline. Importantly, these decisions also erode fundamental rights from the faculty, including those related to the First Amendment and traditional notions of academic freedom. Much of the erosion will likely result in a chilling effect concerning a faculty member reporting another faculty member's or the institution's conflict of interest.

Individual conflicts of interest are relevant for academic capitalism and managed professionals for several reasons. First, there is an idea of "good" and "bad" conflicts as determined by the state or the university. For example, a conflict of interest that interferes with the state's or university's interest (such as dual employment) is bad while those conflicts that bring in revenue for the state or university are good. Universities treat these two types of conflicts differently. This case-by-case management of individual conflicts allows managers and administrators, not faculty, to determine what conflicts should be managed and how they should be managed. As such, it can subjugate the faculty member's interest (or the public interest) to the interests of the managers or the institution. This does not only effect management, but the conflicts disclosure process as well. The conflict disclosure process, one of the primary mechanisms for commercializing academic inventions, creates a situation where faculty members are required to report their work and their use of time to non-faculty in order to meet the interests of the institution. Failure to disclose or the improper allegation that another faculty member failed to disclose may result in the disciplining of an individual by university management. This results in a loss of faculty autonomy, disincentives to participate in the

commercialization process, and even disincentives to report other individual's undisclosed conflicts of interest. The loss of autonomy and patchwork management brings about litigation and that litigation will be the primary data of this analysis. This study provides information on how university commercial activities are impacting faculty autonomy through traditional conflict management and the increased use of managing professionals to ensure compliance with university policy. It also highlights significant incentives and disincentives for faculty to participate in the conflicts process, including analyzing lawsuits where faculty members have been punished, either through defamation suits or university action, for alleging that another individual has an undisclosed conflict.

The analysis for each case includes first a discussion of the overall fact pattern, then application of the relevant law, followed by an analysis of the relevant interests, and then finally an application of the theories to the case. This framework allows each of the varying interests to come to light and showcase how conflicts between the university and faculty members, or conflicts between faculty members themselves, can result in litigation. In addition, the discussion of competing interests helps to highlight the complex nature of the conflicts. Finally, by tying the facts and interests back to the theory, the analysis showcases the way that individual conflicts of interest disclosure and management is predicted by academic capitalism and results in greater use of managing professionals.

Methodology

I utilized the same methodology as in the institutional conflict of interest section.[59] After reading each case I separated those that spoke to institutional conflicts from those that spoke to

[59] Within the advanced search toolbar, I entered the terms "conflict of interest" and "university." In order to limit my returns to less than 3000 results (the maximum allowable by Lexis) I entered date restrictions in 10 year increments. For example, my first search for case law was limited to "the last ten years" and returned 2340 total

individual conflicts. Due to my interest in the legal issues related to conflicts of interest, I organized the individual conflicts of interest cases according to what type of claim was made by the plaintiff (usually a researcher). Overall, there were 15 cases related to individual conflict of interest. Of the 15 cases, 4/15 related to the First Amendment, 3/15 related to defamation, 1/15 related to intentional interference with a profession, 1/15 related to a False Claims Act, and 5/15 were related to dual employment and 1/15 was related to nepotism. In the analysis, I first address the cases where the First Amendment was relevant to the discussion. This requires an initial analysis of First Amendment case-law, including a brief discussion of academic freedom. I then address the cases related to defamation, intentional interference with a profession and the False Claim Act, each in turn. Finally, I address several miscellaneous cases and discuss their importance and relevance to the conflict story.

First Amendment[60]

Many of the individual conflicts of interest suits arise when a university or university actor disciplines a faculty member for either having or alleging a conflict of interest. This discipline may implicate a faculty member's First Amendment right to free speech. As such, a discussion of individual conflicts of interest case law requires an understanding of how the First Amendment applies to faculty, their speech, and individual conflicts of interest. Overall, there are 4/15 cases involving the First Amendment.

These cases highlight how faculty are being managed by the university, to the point where even their speech is managed. Faculty often consider freedom of speech to be a

---

results. My next date limitations were from October 1, 1988 to October 29, 1998 (returning 1377 results) and January 1, 1980 to October 1, 1988 (715 results). Overall, my search results returned 4432 total cases with the terms "conflicts of interest" and "university" for cases decided between January 1, 1980 and October 29, 2008.

[60] For an interesting study concerning Academic Freedom and the First Amendment within a path dependence and policy space framework see; James Jorgensen and Lelia Helms, Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance, *The Review of Higher Education*, Fall 2008 Vol. 32 No. 1, pp. 1-24.

fundamental right associated with their profession. This usually portrays itself through the concept of academic freedom. As noted below, even this most precious of academic rights, is largely managed by structures, organizations, or individuals who are not faculty. Courts often provide these non-faculty individuals with the discretion to manage faculty and they, in the name of more efficiency and increased productivity, utilize it. Faculty speech is important to consider in the context of individual conflicts of interest because almost all of a faculty member's work is considered speech. This includes speech within faculty committees, research, or teaching, any of which can be a component of, or a comment on, a conflict of interest. As universities continue to increase management authority and academic capitalist behavior, conflicts of interest is a place where individual interests (whether of the faculty member or the administrator) may diverge from the interests of the institution or from other faculty members' interests. This then creates a power struggle between faculty and the administration or between faculty members to control faculty work, time, or speech as related to the individual conflict at issue. A study of how universities manage individual conflicts of interest help to highlight the impact that academic capitalism and increased use of administrative oversight are having on faculty autonomy and traditional notions of academic freedom and the First Amendment.

This paper does not intend to provide a total description of academic freedom or First Amendment cases. It, however, analyzes and describe First Amendment/academic freedom cases related to individual conflicts of interest within the frameworks of academic capitalism and managed professionals. The ultimate result is that First Amendment/academic freedom rights become so squeezed by judicial opinion and managerial discretion that, by the end, one must wonder "what remains protected?" (Hofstadter, 1996; Metzger, 1961; Schrecker, 1986).

Overview of the Three Pronged Approach to the First Amendment

Restraint on a faculty member's First Amendment right to free speech may come either from internal or external influences, but internal restraint is primarily relevant for this study.[61] First Amendment protection from internal restraint applies only to public institutions yet private institution faculty members may be protected by contract law, depending on the terms of their specific employment contract. This protection often comes in the form of adopting AAUP or other union guidelines concerning academic freedom within the faculty member's employment contract. Tenure, however, is irrelevant to a First Amendment claim and a faculty member need not have a tenure or contractual claim in order to bring forth a claim regarding a violation of their First Amendment rights (*Perry v. Sindermann*, 408 U.S. 593; 1972). If a faculty member claims that a violation of their First Amendment right to freedom of speech resulted in discipline then they may also allege retaliation. A retaliation claim requires that the employee "establish the speech in question is constitutionally protected and that it was a substantial, or motivating, factor in the employer's retaliatory action" (*Brooks*, p. 749 citing *Carreon v. Ill Dep't of Human Servs.*, 395 F. 3d. 786; 2005). If an employee proves retaliation, then the burden "shifts to the government to prove that it would have taken the same action in the absence of the protected speech" (*Brooks*, p. 749). All of this discussion, however, assumes that the court finds the speech in question is protected by the First Amendment. This assumption, as noted through the case law below, may not be a very good one.

In order to determine if a public employee's speech is constitutionally protected, courts usually employ the two step analysis explained through the *Pickering/Connick* line of cases. First, the court must determine if the speech addressed a matter of public concern (*Connick v.*

[61] Internal restraint refers to speech penalized by the university while external restraint refers to speech penalized by an authority outside the university.

Myers, 461 U.S. 138; 1983). In order to make this determination the court looks to the evidence to "evaluate whether the plaintiffs' speech is most accurately characterized as employee grievances or as a community concern" (*Brooks,* p. 479). The dissent in *Brooks* notes some speech that has been found to be on a matter of public concern, including some related to conflicts of interest. It states, "education improvement and fiscal responsibility in public schools clearly are matters of public concern…especially so where some malfeasance or misuse of school funds is at issue" (*Brooks,* p. 482 citing *Klug v. Chicago School Reform Bd. Of Trustees,* 197 F. 3d. 853; 1999, *Propst v. Blitzer*, 39 F. 3d. 148; 1994, and *Berg v. Hunter* 854 F. 2d. 238; 1988). Similarly, "speech alleging academic misconduct by faculty members…inappropriate sexual requests made by faculty members to students…and potential child abuse by teachers" have also been considered to be matters of public concern (*Brooks* p. 482, citing *Feldman v. Ho*, 171 F. 3d. 494; 1999, *Webb v. Board of Trustees of Ball State University*, 167 F. 3d. 1146; 1999, and *Cromley v. Board of Education of Lockport Township High School District* 205, 848 F. 3d. 194; 1996). If the court determines that the speech at issue is on a matter of public/community concern then the court addressees step two.[62]

The second step in the analysis is often labeled the balancing test. Here the court "must…balance (the employee's) interest in expression against the school's interest in promoting effective and efficient public service" (*Brooks*, p. 479). For example, even if the employee's speech is on a matter of public concern, the employer still has an interest in providing its services to the public and the employee's speech should not be allowed to severely disrupt that service. Put another way, the two prong approach means that "government may set restrictions upon employee speech so long as its need for those restrictions is not outweighed by the interest of the

[62] If the court determines the speech is related to an employee grievance or another private matter, then the speech is not protected by the First Amendment and the analysis stops there.

employee in speaking as a private citizen on matters of public concern" (*Hong*, p. 1165). In *Connick*, the Supreme Court stated that the balance is struck under "the common sense realization that government offices could not function if every employment decision became a constitutional matter" (*Connick*, p. 143). This somewhat hands off approach toward employment decisions is especially notable within the academic community. Courts are particularly wary of replacing academics' decision with their own and will often defer to the decision made by the institution or academic community. This discretion affords universities a greater opportunity to manage faculty work with little concern for potential litigation, ultimately resulting in a loss of faculty autonomy. This two prong analysis was somewhat amended in 2006 when the Supreme Court decided *Garcetti v. Ceballos* (547 U.S. 410; 2006).

In *Ceballos*, the United States Supreme Court extended a public employer's ability to regulate an employee's speech. As interpreted, the Court held that "a public employer is extended unfettered discretion to regulate employee speech that it has **created or commissioned** (*Hong*, p. 1165, citing *Ceballos*). In *Ceballos*, the Court held "that memoranda prepared by a supervising district attorney criticizing inaccuracies in an affidavit used to secure a search warrant were not protected by the First Amendment because they were prepared **pursuant to his official duties** and not as a private citizen" (*Hong* p. 1165, citing *Ceballos*). In its decision, the Court stated:

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created (*Ceballos,* p. 1961).

Thus, speech made in connection with an employee's official duties is not protected by the First Amendment. Official duties are not necessarily limited to a job description but "instead

encompass the full range of the employee's professional responsibilities" (*Hong*, p. 1166 citing *Ceballos,* p. 1962). The *Hong* court notes the few cases that have applied *Ceballos* and says these cases "make clear that an employee's official duties are construed broadly to include those activities that an employee undertakes in a professional capacity to further the employer's objectives" (*Hong*, p. 1166).[63] As applied to higher education, Jorgensen and Helms (2008) note that in order to "preserve the integrity of both precedent and traditional notions of academic freedom, (courts) would have to carve out a specific academic speech exception" to *Ceballos* (Jorgensen and Helms, 2008, p. 8). According to the only higher education application of *Ceballos*, the *Hong* court did not appear willing to create such an exception. The questions then become, what constitutes faculty members' official duties and what are a university's objectives?

The presumption that university faculty members are fully protected by the First Amendment is something that may not be entirely accurate given the discussion above. In order to be protected, a publicly employed faculty member must: 1) speak on a matter of public concern, 2) in a manner that does not disrupt the employer's organization, and 3) on a topic that is outside the employee's official duties and on a topic unrelated to something created or commissioned by the university. Given these caveats to a First Amendment claim, one may begin to ask what, in particular, is still protected speech? As discussed through the case law below, faculty members involved in litigation concerning individual conflicts of interest will find it very difficult to navigate the mind field that is Constitutional Law.

Several of the cases below help to illustrate the First Amendment freedom of speech issues that arise when individual conflicts of interest are at issue. Each case presents a different way the various courts sought to address the conflicts issue within the frame of the First

[63] Only one case has applied *Ceballos* to a higher education setting. The implications are problematic for faculty autonomy and traditional notions of academic freedom.

Amendment. Interestingly, a discussion of academic freedom, or any rights in addition to the First Amendment freedom of speech, only appears in one case and even then, the doctrine is primarily related to institutional academic freedom, not faculty. This suggests that, insofar as conflicts of interest are concerned, courts have not applied the principles of academic freedom when faculty members allege a violation of their right to free speech. This position is consistent with the managed professionals concept. This is because faculty are required to disclose their own conflicts and inventions so that the institution can best determine how to utilize the inventions or manage the conflicts. If a faculty member fails to abide by this system then the university may discipline that faculty member, up to and including termination of his or her contract. Similarly, if a faculty member discloses someone else's conflict of interest this may result in the reporter being punished, depending on how, when, or why the reporting was made. This is relevant to a discussion of freedom of speech because faculty speech covers all of these issues. For example freedom of speech is implicated when a faculty member discloses or fails to disclose, when a faculty member alleges another person has a conflict of interest, or when a faculty member is disciplined for making certain verbal or written statements in connection with his/her job.

In these cases, the courts make it fairly clear that faculty members have no rights other than what any other public employee enjoys and, given the vast objectives of universities, they may have fewer First Amendment rights than similarly situated public employees. I will analyze each case within the particular prong of First Amendment analysis, concentrating first on issues related to a matter public concern, then the balancing test, then the application of *Ceballos*. Overall, the breakdown of the four First Amendment cases is: 2/4 involve matters of public concern, 1/4 describe the balancing test, and 1/4 was decided post-*Ceballos*.

Matter of Public Concern

An individual conflict of interest case is *Brooks v. University of Wisconsin Board of Regents*, et al, 406 F. 2d. 476 (7th Cir. 2004) where the plaintiffs alleged the Regents infringed on their First Amendment right to freedom of speech and violated their due process rights when the Regents "closed a clinic (and a laboratory) devoted to the research and treatment of Multiple Sclerosis and Amyotrophic Lateral Sclerosis…" (*Brooks,* p. 477). In 2001, 3 years before this action, one of the plaintiffs "criticized (the chairman of the school's neurology department) plan to discontinue a program funded by the Muscular Dystrophy Association …" and "voiced concerns to (an) associate dean… about (the chairman's) involvement with NeuroGenomeX, a private venture that competed against the school for grant money" (*Brooks,* p. 478). In 2002, the chairman prevented the plaintiff from "acquiring new patients for clinical trials because he was chronically late in submitting dictations" thus increasing tensions between the various parties (*Brooks,* p. 478). In 2003, the department, citing financial reasons, decided to close the clinic at the end of the year. The closing, however, took place a little earlier than anticipated because of irregularities found at the lab.[64] This lawsuit was filed in 2004 and appealed to the Federal 7th Circuit Court of Appeals after the District Court granted the defendants' motion for summary judgment. The legal issue is related to whether the plaintiffs' speech was related to a matter of public concern.

[64] The irregularities were related to "a student at the MPL preparing to perform unsupervised tests on an ALS patient. It was also learned that this student and others had access to confidential patient files" (*Brooks*, p. 478). As such, the department and senior vide-president decided to close the facility immediately and would only reopen it "if it were reorganized in accordance with the two other clinical labs within the neurology department" (*Brooks,* p. 478).

The primary factual issue is that the plaintiffs alleged the chairman had a financial interest in a private company and this interest, along with the plaintiffs' statements threatening that interest, influenced the chairman's decision to close the plaintiffs' laboratory.[65] What is at issue is the impact that the chairman's private interest had on a decision to close a laboratory designed to research and treat MS and ALS and to what extent those who report the private interest are protected by the First Amendment. Similarly, the plaintiffs have an interest in continuing their research in their laboratory and in ensuring honest research is conducted concerning their area of expertise. In addition to that interest, the public at large has a significant interest in finding cures for diseases such as ALS or MLS and the plaintiffs' laboratory helped to further that interest. The university, meanwhile, has an interest in many different aspects of this matter, including maintaining laboratories, conducting cutting edge research, and potentially profiting from any inventions created on its property or by its faculty. There are clearly conflicting interests within and between the chairman and the faculty members as well as between the faculty members and the university. In addition, the university has conflicting interests by itself as noted through the varying interests of its employees as well as a public relations interest in keeping faculty conflicts out of the public eye.

In this decision, the court first considers the plaintiffs' First Amendment claims and whether the university retaliated against them for expressing constitutionally protected speech. In order to establish a First Amendment retaliation claim "a plaintiff must establish that the speech in question is constitutionally protected and that it was a substantial, or motivating, factor in the employer's retaliatory actions…If the plaintiff establishes these elements, the burden shifts to the government to prove that it would have taken the same action in the absence of the

[65] The legal argument, however, is not so clear cut as the facts of the case make it fairly clear that there were other problems associated with the lab there were not related to the various interests or the plaintiffs' speech.

protected speech" (*Brooks,* p. 479, citing *Carreon v. Ill. Dep't of Human Servs*., 395 F. 3d. 786; 2005). In order to determine if speech is constitutionally protected, courts employ a two step analysis. First, the speech must address "a matter of public concern" and if so, the court "must then balance (the speaker's) interest in expression against the school's interest in promoting effective and efficient public service" (*Brooks,* p. 479 citing *Connick v. Myers*, 461 U.S. 138; 1983 and *Pickering v. Bd. Of Educ.,* 391 U.S. 563; 1968). This court, as did the District Court, found that the speech did not touch on a matter of public concern.

The court held that the plaintiffs did not provide enough specific facts regarding what they said or how their speech impacted matters of public concern and this omission proved fatal to their First Amendment claims. The court notes that "(a)ll we have here is evidence that (the plaintiffs) expressed concern over a potential conflict of interest….there was never a specific allegation of misconduct or misusing funds" (*Brooks,* p. 480). While the plaintiffs alleged that they felt there was the potential for the chairman's private interests to have influenced his decision to close the laboratory, they did not make specific enough factual allegations for the court to take this matter as anything other than an employment related issue. As noted in the dissent, however, the entire court was not convinced that the allegations were not specific enough to warrant a matter of public concern. The majority court describes the dispute as primarily one involving a power struggle over how the department should be run and therefore primarily an employment grievance issue, not a matter of public concern. The majority opinion also states that the dispute "was nothing more than an internal personal squabble" and this case is 'a classic personnel struggle-infighting for control of a department-which is not a matter of public concern" (*Brooks,* p. 480). This reasoning allows universities to exercise almost complete control over a department when interpersonal squabbles may be at issue. The dissenting opinion,

however, takes a much different view of the plaintiff's speech and does find it to be on a matter of public concern.

The dissenting opinion is noteworthy because it suggests that the plaintiffs' speech is on a matter of public concern, although it also states the First Amendment claims may have not met the balancing test. The dissent noted previous cases where the court has held on matters of public concern. Specifically, matters of public concern have been found in "educational improvement and fiscal responsibility in public schools", where "some malfeasance or misuse of schools funds is at issue", "charges of official misconduct in school", or similar matters related to school policy (*Brooks,* p. 482). The dissent then discusses the allegations made in *Propst* "to find a case very close to this one" (*Brooks,* p. 484) [66]. Specifically, the "allegations advanced by the plaintiffs in *Propst* are very similar to those made by (plaintiffs) in the instate case- they accused (defendant) of improperly cutting off the MCL's funding in favor of a private venture in which he has a personal financial stake. The claim here is a classic accusation of malfeasance and abuse of public trust like the one addressed in *Propst*" (*Brooks,* p. 484). The dissent closes its argument noting both *Propst* and *Connick* when it states the plaintiff's allegations

> certainly relate to issues that might directly impact the taxpaying public –i.e. conflicts of interest and mismanagement in the administration of a public university medical center involving the level of public funding available for certain types of medical research and the availability of medical care for certain neurological disorders. Alleged conflicts of interest and cuts in funding for medical research and patient care at a publically funded medical school are, to quote *Connick*, matters 'of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal. (*Brooks,* pp. 484-485 citing *Connick,* p. 149).

[66] The *Propst* decision will be explained in the section concerning the balancing test.

The majority opinion may not have made the connection between the plaintiffs' allegations and the impact that the chair's conflict of interest had on his decision to close the plaintiffs' laboratory. At the very least, the majority did not find the plaintiff's factual allegation regarding the conflict of interest to be specific enough to warrant potential malfeasance or another matter related to the public concern. This failure to specify the conflict of interest, whether because of strategy or ignorance, cost the plaintiffs their lawsuit.

This case is relevant for a discussion of individual conflicts of interest, academic capitalism, and managed professionals for several reasons. First, it clearly shows that the interests of faculty members involved in private ventures can be complex. Here, there are legitimate questions regarding whether the chairman's financial interest in a private company impacted his decision to close a laboratory that was competing with the company. Similarly, there are issues as to whether faculty members who question his authority or ethics concerning the private interest should be punished by the closure of their own laboratory. This factual situation suggests that faculty members are managed by others, as noted in Managed Professionals (Rhoades, 1998). This decision clearly privileges administrators and institutional policymakers as they, and not faculty, can decide to close laboratories. Similarly, as the chairman's private interest in the company is a mechanism for commercial activity this is a situation also predicted by academic capitalism and clearly that interest took precedent over the interest of the plaintiff faculty members. As members of academia continue to pursue resources and commercial activities, they will continue to find themselves embroiled in these types of situations, specifically where one or more people's decision making can be called into question by their financial holdings. This, as seen in *Brooks*, may result in faculty members being disciplined (one of the most coercive ways to manage) for making allegations against superiors,

administrators, or other individuals within the academic institution who have such financial holdings. As with other cases, the decision to challenge an institutional decision requires that faculty members subject themselves to administrative grievance procedures, which are often designed and implemented by non-faculty administrators. Such a policy requires that faculty submit themselves to the policies, procedures, and decisions of institutional managers even when they are challenging a decision by one of those administrators.

Another First Amendment case related to matters of public concern is *Feldman v. Ho* 171 F. 3d. 494, (7th Cir. 1999) where the Seventh Circuit Court of Appeals reversed the trial court's ruling in favor of a former Southern Illinois University faculty member who was terminated when he accused a colleague of unethical conduct. Specifically, Feldman alleged that another faculty member was "trying to improve her standing by claiming falsely that she had written a paper jointly with a famous mathematician" (*Feldman*, p. 495). Chung Wu-Ho, the Chairman of the Mathematics and Statistics Department (and defendant in this suit) took the side of the accused academic and then terminated Feldman's contract. Notably, this suit "has lasted twice as long as Feldman's stint at the University" (*Feldman*, p. 495). This is the only case related to conflict of interest that discusses the principles of academic freedom. It also typifies how courts provide the university with significant discretion (often under the doctrine of academic freedom) in investigating and addressing allegations by one faculty member against another.

There are several interests at issue within this case. Primarily, Feldman has an interest in ensuring that her fellow faculty member honestly and fully discloses information related to her academic writings. Feldman, understandably, does not want someone who has lied on her C.V. to be a part of the academic community to which he belongs. Wu-Ho, as Chairman of the Department, wants to ensure that the academics hired by his department are honest and

forthcoming, but also that they are well-published and able to acquire grants and outside funding. The ability to garner such resources often depends on with which authors one has written, from which agencies one has previously received funding, and similar issues related to social and intellectual capital. The tension between those two interests, honest disclosure versus honest disclosure plus ability to garner funding, appears to be at issue in this case. Also at issue is management's ability (as seen by Ho's termination of Feldman's contract) to discipline a faculty member for making this kind of allegation against a fellow faculty member. In addition to the above, the university, through its administrators, has an interest in investigating allegations made against its faculty members without the threat that each investigation will result in legal action. The interest in self regulation, however, may be influenced by its interest in gaining outside revenue, something that requires a strong C.V. The university also has an interest in keeping this matter under wraps so as not to become embroiled in a public relations problem concerning a potentially dishonest faculty member,

The Court, in reviewing the District Court's decision, noted that the damages were assigned against Ho and the University but the 11th Amendment prevented the recovery from the University. This verdict requires that the appeals court assumed

> that Ho reacted adversely to Feldman's accusation against his colleague and that this led the University to end Feldman's employment. (The Court further) assumes, moreover, that the academic conduct (or misconduct) of teachers at a state university is an issue of public importance rather than just of private interest to the persons involved…But it does not follow that a jury rather than the faculty determines whether Feldman's accusation was correct. A university's academic independence is protected by the Constitution, just like the faculty member's own speech (*Feldman*, p 495 citing *Sweezy v. New Hampshire*, 354 U.S. 234; 1957).

The discussion of *Sweezy* is important because this is the case that most scholars point to as a providing a baseline position on academic freedom.[67] This court, like many courts, takes academic freedom as something that is applicable to universities, not to individual faculty members. Specifically, the court is suggesting that the principles of academic freedom allow the university, and not the jury, to investigate and sanction the actions of faculty members. It would violate that freedom and create unnecessary litigation if juries were allowed to review and alter these types of university decisions.

Although this paper is not going to concentrate on academic freedom, it is important to note the discussion that takes place in the *Feldman* decision concerning the issue, especially as it relates to the alleged conflict of interest. The court states:

> Teachers…speak and write for a living and are eager to protect both public and private interests in freedom to stake out controversial positions. Yet they also *evaluate* speech for a living and are eager to protect both public and private interests in the ability to judge the speech of others and react adversely to some. They grade their students' papers and performance in class. They edit journals, which reject scholarly papers of poor quality. They evaluate their colleagues' academic writing, and deny continuing employment to professors whose speech does not meet their institutions' standards of quality. (see *Weinstein v. University of Illinois*, 811 F. 2d. 1091; 1987) (*Feldman*, p. 496).

The court then notes that the government may not penalize a citizen for mistaken views of Marxism or misunderstanding James Madison, "but a Department of Political Science can and should show such a person the door-and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels" (*Feldman*, p. 496). The court then applies this decision making authority upwards (from

[67] The *Sweezy* decision notes the four freedoms of a *university*: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." It is important to note the italics on "university" is from the *Feldman* decision.

Department to university) instead of downward (from Department to individual faculty). Specifically, the court states:

> Every university evaluates and acts on the basis of speech by members of the faculty; indeed, Feldman proposed that Ho do just this on the basis of his colleague's speech…Feldman…does not deny that speech in a university may be the basis of adverse actions; he believes rather, that the penalty should have fallen on the accused colleague rather than himself. Yet an unsupported charge of (academic misconduct) reflects poorly on the accuser, the first amendment does not ensure that a faculty member whose assessment of a colleague's work reveals bad judgment will escape the consequences of that revelation (*Feldman*, p. 496).

The university, the court states, is the entity "entitled to decide for itself" whether a charge of academic misconduct is substantiated and "transferring that decision to the jury in the name of the first amendment would undermine the university's mission, not only by committing an academic decision to amateurs…but also by creating the possibility of substantial damages when jurors disagree with the faculty's resolution, a possibility that could discourage universities from improving their faculty" (*Feldman*, p. 497). If these types of disagreements went to the jury, the court believes that it would result in almost every tenure decision being decided by juries because tenure decisions are based on an individual faculty member's speech.

In order to be protected by the First Amendment, a faculty member must speak on a matter of public concern. Although many courts have noted that malfeasance or misconduct may suffice for a matter of public concern, the *Brooks* court rejected a faculty member's First Amendment claim because his allegations were not specific enough. It appears as if one must have specific knowledge of a conflict of interest or risk being punished for an unsupported allegation against a fellow faculty member. Although Feldman had a significant interest in ensuring that his department hired only honest and forthright academics, the court appeared to award more weight to the department's interest in concluding its own investigation without

interference from the court system, despite the allegations of dishonesty. This requires a significant amount of discretion and deference given to the university in that the court trusts it to make decisions without judicial oversight. They, further, characterized the inter-departmental discussion on the conflict of interest as primarily a power struggle. Once any dispute is determined to be a matter of employment, speech made in connection with it likely will not be protected by the First Amendment. Similarly, the *Feldman* decision says that once the university has investigated an allegation of a conflict of interest, it is not up to the courts to overturn that decision. This, like the other cases, provides a lot of deference to university officials with regard to who, when, or what to investigate. Overall, these two cases paint a picture where faculty members can rightfully be confused as to when they may be speaking on a matter of public concern. This can then lead to a chilling effect where, even if a faculty member knows of another's conflict of interest, they may not report it, for fear of retaliation from the university.

This case is a fairly clear example of professionals being managed by their institution and privileges non-faculty institutional decision makers. The court notes that it will not interfere with university decisions concerning allegations of conflicts of interest after they have been investigated and cleared by the university system. This then will require that individuals who make such allegations do so with a significant amount of knowledge about the factual situation at issue as well as understand the policies and procedures concerning the investigation. This case, along with others, allows university officials a significant amount of discretion in investigating and adjudicating inter-departmental employment related matters. This discretion, as noted above, allows university management to strategically employ policies and procedures, often times even when they are not in the best interest of the public (honest employment) or faculty members (reporting dishonesty). In addition, the case highlights the stress that academic

capitalism, specifically related to acquiring outside funding, has put on faculty members. Publishing with well-known academics and placing that on one's C.V. means that the scholar is tied to respected academic networks and is, therefore, more likely to receive outside funding and increase university prestige. The problem then becomes, when universities have the authority to investigate charges of academic dishonesty, will their interests in garnering outside funding and increasing university prestige outweigh the academy's interest in maintaining an honest workforce?

Balance test

The second prong of the analysis involves a balancing test between the public employees right to speak on a matter of public concern and the institution's (state's) interest in maintaining an efficient public service. A series of cases after *Connick/Pickerin*g helped to further explicate the balancing test. In one of these cases, *Waters v. Churchill*, (511 U.S. 661; 1994), "the plurality opinion…stressed the need for courts to be deferential to employers when applying the *Pickering/Connick* factors" (Kaplan and Lee, 2006, p. 608). Specifically, the court noted that "in evaluating the impact of the employee's speech, the public employer may rely on its own reasonable belief regarding the content of the speech, even if that belief later proves to be inaccurate; and in evaluating the disruptiveness of the employee's speech, a public employer does not need to determine that the speech actually disrupted operation, but only that the speech was potentially disruptive" (Kaplan and Lee, 2006, p. 608). Courts applied *Waters* to higher education in 1995 when a department chair's removal from his leadership role was sustained after an off-campus anti-Semitic speech (Jorgensen and Helms, 2008). Although the *Waters* "potentially disruptive" standard is not specifically applicable in the conflict of interest case, due to actual disruption caused, it is of important note when considering constitutional issues related

to academics. There is 1 individual conflict case related to the First Amendment balancing test and the plaintiffs' testimony makes it clear that their speech severely disrupted their work environment.

In *Propst v. Blitzer,* 39 F. 3d. 148 (7th Cir. 1994), the plaintiffs alleged their First Amendment right to free speech were violated when they were transferred from their positions in retaliation for exposing a laboratory's director (Blitzer) for misappropriating university funds. This case highlights the *Connick/Pickering* prong regarding the balance that must be preserved between the faculty's right to free speech and the effective management of the university. Specifically, the plaintiffs' alleged "Blitzer had diverted university resources to benefit himself and private companies that he controlled, and that he had failed to document various expenditures as required under university regulations" (*Propst,* p. 150). The university conducted an audit of the laboratory and absolved Blitzer of any wrongdoing. Thereafter, certain administrators believed the lab could no longer properly function (due to the plaintiffs' allegations and the audit) and the plaintiffs were transferred elsewhere within the university. The plaintiffs, due to the alleged retaliatory nature of their transfers, then filed this suit.

In order to make a valid claim for violation of First Amendment freedom of speech, a publically employed plaintiff must pass a two prong test. First, the speech at issue must be on a matter of public concern. Second, if the speech is on a matter of public concern, the court must balance the speaker's freedom against the state's interest in effective and efficient operation. Here, the court quickly notes that the speech, "alleging misuse of a state university's funds involved matters of public concern" (*Propst,* p. 152). The court must then determine what impact the speech has on the employer's workplace and balance the employee's speech against the employer's need for an effective/efficient workplace.

The court ultimately determines that the speech created an untenable atmosphere within the laboratory and therefore the plaintiffs' speech was not protected by the First Amendment. The court points to the deposition testimony of one of the plaintiffs where he stated the "relationship with Blitzer deteriorated to the point of affecting their ability to work with him" and resulted in the parties no longer even being able to speak to one another directly (*Propst,* p. 153). Evidence also established that the "disruption extended beyond the (plaintiffs), affecting other (lab) employees as well" (*Propst,* p. 153). After a summary of the evidence regarding the disruptive nature of the speech the court holds, "(t)here is thus no question of fact that (the lab's) operations were significantly disrupted. Because the evidence unequivocally establishes that, as a result of the Propsts' accusations, (the lab) could no longer accomplish its mission unless either Blitzer or the Propsts were removed from the Laboratory, the Propsts' First Amendment rights were not violated by their transfer" (*Propst,* p. 153). Thus, even though the plaintiffs spoke on a matter of public concern, the disruptive result of that speech meant that their First Amendment rights were not violated when they were transferred as a result of that speech.

Although this case speaks to the balancing test requirement, the results are not much of a surprise given the plaintiffs' testimony concerning the disruption their speech caused. Although, as noted in the *Waters* decision, the disruption only has be a potential disruption and even then the amount of the disruption is a matter largely for the employer to decide. The *Propst* decision privileges institutional managers as the university has wide latitude concerning the amount of disruption it perceives when a faculty member alleges a conflict of interest. Similar to the results of the matter of public concern cases, the result of *Propsts* may be that faculty members who know of another's conflict of interest may not report it due to the disruption that may come with such an allegation. For example, if someone claims that another person has a conflict of interest,

it may result in the university conducting an audit or in another way investigating the claim. These investigations will inevitably lead to a significant disruption of the specific department or university.

Post Ceballos

In *Garcetti v. Ceballos,* 547 U.S. 410 (2006), the Supreme Court held that when public employees speak pursuant to their official duties, that speech is unprotected. This ruling, according to some "appears to threaten the basic notion that academic freedom should protect faculty speech related to official duties of research and scholarship" (Jorgensen and Helms, 2008, p. 8). Jorgensen and Helms (2008) note that at the time of their paper, no court had applied *Ceballos* to higher education, however it appears as if the first application was made within the context of an individual conflict of interest. As noted above, the ruling in *Ceballos* greatly extended a public employer's ability to discipline an employee for her/his speech, specifically when that speech is made in connection with the employee's official duties or pursuant to the employer's objectives. Although it remains unknown exactly how far this may go with regard to faculty member's duties (research, teaching, and service) or a university's objectives (everything to everyone) the one court that has applied *Ceballos* to higher education does not appear willing to make any exceptions when the public employee is a faculty member.

In *Hong v. Grant*[68], 516 F. Supp. 2d. 1158 (C.D. Cal. 2007), the U.S. District Court for California's Central District ruled in favor of the Regents of the University of California in a Section 1983 claim filed against them by an engineering faculty member. Hong alleges, among other things, his "right to free speech was violated when he was denied a merit salary increase because of his critical statements regarding the hiring and promotion of other UCI professors…"

[68] This is the same *Hong* case referred to earlier in the paper.

(*Hong,* p. 1160). The speech at issue was critical statements made by Hong, during a colleague's mid-career review, concerning the colleague's failure to disclose a financial conflict of interest at her initial appointment.[69] Hong made other criticism of his department's conduct in addition to those related to the colleague's conflict of interest.[70]

The Regents deny the allegations and claim that the plaintiff's criticisms had nothing to do with the denial of a merit increase and further argue that his comments are not protected speech under the First Amendment. The court, in granting the defendants' motion for summary judgment and applying *Ceballos* states "(t)he First Amendment does not constitutionalize every criticism made by a public employee concerning the workplace. If a public employee's speech is made in the course of the employee's job duties and responsibilities, the speech is not protected under the First Amendment" (*Hong,* p. 1161). One of the most disturbing results of this language is that faculty members' "duties and responsibilities" include acts in teaching, research, and scholarship, which make up the very foundation of the profession. Similarly, this language may impact faculty governance structures as it may be considered their "duty" or "responsibility" to involve themselves in organizations like Faculty Senates, University Councils or other similar governmental bodies. Under the strict language of *Hong* and *Ceballos*, speech made in connection with these organizations may not be protected.

---

[69] Hong's specific conflicts allegations are "a $400,000 research grant listed on Professor Chang's resume may not have been a refereed (or openly competitive) grant. Instead, Professor Chang's husband's company allegedly donated $200,000 in equipment, qualifying Professor Chang for a $200,00 matching grant from UC-SMART, a research grant program operated by the University of California-Berkeley" (*Hong,* p. 1162).

[70] Hong also made critical statements when he "complained to (the Department Chair) that six of the eight Materials Department classes were taught by lecturers rather than by senior faculty members." (*Hong*, pp. 1162-1163),. He also "voted against (a fellow professor's application for accelerated merit increase) and issued a three page letter of dissent" regarding the accuracy of the professor's application. Finally, he also complained concerning the hiring process of another faculty member because he believed "extending an informal offer prior to full faculty approval violates the faculty right (in the) self governance process" (*Hong,* p. 1164).

The court held Hong's speech concerning a fellow faculty member's conflict of interest, was not protected speech for several reasons. Specifically, the court notes "UCI *commissioned* Mr. Hong's involvement in the peer review process and his participation is therefore part of his official duties as a faculty member. The University is free to regulate statements made in the course of that process without judicial interference" (*Hong,* p. 1167, citing *Garcetti v. Ceballos*, 547 U.S. 410). The court also notes the speech does not speak to a matter of public concern, despite being speech on a conflict of interest. Specifically, the court states: "Each of Mr. Hong's statements regarding faculty performance reviews, departmental staffing and faculty hiring-involved only the internal personnel decisions of his department. In no way did they implicate matters of pressing public concern such as malfeasance, corruption, or fraud" (*Hong,* p. 1169). The determinative factors in this case appear to be that the alleged protected speech took place in a situation "created or commissioned" by the university (e.g. the faculty review process) and was not on a matter of public concern.

This decision, more than any other, privileges institutional managers as they seek to monitor and manage faculty speech. Currently, *Hong* presents a very problematic approach to faculty speech, yet the result is predicable by academic capitalism and managed professionals. Faculty do not have any additional First Amendment protection granted by their specific profession, and as the university's objectives continue to increase, they may find themselves with fewer rights than other public employees. Clearly, the position in *Ceballos*, followed in *Hong*, is that universities may discipline faculty members when the employee's speech is made in connection with their official duties as faculty members. This obviously includes service related activities such as sitting on review committees, hiring committees, and similar situations, but it remains unknown as to whether this also applies to a faculty member's other official duties,

namely teaching or research. Currently, there is no reason to believe that teaching, research or service is exempt from the *Ceballos*/*Hong* application. Unlike other cases, *Hong* does not simply present a problem with chilling allegations of individual conflicts of interest. It goes further and effectively regulates that speech when it is made in the course of a faculty member's official duties. The case therefore may impact more substantial faculty related duties such as those involved in the peer review process, governmental proceedings, administration related duties or hiring/review committees. Whether or not this opinion translates into situations where Institutional Review Boards, faculty senates, or other faculty committees/duties are affected remains unknown. It should not, however, be a surprise when universities attempt to subject other types of speech to the *Ceballos/Hong* rulings.

Defamation[71]

Another set of issues that arises from the case law is related to defamation of character and lawsuits that come from (wrongfully) alleging another person has a conflict of interest. Defamation "is committed by the oral or written publication of matter that tends to injure a person's reputation. The matter must have been published to some third person and must have been capable of defamatory meaning and understood as referring to the plaintiff in a defamatory sense" (Kaplan and Lee, 2006). If a prominent plaintiff brings a defamation claim against someone there is an additional element. Specifically, the plaintiff "must prove that the defendant acted with actual malice…and was made with knowledge of its falsity or in reckless disregard of whether it was false or true" (Kaplan and Lee, 2006 citing *Garrison v. Louisiana*,

[71] I have omitted a defamation case, *Dace v. Commonwealth* (1999 WL 1487590) because it does not provide any additional information to the discussion. It is primarily related to an inter-departmental squabble between two faculty members and is not related to the conflicts of interest as relevant to this paper.

379 U.S. 64 (1964). If a plaintiff proves these elements, then the defendant may be liable for defamation.[72]

The individual conflict of interest cases related to defamation should be of little surprise given the negative connotation of conflicts of interest. Such an allegation damages a person's professional reputation or may lead to a financial audit of their department. It likely will also bring negative publicity as conflicts of interest and university scandals are of high public interest. Also, there may be issues related to qualified immunity when certain defamatory statements are made, especially if the statements are made in connection with an audit or under the authority of a whistleblower protection statute. These issues make defamation litigation complicated as courts must address state or federal immunity defenses. Thus, given the potential firestorm created by an allegation of a conflict of interest, it should be of little surprise that there are defamation lawsuits associated with this type of allegation.

In an unpublished opinion from 2004, *Roberts v. Board of Trustees of the Minnesota State Colleges and Universities* 2004 WL 727175 (Minn. App. 2004) Roberts, an aviation professor, alleged defamation as a result of six statements made by the defendants in connection with an investigation of Minnesota State University at Mankato's aviation program. The Minnesota Court of Appeals, after reviewing each of the alleged defamatory statements, ultimately upholds the ruling of the District Court and dismisses the plaintiff's claims at the summary judgment stage.

Many of the alleged defamatory statements came as the result of an audit conducted by the university. The audit found "that Roberts misrepresented his authority, created a conflict of interest, and misused university assets when he contracted with the computer-assisted-testing

[72] There are other legal issues related to defamation (including immunity or insurance) but these will only be discussed where applicable.

service on the university's behalf to administer the computerized FAA written test. The auditor also concluded that Roberts created a conflict of interest when he conducted and charged students for the FAA flight tests and that although Roberts used MSUM time and resources to become certified, he used these credentials primarily for personal gain" (*Roberts*, p. 2).[73] In light of the audit, the university president put Roberts on paid suspension and instructed an MSUM dean to investigate the auditor's findings. After the dean reported her findings to the president, the president suspended Roberts without pay for 30 days. Roberts filed suit shortly thereafter.

The interests at issue are similar to those in other individual conflicts cases. First of all, Roberts has an interest in increasing his own personal revenue and did so through the unethical use of university time and property. The university has an interest in prohibiting this type of conduct because it limits the amount of revenue that they can receive and reflects poorly on the way that the institution is run. The students, meanwhile, have an interest in the honest and ethical conduct of their faculty because this type of dishonest behavior (misappropriating student fees) may impact their credit hours or graduation dates. The individual defendants' interests are not relevant because they are simply addressing the interests of others (e.g. explaining the situation to students).

Roberts first alleges that a comment made by defendant Brandt to a student was defamatory. Specifically, "after hearing that Roberts had been suspended, the student visited Brandt to find out the reasons for the suspension. When the student asked why Roberts had been suspended, Brandt answered that there were too many under the table transactions by Roberts for him to be involved in this process. When the student asked Brandt to explain, she would not"

[73] Relevant for a discussion of academic capitalism are these facts. Roberts contracted with a company to provide the computerized testing services and MSUM was named as the contracting company but Roberts did not have the authority to enter into such contracts. Roberts charged students a testing fee in addition to their tuition fees and, after paying a portion of the fees to the testing company, kept the remainder.

(*Roberts*, p. 3). Roberts alleges that this statement is defamatory because his transactions were never "under the table" (*Roberts*, p. 3). The court holds that because "Brandt was aware of the contents of the audit report that lead to Roberts suspension" … "the statement was made upon a proper occasion, from a proper motive, and was based upon reasonable or probable cause" (*Roberts*, p. 4). Due to a lack of evidence suggesting that Brandt made the statement from ill will or with the purpose of injuring Roberts, the court holds that this statement is not defamatory. The other statements made by Brandt alleged by Roberts to be defamatory were not argued as such in the District Court and therefore "Roberts cannot argue for the first time on appeal that these statements are defamatory" (*Roberts*, p. 4).[74] The court, therefore, dismissed Robert's lawsuit.

The *Roberts* case helps to highlight the potential problems associated with discussing someone else's conflict of interest, even if it the discussion is with a student and after an investigation into the conduct. Even though the plaintiff ultimately lost his claim, the lawsuit undoubtedly took significant time and money away from the university, other faculty, and probably damaged the morale within Roberts' former work environment.

Another case also helps to highlight issues related to alleged defamatory statements made in the course of a university audit. In *Braun v. Bureau of State Audits et al,* (67 Cal. App. 4th 1382 (Cal. App. 4th Cir. 1998) a former medical director of a research and training center at UC-San Francisco sued the Bureau of State Audits, the State Auditor and others for defamation arising from an audit conducted in which the plaintiff was said to have "grossly mismanaged"

[74] The three statements are "(1) that MSUM had more than enough evidence to fire Professor Roberts; (2) that part of Roberts wrongful conduct justifying his suspension involved his taking money from students in giving them FAA check rides, constituting a conflict of interest; and (3) that the aviation program was going to stay, but Roberts was not" (*Braun,* p. 4).

the center. The audit, conducted in 1994, was the result of allegations concerning misconduct at the plaintiff's center.

There are several important interests in this case. First of all, the State of California has an interest in the effective, honest, and efficient operation of its taxpayer funded enterprises. Oftentimes, this operation must be verified through audits, especially when there are allegations of misconduct. If an auditor were found to be liable for defamatory statements made in connection with an audit's conclusion, then that would hinder the state's ability to ensure good use of taxpayer dollars via audits. Similarly, Braun has a legitimate interest concerning the good standing of her name and having a public document stating that she "grossly mismanaged" her previous place of employment will likely prevent her from gaining future employment in a similar area. Her conflict of interest, however, concerns the operation of the CPRT and is specifically related to her use of state personnel for her own personal gain. Her dual employment created a potential for conflicts of interest related to which employer she owed duties or primary loyalties in addition to interests she had in increasing her own personal revenue. This case pits those interests against one another and, unsurprisingly, the state's interest in an effective and honest use of taxpayer dollars takes precedent over Braun's interest in her name and ability to increase personal revenue.

The audit itself is the primary issue related to the plaintiff's defamation claims. The report stated that the plaintiff "had conflicts of interest relating to contracts between UCSF and the San Francisco Fire Department, where she was also employed; and had conspired to submit falsified payroll records; participated in the use of a secret, unauthorized bank account; falsified deposit records for student tuition fees; directed improper fundraising; used CPRT funds for her personal benefits and that of her family; used CPRT staff to handle her personal travel,

bookkeeping, housekeeping, and child care arrangement, and misled the CPRT advisory board of directors about a 1992 audit" (*Braun,* p. 1387). UC-SF provided a written response to the audit and disagreed with the report's findings that the plaintiff had a conflict of interest and that there had been improper expenditures from the CPRT account. The report also stated that the State Auditor reviewed UC-SF's disagreements, and did not find them persuasive. In her amended complaint, the plaintiff alleges that the report included defamatory allegations of criminal conduct that the auditor and Bureau knew were false and that she had no role in developing the improper payroll practices.

The court, in finding that that audits are absolutely privileged under the law ruled against the plaintiff. The court stated that "the violation of any conflict of interest statute is…within the broad definition of 'improper governmental activities' which may be investigated by the State Auditor" and that the findings are privileged (*Braun,* p. 1393). This case is fairly unsurprising given the problematic nature of suing State Auditors over their findings. For example, if an auditor were subject to defamation claims for every audit she conducted that found someone mismanaged something, there would likely be less audits conducted, thus increasing the potential for mis-management.

Intentional Interference with a Business

There was 1/15 individual conflict of interest case where intentional interference with a contract/profession was at issue. This case proves very interesting because it shows the political nature of higher education and the impact that one or two powerful politicians can have on a single university campus. It also highlights how conflicts of interest that come unfavorably into the limelight are subject to scrutiny that others, such as those in which the university has an interest, are not.

In *Marion v. Hall,* 429 So. 2d. 937 (Al. 1983) the Supreme Court of Alabama affirmed a trial court's ruling in favor of a former faculty member at Troy State who was terminated when he opened and operated a newspaper. Hall, the plaintiff, was employed at Troy State University as special assistant to the President, Dean of the School of Journalism, and Director of Communication Services. In 1979, he and his wife began to publish a weekly newspaper. David Marion, a defendant, owned and operated an existing newspaper in the same geographic region. Marion, due to the economic threat posed by Hall's newspaper, contacted Senator Mike Weeks (a state senator endorsed by Marion) and convinced him that Hall had a conflict of interest between his duties to the University and his newspaper. Weeks accepted the notion that Hall had a conflict and began drafting letters to various individuals, including the University President and the Alabama Ethics Commission concerning the conflict.[75]

Shortly after one letter, Hall met with a supervisor and was told that he could either resign his position from the University or he would be terminated from his employment. Specifically, Hall was told that "I can't put the university in a position of alienating a state senator who has to vote on an eight million dollar budget for this university no matter what the university might think of him personally and I can't put the university in a position of being in

---

[75] The relevant part of one letter states "Whether or not there is a legitimate basis for my complaint lodged with Colonel Robinson at Troy State University or not is irrelevant. In my opinion, Mr. Jim Hall is Troy State University and anything he involves himself in the free enterprise system is a direct reflection on Troy State University. I have personally said on many occasions that I have no qualms whatsoever about Jim Hall going into the newspaper business if he will resign his position forum Troy State University. I would have the same feeling if I was the Dean of Insurance and had an insurance agency on the side….As long as I have to defend Troy State on budget hearings and only other matters I feel that the people associated with Troy State University should conduct themselves in a manner so that there will be no doubt in anyone's mind. If Jim Hall as the time to start a newspaper on the side then maybe there is no need for a School of Journalism at all at Troy State University, and I can assure you I am looking into this matter at present. I already have information that leads me to believe that Jim Hall's association with the Pike County Leader, Inc has made use of some of the students who are involved in the School of Journalism. Regardless of this, I still feel that he is a Dean of Troy State University, therefore, employed by Troy State University and should conduct any outside business interests he might have on a very low profile and certainly not going into the newspaper publishing business which, in my opinion, although legitimate is defiantly a conflict of interest" (*Marion,* pp. 940-941).

cross purposes with the local newspapers" (*Marion,* p. 941). In October of the same year, the University sent Hall a termination notice, with the conflict of interest being the reason. The University President and several other individuals attempted to convince Marion and Weeks to withdraw their complaints, thus alleviating the situation without having to terminate Hall. They would not do so. Finally, a supervisor said that the only way Hall would be allowed to remain employed with the University was if he transferred his stock in the newspaper to someone else. Hall thereafter, transferred his stock in the company to his mother.

In spite of the previously reached agreement, Hall was terminated and shortly thereafter he filed suit alleging the defendant intentionally interfered with his trade or business. In order to prove intentional interference with a business, the plaintiff must show: "(1) an intentional act of interference and (2) some consequential harm to the plaintiff's business" (*Marion,* p. 943). The court found that Hall proved those elements and the trial judgment's verdict of $250,000 was not excessive.

There are several conflicting interests in this case, all of which are complicated by the political issues with the state senator. Hall and his wife have financial and non-financial interests in their newspaper. The public, meanwhile, has an interest in receiving news from multiple sources, thus increasing their exposure to different lenses on similar stories. Marion has an interest in limiting competition from another newspaper in order to maximize his own newspaper's revenue sources. Senator Weeks, meanwhile, has interests in getting re-elected and given that Marion owns a newspaper that endorsed him, thus providing him significant positive publicity, he will do what it takes to ensure that newspaper's success. The university has several interests, each conflicting with each other. It has an interest in employing Hall and given that he is appointed to several high level positions, it has an interest in keeping him around. Similarly,

like all entities, it has an interest in receiving positive publicity and Marion's newspaper can provide that. In addition, it has an interest in keeping state senators happy because they are the ones who provide the financial backing via state dollars to the institution. In this case, however, all of those interests cannot be met and Hall is the one who suffers due to the university choosing its interests in positive publicity and continued funding over continuing his employment.

This fairly short case proves very interesting because of the political component to the conflict of interest allegation. Had the state senator not gotten involved in the discussion, it is likely that the university would have attempted to ignore the complaints from the newspaper editor. This highlights often unseen factors in higher education dimensions, namely the connection between politics and money. This case also showcases the idea that certain conflicts of interest are bad (those that hurt the institution) while other conflicts are not (those that fund the institution). For example, had the institution not been threatened by a powerful state senator, something that would have undoubtedly hurt the institution's finances, they likely would not have terminated Hall. The idea that some conflicts are bad and some are good depending on what the institution receives is something that will be explored in cases below concerning outside employment.

Dual Employment

A fairly obvious form of an in individual conflict of interest occurs when an individual is employed by more than one entity. This may lead to situations where employees owe conflicting loyalties to various groups and creates uncertainty about where their priorities lay. Universities understandably want their faculty member to spend most of their time conducting teaching, research, and service and attempt to limit the amount of time spent on outside work. This often presents itself through prohibitions on outside employment. Overall, there were 5/15 cases that

presented this type of fact pattern. Each case was largely argued as a matter of law and therefore, the facts in each are fairly undeveloped. They all, however, present a situation where institutions largely determine what constitutes a conflict of interest and therefore, gives them control over the situations.[76]

There are two cases in which the courts ruled that judges and legislators may not hold paid public employee positions. The primary justification for these holdings was that this creates a conflict of interest between their duties to the public in receiving honest services by elected officials and undue influence that the officials' other employment may have on rendering those services. In 2001, a South Dakota court ruled that a paid university employee (or any state employee) could not also hold a position as a member of the House of Representatives because that created a conflict of interest and was specifically prohibited by the state's constitution (*Pitts v. Larson* 638 N.W. 2d. 254; 2001). This likely includes faculty members at public institutions. Similarly, in *Brown v. Lillard,* 814 P. 2d. 1040 (Ok. 1991), the Oklahoma Supreme Court ruled that an Associate District Judge was constitutionally prohibited from accepting payment for teaching services rendered at Central State University largely because of the potential for conflicts of interest that may arise from dual employment. These cases were decided pursuant to the relevant state constitution and primarily reflect the state's needs to ensure that its publically

---

[76] Although not directly related to dual employment, another individual conflict of interest case related to anti-nepotism within an academic department. *Fonseca v. Michigan State University, et al* (214 Mich. App. 28; 1996) is a case where a plaintiff sued alleging gender and marital discrimination because she was not granted admission to the doctoral sociology program at Michigan State. The University countered the allegation claiming that their decision to deny her admissions was not based on illegal discrimination but over their concern of a conflict of interest because the plaintiff's husband was the department chair of the sociology department. The court finds that the plaintiff did not provide any evidence of illegal discrimination or that her gender made any difference in her inability to get into the program. As for marital discrimination, the court notes that it is illegal to discriminate based upon one's status as either married or single, "on the other hand, the law does not oblige an employer to ignore to whom the applicant is married or related" (*Fonseca*, p. 32). Specifically related to conflict of interest issues, the court states that "(t)o avoid obvious conflicts of interest involving preferential treatment of spouses and relatives, the law permits anti-nepotism employment policies that an employer deems necessary to ensure fairness to other candidates and fidelity to the employer" (*Fonseca*, p. 32).

elected officials (e.g. judges and legislators) are not entangled in conflicts of interest between the public that they represent or the public that pays their primary salary. These are distinguishable from the other dual employment cases because faculty members' dual employment, aside from one of the jobs of being an elected official, is not a constitutional issue but state law or policy. This means that the prohibitions or allowances on dual employment are found either in state statutes or university policies. Taken to the next mental step, that means university administrators or state policymakers (e.g. politicians) can strategically determine what types of dual employment conflicts of interest are acceptable and which ones are not acceptable.

Other cases related to dual employment suggest that universities and states are utilizing conflicts issues to limit faculty autonomy in strategic ways. The Second Circuit Court of Appeals, in *Adamsons v. Wharton*, et al, 771 F. 2d. 41 (2nd Cir. 1985) ruled that "medical school faculty members have no constitutional right to unlimited private practice revenues" and a medical school has a legitimate interest in "promoting devotion to teaching and the rational relationship between that interest and the" policy at issue (*Adamsons,* p. 43). Clearly, here the court agreed with the plaintiff university, that dual employment can create a conflict of interest between a physician's interest in maximizing personal revenue and the medical school's interest in ensuring its faculty members devote time to teaching and research. They further agreed that the school's interest outweighs any interest by the faculty member. In a similar individual conflicts case, *Witt v. Eastern Kentucky University,* 205 S.W. 3d. 263 (C.A. Ken. 2006), the Court of Appeals of Kentucky upheld a university policy prohibiting employees from subcontracting for a firm which had a contract to perform services for the university. This result is similar to the *Adamsons* decision in that the interests of the university in ensuring loyalty and honest employment outweighed any interests the employee had in gaining increased personal

revenue. In addition, the court noted that if the employee were allowed to remain employed with both entities, while doing similar work on the same campus, this would potentially create problems related to billing, liability insurance, and future litigation against the university for payment for services rendered.

These two cases are clear indications that a university can limit outside employment with its own policies and will do so if that employment is opposed to its interests. Clearly, a university does not want to be sued for damages related to improper billing practices or insurance. Similarly, it has an interest in ensuring teaching, research, and service are priorities for its faculty members. This, however, is contrary to the position that many universities are taking with regard to allowing faculty members to participate (sometimes up to half of their time) in start-up firms and companies affiliated with the university. The only conclusion that can be reached given these contradictory positions (conflicts related to dual employment are both good and bad) is that the university and the administrators strategically determine which conflicts are good and which are bad depending upon which bring revenue to themselves or the institution. The conflicts of interest, therefore, have not been "managed" as opposed to simply allocated into certain categories, those that are acceptable and those that are not with the former being allowed and the latter being prohibited.

In another dual employment case, *Hoover v. Morales,* 164 F. 3d. 221, (5th Cir. 1998) the United States Fifth Circuit Court of Appeals held that Texas state university policies prohibiting state employees from acting as consultants or expert witnesses on behalf of parties opposing the state in litigation were unconstitutional. One of the policies at issue was a Texas A&M policy "which prohibits university professors from taking employment as consultants or expert witnesses when doing so would create a conflict of with the interests of the State" (*Hoover,* p.

223). The court notes that, using the *Pickering/Connick* line of cases, that the policies unconstitutionally restrict speech on a wide variety of matters of public concern. Furthermore, the state has not identified how the policies will advance the effectiveness and efficiency of providing public services. The court states "(s)pecifically, this court does not see how the expert testimony of the faculty-member plaintiffs in this case will adversely affect the efficient delivery of educational services by the institutions in which these faculty members serve" (*Hoover,* p. 226). Interestingly, it appears as if the primary basis in the *Hoover* legislation was not the conflict of interest itself, but the fact that the secondary employment would conflict with the State's interests.

The *Hoover* legislation clearly spells out that some policymakers feel faculty members should be prohibited from involving themselves in conflicts of interest that are against the state's interests. There is no mention of conflicts of interest generally but only those that are against the interests of the state and specifically those where the state can lose money due to expert testimony in lawsuits or when it cannot collect on consulting fees. This prohibition is regardless of whether the expert testimony is accurate or whether the consulting fees are gained in furtherance of a public good. Instead, the prohibition is based simply on whether the action is against the state's interests. This problematic logic brings up the question, who determines what is in the "state's interest"? And, in addition, who is entitled to further the "state's interest" once it is defined? Under the *Hoover* legislation the answer is clearly not faculty, but those that manage them.

The dual employment cases, as a whole are very interesting given that every one of them sought to control public employee's conduct outside the scope of their primary employer (the state). Also interesting is that the justification used in *Adamsons, Whitt,* and *Hoover* was that the

dual employment created a conflict of interest with the state's interest. What this results in is the concept that conflicts of interest are okay so long as they do not conflict with the interests of the state. For example, if a faculty member was employed by the state university and a start up corporation affiliated with the university, it would not be a conflict that would necessarily be detrimental to the state's interests. It is, therefore, okay for that conflict to remain unresolved. Similarly, if a faculty member opened a newspaper, testified against the state, or wanted to participate in some private practice, this would be diverting money from the state (either through lawsuits, budgets, or time) and therefore, is something that the institution would desire to eliminate. At the same time, however, if a faculty member sought to spend most of her time managing a corporate entity partially owned by the university, the potential monetary benefits to the state would outweigh any concern for a conflict of interest. The institution's ability to manage conflicts based upon a potential financial return clearly privileges the university and its managers and harms faculty members and non-managing researchers.

False Claims Act

The False Claims Act, 31 U.S.C. § 3729–3733, is a federal provision that provides private citizens or the federal government the right to bring a legal action against individuals or corporations who knowingly present false claims to the government for payment. Specifically, "(s)uch actions may be brought against institutions or their employees who have engaged in fraudulent activities relating to federal grant or contract funds" (Kaplan and Lee, 2006, p. 1404). This statute is most often used to fight Medicare/Medicaid fraud and fraudulent billing practices associated with military contracts, but this case illustrates that it can also be used when a researcher falsifies an NIH grant application by omitting industry funding. Importantly, it is also the only individual conflict of interest case where scientific research is at issue.

In *United States ex rel. Erdem I. Cantekin v. University of Pittsburgh,* 192 F. 3d. 402 (3rd Cir. 1999) the primary legal issue concerns when a private party is allowed to bring a lawsuit under the False Claims Act and a factual determination of what the researcher "knowingly" falsified on his grant applications. The primary facts of the matter relate to a "medical researcher's failure to disclose his industry funding on a number of grant applications that he submitted to the National Institutes of Health. The undisclosed funding included several million dollars from pharmaceutical companies making the drugs that the NIH paid the researcher to evaluate" (*Cantekin,* p. 404). This is a similar fact pattern to what recently occurred at Emory University and the University of Wisconsin when faculty members failed to disclose industry funding in their National Institutes of Health grant applications.[77]

In this case, Cantekin is the realtor and Charles Bluestone is the researcher/defendant. They are both professors of otolaryngology at the University of Pittsburgh's medical school and have worked together since the 1970s. Their research centered on "testing the effectiveness of various antibiotics, such as amoxicillin, in treating the different types of olitis media" (*Cantekin,* p. 404). To pursue his research, Bluestone applied for and received roughly $17.4 million in NIH grants during the 1970s and 1980s. During this same time, Bluestone began receiving "funding from various pharmaceutical companies to test the effectiveness of their antibiotics in treating otitis media" amounting to about $3.4 million (*Cantekin,* p. 405). This outside funding included "over $250,000 in honoraria and travel expenses" and involved well known companies such as Ross Laboratories, Eli Lilly, and Beechams (Grant, 2007, p. 45). In addition to receiving this funding, Bluestone altered the clinical trial to include "alongside amoxicillin two commercially produced and considerably more expensive variants" manufactured by Elie Lilly

[77] These fact patterns are not a part of this paper because they are not yet legal cases and therefore are outside the scope of the methodology.

and Ross (Grant, 2007, p. 45). Bluestone did all of this against the wishes of his research partner Cantekin.

Cantekin claims that as early as 1976 he raised concerns with Bluestone concerning his failure to list the industry funding on his NIH applications. Bluestone, he alleges, “brushed him off” and said that “he was not going to tell the federal feather merchants because it was none of their business and would muddy up the waters” (*Cantekin,* p. 405). Cantekin also claims that he disputed with Bluestone some of Bluestone’s findings and particularly findings of several industry funded research projects. In 1987, Canetkin reported the problems to the NIH, but they decided to defer to an investigation being conducted by the University of Pittsburgh. When the University declared that there was no wrongdoing, the NIH dropped the matter. Cantekin, however, did not and shortly thereafter testified at Congressional hearings concerning scientific misconduct. While the report from Cantekin’s testimony was pending, the NIH decided to conduct its own investigation and the final report stated “Bluestone and the Otitis Media Research Center had not generally disclosed to NIH the extent of its industry sponsored research…but…since the grant instructions were ambiguous, Bluestone’s conduct was excusable” (*Cantekin,* p. 405). Shortly thereafter, the House of Representatives released its report and “excoriated both the University of Pittsburgh’s investigation as well as the (NIH’s) report and challenged many of their findings” (*Cantekin,* p. 405). NIH then conducted another investigation, this time under the authority of the newly created Office of Scientific Integrity.

The second report recommended that the NIH place Dr. Bluestone on a five year period of administrative oversight for “having failed to disclose his private pharmaceutical company research to NIH and having analyzed the data from NIH funded research in a manner biased towards the effectiveness of the antibodies he had evaluated with public monies” (*Cantekin,* p.

405). Cantekin, in order to show how Bluestone's failure to disclose the funding impacted the NIH grants provided testimony from two of the five members who had voted to approve one of Bluestone's grants. Specifically, the two stated that "if they had known about his industry funding, it would have affected their decision" (*Cantekin,* p. 406). The three other members of the application committee "all submitted affidavits saying that they were aware of Bluestone's industry funding" with one stating that she was "not at all troubled" by the industry funding (*Cantekin,* p. 407). The court, after reviewing the evidence related to the specific disclosure, testimony from the reviewers, and Bluestone's own words, found that the instructions requiring disclosure of industry funding were not ambiguous and that Bluestone knowingly falsified a federal document.

This case provides a blueprint for how persons or the federal government may seek to address issues related to unreported individual conflicts of interest in federally funded research. It also highlights the potentially problematic nature of the risk/reward system involved in not disclosing conflicts of interest. For example, Bluestone received $17 million in federal grants and $3 million from industry funding, but when his fraudulent activities were finally noticed, he only was required to be under administrative oversight for five years. Keeping secrets, it appears, is worth the risk.

Also interesting in this case is the failure of the initial NIH and University of Pittsburgh investigations in that they absolved Bluestone of wrongdoing and, as such were rejected in the House report and subsequent OSI investigation. Although the question of whether UPitt's investigation was clouded by financial holdings or prestige issues is beyond the scope of this case, one must wonder about the incentives for the college to find that one of its faculty members violated federal law. Finally, one must wonder about what would have happened to this case had

Cantekin not pursued the matter for over a decade in the face of resistance and previously failed investigations. Perhaps most worryingly, how many other scientists have understandably given up bringing undisclosed conflicts of interest to light under pressure or faux university investigations?

Interestingly this is the only individual conflicts case directly related to scientific misconduct by a researcher. This is somewhat unsurprising given the negative connotation with both lawsuits and research misconduct and a university's desire to keep this out of the limelight. Given the previous discussion of the situations at Wisconsin and Emory, however, it is notable that *Cantekin* is the only lawsuit similar to those fact patterns. One can suggest that there is a lack of research misconduct related lawsuits due to the effectiveness of the university policies but the Slaughter, Feldman, and Thomas (2009) paper rebuts this idea in the finding that conflict of interest policies are not effective. Although this is speculation, it is likely that these fact patterns rarely go to litigation because the faculty member and the university come to some sort of settlement regarding the research misconduct related to conflicts of interest. This, of course, assumes that the faculty member involved in the research misconduct is ever discovered. Settlement, however, allows the university to keep its researcher, avoid negative publicity, and convince the public that it can manage individual conflicts of interest. Similarly, the researcher can continue his work, with few additional oversights, and remain affiliated with the various groups and interests that have an interest in that research. Settlements appear to be a win/win for everyone involved. They are problematic, however, as many are confidential and they rarely, if ever, are disclosed to the public. Higher education scholars should consider this area to be ripe with future research opportunities and Freedom of Information Act requests may be made against public institutions in order to help gather some of the necessary information.

Conclusion

Overall, the individual conflicts of interest cases paint an interesting pattern, especially when analyzed in the frame of academic capitalism and managed professionals. There are two overarching patterns. Perhaps most notable is the fact that many of these transactions and cases are highly complicated and very fact intensive. In addition, the courts often provide significant deference to the university decision making processes. This deference may come even under the guise of academic freedom as seen in *Feldman*. As noted from many of the decisions, courts are reluctant to disturb institutional decisions without a specific reason. These two issues, complex situations and university deference, allow universities and their administrators to manage faculty in situations that, only 20 years ago, would have been unimaginable.

As related to the First Amendment claims, it is clear that there are significant complications concerning when, where, to whom, and how a faculty member should disclose a colleague's conflict of interest. According to the relevant cases, *Brooks* suggests that the allegation must contain specific information related to malfeasance, *Propsts* suggests that there should not be a major disruption after the allegation, and *Ceballos/Hong* suggest that the allegation should not be made within the confines of a faculty member's official duties. Also notable is that the *Hong* court rejected any notion that there should be an academic exception to *Ceballos*, thus potentially leading to the final demise of individual academic freedom. Clearly, at least within these cases, the institution and the courts are limiting faculty autonomy.

The defamation cases also present a problem for incenting faculty to report colleague's alleged conflicts of interest. While none of the three cases actually found individual liability for defamation, the mere mention of such lawsuits may prevent faculty from discussing other's conflicts. For example, the defendants in *Roberts* and *Dace* were simply discussing the conflicts

of interest of another person and found themselves quickly involved in a lawsuit concerning their statements. This, in and of itself, would be enough to discourage someone from discussing another's conflict.

The dual employment cases are those that most clearly exemplify universities' attempt to manage faculty time. In each non-constitutional case, there was a university policy or state law designed to manage faculty's time and outside employment when that employment conflicted with the interests of the state. The primary issue in each of these cases was not that there was a conflict of interest at work, but simply that the secondary employment conflicted with the state's interests (e.g. in a lawsuit, opening a competing medical clinic, or compromising funding). This suggests that those individuals whose secondary employment is consistent with the state's mission (e.g. managing a startup company associated with the state) are not going to be managed like those whose interests are, for whatever reasons, against the state's interests. This type of case-by-case management, with various criteria, creates confusion and potential animosity between and among faculty members. For example, it makes little sense for a medical doctor to be prohibited from private practice while the individual next door has an employment contract with the university where 51% of her time is spent on university matters and 49% is spent on her corporate interests.

This strategic management position is emphasized by the fact that only one of the cases was directly related to research misconduct and that case was brought by according to the False Claims Act and after many years of failed investigations. It appears as if the University of Pittsburgh failed several times in investigating the claims brought by the realtor. Although one can never know whether UPitt's investigation failed because of the university's financial holdings, the data suggests that this is possible. What is unquestionable about that case is that it

provides evidence to the failure of university management of individual conflicts. In addition, the case also highlights the problems associated with traditional NIH grant management. The federal entity, under the relevant federal regulations, and supported by Senator Grassley's proposed law, leaves conflict management to the individual university. As noted by the case law above, this allows universities to manage strategically individual conflicts and may even result in universities not pursuing adequately allegations of research misconduct. The implications of this will be further analyzed in the conclusion.

CHAPTER 6
CONCLUSTION AND RECCOMENDATIONS

Overall conclusions

The conclusion portion will be broken down into several sections, each addressing separate issues. First, there will be an overall conclusion section, which will include a discussion of my four research questions. Then there will be a section concerning the findings as limited to institutional conflicts, one section discussing individual conflicts, and a section concerning implications of these findings. Finally, there will be a section providing recommendations for future research on conflicts of interest.

Overall, it can be stated with some confidence that many of the structures, organizations, and individuals used to mitigate or manage conflicts of interest fail when it comes to addressing with the conflicts at issue. As noted in the Slaughter, Feldman, and (2009) paper, many elite universities do not have adequate institutional conflict of interest policies to address institutional conflicts and particularly *institution as a firm* or *quid pro-quo exchange* conflicts. These conflicts, however, proved to be the most likely institutional conflicts to lead to litigation. The lack of a bright line standard means that managing professionals, institutional review boards, or trustees manage the various conflicts on a case-by-case basis. This case-by-case management often results in patchwork and inconsistent oversight. It also allows for managers to use these opportunities for strategic conflict management. Such strategies may be utilized to fund the trustees/managers own personal accounts (*Jarvis Christian*), support or conduct highly unethical research (*Grimes)* or pump a significant amount of money into a failing venture (*Oliver*).

Similarly, the case-by-case management allows university administration to squash conflicts of interest that are not in the interest of the university (dual employment cases and *Hall*) and manage those that are in the university's interest (*Cantekin*). This eventually results in administration limiting faculty members' academic freedom and squelching traditional notions of Freedom of Speech. The speech is not protected because it is either not a matter of public concern (*Brooks* and *Ho*) or because it was too disruptive to the institution (*Propst*). Finally, the implications of *Ceballos*, through the *Hong* decision, clearly create problems concerning traditional notions of academic freedom and publicly employed faculty members as any speech made within a faculty member's official duties is not protected. This is problematic for faculty governance. Faculty participation in governance structures is clearly a part of academic service and service is clearly a part of a faculty member's official duties. This means that speech made in connection with faculty governance is not protected. In addition, the peer review process is potentially affected as this faculty participation in it is clearly research (also a faculty duty) and thus not protected.

My first research question was, how do judges, through case law, address individual conflicts of interest? Although the specific way the conflicts are addressed is highly dependent on what type of claim is brought (defamation versus First Amendment versus dual employment versus False Claims Act) courts generally appear to use traditional employment and contract based concepts for making many of their decisions. For example, above anything else, a faculty member is a university employee. This fact appears to guide many of the court decisions concerning individual conflicts of interest. This results in a significant amount of discretion being given to administrators as they are given authority to address personnel related issues. This includes administrative attempts to manage or mitigate individual conflicts of interest, often

with little input from the individual faculty member. Administrators, as controllers of the budget, organization, and mission, are the primary beneficiaries of this judicial deference. Gary Rhoades, in his book Managed Professionals, is accurate in asserting that administrators and managers are restructuring academic work and this restructuring is impacting faculty autonomy. The only addendum that I would make to his concept is that legal precedent may act as a permanent placeholder keeping academics under the foot of administrators.

My second research question was, how do judges, through case law, address institutional conflicts of interest? Due to variation in fact patterns, this is the most difficult question to answer. Courts somewhat recognize the institutional conflicts at issue as seen through the discussion of the IRB at Johns Hopkins in the *Grimes* case and specifically calling it an "in house organ" and "not designed to be sufficiently objective enough." Courts do not, however, appear to take the next mental step and address many of the other issues that can drive institutional conflicts of interest. Some of the issues are the monetary returns available to institutions and trustees. This may be because, as courts, it is not necessarily their prerogative to alter legislative intent designed to facilitate commercialization of academic products (e.g. Bayh-Doyle or similar state statutes). In addition, a court cannot legally address issues not brought before it in a given case. This limits the court to whatever causes of action the plaintiff brings. Within institutional cases, there is also an additional issue associated with indemnification or insurance in institutional conflicts cases. This is especially relevant concerning lawsuits against trustees or high ranking administrators. Indemnification and insurance allow trustees/administrators additional flexibility as many of their actions may not cost them personal money. It also puts institutions and potentially the taxpayers on the hook for defense costs and

paying out damages for the conflicts of interest created by trustees and administrators seeking to enrich themselves or the institution.

My third research question was what impact does university management of individual conflicts have on faculty autonomy? This is probably the most clear of the answers in that faculty members' autonomy is greatly impacted by university conflict management. When faculty members disclose their individual conflicts to administrators, this provides the administrators with enough information to selectively manage the various conflicts. For example, individual conflicts that are opposed to the state's interest (either through dual employment or as expert witnesses in litigation against the state) are conflicts that the state/university attempt to prohibit. Similarly, conflicts that are in line with state or institutional interests (e.g. those that bring revenue into the state or university) are not managed using the same concepts as those used to manage conflicts opposed to the state's interest. Basically, conflicts that support the state's interests are allowed to continue (or are "managed") while those that do not are prohibited or punished. If all conflicts of interest were prohibited, there would be no scientists employed by start-up corporations affiliated with the university (as it is clearly dual employment). Clearly, however, there are researchers engaged in dual employment agreements with universities and start-up companies despite the clear individual and institutional conflicts of interest at issue. Given the facts of the individual conflicts cases, the only justification for the difference in conflict management is to protect those that are in the state's or institution's interest while prohibiting those that are not.

The other issue related to individual conflicts management is addressed through Rhoades' Managed Professionals book. He explains that as universities become more market oriented and more complex, they require that new bureaucracies are introduced to monitor, manage, and

oversee faculty work. This concept is very clear in the case law. Courts often do not distinguish between faculty and administration, instead referring to "the institution" or "the university." However, as the individuals that control the budget and organizational structure, it is fairly clear that administrative managers receive much of the discretion provided through the concept of "the university." This discretion allows institutional managers the authority and discretion to consider many of the conflicts of interest matters to be personnel decisions. By framing the situation as one of personnel or employment related, managers may flex the discretion courts provide them and therefore strategically manage the conflicts in the best interest of the state, the institution or themselves.

My fourth research question was using the facts of the individual cases, how do universities manage conflicts of interest and what causes management to result in litigation? With regard to the first question, universities appear to manage individual conflicts on a case-by-case basis relying primarily on disclosure and management policies. Such a policy results in strategic conflict management. This strategic management of individual conflicts suggests that the conflicts are managed in a way that maximizes institutional priorities. As noted perhaps most significantly through the dual employment cases, how a conflict is managed is dependent on what types of benefits the conflict brings to the institution. This is especially problematic when institutional or administrative interests differ with that of the public. For example, the *Hoover* legislation prevented the public from getting access to state employees in litigation against the state. The inability to access these expert witnesses clearly subjugated the public's and expert's interests in favor of the state. The other case law, especially that related to dual employment, suggests that conflict disclosure results in strategic management, which then affords the state the information and ability to manage the conflicts in its (or its managers) interests.

With regard to the second question, the answer may seem fairly simplistic given the complex nature of many of these cases, but litigation becomes likely when someone loses something (money, a job or individual prestige). Some of the cases occurred when a faculty member was transferred or denied a merit pay increase (*Propst* and *Ho*) and others arose because of what one faculty member said about another (*Dace* and *Roberts*). The primary reason that most of these cases were filed is to recoup or protect an individual interest. Only one case appears to be brought strictly as a matter of social good. The *Cantekin* case had to go through years of administrative processes and poor university investigations before it was ever brought to trial. It is doubtful that many other people would have gone through such red tape in order to bring scientific misconduct to light. Although it is beyond the scope of the data, the lack of cases enforcing the social good may be attributable to the increased use of academic capitalistic activities and universities' strategic management of conflicts. This management would subjugate socially good lawsuits in favor of institutional needs by limiting information, keeping disputes in house, or settling the disputes outside of court before any suits are filed. More research on this topic is needed and would likely prove illuminating.

Implications

There are several important implications that arise from the data concerning institutional conflicts of interest. Primarily, the importance of interstitial organizations cannot be understated. From the 14 institutional conflicts cases, 8 proved to involve interstitial organizations.[78] These organizations are clearly central to institutional conflicts of interest. This is important because, as noted in the Slaughter, Feldman, and Thomas (2009) paper and the literature review, these organizations are often primary facilitators of academic capitalist activities. Occasionally, as

[78] Those cases were: *Alvin, Student Loan Marketing, Grimes, Peyman, Antorieto, Oliver, Stone*, and *Unruh-Haxton*.

with the *Grimes* decision, these entities are exempt from Freedom of Information Act requests and their actions often go unstudied despite their impact on university and faculty behavior. When the 15 individual conflicts cases are included in the interstitial analysis, the figure climbs to 12 out of 29 cases. Although they are present in individual conflicts cases, interstitial organizations, unsurprisingly, are far more relevant in institutional conflicts. Universities will likely increasingly utilize these organizations in order to maintain secrecy and increase revenue regardless of the ethical implications they bring. In addition, there are significant implications concerning interlocking directorships and the impact that they have in creating and complicating institutional conflicts of interest. Of the institutional conflicts cases, 6/14 involved interlocking directorships. This is notable because administrators and corporations often see only benefits that can arise from involving themselves in interlocking directorships. Some positives may include gaining political capital (*Harris*), oversight of bank accounts (*Harris and Sibley*), or to monitor an investment (*Oliver*). While there may be some positive benefits to interlocking directorships, these legal cases note that there are significant negatives as well. Perhaps the biggest negative is an inability of those interlocked to distinguish to who their duty of loyalty is owed (e.g. whether it is to the university or the corporation) as clearly noted in the *Oliver* case. These relationships may also influence individuals to enrich the corporation at the expense of the university as was alleged in *Sibley Hospital* and found in *Jarvis Christian*. At the very least interlocking directorships call issues of trustee and administration loyalty into question as to whose interests are being served. In addition, interlocking directorships may present legal problems to the state or university as related to indemnification or insurance. For example, as the *Harris*, *Oliver*, *Jarvis Christian* and *Sibley Hospital* decisions note, a university or taxpayers may eventually end up paying the bill when a trustee becomes involved in interlocking

directorships. Finally, as noted in *Hall*, an individual conflict case, interlocking directorships may have unintended consequences including allowing outsiders (i.e. politicians) to call a faculty member's integrity into question because of his directorship position in a local newspaper. Similar to interstitial organizations, universities administrators will likely continue to engage in interlocking directorships regardless of the ethical implications due to the perceived benefits of such relationships.

In addition to, and likely because of the issues associated with interlocking directorships and interstitial organizations, institutional conflicts of interest are incredibly complex. As noted perhaps best in the *Oliver* case, there can be conflicts upon conflicts with relationship upon relationship to the point where trustees are forced to admit that they do not know to who they owe duties. In addition, the situations become explosive when trustee or administrator personal revenue is at issue in the conflict (e.g. *Jarvis Christian*, *Oliver*, or *Alvin*). Personal revenue tied to interlocking directorships causes the public to be suspicious of private individuals profiting off of violating the public trust. Institutional conflicts can be even more complex when science, intellectual property, and economic development policies are at stake. These issues by themselves are difficult enough to understand, but become nearly impossible to grasp when someone is sitting on both sides of the proverbial fence playing each side against each other in order to maximize their own personal gain (*Bryant*, *Vrodlyak* and *Jarvis Christian*). Complicating the matter even further is that researchers are often prohibited by state law or university policy from gaining access to the relevant information, thus requiring that they rely on court cases, newspaper articles, and similar means in order to gather the information. These sources, while adequate, do not provide as much information as would an actual written contract or observation (e.g. *Grimes*).

The complex nature of conflicts of interest is often addressed, as noted in the *Sibley Hospital* holding, by requiring that trustees and faculty disclose their conflicts of interest so that they may be managed properly by the institution. This requirement, as noted in nearly every institutional conflicts decision brings about more complications as those individuals responsible for acting on the disclosure (e.g. Institutional Review Boards or trustees) may abdicate their responsibility in favor of either successful or profitable research (*Grimes*). Such a problem is especially noteworthy in the *Grimes* case where the IRB allowed university researchers to experiment on children by increasing the level of lead in their blood in order to test various abatement procedures. As well, *Jarvis Christian*, *Sibley*, and other cases suggest that trustees often fail to disclose conflicts in favor of keeping them secret in order to profit from them. In addition, disclosure to other individuals with similar conflicts (*Oliver*) may not help address the situation at all. Conflict disclosure not only fails at the institutional level, but disclosure impacts faculty autonomy by allowing administrators to identify, manage, and control faculty work and faculty time, even when that time is spent outside the university. Thus, disclosure not only allows administrators the chance to cheat the system, by allowing them to disclose to each other, it subverts faculty members' autonomy by requiring them to answer to individuals who may not understand their work and/or who are working in the interests of someone else. The evidence in this study requires that the following questions be asked to those who favor disclosure as the primary means to manage conflicts; disclosure to whom and for what purposes?[79]

Tied to institutional conflicts of interest is the importance of indemnification agreements and liability insurance that may protect trustees or administrations from personal liability.

[79] For example, in Shared responsibility, individual integrity: Scientists addressing conflicts of interest in biomedical research, published by the Federation of American Societies for Experimental Biology. March 13, 2006, with regard to financial individual conflicts of interest the paper states, "The challenge for the scientific community is to disclose and manage these relationships" p. 7.

Without much potential to be held personally liable for their actions, trustees or administrators may have too much autonomy to be held responsible for the conflicts of interest in which they choose to engage. This is especially complicated when trustees or administrators may personally profit. In addition, this potential freedom from personal liability may influence them to engage in more conflicts of interest than they would otherwise think reasonable. There was not enough data, however concerning indemnification and liability insurance policies to form an adequate opinion on the matter, but this area is ripe for future research.

The most disturbing implication of this study is that which is associated with traditional notions of Academic Freedom and potential disincentives for faculty to disclose a colleague's conflicts of interest. When courts use the *Connick/Pickering/Ceballos* analysis it presents significant problems for faculty autonomy and conflict management. For example, *Brooks* and *Feldman* both speak to the matter of a public concern prong within the context of individual conflicts of interest. In *Brooks*, the court held that the plaintiffs' allegations of a conflict of interest were not specific enough to warrant a matter of public concern, but instead reflected a personnel issue related to the control of their academic department. In addition, the *Feldman* decision held that once a university conducted its own investigation into a conflict allegation, it is not within the court's authority to overturn that decision. Interestingly, the *Feldman* court also cited the *Sweezy* decision as justification to end a faculty member's employment, solidifying the idea that academic freedom rests with the institution and not individual faculty members. With regard to the balancing test, the *Propst* decision clearly states that a conflict allegation that causes a significant disruption in institutional activities is not protected speech. The primary problem with this application to conflicts of interest is that a disruption is inevitable when someone alleges that another person has a conflict of interest. If the university wants adequately

to investigate such an allegation, it will inevitably conduct an audit into the person or activities at the center of the allegation. This will undoubtedly cause a disruption in the workplace, animosity between the colleagues, and ultimately prevent the speech from being protected. Finally, the *Ceballos* prong suggests that public employees (including faculty members) are not protected for speech made pursuant to their official duties or made within the context of something created or commissioned by the employer. The *Hong* court applies the *Ceballos* decision to higher education and more specifically to an individual conflict of interest allegation. If there is no protection for speech made in connection with a faculty member's duties (which include peer review, teaching, research, and service) then there are few reasons to believe that a faculty member will be protected when they allege a colleague has an undisclosed conflict of interest. Taken together, these decisions (*Brooks, Feldman, Propst,* and *Hong*) suggest that Freedom of Speech, as a traditional protection from internal restraint on speech, is dead. Faculty members should, therefore, be very wary of suggesting that another faculty member or an administrator has a conflict of interest. While they may be protected by state or federal whistleblower statutes, they will not be protected by the First Amendment, because their allegation is not a matter of public concern, too disruptive, or made within a context created or controlled by the university.

There are also implications for what universities and faculty members should do in order to help address conflicts of interest, their management, and the results of that management.[80][81]

[80] For an alternative approach to a solution to individual conflicts of interest see: Shared responsibility, individual integrity: Scientists addressing conflicts of interest in biomedical research. Published by the Federation of American Societies for Experimental Biology. March 13, 2006.

[81] The AAU and AAMC recently released recommendations for conflicts of interest in human subjects research. See: Association of American Medical Colleges and Association of American Universities (2008). *Protecting Patients, Preserving Integrity, Advancing Health: Accelerating the implementation of COI policies in human subjects research*: available at

For both institutional and individual conflicts, university managers and faculty members must first determine how, or even if, they want to interact with the market. If they choose to do so, faculty members must assert certain rights, including the right to speak on conflicts of interest regardless of disruption or their official duties. Given that these rights are not available via the Constitution (under *Ceballos* and *Hong*) they should assert them via employment contracts or collective bargaining agreements. This type of approach would help protect traditional notions of academic freedom, prevent faculty from losing critical speech rights, and help mitigate any chilling effect from *Ceballos* and *Hong*. Policymakers should also consider the implications of this study. In doing so, the policy of universities forming arms-length organizations to avoid public inquiry should be ended. Universities are not likely to make these changes and they should therefore come from state legislatures. Many states already have various protections for trade secrets and therefore, protecting commercial activity is not a valid argument to continuing this practice. If a conflict of interest is at issue, this is a matter of public concern and therefore, any information related to it should be available to the public, policymakers, and academics. Not only would this help to prevent some conflicts from becoming problematic, it would also help universities make better policies as more complete information is available.

Other issues that policymakers should look at are indemnification and personal liability of high level administrators or trustees who involve themselves in conflicts. I would suggest that trustees, administrators, and managers be held personally liable for damages incurred due to their conflicts. For example, taxpayers should not be on the hook for damages related to an individual's conflict of interest regardless of the nature of the conflict (e.g. whether it was for a

---

https://services.aamc.org/publications/index.cfm?fuseaction=Product.displayForm&prd_id=220&cfid=1&cftoken=DAE53F39-AAFC-341F-4DCBEBFFE3AC4B42

public matter or not). If trustees or administrators were held personally liable for their conflicts then they may rethink their connections with industry. Some may suggest that this would stifle communication but in turn, I would suggest that if their conduct was ethical then they would have nothing to worry about. This type of personal liability should also be considered for other administrative members of a university and specifically institutional review boards. Plaintiffs should have negligence actions available to them if IRB members breach their duty to maintain adequate oversight and if they (the plaintiffs) incur damages due to this breach. This may result in some disincentive to participate in IRBs but would also help to ensure that these individuals conduct their investigations and make recommendations based on evidence or ethics and not potential revenue. At the very least, lawsuits against IRB members would help to open up the process to the public and scholars so that additional oversight can be achieved.

Faculty members and researchers who abdicate their responsibility to conduct honest and conflict-free research should also be punished, albeit through a different mechanism. One author has described undisclosed conflicts of interest as worthy of being classified as scientific misconduct (Krimsky, 2007). This should be a minimum classification for failing to disclose. Attorneys and physicians have disciplinary boards that help to ensure ethical behavior of the respective professionals and faculty members should also take this step. This would result in faculty members setting up oversight and disciplinary boards in order to ensure that they maintain control over the members of their profession. The AAUP, for example, could set up a disciplinary board in order to protect the academic profession from individuals who act against the interests of the public or other scholars. For example, individuals involved in the *Grimes* study, Dr. Nemeroff, or Dr. Bluestone should be, after due process, terminated from their institutions and prohibited from returning to research at a university. This is not to say that

incorrect or inaccurate research should be punished, but researchers who are tainted by conflicts (regardless of the accuracy of their research) do a disservice to the profession, the public, and their institutions and therefore, should be treated like attorneys who misappropriate funds from their clients. The justification behind this approach is that honest research is the backbone of science and any faculty member who abdicates this responsible should no longer be able to call themselves an academic professional. Anything less than this will allow the public and policymakers to rightfully question research results and the professional ethics of academics. In order to control conflicts of interest, and help regain public trust, administrators and trustees should be held personally liable for all damages related to their conflicts and faculty members should be terminated and prohibited from continued employment in academic institutions.

Future Research

Conflicts of interest, at both the institutional and individual level, is an area ripe for future research. Higher education scholars can focus on several different fact patterns, structures, or outcomes as they elect to choose potential research options. For example, there is likely a significant amount of information available in public universities related to conflicts management. Scholars may be able to request disclosure statements filed by faculty members in order to determine which faculty are most likely to disclose a conflict, how conflicts vary across disciplines, and variation of management by conflict type. Unfortunately, private institutions and entities are not subject to Freedom of Information Act requests and therefore, this type of study would be limited only to public universities. Such a study could be made within the context of a case study of one or two institutions or of several similar types of institution (with variations in commercial activity) to determine if certain types of conflict management resulted in more or less academic capitalist behavior.

Another potential study could interview faculty members who have been involved in highly public conflicts of interest issues. For example, if a researcher could interview Dr. Nemeroff, Dr. Bluestone, or other scientists (e.g. *Grimes*) who have run afoul of conflicts procedures, this may provide valuable insight into how or why conflict management fails. Granted, these types of interviews would be very difficult to obtain (due largely to negative publicity and potential litigation) but if a large enough sample could be found to ensure confidentiality, then perhaps the parties would agree to participate in the interview. These interviews would provide information directly relevant to conflicts management. For example, they would showcase the researchers own ideas of what occurred (versus media reports, case opinions, or management's opinions), whether or not they believed they violated the conflicts policies, and other very interesting and highly relevant information.

Scholars could also conduct a historical case study. This type of study would be constructed as a historical study of one university and how its conflict of interest policies and procedures have changed over time. One would expect that as commercial activities and facilitation structures (such as TTOs) have increased over time, institutions would have changed their policies in order to accommodate these interests. These changes may be impacted by state or federal laws that would also be analyzed. In addition, this case study would examine changes in conflicts policies and procedures in response to public scandals related to conflicts of interest. For example, do institutions like Johns Hopkins University and KKI, Inc. alter their relationship after matters such as the *Grimes* case come to light? This analysis would provide information related to specific actions taken by institutions, some of which would indicate a move toward more capitalistic activities and perhaps some away from the same behaviors. If this type of study were conducted, it would provide unique and interesting information on what causes conflicts

policies to change and what type of management procedures come about under different circumstances.

Another study could analyze to what extent trustee or administrative conflicts of interest present a drain on university resources, via legal costs, indemnification, or other resource loss. Once again, due to their exclusion from Freedom of Information Act requests, private universities would likely be outside the scope of this type of study. First of all, the researcher would need to get information related to the liability insurance. This would include policy limits on liability in order to determine to what extent the university feels it needs to insure its administrators. In addition, the researcher could gather information related to legal costs associated with defending trustees or administrators against allegations involving conflicts of interest. If such a conflict was proven in court, and it (the conflict) was one that cost the university money (e.g. if a company associated with a trustee received a contract despite costing more than other contracts) then any costs associated with that would also have to be taken into account. Second, the researcher would need to get information related to indemnification. This is likely in a state statute governing the conduct of state officials and would provide that official (trustee/administrator) with a defense related to certain actions. In order to get information related to what indemnification cost the state, the researcher would likely have to request information from various attorneys (perhaps the Attorney General's Office) on how much time and expense had been spent on that particular conflict of interest case. This request is not likely covered by attorney/client privilege and given that the state is either the service provider or paid for the service, the information will likely be publically available. Overall, it would be very interesting to determine the amount of hidden costs associated with institutional conflicts of interest.

These are only several examples of potential research topics related to university conflicts of interest. Each would provide a significant amount of new information on academic capitalist activities, university behavior, the financial cost of conflicts of interests, or how to avoid future conflict problems. Universities and faculty members spend a significant amount of time and resources associated with academic capitalist activities in order to gain access to new markets. These activities result in conflicts of interest, either at an institutional level, individual level, or both. Higher education scholars must also put resources into studying conflicts of interest as they impact many different parts of the institution, including governance, structure, morale, and public standing. If scholars, however, do not research conflicts of interest, we may be left with a situation where the referee is being paid by the players.

APPENDIX 1

Case Name	Interstitial Organization	Interlocking Directorship
Alvin	X	
Student Loan Marketing	X	
Grimes	X	
Peyman	X	
Antorieto	X	X
Stone	X	
Unruh-Haxton	X	
Oliver	X	X
Sibley Hospital		X
Harris		X
Bryant		
Jarvis Christian		X
Beychok		X
Vrodlyak		

REFERENCES

Aiken, R., (1976). "Legal Liabilities in Higher Education: Their Scope and Management" (Part I), *3 J. Coll. & Univ. Law.* 121, 313.

Association of American Universities. Conflicts of Interest Policy. Available at http://www.aau.edu/research/COI.01.pdf

Association of American Medical Colleges and Association of American Universities (2008). *Protecting Patients, Preserving Integrity, Advancing Health: Accelerating the implementation of COI policies in human subjects research*: available at https://services.aamc.org/publications/index.cfm?fuseaction=Product.displayForm&prd_id=220&cfid=1&cftoken=DAE53F39-AAFC-341F-4DCBEBFFE3AC4B42

Association of University Technology Mangers (2005) Licensing Survey. Available at http://www.autm.net/AM/Template.cfm?Section=FY_2005_Licensing_Survey

Bekelman, J., MPhil, Y., Gross, G. (2003). Scope and impact of financial conflicts of interest in biomedical research: A systemic review. *Journal of American Medical Association.* 289(4): 454-465

Boyd E and Bero L. (2000). Assessing faculty financial relationships with industry: A case study. *Journal of the American Medical Association* 284, 17: 2209-2214.

Boyd E, Lipton S, Bero L. (2004). Implementation of financial disclosure policies to manage conflicts of interest. *Health Affairs* 23: 206-214.

Bozeman, Barry. (2002). Public-value failure: When efficient markets may not do. *Public Administration Review* 62, 2: 145-161.

Campbell EG, Weissman JS, Ehringhaus S, Rao S, Moy B, Feibelmann S, Goold S. (2007). Institutional academic-industry relationships. *JAMA* 298: pp. 1779-1786.

Campbell EG, Clarridge BR, Gokhole M, Birenbaum L, Hilgartner S, Holtzman NA, Blumenthal D. (2002). Data withholding in academic genetics: Data from a national survey. *JAMA* 287: pp. 473-480.

Campbell EG, Weissman JS, Clarridge B, Yual R, Causino N, Blumenthal D. (2003). Characteristics of medical school faculty serving on institutional review boards: Results of a national survey. *Academic Medicine*. 78: pp. 831-836.

Campbell, T. (1997). Public policy for the 21st century: Addressing potential conflicts in university-industry collaboration. *Review of Higher Education* 204: pp. 357-79.

Cho, M. Shohara R., Schissel A., Rennie D., (2000). Policies on faculty conflicts of interest at US universities. *Journal of the American Medical Association.* 284: pp. 2203-2208

Colyvas J. and Powell W. (2007). From Vulnerable to Venerated: The Institutionalization of Academic Entrepreneurship in the Life Sciences. *Research in the Sociology of Organization* 25: pp. 219-259

Crespo M. (2007). Intensification of university-industry relationships and its impact on academic research. *Journal of Higher Education.* 54(1): pp. 61-84

Ehringhaus S, Weissman JS, Sears JL, Goold SD, Fiebelmann S, Campbell, EG. (2008). Responses of medical schools to institutional conflicts of interest. *Journal of American Medical Association*. 299 (6): pp. 665-671.

Federation of American Societies for Experimental Biology. Shared responsibility, individual integrity: Scientists addressing conflicts of interest in biomedical research, March 13, 2006.

Grant, J. (2007) Corrupted Science: Fraud, ideology, and politics in science. Wiskley, Surrey: Facts, Figures & Fun

Greenwood, R.; Hinings, C.R. (1996) Understanding Radical Organizational Change: Bringing together the Old and the New Institutionalism. *Academy of Management Review,* Vol. 21, No. 4., pp. 1022-1054

Glater, J., The Debt Trap. New York Times, December, 31, 2008. Available at: http://www.nytimes.com/2009/01/01/business/01student.html

Harpool, D., (1998) Minimum compliance with minimum standard: Managing trustee conflicts of interest, *Journal of College and University Law*, v24 n3 pp 465-87.

Hayward M and Booker, W. (1998). Power and conflicts of interest in professional firms: Evidence from investment banking. *Administrative Science Quarterly*, 43(1): pp. 1-22

Hofstadter, R. (1998). Academic Freedom in the Age of the College. Transaction Rutgers University, New Brunswick, NJ

Johns, M.M.E., Barnes, M., Florencio, P.S. (2003). Restoring balance to industry-academic relationships in an era of institutional financial conflicts of interest: promoting research while maintaining trust." *JAMA* 289: pp. 721-746.

Jorgensen, J. and Helms, L. (2008), Academic freedom, the First Amendment and competing stakeholders: The dynamics of a changing balance, *The Review of Higher Education*, Fall. Vol. 32 No. 1, pp. 1-24.

Kaplan, W. and Lee, B., (2006). The Law of Higher Education, , Jossey-Bas Publishers, 4th edition.

Kim, Y. Congressional Research Service, Report for Congress, *Statutory Interpretation: General principles and recent trends*, August 31, 2008 available at http://www.fas.org/sgp/crs/misc/97-589.pdf

Krimsky, S., (2007). When conflict of interest is a factor in scientific misconduct. *Medicine and Law*. 26: pp. 447-463.

Krimsky, S., (2003) Science in the Private Interest: Has the Lure of Profits Corrupted Biomedical Research? Lanham, MD: Rowman & Littlefield; 2003. 2: pp. 395-410.

Krimsky, S., (1999). Small gifts, conflicts of interest, and the zero-tolerance threshold in medicine. *The American Journal of Bioethics* - Volume 3, Number 3, Summer 2003, pp. 50-52

Kunz, C., Schmedemann, D., Downs, M., Bateson, A., (1996) The Process of Legal Research 4th Ed. Little, Brown and Company, Boston MA

Lesser, L., Ebbeling, C., Goozner, M., Wypij, D., Ludwig, D., (2007). Relationship between funding source and conclusion among nutrition-related scientific articles. *Plos Medicine*. 4:1: pp. 41-46.

Lipton, S, Boyd, E, Bero, L (2004). Conflicts of interest in academic research: Policies, processes and attitudes. *Accountability in Research*, 11: pp. 83-102

Lo, B., Wolf, L., Berkely, R., (2000). Conflicts of interest for investigators in clinical trials. *New England Journal of Medicine*. 343:2: pp. 1616-1620

Louis, K., Jones, L., Anderson, M., Blumenthal, D., Campbell, E. (2001). Entrepreneurship, secrecy, and productivity: A comparison of clinical and non-clinical life sciences faculty. *Journal of Technology Transfer*, 26: pp. 233-245

McCrary, S., Anderson, C., Jakovljevic, J., Kahn, T., McCullough, L., Wray, N., Brody, B., (2000). A national survey on policies on disclosure of conflicts of interest in biomedical research. *New England Journal of Medicine*. 343:22: pp. 1621-1626

McKinney R. and Korn D. (2005) Should an institution that has commercial rights in a new drug or device be allowed to evaluate the technology. *Plos Medicine*, 2:1: pp. 5-8

McSherry, C. (2001). Who Owns Academic Work? Battling for Control of Intellectual Property. Cambridge Mass: Harvard University Press.

Mersky R. and Dunn D. (2002). Fundamentals of Legal Research (8th Ed.) New York, NY: Foundation Press

Metzger, W., (1961). Academic Freedom in the Age of the University. New York, NY. Columbia University Press

Monasterky, R., The Chronicle of Higher Education, October 31, 2008 "Hidden Payments to University Researchers Draw New Fire"

Myers, L., Student financial aid scandal grows. NBC News. May 10, 2007. Available at http://www.msnbc.msn.com/id/18598574/

Paley, A., Credit-Rating Firms Grilled Over Conflicts. Washington Post. October 23, 2008. Available at http://www.washingtonpost.com/wp-dyn/content/article/2008/10/22/AR2008102202311.html

Peterson, M. (2007). The Study of Colleges and Universities as Organizations. Sociology of Higher Education: Contributions and Their Contexts (Ed. Patricia Gumport) Baltimore, MD: Johns Hopkins University Press.

Poskanzer, S. (2002). *Higher Education Law: The Faculty*. Baltimore, MD: The Johns Hopkins University Press.

Rhoades, G. (1998). Managed Professionals, Unionized Faculty and Restructuring Academic Labor Albany,NY: State University of New York Press.

Pusser, Slaughter, and Thomas (2006). Playing the board game: An empirical analysis of university trustee and corporate board interlocks. *The Journal of Higher Education* - Volume 77, Number 5, September/October, pp. 747-775

Rhoades, G. (2000). The New Unionism and Over-Managed Professionals. *Thought and Action* 16(1): pp. 83-98.

Rubenstein, S. *A New Low in Drug Research: 21 Fabricated Studies* at http://blogs.wsj.com/health/2009/03/11/a-new-low-in-drug-research-21-fabricated-studies/

Schrecker (1986). No Ivory Tower: McCarthyism and the Universities Oxford University Press, 1986

Schmidt, P. (2002). States push public universities to commercialize research. The Chronicle of Higher Education. March 29.

Slaughter, S. Rhoades, G. (2004) Academic Capitalism and the New Economy: Markets, State, and Higher Education. The Johns Hopkins University Press, Baltimore, M.D.

Slaughter, S., Feldman, M, and Thomas, S. (2009). Policies on institutional conflicts of interest at U.S. research universities. *Journal of Empirical Research on Human Ethics Research*. Vol 4, no 3

Thompson, D.F. (1993). Understanding financial conflicts of interest: Sounding board. *New England Journal of Medicine*. 329.: pp. 473-576

University of Georgia Conflict of Interest Policy. Available at: http://74.125.113.132/search?q=cache:GzoR37qS08gJ:www.ovpr.uga.edu/docs/policies/research/Conflicts-of-Interests.doc+university+of+georgia+conflicts+of+interest&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a

CITED CASE LAW

Adamsons v. Wharton, et. al., 771 F. 2d. 41; (2nd Cir. 1985)

Alvin v. Suzuki, 227 F. 3d. 107; (3d Cir. 2000)

Antorietto v. Regents of the University of California, 2002 WL 1265552; (Cal App. 4th 2002)

Bakalis v. Board of Trustees of Comm. College District No 504,886, F. Supp. 644; (N.D. Ill. 1995)

Beard v. Achenbach Mem. Hospital Ass'n, 170 F. 2d. 859; (10th Cir; 1948.)

Bentz v. Vardaman Mfg, Co., 210 So. 2d. 35; (Miss. 1968)

Berg v. Hunter, 854 F. 2d. 238; (7th Cir. 1988)

Braun v. Bureau of State Audits et al., 67 Cal. App. 4th 1382; (Cal. App. 4th Cir. 1998)

Brooks v. University of Wisconsin Board of Regents, et. al., 406 F. 3d. 476; (C.A. 7 Wis. 2004)

Brown v. Lillard, 814 P. 2d. 1040; (Okl. 1991)

Carreon v. Ill Dep't of Human Servs., 395 F. 3d. 786; (7th Cir. 2005)

Connick v. Myers, 461 U.S. 138; (1983)

Corporation of Mercer v. Smith, 371 S.E. 2d. 858; (Ga. 1988)

Cromley v. Board of Education of Lockport Township High School Distric,t 205, 848 F. 3d. 194; (7th Cir. 1996)

Dace v. Commonwealth, 1999 WL 1487590; (Mass. Super. 1999)

Feldman v. Ho, 171 F. 3d. 494; (7th Cir. 1999)

Fowle Memorial Hospital v. Nicholson, 126 S. E. 94; (N.C. 1925)

Garcetti v. Ceballos, 547 U.S. 410; (2006)

Garrison v. Louisiana, 379 U.S. 64; (1964)

GNG Gas Systems, Inc. v. Dean, 921 S.W.2d 421; (Tex. App. 1996)

Grimes v. Kennedy Krieger Institute, Inc., 366 Md. 29, 782 A.2d 807; (*Md.* 2001)

Harris v. Howard University, Inc., 28 F. Supp. 2d. 1; (D.D.C. 1998)

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

Hoover v. Morales, 164 F. 3d. 221; (5th Cir. 1998)

In re: Beychok and Wolf Baking Company, Inc., 495 So. 2d. 1278; (La 1986)

Jarvis Christian College v. National Union Fire Ins. Co. of Pittsburgh, PA., 197 F.3d 742; (5th Cir. 1999)

Klug v. Chicago School Reform Bd. Of Trustees, 197 F. 3d. 853; (7th Cir. 1999)

Marion v. Hall, 429 So. 2d. 937; (Ala. 1983)

Oliver v. Boston University, et. al., 2006 WL 1064169; (Del.Ch. 2006)

Perry v. Sindermann, 408 U.S. 593; (1972)

Peyman v. The Johns Hopkins University, 2001 WL 238197; (E.D. La 2000)

Pickering v. Bd. Of Educ., 391 U.S. 563; (1968)

Pitts v. Larson, 638 N.W. 2d. 254; (S.D. 2001)

Propst v. Blitzer, 39 F. 3d. 148; (7th Cir. 1994)

Roberts v. Board of Trustees of the Minnesota State Colleges and Universities, 2004 WL 727175; (Minn. App. 2004)

Samuel and Jessie Kenney Presbyterian Home v. Washington, 24 P. 2d 403; (Wash. 1933)

Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F. Supp. 1003; (D.D.C. 1974)

Stone v. The Regents of the University of California, 77 Cal. App. 4th 736; (Cal App. 4th 1999)

*Student House Inc. v. Board of Regents of Regency Universitie*s, 254 M.E. 2d. 496; (Ill. 1969)

Student Loan Marketing Association v. Riley, 112 F. Supp. 2d.38; (D.D.C. 2000)

Sweezy v. New Hampshire, 354 U.S. 234; (1957)

United States ex rel. Erdem I. Cantekin v. University of Pittsburgh, 192 F. 3d. 402; (3d Cir. 1999)
United States v. Bryant, 556 F. Supp. 2d. 378; (D.N.J. 2008)

United States v. Vrodlyak, 536 F. Supp. 2d. 899; (N.D. Ill. 2008)

Unruh-Haxton et al v. Regents of the University of California, 162 Cal. App. 4th 343; (Cal App. 4th 2008)

Waters v. Churchill, 511 U.S. 661; (1994)

Webb v. Board of Trustees of Ball State University, 167 F. 3d. 1146; (7th Cir. 1999)

Weinstein v. University of Illinois, 811 F. 2d. 1091; (7th Cir. 1987)

Witt v. Eastern Kentucky University, 205 S.W. 3d. 263; (C.A. Ken. 2006)