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Lieberman v. University of Chicago: Implying Remedies for Implied Causes of Action, 16 J. Marshall L. Rev. 153 (1982)

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CASENOTE

*LIEBERMAN v. UNIVERSITY OF CHICAGO:** IMPLYING REMEDIES FOR IMPLIED CAUSES OF ACTION

In 1979, the United States Supreme Court decided *Cannon v. University of Chicago*.[1] In *Cannon*, the Court held that an implied cause of action[2] existed under Title IX of the Education Amendments of 1972.[3] To reach this holding, the Court compared the legislative history and content of Title IX with that of

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* 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1993 (1982).

1. 441 U.S. 677 (1979). In *Cannon*, the plaintiff alleged that she had been denied admission to the University of Chicago Medical School because of her sex. Her claim was based on the fact that the school had a policy of not accepting applicants who were over thirty years old. The plaintiff maintained that this policy was sexually discriminatory because women as a group have a higher incidence of interrupted education. *Id.* at 680-81.

2. An implied cause of action is an "extension of a civil remedy to one injured by another's breach of a statute or regulation not providing for such relief." Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

Implied causes of action for federal regulatory statutes are a relatively new development in the law. In 1964, the Supreme Court held that a private party could sue for damages and injunctive relief under the proxy disclosure provisions of the Securities and Exchange Act of 1934, notwithstanding the statute's express provisions for administrative review. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). Since *Borak*, the Court has recognized a private right of action for a variety of statutes. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (§ 10(b) of the Securities and Exchange Act of 1934); Allen v. State Bd. of Elect., 393 U.S. 544 (1969) (Voting Rights Act); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Fair Housing Act); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (Rivers and Harbours Act of 1899).

For a discussion of implied causes of action under Title IX and Cannon v. University of Chicago, see generally Shelton & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 CAL. L. REV. 1121 (1974); Comment, *Private Rights of Action Under Title IX*, 13 HARV. CIV. RTS.-CIV. LIB. L. REV. 425 (1978); Comment, *Private Rights of Action under Title IX of the Education Amendments of 1972:* Cannon v. University of Chicago, 3 HARV. WOMEN'S L. J. 141 (1980); Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978).

3. 20 U.S.C. §§ 1681—1686 (1976) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

its model, Title VI,[4] and applied the four-prong intent test of *Cort v. Ash*.[5] Although it found that an implied cause of action was within the contemplation of Congress when it enacted Title IX, the *Cannon* Court did not reach the question of whether damages were an available remedy.[6] The Court of Appeals for the

4. Cannon v. University of Chicago, 441 U.S. 677, 694-95 (1979). Title VI, 42 U.S.C. §§ 2000d(1)—2000d(6) (1976), states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any activity receiving Federal financial assistance."

Much of the majority's reasoning in *Cannon* was based on the assumption that a private cause of action existed under Title VI and was intended to exist under Title IX when it was enacted by Congress. 441 U.S. at 685-706. *See also* Lau v. Nichols, 414 U.S. 563 (1974) (suit for injunctive relief by parents of Chinese-speaking children); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967) (suit for injunctive relief by parents of black children refused admission to a school receiving federal assistance); Flanagan v. Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (suit for injunctive relief and damages brought by a student who was refused financial assistance). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (White, J., separate opinion) (four justices were of the view that a private cause of action existed, and four would assume it for the purposes of the case).

5. 422 U.S. 66 (1975). The Supreme Court articulated four factors which are to be considered when determining whether an implied cause of action exists under a federal regulatory statute: 1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member; 2) whether the legislative history envisioned an intent to imply or create a private remedy; 3) whether the implication of a private cause of action would frustrate the underlying purpose of the statute; and 4) whether the implication of a private remedy is inappropriate because the subject matter involves an area of state concern. *Id.* at 78. For examples of the Cort v. Ash intent test as it is applied to other federal statutes, see Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (Davis-Bacon Act of 1931); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (Investment Advisors Act); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (Securities and Exchange Act, § 17(a)); Carey v. Piphus, 435 U.S. 247 (1978) (42 U.S.C. § 1983); NAACP v. Medical Ctr., Inc., 599 F.2d 1247 (3d Cir. 1979) (Rehabilitation Act of 1973).

6. Justice Rehnquist, in his concurring opinion in *Cannon*, said, "Although concluding that Title IX and Title VI confer private causes of action, the Court refrains from addressing the permissible remedies available under such a cause of action." 441 U.S. at 724 n. 12 (Rehnquist, J., concurring). "A second remedial question left open by *Cannon* is whether monetary relief will be available in a private action under Title IX." Comment, *Private Rights of Action under Title IX of the Education Amendments of 1972:* Cannon v. University of Chicago, 3 HARV. WOMEN'S L. J. 141, 167 (1980).

Cannon is itself somewhat of an anomaly. Generally, when the Supreme Court has been asked to imply a cause of action, it has done so in the context of a particular remedy. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (private cause of action for damages); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (private cause of action for damages); Allen v. State Bd. of Elect., 393 U.S. 544 (1969) (private cause of action for injunctive relief). In *Cannon*, however, the Court did not refer to any particular remedies, but merely held that an implied cause of action existed. 441 U.S. at 717 (1979).

Seventh Circuit was confronted with the question in *Lieberman v. University of Chicago*.[7] With little available guidance from other courts,[8] the Seventh Circuit ignored the *Cort v. Ash* intent test and instead applied the contract analysis[9] found in a recent Supreme Court decision, *Pennhurst State School and Hospital v. Halderman*.[10] As a result, the Seventh Circuit held as a matter of law that no damages were available under Title IX.[11]

In 1977, Judy Lieberman applied for admission to the University of Chicago Pritzker School of Medicine, which receives federal assistance under Title IX. The university placed her name on a waiting list, but she was never offered admission.[12] She then brought suit against the university,[13] claiming that because she was a woman, she had been discriminated against in violation of Title IX of the Education Amendments of 1972 and 42 U.S.C. § 1983.[14] She requested declaratory relief and compen-

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7. 660 F.2d 1185 (7th Cir. 1981).

8. *See, e.g.*, Guardians Ass'n, Inc. v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980) (court divided on the issue of the availability of damages); Chambers v. Omaha Pub. School Dist., 536 F.2d 222 (8th Cir. 1976) (damages available by implication); Concerned Tenants Ass'n v. Indian Trails Apt., 496 F. Supp. 522 (N.D. Ill. 1980) (no damages available); Rendon v. Department of Employ. Sec. Job Serv., 454 F. Supp. 534 (D. Utah 1978) (no damages available); Flanagan v. Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (damages available by implication).

For cases in which damages were requested under Title IX, see Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977) (damage issue not reached by the court because the plaintiff did not prove discrimination); Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976) (damages available by implication).

9. *See infra* text accompanying notes 20-23.

10. 451 U.S. 1 (1981).

11. Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981).

12. Ms. Lieberman graduated *summa cum laude* from Radcliffe College in 1969 and received a Ph.D in physics from Rockefeller University in 1974. From 1974-76 she was a member of the Institute of Advanced Study in Princeton, New Jersey, and in 1976 she began work as a theoretical physicist at Fermi Laboratory in Batavia, Illinois. She scored in the 99th percentile on the Medical College Admissions Test. Brief for Plaintiff-Appellant at 2, Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981). Lieberman applied to and was offered admission to Harvard, Albert Einstein, Northwestern, Rush-Presbyterian-St. Luke, and the University of Illinois. She was rejected at New York University, Cornell, and the University of Pennyslvania. 660 F.2d at 1186.

13. Also named in her suit were the Pritzker School of Medicine, the Dean of Students of the Division of Biological Sciences, and the Medical School Admissions Committee. *Id.*

14. The claim under 42 U.S.C. § 1983 was dismissed on plaintiff's motion. *Id.*

Lieberman's charge of discrimination stemmed from the fact that she had been interviewed six times by the university and asked questions about her "relationship to her husband, her plans to have children, and other matters of an extremely personal nature." Brief for Plaintiff-Appellant at 3, Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981).

satory damages. The United States District Court for the Northern District of Illinois granted the university's motion for summary judgment, finding first that Lieberman's request for declaratory judgment was moot[15] and that damages was not an available remedy, as a matter of law, under a Title IX implied cause of action.[16] On appeal, the Court of Appeals for the Seventh Circuit affirmed both holdings.[17]

The Seventh Circuit, characterizing the issue of damages under Title IX as one of first impression,[18] relied on *Pennhurst State School and Hospital v. Halderman*[19] for its analysis. In *Pennhurst*, the United States Supreme Court found that "[l]egislation enacted pursuant to the Spending Power is much in the nature of a contract . . . ."[20] States voluntarily accept the conditions of a statute when they accept funds.[21] The imposition of additional obligations would alter the basic conditions of the contract.[22] Therefore, any conditions on funding must be set forth unambiguously.[23]

Applying that reasoning to the issue of damages under Title IX, the Seventh Circuit found that Title IX was also enacted pursuant to Congress' spending power.[24] To imply a damage remedy would place an added financial burden on participating schools, a burden not contemplated when they first accepted funds.[25] The Seventh Circuit found that injunctive relief would not alter the contract, but would only enlarge the class of plaintiffs who could enforce the contract.[26] Private plaintiffs

15. In Lieberman v. University of Chicago, No. 79 C 3533 (N.D. Ill. Sept. 21, 1980), the district court found that at the time the suit came before the court, Ms. Lieberman was in her third year of medical school at Harvard. Because she was not likely to change schools, the court found her request for declaratory or injunctive relief moot. *Id.* at 6.

Although the plaintiff's attorney contended on appeal that the failure to imply a damage remedy or award injunctive relief did not preclude declaratory relief, the Seventh Circuit affirmed without discussion. Lieberman v. University of Chicago, 660 F.2d 1185, 1188 (7th Cir. 1981).

16. Lieberman v. University of Chicago, No. 79 C 3533 (N.D. Ill. Sept. 21, 1980).

17. Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981).

18. *See supra* note 8.

19. 451 U.S. 1 (1981).

20. *Id.* at 17.

21. *Id.*

22. *Id.*

23. *Id.* at 18.

24. Lieberman v. University of Chicago, 660 F.2d 1185, 1187 (7th Cir. 1981).

25. *Id.* at 1188.

26. *Id.*

would have a remedy, but it would be a remedy limited to injunctions.[27]

The Seventh Circuit's reasoning in *Lieberman*, however, is not persuasive. The contract analysis of *Pennhurst*, on which the court relied, is not applicable to a Title IX case because of the inherent differences between the statutes involved and the issues presented. Furthermore, the *Lieberman* court's reasoning is inconsistent with the United States Supreme Court's reasoning in *Cannon*. Finally, the Seventh Circuit's decision overlooks the need to inquire whether a damage remedy would further the legislative intent in enacting Title IX.

The issues in *Pennhurst* and *Lieberman* are not comparable for several reasons. First, in *Pennhurst*, the Supreme Court was asked to decide whether the "bill of rights" provision of the Developmentally Disabled Assistance Act[28] created any enforceable rights and obligations.[29] In *Lieberman*, however, the inquiry was not whether a private right of action existed, but rather the extent of that right.[30] The Seventh Circuit next attempted to apply the same contract analysis used in *Pennhurst* to the facts of *Lieberman*. Several arguments exist to refute such an imposition.

First, each case arises under alleged violations of distinct statutes, and those statutes have separate constitutional origins. The statute interpreted in *Pennhurst* arose under Congress' spending power;[31] the Developmentally Disabled Assistance Act's purpose was to induce states to aid the severely mentally retarded.[32] The states, to qualify for federal funding, had to accept the conditions set forth in the Act.[33] These factors easily support a contract analysis. If a contract between the state and the federal government is found, damages could be precluded as

27. *Id.*

28. 42 U.S.C. § 6010 (1976).

29. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

30. Judge Swygert, in his dissenting opinion, contended that there are three distinct inquiries when federal statutes are involved: first, whether Congress imposed any substantive conditions on the recipients of funds; second, whether the statute created an implied cause of action; and third, whether a particular remedy is within the scope of the implied cause of action. 660 F.2d at 1191-92 (Swygert, J., dissenting). *Accord* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 25 (1979) (Powell, J., concurring) (the questions of the existence of the right to sue and the remedy available are separate).

31. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 18 (1981) ("There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose.").

32. 42 U.S.C. § 6000(b)(1)(Supp. IV 1980).

33. 42 U.S.C. § 6012(a)(1)(1976) provides that each state, "as a condition" of receiving funds, must promise to "have in effect a system to protect and advocate the rights of persons with developmental disabilities."

a remedy. *Lieberman*, however, arose under an alleged violation of Title IX, which has been construed as an enforcement of the equal protection clause.[34] Title IX's purpose, instead of creating a federal funding program, is to prevent discrimination in such programs.[35] Title IX imposes a "distinct statutory prohibition."[36] Statutes which enforce constitutional standards are not subject to a state's voluntary acceptance,[37] unlike statutes which primarily provide funding. Because *Lieberman* raises different issues than *Pennhurst*, and arises under a separate statute which has a different constitutional origin, purpose, and structure, the contract analysis cannot be applied to *Lieberman*. If the contract analysis cannot be applied, neither should the prohibition against damages imposed by contract actions be applicable to violations of Title IX.[38]

Not only does the *Lieberman* court rely on inapplicable case precedent, but it also adopts a questionable interpretation of *Cannon*.[39] The *Lieberman* court found that the Supreme Court "authorized"[40] the remedy of injunctive relief in *Cannon*. In de-

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34. Cannon v. University of Chicago, 441 U.S. 677, 715-16 n.51 (1979).

In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1974) (Stevens, J., concurring in part and dissenting in part), Justice Stevens stated:

> The statutory prohibition against discrimination in federally funded projects contained in section 601 [Title VI] is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.

Id. at 416. *Accord* Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 851 (1967) (individuals suing under Title VI are seeking to enforce a constitutional right); Gilliam v. City of Omaha, 388 F. Supp. 842, 847 (D. Neb. 1975) (Title VI is a "codification" of the fourteenth amendment).

35. *See supra* note 3.

In Cannon v. University of Chicago, 441 U.S. 677 (1979), the Supreme Court found that Title IX was enacted because "[f]irst, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Id.* at 704.

36. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 418 (1978) (Stevens, J., concurring in part and dissenting in part).

37. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 14 (1981).

38. In Lau v. Nichols, 414 U.S. 563 (1973), the Supreme Court found that school districts contractually agree to comply with Title VI, but also found that the federal government may fix the terms on which it disburses money. Therefore, lack of compliance with Title VI could be the basis for a private suit, despite the contractual agreement. *Id.* at 568-69.

In Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), however, the Supreme Court rejected the contractual argument that states must voluntarily accept the terms of a statute that prohibits behavior and cited Katzenbach v. Morgan, 384 U.S. 641 (1966).

39. 441 U.S. 677 (1979).

40. Lieberman v. University of Chicago, 660 F.2d 1185, 1188 (1981). Part of the Seventh Circuit's conclusion that the Supreme Court authorized in-

termining whether the purpose of Title IX would be consistent with an implied cause of action, the *Cannon* Court said in dicta, "In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded."[41] In addition, the *Cannon* Court cited cases in which damages were requested or awarded.[42] *Lieberman* apparently ignored the authority of the cases cited by the *Cannon* Court. Furthermore, the plaintiff in *Cannon* requested money damages as well as injunctive relief.[43] The *Cannon* Court concluded "that petitioner [could] maintain her lawsuit"[44] without distinguishing between the types of relief that might be available. Because the Supreme Court did not distinguish between the types of relief requested in the cited authority or by the plaintiff in the action before it, it may be argued that the Court authorized both types of relief.[45]

The *Lieberman* court also declined to impose a damage remedy because of the "potentially massive financial liability"[46] on recipient institutions, a factor also considered by the Supreme Court in *Cannon*.[47] The *Cannon* Court found, however, that the potential financial burden that would be imposed by allowing damages would be less severe than terminating funds as provided in Title IX.[48] Therefore, because potential financial liability was not a bar to implying a cause of action, neither should it be a bar to damages.

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junctive relief may be based on the *Cannon* Court's "focus on suits requesting injunctive relief." Cannon v. University of Chicago, 441 U.S. 677, 724 n.12 (1979) (Rehnquist, J., concurring). *But see supra* note 6.

One commentator contends that there is a trend toward limiting implied liability as evidenced by Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), in which the Supreme Court declined to imply a private cause of action for damages. Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 279, 283 (1980). Perhaps the Seventh Circuit is following this trend.

41. Cannon v. University of Chicago, 441 U.S. 677, 705 (1979).

42. *Id.* at 694-703. *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (damages available under an implied cause of action); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (damages available to vindicate civil rights); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (damages requested, but the Court explicitly declined to address the issue).

43. Cannon v. University of Chicago, 441 U.S. 677 (1979).

44. *Id.* at 717.

45. In Guardians Ass'n, Inc. v. Civil Serv. Comm'n, 633 F.2d 232 (1980) (Coffrin, J., concurring), Judge Coffrin found that the *Cannon* Court's lack of a distinction between the types of relief requested was a significant factor in favor of the implication of a damage remedy for Title VI.

46. Lieberman v. University of Chicago, 660 F.2d 1185, 1188 (1981).

47. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).

48. *Id.* at 704-06. The Supreme Court also found that it was speculative that the cost of private litigation would unduly burden participating schools because there had been no demonstration that litigation under Title VI had been overly costly or voluminous. *Id.* at 709.

Because the Seventh Circuit relied on inapplicable precedent and misconstrued *Cannon*, its decision does not resolve the issue of whether damages are available under a Title IX implied cause of action. Instead of reasoning that Title IX was a spending power provision and applying the contract analysis, the Seventh Circuit could have used one of three alternative approaches to resolving the issue of damages.

The first alternative is to imply a damage remedy by either the statutory tort[49] theory or the maxim *ubi jus, ibi remedium*.[50] These damage theories presume that when a person's federal right is violated and that person has standing to sue, the federal courts may apply any remedy necessary to compensate the wrong.[51] This reasoning has allowed damage remedies in various contexts, such as for redress of constitutional torts[52] or for violations of a variety of federal statutes which are, like Title IX, prohibitory in nature.[53] Judge Swygert in his dissent in *Lieberman* prefers that approach.[54] He contends that that approach would recognize the unique role federal courts have in enforcing federal statutes, deter discrimination, and encourage highly-qualified petitioners to seek enforcement of Title IX.[55] Accord-

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49. The doctrine of implication is founded upon what has been labeled the statutory tort theory—a court may create a new cause of action if a statute declares wrongful certain behavior, since disregard of the command of a statute is itself a wrongful act resulting in liability to the intended beneficiary of the statutory duty.

Shelton & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 CAL. L. REV. 1121, 1149 (1974). *But see* Cannon v. University of Chicago, 441 U.S. 677, 688 (1979) ("the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person").

50. "Where there is a right, there is a remedy." One commentator describes this maxim as, "the creation of a statutory right necessarily entails provision for its vindication; therefore the legislature must intend that courts will imply a civil remedy when it creates a legal right." Comment, *Private Rights of Action Under Title IX*, 13 HARV. CIV. RTS.-CIV. LIB. L. REV. 425, 430-31 (1978).

51. Bell v. Hood, 327 U.S. 678, 684 (1946).

52. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (damages available for a violation of the eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (damages available for a violation of the fifth amendment); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) (damages available for a violation of the fourth amendment).

53. *See, e.g.*, Owens v. City of Independence, 445 U.S. 622 (1980) (Civil Rights Act of 1964, 42 U.S.C. § 1983); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (Securities and Exchange Act, § 14(a)); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (Fair Housing Act); De Jesus Chavez v. LTV Aerospace Corp., 412 F. Supp. 4 (N.D. Tex. 1976) (Higher Education Act).

54. Lieberman v. University of Chicago, 660 F.2d 1185, 1189 (1981) (Swygert, J., dissenting).

55. *Id.* at 1189.

ingly, a damage remedy should be available to the private plaintiff.

Applying the maxim *expressio unius est exclusio alterius*[56] is the second approach available to determine whether a damage remedy should be implied. This approach is best illustrated by *Transamerica Mortgage Advisors, Inc. v. Lewis*,[57] in which the Supreme Court decided whether section 206 of the Investment Advisors Act of 1940[58] provided an implied damage remedy. To determine if a damage remedy was available, the Court looked at the structure of the entire Act instead of just the section in question. Because a limited remedy was available to the private plaintiff under another section, the Court declined to imply the damage remedy under section 206. The Court reasoned that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies a court must be chary of reading others into it."[59] Under this theory of statutory construction, a damage remedy would be available in Title IX actions. The only express remedy provided in Title IX is the provision for fund termination,[60] a remedy which has been found inappropriate for the private plaintiff.[61] The language of the statute does not preclude the implication of a damage remedy to a private plaintiff.

The third possible approach to implied remedies focuses on legislative intent.[62] Although this approach seems to be favored

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56. "The expression of one thing is the exclusion of the other." This maxim has been defined as:

> the express authorization of a particular remedy in one section of a statute indicates that an omission of that remedy from other sections was intended by the legislature; or, any remedy provided to enforce a provision excludes by implication other remedies; or more narrowly, the existence of a civil remedy precludes additional civil remedies.

Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 290 (1963).

57. 444 U.S. 11 (1979). For a discussion of Transamerica Mortgage Advisors, Inc. v. Lewis, see Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 279 (1980).

58. 15 U.S.C. § 80b-6 (1976).

59. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979).

60. 20 U.S.C. § 1682 (1976).

61. Cannon v. University of Chicago, 441 U.S. 677, 704-05 (1979).

62. In Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), the Supreme Court held that "[t]he question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction . . . what must ultimately be determined is whether Congress intended to create the private remedy asserted. . . ." *Id.* at 15. *Accord* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (the task of the court is to determine if Congress intended the right); Selman v. Harvard Med. School, 494 F. Supp. 603, 617 (S.D.N.Y. 1980) (Congress' intent is of primary importance).

by the Supreme Court,[63] it is perhaps the most difficult to apply.[64] This approach refers to the statute's legislative history to determine if a particular remedy is contemplated. Of course, this approach presents the same problem encountered when determining whether an implied cause of action exists. The legislative history may be ambiguous or silent. Because this approach is a return to the second prong of the *Cort v. Ash* intent test,[65] the same rule of construction should apply: "It is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."[66] Also, the implication of the remedy should be consistent with the purposes of the statute.[67]

Under this approach, it is difficult to predict whether a damage remedy would have been available in *Lieberman*.[68] The legislative histories of Title IX and Title VI do not give any clear indication of whether the legislators contemplated a particular

63. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

64. "Traditionally, courts have used various statutory construction techniques to imply private rights of action. The primary concern is legislative intent, but courts are not agreed on how legislative intent is to be determined." Shelton & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 CAL. L. REV. 1121, 1150 (1974).

One district court made the following observation when applying the intent test to the Securities and Exchange Act of 1943, § 13(d): "[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92, 99 (N.D. Ill. 1980) (citing Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)).

65. *See supra* note 5.

66. Cannon v. University of Chicago, 441 U.S. 677, 694 (1979) (citing Cort v. Ash, 422 U.S. 66, 82 (1975)).

67. *Id.* at 703. *But see* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979) (purpose is not as important a consideration as legislative intent).

68. Other courts have tried the legislative intent approach to determine whether damages are available under 29 U.S.C. § 794 (Supp. IV 1980), which is § 504 of the Rehabilitation Act of 1970. Because the language of § 504, of Title VI, and the language of Title IX are similar, the courts have had little trouble finding that an implied cause of action exists for § 504. *See, e.g.*, NAACP v. Medical Ctr., Inc., 599 F.2d 1247 (3d Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). As to whether the legislative history of Title VI, Title IX and § 504 show an intent to include a damage remedy, there is little agreement. *Compare* Hutchings v. Erie City, 516 F. Supp. 1265 (W.D. Pa. 1981) (legislative history contains no damage prohibition) *with* Miener v. Missouri, 498 F. Supp. 944 (E.D. Mo. 1980) (no legislative intent to include damages). When damages have been found to be available under § 504, it has usually been on the rationale in Bell v. Hood, 327 U.S. 678 (1946), that when a statutory right is violated, the courts may fashion an appropriate remedy. *See, e.g.*, Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980).

remedy.[69] The resolution of the issue may turn on a court's interpretation of the role of damages as a means of enforcing Title IX. In *Cannon*, the Supreme Court found that Title IX "explicitly confers a benefit on persons discriminated against on the basis of sex. . . ."[70] The inquiry must be whether this benefit includes a right to compensation for past discrimination, or whether it only includes forcing the offending institution into compliance by means of injunctive relief.[71]

Each of those three approaches, however, provides a stronger analysis of the issue than does the *Lieberman* court. Its reliance on the inapplicable precedent of *Pennhurst* and its inaccurate interpretation of *Cannon* does little to justify its conclusion that damages are unavailable as a matter of law under Title IX. Neither does its analogy between the purpose and structure of the Developmentally Disabled Assistance Act and Title IX withstand scrutiny.

The plaintiff in *Lieberman* was left without relief because of the court's facile logic, and others will suffer the same fate if other courts blindly ascribe to the *Lieberman* holding. If, however, courts choose another approach to the issue, those others need not go uncompensated. Because the majority in *Lieberman* failed to reconcile its decision with prior Supreme Court opinions, "other courts will be forced to play a shell game in determining what mode of analysis governs the issue of remedy."[72] Justice should not rest on a game of chance.

Elyse Pearlman

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69. Compare the remarks of Senator Pastore during the hearings on Title VI and the remarks of Senator Bayh during the hearings on Title IX with the remarks of Senator Ribicoff during the Title VI hearings. "This bill is designed for the protection of individuals," 110 CONG. REC. 7062 (1964) (Senator Pastore); "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education . . .," 118 CONG. REC. 5806-07 (1972) (Senator Bayh);

> Personally, I think it would be a rare case when funds would actually be cut off. In most cases alternate remedies, principally law suits to end discrimination, would be the most preferable and more effective remedy. If a Negro child were kept out of a school receiving Federal funds, I think it would be better to get the Negro child into school than to cut off funds . . . .

110 CONG. REC. 7067 (1964) (Senator Ribicoff).

70. Cannon v. University of Chicago, 441 U.S. 677, 694 (1979).

71. The Supreme Court has found that there is more reason to infer a private remedy in favor of individuals when Congress has framed the statute with an "unmistakable focus on the benefitted class." Universities Research Ass'n v. Coutu, 450 U.S. 754, 772 (1981).

72. Lieberman v. University of Chicago, 660 F.2d 1185, 1192 (7th Cir. 1981) (Swygert, J., dissenting).