GRADE NON-DISCLOSURE POLICIES: AN ANALYSIS OF RESTRICTIONS ON M.B.A. STUDENT SPEECH TO EMPLOYERS

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The past decade has seen a new trend emerge among the most elite American business schools. In an effort to reduce competitiveness among their respective student bodies, students at several elite business schools have held referenda to prohibit any M.B.A. student from disclosing his or her grades to employers. While these policies differ in scope, some prohibit disclosure even if a failure to disclose one’s grades would result in one not obtaining a job offer. Students have usually ratified such ballot measures by wide margins, and in the wake of such votes, some business school administrators have gone so far as to make disclosing grades to employers an honor code violation.

This Essay will explore the legality of such collective grade non-disclosure agreements, with a particular emphasis on First and Fourteenth Amendment jurisprudence and relevant state statutes, such as California’s Leonard Law. Although courts have allowed public universities to place limits on student speech when regulating speech enhances the educational experience, restricting a student’s ability to disclose information about him or herself to prospective employers impairs the educational experience. While private schools are generally not required to provide freedom of speech protection to their student bodies, courts are unlikely to uphold grade non-disclosure policies adopted by private universities located in jurisdictions such as California where legislatures have prohibited private schools from banning otherwise allowable speech, unless such policies are tailored in a way that avoids official administration enforcement of the policy.

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I. GRADE NON-DISCLOSURE POLICIES: AN OVERVIEW

Five elite American business schools recognize some form of grade non-disclosure policy: Harvard Business School, University of Pennsylvania's Wharton School, the Stanford Graduate School of Business, the University of Chicago Graduate School of Business, and the Haas School of Business at the University of California at Berkeley. Though most of these policies have several common traits, there are some significant differences between them that are worth noting, particularly in scope and enforcement.

A. Adoption

Every business school grade non-disclosure policy has been initially adopted through a student-initiated vote. The grade non-disclosure movement originated in the 1990s, when jobs for graduate business school students were plentiful and it was not uncommon for both those at the top and bottom of an M.B.A. class to have as many as five or six job offers. The Wharton School adopted the first non-disclosure policy in 1994 as a result of a student initiated referendum and the policy remains in effect to this day. Wharton M.B.A. students overwhelmingly voted in favor of the policy, believing that grade non-disclosure would result in a more collegial atmosphere and reduce competition among the student body.

8. Id.
Students at other business schools followed Wharton’s lead by initiating similar referenda within the next few years. In 1998, the overwhelming majority of Harvard Business School’s student body voted to adopt the following policy:

In support of the academic mission of the MBA Program and as voted by the student body on January 23, 1998, individual grades received at HBS shall not be communicated to an HBS recruiter before a job offer is extended. Likewise, HBS recruiters must agree not to use a student’s individual grades as a condition of employment. The award of academic honors is the only standardized measure of academic performance obtained at HBS that can be disclosed during the recruiting process.9

In 2000, students at the University of Chicago’s Graduate School of Business chose to implement a similar grade non-disclosure policy.10 The Stanford Graduate School of Business’s student body also adopted similar grade disclosure restrictions in 2001.11 U.C. Berkeley’s Haas School adopted the most recent policy, with its full-time M.B.A class of 2007 having voted for a non-disclosure policy.12

In recent years other business schools have considered implementing grade non-disclosure policies. The University of California at Los Angeles’s Anderson School of Business surveyed its student body about grade non-disclosure in 2005, discovering that 50.4 percent of Anderson M.B.A. students favored implementing grade non-disclosure.13 Some M.B.A students at the University of Michigan Business School have encouraged the administration to institute a grade non-disclosure policy so that M.B.A. students can focus on “being more collaborative rather than more competitive with their peers.”14 Not all business school students, however, support restrictions on student speech to employers. Students at Cornell University’s Johnson School appear indifferent to the idea.15

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9. HBS, supra note 1 (emphasis omitted). Harvard Business School changed their policy in 2005, stating that “beginning with students matriculating in the fall of 2006, HBS will no longer prohibit students from disclosing, during the interview process, the individual grades they earn in courses in the MBA program. The choice of whether or not to disclose grades will be left entirely to each student.” Id.
10. CGSB, supra note 4.
12. Haas, supra note 5.
15. Nilanjan Banerjee, Grade Disclosure—Good or Bad?, CORNELL BUS., Nov. 5,
fact, a few student bodies have voted down grade non-disclosure ballot measures. A 1998 referendum at the Massachusetts Institute of Technology's Sloan School failed to pass.\textsuperscript{16} At Northwestern University's Kellogg School of Business, a non-disclosure initiative did not pass in 2004, when 52 percent of M.B.A. students voted to maintain Kellogg's current grade disclosure policy.\textsuperscript{17} Although a 67 percent supermajority vote was needed to implement grade non-disclosure, only 47 percent voted to prohibit students from disclosing grades to employers.\textsuperscript{18} A similar referendum at Columbia Business School that required a 75 percent supermajority to pass also was defeated after this threshold was not met.\textsuperscript{19}

B. Scope

Grade non-disclosure policies differ in the scope to which they limit student disclosure of information to employers and other third parties.

1. Employer Speech Restrictions

All grade non-disclosure policies allow students to disclose their grades to other academic programs.\textsuperscript{20} Thus, these policies are only intended to limit the amount of information students disclose to potential employers. However, different schools have placed different restrictions on student/employer speech. One can classify these schools into two categories: those that have adopted broad policies, and those who have implemented narrow policies.

a. Broad policies

The Wharton School, the University of Chicago Graduate School of Business, and the Stanford Graduate School of Business have implemented very broad grade non-disclosure policies. These schools prohibit students

\begin{footnotesize}
\begin{enumerate}
\item Bill Dickey, GBA Debating Whether to Let Students Vote on Disclosure, BOTTOM LINE, November 8, 2004, at 1, 5, available at http://www0.gsb.columbia.edu/students/organizations/retail/BL_Nov18_FINAL_1_22.pdf.
\item See Table 1 infra p. 717.
\end{enumerate}
\end{footnotesize}
from disclosing some grade information to all potential employers, which not only include employers that participate in on-campus recruiting, but also employers who do not formally recruit students through school-sponsored functions. Thus, a Wharton M.B.A. student would violate Wharton's non-disclosure policy if he or she included an official transcript along with his or her resume as part of a self-initiated mass mailing of employers who do not participate in on-campus recruiting.

b. Narrow policies

Harvard Business School and U.C. Berkeley's Haas School of Business adopted more narrowly tailored non-disclosure policies. These narrow policies do not attempt to regulate grade disclosure outside of the on-campus recruitment process. The Harvard referendum limited the policy to "HBS recruiters," a term used to reference employers who participate in school-sponsored recruitment events, such as career fairs.21 The Haas policy is even more explicit, outright stating that "[t]his policy is officially limited to on-campus recruiting."22

2. Information Limits

The non-disclosure policies also significantly differ in what information students cannot disclose to employers. While no policy prohibits students from sharing standardized test scores or grades from previously earned academic degrees, there is significant differentiation in what information students can disclose about their current academic performance. Non-disclosure policies can be sorted into two groups: complete non-disclosure policies and limited non-disclosure policies.

a. Complete non-disclosure policies

Only one school, the Stanford Graduate School of Business, implemented a complete non-disclosure policy. The Stanford GSB policy that began in 2001 prohibited M.B.A. students from disclosing any information about their absolute or relative performance at Stanford GSB. The student-initiated policy restricted students from revealing "Dean's List standing, GPA, percentile rank or specific class grades to potential employers until graduation."23

21. HBS, supra note 1.
22. Haas, supra note 5.
23. Deans Respond, supra note 11. Since the Stanford GSB student body adopted this policy, the business school's official statements regarding the policy indicate that students may choose to disclose their grades: "The GSB has no policy on grade disclosure; your
b. Limited non-disclosure policies

Most non-disclosure policies are limited non-disclosure policies. The Wharton School, Harvard Business School, the Haas School, and the University of Chicago Graduate School of Business have adopted policies that prohibit students from disclosing most information about themselves, but these policies allow students to disclose some aspects of their academic performance. These schools do not allow students to disclose individual grades or grade point averages; however, students are free to disclose academic honors, such as Director's List status.

3. When Can Students Disclose Grades?

Schools also differ as to when these non-disclosure policies are no longer binding on their student bodies. Limited non-disclosure policies can be divided into three groups based on when students are no longer expected to follow them.

a. Second interview disclosure

The University of California at Berkeley's Haas School does not allow students to disclose grades during the first stage of the recruiting process. Unlike other schools with non-disclosure policies, Haas relaxes its policy after this stage: students are given the option of disclosing their grades to employers if they are selected for second round, or callback, interviews. Thus, employers are still able to consider the grades of Haas students prior to making a permanent job offer.

b. Employment offer disclosure

Harvard Business School, the Wharton School, and the University of Chicago Graduate School of Business prohibit grade disclosure to employers before a job offer is made. However, once a student accepts an

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24. CGSB supra note 4; Haas, supra note 5; HBS, supra note 1; WGA, supra note 2.
25. Nomination to the Director's List at Wharton signifies that one is in the top 10 percent of one's M.B.A. class. University of Pennsylvania Wharton School: Survey Details, available at http://www.businessweek.com/bschools/98/top25/profile166.htm
26. Haas, supra note 5.
27. CGSB, supra note 4; HBS, supra note 1; WGA, supra note 2.
offer of employment from an employer, the non-disclosure policies adopted by these schools allow the student to disclose his or her grades to the employer.

c. Graduation disclosure

In contrast, the Stanford Graduate School of Business student-initiated policy prohibited students from disclosing their grades to potential employers even after an employment offer has been made. At this school, individuals cannot disclose certain grades to employers until after graduation.\textsuperscript{28}

C. Recognition and Enforcement

Finally, non-disclosure policies differ significantly in how they are recognized by and enforced at their respective institutions. Schools can be divided into three groups based on recognition and enforcement levels: (1) those that provide official recognition and official enforcement, (2) those that provide official recognition but not enforcement, and (3) those that provide neither recognition nor enforcement.

1. Official Recognition, Official Enforcement

Only one school—Harvard Business School—provided both official recognition and enforcement of their respective grade non-disclosure policies. At Harvard, the policy was considered an official school policy, and admitted M.B.A. students were required by the school’s administration to agree to the terms of the grade non-disclosure policy prior to matriculation.\textsuperscript{29} Students who do not abide by the policies were subject to disciplinary action.\textsuperscript{30}

2. Official Recognition, Unofficial Enforcement

The Wharton School is the sole institution to take a middle ground stance towards its non-disclosure policy. Wharton administration acknowledges the policy and disseminates information about the policy to recruiters and other third parties.\textsuperscript{31} However, unlike Harvard Business School, the Wharton administration does not play any role in actually enforcing the policy. Rather than subjecting students to formal disciplinary

\textsuperscript{28} Deans Respond, supra note 11.
\textsuperscript{29} HBS, supra note 1.
\textsuperscript{30} Id.
\textsuperscript{31} WGA, supra note 2.
action for disclosing grades to employers, the Wharton administration delegates enforcement to students themselves through the Wharton Graduate Association (WGA), the Wharton M.B.A. division of student government. Thus, the penalty for not complying with Wharton’s grade non-disclosure policy is more akin to the penalty for violating an established social norm, such as failing to tip in a fancy restaurant, rather than the penalty for plagiarism or a comparable violation of school policies.

3. Unofficial Recognition, Unofficial Enforcement

The remaining three schools—the Stanford Graduate School of Business, the University of Chicago Graduate School of Business, and the Haas School—not only fail to officially enforce these policies, but explicitly state that their administrations do not formally recognize these policies. Chicago, while including the text of its policy on its website, includes a disclaimer stating that the policy “is not a policy of the Graduate School of Business or the University of Chicago.” The Stanford Graduate School of Business states: “The GSB has no policy on grade disclosure; your grades belong to you and it is your right to use them as you wish. Stanford's nondisclosure norm among MBA students, however, has existed for nearly 40 years.” The Haas Career Services office takes an even stronger approach to distancing itself from the non-disclosure policy; not only does its webpage state that “a nondisclosure policy is not an official policy of the Haas School of Business,” but it goes so far as to all but denounce the policy, informing recruiters that “[t]he Administration and Faculty believe that grades are an important source of information for employers about potential employees.”

The following table provides a concise summary as to how the policies of all five institutions compare to each other in scope, recognition, and enforcement.

32. Id.
33. CGSB, supra note 4.
34. SGSB, supra note 3.
35. Haas, supra note 5.
II. THE LAW OF HIGHER EDUCATION: STUDENT SPEECH RIGHTS

To determine which, if any, of these non-disclosure policies are in violation of the law, one must first examine the limitations courts and legislatures have placed on a college’s ability to restrict student speech. This section will summarize the current state of the law, with the next section applying the law to the context of business school grade non-disclosure policies.

36. CGSB, supra note 4; Haas, supra note 5; HBS, supra note 1; SGSB, supra note 3; WGA, supra note 2.
A. The Relationship between Colleges and Students

Prior to the 1970s, courts generally held that a "college's relationship to its students was . . . parental in nature,"37 and thus both public and private colleges could "exercise virtually unchecked authority over students' lives."38 Since colleges stand in loco parentis, they could "make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose."39 This idea that a college could act in loco parentis, as well as a general belief that attending even a public college was a privilege,40 precluded students from asserting claims against institutions based on their constitutional rights.41

The past forty years, however, have seen a transition from the in loco parentis doctrine to a contract theory approach. Both federal42 and state43 courts have increasingly found that the relationship between colleges and universities and their students is contractual in nature. Though some scholars have argued that contract theory is a poor fit for the college and student relationship,44 courts have generally found that "[t]he elements of a traditional contract are present in the implied contract between a college and a student attending that college, and are readily discernible."45 Students, once they are admitted to a university and they decide to

38. Id.
40. Kaplin, supra note 37.
41. See, e.g., Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 262 (1934)
(The fact that they are able to pay their way in this University but not in any other institution in California is without significance upon any constitutional or other question here involved. California has not drafted or called them to attend the University. They are seeking education offered by the state and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war . . . and military education.).
42. See, e.g., Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975) (opining that "some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University"); Russell v. Salve Regina Coll., 938 F.2d 315, 316 (1st Cir. 1991) (stating that "a student-college relationship is essentially a contractual one.").
43. See, e.g., Carr v. St. John's Univ., 231 N.Y.S.2d 410, 413 n.1 (1962) ("When a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought.").
44. See, e.g., Victoria J. Dodd, The Non-Contractual Nature of the Student-University Contractual Relationship, 33 U. KAN. L. REV 701, 730 (1985) (noting that there is a "lack of a true bargaining and promise orientation in the student-university context . . . ." Thus, the relationship is "intrinsically non-contractual" in nature).
matriculate, agree to abide by that university’s rules and regulations, and colleges and universities are expected to then abide by those rules as well.\textsuperscript{46}

B. Campus Speech Restrictions: The Current State of the Law

The shift from \textit{in loco parentis} to contract theory allowed students to challenge certain college practices in court, ranging from grade disputes\textsuperscript{47} to the recognition of student organizations.\textsuperscript{48} Although college restrictions on student speech have been challenged, the legality of a speech restriction often depends on whether the college is public or private.\textsuperscript{49}

1. Public Schools

Although public colleges are able to enter into enrollment contracts with students,\textsuperscript{50} there are greater limits as to what a public college can require of its students than a private college. Public colleges, as government entities, must comply with the provisions of the U.S. constitution, state constitutions, and relevant federal and state legislation.

Most disputes regarding public college restrictions on student speech have focused on whether the public college’s regulations violate the First and Fourteenth Amendments, particularly the First Amendment’s Free Speech and Press Clauses. In \textit{Healy v. James},\textsuperscript{51} the Court held that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”\textsuperscript{52} However, the Court has also held that “First Amendment rights [should be] applied in light of the special characteristics

\textsuperscript{46} See, e.g., Vought v. Teachers Coll., Columbia Univ., 511 N.Y.S.2d 880, 881 nn.1-2 (N.Y. App. Div. 1987) (“When a student is admitted to a university, an implied contract arises between the parties which states that if the student complies with the terms prescribed by the university, he will obtain the degree he seeks.”); Healy v. Larson, 323 N.Y.S.2d 625, 627 n.3 (N.Y. App. Div. 1971) (holding that a student is entitled to receive a degree because he “satisfactorily completed a course of study at [the] community college as prescribed to him by authorized representatives of the college . . . .”); Univ. of Tex. Health Sci. Ctr. v. Babb, 646 S.W.2d 502, 506 nn.6-7 (Tex. App. 1982) (“We hold that a school’s catalog constitutes a written contract between the educational institution and the patron, where entrance is had under its terms. . . . [Further, the student] had a right to rely on its terms.”).

\textsuperscript{47} See, e.g., Harris v. Blake, 798 F.2d 419 (10th Cir. 1986) (involving a graduate student claiming due process violations following an unfavorable letter of evaluation and low grades).

\textsuperscript{48} See, e.g., Gay Student Servs. v. Tex. A&M Univ., 737 F.2d 1317 (5th Cir. 1984) (upholding state’s right to support university’s refusal to recognize a homosexual student group).

\textsuperscript{49} See discussion \textit{infra} Part II.B.1.

\textsuperscript{50} See Larson, 323 N.Y.S.2d at 626 nn.1-2 (finding that “[t]here is no reason why this principle should not apply to a public university or community college.”).

\textsuperscript{51} 408 U.S. 169 (1972).

\textsuperscript{52} \textit{Id.} at 180.
of the school environment,"\textsuperscript{53} and that "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."\textsuperscript{54}

Lower courts, however, have generally not found public college speech regulations reasonable if alternatives exist that would not restrict speech. For example, in \textit{Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University},\textsuperscript{55} the Fourth Circuit held that a public college could not punish students for making racist or sexist remarks even though the college "has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education," because "a public university has many constitutionally permissible means to protect female and minority students."\textsuperscript{56}

2. Private Schools

Unlike public schools, the legal environment of private schools is less straightforward. While it is clear that the First and Fourteenth Amendments apply to public schools due to the state action doctrine,\textsuperscript{57} private schools are in a more nebulous realm. Some private schools are held to the same standard as public schools, while many others are able to restrain student speech however they wish without violating any constitutional provision or statute.

In the absence of legislation or regulations stating otherwise, First and Fourteenth Amendment protections do not apply to private actors, including private schools. While private schools often serve a public function and receive significant amounts of public funding, courts have generally treated private schools as private actors. The U.S. Supreme Court first addressed the public function issue in 1819, where Justice Story, in his concurring opinion in \textit{Trustees of Dartmouth College v. Woodward},\textsuperscript{58} stated that Dartmouth College remains a private entity even though its charitable mission is a public one.\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{54} Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981) (citing Tinker).
  \item \textsuperscript{55} 993 F.2d 386 (4th Cir. 1993).
  \item \textsuperscript{56} \textit{Id.} at 393. \textit{Contra}, Paul Horwitz, Grutter's First Amendment, 46 B.C. L. REV. 461, 467 (2005) (arguing that dicta in \textit{Grutter v. Bollinger} (539 U.S. 306 (2003)) "suggests that universities may be entitled to greater latitude in formulating speech codes" despite earlier case law holding otherwise).
  \item \textsuperscript{57} See discussion supra Part II.B.1.
  \item \textsuperscript{58} 17 U.S. 518 (1819).
  \item \textsuperscript{59} \textit{Id.} at 668-72 (Story, J., concurring) (arguing that an institution's public or charitable mission does not make the institution public).
\end{itemize}
Lower federal courts have generally deferred to Justice Story’s interpretation when faced with similar situations. For example, the Second Circuit, in *Powe v. Miles*, held that Alfred University, while serving a public function and incorporated by the New York Legislature, remained a private actor and its treatment of student protesters did not constitute state action. The Second Circuit affirmed this decision again twenty years later in *Albert v. Carovano*, when the court found that there was no state action when a private college disciplined its students.

The Supreme Court examined the public funding issue in *Rendell-Baker v. Kohn*, when it held that a private high school that consistently received more than 90 percent of its yearly operating budget through public funds and had none of its students pay tuition was still considered a private entity, and its discharge of former teachers for exercising their First and Fourteenth Amendment rights did not constitute a state action. Although the Supreme Court has not explicitly held that a private university is not a state actor even though it receives substantial public funds, such an interpretation would not be inconsistent with the language in *Rendell-Baker*. Therefore, it comes as no surprise that lower courts have not treated private universities as state actors.

While the First Amendment of the U.S. Constitution does not traditionally extend to private universities because these schools are not state actors, not all speech regulations by private universities are constitutionally acceptable. Though interpretations of the U.S. Constitution place limits on freedom of speech protection, states have the option of providing even greater speech protections through their own individual constitutions. California is arguably the most prominent state to have included such expanded freedom of speech protection in its Constitution.

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61. 407 F.2d 73 (2d Cir. 1968).
62. Id.
63. 851 F.2d 561 (2d Cir. 1988).
64. Id. at 570.
66. Id. at 840-43.
68. The California Constitution states that “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” CAL. CONST. art. 1, § 2(a).
The California Constitution's free speech provisions even go so far as to grant freedom of speech rights on private property. While some property owners have claimed that the California Constitution's increased speech protection results in a violation of their own First and Fourteenth Amendment rights, the U.S. Supreme Court has rejected these claims and affirmed the California Constitution's enhanced protections.69

A private university’s jurisdiction, therefore, can play a pivotal role in determining what restraints on student speech are constitutionally permissible. Although private schools in states such as Massachusetts are able to regulate or not regulate student speech as they see fit, private schools in California may face judicial scrutiny when attempting to place limits on student expression. For instance, in Corry v. Stanford70, a California state court struck down Stanford University’s speech code on the basis that it violated Education Code § 94367, also known as the Leonard Law. California’s Leonard Law explicitly states that both Article 1, § 2 of the California Constitution and the First Amendment of the U.S. Constitution apply to private universities located in the state of California. It reads as follows:

(a) No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

(b) Any student enrolled in a private postsecondary institution that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.71

C. Federal Limits on Grade and Educational Record Disclosure

Unlike the laws governing student speech restrictions, virtually all public and private colleges are subject to the same rules regarding the disclosure of student grades and educational records.72 The Family

69. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that private shopping centers are held to the constraints of California’s constitutional speech protections).
72. A very small number of states have passed laws that place additional regulations on
Educational Rights and Privacy Act of 1974 (FERPA)\(^73\) requires all educational institutions that receive U.S. Department of Education funds or who have their students receive such funds (including government-provided student loans) to comply with certain rules and regulations.\(^74\) FERPA requires these educational institutions to grant their students a right of access to their education records\(^75\) as well as the right to challenge the content of those records.\(^76\) Furthermore, FERPA prohibits institutions from disclosing "personally identifiable" information from a student’s educational records to institutional staff or others.\(^77\)

However, there are several important limitations on FERPA. First, multiple federal courts have prevented students from suing educational institutions for not complying with FERPA’s provisions.\(^78\) Since students have no private cause of action against institutions based on FERPA, their only recourse based on the statute is to file a complaint with the U.S. Department of Education and hope that the department chooses to pursue the issue on their behalf.\(^79\)

The second limitation, and perhaps the one most relevant to the discussion of grade non-disclosure policies, is that FERPA, while placing significant limits on a college’s ability to disclose grades and other educational records,\(^80\) does not grant students an affirmative right to disclose information from their educational records to third parties.\(^81\) This is perhaps because grade non-disclosure policies had not been contemplated in 1974.\(^82\) Because neither FERPA nor any other piece of educational record legislation or regulation grants this affirmative right, students seeking to challenge the legality of grade non-disclosure policies must base their claims on the First and Fourteenth Amendments.\(^83\)
III. DO GRADE NON-DISCLOSURE POLICIES VIOLATE STUDENT SPEECH RIGHTS?

Three factors will largely determine whether grade non-disclosure policies violate student speech rights: school status and location, the benefits of non-disclosure policies to the educational experience, and the extent of the administration’s involvement in enforcing the non-disclosure policy.

A. School Status and Location

Most schools that have implemented grade non-disclosure policies are private. In fact, U.C. Berkeley’s Haas School is the only public school that has grade non-disclosure, though several other public business schools, such as UCLA and the University of Michigan, are thinking about instituting grade non-disclosure policies.84 Public schools, as government entities, must comply with First and Fourteenth Amendment freedom of speech protections, and thus the grade non-disclosure policy practiced by Haas, as well as those under consideration by other public schools, is subject to judicial scrutiny.

Most private schools with grade non-disclosure policies are located in states without statutes similar to California’s Leonard Law; in fact, of these schools, only Stanford’s Business School is subject to the same level of judicial scrutiny as its public counterparts. Since Harvard, Wharton, and Chicago are not subject to the Leonard Law or comparable legislation, their grade non-disclosure policies are not in violation of the law.85

B. Non-Disclosure Policies and the “Educational Experience”

After determining that a school’s status or jurisdiction requires it to comply with the First and Fourteenth Amendments, one must examine whether the educational goals or benefits of a grade non-disclosure policy justify the cost of restricting student speech to potential employers. Those who support grade non-disclosure policies have traditionally argued that these speech restrictions promote collegiality and otherwise enhance the learning experience, as well as enhance student employment prospects.86

84. Anderson, supra note 13; Griffus, supra note 14.
85. Wharton is partially subject to the Leonard Law, since it has recently established a campus dubbed “Wharton West” in San Francisco. However, since Wharton West only offers an executive MBA program, rather than a traditional MBA program, the grade non-disclosure policy is moot, since executive MBA students already have jobs and attend school on a part-time basis. See Wharton West FAQ, http://www.wharton.upenn.edu/campus/wharton_west/faq.cfm (last visited Feb. 21, 2007).
86. See discussion infra Part III.B.1-2.
This sub-section will examine these arguments.

1. Do Non-Disclosure Policies Enhance Classroom Interactions and Promote Collegiality?

M.B.A. students at Wharton, the first business school to implement grade non-disclosure, justified their decision to adopt a grade non-disclosure policy on the grounds that it would enhance the learning environment at Wharton. The Wharton Graduate Association, in its 1994 grade non-disclosure referendum, stated that Wharton’s curriculum “relies heavily on experiential learning to develop students’ leadership and interpersonal skills,” and that professors cannot effectively evaluate these skills through traditional academic measures of performance, especially when “[t]eams, rather than individuals, are held accountable for academic performance.”

The Wharton referendum further states that in the absence of a grade non-disclosure policy, M.B.A. students may “avoid courses that are challenging and/or removed from previous experience, thereby limiting their education to ensure better grades.”

Schools that followed Wharton’s lead used this same justification; for instance, the Stanford Graduate School of Business’s grade non-disclosure statement states that the policy was adopted “to support learning and collective respect at the GSB.”

Many students believe that there is a relationship between grade non-disclosure and a school’s academic environment. A 2005 poll of the Wharton M.B.A. student body found that 82 percent of students felt a switch to grade disclosure would harm the academic experience, with 85 percent believing grade disclosure would adversely impact Wharton’s collaborative environment and 70 percent of respondents stating that a switch would have an impact on their course selections. Although surveys conducted at other schools asked more general questions, many students stated that they perceived a relationship between culture, collaboration, and grade non-disclosure. One Stanford M.B.A student quoted in the Stanford Business Reporter stated, “The collaborative culture at Stanford was one of the main reasons I came here and I feel Grade Non-

87. WGA, supra note 2.
88. Id.
89. Deans Respond, supra note 11.
Disclosure is a significant influence on this collaborative culture."92 A Harvard M.B.A. student reacting to the Harvard Business School’s recent decision to revert to grade disclosure has predicted that “[w]ith the return of grade disclosure, the incentive for some students to be cooperative may not be there.”93

While a significant number of students believe grade non-disclosure has a positive impact on the academic environment, empirical evidence does not support this claim. Annual student surveys at Wharton have revealed significant reductions in the amount of time students spend on their coursework since grade non-disclosure was adopted; in fact, Wharton M.B.A. Program Dean Anjani Jain reports that in the past four years alone time spent on academics has decreased by 22 percent.94 In addition to devoting less time to their studies, Wharton M.B.A. students also perform worse in their courses now than in the past. For example, Jain has observed that, in the years since grade non-disclosure, Wharton M.B.A. student performance in cross-listed courses has steadily decreased—in fact, Wharton undergraduate students now obtain, on average, higher grades than Wharton M.B.A. students in these cross-listed classes, with the gap continuing to widen every year.95

These effects are not limited to Wharton. Internal Stanford Graduate School of Business and Harvard Business School studies reached similar results.96 In response, the deans of both schools sent memos to their respective student bodies explaining the detrimental effect grade non-disclosure may have on academics, with Harvard’s dean also announcing that he would unilaterally end Harvard’s non-disclosure policy effective the following year.97

2. Do Non-Disclosure Policies Enhance Employment Prospects?

While many M.B.A. students have argued that non-disclosure policies enhance their school’s academic environment, other students believe that non-disclosure enhances employment prospects or fixes deficiencies in the

92. Id.
94. Gloeckler, supra note 6.
95. Id.
97. Id.
recruiting system. The 1994 Wharton referendum stated that "[g]rades can be imperfect predictors of job performance" that "measure performance in a setting that is often dissimilar to most work environments." 98 Although many employers have responded to non-disclosure policies by using GMAT scores as a screening mechanism, some students continue to believe that "[g]rades have no place or relevance when considering the fit for employee and employer." 99

However, anecdotes from business school recruiters indicate that, whether students like it or not, grades do have a significant effect on the recruitment process. Richard McNulty, Dartmouth’s Tuck School of Business head of career development and a former recruiter, has stated that grade non-disclosure "puts good students at a disadvantage and may discourage recruiters from coming to campus." 100 Although recruiters have begun to use "case interviews" and other methods of testing a job applicant’s quantitative skills, recruiters have only used these techniques when grades are not available due to a non-disclosure policy, indicating that employers may believe grades provide a better screening mechanism than the more personalized evaluation methods that students seem to prefer. 101

To date, there has been no large scale empirical study of the determinants of business school career placement that can confirm or refute either argument. However, all evidence currently available suggests that grade non-disclosure policies, at best, have no positive impact on employment placement, while at worst may have a negative impact. A simple linear regression on the top 30 American business schools, based on data contained on Business Week’s business school rankings website, 102 demonstrates that, after controlling for average work experience, median GMAT, and school reputation, grade non-disclosure policies do not have a significant impact on the percentage of M.B.A. student job-seekers who are employed at graduation. In fact, of these variables, only school reputation is a significant predictor of employment.

98. WGA, supra note 2.
100. Gloeckler, supra note 6.
101. Id.
TABLE 2: REGRESSION RESULTS (% JOB SEEKERS EMPLOYED AT GRADUATION)

<table>
<thead>
<tr>
<th>Model</th>
<th>R</th>
<th>R Square</th>
<th>Adjusted R Square</th>
<th>Std. Error of the Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>.799(a)</td>
<td>.638</td>
<td>.577</td>
<td>6.572</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Unstandardized Coefficients</th>
<th>Standardized Coefficients</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>B</td>
<td>Std. Error</td>
<td>Beta</td>
<td>t</td>
</tr>
<tr>
<td>1 (Constant)</td>
<td>26.561</td>
<td>55.989</td>
<td>.474</td>
<td>.640</td>
</tr>
<tr>
<td>Grade Non- Disclosure Policy</td>
<td>.314</td>
<td>3.979</td>
<td>.011</td>
<td>.079</td>
</tr>
<tr>
<td>Median GMAT</td>
<td>.104</td>
<td>.073</td>
<td>.269</td>
<td>1.434</td>
</tr>
<tr>
<td>Average Work Experience (in months)</td>
<td>-.214</td>
<td>.229</td>
<td>-.119</td>
<td>-.932</td>
</tr>
<tr>
<td>Business Week Reputation/Satisfaction Ranking</td>
<td>-.641</td>
<td>.220</td>
<td>-.547</td>
<td>-2.909</td>
</tr>
</tbody>
</table>

a. Dependent Variable: % Job Seekers Employed at Graduation

Another linear regression, using the same variables to predict the percentage of M.B.A. student job-seekers who obtained jobs through school-facilitated events such as on-campus recruiting, also provides evidence that grade non-disclosure policies do not have an impact on student employment outcomes. Once again, only one variable — average work experience — is a significant predictor of job placement through school-facilitated events.
TABLE 3: REGRESSION RESULTS (% EMPLOYED VIA SCHOOL-FACILITATED EVENTS)

<table>
<thead>
<tr>
<th>Model</th>
<th>R</th>
<th>R Square</th>
<th>Adjusted R Square</th>
<th>Std. Error of the Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>.586(a)</td>
<td>.343</td>
<td>.229</td>
<td>8.256</td>
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</table>

<table>
<thead>
<tr>
<th>Model</th>
<th>Unstandardized Coefficients</th>
<th>Standardized Coefficients</th>
<th>T</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Constant)</td>
<td>39.841</td>
<td>70.811</td>
<td>.503</td>
<td>.579</td>
</tr>
<tr>
<td>Grade Non-Disclosure Policy</td>
<td>4.104</td>
<td>5.472</td>
<td>.137</td>
<td>.750</td>
</tr>
<tr>
<td>Median GMAT</td>
<td>-.027</td>
<td>.091</td>
<td>-.074</td>
<td>-.292</td>
</tr>
<tr>
<td>Average Work Experience (in months)</td>
<td>.687</td>
<td>.292</td>
<td>.407</td>
<td>2.353</td>
</tr>
<tr>
<td>Business Week Reputation/Satisfaction Ranking</td>
<td>-.469</td>
<td>.278</td>
<td>-.425</td>
<td>-1.687</td>
</tr>
</tbody>
</table>

a. Dependent Variable: % Obtained Jobs Through School Facilitate Activities

Unfortunately, these regressions may not necessarily paint a complete picture of business school employment placement, since there may be some error involved when using percentage employed as the dependent variable. For instance, this figure does not take into account quality of employment or other important factors. Although a more detailed study of business school career placement is desirable, comprehensive studies of career placement in other contexts has found a relationship between grades and employment placement. For example, in the law school career placement context, one recent study determined that students at law schools that use Honors/Pass/Fail grading systems (where students in practice have little or no means of differentiating themselves from other students through their grades) experience worse career placement outcomes than students at schools that use a traditional letter grade system. Thus, it is likely that a more comprehensive study of business school career placement would

103. See generally Anthony Ciolli, The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up, 45 JURIMETRICS J. 413, 431-34 (2005) (observing that schools with "no grades" systems place their graduates in worse jobs than students at schools with "traditional" systems).
confirm the results of these regressions and show that grade non-disclosure policies have no positive impact on employment placement outcomes.

3. Should Schools Receive Deference Even If Non-Disclosure Does Not Meet Its Intended Goals?

Some may argue that, even if grade non-disclosure does not result in any benefits, schools should receive some degree of deference when deciding educational matters. While greater deference to a school’s decisions might be appropriate in other contexts, this argument rings hollow in the particular context of grade non-disclosure policies because schools can try to achieve the same goals without restricting student speech. Other schools that have tried to deemphasize the importance of grades have chosen to adopt alternative grading systems in lieu of restricting student speech. For instance, Yale Law School has adopted a modified pass/fail grading system, while the New College of Florida has eliminated grades altogether and provides its students with a narrative evaluation of their course performance.

C. Administrative Action

In addition to analyzing the costs and benefits of a grade non-disclosure policy, a court would have to determine the extent of the administration’s role, if any, in enforcing the policy. Because Stanford’s Graduate School of Business and the Haas School have explicitly stated that they do not formally recognize or enforce these policies, it is unlikely that a California court would strike down either school’s policy, since students at neither school are formally disciplined for violating the non-disclosure policies.

IV. SHOULD LEGISLATURES RE-VISIT STUDENT SPEECH RIGHTS?

All schools that have implemented grade non-disclosure policies have implemented them with legal constraints in mind, with schools subject to the most judicial scrutiny having implemented liberal policies that are unlikely to be struck down by a court. However, given the evidence that

106. SGSB, supra note 3; Haas, supra note 5.
suggests grade non-disclosure may not have its intended effects, Congress, the California legislature, and other state legislative bodies might wish to revise current legislation in order to provide greater protection for student speech rights. This section will examine the policy implications of maintaining the status quo, and discuss whether amending statutes such as FERPA and the Leonard Law would result in a net benefit to society.

A. Maximizing Student Freedoms

Those who oppose grade non-disclosure policies have generally argued that non-disclosure, whether in a public or private school context, is not consistent with the spirit of FERPA or federal and state constitutions. Professor Ed George, who has lobbied for the abolition of Wharton’s grade non-disclosure policy, argues that grade non-disclosure “restricts the freedom of anyone . . . who would like to distinguish themselves by their academic achievements.”

According to George, a switch to a voluntary grade disclosure policy “does not curtail the freedom of those who would prefer to distinguish themselves” in ways other than their academic performance, such as through extracurricular activities.

This argument alone is not compelling enough to justify additional federal or state government intervention. While George correctly observes that grade non-disclosure “coercively limit[s] an individual’s freedom,” he fails to recognize that a government-mandated shift to a “voluntary” grade disclosure system would have a similar coercive effect on students who do not wish to disclose their grades. Even though students would technically retain the right to refuse to provide prospective employers with their grades, students would have very little choice in the matter in practice because a refusal to provide an employer with grades upon request would almost certainly cause a student to not receive a job offer.

Previous legislation that was meant to maximize student rights has had similar unexpected results. FERPA, for instance, granted students an

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108. Id.
109. Id.
110. Though some students may wish that employers would not care about grades but instead base hiring decisions on non-quantitative factors such as personality and interviewing ability, many employers believe grades are “one of the primary criteria” used in evaluating job applicants since they do have some predictive power in determining which individuals “ha[ve] the bullets” for certain types of work. Heather S. Woodson, Evaluation in Hiring, 65 UMKC L. REV. 931, 932 (1997). Furthermore, recruiters have observed that, “it is very difficult in an interview, whether it is 20 minutes or a full day, to evaluate the student’s intellectual and analytical ability.” Id.
affirmative right to examine their educational records,111 which includes, among other things, admissions summary reports and letters of recommendation.112 Students began to request access to this information under FERPA, and as a result colleges began to request that applicants waive some of their FERPA rights when submitting their application for admission.113 Although waiving one's FERPA rights is voluntary, there may be pressure to waive their rights out of a belief that doing so will make the educational institution give greater weight to their letters of recommendation and will improve their chances of receiving an admissions offer.114 Thus, if federal or state governments amended relevant legislation to mandate voluntary grade disclosure systems, it would merely replace a system where most students feel immense pressure to not disclose grades to employers with a system where most students feel obligated to disclose grades to employers.

B. Potential Macro-Economic Effects

Since voluntary grade disclosure systems would not maximize student freedom of speech rights, some may argue that it is inappropriate for the government to amend FERPA or the Leonard Law because the current system allows schools with grade non-disclosure policies and those without such policies to co-exist. Theoretically, the free market is all that is necessary to regulate this situation. For example, a prospective M.B.A. student can weigh the potential pros and cons of grade non-disclosure policies and, based on a cost-benefit analysis, decide whether to enroll in a school that has grade non-disclosure or one that does not. Though prospective students might not possess perfect information at the start of the admissions process, schools can advertise the advantages of their respective systems, and thus provide prospective students with enough information to make an informed decision.

Initially, this argument seems compelling. After all, if grade non-disclosure impairs a particular school’s educational experience or its ability to place its graduates in desirable job positions, one would expect schools to abandon grade non-disclosure over time on their own without government intervention due to internal pressure from students or

113. See, e.g., University of Oklahoma, Letter of Recommendation Form, http://tulsagrad.ou.edu/odyn/odreferencel.pdf (providing an example of a letter of recommendation form that gives the applicant a choice to waive his or her FERPA rights).
114. See, e.g., Posting of Maf69 to http://www.autoadmit.com/thread.php?thread_id=265074&forum_id=2#3886853 (Sept. 23, 2005, 13:25 EST) (stating a belief that letters of recommendation “are more legit” if FERPA rights are waived).
This assumes, however, that grade non-disclosure policies at some schools have not caused macroeconomic changes in the labor market for M.B.A. students and graduates.

Though the earlier regression analysis showed that grade non-disclosure policies (or the lack thereof) have neither a positive nor negative effect on employment placement at a given school, the fact that some schools have grade non-disclosure policies may have caused employment rates to fall for M.B.A. students at all business schools. It is possible—perhaps even likely—that such a large number of prestigious business schools adopting grade non-disclosure policies may have caused some employers to alter their hiring practices. Since no grade non-disclosure policy prohibits individuals from disclosing their grades to potential employers after graduation, employers who wish to use grades as a screening mechanism may refrain from hiring a significant number of M.B.A. students for permanent positions while they are still enrolled in school, instead preferring to hire greater numbers of very recent M.B.A. graduates who can disclose their grades. If a large number of employers change their recruitment practices in this way, the spillover effect may have an adverse impact on schools that do not have grade non-disclosure policies, because employers may hold off on making hiring decisions until they can compare grades from all job applicants. If this is the case, and if the drop in employment rates was close to evenly distributed, a simple linear regression would not reveal the negative impact, but only show that grade non-disclosure has no effect. While determining whether such macroeconomic effects exist is beyond the scope of this Comment, the potential for such ill effects on the labor market for M.B.A. students may justify federal or state government intervention.

V. Concluding Remarks

The grade non-disclosure policies adopted by Harvard, Wharton, Chicago, Stanford, and Berkeley, while possessing different characteristics, would all likely withstand judicial scrutiny if challenged under current higher education law, though for varying reasons. Administrators at other business schools, however, should take note of these legal limitations when constructing non-disclosure policies in the future. Similarly, administrators, legislators, and M.B.A. students may wish to consider the potential negative effects grade non-disclosure may have on

115. In fact, this has already happened in the business school context. See, e.g., Light, supra note 96 (stating that Harvard Business School will abandon its grade non-disclosure policy beginning with the M.B.A. class entering in Fall 2006).
116. See supra Tables 2, 3.
117. See supra Table 1.
microeconomic and macroeconomic employment placement when determining to what extent student freedom of speech with regard to potential employers may be infringed.