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ARTICLES

Judicial Review of Student Challenges to Academic Misconduct Sanctions

Barbara A. Lee 511

Studies have concluded that academic misconduct by college students—plagiarism and cheating—has increased since the beginning of the twenty-first century. Because the sanctions for academic misconduct may be severe (suspension, expulsion, or at a minimum, an entry on the student’s transcript of an academic integrity violation), the incentive for students to challenge these sanctions is substantial. This article reviews legal challenges brought by students since the year 2000 to institutional determinations that they have engaged in plagiarism or cheating. It examines the scope and amount of judicial deference in reviewing institutional judgments that a student has violated an academic integrity policy, analyzes the amount of due process and compliance with institutional policies required by courts, and discusses courts’ responses to student claims that their conduct was uninformed or unintentional. The article then provides recommendations for institutional action to minimize student academic misconduct.

***CLS v. Martinez* and Competing Legal Discourses over the Appropriate Degree of Judicial Deference to the Co-Curricular Realm**

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Public colleges and universities have faced legal challenges in recent years from members of student organizations testing the legal permissibility of institutions conditioning official recognition for student groups on adherence to campus nondiscrimination rules. Legal contention over this issue reached a high point when a closely divided Supreme Court, in a five-to-four decision, upheld a law school’s nondiscrimination policy in *Christian Legal Society v. Martinez*. Guided by discourse analysis methods, the article explores the markedly differing ways that the majority and

dissenting justices relied on precedent, their competing interpretations of the facts and legal issues presented in the case, and their conflicting characterizations of colleges and universities in relation to nondiscrimination efforts. The analysis reveals significant legal and ideological differences between the justices regarding higher education. Depending on which view of higher education ultimately prevails, the Supreme Court may demonstrate a greater willingness to extend judicial deference to the co-curricular realm. Alternatively, the lack of trust in colleges and universities displayed by the dissenting justices could indicate, depending on the Court's membership, the possibility of a contraction of judicial deference to academic decisions in future decisions.

The Chicago Tribune v. The University of Illinois: The Latest Iteration of New Textualist Interpretation of FERPA by the Federal Courts

Sam Schmitt, David Aronofsky

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The Chicago Tribune Co. v. The Board of Trustees of the University of Illinois is the most recent iteration of a trend in which the Family Educational Rights Protection Act ("FERPA") is interpreted by the federal circuit courts according to the plain language and original meaning of the text rather than the Congressional intent or other "softer" sources. Responding in part to United States Supreme Court decisions in *Gonzaga University v. Doe* and *Owasso Independent School District v. Falvo*, this interpretive trend can be found in all the federal circuit courts that have applied FERPA in the last twenty years. This article first summarizes and explains the current state of FERPA law, twenty years of federal circuit court case law, and the recent Seventh Circuit dismissal of *The Chicago Tribune* for lack of federal subject matter jurisdiction. The authors argue that if university administrators and state court judges can apply FERPA according to its plain language and original meaning, they will be able to accurately predict the outcomes of FERPA disputes and expect federal courts to reach concurrent conclusions.

NOTES

Open-Records Requests for Professors' Email Exchanges: A Threat to Constitutional Academic Freedom?

William K. Briggs

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In March of 2011, an academic freedom controversy arose when the Wisconsin Republican Party filed an open-records request to obtain emails from a University of Wisconsin professor, William Cronon, who had criticized legislation by Wisconsin's Republican governor eliminating collective bargaining rights for the state's public employees. While the University of Wisconsin largely complied with the request, it cited academic freedom to justify withholding private emails between Cronon and other professors. Lost in the national media storm which ensued was the question of whether the university could legally rely on constitutional academic freedom to protect such scholarly email exchanges from disclosure under open-records laws. This Article finds that constitutional academic freedom, to the extent it is even recognized by courts, is not implicated by scholarly email exchanges such as those involving Professor Cronon. Moreover, even if constitutional academic freedom was implicated, the Article finds that it would not offer protection in a state court's adjudication of an open-records dispute because of the fundamental policy interests in favor of open access. Because the importance of academic freedom as a principle makes this answer somewhat unsatisfying, the Article concludes by examining reforms to protect scholarly email exchanges from disclosure under open-records laws. While amendments to open-records statutes are considered, the Article concludes that the best solution is to advance a statutory interpretation argument that scholarly email exchanges should not even be considered "public records" under existing open-records laws.

Student-on-Student Sexual Assault Policy: How a Victim-Centered Approach Harms Men

Alexandra Fries 633

This note reviews the Office of Civil Right’s April 4, 2011 Dear Colleague letter, in which the OCR mandates that colleges and universities that receive federal funding apply a preponderance of the evidence standard in disciplinary hearings concerning student on student sexual assault. This note considers the negative effects that being found responsible for sexual assault can have on a student’s future, especially in light of the fact that the disciplinary hearing is probably the only opportunity the student will have to clear his name. As a result, this note argues that an amendment to Title IX, which would articulate that the clear and convincing standard of evidence is the minimum evidentiary standard that may be required in this context, would benefit students accused of sexual assault and recognize the precarious position these men are placed in by requiring more than merely 50.1% certainty prior to holding a student responsible for sexual assault.

Boston College’s Defense of the Belfast Project: A Renewed Call for a Researcher’s Privilege to Protect Academia

Frank Murray 659

Protecting the free exchange of ideas in academia, much like in journalism, has long been considered an American value and a necessary condition for a free and healthy democracy. The importance of academic autonomy, including the processes by which scholars collect, store, and exchange information, is correspondingly of great importance to anyone happily living in a free society. Recent efforts by Boston College to fight the federal government, acting on behalf of the United Kingdom to secure confidential and highly sensitive audio tapes collected and archived as part of an academic study, shed new light on an ailment in American law. The tremendous legal challenge that Boston College has recently endured in its unsuccessful bid to protect academic sources is not only offensive to our social conscience but also, on a more technical level, stands in staunch contrast to cutting edge developments in international human rights law. Ironically, the subpoena request from the United Kingdom asks the United States to perform an act that would be of highly questionable legality under European law to which the United Kingdom is bound—Article 10 of the European Convention on Human Rights. If a researcher’s privilege is to be recognized in the United States, it will require the Supreme Court to recalculate,

much like European courts have, the great societal value of scholarly research.

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JUDICIAL REVIEW OF STUDENT CHALLENGES TO ACADEMIC MISCONDUCT SANCTIONS

BARBARA A. LEE*

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I. INTRODUCTION

According to some sources, academic misconduct by college students has increased in the past two decades,¹ stimulated in part by grade

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1. KIM PARKER, AMANDA LENHART & KATHLEEN MOORE, PEW RESEARCH CENTER, *THE DIGITAL REVOLUTION AND HIGHER EDUCATION 1* (2011), available at <http://pewinternet.org/~media/Files/Reports/2011/PIP-Online-Learning.pdf>. In a survey of college and university presidents conducted in 2011, the researchers reported,

inflation² and the ease of locating information on the World Wide Web.³ Although some faculty react with anger to evidence of cheating or plagiarism, while others vow to “get” the offending students,⁴ academic misconduct by students (as well as by faculty)⁵ is considered to be an offense against the academic community as a whole, rather than simply a dishonest attempt to claim credit for work (or test answers) that are not one’s own.

Searching the archives of the *Chronicle of Higher Education* identifies numerous articles about students being caught cheating at military academies, public colleges and universities, small private colleges and universities, and even in online courses. In fact, cheating or plagiarism in an online course may be *more* likely to occur because of the more impersonal relationship between instructor and student, and because assignments are typically submitted online,⁶ which also may make digital comparisons with material on the Web easier to accomplish. Further, while some experts assert that faculty can reduce or even eliminate cheating through structuring class assignments and examinations specifically to discourage dishonesty,⁷ creative students will continue to find ways to

“[m]ost college presidents (55%) say that plagiarism in students’ papers has increased over the past 10 years. Among those who have seen an increase in plagiarism, 89% say computers and the internet have played a major role.” *Id.* at 1. See also Donald L. McCabe, Linda Klebe Treviño, and Kenneth D. Butterfield, *Cheating in Academic Institutions: A Decade of Research*, 11 ETHICS AND BEHAVIOR 219, 221 (2001) (noting that the proportion of students who admit to cheating has increased since 1990, with great increases attributed to more women cheating and to collaborative work on projects designed for individual work).

2. STUART ROJSTACZER & CHRISTOPHER HEALY, TEACHERS COLLEGE RECORD, GRADING IN AMERICAN COLLEGES AND UNIVERSITIES (2010), available at <http://gradeinflation.com/tcr2010grading.pdf>. See also STUART ROJSTACZER & CHRISTOPHER HEALY, TEACHERS COLLEGE RECORD, WHERE A IS ORDINARY: THE EVOLUTION OF AMERICAN COLLEGE AND UNIVERSITY GRADING, 1940-2009, at 114 (2012), available at <http://gradeinflation.com/tcr2011grading.pdf>. See also VALEN E. JOHNSON, GRADE INFLATION: A CRISIS IN COLLEGE EDUCATION (Springer—Verlag New York, Inc., 2003). For a wealth of information on grade inflation, see <http://www.gradeinflation.com/>.

3. PARKER, LENHART & MOORE, *supra* note 1.

4. PATRICK ALLITT, I’M THE TEACHER, YOU’RE THE STUDENT (Univ. of Pa. Press, 2005) cited in Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1 (2010).

5. A discussion of academic misconduct by faculty is beyond the scope of this article. For discussions of academic misconduct by faculty, see generally Roger Billings, *Plagiarism in Academia and Beyond: What is the Role of the Courts?*, 38 U.S.F.L. REV. 391 (2004).

6. Jeffrey R. Young, *Online Classes See Cheating Go High Tech*, CHRON. OF HIGHER EDUC., June 3, 2012, available at <http://chronicle.com/article/Cheating-Goes-High-Tech/132093/>. See also McCabe, Trevino & Butterfield, *supra* note 1, at 229.

7. Jeffrey R. Young, *High-Tech Cheating Abounds, and Professors Bear Some Blame*, CHRON. OF HIGHER EDUC., Mar. 28, 2010, available at <http://chronicle.com/article/High-Tech-Cheating-on-Homework/64857/>.

avoid doing their own work.

For purposes of this article, academic misconduct, or an “academic integrity violation,” refers primarily to plagiarism,⁸ cheating,⁹ collaborative work on an assignment that is intended to be done by the student individually, or other violations of the academic expectations of a course or assignment. The use of fabricated data or unauthorized materials, or the destruction of materials in order to prevent other students from using them (such as library resources), is also a form of academic misconduct. Most of the litigation reviewed for this article involves plagiarism, although cheating cases occur with some frequency as well.

It is important to recognize that plagiarism differs from copyright infringement. A copyright infringement could occur when an individual uses a large portion of another’s work, even with attribution, if that use diminishes the market value of the original work. Copyright law permits the “fair use” of a small portion of another’s work if four criteria (called the “four factors”) are met.¹⁰ Courts hearing copyright infringement cases in which a fair use defense is mounted must balance the following factors:

- The purpose and character of the use, including whether the use is

8. Definitions of plagiarism differ. Some institutional definitions include an intent factor, while policies at other institutions state that any unattributed copying or paraphrasing is plagiarism, whether intentional or mistaken. See, for example, the definition of plagiarism at the University of Illinois, which includes both intentional and unintentional misconduct: “Plagiarism is using others’ ideas and/or words without clearly acknowledging the source of that information. It may be intentional (e.g., copying or purchasing papers from an online source) or unintentional (e.g., failing to give credit for an author’s ideas that you have paraphrased or summarized in your own words.” *Academic Integrity and Plagiarism*, UNIV. OF ILL., <http://www.library.illinois.edu/learn/research/academicintegrity.html#def> (last visited Mar. 24, 2013). The definition of plagiarism at Duke University, on the other hand, includes only intentional or reckless conduct: “Plagiarism occurs when a student, with intent to deceive or with reckless disregard for proper scholarly procedures, presents any information, ideas or phrasing of another as if they were his/her own and/or does not give appropriate credit to the original source.” *Plagiarism Tutorial*, DUKE UNIV., <https://plagiarism.duke.edu/def/> (last visited Mar. 24, 2013). Black’s Law Dictionary defines plagiarism as “the deliberate and knowing presentation of another person’s original ideas or creative expressions as one’s own.” BLACK’S LAW DICTIONARY (9th ed. 2009). For a thorough discussion of plagiarism and an argument that institutions should avoid “zero tolerance” plagiarism policies and analyze occurrences of plagiarism with particular attention to intent, see Latourette, *supra* note 4, at 87.

9. The Merriam-Webster Dictionary contains multiple definitions of “cheating.” The most relevant to the purposes of this paper is “to violate rules dishonestly.” *Cheating Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/cheat> (last visited Mar. 24, 2013). Although using another’s answers on a test is the most common form of cheating, violation of “rules,” such as a professor’s requirement that a course project be the product of an individual student’s work, is also a form of cheating if the student collaborates with another in completing the project.

10. 17 U.S.C. § 107 (1992). See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–77 (1994).

for educational versus commercial purposes.

- The nature of the copyrighted work – is it a factual or creative work?
- The amount and substantiality of the portion to be used in relation to the work as a whole.
- The effect or impact of the use upon the potential market for or value of the work.¹¹

Thus, whether or not the use of another's words or ideas is permitted under copyright law, failure to attribute the words or ideas to the original author would constitute plagiarism.¹²

According to one scholar, when considering plagiarism and copyright infringement:

[E]ach [is] distinguished by its definition, its duration, its requisite intent or lack thereof, the focus of its protection, the applicability of criminal law, the relevance of fair use, and the significance of acknowledgement or attribution. An individual set of circumstances may indeed give rise to both plagiarism allegations and copyright infringement claims, but the articulated standards for each ought not to be blurred. Plagiarism is an ethical violation, not a legal wrong; it serves to address a moral imperative of crediting one's sources through proper citation. It involves the purposeful misrepresentation of the ideas or expression of another as one's own, and a finding of plagiarism should demand the showing of intent, or minimally, the blatant disregard of the norms of attribution. . . . Plagiarism can theoretically consist of but a few distinctive words—in contrast to copyright infringement, which requires the copying to comprise a substantial amount of the copyrighted work.¹³

As noted above, intent to pass off another's work as one's own is not an element of a copyright infringement; whether or not the individual

11. For a discussion of copyright law and the fair use doctrine, see William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* § 14.2.5 (Jossey-Bass, 5th ed. 2013) (contributed by Madelyn Wessel).

12. In a case that, on the surface, blends plagiarism and copyright, *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009), four high school students sued Turnitin.com, an online system for detecting plagiarism, for copyright violations. Schools and colleges contract with Turnitin.com and submit a student's written work online to ascertain whether the student's paper is similar or identical to the written work of others, either in the company's database or in commercial databases of journals and periodicals. The students claimed that the use of their written work by Turnitin.com violated the principles of fair use, described above. The court disagreed, ruling that the use of the students' work was "transformative" because its purpose was to deter plagiarism, not to reduce the market value of high school students' written work, and thus the use satisfied all four fair use factors.

13. Latourette, *supra* note 4, at 46.

infringing another's copyright includes an attribution to the author of the work is irrelevant to copyright, but is essential for plagiarism.

In reviewing the response of courts to student legal claims involving plagiarism and cheating, this article will first discuss the discipline/academic misconduct dichotomy and the differences in the amount of deference afforded by courts to the institution's sanctioning process and its determinations regarding each type of misconduct. It will then review court opinions, both published and unpublished, that range from substantial deference on the one hand to a painstaking review of each step of the institution's determination as to the existence of academic misconduct and the outcome of that determination on the other. The article will conclude with a discussion of the implications of these cases for institutional policies and practices in dealing with allegations of academic misconduct.

II. IS ACADEMIC MISCONDUCT "ACADEMIC" OR "DISCIPLINARY"?

Colleges and universities typically develop academic integrity policies (or, put negatively, policies forbidding academic misconduct).¹⁴ The academic integrity policy may be incorporated into the institution's code of student conduct, or it may be a separate policy. At some institutions, violations of the academic integrity policy may be adjudicated through the student judicial process used for all conduct code violations,¹⁵ or there may be a separate process for these violations.¹⁶

Student challenges to sanctions levied for violations of academic integrity at colleges and universities are few in number when compared with litigation over dismissals for "academic failure"¹⁷ or dismissals for nonacademic misconduct; however, since academic misconduct at colleges

14. For resources on developing and evaluating academic integrity policies, see THE INT'L CENTER FOR ACAD. INTEGRITY, <http://www.academicintegrity.org/icai/home.php> (last visited Mar. 24, 2013).

15. See, e.g., *Student Conduct and Honor Code*, THE UNIV. OF FL., www.dso.ufl.edu/sccr/process/student-conduct-honor-code/ (last visited May 16, 2013).

16. Some institutions have honor codes that utilize a separate judicial process for adjudicating alleged honor code violations. See, e.g., *The Honor Committee*, UNIV. OF VA., <http://www.virginia.edu/honor/> (last visited May 16, 2013). See also *Rights Rules and Responsibilities*, PRINCETON UNIV., <http://www.princeton.edu/pub/rrr/part2/index.xml#comp22> (last visited May 16, 2013), for a code that divides academic integrity violations into examination offenses, which are handled by the Undergraduate Honor Committee, and misconduct involving other academic assignments, such as papers, lab reports, and essays, which are handled by the Faculty/Student Committee on Discipline. This committee also handles charges of social misconduct against students.

17. For a discussion of judicial deference to cases involving "academic failure" compared with those involving academic misconduct, see Curtis J. Berger and Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

and universities has increased in recent years,¹⁸ we can expect student challenges to dismissals for academic misconduct to increase as well. In mounting these challenges, students (and some scholars)¹⁹ have argued that they should be provided the type of due process afforded to students who are accused of nonacademic misconduct, and that judicial review of both the process and the outcome of academic misconduct charges should resemble the judicial scrutiny of an institution's sanctions for nonacademic conduct code violations because academic misconduct is "behavior," and therefore should be adjudicated like other forms of misconduct.²⁰ They argue that *Goss v. Lopez*,²¹ a case involving the suspension of students for social misconduct, should apply to students at public colleges and universities who are sanctioned for academic misconduct. The colleges and universities, on the other hand, tend to argue that determining whether an academic integrity violation has occurred is a professional or academic judgment and deserves the deference that courts have afforded "academic" decisions, starting in 1978 with the *Horowitz* case.²²

In 1975, the U.S. Supreme Court, in *Goss v. Lopez*, determined that students who risked sanctions resulting from alleged code of conduct violations at public institutions were entitled to due process—notice of the charges against them and "some kind of hearing."²³ *Goss* was a landmark decision that moved some federal appellate courts to rule that *all* decisions involving student misconduct at public colleges and universities required due process, whether the decision involved social misconduct or academic matters.²⁴

Three years later, however, the U.S. Supreme Court declared that judicial review of *academic* judgments by higher education officials should

18. 75 to 98 Percent of College Students Have Cheated, available at http://education-portal.com/articles/75_to_98_Percent_of_College_Students_Have_Cheated.html.

19. See Berger & Berger, *supra* note 17. In 1967, The American Association of University Professors, joined by several other higher education associations, issued a Joint Statement on Rights and Freedoms of Students. AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS: JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS 273—79 (Johns Hopkins Univ. Press, 10th ed. 2006), available at <http://www.aaup.org/file/joint-statement-on-rights-and-freedoms-of-students.pdf>. The Statement recommends that students be given due process and a full evidentiary hearing for both academic and social misconduct. *Id.* at 276–78.

20. See, e.g., *Napolitano v. Princeton University*, 453 A.2d 263 (N.J. Super. App. Div. 1982) (discussed in Section III, *infra*).

21. 419 U.S. 565 (1975).

22. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

23. *Goss*, 419 U.S. at 579.

24. See, e.g., *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975) (holding that a medical student dismissed for inadequate academic performance was entitled to hearing prior to dismissal; dismissal of his 42 U.S.C. §1983 claim was reversed), *Horowitz v. Bd. of Curators of the Univ. of Mo.*, 538 F.2d 1317 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978).

be much more deferential. In *Board of Curators of the University of Missouri v. Horowitz*,²⁵ a medical student challenged her dismissal from the institution because she claimed not to have been afforded the type of due process discussed in *Goss*. She was dismissed for her alleged failure to meet the academic and professional standards of a physician. The Court rejected her due process claim, explaining:

A school is an academic institution, not a courtroom or administrative hearing room. In *Goss*, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative fact finding to call for a “hearing” before the relevant school authority. . . .

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement. In *Goss*, the school’s decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances “provide a meaningful hedge against erroneous action.” The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision.²⁶

The Court revisited the issue of the nature of judicial review of academic judgments in *Regents of the University of Michigan v. Ewing*.²⁷ Ewing, also a medical student, had challenged his dismissal from medical school without a hearing and also asked the Court to require the school to allow him to retake a test he had failed. The Court rejected his claims, noting:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional

25. *Horowitz*, 435 U.S. at 78.

26. *Id.* at 88–90.

27. 474 U.S. 214 (1985).

judgment.²⁸

Violations of academic integrity, however, have a mixed status. Plagiarism, cheating, and other forms of academic misconduct have a behavioral component, but determining whether academic misconduct occurred also requires professional judgment on the part of faculty or administrators—particularly in the case of plagiarism. One commentator has argued that the dichotomy between “academic” and “disciplinary” misconduct, and thus the differing procedural rights of the accused students, is unfair to students and actually encourages students to litigate.²⁹ And the prevailing view of courts across the federal circuits is that academic misconduct (as opposed to academic failure) should be viewed as a disciplinary matter, which entitles the student to procedural due process.³⁰

Given the mixed status of academic misconduct, how have the courts responded? Do they bifurcate their review, deferring to institutional representatives’ academic judgment with respect to whether plagiarism occurred, but scrutinizing the institution’s adherence to its policies, or do they conduct a *de novo* review of the misconduct determination itself? Do they require the college or university to provide Fourteenth Amendment due process protections to students accused of academic integrity violations at public institutions, and if so, how elaborate must the protections be? Do they apply the deferential “arbitrary and capricious” standard to private institutions’ determinations of academic misconduct, or do they simply apply common law breach of contract theories? Do private institutions

28. *Id.* at 225.

29. Ferrnand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?* 29 J. C. & U. L. 619 (2003). (“Yet concerns that more intensive judicial oversight and more extensive internal procedures would promote litigation against colleges and universities and thus perhaps dilute their credibility seem misplaced. First, there has been no shortage of such lawsuits under the current ‘procedure-lite’ approach to academic decisions. Second, one might persuasively counter that the more careful the institutional process, the less the judicial involvement. This flows from two different sources. First, the student who feels fairly treated will more likely not sue. Second, courts will more quickly and easily deal with such a case; review may center not on the substance of the decision, but on whether institutional procedures provided a fair method of resolution. Such a fair method of resolution would obviously incorporate academic (and disciplinary) expertise, as relevant, and some method for resolving disputes concerning facts ‘susceptible of determination by third parties.’ To some extent, of course, this reflects current judicial practice. Elevating the due process requirements for academic decisionmaking by higher-education institutions can be expected to reduce still further the number of controversies making it to court.” *Id.* at 641–49 (footnotes omitted).

30. *See, e.g.*, *Guse v. Univ. of S.D.*, 2011 U.S. Dist. LEXIS 34621 (D. S.D. Mar. 30, 2011) (concluding that student ethical violations are disciplinary in nature) (citing *Butler v. Rector & Bd. of Visitors of Coll. of William & Mary*, 121 Fed. Appx. 515, 519 n.2 (4th Cir. 2005)); *Nash v. Auburn Univ.*, 812 F.2d 655, 658–59 (11th Cir. 1987)). *See also* *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995) (“Than’s dismissal for academic dishonesty unquestionably is a disciplinary action for misconduct.”).

experience the type of scrutiny applied to public institutions? Do courts attempt to evaluate the fairness of the process used, or simply require the institution to follow whatever procedures it has developed? Do they evaluate the severity of the sanction, or do they defer to the institution's judgment?

III. JUDICIAL REVIEW OF STUDENT CHALLENGES

Although only public colleges and universities are subject to the U.S. Constitution's Fourteenth Amendment Due Process Clause,³¹ many private colleges include a form of due process protection for students accused of both nonacademic and academic conduct code violations in their student handbooks or policy statements.³² Therefore, analysis of judicial review of these cases is less likely to find differences between public and private institutions in the courts' analysis, but differences in judicial deference to the adjudication process, the propriety of the determination of guilt, and the severity of the sanction, are evident. Judicial review ranges from virtually carte-blanche deference³³ to a *de novo* review of the procedures used and the substantive judgments reached.³⁴

A. Degree of Judicial Deference

As noted in Section II, most courts cite *Ewing* and *Horowitz* as the justification for a deferential review of academic judgments, including, in many cases, the determination of whether a student engaged in academic misconduct. An early, and influential, state court case, *Napolitano v. Princeton University*,³⁵ helped set the stage for the application of *Horowitz*

31. U.S. CONST. amend. XIV, §1. *See also* *Goss v. Lopez*, 419 U.S. 565 (1975).

32. *Berger & Berger, supra* note 17, at 297. Consider, for example, the Student Disciplinary Process at Bowdoin College, a private institution. The process provides, among other rights, the right to a "Judicial Board hearing" and protections for the accused, such as written notice of the charges against the student, an opportunity to have individuals speak on behalf of the student, the right by the student to present evidence, and the right of appeal. Bowdoin Student Disciplinary Process, <http://www.bowdoin.edu/studentaffairs/student-handbook/college-policies/student-disciplinary-process.shtml> (last visited Mar. 24, 2013). *See also* the Student Conduct Process of Kenyon College, a private college, which guarantees, among other rights, that the accused has the right to a written statement of charges against the student, provides for an "unbiased hearing" based upon evidence presented at the hearing, the right to present evidence, the right to question witnesses against the student, and the right of appeal. Kenyon College Student Handbook, <http://documents.kenyon.edu/studentlife/studenthandbook.pdf> (last visited Mar. 24, 2013).

33. *Di Lella v. Univ. of the D.C. David A. Clark Sch. of Law*, 570 F. Supp. 2d 1 (D.D.C. 2008).

34. *See, e.g., Faulkner v. Univ. of Tenn.*, 1994 Tenn. App. LEXIS 651 (Tenn. Ct. App. Nov. 16, 1994) and *Napolitano v. Trustees of Princeton Univ.*, 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

35. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

deference to judicial review of academic misconduct determinations. Although the *Napolitano* court closely scrutinized every aspect of the determination (and required a rehearing by the university), it resisted the student's insistence that trial courts should perform a true *de novo* review of the correctness of the determination that academic misconduct had occurred and the appropriateness of the sanction.

In *Napolitano v. Princeton University*,³⁶ a second semester senior was accused of plagiarizing a substantial portion of a required term paper. The university held a hearing, and the hearing committee unanimously determined that the student had violated the university's academic integrity policy. The sanction imposed was withholding her degree for one year. The student challenged the procedures used by the committee to reach the academic misconduct finding, and also argued that the sanction was too severe. Her challenge involved close judicial scrutiny of the process used, the sufficiency of the evidence considered by the hearing committee, and the appropriateness of the sanction—all demonstrating an unusual lack of deference in this line of cases.

The plaintiff sued for breach of contract (and made numerous other claims), and the trial judge ordered the university to repeat the hearing because the committee had not made an explicit finding as to whether the student's actions of plagiarizing were intentional (as required by the university's academic integrity policy).³⁷ The trial judge ordered the parties' attorneys to develop specific instructions for the second hearing by the hearing committee,³⁸ and also ordered that a number of trial-type actions be taken, including requiring that the hearing be tape-recorded, that a written summary of the hearing be created, and that the decision be based only upon evidence presented at the rehearing. The trial judge rejected the student's request to be represented by counsel at the rehearing. The committee reached the same result after the second hearing, and the trial

36. *Id.*

37. *Id.* at 269–70.

38. *Id.* According to the appellate court, the instructions, which were approved by the judge, were: "The Committee should first focus upon whether the offense of plagiarism has occurred. In so doing, it should determine whether there has been deliberate use of an outside source without proper acknowledgment. In this regard, "deliberate" means "intention to pass off the work as one's own." If the question of a penalty is reached, the Committee should then focus upon: (a) the seriousness of the offense that has been found to have been committed, (b) the character and accomplishments of the person who has committed the offense, (c) the penalties assigned in other cases, and (d) the purposes—including educative—of the penalty to be assigned in this matter." In addition, according to the appellate court, "[a]t plaintiff's request, the trial judge directed that the documents which were submitted to him be made available to the Committee prior to the rehearing. They included: (1) plaintiff's three-volume appendix; (2) the complete transcripts of all depositions and (3) unannotated copies of the English translations of plaintiff's paper and the *Ludmer* text [the text from which the student had allegedly copied]."

judge, who had retained jurisdiction, held a subsequent bench hearing and determined that the committee's decision was supported by the evidence adduced at the second hearing. He entered summary judgment for the university, and the student appealed.³⁹

The appellate court affirmed the trial judge's ruling, noting that this was a case of first impression for the state's courts. The trial judge had relied on cases involving the law of private associations; the appellate court said that these cases were useful, but that private higher education was different from a private association.⁴⁰ Discussing the outcome of *Horowitz*,⁴¹ the appellate court decided that that case's reasoning was the most appropriate standard of review for judgments regarding academic misconduct, and that deference to the university's internal decision-making process was appropriate.⁴² The appellate court explicitly rejected the plaintiff's contention that the trial judge should have held an evidentiary hearing—which would have meant a repeat of the second hearing before the trial judge, who would then determine whether the academic policy had been violated.⁴³ Despite that statement and its insistence on the propriety of deference, the appellate court reviewed the evidence of intentional plagiarism considered by the hearing committee, finding both the outcome of the hearing and the penalty imposed to be justified. Subsequent courts have cited *Napolitano* for its language on academic deference, but most have not replicated its close scrutiny of the evidence and its insistence on a variety of trial-type protections for the hearing committee procedure.⁴⁴

Even if a college's academic misconduct policy provides for notice, a hearing, and an opportunity to appeal, some courts still look to *Ewing*⁴⁵ and apply its deferential standard of review for cases involving *academic failure* when reviewing student challenges to *academic misconduct* charges. For example, in *Mawle v. Texas A&M University-Kingsville*, a

39. *Id.* at 270.

40. *Id.*

41. *See* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

42. *Napolitano*, 453 A.2d at 273. The appellate court stated: "Courts have also recognized the necessity for independence of a university in dealing with the academic failures, transgressions or problems of a student. We have noted heretofore that we regard the problem before the court as one involving academic standards and not a case of violation of rules of conduct."

43. *Id.* at 276.

44. *See, e.g.*, Partovi v. Felician Coll., 2011 No. DC-022681-09, 2011 WL 867275 (N.J. Super. Ct. App. Div. Mar. 15, 2011); Mittra v. Univ. of Med. and Dentistry of N.J., 719 A.2d 693 (N.J. Super. Ct. App. Div. 1998). Both of these cases involved dismissals for academic failure, not for academic misconduct. Given the teachings of *Horowitz* and *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), which would subject decisions involving academic failure to minimal judicial scrutiny, this is the appropriate level of scrutiny for cases not involving academic misconduct.

45. *Ewing*, 474 U.S. at 214 (1985).

graduate student, who was a native of India, was found to have plagiarized two term papers.⁴⁶ One term paper had been submitted to Turnitin.com, and was found to contain a high “similarity index” of seventy percent.⁴⁷ The second term paper was also submitted to Turnitin.com, which found a “similarity index” of eighty-eight percent.⁴⁸ University policy provided that cases of “repeated plagiarism” would result in a student’s expulsion.

Two hearings were held, as well as an appeal; the student was found to have plagiarized and was expelled. He claimed violations of procedural and substantive due process, discrimination, and retaliation. With respect to the student’s substantive due process claim, the court, relying on *Ewing*, reasoned:

Whether Plaintiff in fact plagiarized or whether Defendants reached the *wrong* conclusion regarding the same is not for this Court to decide. Even if Plaintiff did not plagiarize, the issue before this Court is whether Defendants exercised their professional judgment in concluding that Plaintiff had in fact done so. Based on the foregoing, the Court finds Defendants (1) had a legitimate basis to conclude that Plaintiff had plagiarized and should be expelled, and (2) used their professional judgment in making those decisions.⁴⁹

The court also rejected the student’s procedural due process, discrimination, and retaliation claims.

On the other hand, a few courts have concluded that academic misconduct should receive the same level of scrutiny that judges use to review sanctions for nonacademic misconduct. For example, in *University of Texas Medical School at Houston v. Than*,⁵⁰ a medical student, Than, was dismissed for allegedly cheating on an examination. He sued, claiming that an *ex parte* portion of the dismissal hearing violated procedural due process. The university argued that the dismissal was for academic reasons, and that Than had no right to procedural due process. The court disagreed:

UT argues that Than’s dismissal was not solely for disciplinary reasons, but was for academic reasons as well, thus requiring less stringent procedural due process than is required under *Goss* for disciplinary actions This argument is specious. Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct Than’s dismissal for academic dishonesty

46. No. CC- 08-64, 2010 WL 1782214 (S.D. Tex. Apr. 30, 2010).

47. *Id.* at 9. For a description of Turnitin.com, see *supra* note 12.

48. *Id.*

49. *Id.* at 10.

50. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926 (Tex. 1995).

unquestionably is a disciplinary action for misconduct.⁵¹

Yet other courts have failed to distinguish between the standard of review for challenges to academic misconduct sanctions and sanctions imposed for poor academic performance (or “academic failure”). For example, in *Di Lella v. University of the District of Columbia David A. Clarke School of Law*,⁵² a law student who had submitted examination answers copied directly from websites challenged her one-year suspension under District of Columbia and federal disability discrimination laws. In reviewing her claim, the court cited *Alden v. Georgetown University*,⁵³ a case involving a medical student’s dismissal for failing grades and excessive absences from clinical responsibilities (“academic failure”), not academic misconduct. The *Di Lella* court characterized the determination of plagiarism as an “academic judgment” and declined to review it.⁵⁴

For purposes of this article, emphasis has been placed on cases decided since 2000, since other scholars have reviewed and assessed cases decided prior to this time period.⁵⁵ Most opinions in student challenges to

51. *Id.* at 931. See also *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (1984)(concluding that a student suspended for cheating on a final exam had a right to procedural due process, and that under the *Goss* standard, he had received it), *In re Kalinsky v. State Univ. of N.Y. at Binghamton*, 557 N.Y.S.2d 577 (N.Y. App. Div. 1990) (student found guilty of plagiarism was entitled to statement detailing the factual findings and evidence relied upon by the Academic Honesty Committee in its determination; lack of such a statement denied her due process).

52. 570 F. Supp. 2d 1 (D.D.C. 2008).

53. *Alden v. Georgetown Univ.*, 734 A.2d 1103 (D.C. 1999).

54. *Di Lella*, 570 F.Supp.2d at 9. The court stated: “First, to the extent that *Di Lella* seeks review of the Committee’s decision, the court ‘follow[s] the lead of the Supreme Court as well as other courts across the country in declining to engage in judicial review of academic decision-making by educational institutions’” (citing *Alden*, 734 A.2d at 1103). However, Berger and Berger scoff at such judicial deference to judgments about academic misconduct: “Traditionally, courts have been hostile to claims challenging disciplinary procedures in institutions of higher education. More so than most other professionals—such as doctors, lawyers, accountants, architects, or engineers—university professors and deans have enjoyed an almost total de facto immunity from judicial review of their methods. Strong adherence to the ideal of academic freedom, possibly combined with a mystical (and mythical) attitude that professors really do know best, may help explain why courts have been so leery of trumping a school’s views about an educational subject with the court’s own. While this attitude may be appropriate on truly academic matters like exam grades or the quality of a Ph.D. dissertation, a panel composed of non-academics can surely decide whether X peeked at Y’s exam, or Z plagiarized another’s paper—a concession that schools, in providing for disciplinary hearings, have already made.” Berger and Berger, *supra* note 17, at 301 (footnotes omitted).

55. See Berger and Berger, *supra* note 17. See also Billings, *supra* note 5; Ralph D. Mawdsley, *The Tangled Web of Plagiarism Litigation: Sorting Out the Legal Issues*, 2009 BYU EDUC. & L. J. 245 (2009); Datile, *supra* note 29; Hazel Glenn Beh, *Student Versus University: The University’s Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183 (2000); Kenneth H. Ryesky, *Part Time Soldiers: Deploying Adjunct Faculty in the War Against Student Plagiarism*, BYU EDUC. & L. J. 119 (2007).

academic discipline are from trial courts; students are overwhelmingly unsuccessful in their quests to overturn the colleges' judgments,⁵⁶ and few of the trial court opinions are appealed.

B. Procedural Due Process Claims

In order for an individual to state a due process claim under the U.S. Constitution's Fourteenth Amendment, the plaintiff must have a "property right" that was denied without the appropriate procedural protections.⁵⁷ The U.S. Supreme Court has not yet ruled on whether a student at a public college or university has a right to continued enrollment, assuming compliance with the institution's rules and regulations (and acceptable academic performance). In addressing students' procedural due process claims when sanctioned for academic misconduct, most courts have assumed, without deciding, that a student has such a property right.⁵⁸ A federal appellate court has ruled, however, that students at public institutions do not have a property right in continued enrollment.⁵⁹ In

56. Even when student claims involve academic misconduct rather than academic failure, courts tend to cite *Ewing* and defer to the college's determinations in cases where the court has found the institution's behavior reasonable. See *Mawle v. Tex. A&M Univ.-Kingsville*, No. CC-08-04, 2010 WL 1782214 (S.D. Tex. Apr. 30, 2010) (discussed in this Section), *Bisong v. Univ. of Houston*, 493 F.Supp.2d 896, 906 (S.D. Tex. 2007). But in one case the court sided with students who accused a professor of conduct that most academics would view as outrageous. In *Papelino v. Albany Coll. of Pharmacy*, 633 F.3d 81 (2d Cir. 2011), three students claimed that they were falsely accused of cheating by a professor because one had rejected her sexual advances; a state court proceeding found the college's determination that they had cheated to be arbitrary and capricious (*Basile v. Albany Coll. of Pharmacy of Union Univ.*, 719 N.Y.S.2d 199 (N.Y. App. Div. 3d Dep't 2001)). The three plaintiffs then brought claims under Title IX for harassment and retaliation, as well as claims for negligence, intentional infliction of emotional distress, and breach of contract. The court concluded that the plaintiffs were entitled to a jury trial, stating: "This is one of those rare education cases where it is appropriate for a court to intervene. Indeed, the Third Department has already done so, setting aside the College's determination that plaintiffs had cheated. . . . we conclude that genuine issues exist for trial with respect to whether the College breached its implied duty of good faith by, inter alia, failing to investigate *Papelino's* complaint of sexual harassment, mishandling the Honor Code proceedings after *Nowak* accused plaintiffs of cheating, and denying (at least initially) *Papelino* and *Basile* a diploma and failing *Yu* in a course. Accordingly, we conclude that the district court erred in granting summary judgment dismissing plaintiffs' breach of contract claim." *Id.* at 94. The court allowed the remaining claims to be tried as well.

57. *Bd. of Regents v. Roth*, 408 U.S. 564, 569–571 (1972).

58. For a discussion of whether a student has a property right in continued enrollment, and citation to cases on both sides of this issue, see *Lee v. Univ. of Mich.-Dearborn*, No. 5:06-CV-66, 2007 WL 2827828 (W.D. Mich. 2007) at 19–23.

59. *Williams v. Wendler*, 530 F.3d 584 (7th Cir. 2008). See also *Lee*, No. 5:06-CV-66, 2007 WL 2827828 (W.D. Mich. 2007) at *24–25 ("This court finds that plaintiff had no clearly established constitutional right to substantive or procedural due process in her disciplinary proceeding at the University based upon her expectation of

Williams v. Wendler, a challenge to discipline for social misconduct (sorority hazing), the court rejected the plaintiffs' contention that they had a protected property right in continued enrollment at Southern Illinois University, a public institution:

The plaintiffs' problem in this case, and the justification for the district court's dismissing their due process claim without awaiting the presentation of evidence, is that they premise the claim entirely on the bald assertion that any student who is suspended from college has suffered a deprivation of constitutional property. That cannot be right. And not only because it would imply that a student who flunked out would have a right to a trial-type hearing on whether his tests and papers were graded correctly and a student who was not admitted would have a right to a hearing on why he was not admitted; but also because the Supreme Court requires more. It requires, proof of an entitlement, though it can be a qualified entitlement (most entitlements are), in this case an entitlement not to be suspended without good cause. That is a matter of the contract, express or implied.⁶⁰

Because the plaintiffs had not made contract claims, the court affirmed the lower court's award of summary judgment.

Many of the students attempting to state procedural due process claims argue that the notice and hearing provided by the institution is defective, or insufficient in some way. For example, in *Van Le v. University of Medicine and Dentistry of New Jersey*,⁶¹ a dental student expelled for cheating on an examination challenged the period of time given him to prepare for the hearing (one week) and the hearing board's decision to admit testimony from a professor who had observed earlier cheating by the plaintiff, but had not reported it, as violations of procedural due process. The court disagreed, noting:

Le was afforded extensive procedural protections: notice, a

continued enrollment, much less her expectation of a certain type of due process itself. . . Here, although some courts have concluded that post-secondary students, such as plaintiff, have procedural or substantive due process rights protected by the federal constitution, the existence and 'contours' of those rights appear to be an issue of judicial debate, even between different panels at the Sixth Circuit. 'If judges thus disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy.'" (citing *Wilson v. Layne*, 526 U.S. 603, 618 (1999)).

60. *Id.* at 589. *Accord* *Park v. Trustees of Purdue Univ.*, 2011 U.S. Dist. LEXIS 39250 (N.D. Ind. 2011). The plaintiff in *Park* had also claimed an equal protection violation, as well as race, sex, and national origin discrimination; these claims were not dismissed. The author of the *Williams* opinion, Judge Posner, has authored a book entitled *The Little Book of Plagiarism*. RICHARD POSNER, *THE LITTLE BOOK OF PLAGIARISM* (2007).

61. 379 Fed.Appx. 171 (3d Cir. 2010).

hearing before a panel of students and faculty, the right to present witnesses and evidence, the right to cross examine witnesses, a lay adviser in the room, an attorney outside the hearing room, two levels of appeal (during one of which he was represented by counsel), and the opportunity to submit further evidence after the hearing. Le argues that the notice was insufficient because he was not advised that evidence would be presented against him regarding other incidents. However, Le was aware of rumors regarding other incidents of cheating. Such evidence also served to rebut his defense that a back problem caused his unusual movements. In addition, there was a period of at least four days between the two days of the hearing to develop a response to these allegations. He was permitted to submit further material after the hearing.⁶²

The court credited the defendants' explanation that the hearing needed to be held before the end of the academic semester to avoid a several-month delay and ruled that the plaintiff was "educated [and] capable;" thus one week was sufficient time to prepare his defense.⁶³

Student claims that an institution did not follow its own procedures typically do not convince a court that a procedural due process violation has occurred if the procedures used to make the decision actually satisfied Fourteenth Amendment standards.⁶⁴ Several courts have ruled that an institution's failure to follow its own procedures is not itself a due process violation,⁶⁵ although it might provide a student with a breach of contract claim.⁶⁶ And, of course, if procedures are available to the student that he or

62. *Id.* at 175.

63. *Id.* at 174.

64. *See, e.g., Newman v. Burgin*, 930 F.2d 955, 960 (1st Cir. 1991). "Dismissal of a student for academic reasons comports with the requirements of procedural due process if the student had prior notice of faculty dissatisfaction with his or her performance and of the possibility of dismissal, and if the decision to dismiss the student was careful and deliberate" (citing *Schuler v. Univ. of Minn.*, 788 F.2d 510, 514 (8th Cir. 1986)).

65. *See, e.g., Schuler v. Univ. of Minn.*, 788 F.2d 510, 515 (8th Cir. 1986) (ruling that, despite the fact that the plaintiff may not have received all of the procedural protections provided for in university policy, the hearing she received exceeded constitutional due process requirements). *See also Flannery v. Bd. of Tr. of Ill. Comm. College*, 1996 U.S. Dist. LEXIS 17049, 8-9 (N.D. Ill. Nov. 4, 1996) (same ruling).

66. Many courts reviewing breach of contract claims brought by students disciplined for social misconduct have ruled that a college is contractually bound to follow the procedural safeguards included in student handbooks and codes of conduct. *See Felheimer v. Middlebury Coll.*, 869 F. Supp. 238, 246 (D. Vt. 1994) (ruling that a disciplinary hearing was "fundamentally unfair" because the college had not provided all of the "due process" protections included in the student handbook). *But see Schaefer v. Brandeis Univ.*, 735 N.E.2d 373 (Mass. 2000) (assuming, without deciding, that a contractual relationship existed between the student and the college, but ruling that, despite the fact that the college had apparently not followed all of its handbook policies

she fails to use, such as an appeal process or the opportunity to provide exculpatory information, or a complete refusal to attend the hearing at all,⁶⁷ no due process violation has occurred.⁶⁸ Courts have determined that an institution's procedure that provides for an informal "hearing" before an academic administrator, who then makes the determination as to whether misconduct occurred, satisfies due process requirements, particularly because the student had an opportunity to appeal that determination.⁶⁹

Furthermore, courts have ruled that a student who admits to the accusation of academic misconduct is not entitled to procedural due process. For example, in *Anvar v. Regents of the University of California*,⁷⁰ a student who admitted to changing incorrect answers to correct answers on a graded examination, then submitting it for regrading, nevertheless claimed that because he did not receive an evidentiary hearing, he was denied due process. The court disagreed for two reasons: procedural due process does not require an evidentiary hearing, and because he had admitted to cheating, he was not entitled to any process beyond the notice and hearing provided by his meeting with the dean.⁷¹

C. Breach of Contract Claims

Students subjected to sanctions for alleged academic misconduct at private colleges and universities rely primarily on breach of contract claims, typically claiming that the institution did not follow its own procedures.⁷² Just as courts addressing due process claims tend to decide that substantial, rather than complete, compliance with the institution's policies is all that is required, so do courts addressing breach of contract claims.⁷³

and procedures, the student had not stated a breach of contract claim).

67. See, e.g., *Chalmers v. Lane*, 2005 U.S. Dist. LEXIS 1793 (N.D. Tex. Jan. 25, 2005).

68. See, e.g., *Morris v. Rinker*, 2005 U.S. Dist. LEXIS 33919 (M.D. Fla. Apr. 14, 2005). In *Morris*, a student who claimed that he did not receive a letter from the college advising him of the plagiarism charge against him "because his ex-girlfriend was tampering with or 'vandalizing' his mail" admitted receiving a second such letter; his failure to respond in a timely manner was not attributable to the college and not a denial of due process. *Id.*

69. *Anvar v. Regents of the Univ. of Cal.*, 2005 Cal. App. Unpub. LEXIS 9850 (Cal. Ct. App. Oct. 27, 2005).

70. *Id.* See also *Viriyapanthu v. Regents of the Univ. of Cal.*, 2003 Cal. App. Unpub. LEXIS 8748 (Cal. Ct. App. Sept. 15, 2003).

71. *Id.* at 19.

72. Although the majority rule seems to be that the relationship between a student and a college or university is contractual in nature, some courts hesitate to apply contract law principles to disputes between students and their institutions. For a discussion of this issue and the varying approaches used by courts, see Kaplin and Lee, *supra* note 11, Section 8.1.3.

73. *Trahms v. Tr. of Columbia Univ.*, 666 N.Y.S.2d 150 (N.Y. App. Div. 1997) (finding that four days' notice of scheduling of hearing was sufficient; student could

A federal trial court addressed a breach of contract claim by a student taking online courses at the University of Scranton, a private university. In *Hart v. University of Scranton*,⁷⁴ a student submitted a paper for a course that contained a portion of a paper she had submitted for a different course. No hearing was held, and the student was expelled. The student claimed that the university's definition of plagiarism did not include submitting portions of a paper for two different courses because "one cannot plagiarize her own work,"⁷⁵ and thus the university had breached its contract with her. In a striking example of deference, the court disagreed, saying:

Hart alleges that the University had a "contractual duty" not to violate the Handbook, but she has not provided any specific provision giving rise to such a duty. While the University may have misconstrued "plagiarism" as per the Handbook, this passage is merely a definition, not a promise, and Hart points to no clause that would bind the University to strictly adhere to that definition. Moreover, Hart has not identified any contractual provision that dictates under what conditions the University could expel her. Simply, the term Hart relies on is a definition, and she has not shown how this term has created an affirmative duty on the part of the University.⁷⁶

And because the student had not specified where in the university's procedures it promised her the right to confront witnesses and present evidence before dismissal, that claim was dismissed as well.⁷⁷

In another breach of contract claim, a student was accused of plagiarism and attempted to obtain a faculty member or graduate student to serve as an advisor to him during the hearing process. No one that he asked would agree to serve, and he was found guilty of plagiarism and suspended.⁷⁸

not demonstrate any harm and institution substantially complied with the provisions of the student handbook). *See also* *Anderson v. Vanderbilt Univ.*, 2010 U.S. Dist. LEXIS 52381 (M. D. Tenn. May 27, 2010) (holding that minor procedural deviations did not disadvantage the student and the outcome would have been the same had procedural compliance been complete); *Okafor v. Yale Univ.*, 2004 Conn. Super. LEXIS 1657 (Conn. Super. Ct. June 25, 2004) (holding that the university substantially complied with procedures; no evidence of bias or ill will by hearing committee members).

74. *Hart v. Univ. of Scranton*, 2012 U.S. Dist. LEXIS 42629 (M.D. Pa. Mar. 28, 2012).

75. *Id.* at 8. The university's definition stated that plagiarism included "giving the impression that you have written or thought something that you have in fact borrowed from someone else." *Id.* There is apparently little consensus as to whether "self-plagiarism" is an ethical violation; the American Psychological Association recommends that an individual who wishes to re-use his or her previously written material should cite the earlier writing. *See* THE ETHICS OF SELF-PLAGIARISM, available at <http://www.ithenticate.com/Portals/92785/media/ith-selfplagiarism-whitepaper.pdf>.

76. *Hart*, 2012 U.S. Dist. LEXIS 42629 at 9.

77. *Id.* at 11–12.

78. *Morris v. Brandeis Univ.*, 2001 Mass. Super. LEXIS 518 (Mass. Super. Ct.

The student claimed that the university's deprivation of an advisor constituted a breach of contract; the court disagreed, saying that the policy allowed the student to bring an advisor to the hearing, but did not require the university to provide him with one.⁷⁹

Students' breach of contract claims are rarely successful, but if the facts are egregious enough the student may prevail. In *Papelino v. Albany College of Pharmacy*,⁸⁰ three students were accused of cheating on tests by a professor who had made sexual advances toward one of the students. After the target of the alleged sexual advances reported the situation to the associate dean of students, who did not investigate and did not report the complaint to anyone, the professor made the cheating accusations, and was the primary witness and "prosecutor" at the academic misconduct hearing. Two of the students were expelled. All three students brought a state court claim against the college, and the court found that the cheating determination was arbitrary and capricious because it was based upon insufficient evidence.⁸¹ The court in the later case, *Papelino v. Albany College of Pharmacy*, determined that summary judgment for the college was inappropriate because of what it considered to be clear evidence of misconduct on the part of the associate dean and the professor, and reversed the award of the trial court.⁸²

In some breach of contract cases, student plaintiffs have asserted that the outcome of the academic misconduct hearing was arbitrary and capricious.⁸³ They appear to use this claim when the institution has complied with the provisions of the student handbook or other relevant policies, but they assert that the decision itself was too harsh.⁸⁴ Berger and Berger criticize use of the arbitrary and capricious standard in academic misconduct cases:

"Arbitrary and capricious" is an administrative review standard.

It is also the standard that courts have ordinarily used when testing the dismissal of a student for academic failure. This test seems appropriate where the agency's or school's decision calls

Sept. 4, 2001).

79. *Id.* at 9-10.

80. *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81 (2d Cir. 2011).

81. *Basile v. Albany Coll. of Pharmacy of Union Univ.*, 719 N.Y.S.2d 199 (3d Dep't 2001).

82. *Papelino*, 633 F.3d at 94.

83. *See, e.g., McCawley v. Universidad Carlos Albizu*, 461 F. Supp. 2d 1251 (S.D. Fla. 2006) (holding that the decision by university not to award doctoral degree to student who had completed all academic requirements but who had engaged in academic misconduct and a variety of unethical and unprofessional actions was neither arbitrary nor capricious); *Shah v. Union Coll.*, 2012 N.Y. App. Div. LEXIS 5502 (N.Y. App. Div. July 12, 2012) (holding that since student admitted to plagiarism, committee's finding and sanction were neither arbitrary nor capricious).

84. *Id.*

for an expert judgment in the area in which the institution, not the court, has greater expertise. But where a student's career may be at stake because of an academic "crime," akin to fraud or copyright infringement, matters courts handle as fact-finders routinely, colleges should not enjoy quite the same degree of deference. Nor does the phrase "good faith and fair dealing" warrant so cramped an interpretation.⁸⁵

In New York and California, students who wish to challenge the decision of a private college or university in state court in cases not involving discrimination claims are limited to proceedings under state administrative law, rather than bringing breach of contract claims in civil court. In these cases, the judge is limited to evaluating whether the college followed its policies and procedures; such review uses the "arbitrary and capricious" standard.⁸⁶

In summary, most courts have concluded that, at public universities, a form of procedural due process is required for proceedings involving a sanction for academic misconduct, usually citing *Goss*.⁸⁷ This does not mean, however, that their deference to the academic judgment of faculty and administrators has diminished, as the cases discussed in this Section have demonstrated. And the standard of review for proceedings at private institutions, where due process is not required, continues to be substantial compliance with the institution's policies and procedures, along with an occasional foray into whether the decision was arbitrary and capricious.

D. Discrimination Claims

The review of cases conducted for this article identified several in which the student claimed that the academic misconduct with which they were charged was a result of a learning disorder or some other disability. Such claims, as in the *Di Lella* case noted earlier in this Section, are typically unsuccessful because courts state that compliance with academic integrity rules is an essential function of being a student; a student whose disability

85. Berger and Berger, *supra* note 17, at 334 (footnotes omitted).

86. See, e.g., *Shah v. Union Coll.*, 948 N.Y.S.2d 456 (N.Y. App. Div. 2012) (holding that judicial review of a private university's disciplinary determinations is limited to whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings). See also *Idahosa v. Farmingdale State Coll.*, 948 N.Y.S.2d 104, 106 (N.Y. App. Div. 2012) ("An administrative penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law It cannot be concluded, as a matter of law, that the penalty of dismissal is so disproportionate to the petitioner's misconduct as to be shocking to one's sense of fairness, particularly in light of the facts that he was put on notice of that possible disciplinary measure, that he continued to deny his plagiarism, and that he provided an implausible explanation for the similarity between his paper and that of the other student.").

87. *Goss v. Lopez*, 419 U.S. 565 (1975).

prevents such compliance thus is not qualified and not protected by the disability discrimination laws.⁸⁸

In *Kiani v. Trustees of Boston University*, a law student with learning disorders was found guilty of plagiarizing in six courses.⁸⁹ Although she claimed that she lacked the intent to plagiarize because of the medication she was taking, she was expelled because her grade point average fell below the required minimum after the grades in the courses in which she had plagiarized were changed to “F”s. The student claimed that she had not been advised in writing of her right to remain silent during the hearing, as required by the law school’s policies. The court found several instances of oral notice to her and to her attorney of her right to remain silent.⁹⁰ The court awarded summary judgment to the university on her discrimination and breach of contract claims, noting that the plagiarism determinations had been made on the basis of documents (course papers), not on the basis of her testimony, which, the court said, actually persuaded the hearing committee to hand down a lesser sanction (suspension) than the typical suspension for repeated plagiarism (expulsion).⁹¹

A claim of discrimination brought by a doctoral student against the University of Houston demonstrates the lengths to which a student may go to attempt to persuade a court to reverse a plagiarism determination. In *Bisong v. University of Houston*, a student from Cameroon enrolled in the doctoral program in English was accused of plagiarism twice and eventually was expelled.⁹² She brought race discrimination and breach of contract claims, asserting that the professors who discovered the plagiarism, and the hearing panel, were biased against her on the basis of race. One of the faculty defendants had worked extensively with the student to help her understand the requirements of scholarly attribution and had also recommended a tutor for her. An academic honesty panel, in two separate hearings, upheld the department chair’s determination that both papers were plagiarized.⁹³

In an effort to rebut the plagiarism determinations, the plaintiff obtained affidavits from two professors of English from other institutions; one from the University of Phoenix and a second from DeVry University. Both individuals reviewed the papers at issue and concluded that the student had not committed plagiarism. In arguing that the court should not award summary judgment to the university, the plaintiff claimed that the views of these “external experts” created issues of fact that a jury must resolve. The court disagreed:

88. See, e.g., *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998)

89. 2005 U.S. Dist. LEXIS 47216 (D. Mass. 2005).

90. *Id.* at 18.

91. *Id.* at 23.

92. 493 F. Supp. 2d 896 (S.D. Tex. 2007).

93. *Id.* at 90–91.

[T]he question is not whether the university made an erroneous decision, but whether the university's decision was made with discriminatory motive. Even an incorrect determination that plaintiff submitted a plagiarized paper constitutes a legitimate nondiscriminatory reason for her expulsion. Since motive is the issue, a dispute in the evidence concerning academic performance does not provide a sufficient basis for a reasonable fact-finder to infer that the proffered justification is unworthy of credence. . .

[P]laintiff has failed to present any evidence that the graduate students or faculty members who comprised the Academic Honesty Panel failed to conduct an independent review of the evidence before concluding that plaintiff's paper was plagiarized, or that any of them harbored discriminatory animus towards plaintiff's race and/or national origin. At best the affidavits of Dr. Bartlett-Pack and Dr. de Vita raise a fact issue about the accuracy of the panel's determination, but that fact issue is not a genuine issue of material fact that precludes summary judgment unless it is also accompanied by evidence from which a reasonable jury could infer that the panel's decision to expel the plaintiff was motivated by unlawful discriminatory intent.⁹⁴

Although the court concluded that the plaintiff had not provided sufficient evidence of race discrimination to avoid a summary judgment ruling, its discussion of the views of the "external experts" solicited by the plaintiff is troubling because it suggested that, had the plaintiff been able to allege facts suggesting actual bias, the court might have allowed the determination of whether, in fact, the plaintiff had committed plagiarism to go to a jury. The plaintiff was inviting the court (and potentially a jury) to determine whose judgments were more credible—those of the university representatives who made the plagiarism determinations or those of individuals from other institutions. Even if the plaintiff had obtained "expert opinions" from scholars from highly-ranked research universities, opening the door to a judicial or lay determination of whether to affirm the institution's decision or not involves the court in a decision that many courts believe judges (and juries) are not qualified to make.

If the student plaintiff can demonstrate that institutional faculty or administrators were unresponsive to attempts to understand, rectify or avoid academic misconduct, he or she may be able to deflect a motion for summary judgment or dismissal. For example, in *Peters v. Molloy College of Rockville Centre*,⁹⁵ an African-American master's student enrolled in a

94. *Id.* at 907–908.

95. 2008 U.S. Dist. LEXIS 52194 (E.D.N.Y. July 8, 2008).

nursing program was accused by a professor of plagiarizing a course paper from another student. The professor required the student to redo the paper but still found it unsatisfactory. According to the student, the professor refused to meet with her to discuss the problems with the paper. When the student asked to meet with the associate dean to discuss a grade appeal and showed up with her attorney, the dean refused to meet with her and required all communications to be made through the college's attorney and hers. The attorneys subsequently agreed on two possible resolutions of the grade appeal, neither of which the student selected. She sued, claiming race discrimination under Title VI of the Civil Rights Act of 1964⁹⁶ and Section 1981 of the Civil Rights Act.⁹⁷ The court, noting that the student had made earlier complaints about alleged race discrimination by certain faculty and administrators, rejected the college's motion to dismiss the race discrimination claim against the institution.⁹⁸

Even though a discrimination claim, compared with a breach of contract or due process claim, presents a stronger rationale for judicial scrutiny of the evidence and process used to make an academic misconduct determination (because the decision-makers' motive is at issue), the cases discussed in this Section (with the exception of *Peters*) are as deferential to institutional processes and determinations as those grounded in contract or constitutional claims.

E. Severity of the Sanction

A few cases, including the early *Napolitano* case,⁹⁹ include student claims that the sanction was too harsh—either a due process claim if the student is suing a public institution or a breach of the covenant of good faith and fair dealing if the student is suing a private college.¹⁰⁰

In *Smith v. VMI*, a cadet at Virginia Military Institute was expelled for

96. 42 U.S.C. § 2000d.

97. 42 U.S.C. § 1981.

98. 2008 U.S. Dist. LEXIS 52194 at *37. In earlier complaints, students had alleged that African-American students were graded more harshly than white students; plaintiff alleged that these complaints had been ignored. *Id.* at *7. If, however, there is no credible factual link between the academic misconduct determination and alleged discrimination, the court will likely dismiss the case or award summary judgment to the institution. *See, e.g., Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71 (D.D.C. 2003) (dismissing a case where an undergraduate student found to have plagiarized could not demonstrate race discrimination as a motive); *Cobb v. Univ. of Va.*, 84 F. Supp. 2d 740 (W.D. Va. 2000), *aff'd without opinion*, 229 F.3d 1142 (4th Cir. 2000) (holding that an African American student expelled for cheating had not alleged facts that demonstrated that honor code prosecution was racially motivated, and granting summary judgment to university).

99. *Napolitano v. Princeton Univ.*, 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982)

100. *See Beh, supra* note 55 (discussing the use of the contractual covenant of good faith and fair dealing in student challenges to institutional decisions).

making a false statement on a required course paper.¹⁰¹ He had stated that he had not received assistance from anyone on the paper, yet inserted another cadet's name instead of his own in the signature block for the honor code statement. Another cadet had proofread the paper and had suggested certain editing—which was considered “assistance” at VMI. Although a hearing panel cleared him of plagiarism, he was found responsible for another honor code violation (making the false statement); the only sanction for any honor code violation at VMI is expulsion.¹⁰² The cadet claimed procedural and substantive due process violations in that if he were cleared of plagiarism he could not have violated the honor code. The court rejected that claim, determining that the evidence supported the hearing panel's conclusion and the sanction of dismissal, although harsh, did not “shock the conscience.”¹⁰³

In cases in which the student plaintiff asks the court to reverse or at least reduce the sanction, the courts have refused to do so, even if the judge's personal belief is that the sanction is too harsh.¹⁰⁴ In *Cho v. University of Southern California*,¹⁰⁵ a state appellate court rejected a doctoral student's charge that, because this was her first offense, expulsion was too harsh a penalty:

Although [the plaintiff] contends that the decision to expel her was unduly harsh given her lack of prior discipline, she does not dispute USC's power to expel a first-time student miscreant for plagiarism, and nothing in the record shows that a different result would have or should have been reached had her lack of prior discipline been considered.¹⁰⁶

The court added in a footnote: “Even so, we believe a lesser punishment could have been justified given the fact that Cho's plagiarism was limited to one of the three essay questions, and the fact that expulsion from the university under these circumstances may effectively foreclose her from ever obtaining an advanced degree elsewhere,”¹⁰⁷ but left the sanction undisturbed.

F. Lack of Understanding of Academic Integrity Requirements

Although few cases discussed the issue of whether the student had been instructed in the institution's expectations for proper attribution of the ideas and words of others,¹⁰⁸ the sizable proportion of international student

101. 2010 U.S. Dist. LEXIS 52900 (W.D. Va. May 27, 2010).

102. *Id.* at *5.

103. *Id.* at *16.

104. *See, e.g., Napolitano*, 453 A.2d at 270 (discussed in Section III of this article).

105. 2006 Cal. App. Unpub. LEXIS 4681 (Cal. Ct. App. May 31, 2006).

106. *Id.* at *20.

107. *Id.* at note 9.

108. *See, e.g., Mawle v. Tex. A&M Univ.-Kingsville*, 2010 U.S. Dist. LEXIS

plaintiffs in the cases reviewed for this article, and the apparent difficulties of native students in understanding proper citation and attribution requirements, suggest that additional instruction in the college's or university's expectations for academic integrity may be necessary. No case has been identified that "blamed" the college for not making its expectations clear; the courts said that students should be familiar with the contents of handbooks and policies. Of course, it is not clear whether the student plaintiffs really did not understand the requirements, which would suggest that the plagiarism was unintentional, or whether they hoped their falsifications would be excused on that ground.

G. Lack of Intent to Deceive

Even in cases involving institutions whose academic misconduct policies required the hearing board to find an *intentional* violation, findings that plagiarism or cheating actually occurred, without clear evidence of intent, were found to be sufficient indicators of intent to deceive.¹⁰⁹ For example, in *Kiani v. Boston University*, a law student found guilty of plagiarism argued that she lacked the intent to plagiarize because she was taking the wrong medication for a disability and the medication clouded her judgment.¹¹⁰ The law school's academic integrity policy defined plagiarism as "the knowing use, without adequate attribution, of the ideas, expressions, or work, of another, with intent to pass such materials off as one's own."¹¹¹ Despite the student's claim that she lacked the intent to deceive, a professor who reviewed all of her written work in law school found that papers she wrote for six different courses contained instances of plagiarism. A divided Judicial Discipline Committee ruled that the student had violated the academic integrity policy. The court rejected the student's breach of contract and discrimination claims, finding that the process had been fair and that the law school had followed its discipline policies.¹¹²

In *Chandamuri v. Georgetown University*, an undergraduate was found guilty of plagiarism because he did not use quotation marks around material copied from other sources, although the student had cited all of the sources.¹¹³ The student argued that, because he had cited the sources, his conduct was not plagiarism, and that the finding was discriminatory. The Georgetown University policy included both intentional and unintentional

42496 (S.D. Tex. Apr. 30, 2010) (concerning an international student who alleged that he did not understand U.S. academic expectations for citation; standards in his native India permitted students to turn in drafts that professors would correct and return for editing).

109. See, e.g., *Napolitano v. Princeton Univ.*, 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

110. 2005 U.S. Dist. LEXIS 47216 (D. Mass. Nov. 10, 2005).

111. *Id.* at *5.

112. *Id.* at *31.

113. 274 F. Supp. 2d 71 (2003).

plagiarism in its academic misconduct policy; the court ruled that the determination that he had violated the academic misconduct policy was supported by evidence and that the student had not provided a causal link between the determination and any form of discrimination.¹¹⁴

H. Summary

The cases reviewed for this article, spanning the first twelve years of the twenty-first century, suggest that little has changed in several decades with respect to judicial review of challenges to academic misconduct determinations. What *has* very likely changed, however, is that both public and private institutions appear to be providing a form of due process to accused students; in most cases, evidentiary hearings were held, students were permitted to question witnesses and provide evidence on their behalf, and in some cases students were permitted to be accompanied by counsel to the hearing (although it appears that in most of these cases, counsel were not permitted to advocate for the student or to question witnesses). And, although the opinions suggest that in most cases the protections given to the student do not resemble trial-type protections (or even those required of the hearing committee in *Napolitano*), students are receiving more due process than the bare notice and “some kind of hearing” dictated by *Goss*. Despite the apparent increase in protections for students accused of academic misconduct, however, the full panoply of due process protections and the right to counsel suggested by some scholars¹¹⁵ does not appear to be common, at least at those institutions whose lawsuits were reviewed for this article.

IV. SUGGESTIONS FOR INSTITUTIONAL POLICIES AND PRACTICE

Accusations of academic misconduct are very serious, and may halt or at least sidetrack a student’s academic career. The unfortunate fact that instances of academic misconduct are increasing suggests that institutions may wish to ensure that their policies provide appropriate procedural

114. *Id.* at 86.

115. *See* Berger and Berger, *supra* note 17, at 336 (“The school must satisfy two tests. First, the school must establish ‘just cause’ by a preponderance of the evidence; in short, the school carries the burden of proving that the offense has occurred. Second, the school must create a process, which has to include an impartial hearing panel in serious cases, that gives to students charged with wrongdoing a fair opportunity to contest the charges against them. This means, where the charges are the academic equivalent of criminal fraud, that the process should contain most of the safeguards provided by the Constitution for persons charged with ordinary crime. Among the protections too often missing from a school’s disciplinary code that we believe fairness requires are the right to counsel, adequate preparation time, the right of cross-examination of adverse witnesses, the right to a hearing transcript, notice of the school’s witnesses and evidence, and the privilege of calling one’s own witnesses.”). *See also* Dutile, *supra* note 29.

protections for students, and that the policies are followed consistently. In addition, the review of cases for this article suggests additional considerations.

A. Provide instruction to all students on the institution's academic integrity expectations.

Most of the cases reviewed for this article involved graduate students, some of whom argued that they had never been instructed on how to cite and reference sources properly.¹¹⁶ And although faculty may expect that once a student has completed an undergraduate degree, he or she should know the fundamentals of proper attribution for the discipline, that assumption may be incorrect.¹¹⁷ Providing *required* instruction for all students on 1) the correct manner of attribution and 2) the institution's expectations for academic integrity could reduce academic misconduct, or at least prevent students from blaming anyone but themselves for academic integrity violations.¹¹⁸ Required instruction may be even more important for international students, given the cultural differences in attitudes toward copying or paraphrasing the ideas of others.¹¹⁹

B. Review the academic integrity policy and determination process.

In some of the lawsuits discussed in this article, students complained that definitions of academic misconduct were vague and difficult to understand. Policies that not only clearly define plagiarism and cheating, but also provide examples of plagiarism and other forms of academic misconduct, should help students understand what is expected of them in citation and attribution. The possible sanctions for academic misconduct should also be spelled out clearly.

The process of determining whether or not a student committed academic misconduct need not be formal, as long as it satisfies due process

116. See generally the discussion in Section III-F; see also *Mawle v. Texas A&M Univ.-Kingsville*, 2010 U.S. Dist. LEXIS 42496 (S.D. Tex. April 30, 2010).

117. For example, in some disciplines, student learning at the undergraduate level may be measured by tests rather than by research papers; at large institutions, learning may be measured by multiple choice examinations that can be graded by a machine rather than by a human.

118. A number of institutions of higher education provide web-based information on the proper manner of attributing and citing the work of others. See, e.g., <http://owl.english.purdue.edu/owl/section/3/33/> (the Purdue University Online Writing Lab) and <http://www.indiana.edu/~wts/pamphlets/plagiarism.shtml> (Indiana University's Writing Tutorial Services). It is not clear, however, whether students are required to read and understand these helpful resources.

119. See, e.g., D. A. Thomas, *How Educators Can More Effectively Understand and Combat the Plagiarism Epidemic*, 2 BYU EDUC. & L. J. 421 (2004). See also Jon Marcus, *Foreign Student Rule-Breaking: Culture Clash or Survival Skills?* Oct. 6, 2011, available at <http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=417650&c=1>.

(for public institutions) and fundamental fairness (for private institutions). Courts have upheld decisions made using a relatively informal process where a neutral, objective decision-maker meets with the student, explains the alleged misconduct, allows the student to respond, and then makes the decision. Allowing the student to appeal that decision will reinforce the fairness of the process.

C. Reinforce the institution's emphasis on academic integrity.

Requiring that faculty include a statement on course syllabi regarding academic integrity and reminding students where the policy can be located can impress upon students the professor's interest in and concern for academic integrity. Asking faculty to spend some class time discussing academic integrity should also heighten student awareness of the importance of compliance with the integrity policy. Some institutions require students to sign a statement that they have read, understand, and followed the institution's honor code or academic integrity policy, either at the beginning of the academic year or when each examination or paper is handed in.¹²⁰

Finally, faculty can make it more difficult for students to commit academic integrity offenses by varying assignments each time they teach the class, using digital resources, such as Turnitin.com, and utilizing multiple versions of examinations.¹²¹ Scholars have concluded that faculty efforts to reduce cheating or plagiarism can have positive effects on student compliance with academic integrity policies.¹²²

Despite the fact that colleges and universities prevail virtually all the time when a student challenges an academic integrity violation, these lawsuits could be minimized, if not completely avoided, if colleges and universities placed more emphasis, time, and resources toward educating students about academic integrity and reinforcing its importance. In the absence of this heightened attention to academic integrity, it is likely that student violations will continue and academe will be tarnished as result.

120. See, e.g., the statement that appears on examinations at the University of Virginia, available at <http://www.virginia.edu/uvatours/shorthistory/code.html>. See also Jeffrey R. Young, *Coursera Adds Honor-Code Prompt in Response to Reports of Plagiarism*, CHRON. HIGHER EDUC. Aug. 24, 2012, available at <http://chronicle.com/blogs/wiredcampus/coursera-adds-honor-code-prompt-in-response-to-reports-of-plagiarism/39328>. Coursera, a company offering free online courses, experienced substantial amounts of plagiarism in some of the courses it offered. *Id.* It has added a requirement that students certify that the answers on the assignments they submit are their own work and that all external sources used have been acknowledged. *Id.*

121. See, e.g., Anita Banerji, *Professors Could All but Wipe Out Student Cheating, Study Finds*, CHRON. HIGHER EDUC., July 9, 1998, available at <http://chronicle.com/article/Professors-Could-All-but-Wipe/104621/>.

122. See McCabe, Trevino and Butterfield, *supra* note 1, at 229.

CLS v. MARTINEZ AND COMPETING LEGAL DISCOURSES OVER THE APPROPRIATE DEGREE OF JUDICIAL DEFERENCE TO THE CO-CURRICULAR REALM

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I. INTRODUCTION

Public colleges and universities have faced legal challenges in recent years from members of student organizations testing the legal permissibility of institutions conditioning official recognition for student

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groups on adherence to campus nondiscrimination rules.¹ Group members have argued in litigation that campus nondiscrimination rules impinge on their rights related to speech, association, and religion. Legal wrangling over nondiscrimination policies for student organizations reached a high point when a closely divided Supreme Court, in a five-to-four decision, upheld a law school's nondiscrimination policy in *Christian Legal Society v. Martinez*.² The case highlighted glaring differences among Court justices regarding how to interpret the factual issues presented in the record,³ the constitutional standards that should apply to the challenged nondiscrimination policy and, more generally, the extent of judicial deference that courts should extend to institutional decision-making.

This article examines the legal and ideological divisions that existed between the justices in the majority and those in the dissent, by comparing and contrasting the competing opinions from *Martinez*. While much of the article's assessment of the opinions is representative of methods of legal analysis commonly used by attorneys, this article looks to analytical approaches used in qualitative research, specifically methods and concepts associated with discourse analysis. Guided by discourse analysis methods, the article explores the markedly differing ways that the majority and dissenting justices relied on precedent, their competing interpretations of the facts and legal issues presented in the case, and their conflicting characterizations of colleges and universities in relation to nondiscrimination efforts. In examining the divergent legal and factual interpretations at play in *Martinez*, a key goal of the article is to consider the potential legal implications for colleges and universities depending on whether the views of the majority or those of the dissent ultimately prevail in future case law.⁴

1. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009); *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026 (D. Mont. 2009).

2. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2978 (2010).

3. For commentary on this issue, see, for example, Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631, 636 (2011), who discusses how ". . . the extraordinary potshots and retorts between the opinions revealed the heightened tensions between the majority and dissenting Justices."

4. The issue of these competing views arising in future litigation is, in fact, still very relevant in relation to the kind of institutional nondiscrimination policy under scrutiny in *Martinez*. In the decision, the Supreme Court considered the permissibility of an accept-all-comers policy. The focus on such a specific type of policy left unresolved whether a college or university may impose a nondiscrimination rule on student organizations that prohibits membership discrimination on certain grounds, such as religion or sexual orientation, but permits membership exclusion on bases not prohibited by the rule. The U.S. Court of Appeals for the Ninth Circuit has already approved the legal permissibility of such a narrower nondiscrimination policy, and

The article discusses in Part II how discourse analysis helps guide and structure consideration of the *Martinez* opinions. To provide context, Part III provides an overview of the decision from a more conventional legal viewpoint. The article then turns in Part IV to an examination of *Martinez* from a perspective influenced by discourse analysis. In Part V, the article considers the potential legal consequences for higher education depending on whether the stances of the justices in the majority or those in the dissent succeed in future legal decisions. The article concludes in Part VI by underscoring how the competing legal discourses at play in *Martinez* represent not only legal disagreement over college and university nondiscrimination efforts in the student organizational context, but reflect broader discord among justices of the Supreme Court regarding judicial attitudes toward higher education.

II. LOOKING TO DISCOURSE ANALYSIS WHILE COMPARING AND CONTRASTING OPINIONS IN *CLS v. MARTINEZ*

A striking feature from *Martinez* involves how completely in opposition the majority and dissenting justices were in terms of the legal issues at stake, the constitutional standards that should govern colleges' and universities' nondiscrimination policies, and even how to interpret factual issues contained in the record. The competing opinions produced in the decision offer rich data for analyzing the manner in which the majority and concurring opinions competed against the dissenting opinion for intellectual dominance and legitimacy, especially as the opinions capture some of the polarizing political discourse prevalent in the United States regarding higher education institutions.

The authors borrowed from methods and concepts associated with discourse analysis to guide their examination of the decision's opinions in an effort to analyze the clashing views of the justices in *Martinez* in a systematic way. Discourse analysis is the study of the way language (or other forms of communication such as images) is used to describe and build social activities.⁵ Because language is used to describe common aspects of society, the significance and power relations undergirding language often go unarticulated.

Multiple approaches exist to discourse analysis, and the authors looked to one with an emphasis on the analysis of written text and the

other legal challenges to these types of institutional nondiscrimination rules are likely to emerge. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011).

5. See generally NORMAN FAIRCLOUGH, *DISCOURSE AND SOCIAL CHANGE* (1992); see also JAMES PAUL GEE, *HOW TO DO DISCOURSE ANALYSIS: A TOOLKIT* (2011); JAMES PAUL GEE, *AN INTRODUCTION TO DISCOURSE ANALYSIS THEORY AND METHOD* (2nd ed. 2005).

accompanying concept of intertextuality and hegemony.⁶ Intertextuality refers to the understanding that no text is produced in isolation, but, rather, reflects a complex set of relationships between other texts and cultural elements.⁷ In the context of discourse analysis, hegemony refers to the power that dominant groups assert over others;⁸ for example, one group may be the “voice of authority” over other groups. From such a perspective, the Supreme Court represents a dominant group asserting its right over a privileged discourse, namely legal language, to assert what are justifiable practices at colleges and universities in the regulation of student organizations. The competing opinions in *Martinez* provide insight into the struggle for dominance (hegemony) between the justices in the majority and those in the dissent.

It is important to note that in looking to discourse analysis, the goal was not to supplant methods of case interpretation often relied upon by legal scholars. Rather, the authors had the more modest aim of seeking to complement conventional legal analysis of the *Martinez* opinions. Accordingly, the authors do not claim that this approach to analyzing the cases necessarily results in insights dramatically different from those gained when attorneys and legal scholars typically analyze and interpret cases. But, looking to discourse analysis may help to provide a systematic approach when considering the *Martinez* opinions and also result in an orientation to language in legal opinions somewhat distinct from that often taken by attorneys when reading cases.

Following the suggestion that discourse analysis is best undertaken from an interdisciplinary perspective,⁹ the authors come to higher education with differing disciplinary and professional perspectives. While two of the authors are attorneys focusing on law and policy issues in higher education, the other is a higher education practitioner and scholar who relies primarily on qualitative research methods. Two of the authors, one an attorney and one not, coded the four opinions in *Martinez*. “Coding” is used to refer to the creation of separate documents that, based on themes and topics of interest, identified relevant language and passages from which to compare and contrast Justice Ginsburg’s majority opinion,¹⁰ the concurring opinions written by Justices Stevens¹¹ and Kennedy,¹² and the dissenting opinion authored by Justice Alito.¹³

6. See generally FAIRCLOUGH, *supra* note 5.

7. *Id.* at 101–05.

8. *Id.* at 93–96.

9. See generally FAIRCLOUGH, *supra* note 5.

10. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978 (2010).

11. *Id.* at 2995 (Stevens, J., concurring).

12. *Id.* at 2998 (Kennedy, J., concurring).

13. *Id.* at 3000 (Alito, J., dissenting).

Because both the authors read the data (i.e., opinions) prior to the formation of a codebook, they approached coding with a shared view of the legal discourses under consideration as a hegemonic struggle within the institution of law about the role of colleges and universities and the appropriate degree of judicial deference with regards to the co-curricular realm and issues involving diversity and nondiscrimination. The authors were especially interested in coding for themes related to the following hegemonic cultural struggle: To what extent should legal standards support or restrain institutional nondiscrimination efforts in the student organizational realm? That is, should courts assume a level of trust and deference to colleges and universities in reviewing nondiscrimination policies applicable to student groups or should they operate from a more circumspect position? To help better contextualize the results from the coding of the opinions, the article will review the specific legal issues at play in *Martinez*.

III. OVERVIEW OF LEGAL ISSUES AT STAKE IN *CLS V. MARTINEZ*

In *Martinez*, a chapter of the Christian Legal Society (CLS), which was affiliated with the national group of the same name, initiated a lawsuit against Hastings College of Law after the group's rejection by the law school to become registered as an official student organization.¹⁴ Recognized student organizations at the law school were eligible for a variety of benefits, including access to funding, the ability to send out mass emails, and access to law school equipment and facilities.¹⁵ As a nonregistered student organization, CLS still had access to school facilities to hold meetings and could make announcements on designated bulletin boards and chalk boards.¹⁶ The national CLS organization, with which the Hastings student group had formed an affiliation, required chapters to have members sign a "Statement of Faith."¹⁷ Under the standards of the Statement, the Hastings CLS intended to deny membership to students who refused to sign the Statement, condoned sex outside of marriage, demonstrated "unrepentant homosexual conduct," or disagreed with other religious tenets of the group.¹⁸

Following its denial as a recognized student organization, members of the Hastings CLS initiated a lawsuit, claiming that the action violated members' rights to freedom of speech, religion, and expressive association.¹⁹ The group's challenges proved unsuccessful in federal

14. *Id.* at 2981.

15. *Id.* at 2979.

16. *Id.* at 2981.

17. *Id.* at 2980.

18. *Id.*

19. *Id.* at 2981.

district court and with the U.S. Court of Appeals for the Ninth Circuit.²⁰ Other student groups, however, were successful in legal challenges against institutional nondiscrimination policies.²¹ Seeking to resolve conflicting decisions among federal courts regarding the appropriate standards to evaluate institutional regulation of student organizations, the Supreme Court accepted the *Martinez* case for review.

In considering the case, the Supreme Court could look to several of its previous decisions that had dealt with student organizations. These cases established that the First Amendment, as well as other constitutional protections, applies to the recognition and regulation of student groups at public colleges and universities. In *Healy v. James*,²² for example, the Supreme Court rejected the position that non-recognition of a student organization posed no First Amendment violation because the group could still meet off campus.²³ While making clear that First Amendment principles apply to institutional regulation of student groups, the Court in *Healy* also stated that public colleges and universities possess discretion to prohibit associational activities that “infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”²⁴

In formulating and refining First Amendment standards applicable to institutional regulation of student organizations, the Supreme Court has relied on its decisions dealing with the regulation of government owned property (i.e. its forum cases).²⁵ Some types of public property, such as streets or sidewalks, are deemed traditional public forums and legally recognized as places historically open to speech.²⁶ Restrictions on the content of speech in a public forum are subject to heightened judicial review.²⁷ Other types of forums are considered nonpublic and are not generally open to the public, with the government possessing considerable control over speech-related issues in such a forum. The Supreme Court has also recognized forums that are voluntarily created by the government but are restricted to certain groups, such as students, and, depending on the

20. *Id.*

21. *See, e.g.*, *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (holding that university nondiscrimination policy violated members’ rights of expressive association).

22. 408 U.S. 169 (1972).

23. *Id.* at 169.

24. *Id.* at 189.

25. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000).

26. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010).

27. *Id.*

circumstances, limited to certain speech topics.²⁸

Whether in the context of virtual or physical space, the Supreme Court has looked to its forum standards in evaluating the authority possessed by colleges and universities over forums they have created for student groups.²⁹ The Court has held that public colleges and universities may not favor or disfavor particular viewpoints once a campus forum has been created for students.³⁰ For example, an institution may choose to designate a particular student forum for the discussion of political topics, but it could not then choose to grant recognition to the campus Republicans and then deny it to the campus Democrats based on the political views of the second group. In *Rosenberger v. Rector and Visitors of University of Virginia*,³¹ the Supreme Court held that a university could not deny funding to a student publication that sought to advocate a religious viewpoint.³² Under viewpoint neutrality standards, the Supreme Court has also held that public colleges and universities are permitted to use mandatory student fees to support speech by recognized student organizations, as long as funds are distributed in a viewpoint neutral way.³³

Questions regarding college and university authority over student groups persisted following cases such as *Rosenberger*, particularly in light of the Court's decision in *Boy Scouts of America v. Dale*,³⁴ and its limitation on the application of state nondiscrimination standards to private groups. In *Dale*, the Supreme Court held that individuals associated with a Boy Scout troop possessed a First Amendment right to dismiss a scoutmaster because he was gay.³⁵ CLS argued in *Martinez* that its members occupied a legally analogous position as that faced by the Boy Scouts in *Dale*.³⁶ In cases preceding the Supreme Court's decision in *Martinez*, lower federal courts had reached conflicting conclusions regarding the legal permissibility of imposing nondiscrimination policies on student organizations.³⁷

In a five-to-four decision, the Court in *Martinez* affirmed the law school's authority to impose nondiscrimination standards on student groups

28. *Id.*

29. *Id.*

30. *See, e.g.*, *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995).

31. *Id.*

32. *Id.* at 819.

33. *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 217 (2000).

34. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

35. *Id.* at 643.

36. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2985 (2010).

37. *See, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009); *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026 (D. Mont. 2009).

seeking official institutional recognition.³⁸ Writing for the majority, Justice Ginsburg stated that the case involved the issue of whether a public law school could require officially recognized student organizations to “open eligibility for membership and leadership to all students.”³⁹ The opinion noted that previous decisions prohibited governmental actors, including those at public universities, from denying access to a limited public forum on the basis of an individual’s viewpoint.⁴⁰ The majority determined that the law school sought to impose an “accept-all-comers policy” on CLS in the enforcement of the institution’s nondiscrimination policy.⁴¹ The policy specifically prohibited discrimination on the basis of “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.”⁴² Rejecting arguments by CLS to the contrary, the majority accepted the law school’s position that an accept-all-comers requirement was how the law school applied the rule to student groups.⁴³

Looking to cases dealing with regulation of governmental property under its control, the majority opinion discussed that previous decisions had grouped governmental property into three types of forums: (1) traditional public forums; (2) designated public forums; and (3) limited public forums.⁴⁴ From these three categories, Justice Ginsburg’s opinion stated that the law school had created a limited public forum for student organizations.⁴⁵ For limited public forums, according to the opinion, a governmental actor may impose restrictions related to speech that are reasonable in light of the purposes served by the forum and that do not discriminate on the basis of viewpoint.⁴⁶

Despite CLS’s efforts, the majority in *Martinez* concluded that the associational rights cases like *Dale* did not provide the appropriate legal framework to assess the student organization’s First Amendment claims.⁴⁷ Instead, the majority determined that standards associated with the limited public forum proved better suited to evaluate institutional regulation of student organizations, with colleges and universities having to satisfy standards of reasonableness and viewpoint neutrality.⁴⁸

Among the primary justifications for using these standards, Justice Ginsburg explained, was that adoption of the legal standards advocated by

38. *Martinez*, 130 S. Ct. at 2978.

39. *Id.* at 2978.

40. *Id.* at 2984.

41. *Id.* at 2982.

42. *Id.* at 2979.

43. *Id.* at 2982.

44. *See id.* at 2984 n.11.

45. *Id.* at 2984 n.12.

46. *Id.* at 2984 n.11.

47. *Id.* at 2985–86.

48. *Id.*

CLS would void the less restrictive rules typically associated with regulation of limited public forums if colleges and universities also had to routinely satisfy the standards from the associational rights cases like *Dale* in regulating student organizations.⁴⁹ Additionally, the opinion stated that the situation facing the student group fit “comfortably within the limited-public-forum category” as CLS was only facing “indirect pressure to modify its membership policies” to receive a governmental subsidy.⁵⁰ The organization could still exist and continue to rely on discriminatory membership criteria if it chose to forego the benefits provided by official institutional regulation.⁵¹

By applying the standards of the limited public forum, the majority held that the law school’s policy satisfied constitutional requirements of reasonableness and viewpoint neutrality.⁵² According to the majority opinion, the policy met the reasonableness prong in seeking to make sure that all students had access to co-curricular “leadership, educational, and social opportunities” and also promoted bringing individuals together from diverse backgrounds.⁵³ The accept-all-comers requirement also permitted the law school to enforce its nondiscrimination standards without having to conduct an inquiry into a group’s reasons or motivations for any membership restrictions.⁵⁴ Turning to viewpoint neutrality, Justice Ginsburg explained that the policy easily satisfied this standard because the accept-all-comers requirement applied equally to all groups, regardless of the views expressed.⁵⁵

In contrast, the dissenting justices rejected the notion that in reality the policy actually operated on an accept-all-comers basis.⁵⁶ But, even if accepting that the law school’s standards operated in this manner, the dissenters still disagreed that the policy satisfied constitutional requirements.⁵⁷ Writing for the dissenting justices, Justice Alito described the situation facing CLS as akin to that at issue in cases like *Healy* and *Dale* and represented a substantial burden on students’ associational rights.⁵⁸ Justice Alito stated that the institution created a forum for students analogous to “the same broad range of private groups that nonstudents may form off campus.”⁵⁹ The accept-all-comers policy subverted such an effort

49. *Id.* at 2985.

50. *Id.* at 2986.

51. *See id.*

52. *Id.* at 2991, 2993.

53. *Id.* at 2989.

54. *Id.* at 2990.

55. *Id.* at 2994.

56. *Id.* at 3001 (Alito, J., dissenting).

57. *Id.* at 3010.

58. *Id.* at 3008–10.

59. *Id.* at 3013.

and ran afoul of cases such as *Dale*, argued Justice Alito, because it prevented student organizations, as expressive associations, from excluding individuals in the same manner than if the government sought to apply such a standard to private groups outside of a campus environment.⁶⁰ The dissenting justices also argued that it appeared that the policy served as a pretext to silence CLS on the basis of the group's views.⁶¹

Martinez reveals decidedly different legal conclusions on the part of the majority and the dissenting justices, as well as contradictory interpretive reactions to the facts presented in the case. Considering the conflicting views or narratives presented in the decision, *Martinez* provides a context to examine competing judicial perceptions of higher education institutions in relation to nondiscrimination initiatives, and of colleges and universities more generally. With these aims in mind, the paper now turns to assessment of the legal narratives jockeying for dominance in *Martinez* through a perspective influenced by discourse analysis.

IV. COMPETING LEGAL DISCOURSES IN *CLS v. MARTINEZ*

After coding the four opinions in *Martinez* in the manner discussed in Part II, three themes seemed especially cogent to the authors. First, the justices, both in the majority and in the dissent, engaged in a remarkably strident dispute over the correct interpretation of issues and facts contained in the record, with this conflict seemingly undergirding the deeply contrasting ideological perspectives in contention. The second theme, which reflected contrasting judicial attitudes toward colleges and universities, including co-curricular situations, involved fundamental disagreement over which prior cases and legal standards should govern review of the law school's nondiscrimination policy. Third, the majority and dissenting justices employed ideologically distinct rhetoric in relation to colleges and universities generally, as well as to the specific nondiscrimination policy at issue in the case.

A. Competing Interpretations of the Record

While the record represented a shared text from a discourse analysis perspective, the majority and dissenting justices disagreed significantly over issues involving its correct interpretation. A basic point of divergence dealt with the actual nondiscrimination policy before the Court and whether the record supported the allegation that the law school had unfairly applied its nondiscrimination policy to CLS in relation to other student groups.

Justice Ginsburg's majority opinion characterized the case as involving the issue of whether a public law school could require officially recognized

60. *Id.* at 3010.

61. *Id.* at 3017.

student organizations to “open eligibility for membership and leadership to all students.”⁶² The majority accepted the law school’s position that, through the institution’s nondiscrimination policy as actually applied, it sought to impose an “accept-all-comers policy” on CLS (and all other student groups).⁶³ The majority also appeared amenable to the law school’s arguments that certain kinds of membership standards not based on status or belief, such as requiring members to pay dues, did not violate the accept-all-comers nature of the nondiscrimination rule.⁶⁴

The majority opinion criticized the dissent and CLS for arguing that the law school had not actually followed an accept-all-comers policy.⁶⁵ According to Justice Ginsburg’s opinion, CLS had agreed to a stipulation that the law school enforced such a policy.⁶⁶ Justice Ginsburg stated, “[t]ime and again, the dissent races away from the facts to which CLS stipulated.”⁶⁷ Justice Ginsburg referred at one point to CLS’s “unseemly attempt to escape from the stipulation and shift its target to Hastings’ policy as written [rather than as actually applied].”⁶⁸ In terms of how the law school enforced the policy against CLS, the majority also argued that Justice Alito’s dissent “present[ed] a one-sided summary of the record evidence . . . an account depending in large part on impugning the veracity of a distinguished legal scholar and a well respected school administrator.”⁶⁹

Of the two concurring opinions, Justice Stevens’ also weighed in on issues related to the record. He noted that, “[t]he Court correctly confines its discussion to the narrow issue presented by the record. . . .”⁷⁰ His opinion rejected the view that the record supported the assertion that the law school adopted the policy as a means to target the views of CLS:

There is . . . no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views. The policy’s religion clause was plainly meant to promote, not to undermine, religious freedom.⁷¹

While acknowledging that the nondiscrimination policy could affect

62. *Id.* at 2978.

63. *Id.* at 2979.

64. *See id.* at 2980 n.2.

65. *Id.* at 2983.

66. *Id.* at 2982.

67. *Id.* at 2983.

68. *Id.* at 2984.

69. *Id.* at 2995 n.29.

70. *Id.* at 2995 (Stevens, J., concurring).

71. *Id.* at 2996.

religious student organizations more than other types of groups, Justice Stevens stated that “there is likewise no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations.”⁷²

Justice Alito’s dissenting opinion offered a pointedly different interpretation of the record in relation to the policy under consideration and to the law school’s apparent treatment of CLS.⁷³ It charged the majority with offering “a misleading portrayal of this case” in relation to the law school’s activities and noted that the school had never previously denied recognition to a student organization.⁷⁴ According to Justice Alito, “the record is replete with evidence that [at least until 2005,] Hastings routinely registered student groups with bylaws that limited membership and leadership positions to those who agreed with the groups’ viewpoints.”⁷⁵

His opinion argued that the law school fabricated the concept of an accept-all-comers requirement only in response to the litigation brought by CLS members.⁷⁶ Whatever the actual policy supposedly followed by the law school, the dissenting opinion also contended that the record supported the view that the law school had treated CLS differently from other groups, ostensibly as a means to squelch the organization’s religious views.⁷⁷ According to the dissent, “[e]ven if it is assumed that the policy is viewpoint neutral on its face, there is strong evidence in the record that the policy was announced as a pretext.”⁷⁸ Additionally, Justice Alito chastised the majority for distorting the record regarding the impact of non-recognition on CLS, arguing that the facts demonstrated that the law school had actually not permitted CLS any meaningful use of school facilities as a nonregistered student organization.⁷⁹

The competing opinions in *Martinez* reveal a tale of two seemingly different records. The majority interpreted the record as establishing that the law school acted impartially and consistently in enforcing its nondiscrimination standards for students groups and its treatment of CLS. In contrast, the dissent concluded that the record supported the view that the law school altered its formal policy in response to litigation concerns and likely targeted CLS in an unfair manner to silence the group’s religious views. As developed in Part V, this disagreement is indicative of more fundamental differences in how the justices view the appropriate role of the

72. *Id.*

73. *Id.* at 3000 (Alito, J., dissenting).

74. *Id.* at 3001.

75. *Id.* at 3004.

76. *Id.* at 3003.

77. *See id.* at 3017.

78. *Id.* at 3016–17.

79. *Id.* at 3008.

judiciary in reviewing a college's or university's nondiscrimination rule as well as the likely motives of the law school in enforcing its nondiscrimination policy.

B. Clashing Stances Regarding Application of Precedent

Just as with issues involving the record, the majority and concurring opinions diverged extensively over how previous Supreme Court decisions should apply to the case. The majority concluded that associational rights cases like *Dale*⁸⁰ did not provide the appropriate legal framework to assess the student organization's First Amendment claims.⁸¹ Instead, as noted, the majority decided that the more permissive legal standards of reasonableness and viewpoint neutrality associated with the limited public forum proved better suited to evaluate institutional regulation of student organizations.⁸² In reaching this determination, the majority rejected the position that a student organization subjected to a campus nondiscrimination rule occupied an analogous legal position to other private groups in society facing governmental regulation of their membership, such as a church or the Boy Scouts. According to the majority, CLS only faced an "indirect pressure to modify its membership policies" in order to receive a government subsidy.⁸³ From this perspective, rather than experiencing coercion, CLS simply encountered a decision regarding whether to modify its membership criteria in exchange for the benefit (subsidy) associated with official recognition as a student group.⁸⁴ If it chose not to adhere to the nondiscrimination requirement, the group could still exist and meet off campus or take advantage of certain kinds of access to the law school granted to non-recognized groups. Additionally, it could make use of online social networking sites.⁸⁵

Justice Ginsburg described the law school policy as easily satisfying the limited forum standards of viewpoint neutrality and reasonableness.⁸⁶ In relation to reasonableness, the majority stressed the pedagogical goals of the policy, including the law school's striving to make sure that all students had access to co-curricular "leadership, educational, and social opportunities" and to bring individuals together from diverse backgrounds.⁸⁷ The majority determined that the policy also satisfied viewpoint neutrality because the accept-all-comers requirement applied

80. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

81. *Martinez*, 130 S. Ct. at 2985–86.

82. *Id.* at 2971.

83. *Id.* at 2986.

84. *Id.*

85. *Id.* at 2991.

86. *Id.* at 2975.

87. *See id.* at 2989.

equally to all groups, regardless of the views expressed.⁸⁸

In discussing how the policy satisfied pertinent legal standards, a key theme developed in Justice Ginsburg's opinion centered on situating the nondiscrimination policy within the broader context of institutional academic decision-making. In her opinion, Justice Ginsburg discussed the importance of courts deferring to colleges and universities and to educators in relation to pedagogical decisions.⁸⁹ Accordingly, the majority sought to align nondiscrimination policies for student organizations alongside Supreme Court decisions that emphasized noninterference by courts with academic (i.e., curricular) decisions in cases such as *Board of Curators of University of Missouri v. Horowitz*⁹⁰ and *Regents of University of Michigan v. Ewing*.⁹¹ Rather than treating co-curricular, pedagogically-related policies as legally distinct from curricular situations, Justice Ginsburg explained how "extracurricular programs are, today, essential parts of the educational process."⁹²

With this view of co-curricular decisions with pedagogical aims as deserving legally analogous judicial deference as that applied to curricular-based academic decisions, Justice Ginsburg's opinion stated that "special caution" was warranted in reviewing the policy to ensure that the Court showed appropriate legal consideration to the academic judgment of public colleges and universities.⁹³ Responding to views expressed in the dissenting opinion, the majority argued that "determinations of what constitutes sound educational policy or what goals a student-organization forum ought to serve fall within the discretion of school administrators and educators."⁹⁴

In furthering a depiction of the nondiscrimination standards at issue as an exercise of academic decision-making, the opinion describes the law school's policy as equivalent to an institution disallowing a professor from excluding students from a classroom based on their beliefs or status.⁹⁵ Rather than treating Hastings Law School acting merely as any other governmental entity in relation to the regulation of a limited forum, the Court promoted a view of the law school as fulfilling a special and distinct educative role in its regulation of student groups. In framing the regulation at issue within the general context of academic decision-making, the majority assessed these justifications in a deferential manner, one operating

88. *Id.* at 2975.

89. *Id.* at 2993–94.

90. 435 U.S. 78 (1978).

91. 474 U.S. 214 (1985).

92. *Martinez*, 130 S. Ct. at 2989.

93. *Id.*

94. *Id.* at 2989 n.16.

95. *Id.* at 2989.

from an overall position of trust in relation to the announced and perceived motives of the law school.

Justice Stevens' concurring opinion describes the policy as seeking to "advance numerous pedagogical objectives," in a manner similar to the majority opinion.⁹⁶ Justice Stevens echoed the majority opinion's sentiments that the student group's access to a special forum on campus was not the same as a governmental regulation imposed in a "wholly public setting."⁹⁷ According to his opinion, a public college or university represented a special type of place, one with unique attributes that deserve recognition in assessing the First Amendment issues at stake:

The campus is, in fact, a world apart from the public square in numerous respects, and religious organizations, as well as all other organizations, must abide by certain norms of conduct when they enter an academic community. Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role. Some of those decisions will be controversial; many will have differential effects across populations; virtually all will entail value judgments of some kind. As a general matter, courts should respect universities' judgments and let them manage their own affairs.⁹⁸

As in the majority opinion, Justice Stevens emphasized that the limited public forum for student organizations created by the law school provided a means for it to advance multiple educational objectives, including those related to tolerance and openness.⁹⁹ The decision to impose a nondiscrimination policy represented an educational choice deserving of judicial noninterference to the extent possible. Perhaps even more forcefully than the majority opinion, Justice Stevens advanced a view of public colleges and universities as unique societal institutions deserving respect and deference from the courts, even when making educationally based decisions in co-curricular settings.¹⁰⁰

While relatively brief, Justice Kennedy's concurring opinion also emphasizes that the nondiscrimination policy was closely connected to educational interests.¹⁰¹ He suggests that the law school sought to encourage the sharing and debate of a wide variety of ideas, with such "vibrant dialogue . . . not possible if students wall themselves off from

96. *Id.* at 2997 (Stevens, J., concurring).

97. *Id.*

98. *Id.* at 2997–98.

99. *Id.* at 2997.

100. *Id.* at 2998.

101. *Id.* at 2999–00 (Kennedy, J., concurring).

opposing points of view.”¹⁰² His opinion describes the nondiscrimination policy as a function of educational decision-making.¹⁰³ As such, judicial scrutiny of the policy should not unduly interfere with the educational process and the autonomy that public colleges and universities should possess in the context of exercising academic judgment, including in co-curricular contexts.¹⁰⁴

Justice Alito’s dissenting opinion in *Martinez* concludes that precedent should apply in a strikingly different way to the legal issues at play in the case. A fundamental difference involved a determination that the law school’s authority over student groups, for purposes of the First Amendment, was legally akin to any other governmental actor’s regulation of a private entity.¹⁰⁵

Justice Alito’s opinion described the situation presented in the case as most similar to *Healy*,¹⁰⁶ a decision where the Supreme Court prohibited a university from denying a student group access to campus because institutional officials disapproved of the group’s political views.¹⁰⁷ The dissent urged that the *Martinez* case presented a similar situation to the one encountered by the Court in *Healy*, with Hastings Law School targeting “one category of expressive association for disfavored treatment: groups formed to express a religious message.”¹⁰⁸ In relation to deference to academic decision-making, Justice Alito wrote:

[The] *Healy* Court, unlike today’s majority, refused to defer to the college president’s judgment regarding the compatibility of “sound educational policy” and free speech rights. The same deference arguments that the majority now accepts were made in defense of the college president’s decision to deny recognition in *Healy* Unlike the Court today, the *Healy* court emphatically rejected the proposition that “First Amendment protections should apply with less force on college campuses than in the community at large.”¹⁰⁹

Besides *Healy*, the dissenting opinion also contended that *Dale* was applicable.¹¹⁰ According to the dissent, the legal situation facing CLS paralleled that encountered by the Boy Scouts in *Dale*. In making this point, Justice Alito stated that the majority erred in permitting the law

102. *Id.* at 3000.

103. *Id.* at 2999.

104. *Id.*

105. *Id.* at 3010–11 (Alito, J., dissenting).

106. *Id.* at 3008–09.

107. *Healy v. James*, 408 U.S. 169 (1972).

108. *Martinez*, 130 S. Ct. at 3010 (Alito, J., dissenting).

109. *Id.* at 3008.

110. *Id.* at 3014 (citing *Boy Scouts v. Dale*, 530 U.S. 640 (2000)).

school to place a nondiscrimination restriction on “a [student] forum that is designed to foster the expression of diverse viewpoints” when California would not be able under the First Amendment to “impose such restrictions on all religious groups in the State.”¹¹¹

While disagreeing that rules associated with a limited public forum should apply, the dissenting justices argued that the law school’s written policy failed under these standards as well, based on either the version of the nondiscrimination policy advanced by the majority or by the dissent.¹¹² Justice Alito’s opinion characterizes the policy as affecting only those groups advocating a religious viewpoint, while not impinging on the views of secular student groups.¹¹³ In contending that the policy violated standards of viewpoint neutrality, the opinion emphasizes the judiciary’s role in overseeing the action of public colleges and universities: “We have also stressed that the rules applicable in a limited public forum are particularly important in the university setting, where ‘the State acts against a background of tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.’”¹¹⁴

The dissenting justices, then, took a stance rejecting the view that the law school’s nondiscrimination policy merited substantial judicial deference because the standards at issue represented an exercise of academic judgment. For them, the policy did not represent an extension of academic judgment akin to the kinds of institutional decisions reviewed in cases such as *Ewing* and *Horowitz*. Instead, the dissenting justices sought to treat the law school as any other governmental actor seeking to regulate a private entity. Or, on somewhat alternative grounds, the dissent contended that courts should actually play a heightened role in ensuring that colleges and universities respect students’ speech and free exercise rights. As discussed in Part V, these competing views of judicial oversight of colleges and universities reflect deeply different views of contemporary higher education that go beyond the specific institutional policy at issue in *Martinez*.

C. Political and Diversity Rhetoric

Consideration of the contrasting discourses present in *Martinez* related to rhetoric on politics and diversity also stood out. The majority opinion, along with viewing the institution’s policy and actions favorably from a pedagogical perspective, also validated the school’s efforts to curtail discrimination as in alignment with overall public policy goals in

111. *Id.*

112. *Id.* at 3013.

113. *Id.* at 3011.

114. *Id.* at 3009 (quoting *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995)).

California.¹¹⁵ Accordingly, the justices in the majority characterized the law school's actions as situated within broader governmental efforts to curtail discrimination in society against various groups and individuals, including discrimination related to sexual orientation.¹¹⁶

According to Justice Ginsburg's opinion, the law school possessed a legitimate purpose in seeking to bring individuals together "with diverse backgrounds and beliefs" to exchange ideas in a way that "encouraged tolerance, cooperation, and learning among students."¹¹⁷ She notes that CLS's "predecessor organization . . . experienced these [kinds of] benefits first-hand when it [previously] welcomed an openly gay student as a member."¹¹⁸ In considering the interests of those students potentially subject to discrimination if CLS prevailed, the opinion points out that since mandatory fees were available to help support student organizations, it would be unfair to make students provide financial support to a group that could then deny them membership.¹¹⁹

Justice Stevens' concurring opinion directly challenges the dissenting justices for focusing on alleged religious discrimination of CLS members while failing to acknowledge legitimate governmental or educational concerns in responding to discrimination aimed at individuals for such reasons as their sexual orientation.¹²⁰ According to Justice Stevens, "Although the dissent is willing to see pernicious antireligious motives and implications where there are none, it does not seem troubled by the fact that religious sects, unfortunately, are not the only social groups who have been persecuted throughout history simply for being who they are."¹²¹

As long as satisfying basic constitutional requirements, Justice Stevens argued that the law school should be able to enact standards meant to resist discrimination and it did not have to subsidize discriminatory student organizations. While a "free society must tolerate" groups that "exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women," it is not required to "subsidize them, give them its official imprimatur, or grant them equal access to law school facilities."¹²²

In contrast to the themes present in the majority and concurring opinions related to the importance of supporting the law school's nondiscrimination

115. *Martinez*, 130 S.Ct. at 2990-91.

116. *Id.* at 2991 ("[S]o long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing.").

117. *Id.* at 2990.

118. *Id.* at 2990, n.19.

119. *Id.* at 2992.

120. *Id.* at 2997, n.3 (Stevens, J., concurring).

121. *Id.*

122. *Id.* at 2998.

efforts, Justice Alito's opinion for the dissenting justices states that the decision resulted in "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."¹²³ The opinion charged that the majority had given institutions a "handy weapon for suppressing the speech of unpopular groups."¹²⁴

Responding to the assertion that the law school's policy promoted "tolerance, cooperation, learning, and the development of conflict-resolution skills," the dissenting opinion countered: "These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith."¹²⁵ Quoting an amicus brief submitted by a group called "Gays and Lesbians for Individual Liberty," the opinion argued that goals related to tolerance and cooperation were best achieved through a "confident pluralism that conduces to civil peace and advances democratic consensus-building" rather than efforts to abridge First Amendment rights.¹²⁶

Just as with interpretive issues involving the record and precedent, the dissent also differs significantly from the majority regarding how to portray the nature and impact of the law school's nondiscrimination policy. This disagreement reflected far different conceptualizations, both legally and ideologically, of the purposes and impact of the nondiscrimination standards at issue. As with the other themes previously discussed, out of these conflicting judicial stances, the one that prevails over the long term in relation to judicial decision-making potentially has important consequences for how courts respond to institutional actions, both in curricular and co-curricular settings. The article now turns to the consideration of these possible implications.

V. REFLECTIONS ON COMPETING LEGAL DISCOURSES IN *CLS v. MARTINEZ*

The competing legal discourses in *Martinez* touch on intriguing and important issues regarding judicial conceptions of and attitudes towards colleges and universities. As discussed by both supporters and critics of the majority opinion,¹²⁷ and also as shown in this analysis, the opinions reveal significant disagreement between the justices regarding college and university efforts to promote equality through nondiscrimination policies

123. *Id.* at 3000 (Alito, J., dissenting).

124. *Id.* at 3001.

125. *Id.* at 3015.

126. *Id.* at 3016.

127. See generally, e.g., Theresa M. Beiner, *Shift Happens: The U.S. Supreme Court's Shifting Antidiscrimination Rhetoric*, 42 U. TOL. L. REV. 37 (2010); William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657 (2011); Nice, *supra* note 3; William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 ED. LAW REP. 473 (2010).

versus the speech and association rights of religiously conservative groups.

More specifically, the competing discourses reveal a hegemonic struggle regarding whether discrimination on the basis of sexual orientation should be placed alongside other nondiscriminatory classifications, such as those based on race, or whether it may receive judicial approval, even when speech or associational rights are affected. While noting that institutional nondiscrimination goals on the basis of sexual orientation should not necessarily be viewed in a negative light, the dissenting justices in *Martinez* rejected the proposition that sexual orientation discrimination warrants any heightened judicial protection or deference in relation to governmental nondiscrimination efforts.

In fact, instead of directly speaking to the harms caused to those who face discrimination on the basis of their sexual orientation, the dissent emphasizes how the issues at stake in *Martinez* essentially involve marginalization of another group of individuals, those students with conservative religious beliefs. As one author points out, Justice Alito's opinion, though stopping short, "came very close to suggesting that religious adherents might be a suspect class deserving of heightened protection."¹²⁸ Accordingly, the issue of which group of students most legitimately deserve judicial protection represents a basic fault line between the majority and the dissent, helping to shape each side's legal discourse.

The ideological fault lines present in *Martinez* contributed to and were highlighted in another significant area of legal contention in the case. The justices were also divided over whether institutional co-curricular rules with a pedagogical purpose should receive the same kind of judicial deference as given to academic decisions in curricular contexts. From one perspective, the outcome in *Martinez* comports with previous cases affirming judicial deference to academic decision-making in cases such as *Ewing*¹²⁹ and *Horowitz*.¹³⁰ But, the case adds an important new wrinkle to this line of precedent in explicitly placing co-curricular activities under an institution's academic or pedagogical umbrella.

While in *Board of Regents of University of Wisconsin System v. Southworth* the Supreme Court recognized the special nature of the higher education environment in the context of a mandatory student fee program,¹³¹ the majority opinion in *Martinez* went even further. It emphasizes that the substantial judicial deference typically given to academic judgments should also extend to co-curricular contexts. As

128. Nice, *supra* note 3, at 668. She also discusses how "this sense of fundamentalist Christians or fundamentalist religious adherents as a suspect class permeates the logic of Justice Alito's dissenting opinion." *Id.*

129. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

130. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

131. 529 U.S. 217, 231–32 (2000).

Justice Ginsburg states in the majority opinion: “Students may be shaped as profoundly by their peers as by their teachers. Extracurricular activities . . . facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self.”¹³²

Depending on the extent to which courts in future legal decisions incorporate the views articulated by the majority regarding the co-curricular realm, the majority’s characterization of co-curricular decisions as academic judgments deserving substantial judicial deference may prove one of the more noteworthy legal legacies of *Martinez*. Such language seemingly represents an expansion of the judicial deference shown in decisions involving academic judgment in clearly curricular settings in cases such as *Ewing* and *Horowitz*. Accordingly, an issue to follow in future litigation involves the extent to which courts actually look to the *Martinez* decision as a basis to provide heightened judicial deference to co-curricular decision-making.

In considering the deference shown in the majority and concurring opinions to the law school and its nondiscrimination policy, one can describe these justices as having displayed a substantial degree of trust in public colleges and universities. The majority opinion emphasized that colleges and universities offer support to student organizations as a way to enhance student speech opportunities and to enrich the academic experience.¹³³ Underlying the majority’s acceptance of the policy was a willingness to view public colleges and universities as serving a special societal role and that they may be trusted to treat their students in an even-handed manner. As such, the majority situates its approval of the law school’s nondiscrimination policy within a broader context of overall judicial confidence in and deference to public colleges and universities in relation to academic decisions, which also encompasses co-curricular environments. Thus, Justice Ginsburg’s majority opinion casts the law school’s efforts to promote tolerance in the regulation of student organizations as a reasonable and legitimate exercise of pedagogical judgment, the kind that has routinely received judicial deference.

In contrast, the dissenting justices believed that colleges and universities were not necessarily deserving of any special kind of judicial deference in relation to the treatment of students in the context of co-curricular activities. The case, they determined, did not fall into the same category as other Supreme Court decisions that emphasize the restraint that courts should exercise when reviewing academic decisions.¹³⁴ Instead, the dissenting justices treat the student forum created by the law school as

132. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2999 (2010).

133. *Id.* at 2990.

134. *Id.* at 3008 (Alito, J., dissenting).

involving action by a governmental entity in general, rather than within the context of a special educational environment. From this vantage, the law school's actions related to its nondiscrimination policy and regulation of student organizations did not deserve any special judicial deference.¹³⁵ In fact, the opinion contends that courts arguably need to play an especially vigilant role in protecting students' speech and free exercise rights at public colleges and universities.

As shown in this analysis, the dissenting opinion did not limit itself to depicting the law school as simply a governmental entity undeserving of any special judicial deference in this instance; it went further, describing the law school as seeking to promote liberal views and ideas. Additionally, the dissent did not confine its characterizations of the nondiscrimination policy and the motives behind it to Hastings Law School, with the opinion contending that liberal prerogatives dominate higher education in general.¹³⁶ These views arguably show a degree of distrust and disapproval by the dissenting justices regarding colleges and universities in a more universal sense.

Under the narrative (discourse) advanced by the dissenting opinion, CLS occupied the position of an unpopular minority group suffering from discrimination at the hands of a law school seeking to promote political correctness. Again, rather than only focusing on events at the law school, Justice Alito characterizes the institution's actions as illustrative of a broader societal problem, from the perspective of the dissent, with political correctness and left-leaning indoctrination efforts at the nation's colleges and universities.

The judicial attitude of the dissenting justices in *Martinez* towards colleges and universities contrasts significantly with that of the majority. While the case focuses on co-curricular issues in relation to the regulation of student organizations, the overall lack of trust in higher education institutions shown by the dissenting justices could easily be applied to other contexts, including curricular settings.

Depending upon the Court's future membership, language in the dissenting opinion suggests the possibility of a weakening of judicial deference to institutional decision-making, including in relation to academic decisions in curricular settings. Just as the majority opinion provides the possibility for an expansion of judicial deference to colleges and universities in co-curricular contexts, the dissenting justices articulate a rationale to restrict institutional discretion that could be applied to curricular matters in addition to co-curricular ones. In sum, the dissenting opinion suggests that courts have an important role to play in ensuring that left-leaning colleges and universities do not encroach on the speech and

135. *Id.*

136. *Id.* at 3000.

religious rights of students with conservative beliefs.

The competing legal discourses in *Martinez* can be viewed as encapsulating broader societal debates regarding nondiscrimination on the basis of sexual orientation and common allegations that colleges and universities routinely seek to indoctrinate students with left-leaning values. The point of this article, however, has not been to wade directly into these debates; rather the analysis of the *Martinez* opinions highlights how such larger societal debates surface in legal opinions, affecting the ways in which the judiciary conceptualizes and interprets the legal issues at stake.

Our analysis suggests that the distinct ideological differences dividing the justices played an important role regarding how the majority and the dissent approached the legal issues under consideration and the correct interpretation of factual issues presented in the decision. The competing opinions in *Martinez* demonstrate two different discourses regarding the appropriate level of trust and deference the judicial system should extend to colleges and universities in making decisions in the area of academics, including in co-curricular situations. The outcome of this hegemonic struggle has potential importance not only for institutional nondiscrimination efforts and regulation of student organizations, but also more broadly in relation to the appropriate level of judicial deference that should exist for academic expertise and judgment.

VI. CONCLUSION

The authors believe that the type of analysis undertaken in this study will be beneficial in better understanding evolving and competing judicial notions of the appropriate legal treatment of colleges and universities, in both curricular and co-curricular settings. The analysis suggests significant legal and ideological differences between the justices regarding higher education. Depending on which view ultimately prevails, the Supreme Court may demonstrate a greater willingness to extend judicial deference to the co-curricular realm. Alternatively, the lack of trust in colleges and universities displayed by the dissenting justices could indicate, depending on the Court's membership, the possibility of a contraction of judicial deference to academic decisions in the future.

The point of this article, as noted, has not been to "take sides" in the legal discourses competing for dominance in *Martinez*. Rather, the goal has been, borrowing from methods and concepts associated with discourse analysis, to analyze the *Martinez* opinions in a systematic manner and to consider the possible legal implications of competing judicial attitudes towards colleges and universities. The use of methods and concepts associated with discourse analysis contextualizes the competing views within a larger legal discourse related to academic decisions involving colleges and universities. Along with providing a means to consider legal conflict specifically involving institutional nondiscrimination standards addressing sexual orientation, this analysis assesses the potential

implications of the opinions in a more general sense in relation to higher education and the courts.

In particular, this article's approach to analysis led us to reflect on the explicit migration in the majority opinion of judicial deference from the curricular to the co-curricular realm. The authors suggest that this may prove to be one of the more enduring outcomes from *Martinez* and one that has not yet received substantial scholarly attention.¹³⁷ This method of analysis also helped to highlight the dissenting justices' seeming acceptance—and accompanying distrust—of colleges and universities as motivated by left-leaning goals and ideology. While stressing that the analysis largely reflected a standard approach to case reading and interpretation, the authors suggest that borrowing from methods and concepts associated with discourse analysis generates useful analytical insights. Other legal writers, including those concerned with legal issues involving higher education, may find value as well in examining legal opinions from a discourse analysis perspective.

137. The authors are, of course, in no way seeking to undervalue the contributions or quality of other scholarship that has dealt with *Martinez*, but, instead, only trying to point out how this analytical approach has hopefully helped to contribute some new facets to ongoing discussion and assessment of the decision. Additionally, the issue of deference to institutional authority existing in *Martinez* has been addressed to varying degrees by other authors. See, e.g., Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533 (2011) (providing extensive discussion of the concept of campus citizenship and institutional efforts to engage students beyond the classroom); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 912 (2011) (arguing that *CLS v. Martinez* should be considered among those association rights decisions in which the Supreme Court has shown “deference toward the government’s view on the importance of its measure”).

*THE CHICAGO TRIBUNE V. THE UNIVERSITY OF
ILLINOIS: THE LATEST ITERATION OF NEW
TEXTUALIST INTERPRETATION OF FERPA BY
THE FEDERAL COURTS*

SAM SCHMITT*
DAVID ARONOFSKY**

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INTRODUCTION

*The Chicago Tribune Co. v. The Board of Trustees of the University of Illinois*¹ is the most recent iteration of a trend in which the Family Educational Rights Protection Act (“FERPA”)² is interpreted by the federal courts according to New Textualism.³ The object of this approach is to interpret the meaning of a law’s text with text-linked or text-based sources rather than legislative history or Congressional intent.⁴ The last twenty years of federal court FERPA case law evidences a shift toward a textualist approach to FERPA interpretation whereby softer approaches to statutory interpretation: legislative history, Congressional intent, and policy objectives are secondary for resolving legal disputes in the federal judiciary. Consequently, FERPA interpretation by federal circuit courts has also become highly uniform.

This article begins with an explanation of the language and structure of FERPA. The Second Section reviews FERPA case law in the Supreme Court and federal circuit courts over the last twenty years. These cases demonstrate the Supreme Court’s preference for New Textualism and the influence of *Gonzaga University v. Doe*⁵ upon federal courts’ application of FERPA. Not only has Supreme Court preference for New Textualism herded the circuits away from softer approaches to statutory interpretation, *Gonzaga*’s treatment of Section 1983 causes of action has eliminated a major reason the federal courts have needed to go beyond FERPA’s text. Following *Gonzaga*, the federal circuit courts no longer need to determine

1. 680 F.3d 1001 (7th Cir. 2012) [hereinafter *Chicago Tribune*].

2. The Family Educational Rights Protection and Privacy Act, 20 U.S.C. § 1232g (2012).

3. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION*, 227 (2d ed., Foundation Press 2000) [hereinafter Eskridge, Frickey, & Garrett]. *Muhammed v. Barlow*, 488 Fed. App’x. 824, (5th Cir. 2012), is a more recent federal FERPA appeal dismissed for the plaintiff’s failure to prosecute.

4. Eskridge, Frickey, & Garrett, *supra* note 3, at 228. *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

5. 536 U.S. 273 (2002) [hereinafter *Gonzaga*].

whether Congress intended to create individually enforceable privacy rights.

This trend is borne out by recent FERPA litigation in the Seventh Circuit. Section Three of this article begins with a summary of the events leading to *The Chicago Tribune v. The University of Illinois*. Section Three continues with the U.S. district court decision,⁶ granting The Chicago Tribune Co. (“Tribune”) access to the records sought in its Illinois Freedom of Information Act (“FOIA”) request.⁷ Section Three concludes with a summary of the Seventh Circuit appeal,⁸ vacating the U.S. district court order for lack of subject matter jurisdiction. This article argues that the *Chicago Tribune* fits neatly into the federal court trend towards principally text-based interpretation of FERPA. Consequently, state courts faced with conflicts requiring the resolution of FERPA disputes to apply state law correctly can rely on a straightforward method for properly interpreting the federal law.

I. FERPA TEXT AND STRUCTURE

FERPA protects the integrity and privacy of education records by imposing two principal requirements on educational institutions that maintain those records as conditions for receiving federal money.⁹ Under the first of these requirements, educational institutions must allow students access to their own education records and an opportunity to contest any perceived inaccuracies.¹⁰ Under the second, an educational institution cannot have a policy or practice of disclosing a student’s education records or the “personally identifiable information” therein¹¹ without obtaining the

6. *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F. Supp. 2d 672, 673 (N.D. Ill. 2011) [hereinafter *Chi. Trib. v. U.I.*].

7. Freedom of Information Act, 5 I.L.C.S. § 140 (2009). The § 140/7 exemptions from disclosure section was amended shortly after U.I. denied the Tribune’s FOIA request. At the time the district court issued its decision, the “private information” exemption (§ 140/7(1)(b) – (c)) remained unchanged: “personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . .” See *Chi. Trib. v. U.I.*, 781 F. Supp. 2d at 674.

8. *Chicago Tribune*, 680 F.3d 1001 (7th Cir. 2012).

9. 20 U.S.C. § 1232g(a)-(b) (West 2010).

10. § 1232g(a)(1)(A)–(B). Section 1232g(a)(1)(C) limits students’ and parents’ rights to inspect documents maintained by the institution. § 1232g(a)(1)(D) provides for a waiver of a student’s right to access confidential recommendations. § 1232(a)(2) conditions the receipt of federal education funding on the requirement that educational agencies and institutions are provided a hearing in which the content of their records may be challenged. The same subsection allows parents to insert a written explanation “respecting the content of such records” into the file.

11. § 1232g(b)(1). The Secretary of Education regulations, not statute, define personally identifiable information. It includes but is not limited to “(a) The student’s name; (b) The name of the student’s parent or other family members; (c) The address

student's written consent.¹² Congress derives its authority to regulate access to education records in state and private educational institutions from the federal constitutional Spending Clause.¹³ That is, Congress conditions the receipt of federal education funding, including financial aid, upon compliance with FERPA's privacy and access provisions.

Once an educational institution accepts federal money from the Department of Education ("DOE"), FERPA subjects "education records" as defined by Section 1232g(a)(4)(B) to the access and confidentiality conditions summarized above. Education records are defined by statute as files "directly related to a student" that are "maintained by an educational agency or institution or by a party acting for the agency or institution."¹⁴

of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. § 99.3.

12. § 1232g(b). Section 1232g(b)(2) affords very similar prohibitions against disclosing personally identifiable information in education records in addition to the protections for the records themselves. There is a written consent and judicial order exception to this prohibition as well. § 1232g(b)(2)(A)–(B). Parental permission and consent requirements transfer to the student once he or she turns eighteen. § 1232g(d).

13. Spending Clause power, the power to lay and spend taxes, comes from the first clause of article 1, section 8 of the U.S. Constitution. *U.S. v. Butler*, 297 U.S. 1, 63 (1936) [hereinafter *Butler*]; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("Put simply, Congress may tax and spend.") [hereinafter *Sebelius*]. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987) [hereinafter *South Dakota*] (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 143–44 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)); *Sebelius*, 132 S. Ct. at 2579). Congress may achieve legislative objectives using the spending power provided it meets four requirements. *Id.* at 207–08 (exercise of general spending power must be pursuant of the general welfare, unambiguously made by Congress, related to federal interest in national projects or programs, and not barred by other constitutional provisions independent of a constitutional grant of federal funds) (citations omitted). In short, Congress can attach conditions to funds it distributes to states to achieve a wide range of policy goals that it might not be constitutionally empowered to regulate otherwise. *Sebelius*, 132 S. Ct. at 2600.

14. § 1232g(a)(4). Note, "student" is defined by § 1232g(a)(6) as "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution." See regulatory definition of "personally identifiable information," *supra* note 11.

Any record maintained by the educational institution meeting this definition is subject to the access requirements and privacy protections of FERPA unless the student consents to disclosure or a statutory exception applies.

Because of the threshold definitional requirements and exceptions, FERPA does not protect absolutely every educational record. For documents that meet the two elements above, FERPA creates four initial exceptions for education records that may be disclosed without consent. In short, records of instructional, supervisory, and ancillary personnel that are solely possessed by the person who made them; records maintained by law enforcement personnel for law enforcement purposes; human resource records of the institution's employees; and physician, psychologist, and psychiatrist records used only for the student's treatment are not subject to FERPA.¹⁵ In addition, an educational institution may publish "directory information" as defined in Section 1232g(a)(5) with proper notice to all students.¹⁶ These exceptions to records protected by FERPA carve out room for school officials to share records necessary for smooth operations while allowing student access and respecting confidentiality.

Subsection 1232g(b), conditioning the receipt of federal education money on an educational institution's non-release of education records, was implicated in *Chicago Tribune*. This subsection allows the release of education records with student consent or in the case of an exception to the "written consent requirement."¹⁷ School officials and teachers within the institution who have legitimate educational interests,¹⁸ officials at schools the student intends to attend,¹⁹ the U.S. Secretary of Education,²⁰ financial

15. § 1232g(a)(4)(B)(i) - (iv). Refer to this subsection of the law directly for completely nuanced outline of records that do not qualify under the definition of education records.

16. "The student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." § 1232g(a)(5)(A). Public notice must be given and a "reasonable period of time" afforded for a parent to request that the directory information not be disclosed. § 1232g(a)(5)(B).

17. The "written consent requirement" refers to the prohibition against disclosing student education records subject to FERPA without first obtaining the student or parent's written consent.

18. § 1232g(b)(1)(A).

19. § 1232g(b)(1)(B).

20. § 1232g(b)(1)(C). This section also allows access for the U.S. Comptroller General and state educational authorities. For more on complying with law enforcement requests for information under the PATRIOT ACT see Lee S. Strickland, Mary Minow, & Thomas Lipinski, *Patriot in the Library: Management Approaches When Demands for Information Are Received from Law Enforcement and Intelligence Agents*, 30 J.C. & U.L. 363 (2004).

aid administrators,²¹ state and local authorities,²² organizations conducting studies for or on behalf of educational institutions,²³ accrediting organizations,²⁴ parents of a dependent student,²⁵ emergency responders,²⁶ those subject to grand jury or law enforcement subpoenas,²⁷ and the Secretary of Agriculture²⁸ need not obtain written consent before accessing students' educational records subject to FERPA protections. The remaining sections of FERPA regulate administrative requirements,²⁹ enforcement of the provisions,³⁰ and specific applications of the law.³¹ The

21. "[I]n connection with a student's application for, or receipt of, financial aid." § 1232g(b)(1)(D).

22. § 1232g(b)(1)(E). This sub-section addresses disclosure to state and local authorities by straddling November 19, 1974 when FERPA was first amended. It grandfathers in reporting that was allowed prior to this date. § 1232g(b)(1)(E)(i). It adds additional privacy protections to a similar allowance for disclosure after this date. § 1232g(b)(1)(E)(ii).

23. § 1232g(b)(1)(F). This provision has the additional requirements that the information be collected (i) "for the *purpose* of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction;" (ii)(a) "if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations;" and (ii)(b) "such information will be destroyed when no longer needed for the purpose for which it is conducted." (emphases and tabulation added).

24. "[I]n order to carry out their accrediting functions . . ." § 1232g(b)(1)(G).

25. § 1232g(b)(1)(H).

26. "[I]n connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons . . ." § 1232g(b)(1)(I).

27. § 1232g(b)(1)(J).

28. "[O]r authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service . . ." § 1232b(1)(K).

29. State and federal education authorities are allowed access to student records for audit and evaluation of federally supported education programs under § 1232g(b)(3). A similar allowance is provided by § 1232g(b)(5). A record of entities requesting or receiving access to education records must be kept by the educational institution under § 1232g(b)(4)(A). Information can only be transferred to a requesting entity if that entity promises to guard the privacy of the information provided under § 1232g(b)(4)(B). Sections 1232g(b)(6)–(7) allow for the disclosure of information relating to convictions of violent or sex offenders. *See also* Benjamin F. Sidbury, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress Can Eliminate the Loophole*, 26 J.C. & U.L. 755 (2000). Section 1232g(c) governs student privacy pertaining to data gathering activities. Parents and students must be informed of their FERPA rights. § 1232g(e). Finally, the Secretary of Education must (and has established the Family Policy Compliance Office) establish an office and review board to hear alleged FERPA violations. § 1232g(g).

30. Section 1232g(f) authorizes the Secretary of Education to take "appropriate action" to enforce FERPA and "deal with violations."

31. Section 1232g(h) authorizes disclosure of disciplinary action against a student that posed a "significant threat" to the well-being of any student. Section 1232g(i) authorizes disclosure of drug or alcohol violations to parents when students are under

Secretary of Education issues FERPA regulations that compliment, interpret, and explain FERPA's various provisions.³² Within the DOE, the Family Policy Compliance Office ("FPCO") receives complaints of alleged FERPA violations and issues occasional advice letters to institutions with questions about the application of FERPA to a given disclosure.³³

II. FERPA CASE LAW

The dominant approach to FERPA interpretation by the federal courts has been New Textualism, heavily dependent upon the statute's plain language and the meaning of the words in the statute. The federal circuit courts' use of "soft" information such as the law's policy objectives, legislative history, or Congressional intent merely to clarify the meaning of ambiguous terms or to resolve linguistic conflicts between FERPA and other applicable federal laws was endorsed and made mandatory by the Supreme Court in two cases. In addition to this emphasis, Supreme Court precedent has eliminated a major reason the federal circuit courts often resorted to softer methods of statutory interpretation: determining enforceability of federal rights under United States Code, Title 42, § 1983.³⁴

A. FERPA in the Supreme Court

FERPA case law is relatively sparse in the U.S. Supreme Court.³⁵ In the

twenty-one. Section 1232g(j) authorizes disclosure to investigate and prosecute terrorism. For more on this specific addition to FERPA see Jamie Lewis Keith, *The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies That Apply to Colleges and Universities*, 30 J.C. & U.L. 239, 292 (2004).

32. 34 C.F.R. § 99.1 et seq.

33. The FPCO maintains a website to achieve its mandate. DEPT. OF EDUC., *Family Policy Compliance Office*, <http://www2.ed.gov/policy/gen/guid/fpc/index.html> (last visited Jan. 2, 2013).

34. In short, a law may expressly confer a right and a cause of action to enforce it. In that case, one simply sues to enforce the right under the law itself. However, a statute may also create a right and imply a right or cause of action to enforce it. See *Blessing v. Freestone*, 520 U.S. 329 (1997) for factors to determine whether a statute confers a right enforceable under Section 1983). In the latter case, a party seeking to enforce the right conferred by the law must sue to enforce the law under another statute. 42 U.S.C. § 1983 creates a federal cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." If, for example, one were to be discriminated against based on race, color or national origin in violation of 42 U.S.C. § 2000d, one has a cause of action for the violation of rights against discrimination under § 1983. Since FERPA creates no private right of action to enforce any privacy rights that it confers, FERPA litigants frequently sue under § 1983 to enforce FERPA privacy rights. A lawsuit such as this is referred to throughout this paper as a "Section 1983" cause of action.

35. Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 63 (2008) ("From FERPA's

two instances the Court has taken up FERPA since its enactment in 1974, the Court has been concerned with the plain language of the law. The first U.S. Supreme Court ruling on a FERPA issue came in 2002.³⁶ *Owasso Independent School District v. Falvo* clarified the potentially ambiguous definition of “education records” and what it means to maintain those records under that definition.³⁷ The case arose when the school district was sued for allowing students to grade one another’s papers and call out the grades for the teacher to record. Both parties agreed that if a student’s graded assignment immediately became an “education record” as contemplated by FERPA, the sharing of grades with peers or calling out the grades aloud in class would have violated the Section 1232g(b)(1) disclosure prohibitions.³⁸ *Owasso* was the first time the Court applied FERPA to decide what constituted “education records” under the law.

In this determination, the Court was primarily concerned with respecting the balance of federalism by relying first on the ordinary meaning of the statutory language.³⁹ Particularly important was the word “maintain,” which the Court defined as “to keep in existence or continuance; preserve; [or] retain.”⁴⁰ Furthermore, because “maintain” is a verb, the court determined that someone must have acted on the school’s behalf.⁴¹ The only agents the Court would recognize as maintaining the records were teachers, administrators, and other school employees, but not the students in their capacity as students.⁴² *Owasso* thus turned on a textualist interpretation of FERPA in addition to concerns about any new burdens Congress sought to impose on teachers if plaintiffs’ interpretations were to be acceptable.⁴³

enactment in 1974 until 2002, the Supreme Court decided no FERPA cases. In fact, during this period only two of the Court’s opinions even cited FERPA, and then only in passing in footnotes.” (citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318, note 16 (1979); *Goss v. Lopez*, 419 U.S. 565, 575, note 7 (1975)). Margaret L. O’Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 687 (2003) [hereinafter O’Donnell].

36. *Owasso Ind. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) [hereinafter *Owasso*].

37. *Owasso*, 534 U.S. at 428–29.

38. *Id.* at 431.

39. *Id.* at 432. Note, O’Donnell, *supra* note 35, at 694–95 reads the guiding principle language to mean that “statutory considerations” were secondary to an interpretation “tailored to fit the guiding principle announced.” The authors of this article read the Court’s focus on Webster’s definition of “maintain” and the implications of that definition as aligning what O’Donnell calls the “rules approach” to interpretation with the federalism principle. *Id.* at 688.

40. *Id.* at 433–34 (citing *Random House Dictionary of the English Language* 1160 (2d ed. 1987)).

41. *Id.* at 433.

42. *Id.* at 433–34.

43. *Id.* at 434–35. The Court reasoned that Congress would not have wanted to

Six months later, the Supreme Court decided *Gonzaga*.⁴⁴ In this case, Gonzaga University disclosed information about one of its recent graduates to comply with a Washington law requiring the state's "new teachers to obtain an affidavit of good moral character from a dean of their graduating college or university."⁴⁵ Without this disclosure, Doe would not have been able to obtain the affidavit and thus would have been unable to teach in the state. Even so, Doe sued Gonzaga University in a Spokane state district court, claiming a federal private right of action for deprivation of rights conferred by FERPA under Section 1983.⁴⁶ Doe's theory was that FERPA confers a student right to withhold consent to disclose. He argued that by disclosing his education records without his consent or a FERPA exception to this requirement, Gonzaga had violated a federally conferred right that could be enforced under Section 1983. After Doe won at the trial-court level, the issue of whether FERPA conferred a right enforceable under Section 1983 was central to each stage of the appeal.⁴⁷

The trial court held that FERPA conferred a right enforceable under Section 1983.⁴⁸ The Washington Court of Appeals reversed⁴⁹ and the Washington Supreme Court re-reversed.⁵⁰ Subsequently, the U.S. Supreme Court granted certiorari for a final decision on whether a private right of action was possible to enforce FERPA under Section 1983.⁵¹ Chief Justice

burden teachers with the vast number of records that would be necessary to allow access to all the information recorded about students in every way whatsoever. If the Court were to adopt the respondent's position, teachers would be burdened with keeping a separate access record for all requests to examine their individual grade books in accordance with § 1232g(b)(4). The Court further explained formal hearings for student disputes of their grades and abandoning traditional teaching methods like group grading would further burden teachers. *Id.* at 435–36.

Note Justice Kennedy's single-location interpretation of education record: "[B]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar . . ." and Scalia's disagreement with this interpretation in his *Gonzaga* concurrence are omitted from this discussion but offer additional support for the Supreme Court's clear textualist preference in this FERPA case.

44. See *Gonzaga*, 536 U.S. 273 "The Court, having been primed on the § 1983 issue in *Falvo* and disappointed [n 130] to find that the attorneys had not properly preserved the issue on appeal, was eager to address the § 1983 question in *Gonzaga*." O'Donnell, *supra* note 35, at 705. See also, Benjamin F. Sidbury, *Gonzaga Univ. v. Doe and Its Implications: No Right to Enforce Student Privacy Rights Under FERPA*, 29 J.C. & U.L. 655 (2003) [hereinafter Sidbury (2003)].

45. See *Gonzaga*, 536 U.S. at 277.

46. *Id.* at 276; Sidbury, *supra* note 44, at 658–59.

47. See Sidbury, *supra* note 44, at 661–63.

48. *Doe v. Gonzaga Univ.*, No. 94-2-03120-6, (Spokane Super. Ct. filed Aug. 6, 1997).

49. *Doe v. Gonzaga Univ.*, 992 P.2d 545 (Wash. App. 2000).

50. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 400–02 (Wash. 2001).

51. See *Gonzaga*, 536 U.S. at 273.

Rehnquist, writing for the U.S. Supreme Court majority, began by analyzing the operative provisions of FERPA implicated by the facts of the case: Sections 1232g(b)(1), 1232g(f), and 1232g(g).⁵² Referring to Section 1232g(b) as FERPA's "nondisclosure provision," the Court held that the law failed to create a private right that could be enforced by the courts.⁵³ This holding was based, in part, on the observation that the relevant portions of FERPA speak in terms of institutional policy or practice rather than individual instances of disclosure.⁵⁴ Moreover, the specific portions of the law implicated in this action direct the Secretary of Education to enforce the law's spending conditions and to establish an administrative body (the FPCO) to review alleged violations.⁵⁵ In addition, educational institutions that receive federal education money need only "substantially comply" with FERPA to avoid termination of federal funding.⁵⁶ Finally, the language of both subsections 1232g(b)(1) and (2) references individual consent "in the context of describing the type of 'policy or practice' that triggers a funding prohibition" such that no individual right is created.⁵⁷ Here, as in *Owasso*, the majority based its interpretation on the plain language and structure of the relevant portions of FERPA.⁵⁸

Gonzaga is probably more significant for its general treatment of Section 1983 causes of action than for its treatment of FERPA. After all, the Justices were preoccupied with whether FERPA was individually enforceable under Section 1983.⁵⁹ Nevertheless, the Section 1983 analysis turned largely upon FERPA's language. The majority wanted, and could not find, unambiguous rights-creating language to allow FERPA enforcement under Section 1983. This high linguistic threshold for

52. *Id.* at 279. The Court also cites § 1234c(a), but it appears to have been referring to § 1232c(b)(2) for the requirement that educational institutions receiving FERPA funding need only to "substantially comply" with federal programs awarding federal money.

53. *See Gonzaga*, 536 U.S. at 288.

54. *Id.* (citing § 1232g(b)(1) – (2), "prohibiting the funding of 'any educational agency or institution which has a *policy or practice* [sic] of permitting the release of education records'").

55. *Id.* at 289.

56. *Id.*

57. *Id.*

58. "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. "'The question of whether Congress . . . intended to create a private right of action [is] definitively answered in the negative' where a 'statute by its terms grants no private rights to any identifiable class.'" *Id.* at 283–84 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)). "Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or an implied right of action." *Gonzaga*, 536 U.S. at 286.

59. For an explanation of 42 U.S.C. 1986, *see supra* note 34.

creating individually enforceable rights inspired commentary by four Justices in one concurring and one dissenting opinion.

Justice Souter joined Justice Breyer concurring in the outcome, but not in the majority's strict adherence to plain-language and structural interpretation of FERPA.⁶⁰ Instead of modifying the test for Section 1983 rights, the concurrence found the breadth of the statute's key language in Section 1232g(b), rather than the absence of specific rights-creating language, sufficient to reach the majority holding.⁶¹ For Justices Souter and Breyer, "the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance."⁶² The concurrence thus accepted the conclusion that Congress did not intend for Section 1983 enforceability of the applicable sections, but was reluctant to require affirmative enforceability language for future litigants seeking to protect federally conferred rights through Section 1983.

Both the majority's Section 1983 requirements and its textual analysis of FERPA were too much for Justices Ginsburg and Stevens. Justice Stevens' dissent attacked the majority holding on both fronts.⁶³ First, he said, the majority read FERPA to circuitously avoid the rights-creating language in the title and text of the act.⁶⁴ Justice Stevens further read Section 1232g(b) as conferring a right upon parents and students to withhold their consent to disclose education records, rather than as a system-wide administrative limitation on educational institutions.⁶⁵ Based on the rights-creating language, previously established tests for implied rights of action and enforceability of rights under Section 1983, and the "overall context of FERPA," Stevens would have allowed FERPA to be enforced individually.

Justice Stevens' second argument was that the majority had incorrectly combined the implied right of action case law with the requirements for enforcing rights of action under Section 1983 so badly as to create a second-class federal right.⁶⁶ In short, he said, the Court cannot require plaintiffs to show that Congress intended to unambiguously confer a right

60. See *Gonzaga*, 536 U.S. at 291–92 (Souter & Breyer, JJ., concurring); Sidbury, *supra* note 44, at 670–71. They did not endorse the majority's presumption that "a right is conferred [by Congress] only if set forth 'unambiguously' in the statute's 'text and structure.'" *Gonzaga*, 536 U.S. at 291 (citing *ante* 280, 288).

61. *Id.* at 292.

62. *Id.* at 291.

63. *Id.* at 293–303 (Stevens & Ginsburg, JJ., dissenting); Sidbury (2003), 29 J.C. & U.L. at 671–773.

64. *Id.* at 293 (citing §§ 1232g(a)(1), 1232g(a)(1)(D), 1232g(a)(2), 1232g(c), and the title).

65. "The right of parents to withhold consent and prevent the unauthorized release of information." *Id.* at 294 (citing the respondent).

66. *Id.* at 299–303.

of action under Section 1983 because that has never been the standard.⁶⁷ If an implied federal right is evident in a federal law, then Section 1983 can be used to enforce that right unless the statute says otherwise, he argued.⁶⁸ By requiring the opposite, the majority had placed new burdens on plaintiffs who wish to use Section 1983.⁶⁹ For Stevens, the Court had eroded the “long-established principle of presumptive enforceability of rights under § 1983.”⁷⁰

Thus, *Owasso* and *Gonzaga* demonstrated a preference for New Textualism by the Supreme Court in the interpretation of FERPA and related laws. With the exception of the *Gonzaga* concurrence, the Justices largely refrained from questioning whether the court should have been taking a largely textualist approach to statutory interpretation. Justice Stevens’ *Gonzaga* dissent focused on rights-creating language that he found in the statute. His focus on the linguistic dispute was an endorsement of the Court’s approach to statutory interpretation even if he disagreed with its conclusion.

B. FERPA According to *Owasso* and *Gonzaga* in the Federal Circuit Courts

Consistent with *Owasso* and *Gonzaga*, the federal circuit courts also emphasize the textualist approach to interpreting FERPA over softer methods of interpretation. In addition to this emphasis, *Gonzaga* eliminated the major impetus for interpreting FERPA with sources beyond the law’s text—courts no longer need to determine whether Congress intended FERPA to confer individually enforceable privacy rights. Consequently, *Gonzaga* has had a significant impact on federal circuit court FERPA jurisprudence,⁷¹ especially since prior to *Gonzaga*, the majority of federal circuit courts recognized FERPA as individually enforceable under Section 1983.⁷²

67. *Id.* at 301.

68. *Id.* at 300.

69. *Id.* at 302–03.

70. *Id.* at 302.

71. For examples of *Gonzaga*’s effect on § 1983 rights outside of FERPA context, see *Delancey v. City of Austin*, 570 F.3d 590, 594 (5th Cir. 2009); *Cuvillier v. Sullivan*, 503 F.3d 397, 407 (5th Cir. 2007); *Johnson v. City of Detroit*, 446 F.3d 614, 618–22 (6th Cir. 2006); *Ohio Republican Party v. Brunner*, 544 F.3d 711, 728 (6th Cir. 2006); *Hughlett v. Romer-Sensky*, 497 F.3d 557, 561–65 (6th Cir. 2006); *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 363 (7th Cir. 2010); *Slovinec v. DePaul Univ.*, No. 02-3837, 332 F.3d 1068 (7th Cir. June 18, 2003) (Unpublished); *Mo. Child Care Ass’n v. Cross*, 294 F.3d 1034, note 8 (8th Cir. 2003); *Sanchez v. Johnson*, 416 F.3d 1051, 1057–58 (9th Cir. 2005); *Day v. Bond*, 500 F.3d 1127, 1138 (10th Cir. 2007).

72. *Gonzaga*, 536 U.S. at 299 (Stevens, J. dissenting); *Sidbury*, *supra* note 44 at 659, 674. The following review of federal circuit court FERPA jurisprudence also

1. Tenth Circuit

The effect of Supreme Court jurisprudence on FERPA litigation can be directly assessed in *Falvo ex rel. Pletan v. Owasso Independent School District No. 1-011*⁷³—the Tenth Circuit case overturned by *Owasso*. Although neither party argued the issue on appeal, the Tenth Circuit’s first relevant inquiry was whether the law conferred an individual right enforceable under Section 1983.⁷⁴ The court almost immediately departed from FERPA’s plain language to the Congressional Record to determine whether Congress intended to confer this individually enforceable right.⁷⁵ As the reader already knows,⁷⁶ the Tenth Circuit concluded that FERPA indeed conferred an individual privacy right enforceable by Section 1983.

Even though the Supreme Court ultimately reversed the Tenth Circuit’s *Falvo* decision, it did not do so because of the interpretive approach taken by the Tenth Circuit on issues separate from the Section 1983 enforceability of FERPA. Regarding those issues, the Tenth Circuit embarked on a lengthy analysis on the merits of the claim that a FERPA violation had occurred, to determine whether the practice of peer grading, allowing students to shout their grades to the teacher for recording, violated FERPA.⁷⁷ It began with the statutory language, focusing on “education records.” According to the court, the statutory language alone was enough to conclude that an opinion of the FPCO had improperly interpreted “education record” to exclude a teacher’s grade book from the statutory definition.⁷⁸ The Tenth Circuit opined that interpreting the statute otherwise would obviate the need for allowing the disclosure of this information to substitute teachers in Section 1232g(a)(4)(B)(I). This conclusion was bolstered by reference to FERPA’s privacy and access purposes.⁷⁹ While it was reversed on this interpretation, the Tenth Circuit began with the text of FERPA in its analysis and relied on softer methods of interpretation to confirm its textualist conclusions.

In spite of eventual reversal by the Supreme Court, the Tenth Circuit in *Falvo* also relied upon FERPA’s plain language also to interpret the

supports this statement.

73. 233 F.3d 1203 (10th Cir. 2000) [hereinafter *Falvo*] *overruled by Owasso*, 534 U.S. 426. In *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1062 (10th Cir. 2002) the Tenth Circuit faithfully deferred to the Supreme Court precedent in *Owasso*.

74. *Id.* at 1210.

75. *Id.* at 1211.

76. *See Owasso*, 534 U.S. at 426.

77. *Falvo*, 223 F.3d at 1213.

78. *Id.* at 1214. This conclusion inspired some criticism from the academy. Amy Bennett & Adrienne Brower, “*That’s Not What FERPA Says!*”: *The Tenth Circuit Court Gives Dangerous Breadth to FERPA in its Confusing and Contradictory Falvo v. Owasso Independent School District Decision*, 2001 B.Y.U. Educ. & L.J. 327 (2001).

79. *Falvo*, 223 F.3d at 1216.

meaning of “maintained . . . by a person acting for [an educational] agency or institution.” The Tenth Circuit analysis did not end with FERPA’s statutory language. Upon reaching its now invalid holding, the court proceeded to match this interpretation with Congress’s intent to protect student grades from disclosure.⁸⁰ Even though it was reversed, the Tenth Circuit’s *Falvo* decision remained loyal to textualist methods of interpretation, declining to test the “murky waters” of legislative history and Congressional intent. Despite the correct approach, the Tenth Circuit’s flawed conclusion remained the law in the Tenth Circuit for over a year before the Supreme Court reversed.

Before *Owasso* reversed *Falvo*, the Tenth Circuit adjudicated another FERPA appeal: *Jensen v. Reeves*.⁸¹ In *Jensen*, a child’s parents sued the school district after their child was suspended for several acts of misconduct and other parents were notified of his punishment.⁸² On appeal, the parents argued that the school’s disclosure of the disciplinary measures taken against their child violated FERPA’s non-disclosure provisions.⁸³ In its unpublished opinion, the court found “the contemporaneous disclosure to the parents of a victimized child of the results of any investigation and resulting disciplinary actions taken against an alleged child perpetrator does not constitute a release of an ‘education record’ within the meaning of 20 U.S.C. § 1232g(a)(4)(A).”⁸⁴ Despite what it said was a reliance upon the statutory language for this conclusion, the court’s explanation for this conclusion makes clear the desire to avoid placing teachers in the “untenable position” of preventing schools from notifying the parents of victimized children that protective measures were being taken to shield their child from the offending student. Similarly, the court affirmed the school’s notification of parents of witnesses because it had not found “a single case holding that the extremely limited type of information conveyed [constituted] an education record under § 1232g.”⁸⁵ The Tenth Circuit thus applied New Textualism in its *Falvo* decision, but its conclusion was reversed by the Supreme Court in *Owasso*. In the interim, its *Jensen* decision demonstrated Tenth Circuit consideration for FERPA’s practical effects. The Tenth Circuit’s timid *Jensen* decision perhaps anticipated unfavorable results as *Falvo* was appealed to the Supreme Court.

80. *Id.* at 1217.

81. *Jensen v. Reeves*, 3 Fed. Appx. 905 (10th Cir. 2001).

82. *Id.* at 906.

83. *Id.* at 910.

84. *Id.*

85. *Id.*

2. Sixth Circuit

The leading Sixth Circuit FERPA case was decided in June 2002 (about one week after *Gonzaga*).⁸⁶ In *U.S. v. Miami University*, the Secretary of Education sued Ohio State University and Miami (Ohio) University for releasing disciplinary records to a national education magazine without redacting students' personally identifiable information.⁸⁷ On appeal, the court faced one relevant issue: whether disciplinary records were "education records" subject to FERPA and prohibited from disclosure.⁸⁸ The court applied FERPA according to the "unambiguous and plain meaning from the language of a statute."⁸⁹ Accordingly, it found "student disciplinary records are education records because they directly relate to a student and are kept by that student's university."⁹⁰ The application of the federal law was very straightforward. Any explanation the court provided for Congressional intent or FERPA's purpose was mere context for its textualist interpretation.⁹¹

The Sixth Circuit proceeded with softer methods of statutory interpretation to confirm this conclusion. That is, the court explained that the legislative history, the structure of the statute,⁹² and its "evolution by amendment" demonstrated that Congress intended "education records" to

86. Prior to *Gonzaga*, the Sixth Circuit recognized private rights created by FERPA that could be enforced in a Section 1983 action. *Cullens v. Bemis*, No. 92-1582, 1992 U.S. App. Lexis 30892, at *2 (6th Cir. Nov. 18, 1992). Since then, the Sixth Circuit no longer allows a private action to enforce FERPA under Section 1983. *Bevington v. Ohio Univ.*, 93 Fed. Appx. 748, 750 (6th Cir. 2004).

87. *United States v. Miami Univ.*, 294 F.3d 797, 803-05 (6th Cir. 2002) [hereinafter *Miami*]. The decision to release these records was made pursuant to *State ex rel. Miami Student v. Miami University*, 680 N.E.2d 956, 957 (Ohio 1997) [hereinafter *The Miami Student*]. In *The Miami Student*, the Ohio Supreme Court held that the Ohio Freedom of Information Act exception for the release of records was prohibited by state or federal law because it concluded student disciplinary records were not "education records" as contemplated by FERPA. The Ohio Supreme Court relied on *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia*, 427 S.E.2d 257 (Georgia 1993) [hereinafter *Red & Black*] for this conclusion about federal law. Similarly in *Red & Black*, the Georgia Supreme Court held that the disciplinary records sought by a student newspaper were not "education records" subject to FERPA privacy protections. Consequently, FERPA did not trigger applicable exceptions to the Georgia FOIA.

88. *Id.* at 811-15 (heading E. Student Disciplinary Records, Education Records and the FERPA). Note the preceding section D. of *Miami* determined that the Ohio Supreme Court had improperly interpreted "education record" in *The Miami Student*, which was a question of federal law. *Id.* at 810-11.

89. *Id.* at 811 (citing *Bartlik v. U.S. Dept. of Labor*, 62 F.3d 163, 166 (6th Cir. 1995)). Education record is defined by § 1232g(a)(4)(A).

90. *Id.* at 812.

91. *See id.* at 806-07 (Section B).

92. Specifically, the law's exceptions for the release of certain disciplinary records in §§ 1232g(b)(6)(A)-(C); 1232g(h)(2), 1232g(i)(1), 1232g(a)(4)(B)(ii).

include student disciplinary records within its meaning.⁹³ Disciplinary records are not, however, the same as law enforcement records. When there was ambiguity regarding the Section 1232g(a)(4)(B)(ii) exclusion of law enforcement records, the court relied on regulations⁹⁴ issued by the Secretary of Education to clarify the statute's meaning.⁹⁵ Based on the regulations, the court found the DOE protects student disciplinary records, as "education records," but not law enforcement unit records."⁹⁶ It further found that disciplinary records containing criminal offense references as requested by the newspaper were not law enforcement unit records. Accordingly, those records remained education records, subject to FERPA disclosure protections.

Thus FERPA's interpretation and application in the Sixth Circuit is very similar to the Tenth Circuit and Supreme Court approach. FERPA is interpreted primarily based on its text. Other, softer approaches to statutory interpretation are used by the Sixth Circuit only to clarify ambiguity and confirm its text-based conclusions. The Secretary of Education's regulations, Congressional intent, and the law's policy goals were discussed in this case as little more than narrative flourishes to confirm the meaning of the language and structure of FERPA.⁹⁷

3. Seventh Circuit

The most relevant Seventh Circuit case (prior to *Chicago Tribune*) was

93. *Miami*, 294 F.3d at 812–14. For a largely comprehensive review of legislative amendments to FERPA since it was enacted in 1974 see U.S. DEPT. OF EDUC., *Legislative History of Major FERPA Provisions* (last visited Mar. 10, 2012), <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf>). As of December 14, 2012, Congress has amended FERPA twice since the DOE published this list: (1) Jan. 8, 2002, P.L. 107-110, Title X, Part F, § 1062(3), 115 Stat. 2088 (No Child Left Behind Act, which created new exceptions to confidentiality for particular information-sharing reasons like transferring suspension and expulsion records, transferring disciplinary records, and to allow for sharing immunization, guardianship, and other non-academic and academic records with local educational entities); and (2) Dec. 13, 2010, P.L. 111-296, Title I, Subtitle A, § 103(d), 124 Stat. 3192 (Allowing information sharing with the Secretary of Agriculture for the Food and Nutrition Service). See also Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75 (2011) for a discussion of politics and Congressional Record leading to FERPA.

94. 34 C.F.R. §§ 99.8(a)(1)(i),(ii), 99.8(a)(2), 99.8(b)(2)(ii), 99.8(c)(2), and 60 F.R. 3464, 3466.

95. *Miami*, 294 F.3d at 814–15 (using the two-step procedure in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, (1984) [hereinafter *Chevron*]).

96. *Id.* at 815.

97. *Id.* at 806 ("Congress enacted the FERPA 'to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent.' Joint Statement, 120 Cong. Rec. 39858, 39862 (1974)"). A similarly hierarchical treatment of interpretive approaches can be found in *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 926–27 (6th Cir. 2000).

Disability Rights Wisconsin v. State Department of Public Education.⁹⁸ In *Disability Rights Wisconsin*, Wisconsin's nonprofit stock corporation ("DRW") served as the state's protection and advocacy agency, required by federal law.⁹⁹ DRW investigated allegations that developmentally disabled students had been improperly restrained at an elementary school.¹⁰⁰ On appeal, the court was confronted with the issue of whether and to what extent the Wisconsin public school system had to disclose records uncovered in DRW's investigation into the use of "seclusion rooms" for disciplining students with disabilities.¹⁰¹ In making this decision, the Seventh Circuit began with the plain language of the federal protection and assistance statutes.¹⁰² The federal laws empowered DRW with "broad investigatory authority, including access to certain records."¹⁰³ With regard to the investigatory powers of an agency charged with protecting developmentally disabled individuals, the court remained faithful to a plain-language and structural analysis of those laws.¹⁰⁴ However, the textualist analysis was insufficient to determine how the language of two

98. *Disability Rights Wis., Inc. v. State Dep't of Pub. Instruction*, 463 F.3d 719 (2006) [hereinafter *Disability Rights Wisconsin*]. Prior to *Gonzaga*, the Seventh Circuit recognized the enforceability of FERPA rights under Section 1983. *Adatsi v. Mathur*, No. 90-2002, 1991 U.S. App. Lexis 13087, at *7 (7th Cir. June 17, 1991) (Unpublished) (disputes over correctness of grades are beyond the scope of FERPA). Seventh Circuit cases seeking to enforce FERPA with private rights of action are dismissed under *Gonzaga*. See also *Shockley v. Svoboda*, 342 F.3d 736, 741 (7th Cir. 2003) (the authors recommend this case for a particularly juicy read); *Slovinec v. DePaul Univ.*, 332 F.3d 1068, 1069 (7th Cir. 2003).

99. *Disability Rights Wisconsin*, 463 F.3d at 722. DRW lost its motion at the district court level.

100. *Id.* at 723

101. *Id.* at 722.

102. *Id.* at 724–26. (referring to Developmental Disabilities and Bill of Rights Act (the DD Act), the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (the PAIMI Act) and the Protection and Advocacy of Individual Rights Act (the PAIR Act)—known collectively as the federal protection and advocacy statutes or the federal P&A statutes. DD Act, 42 U.S.C. §§ 15001–15115 (2006); PAIMI Act, 42 U.S.C. § 10801–10851 (2006); PAIR Act, 29 U.S.C. § 794e (2006)). For more on the interaction between sharing mental illness information by universities while complying with FERPA privacy protections, see Susan P. Stuart, "Hope and Despondence": *Emerging Adulthood and Higher Education's Relationship with Its Nonviolent Mentally Ill Students*, 38 J.C. & U.L. 319 (2012) (citing Allison B. Newhart & Barbara F. Lovelace, *FERPA Then and Now: Tipping the Balance in Favor of Disclosure of Mental Health Information under the Health and Safety Emergency Exception*, 2009 URMIA J. 19 (2009); Lesley McBain, *Balancing Student Privacy, Campus Security, and Public Safety: Issues for Campus Leaders*, WINTER 2008 PERSP. (2008) (available at http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08_perspectives%281%29.pdf).

103. *Disability Rights Wisconsin*, 463 F.3d at 725 (citing 42 U.S.C. § 15043(a)(2)(H)–(I); 42 U.S.C. § 10805(a); 29 U.S.C. § 794e(f)(2)).

104. *Id.* at 726–27.

federal disability statutes interacted with one another.¹⁰⁵ The court decided DRW need not obtain approval of the state education department for the records it sought, based on the purposes and effects of the applicable laws, not the statutory text.¹⁰⁶

This softer approach to statutory interpretation was also applied to determine FERPA's interaction with federal protection and advocacy statutes.¹⁰⁷ It began with the policy goals Congress hoped to achieve with FERPA: preventing access to student records without parental consent and statutory protection.¹⁰⁸ The court then outlined the statutory protection for personally identifiable information under Section 1232g(b)(1) and regulatory elaboration on the meaning of the phrase under the applicable regulations (34 C.F.R. § 99.3). Noting that the student names with corresponding information about their disabilities and disciplinary histories were "education records," the court declined to proceed with a plain language analysis.

Instead, the Seventh Circuit looked to the uniqueness of the situation in which a state agency was charged with protecting disabled students from abuse and neglect. Relying on a 1996 case from the Eleventh Circuit,¹⁰⁹ the court found that neither disabled students nor their parents were harmed when an agency responsible for ensuring compliance with federal law was allowed access to their records. Because the agency requesting student records protects individuals with mental disabilities, those individuals' privacy interests were outweighed by DRW's mandate to investigate and remedy suspected neglect.¹¹⁰ The Seventh Circuit thus demonstrated a preference for the statutory plain language, but ultimately utilized the purposes of FERPA and the applicable disability statutes to determine how the laws interacted. This softer method of statutory interpretation was necessary only because the language of the applicable federal laws did not dictate how the laws affect one another. The softer approach in these special circumstances has survived *Gonzaga*.

105. *Id.* at 727–28.

106. *Id.* at 729–30.

107. *Id.* at 730 (referring to section C. FERPA's Interaction with the Federal P&A Statutes).

108. *Id.* (citing *Rios v. Read*, 73 F.R.D. 589, 597–99 (E.D.N.Y.1977); Address to the Legislative Conference of the National Congress of Parents and Teachers, March 12, 1975, 121 Cong. Rec. S7974 (daily ed. May 13, 1975)).

109. *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 497–99 (11th Cir. 1996) (Defendant facility and Alabama Dept. of Mental Health and Mental Retardation challenged the order of Alabama's federal district court, which enjoined defendants from failing to release to plaintiff Alabama Disabilities Advocacy Program the medical records of two former institutionalized residents [non-educational] under the Developmental Disabilities Assistance and Bill of Rights Act).

110. *Disability Rights Wisconsin*, 463 F.3d at 730 (citing *Bery v. City of New York*, 97 F.3d 689, 97 (2nd Cir. 1996)).

4. Second Circuit

Second Circuit case law prior to *Gonzaga* is particularly illustrative of the case's effect on the use of interpretive methods other than the statutory language to decide if Congress intended Section 1983 enforceability. For example, in *Fay v. South Colonie Central School District*, a father who had recently separated from his wife sought information about his children's grades from their school.¹¹¹ The case thus implicated FERPA's parental access provisions under Section 1232g(a).¹¹² In deciding the case, the Second Circuit began with the language of the applicable portion of FERPA, but went beyond the language and structure of the law to determine whether Congress intended to preclude private enforcement of the law under Section 1983.¹¹³ It concluded, "although FERPA authorizes extensive enforcement procedures created by regulation, *see* 34 C.F.R. §§ 99.60-67 (1985), these regulations do not demonstrate a Congressional intent to preclude suits under [Section] 1983 to remedy violations of FERPA."¹¹⁴ The Second Circuit thus employed a softer method of statutory interpretation to conclude that FERPA rights were enforceable under Section 1983. *Gonzaga* directly overruled this conclusion and eliminated any future need for the Second Circuit to go beyond FERPA's plain language to determine Section 1983 enforceability.¹¹⁵

The same approach was taken by the Second Circuit in another pre-*Gonzaga* case: *Brown v. City of Oneonta*.¹¹⁶ In *Brown*, local police were pursuing a black criminal suspect near a college campus. The college released a list of its black students to the police, who then questioned individuals on that list matching the description given by the victim.¹¹⁷ Several students on the list sued, alleging FERPA violations by the school

111. *Fay v. S. Colonie Central School District*, 802 F.2d 21, 24 (2d Cir. 1986) [hereinafter *Fay*].

112. *Id.* at 24-27. In relevant part FERPA reads, "No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . ." Recall that *Gonzaga* addressed § 1232g(b), FERPA's nondisclosure subsection.

113. *Id.* at 33.

114. *Id.*

115. *Id.* at 21-34. The Second Circuit decided other cases for reasons that prevented the court from reaching substantive FERPA arguments. *Robertson v. Doe*, No. 01-9434, 40 Fed. Appx. 631 (2d Cir. July 17, 2002) (Unpublished); *Robertson v. Goode*, No. 99-7408, 2000 U.S. App. LEXIS 6117 (2d Cir. Mar. 30, 2000) (Unpublished); *Sirohi v. Trustees of Columbia Univ.*, No. 97-7912, 1998 U.S. App. LEXIS 22519 (2d Cir. Apr. 16, 1998) (Unpublished).

116. *Brown v. City of Oneonta*, 106 F.3d 1125, 1128 (2d Cir. 1997).

117. *Id.* at 1128-29.

for releasing their information.¹¹⁸ The school responded that the emergency situation exception to FERPA's nondisclosure provisions justified the university's release of this information.¹¹⁹

The Second Circuit began its analysis with the language of the applicable portions of FERPA: 1232g(b)(1)(E)(ii) and 1232g(b)(6). Faced with a statutory ambiguity, the court looked to the applicable regulations to help determine what constituted a sufficient emergency to trigger the FERPA exception.¹²⁰ Ultimately, the Second Circuit sided with the college, affording administrators responding to the crime large discretion in determining what constituted an emergency situation sufficient to trigger the exception.¹²¹ *Gonzaga* subsequently reversed the Second Circuit holding in both *Fay* and *Brown* that FERPA is individually enforceable under Section 1983.¹²² The Second Circuit approach to plain language FERPA interpretation was thereby reinforced and the need to explore Congressional intent to determine Section 1983 enforceability was

118. *Id.* at 1129–30.

119. *Id.* at 1131 (citing § 1232g(b)(1)(I) (1990)). For more about FERPA's emergency exception see Stephanie Humphries, *Institutes of Higher Education, Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law*, 35 J.C. & U.L. 145 (2008); Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J.C. & U.L. 267 (2011).

120. *Brown*, 106 F.3d at 1132 (citing 34 C.F.R. § 99.36 (1986)).

121. *Id.* at 1132–33. The Second Circuit relied on the statutory language of § 1232g to resolve *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 151 (2d Cir. 2002) (alleged disclosures to doctors, home instructor, and lawyer were not sufficient to amount to a policy or practice of violating plaintiff student's privacy rights) (citing *Gundlach v. Reinstein*, 924 F. Supp. 684, 690 note 7 (E.D.Pa. 1996), *aff'd without op.*, 114 F.3d 1172 (3d Cir. 1997)) [hereinafter *Gundlach*].

122. In the years following the decision in *Gonzaga*, the Second Circuit affirmed a district court's 12(b)(6) dismissal of a private suit against the Connecticut Department of Children and Families for violating a non-disclosure agreement. *Dutkiewicz v. Hyjek*, 135 Fed. Appx. 482, 483 (2d Cir. 2005) (no private right of action under FERPA; its nondisclosure requirements could not have been enforced pursuant to 42 U.S.C. § 1983). Similarly, in *Sverev v. New School University*, the court upheld the trial court's sua sponte dismissal of the student's private FERPA lawsuit. *Sverev v. New Sch. Univ.*, 114 Fed. Appx. 439 (2d Cir. 2004). Similar results were reached in *Doe v. Anonymous Unnamed School Employees*, 87 Fed. Appx. 788, 789 (2d Cir. 2004) (FERPA's nondisclosure provisions created no rights enforceable under 42 U.S.C. § 1983; §1983 and FERPA claims against the college, private university, and private university employees were properly dismissed); *Curto v. Roth*, 87 Fed. Appx. 785, 785 (2d Cir. 2004) ("In light of the Supreme Court's recent holding that the nondisclosure provisions of FERPA 'create no rights enforceable under § 1983,' [citing *Gonzaga*], we affirm the dismissal of Curto's claims under 42 U.S.C. § 1983 and FERPA . . ."); and *Taylor v. Vermont Department of Education*, 313 F. 3d 768 (2d Cir. 2002) ("We also affirm the dismissal of plaintiff's 42 U.S.C. § 1983 claim based on FERPA, § 1232g(a), under the reasoning of [*Gonzaga*]"). Note that *Taylor* implicated the records access provisions of FERPA, § 1232g(a)(1)(A) whereas *Gonzaga* dealt with the nondisclosure provisions of FERPA, § 1232(b)(1). Note: as to whether or not *Gonzaga* directly reversed *Fay* & *Brown*, it does not cite either case in the opinion.

eliminated.

5. Third Circuit

The *Gonzaga* majority cited one federal district court case and an Indiana state intermediate appellate court case for the finding that courts were split on whether FERPA created an individually enforceable Section 1983 right.¹²³ The federal case was a Third Circuit case, affirmed without an opinion. In *Gundlach*, a Temple University law student sued his former school after it denied him access to the facilities during his sixth semester of law school.¹²⁴ The federal district court ultimately dismissed his Section 1983 claim to enforce his FERPA rights based on the language of Section 1232g(b)(1) as well as Congressional intent.¹²⁵ That is, “the requirement placed on the participating institution is not that it must prevent the unauthorized release of education records, as Mr. Gundlach contends, but that it cannot improperly release such records as a matter of policy or practice.”¹²⁶ The Third Circuit’s pre-*Gonzaga* reading of the law thus eliminated much of the need for the court to look past the statutory language. *Gonzaga* simply reaffirmed the Third Circuit approach to statutory interpretation and its conclusions about FERPA enforceability under Section 1983.

The *Gundlach* decision depended on a prior Third Circuit district court case, also affirmed without discussion on appeal: *Smith v. Duquesne University*.¹²⁷ In *Smith*, the district court undertook a much more systematic analysis of the remedies permitted for FERPA violations under the now disfavored *Court v. Ash*.¹²⁸ That is, the court looked at the remedies permitted under the language of FERPA, the legislative intent regarding a private action to enforce FERPA, and the enforcement mechanisms available to the Secretary of Education. Here, as in *Gundlach*, the Third Circuit affirmed the district court holding that FERPA did not confer a federal right enforceable pursuant to Section 1983. The Third Circuit had thus already eliminated the need to go beyond FERPA’s text and determine Congressional intent regarding Section 1983 enforceability before the Supreme Court decided *Gonzaga*.¹²⁹

123. See *Gonzaga*, 536 U.S. at 278, n.2 (citing *Gundlach v. Reinstein*, 924 F.Supp. 684 (E.D. Pa. 1996; *Meury v. Eagle-Union Community School Corp.*, 714 N.F. 2d 233, 239 (Ind. Ct. App. 1999)).

124. *Gundlach*, 612 F. Supp. at 690.

125. *Id.* at 692.

126. *Id.*

127. *Smith v. Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff’d without op.*, 787 F.2d 583 (1986).

128. *Smith*, 612 F.Supp. at 79. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

129. A discussion of federal district court cases are beyond the scope of this article, but *Krebs v. Rutgers*, No. 92-1682, 797 F Supp. 1246 (D.C. NJ July 22, 1992) is a

6. Fifth Circuit

Although not cited by the *Gonzaga* majority, some relatively old FERPA case law out of the Fifth Circuit may have also supported the minority position that FERPA confers no rights enforceable under Section 1983. In *Klein Independent School Dist. v. Mattox*, a superintendent provided copies of a schoolteacher's transcripts pursuant to a state FOIA request.¹³⁰ In its determination that sharing such records did not constitute a FERPA violation, the court relied on the language of the law to conclude that FERPA does not protect records of individuals not in attendance, and also does not protect records maintained in the normal course of business pertaining to an employee exclusively in that employee's capacity as such.¹³¹ Consequently, it was unnecessary for the court to address whether FERPA rights could be privately enforced under Section 1983.¹³² However, the Fifth Circuit dicta, written fifteen years before *Gonzaga* was decided, indicated a reluctance to recognize that such a right existed fifteen years before the Supreme Court took up *Gonzaga*. As in other federal circuit court case law, the Fifth Circuit discussed FERPA's purpose and Congressional intent, but merely for an affirmation of its conclusions based on a textualist FERPA interpretation.

In another relatively old case, *Tarka v. Cunningham*, the Fifth Circuit applied FERPA plain language to determine the applicability of the law to a non-matriculating student who was auditing graduate courses at the University of Texas.¹³³ Because the statute and regulations did not adequately distinguish between enrolled students and auditing students, the court looked to the legislative history for assistance interpreting "student" as it appears in the statute.¹³⁴ The Fifth Circuit held FERPA inapplicable to auditing students based on the Congressional Record. The Fifth Circuit thus interpreted FERPA based on the text to the extent possible many years before *Owasso* and *Gonzaga*. It referred to the legislative history only to clarify otherwise ambiguous terms in the law prior to Supreme Court FERPA case law and can be expected to adhere even more closely to this interpretive approach after *Owasso* and *Gonzaga*.

particularly interesting federal case out of New Jersey involving the use of students' social security numbers as personal identifiers. It is discussed by Alexander C. Papandreou, *Krebs v. Rutgers: The Potential for Disclosure of Highly Confidential Personal Information Renders Questionable the Use of Social Security Numbers As Student Identification Numbers*, 20 J.C. & U.L. 79, 82 (1993).

130. *Klein Independent School Dist. v. Mattox* 830 F.2d 576, 578 (5th Cir. 1987).

131. *Id.* at 579–80.

132. *Id.* at 580.

133. *Tarka v. Cunningham*, 891 F.2d 102, 105 (5th Cir. 1990).

134. *Id.* at 106–07.

7. Ninth Circuit

Finally, the Ninth Circuit's application of FERPA privacy protections in *Disability Law Center of Alaska, Inc. v. Anchorage School District*¹³⁵ was very similar to that of the Seventh Circuit in *Disability Rights Wisconsin*. In *Disability Law Center of Alaska*, the plaintiff law center, an advocacy agency, requested information from the defendant school district in response to several complaints.¹³⁶ The school district refused to provide the requested contact information for the students' guardians or legal representatives, citing FERPA. The Ninth Circuit held that the law center's access to the contact information was not barred by FERPA.¹³⁷

In arriving at this conclusion, the Ninth Circuit began with a plain language interpretation of FERPA's applicable provisions and the Developmental Disabilities Act.¹³⁸ Finding the interaction of the two laws ambiguous, the court gave *Chevron*¹³⁹ deference to the Department of Health and Human Services and DOE's proposed finding that the disability laws fit within an exception to FERPA's nondisclosure provisions.¹⁴⁰ The court weighed FERPA's policy interests against its plain language conclusions, but only as a post-factum test of its conclusions.¹⁴¹ Finding "the value in protecting vulnerable individuals outweighs the value in protecting against a small diminution in privacy," the Ninth Circuit deferred to the agencies' proffered interpretations.¹⁴² Much like its sister circuits¹⁴³ and the Supreme Court, the Ninth Circuit demonstrated a

135. 581 F.3d 936 (9th Cir. 2009).

136. *Id.* at 938.

137. *Id.* at 939–41.

138. *Id.* (referring to 42 U.S.C. §§ 10801 et seq., 15001 et seq.).

139. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). "The *Chevron* doctrine [fn 5] . . . concerns when courts should defer to interpretations of statutes by administrative agencies. In contrast to the older pragmatic tradition that emphasized a variety of contextual factors in deciding when and to what extent deference is appropriate,[fn 6] *Chevron* posits that a two-step inquiry is required in every case. At step one, the court undertakes an independent examination of the question. If it concludes the meaning of the statute is clear, that ends the matter. But if the court concludes that the statute is ambiguous, then it moves on to step two, under which it must defer to any interpretation by a responsible administrative agency that the court finds to be reasonable. . . . [Justice Scalia] has long been perceived as the Court's most enthusiastic partisan of the two-step method associated with the decision. [fn 7]" Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 352 (1994) [hereinafter Merrill].

140. *Disability Law Center of Alaska, Inc.*, 581 F.3. at 939–41 (referring to 467 U.S. 837, 842–43).

141. *Id.* at 940 ("The analysis is especially apt here, where the value in protecting vulnerable individuals outweighs the value in protecting against a small diminution in privacy. We defer to the interpretation.").

142. *Id.*

143. In the interest of brevity, this review has omitted some Circuit Court case law

preference for textualist interpretation of FERPA, relying on corresponding regulatory scheme, modifications by amendment, legislative history, and policy objectives as a secondary source for interpretation. As did the Court in *Disability Rights Wisconsin*, this Ninth Circuit in this case also affirmed the use of softer interpretive approaches to FERPA in cases of ambiguity and conflict even after *Gonzaga*.

III. *THE CHICAGO TRIBUNE V. THE UNIVERSITY OF ILLINOIS*

The twenty-year trend toward New Textualism preceded the FERPA dispute in *The Chicago Tribune v. The University of Illinois*. Prior to the dismissal of the case on jurisdictional grounds, the parties and district court grappled with the plain meaning of statutory terms of art in FERPA. On appeal, the Seventh Circuit held that the dispute could be determined only by deciphering the meaning of a phrase from Illinois' FOIA: "prohibited from disclosure by federal law."¹⁴⁴ Consequently, the Seventh Circuit's interpretation of FERPA is brief and non-binding.

A. Background

In the early years of this century, the University of Illinois ("U.I.") employed a standard admissions process by which admissions decisions were based on an applicants' grade point average, standardized test scores, and other accomplishments.¹⁴⁵ U.I. also had an informal system, commonly known by faculty and staff as Category I, by which prominent political figures, donors, and U.I. administrators could influence admissions decisions based on non-merits.¹⁴⁶ U.I. began formally tracking these Category I recommendations in 2002.¹⁴⁷ While it is unclear what triggered the *Chicago Tribune's* ("the *Tribune*" hereinafter) interest, the newspaper began its investigation of U.I.'s Category I applications process at least as early as April 2009.¹⁴⁸ Much of the information the *Tribune*

that deals with FERPA briefly and tangentially. *Webster Groves School Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1375 (8th Cir. 1989); *Vukadinovich v. McCarthy*, 901 F.2d 1439 (7th Cir. 1990); *Stow v. Grimaldi*, 993 F.2d 1002 (1st Cir. 1993).

144. See *Chicago Tribune*, 680 F.3d at 1004–05.

145. ABNER MIKVA ET AL., STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION, REPORT & RECOMMENDATIONS, 13–14 (Aug. 6, 2009) [hereinafter ADMISSIONS REVIEW COMMISSION REPORT] available at <http://www.uillinois.edu/our/news/2009/admissions.cfm>.

146. *Id.* at 14–15.

147. *Id.* at 14 (referring to Abel Montoya); Jodi S. Cohen & Tara Malone, *U. of I. Admissions System Changed in 2002, Former Employee Says*, *Chicago Tribune* (June 30, 2009), <http://www.chicagotribune.com/news/local/chi-u-of-i-clout-commission-30-jun30,0,1635187.story>.

148. Brief of Appellant Bd. of Trs. of the Univ. of Ill. at 11, *Chicago Tribune v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001 (7th Cir. 2012) [hereinafter U.I. Appellant Br.].

obtained was provided pursuant to the Illinois FOIA.¹⁴⁹

In May 2009, the *Tribune* broke the story with an article entitled, “Clout Goes to College.”¹⁵⁰ Among the many striking details of the Category I admissions process the article exposed, the newspaper made public that under the cover of the Category I admission process, “University officials recognized that certain students were underqualified [sic]—but admitted them anyway; Admissions officers complained in vain as their recommendations were overruled; Trustees pushed for preferred students, some of whom were friends, neighbors and relatives; Lawmakers delivered admission requests to U. of I. lobbyists, whose jobs depend on pleasing the lawmakers.; [and] University officials delayed admissions notifications to weak candidates until the end of the school year to minimize the fallout at top feeder high schools.”¹⁵¹ The publicity and public response prompted an official investigation by order of Illinois Governor Pat Quinn in June 2009.¹⁵² Elicited by this article, in its August 2009 final report, the official investigation by the Admissions Review Commission confirmed much of what the *Tribune* found with greater detail and provided more details about the practice in question.¹⁵³ The report was based upon interviews with faculty and staff as well as over 9,000 pages of documents from the U.I.¹⁵⁴ All student identities and additional information subject to FERPA privacy protections were redacted from these documents specifically to comply with FERPA.¹⁵⁵ Similar redactions were made to documents independently requested by the *Tribune* in its own investigation.¹⁵⁶ Although the Admissions Review Commission declined to challenge the completeness of the redacted information provided by U.I., the *Tribune* persisted in its requests for unedited responses to its FOIA requests.

149. 5 I.L.C.S. § 140/7(1)(a).

150. Jodi S. Cohen, Stacy St. Clair & Tara Malone, *Clout Goes to College*, Chicago Tribune (May 30, 2009), <http://www.chicagotribune.com/news/watchdog/college/chi-070529u-of-i-clout,0,5173000.story>.

151. *Id.*

152. ADMISSIONS REVIEW COMMISSION REPORT, *supra* note 145, at 3 (citing Ill. Exec. Or. 09-12 (June 10, 2009)). The Commission created a website to elicit feedback and post all relevant documents, including a link to the final Review Commission Report at <http://www2.illinois.gov/gov/admissionsreview/Pages/default.aspx> (accessed Jan. 2, 2013).

153. *Id.* at 1–7.

154. *Id.* at 9.

155. *Id.* This assessment was based on advice from U.I. counsel and an opinion letter from the DOE. Letter fr. Paul Gammill, Director, Family Policy Compliance Office of the D.O.E., to Zachary T. Fardon, Associate, Latham & Watkins LLP, *Response to June 25, 2009 Request for FERPA Guidance on Behalf of U.I.*, at 1, ¶ 2 (Aug. 6, 2009) (available via PACER).

156. U.I. Appellant Br., *supra* note 148, at 11–12.

B. The District Court Opinion Finding No Federal Prohibitions in FERPA's Funding Conditions and Ordering Disclosure to the *Tribune*

This controversy found its way to federal court after U.I. declined to respond to a FOIA request by the *Tribune* for

the following public records with regard to each applicant in Category I (and/or the equivalent designation in the professional schools) who was admitted to the University of Illinois and subsequently attended the University of Illinois: the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in such applicants' applications. Further, please provide any records about the identity of the University official to whom the request was made, any other University officials to whom the request was forwarded, and any documents which reflect any changes in the status of the application as a result of that request.¹⁵⁷

At trial, U.I. argued that the Illinois FOIA exempted a public body from its otherwise applicable legal obligation to disclose because FERPA prohibited disclosure.¹⁵⁸ The *Tribune* responded with three relevant arguments, each about the meaning of FERPA and Illinois FOIA terms of art. The *Tribune* argued that the request did not ask for "education records," that the records were about applicants not "students," and that FERPA did not "prohibit" the release of information as contemplated by the exception to Illinois FOIA.¹⁵⁹

The district court found the third argument about the meaning of "prohibit" in the Illinois FOIA dispositive. After defining the word according to Webster's dictionary, the district court opined, "FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid Illinois officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations."¹⁶⁰ Under the Spending Clause, the district court said, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under the enumerated powers in Article I.¹⁶¹

157. *Chicago Tribune v. U.I.*, 781 F. Supp. 2d 673, 673–74 (N.D. Ill. 2011). Compare with the regulatory definition of "personally identifiable information," *supra* note 11.

158. *Chi. Trib. v. U.I.*, 781 F. Supp. 2d at 675 (citing 5 ILCS § 140/7(1)(a)).

159. *Id.*

160. *Id.* (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)).

161. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987)).

In support of its analysis, the district court cited only the Sixth Circuit's *Miami* case for the analogy between Spending Clause legislation and state-federal contracts. That is, "the federal government has a right to enforce the state's promise to abide by the conditions of FERPA once it has accepted federal funds."¹⁶² However, the Sixth Circuit's limit of this conclusion to federal actions to enforce FERPA was the caveat upon which the district court built its decision for the *Tribune*. The district court holding was only a limited one that FERPA does not "specifically prohibit" U.I. from doing anything.¹⁶³ Accordingly, U.I. was ordered to respond to the *Tribune's* information request in toto.

C. The Seventh Circuit Decision Vacating the District Court Order for Lack of Federal Subject Matter Jurisdiction

The *Tribune's* trial court victory was short-lived because U.I. immediately appealed,¹⁶⁴ arguing that it had created administrative privacy policies to comply with federal law.¹⁶⁵ The U.I. appellate brief emphasized FERPA's plain language and U.I.'s reliance upon it to create practical policies for controlling the release of sensitive education records. In response, the *Tribune* offered a scandalous story describing corrupt politicians and public school administrators allegedly doing favors for one another and hiding behind federal privacy laws intended to protect the very system that they abused.¹⁶⁶ Despite many well-founded textualist arguments, the *Tribune* framed the controversy to be about more than U.I.'s compliance with federal privacy protections; this was, the *Tribune* argued about Chicago-style politics at their worst.¹⁶⁷

After appellate briefing,¹⁶⁸ amicus briefing,¹⁶⁹ oral argument,¹⁷⁰ and supplemental briefing,¹⁷¹ the Seventh Circuit vacated the district court

162. *Id.* at 675–76 (citing *U.S. v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002)).

163. *Id.* at 676.

164. *Chi. Trib. v. U.I.*, 680 F.3d 1001 (7th Cir. 2012).

165. U.I. Appellant Br., *supra* note 148, at 8–14.

166. Brief of Plaintiff-Appellee Chicago Tribune Co. at 2–10, *Chicago Tribune v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001 (7th Cir. 2012) (No. 11—2066) [hereinafter *Tribune Appellee Br.*].

167. *Id.* at 11 ("When University Trustee Lawrence Eppley tells Chancellor Herman that Governor Blagojevich wants a student admitted to the University and the Chancellor overrides the Admissions Department and orders the sponsored student to be admitted in place of a more qualified applicant, that is a matter of profound public interest and concern.").

168. U.I. Appellant Br. filed July 13, 2011; *Tribune Appellee Br.* filed August 13, 2011.

169. U.I. Amici filed July 20, 2011; *Tribune Amicus* filed August 19, 2011.

170. October 1, 2011.

171. Filed October 14, 2011. The Electronic Privacy Information Center gathers and links to all appellate and amicus briefs as well as some relevant cases at its website,

order on May 24, 2012, finding that the federal courts lack subject matter jurisdiction over this case.¹⁷² Writing for the three-judge panel, Chief Judge Easterbrook foreshadowed this result from the outset.¹⁷³ Accordingly, the Seventh Circuit opinion is a lesson in procedural law¹⁷⁴ and the nuances of federal subject matter jurisdiction for federal defenses to state-law causes of action.¹⁷⁵

The Seventh Circuit ruled that the *Tribune's* claim for documents arose “under state law and *only* state law.”¹⁷⁶ Furthermore, the court found that the application of Section 7(1)(a) of the Illinois FOIA did not entirely depend on the meaning of Section 1232g(b)(1) of FERPA because the language at issue, “specifically prohibited from disclosure by federal . . . law,” was embedded in an Illinois law—namely, FOIA. The holding was that because “the *Tribune's* claim to the information [arose] under Illinois law, the state court [was] the right forum to determine the validity of whatever defenses the University [presented] to the *Tribune's* request.”¹⁷⁷ Although “‘pure’ argument about the meaning of [FERPA] belongs in federal court,” Judge Easterbrook said, it can only arrive there if the United States brings suit because *Gonzaga* does not allow a private party to enforce Section 1232g.¹⁷⁸

The Seventh Circuit officially declined to “express any opinion as to whether the information the Tribune [sought related] to student records within the meaning of [FERPA] and the implementing regulations.”¹⁷⁹ Unofficially, the court affirmed the district court’s explanation of FERPA’s conditional spending provisions.¹⁸⁰ In relevant part, the Seventh Circuit opined that FERPA “does not by itself forbid any state to disclose anything.”¹⁸¹ Rather, FERPA prohibits the Secretary of Education from granting money to state bodies whose policies allow student records to be disclosed. Furthermore, any “state can turn down the money and disclose whatever it wants. The most one can say about [FERPA] is that *if* a state takes the money, *then* it must honor the conditions of the grant, including

<http://epic.org/amicus/tribune/> (accessed Jan. 2, 2013).

172. See *Chicago Tribune*, 680 F.3d at 1006. The authors give a Stephen Colbert wag of the finger to the Court’s apparent use of Wikipedia for its fact statement.

173. *Id.* at 1002.

174. *Id.* at 1003 (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986)).

175. *Id.* at 1003–04 (citing *Grable & Sons Metal Products, Inc. v. Daure Engineering & Manufacturing*, 545 U.S. 308 (2005)).

176. *Id.* at 1004.

177. *Id.* at 1006.

178. *Id.* at 1005; See also Sidbury (2003), *supra* note 44, at 668 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002)).

179. *Id.* at 1006.

180. *Id.* at 1004–05.

181. *Id.* at 1004.

nondisclosure.”¹⁸² It follows that honoring “a grant’s conditions is a matter of contract rather than a command of federal law.”¹⁸³

The dicta further explained two ways in which the Illinois FOIA could affect this contractual agreement. It is possible that information is specifically prohibited from disclosure by federal law in the sense intended by a particular state FOIA whenever the state has “entered into a contractual commitment with the federal government under which disclosure is forbidden as long as the contract lasts.”¹⁸⁴ It is equally possible that those same prohibitions from disclosure are triggered only by federal laws that are unconditional—“when there is nothing the state can do (such as turning down proffered funds) to honor the pro-disclosure norm” The Seventh Circuit thus approached this controversy according to the text of FERPA and the Illinois FOIA, but declined to issue an advisory opinion on the meaning of Illinois state law as applied to federal law.¹⁸⁵

IV. STATE COURTS RISING TO THE CHALLENGE OF INTERPRETING FERPA ACCORDING TO ITS PLAIN LANGUAGE

Because of its jurisdictional failings, *The Chicago Tribune v. The University of Illinois* has not been as exciting for FERPA scholars as anticipated. Albeit in dicta, the Seventh Circuit very briefly expanded the case law about FERPA’s operation as Spending Clause legislation. Based on this opinion, FERPA remains distinct from an outright federal prohibition on state activity. Accordingly, the way in which a state FOIA treats FERPA conditions (as prohibitions or something else) will assuredly be the focus of future scholarly analysis and state court litigation.¹⁸⁶ In this

182. *Id.* (citing *Owasso Indep. Sch. Dist.*, 534 U.S. 426, 428 (2002); *U.S. v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002)).

183. *Id.* at 1004–1005.

184. *Id.* at 1005.

185. Judge Easterbrook added that the Seventh Circuit would not allow a state to avoid the effects of its commitments to the federal government by reading its own FOIA laws “narrowly.” *Id.* at 1005. Since this statement follows the alternative arguments, which would presumably be allowed by the Seventh Circuit, the court apparently means a reading of the state FOIA exemption that requires very specific kind of federal prohibition, allowing for disclosure under state law in spite of the federal prohibition.

186. See Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. Rev. 1045 (2012) (FERPA meets the *South Dakota* test and trumps conflicting state FOIA laws otherwise requiring disclosure); *Press-Citizen Co, Inc. v. Univ. of Iowa*, 817 N.W.2d 480, 482 (Iowa 2012) (“This case requires us to decide where disclosure ends and where confidentiality begins under the Iowa Open Records Act and the Federal Educational Rights and Privacy Act. . . .”); *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 970 N.E.2d 939, 942 (Ohio 2012) (“This is a public-records action in which relator, ESPN, Inc. seeks certain records from respondent, the Ohio State University”).

respect, the Seventh Circuit has reinforced a message the federal circuit courts have been sending for over twenty years: interpret FERPA according to its text unless there's a good reason to do otherwise. If state courts can apply this simple approach to FERPA interpretation, the need for federal court intervention in cases like *The Miami Student* and *Red & Black* will be eliminated.¹⁸⁷

Recall that the Sixth Circuit in *Miami* effectively reversed the Ohio Supreme Court's ruling about whether student disciplinary records could be disclosed because, the Sixth Circuit concluded, the Ohio Supreme Court improperly interpreted FERPA's definition of "education record." If the *Miami Student* is read in conjunction with *Chicago Tribune*, it might appear that FERPA litigants now find themselves in an impossible position. Plaintiffs who construe the conflict in terms of state FOIA will go to state court and risk effective reversal of improper interpretations of federal law in federal court.¹⁸⁸ On the other hand, plaintiffs who construe the conflict in terms of FERPA will go to federal court where they will encounter jurisdictional problems after *Gonzaga* and the *Chicago Tribune*. However, recent state court FERPA litigation has demonstrated an awareness of a trend toward textualism in the federal courts and applied FERPA in such a way that litigation has not proceeded to federal court.

Recent state court litigation has demonstrated a willingness and ability to interpret FERPA as it applies to state FOIA exemptions. For example, in *Press-Citizen Co. v. University of Iowa*, the Iowa Supreme Court applied FERPA to deny media access to information, even in redacted form, about University of Iowa football players allegedly involved in sexual assaults.¹⁸⁹ The court concluded that the Iowa FOIA¹⁹⁰ effectively treated FERPA as preemptive of Iowa's state open records statute because of the potentially severe consequences arising from FERPA violations.¹⁹¹ The court further determined that redaction in this case could not adequately shield identities of students whose privacy rights enjoy FERPA privacy protection.¹⁹²

Also, in *State ex rel. ESPN v. Ohio State University*, the Ohio Supreme Court reached a similar decision. It did so by refusing to release student-related emails records outright or requiring redaction of personally identifiable student information subject to FERPA, in response to an ESPN media demand for these materials under the Ohio public records statute.¹⁹³

187. See note 87 and accompanying text.

188. See *supra* note 175 and accompanying text.

189. *Press-Citizen*, 817 N.W.2d at 482–84.

190. Iowa Open Records Act, IOWA CODE §§ 22.1(3) & 22.2(1) (2010). See § 22.7 for list of exemptions from disclosure.

191. *Press Citizen*, 817 N.W.2d at 487–88.

192. *Id.* at 491–92.

193. *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 970 N.E.2d 939, 944–45 (Ohio

Perhaps sensitive to *Miami Student* which arose in Ohio, the Ohio Supreme Court relied heavily on the Sixth Circuit's FERPA analysis in that case to conclude that Ohio law incorporated FERPA to bar from disclosure or to severely restrict disclosure of FERPA-protected student information.¹⁹⁴ It is reasonable to predict the Illinois Supreme Court would reach the same result if the *Tribune* case is litigated in state court under the Illinois FOIA.

CONCLUSION

Those encountering disputes over FERPA will be best served by text-based interpretations of the law. The battleground for FERPA litigation in the federal circuit courts is thus well established. *Owasso* and *Gonzaga* evidence the Supreme Court's preference for New Textualism in the interpretation of FERPA. The Federal Circuits have responded to the thrust of these cases. Moreover, *Gonzaga*'s effect on individual FERPA enforceability under Section 1983 has eliminated a major reason why the federal circuit courts have gone beyond the text of FERPA. As of this writing, FERPA interpretation almost uniformly begins with the letter of the law and often ends there.¹⁹⁵

The federal circuit court approach, New Textualism, is very straightforward. Interpret the meaning of a law's text with text-linked or text-based sources rather than write legislative history or Congressional intent.¹⁹⁶ If state courts can interpret FERPA in a similarly textualist way, they may keep FOIA-FERPA litigation out of federal court. FERPA policy objectives, legislative history, and Congressional intent can only be used to frame textualist interpretations, confirm conclusions based on textualist approaches, resolve conflicts between the language of different federal statutes, and clarify ambiguity in statutory language.¹⁹⁷ While there are

2012).

194. *Id.* at 218–220.

195. A similar trend is also evident in DOE interpretation as well as in federal district court and state court. Cara Runsick Mitchell, *Defanging the Paper Tiger: Why Gonzaga Did Not Adequately Address Judicial Construction of FERPA*, 37 GA. L. REV. 755, 771 (2003) (“Many FERPA questions addressed by courts have been definitional. Frequently, courts decide whether the requested records are “education records” [fn 137] or whether they fall under some exemption or exception. [fn 138]”).

196. *Supra* note 3 and accompanying text.

197. See Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393 (2008), for a discussion about FERPA's interaction with HIPAA and an assessment of the law's treatment of various records kept by institutes of higher education. See Laura Khatcheressian, *FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing Information About Foreign Students*, 29 J.C. & U.L. 457 (2003), for a discussion of FERPA's interaction with immigration law.

criticisms of a textualist approach to statutory interpretation,¹⁹⁸ students, administrators, journalists, and attorneys who encounter FERPA disputes will be best served in achieving their desired outcomes with arguments based in the language of the statute.¹⁹⁹

198. See Eskridge, Frickey, & Garrett, *supra* note 3, at 230–36 (citing Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Daniel Farber & Philip Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Merrill, 72 WASH. U.L.Q. 351 (1994) *supra* note 138; Stephen Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399; Patricia Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. L. REV. 277 (1990); Nicholas Zepos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991); John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Jerry Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.).

199. An exhaustive discussion of the propriety of New Textualist FERPA interpretation is beyond the scope of this article. However, a healthy body of literature addresses FERPA interpretation. Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide their Scandals*, 33 CARDOZO L. REV. 1555 (2012) (critiques current use of FERPA by universities, often based on plain-language interpretation and corresponding university policy, to hide scandal, particularly in college football). Randi M. Rothberg, *Not As Simple As Learning the ABC's: A Comment on Owasso Independent School District No. I-011 v. Falvo and the State of the Family Educational Rights and Privacy Act*, 9 CARDOZO WOMEN'S L.J. 27, 37 (2003) ("While the confusing nature of FERPA's language often renders the statute weak or bypassable, so too does its inherent lack of enforcement mechanisms and remedies."). Robert W. Futey, *The Family Educational Rights & Privacy Act of 1974: Recommendations for Realigning Educational Privacy with Congress' Original Intent*, 41 CREIGHTON L. REV. 277, 278 (2008) ("Congress should amend FERPA to realign it with the protections Congress originally intended.").

OPEN-RECORDS REQUESTS FOR PROFESSORS’ EMAIL EXCHANGES: A THREAT TO CONSTITUTIONAL ACADEMIC FREEDOM?

WILLIAM K. BRIGGS*

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INTRODUCTION

Early in March 2011, Wisconsin Governor Scott Walker and the republican Wisconsin legislature pushed through legislation that virtually eliminated the collective bargaining rights of the state’s public employees.¹ This action followed weeks of protest, which drew over ten thousand people to the state Capitol building.² Following the legislation, some people also chose to protest online, including University of Wisconsin professor William Cronon who began a blog and, on March 15, 2011, wrote a post criticizing the legislation and its motivations.³

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1. *Wis. governor officially cuts collective bargaining*, NBC NEWS (Mar. 11, 2011), http://www.msnbc.msn.com/id/41996994/ns/politics-more_politics/t/wis-governor-officially-cuts-collective-bargaining/.

2. *Id.*

3. William Cronon, *Who’s Really Behind Recent Republican Legislation in Wisconsin and Elsewhere?*, SCHOLAR AS CITIZEN (Mar. 15, 2011),

Two days later, the Wisconsin Republican Party filed an open-records request, pursuant to Wisconsin's Open Records Law, to obtain all emails from Cronon's university email account which referenced multiple terms relating to the ongoing political dispute, including: "republican," "Scott Walker," "recall," "collective bargaining," "rally," and "union."⁴ While the Wisconsin Republican Party did not have to declare its motivation under the Open Records Law (and adamantly refused to do so),⁵ it likely intended to determine whether Cronon had illegally used public resources for partisan political advocacy.⁶ In response to this open-records request, Cronon publicly protested in a blog post entitled, "Abusing Open Records to Attack Academic Freedom."⁷

In the aftermath, many people came to Cronon's defense, echoing the concern he expressed on his blog that this open-records request was an assault on his academic freedom. These supporters included writers of opinion pieces in such media entities as the *New Yorker*,⁸ the *New York Times*,⁹ and the *Atlantic*.¹⁰ Cronon also received support in the form of public statements by multiple higher-education entities, including the American Historical Association,¹¹ American Anthropological

<http://scholarcitizen.williamcronon.net/2011/03/15/alec/>.

4. John Gardner, *William Cronon and academic freedom*, THE GUARDIAN (Apr. 1, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/apr/01/wisconsin-republicans?INTCMP=SRCH>.

5. Press Release from Mark Jefferson, Executive Director of the Republican Party of Wisconsin, in response to professor William Cronin's deplorable tactics (Mar. 25, 2011), available at <http://scholarcitizen.williamcronon.net/2011/03/25/republican-party-response/>.

6. Indeed, the University of Wisconsin treated the request as if this was the motivation; taking care to emphasize that it had reviewed Cronon's emails for such partisan advocacy. See Chancellor Biddy Martin, *Chancellor's message on academic freedom and open records*, UNIV. OF WIS. NEWS (Apr. 1, 2011), <http://www.news.wisc.edu/19190> ("We have dutifully reviewed Professor Cronon's records for any legal or policy violations, such as improper uses of state or university resources for partisan political activity. There are none.").

7. William Cronon, *Abusing Open Records to Attack Academic Freedom*, SCHOLAR AS CITIZEN (Mar. 24, 2011), <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/>.

8. Anthony Grafton, *Wisconsin: The Cronon Affair*, THE NEW YORKER (Mar. 28, 2011), <http://www.newyorker.com/online/blogs/newsdesk/2011/03/wisconsin-the-cronon-affair.html>.

9. Paul Krugman, *American Thought Police*, N.Y. TIMES (Mar. 27, 2011), http://www.nytimes.com/2011/03/28/opinion/28krugman.html?_r=0.

10. James Fallows, 'Have You No Sense of Decency?' *The Wm. Cronon Story*, THE ATLANTIC (Mar. 25, 2011), <http://www.theatlantic.com/national/archive/2011/03/have-you-no-sense-of-decency-the-wm-cronon-story/73010/>.

11. *AHA Deplores Effort to Intimidate William Cronon*, AM. HISTORICAL ASS'N (Mar. 27, 2011), <http://blog.historians.org/news/1293/aha-council-deplores-recent-intimidation-efforts-aimed-at-cronon>.

Association,¹² and the American Association of University Professors (“AAUP”).¹³ While the public support in favor of Cronon was not unanimous,¹⁴ the detractors were in the clear minority.

Every state has an open-records statute, which allows the public to obtain the records of public officials.¹⁵ All these statutes also include, within their definitions of public records, emails sent and received by professors at public colleges or universities using their “.edu” email addresses.¹⁶ Of course, these statutes limit which emails may be obtained by including exemptions for such things as personal communications.¹⁷ But no state open-records statute has an explicit exemption for records whose contents are within the scope of academic freedom.¹⁸ Nevertheless, the University of Wisconsin cited academic freedom as its reason for withholding those of Cronon’s emails it considered to be “[i]ntellectual communications among scholars.”¹⁹ Its chancellor explained the rationale:

We are also excluding what we consider to be the private email exchanges among scholars that fall within the orbit of academic freedom and all that is entailed by it. Academic freedom is the freedom to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas.²⁰

There is a broad professional definition of academic freedom, promulgated by the AAUP, which could conceivably cover Cronon’s email exchanges to his fellow scholars.²¹ But this professional academic

12. Joslyn O., *Anthropologists Speak Out in Protection of Academic Freedom*, AM. ANTHROPOLOGICAL ASS’N (Apr. 5, 2011), <http://blog.aaanet.org/2011/04/05/anthropologists-speak-out-in-protection-of-academic-freedom/>.

13. Letter from Gregory F. Scholtz, Assoc. Sec. and Dir. of the American Association of University Professors, to Carolyn A. (Biddy) Martin, Chancellor of the Univ. of Wis. (Mar. 28, 2011), *available at* <http://www.aaup.org/NR/rdonlyres/CCED586E-3430-4865-B578-01D8584127B4/0/BiddyMartin.pdf>.

14. For examples of the media not supporting Cronon, *see* Jack Schafer, *There’s No Such Thing as a Bad FOIA Request*, SLATE MAGAZINE (Mar. 25, 2011), http://www.slate.com/articles/news_and_politics/press_box/2011/03/theres_no_such_thing_as_a_bad_foia_request.html; Peter Wood, *Cronon’s Whirlwind*, CHRON. OF HIGHER EDUC. (Mar. 30, 2011), <http://chronicle.com/blogs/innovations/cronons-whirlwind/29016>.

15. *See State Sunshine Laws*, SUNSHINE REVIEW, http://sunshinereview.org/index.php/State_sunshine_laws (last visited Oct. 30, 2012).

16. *Id.*

17. *Id.*

18. *Id.*

19. Letter from John C. Dowling, Senior Univ. Legal Counsel, Univ. of Wis., to Stephan Thompson, Rep. Party of Wis. (Apr. 1, 2011), *available at* <http://scholarcitizen.williamcronon.net/> [hereinafter *Dowling Letter*].

20. Martin, *supra* note 6.

21. ERIC BARENDT, *ACADEMIC FREEDOM AND THE LAW* 161 (2010).

freedom, although it is endorsed by numerous educational associations, has no direct legal effect and is not embraced within the current case law.²² For there to be a legal basis to withhold scholarly email exchanges under the guise of academic freedom, the emails would have to fit within the much narrower constitutional definition of academic freedom granted to institutions.

Consequently, Professor Cronon's situation raises the question of whether constitutional academic freedom protects such scholarly email exchanges from disclosure under open-records laws. The overwhelming public reaction in favor of Cronon, and the fact that a similar open-records request unfolded in Michigan later that year,²³ illustrates the importance of this issue. Part I examines constitutional academic freedom in detail to determine how much protection it provides against competing governmental policy interests. It concludes that to the extent academic freedom is recognized by the Supreme Court and lower federal courts, it is as an interest rather than a right and accordingly, is afforded little protection when balanced against competing interests. Part II then examines the facts and reasoning underlying these cases to see if scholarly email exchanges would even implicate constitutional academic freedom. It concludes that they do not implicate academic freedom and that, as a result, open-records laws are constitutional as applied in situations like Professor Cronon's. Part III then turns to state law and finds that even if constitutional academic freedom was implicated by scholarly email exchanges, it would not offer protection in a state court's adjudication of an open-records dispute.

Because the argument that an open-records law is unconstitutional appears nonviable, Part IV asks whether there are policy arguments, outside of constitutional academic freedom, in favor of non-disclosure. Finding valid arguments, Part IV examines statutory reforms that would protect scholarly email exchanges. Ultimately, Part IV rejects statutory amendments and other explicit statutory reforms and instead concludes that the best solution is to advance a statutory interpretation argument that scholarly email exchanges should not even be considered "public records" under existing open-records laws.

I. IS ACADEMIC FREEDOM A CONSTITUTIONAL RIGHT OR INTEREST?

The academic community²⁴ and its supporters have justified the refusal

22. *Id.* at 172. *See also id.* at 165–173 for more information on the precise contours of professional academic freedom.

23. Steven Greenhouse, *Group Seeks Labor E-Mails by Michigan Professors*, N.Y. TIMES (Mar. 29, 2011), <http://www.nytimes.com/2011/03/30/education/30professors.html>.

24. This is of course a generalization as not "all" members of the academic community support the idea that academic freedom protects scholarly email exchange. However, for the sake of simplicity, such supporters will be referred to as "academics"

to release scholarly email exchanges following an open-records request on the grounds that such exchanges are protected by a constitutional right to academic freedom found within the First Amendment. In support of this position, academics cite both Supreme Court precedents extolling the importance of academic freedom and federal circuit courts of appeal opinions finding in favor of public university professors withholding documents despite subpoenas. However, a closer analysis of these cases reveal not only that they are not on point, but also, that the existence of a constitutional right of academic freedom is unlikely. At best, these cases support only a constitutional interest in academic freedom.

The difference between rights and interests is important because, although both serve as limitations on government, courts afford more protection to constitutional rights.²⁵ The increased protection means that the limitations on government actions are more severe when a constitutional right is at stake. Whether academic freedom is classified as a constitutional right or interest can make a difference in the open-records context because if academic freedom is an interest, then it must be balanced against other public policy interests such as open government and disclosure. For example, publically employed scholars are paid by taxpayers, which means that the public has an interest in knowing what activities their tax dollars are funding. If scholars are using public resources to engage in political activities, a violation of state law, the public has a right to know. But whether courts will view these interests as subordinate to academic freedom may depend on the level of protection they are willing to afford academic freedom.

Consider the following example concerning the selling of films; although an oversimplification, this example can illustrate the general distinction between a constitutional right and interest in practice. Because free speech is a constitutional right it protects citizens from prosecution for selling controversial films, even when there are legitimate government interests in favor of prosecution. For example, if a film appears to praise law breaking, then the right of free speech protects it even if the government has an interest in citizens following the law. The sole time in which the right of free speech will not provide protection is when there is a countervailing interest that is especially compelling.²⁶ Thus, while the pro-

throughout.

25. Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429 (1993); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 222–225 (2008) (“Although rights can be circumscribed, they still have a special status and genuine heft in adjudication.”). *Contra* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 389 (1993). For a much more comprehensive analysis of the distinctions between constitutional rights and constitutional interests, see also Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

26. See, e.g., Schauer, *supra* note 25, at 429 (analogizing a constitutional right as a shield that protects against knives—lower justification interests—but can be

law breaking film is protected, a child pornography film would not be protected because the protection of children is considered a compelling interest and trumps the constitutional right to free speech.²⁷

In contrast, if free speech were considered only a constitutional interest,²⁸ the free speech justification for selling a controversial film would have to be weighed equally against all the competing governmental interests, even those less than compelling. Under this scenario, the filmmaker's free speech interest in making the pro-law breaking film would be weighed against the government's interest in having citizens follow the law, presenting the potential for the government's non-compelling interest to outweigh free speech.

Those who believe academic freedom is a constitutional right on par with free speech, rely on two Supreme Court cases: *Sweezy v. New Hampshire*²⁹ and *Keyishian v. Board of Regents of the University of the State of New York*³⁰ as fully endorsing such a right.³¹ Both *Sweezy* and *Keyishian* concerned state statutes intended to expose and remove communists from public positions.³² The Supreme Court, in the course of finding the statutes at issue in these two cases unconstitutional, highlighted the existence of a threat to academic freedom.³³ However, despite its lofty rhetoric regarding academic freedom in these two opinions, the Court never explicitly declared that academic freedom for individual professors was an independent constitutional right.³⁴ In *Sweezy*, for example, the plurality opinion broadly praised academic freedom, but stopped short of calling it a right:³⁵

The essentiality of freedom in the community of American

overcome by bombs—higher justification interests).

27. See *New York v. Ferber*, 458 U.S. 747, 760–61 (1982).

28. An example of a constitutional interest is human dignity, which the Supreme Court, in *Trop v. Dulles*, recognized as an interest underlying the Eighth Amendment that must be weighed against the government interests in support of punishment. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

29. 354 U.S. 234 (1957).

30. 385 U.S. 589 (1967).

31. See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 967–82 (2009); David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 330 (1990).

32. See *Sweezy v. New Hampshire*, 354 U.S. 234; *Keyishian v. Bd. Of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589.

33. *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. 589 at 603.

34. See Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111 (2007).

35. It is worth pointing out that Justice Felix Frankfurter's concurring opinion implies that academic freedom is a right. However, this concurrence does not represent the Supreme Court's view on academic freedom. *Sweezy*, 354 U.S. at 255–67 (Frankfurter, J., concurring).

universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust.³⁶

Notably, despite this language the case was decided on non-academic freedom grounds, with the plurality instead basing its decision on a violation of due process.³⁷

Similarly, in *Keyishian*, instead of referring to academic freedom as a right, the Court referred to it as a concern and value: “Our Nation is deeply committed to safeguarding academic freedom, which is of *transcendent value* to all of us and not merely to the teachers concerned. That freedom is therefore a *special concern* of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”³⁸ And just as with *Sweezy*, the Court decided the case on non-academic freedom grounds, this time striking down the New York statutes in question because of vagueness and over-breadth.³⁹

In light of these facts, a strong argument can be made that the Court’s references to academic freedom in these two cases were not intended to recognize academic freedom as a genuinely independent right, but rather, to point out an important observation about the different values at stake under the First Amendment.⁴⁰ Supreme Court jurisprudence since these two cases has supported this interpretation, offering no other discernible support for a college or university faculty member having an individual right to academic freedom.⁴¹ While the Supreme Court has addressed academic freedom in other contexts, *Sweezy* and *Keyishian* exhaust the Supreme Court’s development of the academic freedom doctrine in regard

36. *Id.* at 250–51 (majority opinion).

37. *Id.* at 245, 254–55.

38. *Keyishian*, 385 U.S. at 603 (emphasis added).

39. *Id.* at 604.

40. See Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 908–09 (2006) (“[I]t is doubtful that, except in a surprisingly small number of instances, the Supreme Court’s references to academic freedom were intended to recognize, or had the effect of recognizing, a genuinely distinct individual academic freedom right, as opposed to simply pointing out an important but undifferentiated instantiation of a more general individual right to freedom of speech.”) (footnote omitted); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 (2006) (“[T]he courts have not carefully delineated when speech is protected specifically because it is academic *and* when speech is protected under generally applicable First Amendment principles in cases when the speaker happens to be a member of the academic community.”).

41. See J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 298 (1989).

to individuals.⁴² As one scholar has described it, the Court's academic freedom jurisprudence after these two cases has been "[l]acking definition or guiding principle" and "float[ing] in the law, picking up decisions as a hull does barnacles."⁴³

Moreover, recent Supreme Court decisions have indicated that if there is a constitutional right to academic freedom, it belongs to institutions not individual professors. In *Regents of the University of Michigan v. Ewing*,⁴⁴ the Court suggested the existence of such a protection by noting the Court's responsibility to safeguard the academic freedom of state and local educational institutions.⁴⁵ Similarly, in *Grutter v. Bollinger*,⁴⁶ the Court noted that Justice Lewis Powell, in his plurality opinion in *Regents of University of California v. Bakke*,⁴⁷ had grounded his analysis in institutional academic freedom.⁴⁸ The Court then endorsed Justice Powell's opinion⁴⁹ and stated that its holding was "keeping with our tradition of giving a degree of deference to a university's academic decisions."⁵⁰

Nor is there much support in the federal circuit courts of appeal for treating individual academic freedom as a constitutional right. The Fourth Circuit has firmly expressed its belief that the academic freedom of professors is not a constitutional right. In *Urofsky v. Gilmore*,⁵¹ the Fourth Circuit declared en banc that "[a]ppellees' insistence that [the Virginia statute in question] violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree."⁵² *Urofsky* then went on to point out that despite the Supreme Court's high-minded language regarding academic freedom it had never set aside a state regulation on the grounds that a First Amendment right to academic freedom was infringed.⁵³

In *Johnson-Kurek v. Abu-Absi*,⁵⁴ the Sixth Circuit favorably quoted *Urofsky*'s language regarding the absence of a constitutional right of academic freedom for individual professors.⁵⁵ Similarly, the Tenth Circuit

42. *Id.*

43. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 813 (2010) (citing Byrne, supra note 41, at 253).

44. 474 U.S. 214 (1985).

45. *Id.* at 226.

46. 539 U.S. 306 (2003).

47. 438 U.S. 265 (1978).

48. *Grutter*, 539 U.S. at 307.

49. *Id.* at 325.

50. *Id.* at 328.

51. 216 F.3d 401 (4th Cir. 2000) (en banc).

52. *Id.* at 411 (footnote omitted).

53. *Id.* at 412.

54. 423 F.3d 590 (6th Cir. 2005).

55. *Id.* at 593 (quoting *Urofsky*, 216 F.3d at 410) ("[T]o the extent the

has rejected the argument that professors at public colleges or universities possess a special constitutional right of academic freedom that is not possessed by other public employees.⁵⁶ And in *Bishop v. Aronov*,⁵⁷ the Eleventh Circuit held that “we do not find support to conclude that academic freedom is an independent First Amendment right.”⁵⁸

While the Seventh Circuit suggested in *Dow Chemical Company v. Allen*⁵⁹ that individual academic freedom might be a constitutional right,⁶⁰ it ultimately refused to answer the question, concluding that “[f]or present purposes, our point is simply that respondents’ *interest* in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable.”⁶¹ Admittedly, the Seventh Circuit has not completely foreclosed the possibility of a constitutional right of individual academic freedom.

It is hard to consider individual academic freedom as a constitutional right when the Supreme Court has never recognized it as such. *Sweezy* and *Keyishian* illustrate the Court’s respect for the importance of academic freedom, but the fact that the Court did not expressly decide either of these cases on academic freedom grounds shows the Court’s hesitancy to treat academic freedom as a full-fledged constitutional right. This fact is especially telling considering the Court has shown few qualms about accepting institutional academic freedom as a constitutional right.⁶²

The result is that in practice, constitutional academic freedom is a rather toothless limitation on government interference with publicly employed scholars. The lesson from *Sweezy* and *Keyishian* is that, while academic freedom concerns may serve as an underlying influence on a court, the decision as to whether government interference is constitutionally permissible will ultimately be made on independent grounds. Whether academic freedom will have a limited influence on a court’s decision to prevent government action will depend on whether the government action in question actually fits within the scope of academic freedom. As the following section shows, that scope is quite narrow.

Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors.”).

56. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005).

57. 926 F.2d 1066 (11th Cir. 1991).

58. *Id.* at 1075.

59. 672 F.2d 1262 (7th Cir. 1982).

60. *Id.* at 1275 (“[A]cademic freedom, like other *constitutional rights*, is not absolute, and must on occasion be balanced against important competing interests.”) (emphasis added).

61. *Id.* at 1276–77 (emphasis added) (citation omitted).

62. *See* *Byrne*, *supra* note 41, at 226; *Gutter v. Bollinger*, 539 U.S. 306, 328 (2003).

II. THE SCOPE OF CONSTITUTIONAL ACADEMIC FREEDOM

The limited nature of the Supreme Court's jurisprudence makes it clear that academic freedom is not implicated just because the government interferes with a professor's speech. It is unclear, however, how far the scope of constitutional academic freedom extends. Multiple scholars have noted the Court's refusal to offer any guidance on the standards that courts should follow in evaluating academic freedom claims.⁶³ The result of this ambiguity has been that academic freedom analysis, even in lower courts, is highly "context-specific."⁶⁴ Frustratingly, lower courts have followed the Supreme Court's lead and consistently refused to define the contours and limits of academic freedom.⁶⁵ Adding to this lack of guidance—or perhaps due to it—these lower courts also tend to invoke the doctrine inconsistently.⁶⁶

Harping on this ambiguity, academics have fomented two somewhat indirect arguments in favor of an expansive concept of academic freedom that covers scholarly email exchanges sought through open-records requests. One of these arguments is based on Supreme Court rulings, while

63. See Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145, 149 (2009) ("Supreme Court decisions have failed to offer clear guidance on standards that courts should follow in evaluating academic freedom claims by faculty members in public higher education."); Byrne, *supra* note 41, at 257–58; Chen, *supra* note 40, at 959 ("For nearly fifty years, the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights."); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 469 (2005) ("[N]either the Supreme Court nor the lower courts have ever explained fully the scope and meaning of constitutional academic freedom. . .").

64. See Chen, *supra* note 40, at 959 ("Because the Supreme Court has never fully articulated a constitutional doctrine of academic freedom, the extant law can best be described as a set of context-specific legal standards loosely connected by some common principles.").

65. See W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom."); Hutchens, *supra* note 56, at 154 ("[I]mportant questions regarding the contours of First Amendment protection for academic freedom remain unanswered."); Byrne, *supra* note 41, at 252–53 ("Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.").

66. See *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982) (finding that academic freedom's "perimeters are ill-defined and the case law defining it is inconsistent"); *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (citing Byrne, *supra* note 41, at 262–64; Stuller, *supra* note 58, at 303); Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409, 452 (2009) (attributing circuit court struggles to find a workable standard that protects constitutional in-class teacher expression to the Supreme Court's "ambiguous rulings on academic freedom").

the other is primarily based on circuit court rulings. The first argument begins with the assumption that the academic freedom worries that the Supreme Court raised in *Sweezy* and *Keyishian* are applicable to every statute, which in turn, “chills” the freedom of teachers to speak openly and share their thoughts on intellectual matters. From this assumption it follows that because open-records statutes have the potential to limit teachers from sharing intellectual communications over email with each other, these scholarly email exchanges are properly within the scope of academic freedom. The second argument is that circuit court decisions refusing to enforce subpoenas of professors’ research documents support academic freedom covering other documents such as emails that are of a scholarly nature.

Both arguments are well-intended. However, an examination of the factual basis underlying the cases relied upon shows that, at most, academic freedom only prevents direct government action intended to control the content of teaching and research. Teaching plainly encapsulates classroom speech, curriculum, activities, documents, and textbooks. Similarly, research includes the notes, data, papers, reports, and other preparatory activities associated with scholarly publication. But it is unlikely that either teaching or research includes scholarly email exchanges. No court has held as much, and no matter how loosely one defines “teaching” or “research,” political email exchanges between faculty members cannot reasonably fit within the scope of either basis that is advanced in favor of an expansive notion of academic freedom.

A. The First Argument

Academics argue that the Supreme Court’s reasoning in *Sweezy* and *Keyishian* serves as a justification for extending academic freedom to cover scholarly email exchanges sought through open-records statutes. *Sweezy* and *Keyishian* warned that academic freedom is implicated when statutory interference with the academic sphere fosters an “atmosphere of suspicion and distrust” that chills intellectual thought.⁶⁷ The argument follows that state open-records statutes, like the state statutes in *Sweezy* and *Keyishian* seeking to root out communists in the school house, also interfere with the academic sphere and create a similar atmosphere of suspicion and distrust around scholarly email exchanges.⁶⁸ In support of the existence of such an “atmosphere,” academics emphasize that open-records requests of scholarly email exchanges are often done solely to embarrass or harass a

67. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

68. See Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, AM. CONST. SOC’Y FOR LAW AND POLICY, Sept. 8, 2011, at 7, available at http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief.pdf.

public professor for his or her political views.⁶⁹ According to these academics, such a motivation could have many chilling consequences, such as stifling debate rather than fostering it,⁷⁰ driving public college and university professors to leave for private colleges and universities,⁷¹ and influencing state legislatures to reduce research funding for public colleges and universities.⁷²

Taken in isolation, this comparison to *Sweezy* and *Keyishian* seems to hold weight. But, while these academics correctly quote *Sweezy* and *Keyishian*, they fail to put such language in context. In both cases the Court warned of direct statutory threats to academic freedom in the classroom. There is no mention of threats to non-classroom speech or of indirect threats posed by neutral statutes such as open-records statutes.⁷³ Also, as examination of these two cases reveals, direct statutory threats to academic freedom that mandate the termination of certain teachers for their classroom speech have much greater potential for chilling academic speech than do indirect statutory threats to non-classroom speech that do not authorize such termination. Thus, while these two cases do not foreclose the possibility of open-records statutes chilling academic speech, *Sweezy* and *Keyishian* alone cannot be used to justify treating the effect of open-records statutes on scholarly email exchanges as implicating constitutional academic freedom.

Sweezy concerned a statutory scheme that presented a direct threat to academic freedom. One of the statutes—which were all designed to regulate communist activities—permitted the state attorney general to question potential communists, including professors, and initiate criminal prosecution. One such person questioned, a University of New Hampshire professor, was convicted of contempt for refusing to answer questions relating to his classroom teaching. As a result, the Court’s language stressing the importance of protecting academic freedom emphasized that it was protection from the direct interference of governmental authority that mattered. The plurality opinion expressed concern for “governmental interference” with teaching and referred to the academic sphere as an “area[] in which government should be extremely reticent to tread.”⁷⁴

69. *Id.* at 6.

70. *Id.*

71. See *Dowling Letter*, *supra* note 19 (“The consequence for our state of making such communications public will be the loss of the most talented and creative faculty who will choose to leave for universities that can guarantee them the privacy and confidentiality that is necessary in academia.”); Christopher Shea, *William Cronon vs. Wisconsin Republicans*, WALL ST. J. (Mar. 28, 2011), <http://blogs.wsj.com/ideas-market/2011/03/28/william-cronon-vs-wisconsin-republicans/>.

72. Levinson-Waldman, *supra* note 61, at 6.

73. This distinction is consistent with other Supreme Court cases, which invoke academic freedom in the face of direct government pressure. See *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

74. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Justice Felix Frankfurter's concurrence echoed this concern, stressing the importance of "the exclusion of governmental intervention in the intellectual life of a university."⁷⁵ It was this context that led the Court to worry about the chilling of academic speech and the creation of an atmosphere of suspicion and distrust.

Keyishian also concerned statutes that represented a direct threat on academic freedom in the classroom. The New York Board of Regents had authorized laws that directly required the firing of public college and university professors who, by virtue of belonging to communist organizations, had the potential of bringing communist beliefs into the classroom. For example, New York Civil Service Law § 105(1)(c), which was deemed constitutionally invalid, provided that "membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."⁷⁶ In determining that such a statute was overbroad, *Keyishian* quotes language from multiple administrative documents emphasizing the statute's single-minded goal of eliminating certain types of teachers.⁷⁷

As opposed to *Sweezy*, in which it was the state attorney general threatening academic freedom, and *Keyishian*, in which the statute directly mandated the firing of certain teachers, open-records laws only allow a non-governmental entity to obtain certain types of documents without a direct threat to academic freedom or employment. Such entities have no power to use the contents of email exchanges as the basis to directly fire a professor or decrease his funding. All non-governmental entities can hope for is to embarrass and harass the professor, or, at the very most, expose him or her to liability under a different statute or law.

While this indirect effect on professors may still count as chilling a professor's academic speech, or as creating an atmosphere of suspicion and distrust, it is much less evident an assault on constitutional academic freedom than a statute that directs the government to fire professors who express particular political views. And while open-records laws do nothing to prevent third parties from using information attained to chill academic speech by influencing a state legislature to fire a professor or decrease his funding, they do not directly mandate it. Most importantly, open-records statutes are distinct from the statutes discussed in *Sweezy* and *Keyishian* in that they are neither directly aimed at the classroom activities of professors nor motivated by a government desire to interfere with academic freedom.

75. *Id.* at 262 (Frankfurter, J., concurring).

76. N.Y. CIVIL SERV. LAW § 105(1)(c) (McKinney 2011). Similar language is affected in the other statute at issue. N.Y. EDUC. LAW § 3022(2) (McKinney 2009).

77. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 608–09 (1967).

All these differences add up to the conclusion that not all potential chilling of academic speech is equal. *Sweezy* and *Keyishian* concerned statutes intended to chill academic speech in the classroom, and whose enforcement would directly chill academic speech. They cannot be read to support an implication of academic freedom whenever the enforcement of a generally-applicable statute might hypothetically lead to a chain of events with the potential to chill academic speech.

The Supreme Court itself has stressed the importance of reading *Sweezy* and *Keyishian* in a narrow manner as being applicable only when there is a direct threat to academic speech. In the *University of Pennsylvania v. Equal Employment Opportunity Commission*, the Court ignored the petitioner's academic freedom argument, which was based on *Sweezy* and *Keyishian*, and enforced subpoenas requiring the disclosure of peer review evaluations in tenure decisions of former faculty members who had allegedly been discriminated against.⁷⁸ The Court stressed that in order for academic freedom to be implicated there had to be more than an attenuated connection of a generally-applicable law to academic freedom. As that was all that was present in the case at hand, the Court deemed the alleged threat to academic freedom to be "speculative."⁷⁹ In doing so, the Court indicated that the academic freedom reasoning in *Sweezy* and *Keyishian* was only limited to those cases in which the government "was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it."⁸⁰

Academics try to circumvent this reasoning by arguing that the college and university's academic freedom claim was recognized by the Court but was outweighed by the compelling interest in enforcement of federal anti-discrimination laws.⁸¹ However, this argument ignores the fact that the Court's decision was explicitly *not* based on the avoidance of sexual and racial discrimination being a compelling state interest that trumped an existing right to academic freedom:

Because we conclude that the EEOC subpoena process *does not infringe any First Amendment right* enjoyed by petitioner, the EEOC *need not demonstrate any special justification* to sustain the constitutionality of Title VII as applied to tenure peer review materials in general or to the subpoena involved in this case.⁸²

Thus, the Court—despite recognizing that such disclosure may serve to

78. *Univ. of Pa. v. Equal Emp't Opportunity Comm'n*, 493 U.S. 182, 201 (1990).

79. *Id.* at 200 ("Indeed, if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment.").

80. *Id.* at 197. *See also In re Dinnan*, 661 F.2d 426, 430 (5th Cir. 1981) ("Time after time the Supreme Court has upheld academic freedom in the face of government pressure. However, in all those cases there was an attempt to suppress ideas by the government.") (citations omitted).

81. *See* Levinson-Waldman, *supra* note 61, at 11.

82. *Univ. of Pa.*, 493 U.S. at 201 (emphasis added).

have a minimally chilling effect on the tenure system⁸³—refused to find academic freedom implicated and enforced the subpoenas without applying a balancing test or determining whether the state’s interest in preventing discrimination was a substantial justification.⁸⁴

In conclusion, while *Sweezy* and *Keyishian* do warn of the need to avoid the chilling of academic speech, at most they can only stand for the proposition that academic freedom is implicated when there is a direct government threat to a professor’s classroom speech. These two cases say nothing about whether constitutional academic freedom is implicated by the mere existence of a neutral statute, such as an open-records law, that could initiate a chain of events that might eventually threaten a professor’s non-classroom speech. Arguing otherwise requires the same type of attenuated connection of a generally-applicable law to academic freedom that was roundly criticized and called “speculative” in the *University of Pennsylvania* opinion.

B. The Second Argument

Academics also try to twist lower court reasoning to fit their argument that constitutional academic freedom should be extended to cover scholarly email exchanges. Primarily, academics cite cases in which federal circuit courts of appeal have held that college and university professors do not need to turn over documents despite having been subpoenaed. For example, the American Constitutional Society (“ACS”) cites the Seventh Circuit opinion in *Dow Chemical Company v. Allen*⁸⁵ as an example of circuit courts “articulat[ing] forcefully the [academic freedom] values at stake in these cases.”⁸⁶ In *Dow*, following the scheduling of a hearing by the Environmental Protection Agency regarding the cancellation of one of Dow Chemical’s herbicides, the company issued subpoenas to the University of Wisconsin researchers whose research had led to the hearing. The Seventh Circuit refused to enforce the subpoenas. Academics and their supporters, including the ACS, jump on the court’s language that to uphold the subpoenas would “threaten substantial intrusion into the enterprise of university research, and . . . [be] capable of chilling the exercise of academic freedom.”⁸⁷

However, there is a problem with this attempted analogy to *Dow* and other such subpoena cases. First, at issue in *Dow* is ongoing research. The very first paragraph of the opinion emphasizes that the subpoenas were seeking “the notes, reports, working papers, and raw data relating to on-

83. *Id.* at 200.

84. *Id.* at 201–202.

85. *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1274–76 (7th Cir. 1982).

86. Notably, the ACS refers to academic freedom in this quote as a “value” as opposed to a right. See Levinson-Waldman, *supra* note 61, at 9.

87. *Dow Chem. Co.*, 672 F.2d at 1276.

going, incomplete animal toxicity studies”⁸⁸ Similar pre-publication research is also at issue in other opinions which refuse to enforce subpoenas issued to academics.⁸⁹ This fact is an important difference from scholarly email exchanges, which tend to be unrelated to ongoing research. As illustration, the University of Wisconsin made no mention of “research” when explaining why it was withholding Cronon’s scholarly email exchanges.⁹⁰ While the University stated that scholarly emails could be used to develop lines of argument, it in no way indicated that it meant the development of arguments pertaining to ongoing research.⁹¹

For the researchers in *Dow*, granting the subpoenas would mean public access to their research data, potentially costing them the ability to publish which would compromise their months of research.⁹² In contrast, by all indications the emails Cronon sought to protect were unrelated to any ongoing research. They did not contain research data obtained through months of study. Nor did they contain information that was intended for publication. All they presumably contained was Cronon expressing his opinions on a timely political issue to colleagues. Moreover, it is likely that many of those opinions had already been made public by Cronon in the original blog post that led to the open-records request.

There is little dispute, in this line of subpoena cases, that direct threats to the research and classroom activities of professors implicate constitutional academic freedom to some extent. However, it is unclear how disclosure of Cronon’s email exchanges with other scholars would directly threaten his research or classroom activities, and any argument that it would present such a threat appears likely to be speculative. As already mentioned in regard to the *University of Pennsylvania*, which was also a subpoena case, attenuated, speculative threats do not implicate academic freedom. Thus, without any indication from courts that it would be appropriate to extend academic freedom to scholarly email exchanges that do not concern ongoing research or classroom activity, analogies to cases such as *Dow* offer little support for professors such as Cronon. The only conclusion is that scholarly email exchanges are not protected by constitutional academic freedom.

III. STATE COURT INTERPRETATION OF OPEN-RECORDS STATUTES

A third consideration is whether state courts would even allow the withholding of scholarly email exchanges if constitutional academic freedom was legitimately threatened. In all likelihood these courts would

88. *Id.* at 1266.

89. *See, e.g.,* *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *In re R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729 (N.Y. 1987).

90. *Dowling Letter*, *supra* note 19.

91. *Id.*

92. *Dow Chem. Co.*, 672 F.2d at 1273 (citing affidavits of researchers).

find that scholarly email exchanges do not implicate constitutional academic freedom and would treat them the same as any other public document being sought by ordering their release barring any explicit statutory exemption.⁹³ But, assuming that a court did find that scholarly email exchanges implicated academic freedom, it is still unlikely that the court would endorse the withholding of the documents. Out of deference to the balancing done by a legislature in drafting an open-records statute (and likely a desire to avoid finding such a statute unconstitutional), most courts are hesitant to give much consideration to policy arguments in favor of withholding documents, even constitutional arguments. While a minority of courts give more consideration to such arguments and engage in a more strenuous case-by-case balancing, those courts would nonetheless be similarly unlikely to find enforcement of a public records request to be an impermissible violation of constitutional academic freedom. Largely because these courts consider the policy interests in favor of open access fundamental and compelling, they have never found that academic freedom concerns trump these interests.⁹⁴ This fact holds true whether the courts hearing each case treated academic freedom as a constitutional right or merely a constitutional value.

A. The Majority of Courts

It is important to note at the outset the factors in which courts are uninterested when confronted with a claim that an open-records request threatens academic freedom. Courts have not considered the privacy of the documents at hand,⁹⁵ or the potential for embarrassment⁹⁶ or harassment.⁹⁷ Moreover, these same courts do not care about the motivations underlying the request. Occasionally, public records statutes contain provisions

93. For information on the open-records laws in all fifty states see *State Sunshine Laws*, SUNSHINE REVIEW, http://sunshinereview.org/index.php/State_sunshine_laws (last visited Oct. 30, 2012).

94. This conclusion is based off of a review of all state court cases in Westlaw that contain both the terms “academic freedom” and “open records.”

95. See *Capital Newspapers v. Whalen*, 505 N.E.2d 932 (N.Y. 1987) (although the Mayor’s papers concerned matters of a personal nature, that did not change their susceptibility to New York’s open-records law).

96. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994) (“Courts are to take into account the Act’s policy ‘that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.’”); *KUTV, Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357, 1361 (Utah 1984) (“[T]he Board’s mere unsubstantiated assertion that disclosure of the questionnaire contents would be embarrassing and possibly detrimental to certain individuals is insufficient to support a judicial ruling that disclosure would be contrary to the public interest.”).

97. See *Students for the Ethical Treatment of Animals, Univ. of N.C. Chapter v. Huffines*, 399 S.E.2d 340, 342 (N.C. Ct. App. 1991), *aff’d by* 420 S.E.2d 674 (N.C. Ct. App. 1992) (“We reject respondent’s argument that the entire IACUC application must be protected because of the researcher’s fear of violence and harassment.”).

explicitly stating that the motivations of the party seeking documents are immaterial.⁹⁸ But even when the statutes do not have such an explicit caveat, courts tend to read-in one.⁹⁹ Thus, the fact that third parties might be seeking scholarly email exchanges only for the purposes of embarrassment, harassment, or to try to have a professor fired is irrelevant to a court's analysis.

Against this backdrop, a party asserting that academic freedom is threatened faces an uphill battle. This fact is especially true with scholarly email exchanges because the argument that academic freedom will be undermined in that context is almost entirely dependent on the motivations of the party seeking the documents. In other words, academic freedom cannot be undermined unless the third party uses the documents to embarrass or harass a professor for his or her political beliefs, a use of open-records laws that is not statutorily intended. Thus, the inability to point to any sinister motives of the requester can leave any allegations regarding academic freedom conclusory at best.

State courts, like the Supreme Court in *University of Pennsylvania*, have not responded favorably to academic freedom claims that are so attenuated. Consider *Progressive Animal Welfare Society v. University of Washington*, which stressed that open-records laws represent government action that is "content-neutral."¹⁰⁰ Despite recognizing that allowing access to the

98. *E.g.*, ARK. CODE ANN. § 25-19-105(a)(1)(A) (West 2011); WASH. REV. CODE ANN. § 42.56.080 (West 2011).

(stating that requesters of public documents "shall not be required to provide information as to the purpose for the request" except in very narrow circumstances).

99. *See, e.g.*, *News Press Publ'g Co. v. Gadd*, 388 So.2d 276, 278 (Fla. Dist. Ct. App. 1980) (finding that the Florida open-records act is not concerned with the motivation of the person who seeks the records despite absence of such a provision in the act); *City of Lubbock v. Cornyn*, 993 S.W.2d 461, 465 (Tex. App. 1999) (reading in that motivations are irrelevant even though the Texas open-records act does not explicitly say so); *Mans v. Lebanon Sch. Bd.*, 290 A.2d 866, 867 (N.H. 1972) (finding that the open-records act of New Hampshire's reference to "every citizen" meant that motives are irrelevant); *State Emps. Ass'n v. Dep't of Mgmt. and Budget*, 404 N.W.2d 606, 614 (Mich. 1987) ("In determining whether to withhold information under the privacy exemption [in Michigan's open-records act], a state agency should not consider the requester's identity or evaluate the purpose for which the information will be used. The exemption conspicuously lacks a requirement that such factors be considered."); *State Bd. of Equalization v. Super. Ct.*, 13 Cal.Rptr.2d 342, 350 (Cal. Ct. App. 1992) ("What is material is the *public* interest in disclosure, not the private interest of a requesting party . . . [The California open-records act] does not take into consideration the requesting party's profit motives or needs."); *Finberg v. Murnane*, 623 A.2d 979, 983 (Vt. 1992) ("In any event, the claim is based on the theory that plaintiff's motive disqualifies him from obtaining the list. This theory is inconsistent with the basic disclosure provision of the Act, which gives 'any person' the right to disclosure."); *Coleman v. Boston Redevelopment Auth.*, 809 N.E.2d 538, 542 (Mass. App. Ct. 2004) ("[T]he reference to 'any person' in [Massachusetts's open-records act] . . . means there is no requirement of 'standing' by the person who requests production of records or any issue about the person's motives or purpose in making the request.") (citation omitted).

100. *Progressive Animal Welfare Soc.*, 884 P.2d at 604.

documents in question might have posed a threat to First Amendment concerns, the court declined to extend the First Amendment to cover the situation presented because the alleged threat was “less than direct.”¹⁰¹ Similarly, the New York Supreme Court declined to prevent the release of documents in a similar case because the alleged threats to academic freedom were what it deemed “conclusory” and not specifically related to the documents at hand.¹⁰²

Even if a court accepted that the arguments concerning academic freedom with respect to scholarly email exchanges were not conclusory, it is still extremely unlikely that a court would overrule the balancing done by the legislature in drafting the statute. Absent a pertinent statutory exemption, most state courts demonstrate hesitancy to even consider public policy concerns related to academic freedom—or, for that matter, any other interest in favor of a party withholding documents.¹⁰³ One reason is that state courts are worried about usurping the role of state legislature.¹⁰⁴ This worry remains true even where academic freedom is concerned. For example, in *State ex rel. Thomas v. Ohio State University*, the Ohio Supreme Court refused to entertain the University’s argument that disclosing the names and addresses of animal research scientists would have a chilling effect on academic freedom.¹⁰⁵ Despite recognizing such a possibility, the court held that such competing public policy concerns had already been “weighed and balanced” by the state legislature in formulating the open-records law.¹⁰⁶

101. *Id.* See also *Students for the Ethical Treatment of Animals*, 399 S.E.2d at 342 (refusing to extend the First Amendment to cover respondent’s documents after rejecting the respondent’s argument that the release of the documents would have a chilling effect on university research).

102. *Am. Soc’y for Prevention of Cruelty to Animals v. Bd. of Trs.*, 556 N.Y.S.2d 447, 452 (N.Y. 1990).

103. See *News Press Publ’g Co.*, 388 So.2d at 278 (“Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public’s interest in disclosure and the damage to an individual or institution resulting from such disclosure.”); *State ex rel. Thomas v. Ohio State Univ.*, 643 N.E.2d 126, 130 (Ohio 1994) (“[I]n enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public’s right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.”) (citing *James v. Ohio State Univ.*, 637 N.E.2d 911, 913–14 (Ohio 1994)); see also *Progressive Animal Welfare Soc.*, 884 P.2d at 604 (“Neither the people nor the Legislature created a general exemption from the Act for public universities or for academics. We see no constitutionally compelling reason to do so.”).

104. See *Times Publ’g Co. v. City of Clearwater*, 830 So.2d 844, 848 (Fla. Dist. Ct. App. 2002) (“It may be difficult to find a solution to this problem that balances individual privacy and the public’s right of access. . . . This issue, however, is a matter that must be addressed by the legislature.”).

105. See *State ex rel. Thomas*, 643 N.E.2d at 129.

106. *Id.* at 130.

Notably, a similar result is reached even when state courts recognize academic freedom as a distinct constitutional right. For example, the Florida Supreme Court recognized that academic freedom should be exercised “without fear of government reprisal” when considering the implications of an open-records request.¹⁰⁷ Nevertheless, it did not find the open-records statute at issue unconstitutional. Likely due to the constitutional avoidance canon of statutory interpretation, the court refused to overrule the legislature’s balancing, stating that it considered the purposes underlying the Florida open-records law to represent compelling interests: “Were the chilling effect respondents apprehend balanced against any less *compelling a consideration* than Florida’s commitment to open government at all levels, we might agree that the burdens herein imposed were unduly onerous.”¹⁰⁸ Thus, despite recognizing “the necessity for the free exchange of ideas in academic forums,” the court stressed that academic freedom was “not to be used as a shield which could, in some other case on other facts, be used to mask abuses of the rights of others.”¹⁰⁹

The compelling consideration of open government mentioned by the Florida Supreme Court has been described by other courts as “basic to our society”¹¹⁰ and as “nothing less than the preservation of the most central tenets of representative government.”¹¹¹ These courts echo that such interests can only be satisfied by full access.¹¹² This high-minded language is borrowed from the state statutes themselves, which explicitly declare the importance of the public policy underlying open government.¹¹³ The foundational nature of these interests has led courts interpreting open-records acts to emphasize the need to construe the acts broadly and any exemptions narrowly.¹¹⁴ As one court explained, “any doubt must be resolved in favor of disclosure of public records.”¹¹⁵ These compelling interests, combined with courts’ demonstrated deference to state legislatures and use of the canon of constitutional avoidance, illustrate how unviable an option it is in the majority of state courts to even argue that academic freedom—already ambiguous under the Constitution—should

107. Wood v. Marston, 442 So.2d 934, 941 (Fla. 1983).

108. *Id.* (emphasis added).

109. *Id.*

110. Russo v. Nassau Cnty. Cmty. Coll., 623 N.E.2d 15, 17 (N.Y. 1993).

111. Progressive Animal Welfare Soc’y v. Univ. of Wash., 884 P.2d 592, 597 (Wash. 1994).

112. See, e.g., *id.* (quoting WASH. REV. CODE. § 42.17.010 (2011) (current version at WASH. REV. CODE. § 42.17A.001 (2012)) (“[F]ull access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.”)).

113. See, e.g., WASH. REV. CODE. ANN. § 42.17A.001 (West 2012).

114. See, e.g., *State ex rel. Thomas v. Ohio State Univ.*, 643 N.E.2d 126, 128 (Ohio 1994); Wood v. Marston, 442 So.2d 934, 938 (Fla. 1983); Russo, 623 N.E.2d at 19; Hearst Corp. v. Hoppe, 580 P.2d 246, 249 (Wash. 1978).

115. *State ex rel. Thomas*, 643 N.E.2d at 128 (citation omitted).

protect documents from disclosure.

B. The Minority of Courts

Despite the reluctance of the majority of courts to give much consideration to policy arguments in favor of the withholding of documents, a minority of courts will give such arguments more consideration and engage in case-by-case balancing if specifically instructed to by the governing statute. In some states, such as Michigan, this instruction comes only when a narrow statutory exemption might apply.¹¹⁶ In Utah, however, courts are encouraged to engage in balancing even when there is no relevant statutory exemption.¹¹⁷ But even in Utah, in order to find that documents should not be released, a Utah court must determine both that there are compelling interests favoring restriction of access to the record, and that these interests clearly outweigh the interests favoring access.¹¹⁸ Moreover, the key word in the statute is “may”; courts may undertake this balancing but are in no way obligated to do so.¹¹⁹ Stronger support for such a balancing test lies in California’s Open Records Act, which provides that “[t]he agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”¹²⁰ California courts have interpreted this provision to require a case-by-case balancing process when reviewing an agency’s justifications for withholding documents.¹²¹

In one instance, the Wisconsin Supreme Court read in a balancing test that was not explicitly stated in the governing statute.¹²² Wisconsin’s Open Records Law declares that there is a “presumption of complete public access.”¹²³ However, it leaves open the possibility that public access can be denied in an “exceptional case.”¹²⁴ Courts have construed this phrase to permit a balancing inquiry, provided that the custodian of the documents has justified its refusal to comply on the grounds that the public interest in keeping a particular record confidential outweighs the public’s right to

116. *See, e.g.*, Mich. Fed’n of Teachers & Sch. Related Pers., v. Univ. of Mich., 753 N.W.2d 28, 38 (quoting *Mager v. Dep’t of State Police*, 595 N.W.2d 142, 147 (Mich. 1999) (“[A] court must balance the public interest in disclosure against the interest Congress intended the exemption to protect.”)).

117. UTAH CODE ANN. § 63G-2-405(1) (West 2010).

118. *Id.*

119. *Id.*

120. CAL. GOV’T CODE § 6255(a) (West 2011).

121. *See, e.g.*, *San Diego Cnty. Emps. Ret. Ass’n v. Super. Court of San Diego*, 127 Cal. Rptr. 3d 479, 485 (Cal. Ct. App. 2011).

122. *See, e.g.*, *Osborn v. Bd. of Regents of the Univ. of Wis. System*, 647 N.W.2d 158, 166 (Wis. 2002).

123. WIS. STAT. ANN. § 19.31 (West 2011).

124. *Id.*

open access.¹²⁵

Nevertheless, even in those states where case-by-case judicial balancing is encouraged, there are no instances of a state court finding that an interest in academic freedom outweighed the public policy underlying open-records laws.¹²⁶ One reason for this result is perhaps small sample size—the number of open-records disputes that make it to court is small, and of those cases that do, many of the arguments in favor of keeping the records confidential are based on claims other than academic freedom.

However, a more likely reason is the fact that these courts, as instructed to by their governing statutes, accord the same strong respect to the public policy interests in favor of open access as the courts discussed in Part III.A. The California Public Records Act declares that access to information is a “fundamental and necessary right of every person in this state.”¹²⁷ Similarly, Wisconsin’s open-records act declares such access to information to be an “essential function of a representative government and an integral part of the routine duties of officers and employees.”¹²⁸

The interests are especially strong when it comes to the email exchanges of publicly employed scholars on their college or university email accounts. As mentioned in Part I, the salaries of these scholars come directly from taxpayers. Because the public’s money is at stake, the public has a right to know how scholars are using their college or university email accounts. For example, the public has an interest in monitoring these scholars to ensure that they are not taking advantage of their positions to engage in fraud or law-breaking. In Professor Cronon’s case, the public had an interest in knowing if he was violating state law by using public resources to engage in political activities. The magnitude of these interests in favor of disclosure makes it unlikely that they will be outweighed in balancing by a tenuous academic freedom concern.

IV. POSSIBLE STATUTORY REFORMS

Based on the foregoing analysis of the state of constitutional academic freedom, open-records laws, and court interpretation of both, it appears unlikely that scholarly email exchanges would be protected from release. Any argument that an open-records law is unconstitutional as applied in such a situation is likely to fail. However, as a policy matter, laws, even if constitutional, should not restrict the “marketplace of ideas” any more than is reasonably necessary to carry out their own publicly-valuable objectives. And just because academic freedom is not implicated or protected in open-records cases in a constitutional sense, does not mean that the academic freedom concerns of academics are frivolous as a matter of policy.

125. See, e.g., *Osborn*, 647 N.W.2d at 166.

126. See *supra* note 88.

127. CAL. GOV’T CODE § 6250 (West 2011).

128. WIS. STAT. ANN. § 19.31 (West 2011).

Academic freedom is an important value in a democratic society, and the recent trend of using open-records laws for harassment purposes unnecessarily threatens that value.¹²⁹ *The Washington Post* illustrated the threat in an editorial response to one such misuse of an open-records law:

Academics must feel comfortable sharing research, disagreeing with colleagues and proposing conclusions — not all of which will be correct — without fear that those who dislike their findings will conduct invasive fishing expeditions in search of a pretext to discredit them. That give-and-take should be unhindered by how popular a professor's ideas are or whose ideological convictions might be hurt.¹³⁰

If academics do not feel comfortable as a result of such harassment, it could stifle research and debate that is valuable to society. The harassment could also drive public college and university professors to private colleges and universities. And, perhaps most worrisome, such harassment could culminate in political maneuverings to terminate a professor or decrease his funding.

Of course, there are certainly competing interests in favor of disclosure, such as taxpayers' interest in monitoring the use of their money and possible law-breaking by recipients of that money.¹³¹ And, as discussed earlier, these interests are of sufficient magnitude to outweigh, in a state court adjudication, academic freedom interests. However, one of the main reasons for that outcome is that the motivations of the record-seeker are ignored by courts,¹³² meaning that courts assume that the policy interests in favor of disclosure are actually implicated. But with the recent incidents regarding email exchanges, the motivation of the record-seeker has been more ideologically-charged harassment than an interest in monitoring taxpayer money. When that is the case, the policy interests in favor of disclosure are lessened and are likely outweighed by the academic freedom interests. Thus, while record-seeker motivation may be unimportant as a matter of law, it is important as a matter of policy and suggests that, in the scholarly email context, legislatures should offer more protection from disclosure.

Consequently, although the current open-records statutory system does not protect scholarly email exchanges from disclosure, if a reform existed that would protect such exchanges without undermining the public policy goals of open government, such a reform would be worth serious consideration. Academics, noticing the reluctance of courts to protect such email exchanges, have suggested a handful of reforms. These reforms accept the constitutionality of open-records laws and instead focus on

129. See *supra* notes 62–65 and accompanying text.

130. Editorial, *Harassing Climate-Change Researchers*, WASH. POST, May 30, 2011, at A22.

131. See *supra* Part III.B.

132. See *supra* notes 89–93 and accompanying text.

policy arguments for removing scholarly email exchanges from their scope. However, suggested reforms such as mandatory balancing and new statutory exemptions prove to be impractical and unlikely to achieve the desired result of protecting scholarly email exchanges without undermining open government. Indeed, the best way to protect scholarly email exchanges might be with a novel statutory interpretation argument rather than an explicit statutory reform. A viable argument can be made that the current text and purpose behind the definitions of “public records” in open-records statutes should be interpreted to not include scholarly email exchanges within their meaning.

A. Suggested Reforms that are Impractical

In the ACS’s issue brief on this topic, it recognized the unlikelihood of courts protecting scholarly email exchanges from disclosure and the futility of arguing that an open-records law is unconstitutional as applied in such a case.¹³³ In response, it suggested mandatory balancing and specific statutory exemptions as ways to protect scholarly email exchanges without having to argue in court for the overturning of an open-records statute. But while these two reforms are well-intended, both would be difficult to implement and are unlikely to achieve the desired result of protecting scholarly email exchanges without undermining open government.

The first suggested ACS reform, specific statutory exemptions for scholarly email exchanges, is appealing for multiple reasons. First, by protecting these exchanges from disclosure it would ensure the desired open communication among professors without self-censorship.¹³⁴ In doing so, it would “provide certainty and concrete guidance” as to whether professors’ emails would be disclosable.¹³⁵ Second, providing a specific exemption in this manner would not be that unique, as some states already provide narrow exemptions for such documents as faculty members’ papers.¹³⁶ But what makes this reform the most appealing is that it is narrowly-tailored. It would protect scholarly email exchanges from disclosure while not upsetting the status quo for the vast majority of documents sought under open-records statutes.

Despite the appeal, this reform would be difficult to implement. It would be up to each individual state legislature to amend current open-records laws to specifically exempt scholarly email exchanges. Not only will state legislatures be hesitant to re-open discussion of statutes already

133. See Levinson-Waldman, *supra*, note 61, at 10–12.

134. See *id.* at 12.

135. See *id.*

136. Levinson-Waldman points to New Jersey’s protection of scholarly records and Ohio’s protection of intellectual property records. See *id.* See also N.J. STAT. ANN. § 47:1A-1.1 (West 2011); OHIO REV. CODE ANN. § 149.43(A)(5) (West 2011).

on the books, but they also have more pressing concerns. It is unrealistic to think that such an amendment, even if proposed, would succeed in being approved. Admittedly, it is possible that, in light of the recent publicity surrounding professor Cronon's situation, state legislatures would be more willing to recognize the public policy interests in favor of such an exemption. But there is no guarantee that such concerns were not considered before or would be deemed sufficient to support a new exemption. It seems inadequate to leave the protection of scholarly email exchanges up to the whims of fifty different legislatures.

Another suggested reform is mandatory balancing. The theory behind mandatory balancing is that for every disputed open-records request, courts will have to weigh the competing interests. It would be the same type of analysis already used for open-records disputes in states such as Utah and California, which currently allow for balancing.¹³⁷ The ACS stressed the fact that this reform is advantageous because it avoids the hesitancy that state legislatures might have to enact specific statutory exemptions protecting scholarly email exchanges.¹³⁸ However, this argument is misleading. While it is true that there does not necessarily have to be specific language in a statute mandating balancing for a court to engage in such, courts are still bound to follow statutory intent. And with precedent in most states holding that balancing is inappropriate under open-records statutes, evidence of changed statutory intent would probably have to be present for a court to overturn its prior decisions. The result is that the legislatures of nearly every state would most likely have to reconsider their open-records statutes and enact amendments eliciting a desire for courts to engage in balancing.

Another problem with this reform is that the existing usage of this balancing analysis in states such as Utah and California, rather than illustrating that the reform would be easy to implement,¹³⁹ instead evidences that the reform of mandatory balancing does not provide the desired solution of protecting scholarly email exchanges. What the ACS failed to take into account is that such balancing in Utah, California, and other states has failed to result in a single case in which a court has deemed academic freedom concerns to outweigh the public interest in disclosure.¹⁴⁰ This failure results from the fact that, even with balancing, scholars are stuck having to make the seemingly futile argument that academic freedom (1) is a constitutional right, (2) covers scholarly email exchanges, and (3) outweighs the public policy in favor of open access.

A final hurdle is that there would be three issues with narrowly tailoring this solution. First, the natural tendency, when a legislator identifies an

137. See *supra* notes 111–15 and accompanying text.

138. See Levinson-Waldman, *supra* note 61, at 13.

139. See *id.* at 14.

140. See *supra* note 88.

important problem and calls for a robust response, is for a legislature to respond by over-legislating, which in this case could harm the open government interests at stake. A second issue with this narrow tailoring is that even if the legislature did attempt to limit the mandatory balancing to scholarly email exchanges, delineating clear boundaries for the category of scholarly email exchanges would be difficult. And lastly, there are well-documented problems with balancing analyses.¹⁴¹ As one scholar described it, “[t]he problem with balancing is that it is indeterminate and unpredictable on the one hand and subjective and value laden on the other.”¹⁴² Similarly, former United States Supreme Court Justice Hugo Black once said that the “ever-present danger of the balancing test” was that the end result was “necessarily tied to the emphasis particular judges give to competing societal values.”¹⁴³ While these problems do not necessarily mean that a balancing test should be avoided, they do mean that it may not be the best solution to protect the interests of academic freedom while not harming the interests in open government. Considering the unlikelihood that balancing would even protect scholarly email exchanges in the first place, this solution appears untenable.

B. An Argument That May Work

The ACS also suggested that scholarly email exchanges could be protected if courts interpreted open-records statutes as not applying to publicly employed scholars as a matter of statutory intent. The main argument in support of this statutory interpretation argument is that scholars do not perform the government functions to which the statutes are designed to provide access. However, this argument proves too much; almost no one doubts that open-records laws to some extent cover scholars at public universities. Still, the reasoning underlying the ACS’s argument is sound and can be used to support a more narrow statutory interpretation argument: open-records statutes should be interpreted to not include scholarly email exchanges within the ambit of “public records,” as it is defined in the statutes.

The reasoning behind interpreting open-records laws to not apply to scholars in any capacity is that professors at public universities, although government employees, have little to do with the workings of government:

Most government employees are elected, hired, or appointed to carry out

141. For an in-depth, comprehensive examination of balancing and its shortcomings, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

142. Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause are Stronger When Both Clauses are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1722 (2011).

143. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 74 (1961) (Black, J., dissenting) (internal quotation marks omitted).

a particular governmental agenda; either they participate in forming government policy and thus engage in official acts, or they are working under the direction of those who are and thus carry out duties for the public. Faculty members at public institutions, by contrast, are hired not to pursue a particular governmental agenda, but instead to participate as equal members of the academic community and to engage in creative and innovative scholarship, research, and teaching.¹⁴⁴

Some open-records statutes, such as Wisconsin's Public Records Law and Michigan's Freedom of Information Act, are written as if they are aimed only at government employees performing government functions.¹⁴⁵ Wisconsin's Public Records Law limits "public records" to those records regarding "the affairs of government and the official acts of those officers and employees who represent them."¹⁴⁶ Similarly, Michigan's Freedom of Information Act describes a public record as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. . . ."¹⁴⁷ The ACS endorses understanding this language as only implicating records relating to a government function and extends such an understanding to the open-records statutes in all the states.¹⁴⁸

This argument finds support in the Wisconsin courts. While the Wisconsin Supreme Court has not foreclosed the use of the state's Public Records Law to obtain records from a public college or university in some situations,¹⁴⁹ it has foreclosed its use to obtain personal emails sent and received by teachers on a public school district's email system. In *Schill v. Wisconsin Rapids School District*,¹⁵⁰ the Wisconsin Supreme Court held that such personal emails were not records under the Public Records Law, declaring that to be a public record "the content of the document *must have a connection to a government function.*"¹⁵¹ This assertion distinguishes Wisconsin from other states where the public nature of the record holder himself is deemed sufficient to make a record appropriate for disclosure barring any exemptions.¹⁵²

However, the ACS proves too much by taking the next step of arguing

144. Levinson-Waldman, *supra* note 61, at 19.

145. *See id.* at 18.

146. WIS. STAT. ANN. § 19.31 (West 2011).

147. MICH. COMP. LAWS ANN. § 15.232(e) (West 2011).

148. *See* Levinson-Waldman, *supra* note 61, at 18–20.

149. *See* *Osborn v. Bd. of Regents*, 647 N.W.2d 158 (Wis. 2002) (reversing lower court's finding that the Board of Regents of the University of Wisconsin did not have to turn over records relating to admissions applications).

150. 786 N.W.2d 177 (Wis. 2010).

151. *Id.* at 185 (emphasis added).

152. *See, e.g.,* IND. CODE ANN. § 5-14-3-2 (West 2012); IOWA CODE ANN. § 22.1(3) (West 2011); KAN. STAT. ANN. § 45-217 (West 2011); MASS. GEN. LAWS ANN. ch. 4, § 7 (West 2012); N.Y. PUB. OFF. LAW § 86 (McKinney 2011); OHIO REV. CODE ANN. § 149.43 (West 2011).

that this government function limitation means that Wisconsin's Open Records Law (and by implication the open-records laws in every state that ties public records to government functions) does not affect scholars at public universities. There is no doubt that these scholars are covered by open-records laws in every state, at least in some situations. Even in states like Wisconsin, which tie the definition of "public records" to documents made or received in the course of official business, scholarly records have been deemed suitable for disclosure when related to research or classroom activities. For example, Washington's definition of "public records" is "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function. . . ."¹⁵³ Nonetheless, Washington's Supreme Court has deemed unfunded grant proposals filled out by scholars to be appropriate for disclosure.¹⁵⁴ Similarly, North Carolina describes "public records" as documents "made or received pursuant to law or ordinance in connection with the transaction of public business,"¹⁵⁵ yet still has deemed research applications to be subject to disclosure.¹⁵⁶ Thus, according to the practice of courts, the research and classroom activities of public professors constitute government functions under these open-records statutes.

If the ACS's solution is accepted, these research applications and grant proposals would not be deemed subject to disclosure. This solution is unacceptable because it is consistent with the statutory language in these states to consider research performed by professors at public universities as relating to their official function and thus, as public records. Such a reform would require courts to overturn previous holdings and contradict statutory definitions of "public records" despite statutory directives to interpret open-records laws broadly and in favor of disclosure.

However, the ACS's reasoning can be used to come up with a simpler solution that would remain consistent with the statutory directives to interpret open-records laws broadly and also preserve the public interest in open government. As the ACS indicates, the proper interpretation of the language in the statutes of such states as Wisconsin and North Carolina is that public records do not include any records of a public official unrelated to his or her government function.¹⁵⁷ If that is the case, scholarly email exchanges, because they are unrelated to the official function of professors—research and classroom activities—are not public records

153. WASH. REV. CODE ANN. § 42.56.010 (West 2012).

154. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592 (Wash. 1994).

155. N.C. GEN. STAT. ANN. § 132-1 (West 2011).

156. *See Students for the Ethical Treatment of Animals, Univ. of N.C. Chapter v. Huffines*, 399 S.E.2d 340 (N.C. Ct. App. 1991), *aff'd* by 420 S.E.2d 674 (N.C. Ct. App. 1992).

157. *See Levinson-Waldman, supra* note 61, at 19.

capable of being requested under open-records laws as currently written.¹⁵⁸ Indeed, it would be hard to argue that emails between scholars, discussing current events or swapping ideas, are related to any official function of being a scholar at a public college or university.

But rather than using this analysis to conclude that scholars are exempt from open-records laws as a matter of statutory interpretation, the ACS should let it speak for itself. The conclusion that scholarly email exchanges are not public records in states such as Wisconsin is enough to protect the email exchanges of professor Cronon and other similarly situated scholars from disclosure. And the argument can even be made that such interpretive reasoning should be extended to states where the definition of “public records” is not explicitly connected to government functions. Reading in such a limitation would be consistent with the expressed policy and goals underlying the open-records statutes in those states. For example, while Kentucky does not describe “public records” as having to relate in any way to an official function, it would not be untoward to find this limitation implied given Kentucky’s expressed underlying policy that access to public records is important “to ensure the efficient administration of government and to provide accountability of government activities.”¹⁵⁹ Similar expressed policies can be found as well in other states that do not limit the definition of “public records.”¹⁶⁰ The disclosure of scholarly email exchanges in these states would do nothing to further these expressed policies, meaning that these email exchanges could be protected while still preserving the states’ interest in open government. And as no court has yet addressed the issue of scholarly email exchanges, such an argument would not call for the overturning of precedent.

Admittedly, the argument to extend the government function limitation on public records to states that do not explicitly provide for it will face skepticism from some courts. Courts in at least one state, New York, have explicitly declared that the scope of their open-records statute “should not be restricted to the purpose for which a document was produced or the function to which it relates.”¹⁶¹ But given that New York’s expressed reason for its open-records law is explicitly tied to governmental decision-making,¹⁶² it cannot be said that the possibility of New York courts

158. Such a solution has been mentioned in passing by the media. *See, e.g.*, Gardner, *supra* note 4.

159. KY. REV. STAT. ANN. § 61.8715 (West 2011).

160. *See, e.g.*, HAW. REV. STAT. ANN. § 92F-2 (West 2011) (expressing the goal of “opening up the government processes to public scrutiny”); IND. CODE ANN. § 5-14-3-1 (West 2012) (“[A]ll persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.”); N.Y. PUB. OFF. LAW § 86 (McKinney 2011).

161. *Russo v. Nassau Cnty. Cmty. Coll.*, 623 N.E.2d 15, 18 (N.Y. 1993) (internal quotation marks omitted) (quoting *Westchester Rockland Newspapers v. Kimball*, 408 N.E.2d 904, 907 (N.Y. 1980)).

162. N.Y. PUB. OFF. LAW § 86 (McKinney 2011) (“The people’s right to know the

changing their interpretation of New York's open-records statute is foreclosed, especially when many states already limit the scope of their "public records" definitions this way.

Additionally, the argument that open-records statutes should be interpreted in this manner is more likely to succeed than convincing fifty state legislatures to amend their open-records laws to implement a mandatory balancing test or specific exemptions for scholars. Another benefit is that this argument can be made in cases that may be brought into court under the current system. Colleges, universities, and professors can depend on the statutory language itself to seek protection for their documents rather than having to rely on the troublesome argument that academic freedom is a constitutional right and scholarly email exchanges implicate that right.

CONCLUSION

The use of open-records statutes to request emails sent and received from professors' public college or university email accounts is in accord with current state court interpretation of open-records statutes, regardless of the purpose behind such a request. Constitutional academic freedom, to the extent it exists, does not appear to extend to these scholarly email exchanges which are unrelated to research or classroom activities. And, even if it did extend to these exchanges, academic freedom appears to be only a constitutional interest and is unlikely to make a difference in state courts that are highly unlikely to find the policy interests in favor of open access outweighed.

Nevertheless, academic freedom is vital to our society. Just because constitutional academic freedom is not implicated by this use of open-records statutes does not mean that important academic freedom considerations are not at stake. While the open-records system should by no means be overhauled, there is room for minor reform that protects academic freedom while not sacrificing the public policy considerations underlying open-records statutes.

However, such a reform should not come from unduly burdensome statutory amendments that lead to mandatory balancing or specific exemptions for public professors. Nor should it consist in trying to convince courts to expand constitutional academic freedom to protect scholarly email exchanges.

Instead, the most sensible solution is a new statutory interpretation argument rather than an explicit statutory reform. Based on the statutory definitions of public records and the expressed statutory purposes underlying these definitions, a strong case can be made that, as a matter of statutory interpretation, the category of public records should only be

process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.").

limited to those records related to a government function. As scholarly email exchanges do not relate to the understood government function of professors, under this interpretation of open-records statutes there is no reason for courts to treat such email exchanges as public records capable of being requested.

STUDENT-ON-STUDENT SEXUAL ASSAULT POLICY: HOW A VICTIM-CENTERED APPROACH HARMS MEN

A Close-up on Notre Dame's Changes to Its Student Handbook

ALEXANDRA FRIES*

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INTRODUCTION

The University of Notre Dame's academic year had a tragic beginning in the fall semester of 2010. Nineteen-year-old Lizzy Seeberg, a student at Saint Mary's College, filed a police report alleging that a Notre Dame football player had sexually assaulted her on August 31, 2010.¹ A little

*J.D., Notre Dame Law School, 2013. B.A., University of California Irvine, 2010. I would like to thank Professor Robinson for reading several drafts of this Note and offering invaluable insight, the editors and staff of the *Journal of College and University Law* for their diligence and hard work, and finally, my family for their constant love and support.

1. "The male student grabbed her face and kissed her, pulled down her tank top, touched and squeezed her bare breasts, and held her down in his lap, all while she was

over a week later, Seeberg committed suicide.² At that point police had not yet interviewed the accused and did not do so until September 15.³ Seeberg's death triggered a media frenzy as the public learned of the circumstances surrounding her tragic suicide.

Notre Dame, along with other prestigious colleges and universities,⁴ has had to deal with an onslaught of criticism, most notably coming from the Office of Civil Rights (OCR), part of the Department of Education (DOE). Under Title IX of the Education Amendment of 1972, educational institutions that receive money from the federal government are required to "prohibit discrimination on the basis of sex in [their] federally funded education program[s] or activit[ies]."⁵ The national attention Notre Dame received due to the Seeberg investigation created concern at the OCR that the University was allowing a "hostile environment"⁶ to exist—thereby violating the students' Title IX right to education. Subsequently, Notre Dame allowed OCR officials to come onto campus and conduct a seven-

rying and scared for her safety, Seeberg wrote in a Sept. 5, 2010 typed statement for police." Margaret Fosmoe, *Part I: Notre Dame Changes Sex Assault Investigation Procedures*, SOUTH BEND TRIB., Sept. 16, 2011, http://articles.southbendtribune.com/2011-09-16/news/30167668_1_elizabeth-lizzy-seeberg-sexual-harassment-sexual-assault.

2. Press Release, St. Joseph County Prosecutor's Office, Elizabeth Seeberg Allegations, (Nov. 22, 2010) (on file with author).

3. Fosmoe, *supra* note 1.

4. Many other colleges and universities have had sexual assault scandals in the recent past, promoting skepticism that administrators are more concerned with their school's reputation than protection of individuals. For instance, at Yale University male fraternity students shouted aggressive sexual obscenities at female students. *Yale suspends embattled frat for sexist chants*, USA TODAY May 18, 2011, http://usatoday30.usatoday.com/news/education/2011-05-18-yale-fraternity-suspension_n.htm. See also Nina Bernstein, *On Campus, a Law Enforcement System to Itself*, N.Y. TIMES, Nov. 11, 2011, http://www.nytimes.com/2011/11/12/us/on-college-campuses-athletes-often-get-off-easy.html?_r=1&hp (remarking on the number of sexual assault cases that have implicated university football programs, and were swept under the rug or only superficially investigated). Note also that the OCR specifically addressed this concern in the most recent Dear Colleague letter, in which the Office stated: "These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures." Letter from Russlynn Ali, Assistant Secretary, Office of Civil Rights, Department of Education, to University Administrators ("Colleagues") (2011) 8, n. 22 [hereinafter Dear Colleague Letter].

5. OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY, AND FAST FACTS (2011).

6. "As explained in OCR's 2001 *Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe." Dear Colleague Letter, *supra* note 4, at 3.

month investigation into the University's practices.⁷ The results, detailed in the University's student handbook, *Du Lac*,⁸ sought to clarify Notre Dame's approach to sexual assault on campus, promote procedural equality between the complainant and the accused, and educate the students, faculty, and staff about sexual assault.⁹

This note will focus on disciplinary hearings that address allegations of student-on-student sexual assault perpetrated against female students by male students¹⁰ at colleges and universities that receive federal funding. In particular, this note will concentrate on the burden of proof standard mandated in the OCR's Dear Colleague letter released April 4, 2011, which establishes that during disciplinary proceedings that take place when a student is accused of sexual assault, a preponderance of the evidence standard should be utilized.¹¹ This change reflects the OCR's overarching policy of encouraging procedures that are meant to protect the complainant's ability to report sexual assault, as well as her physical and mental well-being leading up to and during the disciplinary hearing.

This note will argue that, because the victim-friendly procedural safeguards are granted at the expense of the male student accused of sexual assault, they tilt the balance of the disciplinary hearing in favor of the complainant. Students found responsible for sexual assault in disciplinary proceedings face irreparable damage to their reputations and employability, especially in light of the uncertainty surrounding the application and scope of Family Educational Rights and Privacy Act (FERPA), the federal statute regulating disclosure of students' education records.¹² The course of their lives may be redirected, as they are stigmatized and turned down by employers, graduate schools, and women whom they would like to date.

7. Fosmoe, *supra* note 1.

8. *Du Lac: A Guide to Student Life*, UNIVERSITY OF NOTRE DAME, available at <http://dulac.nd.edu> (last visited Apr. 10, 2013).

9. In this note, I use "sexual assault" just as the OCR uses that phrase. In its April 4, 2011, Dear Colleague Letter, the OCR explains that sexual violence:

[R]efers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

Dear Colleague Letter, *supra* note 4, at 1–2.

10. Due to the limited scope of this note, analysis has been narrowed to exclude sexual assault occurring at primary and high schools, sexual assault occurring off-campus by non-students, and sexual assault perpetrated against boys and men. This decision was not meant to diminish the significance of these issues. For more information, *see id.* at 2.

11. *Id.* at 10.

12. Clery Act, 20 U.S.C. § 1232g (2011); 34 C.F.R. § 99 (2003).

Furthermore, students unjustly expelled, suspended, or slandered have no viable remedy outside of the college or university. While arguments have been made that apply contract or tort law as a means for finding the colleges and universities liable to the wrongly accused student, these attempts have been unsuccessful. Because these consequences are so detrimental to the future of a student found culpable of sexual assault, and because he has no means of being made whole if the disciplinary committee reaches the wrong result, he deserves adequate protection during the disciplinary hearing.

This note will argue for an amendment to Title IX that would clarify which evidentiary standard may be applied in disciplinary hearings when a student is accused of sexual assault. The Title IX amendment would include language that explains that nothing in the statute should be interpreted to mean that Congress *requires* a preponderance of the evidence standard in sexual assault disciplinary hearings. Furthermore, it would establish that college and universities are permitted to use either a clear and convincing standard or a beyond a reasonable doubt standard when conducting sexual assault disciplinary hearings.¹³ This amendment would constrain the DOE and OCR's ability put forth regulations and interpretative letters that mandate anything lower than a clear and convincing standard of evidence.

This note will begin by discussing one prominent contemporary scholar's position on sexual assault policy, as her work is representative of the general school of thought that disciplinary hearings should be treated as fundamentally different from criminal trials, where a beyond a reasonable doubt standard of evidence is used, most importantly because the punishments are categorically different.¹⁴ Criminal trials present the possibility of incarceration, whereas the worst that can come of a disciplinary hearing is expulsion. Thus, according to her argument, students are not entitled to the same procedural safeguards that criminal defendants receive, and women who allege sexual assault should expect to have more rights than they would otherwise have as complaining witnesses at the trial of their alleged victimizer.

Next, the OCR's recent Dear Colleague letter will be examined in light of these victim-centered policy arguments. Specifically, the explicit limitations placed on the accused will be contrasted with the advantages given to the complainant.

13. While other procedural changes in the April 4, 2011 Dear Colleague letter deserve attention, such as the inability of the accused student to confront his accuser, this development is beyond the scope of this note.

14. Nancy Cantalupo, "*Decriminalizing*" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481 (2012), Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, B.Y.U. EDUC. & L.J. 143 (2013)

The note will then observe how Notre Dame has reacted to the OCR investigation and to the Dear Colleague letter. This section will address the areas of Notre Dame's policy that the OCR approved and disapproved, indicating how these changes have tilted the balance in favor of the victim. Following will be an overview of alternatives that male students found culpable of sexual assault at colleges or universities may consider arguing in court if they believe that they were unjustly treated leading up to or during their disciplinary hearing. This note argues that because these avenues to finding the college or university liable are untested or unsuccessful, the student wrongly found to have sexually assaulted a fellow student is remediless, and therefore, in need of more protection than the preponderance of evidence standard of proof offers. The solution advocated by this note is an amendment to Title IX establishing clear and convincing as the minimum evidentiary standard that may be used in sexual assault disciplinary hearings.

Finally, this note will present the moral reasons why colleges and universities, and Notre Dame in particular, should promote equality on campus through their fair treatment of the accused in sexual misconduct proceedings.

I. THE ARGUMENTS IN FAVOR OF A VICTIM-FRIENDLY APPROACH

Assistant Dean for Clinical Programs at Georgetown University Law Center, Nancy Chi Cantalupo, believes colleges and universities should have victim-centered rules and procedures for reporting and punishing student-on-student sexual assault.¹⁵ Cantalupo's argument is motivated by multiple studies that suggest that female students are frequently the victims of sexual assault, but infrequently report these incidents.¹⁶ She ultimately concludes that colleges and universities should not treat students who have been accused of sexual assault as if they were criminal defendants, or treat the disciplinary hearing as a criminal trial.¹⁷ Rather, the focus should be on protecting the female student body and on promoting the reporting of sexual assault by providing certain procedural advantages to the alleged victim.¹⁸

Cantalupo believes that, after receiving a sexual assault complaint from

15. See Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, 3 *NASPA J. ABOUT WOMEN HIGHER EDUC.* 49 (2010).

16. See *id.*; Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-related Alcohol Expectancies*, 22 *J. FAM. VIOLENCE* 341 (2007); C. BOHMER & A. PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* (Lexington Books 1993).

17. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 *J.C. & U.L.* 613, 672 (2009).

18. *Id.* at 681–82.

a student, the college or university should guarantee that the alleged victim feels safe and secure. In order to do so, Cantalupo recommends “interim measures” that the college or university should take after an accusation has been made, but before any disciplinary hearing has begun.¹⁹ “These measures include such methods as changing class schedules and living arrangements, issuing stay-away orders, and swiftly responding to any retaliation or further harassment that may be directed at a survivor after a report.”²⁰

Cantalupo argues that at the disciplinary hearing stage the alleged victim should receive procedural safeguards as well. Specifically, the procedures afforded the accused at a disciplinary hearing should not be conflated with procedural protections to which a criminal defendant would be entitled by virtue of the Due Process Clause of the Fourteenth Amendment.²¹ She argues that because the accused is not threatened with incarceration or monetary damages, there is less at stake during a disciplinary hearing than there is at a criminal trial.²² She maintains that the victim remains in a fragile position that can be worsened by a traumatizing hearing where she must face the accused. Cantalupo believes that because the repercussions are not as severe as those that ordinarily follow the conviction for a felony, the procedural safeguards that protect the defendant’s potential innocence at trial must give way in order to protect the victim from experiencing additional trauma.

Additionally, Cantalupo argues that a victim-centered approach is in a college or university’s best interest from a pragmatic point of view, because it limits the college or university’s liability. By setting up processes that prioritize the complainant’s interests, she says, a college or university may limit its exposure to private actions brought against it by alleged victims of sexual assault because of its failure to take precautionary measures that resulted in the complainant’s re-victimization.²³ Thus, even if the woman had been sexually assaulted, the college or university may be able to point to its victim-friendly protocol as a defense against liability. Cantalupo explains that courts have allowed alleged victims of sexual assault to sue their college or university if it fails this four-part test:

1. the school is a recipient of federal funding,
2. the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits

19. Cantalupo, *supra* note 15, at 73. Cantalupo also reports that private actions by victims are on the rise, and frequently successful. *Id.* at 57.

20. *Id.* at 73.

21. Cantalupo, *supra* note 17, at 663.

22. *Id.* at 679–80.

23. Cantalupo, *supra* note 15, at 73.

- provided by the school,
3.the school has actual knowledge/notice of the harassment,
4.the school was deliberately indifferent to the harassment.²⁴

The first two requirements typically are easy to satisfy:

So many schools receive federal funds of some kind that the first prong is generally not in controversy. In addition, most cases of peer sexual violence such as sexual assault are accepted as being “severe, pervasive, and objectively offensive” enough to “deprive the plaintiff of access to the educational opportunities or benefits provided by the school” even if they happen only once.²⁵

The main issue becomes whether the college or university had actual knowledge of the sexual assault and was deliberately indifferent to it.²⁶ Indifference ends up being established through an examination of the college or university’s response to the harassment once it was made aware of its alleged occurrence—both in the interim, between the assault and the disciplinary hearing, and also, during the disciplinary process itself if one takes place. On the other hand, a violation of the accused’s rights, especially at a private institution, is harder to establish because those rights lack a firm legal foothold (such as the Constitution or Title IX). Cantalupo argues that it is pragmatic to favor the alleged victim because ensuring that victim-centered procedural protections are in place will inhibit her ability to prove that the college or university was “deliberately indifferent” to the offending conduct if the accused student is found, at the hearing, not to have engaged in the conduct of which the alleged victim had accused him.²⁷ On the other hand, men who believe that they were wrongly found responsible for sexual assault after being accused of sexual assault have a low rate of success.

In sum, Cantalupo believes that while the accused’s circumstances do not warrant additional protection, the alleged victim’s position certainly does. The disturbing studies that found that nearly a quarter of college and university women have been sexually assaulted²⁸ and that men who

24. *Id.* at 59 (citing *S.S. v. Alexander*, 177 P. 3d 724, 726 (Wash. Ct. App. 2008)).

25. *Id.*

26. *Id.* at 60.

27. Cantalupo writes:

In the past, colleges and universities have been concerned about incurring . . . costs as a result of lawsuits by students accused of peer sexual violence who have been disciplined and feel they have been mistreated by the institution [T]he high unlikelihood of their winning a lawsuit means that they will not be successful in forcing schools to [settle].

Id. at 71.

28. National Institute of Justice reports that 1/5 of women on college and university campuses are sexually assaulted. *Sexual Assault on Campus: What Colleges and Universities Are Doing About It*, NAT’L INST. JUST., (Dec. 2005),

commit sexual assault once are often serial assailants²⁹ warrant, she says, a policy that increases the chances that the alleged victim is not dissuaded from reporting crimes, is protected in the interim, and is not re-traumatized during the hearing.

Cantalupo's well-intentioned reasoning and recommendations, and her legitimate concern for protection of the victim, is commendable. Unfortunately, Cantalupo's line of reasoning is *premised* on the assumption that the consequences faced by the accused at a disciplinary hearing are fundamentally different from those resulting from a criminal trial. This argument relies on a line of reasoning that is too narrow. Of course a college or university lacks the power to incarcerate a student who has been found to have committed sexual assault in a disciplinary hearing. It is overly simplistic, though, to draw a conclusion that the consequences faced by the student could not have many of the same implications as a criminal conviction when considering his future. Analyzing a criminal trial and disciplinary hearing at a higher level of generality reveals that the two have more in common than Cantalupo allows. For instance, in addition to the literal denial of liberty, incarceration has a lasting impact on the individual in the form of a criminal record. Colleges and universities also maintain accounts of their students' disciplinary records, and the law with regard to whether or not these documents may be produced for third parties is conflicting and unclear.

I. DAMAGE CONTROL: FERPA & THE INTERNET

Under FERPA, colleges and universities that accept financial assistance from the federal government may not disclose a student's educational records without the consent of the student, if he or she is over eighteen years old, or, if the student is a minor, without the consent of his or her parent.³⁰ What constitutes an education record is outlined in the statute as well as in the DOE's administrative rules: "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."³¹

The simplest way a student's disciplinary record can be revealed is if the individual consents.³² This might occur if the student is applying to a

<https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

29. Research has found that sexual predators are usually serial assailants. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 73–84 (2002).

30. Clery Act, 20 U.S.C. § 1232g (2011).

31. *Id.* § 1232g(a)((4)(A) (2011).

32. "FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have

graduate program or for a professional degree. For instance, a law school application will typically ask the student to divulge any disciplinary action taken against the applicant at any level of schooling.³³ And, while the student retains the right to refuse, it is probable that admissions departments would be suspicious of this applicant. If the student acknowledges that disciplinary action has been taken against him, the admissions office would follow up by requesting an explanation and potentially seeking the applicant's consent to have his prior educational institution disclose the relevant information.³⁴

In addition, historically, there has been confusion regarding the overlap of FERPA and Title IX. Initially, colleges and universities interpreted FERPA as a prohibition against disclosing the outcome of a hearing to the victim or at least qualified that the victim could only learn the outcome if she agreed to keep the information confidential.³⁵ But such measures were harshly criticized as “gag-rules” and perceived as counterproductive to the victim's recovery.³⁶ The DOE subsequently declared that requiring the victim's silence is “inconsistent with the letter and spirit of the Clery Act,”³⁷ a federal statute that applies to all colleges and universities that receive federal funding and that requires them to report crimes that occur on and around campus.³⁸

The Dear Colleague letter attempts to clarify the relationship between FERPA and Title IX: the DOE believes that “FERPA continues to apply in the context of Title IX enforcement” but the DOE also believes that Title IX requirements supersede FERPA if they conflict³⁹—thus, “FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student.”⁴⁰ Furthermore, “a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegations made, the student has committed a violation of the institution's rules or policies.”⁴¹

transferred are ‘eligible students.’” FERPA Overview, U.S. DEPT OF EDU., <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited Apr. 10, 2013).

33. Melissa Fruscione, Director of Admissions and Financial Aid, Notre Dame Law School.

34. *Id.*

35. Cantalupo, *supra* note 17, at 630–40.

36. *Id.* at 640.

37. *Id.*

38. Clery Act, 20 U.S.C. § 1092(f).

39. Dear Colleague Letter, *supra* note 4, at 13 n. 32.

40. *Id.* at 13.

41. *Id.* at 14.

If a college or university discloses to “anyone” other than the victim that the individual was held responsible for sexual assault, there is no supplementary requirement to additionally say that the hearing was conducted with a lower standard of proof or without the defendant’s having the ability to cross-examine the complainant. Employers and graduate institutions that have access to the academic records of a student found responsible for sexual assault are likely to treat the student as a serious wrongdoer. The results may even be as negative as having a criminal record. These negative consequences will apply even if the student was later acquitted in a criminal court.⁴² Thus, students face the possibility of succeeding in a criminal court, but being expelled from school as a sexual predator.

Search engines, like Google, and social media websites only exacerbate a person’s struggle to prevent the outcome of the hearing from dictating one’s future. But, “[t]he modern application of the negligent hiring theory imposes liability on an employer when it ‘places an unfit person in an employment situation that entails an unreasonable risk of harm to others.’ Ultimately, it is a theory that imposes upon an employer an obligation to hire ‘safe employees.’”⁴³ A student found to have sexually assaulted another student will be considered a liability at work. This same rationale may be adopted by a graduate institution that must decide whether or not to accept a student who was found to have sexually assaulted another student earlier in his academic career. The litigious nature of our society will cause employers and admissions departments to hesitate before knowingly accepting a man who was found to have committed sexual assault during his academic career.

Furthermore, while the student is still attending the college or university where the alleged transgression occurred, the student’s peers will learn of the situation and may discuss the events online. For example, students may observe the accused being switched out of classes and assume his guilt. Even if the student is acquitted in court, if the disciplinary committee on campus finds that he committed sexual assault and word travels, regardless of the college or university imposed punishment, he may get a negative reputation as a predator that will harm his social, and potentially his

42. The Dear Colleague letter specifically explains:

Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.

Id. at 10.

43. Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 *LAB. LAW.* 19, 23 (2008).

professional, life. Information travels faster than ever and confidential information may not simply be revealed, but it may become public and permanent. The damage that may be done to a reputation is aggravated by the fact that it is extremely challenging to erase something once it appears on the Internet, something young adults with Facebook, MySpace, Twitter, and blogs, are beginning to realize.⁴⁴ The DOE's interpretation of FERPA, coupled with college or university policy that centers around the alleged victim, means that the accused has a better chance of defending himself and his reputation in state court than he does at his college or university.

II. THE APRIL 4, 2011 DEAR COLLEAGUE LETTER

Dear Colleague letters are periodically published by the OCR in order to remind colleges and universities that receive federal funding that they must comply with the OCR's mandates regarding Title IX enforcement. Failure to follow these directives may result in a complaint, independent investigation, and loss of federal funding.⁴⁵ This section will provide an overview of the content of the April 4, 2011 Dear Colleague letter that is the subject of this note.

A. Making a Complaint

One of the primary objectives of the Dear Colleague letter was to increase education on and awareness of sexual violence that occurs on college and university campuses. As Russlynn Ali, the author of the letter, said near its outset:

44. In a comprehensive *New York Times* web article entitled "The Web Means the End of Forgetting," Professor Jeffrey Rosen explained how the increased use of the Internet has prompted employers to search various social media sites when reviewing applications for job openings, provoking controversy over how to protect people's privacy and reputations in this new era. See Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES July 21, 2010, <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&r=0>. Additionally, reviewing a recent book written by Viktor Mayer-Schönberger on the importance of "social forgetting," Professor Rosen relates Mayer-Schönberger's argument:

By "erasing external memories," he says in the book, "our society accepts that human beings evolve over time, that we have the capacity to learn from past experiences and adjust our behavior." In traditional societies, where missteps are observed but not necessarily recorded, the limits of human memory ensure that people's sins are eventually forgotten. By contrast, Mayer-Schönberger notes, a society in which everything is recorded "will forever tether us to all our past actions, making it impossible, in practice, to escape them." He concludes that "without some form of forgetting, forgiving becomes a difficult undertaking."

Id. (quoting Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press 2009)).

45. 34 C.F.R. § 106.4(a) (2003).

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX regulations. Specifically, a recipient must: (A) Disseminate a notice of nondiscrimination; (B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; (C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.⁴⁶

Notice must be published around the college or university and online, announcing the college or university's Title IX coordinator and the school's "specific" policy on sexual violence.⁴⁷ Furthermore, notice "should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed."⁴⁸

The letter requires that colleges and universities expand their educational programs to include "information aimed at encouraging students to report incidents of sexual violence," despite the potential involvement of drugs or alcohol.⁴⁹ Rather than "chill" student reporting, schools should "inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence."⁵⁰

The letter goes on to say that once a complaint has been made, the school may be required by Title IX to take interim measures to protect the complainant. Specifically, "[t]he school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate."⁵¹ These special arrangements are *exclusively* granted to the complainant: "When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain."⁵²

If the OCR does not believe that the college or university has taken appropriate measures, it may "initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of

46. Dear Colleague Letter, *supra* note 4, at 6 (footnotes omitted).

47. *Id.* at 6–7.

48. *Id.* at 9.

49. *Id.* at 15. While certain changes disseminated in the Dear Colleague letter *must* be adhered to, such as the preponderance of the evidence standard, others are suggestions designed to bring the college's or university's policy in line with OCR policy and reduce the likelihood of OCR revision and sanction down the line.

50. *Id.*

51. Dear Colleague Letter, *supra* note 4, at 15.

52. *Id.* at 15–16.

Justice for litigation.”⁵³ Thus, the OCR puts enormous pressure on the school to maintain a victim-friendly environment, which can end up creating an environment that is less sympathetic to the accused and tilted in favor of the alleged victim. If a male student feels threatened or uncomfortable because he has been falsely accused of sexual assault, he does not possess the right to interim measures that would separate him from the complainant. He cannot ask to have his schedule changed, only the alleged victim has this option. Still, the OCR describes its procedures as “equitable.”⁵⁴

B. Disciplinary Hearing

Once the disciplinary proceeding is underway, according to the Dear Colleague letter, “preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.”⁵⁵ The OCR reaches this conclusion by interpreting the regulations promulgated under the authority granted in Title IX, which require a college or university that receives federal funding to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX].”⁵⁶ The OCR supports its decision to read “equitable grievance procedures” to mean that a college or university should adopt a preponderance of the evidence standard,⁵⁷ by first analogizing Title IX to Title VII of the Civil Rights Act of 1964, which also “prohibits discrimination on the basis of sex.”⁵⁸ The letter then goes on to explain that “OCR’s Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX. OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.”⁵⁹ These three instances, according to the OCR, require colleges and universities to apply the preponderance of evidence standard “in order for a [college or university’s] grievance procedures to be consistent with Title IX standards Grievance procedures that use [a] higher standard are inconsistent with the standard of proof established for violations of the civil

53. *Id.* at 16.

54. *Id.* at 6.

55. *Id.* at 11. The OCR justifies use of this lower standard because “[t]he Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 . . . [which] prohibits discrimination on the basis of sex.” *Id.* at 10–11.

56. 34 C.F.R. § 106.8(b) (2003).

57. Dear Colleague Letter, *supra* note 4, at 10.

58. *Id.* at 11.

59. *Id.*

rights laws, and are thus not equitable under Title IX.”⁶⁰

In addition to insisting on the lowest evidentiary standard, the letter makes other procedural qualifications that favor the alleged victim at the expense of the accused. While in certain instances the letter seems to advocate a level playing field during the hearing,⁶¹ the OCR removes crucial procedural safeguards that would exist during a criminal trial. Most significantly, the OCR “strongly discourages schools from allowing the parties to cross-examine each other”⁶² during the proceedings. The OCR reasons that, “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”⁶³ Additionally, any contact between the two parties prior to the hearing is prohibited by the Dear Colleague letter.⁶⁴

The OCR does recommend that the school allow for appeals and “maintain documentation of all proceedings.” But, the benefits of the appeal process are minimized by the overarching lack of procedural safeguards afforded the accused during the original hearing. The letter barely touches on this subject, simply mentioning that “[p]ublic and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”⁶⁵ The complete lack of attention the accused receives is indicative of the weakness of this victim-centered approach.

III. THE OCR’S FINDINGS AND NOTRE DAME’S CHANGES

July 1, 2011 OCR announced that it had entered into a settlement agreement with Notre Dame, concluding the office’s investigation into the University’s student-on-student sexual assault policies. As noted at the outset of this note, the agency-initiated investigation was prompted by the negative attention Notre Dame received during the school’s investigation

60. *Id.*

61. For instance, the letter explains: “Throughout a school’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.” *Id.* at 11.

62. *Id.* at 12.

63. *Id.*

64. *Id.* at 12. “OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”

65. *Id.*

into Lizzy Seeberg's suicide.⁶⁶

The agreement laid out the four objectives the agreement aspired to address:

(1) it furthers the goals of OCR and the university to have in place procedures and practices that are designed to prevent a sexually hostile environment from occurring on campus; (2) assures that students feel comfortable and safe complaining about sexual harassment, including incidents of sexual violence; (3) assures that sexual harassment complaints will be quickly and equitably resolved and that appropriate discipline will be taken against the harasser; and, (4) assures that victims of sexual harassment will be given appropriate and necessary counseling services and academic support.⁶⁷

Overall, the OCR was pleased with the level of cooperation exhibited by the University, and while it was concerned with certain aspects of the existing policy, it commended specific practices as well. Notre Dame embraced the OCR's suggestions and requirements, striving to create a campus environment that was more victim-friendly.⁶⁸

A. Room for Improvement

The circumstances surrounding the OCR's investigation into Notre Dame's sexual assault policy on campus were far from ideal. Having been accused of complacency in light of a young woman's suicide and possible sexual assault, the University was under close scrutiny to bring its policy in line with OCR policy, which emphasizes the importance of dissemination of information regarding reporting procedures and the University's student handbook.⁶⁹ Additionally, the OCR promotes education and training of students and all personnel that may come in contact with a victim of sexual assault.⁷⁰ Finally, the OCR seeks to make campuses safer and friendlier to women who allege that another student has sexually assaulted them by requiring certain measures to be taken to protect the alleged victim in the interim and during the disciplinary hearing.⁷¹

In line with these overarching goals, the OCR initially recommended that Notre Dame make its policy more clear. "OCR's investigation found

66. Civil Rights Office Announces Settlement Agreement on Discrimination Investigation at Notre Dame, U.S. DEPARTMENT OF EDUCATION, (July 1, 2011), <http://www.ed.gov/news/press-releases/civil-rights-office-announces-settlement-agreement-discrimination-investigation-> (last visited Apr. 10, 2013).

67. *Id.*

68. *Id.*

69. Dear Colleague Letter, *supra* note 4, at 6-13.

70. *Id.* at 7.

71. Those measures have been described in Part II of this Note.

that students and University staff were not always clearly instructed as to the processes that would be followed after a report of sexual misconduct or sexual assault was made to the University.”⁷² This was partly the result of the policy being written “somewhat inconsistent[ly]” in different sources around the school.⁷³ Furthermore, the policy did not specify the evidentiary standard that would be used during a disciplinary hearing. The OCR noted this, and also, that the University should use the preponderance of the evidence standard.⁷⁴ This lower standard is contrasted with the clear and convincing standard many colleges and universities had previously been using.⁷⁵ Notre Dame had in fact been using the lower standard, but the OCR wanted to formalize this fact in *Du Lac*, the University’s student handbook.⁷⁶

The OCR also required the University to:

Clearly delineate the options available to students who report sexual harassment, the specific steps the University will take in its investigation, the interim and permanent steps the University will take to stop and/or remedy the harassment, prevent its recurrence and minimize the burden to the complainant’s educational program, the resources and services available to complainants, accused students and witnesses, and the provision to both parties of the equivalent opportunity to provide evidence, and equivalent notice of the process, access to peer support, information about the procedures and written notice of the outcome.⁷⁷

With regard to the actual disciplinary hearing, the Agreement required the University to “conclude [any of] its Title IX sexual harassment investigations within sixty (60) calendar days, except in extraordinary circumstances.”⁷⁸ The OCR also required the University “to provide for alternative arrangements for complainants who do not want to be present in the same room as the accused during the disciplinary hearing, and to allow the complainant to appeal a disciplinary decision on the same grounds as

72. Letter from Debbie Osgood, Director, Office of Civil Rights, Department of Education, to Reverend John I. Jenkins, C.S.C., President, University of Notre Dame, *Re: OCR Sexual Harassment Investigation, 2* (Jun. 30, 2011) (on file with author) [hereinafter Letter to Rev. Jenkins].

73. *Id.* at 6.

74. *Id.*

75. William Creeley, *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate*, THE LANTERN, (2011), available at <http://www.thefirelantern.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/>.

76. *Id.*

77. *Id.* at 7.

78. Letter to Rev. Jenkins, *supra* note 72, at 7.

provided for the accused.”⁷⁹

B. Changes Made by Notre Dame⁸⁰

One of the unique and successful changes that Notre Dame made was the introduction of a Sexual Assault Resource Coordinator (SARC), an employee whose job is to “take a much more hands-on and personal approach”⁸¹ to complaints of sexual assault on campus, while “providing support to both a complainant and an accused student throughout the process.”⁸² The SARC program has been praised by University officials as being a successful and innovative way to get information to the students⁸³—thereby fulfilling one of the Dear Colleague letter’s goals of notice. It also, theoretically, promotes equality. Since neither the accused nor the alleged victim is allowed an attorney at a disciplinary hearing regarding a sexual assault claim, the SARC personnel are required to help the students manage the process, but they are also required not to give either party an advantage.

Notre Dame also clarified its definition of sexual harassment by writing it in student-friendly language and including sex-based cyber-harassment under the sexual misconduct umbrella.⁸⁴ Thus, Notre Dame’s definition of sexual misconduct includes non-consensual sexual intercourse, non-consensual sexual contact, and other forms of sexual wrongdoing including: indecent exposure, sexual exhibitionism, sex-based cyber-harassment, prostitution or the solicitation of a prostitute, peeping or other voyeurism, and going beyond the boundaries of consent, e.g., by allowing others to view consensual sex or the non-consensual video or audiotaping of sexual activity.⁸⁵

79. *Id.*

80. For a list of the changes that Notre Dame has made to *Du Lac*, see Fosmoe, *supra* note 1.

81. Laura Kraegel, *Policy: can you spot the changes?*, SCHOLASTIC: UNIVERSITY OF NOTRE DAME’S STUDENT MAGAZINE, Sept. 15, 2011, at 22. (quoting Ann Firth, Associate Vice President for Student Affairs (Mission & Integration) and Deputy Title IX Coordinator).

82. *Id.*

83. *Id.*

84. Fosmoe, *supra* note 1.

85. Committee on Sexual Assault Prevention, *Sexual Misconduct and Sexual Assault*, UNIVERSITY OF NOTRE DAME, <http://csap.nd.edu/policy/> (last visited Apr. 9, 2013). See also Notre Dame’s definition of consent and intoxication:

Consent means informed, freely given agreement, communicated by clearly understandable words or actions, to participate in each form of sexual activity. Consent cannot be inferred from silence, passivity, or lack of active resistance. A current or previous dating or sexual relationship is not sufficient to constitute consent, and consent to one form of sexual activity does not imply consent to other forms of sexual activity. By definition, there is no consent when there is a threat of force or violence or any other form of

If a student believes that she has been the victim of sexual assault, she is encouraged by Notre Dame to make a complaint to the University and is also free to report the incident to law enforcement. "To further encourage reporting, the University's procedures provide that students who report sexual misconduct and/or sexual assault will not be subjected to disciplinary action for violating other provisions of the disciplinary code (e.g., alcohol violations) or be subjected to questioning concerning past unrelated sexual relationships."⁸⁶ Furthermore, the University is obligated to take action if it believes sexual misconduct is occurring, even if there has not been a complaint.⁸⁷ Previously, the University would wait until an issue was brought to its attention through the reporting system.

Finally, the University agreed that the complainant would not be forced to face the accused during the hearing, nor would she be precluded from appealing the result if it is unfavorable to her claim. The University's endorsement of the Dear Colleague letter,⁸⁸ indicates that Notre Dame has embraced the victim-centered approach to sexual misconduct that was advocated by scholars such as Nancy Cantalupo and adopted by the OCR.

IV. WHAT IF A STUDENT IS UNJUSTLY FOUND TO HAVE COMMITTED SEXUAL ASSAULT?

Some scholars have recognized the precarious position that male students accused of sexual assault are placed in, and have sought to find ways to remedy the unjust treatment these students may experience during disciplinary hearings.⁸⁹ This next section will outline some of the arguments that academics have presented; but will conclude by arguing that these attempts have been unsuccessful. Instead, what these legal acrobatics demonstrate is the difficulty of establishing a cause of action that a male student, unjustly accused of sexual assault, can cling to in his efforts to be made whole. The disciplinary hearing becomes, then, the only venue for establishing his innocence and preserving his reputation. Consequently, procedural protections, in particular the evidentiary

coercion or intimidation, physical or psychological. A person who is the object of sexual aggression is not required to physically or otherwise resist the aggressor; the lack of informed, freely given consent to sexual contact constitutes sexual misconduct. [I]ntoxication is not an excuse for failure to obtain consent. A person incapacitated by alcohol or drug consumption, or who is unconscious or asleep or otherwise physically impaired, is incapable of giving consent.

Id.

86. Letter to Rev. Jenkins, *supra* note 72, at 5.

87. *Id.* at 2.

88. "The University specifically expressed interest in ensuring that its policies and procedures comport with OCR's 2011 Dear Colleague letter on Sexual Violence." *Id.* at 6 (footnote omitted).

89. See *infra* note 91 and accompanying text.

standard, need to be stronger in order prevent wrongful condemnations that will negatively impact the rest of the wrongly accused student's life.

A. The Other Areas of the Law That Have Been (Unsuccessfully)
Explored: Contract and Tort Law

Some scholars argue that students at private colleges and universities have rights that find their source in contract law, which requires good faith and fair dealing.⁹⁰ According to these scholars, contract law is the “contractual equivalent of ‘due process,’ protecting the student against unfair or arbitrary enforcement of school rules.”⁹¹ A core principle of contract formation, they argue, is that “an agreement [should be] ‘reached by two parties of equal bargaining power by a process of free negotiation.’”⁹² As some scholars point out,⁹³ though, students have no ability to negotiate the conditions of the contract—they must either take it or leave it.⁹⁴ The adhesionary nature of these contracts is reinforced when considered in light of the student's circumstances, primarily his or her lack of sophistication relative to the college or university⁹⁵ as well the student's limited alternatives.⁹⁶

Berger and Berger further argue that contract law requires that a college or university consider the student's reasonable expectations⁹⁷ when

90. See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999) (arguing contract law's requirement of good faith and fair dealing should be read into the contract between a student and a college or university); Johanna Matloff, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U. L. REV. 169 (2001) (arguing that students are subjected to adhesionary contracts put forth by colleges and universities). See also Restatement (Second) of Contracts § 205 (1981).

91. Berger & Berger, *supra* note 90, at 292 (footnote omitted).

92. *Id.* at 319 (footnote omitted).

93. *Id.* at 294.

94. *Id.* at 330.

95. Berger and Berger explain the convoluted structure of the contract: “[U]ncertainty about the precise terms of the student-university contract constitutes the first distinction between this contract and most standard commercial (that is, money for goods and services) exchanges . . .” *Id.* at 321. See also Berger and Berger's discussion of the college or university as a commodity and the potential applicability of the U.C.C. to the student-university contract. Specifically, if there are ambiguous terms, the authors argue that courts should interpret the “trade usage” in favor of the weaker party, meaning the students. *Id.* at 336 n. 251.

96. *Id.* at 322.

97. The student's reasonable expectations should be determined by considering:

[W]hat the average student might expect regarding those [disciplinary] rules, if he could imagine himself ‘on trial’ for academic wrongdoing, the Restatement [(Second) of Contracts] gives courts a tool for aligning a school's procedures with their students' (presumed) expectations. And how do we believe students would answer the inquiry? Much as we propose: in a

conducting disciplinary hearings.⁹⁸ And, if the potential punishment is severe, procedural safeguards commensurate with the punishment should be available.⁹⁹ In support of their argument, Berger and Berger note that the Restatement (Second) of Contracts § 211 “permits courts, in construing a standardized agreement, to nullify any portion of the contract that falls outside the ‘reasonable expectations’ of the weaker party and to substitute fairer language for it.”¹⁰⁰

These contract causes of action have yet to be successful, and likely never will be. Even if a plaintiff demonstrated that a standard form or adhesion contract existed between himself and his college or university, contract law in this area is becoming *more*, rather than less, permissive.¹⁰¹ The result is that a student unjustly convicted of sexual assault will not be successful in arguing that he is entitled to damages resulting from the unconscionability or breach of his contract.

Under tort law, the three potential injuries that may be inflicted upon a student that has been expelled after a hearing that was not characterized by adequate procedural safeguards are: intentional infliction of emotional distress (IIED); interference with prospective economic interest; and defamation.¹⁰² Unfortunately, with each injury, an element of the tort is unlikely to be satisfied. For instance, with IIED the plaintiff must show that the college or university’s “conduct was ‘extreme and outrageous’ falling ‘beyond all possible bounds of decency’ and was ‘utterly intolerable in a civilized community.’”¹⁰³ While the college or university may favor the victim relative to the accused in a sexual assault hearing, only the most unlikely set of facts could ever warrant the assertion that it had acted maliciously. High standards, such as the previous one, will rarely be satisfied.

B. One Shot to Prove His Innocence

Students accused of sexual assault realistically have a single opportunity to prove their innocence, and it is at the disciplinary hearing. This note

manner consistent with the conception of good faith and fair dealing
Id. at 331.

98. *Id.* at 335.

99. Berger and Berger explain: “This means, where the charges are the academic equivalent of criminal fraud, that the process should contain most of the safeguards provided by the Constitution for persons charged with ordinary crime.” *Id.* (footnote omitted).

100. *Id.* at 294.

101. See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

102. Ryan J. Hayward, *With Liberty and Justice for All . . . Even Students at Private Colleges and Universities*, 8 *HOLY CROSS J.L. & PUB. POL’Y* 37, 48–50 (2004).

103. *Id.* at 48 (quoting *Tynecki v. Tufts Univ. Sch. of Dental Med.*, 875 F. Supp. 26, 34 (D. Mass. 1994) (citations omitted)).

began by reviewing Professor Cantalupo's scholarship and OCR policy, outlined in its Dear Colleague letter, both of which support a victim-friendly approach to student-on-student sexual assault at colleges and universities. A key feature of Cantalupo's argument is that criminal adjudication is fundamentally different than a college or university's disciplinary hearing, a fact that warrants different procedural protections. An examination of FERPA and the nature of the Internet, however, demonstrate that the reputational damage to a student accused of sexual assault might end up being similar to the consequences that face a criminal defendant if the student's record is disclosed or his alleged misconduct is preserved online.

If an innocent student is wrongly found to have committed sexual assault by a disciplinary committee, his avenues of redress are severely limited, if any exist at all. This predicament is not addressed in the Dear Colleague letter, which advocates several procedural changes that advantage the complainant at the expense of the alleged assailant. Unfortunately, addressing each concerning aspect of the letter is beyond the scope of this note. Instead, attention will be directed to the change that the letter made to the applicable evidentiary standard at sexual assault disciplinary hearings.

In the Dear Colleague letter, OCR explains that "[i]n addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints."¹⁰⁴ The failure of a college or university to use this standard may result in OCR holding that the college or university is in violation of Title IX and ineligible for federal funding.¹⁰⁵ Prior to the publication of this letter, many colleges and universities required evidentiary standards higher than a preponderance of the evidence.¹⁰⁶ A survey of the top 100 colleges and universities¹⁰⁷ conducted

104. Dear Colleague Letter, *supra* note 4, at 10.

105. The federal regulations expounding Title IX require assurance that:

Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

34 C.F.R. § 106.4 (a) (2003).

106. Creeley, *supra* note 75, at 1.

107. *Id.* The rankings are based on the *National University Rankings: Best*

to gauge changes in their policies in response to the Dear Colleague letter, found that “39 of the nation’s top 100 schools, most of them in the top 50, required that allegations of sexual misconduct be proved by a standard other than ‘more likely than not.’ Of these 39, 15 schools did not specify any standard of proof.”¹⁰⁸

Today, colleges and universities, such as Notre Dame, that are the subject of an OCR investigation, must publish in their student handbooks that the standard that will be used at sexual assault disciplinary hearings is a preponderance of the evidence. Otherwise, OCR could withhold federal funding to the college or university.¹⁰⁹ As the survey above noted, many colleges and universities are acting preemptively by changing their policies in order to conform to the Dear Colleague letter and avoid trouble with OCR. The implication is that proof of student’s guilt only needs to be .01% above a 50-50 chance, despite the *certainty* that the repercussions he will face will be devastating if he is found responsible for sexual assault in the hearing.

C. Finding a Remedy

Neither Title IX nor the federal regulations promulgated by the OCR under that act explicitly require the use of a preponderance of the evidence standard in sexual assault disciplinary hearings. The Dear Colleague letter makes a large interpretative leap from 34 C.F.R. § 106.8(b), created under the authority granted to the DOE in 20 U.S.C. §§ 1681 & 1682, which requires “equitable” grievance procedures,¹¹⁰ to application of the lowest evidentiary standard. This interpretation is not justified by the preponderance of the evidence standard’s application in Title VII adjudication or its internal use by OCR, as the Dear Colleague letter implies.¹¹¹ Furthermore, OCR requirement that colleges and universities establish the preponderance of the evidence standard in order to comply

Colleges, U.S. NEWS & WORLD REPORT (2011 ed.).

108. *Id.* See also Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 73, 80 (1985–1986) (noting that courts, colleges and universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of “clear and convincing” evidence).

109. The Dear Colleague letter’s has been attacked by opponents of the preponderance of the evidence standard as violating the Administrative Procedures Act, which requires administrative rulemaking to go through an extensive three-step process before becoming effective. Creeley, *supra* note 75, at 3. The letter arguably circumvents the rulemaking process by making an aggressive interpretation of the relevant regulations, which do not include language promoting or requiring a preponderance of the evidence standard. By requiring colleges and universities to use this particular standard, the OCR is, the argument goes, for all practical purposes creating a rule. *Id.* This argument has yet to be tested.

110. Dear Colleague Letter, *supra* note 4, at 10; and 34 C.F.R. § 106.8(b).

111. Dear Colleague Letter, *supra* note 4, at 10.

with OCR policy and avoid punishment, arguably violates the Administrative Procedures Act.¹¹² The mandate effectively acts as a rule even though OCR did not comply with the three-step rulemaking process, whereby the agency must notify the public, allow for comments regarding the proposed rule, and publish the final rule.¹¹³

Enacting an amendment to Title IX could pull the rug out from under the Dear Colleague letter by clarifying that OCR does not have the authority to create new regulations, or construe already existing rules, to require a preponderance of the evidence standard in sexual assault disciplinary hearings. Rather, it would establish clear and convincing as the lowest evidentiary standard that a college or university could apply and it would also allow colleges and universities to apply a higher standard of beyond a reasonable doubt. This amendment would mitigate the powerless position students wrongly found to have committed sexual assault are placed in, by striving to ensure, *ex ante*, that students are not incorrectly found responsible.

Because the language used in Title IX is does not specifically address evidentiary standards in this context, leaving the door open for the DOE and OCR to read in a standard, the proposed amendment would eliminate this leeway. Namely, by illuminating Congress's intent regarding the lowest standard of proof that may be applied in a disciplinary hearing for sexual assault, the proposed amendment would clarify that "equitable grievance procedures" in the context of student on student sexual assault disciplinary hearings should not be interpreted as allowing for a standard of proof lower than clear and convincing. The implication is that Congress would be signaling to the DOE that the preponderance of the evidence standard in this context is inherently inequitable.

Support for establishing the clear and convincing standard of evidence as the floor in sexual assault disciplinary hearings can be found in the American Association of University Professors' (AAUP) own letter in which it said: "Given the seriousness of accusations of harassment and sexual violence and the potential for accusations, even false ones, to ruin a faculty member's career, we believe that the 'clear and convincing' standard of evidence is more appropriate than the 'preponderance of evidence' standard."¹¹⁴ AAUP similarly relied on the repercussions to an individual's reputation and emphasized the importance of safeguarding this asset.

112. 5 U.S.C. § 553 (2006); Creeley, *supra* note 70, at 3.

113. Creeley, *supra* note 75, at 3.

114. Letter from Cary Nelson, President, American Association of University Professors, to Russlynn Ali, Assistant Secretary for Civil Rights, Office of Civil Rights, Department of Education, 1-2 (Aug. 18, 2011), <http://thefire.org/public/pdfs/be5df1a71d0eae6b7b840a2ecdb01bb9.pdf> (cited in Creeley, *supra* note 75).

CONCLUSION

After the tragic death of Lizzy Seeberg, Notre Dame was forced into the spotlight by the media and the OCR. After its investigation, OCR required Notre Dame to formally conform to OCR's victim-friendly policies outlined in its April 4, 2011 Dear Colleague letter. Notre Dame's conformity to the OCR's Dear Colleague letter means that the rights of the accused during sexual assault disciplinary proceedings are required to come second to the rights of the complainant. The explanation that OCR and Notre Dame gave for adopting this approach presents the consequences of a disciplinary hearing as fundamentally different from a criminal trial, and conclude that students do not need the same level of procedural safeguards in the former as they need in the latter. This is an overly simplistic argument that does not adequately consider how analogous the repercussions may be for a student found culpable of sexual assault at a disciplinary hearing and a student found responsible for sexual assault in a courthouse. While a college or university may not imprison the student who has been found responsible for sexual assault, this young man may lose his ability to pursue his career plans because his next step academically or professionally will be unfavorably colored by his past. It is unrealistic to assume that society will seriously take account of the differences that exists at a disciplinary hearing for sexual assault and a criminal trial if the student is ultimately found responsible in that hearing; but the result—diminution in opportunity—will be fundamentally the same.

The creativity demonstrated by scholars in their efforts to advocate for rights of the accused during disciplinary hearings demonstrates concern that male students accused of sexual assault lack adequate protection. These attempts to find causes of actions against colleges and universities that have mistakenly found students to be responsible for sexual assault have been, and will likely continue to be, unsuccessful. They demonstrate, however, the importance of the disciplinary hearing for the student accused of sexual assault, because it is his one and only shot at preserving his innocence and reputation.

In order to mitigate the precarious position male students accused of sexual assault are placed in, this Note proposes an amendment to Title IX that would limit the DOE's scope of authority when interpreting the appropriate evidentiary standard applicable in student on student sexual assault disciplinary hearings. Specifically, this amendment would create a floor – the clear and convincing standard of evidence – rather than permitting students to be found responsible for sexual assault based on a mere preponderance of the evidence.

The objective of this Note is to stress the implications that a negative result at disciplinary may have on a male student's life. Establishing a clear and convincing standard of evidence will not detract from the trauma an alleged victim has faced. It will however, ensure that the male student's

responsibility is more thoroughly established before punishing him, and lead to disciplinary hearings that do not excessively favor the alleged victim at the expense of the alleged assailant.

BOSTON COLLEGE’S DEFENSE OF THE BELFAST PROJECT: A RENEWED CALL FOR A RESEARCHER’S PRIVILEGE TO PROTECT ACADEMIA

FRANK MURRAY*

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INTRODUCTION

In March 2011, the British government contacted the United States Department of Justice to initiate proceedings pursuant to the United Kingdom Mutual Legal Assistance Treaty (“UK-MLAT”), eventually resulting in the issuance of a subpoena for all materials involving two interviews from Boston College’s Belfast Project.¹ Researchers at Boston College had organized the Belfast Project, an oral history of the Irish Republican and Loyalist Paramilitaries, from 2001–2006 and archived the interviews in Boston College’s Burns Library.² All the interviews were recorded and stored on the condition of anonymity.³

On December 16, 2011, the Federal District Court of Massachusetts denied Boston College’s motion to quash the subpoena.⁴ In doing so, the court rejected the argument that the documents could be shielded by an academic researcher privilege.⁵ The First Circuit Court of Appeals would later affirm the District Court’s ruling.⁶ Although the case has raised concern in the academic researcher community,⁷ it is nevertheless consistent with American jurisprudence regarding subpoena power and

1. *In re Request from U.K. Pursuant to Treaty Between Gov’t of U.S. & Gov’t of U.K. on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 685 F.3d 1, 3–6 (1st Cir. 2012) [hereinafter *In re Dolours Price*].

2. *Updates on the Threat to Oral History Archives*, B.C. SUBPOENA NEWS, <http://bostoncollegesubpoena.wordpress.com> (last visited Feb. 14, 2013).

3. *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 441 (D. Mass. 2011), *aff’d in part sub nom. In re Dolours Price*, 685 F.3d 1 (O’Neill Aff. ¶ 6; McIntyre Aff. ¶ 9; Moloney Aff. ¶ 29). Boston College would later claim that the intention of the agreement was that the documents would be protected to the extent allowed under American law. But the donor agreement makes no explicit mention of this, and some commentators have dubbed it misleading. See Ted Palys & John Lowman, *Defending Research Confidentiality “To the Extent the Law Allows”: Lessons from the Boston College Subpoenas*, J. ACAD. ETHICS, DOI 10.1007/s10805-012-9172-5, at 3 (2012).

4. *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 459.

5. *Id.* at 453, 455–58.

6. See *In re Dolours Price*, 685 F.3d at 20. The appeal was brought by two researchers involved in the project who decided to intervene after Boston College declined to appeal part of the document turnover order. For more information on the procedural history of the case, see Lyle Denniston, *British Subpoenas Blocked*, SCOTUSBLOG (Oct. 17, 2012, 1:26 PM), <http://www.scotusblog.com/2012/10/british-subpoenas-blocked/>, and *Court Documents*, B.C. SUBPOENA NEWS, <http://bostoncollegesubpoena.wordpress.com/court-documents/> (last visited Feb. 14, 2013).

7. See, e.g., Chris Bray, *The Whole Story Behind the Boston College Subpoenas*, CHRON. HIGHER EDUC. (July 5, 2011), <http://chronicle.com/article/The-Whole-Story-Behind-the/128137> (discussing the threat to academic freedom in government seizure of Boston College research materials).

confidential research.⁸ By contrast, the European Court of Human Rights (“ECtHR”) has taken an expansive view of Article 10 of the European Convention on Human Rights (“ECHR”) and has created a strong foundation for the recognition of a privilege for social commentators and their confidential sources.⁹ Ironically, the very actions that the United Kingdom has requested of the United States with respect to its academic institutions, although legal in America, would likely violate ECHR Article 10, to which the United Kingdom is bound.¹⁰

Part I of this note outlines the historical and contemporary role of the scholarly researcher, examining the importance of confidentiality to academic research and commentary. Part II discusses the legal status of subpoenas and academic privilege in American law, as well as the notion of source privilege for social commentary as a quickly evolving human right in ECtHR jurisprudence. Part III analyzes the stunted growth of a scholarly researcher’s privilege in America, as brought to light by Boston College’s current struggle, and looks to international human rights law for guidance. This note concludes by proposing a preferred path for the development of a researcher’s privilege in America.

I. BACKGROUND

A. The Historical and Contemporary Role of the Scholarly Researcher

The idea of academic freedom in democratic societies, both in substance and as a fundamentally recognized institutional norm, can trace its roots as far back as the philosophy of intellectual freedom in ancient Greece.¹¹ During the Middle Ages, European scholars formed universities from self-constituted academic communities, which the Catholic Church sporadically censored.¹² Over time, scholars were able to slowly shake the human

8. See Robert H. McLaughlin, *From the Field to the Courthouse: Should Social Science Research Be Privileged?*, 24 LAW & SOC. INQUIRY 927, 960–61 (1999) (noting the absence of protection for academic research under federal and state common law and statute).

9. DAVID HARRIS, MICHAEL O’BOYLE, & COLIN WARBRICK ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 444–45, 466–67 (2d ed. 2009) [hereinafter HARRIS].

10. Compare *Goodwin v. United Kingdom*, App. No. 17488/90, paras. 39–46 (Eur. Ct. H.R. 1996) (concluding that requiring the applicant to reveal his source was a violation of his right to freedom of expression under Article 10), with *Branzburg v. Hayes*, 408 U.S. 665, 688–94 (1972) (holding that the public interest in law enforcement justifies requiring the cooperation of news organizations in grand jury investigations and criminal trials), and *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–58 (declining to recognize an academic research privilege claimed by Boston College).

11. Ralph F. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 59 LAW & CONTEMP. PROBS., Summer 1996, at 431, 431.

12. *Id.* at 433–34.

intellect free from bondage imposed by the State and other religious institutions.¹³

The American tradition of academic freedom, inspired by the Renaissance, Age of Reason, and social and political notions of the American Revolution,¹⁴ institutionally resembled the English university system.¹⁵ The English Monarch and Church “largely respected the autonomy of the universities, in part because both needed the universities and in part because the universities were able to enlist each source of power to check incursions by the other.”¹⁶ English and American higher education systems also shared a lingering and immutable cultural suspicion of centralized State autocracy.¹⁷ The resulting contemporary conception of academic freedom ubiquitously adopted by American colleges and universities, as well as most other liberalized modern nations around the world, thus relies on the fundamental premise that “the people and the [S]tate [have] no desire to place obstacles in the way of an honest search for truth . . .”¹⁸ Implicit in such an ideal is the defense of institutions, including faculty and researchers, in testing views, commenting on world affairs, and—most importantly—gathering, securing, and analyzing data.¹⁹

The rise of modern researchers, and their corresponding need for protection in society resulted from the development of scientific research value in the late nineteenth century.²⁰ Conceptions of higher education changed and “began to be seen as scientific training for practical jobs rather than moral training of gentlemen for elite professions.”²¹ The rapid development of social sciences further altered the nature of research, resulting in increased interest in and funding for areas such as political science, sociology, anthropology, psychology, and economics.²² As the American Association of University Professors noted in its *1915 General*

13. *Id.* at 434.

14. *Id.* at 431.

15. See J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 *YALE L.J.* 251, 267 (1989).

16. *Id.* at 267 (footnote omitted).

17. Cf. DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS* 60, 363, 366–369 (2d ed. 2004) (describing an anti-autocratic culture in England and America, including King John’s signing of the *Magna Carta* under duress, Parliament’s attempts to limit Oliver Cromwell’s power by offering him the crown, England’s Glorious Revolution, as well as Puritan suspicions of the English proprietorial magistrate class, English law, and political institutions in the Bay Colony).

18. Friedrich Paulsen, *THE GERMAN UNIVERSITIES AND UNIVERSITY STUDY* 244 (Frank Thilly & William W. Elwang trans., 1906).

19. See *id.*

20. See Byrne, *supra* note 15, at 269–70 (describing the transformation of higher education after the Civil War).

21. *Id.* at 270 (footnote omitted).

22. *Id.* at 271 (footnote omitted).

Declaration of Principles,²³ the “modern university is becoming more and more the home of scientific research,” declaring the complete and unfettered freedom to pursue and publish inquiry to be “the breath in the nostrils of all scientific activity.”²⁴

As scientific activity and research came to dominate the modern higher educational setting, the role of researcher took center stage in the academic world and in society at large.²⁵ Today, the role of the researcher maintains this consequence and has, in many ways, joined that of journalists in comprising what Irish philosopher and statesman Edmund Burk referred to as the Fourth Estate of Parliament.²⁶ Whereas journalism has been referred to as society’s daily informative voice,²⁷ commentators refer to scholarly research and publication as its mechanism of historical reflection and conscience.²⁸ Research scholars also serve both a contemporary and prospective function—they are our distillers of misinformation, our champions against propaganda, and they enable society to rationally chart the undiscovered.²⁹

23. *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 BULL. AM. ASS’N U. PROFESSORS 15, 20–39 (1915).

24. *Id.* at 27–28.

25. *See* Byrne, *supra* note 15, at 271 (describing a paradigm shift from fixed values of religion to relative truths of science).

26. *See* THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, & THE HEROIC IN HISTORY 141 (Michael K. Goldberg et al. eds., Univ. Cal. Press 1993) (1840) (“[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact,—very momentous to us in these times. . . . Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority.”); Robert M. O’Neil, *A Researcher’s Privilege: Does Any Hope Remain?*, 59 LAW & CONTEMP. PROBS., Summer 1996, at 35, 36–37 (examining the legal basis for the protection of the academic research process and its results).

27. *See* Kara A. Larsen, *The Demise of the First Amendment-Based Reporter’s Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235, 1235 (2005).

28. *See* McLaughlin, *supra* note 8, at 930; O’Neil, *supra* note 26, at 36–37.

29. *See, e.g.,* Fuchs, *supra* note 11, at 431–36 (discussing the historical conception of academic freedom and the idea of the university as pursuing truth); Samuel Hendel & Robert Bard, *Should There Be a Researchers’ Privilege?*, 59 AAUP BULL. 398, 398 (1973) [hereinafter Hendel] (arguing that the strong shield laws protecting journalism from government coercion should apply to scholars and researchers as citizens “dedicated to inquiry into matters of public concern”); McLaughlin, *supra* note 8, at 930 (asserting that researchers strive to improve the human condition and learn more about themselves in the process).

B. The Importance of Confidentiality to Academic Research and Commentary

Although academic researchers are central to society's progress,³⁰ they inhabit a fragile and vulnerable position.³¹ Law and academic research diverge greatly in terms of the "values that they hold and the rules that they follow."³² Compounding this reality is the highly critical and condemning role that academia assumes, which, over time, promises to attract an exponential amount of assaillment.³³ This fragility is evident in the academic community's perceptions, attitudes, and culture, as well as in their ability to conduct accurate, independent, and socially important research.³⁴ In a 1976 survey, the majority of responding researchers expressed the need for strict legal protection from subpoenas for the confidentiality of research study sources—and almost three-quarters "said they believed that with such protection potential sources would be more willing to participate in research projects."³⁵ Furthermore, half of the group believed that academic investigators would be more willing to "undertake controversial research if they could be assured that their sources would not be subject to the possibility of revelation in court."³⁶

Current perceptions in the academic community mirror those shared by journalists.³⁷ According to a 2009 study, nearly 70% of newsroom leaders

30. See, e.g., Fuchs, *supra* note 11, at 431–36; Hendel, *supra* note 29, at 398; McLaughlin, *supra* note 8, at 930.

31. See, e.g., Paul M. Fischer, *Science and Subpoenas: When Do the Courts Become Instruments of Manipulation?*, 59 LAW & CONTEMP. PROBS., Summer 1996, at 159, 167 (noting the disadvantages of scientists facing compelled disclosure of research); Rik Scarce, *Scholarly Ethics and Courtroom Antics: Where Researchers Stand in the Eyes of the Law*, 26 AM. SOCIOLOGIST 87, 87 (1995) (arguing for federal legislation to protect academic research).

32. Fischer, *supra* note 31.

33. See *id.* at 163–167 (citing cases in which a company subpoenas research that threatens its interests); Fuchs, *supra* note 11, at 436 (highlighting the role of educational institutions in searching for truth in politics and social science).

34. See, e.g., Ronnell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 349–81 (2009) (studying the effects of media subpoenas on the perceptions of journalists and confidential sources); Fischer, *supra* note 31, at 163–67; Michael Traynor, *Countering the Excessive Subpoena for Scholarly Research*, 59 LAW & CONTEMP. PROBS., Summer 1996, at 119, 120 (noting the reluctance of researchers to participate in litigation).

35. Robert M. O'Neil, *Scientific Research and the First Amendment: An Academic Privilege*, 16 U.C. DAVIS L. REV. 837, 848 (1983).

36. *Id.* (footnote omitted).

37. Compare Rick Legon, *The Climate of Academic Freedom*, ASS'N GOVERNING BDS. UNIV. & COLL. (May 25, 2010) available at <http://www.highbeam.com/doc/1G1-227483932.html> (noting that enhanced scrutiny by government is straining institutional independence), with Jones, *supra* note 34, at 375 (pointing to the perception among newsroom leaders that courts have become less protective of media).

believe courts' attitudes toward news organizations and subpoenas were less protective of the media than they were five years prior, nearly 30% thought they were "much less" protective, and over 60% believed that both prosecutors and civil litigants were more likely to subpoena the press.³⁸ Following the "Climategate" incident at the University of Virginia, in which Virginia's Attorney General issued a subpoena for a scholar's climate change research, the Association of Governing Boards of Universities and Colleges released a statement in response, highlighting that "[w]e are in an era of enhanced scrutiny of higher education by state and federal policymakers"³⁹ The onset of increased criminal and civil sanctions on researchers has created an atmosphere that many in the community analogize to Galileo's era.⁴⁰ The ominous effect of criminal or civil investigations, including the lingering threat they pose, has been noted by many scholarly researchers, such as Professor Paul Bullock—a University of California Los Angeles research economist who was brought before a local police corruption panel and threatened with fines and jail time following his refusal to divulge sources that included street criminals.⁴¹

These perceptions and expectations have directly affected researchers' willingness and ability to undertake new projects.⁴² Bullock later noted

38. Jones, *supra* note 34, at 375 (footnotes omitted).

39. Legon, *supra* note 37. The statement noted that Attorney General Ken Cuccinelli, a vocal critic of global warming, issued a subpoena claiming that the professor defrauded taxpayers by using in his research what the professor once referred to in an email as a statistical research "trick." *Id.* Professor Mann claimed that the Attorney General was simply trying to smear him as part of a larger campaign to discredit his science. *Id.* In support of Mann, the Union of Concerned Scientists released a letter signed by 800 professors and scientists in Virginia urging Cuccinelli to drop the case, citing Virginia's long tradition of academic freedom, innovation, research, and discovery. *Id.*

40. See Daniel Heninger, *Climategate: Science Is Dying*, WALL ST. J. (Dec. 3, 2009, 12:53 PM), <http://online.wsj.com/article/SB10001424052748704107104574572091993737848.html> (likening the East Anglians' mistreatment of scientists who challenged global warming to the attempt three centuries ago to silence Galileo). See also Dahlia Lithwick & Richard Schragger, *Does the Constitution Really Protect a Right to "Academic Freedom"?*, SLATE (June 1, 2010, 6:19 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/06/jefferson_v_cuccinelli.single.html (describing a letter from Richard Schragger claiming that the use of prosecutorial power "to investigate climate science in the academy constitutes a threat to free inquiry"); Kathleen Bond, *Confidentiality and the Protection of Human Subjects in Social Science Research: A Report on Recent Developments*, 13 AM. SOCIOLOGIST 144, 146 (1978) (listing numerous cases in which government requests have been made for social science research, the disclosure of which would jeopardize promised confidentiality).

41. O'Neil, *supra* note 35, at 851.

42. *Id.* at 848; Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 158 (2006) (footnote omitted) (internal quotation marks omitted) (describing how "[i]f potential informants believe

that if he were “to undertake a similar study [again], [he would] want to know that [he was] somehow protected on the confidentiality of that kind of information,” further noting his fears of being thrown in jail.⁴³ Other researchers share Bullock’s perception, catalyzing a chilling effect nearly impossible to measure, especially in terms of lost research.⁴⁴ This effect jeopardizes the controversial and sensitive research topics that some argue probably deserve the greatest social attention and legal protection.⁴⁵ This is largely underscored by researchers’ disinterest in legal rules and unwillingness to endure the distraction, anxiety, and cost of legal proceedings.⁴⁶ Moreover, researchers are often deterred by concerns about ethical conduct.⁴⁷ Considerable disagreement exists in the researcher community as to how professional codes of ethics should be interpreted, redrafted, or altogether ignored in the face of frail legal protection of confidential sources.⁴⁸

that a subpoena can convert journalists into ‘an investigative arm of the government,’” they and others will be less likely to cooperate, thus reducing the press’s ability to report on governmental and social functions).

43. O’Neil, *supra* note 35, at 851 (footnote omitted) (internal quotation marks omitted).

44. *Id.* at 851–52.

45. *Id.* at 852.

46. Fischer, *supra* note 31, at 166; *see also* Jacques Feuille, *Every Man’s Evidence Versus a Testimonial Privilege for Survey Researchers*, 40 PUB. OPINION Q. 39, 49–50 (noting how “professionally embarrassing [it is for] the individual researcher to work out a desperate compromise or face jail” time); McLaughlin, *supra* note 8, at 930 (describing how these considerations are not the only difficult issues researchers face with respect to the current state of the law; ferociously competing demands of the professional code of ethics and the law serve as another hurdle for researchers).

47. *See* Sudhir Venkatesh, *The Promise of Ethnographic Research: The Researcher’s Dilemma*, 24 LAW & SOC. INQUIRY 987, 988–90 (1999) (noting that if researchers knew that the court system would provide greater protection for confidential research material such as notes, then they would find great solace in knowing such protections existed and their informants would be much less fearful as well). *See generally* John Lowman & Ted Palys, *Subject to the Law: Civil Disobedience, Research Ethics, and the Law of Privilege*, 33 SOC. METHODOLOGY 381 (2003) (clarifying the “ethics-first” approach) [hereinafter Lowman]; Felice J. Levine & John M. Kennedy, *Promoting a Scholar’s Privilege: Accelerating the Pace*, 24 LAW & SOC. INQUIRY 967 (1999) (advocating a research privilege for scholars to protect confidential information based on researchers’ ethical obligations to their subjects) [hereinafter Levine]; Robert H. McLaughlin, *Privilege and Practice in Social Science Research*, 24 LAW & SOC. INQUIRY 999 (1999) (noting the absence of protection for academic research under federal and state common law and statute); Scarce, *supra* note 31 (arguing for federal legislation to protect academic research); Geoffrey R. Stone, *Discussion: Above the Law—Research Methods, Ethics, and the Law of Privilege*, 32 SOC. METHODOLOGY 19 (2002) (discussing the rationale for a researcher-participant privilege).

48. *See, e.g.,* Lowman, *supra* note 47, at 386, 388 (arguing that researchers should be prepared to defy a court order to release confidential information and that the American Sociological Association Code of Ethics should be interpreted, at a

Complementing a beleaguered scholar's chilled willingness to engage in certain subject areas is the scholar's inability to perform notwithstanding such apprehension.⁴⁹ Corporate litigation has increasingly focused on discrediting researchers and their work product.⁵⁰ A researcher's notes and personal opinions, often completely unrepresentative of their research methods, are easy targets for those seeking to discredit their findings outside the normal process of scientific inquiry.⁵¹ The threat of litigation can be used to wear down a researcher's resources, time, attention, financial support, and academic reputation.⁵² Further at issue is the ability of researchers to find sources and subjects willing to cooperate under promises of confidentiality when prior promises have proven empty.⁵³ Research involving human subjects, for example, requires that the "the public have confidence that its best interests will be protected and that its confidentiality will be preserved."⁵⁴ When this confidence is eroded by external forces and the delicate relationship between researcher and subject is exposed, more than mere participation is scarified—neutrality, candor, and accuracy fade as well.⁵⁵

minimum, to provide protection for research subjects); McLaughlin, *supra* note 47, at 1000 (describing an approach in which difficult research decisions would not be based in personal ethics or professionalism but rather sublimated to mere legalities, deriving from the law an instrumentalist position); Stone, *supra* note 47, at 25–27 (arguing that the proper course for a researcher who cannot count on the protection of a privilege is "not to promise unconditional confidentiality, but to promise unconditional confidentiality *within the limits allowed by the law*").

49. See Fischer, *supra* note 31, at 163–67.

50. See, e.g., *id.* at 163, 166 (describing how a medical researcher may uncover a series of side effects to a product, resulting in the pharmaceutical company's subpoena of the records in an effort to discredit the research and look for an alternative explanation).

51. *Id.* at 164, 166.

52. See *id.* at 166; J. Graham Matherne, *Forced Disclosure of Academic Research*, 37 VAND. L. REV. 585, 601 (1984).

53. Fischer, *supra* note 31, at 164–65; Venkatesh, *supra* note 47, at 989–90 (describing that when notifying a potential participant that his rights are protected, but not against subpoenas, "an uneasy silence often ensues," followed by lines of hypothetical questioning that do not do well to serve as the foundation of a relationship); see also O'Neil, *supra* note 35, at 848.

54. Fischer, *supra* note 31, at 164.

55. See Jones, *supra* note 34, at 367 (footnote omitted) (internal quotation marks omitted) (describing that in 35.4% of American newsrooms, the use of confidential sources has decreased from 2004–2009, and in 15.1% of newsrooms, the use is "significantly less"); McLaughlin, *supra* note 8, at 930–33 (noting how contemporary studies that involve socially complex and criminally related subjects depend on establishing relationships with vulnerable subjects, trust, and certain degrees of confidence and non-disclosure); Stone, *supra* note 47, at 21 (recognizing that "the absence of such a privilege could inhibit research participants from cooperating fully and candidly with a scholarly project; in at least some circumstances, the refusal of such individuals to participate, or to participate fully and candidly, could undermine the reliability of the study and perhaps even preclude the research entirely").

Researchers at Boston College's Belfast Project have encountered many of the above challenges.⁵⁶ It became evident early in the oral history project that confidentiality promises would be necessary in order to record the interviews with IRA members.⁵⁷ This was largely due to a serious threat of reprisal faced by potential interviewees who, through their participation, would be risking death by breaking the IRA code of silence.⁵⁸ Boston College researchers felt that forced disclosure of the interviews would not only destroy the researcher-participant relationship that had been guaranteed but would also hinder future attempts to gather oral history and other primary sources—thereby inhibiting the free exchange of ideas and stifling public policy research.⁵⁹

In light of the recent challenges faced by social science researchers at Boston College, as well as all scholarly researchers across the academic community, a question arises: Does the law of the United States, once considered to be the ultimate bulwark of the freedom of human expression and progress, provide researchers some form of privilege? And if not, have other free and democratic societies moved in this direction?

II. DISCUSSION

A. Researchers' Privilege in the United States

American researchers' legal freedom from forced disclosure has always traversed on unsure footing.⁶⁰ No federal statutory protection currently exists—the handful of states that do recognize a journalist privilege in state common law have seemingly not extended the same privilege to researchers—and only one state has explicitly recognized the interest of researchers in its journalist shield statute.⁶¹ With regard to federal common law, federal courts “have never recognized a Constitutional or common law privilege equivalent to the Fifth Amendment or the attorney-client privilege that would give a researcher an automatic exemption from participating in

56. See *In re Dolours Price*, 685 F.3d 1, 4–6 (1st Cir. 2012); *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435 (D. Mass. 2011) (Moloney Aff. ¶ 28; McIntyre Aff. ¶ 8).

57. See *Trs. of Bos. Coll.*, 831 F. Supp. 2d 435 (Moloney Aff. ¶ 28; McIntyre Aff. ¶ 8).

58. *Id.* (Moloney Aff. ¶ 28, McIntyre Aff. ¶ 8).

59. *Id.* (Moloney Aff. ¶ 32; McIntyre Aff. ¶ 17).

60. O'Neil, *supra* note 26, at 35.

61. McLaughlin, *supra* note 8, at 945, 948–49, 954 (internal quotation marks omitted) (citing Delaware, which defines “reporter” as “any journalist, scholar, educator, polemicist” or individual engaged in producing information for public dissemination,” DEL. CODE ANN. tit. 10 § 4320 [3] (1992), and referencing New York, Wisconsin, and Washington, along with Massachusetts’ Supreme Judicial Court’s “willingness” to consider a common law privilege in future cases”).

litigation” and criminal investigations.⁶² Courts have, however, consistently recognized the societal interest in protecting academic research⁶³ and, in some cases, have even discussed the possibility of a constitutional protection against compelled disclosure.⁶⁴ Courts have also displayed a willingness to respect the interests of research participants on a case-by-case basis.⁶⁵ In cases regarding confidential information and privilege, courts highlight concerns ranging from the development, warmth, and fluidity of scholarship to the institutional autonomy of educational institutions and scholars.⁶⁶ The words of Justice Felix Frankfurter exemplify such concerns: “It matters little whether [governmental intervention into the intellectual life of an institution] occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.”⁶⁷

Yet, despite showing high regard for the fruits and fragility of academic labor and research, American courts have, in practice, been resistant to the idea of establishing a permanent doctrine to privilege confidential research from compelled disclosure.⁶⁸

1. A Promising Start

At the onset of this line of jurisprudence in the 1960s and 1970s, courts suggested possible judicial recognition of a privilege.⁶⁹ In *Henley v. Wise*, the federal court for the Northern District of Indiana struck down parts of an Indiana strict liability obscenity law, observing that mere possession of obscenity would be “prohibited to professors and researchers in psychology, law, anthropology, art, sociology, history, literature and related areas.”⁷⁰ The court noted that the statute would “put in violation of

62. Barbara B. Crabb, *Judicially Compelled Disclosure of Researchers' Data: A Judge's View*, 59 LAW & CONTEMP. PROBS. 9, 19 (1996).

63. See O'Neil, *supra* note 26, at 39; Rebecca Emily Rapp, *In re Cusumano and the Undue Burden of Using the Journalist Privilege as a Model for Protecting Researchers from Discovery*, 29 J.L. & EDUC. 265, 271 (2000); see also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“[S]afeguarding academic freedom . . . is of transcendent value to all of us and not merely the teachers concerned.”).

64. Crabb, *supra* note 62, at 21.

65. Ted Palys & John Lowman, *Protecting Research Confidentiality: Towards a Research-Participant Shield Law*, 21 CAN. J.L. & SOC'Y. 163, 165–66 (2006).

66. See O'Neil, *supra* note 26, at 36.

67. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957); see also Hendel, *supra* note 29, at 401.

68. O'Neil, *supra* note 26, at 36.

69. *Id.* at 38 (citing *Henley v. Wise*, 303 F. Supp. 62 (N.D. Ind. 1969); *United States v. Doe*, 460 F.2d 328 (1st Cir. 1972), *cert. denied sub nom. Popkin v. United States*, 411 U.S. 909 (1973) [hereinafter *Doe*]).

70. See *Henley*, 303 F. Supp. at 67–72.

the law the famous Kinsey Institute at Indiana University” and that the resulting “chilling effect on the research, development and exchange of scholarly ideas [would be] repugnant to the First Amendment.”⁷¹

Another early case, *United States v. Doe*, involved a grand jury investigation of a Harvard scholar in an effort to find a link between the Pentagon Papers and *The New York Times*.⁷² While the court refused to grant a scholarly privilege, it recognized the need for protection of names and sources, including Vietnamese villagers and government officials interviewed by the scholar.⁷³ The court contemplated shielding the researcher’s hypothesis, noting that a forced disclosure of opinion as to the identity of the leaks would lead scholars to “think long and hard before admitting to an opinion,” thus hindering scholarly pursuits, but declined to rule on the issue in accordance with the procedural posture of the case.⁷⁴

Other early forced disclosure cases, involving disclosure requests used as a litigation tactic, display judicial sensitivity to the threat of stifling research.⁷⁵ *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.* concerned a study by Harvard School of Public Health Professor Marc Roberts involving employees of Pacific Gas and Electric Company, in an attempt to analyze companies’ decision-making processes when environmental concerns are at issue.⁷⁶ The plaintiff in *Rockford*, a federal contract breach claim, sought to use the study against the utility company, but Roberts successfully resisted the request for court-ordered disclosure.⁷⁷ The court did not reach its decision on Robert’s proffered constitutional grounds⁷⁸ but employed a multifactor balancing test.⁷⁹ The judgment did, however, note “the importance of maintaining confidential channels of

71. *Id.* at 67.

72. *Doe*, 460 F.2d at 329–31 (The Pentagon Papers were a Department of Defense study of the United States’ political-military involvement in Vietnam and were leaked to the *New York Times*.).

73. *See id.* at 334.

74. *Doe*, 460 F.2d at 334; O’Neil, *supra* note 26, at 38 n.16. It should be noted that Professor Popkin was found to have a legal duty to assist the state in protecting itself against acts in violation of the law, was found in contempt, and was sent to jail. Feullian, *supra* note 46, at 45.

75. *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1269–77 (7th Cir. 1982) [hereinafter *Dow*]; *Richards of Rockford, Inc. v. Pac. Gas & Elec. Co.*, 71 F.R.D. 388, 388–89 (N.D. Cal. 1976) [hereinafter *Rockford*].

76. *Richards of Rockford, Inc. v. Pac. Gas & Elec. Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976); O’Neil, *supra* note 26, at 38.

77. *Rockford*, 71 F.R.D. at 388, 390–91.

78. *Id.* at 390; O’Neil, *supra* note 26, at 38–39.

79. *See* O’Neil, *supra* note 26, at 38–39. *Rockford*, 71 F.R.D. at 390 (listing factors such as the fact that Roberts was a non-involved third party to the lawsuit, the uncertain probative value of the data to the contract suit, and alternative means by which similar data could be acquired).

communication between academic researchers and their sources”⁸⁰

The height of jurisprudence favoring an academic privilege was *Dow Chemical Co. v. Allen*, a Seventh Circuit Court of Appeals case where the Dow Chemical Company sought from a senior University of Wisconsin scientist large amounts of data relating to an Environmental Protection Agency pesticide ban.⁸¹ Stopping short of declaring a constitutional shield, the *Dow* court nevertheless cited a series of factors motivated by First Amendment concerns, which in their totality supported such protection.⁸²

2. A Frailty of Precedent and Recent Developments

Federal courts over time, however, did not develop a consistent approach.⁸³ Two years after *Dow*, the Seventh Circuit failed to expressly utilize its multifactor framework of considerations laid out in the previous case,⁸⁴ while overturning in part a district court ruling that barred all discovery requests made to a researcher.⁸⁵ The 1980s and early 1990s witnessed a mix of approaches to forced disclosure, none of which granted the level of support needed to carve out a defined or constitutionally rooted privilege.⁸⁶ For example, in *Farnsworth v. Procter & Gamble Co.*, the Eleventh Circuit accepted a Center for Disease Control plea to keep confidential the identity of subjects who had taken part in toxic shock studies, noting the importance of research supported by public willingness to submit to studies, and the reasonable expectation of confidentiality, even in the absence of express promises.⁸⁷ The 1980s also saw the Federal

80. *Rockford*, 71 F.R.D. at 390.

81. *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1266, 1269–77 (7th Cir. 1982); O’Neil, *supra* note 26, at 39.

82. *Dow*, 672 F.2d at 1269–77; O’Neil, *supra* note 26, at 39 (pointing to “the researcher’s non-party status; the grave risks of premature disclosure of research findings on a highly volatile topic—the effects of Agent Orange on troops in Vietnam; the hazards of disrupting research in progress (or diverting the researcher’s time and attention at a critical stage); and the potentially chilling effects of such subpoenas on the conduct of future research”).

83. *See* O’Neil, *supra* note 26, at 39–44 (outlining divergent approaches and results by different courts over time).

84. *Dow*, 672 F.2d at 1269–77.

85. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 564–66 (7th Cir. 1984).

86. *See* O’Neil, *supra* note 26, at 39–44; O’Neil, *supra* note 35, at 843 (explaining that few court decisions define a researcher’s claim to confidentiality or academic freedom). *See generally* *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985); *Wright v. Jeep Corp.*, 547 F. Supp. 871, 876 (E.D. Mich. 1982); *Noga v. Am. Motors Corp. (In re Snyder)*, 115 F.R.D. 211, 215 (D. Ariz. 1987); *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F. 2d 223, 225 (2d Cir. 1984); *Scarce v. United States*, 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *In re Application of R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729 (N.Y. Sup. Ct. 1987).

87. *Farnsworth*, 758 F.2d at 1547.

District Court of Arizona partially protect research done by a University of Michigan professor from two litigating parties, quashing a subpoena for research that included confidential sources.⁸⁸ The court reasoned that because “discovery offers an avenue for indirect harassment of researchers whose published work points to defects in products or practices,” there was “potential for harassment of members of the public who volunteer, under a promise of confidentiality, to provide information for use in such studies.”⁸⁹

Differing approaches, both between and within circuits, have persisted in more recent years.⁹⁰ In 1984, state and federal prosecutors subpoenaed the work of graduate student and ethnographic researcher Mario Brajuha during a criminal arson investigation.⁹¹ While the federal district court recognized a qualified privilege,⁹² the Second Circuit reversed and remanded.⁹³ The court avoided a direct statement on the existence or nonexistence of a research privilege and held that the district court’s record was “far too sparse to serve as a vehicle for consideration of whether a scholar’s privilege exists”⁹⁴

A similar Ninth Circuit case, *Scarce v. United States*, involved a Washington State University student claiming a scholarly research privilege under the First Amendment when ordered to testify before a federal grand jury regarding the break-in and destruction of a federally funded laboratory.⁹⁵ The Ninth Circuit refused to consider “even the bare possibility of a scholar’s privilege to confidentially obtained information.”⁹⁶ The court, reasoning that the Supreme Court had denied a journalist privilege before a grand jury in *Branzburg v. Hayes*⁹⁷ and that a researcher’s claim could not be any stronger than a reporter’s, ruled that the public interest in protecting confidential sources in research is “subordinate” to the “more compelling requirement that a grand jury be

88. *In re Snyder*, 115 F.R.D. at 212–13, 216.

89. *In re Snyder*, 115 F.R.D. at 216 (citations omitted).

90. *See, e.g.*, *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *In re Grand Jury Subpoena*, 750 F.2d at 225–26; *Scarce*, 5 F.3d at 402–03.

91. *McLaughlin*, *supra* note 8, at 939.

92. *In re Grand Jury Subpoena*, 750 F.2d at 224.

93. *Id.* at 226. The opinion did not, however, cover the risk of a criminal indictment growing out of the grand jury inquiry, in which case Brajuha might be compelled to produce his field notes. *McLaughlin*, *supra* note 8, at 939.

94. *McLaughlin*, *supra* note 8, at 939 (quoting *In re Grand Jury Subpoena*, 750 F.2d at 224) (internal quotation marks omitted).

95. *McLaughlin*, *supra* note 8, at 940–41; *Scarce*, 5 F.3d at 398–99 (Rick Scarce, the student at issue, had previously published a book entitled *Eco-Warriors: Understanding the Radical Environmental Movement*, and had a long-time friendship with a suspect in the case.).

96. O’Neil, *supra* note 26, at 42.

97. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

able to secure factual data relating to its investigation of serious criminal conduct.”⁹⁸

Unlike criminal investigations, courts have, in recent years, been more amenable to potential protection in civil suits, albeit still offering different approaches.⁹⁹ In 1987, a New York State trial court rejected a tobacco manufacturer's request to obtain research on the effects of smoking on participants exposed to asbestos.¹⁰⁰ The state court expressly recognized the scholar's interest in academic freedom, but when the parties moved the case to federal district court, the federal court granted a subpoena.¹⁰¹ On appeal, the Second Circuit redacted the names of subjects and other sensitive information but nevertheless affirmed the subpoena, noting that “[t]he public has an interest in resolving disputes on the basis of accurate information.”¹⁰² In 1998, however, the First Circuit took a much different approach in an antitrust suit concerning Microsoft.¹⁰³ In *In re Cusumano*,¹⁰⁴ the court refused to order professors to turn over the notes, tapes, and transcripts of their relevant research.¹⁰⁵ Applying a balancing test colored with First Amendment concerns,¹⁰⁶ it analogized the interests of a scholarly researcher to those of a news reporter.¹⁰⁷

Yet, the First Circuit is the only circuit to expressly recognize that a

98. *Scarce*, 5 F.3d at 402 (internal quotation marks omitted) (citing *Farr v. Pitchess*, 522 F.2d 464, 467–68 (9th Cir. 1975)).

99. *Compare In re Am. Tobacco Co.*, 880 F.2d 1520, 1526–31 (2d Cir. 1989), with *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998).

100. *In re Application of R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729, 733–34 (N.Y. Sup. Ct. 1987); O’Neil, *supra* note 26, at 42.

101. *In re Am. Tobacco Co.*, 880 F.2d at 1525; *In re Application of R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d at 733–34.

102. *In re Am. Tobacco Co.*, 880 F.2d. at 1529–31.

103. *See Cusumano*, 162 F.3d at 714.

104. *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998).

105. Rapp, *supra* note 63, at 266.

106. *Cusumano*, 162 F.3d at 716. The *Cusumano* test was comprised of three prongs intended to determine whether, and to what extent, a subpoena should be enforced to compel the disclosure of academic research materials. *Id.* The test first requires that the party initially requesting the materials make a prima facie showing that its claim of need and relevance is not frivolous. *Id.* Second, after this burden is met, the objector, now inheriting the burden, must demonstrate the basis for withholding the information. *Id.* Finally, the court must balance the need for the information with the objector's interest—in particular, the compromised confidentiality of the objector and the potential injury to the free flow of information that disclosure portends. *Id.*

107. *Id.* at 714 (“As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.”).

researcher's privilege exists, and subsequent cases within the circuit, such as the Belfast Project cases, have revealed the shaky foundation upon which a *Cusumano*-type balancing test relies.¹⁰⁸ The interview materials at issue in *In re Dolours Price* and *Trustees of Boston College* were part of a collection held by Boston College for continued academic use.¹⁰⁹ The tapes included stories told by participants in the "Troubles" in Northern Ireland and included firsthand accounts of personal involvement from members of paramilitary and political organizations, such as the Provisional Irish Republican Army (IRA), Provisional Sinn Féin, and the Ulster Volunteer Force.¹¹⁰ The purpose of the collection was to gather and preserve for posterity stories that would aid historians and other scholars in the hope of eventually advancing knowledge of the nature of social violence through a more accurate understanding of the mindset of those who played integral roles in the events.¹¹¹ Additionally, the Belfast Project's files would constitute a database of information to assist the Irish and British governments in any potential truth and reconciliation process.¹¹²

Early on in the project, Boston College researchers realized that confidentiality would have to be part of any agreement to record the interviews, mostly due to a fear of reprisal by potential interviewees who, through their participation, would be breaking the IRA code of silence.¹¹³ Potential participants were unwilling to participate without assurance that their interviews would be kept confidential and locked away until their deaths.¹¹⁴ Boston College thus provided each interviewee with a form containing the express condition that the materials would not be disclosed, absent the granting of permission by the interviewee, until after his or her demise.¹¹⁵ Former IRA member Dolours Price, among others, signed the

108. Paul G. Stiles & John Petrla, *Research and Confidentiality: Legal Issues and Risk Management Strategies*, 17 PSYCHOL. PUB. POL'Y. & L. 333, 341–42 (2011) [hereinafter Stiles]. See *Cusumano*, 162 F.3d at 716; *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 454 (D. Mass. 2011).

109. *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 440.

110. *Id.* The "Troubles" were a period of great violence and political unrest in Northern Ireland from 1969 to the early 2000s. See *id.*

111. *Id.*

112. *Trs. of Bos. Coll.*, 831 F. Supp. 2d 435 (Moloney Aff. ¶¶ 19–20, 24).

113. *Id.* (Moloney Aff. ¶ 28 (explaining that such violations are punishable by death); McIntyre Aff. ¶ 8).

114. *Id.* (Moloney Aff. ¶ 28; McIntyre Aff. ¶ 9).

115. *Id.* (O'Neill Aff. ¶ 6; McIntyre Aff. ¶ 9; Moloney Aff. ¶ 29). One version of the contact with researchers included language that guaranteed confidentiality "to the extent American law allows," but Boston College nevertheless contended that despite the equivocal language in this guarantee, the promises of confidentiality given to the interviewees were absolute. *In re Dolours Price*, 685 F.3d 1, 5 (1st Cir. 2012) (alteration in original); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 441 (citations omitted).

agreement and participated in the Belfast Project.¹¹⁶

In addressing Boston College's assertion of a researcher privilege in *United States v. Trustees of Boston College*, the Federal District Court of Massachusetts looked to three relevant First Circuit cases—*In re Cusumano*, *United States v. LaRouche Campaign*,¹¹⁷ and *Bruno & Stillman, Inc. v. Globe Newspaper Co.*¹¹⁸—adopting the view that First Circuit jurisprudence requires “a ‘heightened sensitivity’ to First Amendment concerns and invite[s] a ‘balancing’ of considerations.”¹¹⁹ Yet the court also noted the First Circuit's reluctance to describe heightened scrutiny as a privilege afforded to journalists or academics.¹²⁰ Because the case involved a criminal investigation, the court then turned to another First Circuit case, *In re Special Proceedings*, “where [the First Circuit] expressed skepticism that even a general reporter's privilege would exist in criminal cases absent ‘a showing of a bad faith purpose to harass.’”¹²¹ In that case, the First Circuit rejected claims for a reporter's privilege after the special prosecutor had exhausted all other means of obtaining the necessary information, relying in part on *Branzburg* for support.¹²²

The court then continued on to a *Cusumano* analysis but conducted it through the lens of *In re Special Proceedings* and *Branzburg*.¹²³ In evaluating the need for the information, the court noted the United States' international legal commitments and the general legal rule, per *Branzburg*, of preventing journalistic or academic confidentiality from impeding criminal investigations.¹²⁴ The court went on to expressly deny privilege, emphasizing the seriousness of the crimes under investigation and the resulting strong government interest.¹²⁵

Addressing the possible harm to the free flow of information and other First Amendment concerns, the court noted the possible chilling effect that

116. *Trs. of Bos. Coll.*, 831 F. Supp. 2d 435 (McIntyre Aff. ¶ 11, 15).

117. *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988).

118. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980).

119. *Trs. of Bos. Coll.*, 831 F.Supp.2d at 453 (citation omitted) (internal quotation marks omitted).

120. *Id.* at 454 (citation omitted).

121. *Id.* (quoting *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004)).

122. *Id.* at 454–55 (emphasis added) (citations omitted) (noting prior cases' observations that “*Branzburg* governs cases involving special prosecutors *as well as* grand juries.”).

123. *Id.* at 435, 453–55.

124. *Id.* at 457 (citing *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972)) (quoting *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998) (“*Branzburg* will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen.”)).

125. *See id.* at 458.

compelled disclosure might have on further oral history efforts.¹²⁶ But the court ultimately deferred to the government's argument, citing *Branzburg*, that compelling production in this "unique case" is unlikely to threaten most confidential relationships between academics and their sources.¹²⁷ Finally, after noting that the free flow of information in this case would experience "no harm" because the Belfast Project had ended and stating once again the "unquestioned" governmental and public interest in legitimate criminal proceedings, the court denied the motion to quash the subpoenas, granting only an in camera review.¹²⁸

On appeal,¹²⁹ the First Circuit affirmed in *In re Dolours Price*, noting that it was required by *Branzburg* to find that no First Amendment basis existed to challenge the subpoenas.¹³⁰ The majority of the court refused to apply the *Cusumano* balancing test, finding that the criminal nature of the investigation brought the case closer to *Branzburg* and other similar precedent than any prior First Circuit law.¹³¹

126. *Id.* (citing *Doe*, 460 F.2d 328, 333 (1st Cir. 1972); *Branzburg*, 408 U.S. at 688).

127. *Id.* (emphasis added) (citing *Branzburg*, 408 U.S. at 691). Since the issuance of the subpoena, Boston College and the Burns Library have had to respond to several concerns expressed by other research participants and institutions. For more information, see *Updates on the Threat to Oral History Archives*, *supra* note 2.

128. *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 458–59. Following the onset of the case, Massachusetts State Representative Eugene O'Flaherty wrote then Secretary of State Hillary Clinton requesting her intervention. Letter from Rep. Eugene L. O'Flaherty to Hillary Rodham Clinton, Sec'y of State (Feb. 23, 2012), available at <http://bostoncollegesubpoena.wordpress.com/congress/congressman-eugene-oflahertys-letter-to-secretary-of-state-hilary-clinton/>. United States Congressman Joe Crowley echoed a similar request. Letter from Congressman Joseph Crowley to Hillary Clinton, Sec'y of State (Feb. 2, 2012), available at <http://bostoncollegesubpoena.wordpress.com/2012/02/08/bc-tapes-letter-from-congressman-joe-crowley-to-secretary-of-state-hillary-clinton/>. Then Senator John Kerry also wrote to then Secretary Clinton, urging her to work with British authorities to "reconsider the path they have chosen and revoke their request." Letter from Sen. John Kerry to Hillary Clinton, Sec'y of State (Jan. 23, 2012), available at <http://bostoncollegesubpoena.wordpress.com/2012/01/25/senator-john-kerrys-letter-to-secretary-of-state-hillary-clinton/>.

129. The appeal was brought by researchers involved in the Belfast Project, Ed Moloney and Anthony McIntyre, after several attempts to intervene. The appeal sought protection under the First and Fifth Amendments. *In re Dolours Price*, 685 F.3d 1, 7–8 (1st Cir. 2012), *cert. denied*, 133 S.Ct. 1796 (2013).

130. *See id.* at 16.

131. *See id.* at 16, 18 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 586 (1991) (holding that the First Amendment does not prohibit a plaintiff from recovering damages, under state promissory estoppel law, if the defendant newspaper breaches its promise of confidentiality); *Univ. of Pa. v. Equal Emp't Opportunity Comm'n [EEOC]*, 493 U.S. 182 (1990) (holding that the First Amendment does not give a university any privilege to avoid disclosure of its confidential peer review materials pursuant to an EEOC subpoena in a discrimination case); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (holding that the First Amendment does not provide any special protections for

While addressing the interests of academic researchers for First Amendment purposes, the court held that the fear, threatened job security, personal safety, dishonor, and embarrassment that could result from the exposure of confidential sources were “insufficient interests.”¹³² The court also echoed *Branzburg*'s skepticism that sources would disappear as a result of its holding and stated that the criminal investigation by a foreign sovereign in the case at bar was arguably stronger than the governmental interests apparent in *Branzburg*.¹³³ Further, the First Circuit declared that “[t]he choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers” and that their interests were therefore “necessarily . . . insufficient.”¹³⁴

3. The Juristic Geography of a Researcher and Researcher's Privilege

The discord in United States courts over the years is largely due to a “frailty of precedent in favor of researchers”¹³⁵ but also reflects a fundamental disagreement over how to categorize scholars and their research.¹³⁶ As noted above, *Branzburg v. Hayes*, the landmark Supreme Court holding denying a journalist privilege, has significantly impacted research privilege jurisprudence.¹³⁷ *Branzburg* cemented the academic researcher-journalist analogy¹³⁸ and remains strong precedent in cases

newspapers whose offices might be searched pursuant to a search warrant based on probable cause to look for evidence of a crime).

132. See *id.* at 18 (citation omitted).

133. *Id.* at 17–18 (citing *Zurcher*, 436 U.S. at 566).

134. *Id.* at 19. Boston College did not appeal the first set of subpoenas dated May 2012 after their *in camera* review but did appeal a series of broader subpoenas issued in August. *Id.* at 7–8. Boston College recently moved to vacate the order involving the August subpoenas, claiming that the reported death of Dolours Price makes the criminal investigation justifying the MLAT subpoenas moot. Notice of Boston College of Suggestion of Death, No.12-1236, para. 5, Jan. 28, 2013, available at <http://bostoncollegesubpoena.wordpress.com/court-documents/>. Boston College's argument for mootness was rejected immediately prior to the publication of this article, but the number of compelled materials was reduced in number. In re Request from the United Kingdom Pursuant to the Treaty between the Gov't of the U.S. & the Gov't of the United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price, 12-1236, 2013 WL 2364165 (1st Cir. May 31, 2013). Intervening parties Moloney and McIntyre were granted a stay order by Justice Breyer on October 17, 2012, but their petition for certiorari was denied on April 15, 2013. *Moloney v. United States*, 133 S. Ct. 9 (2012), *cert denied*, 113 S.Ct. 1796 (2013).

135. See O'Neil, *supra* note 26, at 39.

136. Compare David A. Kaplan & Brian M. Cogan, *The Case Against Recognition of a General Academic Privilege*, 60 U. DET. J. URB. L. 205, 236–37 (1983), with Rapp, *supra* note 63, at 284, and O'Neil, *supra* note 35, at 843.

137. *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972). See O'Neil, *supra* note 26, at 44.

138. *Branzburg*, 408 U.S. at 705 (“The informative function asserted by

involving criminal investigations.¹³⁹

As a result, many have argued for an independent scholarly research privilege, noting the “dispositive differences in the nature of the activities themselves,” particularly the heightened severity of forced disclosure.¹⁴⁰ This argument relies on the fact that many of the state protections shielding journalists, as well as other court interpretations that have aided the journalist cause in the face of *Branzburg* precedent, have not been extended to academic researchers.¹⁴¹ These protections were a fundamental part of the holding in *Branzburg*, with the court emphasizing the role of the legislature vis-à-vis the court.¹⁴² Researchers have thus received none of the *Branzburg* safeguards and have consequently been left exposed to the full force of the case’s holding.¹⁴³

The categorical doubt as to where scholarly researchers fall is currently complimented by disagreement as to where in the jurisprudential field an academic researcher privilege should be rooted.¹⁴⁴ Courts, claimants, and scholars enjoy great flexibility when addressing subpoenas for academic research because no real statutory protection exists.¹⁴⁵ Turning to common law, some view the issue as an undue burden argument and accordingly apply Federal Rule of Civil Procedure 25(b)(1) or Federal Rule of Evidence 501.¹⁴⁶ Others push for a more common-law-based exception through the valves of Rule 501.¹⁴⁷ Still others argue that the privilege is rooted in

representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.”)

139. See *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 454–55 (D. Mass. 2011) (emphasis added) (citing *In re Special Proceedings*, 373 F.3d 37, 44–45 (1st Cir. 2004)) (“*Branzburg* governs cases involving special prosecutors as well as grand juries.”).

140. O’Neil, *supra* note 26, at 45.

141. McLaughlin, *supra* note 8, at 945, 960 (explaining that only one of the United States’ thirty-one state shield laws explicitly references scholars). See Donna M. Murasky, *The Journalist’s Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 917 (1974).

142. See *Branzburg*, 408 U.S. at 689–90; O’Neil, *supra* note 26, at 45.

143. See *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455; O’Neil, *supra* note 26, at 45 (footnotes omitted) (“Prior to *Branzburg*, seventeen states had in fact adopted shield laws for precisely [the purpose of protecting reporters]. Here, the contrast is striking: No states [as of 1996] have legislatively protected the researcher in ways comparable to those reporters have enjoyed—nor is there a substantial prospect of such protection in the near future.”).

144. See, e.g., Crabb, *supra* note 62, at 33–34; McLaughlin, *supra* note 8, at 943–962; Rapp, *supra* note 63, at 284.

145. Matherne, *supra* note 52, at 586. Researchers may claim the privilege of academic freedom under a common law privilege against forced disclosure; as a liberty under the due process clause; or, finally, as a First Amendment right to academic freedom. *Id.* at 606 (footnotes omitted).

146. Rapp, *supra* note 63, at 267.

147. See Matherne, *supra* note 52, at 586, 607. The evidentiary rule allows courts

academic freedom and that evidentiary analysis should fall under its considerations—thereby pushing the analysis further into the First Amendment's realm.¹⁴⁸

The identity crisis of a potential researcher's privilege in American law is readily apparent in recent cases, such as those surrounding the Belfast Project.¹⁴⁹ Some courts utilize a pseudo-First Amendment balancing test, noting their respect for academia.¹⁵⁰ Others, such as the court in *Scarce*, are less sympathetic to the aims of scholarly research—especially in the *Branzburg*-like context of a criminal or grand jury investigation.¹⁵¹ Even when courts utilize a balancing test, however, they refuse to create an express First Amendment-based qualified privilege and thus have been reluctant to venture into the deeper and more powerful doctrine of researcher protection as a constitutional right.¹⁵² And even if cases such as *Cusumano* are taken to represent the foundation of a researcher's privilege as grounded in First Amendment concerns, it is not clear how fully that privilege can thrive in the shadow of *Branzburg*.¹⁵³

The American jurisprudential landscape does contain a constant, besides frivolous dicta on the importance of academic research.¹⁵⁴ Evident throughout is the reality that the legal system rests on the premise that the public has a right to everyone's evidence, largely because the system has a fundamental interest in deciding cases on factual truth.¹⁵⁵ Exceptions to this rule extend only to those relationships that society has deemed so valuable that the interest in protecting confidentiality is greater than the normally predominant principle of fact-finding and truth.¹⁵⁶ American courts have thus communicated the belief that the academic researcher's interest in confidentiality is generally inferior to legal tribunals' interests in

to examine a claim of privilege “in the light of reason and experience” and under “the principles of the common law.” FED. R. EVID. 501.

148. See O'Neil, *supra* note 26 at 48; Rapp, *supra* note 63, 280–81.

149. See *In re Dolours Price*, 685 F.3d 1, 16, 18 (1st Cir. 2012) (refusing to apply the *Cusumano* balancing test); *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 453–55 (D. Mass. 2011) (conducting a *Cusumano* analysis through the lens of *In re Special Proceedings* as colored by *Branzburg* concerns).

150. See, e.g., *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 713, 716–17 (1st Cir. 1998); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–58.

151. See *In re Dolours Price*, 685 F.3d at 16–20; *Scarce v. United States*, 5 F.3d 397, 402 (9th Cir. 1993); *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

152. See Judith G. Shelling, *A Scholar's Privilege: In re Cusumano*, 40 JURIMETRICS J. 517, 526 (2000).

153. See *Branzburg*, 408 U.S. at 690; *Cusumano*, 162 F.3d at 717; Rapp, *supra* note 63, at 266–68, 270–73.

154. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Crabb, supra* note 62, at 16; O'Neil, *supra* note 26, at 39; Rapp, *supra* note 63, at 270–71.

155. *Crabb, supra* note 62, at 16 (citing *Branzburg*, 408 U.S. at 688).

156. *Id.* (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

facts.¹⁵⁷ In comparison with human rights jurisprudence abroad (especially in Europe), however, American courts are increasingly isolated in this belief.¹⁵⁸

B. Social Commentators' Privilege as a Human Right in Europe and Beyond

1. The European Convention on Human Rights and Article 10

The European Convention on Human Rights ("ECHR")¹⁵⁹ is central to the development of European law.¹⁶⁰ While similar to the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man, the ECHR is far more than a philosophical or morally normative promulgation.¹⁶¹ It represents the first international human rights mechanism "to aspire to protect a broad range of civil and political rights both by taking the form of a treaty legally binding on its High Contracting Parties and by establishing a system of supervision over the implementation of rights at the domestic level."¹⁶² As one of the many instruments of European integration, the ECHR has, through its inherent legal formula as well as its acceptance by contracting member states, penetrated the legal veil of domestic law.¹⁶³ Articles 32, 36, and 46 of the treaty, which provide the European Court of Human Rights ("ECtHR") with jurisdiction to receive individual complaints and interpret and apply the Convention in a binding manner, represent a limited transfer of state sovereignty to a supranational organization.¹⁶⁴ In this respect, the Convention and the rulings of its court have interfused with liberal rights granted within national constitutional structures in Europe—assuming the

157. See, e.g., *Branzburg*, 408 U.S. at 690; *Scarce v. United States*, 5 F.3d 397, 402 (9th Cir. 1993); *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 453–55 (D. Mass. 2011).

158. Compare *Branzburg*, 408 U.S. at 690, with *Goodwin v. United Kingdom*, App. No. 17488/90, 22 Eur. H.R. Rep. 123, paras. 39–40 (1996). See HARRIS, *supra* note 9, at 444–45, 466–67.

159. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

160. See GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 34–35 (2007).

161. See DONNA GOMIEN, *SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 12 (3d ed. 2005).

162. *Id.*

163. LETSAS, *supra* note 160, at 33–34 (footnote omitted) (“[T]he effect of art 13 ECHR is to ‘require the provision of a domestic remedy allowing the ‘competent national authority’ both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.’”).

164. *Id.* at 34. ECHR art. 32, 36, 46.

same moral and legal status in the process.¹⁶⁵

ECHR Article 10 thus possesses the same social and legal status as the First Amendment does in the United States.¹⁶⁶ Freedom of expression, as incorporated in Article 10 of the Convention, has been said to exemplify “one of the essential foundations of a [democratic] society [and] one of the basic conditions for its progress.”¹⁶⁷ Article 10 reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁶⁸

Article 10 thus protects certain negative rights of natural legal persons, including the “freedom to hold opinions and to receive and impart information and ideas.”¹⁶⁹ Of further importance in application has been Paragraph 2,¹⁷⁰ which in part qualifies the first paragraph while affirmatively expanding its ambit to other areas of high value and special status.¹⁷¹ In recent years, the court has established the principle that a state may have a positive obligation to insulate social commentators from intimidation, harassment, or violence.¹⁷² As a result, Article 10 possesses

165. See LETSAS, *supra* note 160, at 35–36.

166. See Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 229 (2005).

167. *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, para. 49 (1976).

168. ECHR art. 10, para. 1.

169. *Id.*

170. See P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 565 (3d ed. 1998) [hereinafter VAN DIJK].

171. See *id.* at 558–59; ECHR art. 10 para. 2.

172. See, e.g., *Özgür Gündem v. Turkey*, App. No. 23144/93, paras. 6–16, 46 (Eur. Ct. H.R. 2000) (finding a violation of Article 10 where the government failed to

dialectical tension, particularly apparent in Paragraph 2.¹⁷³ On one hand, certain governmental restraints limit Article 10 freedoms by the formalities and procedures prescribed by democratic law; on the other hand lays the negative right to expression and non-infringement on the imparting of information, along with the government's positive obligation to protect said liberties.¹⁷⁴

2. The European Court of Human Rights

In interpreting Article 10 with respect to social commentators, the ECtHR has repeatedly emphasized that the Convention protects not only the substance and contents of information and ideas but also the means of acquiring them for transmission.¹⁷⁵ Journalists and their confidential sources have thus benefited from the court's broad interpretation.¹⁷⁶ The ECtHR first directly addressed the issue of journalists and confidential sources in *Goodwin v. United Kingdom*.¹⁷⁷ In *Goodwin*, a British journalist attained confidential information about a company's financial ills,¹⁷⁸ ultimately generating an injunction against the journalist and his publishing company that restricted the story's publication and also demanded the source's identity.¹⁷⁹ The journalist refused and was fined for not complying with the order.¹⁸⁰ Addressing whether or not the interference was "necessary in a democratic society" to protect the company's rights, the ECtHR stated:

Protection of journalistic sources is one of the basic conditions for press freedom Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely

provide protection for a newspaper that had been subject to terrorist attacks).

173. See ECHR art. 10 para. 2.

174. *Id.*

175. See generally *Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03 (Eur. Ct. H.R. 2010); *Financial Times Ltd. & Others v. United Kingdom*, App. No. 821/03 (Eur. Ct. H.R. 2010); *Voskuil v. Netherlands*, App. No. 64752/01 (Eur. Ct. H.R. 2007); *Nordisk Film & TV A/S v. Denmark*, App. No. 40485/02 (Eur. Ct. HR. 2005); *Goodwin v. United Kingdom*, App. No. 17488/90 (Eur. Ct. H.R. 1996).

176. See *Factsheet—Protection of Journalistic Sources*, EUR. CT. HUM. RTS., http://www.echr.coe.int/NR/rdonlyres/0856B8A0-D3A1-47B4-B969-6250E84F9F3D/0/FICHES_Protection_des_sources_journalistiques_EN.pdf (last visited Mar. 2, 2013).

177. See *Goodwin v. United Kingdom*, App. No. 17488/90, 7 Rep. 1996-II, paras. 37–40 (1996).

178. *Id.* paras. 10–11; VAN DIJK, *supra* note 170, at 581.

179. *Goodwin*, App. No. 17488/90, paras. 12–16; VAN DIJK, *supra* note 170, at 581.

180. *Goodwin*, App. No. 17488/90, paras. 16, 19.

affected.¹⁸¹

In holding that a violation of Article 10 had occurred, the court further asserted that forced source disclosure “cannot be compatible with Article 10 . . . unless it is justified by an *overriding* requirement in the public interest” and that any such “limitation[] on the confidentiality of journalistic sources call[s] for the most careful scrutiny”¹⁸² The weight placed by the court on the role of social commentary, and the necessity of confidentiality in source gathering, represented the foundation of a very strong but qualified presumption of journalistic source privilege.¹⁸³

The court has carried this strong presumption in favor of a journalistic privilege forward over the past decade and found violations of Article 10 on numerous occasions, such as *Voskuil v. Netherlands*, where a journalist had been denied the right not to disclose his source for his articles concerning a criminal investigation of arms trafficking.¹⁸⁴ In its analysis, the court analyzed whether governmental interference was “necessary in a democratic society” pursuant to Section 2 of Article 10.¹⁸⁵ After recognizing the government’s interest in rooting out suggestions of foul play on the part of public authority, the ECtHR took “the view that in a democratic state governed by the rule of law the use of improper methods by public authority [was] precisely the kind of issue about which the public [has] the right to be informed.”¹⁸⁶ The ECtHR further noted how struck it was by the lengths that the Netherlands’ authorities were willing to go to obtain the information in question, and also expressed concern about the discouraging effects that a forced disclosure would have on future potential whistleblowers.¹⁸⁷ The court then concluded that this concern tipped the scale of competing interests in favor of securing a free press for a democratic society and ultimately found an Article 10 violation.¹⁸⁸

Voskuil was not the last time that the ECtHR found the interests of securing and maintaining the free flow of information in a democratic society through the use of confidential sources to be paramount.¹⁸⁹ The

181. *Id.* paras. 38–39.

182. *Id.* paras. 39–40 (emphasis added).

183. *See* VAN DIJK, *supra* note 170, at 581.

184. *See, e.g., Voskuil v. Netherlands*, App. No. 64752/01, paras. 7–14 (Eur. Ct. H.R. 2007). *Voskuil* was sentenced to a maximum of thirty days in prison. *Id.*

185. *Id.* paras. 45, 57–74 (internal quotation marks omitted).

186. *Id.* para. 70.

187. *Id.* para. 71.

188. *Id.* paras. 72–74.

189. *See, e.g., Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03, paras. 100–01 (Eur. Ct. H.R. 2010); *Financial Times Ltd. & Others v. United Kingdom*, App. No. 821/03, para. 73 (Eur. Ct. H.R. 2010); *Tillack v. Belgium*, App. No. 20477/05, para. 68 (Eur. Ct. H.R. Feb. 27, 2008).

court in *Financial Times Ltd. and Others v. United Kingdom* found an Article 10 violation in an order to disclose documents that could lead to the source at the origin of a takeover-bid leak.¹⁹⁰ In evaluating the interests of the information seeker, the court found that the current threat of damage to the company, its interests in obtaining compensation for past breaches, and the threat of damage through future dissemination of confidential information were not, even in their totality, sufficient to outweigh the public interest in protecting journalistic sources.¹⁹¹ In its reasoning, the ECtHR also heavily emphasized the chilling effect of journalists being seen by the public as assisting in the identification of anonymous sources.¹⁹²

The ECtHR has further found that such interests can withstand the compelling interests of a criminal or governmental investigation.¹⁹³ In *Sanoma Uitgevers B.V. v. Netherlands*, journalists, under a guarantee of anonymity and selective editing, were granted permission to cover an illegal street race.¹⁹⁴ Police and prosecuting authorities were afterwards led to suspect that one of the vehicles participating in the race was used as a getaway car; the authorities eventually secured the photographs after authorization by an investigating judge.¹⁹⁵ The court found an Article 10, Section 1 violation, namely on the grounds that an order compelling confidential journalistic material interferes with the “freedom to receive and impart information.”¹⁹⁶ In continuing its analysis, the court also found a violation of Article 10, Section 2, in that Denmark’s prosecutor-centric procedure for dealing with investigations seeking sensitive information was lacking and was “scarcely compatible with the rule of law.”¹⁹⁷ The court concluded by stressing the need for an able and independent process to assess whether the interests of a criminal investigation override the public interest in the protection of journalistic sources.¹⁹⁸

The ECtHR again solidified the value of freedom to receive and impart information in *Tillack v. Belgium*, where a journalist complained about

190. *Financial Times Ltd. & Others v. United Kingdom*, App. No. 821/03, paras. 5–17, 73 (Eur. Ct. H.R. Mar. 15, 2010).

191. *Id.* para. 71.

192. *Id.* para. 70.

193. *Sanoma Uitgevers*, App. No. 38224/03, paras. 10–14, 100. *See also* Roemen & Schmit v. Luxembourg, App. No. 51772/99, paras. 58–60 (Eur. Ct. H.R. 2003).

194. *Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03, paras. 10–14 (Eur. Ct. H.R. 2010).

195. *Id.* paras. 14, 19, 21–22 (noting that threats were made to search the company’s premises and that a journalist was briefly arrested).

196. *Id.* para. 72.

197. *Id.* paras. 75, 96–100 (explaining that Denmark law under Article 96a of the Code of Criminal Procedure transferred power to issue surrender orders to the public prosecutor and away from an investigating independent judge and that it therefore no longer guaranteed independent scrutiny).

198. *Id.* para. 100.

searches and seizures at his home and place of work following several publications relating to irregularities in European institutions.¹⁹⁹ The articles were based on confidential sources received from the European Anti-Fraud Office.²⁰⁰ The court noted that “[a]s a matter of general principle the necessity for *any* restriction on freedom of expression must be convincingly established” as having a legitimate aim supported by sufficient government reasoning in a free and democratic society.²⁰¹ In finding a violation of Article 10, the court expressly emphasized that a journalist’s right not to disclose sources could not “be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution.”²⁰²

The court’s jurisprudence on journalism and confidential sources has not stopped at ordinary reporting, and has shown signs of having a solid legal foundation for extension and reapplication to other similar areas of social commentary.²⁰³ In *Nordisk Film & TV A/S v. Denmark*, criminal investigators sought to acquire unaired portions and notes from research done as a part of an undercover documentary on pedophilia in Denmark.²⁰⁴ When addressing whether the subpoena violated Article 10,²⁰⁵ the ECtHR focused on confidential sources who were willing and voluntary documentary participants in social science research and reporting.²⁰⁶ Declaring that only because the participants that could be considered traditional confidential sources were protected by the terms of the court order,²⁰⁷ the ECtHR affirmed the Danish Supreme Court’s finding that the sources at issue were sufficiently protected pursuant to Article 10.²⁰⁸

Finally, the court has expressly noted over time that the public interest in protecting confidential sources of information, and the dangers inherent in

199. *Tillack v. Belgium*, App. No. 20477/05, paras. 14–17, 68 (Eur. Ct. H.R. 2008).

200. *Id.* para. 7.

201. *Id.* paras. 55–60 (emphasis added).

202. *Id.* paras. 65–68.

203. *See Nordisk Film & TV A/S v. Denmark*, App. No. 40485/02, , paras. 46–114 (Eur. Ct. H.R. 2005), <http://echr.ketse.com/doc/40485.02-en-20051208/view/>.

204. *Id.* at § A.

205. *Id.* at para. 41. The court saw the interference with Article 10 Section 1 as prescribed by law and pursued by the legitimate aims of preventing disorder and crime, and therefore moved on to address the question of whether the reasoning of the national authorities was “relevant and sufficient” and the means “proportionate to the legitimate aims pursued.” *Id.*

206. *Id.* at paras. 46–114.

207. The recordings and notes were exempted from the order whenever the handover would entail a risk of revealing the identity of any of three named persons, namely “the victim [not the Indian boy], the police officer and the hotel manager.” *Id.* at § A.

208. *Id.* at paras. 46–114.

not doing so, are not faced solely by journalists.²⁰⁹ In *Gillberg v. Sweden* for example, the Court stated that doctors, psychiatrists, and researchers may have similar interests to those of journalists in protecting their sources, as well as a professional interest in protecting secrecy akin to that of a lawyer-client relationship.²¹⁰ *Gillberg* involved an order to compel disclosure of medical research done by a public sector researcher at the University of Gothenburg.²¹¹ The head researcher refused to comply because of promises made to test subjects regarding confidentiality, and the court found the criminal conviction resulting from his non-compliance not to be a violation of Article 10.²¹² In doing so, however, the majority stressed that the criminal conviction was not because of the researcher's refusal to give up professional secrecy in providing evidence, but for his misuse of office.²¹³ The concurrence took issue with this framing, but even in stating that the interests of society in the case at bar overrode Article 8²¹⁴ and 10 protections, noted the importance of confidentiality in research, the high degree of public interest in such endeavors, and called for a balancing test to weight competing interests.²¹⁵ The dissenting opinion called for a more nuanced approach and focused on the interests of confidentiality of the participants, the "major chilling effect that an imposition of a criminal sentence on a researcher" has, as well as the public interest in promoting medical science and research in accordance with human rights standards.²¹⁶

3. Other Supportive Foreign and International Law

The developing case law of the ECtHR does not stand alone in its approach to the confidentiality of a social commentator's sources.²¹⁷

209. See *Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03, paras. 70–72 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100448> ("This danger [of depriving the news commodity of its value and interest through court intrusion], it should be observed, is not limited to publications or periodicals that deal with issues of current affairs."); *Gillberg v. Sweden*, App. No. 41723/06, paras. 121–23 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144> (2010) (internal citations omitted).

210. *Gillberg*, at paras. 121–23 (internal citations omitted).

211. *Id.* at paras. 6–33.

212. *Id.* at paras. 120–27.

213. *Id.* at paras. 124–25.

214. *Gilberg*, (J. Power concurring) (referring to Article 8 of the ECHR, which guarantees a right to private and family life, in the home and with respect to correspondence, subject to several enumerated public policy exceptions).

215. *Id.*

216. *Id.* (JJ. Gyulumyan and Ziemele dissenting at paras. 2, 4–7).

217. See, e.g., *R. v. Nat'l Post*, 2010 SCC 16, para. 34 (Can.). The Canadian Supreme Court has stated that "the law should and does accept that in some situations the public interest in protecting the secret [journalist] source from disclosure outweighs other competing public interests- including criminal investigations," and that in those situations the courts will grant immunity against disclosure of sources to whom

Recommendation No. R (2000) 7 by the Committee of Ministers of the Council of Europe serves as another international instrument in European law supporting this premise.²¹⁸ The recommendation promulgates that domestic law of member states provide “explicit and clear protection of the right of journalist[s] not to disclose information identifying a source in accordance with Article 10.”²¹⁹ It also declares that other persons, who by their professional relations with journalists acquire such information, should be equally protected.²²⁰

Moving beyond Europe, nearly every major international body has endorsed a form of source protection akin to Article 19 of the International Covenant on Civil and Political Rights, which enshrines “the right . . . to seek, receive, and impart information and ideas.”²²¹ These bodies include The U.N. Commission on Human Rights, The African Commission on Human and Peoples Rights, and the Inter-American Commission on Human Rights.²²² The International Criminal Tribunal for the Former Yugoslavia has also created a privilege for war reporters based on the “clear and weighty” social interest in the news gathering process.²²³ The Special Court for Sierra Leone took this one step further in 2006, extending protection to human rights activists and researchers reporting war crimes and human rights violations.²²⁴

European law and international tribunals are not alone in their approaches either.²²⁵ In fact, nearly 100 national governments recognize source protection as a fundamental right.²²⁶ Austria, the Netherlands, Japan,

confidentially has been promised. *Id.* Also stating that in a balancing test the public interest in free expression will always weigh heavily in the balance. *Id.* at para. 64; R. v. Nat'l Post, (2004), 69 OR.3d 427, para. 82 (Can. Ont.); 4th European Ministerial Conference on Mass Media Policy, Resolution on Journalistic Freedoms and Human Rights (2006); Resolution on the Confidentiality of Journalists Sources, Eur. Parl. Doc.; Recommendation No. R (2000) 7, Committee of Ministers of the Council of Europe (Mar. 8, 2000);

218. Recommendation No. R (2000) 7, Committee of Ministers of the Council of Europe (Mar. 8, 2000).

219. *Id.* at Principle 1.

220. *Id.* at Principle 2.

221. See Brief for Amicus Curiae at 10, *Maloney v. United States*, 133 S. Ct. 9 (2012) (No. 12-627) (representing the interests Article 19: Global Campaign for Free Expression in Support of Petitioners), available at <http://bostoncollegesubpoena.wordpress.com/court-documents/>.

222. *Id.*

223. See *Prosecutor v. Brdjanin*, Case No. IT-99-36-AR73.9, para. 36 (App. Dec. 11, 2002).

224. See *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-04-16- AR73, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to 18 Testify, para. 33 (May 26, 2006).

225. See e.g., *Broad Corp of NZ v. Alex Harvey Indus Ltd* (1980) 1 NZLR 163 CA 163; R v. National Post 69 OR 3d 427 Para 82 (Ontario 2004) (Can.).

226. DAVID BANISAR, SILENCING SOURCES: AN INTERNATIONAL SURVEY OF

Romania, Poland, Armenia, Georgia, Croatia, Lithuania, and Germany—among others—all recognize commentator source privilege.²²⁷ French criminal code provides for an almost absolute right, while in Sweden the failure to maintain confidentiality is a criminal offense.²²⁸ The constitutions of Brazil, Mozambique, Paraguay, Argentina, and Ecuador expressly guarantee the protection of sources in social communicative activity.²²⁹

Looking to nations with English legal traditions, Ontario's highest court in Canada established a journalist's privilege in 2004, with the court stating that the "law of privilege may evolve to reflect the social and legal realities of our time."²³⁰ The Supreme Court of Canada later reaffirmed this premise, noting that the law should and does accept certain situations in which compelling state interests will be dwarfed by heavily weighed interests in freedom of expression.²³¹ Recent cases in Canada have further widened this privilege, extending it to civil litigation.²³² The New Zealand Court of Appeal has also recognized such a privilege, noting the high degree of public interest in the dissemination of information, as well as stating that the privilege should be applied "*as a matter of course* except where special circumstances are established warranting a departure."²³³ It is thus of great interest that American high courts, having the same common law lineage as Canada and New Zealand, and the same professed liberal social values as many of the above mentioned democratic societies, have failed to find such approaches persuasive.²³⁴ This is especially perplexing in light of the fact that the United States so often holds itself up as a world leader in terms of protecting the freedom of public discourse.²³⁵

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227. Brief for Amicus Curiae, *supra* note 221, at 6–8.

228. See CODE DE PROCÉDURE PÉNALE (C. PR. PÉN.) art. 109 (Fr.); REGERINGSFORMEN [RF] [CONSTITUTION] 1:3 (Swed.); Tryckfrihetsförordningen [TR] [Constitution] 3:5 (Swed.).

229. Brief for Amicus Curiae, *supra* note 221, at 6–7.

230. *R. v. Nat'l Post*, 2004 69 OR 3d 427 (Can. Ont.) at para 82; See Nestler, *supra* note 155, at 228–29 (explaining that the Canadian court interestingly used Wigmore's four criteria to find "an overwhelming interest in protecting the identity" of confidential sources, while most cite Wigmore for the proposition that a privilege should not be afforded to journalists.).

231. *Nat'l Post*, 2010 SCC 16, at paras. 34 & 64.

232. See *Globe and Mail v. Attorney General of Canada*, 2010 SCC 41, paras. 6–13, 59, 65–67.

233. Nestler, *supra* note 166 at 228; *Broad Corp. of N.Z. v. Alex Harvey Indus. Ltd.* [1980] 1 NZLR 163 (CA) (emphasis added).

234. See Nestler, *supra* note 166, at 229.

235. See *id.*

III. ANALYSIS

A. A Social Value Missing in Translation

The disparity between the approaches taken by federal courts in the United States and the European Court of Human Rights could not be more apparent.²³⁶ American treatment is riddled with differing approaches that very rarely protect confidential research, and even when a scholar's interest is recognized, its foundation is weak²³⁷ and consequently courts often fail to find the interests of researchers to be paramount.²³⁸ This approach stands in stark contrast to that of European law, where it is established that interference with Article 10 rights can only be substantiated by “imperative necessities,” and that exceptions must be interpreted narrowly.²³⁹ What has emerged in Article 10 jurisprudence involving confidential sources is a rigorous test, which applies near strict scrutiny to ensure that any infringement on Article 10, Section 1 is prescribed by law and has legitimate aims.²⁴⁰ Any action involving confidential sources must also be justified by an overriding requirement of the public interest in a “free and democratic society” and is subject to “the most careful scrutiny.”²⁴¹ This is not to say that an absolute privilege has emerged,²⁴² but the heavy presumption in favor of confidential source protection for social commentators has cast a solid foundation in European law for a qualified researcher's privilege.²⁴³

It would be quite difficult to fully evaluate why the American and

236. Compare *Goodwin v. United Kingdom*, App. No. 17488/90, paras. 39–40 (Eur. Ct. H.R. 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974>, with *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972), and *Scarce v. United States*, 5 F.3d 397, 400–02 (9th Cir. 1993), cert. denied 510 U.S. 1041 (1994).

237. See, e.g., Stiles, *supra* note 108, at 340 (citing *In re Grand Jury Subpoena*, 750 F.2d 223, 225 (stating that the party wishing to create a researcher's privilege had the burden of providing a detailed description of the nature and seriousness of the study)).

238. Compare *Branzburg*, 408 U.S., at 690 with HARRIS, *supra* note 9, at 466–67.

239. HARRIS, *supra* note 9, at 443 (citing *Vereinigung Demokratischer Soldaten Österreich und Gubi v. Australia*, A302 (1994) and 20 EHRR 56 para. 37.).

240. See ECHR, *supra* note 157 at Art. 10 para 2; Voskuil, Eur. Ct. H.R. at paras. 54–56; HARRIS, *supra* note 9, at 465 (explaining that these areas are not only subject to proportionality test, but that it may be stringently applied).

241. *Goodwin v. United Kingdom*, App. No. 17488/90, paras. 39–40 (Eur. Ct. H.R. 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974>; HARRIS, *supra* note 9, at 446.

242. VAN DIJK, *supra* note 170, at 581.

243. See *Gillberg v. Sweden*, App. No. 41723/06, paras. 121–23 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144>; *Nordisk Film & TV A/S v. Denmark*, App. No. 40485/02, at THE LAW (Eur. Ct. H.R. 2005), <http://echr.ketse.com/doc/40485.02-en-20051208/view/>; *Goodwin*, Eur. Ct. H.R. at para. 40.

European systems have developed a dissonance in their approaches over time. Academic research is an important and fundamental value of any free modernized society, a fact that has been clearly recognized by courts and legislatures on both sides of the Atlantic.²⁴⁴ Article 10 is a modern piece of legal machinery compared to the First Amendment, having been drafted in response to the “devastating turmoil of the two World Wars and the Holocaust.”²⁴⁵ Yet the Supreme Court has never failed to invent ways to update the Bill of Rights through interpretation,²⁴⁶ and the foundation of a qualified privilege for social commentators’ confidential sources in Europe is more so a creature of recent ECtHR adjudication than a pure Article 10 creation.²⁴⁷ Amidst the political, social, cultural, historical, and institutional differences between the two legal systems, one fact remains: a shared social value has managed to translate into law in Europe, but that same translation has been obstructed in American jurisprudence.²⁴⁸

The translation of this value into American law has been hindered in part by judicial deference to social authority.²⁴⁹ Tocqueville wrote in *Democracy in America* that democratic nations have a natural and extremely dangerous tendency to “undervalue the rights of private persons” as the rights of society are extended and consolidated.²⁵⁰ This natural tendency is especially prevalent today in criminal contexts, where judicial recognition of law enforcement interests often rests on a trade-off theory: the implicit acceptance that the executive branch and its security functions are of paramount importance and must be given flexibility to change with changing circumstances, and that resulting infringements on liberty are a necessary cost to guarantee security.²⁵¹ Such an acceptance found a home

244. See, e.g., *Gillberg*, Eur. Ct. H.R. at paras. 1–2, 4–5 (J. Gyulumyan and Ziemele dissenting); Rapp, *supra* note 63, at 270–71; O’Neil, *supra* note 26, at 39.

245. Harris, *supra* note 9, at 443. Social research was not prevalent in the 18th Century, and did not become a staple of university academia until centuries after the drafting of the First Amendment. See *supra* text accompanying notes 14–29.

246. See G. Edward White, *Reflections On the Role Supreme Court: The Contemporary Debate and the ‘Lessons’ of History*, 63 JUDICATURE 162, 163–64 (1979) (explaining that it is well settled that the Court has accepted its role as the modern interpreter of the Constitution, and the action therefore lies in the methodology of interpretation).

247. *Goodwin*, Eur. Ct. H.R. at paras. 39–40.

248. Compare *Goodwin*, Eur. Ct. H.R., at paras. 39–40, with *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

249. See, e.g., *Branzburg*, 408 U.S. at 690.

250. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Francis Bowen, ed. 3rd. ed. 1863) (noting that men have a tendency to become less attached to private rights just when it is most necessary to defend and retain what remains of them, and that true friends of liberty must be constantly on the alert to prevent the power of government from lightly sacrificing private liberties in order to achieve its own designs).

251. Adrian Vermeule, *Posner on Security and Liberty: Alliance to End Repression v City of Chicago*, 120 HARV. L. REV. 1251, 1260–61 (explaining how this

in *Branzburg*, where the Supreme Court cited the importance of fair and effective law enforcement and its ability to provide security for people and property as a “fundamental function of government” and a predominant interest in refusing to recognize a First Amendment privilege for journalists.²⁵²

B. *Branzburg*'s Legacy and Boston College's Recent Struggle

Branzburg did not at its inception represent a *per se* kiss of death for the future recognition of a researcher's privilege,²⁵³ but the way the opinion weighed prosecutorial considerations against the interests of social commentators in our society has remained a loaded gun in Supreme Court precedent and has heavily influenced its progeny.²⁵⁴ This effect is most recently illustrated by Boston College's struggle to fight for a researcher's privilege in *Trustees of Boston College*, in which Boston College's attempt to protect the identity of a Belfast Project participant presented the court with a seldom-faced scenario—a criminal investigation of a violent felony in which the research participant and her story are both confidential academic research as well as important inculpatory evidence.²⁵⁵ The research subpoenaed in the Belfast Project cases is inseparably intertwined with the identity of the research participant, making an ad hoc resolution impossible.²⁵⁶

Several themes common to the jurisprudence of American researcher privilege are readily apparent in *United States v. Trustees of Boston College*—the district court case prior to *In re Dolours Price*. The first is the judicial deference shown to and the institutional stature of law enforcement interests.²⁵⁷ The United States attacked the proposition that the court possessed broad discretion to evaluate the subpoenas, arguing that judicial discretion is narrowly circumscribed by US-UK MLAT, which holds the same force as a federal statute.²⁵⁸ The two exceptions to this rule in the MLAT agreement, that immediate enforcement would violate the

theory best explains the *Alliance To End Repression* opinion, as well as a large judicial trend in national security law).

252. *Branzburg*, 408 U.S. at 690.

253. See Feullian, *supra* note 46, at 44. The court denied certiorari to *United States v. Doe* in the same year *Branzburg* was decided. 460 F.2d 328 (1st Cir. 1972) *cert. denied* 411 US 909 (1973).

254. See, e.g., *In re Dolours Price*, 685 F.3d 1, 16–20 (1st Cir. 2012); *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 451 (D. Mass 2011); *Scarce v. United States*, 5 F.3d 397, 402 (9th Cir. 1993), *cert. denied* 510 U.S. 1041 (1994); McLaughlin, *supra* note 8, at 940–42; O'Neil, *supra* note 26, at 42.

255. See *Trs. of Bos. Coll.*, 831 F. Supp. at 439–41.

256. *Id.*

257. *Id.* at 455–59.

258. *Id.* at 441–43.

Constitution or where such enforcement would violate a federally recognized testimonial privilege (e.g. attorney-client, spousal), were—according to the United States—not present in this case.²⁵⁹ After addressing several procedural and interpretive issues,²⁶⁰ the court rejected part of this assertion concluding that it indeed had the discretion to review a motion to quash a subpoena, under the statutory authority conferred by 18 U.S.C § 3512 and the framework articulated in the UK-MLAT.²⁶¹

While the *Trustees of Boston College* court carved itself out a place at the table, judicial institutional timidity soon became clear as the court declined to adopt a standard of review analogous to the Federal Rules of Criminal Procedure²⁶² and instead ruled that the appropriate standard of review was similar to that of evaluating a grand jury subpoena.²⁶³ In its evaluation, the court cited the importance of reciprocal compliance to MLAT, foreign government needs for information concerning criminal investigations, and the need for expeditious responses for domestic investigative requests.²⁶⁴ The court went even further, noting that an MLAT request is not a grand jury subpoena but a direct executive order deserved of *extreme judicial deference*.²⁶⁵

The court's review of constitutional issues and potential privilege was therefore the only hope that Boston College had of quashing the subpoena, and an evaluation of this section of the court's opinion highlights the frailty of precedent and power of *Branzburg* with regard to a researcher's privilege in American law.²⁶⁶ In its motion to quash the subpoenas, Boston College petitioned the court to apply the balancing test first laid out in *Cusumano v. Microsoft Corp.*²⁶⁷ The United States argued that Boston

259. *See id.* at 452.

260. *See id.* at 442–49.

261. *Id.* at 449. The First Circuit later affirmed this finding in an opinion released immediately prior to the publication of this article, ruling that nothing in the text or legislative history of the MLAT divested courts of the inherent judicial role of enforcing subpoenas. In re Request from the United Kingdom Pursuant to the Treaty between the Gov't of the U.S. & the Gov't of the United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price, 12-1236, 2013 WL 2364165 (1st Cir. May 31, 2013).

262. FED. R. CRIM. P. 17(c)(2) (the court may quash or modify the subpoena if compliance would be unreasonable or oppressive); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 450, 452.

263. *Trs. of Bos. Coll.*, 835 F. Supp. at 452.

264. *Id.* at 450.

265. *See id.* at 451 (noting that in most MLAT cases, the information contained in the government's application for commissioner or order pursuant to an MLAT will be sufficient to meet its burden and cause the court to approve the requested order, subject to a review of constitutional issues and potential privilege) (emphasis added).

266. *See id.* at 452–59.

267. *Id.* at 440–41 (citing *Cusumano v. Microsoft Corp.*, 162 F. 3d 708, 716 (1st Cir. 1998)).

College's reliance on *Cusumano* was misplaced, as the case addressed civil discovery and other litigation issues and did not involve criminal investigations resulting from reciprocal obligations of the United States and other foreign nations.²⁶⁸ Grafting such a "quasi-privilege" for academic research was, according to the government, "dubious even under civil domestic law," and directly conflicted with the procedures and purpose of the MLAT treaty.²⁶⁹

The court in *Trustees of Boston College* adopted the balancing test, but decided to emphasize the reluctance of First Circuit judges to describe heightened scrutiny as a privilege afforded to journalists or academics.²⁷⁰ The court stated that the answer to a balancing test with respect to criminal cases was found in *In re Special Proceedings*, where the Court, citing *Branzburg*, expressed skepticism that even a general reporter's privilege would exist in criminal cases absent "a showing of bad faith."²⁷¹ The Court then, relying on *Branzburg*, enumerated three factors from the case that cut against the recognition of a privilege: (1) the importance of criminal investigations, (2) the usual obligation of citizens to provide evidence and (3) the lack of proof that news-gathering required such a privilege.²⁷²

An evaluation of the subsequent First Circuit opinion, *In re Dolours Price*, is even more telling.²⁷³ The court refused to even engage in the *Cusumano* balancing test—instead concluding that the criminal nature of the subpoenas required a *Branzburg*-like categorization, which the court claimed necessarily compelled a finding that no legally cognizable First Amendment or common law injury exists.²⁷⁴ The "necessarily" insufficient interests of academic researchers, the court expounded, were not recognized by law, in part because *Branzburg* found it "obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."²⁷⁵ This fact was presented by the First Circuit court as not only a legal truism, but also a historical one supported by Anglo-American history outlawing concealment of a felony.²⁷⁶ The extent of the majority opinion's

268. *Id.* at 443.

269. *Id.*

270. *Id.* at 444.

271. *Id.* at 37–39 (citing *In re Special Proceedings*, 373 F.3d 37, 45 (2004)) (stating that *Branzburg* governs cases involving special prosecutors *as well as* grand juries).

272. *Trs. of Bos. Coll.*, 835 F. Supp. at 454.

273. *In re Dolours Price*, 685 F.3d at 16.

274. *Compare id.*, with *United States v. Cuthbertson*, 630 F.2d, 139, 147 (11th Cir. 1986) (concluding that journalists possess a qualified privilege in criminal cases, the interests of which are not diminished by the criminal nature of the underlying proceeding).

275. *In re Dolours Price*, 685 F.3d at 17–18.

276. *Id.* at 18.

recognition of the burden placed on academic research interests by forced disclosure can be summed up in the following exhaustive list: “consequential, but uncertain,” “incremental,” and “could have some chilling effect.”²⁷⁷

It is not entirely clear why the majority found that the First Amendment could provide no constitutional claim and absolutely no degree of protection.²⁷⁸ As Judge Torruella noted in a thorough concurrence, *Branzburg* and its progeny do not necessarily compel this approach.²⁷⁹ While *Branzburg* may compel a similar end result, it does not, as the concurrence stated, preclude the proper and essential balancing of interests on both sides of a request.²⁸⁰ Even under such an approach, however, a compelling argument exists that the “interest has been weighed and measured by the Supreme Court and found insufficient to overcome the government’s paramount concerns. . . .”²⁸¹

As noted above, the court in *Trustees of Boston College* conducted a *Cusumano* balancing test, but did so in a way that was overwhelmed by *Branzburg* concerns.²⁸² Unlike *Goodwin*, where the ECtHR emphasized a strong interest in social commentary, the balancing test emphasized the need for the information, noting the international legal commitments of the United States of America, and the general legal rule, as per *Branzburg*, preventing journalistic or academic confidentiality from impeding criminal investigations.²⁸³ The social interest is, as the First Circuit in *In re Dolours*

277. *Id.* at 17–19.

278. *Id.* at 20 (Torruella, J., concurring).

279. *Id.*

280. *Id.* at 21.

281. *Id.* In fact, immediately preceding the publication of this article, the First Circuit expressly ruled that *Branzburg*’s balancing calculus governs when selecting a standard by which to address the scope of subpoena-eligible materials from Boston College. *In re Request from the United Kingdom Pursuant to the Treaty between the Gov’t of the U.S. & the Gov’t of the United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 12-1236, 2013 WL 2364165 (1st Cir. May 31, 2013). The argument that heightened sensitivity, as found in *In re Special Proceedings*, compels a “direct relevance” standard was rejected as not applying to *Branzburg*-like cases. *Id.* The opinion, authored by Judge Torruella, instead applied the broader and more encompassing “ordinary standard of relevance”. *Id.* Under this pertinence standard, the compelled materials were reduced in number from approximately 85 to 11. *Id.*

282. Compare *In re Dolours Price*, 685 F.3d., at 16 (majority opinion) (conducting no balancing test) with *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 455–58 (D. Mass. 2011).

283. See *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 457. The court cited *United States v. Smith*, for the proposition that “*Branzburg* will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen.” 135 F.3d 963, 971; *Goodwin*, Eur. Ct. H.R. at para. 39–40.

Price frequently noted, confined to the success of law enforcement.²⁸⁴ In expressly denying privilege, both courts concluded with the seriousness of the crimes under investigation and the resulting strong government interest.²⁸⁵ Whereas in *Financial Times*, the ECtHR displayed an extreme sensitivity to possible public perception of journalists being seen assisting in criminal investigations, the court in *Trustees of Boston College* simply noted in passing that forced disclosure in this “*unique case*” is unlikely to threaten the majority of confidential relationships between academics and their sources.²⁸⁶ Instead of emphasizing, as the ECtHR did in *Tillack*, that confidential sources are not a “mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of . . . sources” but are indeed “part and parcel of the right to information [and are correspondingly] to be treated with the utmost caution,” the court in *Trustees of Boston College* denied the motion to quash the subpoenas.²⁸⁷ Presenting an incredibly shortsighted view, the court stated that the free flow in information in this case would experience “no harm” because the Belfast Project itself had stopped conducting interviews.²⁸⁸ The First Circuit was even more absolutist in its approach, refusing to recognize privilege as anything other than a “veto” by academics on criminal investigations.²⁸⁹

C. What the Belfast Project Cases Contribute in the Search for a Solution

When evaluating potential solutions to provide protection for scholarly researchers, several lessons can be drawn from the Belfast Project cases. In many ways the cases serve as a microcosm, revealing the raw interests at stake in the debate over a researcher's privilege by providing a direct and unavoidable confrontation of values: perhaps the strongest interests in researcher confidentiality imaginable, pitted against a governmental interest in an international criminal investigation for a violent crime.²⁹⁰

While the district court's recognition of Boston College's important interests and the application of the *Cusumano* balancing test to a criminal setting was a minor victory, the First Circuit opinion makes clear that the

284. *In re Dolours Price*, 685 F.3d at 16–20 (Every mention of the public interest in the majority opinion solely involves law enforcement interests).

285. *Id.*; *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 458.

286. *Compare id.* at 457 (emphasis added), with *Financial Times Ltd and Others v. the United Kingdom*, App. No. 821/03, paras. 70–73 (Eur. Ct. H.R. 2009).

287. *Tillack v. Belgium*, App. No. 20477/05, para. 65 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83527>.

288. *Id.* at 46–48 (emphasizing once again the “unquestioned” governmental and public interest in legitimate criminal proceedings); *Id.* at paras. 65–68

289. *In re Dolours Price*, 685 F.3d at 19.

290. *See Trs. Of Bos. Coll.*, 831 F. Supp. 2d, at 455–59.

influence of *Branzburg* prevails.²⁹¹ *Branzburg's* treatment of criminal investigatory interests *vis-à-vis* those of social commentators and the First Amendment continues to hinder the creation of a constitutionally rooted qualified privilege.²⁹² The result is at best the adoption of pseudo-First Amendment balancing tests that are rooted on the outer edges of the Amendment's penumbra and colored by *Branzburg's* prioritization of executive and law enforcement interests.²⁹³ The same can of course be said for any burden analysis put forth by evidentiary standards, which would be forced to weigh the interest of confidential research and its function in society against the competing interests of disclosure and factual truth in adjudication.²⁹⁴ Combine these technical realities with judicial institutional insecurity, and their effects become even more pronounced, as is clearly apparent in *Trustees of Boston College* and *In re Dolours Price*.²⁹⁵

The cases also serve as a reminder that the Federal government has assented to a reciprocal agreement that, in effect, transforms the Attorney General into a tool whereby foreign governments can subpoena research and other confidential information for use in foreign tribunals.²⁹⁶ While the power of the MLAT treaty is not unlimited,²⁹⁷ absent a refusal by the Attorney General²⁹⁸ only two situations exist wherein a researcher would be protected: where such enforcement would violate the U.S. Constitution, or where such enforcement would violate a federally recognized testimonial privilege.²⁹⁹ The holdings in *In re Dolours Price* and *Trustees of Boston College* make clear that neither exception applies to researchers, and given the inherent criminal interests at issue in MLAT requests, it is

291. See *id.*

292. See Paul Nejelski and Kurt Finsterbusch, *The Prosecutor and the Researcher: Present and Prospective Variations on the Supreme Court's Branzburg Decision*, 21 SOC. PROBS. 3, 8 (1974) [hereinafter Nejelski]; *Scarce v. U.S.*, 5 F.3d 397, 400–02 (9th Cir. 1993), *cert. denied* 510 U.S. 1041 (1994); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–59; McLaughlin, *supra* note 8, at 940–42; O'Neil, *supra* note 26, at 42.

293. See, e.g., *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–59; *Scarce*, 5 F.3d at 400–02; McLaughlin, *supra* note 8, at 940–942; O'Neil, *supra* note 26, at 42.

294. See J. Steven Picou, *Compelled Disclosure of Scholarly Research: Some Comments on "High Stakes Litigation"*, 59 LAW & CONTEMP. PROBS. 149, 155 (1996) (explaining Judge Crabb's contribution to his work, that the argument of "burdensomeness" may not be compelling to a court when requested data is deemed to have "significant probative value"); Rapp, *supra* note 63, at 267–68.

295. See *In re Dolours Price*, 685 F.3d at 16; *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–59; Vermeule, *supra* note 251, at 1251, 1260–61; Tom S. Clark, *Separation of Powers, Court Curbing and Judicial Legitimacy*, 53 AM. J. OF POL. SCI., no. 4, 2009 at 971, 985.

296. See *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 456–58.

297. *Id.* (citing Treaty with the UK on MLA in Crim. Matters, S. Exec Rep No 104–23 at 12 ("The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles.")).

298. See *id.* at 440 (citing US-UK MLAT Art. 2 Sec. 2, Art. 5).

299. See *id.* at 441.

hard to imagine a scenario that would.³⁰⁰

Finally, the decisions display an institutional insensitivity toward the power, importance, and fragility of social research, as well as a lack of precedent to support any burgeoning sensitivity.³⁰¹ There does not seem to be a foundation in American law for this value the way there is for intraspousal testimony³⁰² and attorney-client privilege,³⁰³ and as a result one would be hard-pressed to find a way in which the interest could trump the emphasized importance of a criminal investigation.³⁰⁴ Not only does the social value of research lack constitutional footing, it lacks precedent within and across the circuits.³⁰⁵ *Trustees of Boston College* points to only four First Circuit cases that are marginally on point, and each case requires an analogy of some kind to find relevance in the opinion.³⁰⁶ *In re Dolours Price* combines precedent involving journalistic sources and other university privilege claims, but cites nothing about the value of social research.³⁰⁷ The limited number of cases on point is the result of most subpoenas for research either being abided by without a challenge or being complied with after a challenge was negotiated and resolved with prosecutors outside of court.³⁰⁸ The limited precedent and dicta available to tie the interests of researchers to larger societal values, the way ECtHR jurisprudence does, is another defining factor of *Trustees of Boston College* and results in the shortsighted conclusion that “no harm” exists to the free flow of information simply because the Belfast Project is over.³⁰⁹

300. See *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972); *In re Dolours Price*, 685 F.3d at 16; *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 458–59.

301. See *In re Dolours Price*, 685 F.3d at 16; *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 458–59 (stating that the free flow in information in this case would experience “no harm” because the Belfast Project itself has stopped conducting interviews, and emphasizing once again the “unquestioned” governmental and public interest in legitimate criminal proceedings, the court denied the motion to quash the subpoenas, granting only in camera review).

302. See McLaughlin, *supra* note 8, at 942–43.

303. See *Hickman v. Taylor*, 329 U.S. 495, 508–511 (1947) (stating that an attorney’s privilege is extended to their work product including “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.”).

304. See McLaughlin, *supra* note 8, at 957; see also *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 453–56; *In re Dolours Price*, 831 F. Supp. 2d at 453–58.

305. See *supra* text accompanying notes 60–148; McLaughlin, *supra* note 8, at 950.

306. *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 453–56.

307. *In re Dolours Price*, 685 F.3d at 16–20.

308. See Nejeleski, *supra* note 292, at 17–18.

309. Compare *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 458, with *Tillack v. Belgium*, App. No. 20477/05, paras. 65–68 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83527>, and *Goodwin*, para. 39–40; O’Neil, *supra* note 35, at 855 (arguing that courts must consider the contribution of each decision to transcendent principles of free inquiry and the advancement of knowledge, and that

These aspects of the Belfast Project cases are quite troubling for those who advocate for an approach anchored in common law.³¹⁰ In 1999 Robert McLaughlin published an influential analysis of a researcher's privilege in American jurisprudence.³¹¹ McLaughlin concluded that of the numerous formulations of a possible researcher's privilege—including state shield statutes, state and federal common law, and federal statutes—the most plausible way forward would be a combination of federal and state common law privileges.³¹² In doing so, McLaughlin noted that Federal Rule of Evidence 501 was drafted to avoid codification of, and defer to, state law,³¹³ and also that a clear interest has been expressed in the common law of several states with regard to researcher's privilege.³¹⁴ McLaughlin further recognized, however, the interstate nature of scholarship and argued that federal common law tended to better reflect the connection between research and its societal benefit³¹⁵ as well as constitute a superior guiding presence in American jurisprudence.³¹⁶ Pointing to budding recognition of researchers' interests in several Court of Appeals cases,³¹⁷ as well as a lack of Congressional activity on the issue, McLaughlin concluded that a combined common law approach was the most viable.³¹⁸ This approach may be the most realistic, but issues in the Belfast Project cases cast serious doubt on whether it is the preferred course of action for the development of a privilege.³¹⁹

While *In re Dolours Price* and *Trustees of Boston College* occur in a criminal context,³²⁰ they nevertheless expose both the frailty of precedent and judicial attitude toward social research value in federal common law

thus the inquiry should not be limited in its focus to solely the immediate parties).

310. See *In re Dolours Price*, 685 F.3d at 17–20 (noting that “[t]he *Branzburg* Court ‘flatly rejected any notion of a general-purpose reporter’s privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege.’”); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 453–59; McLaughlin, *supra* note 8, at 960–62.

311. McLaughlin, *supra* note 8, at 941, 960–62.

312. *Id.*

313. *Id.* at 941–43.

314. *Id.* at 948.

315. See *id.* at 946–47, 950.

316. *Id.* at 949.

317. McLaughlin, *supra* note 8, at 949–56.

318. *Id.* at 960–61.

319. See *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 453–58 (D. Mass. 2011).

320. *In re Dolours Price*, 685 F.3d 1, 16 (1st Cir. 2012) (eschewing a balancing test approach altogether); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 450. McLaughlin admits this will likely have the hardest time finding success along with cases where the immediate social benefit of the research project is not apparent. McLaughlin, *supra* note 8, at 954.

when competing interests are at bar.³²¹ It is true that courts have gone out of their way to protect research participants on a case-by-case basis, but such protection is insufficient.³²² The intermittent, inconsistent, and altogether barely existing precedent in *In re Dolours Price*, and across the system, casts serious doubt on the premise that a clear common law principle will soon emerge.³²³ In fact, the *Cusumano* case noted above is the only case to date that has explicitly ruled that a researcher's privilege exists.³²⁴ Also of increasing importance is the judicial valuation of social research, as the modern trend towards privileges—including those that have long been established—is a narrowed case-by-case ad hoc analysis designed to balance competing interests.³²⁵ This trend coincides with an increasing judicial tendency “to avoid inflexible determinates,” as well as a general movement away from creating testimonial privileges.³²⁶ Add these considerations to the continued influence of *Branzburg* and it is quite uncertain whether anything that could function as a serious qualified researcher's privilege in both civil and criminal contexts will organically emerge in the federal common law without a major change in value recognition by the high court.³²⁷

State statutory and common law protections are even more vulnerable in light of *In re Dolours Price*.³²⁸ As noted above, only three states clearly possess common law privileges for a journalist's confidential sources rooted in an interpretation of their respective state constitutions.³²⁹ Only

321. *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 453–58; see O'Neil, *supra* note 35, at 843.

322. See Lowman, *supra* note 47, at 381–89 (arguing that a case-by-case deployment of Wigmore criteria to privileged confidential information from courts fails as a solution for several reasons including: (1) such an approach is impossible to deploy before research has been started, and thus the weighing of interest required by the Wigmore test creates so much uncertainty that it may be worse than having no privilege recognized at all; (2) desires to comply to the law or play to the test may create pressures to limit confidentiality in a way that jeopardizes research and threatens academic freedom; (3) researchers must make a decision on whether they are willing to accept an ethical stance to defy the law ahead of time in order to be ethical in their research process; and (4) after-the-fact protections leave researchers and their participants a target for over-zealous attorneys and prosecutors.).

323. *In re Dolours Price*, 685 F.3d at 16; see Levine, *supra* note 47, at 969 (arguing that although it is important to continue to advocate for a common law privilege, history has shown that the use of common law alone is necessary but not sufficient, and therefore that McLaughlin's approach does not represent a sufficient solution.).

324. Stiles, *supra* note 108, at 341–42.

325. See Stone, *supra* note 47, at 22–23.

326. Nejelski, *supra* note 292, at 6–7.

327. See *id.* at 8; see also *In re Dolours Price*, 685 F.3d at 16; *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *Scarce v. United States*, 5 F.3d 397, 400–02 (9th Cir. 1993); McLaughlin, *supra* note 8, at 940–42; O'Neil, *supra* note 26, at 42.

328. 685 F.3d 1 (1st Cir. 2012).

329. McLaughlin, *supra* note 8, at 948–49 (referencing New York, Wisconsin and

one of the nation's thirty-one states that have passed shield laws to protect journalists explicitly includes a reference to scholars.³³⁰ As noted above, the inherent interstate nature of scholarship makes this handful of states' efforts woefully insufficient to protect academic interests.³³¹ Furthermore, the parallel interests of confidentiality issues faced by reporters and researchers have "yet to command a comparable level of popular attention," thus making existing efforts clearly insufficient to constitute any kind of critical mass that could influence other state legislatures.³³² Piecing together a legal solution in a federalist system also exposes the efforts of researchers and their sources to international law enforcement arrangements.³³³ Because treaty agreements such as MLAT³³⁴ carry the force of federal statutory law, they would in most cases override the most extensive of state efforts to shield a researcher's confidential information.³³⁵ As more of these agreements come into force, presumably due to an increasing need for international law enforcement cooperation, state level privileges become increasingly inadequate.³³⁶

These deficiencies are what make the prospect of a federal shield statute so attractive.³³⁷ A federal shield law is the most common among proposals for a researcher's privilege³³⁸ and if enacted would presumably protect, at a minimum, confidentiality and the fundamental human rights of third

Washington, along with Massachusetts' Supreme Judicial Court's "willingness" to consider a common law privilege in future cases).

330. *Id.* at 945 (referring to Delaware, which defines "reporter" as "any journalist, scholar, educator, polemicist," or individual engaged in producing information for public dissemination).

331. *See id.* at 946–49 (noting the particularly interesting effect that New York law has had on quashing subpoenas in tobacco litigation and how such an approach has reflected a successful articulation of researcher's interests through the common law).

332. *See id.* at 947.

333. *See, e.g., In re Dolours Price*, 685 F.3d 1, 16 (1st Cir. 2012); *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 449–453, 453–58 (D. Mass. 2011).

334. United States Department of State, *Mutual Legal Assistance in Criminal Matter Treaties and Other Agreements*, available at <http://library.findlaw.com/1997/Dec/1/127851.html>. The United States has nineteen of these in force, fifteen signed but not yet in force, not to mention dozens of other executive international agreements. *Id.*

335. *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 442 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

336. *See id.*; United States Department of State, *supra* note 334. *Contra* Levine, *supra* note 47, at 971 (arguing that state statutes could be developed for researcher-subject relations that in turn could better convey and promote the value of a researcher's privilege).

337. *See, e.g., Richard Leo, Trial and Tribulations: Courts, Ethnography, and the Need for an Evidentiary Privilege for Academic Researchers*, 26 AM. SOC. 113, 130–34 (1995); McLaughlin, *supra* note 8, at 956–57 (discussing various proposals for a federal researcher shield statute); Rik Scarce, *(No) Trial (But) Tribulations: When Courts and Ethnography Conflict*, J. CONTEMP. ETHNOGRAPHY 123, 146–48 (1994).

338. *See* McLaughlin, *supra* note 8, at 954.

parties.³³⁹ A statute would possess the advantage of overcoming the shaky foundation upon which a qualified privilege would have to be constructed in federal common law³⁴⁰ and could be tailored in accordance with societal values and the needs of the justice system.³⁴¹ Congress could find Constitutional authority to pass such legislation through various channels, including the First and Fourteenth Amendments,³⁴² the commerce clause,³⁴³ and the necessary and proper clause.³⁴⁴ Several different proposals have been made over the years, most of which expressly recognize the social value of academic research, attempt to define a researcher, and set about to define a class of privileged materials and exceptions.³⁴⁵ Other less grandiose proposals have included congressional action to strengthen and broaden already existing programs that grant federal certificates of privilege to qualifying research, as well as improved Department of Justice guidelines for federal attorneys.³⁴⁶

A federal statutory solution would no doubt be welcomed by the academic community, but pursuing such an approach is not without serious drawbacks.³⁴⁷ A lack of congressional activity on the issue reflects, among other things, a lack of public attention, and a serious effort to pass federal legislation is therefore unlikely.³⁴⁸ A recent attempt in 1999 was the

339. Leo, *supra* note 305, at 132.

340. See Nejeleski, *supra* note 292, at 8 (outlining the effects the *Branzburg* ruling may have on federal common law); see also *In re Dolours Price*, 685 F.3d 1, 16–20 (1st Cir. 2012); *Scarce v. United States*, 5 F.3d 397, 400–02 (9th Cir. 1993); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 453–58; McLaughlin, *supra* note 8, 940–42; O’Neil, *supra* note 26, at 42; *Contra* McLaughlin, *supra* note 8, at 954 (leaving room for the prospect of a common law privilege to emerge in federal common law).

341. See McLaughlin, *supra* note 8, at 956–57.

342. *Id.* at 955 (stating that the First Amendment “has been interpreted to protect the gathering of information and may be construed to protect this process where disclosure would compromise the free flow of information to the public.”).

343. *Id.* (drawing “on the interstate nature of scholarly research” and Congress’ interest in protecting research findings that are later published through interstate media channels).

344. *Id.* at 956 (arguing that grounds could be made that a researcher’s privilege is necessary to the proper functions of a free and democratic government).

345. See e.g., Hendel, *supra* note 29, at 398–400; McLaughlin, *supra* note 8, at 954–59.

346. See Levine, *supra* note 47, at 971–72; Lowman, *supra* note 47, at 386 (noting U.S. Federal government recognition of the interests of confidential research via certificates in the fields of health, crime, and criminal justice).

347. See e.g., Feuillan, *supra* note 46, at 47; McLaughlin, *supra* note 8, at 960; see *infra* text accompanying notes 316–24.

348. *But see*, Bruce P. Brown, *Free Press, Privacy, and Privilege: Protection of Researcher Subject Communications*, 17 GA. L. REV. 1009, 1011 (1983); McLaughlin, *supra* note 8, at 960 (emphasizing the lack of Congressional activity on the issue and its effect on a possible statutory solution); Joe S. Cecil and Gerald T. Wetherington, *Foreword*, 59 LAW & CONTEMP. PROBS. 1, 6 (1996) (noting that it is unlikely that

Thomas Jefferson Researcher's Privilege Act, which mainly focused on researchers' propriety rights and died on the Senate floor.³⁴⁹ Moreover, the lack of a federal shield statute to protect journalists may serve as a strong indicator that Congress would prefer to see any research privilege develop in a manner parallel to state shield laws for journalists.³⁵⁰

And even if a bill were to be passed, it may not be structured in a way that comports with the best interests of researchers.³⁵¹ Lawyer-politicians would be involved in almost every aspect of the drafting process, and generally they have a distaste for secrecy and non-transparency, particularly when contemporary crime fighting interests are at issue.³⁵² Furthermore, the statutory definitions of terms such as "researcher" and "confidential source" would shape the legislation, and the academic community lacks the lobbying organization and power of, for example, the American Bar Association.³⁵³ Such terms may be watered down during the political process,³⁵⁴ require judicial interpretation, and if the legislation is passed pursuant to the First Amendment, it may fall victim in adjudication to the uncertainties of federal common law that it was originally drafted to overcome.³⁵⁵ Finally, many researchers worry that any effort to categorize or register researchers in order for them to qualify under legislation and/or an expanded federal certificate program would represent an unacceptable government encroachment on the freedom of the academic researcher community.³⁵⁶

scientists and attorneys will ever be of one mind about the extent to which research activities should be disclosed in the name of non-research purposes).

349. S. 1347, 106th Cong. § 1 (1999), available at <http://www.gpo.gov/fdsys/pkg/BILLS-106s1437is/pdf/BILLS-106s1437is.pdf>; Lowman, *supra* note 47, at 382.

350. McLaughlin, *supra* note 8, at 960.

351. See Feullian, *supra* note 46, at 47.

352. See *id.*

353. See *id.* at 47, 50 (encouraging social scientists as an allied group of professionals to be ready with more than ad hoc responses to someone else's text when a statutory proposal emerges); DANIEL R. COUILLETTE, REAL ETHICS FOR REAL LAWYERS 316 (2d ed. 2012) (explaining that major lobbying by the ABA and other professional groups prevented the Sarbanes-Oxley Act from requiring mandatory reporting by lawyers to the SEC).

354. Feullian, *supra* note 46, at 47. The entire legislation itself may have to be watered down so as to coexist with MLAT obligations. See *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 449–58 (D. Mass. 2011).

355. See Feullian, *supra* note 46, at 47; Douglas E. Lee, *Do Not Pass Go, Do Not Collect \$200: The Reporter's Privilege Today*, 29 U. ARK. LITTLE ROCK L. REV. 77, 88 (2006); McLaughlin, *supra* note 8, 940–42; Nejelski, *supra* note 292, at 8; see also *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 453–58; *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *Scarce v. United States*, 5 F.3d 397, 400–02 (9th Cir. 1993); O'Neil, *supra* note 26, at 42.

356. See Palys, *supra* note 65, at 180 (noting that a problem with certificates of confidentiality and privacy is that they are only granted by the government to certain researchers in particular fields).

There is, however, a deeper reason why a federal shield statute would ultimately not be the preferable course for a researcher's privilege. A solution that does not involve Supreme Court extension of First Amendment protection to academic researchers' confidential sources does not sufficiently recognize the very essence of the value at stake.³⁵⁷ The great role of the court, despite its institutional insecurity, has been that of sifting through ever fluctuating social values over time in search of consistent principles deserved of incorporation as abstract rights against the state.³⁵⁸ The framers assumed that a confinement of such rights by the legislature in a republican system of governance would preclude the adequate implementation of certain conceptions deserved of recognition.³⁵⁹ As the court noted, "[the framers] thus created an appeal to the Constitution as a source by which rights could be implemented," and Justice Marshall's corollary in *Marbury v. Madison* removed the majoritarian threat to such a system of incorporation, thus allowing it to become a mechanism by which the Constitution perpetuates.³⁶⁰ This is true of the ECtHR as well, where the court views itself as the curator of a "free and democratic society."³⁶¹ It is therefore incumbent on the Supreme Court of the United States to give due recognition to an abstract right, which since the turn of the Twentieth Century has been necessary to the continued free exchange of ideas, academic inquiry, freedom of thought, and the social acquisition of knowledge.³⁶² Whether the majority of Americans are acutely aware of the powerful impact these notions have on their lives and are deeply familiar

357. See Shelling, *supra* note 152, at 523–26.

358. See White, *supra* note 246, at 170–72.

359. *Id.*

360. See *id.*; see also *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny. . . . Nor need we enquire whether similar considerations enter into review of statutes directed at particular minorities which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *Marbury v. Madison*, 5 U.S. 137, 178–79 (1803).

361. See HARRIS, *supra* note 9, at 443–44.

362. See Byrne, *supra* note 15, at 269–70; *In re United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 443–44 (D. Mass. 2011); see also *Goodwin v. United Kingdom*, App. No. 17488/90, para. 39 (Eur. Ct. H.R. 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974> ("[t]he protection of journalistic sources is one of the most basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected.").

with the social structure they buttress should not alone be dispositive.³⁶³ Normative conflict in society falls under the purview of the judiciary, especially the high court, and must shape conceptions of justice and Constitutional interpretation regardless of the power of the norm's advocates and the historical mystique of countervailing interests.³⁶⁴ Constitutional law enshrines, expounds, and refines over time fundamental political, moral, and social values.³⁶⁵ For the judiciary to simply placate the interests of the academic research community with toothless dicta and balancing tests conducted on fixed scales, or to punt such important social values to a tainted political process,³⁶⁶ is to abdicate a major role in the mechanism by which the Constitution retains its legitimacy.³⁶⁷

The sociological importance of this value is amplified by two phenomena in late modern societies such as ours.³⁶⁸ First is the power of

363. White, *supra* note 246, at 172–73 (explaining that over time, the public will compare the rhetorical justifications for a decision with its practical consequences, and will therefore be able to make a decision on whether or not to square with the proclaimed norm, even if unfamiliar with it *ex ante*); see Paul M. Fischer, *Fischer v. The Medical College of Georgia and the R.J. Reynolds Tobacco Company: A Case Study of Constraints on Research*, in *ACADEMIC FREEDOM: AN EVERYDAY CONCERN* 33, 41 (Ernst Benjamin and Donald R. Wagner eds., 1994) (“The ability to conduct scholarly research freely is an activity that lies at the heart of higher education and falls within the First Amendment’s protection of academic freedom. Research and teaching activities are closely linked components of scholarly activity in American higher education. Academic freedom includes the freedom to search for knowledge; therefore, it is as much an infringement on the scholar’s academic freedom to constrain or limit the scholar’s research activities as to limit his or her freedom in the classroom.”).

364. See RONALD DWORKIN, *LAW’S EMPIRE* 368–69 (1986) (“Some clauses, on any eligible interpretation, recognize individual rights against the state and nation: to freedom of speech. . . . Stability in the interpretation of each of these rights taken one by one is of some practical importance. But since these are matters of principle, substance is more important than that kind of stability. The crucial stability in any case is that of integrity: the system of rights must be interpreted, so far as possible, as expressing a coherent vision of justice. This could not be achieved by the weak form of historicism that ties judges to the concrete opinions of the historical statesman who created each right, so far as these concrete opinions can be discovered, but asks them to use some other method of interpretation when the framers had no opinion or their opinion is lost to history. . . . the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman’s time, imagination, and interest stopped.”); Vermeule, *supra* note 251, at 1260–61; Jeremy Webber, *The Adjudication of Contested Social Values: Implications of Attitudinal Bias for the Appointment of Judges*, in *APPOINTING JUDGES: PHILOSOPHY, POLITICS AND PRACTICE—PAPERS PREPARED FOR THE ONTARIO LAW REFORM COMMISSION* (1991), 3–30, 18.

365. See Dworkin, *supra* note 364, at 368.

366. See *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

367. See, e.g., Dworkin, *supra* note 364, at 368; Heike Stintzing, *Constitutional Values and Social Change—The Case of German Marital and Family Law*, 13 *INT’L J.L. POL’Y AND FAM.*, 132, 132–33 (1999).

368. See, e.g., Fischer, *supra* note 31, at 167; Fuchs, *supra* note 11, at 431–36; Hendel, *supra* note 29, at 398; McLaughlin, *supra* note 8, at 930; Rik Scarce, *supra*

mass media, propaganda, and mass communications.³⁶⁹ We live in the age of the Super PAC, corporate-sponsored study, and for-profit Facebook.³⁷⁰ We are inundated with commercial arguments: on our phones, computers, televisions, in our movies and books, and even in our visits to the doctor's office.³⁷¹ The power and money behind the mechanisms that control the distribution of truth and fact are at heights never before seen by our society.³⁷² Secondly, never before has social and natural science been so deep, intellectually encompassing, delicate, and important for law and public policy.³⁷³ Even the Supreme Court turns to scientific research for empirical data to support truth in legal decision-making.³⁷⁴ Truth, as philosopher John Stuart Mill once wrote, is a delicate creature.³⁷⁵ The

note 31, at 87 (noting "the hegemonic relationship between the state and scholarship").

369. See James F. Hamilton, *Contesting Democratic Communications: The Case of Current TV*, in *A MOMENT OF DANGER; CRITICAL STUDIES IN THE HISTORY OF U.S. COMMUNICATION SINCE WORLD WAR II* 331, 331–33 (Janice Peck and Inger L. Stole eds., 2011) (arguing that the optimistic and utopian viewpoints that the Internet and digital age has shaken the undemocratic hold that media organizations have over the public with their programing must be challenged); Deepa Kumar, "Sticking It to the Man"; *Neoliberalism: Corporate Media & Strategies of Resistance in the 21st Century*, in *A MOMENT OF DANGER; CRITICAL STUDIES IN THE HISTORY OF U.S. COMMUNICATION SINCE WORLD WAR II* 307, 315 (Janice Peck and Inger L. Stole eds., 2011) (noting that the bulk of media in the U.S. today is owned by a handful of giant corporate conglomerates).

370. See Peter Overby, *A Year Later, Citizens United Reshapes Politics*, NPR (Jan. 21, 2011) <http://www.npr.org/2011/01/21/133083209/a-year-later-citizens-united-reshapes-politics>.

371. See Philip H. Dougherty, *Advertising; The Doctor's Office: Target of Time Inc.*, N.Y. TIMES (Apr. 4, 1998) <http://www.nytimes.com/1988/04/04/business/advertising-the-doctor-s-office-target-of-time-inc.html>.

372. See Scott M. Cutlip, *The Manufacture of Opinion*, in *IMPACT OF MASS MEDIA: CURRENT ISSUES* 177, 184 (Ray Eldon Hiebert ed., 4th ed. 1999) (explaining the modern struggle in mass media communications to define the truth, citing the example of The Tobacco Institute and its public relations staff that spend upwards of \$20 million dollars a year trying to soften the fact that 350,000 people die annually from causes linked to cigarette smoking.); KEVIN MOLONEY, *RETHINKING PUBLIC RELATIONS: THE SPIN AND THE SUBSTANCE* 41 (2d ed. 2002).

373. See, e.g., Fischer, *supra* note 31, at 167; Fuchs, *supra* note 11, at 431–36; Hendel, *supra* note 29, at 398; McLaughlin, *supra* note 8, at 930; Rik Scarce, *supra* note 31, at 87 (noting "the hegemonic relationship between the state and scholarship").

374. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493–95 (relying on numerous social science and psychological studies involving the psychological, social and educational effect that segregated education has on colored children, and commenting that "Whatever may have been the extent of psychological knowledge at the time of *Plessey v. Ferguson*, this finding is amply supported by modern authority."); see also Vincent James Strickler and Richard Davis, *The Supreme Court and the Press*, in *MEDIA POWER, MEDIA POLITICS* 45, 45 (Mark J. Rozell ed., 2003) (arguing that even the Supreme Court is influenced by press coverage and public discourse in society, as the court's only substantial power is the power of public persuasion).

375. See JOHN STUART MILL, *ON LIBERTY* 27 (Elizabeth Rapaport ed., 1978).

belief “that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplace, but which all experience and history refutes.”³⁷⁶ Truth and fact in modern society must be buttressed so as not to be overwhelmed by a whirlwind of propaganda.³⁷⁷ Ironically, the free marketplace of ideas must be shielded from the modern free market, as the free flow of information is of little use if such information is distorted by special interests.³⁷⁸ This is not merely a state concern, but a duty of the state because the existence of publically identifiable truth is a precondition for democracy.³⁷⁹ A privilege

376. *Id.* (explaining that history teems with instances of truth put down by persecution, and that if not suppressed forever, is often thrown back for centuries).

377. See Sen. George J. Mitchell, *The Media May Devour Democracy*, in *IMPACT OF MASS MEDIA: CURRENT ISSUES* 300, 300–01 (Ray Eldon Hiebert ed., 1999) (noting that the contemporary requirement of controversy in news and political process coverage may devour democracy); Michael Parenti, *Methods of Media Manipulation*, in *IMPACT OF MASS MEDIA: CURRENT ISSUES* 120, 120–24 (Ray Eldon Heibert ed., 1999) (arguing that the mass media has manipulated public opinion and discourse via numerous selective tactics including suppression by omission, aggressive attacks, labeling, face-value transmission of misinformation, false balancing, and framing); MOLONEY, *supra* note 372, at 41. The use of PR and propaganda in liberal modern free market oriented democracies has been by big business in defense of their economic and political interests and by governments to maintain power or promote a social engineering agenda. *Id.* PR has manipulated public opinion in favor of ideas, values, and politics that economic and political elites (some elected) have favored. *Id.* It occurs via hiding sources, low factual and cognitive content in relation to high emotional content, and one-way communications flow. *Id.* Few scholars have rebutted this premise. *Id.*

378. Stephen K. Medvic and David A. Dulio, *The Media and Public Opinion*, in *MEDIA POWER, MEDIA POLITICS* 207, 215–18 (Mark J. Rozell ed., 2003) (noting the modern pressures on journalists and their corresponding ability to take even objective and verifiable polling data and report it in a way that is desirable and beneficial to the agency, thereby shaping public opinion). We live in a world much different than the one that existed for most of the Twentieth Century. See *Abrams v. United States*, 250 US 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

379. See J. MICHAEL SPROULE, *PROPAGANDA AND DEMOCRACY: THE AMERICAN EXPERIENCE OF MEDIA AND MASS PERSUASION* 92 (1997) (explaining that scholars and commentators have had doubts about whether democracy’s people were up to the task of twentieth-century life defined by the collision of big communications and traditional democracy); McLaughlin, *supra* note 8, at 960 (“The effectiveness of a democratic government depends on an informed public. Scholarly research, especially that of the social sciences, participates in democratic government as a constant and important source of both information and knowledge.”). See also *Tillack v. Belgium*, App. No. 20477/05, paras. 55–60 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83527>; Mill, *supra* note 375, at 33 (“When there is a tacit convention that principles are not to be disputed, where the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable.”). See generally, Sproule, *supra* note 379 (providing an in-depth study of the relationship of propaganda to participatory democracy in the United States during the 20th Century). The value of oral history, such as that of Boston College’s

therefore must be granted to those professions who serve as a locus and greenhouse for fact-finding, untarnished by corrupted facts paid for by free enterprise.³⁸⁰ The best institutional candidate for this role is academia's scholarly researcher, who toils not for profit, but for humanity.³⁸¹ Any democratic constitutional order that seeks to preserve its function must assure the survival of this last bastille of truth.³⁸²

A federal statute may therefore represent a practical solution, but does not represent an expressive promulgation and constitutionally supported social solution.³⁸³ Even given its practicality however, other more pragmatic reasons support a constitutional resolution over a purely statutory one.³⁸⁴ A constitutionally rooted privilege would fill gaps that a federal statute would inevitably possess, and its coexistence would increase the seriousness with which a judge approaches a researcher's interests when competing norms are at stake.³⁸⁵ Constitutional recognition would also cement the interests of researchers and their confidential sources into constitutional law, insulating them from federal statutes that could be heavily modified or repealed at the whim of public opinion.³⁸⁶ Moreover, a

Belfast Project, is even more important to a thriving democracy. *Boston College Subpoena News*, THE BELFAST PROJECT, <http://bostoncollegesubpoena.wordpress.com/> (last visited Mar. 30, 2012). As Cleophus Thomas Jr. once said, "The value of the Oral Tradition is its democracy; it doesn't give to an intellectual elite the exclusive right to shape a communal memory and the collective memory. It makes into a common wealth the story of our shared lives. It's something we share in common—and it's like a collection plate into which we can all put something: our stories, our myths and the ease with which we are able to, in some ways, cross boundaries." *Id.*

380. See DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE 209 (2004) (noting that Big Business, Big Media, government, entertainment, tech companies and other consumerist interests have begun to corral the Internet, once considered to be a robust free and democratic communications system).

381. Cf. Kumar, *supra* note 369, at 315. When looked at in this light, the researcher plays a more pivotal role in the long run than the modern media, who are almost invariably controlled by for-profit interests. *Id.*

382. See DWORKIN, *supra* note 364, at 368; Lawrence K. Grossman, *The Electronic Republic*, in *IMPACT OF MASS MEDIA: CURRENT ISSUES* 279, 279–82 (Ray Eldon Hiebert ed., 1999) (arguing that the emerging electronic republic will be a political hybrid including increased elements of direct democracy, bringing public opinion to the center stage of policy making, lawmaking, and governance.); see also, KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* 47–69 (2011) (providing a compelling look at how our anatomical limitations affect our autonomy in decision making).

383. See DWORKIN, *supra* note 364, at 368; Grossman, *supra* note 382, at 280–82.

384. See Nejelski, *supra* note 292, at 9–10.

385. See Lee, *supra* note 355, at 88. Compare *United States v. Trs. Of Bos. Coll.*, 831 F.Supp. 2d. 435, at 455–59 (D. Mass 2011), with *Goodwin v. United Kingdom*, reports 1996-II, VOI 7, (1996), para 39–40.

386. Cf. Lee, *supra* note 355, at 88 (making a similar argument in the context of state statutes). Imagine, for example, how quickly a social science field study of

qualified privilege found in the First Amendment is more democratic in application and avoids large institutional categorizations.³⁸⁷ As Justice White wrote in *Branzburg*, “liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photo-composition methods.”³⁸⁸

D. Toward First Amendment Recognition

Despite the unfavorable precedent and nearly non-existent jurisprudential foundation brought to light by *In re Dolours Price* and *Trustees of Boston College*, the building blocks of a First Amendment-based qualified privilege for researchers exist.³⁸⁹ This is particularly true in cases such as Boston College’s Belfast Project, where an explicit or strongly implied promise of confidentiality has been given to research participants.³⁹⁰ The Supreme Court of the United States has long recognized that the main purpose of the First Amendment is to maintain the free and full flow of information.³⁹¹ Recent Supreme Court jurisprudence has recognized the right to gather information on matters of legitimate public concern.³⁹² The Supreme Court has also declared that confidentiality is necessary to the continued exchange of valuable information.³⁹³ To this

teenage Muslim radicalism in American mosques would lose federal statutory protection in the aftermath of a terrorist attack. *See, e.g.*, Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1141 (2007) (noting how in the aftermath of 9/11, the “Global War on Terror” “marginalized the rule of law”).

387. *See* Nejeleski, *supra* note 292, at 9–10.

388. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

389. *See, e.g.*, *In re Dolours Price*, 685 F.3d 1, 16 (1st Cir. 2012); *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 452 (D. Mass 2011); O’Neil, *supra* note 26, at 48.

390. *See Trs. of Bos. Coll.* 831 F. Supp. 2d at 441 (The contract included language that guaranteed confidentiality “to the extent that American law allows,” but Boston College nevertheless contends that despite the equivocal language in its guarantee, “the promises of confidentiality given to the interviewees were absolute.”); O’Neil Affidavit 6; McIntyre Aff. 9, Moloney Aff. 29; O’Neil, *supra* note 26, at 48.

391. *See, e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 51 (1971) (citing 6 WRITINGS OF JAMES MADISON, 1790–1802 336 (G. Hunt ed. 1906)); *Estes v. Texas*, 381 U.S. 532, 539 (1956).

392. *See* *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”); *Houchins v. KQED, Inc.*, 438 U.S. 1, 10–11 (1978) (quoting *Branzburg*, 406 U.S. at 707, that there is an undoubted right to gather news from anywhere so long as it is done by legal means); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (noting that it is well established that the Constitution extends protection to the right to receive information and ideas).

393. *See* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (“the

end, the court has most recently interpreted the Federal Rules of Evidence to clearly apply the federal privilege of psychologists and psychiatrists to confidential communications of licensed social workers in the course of psychotherapy, citing the “atmosphere of confidence and trust” required for effective treatment.³⁹⁴ Finally, the court has found a constitutional interest in confidentiality and in avoiding the disclosure of personal matters.³⁹⁵ With respect to academic freedom, the court has turned to the First and Fourteenth Amendments “to help ensure that academic institutions can continue to be forums for the *unfettered* exchange of ideas.”³⁹⁶ The court has given academic freedom “legal existence . . . ‘confirmed in the Constitution, statutes, regulations, policy and contracts.’”³⁹⁷

Even *Branzburg* is not insurmountable should the Supreme Court decide to revisit the issue.³⁹⁸ As Justice Douglas once noted in *Gideon v. Wainright*, “Happily, all constitutional questions are always open . . . and what we do today does not foreclose the matter.”³⁹⁹ The court could use the fact that the opinion does not apply explicitly to scholarly researchers and decide to visit the issue anew under the banner of either free flow of information or academic freedom concerns.⁴⁰⁰

The court could also (in a more likely scenario) address an existing circuit split concerning whether or not there can ever be a confidential source privilege under *Branzburg*.⁴⁰¹ Such an opinion could have the effect

interests in having anonymous works enter the marketplace of ideas *unquestionably outweighs* any public interest in requiring disclosure as a condition of entry”) (emphasis added); *Talley v. California*, 362 U.S. 60, 64 (1960) (“There can be no doubt that . . . an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.”); *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (“The [informer’s] privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.”).

394. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996); Picou, *supra* note 294, at 157 (noting that case law seems to be developing that could extend this privilege to sociologists and cultural anthropologists).

395. *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965); Bruce P. Brown, *Free Press, Privacy, and Privilege: Protection of Researcher- Subject Communications*, 17 GA. L. REV. 1009, 1027–48 (providing a thorough evaluation of the analytical framework that could arise to support a constitutionally based researcher-subject privilege).

396. William H Daughtrey, Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities*, 25 U. RICH. L. REV. 233, 233 (1991).

397. Rapp, *supra* note 63, 277 (quoting James A. Rapp, EDUCATION LAW 11–16).

398. Nejelski, *supra* note 292, at 5–9.

399. 372 U.S. 335, 346 (1963).

400. Nejelski, *supra* note 292, at 8; O’Neil, *supra* note 26, at 48; Rapp, *supra* note 63, at 268–81; Shelling, *supra* note 152, at 522–26.

401. *In re Dolours Price*, 685 F.3d. 1, 17 n. 23 (1st Cir. 2012) (citing *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir.2003)). A strong argument exists that *Branzburg*

of distinguishing or revaluing confidential scholarly research.⁴⁰² The majority in *Branzburg* adopts the view that the burden should be placed on the journalist to prove irrelevance or bad faith; as opposed to the minority view that a presumptive privilege exists with the burden on the government to demonstrate otherwise.⁴⁰³ The construction of this framework was predicated on a balancing of social interests that prospectively viewed the harm to journalistic endeavors as *de minimus* in comparison to public interests in crime fighting.⁴⁰⁴ While judicial deference to the interests of law enforcement may not easily be shook, an increased valuation of the importance of researcher confidentiality in the judicial calculus could serve to shift the burden and thereby militate this tendency.⁴⁰⁵ Such a calculus could be redrawn on a spectrum of First Amendment sensitivities: where researchers and participants enter into a confidential relationship in legitimate pursuance of social or scientific understanding, the combined interests of academic freedom and the free flow of information would be recognized as so heightened that constitutional protections are triggered.⁴⁰⁶

Regardless of how the court may decide to engineer its rapprochement, a constitutionally-based qualified researcher's privilege in both a criminal and civil context will require the Supreme Court, as head of the judicial

does not support the proposition that the lack of an impenetrable shield results in subpoenas never implicating First Amendment interests. *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972) (stating that newsgathering is not without First Amendment protections and that grand juries are subject to judicial control, as are subpoenas to motions to quash).

402. Nejliski, *supra* note 292, at 5–9; O'Neil, *supra* note 26, at 48. Justice Powell, the deciding vote in *Branzburg*, wrote separately to present his view that the opinion should be narrowly read, and that each claim of privilege "should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

403. Nejliski, *supra* note 292, at 6 (explaining Justice Stewart's dissent in *Branzburg* that advocated for a privilege for a grand jury request that required the disclosure of confidences unless the government showed (1) "that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment Rights; and (3) demonstrate a compelling and overriding interest in the information;" while also explaining that Justice Douglas wrote for an absolute privilege based on First Amendment interests that override other societal interests).

404. See *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972); Nejliski, *supra* note 262, at 8.

405. Nejliski, *supra* note 292, 5–9.

406. See Rapp, *supra* note 63, at 279–80. See also *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d 435, 458 (D. Mass. 2011) ("His privilege, if it exists, exists because of an important public interest in the continued flow of information to scholars about public problems which would stop if scholars could be forced to disclosure the sources of such information.") (quoting *United States v. Doe*, 460 F.2d 328, 333 (1st Cir. 1972)).

bureaucracy, to rethink its value matrix.⁴⁰⁷ The social value of research requiring confidentiality and its corresponding legal interest must be found to be weighty to justify the cost to the truth-finding function of the legal process.⁴⁰⁸ The ECtHR has taken a long, hard look at this issue, and has found sufficient weight in the value social commentary lends to the continued existence of a free and democratic society—even in the face of compelling competing interests.⁴⁰⁹ In *Sweezy v. New Hampshire*, the United States Supreme Court declared:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁴¹⁰

And yet we live in an America where the law does not fully allow for the legal protection of activities necessary to the continued survival of such an

407. See Nejeleski, *supra* note 292, at 5–9; Stone, *supra* note 47, at 19. Compare Branzburg, 408 U.S. at 690, with *Goodwin v. United Kingdom*, (1996), Reports 1996-II, VOI 7, paras. 39–40. See also *Trammel v. United States*, 445 U.S. 40, 50–51 (1980) (describing that the recognition of an evidentiary privilege must “promote[] sufficiently important interests to outweigh the need for probative evidence” and must rely on the existence of “a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth”).

408. See Stone, *supra* note 47, at 19. Compare *Goodwin v. United Kingdom*, App. No. 17488/90, paras. 39–40 (Eur. Ct. H.R. 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974> and *Tillack v. Belgium*, App. No. 20477/05, paras. 65–68 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83527> with, *Branzburg*, 408 U.S. at 690, and *In re Dolours Price*, 685 F.3d 1, 16 (1st Cir. 2012), and *United States v. Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–59. It should be noted that several lower courts have already begun the process of reevaluating the social value of confidential sources in light of truth in adjudication. See, e.g., *The New York Times Co. v. Gonzales*, 459 F.3d, 160, 169 (2d Cir. 2006) (concluding that a qualified privilege existed for a reporter trying to prevent compelled disclosure of information held by a third party); *United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980) (recognizing privilege in a criminal case due to the importance of source collection in the socially valuable and important process of information disbursement); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979) (overturning a contempt order against a reporter who refused to reveal confidential sources).

409. See HARRIS, *supra* note 9, at 446; *Gillberg v. Sweden*, App. No. 41723/06, paras. 121–23 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144>; *Goodwin*, Eur. Ct. H.R., at paras. 39–40.

410. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

atmosphere.⁴¹¹ We live in a country where the United Kingdom can ironically do to Boston College and other American universities, through the exploitation of American law, what it would most likely be condemned for doing under Article 10 of its own European human rights law.⁴¹² We live in such a state where Boston College must plea with students studying abroad in Ireland “to avoid wearing. . . American or Boston College logos” and avoid “political discussions involving Northern Ireland in public settings,” all for fear of retribution over the forced disclosure of an oral history project.⁴¹³ We live in a country where researchers who refuse to betray ethical guidelines and promises made to their participants are arrested and thrown in jail.⁴¹⁴

Until this plight is recognized by the Supreme Court, and the societal value bequeathed by our fact-finders and educators is finally translated into law, the foundation for a researcher’s privilege will remain an amorphous fantasy.⁴¹⁵ And as long as such a foundation is missing, a holding such as—*And we find that the researcher’s interests in gathering, disseminating, and imparting legitimate scholarly information in a free and democratic society outweigh in this case the important governmental investigatory interests at bar*—will be impossible in America.⁴¹⁶

411. See *Branzburg*, 408 U.S., at 690; *In re Scarce*, 5 F.3d 397, 400–02; *In re Dolours Price*, 685 F.3d 1, 40–48; see also Am. Sociological Ass’n Amicus Brief for Rik Scarce at 8–15, in *In re Scarce*, 5 F.3d, at 397 (No. 93–35333) (arguing that First Amendment interests are furthered by the recognition of a privilege rooted in the social and ethical value of research involving information received in confidence).

412. Compare *Gillberg*, Eur. Ct. H.R. at paras. 121–23 and *Tillack v. Belgium*, App. No. 20477/05, paras. 65–68 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83527>, and *Goodwin*, Eur. Ct. H.R. paras. 39–40, with *Branzburg*, 408 U.S. at 690, and *In re Dolours Price*, 685 F.3d at 16. Domestic law in the United Kingdom also recognizes a presumptive immunity in defined circumstances, subject to being overridden on enumerated grounds. Contempt of Court Act, 1981, c. 49 § 10 (Eng.). Section 10 of the provision reads “No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. *Id.* (emphasis added).

413. David Cote, *Admins Alert Students of Belfast Project*, THE HEIGHTS, (Mar. 30, 2012), <http://www.bcheights.com/news/admins-alert-students-of-belfast-project-1.2766099#.TzEqM-O3DoR>.

414. See e.g., O’Neil, *supra* note 35, at 843–45; Scarce, *supra* note 31, at 87; Theodore B. Olson, Commentary, *A Much-Needed Shield for Reporters*, WASH. POST June 29, 2006, at A27, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/28/AR2006062801983.html>.

415. See *In re Dolours Price*, 685 F.3d at 16–20; *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–59; Daughtrey, *supra* note 396, at 233 (emphasis added) (“The courts serve as the ultimate guardians of the free expression of ideas in colleges and universities throughout the United States”); see also Scarce, *supra* note 31, at 92–93.

416. See Nejeleski, *supra* note 292, 5–9; O’Neil, *supra* note 26, at 48. See also

When such a holding is jurisprudentially impossible in a society, that society cannot with a straight face pride itself on being open, tolerant, and free. That society will, as the Supreme Court has warned, “stagnate and die.”⁴¹⁷

CONCLUSION

Boston College's recent struggle to protect an oral history archive from subpoena presents a unique opportunity to reevaluate the current state of a researcher's privilege in America.⁴¹⁸ The case presents the courts with a factual scenario in which the values of open and free academic research directly conflict with the compelling interests of law enforcement. The resulting opinions, *In re Dolours Price* and *Trustees of Boston College*, demonstrate that hope for such a privilege has and continues to exist in a precarious state in American law. The European Court of Human Rights, however, has taken a drastically different stance on the issue, casting a solid foundation for a qualified privilege to protect social commentators and their confidential sources. In light of European human rights law, the most preferred route for an American solution is the recognition of a qualified researcher's privilege as a constitutionally rooted First Amendment right. Such a privilege would accurately reflect the important role that scholarly research plays in late modern society. For this to occur, however, the Supreme Court of the United States must address its prior precedent, and must recalculate the way it weighs the value of scholarly research in a free and democratic society.

Branzburg, 408 U.S., at 690. *Compare Trs. of Bos. Coll.*, 831 F.Supp. 2d. at 455–59, with *Goodwin*, para 39–40.

417. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Trs. of Bos. Coll.*, 831 F. Supp. 2d at 455–59.

418. At the time of writing, it is unclear whether or not this opportunity will extend to docket of the Supreme Court of the United States. Intervening parties Ed Moloney and Anthony McIntyre had their petition for a writ of certiorari denied in April 2013. *Moloney v. US* 133 S.Ct. 1796 (April 15, 2013). The sudden death of Dolours Price, 61, was found on appeal not to have a decisive effect on the subpoena request, as the request was never solely about individual prosecution but a broader investigation into the death of an individual. *In re Request from the United Kingdom Pursuant to the Treaty between the Gov't of the U.S. & the Gov't of the United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 12-1236, 2013 WL 2364165 (1st Cir. May 31, 2013). Price's cause of death is unknown at the time of writing, suspected by some media reports to be the result of a drug overdose.

FIXING COPYRIGHT IN THREE IMPOSSIBLE STEPS: REVIEW OF *HOW TO FIX COPYRIGHT* BY WILLIAM PATRY

MARK P. MCKENNA*

William Patry is one of the world's best and most experienced copyright lawyers. In his distinguished career he has played nearly every imaginable role: full-time legal academic, treatise author, copyright litigator at a major firm, copyright counsel to the U.S. House of Representatives, policy planning advisor to the Register of Copyrights, and Senior Copyright Counsel at Google. When someone with that depth of experience pronounces the copyright system fundamentally broken, we have serious problems. And yet that is precisely what Patry has done in *How to Fix Copyright*.¹

Patry is at pains to insist that he does not advocate for the repeal of copyright law altogether, but one could be forgiven for believing he has made a compelling case for just that.² As Patry ably demonstrates, copyright is overwhelmingly irrelevant to creativity, and much of the current copyright system creates significant economic harm in its pursuit of ever greater control for copyright owners.³ Yet Patry believes this system can be salvaged, if only policymakers would embrace empirical evidence and focus on overall utility.⁴

To my mind, the most striking thing about Patry's reform proposals is their essential impossibility, given the political economy of copyright.⁵ I do not mean this as a criticism of Patry—his proposals are generally quite sensible, and they flow naturally from the evidence Patry insists ought to guide our copyright policymaking. But two of his major proposals—

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1. WILLIAM PATRY, *HOW TO FIX COPYRIGHT* (2011).
2. *Id.* at 11.
3. *Id.* at 15–26, 29–32.
4. *Id.* at 50–52.
5. See generally Pamela Samuelson, *Is Copyright Reform Possible?* 126 HARV. L. REV. 740 (2013) (reviewing PATRY, *supra* note 1, and JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (2011), and discussing mechanisms for possible reform).

shortening of the copyright term⁶ and reinstatement of formalities⁷—are, for all practical purposes, non-starters. Congress has a long and unbroken practice of lengthening copyright,⁸ and the United States' full entry into the Berne Convention, which largely prohibits formalities, makes re-imposition of formalities extremely unlikely.⁹ Patry knows this, and perhaps that is why he eschews a summary section with a list of specific recommendations, and why the book lacks detailed description of how these reforms would come to pass.¹⁰ It is hardly that Patry is unfamiliar with the mechanisms for copyright reform; it is instead that he so well understands the unlikelihood of his proposals that such a level of detail is not really worth the effort.

What then do we make of a book that offers such a devastating critique of copyright in its current form, identifies some reforms that would make the system more defensible,¹¹ and yet seems almost resigned to the impossibility of those reforms? One answer is that Patry's book tees up an existential crisis for copyright: if the current copyright system diverges so significantly from one rationally related to its purposes, and if reforms that would bring copyright closer to those purposes are essentially impossible, can copyright be justified at all? Put differently, is there any real difference between offering such unrealistic proposals and advocating abolition of copyright?

I will not try to answer those questions directly here. Instead, I will focus on three themes that I think are worth emphasizing even if Patry's ultimate proposals are unlikely to gain any traction. First is Patry's insistence that copyright policy be based on real-world evidence, a suggestion that should be uncontroversial but instead runs headlong into the near-religious commitments of copyright stakeholders.¹² Second is Patry's highlighting of the gulf between the interests of creators, on the one hand, and owners of copyright interests, on the other.¹³ Third, and finally, is Patry's focus on the

6. PATRY, *supra* note 1, at 189–90.

7. *Id.* at 203.

8. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 278–80 (2004).

9. Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886; 1986 U.S.T. Lexis 160, available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (entered into force for U.S. Mar. 1, 1989 (Sen. Treaty Doc. 99-27)).

10. *Id.* at 5–6; Samuelson *supra* note 5, at 741 (noting that Patry's book does not discuss how the reforms might be accomplished).

11. More defensible, but surely not entirely so, as Patry largely ignores copyright scope. Obviously scope would be less critical if the copyright term were shortened and affirmative claiming required, but in many cases questions about scope are inescapable. *Cf. id.*, at 741 (arguing that Patry's reform proposals are incomplete).

12. *Id.* at 50–51.

13. *Id.* at 30, 38–39.

copyright system's strong tendency to entrench business models and resist change, particularly in the face of new technology.¹⁴ All of these themes have received extensive discussion elsewhere. Patry, for example, is not the first to note that copyright law primarily serves the interests of publishers, record labels, and other distributors, or that owners' interests often diverge sharply from those of creators. Likewise, copyright's role in protecting business models is well understood. But Patry's discussion weaves these themes together more thoroughly than most other treatments, and he sometimes signals a much firmer commitment to reorienting copyright to protect creators' interests over those of the distributor/intermediaries than do other reform proposals.

EVIDENCE-BASED POLICYMAKING

Patry's overriding criticism of copyright is that the law is overwhelmingly developed on the basis of ideology rather than empirical evidence. Indeed, "[p]olicymakers have been operating in an evidence-free copyright law zone for many decades."¹⁵ It is received wisdom that authors would not create without copyright;¹⁶ that because copyright law is necessary for creativity, more copyright must lead to more creativity;¹⁷ that "creative industries" are the basis for the knowledge economy;¹⁸ piracy is a huge problem that is devastating the creative industries;¹⁹ and others do not really "need" access to a work because they can (and should) create their own works.²⁰ Virtually no evidence is demanded on these claims in the first place, and policymakers (Congress in particular) pay little attention to the evidence when it is available.

There are a couple of reasons for this failure to engage evidence. One is that copyright *is* enormously important to certain parties with economic interests in copyright. Many of the claims made regarding copyright are really focused on the economic effects of various policies on those particular parties. These claims are frequently made without any supporting data and/or are wildly overstated.²¹ But even if the claims were based on solid empirical evidence, they would still only reflect part of the story, because there is no reason to assume that the overall effects of copyright necessarily mirror the effects on particular parties. It is not as if the money made (or potentially made) by those who administer one set of rights to a

14. *Id.* at 2, 46–47.

15. *Id.* at 51.

16. *Id.* at 75–76.

17. *Id.* at 79.

18. *Id.*

19. *Id.* at 63–67.

20. *Id.* at 13.

21. *Id.* at 51–53 (discussing inaccurate information policymakers receive).

work (those who, for example, license sound recordings) would vanish into thin air if the copyright system did not maximally protect those parties' interests. Patry usefully reminds us of the difference between micro effects (the effects on particular parties) and the broader macro effects that ought to guide policy. He argues, for example, that copyright should be structured so that all of the rights to a particular work can easily be cleared at once, even if that requires eliminating the business models of some entrenched interests. Similarly, Patry suggests that the massive costs of clearing rights in out-of-print books indicate a serious problem. Those costs are consequences of excessively long copyright and the lack of any requirement that authors act affirmatively to secure or retain their rights.²² If we incur those costs for the benefit of only a few authors or intermediaries, we need to ask why the consequences for the few are allowed to outweigh the costs to the many.

Another reason copyright policy is so resistant to evidence, which operates mostly below the surface of Patry's discussion, is the persistence of *moral* claims that are used to backstop economic claims about the importance of copyright. On one level, we are told that copyright is critical to economic growth. Yet when economic evidence is brought to bear on questions relating to the proper scope of copyright, then copyright interests often shift to arguments that sound in "wrongfulness."²³ Copying someone else's work is simply "unfair", so it is "wrong" even if it has little or no effect on incentives. Such claims of unfairness, often predicated on or offered in tandem with allegations of "free-riding", have proven rhetorically powerful in intellectual property generally.²⁴ But aside from the fact that these arguments are selectively deployed (if copyright were primarily about moral claims of authors, then the constant claims about economic impact are beside the point), these moral arguments offer no logical stopping point. Free-riding is ubiquitous in a competitive economy, and emotional appeals to unfairness rarely offer principles on which to distinguish legitimate from illegitimate forms.²⁵

Here I think it would have been useful for Patry to lay more of his cards on the table in terms of the justifications for copyright. His criticisms of

22. See *id.* at 194–95 (discussing the cost of clearing rights).

23. *Id.* at 59 ("Since Mr. Burnham could not challenge any of the empirical conclusion in the Gowers report, he instead relied on a previously unarticulated and undefined 'moral case at the heart of copyright law.'").

24. See generally Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137 (2010) (criticizing free riding arguments in trademark law); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992) (describing, and criticizing, courts' tendency to decide cases on intuitions of fairness and distaste for free riding).

25. See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007) (noting the ubiquity of spillovers from intellectual creations and the positive value associated therewith).

policymakers for failing to follow evidence generally sound utilitarian: he chides Congress and the courts for paying too much attention to the interests of entrenched interests and not enough attention to the overall costs of overprotection.²⁶ But his suggestions that copyright ought to be more focused on creators, and particularly the implication that copyright should be geared toward enabling those creators to make a living,²⁷ indicate Patry's utilitarianism may not be so thoroughgoing. For it is not entirely clear that, *overall*, we would be better off providing more compensation to creators. To be sure, the creators would likely be better off under such a system. As Patry shows, however, we would get much of the creativity we desire without any protection at all.²⁸ Thus it seems that Patry's appeals to the interests of creators have at least a tinge of normative preference for creators as a class. That preference may well be justified – a system that rewarded creators might well give us more interesting work or a more just society – but it is not clear such a system would increase overall social utility, which the preponderance of Patry's analysis suggests is copyright's purpose.

I think there is at least one other important reason that copyright policymaking is so resistant to evidence, on which Patry only barely touches—the professional investment of lawyers in the prevailing wisdom of copyright. Intellectual property orthodoxy runs deep, so deep that despite his trenchant and wide-ranging criticisms of the copyright system, Patry repeatedly insists that he does not advocate abolition of copyright. In that respect it often seems that Patry is pulling his punches; his argument goes far beyond a critique of the current legal rules and actually undermines the narrative on which copyright is traditionally justified. Perhaps it is unfair to have expected a more robust affirmative defense of the idea of copyright. After all, Patry's book is focused on how *to fix* copyright, and he does suggest that any justification for copyright needs to focus on creators' ability to make a living. But given the impracticality of the major reforms Patry proposes, one might reasonably conclude that he may as well have advocated abolition.

The point here is not to criticize Patry for not having done so—I doubt I would have—but instead to point out how difficult it is for intellectual property lawyers even to entertain the idea of life without copyright, notwithstanding powerful arguments that undermine the central premises of the system. Copyright lawyers are deeply invested in a narrative of creativity in which copyright plays a necessary role, just as patent lawyers are deeply invested in the idea that patent protection is central to

26. PATRY, *supra* note 1, at 103–18.

27. *Id.* at 127 (arguing that “we do need [copyright] for those who do want to make a living from their works regardless of why they created them in the first place”).

28. *Id.* at 78–80.

innovation. Beliefs in these narratives are highly resilient to contrary information. Despite substantial evidence that patent law is doing more harm than good in most industries,²⁹ for example, no legal scholar has seriously advocated that patent law be abolished. Intellectual property lawyers, including academics, believe fundamentally in the correctness of the incentive narrative, which is firmly entrenched as the rule, and information about the harm patent law causes in various industries is cordoned off as exceptional. Scholars advocate modest reforms, but rarely (if ever) fundamental ones.³⁰

Non-legal scholars are, by contrast, sometimes willing to consider much more radical changes. Two economists, Michele Boldrin and David Levine, have argued strenuously that most intellectual property laws should be eliminated.³¹ A number of economists have devoted serious attention to prizes as alternatives to exclusive rights.³² Legal scholars, however, largely push back against these arguments or ignore them altogether, even though they rarely take on directly the evidence that Boldrin and Levine marshal.³³ The bottom line is that lawyers are entrenched interests too, and they are professionally invested in the system. It is therefore easy for lawyers to justify the current legal structure, at least in broad strokes. Modest changes to that system are tolerable, but radical ones (which might cost a number of lawyers substantial revenue) rarely are. I do not suggest that this explains Patry's positions; collectively his proposals are significantly more radical than most in the copyright area that I can

29. See, e.g., JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2009) (finding that the overall costs imposed by the patent system outweigh its benefits, and that patent law has net positive value only in a very few industries, such as the pharmaceutical industry).

30. This is not to say that none of the reform proposals would have real impact. For example, Mark Lemley's suggestion that functional claiming be limited seems likely to improve things considerably in the software area. See Mark A. Lemley, *Software Patents and the Return of Functional Claiming*, 2013 WISC. L. REV. ___ (forthcoming 2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117302.

31. MICHELE BOLDRIN & DAVID K. LEVINE, *THE CASE AGAINST INTELLECTUAL MONOPOLY* (2008). See also Michele Boldrin & David K. Levin, *The Case Against Patents* (Federal Reserve Bank St. Louis, Working Paper No. 2012-035A, 2012), available at <http://research.stlouisfed.org/wp/2012/2012-035.pdf>.

32. See Boldrin & Levine, *supra* note 31, at 4–5, 21.

33. For a rare example of direct engagement with Boldrin and Levine, see Mark A. Lemley, *A Cautious Defense of Intellectual Oligopoly with Fringe Competition*, 5 REV. L. & ECON. 3 (2009) (reviewing BOLDRIN & LEVINE, *supra* note 31). Legal scholars have taken prizes somewhat more seriously. See, e.g., Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 58 UCLA L. REV. 970, 985–88 (2012); Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003).

remember. But it is what Patry is up against, and one reason why evidence-free policymaking is so pervasive.

Efforts like Patry's could nevertheless do some good insofar as they put greater pressure on those who would claim even broader rights to make their case by reference to evidence. Much copyright expansion occurs because the policymakers hear only from those who stand to benefit. That, of course, is often not a mere oversight—as Patry notes, hearings before Congress are nearly always stacked such that only pro-copyright talking points get aired.³⁴ But courts face different institutional constraints, and they are often called on to make policy-based judgment calls. Focusing courts on the right questions and highlighting the available evidence on those questions might allow them to think in a more balanced way about some edge cases. It might, for example, help courts decide what kinds of uses ought to be regarded as fair use, when to ratchet up the originality requirement, or when to imply exceptions to the DMCA anti-circumvention provisions. These would be most improvements, but improvements nonetheless.

CREATORS VS. OWNERS

The most persuasive part of Patry's book, in my view, is his discussion of the divergent interests of creators (to whom copyright offers very little by way of incentives to create) and rights owners, who frequently are not creators and whose work is not especially creative at all.³⁵ As Patry demonstrates, many authors (indeed, for most types of works, the overwhelming majority of authors) have no use for copyright.³⁶ When authors once were required to claim copyright affirmatively by registering their works, very few did.³⁷ Even fewer re-claimed copyright when it was time to renew.³⁸ Having eliminated formalities, copyright now automatically sweeps into its ambit huge numbers of works that the creators do not really care to have protected. Why does it do that?

One answer is that we are concerned about protecting the smaller number of authors who do want to claim rights, and we are willing to be over-inclusive in order to reduce the burden on those authors. And there is no doubt that some of the old formality rules were quite byzantine, so some unsophisticated authors who did want to claim rights may well have been penalized by those rules. But if one assumes copyright law aims to maximize overall social utility, then it is hard to imagine how the benefits of eliminating those burdens on unsophisticated authors could outweigh the

34. PATRY, *supra* note 1, at 167–68.

35. *Id.* at 103, 107–08, 164.

36. *Id.* at 103.

37. *Id.* at 104–05.

38. *Id.* at 104.

massive transaction costs created by sweeping in so many works for which the owners have little interest in copyright. It is even harder to imagine extending the duration of all of those undesired copyrights to life of the author plus seventy years, allowing ownership of all of those works to be fragmented, and failing to create a mechanism through which would-be users could find information about the works and potentially locate their owners.

A more plausible explanation for copyright's overbreadth—and an explanation that is consistent with copyright law's history—is that authors are not (and have never really been) copyright's primary concern. After all, it has long been an open secret that very little of the money generated in “creative industries” (a term I used advisedly) actually flows to the creators. Patry illustrates this quite well, and his account is consistent with the longstanding sense that record label and movie studio accounting practices were themselves creative works.³⁹ If copyright law were really animated by creators' interests, it would be hard to imagine how this state of affairs could persist, notwithstanding attempts to rationalize the outcomes by suggesting (farcically) that they are simply the result of consensual transactions. At the very least the fact that so little of the money makes its way to the creators who nevertheless continue to create so much is powerful additional evidence of the irrelevance of copyright incentives, or perhaps the incredible power of the optimism bias.

More likely, authors are romanticized because they are sympathetic, which explains why copyright interests always advocate publicly for greater enforcement by suggesting (sometimes quite vividly) that users are taking food out of authors' mouths.⁴⁰ But this is much like trademark owners' cynical exploitation of “consumer interests” in trademark law—neither authors' nor consumers' interests really drive the law, and indeed many expansions that are contrary to their interests are achieved in their name. One contribution of Patry's book is to shine an even brighter light on these claims, and perhaps to focus our attention more clearly on copyright's real beneficiaries—the distributors—so that we can more honestly determine whether and when distributors' interests need protection, independent of rhetoric about creators.

Greater attention to the interests of creators might also influence some modest reforms that courts are well-situated to implement. For this to work, however, courts must first firmly reject the notion that copyright serves

39. *Id.* at 119–25.

40. *See, e.g., Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, RIAA (Sept. 8, 2003), <http://riaa.com/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1> (quoting Bart Herbison, Executive Director, Nashville Songwriters Association International: “When someone steals a song on the Internet it is not a victimless crime. Songwriters pay their rent, medical bills and children's' educational expenses with royalty income.”).

creators' interests by providing an incentive to create or to distribute. Patry's discussion (which builds on empirical evidence developed by many others) makes clear that this is not copyright's real role.⁴¹ Copyright could be tailored to help creators by making it possible for them to earn a living as professionals.⁴² To achieve that for creators, courts would have to adopt rules that shift the balance of power away from copyright intermediaries and toward the creators themselves. They might do so by interpreting contracts more favorably to artists, being less willing to assume that authors have surrendered their rights in the absence of clear evidence, and by being exacting in their analysis of the work for hire doctrine. They might also recognize the inevitability of borrowing in the process of creation and therefore interpret fair use broadly and be more reluctant to find infringement in the absence of more substantial copying.

BUSINESS MODELS AND TECHNOLOGICAL CHANGE

The final major theme of Patry's that I wish to take up here has to do with copyright's role in structuring the markets in which works are exploited.⁴³ As Patry very ably demonstrates, copyright's complexity is to a significant degree a function of the fragmentation of ownership, each of the many stakeholders having developed their stakes under certain prevailing market conditions that may no longer obtain.⁴⁴ The distinction between musical work and the sound recording, for example, is a byproduct of the fact that music was once fixed in tangible form primarily by rendering notation on sheet music. Rather than reconceiving that paradigm when technology later allowed for fixation in recordings, Congress instead created new exclusive rights in sound recordings that are distinct from rights in the musical work.⁴⁵ That might have seemed workable (even if it added transaction costs) for as long as it was true that music was first fixed in written form and then only later recorded. But as Bob Brauneis has noted, that is no longer how musicians work.⁴⁶ Music is now often fixed for the first and only time in a sound recording, making it difficult, if not impossible, to determine where the musical work ends and the sound recording begins. The distinction between the musical work and the sound

41. PATRY, *supra* note 1, at 77–78.

42. *Cf.* ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 195 (2011).

43. PATRY, *supra* note 1, at 143–45.

44. *Id.* at 144.

45. 17 U.S.C. § 106(6) (2012). According to the Copyright Act, a sound recording is a work “that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” 17 U.S.C. § 101 (2012).

46. Robert Brauneis, *The Musical Work in the Age of Sound Recordings* (draft on file with author).

recording, however, is practically quite important because sound recording rights are more limited,⁴⁷ and because rights to the musical work and those to the sound recording may well be owned by different parties.

Given the additional difficulties entailed in a system with such a duality of rights (multiplication of which makes certain kinds of uses essentially impossible),⁴⁸ why have we not streamlined? The obvious answer is that there are entrenched interests that have built business models around administration of these distinct rights, and one or more interests would be hurt by consolidation.⁴⁹ We could say something very similar about why owners of various interests have been so slow to adapt to new technologies, despite the fact that those technologies have nearly always added enormous economic value. Even if the VCR expanded markets and opened up new revenue streams for copyright owners, its introduction threatened existing distribution practices, just as downloading and streaming threaten physical distribution and sequencing of movies.

It is, of course, inevitable that economic interests will harden around existing rules and technologies. But that is all the more reason to be skeptical of claims by rights owners that new technologies threaten creativity— what they really mean is that those new technologies threaten certain entrenched interests. Patry usefully reminds us here that we ought to be particularly careful about crediting those claims in the face of technological change, as history teaches that new business models will develop around new technology.⁵⁰ That is, in effect, an argument in favor of copyright flexibility, and the need to revisit copyright's basic structure periodically. And Patry has given us the broad outlines against which to judge its condition at any particular time. That is a significant achievement.

47. See 17 U.S.C. § 114 (2012).

48. See Patry's discussion of the difficulty of sampling in this age. PATRY, *supra* note 1, at 182–85.

49. See, e.g. *In re Cellco P'ship*, 663 F.Supp. 2d 363 (S.D.N.Y. 2009) (rejecting the American Society of Composers, Authors, and Publishers' argument that a wireless company must pay public performance licensing fees for ringtones).

50. PATRY, *supra* note 1, at 142–45.

ACADEMIC FREEDOM AND POLITICAL INDOCTRINATION

KENNETH L. MARCUS*

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INTRODUCTION

The wall of separation between academic freedom and political indoctrination was once firmly established within the academic profession. Academic freedom, it was understood, applied to teaching, research, and study but not to political advocacy or indoctrination. This principle is enshrined, for example, in the canonical 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* (the 1915 Declaration) of the American Association of University Professors (AAUP), which emphasizes that an instructor who addresses “controversial matters” should present “the divergent opinions of other investigators” and “above all” should “remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently”¹

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1. AM. ASSN. OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES ON ACADEMIC

In recent years, however, this wall has increasingly eroded, and influential figures and institutions have resisted efforts to reinforce it. This can be seen in the most recent pronouncements of the AAUP and in the academic work of influential legal scholars like Matthew Finkin and Robert Post. The trend is also well illustrated by the recent decision of the Pennsylvania State University (Penn State) Senate Committee on Faculty Affairs to amend that university's academic freedom policy to delete language that provided: "It is not the function of a faculty member in a democracy to indoctrinate his/her students with ready-made conclusions on controversial subjects."²

The conflation of academic freedom with political advocacy is most apparent in academic treatments of the Middle East. In 2006, for example, the U.S. Commission on Civil Rights observed that, "many university departments of Middle East studies provide one-sided, highly polemical academic presentations and some may repress legitimate debate concerning Israel."³ Some commentators have argued that academic freedom has been abused as a means of justifying virulent criticisms of Israel which would otherwise be dismissed as intellectually unsupportable.⁴ At the same time, there is now a significant sub-genre of scholarly writing consisting of essays about the putative threat to academic freedom posed by charges that many academic treatments of the State of Israel lack scholarly merit and that some are tinged with anti-Semitism.⁵ The AAUP President, Cary Nelson, who devotes a full chapter of his volume on academic freedom to the Middle East conflict, acknowledges that, "there is one area where tension and misrepresentation reign supreme: campus incarnations of the

FREEDOM AND ACADEMIC TENURE 298 (1915), available at <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> [hereinafter *Declaration*].

2. SENATE COMMITTEE ON FACULTY AFFAIRS OF THE PENNSYLVANIA STATE UNIVERSITY, REVISIONS TO POLICY HR64: ACADEMIC FREEDOM (2010), available at <http://www.senate.psu.edu/agenda/2010-2011/dec2010/appd.pdf> [hereinafter SENATE COMMITTEE].

3. U.S. COMM'N ON CIV. RTS., FINDINGS AND RECOMMENDATIONS OF THE U.S. COMMISSION ON CIVIL RIGHTS REGARDING CAMPUS ANTI-SEMITISM (Apr. 3, 2006), available at <http://www.usccr.gov/pubs/050306FRUSCCRRCAS.pdf>. The author served as staff director of the Commission at this time and was the principal author of this document.

4. See, e.g., Tammi Rossman-Benjamin, *Anti-Zionism and the Abuse of Academic Freedom: A Case Study at the University of California, Santa Cruz, Post-Holocaust and Anti-Semitism*, JERUSALEM CTR. FOR PUBLIC AFFAIRS (Feb. 1, 2009), <http://jcpa.org/article/anti-zionism-and-the-abuse-of-academic-freedom-a-case-study-at-the-university-of-california-santa-cruz/>; Leila Beckwith and Tammi Rossman-Benjamin, *Academic Freedom and the Anti-Zionists*, AMERICAN THINKER (Mar. 14, 2009), http://www.americanthinker.com/2009/03/does_academic_freedom_have_lim.html.

5. See, e.g., ACADEMIC FREEDOM AFTER SEPTEMBER 11 (Beshara Doumani ed., 2006).

Arab-Israeli conflict.”⁶ This tension is illustrated in the uproar surrounding charges that emails sent by Professor William Robinson to his undergraduate University of California at Barbara students were insensitive to Jewish students. Despite the apparently inflammatory character of Professor Robinson’s communication (discussed below), Robinson received enormous support from professors who argued that his academic freedom was violated by even the commencement of an investigation to assess the validity of the claims made against him.⁷

The erosion of the wall between academic freedom and political indoctrination is deeply problematic. This paper argues, in Part II, that the vitality of the academic freedom doctrine requires that it be limited to core academic functions (II-A), that efforts to exceed those limitations entail significant risks for the doctrine (II-B), and that a firmly circumscribed but vigorous conception of academic freedom can avoid these risks (II-C). In Part III, this paper argues that political indoctrination cannot be considered academic because it exhibits five characteristics that are inconsistent with the academic function: non-educativeness, controversy, extraneousness, imbalance and bias. Moreover, recent efforts to redefine these five concepts in narrow terms are inconsistent with the basic values that academic freedom is intended to support. Finally, Part IV will apply this five-fold understanding of academic freedom to the William Robinson case, demonstrating that only a robust conception of these five strands can properly illuminate the issues at stake in that case.

I. THE FUNCTIONAL ARGUMENT

A. The Scope of the Academic Function

Academic freedom can best be understood in terms of the professional function that it protects. Specifically, this doctrine protects professors to the extent that they advance the college or university’s function of advancing and disseminating knowledge.⁸ Professors serve this function through instruction and research pursuant to academic norms and standards. Many commentators have argued that the college or university should pursue other functions, including the preparation of students for participation or leadership in a democratic society. It is overly restrictive, according to this argument, to limit academic freedom to this narrow sense of the academic function, since professors properly pursue an array of other functions. The

6. CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM 109 (2010).

7. The case is instructively discussed in Arthur Gross-Schaefer, *Academic Freedom: Moving Away from the Faculty-Only Paradigm*, SCHOLARS FOR PEACE IN THE MIDDLE EAST (Feb. 2011), spme.net/cgi-bin/articles.cgi?ID=7593.

8. See William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 61-63 (Edmund L. Pincoffs ed., 1972).

problem with this argument is that it confuses the academic function with the various nonacademic functions which academics may properly pursue. Regardless of whether colleges and universities could or should pursue broad democratic purposes, these goals have nothing to do with academic freedom because they are not academic in nature.

The faculties of colleges and universities may engage in sundry other tasks, from hosting sporting events to providing career counseling, but these tasks are not central to the institution's academic mission. The University of California at Berkeley's legendary president, Clark Kerr, once remarked that the function of a college or university is to provide "parking for faculty, sex for the students, and athletics for the alumni."⁹ Whatever the veracity of Kerr's observation, one would not argue that parking, sex and sports are now therefore academic functions to which the doctrine of academic freedom applies. In a somewhat more serious vein, Stanley Fish has bemoaned the extraordinary mission creep that has characterized modern colleges and universities. "Pick up the mission statement of almost any college or university," Fish has observed, "and you will find claims and ambitions that will lead you to think that it is the job of an institution of higher learning to cure every ill the world has ever known: not only illiteracy and cultural ignorance, which are at least in the ballpark, but poverty, war, racism, gender bias, bad character, discrimination, intolerance, environmental pollution, rampant capitalism, American imperialism, and the hegemony of Wal-Mart... ."¹⁰ Whatever the merits of the pursuit of such goals by academic institutions, they are similarly distinct from the academic mission.

To be sure, prominent authorities have argued that preparation of students for democracy is an important function of American colleges and universities. For example, several hundred college and university chiefs endorsed the 1999 *Presidents' Declaration on the Civic Responsibility of Higher Education*, which identifies "a fundamental task to renew our role as agents of democracy" which "is both urgent and long-term."¹¹ These leaders pledged "to take responsibility for helping [students] realize the values and skills of our democratic society and their need to claim ownership of it." Similarly, the U.S. Supreme Court has emphasized "the overriding importance" of higher education's role in "preparing students for work and citizenship," relying upon past Court decisions "describing education as pivotal to 'sustaining our political and cultural heritage' with a

9. Former UC President Clark Kerr, a National Leader in Higher Education, Dies at 92, UC BERKELEY NEWS (Dec. 2, 2003), http://berkeley.edu/news/media/releases/2003/12/02_kerr.shtml.

10. See generally STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 10–12 (2008).

11. *Presidents' Declaration on the Civic Responsibility of Higher Education*, CAMPUS COMPACT (1999), available at <http://www.compact.org/wp-content/uploads/2009/02/Presidents-Declaration.pdf>.

fundamental role in maintaining the fabric of society.”¹² At first blush, these authorities appear to give credence to the view that the academic function should be construed broadly to encompass social or political concerns.

That reading would be erroneous. Indeed, political indoctrination is arguably even more inconsistent with the mission of preparing students for participation in a democratic society than it is with the mission of advancing and disseminating knowledge, since indoctrination communicates an authoritarian disposition. Moreover, even if every college or university president were to pledge his or her institutions to pursuing this mission, it would not render the mission *academic*; it would merely indicate that academic leaders were universally adopting certain non-academic goals. College and university presidents certainly may choose to pursue these goals by academic *means*, for example, by redoubling their commitment to the effective teaching of critical reasoning skills or by enhancing their course offerings in such fields as political science, economics, philosophy and economics. Nothing in the presidents’ statement however justifies the use of classroom political indoctrination.

B. Some Consequences of Abandoning the Academic Function

Some academics will think that this notion of the academic function is unnecessarily stingy and may argue that an expansive interpretation would better reflect the importance of the value that it serves. In fact, nothing could be further from the truth. It is precisely the importance of the academic function that counsels extreme caution as to efforts to expand its domain. This can be seen most clearly in recent battles over politically controversial academic hiring, tenure and promotion cases. The academic establishment, led by the AAUP, repeatedly insists that academic personnel decisions must be protected against external political influences. This position, however, is undercut by the AAUP’s own efforts to eliminate barriers between politics and academia. It is only the public perception of a wall between academic freedom and political indoctrination that precludes greater public intervention into the politics of public colleges and universities. To the extent that this perception fades, it will be difficult to maintain that universities should be insulated from external intrusions.

This conflict can best be seen in the AAUP’s most recent report, *Ensuring Academic Freedom in Politically Controversial Academic*

12. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). This opinion has not been without its critics. For example, Paul Horwitz observed that it “sits uneasily with the Court’s approach elsewhere in First Amendment jurisprudence, and it fails to acknowledge the difficulty in enshrining in the First Amendment any particular vision of education or academic freedom when those values are deeply contested outside the courts, in the very communities at issue.” Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV 461, 589 (2005).

Personnel Decisions.¹³ In this report, the AAUP laments the intrusion of external political influences into academic personnel decision-making.¹⁴ In particular, the AAUP is concerned about the treatment of professors who express politically controversial views concerning the State of Israel. The AAUP correctly maintains that the intrusion of such political influences can, under some circumstances, amount to a violation of academic freedom. There may be room for disagreement as to the extent of this problem, the even-handedness of the AAUP's analysis, or the wisdom of the organization's proposed solutions.¹⁵ Two propositions are however indisputable. First, academic personnel decisions should be based upon academic merit. Second, the application of political criteria in such cases represents a breach of academic integrity. Unfortunately, these propositions fundamentally conflict with positions which the AAUP and others in the academic establishment are taking with respect to the relationship between classroom instruction and political indoctrination.

The premise upon which these propositions are based is that the university serves a distinctly apolitical mission upon which the intrusion of external political considerations represents a serious taint. After all, if classroom instruction were inherently political, then the public could reasonably insist upon having a say as to the political bent which it pursues. In a democratic society, this demand would represent a minimum expectation for public institutions. It would also presumably amount to a significant departure at many institutions, given the substantial differences between public opinion and professorial attitudes on controversial topics, such as the politics of the Middle East. If political indoctrination were a proper function of higher education, then democratic electorates could appropriately demand that university faculties be, for example, as conservative and as pro-Israel as the public is, particularly in fields where the tendency to indoctrinate is most salient (*e.g.*, the humanities and social sciences).

In fact, such demands would be grossly inappropriate because political indoctrination is *not* a legitimate function of professorial work. Ironically, this understanding of political indoctrination, once widely held by advocates of academic freedom, is now increasingly contested precisely by

13. AM. ASSN. OF UNIV. PROFESSORS, ENSURING ACADEMIC FREEDOM IN POLITICALLY CONTROVERSIAL ACADEMIC PERSONNEL DECISIONS (Aug. 2011), available at <http://www.aaup.org/NR/rdonlyres/5F6ABEED-D344-4C61-808F-AD53CF6AC3D8/0/EnsureFreedomReportFinal.pdf> [hereinafter, ENSURING ACADEMIC FREEDOM].

14. *Id.*

15. For the author's substantive comments on this proposed AAUP policy see Kenneth L. Marcus, *IJCR response to draft "Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions," by the American Association of University Professors, Feb. 18, 2011*, INSTITUTE FOR JEWISH AND COMMUNITY RESEARCH (2012), available at <http://www.jewishresearch.org/v2/2011/articles/anti-semitism/AAUP-IJCR-letter.htm>.

the institutions and individuals who insist that the academy be provided with a sphere of decision-making autonomy safeguarded against external political intrusion.

C. The Prophylactic Argument

There is one plausible practical argument in favor of extending academic freedom protections to at least some forms of classroom political advocacy and even to some borderline cases of instructional political advocacy. This is the prophylactic argument, which posits that “the line between professional and aprofessional speech may be controversial, and that protection for clearly aprofessional speech is needed to give ‘breathing room’ to the professional speech that is the special subject of academic freedom.”¹⁶ In other words, institutions should be overly inclusive about protecting instructional academic freedom, because otherwise they might inadvertently become underinclusive and might therefore encroach upon certain activities that properly should be protected under this basic doctrine.¹⁷

There are several problems with this prophylactic argument. Michael Olivas has identified a couple of them. First, the practical necessity of this prophylactic measure is at best unnecessary, since the same function could be served by a generous definition of the professorial function. Second, this approach risks drawing resentment towards professors, who might be seen as enjoying special privileges which are not fully justified by the requirements of academic work.¹⁸ Third, institutions that protect aprofessional instructional speech may be perceived as endorsing this speech. This can be seen by analogy in religious proselytizing cases.¹⁹ For example, in *Bishop v. Aronov*, the Eleventh Circuit rejected claims brought by an exercise physiology professor whom the University of Alabama warned to discontinue expressing his religious beliefs in optional after-class sessions linking Christianity and physiology.²⁰ The court held that a university may broadly exercise authority over faculty and that even a professor’s classroom speech can be taken as representative of the school.²¹ Most importantly, overly expansive interpretations of professorial prerogatives become suspect when they entail equally restrictive interpretation of student rights. The attractiveness of broadly construing professorial interests in free expression may seem appealing when it is

16. Michael A. Olivas, *Reflections on Professional Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1846–53 (1993).

17. This is analogous to the Talmudic notion of “building a fence around the Torah.” The idea is to create a protective barrier or “fence” of rules to protect against unintended encroachment of a body of law which is considered sacred.

18. Olivas, *supra* note 16, at 1846.

19. *See id.* at 1835.

20. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

21. *Id.* at 1073.

balanced against the institutional interests of the university but less so when balanced against the interests of the students whom this doctrine protects against indoctrination.

II. ACADEMIC FUNCTION AND POLITICAL INDOCTRINATION

The principle distinction between academic activity and mere indoctrination is that the former serves a professional educative function and the latter does not.²² Stanley Fish has expressed this point with characteristic bluntness:

The moment a teacher tries to promote a political or social agenda, mold the character of students, produce civic virtue, or institute a regime of tolerance, he or she has stepped away from the immanent rationality of the enterprise and performed an action in relation to which there is no academic freedom protection because there's nothing academic going on.²³

Why is there “nothing academic going on”? Classroom political indoctrination abandons academic content in any of five ways: by abandoning the educative objective (non-educativeness), by generating unreasonable controversy (controversy), by intruding material outside the scope of course instruction (extraneousness), by failing to provide appropriate consideration of contrary views (imbalance), or by presenting instruction in a manner which evinces an inappropriate bias among students (bias). These five characteristics are basic to an understanding of what political indoctrination is and why it should not be protected under the doctrine of academic freedom.

Each of them has come under criticism lately from within what might be called the academic freedom establishment. The AAUP and its defenders have tried in various ways to minimize or restrict these five concepts in ways that would drain them of meaning and further blur the boundary between academic freedom and political indoctrination. As this section will show, those efforts have been misguided.

A. Non-educativeness

“The essential point,” as Robert Post correctly observes, “is that a professor’s pedagogical approach must educate, rather than indoctrinate, students.”²⁴ In John Dewey’s influential formulation, Dewey states that it is an abuse of “freedom in the classroom” for an instructor to “promulgate as truth ideas or opinions which have not been tested.”²⁵ This has been

22. FISH, *supra* note 10, at 81.

23. *Id.*

24. Robert Post, *The Structure of Academic Freedom*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, *supra* note 5, at 61, 81.

25. John Dewey, *Academic Freedom*, 23 EDUC. REV. 1, 8 (1902).

understood to mean that professors must avoid presenting opinion as if it were truth. As the 1915 Declaration states, the purpose of higher education is “not to provide. . .students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.”²⁶ Thus, the doctrine protects professorial classroom speech which meets professional pedagogical standards and which results from academic training, specialized expertise, and adherence to scholarly methodology.²⁷ One problem with classroom political indoctrination is that it does not attempt to meet such standards, both because it seeks different goals and because it uses different methods.

More recently, the AAUP has tended to erode the distinction between education and indoctrination by defining political indoctrination very narrowly. For example, the AAUP’s 2007 report, *Freedom in the Classroom*, provides that “[i]ndoctrination occurs when instructors dogmatically insist on the truth of [dogmatic] propositions by refusing to accord their students the opportunity to contest them.”²⁸ This formulation defines indoctrination much more narrowly than is commonly understood. Indeed, it condones instructors’ use classroom instruction time to impose political views on students as long as the students have an opportunity to present contrary views. Under this formulation, there is nothing indoctrinating about a professor who espouses controversial opinions in the classroom, and insists that they are true, as long as the professor does not preclude the possibility of a student rebuttal.²⁹

There are numerous problems with this approach, which ignores students’ vulnerability to professorial retaliation, assumes that students and professors have no power imbalance within the classroom, and implies that the only way to indoctrinate a student is to prevent the student from responding.³⁰ While the distinction between education and indoctrination is highly contextual, classroom instruction is indoctrinating when an instructor engages in political advocacy, regardless of whether a theoretical opportunity exists for students to reject the instructor’s position.

B. Controversy

Similar problems arise when instructors introduce controversial opinions into classroom teaching.³¹ The AAUP has long recognized the dangers

26. DECLARATION, *supra* note 1, at 298.

27. See Olivas, *supra* note 16, at 1844.

28. AM. ASS’N OF UNIV. PROFESSORS, FREEDOM IN THE CLASSROOM (2007), available at <http://www.aaup.org/AAUP/comm/rep/A/class.htm>.

29. See ENSURING ACADEMIC FREEDOM, *supra* note 13, at 13–28.

30. For a useful discussion of the relevance of classroom power imbalances to the doctrine of academic freedom, see Gross-Schaefer, *supra* note 7.

31. When political indoctrination is also conducted on a partisan basis additional legal and ethical issues arise, especially at public institutions, because it may entail the

inherent in controversial teaching material but has protected professorial prerogatives by defining in very narrow terms the scope of controversial teaching that is deemed objectionable. Under long-standing AAUP guidance, controversial teaching materials are objectionable only if they are also extraneous, and even then only if they *persistently intrude* upon the classroom. More recently, even this narrow limitation has come under criticism, as the AAUP has pulled back from the standard of “persistent intrusion.” This apparent pullback would be unwise, as the notion of academic freedom would lose meaning if it protects unlimited professorial advocacy on matters unrelated to course instruction.

The “persistent intrusion clause” is a gloss on the AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure*, which provides rather plainly that “teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no relation to their subject.”³² In other words, instructors deviate from their academic function when they introduce material that is both controversial and extraneous. In 1970, the AAUP pulled back significantly from this principle when it announced that the problem was not with controversial and extraneous materials *per se* but with their *persistent intrusion* into the classroom:

The intent of this statement is not to discourage what is “controversial.” Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid *persistently intruding* material which has no relation to their subject.³³

Even this quite modest “persistent intrusion” standard now has begun to seem too restrictive to the AAUP. The AAUP’s proposed 2011 report, *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*, argues that “[t]he danger in the use of the persistent-intrusion standard lies precisely in the tendency to focus on and seek to constrain controversial subject matter.”³⁴ Indeed, this new report goes so far as to insist that “exclusion of controversial matter, whether under the persistent-intrusion clause or in the name of protecting students from challenges to their cherished beliefs, stifles the free discussion necessary for academic freedom.”³⁵

When this last sentence is unpacked, it reveals an abandonment of basic

use of public funding to advance a political candidate or party.

³² AM. ASS’N OF UNIV. PROFESSORS, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (1940), available at <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf>.

³³ *Id.* at 5.

³⁴ ENSURING ACADEMIC FREEDOM, *supra* note 13, at 13.

³⁵ *Id.* (citation omitted) (italics omitted).

principles without which the notion of academic freedom becomes untenable. Recall that the AAUP has long maintained that occasional reference to controversial topics is pedagogically appropriate, even if the topics are extraneous, as long as instructors do not do so *persistently*. Here the AAUP argues that the “free discussion necessary for academic freedom” requires that universities condone even the *persistent intrusion* of extraneous controversial materials (this is what is meant by the “persistent intrusion clause”). This argument is different in kind from the long-standing principle that permitting occasional use of controversial materials may help to attract students’ interest and attention.³⁶ The AAUP’s new notion apparently is that instructors must be permitted to devote *unlimited* class time to controversial topics that are not related to the subject matter of the course. Indeed, the AAUP argues that academic freedom cannot exist unless professors are permitted to do so. Evidently, there has been no academic freedom at the countless institutions that have adopted the AAUP’s prior statements, including the “persistent-intrusion clause.” Clearly the AAUP’s newest ideas stretch to absurdity the prerogatives that it would assign to classroom instructors.

C. Extraneousness

As we have seen, under the AAUP’s classic expression, even the persistent intrusion of controversial materials into the classroom is protected under the doctrine of academic freedom unless those materials are extraneous to course objectives. The classic example is repeated criticism of Israeli foreign policy during a calculus class. Under the standard account, extraneous content is excepted from the doctrine of academic freedom on the ground that it dilutes course content and fails to advance the pursuit of instructional objectives. The extraneousness principle is now under assault from both radical and mainstream thinkers. Ironically, the greater danger lies within what is currently the academic mainstream.

Judith Butler, a leading figure in critical theory, has argued that standard accounts of extraneousness fail to appreciate the evolving and contested nature of academic standards. Interestingly, her critique turns out not to be as subversive as it may seem at first blush; indeed, it may promote more nuanced understandings of the limits of academic freedom. Ironically, it is Robert Post, Yale Law School Dean, who provides the more disruptive intervention in his recent co-authored attempt to restrict the notion of extraneousness to the point where it is no longer meaningful. Given Post’s position in the academy, his and Matthew Finkin’s recent analysis of extraneousness threatens to drain this basic concept of meaning.

Judith Butler has provided an interesting challenge to the extraneousness

36. See MATTHEW W. FINKIN AND ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 93–94 (2009).

argument.³⁷ To begin with, she argues the academic function is historically and socially contingent. What counts as legitimate academic work is a matter of evolving historical norms subject to continual revision. Indeed, intellectual positions initially rejected as unacceptable later become central to new fields of knowledge. The problem is not merely that answers once considered wrong may later be considered right. More fundamentally, entire modes of inquiry once rejected as outside the scope of proper academic inquiry may later be accepted as prevailing scholarly paradigms shift. If academic freedom is extended only to professorial work that conforms to existing professional norms, scholars will not be able to pursue the transformative kinds of scholarly innovation which have driven intellectual progress. Moreover, it is not enough merely to suspend professional standards to allow for innovation, as these standards are themselves subject to continuous reinterpretation, evolution, reformulation, challenge and abandonment. It is often the case that academic norms are not consensually established, clearly formulated, and available for ready application. Instead, the very existence and nature of particular norms within specific disciplines may be a matter of intense disagreement within and between academic departments.

Butler does not, however, reject the establishment of academic norms or the notion that academic work must be evaluated against proper standards. “To allow that the specific academic norms that govern particular fields have a historicity, change under pressure, are revised in response to intellectual challenges, undergo paradigm shifts,” she explains, “is *not the same* as disputing the relevance of professional norms, but is only to ask which norms ought to be invoked and for what reasons and to concede that debates of this kind precede any possibility of the ‘application’ of these norms.”³⁸ In Butler’s view, then, we should not fall into the Hobson’s choice of deciding between the rigid, authoritarian enforcement of dogmatic academic norms on the one hand and, on the other, the “reckless freedom” that comes with rejecting academic norms altogether.³⁹ The notion that enforcement of academic norms is inherently suspect “makes a serious critical debate into an adolescent complaint.”⁴⁰ Butler instead recommends “a critical inquiry in which norms are appropriately invoked in order to judge a piece of academic work.”⁴¹ This is an entirely reasonable amendment.

Matthew Finkin and Robert Post by contrast, although writing from a position well within the academic mainstream, have proposed a theory of

37. Judith Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, *supra* note 5, at 107.

38. *Id.* at 114.

39. *Id.* at 116.

40. *Id.*

41. *Id.*

classroom academic freedom under which practically anything goes. Finkin and Post argue that the trend towards interdisciplinarity demonstrates the difficulty in dividing knowledge into what Finkin and Post derisively characterize as “hermetically disconnected domains.”⁴² They maintain that such efforts are mere folly, since— as Finkin and Post approvingly quote Conrad Russell—“all knowledge can be related to all other knowledge (given enough ingenuity) and what background knowledge any teacher finds necessary to the understanding of his subject may depend on his approach to that subject.”⁴³ Of course, if “all knowledge can be related to all other knowledge,” then *nothing* is educationally extraneous.

Under Finkin and Post’s proposed reformulation of extraneousness, *any* pedagogical intervention would be deemed educationally relevant if:

It assists students in better understanding a subject under consideration, either in the sense of acquiring greater cognitive mastery of that subject or in the sense of acquiring a more mature apprehension of the import of that subject, which is to say, an improved ability to experience and appreciate the significance of the subject.⁴⁴

Finkin and Post’s point is that virtually anything can be relevant, even if it bears no relation to the topic of instruction and does not increase the students’ mastery of the subject, if it helps the students to “experience and appreciate” the subject’s importance. Applying this standard, Finkin and Post lambaste the suggestion, made by a student advocacy organization, that if the subject of a course is not the war in Iraq, then professors should not make statements about the war in class. According to Finkin and Post, this “misses entirely the heuristic necessity of actively arousing student attention and interest.”⁴⁵ In other words, professors should enjoy complete academic freedom to advocate their positions on any issue that they think students should find interesting, no matter how put off the students may actually be by this intrusion on their instructional time. In fact, this is not a conception of the relevancy requirement but a covert attempt to eliminate it.

The traditional AAUP standard is actually a very modest one: instructors should not persistently intrude extraneous controversial matters into instructional class time. This should be the very least that is expected of university professors. Indeed, it allows unlimited discussion of relevant discussion of controversial topics, wide discretion as to irrelevant topics that are not controversial, and occasional discussion of topics that are neither relevant nor uncontroversial. The current assault on the concepts of

42. FINKIN AND POST, *supra* note 36, at 92–93.

43. *Id.* at 93.

44. *Id.* at 92.

45. *Id.* at 94.

educational relevancy and extraneousness, like the simultaneous attacks on the persistent-intrusion concept, would ultimately drain the notion of academic freedom of content by sending the message that “anything goes.” This is a dangerous message for the academy to send. If instructors are demanding freedom to engage in conduct that is not consistent with meaningful professional norms, then the case for public deference becomes very weak.

D.Imbalance

Classroom instruction is imbalanced when an instructor neglects to provide students with contrary views on contested subjects or fails to expose students to alternative points of view. Imbalanced presentations tend to have an indoctrinating effect, because the students are taught to think only in the preferred manner, and contested opinions are given the appearance of universally accepted truths. This basic understanding of imbalance has been challenged recently by the AAUP and its supporters. In *Ensuring Academic Freedom*, the AAUP takes the position that academic balance can only be “based on the standards of the pertinent disciplines.”⁴⁶ This position has been given a robust academic defense by Finkin and Post. In fact, this narrow conception of academic balance would drain the concept of meaning in an age in which academic disciplines have too often become one-sidedly imbalanced. The refusal to look beyond disciplinary boundaries, even in an age of interdisciplinarity, can only serve to insulate academic departments from appropriate review and oversight.

The AAUP and its supporters have fiercely opposed efforts to ensure that classroom instruction is properly balanced. Finkin and Post have led the academic attack on the notion, advanced by several critics of the contemporary academy, that instructors should evenhandedly present all sides of ideologically or politically controversial issues. “Any such obligation,” they argue, “would be flatly incompatible with a scholar’s accountability to professional standards.”⁴⁷ To support this argument, they point out that it would require biologists to give equal time to the theory of intelligent design. This is a somewhat extreme formulation of the notion of political balance. Few critics would actually require that precisely equal time be assigned to all intellectual theories regardless of their scholarly merit. Nevertheless, the extent to which Finkin and Post recoil from the idea of teaching intelligent design is also telling: “To require a biologist to give equal time to a theory of intelligent design, simply because lay persons who are politically mobilized believe this theory, is to say that a scholar must in the name of political balance present as credible ideas that the scholarly profession repudiates as false.”⁴⁸ Instead, scholars should “use

46. ENSURING ACADEMIC FREEDOM, *supra* note 13, at 13 (italics omitted).

47. FINKIN AND POST, *supra* note 36, at 103.

48. *Id.* at 103.

disciplinary standards, not political standards, to guide their thinking.”⁴⁹ This is because “the concept of balance makes sense in the context of academic freedom only by reference to the professional norms of a relevant scholarly community.”⁵⁰

This discipline-centric notion of balance has been adopted by the AAUP as a means of further insulating classroom instruction from oversight to ensure the absence of political indoctrination. In *Ensuring Academic Freedom*, the AAUP adopts a strong position limiting the requirement of balance to the notion that instructors must only present those arguments that are considered “essential” within their discipline and, even then, insisting that the final decision must be left to the discretion of each instructor:

Whether a specific matter or argument is essential to a particular class or what weight it should be given is a matter of professional judgment, based on the standards of the pertinent disciplines and consistent with the academic freedom required if the disciplines themselves are to remain capable of critical self-reflection and growth.⁵¹

The AAUP/Finkin-Post argument provides a convenient means of minimizing the “balance” requirement to the point of meaninglessness. The idea that “balance” could properly be assessed only within the norms of a particular discipline presumes that all academic disciplines are themselves fully balanced. To the extent that many disciplines have become ideologically imbalanced, as numerous studies have shown, the AAUP/Finkin-Post argument becomes a license for politicized academic communities to permit only the leeway that their own ideological commitments support.

To understand the way in which Finkin and Post have drained the concept of meaning, it is best to consider a discipline, like Middle East studies, which has been widely criticized for the serious ideological imbalances within the discipline. Under the Finkin-Post doctrine, Middle East studies departments need never provide balanced presentations of any topic within their discipline as long as they follow three simple steps: first, establish dominant ideological positions within the discipline; second, refuse to provide any concessions to dissenting viewpoints; third, limit new faculty hires to scholars who share the discipline’s dominant ideological positions. As long as these three steps are consistently followed, the Finkin-Post doctrine will insulate the discipline from any requirement of balance, since the notion of balance is defined in terms of the discipline’s professional norms. Indeed, the more thoroughly the discipline stamps out dissent, the less susceptible it is to the challenge that it lacks academic

49. *Id.* at 104.

50. *Id.* at 101.

51. *ENSURING ACADEMIC FREEDOM*, *supra* note 13, at 13 (italics omitted).

balance. The best part of the Finkin-Post doctrine is that those who work most adamantly to stamp out dissent from within the discipline are seen as the champions of academic freedom, while those who seek balance can be derogated as enemies of the doctrine.

E. Bias

The final salient characteristic of political indoctrination is instructional bias. This issue is subtly different from academic balance, although the two issues often overlap. Instructional bias, in this sense, occurs when an instructor creates an atmosphere which is objectively offensive to some students based upon their intellectual point of view. In extreme cases, hostile environments are maintained for students who disagree with the professors' positions. This instructional bias must be distinguished from the situation that exists where instructors properly subject students' ideas to intense, even withering criticism, in an even-handed and professional manner. Instructional bias tends to be indoctrinating, because it tends to foster conditions in which students accept professorial pronouncements on controversial topics without the possibility of meaningful engagement or dissent.

Here again, the AAUP has worked to undermine the concept of professorial bias and to insulate classroom instruction from oversight to ensure unbiased activity. Historically, the AAUP recognized the importance of mutual intellectual respect within the classroom. For example, the AAUP's *On Freedom of Expression and Campus Speech Codes* requires instructors to "foster an atmosphere respectful of and welcoming to all persons."⁵² Thus, for example, the AAUP acknowledged that it is a "breach of professional ethics" for an instructor to ridicule a student in class for advancing an idea grounded in religion or politics.⁵³ Since its report on *Freedom in the Classroom* (2007), however, the AAUP has rebuffed efforts to hold instructors accountable for biased classroom presentations, even when the instructor goes so far as to create a hostile environment for students. Indeed, the AAUP has attacked the very idea of a "hostile learning environment," as if it were the concept itself and not its various manifestations that were the graver threat to academic freedom:

[T]he current application of the idea of a "hostile learning environment" to the pedagogical context of higher education presupposes much more than blatant disrespect or harassment. It assumes that students have a right not to have their most cherished beliefs challenged. This assumption contradicts the central purpose of higher education, which is to challenge

⁵² AM. ASS'N OF UNIV. PROFESSORS, ON FREEDOM OF EXPRESSION AND CAMPUS SPEECH CODES (1994), available at <http://www.aaup.org/file/freedom-of-expression-campus-speech-codes.pdf>.

⁵³. See FREEDOM IN THE CLASSROOM, *supra* note 28.

students to think hard about their own perspectives, whatever those might be.⁵⁴

This objection confuses the concept of a “hostile learning environment” with certain alleged but unspecified abuses of the concept. It creates a straw-man argument which can readily be defeated, rather than confronting the more difficult problem that arises when professorial bias *discourages* students from thinking hard about their perspectives rather than challenging them to do so.

III. THE ROBINSON CASE

The need to distinguish academic freedom from political indoctrination can be illuminated by a deeper examination of the William Robinson case, which is briefly introduced above. Robinson is the sociology professor at the University of California at Santa Barbara (UCSB) who became a national cause célèbre after sending students in his undergraduate course on Sociology of Globalization an email entitled, “Parallel images of Nazis and Israelis,” which at least two of his undergraduate students found to be both anti-Semitic and deeply offensive. The email juxtaposed photographs of Israeli soldiers in Gaza with those of Nazi soldiers during World War II, commenting that “Gaza is Israel’s Warsaw—a vast concentration camp that confined and blockaded Palestinians”—and that “We are witnesses to a slow-motion process of genocide.”

One of Robinson’s students filed a complaint with UCSB’s Academic Senate, saying that when reading Robinson’s email, she “felt nauseous that a professor could use his power to send this email” and felt that she “had to drop the class.”⁵⁵ Another student, referring in his complaint to his family’s experience in the Holocaust, asked rhetorically, “How could one continue to participate in this professor’s class?” and disclosed that, “I felt as if I have been violated by this professor.”⁵⁶ Upon receiving the students’ charges, the university’s Academic Senate began but then hastily abandoned an investigation to determine whether Robinson’s actions violated UCSB’s Faculty Code of Conduct.⁵⁷ The dismissal was enthusiastically applauded within the higher education community, and an

54. *Id.*

55. *First Student Complaint*, COMM. TO DEFEND ACAD. FREEDOM AT UCSB, sb4af.wordpress.com/robinson-case/charges-responses/first-student-complaint/ (last visited Oct. 31, 2012).

56. *Second Student Complaint*, COMM. TO DEFEND ACAD. FREEDOM AT UCSB, sb4af.wordpress.com/robinson-case/charges-responses/second-student-complaint/ (last visited Oct. 31, 2012).

57. MIT’s Noam Chomsky, for example, scolded Santa Barbara’s Chancellor Yang that “[i]t is, in my opinion, entirely improper that the charges in this case should even be considered, let alone be submitted for investigation.” Letter from Noam Chomsky to Chancellor Yang, COMM. TO DEFEND ACAD. FREEDOM AT UCSB, sb4af.wordpress.com/letters-of-support/letters-from-professors (last visited Oct. 31, 2012).

investigation was then commenced to determine why the inquiry was brought in the first place.⁵⁸ Some of Robinson's defenders went so far as to insist that acquitting Robinson was not enough and urged public condemnation of the complainants.⁵⁹

It is a sad commentary on the state of academic freedom discourse that Robinson's supporters see no irony in their efforts to publicly condemn students for speaking out against professorial abuse. In this case, the allegations against Robinson, if true, reflect several of the characteristics of political indoctrination. First, it is at best unclear as to whether Robinson's intent was educative and whether he saw these materials as being relevant to course objectives. One student complainant asked Robinson why he had distributed the now-infamous email: "I just wanted to know what this information was for?" She asked, "Is it for some assignment or just information that you put out there for us?" According to the student, Robinson responded, "Rebecca, just for your interest . . . I should have clarified."⁶⁰ To the extent that Robinson means that this information was not intended to advance instructional objectives—which is certainly one plausible interpretation of this ambiguous exchange (for which we have only the student's account)—his response could be taken as an admission that it was extraneous to the course and, perhaps, that it was not even intended for educative purposes. There can be no question that Robinson's email addressed a controversial topic from a one-sided perspective. More information would be required to determine whether his course content, taken as a whole, involved a persistent intrusion of such interventions and whether balance might be discerned when this communication is viewed in

58. The American Association of University Professors, for example, applauded the dismissal of charges, noted that the academic senate investigation was handled, and admonished the administration rather scoldingly to "cooperate fully with the as it proceeds with its study." Letter from Anita Levy, Assoc. Sec'y, AAUP, to Henry T. Yang, Chancellor, COMM. TO DEFEND ACAD. FREEDOM AT UCSB, *available at* <http://sb4af.wordpress.com/letters-of-support/letters-from-scholarly-orgs/>. Numerous academics criticized the perceived role of the Anti-Defamation League in advocating on behalf of the two students. *See, e.g.* Letters from Professors, COMM. TO DEFEND ACAD. FREEDOM AT UCSB, <http://sb4af.wordpress.com/letters-of-support/letters-from-professors/> (last visited May 17, 2013).

59. For example, UCLA anthropologist Sondra Hale argued that it is "not enough to dismiss the charges," urging that "the attack on Professor Robinson's academic freedom. . . be publicly condemned." Letter from Sondra Hale to Professor Joel Michaelson, COMM. TO DEFEND ACAD. FREEDOM AT UCSB, *available at* sb4af.wordpress.com/letters-of-support/letters-from-professors. Similarly, Professor Alan Nasser of Evergreen State College argued that "[t]his condemnation is essential to preserve full and fair discussion within the most important of the U.S.'s civic institutions. . . . Further, the attacks must be condemned to protect faculty and students from wasting valuable time and energy defending themselves against frivolous allegations and political repression." Letter from Alan Nasser To Whom It May Concern, COMM. TO DEFEND ACAD. FREEDOM AT UCSB, *available at* sb4af.wordpress.com/letters-of-support/letters-from-professors.

60. *First Student Complaint, supra* note 55.

the broader context of the course as a whole. Finally, it must be emphasized that the allegations here are not merely that Robinson presented material in an imbalanced fashion but that his inflammatory approach created a hostile environment for at least some of his students.

Absent a full investigation, it is impossible to determine whether any of these criteria are met. What is striking, however, is the vehemence with which so many academics challenged even the notion that these claims should be investigated. If the allegations are true, then Robinson's communication to his students was apparently tendentious, polemical, extraneous, one-sided and inflammatory. These characteristics should, under a traditional analysis, exempt them from the doctrine of academic freedom. The modern tendency to ignore these characteristics—if not indeed to celebrate them—has given plausibility to the claim that Robinson was merely exercising his academic freedom.

CONCLUSION

Political indoctrination is different from academic instruction in ways that matter. Recent efforts by the AAUP and others to efface these differences can only do damage to the doctrine of academic freedom. Other collateral damage will include a lessened focus on critical reasoning skills, dilution of instructional programs, a coarsening of intellectual discourse, and an increasing bias in higher education. Unfortunately, the trend towards conflating academic freedom with political indoctrination has only accelerated in recent months. As we have seen, late last year Penn State's Senate Committee on Faculty Affairs moved, subject to the president's approval, to delete the explicit exception for political indoctrination from Penn State's exceptionally strong policy. The Penn State case provides in microcosm a view of the problem now brewing across American academia. The proposed amendment would delete this seemingly unobjectionable statement on political indoctrination: "It is not the function of a faculty member in a democracy to indoctrinate his/her students with ready-made conclusions on controversial subjects."⁶¹ The amendment then deletes the following language from the document:

No faculty member may claim as a right the privilege of discussing in the classroom controversial topics outside his/her own field of study. The faculty member is normally bound not to take advantage of his/her position by introducing into the classroom provocative discussions of irrelevant subjects not within the field of his/her study.⁶²

61. SENATE COMMITTEE ON FACULTY AFFAIRS OF THE PENNSYLVANIA STATE UNIVERSITY, REVISIONS TO POLICY HR64: ACADEMIC FREEDOM (ADVISORY AND CONSULTATIVE) 1, 4–5 (Dec. 10, 2010), *available at* <http://www.senate.psu.edu/agenda/2010-2011/dec2010/appd.pdf>.

62. *Id.* at 5.

It should be emphasized that this proposed amendment would leave untouched various other provisions which serve similarly beneficial purposes and that the policy as amended would be far from the worst in higher education. It would just no longer be one of the best.

Critics of the academic establishment have described Penn State's long-standing academic freedom policy, HR 64, as a "model" policy,⁶³ the "most powerful statement of the meaning of academic freedom at any university,"⁶⁴ and even "the only academic freedom provision . . . worthy of the name."⁶⁵ The substantive HR 64 provisions have a particular punch at Penn State, where students have enjoyed an unusual procedural right to assert their own academic freedom rights against faculty encroachments. Among the academic establishment, Penn State's policy has been viewed rather less favorably. Indeed, Cary Nelson has fumed that "Penn State had one of the most restrictive and troubling policies limiting intellectual freedom in the classroom that I know of."⁶⁶

HR 64, as previously amended in 1987, defines "academic freedom" as "the principle of self-direction in inquiry and in the acquisition of knowledge in research, teaching, and learning, so long as this is undertaken within the framework of established scholarly methodology and professionalism."⁶⁷ The policy stresses faculty obligations "respecting the rights of others to learn"⁶⁸ and emphasizes that each "faculty member agrees at all times to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he/she is not an institutional spokesman."⁶⁹ Moreover, the policy provides that faculty members are "responsible for the maintenance of appropriate standards of scholarship and teaching ability, and for not persistently intruding material which has no relation to their subjects."⁷⁰ The proposed amendment would retain all of these provisions.

Nevertheless, the proposed amendment would delete this seemingly unobjectionable statement on political indoctrination: "It is not the function of a faculty member in a democracy to indoctrinate his/her students with

63. Sara Dogan, *Letter from the National Campus Director*, STUDENTS FOR ACAD. FREEDOM (Sept. 10, 2007), <http://www.studentsforacademicfreedom.org/letters/2515/welcome-back-to-campus>.

64. *Id.*

65. Stanley Fish, *We're All Conservatives Now*, N.Y. TIMES, Dec. 20, 2010, (quoting David Horowitz), available at <http://opinionator.blogs.nytimes.com/2010/12/20/were-all-conservatives-now/>.

66. Ashley Thorne & Steve Balch, *Free to Indoctrinate: The AAUP Applauds Penn State's Retreat from Academic Freedom*, NAT'L ASS'N OF SCHOLARS (Dec. 14, 2010), http://www.nas.org/articles/Free_to_Indoctrinate_The_AAUP_Aplauds_Penn_StatesRetreat_from_Academic_Fr.

67. SENATE COMMITTEE, *supra* note 2.

68. *Id.* at 3.

69. *Id.* at 4.

70. *Id.* at 4.

ready-made conclusions on controversial subjects.”⁷¹ The amendment then deletes the following language from the document:

No faculty member may claim as a right the privilege of discussing in the classroom controversial topics outside his/her own field of study. The faculty member is normally bound not to take advantage of his/her position by introducing into the classroom provocative discussions of irrelevant subjects not within the field of his/her study.⁷²

This language, which the proposed amendment would jettison, has served as an important protection for student academic rights. As Provost Rodney Erickson has explained the policy, “Students must be free to express their opinions without fear of ridicule, intimidation, or retaliation by any instructor.”⁷³ For this reason, the provost cautioned that “[i]nstructors should be mindful of their relationship to students and, consistent with HR 64, avoid political or philosophical statements or appearances that may be interpreted by students as biases or proselytizing.”

The thrust of these changes is to insist that academic freedom—the “cornerstone of the university as a community of scholars”—includes not only the “acquisition of knowledge in research, teaching, and learning” as those terms are traditionally understood, but also (and equally) those classroom practices which can fairly be described as political indoctrination on controversial subjects which are outside the professor’s field of expertise and irrelevant to the course of study.⁷⁴ Within Penn State’s faculty senate, faculty members debated the precise language in the proposed amendment at length, yet there were reportedly “no substantive disagreements” as to whether the changes should be made.⁷⁵ Within the broader academic community, the changes have been cheered by those who consider Penn State’s long-standing policy to be too restrictive. Cary Nelson has claimed that the language the proposed amendment would

71. *Id.* at 4–5.

72. *Id.* at 5.

73. Rod Erickson, Message from the Executive Vice President and Provost, dated August 22, 2008, available at <http://www.sociology.psu.edu/faculty%20and%20staff%20information/Teaching%20Resources/HR64%20SenatePolicy20-00-Academic%20Freedom.pdf>.

74. *Id.* at 1, 4–5.

75. Professor Thomas Beebee, who co-chairs the subcommittee that managed the amendment through the Faculty Senate, has reportedly claimed that he agrees with the statement on political indoctrination which his subcommittee deleted but that he and his colleagues believed that it would be better to retain only the policy’s more general expression of this principle. See Anne Danahy, *PSU Reworks ‘Academic Freedom,’* CENTRE DAILY TIMES, Jan. 8, 2011, available at <http://www.centredaily.com/2011/01/08/2441361/psu-reworks-academic-freedom.html#ixzz1AplihJ95>. This rationale, if correctly reported, is patently disingenuous, since it makes no sense to actively delete a clear and specific statement which one believes to be correct on the grounds that you prefer a broader and vaguer formulation—unless one has something to hide.

remove is “the normal human capacity to make comparisons and contrasts between different fields and between different cultures and historical periods. The revised policy is a vast improvement.”⁷⁶ Similarly, one higher education blogger called some of the HR 64 provisions “absolutely appalling attacks on academic freedom,” and argued that the policy as amended would be “dramatically improved.”⁷⁷ The National Association of Scholars (NAS) shot back that this apparent AAUP endorsement of Penn State’s amended policy shows that the organization “no longer understands” academic freedom, which is “its primary ideal.”⁷⁸ NAS argues “that the revisions are a troublesome invitation to faculty members to engage in conduct that serves students poorly and ultimately undermines academic freedom.”⁷⁹

Sadly, NAS may have gotten the better of this argument, but they remain very much an isolated voice of dissent. The academic establishment today is moving quickly in the wrong direction when it comes to the problem of political indoctrination. If this trend continues, the idea of academic freedom, as interpreted by its academic expositors, will become so broad, thin and diffuse as to become indefensible by any but the truest believers and unpalatable to an American public which has previously been disposed to support it.

76. Thorne & Balch, *supra* note 66.

77. John K. Wilson, *Penn State Senate Moves to Restore Academic Freedom*, COLLEGE FREEDOM BLOG (Dec. 12, 2010, 5:28 PM), <http://collegefreedom.blogspot.com/2010/12/penn-state-senate-moves-to-restore.html>.

78. Thorne & Balch, *supra* note 66.

79. Peter Wood, *Is Academic Freedom a License to Indoctrinate?*, THE CHRON. OF HIGHER EDUC. (Dec. 23, 2010), available at <http://chronicle.com/blogs/innovations/is-academic-freedom-a-license-to-indoctrinate/28198>.

ADVOCACY VERSUS INDOCTRINATION: A REPLY TO KENNETH MARCUS

CARY NELSON*

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I. WHAT POLITICS IN THE CLASSROOM IS ACTUALLY ABOUT

As we all know, “politics,” the widely savored third rail of this generation’s pedagogical debates, covers much more than endorsements for candidates running for political office. Even a strictly institutional and governmental definition of politics—covering both elections and the full range of subjects of state and national legislation—engages more areas of public policy and social life than one could readily list comprehensively, from funding for public education to national defense policy to health care regulation to constitutional rights. Scores of such subjects at any time are the objects of public debate, discussion, analysis, and passionate opinion. Topics like these intersect with scores of academic disciplines and hundreds of course topics.

Making that case does not entail invoking the quite different argument that all instruction is inherently political—a potentially deeper claim about the penetration of politics into daily life and the political nature of all thought. The case I am making here merely requires recognizing that course subject matter often intersects with political issues, concerns, and controversies. Faculty members may well believe that responsible instruction requires exploring those connections and offering evaluations of their character. The freedom to do so—I would argue—is essential to

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maintaining a vibrant liberal arts tradition in higher education. It is particularly ironic that the National Association of Scholars (NAS), which rails endlessly against politics in the classroom, also sees itself as a champion of a traditional liberal arts education¹, for that is precisely what the broad campaign against political advocacy would eviscerate.

At least where candidate endorsements are concerned, many faculty members prefer to keep their preferences to themselves. Others may offer occasional political asides as a way of communicating their values, rather than as a way to recruit students for candidates of their choice, though it is best to withhold such remarks until a relationship of trust is established with a class. But for faculty members to maintain the illusion of neutrality across the full range of contentious state, national, and international subjects would leave much classroom debate impoverished.

Of course faculty members must avoid imposing their views on their students, but it is easy enough for them to voice their own opinion while encouraging debate. They can honor alternative views, withhold their own views strategically, adopt the opposition's arguments as a temporary debate strategy, and so forth. They can also assign students to research different views and present the results in class. A little humor about their own convictions can go a long way toward empowering students to voice alternative positions and make it clear that professors are not insisting their students agree with them.

Encouraging students to disagree with professors not only produces a more interesting classroom, but it also empowers students for future responsibilities. And it can generate moments when faculty members change their minds, a particularly valuable pedagogical experience. The idea that advocacy necessarily leads faculty members to suppress alternative opinions has no pedagogical or psychological basis. It can have a basis in individual character, but that is a personal weakness that colleagues should address, not a rationale for universally constraining free speech in the classroom.

Should a professor of constitutional law withhold his or her reading of the Second Amendment, limiting a lecture to summaries of other peoples' arguments? Should a literature professor analyzing a group of Langston Hughes poems about the politics of racism hide his or her own views about the significance of racism in American life? Should a professor of the history of art offer no opinions about the effectiveness of the political paintings reproduced in the course textbook? Should a music professor avoid judgments about the persuasive power of political music? Should a faculty member training social workers remain silent about the effects current legislation might have on the clients students will be serving?

1. See generally *NAS Overview*, NAT'L ASS'N OF SCHOLARS, <http://www.nas.org/about/overview>, (last visited Mar. 29, 2013) (providing portal access to a variety of sources in support for this assertion).

Should a faculty member teaching an ecology or geology class suppress what he or she believes to be the scientific consensus about controversial topics like global warming? Should political science or rhetoric professors refrain from analyzing and evaluating political arguments during an election season? Should a philosophy professor guard against comments about the coherence or social consequences of contemporary political philosophies? Should a history professor properly offer no moral judgments about the past or present actions of nation states? Should economics professors analyzing the 2008 recession suppress their views about the interface between congress and the financial services industry? Should a professor of medicine refrain from criticizing the impact the politics of health care will have on the medical care students will be able to deliver when they graduate?

This list of examples, which may already try a reader's patience, could obviously be substantially expanded. I offer it so that readers can understand how pervasive politically charged issues are. They touch all disciplines and all departments. Moreover, I have limited myself in the paragraph above to political concerns that directly correlate with disciplinary subject matter. But these matters overlap. That constitutional law professor in the first sentence could easily have occasion to comment on topics in a number of the other examples. The literature, art, and music professors might choose to make comparisons with other forms of political art. Many of these faculty members might have reason to reference global warming. Philosophy professors not uncommonly have wide cultural interests that cross many disciplinary boundaries. In "Academic Freedom and Political Indoctrination" Kenneth Marcus decries the American Association of University Professors' (AAUP's) "efforts to eliminate barriers between politics and academia," but in all the examples I have cited no such barriers exist. Academic freedom protects faculty members' right to comment on the political matters listed above. Mr. Marcus is actually trying to create barriers where there are none.

The right has created a fictional monster, an undefined and undifferentiated beast called "politics," that forces its way into a hitherto innocent, Edenic classroom. One bite of the political apple risks casting an instructor out of the garden. Worse still if he or she develops a taste for the fruit of the poisoned political tree. Then he or she can end up on David Horowitz's growing list of dangerous professors.²

"Politics in the classroom" actually means a thousand different topics germane to the subjects at hand. Politics is not one thing. Whether "politics in the classroom" is even a valid category for the content it embraces is itself debatable, given its myriad registers, but in any case it is anything but a unitary one. Indeed faculty members commonly forge convincing

2. See generally DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* (2006).

connections between subject matter and political issues that neither their students nor their colleagues would anticipate. Consider the case of a professor teaching a statistics course, who habitually used politically charged contemporary examples to spark student interest and persuade them that statistics actually does matter. During the Vietnam War he regularly cited battlefield body counts as a way of establishing the interpretive and political nature of statistical claims. He was also thereby casting doubt on military reports about the progress of the war. Should he have been prohibited from using such examples?

If we established a strict firewall separating all the political issues above from the academy, just what would be left on the academic side? What would students be missing, and how would education be impoverished, if all faculty members held their tongues on these and thousands of other politically charged matters? A conservative argument runs that students would be better off were that the case, that students would be freer to adopt their own positions if faculty members hid theirs.³ Of course students are exposed to conflicting opinion through newspapers, radio, television, the Internet, campus lectures, and dormitory conversation. The idea that faculty opinion, when freely expressed, trumps all these influences and towers over their lives in some categorically definitive way considerably exaggerates the half-life of classroom experience. What is arguably more important is that a rigidly neutral education deprives students of direct experience of informed advocacy.

If all classroom political advocacy were prohibited, would an instructor be free to say that democracy is the best known form of government? Could an instructor press the argument that electoral participation is a civic duty? Could he or she advocate for the political benefits of free markets? Could he or she criticize regimes that deny basic human rights? Could one argue that the forced starvation of Ukrainians in the 1930s and the Holocaust of the 1940s were fundamentally evil?⁴ Could one claim that 1947's UN Resolution 181 gave Israel the political warrant to exist as a nation state?

What credible definition of academic freedom could protect the faculty right to advocate for these positions, but not a range of opposing stands? That *not* voting is a valid form of citizen protest? That evil is a politically and culturally constructed concept and thus finally unprovable? That Israel is a colonialist imposition on Arab lands? Perhaps: "Academic Freedom guarantees US faculty the right to advocate for any political position that a majority of American citizens would support." Of course some societies essentially honor such a standard.

3. *Id.* Note that this is one of Horowitz's recurrent assertions which is repeated in each of his books about the contemporary Academy.

4. *See generally* TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN (2010).

Every four years virtually every department on campus offers courses devoted all or in part to studying the presidential elections. It is an opportunity to take advantage of student interest and to provide timely real world application of established disciplinary skills. It also represents an education in critical citizenship. Thus, students and faculty share and comment on political speeches and editorials. They visit highly partisan web sites and watch political videos. Evaluating the arguments put forward by politicians, talk show hosts, pundits, and members of the public alike also enables, directly or indirectly, evaluation of the candidates themselves. Some students obtain academic credit by working on political campaigns and writing papers about their experience. If students become better at judging our political process as a result, if they can imagine a higher standard for political discourse as a consequence, that is hardly regrettable. Should classes be restricted to studying only examples from past political campaigns? Would such a restriction be compatible with academic freedom? Can we impose limits on what students say about candidates during such class discussions? Are the students free to offer opinions but their teachers pledged to silence?

It is hardly in dispute that much public political debate relies on superficial sound bites, misrepresentation, and hyperbole. The public sphere can hardly be accounted a good training ground for learning reasoned argument at its best. A college or university education, on the other hand, should offer a very different model of what counts as sufficient evidence, let alone evidence at all. It should hold to a higher standard of what persuasive argument entails. It should demonstrate how personal conviction can be supported and dignified. Hearing a faculty member advocate for a position at length is one important component of establishing the difference higher education can make for students. Simply to equate advocacy with indoctrination, or to argue that every time a faculty member offers an opinion amounts to an effort to impose that opinion on students, largely eviscerates the potential for classroom dialogue.

Experiencing professorial advocacy about a variety of issues helps prepare students to think for themselves. The experience of advocacy is a critical component of personalizing both how to think and what it means to think. Effectively performed, classroom advocacy is not about transmitting “ready-made conclusions,” to cite one of the admonitions in the AAUP’s founding 1915 “Declaration.”⁵ It is about what it means to speak with conviction, about how one arrives at a state of conviction, and how to communicate one’s conclusions to others.

When it is well done, classroom advocacy has the character of a

5. AM. ASS’N OF UNIV. PROFESSORS, APPENDIX I: 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE, 298 (1915), *available at* <http://www.aaup.org/file/1915-Declaration-of-Principles-on-Academic-Freedom-and-Academic-Tenure.pdf> [hereinafter 1915 DECLARATION].

condensed scholarly paper. It can be thorough, detailed, and nuanced. It can be backed up by assigned readings of greater length. The AAUP has been issuing policy statements and reports for almost a hundred years that advocate for particular conclusions on political issues, and does so with meticulous care. Faculty members routinely assign essays, including their own, that advocate for particular politically inflected conclusions. Should they be free to advocate as scholars, but not as teachers? Should they be barred from assigning their own essays?

In the long run, the experience of campus models of informed advocacy often matters far more than the topics that occasion them. Issues evolve over time, but standards for informed debate, the character of advocacy that is worth emulating, can last very long indeed. Serious, committed advocacy is fundamental to what it means to profess, to be a professor, not only when faculty fulfill the role of giving advice in the public sphere, but also when they take stands in the classroom. Of course some faculty members will be better advocates than others, but drawing such distinctions is also part of an education.

That does not, of course, mean that faculty members are either expected or required to reveal their beliefs. The dispassionate presentation of opposing arguments is equally valuable. There is no moral, professional, or pedagogical necessity to hue to either practice. A college or university education is likely to include classes both from faculty who are frank about where they stand on certain issues and from faculty who never reveal themselves. An administrative decision to impose either inclination on all faculty members not only violates academic freedom, but also impoverishes the character of education. Students who never experience informed advocacy in the classroom may be less well prepared for the workplace and less effective as citizens—either in evaluating advocacy or in carrying it out themselves.

II. THE PERSISTENCE PRINCIPLE

The American Association of University Professors has regularly addressed the issue of politicized classroom speech—both in major policy statements and reports and in occasional public comments on high profile cases receiving media attention. The organization warned against faculty bringing controversial material unrelated to a course into the classroom in its 1940 statement.⁶ That document, however, was a collaborative, consensual text intended to attract multiple signatories, which it has. Over 200 organizations have endorsed it.⁷ It was also necessarily concise, and

6. AM. ASS'N OF UNIV. PROFESSORS & ASS'N OF AM. COLL. AND UNIV. [hereinafter AAUP], 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, 3 (rev. Jan. 1990), available at <http://www.aaup.org/file/principles-academic-freedom-tenure.pdf>.

7. *Id.* at 7–11.

the AAUP has recognized the need to elaborate on and clarify its arguments. Especially notable is the organization's 1970 clarification, which warned against the *persistent* intrusion of controversial political material unrelated to course content.⁸ Despite Mr. Marcus's assertion that the AAUP has abandoned the "persistent" standard, the organization has not done so.⁹

As I point out in *No University Is An Island*¹⁰, one reason it was necessary to make "persistent," rather than infrequent, intrusion of extraneous material into the classroom the standard was in order to allow students and faculty in any class to address compelling local or national events—from a campus employee strike to the assassination of a national leader to the outbreak of war. One would not want to see a math professor's tenure challenged because he or she talked in class about the attack on Pearl Harbor the morning after it happened, though a faculty member who chose not to do so would also be within his or her rights. Nor, I would argue, would one want to tell students they could not speak to such topics because they were not anticipated in the course syllabus. There was also a recognized need to avoid the chilling effect of surveillance protocols and elaborate disciplinary hearings triggered by one or two classroom asides.

What constitutes "persistence" is a matter of judgment, though the most obvious trigger for concern would be student complaints. Such complaints would be handled by a committee of faculty members and would be honored with due process. Again, contrary to Mr. Marcus' assertion, the AAUP's recent policy statements and reports do not abandon the warning against persistent introduction of extraneous political or controversial material into the classroom.¹¹ Rather we warn that what seems extraneous is itself partly a political determination. Disciplinary standards give some guidance, but interdisciplinary work alone, coupled with the evolution of disciplinary standards that Judith Butler emphasizes, gives reason to attend to and honor nuances embodied in individual classes and pedagogical agendas.¹² The danger in the application of the "persistence" standard is that some faculty will use it to fault inclusion of material that their colleagues regard as germane, not extraneous. The kind of obviously unacceptable examples that Mr. Marcus and others cite—such as repeated complaints about Israeli conduct in a calculus class¹³—would not be

8. *Id.* at 5.

9. *See, e.g.,* Kenneth L. Marcus, *Academic Freedom and Political Indoctrination*, 39 J.C. & U.L. 727, 736 (2013).

10. *See generally* CARY NELSON, *NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM* (New York Univ. Press 2010).

11. *Compare id.* with Marcus, *supra* note 9, at 736.

12. *See* Judith Butler, *Academic Norms, Contemporary Challengers: A Reply to Robert Post*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, 107, 107–42 (Beshara Doumani ed., 2006).

13. *See* Marcus, *supra* note 9, at 737.

defended by the AAUP.

The notion that any intellectual or political connections are possible does not mean that all such comparisons and contrasts are guaranteed in advance. The relevance has to be demonstrated. Sometimes both students and instructors will fail to do so adequately, but that does not mean that “anything goes,” as Mr. Marcus asserts the AAUP claims.¹⁴ Nor does it mean that the right to propose comparisons and contrasts between fields, across the whole field of human knowledge, should be denied. Mr. Marcus expresses astonishment that “if ‘all knowledge can be related to all other knowledge,’ then *nothing* is educationally extraneous,” but that is exactly the point. That is the position both I and the AAUP endorse. But it does not remove the necessity of convincing an audience that the connections you propose are valid. One also needs to emphasize that—for the university as a whole—its proper role is potentially to study the whole of the physical universe and the entirety of human culture. There are no limits except those our imaginations impose, no boundaries save those we erect. Anything can be the subject of university-based inquiry.

None of this changes the standard that the persistent intrusion of irrelevant political material is unacceptable. Nowhere does the AAUP argue or imply, as Mr. Marcus claims, that “instructors must be permitted to devote unlimited class time to controversial topics that are not related to the subject matter of the course.”¹⁵ Quite to the contrary. The organization’s position does not risk the “‘reckless freedom’ that comes with rejecting academic norms altogether.”¹⁶ Indeed I challenge anyone to imagine what that hyperbolic moral panic might entail. How would an institution abandon all academic norms? What would such an institution look like? How would it conduct its affairs? At best we are talking about a science fiction scenario, one, however, that I at least cannot imagine.

Some years ago, a president of a small Catholic college was confronted by complaints about a faculty member who regularly harangued his students with attacks against abortion rights in every course he taught, regardless of whether abortion rights had anything to do with the topic of the course.¹⁷ Proffering both carrot and stick, the president told the faculty member he would have to stop, but offered to schedule him for an entire class about abortion rights.¹⁸ The faculty member agreed, but the students

14. *Id.* at 739.

15. *Id.* at 737.

16. *Id.* at 739 (citing Judith Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11* (Beshara Doumani ed., 2006)).

17. See generally *Molloy College President Resigns*, *THREE VILLAGE TIMES* (Elmont), Feb. 26, 1999, <http://www.antonnews.com/threevillagetimes/1999/02/26/news/molloy.html>;

18. Interview with Martin Snyder, former president of Molloy College, in Rockville Center, NY (March 18, 2011).

voted with their feet.¹⁹ No one enrolled in the course. Although most of the students at the college were likely opposed to abortion rights, they were not interested in being hectored about the issue in the classroom.²⁰ The faculty member had received a very nicely targeted wakeup call about the marketability of his opinions.²¹

More complex still is deciding whether controversial or political subjects may in fact be relevant to the course. That was one of the topics taken up in the AAUP's 2007 report *Freedom in the Classroom*, drafted by a subcommittee of which I was a member.²² One of the central aims of that report was to preserve the broad intellectual freedom that makes for stimulating classroom discussion, indeed to credit the unpredictable and sometimes challenging or inspiring nature of human reasoning and imagination. Every student and teacher has likely experienced moments in class when an unexpected connection with or comparison to an apparently different subject has come to mind. It may be a comparison, analogy, or contrast between different historical periods, different disciplines, different art forms, different individuals, or different discursive traditions. Sometimes these insights are illuminating and sometimes they fall flat. In either case, speculation of this sort is essential to the life of the mind and thus essential to pedagogical freedom.

Some commentators, among them David Horowitz, want the much more restrictive horizon of a course catalogue description or syllabus to govern whether such "intrusions" of potentially political or controversial subjects is permissible.²³ Horowitz has also experimented with an argument that faculty members need to be professionally credentialed before they address other disciplines, despite the fact that faculty members acquire new areas of expertise in the course of their careers by way of reading, conversation, and attendance at scholarly meetings.²⁴ *Freedom in the Classroom* argues instead for a test of demonstrable relevance. It is up to the faculty member to persuade students that the political issues he or she raises are relevant, and for the most part colleagues and administrators must respect the faculty member's judgment in any disciplinary proceeding. Students, however, are free to contest the claim of relevance; academic freedom guarantees them that right.²⁵

Such a debate was, in effect, conducted on a national stage after University of California at Santa Barbara sociology professor William

19. *Id.*

20. *Id.*

21. *Id.*

22. *Freedom in the Classroom*, AM. ASS'N OF UNIV. PROFESSORS, <http://www.aaup.org/AAUP/comm/repA/class.htm> (last visited Mar. 29, 2013).

23. DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* xlii (2006).

24. *Id.* at xxvi.

25. *Freedom in the Classroom*, *supra* note 11.

Robinson sent an email to students in his 2009 “Sociology of Globalization” course. The email matched photos of the 2008-09 Israeli military action in Gaza with photos of the German occupation of the Warsaw Ghetto in World War II.²⁶ Depending on how Professor Robinson’s syllabus was structured, he certainly could have discussed the Mideast conflict and the status of Gaza in a globalization course, but the national debate focused instead on the provocative character of the photographic comparisons. The debate centered on whether they were anti-Semitic, and whether Professor Robinson was inappropriately imposing his views on his students.²⁷

As I point out above, not all historical comparisons are sound or illuminating. I considered Professor Robinson’s comparison to be facile, unpersuasive, and historically sloppy. He paired an image of armed Israeli soldiers walking through Gaza with an image of Nazi troops in Warsaw. The angles of the rifles each patrol held were close enough to suggest some similarity. Civilians pressed up against a wire fence in both contexts provided another analogy. It should be needless to point out that one could easily add a dozen similar photographs from other historical moments, perhaps thereby producing something like a universal “cruelties or iconography of war” photo spread. The analogy between Israel and Nazi Germany was, I felt, basically empty.

Nonetheless, in comments to the press at the time, I defended the potential relevance to the course and Professor Robinson’s right to send out the email. What Professor Robinson did was covered by academic freedom.²⁸ That doesn’t mean one needs to respect his reasoning, only that one needs to respect his rights. By the time he sent his now notorious email, comparisons between Israel and Nazi Germany were commonplace in the academy.²⁹ The comparisons between Israel and Nazi Germany that eventually became relatively common in academic fields like Middle

26. Arthur Gross-Schaefer, *Academic Freedom: Moving Away from the Faculty-Only Paradigm*, 16 J. OF LEG. STUDS IN BUS. 45, (2011), available at spme.net/cgi-bin/articles.cgi?ID=7593.

27. *Id.*

28. *Contra* Marcus, *supra* note 9, at 743–45.

29. The comparisons between Israel and Nazi Germany that eventually became relatively common in academic fields like Middle Eastern studies had their origins in the public sphere. HERBERT DRUKS, *THE UNCERTAIN ALLIANCE: THE U.S. AND ISRAEL FROM KENNEDY TO THE PEACE PROCESS* 50 (2001). The Soviet Union compared Israeli and Nazi military tactics after the 1967 Six Day War. *Id.* A generation later reports of comparisons between Nazism and Israeli policies appeared in major newspapers like *The Christian Science Monitor*, *The New York Times*, and *The Washington Post*. See ISRAEL STOCKMAN-SHOMON, *ISRAEL, THE MIDDLE EAST, AND THE GREAT POWERS* 79 (1984). Such comparisons then evolved to the point where they became a feature of anti-Israeli protest demonstrations. TOM LANTOS, *IN THE DURBAN DEBACLE: AN INSIDER’S VIEW OF THE UN WORLD CONFERENCE AGAINST RACISM* 17 (2002) (describing a placard reading “1940s Hitler 2000s Sharon” carried by a group in a demonstration at the 2001 UN conference in South Africa).

Eastern studies had their origins in the public sphere. Professor Robinson's views were not exceptional, which seriously undermines claims that he did not deserve tenure or should have been sanctioned. The protest about his email, moreover, suggests that students and community members were well armed against easy indoctrination to his views.³⁰ Indeed, Professor Robinson insisted at the time that students were free to disagree with him. UCSB initiated an investigation of the charges against Professor Robinson, an investigation that I considered both unwise and unwarranted because of its obvious chilling effect. Fortunately, the charges were dismissed after months of controversy.³¹

Curiously enough, I would now be quite ready to use Professor Robinson's photo array to stimulate class discussion of irresponsible or unwarranted historical comparisons. The use of his display as an example of ineffective comparison is hardly what Professor Robinson had in mind, but a possibility that demonstrates the unpredictable pedagogical utility of historical comparisons of all sorts. Hyperbolic scholarship or pedagogy can be productive when others make use of it. Faculty members commonly assign highly polemical readings because they generate good class discussions. The Robinson incident is now as well a case study in the politics of academic freedom.

III. POLITICS CAN BE PAINFUL

Professor Robinson was, in my opinion, advocating for his interpretation of contemporary political, military, and cultural practices. His email photo array was certainly highly charged and provocative, but I do not see it as part of an indoctrination program. While campus debates about the Middle East can be not only challenging but also coercive, the simple fact of placing the email before his students and arguing for its truth-value does not amount to intimidation or coercion. Moreover, it certainly provoked discussion and debate, leading some to question or defend their own or Professor Robinson's views with some of the detailed arguments one hopes a college or university education would provoke. In specific settings, discussions of evolution or global warming could be equally intense. I can understand that some of Professor Robinson's students were offended, but they were offended by what was, by then, a common analogy. It's the job of a college or university to confront such claims.

One purpose of a college or university to challenge preconceptions and beliefs. Such challenges are sometimes painful. Intellectuals can learn to enjoy having their beliefs questioned. Countering a well-articulated critique is stimulating. Changing your own thinking can be fulfilling. But some students with deep convictions will inevitably take challenges to their

30. See Marcus, *supra* note 9, at 744.

31. *Id.*

thinking personally. One may make an effort to critique the position and honor the person, but the categories readily get blurred emotionally. Mr. Marcus's language—"instructors properly subject students' ideas to intense, even withering criticism, in an even-handed and professional manner"³²—embodies the inherent risk whether he realizes it or not.

College or universities cannot protect every student from experiencing withering criticism by treating it as a "hostile environment."³³ They can work to discourage and defuse critique infused with rage, which mostly comes from other students, but a student who hears his or her cherished beliefs demolished for the first time may well be seriously unsettled. Mr. Marcus argues that "instructional bias . . . occurs when an instructor creates an atmosphere which is objectively offensive to some students based upon their intellectual point of view."³⁴ But if an instructor insists that dinosaur bones were deposited naturally over millions of years and a student accepts the idea that God placed them here to test our faith in a literal interpretation of the six-day creation story in Genesis, the classroom atmosphere may seem offensive. Some students may simply have to opt for an institution that reinforces their convictions, rather than one that subjects them to scrutiny.

This example suggests how students themselves might experience advocacy as an attempt at indoctrination. Nonetheless, a confusion about—or deliberate conflation of—the categories of advocacy and indoctrination animates many critiques of both campus debate and AAUP policy. Mr. Marcus's essay suffers from exactly that problem. He treats all advocacy as indoctrination and then rails against indoctrination as if were a widespread problem and as if the AAUP and its leaders had endorsed it, when we have done exactly the opposite. Thus he claims that the AAUP's *Freedom in the Classroom*³⁵ "condones instructors' use of classroom time to impose political views on students as long as the students have an opportunity to present contrary views."³⁶ Whereas what the AAUP condones is advocacy of certain political interpretations and analyses, while simultaneously making it clear that faculty cannot require students to adopt those views. The conflation of advocacy with indoctrination allows him to create a problem where none exists. There is plenty of advocacy in higher education, but relatively little indoctrination. Few of us need convincing that actual indoctrination is unacceptable.

In the now long-running national debates about the matter, paradoxically, unwarranted umbrage about "indoctrination" often focuses

32. Marcus, *supra* note 9, at 742.

33. *Id.*

34. *Id.*

35. AAUP, *Freedom in the Classroom* (2007), <http://www.aaup.org/AAUP/comm/rep/A/class.htm>.

36. Marcus, *supra* note 9, at 109.

on exactly those topics about which students are best armed to debate. This ability to resist alternative viewpoints comes from prior opinion or family and institutional schooling. Predictably, those are also among the topics debated most hotly in the media, sometimes by way of intellectually debased “balance” that credits opposing arguments even when scientific or disciplinary consensus would argue that only one view is correct.

Although I have argued here for a very broad notion of what counts as political—including all the ideological positions and institutional structures that condition and structure public life—it is worth noting in this context that the most narrow construction of politics, namely the contests for elective office, represent the area where students are most thoroughly immunized against faculty opinion. They may well have been thoroughly indoctrinated by friends, family, and media commentary, but they often, as a result, hold very strong opinions about their political preferences. Although elections are but one among many potential subjects of advocacy, I cannot imagine an area of student belief less susceptible to faculty persuasion. The point is that neither students with settled opinions nor those who have been endlessly exposed to alternative views are obviously ripe for brainwashing. The most reasonable conclusion is that those making the most noise about political “indoctrination” are actually more interested in suppressing faculty opinion with which they disagree.

Critics of classroom advocacy argue that leftist faculty members do not object to indoctrination because their fellow leftists are running our colleges and universities. In truth, though,³⁷ faculties of business, economics, agriculture, and engineering, among other powerful fields, characteristically display rather different political biases from those of their liberal arts colleagues. These critics often also point to party affiliations to prove that university faculties are “imbalanced,” though there is no guaranteed correlation between national party affiliation and a faculty member’s take on disciplinary issues, pedagogical practices, or university governance.³⁸

Faculty members in some disciplines are more likely to register as Democrats, whereas faculty in others are more likely to register as Republicans, but that is the result of the lure that varying disciplinary ideologies have for people of different political persuasions. Identified for two generations with efforts to expand the canon to include more women and minorities, literature departments are more likely to appeal to Democrats. Linked, except for Marxist economists, with business interests—and often well paid as financial service industry consultants—economists gravitate toward the Republicans. In any case, as I argue below,³⁹ there is no one-to-one correlation between party affiliation and

37. *Id.* at 106–07.

38. *Id.* at 114.

39. *See infra* text accompanying note 32.

campus politics. Put simply, registered Democrats often engage in conservative advocacy on key classroom and campus issues. Registered Republicans are often staunch defenders of free speech on campus. Attitudes toward faculty unionization is one widespread example of a disconnect between national party policy and faculty opinion. During collective bargaining campaigns at the University of Illinois and the University of Oregon, both I and other organizers commonly met professors who were registered Democrats but opposed collective bargaining for faculty members. Faculty members are no less tolerant of inner contradiction than any other humans, though they may be more adept at rationalizing it.

The most depoliticized way of describing the debate regarding political controversy in the classroom is to say that what is most fundamentally at issue is pedagogical philosophy. Thus Stanley Fish insists that the neutral study of the rhetorical character of different positions should be the gold standard of a proper pedagogy.⁴⁰ A pedagogy aimed, say, at making students better artists or citizens, he regularly repeats, is at best an unachievable fool's errand. A pedagogy promoting a particular political point of view is he says, worse still, a corruption of the college or university mission.⁴¹ On that basis Fish should take a very dim view alike of religious colleges and universities and proprietary institutions devoted to the profit motive.

Part of what is in fact particularly healthy about most secular institutions is the variety of pedagogical philosophies at work in their classrooms. Even in disciplines or departments that are more politically uniform, the philosophical agendas of classrooms will vary; moreover, those variations will play out in differently nuanced political implications. Whether left or right, a faculty member who discourages contrasting opinion will have a different impact on students from one who encourages free expression and debate. The rhetorical style and manner of advocacy, its relationship at once to assigned readings and classroom discussion, varies immensely. Both advocacy and indoctrination are dispersed and deconstructed by differing pedagogical practices, despite the fantasy of those who speak of Cambodian reeducation camps masquerading as American colleges and universities.

IV. THE MISGUIDED CAMPAIGN FOR "BALANCE"

Another way of putting this is that I am offering the unplanned variety of methods and opinions as an alternative to the persistent drumbeat demanding balance in the classroom presentation of controversial subjects.

40. See generally STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (NY: Oxford University Press, 2008).

41. *Id.*

Requiring that all instruction be balanced—a demand usually accompanied by vague demands for classroom oversight—would create a hostile environment for academic freedom and free expression in the classroom. As much as anything else, the demand for “balance” is a political appeal to what passes for public common sense, rather than an effort to reform instructional practices. It sounds eminently reasonable to those unfamiliar with the wide variation in the nature and degree of intellectual and disciplinary consensus in the academy. Disseminated in the public sphere and offered as an inducement to legislation, demands for instructional balance constitute an invitation to political intrusion into the academy, not an effort to reform university instruction.

Lack of balance, for Mr. Marcus, invites instructional bias, and “instructional bias,” he argues, “tends to be indoctrinating.”⁴² He offers variations on the equation—“Imbalanced presentations tend to have an indoctrinating effect”⁴³ or “indoctrination communicates an authoritarian disposition”⁴⁴—so that the cumulative effect is to turn a modest concern about unchallenged opinion into a clarion call against university instruction coalescing into unqualified brainwashing. The effects Mr. Marcus fears would require lock-step curricula policed by monolithic institutions. The world he warns against does not exist in the United States. Indeed Mr. Marcus seems undecided as to which moral panic he wants to commit to—chaos (anything goes) or totalitarianism (indoctrination). Balance apparently insures against both risks.

Yet many opposing arguments simply do not weigh equally on the scales of reason. Some opposing arguments have been widely discredited. Others have always been weak. Some arguments deserve equal time. Others do not. And the status of many disagreements changes over time. Faculty members need the academic freedom to make both individual and collective decisions about how to negotiate this shifting terrain. A uniform imperative for equal time would be a fundamental assault on intellectual integrity and the process of discovery.

In my own teaching I give equal time to opposing arguments when I think it is merited. On other occasions I cite positions I consider discredited only very briefly. Sometimes it is pedagogically useful to chart the history of evolving opinion and consensus, other times not. These are of necessity partly individual decisions. As background for my modern poetry courses, I maintain a web site with thousands of pages of background readings that aim to include every existing scholarly interpretation of over 700 modern poems, both those analyses I consider sound and those I consider silly.⁴⁵

42. Marcus, *supra* note 9, at 742.

43. *Id.* at 114.

44. *Id.* at 105.

45. See THE MODERN AMERICAN POETRY SITE, <http://www.english.uiuc.edu/maps> (last visited Mar. 28, 2013).

Many deal with political subjects such as Native American and African American history, racist violence, just and unjust wars, women's rights, genocide, and individual politicians. With the web site, to use the language of the 1915 Declaration, I provide my students with "access to those materials which they need if they are to think intelligently."⁴⁶ Then in class I often offer my own views and encourage students to offer theirs.

The demand for instructional "balance," perhaps surprisingly, can be most problematic when applied to areas widely regarded as controversial. Matthew Finkin and Robert Post offer a very thoughtful rejection of requirements for balanced classrooms in *For the Common Good*, taking up, among other examples, the case of intelligent design. "To require a biologist to give equal time to a theory of intelligent design, simply because lay persons who are politically mobilized believe this theory," they write, "is to say that a scholar must in the name of political balance present as credible ideas that the scholarly profession repudiates as false."⁴⁷ Mr. Marcus finds particularly telling "the extent to which Finkin and Post recoil from the idea of teaching intelligent design,"⁴⁸ and indeed it is, but not, as he apparently thinks, because they endorse political bias in science classrooms, but because they reject it.

Nothing could be more disabling and compromising to scientists than a requirement that they treat beliefs they regard as mass delusions with the same respect they award established scientific fact. While scientific consensus changes over time, some public misconceptions are simply false. This problem has become more clearly defined recently, as it has been demonstrated that doubt and controversy have been willfully manufactured in an effort to distort and undermine university science.

The most telling case is that of the tobacco industry, which created a controversy over whether smoking causes cancer that lasted for roughly half a century after the scientific case for the link was definitively established. Indeed, in 2006, a group of tobacco companies was convicted under the RICO statute⁴⁹ of conspiracy to deceive and defraud the public by distorting scientific evidence.⁵⁰ A whole series of "controversies" have been artificially manufactured by industries marketing carcinogenic products since the tobacco industry initiated the strategy in 1954.⁵¹ The aim

46. 1915 DECLARATION, *supra* note 5 at 298.

47. MATTHEW W. FINKIN and ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 103 (New Haven, Yale University Press) (2009).

48. *See* Marcus, *supra* note 9, at 741.

49. Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961–1968 (2012).

50. *See* ROBERT N. PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* (Berkeley: University of California Press) (2012).

51. DAVID MICHAELS, *DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON*

in each case was to sow doubt about the scientific consensus that the product was harmful. Media reports then typically treated each case as a “controversy” requiring a balanced presentation of the arguments from both sides. Balance in these cases was the opponent of science and a danger to public health. The most notable current example of the strategy is the controversy over whether global warming is real and whether it is a consequence of human activity.⁵²

Some controversies merit study as cultural phenomena—if a faculty member chooses to do so—but not as serious debates about the truth. For example, one might interrogate the 2008 controversy about whether Barack Obama was an American citizen without taking the arguments of the “birthers” seriously. International politics is rife with conspiracy theories that generate controversy but remain phantasmatic. One can certainly find some faculty members who endorse counter-factual convictions—there are faculty who believe the airplanes that struck the twin trade towers were remotely piloted by the CIA—but that does not elevate them to the level of issues that would benefit from balanced treatment. When the AAUP in 1915 urged faculty members to communicate “the divergent opinions of other investigators” to students,⁵³ it was referencing serious scholarly disagreements, not the delusional, misguided, or malicious views of non-specialist members of the general public.

Even within the campus itself, the practice of policing classroom “balance” would seriously distract faculty and administrators from the business of teaching and undermine academic freedom. In 2007 the system used by Pennsylvania State University to review student complaints about lack of balance in the classroom was tested. An English class, titled “Effective Writing in the Social Sciences,” scheduled a session on global warming after several students expressed an interest in writing about the topic. Background essays—one endorsing and one questioning global warming science—were assigned. Then, the instructor showed 20-30 minutes of Al Gore’s film “An Inconvenient Truth.” A student wrote several times to administrators to complain that the discussion of global warming had no place in an English class, even though the class was about *social science* writing. He also felt that the relative attention to the alternative positions was out of balance. The complaints were eventually dismissed, but only after the instructor and responsible administrators spent considerable time responding to repeated complaints from the same

SCIENCE THREATENS YOUR HEALTH (2008).

52. See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, RECOMMENDED PRINCIPLES & PRACTICES TO GUIDE ACADEMY-INDUSTRY RELATIONSHIPS (2012), available at www.aaup.org/eport/recommended-principles-practices-guide-academy-industry-relationships (describing the half-century long effort to undermine scientific consensus on multiple fronts, culminating in the controversy over global warming).

53. 1915 DECLARATION, *supra* note 5, at 298.

student.⁵⁴ The student, incidentally, had received a grade of “A” in the course.

Like David Horowitz, Mr. Marcus reserves a special level of distress for entire academic disciplines that he believes have become “unbalanced.”⁵⁵ Although most disciplines eventually heal themselves—partly through contact with and critique by faculty members outside their boundaries—it is true that intellectual distortion and bias can dominate a field for some time. Challenges by those outside the field are important correctives, but enforced correction by academics or administrators who are convinced that they know better creates the academic equivalent of thought police. One of the consequences of our system of academic freedom is that faculty members will sometimes individually or collectively make mistakes. Mr. Marcus is correct that academic freedom protects the right to make claims others can disprove. That is the price we pay for a system that offers more benefits than liabilities. But there is a limit. You are not protected from the consequences of making statements that demonstrate you are incompetent to teach in your discipline.

To demand that faculty members actually abandon the standards and consensus judgments of their disciplines, however, is to undermine the whole structure of academic knowledge. Yet, at the same time, we must find ways of protecting faculty members who break with disciplinary bias or consensus. One way faculty members do that is to adopt the standards of disciplines other than their own, a practice that academic freedom must also protect.

V. POLITICS IN THE PUBLIC SPHERE

As early as 1915, the AAUP recognized that faculty members have a special responsibility to offer analysis and advice in the public sphere, not simply to profess on campus.⁵⁶ Sharing the reasoned judgments and expertise of informed faculty with the public and with state and national legislators is indeed a core academic function. It is a natural corollary to the task of advancing and disseminating knowledge through publication. As a

54. See English 202A Academic Freedom Complaint Department Communications, DISCOVER THE NETWORKS, <http://www.discoverthenetworks.org/Articles/acadfreepsuebuhler.html> (last visited Mar. 25, 2013) (detailing the communication between the student and the school regarding the complaint).

55. See DAVID HOROWITZ & JACOB LAKSIN, ONE-PARTY CLASSROOM: HOW RADICAL PROFESSORS AT AMERICA’S TOP COLLEGES INDOCTRINATE STUDENTS AND UNDERMINE OUR DEMOCRACY (2009).

56. See 1915 DECLARATION *supra* note 5, at 295 (“The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable.”).

result, protection from institutional retaliation for such extramural speech has gradually been recognized as a central component of academic freedom itself. Indeed, it is one of the reasons the AAUP was founded. As Robert Post and Matthew Finkin argue persuasively in *For the Common Good*, however, distinctions between extramural statements that do and do not bear directly on a faculty member's expertise can be difficult to draw. Furthermore, institutional retaliation for controversial extramural political speech would have a chilling effect on faculty members' confidence that they could speak forthrightly in the classroom and in their professional publications. Finally, once a university takes responsibility for enforcing what the 1915 Declaration called "the tyranny of public opinion,"⁵⁷ it becomes difficult either to set limits to that task or to deny institutional responsibility for all faculty speech.

Mr. Marcus argues that academic freedom should be applied only to functions that are narrowly academic. However, faculty advice to the public and faculty extramural speech on controversial political issues are valuable public goods, requiring academic freedom encompass a broader range of issues than Mr. Marcus is willing to do. Moreover, it has been clear for some time that First Amendment protections do not extend to speech that offends private employers.⁵⁸ Now there is reason to fear that public employees may be sanctioned for speech related to their jobs when it meets with employer disapproval.⁵⁹ Mr. Marcus also suggests that elements of institutional mission statements—he mentions preparing students to be better participants in a democracy—should not be covered by academic freedom, but faculty in fact need the right to comment on such matters without fear of retaliation. Contractual guarantees can help protect faculty engaged in collective bargaining, but the majority of American faculty do not presently have that option. Protections built into faculty handbooks and linked to academic freedom remain the only option.

VI. CONCLUSION: IF IT IS NOT BROKEN

Political indoctrination in the classroom is a serious and disabling problem in many countries. Those same countries lack anything similar to the kind of academic freedom that American students and faculty members experience.⁶⁰ That is no accident. The two characteristics go hand-in-hand. Political indoctrination is not a systemic problem in American colleges and

57. *Id.* at 297.

58. See Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 567–74.

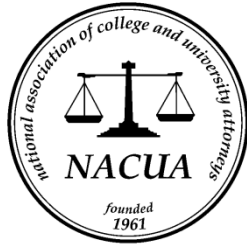
59. See CARY NELSON & STEPHEN WATT, ACADEMIC KEYWORDS: A DEVIL'S DICTIONARY FOR HIGHER EDUCATION 46–50 (1999) (discussing how the 2006 U.S. Supreme Court decision in *Garcetti v. Ceballos* poses a growing risk to faculty speech on institutional matters at public universities).

60. See generally SCHOLARS AT RISK, www.scholarsatrisk.nyu.edu (last visited March 30, 2013). The organization *Scholars at Risk* is an international network of institutions and individuals that tracks the stays of academic freedom in other countries.

universities. And we do possess a high degree of academic freedom.

On college and university campuses in the United States, the corrective measure for speech that is intolerant, oppressive, hostile, irrational, or ill-informed is more speech. That is the strategy behind the AAUP's long-standing position against campus speech codes.⁶¹ It is also the strategy we recommend for the rebuttable assertions on campus—those statements that could “be dismissed as intellectually unsupportable”—that so trouble Kenneth Marcus. A regime of surveillance and sanctions, whether imposed from within or without, would make American campuses repressive, if not now then later. That is the ultimate danger in what is now a generation's worth of scare tactics about a factitious crisis.

61. *See generally* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, FREEDOM IN THE CLASSROOM (2007), available at http://www.epi.soe.vt.edu/perspectives/policy_news/pdf/ClassroomFreedom.pdf.



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