

# THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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Volume 36

2009

Number 1

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## ARTICLES

### ***Bakke*, With Teeth? The Implications of *Grutter v. Bollinger* in an Outcomes-Based World**

Ann Mallatt Killenbeck 1

Much of the commentary following the Supreme Court's decision in *Grutter v. Bollinger* (2003) characterized it as a case that simply accepted the approach taken by Justice Lewis F. Powell, Jr. in *Regents of the University of California v. Bakke* (1978). This article takes issue with those assumptions, arguing that the manner in which the Court embraced the diversity rationale in *Grutter* makes it “*Bakke* with teeth,” a holding that allows affirmative action in the admissions process but also imposes significant obligations if an institution employs affirmative action. As part of this analysis the article offers a unique take on Justice O'Connor's discussion of “deference” in *Grutter*, stressing that her use of that term recognized only the right of individual institutions to choose their mission, and that true strict scrutiny was the analytic approach employed in the O'Connor opinion and remains the operative standard in its wake. Finally, the article stresses a reality that many institutions embracing affirmative action overlook: simply admitting a diverse group of students is not enough to truly comply with the mandates of *Grutter*. The article provides an overview of both the social science that makes that a reality and the ways in which institutions can and should act in order to make diversity rhetoric an educational reality.

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The article concludes that although *Heller* has been used to launch certain judicial and legislative challenges against college and university policies, institutions can withstand these challenges. Even if the Second Amendment is incorporated against the states, colleges and universities can defend their campus policies against concealed and non-concealed weapons if the institutions have clear state statutory delegations of firearm regulatory authority. Such express delegations will likely defeat both statutory arguments based on pre-emption and constitutional arguments based on individual rights.

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## ESSAY

### **After the Gold Rush: *Grutter*, Sander, and ‘Affirmative Action’ “on the run” in the Twenty-First Century**

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Professor Richard Sander’s groundbreaking work on ‘affirmative action’ in the legal academy documented well the fact of African-American under-achievement in the time it has been in place, locating the nut of that problem within the remedy itself, with implications following. But is that the right conclusion... is that the ‘whole story’? Anthony Baker takes a different look at the same, urging a qualitative review of Sander’s quantitative story, to more precisely map the problem’s true locus, and to more effectively craft appropriate solutions.

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## NOTE

### **Take a Knee: Applying the First Amendment to Locker Room Prayers and Religion in College Sports**

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As the team prepares to take the field or court before an athletic competition, the players may grasp hands and bow their heads while standing in a circle, or they may take a knee together in a locker room in preparation, not for words of wisdom or instruction from the coach, but for prayer. Pre-game prayer is a familiar tradition in a great number of public colleges and universities across the country. Despite the frequency of such prayers and other religious practices in college sports and the validity of concerns about First Amendment violations, few objections are raised and the issue is hardly ever litigated. This Note examines how courts, colleges, and universities have balanced the First Amendment concerns about the establishment and free exercise of religion and how they have dealt with the specific issue of religion and prayer in college athletics. It advocates for a judicial approach to locker room prayer that is vigorously protective of student-athletes and their right to be free from state-sponsored religious activity.

## DEDICATION

This issue of the Journal of College and University Law is dedicated to Captain Wendy Kosek, United States Air Force. From May of 2006 until May of 2007, Wendy was the editor-in-chief of the Journal. In that capacity she performed splendidly, overseeing the process by which submissions to the Journal appear in print as finely polished finished products. Upon graduating from the Notre Dame Law School in May of 2007, she resumed the Air Force career that she had begun in the fall of 2000, when she joined the Air Force Reserve Officer Training Corps upon enrolling as an undergraduate at Notre Dame. Her initial assignment was to Little Rock Air Force Base in Little Rock, Arkansas, but in June of 2009, she was sent to Baghdad, Iraq, where her task was to aid in the prosecution of Iraqi citizens who had been detained during the early years of the American occupation of Iraq and who are now being tried in Iraqi courts for a range of criminal offenses.

On August twenty-first of this year, while traveling in a convoy in Baghdad, Wendy was seriously injured when an improvised explosive device exploded underneath the military vehicle in which she was riding. Large chunks of shrapnel from the IED penetrated her right leg in several places, causing extensive injuries. After being evacuated to Camp Victory for triage, Wendy was flown to several military sites before reaching Brooke Army Medical Center in San Antonio, Texas, where she has had surgery to remove shrapnel and to repair bone damage to her right leg. She is now engaged in physical therapy that is designed to give her full use of her injured leg.

In gratitude for Wendy's service to the nation and in the hope that her recovery from the injuries that she suffered this past August will be complete, the faculty editors and the staff of the Journal dedicate this issue to her.

Rebecca Anderson, *Editor-in-Chief*

Bill Hoye, *Faculty Editor*

John Robinson, *Faculty Editor*

*BAKKE, WITH TEETH?:*  
THE IMPLICATIONS OF *GRUTTER V. BOLLINGER*  
IN AN OUTCOMES-BASED WORLD

ANN MALLATT KILLENBECK\*

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\* Professor Killenbeck is an Assistant Professor at University of Arkansas School of Law. Professor Killenbeck holds both a B.A. and an M.A. in English from the University of Nebraska. She earned her J.D. from the University of Nebraska and her Ph.D. in higher education, with an emphasis on law and public policy, from the University of Michigan. Professor Killenbeck wishes to acknowledge and thank the Journal’s anonymous reviewer for comments that strengthened the initial draft of this article. Professors Larry Alexander, Bryan Fair, and Goodwin Liu also reviewed the manuscript and offered criticisms that have been taken into account and improved the final product. In addition, a number of individuals at the University of Arkansas helped along the way, including Dean Cynthia Nance (both comments and summer research support) and Professors Don Judges, Mark Killenbeck, Rob Leflar, and Steve Sheppard. Finally, this Article is dedicated to the person who makes everything worthwhile, our daughter, Jessica Ann Marie.

## INTRODUCTION

On June 23, 2003, the Supreme Court handed down two rulings exploring whether group identity can be taken into account in college and university admissions policies. In the first ruling, *Grutter v. Bollinger*,<sup>1</sup> a narrow five to four majority held that the University of Michigan Law School had “a compelling interest in attaining a diverse student body”<sup>2</sup> and found that the policy at issue was narrowly tailored and, therefore, constitutional.<sup>3</sup> In the second ruling, *Gratz v. Bollinger*,<sup>4</sup> by a somewhat larger margin of six to three, the Court acknowledged that the *Grutter* principle controlled.<sup>5</sup> However, the Court held that a different admissions system employed by the University’s College of Literature, Science, and the Arts was not narrowly tailored and, therefore, unconstitutional.<sup>6</sup>

The decisions were both celebrated and condemned. Michigan’s President, Mary Sue Coleman, declared that the Court had handed the University and “all of higher education” a “tremendous victory,” a ruling “in support of affirmative action [that] will go down in history as among the great landmark decisions of the Supreme Court.”<sup>7</sup> The *New York Times* agreed, stating that the Court had taken “a historic stand for equality of opportunity.”<sup>8</sup> Affirmative action’s opponents felt differently. Terry Pell, President of the Center for Individual Rights, the organization that brought the suits, characterized the results as “mixed decision[s]” marking “the beginning of the end of race preferences,” maintaining that their “complexity . . . make it risky for most schools to rely [on] these means.”<sup>9</sup> The *Washington Times* mourned “a large step backward from the goal of a colorblind society,”<sup>10</sup> and the *Wall Street Journal* observed that “[a]nyone looking for legal, much less moral, clarity . . . was surely disappointed.”<sup>11</sup>

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1. 539 U.S. 306 (2003).

2. *Id.* at 328.

3. *Id.* at 333–43.

4. 539 U.S. 244 (2003).

5. *Gratz*, 539 U.S. at 268 (“For the reasons set forth today in *Grutter* . . . the Court has rejected” the argument that diversity is not a compelling interest).

6. *See id.* at 270 (“We find that the University’s policy . . . is not narrowly tailored to achieve the interest in educational diversity that [the University claims] justifies [its] program.”).

7. Press Release, University of Michigan, U.S. Supreme Court rules on University of Michigan Cases (June 23, 2003), available at <http://umich.edu/news/index.html?Releases/2003/Jun03/supremecourt2>.

8. Editorial, *A Win for Affirmative Action*, N.Y. TIMES, June 24, 2003, at A30 [hereinafter N.Y. TIMES Editorial].

9. Press Release, The Center for Individual Rights, Supreme Court’s mixed decision on race preferences (June 23, 2003), available at <http://www.cir-usa.org/releases/63.html> [hereinafter CIR Press Release].

10. Editorial, *Bad Law on Preferences*, WASH. TIMES, June 25, 2003, at A16.

11. Editorial, *Supreme Court Quotas*, WALL ST. J., June 24, 2003, at A16 [hereinafter WALL ST. J. Editorial].



Six years later the meaning of these decisions and the requirements they impose on institutions wishing to pursue racial diversity are still at issue.<sup>12</sup> In August, 2008, for example, the Office for Civil Rights (OCR) in the United States Department of Education issued a “Dear Colleague” letter in response to what it characterized as “numerous inquiries from postsecondary institutions, individuals and private organizations, about the impact” of the two decisions.<sup>13</sup> Stressing the “highly suspect nature” of “racial classifications,” the letter described the “parameters” within which OCR would assess affirmative admissions policies.<sup>14</sup> Roger Clegg, President and General Counsel of the Center for Equal Opportunity, characterized the statement as a “belated” but “helpful and legally sound description of what the Supreme Court held [in the *Gratz* and *Grutter* decisions].”<sup>15</sup> The National Association for the Advancement of Colored People (“NAACP”) Legal Defense Fund, on the other hand, condemned the letter as an attempt on the part of OCR “to further its efforts to subvert and give unnecessary pause to higher education institutions that are pursuing a racially diverse student population in a constitutional manner.”<sup>16</sup>

None of this is unexpected. Affirmative action has always been and likely will always remain a highly divisive issue, especially when examined under the arguably artificial light cast by litigation and political discourse. Professor Jack Greenberg was an Assistant Counsel for the NAACP Legal Defense and Educational Fund and litigated many of the most important civil rights cases decided between 1949 and 1984. He has noted that “[o]pposing sides in the war over affirmative action in higher education have generated a rat’s nest of arguments over facts, philosophy, and constitutional law.”<sup>17</sup>

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12. *Grutter* and *Gratz* both focused expressly and exclusively on racial diversity. That was not surprising, since the Court itself framed the question presented in those terms. See *infra* text accompanying note 140. Diversity properly understood is, however, about much more than that. See *infra* text accompanying note 42.

13. Letter from Stephanie J. Monroe, Assistant Secretary for Civil Rights (Aug. 28, 2008), available at <http://www.ed.gov/about/offices/list/ocr/letters/raceadmissionpse.html>.

14. *Id.*

15. Scott Jaschik, *Guidance or Spin on Affirmative Action?*, INSIDE HIGHER EDUC., Sept. 19, 2008, available at <http://www.insidehighered.com/news/2008/09/19/ocr>.

16. Statement of the NAACP Legal Defense Fund on Diversity in Higher Education (Sept. 19, 2008), available at <http://www.naacpldf.org/content.aspx?article=1323>.

17. Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1610 (2003). For a sampling of the literally hundreds of articles, pro and con, see the following symposia: *Post-Grutter: What Does Diversity Mean in Legal Education and Beyond?*, 35 PEPP. L. REV. 569–732 (2008); *Meeting the Challenge of Grutter—Affirmative Action in Twenty-Five Years*, 67 OHIO ST. L.J. 1–345 (2006); *From Brown to Bakke to Grutter: Constitutionalizing and Defending Racial Equality*, 21 CONST. COMMENT. 1–250 (2004); *From Brown to Grutter: Affirmative Action and Higher Education in the South*, 78 TUL. L. REV. 1765–2278 (2004); *On Grutter and*

Even the most cursory examination of the literature bears this out. For example, in the wake of the first higher education affirmative action case to reach the Court, *Regents of the University of California v. Bakke*,<sup>18</sup> Professor Derrick Bell described the sorts of programs countenanced by that decision as “modest mechanism[s] for increasing the number of minority professionals, adopted as much to further the self-interest of the white majority as to aid the designated beneficiaries.”<sup>19</sup> Then-Professor Richard Posner disagreed, characterizing group preference admissions policies as an “administrative convenience” and “a source of both economic injury and profound personal resentment to members of the excluded racial or ethnic groups . . . .”<sup>20</sup> Similar disputes arose after *Grutter* and *Gratz* were decided. A “Joint Statement” signed by some of the nation’s most prominent constitutional law scholars argued that the decisions “have affirmed the underlying values of diversity in higher education and of racial integration in American society [and] provide clear guidelines for institutions to use in designing inclusive admissions policies.”<sup>21</sup> But Professors Larry Alexander and Maimon Schwarzschild characterized them as “dubious as constitutional law” and argued that there is “overwhelming reason” to the effect that “preferential affirmative action is [not] a good thing.”<sup>22</sup>

What is surprising is the extent to which even those who favor affirmative action argue between and among themselves about the meaning of *Grutter* and *Gratz* and what those decisions require. For example, having carried the day before the Court, many of affirmative action’s champions now question both the propriety of the diversity rationale and the costs that the pursuit of diversity impose. Professor Bell, for example, argues that “the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing efforts to achieve racial

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*Gratz: Examining Diversity in Education*, 103 COLUM. L. REV. 1589–1639 (2003); *Affirmative Action: Diversity of Opinions*, 68 U. COLO. L. REV. 833–1229 (1997); *Regents of the University of California v. Bakke*, 67 CAL. L. REV. 1–255 (1979).

18. 438 U.S. 265 (1978).

19. Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 17 (1979).

20. Richard A. Posner, *The Bakke Case and the Future of “Affirmative Action,”* 67 CAL. L. REV. 171, 177 (1979).

21. A JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 26 (July 2003) [hereinafter JOINT STATEMENT]. The statement was signed by Professors Erwin Chemerinsky, Drew Days III, Richard Fallon, Pamela S. Karlan, Kenneth L. Karst, Frank Michelman, Eric Schnapper, Laurence H. Tribe, and Mark Tushnet.

22. Larry Alexander and Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 3 (2004).

justice.”<sup>23</sup> Professor D. Marvin Jones in turn maintains that “*Grutter* is a very conservative framework at war with the project of affirmative action” and that it “is not a victory, but a defeat in disguise.”<sup>24</sup> More tellingly, even those who agree with the holding in *Grutter* dispute the extent to which institutions adopting affirmative admissions policies need to pursue anything more than structural diversity, that is, simply identifying and matriculating a diverse class. Professor Dorothy A. Brown argues that “[s]tructural diversity without more . . . will not” achieve the goals embraced by the Court in *Grutter* because it “will not influence student outcomes.”<sup>25</sup> Dean Evan Caminker of the Michigan Law School disagrees, maintaining that “neither the majority nor concurring opinions ever suggested . . . that any post-admission programming efforts were a precondition for the validity of admissions-related diversity efforts.”<sup>26</sup>

My focus in this article is on key aspects of these debates. One common post-*Grutter* theme is that the decision simply provided the “fifth vote,”<sup>27</sup> that is, that it gave binding constitutional force to Justice Powell’s acceptance of diversity as a compelling educational interest in *Bakke*. I disagree. Rather, I argue that by clearly embracing the arguments that Michigan made at trial and on appeal, *Grutter* went further than Justice Powell did in *Bakke* and imposes stringent requirements on institutions using race as a factor in admissions decisions.

Michigan’s litigation strategy was intentional and well-crafted. The president of the University when the litigation began, Lee C. Bollinger, understood that “Justice Powell’s decisive opinion in *Bakke* . . . specifically precluded any justification of using race and ethnicity as factors in admissions as a ‘remedy’ for past societal discrimination.”<sup>28</sup>

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23. Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

24. D. Marvin Jones, *Plessy’s Ghost: Grutter, Seattle, and the Quiet Reversal of Brown*, 35 PEPP. L. REV. 583, 585 (2008).

25. Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 17 (2006).

26. Evan Caminker, *Post-Admissions Educational Programming in a Post-Grutter World: A Response to Professor Brown*, 43 HOUS. L. REV. 37, 40 (2006).

27. See, e.g., WALL ST. J. Editorial, *supra* note 11, at A16 (O’Connor’s opinion “has given [the Powell] view the fifth vote it needed to become the law of the land”); N.Y. TIMES Editorial, *supra* note 8, at A30 (“the court reaffirmed *Bakke* and proceeded to use it as a template”).

28. Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1590 (2003). The University studiously avoided embracing the only other constitutionally acceptable justification for employing race-based admissions criteria, the “compelling interest of remedying the effects of [its own] past intentional discrimination.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). As a number of civil rights advocates recognized, resorting to that approach “would not only be embarrassing for the university; it also might open the school to lawsuits by black and Latino students who faced discrimination.” GREG STOHR, *A BLACK AND WHITE CASE: HOW AFFIRMATIVE ACTION SURVIVED ITS*

Michigan decided accordingly to argue that what was characterized simply as a “belief” in Justice Powell’s opinion in *Bakke* was demonstrable fact: that the “atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is . . . promoted by a diverse student body.”<sup>29</sup> In particular, Michigan and its *amici* developed and relied on “extensive evidence” that “a racially diverse student body” results in specific, tangible outcomes.<sup>30</sup>

Justice O’Connor’s opinion for the Court in *Grutter* emphasized and embraced the key element in Michigan’s litigation strategy: its contention that the educational benefits are “substantial” and that they “are not theoretical but real . . . .”<sup>31</sup> This is powerful language by the Court, phrasing that strongly suggests that it actually expects these outcomes to result from a racially diverse educational environment.

The good news for higher education is that Justice O’Connor and her colleagues were persuaded that the pursuit of diversity is constitutional. The potentially bad news is that there is every reason to believe that institutions that employ race conscious admissions policies will be held to the standards for which they argued. Namely, that they will need to show that positive educational outcomes *are occurring* due to the resulting matriculation of a diverse student population. I believe that this is the logical consequence of what narrow tailoring means in a post-*Grutter* world,<sup>32</sup> one within which institutions must be ever mindful that a general rule that race might be considered in admissions decisions does not insulate particular programs from legal challenges.

This is clearly not bad in an absolute sense, since institutions that voluntarily embrace race-sensitive admissions policies presumably do so for the right reasons. That is, they do so because of the educational benefits

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GREATEST LEGAL CHALLENGE 83 (2004) (noting the concerns of Theodore M. Shaw, the Director-Counsel and President of the NAACP Legal Defense and Educational Fund at the time, in a chapter discussing the “Arguments Michigan Wouldn’t Make”). Two groups were eventually allowed to intervene in the case to press those claims. The District Court refused their request; *see* *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998), but the Court of Appeals reversed, “find[ing] persuasive their argument that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria . . . .” *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999).

29. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

30. *See, e.g.*, Brief for Respondents at 21–26, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241). A number of the amicus briefs were devoted almost exclusively to the social science evidence. *See, e.g.*, Brief for the American Sociological Association et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Brief for the American Educational Research Association et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

31. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

32. *See infra* text accompanying note 181.

associated with diversity, spelled out in light of the institution's particular mission. Unfortunately, that is not always the case. The need to do so nevertheless reflects both the opportunities and the challenges higher education now faces, given the reality of what the Court actually did in *Grutter*. My point in this article is not that the current legitimacy of diversity as a compelling interest is in doubt, or that institutions will be required to repeatedly defend and prove that point. It is rather that the reality of the actual results that follow from diversity plays a very important role in defending the constitutionality of individual diversity policies.<sup>33</sup>

It is in this respect that I argue in this article that *Grutter* is in effect *Bakke* with teeth: a holding that allows colleges and universities to use race-based affirmative action in pursuit of diversity, but also imposes new obligations on the institutions that do so. The Court accepted the contention that diversity is a compelling educational interest. But it did so in a context that made it quite clear that a major consideration was the expectation that the positive educational outcomes associated with diversity actually occur, and not on the intuitive belief that such outcomes were simply possibilities that might follow from the matriculation of a diverse entering class.

My argument in this article proceeds in four steps. In Part I, I briefly outline the origins and development of what is now known as the diversity rationale. In particular, I note the seeds of that argument in *Sweatt v. Painter*,<sup>34</sup> its nominal adoption by Justice Powell in *Regents of the University of California v. Bakke*,<sup>35</sup> and its refinement and formal acceptance by the Court in Justice O'Connor's opinion in *Grutter*.

In Part II, I argue that the *Grutter* Court's embrace of diversity is far more rigorous than many scholars have to date contended. Specifically, I maintain that *Grutter* is in effect "*Bakke* with teeth" because the paradigm adopted by the Court stresses that diversity constitutes a compelling interest precisely because the educational benefits flowing from a racially diverse environment are "not theoretical but real."<sup>36</sup> Moreover, far from deferring to institutions concerning their admissions policies, the Court simply acknowledged their right to adopt their own institutional missions. That is, each institution has the right to adopt a mission that embraces diversity as an integral element of the educational objectives that it wishes to pursue. But the proper use of otherwise constitutionally suspect admissions criteria—in this instance race or ethnicity—will succeed when challenged only if an institution can show two things; that the use of such criteria follow from and reflect its mission, and that the benefits associated

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33. See *infra* text accompanying notes 361–365.

34. 339 U.S. 629 (1950).

35. 438 U.S. 265 (1978).

36. *Grutter*, 539 U.S. at 330.

with diversifying its student body are actually occurring.

In Part III, I discuss specific consequences that follow from these realities, using the situation that law schools now find themselves in to illustrate both the obligations and opportunities that arise as a result of *Grutter*. That focus reflects more than the simple fact that the dispute in *Grutter* was about the consideration of race in the admissions decisions at the University of Michigan Law School. Legal education is, I believe, an especially apt vehicle for examining the realities that follow in the wake of *Grutter* and *Gratz*. Law schools are, by their very nature, selective institutions within which the need to use constitutionally questionable criteria in the admissions process is especially pronounced.<sup>37</sup> Moreover, in direct response to *Grutter*, the accrediting agency for law schools, the American Bar Association, made the pursuit of diversity a mandate rather than a choice,<sup>38</sup> a development that is important in and of itself and that assumes even greater significance given that the ABA is now also in the process of moving from an “input” to an “outcomes” model for law school accreditation.<sup>39</sup>

In Part III-B, I highlight the importance of certain key social science evidence that bears on these matters. In particular, I note that the clear consensus within the expert community that structural, or numeric, diversity is necessary, but not sufficient, to produce the educational, social and democracy outcomes noted in *Grutter*. My central premise is then that *Grutter* and *Gratz* require more of institutions that choose to use race as a factor in their admissions decisions than the structural diversity that, for example, Dean Caminker characterized as sufficient to meet the rigors of strict scrutiny.<sup>40</sup> In Part III-C, I discuss the need for and importance of a commitment to continuous and rigorous assessment of institutional diversity efforts.

*Grutter* and *Gratz* provide higher education institutions with both an opportunity and a challenge. The opportunity is to remove at least some of the ties that bind public opinion about affirmative action programs.

37. See *infra* text accompanying notes 236–244.

38. AMERICAN BAR ASSOCIATION, 2008–09 STANDARDS FOR APPROVAL OF LAW SCHOOLS, CHAPTER 2: ORGANIZATION AND ADMINISTRATION, Standard 212(a) (stating that all law schools “shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”), available at <http://www.abanet.org/legaled/standards/standards.html> (emphasis added). I discuss the details and implications of this *infra* at text accompanying notes 258–270.

39. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE I (July 27, 2008) (“T[his] report recommends that the Section re-examine the current ABA Accreditation Standards and reframe them, as needed, to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”).

40. See *infra* text accompanying notes 272–336.

Institutions that fashion creative, proactive programs will be in a position to show that the benefits that *can* result from a diverse educational environment are *in fact* occurring. Public support for race-conscious admissions programs in higher education is lacking.<sup>41</sup> Institutions of higher education, and law schools in particular, that begin serious and transparent outcomes assessment programs will free the public, and the students at these institutions, to fully embrace the laudable goals of diversity. The challenge is to recognize the need for such actions and to undertake them for both the right reasons and in the right way.

A second challenge is to find the will to eventually shift perspectives and realize that true diversity involves much more than the color of one's skin. My focus in this Article is on racial diversity and the requirements the Court has now imposed on institutions that pursue that goal. That emphasis is both necessary and unfortunate. It is necessary because current discussions of diversity inevitably hone in on two and only two characteristics: race and/or ethnicity. Properly understood, however, diversity is about much more. It involves the full range of characteristics and perspectives associated with personal identity. These traits include, but reach far beyond, the color of one's skin. They involve a wide range of beliefs, assumptions, and quite possibly prejudices: the individual views and values that make each of us distinct. Programs and policies that reduce us to a single denominator are accordingly unfortunate. I am confident that the higher education establishment would argue in response that true diversity is what they seek. The reality is that most policies and procedures inevitably focus on a single consideration, race, and that the litigation, political movements, and accreditation standards that follow in their wake track this emphasis.<sup>42</sup>

#### I. THE DIVERSITY RATIONALE: FROM INTUITION TO FACT

One common reaction to *Grutter* and *Gratz* was the belief that the Court simply cleared up the confusion sown by the fact that the *Bakke* Court was deeply divided, with no clear majority opinion.<sup>43</sup> In *Bakke*'s wake a widely shared assumption was that Justice Powell spoke for the Court.<sup>44</sup> This belief, however, was not universal.<sup>45</sup> Recognizing this, affirmative action's

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41. See *infra* text accompanying notes 347–356.

42. I thank Professor Larry Alexander for reminding me of this. I also note that one reason why this has happened is the reality that the Supreme Court has consistently stressed that race is the one characteristic that should virtually never matter. That makes its use both controversial and, in the light of the rigors of strict scrutiny, an inviting litigation target.

43. See *supra* note 27 and accompanying text.

44. See, e.g., Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 148 (characterizing Justice Powell's opinion as "the law of the land").

45. See, e.g., Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 47 (1995) ("What is called the controlling

opponents crafted a concerted litigation strategy that “us[ed] techniques first honed by leaders of the civil rights movement,”<sup>46</sup> albeit with the avowed objective of either establishing that the Powell opinion did not control or, in the alternative, providing the Court with the opportunity to hold expressly that affirmative admissions policies were unconstitutional.<sup>47</sup> These efforts eventually brought the Michigan plans before the Court.

Justice O’Connor did declare in *Grutter* that the Court “endorse[s] Justice Powell’s view that student body diversity is a compelling interest that can justify the use of race in university admissions.”<sup>48</sup> But the Court did more than simply provide Justice Powell with a belated fifth vote or use his opinion as a template. Rather, it employed an analytic matrix within which what had been an extremely deferential view of the permissibility of affirmative action was transformed into what I argue is now a rigorous constitutional standard. Before seeing why this is the case, however, it is important to briefly review the history of higher education diversity in this country so that the *Grutter* decision can be placed in context.

#### A. The Early Evolution of Affirmative Action and The Diversity Rationale

The quest to give effect to the constitutional guarantee that all individuals are entitled to the equal protection of the laws was initially understood to mean that race simply should not matter. One of the most eloquent statements of this principle was made by Professor Alexander Bickel, who characterized the legal regime in the wake of *Brown v. Board of Education*<sup>49</sup> as one within which “[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”<sup>50</sup> That statement accurately captured what had been the central theme in the movement that fought to make the constitutional promise of

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opinion in *Bakke*, authored by Justice Powell, was in fact joined by no other member of the Court.”). Fried concedes the “influence” of the Powell opinion, but stresses that “the resolution was an equivocal one.” *Id.* That reality opened the door to what followed. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“Justice Powell’s view in *Bakke* is not binding precedent on this issue”).

46. David Segal, *Putting Affirmative Action on Trial*, WASH. POST, Feb. 20, 1998, at A1. The firm was the Center for Individual Rights, which brought both the challenge to affirmative action litigated in the *Hopwood* case, see *supra* text accompanying note 45, and the two Michigan cases, *Grutter*, 539 U.S. 306 (2007) and *Gratz*, 539 U.S. 244 (2007).

47. *Id.* at A16 (noting that “[a]t CIR, the quarry is *University of California Regents v. Bakke*”).

48. *Grutter*, 539 U.S. at 325.

49. 347 U.S. 483 (1954).

50. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).



equality a legal, political, and social reality: the assumption that, in the normal course of events, an individual's race should not be taken into account when government acts.<sup>51</sup> Rather, decisions should be made on the basis of individual talents and qualifications, and not group identity. As the Court declared in one of the first cases to analyze the Equal Protection Clause: "What is this but declaring that the law shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws . . . ?"<sup>52</sup> Eighty-plus years later, Dr. Martin Luther King, Jr. made what was in effect the same observation, stating famously that the civil rights movement was a quest for "a nation where [people] will not be judged by the color of their skin but by the content of their character."<sup>53</sup>

The original arguments in favor of affirmative action reflected that goal. The objective was a system that operated in a fair and open way. The "overarching policy" was "neutrality."<sup>54</sup> The obligation that followed from this was in turn to create nondiscriminatory policies and practices within which "decisions are made on merit, with neither positive nor negative reference to minority determinative characteristics."<sup>55</sup> The assumption was that everything would be fair and open, which "[p]resumably . . . meant such things as advertising the fact [that openings exist], seeking out qualified applicants from sources where they might be found, and the like."<sup>56</sup> Such policies were affirmative in the sense that steps would be taken to eliminate bias and see that all qualified candidates could compete on a level playing field.

The dilemma for higher education was what to do when "the use of certain standards"—for example, applying the same admissions requirements to all applicants—"result[s] in the exclusion of women and

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51. The stress here on government decisions reflects the fact that the Equal Protection Clause applies only where government acts. The Court made it clear in both *Grutter* and *Bakke*, however, that the same analysis and principles apply when parsing Title VI of the Civil Rights Act of 1964, which does bind private institutions. See *Grutter*, 539 U.S. at 343 ("Consequently, petitioner's statutory claims based on Title VI . . . also fail."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment.") (quoting *General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 389–91 (1982)).

52. *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879).

53. Martin Luther King, Jr., *I Have A Dream*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* at 217, 219 (James Melvin Washington ed., 1986).

54. Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1300 (1971).

55. *Id.* at 1300–01.

56. NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 46 (1975).

minorities from . . . or their inclusion only in token proportions to their availability . . . .”<sup>57</sup> Critics maintained that persistent poverty and social disadvantage meant that the playing field could never be level<sup>58</sup> and that decades of discrimination made it necessary to seek both equal treatment and equal achievement.<sup>59</sup> The goal became “not just equality as a right and a theory but equality as a fact and equality as a result.”<sup>60</sup> The emphasis shifted and the central assumption became, as Justice Blackmun noted in *Bakke*, that “[i]n order to get beyond racism, we must first take account of race.”<sup>61</sup>

Early decisions of the Court hinted at what would come. In *Sweatt v. Painter*,<sup>62</sup> for example, the question was whether the state of Texas could establish a separate program of legal education for its African American residents at Texas State University for Negroes.<sup>63</sup> The University of Texas Law School had refused to admit Heman Sweatt “solely because he is a Negro”<sup>64</sup> and argued that it could fulfill whatever legal obligations it had by

57. American Association of University Professors, *Affirmative Action in Higher Education: A Report by the Council Committee of Discrimination*, in AAUP POLICY DOCUMENTS AND REPORTS 155, 155 (1995) [hereinafter AAUP REPORT]. The report was approved by the Association’s Council in April 1973.

58. See, e.g., Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1605 (1989) (discussing the impact of “class disadvantage” and arguing that “the qualifications they insist on are precisely the credentials and skills that have long been denied to people of color”). See also HIGHER EDUCATION FOR DEMOCRACY: A REPORT OF THE PRESIDENT’S COMMISSION ON HIGHER EDUCATION, cited in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 970, 977 (Richard Hofstadter & Wilson Smith eds., 1961) (“The old, comfortable idea that ‘any boy’ can get a college education who has it in him simply is not true.”).

59. See, e.g., Harry T. Edwards & Barry L. Zaretsky, *Preferential Remedies for Employment Discrimination*, 74. MICH. L. REV. 1, 2 (1975) (“The most effective form of affirmative action is temporary preferential treatment.”); Graham Hughes, *Reparations for Blacks*, 43 N.Y.U. L. REV. 1063, 1071 (1968) (“it will probably also be necessary in the short run to institute a policy of discrimination in reverse in favor of disadvantaged groups”).

60. Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, 1965, 635, 636 (1966).

61. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.).

62. 339 U.S. 629 (1950). The Court first addressed discrimination in legal education in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), in which it held that the state of Missouri’s failure to provide any legal education for African Americans within the state itself violated the equal protection guarantee. The Court made it clear, however, that the decision did not rest on the quality or nature of the education that Missouri’s African-Americans could receive in another state. *Id.* at 349 (“The basic consideration is . . . what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color.”). While important then, the case does not overtly embrace what we now recognize as the diversity rationale.

63. *Sweatt*, 339 U.S. at 633.

64. *Id.* at 631.

creating a separate program. The Court rejected that approach. It stressed that legal education was a complex and interactive process that required very specific types of resources.<sup>65</sup> It noted that the University of Texas Law School was a nationally recognized and unique educational, political, and social resource.<sup>66</sup> And it stressed that no other program in the state could possibly be considered the “equal” of the one at the University of Texas, especially one created at the last minute and lacking virtually all of the characteristics that made the University program nationally visible.<sup>67</sup>

The Court’s ruling used language that reflected the values of what is now known as “diversity.” It emphasized the interactive nature of legal education and the vital role that access to a variety of perspectives played in the learning process:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.<sup>68</sup>

This commitment to true equality of opportunity was strengthened in a companion case decided the same day, *McLaurin v. Oklahoma State Regents for Higher Education*.<sup>69</sup> There, the Court considered whether the University of Oklahoma could meet its legal obligations when by admitting George W. McLaurin to a doctoral program in education, but requiring him to “sit apart at a designated desk in an anteroom adjoining the classroom” and to study and eat at separate tables.<sup>70</sup> It rejected that approach, finding that the physical and social isolation of the student made it clear that his educational opportunities could not, in either theory or fact, be characterized as equal: “Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students,

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65. *Id.* at 633–34.

66. *Id.* at 634.

67. *Id.* at 634–35.

68. *Id.* at 634.

69. 339 U.S. 637 (1950).

70. *Id.* at 640.

and, in general, to learn his profession.”<sup>71</sup> The Court also stressed the social dimensions of McLaurin’s education in language that foretold *Grutter*, noting that

[o]ur society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant’s case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates.<sup>72</sup>

These decisions did not hold that the “separate but equal” doctrine was invalid. That came a few years later, initially in *Brown v. Board of Education*<sup>73</sup> for K-12 education and then for higher education in yet another case involving legal education, *Florida ex rel. Hawkins v. Board of Control of Florida*.<sup>74</sup> The Florida Supreme Court had held that “equality of treatment need not mean identity of treatment” and that the existence of a “separate but equal” black law school at Florida Agricultural and Mechanical College meant that the state did not have to admit Virgil Hawkins to the University of Florida College of Law.<sup>75</sup> The Court, in a brief *per curiam* opinion, disagreed, stating that “on the authority of” *Brown*, Hawkins “is entitled to prompt admission under the rules and regulations applicable to other qualified candidates.”<sup>76</sup>

The core principle in each of these cases was equal treatment. Affirmative action, at least as it was initially understood and practiced, reflected that goal. Laurence Silberman, a key figure in the early development of affirmative action policies in his capacity as Undersecretary of Labor from 1970 to 1973, summarized what was afoot when he observed that “[w]e wished to create a generalized, firm, but

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71. *Id.* at 641.

72. *Id.* The emphasis here is on unequal treatment, rather than diversity per se. The language nevertheless reflects one of the elements that Justice O’Connor would stress in her opinion for the Court in *Grutter*, that “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders . . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (citations omitted).

73. 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

74. 350 U.S. 413 (1956).

75. *State ex rel. Hawkins v. Bd. of Control*, 60 So. 2d 162, 165 (Fla. 1952).

76. *Hawkins*, 350 U.S. at 414.

gentle pressure to balance the residue of discrimination.”<sup>77</sup> Many maintained that this was not enough, with one blunt assessment arguing that “black people are disadvantaged as a group and what is therefore most necessary is that large numbers of them should be assisted along the paths of economic and educational advancement.”<sup>78</sup> The general understanding remained, nevertheless, that affirmative action was a matter of *procedure* rather than *substance* and that, as phrased by the American Association of University Professors, the “first test of equal opportunity” was that “standards of competence and qualification,” and, by implication, important decisions taking such matters into account, would be “set independently of the actual choices made.”<sup>79</sup>

### B. The Embrace of Intuition-Based Analysis in *Bakke*

The debate converged in *Bakke*. The University of California, Davis Medical School had adopted an admissions policy that was “designed to assure the admission of a specified number of students from certain minority groups.”<sup>80</sup> The Court held that the program was unconstitutional.<sup>81</sup> It was, however, deeply divided. Four members of the Court believed that there was no need to decide the constitutional question. They argued that the “plain language” of Title VI of the Civil Rights Act of 1964 meant that “[r]ace cannot be the basis of excluding anyone from participation in a federally funded program.”<sup>82</sup> A different group of four felt that the Davis program was appropriate as both a constitutional and statutory matter. They maintained that “[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice . . . .”<sup>83</sup>

Common ground, and the eventual result, was provided by Justice Powell. The University argued that its admissions program served four purposes: “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession[;] . . . countering the effects of societal discrimination; . . . increasing the number of physicians who will practice in communities currently underserved; and . . . obtaining the educational benefits that flow from an ethnically diverse

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77. Laurence H. Silberman, *The Road to Racial Quotas*, WALL ST. J., Aug. 11, 1977, at 14.

78. Hughes, *supra* note 59, at 1072.

79. AAUP REPORT, *supra* note 57, at 156.

80. *Bakke*, 438 U.S. at 269–70.

81. *Id.* at 320 (“The fatal flaw in petitioner’s preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.”).

82. *Id.* at 418 (Stevens, J., concurring in the judgment in part and dissenting in part). Chief Justice Burger and Justices Stewart and Rehnquist joined the Stevens opinion.

83. *Id.* at 325 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

student body.”<sup>84</sup>

Justice Powell rejected the first three.<sup>85</sup> But he accepted the fourth, finding that the University’s argument that the “attainment of a diverse student body” was “a constitutionally permissible goal for an institution of higher education.”<sup>86</sup> He stressed that “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”<sup>87</sup> He also accepted the notion that “universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a goal “that is of paramount importance in the fulfillment of [higher education’s] mission.”<sup>88</sup>

Institutions were thus free to take race into account in the admissions process, provided they did so by treating group identity simply as a “‘plus’ in a particular applicant’s file” and did not “insulate the individual from comparison with all other candidates for the available seats.”<sup>89</sup> The lodestar for Justice Powell was the admissions policy employed by Harvard College, where “the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases.”<sup>90</sup> A university or college needed to act with care. It could not, for example, set aside a set number of spaces for minority applicants,<sup>91</sup> have different admissions standards for different groups,<sup>92</sup> or have a two track admissions process, one for minority applicants and a different one for others.<sup>93</sup>

The analytic bottom line was that Justice Powell took the claims made by the higher education establishment at face value: educators *believed* that diversity enhanced the college and university experience. That *intuitive* judgment and the “widely” shared “beliefs” were not documented in any meaningful fashion. Rather, Justice Powell relied simply on “tradition and experience,”<sup>94</sup> which “lend support to the view that the contribution of

84. *Id.* at 306 (opinion of Powell, J.) (quoting Brief for Petitioner at 32).

85. *Id.* at 307–11.

86. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978).

87. *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

88. *Id.* at 313 (opinion of Powell, J.).

89. *Id.* at 317.

90. *Id.* at 323 (quoting Harvard College Admissions Program).

91. *See id.* at 279 (“16 places in the class of 100 were reserved for” minority applicants).

92. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 278 n.7 (1978) (minority applicants “admitted under the special program . . . had benchmark scores significantly lower than many students . . . rejected under the general admissions program”); *id.* at 279 (“minority applicants in the special program were rated only against one another”).

93. *Id.* at 274 (“The special admissions program operated with a separate committee, many of whom were members of minority group.”).

94. *Id.* at 313.

diversity is substantial.”<sup>95</sup>

### C. Post-*Bakke* Reaction

The *Bakke* Court was deeply divided, but the general consensus in the wake of that decision was that Justice Powell’s opinion controlled. In an article written before he joined the Court, then-Professor Antonin Scalia characterized the Powell opinion as an “excellent compromise,” one that “we must work with as the law of the land.”<sup>96</sup> In her concurring opinion in *Wygant v. Jackson Board of Education*,<sup>97</sup> Justice O’Connor observed that “although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial considerations in furthering that interest.”<sup>98</sup> Those statements captured what most observers believed the law to be in the wake of *Bakke*: diversity was a compelling educational interest, and race could be used as a factor in admissions, provided the policy in question could withstand the rigors of strict scrutiny. Indeed, as Justice O’Connor observed in *Wygant*, “[i]t appears, then, that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as in defining the degree to which the means employed must ‘fit’ the ends pursued to meet constitutional standards.”<sup>99</sup>

The belief that the pursuit of diversity was an appropriate, constitutional goal was not universal. Some argued vehemently that affirmative action was wrong, as it was a form of reverse discrimination that imposed inappropriate burdens on qualified applicants who were denied admission to the educational programs of their choice.<sup>100</sup> They maintained that Justice Powell did not speak for the Court and that his opinion should not be deemed controlling.<sup>101</sup> They also alleged that the license granted by the Powell opinion was being abused by institutions that were treating racial

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95. *Id.*

96. Scalia, *supra* note 44, at 148.

97. 476 U.S. 267 (1986).

98. *Id.* at 286 (O’Connor, J., concurring) (citing *Bakke*, 438 U.S. at 311–15).

99. *Id.* at 287.

100. See, e.g., STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 286 (1997) (characterizing the arguments for affirmative action as “an educational disaster” and “the morass in which rigid academic standards sink”); Paul Craig Roberts & Lawrence M. Stratton, Jr., *Color Code*, NAT’L REV., Mar. 20, 1995, at 36 (affirmative action is “reverse discrimination [that] violates fundamental norms of justice and fair play”).

101. See, e.g., Carl Cohen, *Preference by Race in University Admissions and the Quest for Diversity*, 54 WASH. U. J. URB. & CONTEMP. L. 43, 51 (1998) (“This defense of intellectual diversity as a support for state-imposed racial classifications was shared by no other member of the Court in *Bakke* and by no justice of the U.S. Supreme Court from that time to this. Justice Powell is lonely in relying upon it.”).

identity not simply as one factor, but rather as the only meaningful consideration in the admissions decisions.<sup>102</sup>

For example, in *Hopwood v. State of Texas*,<sup>103</sup> the District Court for the Western District of Texas rejected certain aspects of a University of Texas School of Law admissions process designed to select “the best qualified from the entire minority pool and . . . enroll sufficient numbers of those applicants in the entering class to satisfy the” minority enrollment goals it had adopted.<sup>104</sup> On appeal, the United States Court of Appeals for the Fifth Circuit agreed that the system was flawed.<sup>105</sup> That court could have confined its ruling to a simple recitation of the ways in which the Texas policy violated the limitations set forth in *Bakke*. The Texas system did not seem to involve a quota or set-aside for minority students. Nevertheless, it did create a two-track system within which minority applicants were screened by a separate minority applicant subcommittee and, if not admitted initially through that process, were placed on what the court characterized as “segregated waiting lists, dividing applicants by race.”<sup>106</sup> The law school also used different admissions indices for minority applicants, lowering the threshold in order “to allow the law school to consider and admit more of them.”<sup>107</sup> Indeed, at one point in the admissions cycle at issue, the index was lowered even further for Mexican American candidates “in order to admit more of this group.”<sup>108</sup>

The *Hopwood* panel did not, however, simply recite these facts and hold that the policy was not narrowly tailored. Instead, it declared that “Justice Powell’s view in *Bakke* is not binding precedent on this issue” and “that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”<sup>109</sup>

This bold challenge to the accepted wisdom made *Hopwood* the most visible of a series of decisions in which the constitutional issues were raised and conflicting results reached. The Court of Appeals for the Ninth Circuit, for example, refused to repudiate *Bakke*.<sup>110</sup> It conceded that there

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102. See, e.g., Lino A. Graglia, *The “Affirmative Action” Fraud*, 54 WASH. U.J. URB. & CONTEMP. L. 31, 31–32 (1998) (“The whole point of all racial preference programs is to evade and camouflage the fact that the groups preferred by the programs cannot otherwise compete with others for admission to selective institutions of higher education on the basis of the standard criteria for academic achievement or ability.”).

103. *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994).

104. *Id.* at 578.

105. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

106. *Id.* at 938.

107. *Id.* at 936.

108. *Id.* at 936 n.6.

109. *Id.* at 944.

110. See *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (“at our level of the judicial system[,] Justice Powell’s opinion remains the law”), *cert.*



had been important developments since *Bakke*, especially at the Supreme Court level where “the Court has not looked upon race-based factors with much favor.”<sup>111</sup> It concluded, however, that it was for the Supreme Court itself to “declare that the *Bakke* rationale regarding university admissions policies has become moribund” and that “[f]or now . . . it ineluctably follows that the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.”<sup>112</sup>

A different approach was taken in the Court of Appeals for the Eleventh Circuit. In *Johnson v. Board of Regents of the University of Georgia*, it characterized the status of diversity as a compelling interest as “an open question.”<sup>113</sup> It declared, however, that “[w]e need not, and do not, resolve . . . whether student body diversity ever may be a compelling interest supporting a university’s consideration of race in its admissions process.”<sup>114</sup> Instead, it held that the policy was not narrowly tailored. The court stressed that the University “mechanically and inexorably award[ed] an arbitrary ‘diversity’ bonus to each and every non-white applicant . . . and severely limit[ed] the range of other factors that may be considered . . . .”<sup>115</sup> This meant that the “policy contemplates that non-white applicants will be admitted or advance further in the [evaluation] process at the expense of white applicants with greater potential to contribute to a diverse student body. This lack of flexibility is fatal to UGA’s policy.”<sup>116</sup>

At the same time, a parallel set of developments took place at the polls, where the general public voiced consistent opposition to affirmative action. In California, for example, Proposition 209 declared that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>117</sup> It was approved by fifty-four percent of the individuals

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*denied*, 532 U.S. 1051 (2001).

111. *Smith*, 233 F.3d at 1200 (citing *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1994); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

112. *Smith*, 233 F.3d at 1200–01. The Court also noted that the challenge to the policy at issue had been rendered moot by the intervening vote by the people of Washington to bar “‘preferential treatment’ to any individual ‘on the basis of race.’” *Id.* at 1201.

113. 263 F.3d 1234, 1250 (11th Cir. 2001).

114. *Id.* at 1244.

115. *Id.* at 1254.

116. *Id.*

117. CAL. CONST. art. I, § 31(a) (1996). A legal challenge was unsuccessful. *See Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated*, 110 F.3d 1431 (9th Cir.), *amended and superseded by* 122 F.3d 692 (9th Cir.), *stay denied*, 122 F.3d 718 (9th Cir.), *cert. denied*, 521 U.S. 1141 (1997).

voting.<sup>118</sup> In a similar vein, the voters in Washington state approved Initiative Measure No. 200 by an equally robust margin.<sup>119</sup> It used the same language, banning “discrimination” and “preferential treatment.”<sup>120</sup>

These developments suggested that a reexamination of the issues was in order, and the foes of affirmative action were only too happy to oblige. The primary challenge came from the Center for Individual Rights, the public interest litigation group that had brought the *Hopwood* litigation. It selected the University of Michigan as its next target, filing challenges to the admissions policies employed by its Law School and College of Literature, Science, and the Arts (LSA). That decision turned out to be particularly significant.

#### D. Diversity at the University of Michigan Pre-*Grutter* and *Gratz*

In the late 1980s, the University of Michigan made a significant commitment to affirmative action and diversity when it adopted the Michigan Mandate, a program premised on the assumption that diversity will become the cornerstone in efforts “to achieve excellence in teaching, research, and service in the years ahead.”<sup>121</sup> The Mandate envisioned a wide range of affirmative measures. As one University administrator noted, “[t]he fundamental principle of the mandate was that the university should become a leader in creating a multicultural community that could serve as a model for society as well as for higher education.”<sup>122</sup> One integral aspect of this was the desire to “achieve increases in the number of entering under-represented minority students, as well as in our total under-represented minority enrollment.”<sup>123</sup>

Consistent with this, both the Law School and LSA adopted detailed affirmative admissions policies. In particular, the Law School declared its intention “to ‘achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the

118. See Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7.

119. See Sam Howe Verhovek & B. Drummond Ayres, Jr., *The 1998 Elections: The Nation—Referendums; Voters Back End to State Preferences*, N.Y. TIMES, Nov. 4, 1998, at B2 (noting that the measure was “running ahead, 60 percent to 40 percent”).

120. WASH. REV. CODE ANN. § 49.60.400 (West 2008) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group . . .”). Similar measures would eventually be approved in Nebraska and, notably, Michigan. See *infra* text accompanying notes 351–360.

121. JAMES J. DUDERSTADT, *THE MICHIGAN MANDATE: A STRATEGIC LINKING OF ACADEMIC EXCELLENCE AND SOCIAL DIVERSITY* 1 (1990) (Draft 6.0) [hereinafter DUDERSTADT, *MANDATE: A STRATEGIC LINKING*].

122. Earl Lewis, *Why History Remains a Factor in the Search for Racial Equality*, in *DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN*, at 17, 55 (Patricia Gurin et al. eds., 2004).

123. DUDERSTADT, *MANDATE: A STRATEGIC LINKING*, *supra* note 121, at 16.

sum of its parts.”<sup>124</sup> This focus on the benefits of a diverse learning environment was in some respects a departure from the strict terms of the Mandate, which spoke largely in terms of moral justifications.<sup>125</sup> It would, however, prove to be a crucial decision. In the face of the attacks brought by CIR, the Law School and University mounted what one observer characterized as a “full-throated counteroffensive,” a vigorous response that included “the marshaling of statistical evidence of the benefits of racial diversity.”<sup>126</sup> As one University official noted, “[t]he lawsuits, ironically, did force the university to clarify what it had been doing and why, and to articulate a rationale for the educational benefits of diversity.”<sup>127</sup>

Two separate cases were filed and two different results emerged at the district court level. In the first decision, *Gratz v. Bollinger*,<sup>128</sup> District Judge Patrick Duggan held that the Powell opinion in *Bakke* controlled,<sup>129</sup> that the University had established that diversity was a “compelling governmental interest under strict scrutiny,”<sup>130</sup> and that the LSA policy withstood the rigors of a narrow tailoring analysis.<sup>131</sup> In the second decision, *Grutter v. Bollinger*,<sup>132</sup> a different district judge, Bernard Friedman, concluded that Justice Powell did not speak for the Court in *Bakke* and “that under the Supreme Court’s post-*Bakke* decisions, the achievement of such diversity is not a compelling state interest because it is not a remedy for past discrimination.”<sup>133</sup> Judge Friedman did acknowledge that “diversity [has] important educational benefits.”<sup>134</sup> But he ruled that the Law School’s “use of race has not been . . . narrowly tailored at any time under consideration in this case.”<sup>135</sup>

Both decisions were appealed to the Court of Appeals for the Sixth Circuit, which subsequently decided only one of the two, *Grutter*.<sup>136</sup> The

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124. *Grutter*, 539 U.S. at 315 (quoting the Law School policy).

125. See, e.g., JAMES J. DUDERSTADT, THE MICHIGAN MANDATE: A SEVEN-YEAR PROGRESS REPORT 1987–1994, at 3 (1995) (“Fundamentally, it is the morally right thing to do.”); DUDERSTADT, MANDATE: A STRATEGIC LINKING, *supra* note 121, at 3 (“First and foremost, the . . . commitment to affirmative action and equal opportunity is based on our fundamental social, institutional, and scholarly commitment to freedom, democracy, and social justice.”).

126. Steven A. Holmes, *A New Turn in Defense of Affirmative Action*, N.Y. TIMES, May 11, 1999, at A1.

127. Lewis, *supra* note 122, at 55.

128. 122 F. Supp. 2d 811 (E.D. Mich. 2000).

129. *Id.* at 817–22.

130. *Id.* at 824.

131. *Id.* at 824–33.

132. 137 F. Supp. 2d 821 (E.D. Mich. 2001).

133. *Id.* at 849.

134. *Id.*

135. *Id.* at 850.

136. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc).

court considered the case *en banc* and was bitterly divided.<sup>137</sup> Five judges held that *Bakke* provided the appropriate analytic matrix and that “the Law School’s consideration of race and ethnicity is virtually indistinguishable from the Harvard plan Justice Powell approved in *Bakke*.”<sup>138</sup> Four disagreed, arguing that *Bakke* did not control, that diversity was not a compelling interest, and that even if it were the law school policy was not narrowly tailored.<sup>139</sup>

This set the stage for a reexamination of these issues by the Supreme Court, which “granted certiorari . . . to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”<sup>140</sup> In a highly unusual move, the Court also agreed to hear *Gratz* “despite the fact that the Court of Appeals had not yet rendered a judgment, so that this Court could address the constitutionality of race in university admissions in a wider range of circumstances.”<sup>141</sup>

#### E. The Shift to Fact-Based Analysis in *Grutter* and *Gratz*

The two cases were argued together and decided on the same day, albeit in separate opinions. The key decision was *Grutter*. Justice O’Connor, writing for herself and Justices Stevens, Souter, Ginsburg, and Breyer, disclaimed any need to determine if Justice Powell had in fact spoken for the Court in *Bakke*.<sup>142</sup> She preferred instead, “for the reasons set out below,” to simply “endorse [his] view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”<sup>143</sup> The manner in which she went about this, however,

137. Those disagreements involved both fundamentally different views regarding the operative doctrines, *see, e.g., id.* at 788 (Boggs, J., dissenting) (“the majority has given us now argument as to why the engineering of a diverse student body should be a compelling interest sufficient to satisfy strict scrutiny”), and accusations of bad faith in how the case was handled. *Id.* at 810–14 (Boggs, J., dissenting) (“Procedural Appendix”).

138. *Id.* at 747.

139. *Id.* at 793 (Boggs, J., dissenting) (diversity principle “poorly defined” and lacks a “logical stopping point”); *id.* at 815–18 (Gilman, J., dissenting) (stating that the policy was not narrowly tailored).

140. *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003).

141. *Gratz v. Bollinger*, 539 U.S. 244, 260 (2003).

142. *Grutter*, 539 U.S. at 325 (“We do not find it necessary to decide whether Justice Powell’s opinion is binding under *Marks*.”). The reference is to the rule articulated in *Marks v. United States*, 430 U.S. 188 (1977), which states that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those members who concurred on the narrowest grounds.’” *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

143. *Grutter*, 539 U.S. at 325. There is some dispute about whether diversity

departed in significant ways from the approach taken by Justice Powell.

Justice O'Connor accepted the University's argument that "the educational benefits that diversity is designed to produce" are "substantial."<sup>144</sup> Quoting the district court, and echoing views expressed fifty-three years earlier in *Sweatt*,<sup>145</sup> she found that:

[T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." . . . These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."<sup>146</sup>

She noted that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"<sup>147</sup> And she stressed that "[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>148</sup> As one prominent social scientist has observed, the approach embraced by Justice O'Connor was "a victory for higher education research," with "the evidence about the need for racial diversity in education . . . cited as compelling evidence by both the appellate court judge in the undergraduate case and by the Supreme Court, with Sandra Day O'Connor writing the opinion for the majority in *Grutter* . . ."<sup>149</sup>

The Court's clear and unambiguous embrace of diversity as a compelling interest was significant. It was, however, only the necessary first step. The operative standard of review was strict scrutiny, which meant that the admissions policy would be "constitutional only if [it is]

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commanded a sixth vote, that of Justice Kennedy, who observed in his dissenting opinion that "[o]ur precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence." *Id.* at 387–88 (Kennedy, J., dissenting).

144. *Id.* at 330.

145. *Sweatt v. Painter*, 339 U.S. 629 (1950). *See supra* text accompanying note 68.

146. *Grutter*, 539 U.S. at 330.

147. *Id.* (quoting Brief for American Educational Research Association et al. as Amici Curiae Supporting Respondents at 3).

148. *Id.* (citing Brief for 3M et al. as Amici Curiae Supporting Respondents at 5; Brief for General Motors Corporation as Amicus Curiae Supporting Respondents at 3–4).

149. Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 REV. HIGHER EDUC. 185, 188 (2007) [hereinafter Hurtado, *Linking Diversity*].

narrowly tailored to further [the] compelling” interest sought.<sup>150</sup> Justice O’Connor found “that the Law School’s admission program bears the hallmarks of a narrowly tailored plan,” employing “race or ethnicity . . . flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant.”<sup>151</sup> The Law School, she stressed, “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment” and “affords this individualized consideration to applicants of all races.”<sup>152</sup>

The Law School also established that it had complied with three additional requirements. First, it had engaged in a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>153</sup> Second, its approach did not, at least in Justice O’Connor’s estimation, “unduly harm members of any racial group,” given “its individualized inquiry into the possible diversity contributions of all applicants . . . .”<sup>154</sup> Third, she stressed that the Law School itself had recognized that its “race-conscious polic[y] must be limited in time,”<sup>155</sup> a general requirement that “can be met by sunset provisions . . . and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>156</sup> Further, she observed, in what would prove to be a controversial statement, the legal force of which has been debated, that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>157</sup>

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150. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

151. *Id.* at 334.

152. *Id.* at 337. For an argument that the O’Connor approach to narrow tailoring both changes how such matters should be done and is incorrect, see Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007).

153. *Grutter*, 539 U.S. at 339. For an extensive discussion of this requirement, see George La Noue & Kenneth L. Marcus, *Serious Consideration of Race-Neutral Alternatives in Higher Education*, 57 CATH. U. L. REV. 991 (2008). They conclude that “[w]hether the defendant institution has engaged in the kind of program evaluation that has seriously considered race-neutral alternatives may well be decisive in the future litigation and OCR investigations.” *Id.* at 1044.

154. *Grutter*, 539 U.S. at 341.

155. *Id.* at 342.

156. *Id.*

157. *Id.* at 343. The suggestion that there should be a 25 year limit has been downplayed. See, e.g., Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O’Connor’s Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541 (2003). One recent study stresses that the real problem lies elsewhere, noting that “substantial progress in increasing black students’ pre-collegiate performance is critical to any hope of eliminating the need for affirmative action within the next generation.” Alan Krueger & Jesse Rothstein, *Race, Income, and Colleges in 25 Years: Evaluating Justice O’Connor’s Conjecture*, 8 AM. L. & ECON. REV. 282, 309–10

The companion case was *Gratz v. Bollinger*,<sup>158</sup> in which the Court considered the system employed by Michigan's primary undergraduate unit, the College of Literature, Science, and the Arts (LSA). The focus here was on the policy in effect at the time the plaintiffs applied,<sup>159</sup> which used a point system to determine who would be admitted. That system assigned a set number of points to various factors. In particular, it "automatically distribut[ed] 20 points" of the 100 required for admission "to every single applicant from an 'underrepresented minority' group, as defined by the University."<sup>160</sup>

Writing for a different majority,<sup>161</sup> Chief Justice Rehnquist conceded that *Grutter* resolved the compelling interest question.<sup>162</sup> But he found that the LSA system was not narrowly tailored. He stressed that a constitutionally permissible system would make certain that "each characteristic of a particular applicant [should] be considered in assessing the applicant's entire application."<sup>163</sup> The net result of the LSA approach was, he believed, to "mak[e] 'the factor of race . . . decisive' for virtually every minimally qualified minority applicant."<sup>164</sup> Indeed, he stressed, "the University" itself "has conceded [that] the effect . . . is that virtually every qualified underrepresented minority applicant is admitted."<sup>165</sup>

The University disagreed. It argued that "the fact that every minority applicant receives the same 'plus' hardly means that race plays the same role in the admissions outcome for each applicant."<sup>166</sup> It maintained that the LSA formula was "flexible" and "'considered all pertinent elements of diversity in light of the particular qualifications of each applicant . . .'"<sup>167</sup> The sheer weight accorded to race was nevertheless clearly troubling. The Chief Justice complained, for example, that "[e]ven if" a student's "'extraordinary artistic talent' rivaled that of a Monet or Picasso, the

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(2006). For an eloquent explanation of why the problem is not new, nor likely to change, see Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L. Q. 599 (1992).

158. 539 U.S. 244 (2003).

159. The Court noted that "[t]he University has changed its admissions guidelines a number of times during the period relevant to this litigation . . ." *Id.* at 253.

160. *Id.* at 271.

161. The four dissenters in *Grutter*—Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—were joined by Justices O'Connor and Breyer.

162. *Gratz*, 539 U.S. at 268 ("for the reasons set forth today . . . the Court has rejected" the argument that diversity is not a compelling interest).

163. *Id.* at 271. He did not, however, cite *Grutter* for this proposition. Rather, he drew on Justice Powell's *Bakke* opinion.

164. *Id.* at 272.

165. *Id.* at 273.

166. Brief for Respondents at 37, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

167. *Id.* at 38 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

applicant would receive, at most, five points under LSA's system."<sup>168</sup> The net effect, he concluded, was that any possible "individualized review" occurred "only . . . *after* admissions counselors automatically distribute the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant."<sup>169</sup>

Justice O'Connor agreed. In a concurring opinion that Justice Breyer joined, she stressed that LSA had failed to provide "the necessary individualized consideration."<sup>170</sup> The other three members of the *Grutter* majority disagreed, arguing in particular that the LSA point system was an "accurately described, fully disclosed . . . affirmative action program,"<sup>171</sup> one that "lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race" but on a myriad number of factors.<sup>172</sup> In particular, Justice Souter declared that a twenty, as opposed to, for example, a ten point "plus factor" for race was, at best, "suspicious."<sup>173</sup> Any credible doubts, he maintained, could be resolved by a remand directed toward gathering additional evidence about how the process actually operated.<sup>174</sup> Those pleas fell on deaf ears. The majority held that the LSA system was "not narrowly tailored to achieve . . . [the] asserted compelling interest in diversity"<sup>175</sup> and was, accordingly, unconstitutional.

## II. *GRUTTER* EQUALS "*BAKKE*, WITH TEETH"

The brief summary of the evolution and treatment of the diversity rationale that I have provided in Part I of this article does not exhaust the range of issues raised and debated in the history of affirmative action and diversity, much less in *Grutter* and *Gratz*. There were thirteen separate opinions in the two cases. Seven of the justices wrote twice, with only Justices Scalia and Kennedy confining themselves to a single expression of concurrence and dissent.

However, two important points emerge, at least as matters currently stand.<sup>176</sup> First, the Court has now held, clearly and unequivocally, that

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168. *Gratz v. Bollinger*, 539 U.S. 244, 273 (2003).

169. *Id.* at 274 (emphasis in original).

170. *Id.* at 280 (O'Connor, J., concurring).

171. *Id.* at 305 (Ginsburg, J., dissenting).

172. *Id.* at 293 (Souter, J., dissenting).

173. *Id.* at 296 (Souter, J., dissenting).

174. *Gratz v. Bollinger*, 539 U.S. 244, 296–97 (2003) (Souter, J., dissenting).

175. *Id.* at 275.

176. Various developments since the decisions were handed down counsel caution regarding both the implications and the long-term viability of *Grutter* and *Gratz*. Justice O'Connor, for example, has retired and her seat on the Court has been taken by Justice Samuel A. Alito, Jr. Justice Alito has not yet written an opinion in this area, but he joined, apparently without reservation, Chief Justice John J. Roberts, Jr.'s opinion



diversity is a compelling educational interest for the purposes of college or university admissions decisions.<sup>177</sup> That is the law of the land and will remain so unless and until the Court itself retreats from that position. In this respect, higher education arguably now finds itself in the same position that elementary and secondary education did in the wake of *Brown*.<sup>178</sup>

Second, in the wake of *Grutter* and *Gratz*, it is not enough for an institution to simply declare that diversity is a goal and then take race or ethnicity into account however it chooses as it fashions its entering classes. It must embrace diversity as an integral part of its mission. Further, it must do so for educational reasons, and not to correct for “societal discrimination”<sup>179</sup> or to achieve “racial balancing.”<sup>180</sup> Institutions must craft race-conscious admissions policies in a carefully controlled way, openly linking the particular approach it takes to its educational goals and the specific outcomes it wishes to attain.

These would normally be regarded as the natural requirements of sound educational policy and practice. The reality is, however, that many of these principles are often ignored. I will now argue, accordingly, that higher education must take two critical factors into account as it crafts the sort of race-conscious admissions policies that *Grutter* contemplates.

The first is that Justice O’Connor’s emphasis on the notion that the benefits of diversity are “real” should put higher education on notice that admissions policies that employ preferences are now subject to a much more rigorous evaluation standard than the one that prevailed in the years

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for the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). The Chief Justice acknowledged that the Court has “recognized as compelling for the purposes of strict scrutiny . . . the interest in diversity in higher education . . .” *Id.* at 722 (citing *Grutter*, 539 U.S. at 328). But he went on to declare that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” *Id.* at 748. This formulation does not bode well for continuing acceptance of the diversity rationale, if and when the issue returns to the Court. The recent replacement of Justice David H. Souter by Justice Sonia Sotomayor does not materially change matters, arguably leaving the issue in the sometimes mercurial hands of Justice Anthony M. Kennedy.

177. The holdings expressly did not extend beyond the admissions decision, a point Justice Scalia stressed in his dissent in *Grutter*. See *Grutter*, 539 U.S. at 349 (Scalia, J., dissenting).

178. I say arguably because the parallels between the two cases are not exact ones. The *Brown* Court was unanimous; the *Grutter* Court was deeply divided. Chief Justice Earl Warren, the author of the *Brown* opinion, and the primary force behind its unanimity, did not resign until 1969, while Justice O’Connor left the Court a scant three years after writing the *Grutter* opinion, replaced by Justice Alito, whose support for the diversity principle will, if anything, be a matter of *stare decisis* rather than conviction.

179. See *Grutter*, 539 U.S. at 323–24 (noting that Justice Powell’s *Bakke* opinion “rejected as an interest remedying societal discrimination”).

180. See *id.* at 329–30 (rejecting diversity plans that seek “some specified percentage of a particular group” as “outright racial balancing, which is patently unconstitutional”).

between *Bakke* and *Grutter*. It is no longer enough to theorize that actual education outcomes will ensue. Rather, institutions that undertake race-based admissions must acknowledge and account for the reality that their ability to defend such policies and practices now depends on their ability to demonstrate that the benefits associated with those policies and procedures are actually occurring.<sup>181</sup>

The second is that it would be a mistake to assume that judicial treatment of future challenges to either the diversity principle itself or a particular admissions policy will be in any meaningful respects “deferential.” Justice O’Connor did state that “[t]he Law [S]chool’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”<sup>182</sup> As I will stress, however, read with care and in context, that statement does nothing more than leave as a matter of educational choice a given institution’s decision about the mission it wishes to pursue. It does not in fact relieve that institution of the obligation to comply with the rigors of strict scrutiny.

#### A. The Benefits of Diversity “Are Real”

If we compare the approach taken by Justice Powell in his *Bakke* opinion with that of Justice O’Connor in *Grutter*, it becomes clear that *Grutter* is *Bakke* with teeth. Justice Powell did stress that “[r]acial and ethnic distinctions of any sort are inherently suspect and this calls for the most exacting judicial examination.”<sup>183</sup> He did not, however, consistently employ the language and approaches of strict scrutiny in his discussion of diversity as a “constitutionally permissible”<sup>184</sup> interest. Nor did he characterize his examination of the various aspects of the Davis plan that he found objectionable as an assessment of the extent to which the program was not “narrowly tailored.”

Instead, Justice Powell did two things. First, he discussed the extent to which “[a]cademic freedom,” which he characterized as “a special concern

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181. In effect, I am arguing that this is one of the “hallmarks” of narrow tailoring, *see supra* text accompanying note 31, and should be expressly added to the list spelled out by Justice O’Connor. I acknowledge, as Professor Goodwin Liu stressed in a thoughtful review of this Article, that in many important respects the University of Michigan was not required to meet this burden, and that much of the social science evidence it relied on in making its case was not actually reviewed by the Court in any meaningful manner. I believe, however, that the landscape has changed. I believe that institutions should act in this manner as a matter of course and not simply as a litigation strategy. That said, I also believe, and argue in this Article, that the courts must now pay much closer attention to these matters.

182. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

183. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291(1978) (opinion of Powell, J.).

184. *Id.* at 311–12.

of the First Amendment,<sup>185</sup> allowed a college or university “to make its own judgments as to education includ[ing] the selection of its student body.”<sup>186</sup> Then he offered the “illuminating example” of the admissions program at Harvard College, which takes “race into account in achieving the educational diversity valued by the First Amendment . . .”<sup>187</sup> He quoted the Harvard policy at some length and then discussed it in general terms, concluding that it “treats each applicant as an individual in the admissions process.”<sup>188</sup> The net effect, he stated, was that the qualifications of an “applicant who loses out . . . would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.”<sup>189</sup>

Justice Powell simply took as gospel the text preached by the higher education establishment. He did not require that the parties supporting affirmative action and diversity actually document the extent to which their intuition about these matters was supported by a detailed accounting of the actual benefits that would be attained. Nor did he ask them to provide any evidence that such outcomes actually occurred. Rather, he simply accepted the premise of the Harvard policy, that students with different “background[s] and outlook[s]” bring an undefined “something” with them when they matriculate.<sup>190</sup>

Justice O’Connor did something quite different. She did not simply note and embrace the Michigan Law School plan as an “example” to be followed. Instead, she made the transition from educational theory to educational fact, stressing that the actual benefits for all students enrolled in a racially diverse educational setting are “substantial” and are “not theoretical but real.”<sup>191</sup> She found support for this in a variety of forms, including: evidence adduced at trial about actual results;<sup>192</sup> “numerous studies that show that student diversity promotes learning outcomes”;<sup>193</sup> and the perspectives offered by various *amici* that documented the positive, post-graduation effects flowing from “exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>194</sup>

Michigan and its *amici* consciously developed, and Justice O’Connor appears to have been persuaded by, detailed evidentiary support for its claim that diversity had real, demonstrable, and positive effects. This stood

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185. *Id.* at 312.

186. *Id.*

187. *Id.* at 316.

188. *Id.* at 318.

189. *Bakke*, 438 U.S. at 318.

190. *Id.* at 323 (quoting the Harvard College Admissions Program statement).

191. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

192. *Id.*

193. *Id.*

194. *Id.* at 330–33.

in stark contrast to the evidence accepted by Justice Powell. For example, the Harvard College policy he quoted at length spoke in general terms about the ability of “[a] farm boy from Idaho” and “a black student” to “bring something” to Harvard that “a white person cannot offer.”<sup>195</sup> The only other “evidence” offered in support of diversity’s educational effects was equally vague, with the then-President of Princeton University outlining various types of “informal” learning that might flow from “unplanned, casual encounters.”<sup>196</sup>

Justice Powell’s rather cursory treatment of the narrow tailoring inquiry also contrasts sharply with the approach taken by Justice O’Connor. Some of this is almost certainly due to the evolution of Equal Protection doctrines over the twenty-six years between *Bakke* and *Grutter*. Strict scrutiny was an accepted fact when *Bakke* was decided in 1977.<sup>197</sup> Its current parameters are, however, more detailed and demanding in the light of intervening cases.<sup>198</sup> The extent to which the present analytic framework is especially demanding is revealed in the four very specific requirements for narrow tailoring emphasized in the O’Connor opinion: truly individualized evaluation,<sup>199</sup> careful examination of race neutral alternatives before adopting a race-conscious policy,<sup>200</sup> the need to avoid inflicting harm on other applicants,<sup>201</sup> and recognition that the program must be limited in duration and subject to periodic, rigorous review.<sup>202</sup>

Justice Powell alluded to various aspects of these elements in his discussion.<sup>203</sup> But he did not couch his analysis in these terms. Nor did he in any meaningful sense make compliance with such standards mandatory.

195. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (quoting the Harvard College Admissions Program statement).

196. *Id.* at 312 n.43 (quoting William Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9).

197. Justice Powell acknowledged this when he noted that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial scrutiny.” *Bakke*, 438 U.S. at 291. And he refused to accept the University’s contention that a different standard should be apply. *See id.* at 294–99 (discussing the argument that “discrimination against members of the white ‘majority’ cannot be suspect if its purpose can be characterized as ‘benign.’”).

198. *See*, in particular, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (stressing the need to apply strict scrutiny as the only “way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (emphasizing the need to subject all affirmative measures to strict scrutiny).

199. *Grutter*, 539 U.S. at 334–39.

200. *Id.* at 339–40.

201. *Id.* at 341.

202. *Id.* at 341–43.

203. *See, e.g., Bakke*, 438 U.S. at 317 (opinion of Powell, J.) (expressing support for admissions programs that are “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant”).

Justice O'Connor noted as much when she observed that "[s]ince *Bakke* we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs."<sup>204</sup> She then emphasized the nature of what she characterized as "the hallmarks of a narrowly tailored plan"<sup>205</sup> in a highly detailed, ten page discussion of the Michigan approach.

The differences between the Powell and O'Connor opinions are, then, pronounced and important. Justice Powell was willing to accept at face value the what the pro-diversity litigants before him maintained. Justice O'Connor did not. Rather, she wrote an opinion within which these matters are treated as fact rather than intuition. It was on that basis that she accepted the argument that diversity is a compelling educational interest. And it is in the light of that approach that affirmative admissions policies will be judged in the future.

#### B. *Grutter* Allows Judicial Deference Only to an Institution's Chosen Mission

One controversial element of the O'Connor opinion was her statement that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."<sup>206</sup> Justice Kennedy was especially outraged, believing that this marked a sharp departure from the rigors of strict scrutiny and that the Court's "review" of these matters was "nothing short of perfunctory."<sup>207</sup> Some commentators agree with Kennedy, alleging, for example, that "the Court has effectively dropped the standard of review from strict scrutiny to rational basis review."<sup>208</sup>

These criticisms are clearly misplaced. First, the "deference" afforded did not extend to whether diversity itself should be deemed a compelling interest. The precise statement is worth repeating: "The Law School's

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204. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

205. *Id.* at 334.

206. *Id.* at 328.

207. *Id.* at 388 (Kennedy, J. dissenting). *See also id.* at 356 (Thomas, J., dissenting) (characterizing the majority's analysis as "conclusory").

208. Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 468 (2004). *See also* JOINT STATEMENT, *supra* note 21, at 5 (noting the deference language and stressing that the opinion "establishes a presumption of good faith on the part of universities in selecting their student bodies"); Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law School as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1622 (2007) ("What is striking here is not that the Court thinks racial diversity within the student body of a selective public educational institution can be a compelling governmental purpose, but rather that it declares that racial diversity is compelling because a school thinks it is."); Luis-Fuentes Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT. 133, 136 (2004) ("In this Essay, we defend the Court's deference to the judgment of educators and admissions officials on the necessity of raceconscious admissions.").

educational judgment that such diversity is *essential to its educational mission* is one to which we defer.”<sup>209</sup> Justice O’Connor did not declare that the Law School’s judgment that diversity *itself* is a compelling educational interest is one to “which we defer.” Rather, she deferred to Michigan’s choice of mission. She quite correctly treated this as something Michigan was free to do. Both Justices Scalia and Thomas recognized this in their dissents. Justice Scalia argued that the real issue was “Michigan’s interest in maintaining a ‘prestige’ law school whose normal admissions standards disproportionately exclude blacks and other minorities.”<sup>210</sup> Justice Thomas agreed, complaining that “[t]he interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions ‘standards’ that, in turn, create the . . . ‘need’ to discriminate on the basis of race.”<sup>211</sup>

Justice O’Connor’s “deference” statement was descriptive. It simply acknowledged that the University of Michigan had chosen to embrace student body diversity as part of its institutional identity. The constitutional question was whether what followed from this decision could withstand strict scrutiny. The first step for Michigan was to define its institutional mission. The second was to structure its admissions policies and practices in ways that would allow it to admit a diverse group of students. It is only at this second stage that the active use of race as a decision-making criterion enters the picture. The focus for Justice O’Connor was then whether the consequences that follow from Michigan’s judgments about its educational mission, and its concomitant practices, are constitutional. That is, is the pursuit of student body diversity, achieved through the active consideration of race, in practice a compelling interest?

This becomes clear when we look at what Justice O’Connor actually did in her opinion. The very next sentence after the “deference” statement, sets the stage for what follows: “The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*.”<sup>212</sup> Justice O’Connor thus makes a quick transition from deference regarding mission to a detailed consideration of the extent to which the means selected to pursue one aspect of that mission are constitutional. That is, is the belief that diversity has constitutionally cognizable benefits supported by the facts? If so, the interest is compelling, which then requires a discussion of the extent to which the particular means selected are narrowly tailored.

Her discussion of these questions was lengthy and detailed. She noted the explicit findings of the District Court, which were based on an

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209. *Grutter*, 539 U.S. at 328 (emphasis added).

210. *Id.* at 347 (Scalia, J., dissenting).

211. *Id.* at 361 (Thomas, J., dissenting).

212. *Id.* at 328.

extensive record.<sup>213</sup> She referred to “numerous studies show[ing] that student body diversity promotes learning outcomes and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”<sup>214</sup> She noted the considered judgments of a wide variety of actors to the effect that the benefits of diversity “are not theoretical but real.”<sup>215</sup> And she subjected the actual policy to a series of specific narrow tailoring requirements that were discussed at some length. Viewed in this light, whatever respect Justice O’Connor accorded Michigan’s educational judgments about its mission did not in reality operate as a justification for setting aside the requirements of strict scrutiny.

The actual discussion was, moreover, far more rigorous and demanding than that applied by Justice Powell in *Bakke*. The contrast between the two approaches is stark and telling. Justice Powell accepted what he was told. Justice O’Connor in turn described what the University postulated and then explored, in considerable detail, whether the positions embraced were supported by the facts.

Any questions about whether this is the case are easily resolved when one looks with care at any number of decisions in which the Court has engaged in true deferential review. Those cases that make it quite clear that the level of scrutiny in *Grutter* was far more exacting than the analysis undertaken by the Court in any number of other situations.

For example, in *Goldman v. Weinberger*,<sup>216</sup> an Orthodox Jew and ordained rabbi pressed his claim that the United States Air Force’s refusal to allow him to wear his yarmulke while on duty infringed his First Amendment freedom to exercise his religious beliefs. The Court held that the challenged regulations “reasonably and even-handedly regulate dress in the interest of the military’s perceived need for uniformity.”<sup>217</sup> The majority observed that “[o]ur review of military regulations challenged on

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213. *See id.* at 330 (noting “the expert studies and numerous reports entered into evidence at trial”).

214. *Id.* (quoting Brief for American Educational Research Association et al. as Amici Curiae at 3). Additional sources noted were: WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michael Kurlaender eds., 2001); and *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang et al. eds., 2003). The AERA brief and these three books did in fact compile virtually all of the direct social science evidence available at the time. One of the welcome ironies of *Grutter* and *Gratz* is that the decisions have spurred a virtual explosion of research in the field.

215. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003) (citing briefs filed by various corporations and “high-ranking retired officers and civilian leaders of the United States military”).

216. 475 U.S. 503 (1986).

217. *Id.* at 510.

First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”<sup>218</sup> It stressed that “[t]he considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission.”<sup>219</sup> And, in a key passage, it emphasized that “whether or not expert witnesses may feel that religious exceptions to [the regulation] are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.”<sup>220</sup>

This is true deference. The majority declared in no uncertain terms that the opinions of the outside world did not matter, expert or otherwise. Once the military determines that a particular course of action is essential, judicial inquiry is at an end. Justice Brennan recognized this in his dissent, where he complained that the Court had “eliminat[ed] in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.”<sup>221</sup> He characterized the deference articulated in *Goldman* as “a subrational-basis standard” and complained that “it seems that the Court will accept” the Air Force’s judgment “no matter how absurd or unsupported it may be.”<sup>222</sup>

The point is not whether the *Goldman* standard is or is not appropriate. It is rather that examples of true deference abound in the decisions of the Court, including, but not limited to, cases involving the military, primary and secondary education,<sup>223</sup> and prisons.<sup>224</sup> In prison litigation, for example, the search is for a “logical connection” between the “expert opinion” of prison officials and the burden imposed on what would otherwise have been deemed a fundamental right subject to the rigors of strict scrutiny.<sup>225</sup> That is quite different from what the Court actually did in *Grutter*, where, given the need to adhere to the rigors of strict scrutiny, the majority felt obliged to discuss at considerable length the extent to which

218. *Id.* at 507.

219. *Id.* at 508.

220. *Id.* at 509.

221. *Id.* at 515 (Brennan, J., dissenting).

220. *Goldman v. Weinberger*, 475 U.S. 503, 515 (1986).

223. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 396 (2007) (holding that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (standard for actions governing “school-sponsored expressive activities” is whether an educator’s “actions are reasonably related to legitimate pedagogical concerns.”).

224. *See, e.g., Turner v. Safley*, 482 U.S. 78, 89 (1987) (adopting standard that asks whether a burden on a prisoner’s fundamental rights was “reasonably related” to “legitimate penological interests”).

225. *See id.* at 92–93.



Michigan's educational judgment was supported by the evidence, ascertaining that the educational benefits are "substantial" and "not theoretical but real."<sup>226</sup>

Any doubt that this is the case is dispelled by *Overton v. Bazzetta*,<sup>227</sup> a prison case decided just one week before *Grutter*. The issue before the Court was the extent to which prison officials in Michigan could restrict visits to prisoners, in particular visits by their children. The Court recognized that, outside the prison, such measures would burden a fundamental right—namely, the ability "to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents."<sup>228</sup> It did not find it necessary to explore the extent to which that right survives imprisonment, however, because the operative standard was whether "the challenged regulations bear a rational relationship to legitimate penological interests."<sup>229</sup> The regulation was accordingly permissible given the "logical connection" between "maintaining internal security" and protecting children from harm.<sup>230</sup>

It is also important to recognize that the post-*Grutter* Court has insisted that the rigors of strict scrutiny cannot, and should not, be relaxed when decisions based on race are at issue, even in prisons. That was the message conveyed two years after *Grutter* in *Johnson v. California*.<sup>231</sup> Writing for the Court, Justice O'Connor insisted that *Grutter* stood for the proposition that "strict scrutiny [applies] in every context, even for so-called 'benign' racial classifications."<sup>232</sup> She then refused to apply a rule of deference appropriate in other prison contexts to a policy of racially segregating prisoners during the initial classification process following incarceration.<sup>233</sup> The same thing happened when the Court considered an attempt by two K-12 school districts to extend the logic of *Grutter* to those settings and insisted that the rigors of strict scrutiny should apply.<sup>234</sup>

The approach actually taken in *Grutter* is then far more rigorous than its critics care to admit. Justice O'Connor's use of the term "deference" was

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226. *Grutter*, 539 U.S. at 330.

227. 539 U.S. 126 (2003).

228. *Id.* at 131 (citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

229. *Id.* at 132 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

230. *Id.* at 133.

231. 543 U.S. 499 (2005).

232. *Id.* at 505.

233. *Id.* at 509–15 (refusing to apply the *Turner* rule of deference to prison decisions predicated on race).

234. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007) ("Such deference 'is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.'" *Id.* (quoting *Johnson v. California*, 543 U.S. 499, 506 (2005))).

unfortunate.<sup>235</sup> But her actual opinion for the Court did not signal a willingness on its part to blindly accept whatever story Michigan wished to tell, either as an absolute matter, or in the light of how the Court has handled other cases in which what otherwise might have been deemed suspect constitutional issues were adjudicated.

*Grutter* is then *Bakke* with teeth. *Bakke* embraced the assumption that diversity is a compelling interest because certain institutions thought it was a good idea and minority students might bring, for example, an unspecified “something” to the then predominantly white Harvard College.<sup>236</sup> That view has been replaced by a standard within which diversity is accepted as a compelling interest because the assumptions for which it stands are supported by positive evidence regarding actual outcomes. Narrow tailoring, in turn, has become more than a simple list of the flaws endemic to the quota system employed by UC Davis. Instead, affirmative admissions policies and practices will now be evaluated within a detailed, multi-step matrix that will ask in each instance whether the policy and program at issue comports with “the hallmarks of a narrowly tailored plan.”<sup>237</sup>

### III. INSTITUTIONAL PROGRAMMING AND ASSESSMENT FOR INSTITUTIONS UTILIZING RACE-CONSCIOUS ADMISSIONS POLICIES

I would be remiss, having argued that *Grutter* is *Bakke* with teeth, if I did not then at least sketch out some of the major implications of this reality for higher education. This discussion is not meant to be definitive. Rather, my goal is to outline some threshold considerations and leave a more detailed examination of these concerns to a future article. My core assumption is that a college or university using race as a factor in admissions decisions must clearly articulate how a racially diverse student body supports its institutional mission and must then specify the educational outcomes it expects will flow from such diversity. Further, the institution must construct and implement an institutional plan for measuring whether those outcomes are in fact occurring.<sup>238</sup>

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235. One possible explanation for invoking “deference” is that it offered the majority a way to deal with the problem posed by the Law School’s contention that it did not engage in “racial balancing” in the latter stages of a given admissions cycle as it pursued a “critical mass” of minority students. *See Grutter*, 539 U.S. at 335–36. A careful reading of the opinion reveals that this is the one area where the majority took Michigan at its word, relying on assertions by the law school’s admissions officers that, while pursuing a “critical mass,” they did not “seek to admit any particular number or percentage of underrepresented minority students.” *Id.* at 318–19 (discussing the testimony of Dennis Shields and Erica Munzel).

236. *See supra* text accompanying notes 181–188.

237. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

238. The first requirement was both imposed on Michigan and met by it. The

My analysis proceeds in three steps. First, in Part III-A, I note and explain the special significance of *Grutter* and *Gratz* for legal education. This focus is natural for me, as I teach in a law school and am very familiar with the assumptions and practices that inform legal education. It is also highly appropriate for two reasons. First, admission to law school is almost invariably a selective process, involving the screening of a large number of applicants seeking a comparatively small number of seats in any given entering class. This means that they likely use preferences much more frequently than might otherwise be the case.<sup>239</sup> This is an important reality, given that the strictures imposed by *Grutter* and *Gratz* apply only when an institution voluntarily adopts race-conscious admissions criteria. Even then, that presumably happens only after it has given “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity the [institution] seeks.”<sup>240</sup>

Simply put, law schools are precisely the sorts of institutions most likely to find themselves confronting the problems posed by the adoption of race-conscious admissions policies, even if they do not aspire to the “elite”<sup>241</sup> status of an institution like the University of Michigan Law School. Moreover, given changes in the law school accreditation standards adopted by the American Bar Association in response to *Grutter* and *Gratz*,<sup>242</sup> law schools now find themselves in a world within which the active pursuit of diversity appears to be a mandate, rather than an option. Law schools will also soon find themselves confronting the implications of an additional, pending ABA shift in accreditation focus, from an input to an output based approach.<sup>243</sup> This is in some respects not a new experience, since law schools have always had to take into account a post-graduation screening

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second, as Professor Liu correctly notes, is a burden that the Court did not actually impose on Michigan. That is in some respects unfortunate. It also likely reflects the fact that resolving the wider question of diversity as a compelling interest per se was far more important at that point than holding Michigan’s feet to the fire regarding the details of the evidence they offered. Indeed, this “next generation” issue may well be one of the reasons why the nature and force of the social science evidence received much greater attention in *Parents Involved*. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 552 U.S. 701, 760–767 (2007); *id.* at 837–840, 850–852 (Breyer, J., dissenting).

239. Bowen and Bok, for example, stressed that “[o]ne of the most common misunderstandings concerns the number of institutions that actually take account of race in making admissions decisions. Many people are unaware of how few colleges and universities have enough applications to be able to pick and choose among them.” BOWEN & BOK, *supra* note 214, at 15. They concede that “[t]here is no single, unambiguous way of identifying the number of such schools, but we estimate that only about 20 to 30 percent of all four-year colleges and universities are in this category.” *Id.*

240. *Grutter*, 539 U.S. at 339.

241. See *supra* text accompanying notes 210–211.

242. See *infra* text accompanying note 275.

243. See *infra* text accompanying note 271.

device, the bar examination, that served as a reference point regarding the success or failure of its students and, by necessary implication, its educational programs.<sup>244</sup> Such changes will nevertheless require a shift in focus that, I believe, presents law schools with both an obligation and an opportunity to undertake precisely the sorts of programs and studies I associate with the rigors of *Grutter* and *Gratz*.

In Part III-B, I examine key aspects of the social science research supporting the notion that diversity is a compelling constitutional interest. I focus on certain central elements of that research, identifying information and perspectives that can assist law schools as they intentionally structure their learning environments to enhance the likelihood that they are achieving the educational outcomes cited in *Grutter* and the new ABA Standards. Finally, in Part III-C, I address the value of program assessment in law schools, a practice that has not heretofore been a cornerstone in legal education.

#### A. Legal Education and Diversity: The Post-*Grutter* Realities

Higher education's commitment to diversity is pervasive and long-standing.<sup>245</sup> The American Association of University Professors was one of the early leaders attacking traditional policies and procedures, declaring in 1973 that, in its view, these "result in the exclusion of women and minorities from [academe] or their inclusion in only token proportions to their availability."<sup>246</sup> More recently, sixty-two of North America's most prestigious universities responded to the threats posed by the *Hopwood* litigation and voter initiatives banning affirmative action with a statement emphasizing that "as educators . . . [w]e believe that our students benefit

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244. One persistent and sobering fact in the diversity debate has been the reality that "relatively large proportion of examinees of color, particularly black examinees . . . failed the bar examination on the first attempt and did not make a second attempt." LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 79 (1998). Both Richard Sander and his critics report similar findings. Sander is the author of a very controversial study suggesting that affirmative action may do more harm than good by admitting minority students to legal education programs for which they are ill-prepared and within which they struggle to succeed. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). Professors Ayres and Brooks have strongly criticized his work, but also note that "Sander's study . . . highlights a real and serious problem: the average black law students's grades are startlingly low." Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1807 (2005). As Sander stresses, "[m]ost" scholars "concede (and none dispute) the basic facts . . . blacks are nearly two-and-one-half times more likely than whites not to graduate from law school, are four times more likely to fail the bar on their first attempt, and are six times more likely to fail after multiple attempts." Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1964-65 (2005).

245. See *infra* text accompanying note 78.

246. AAUP Report, *supra* note 57, at 155.

significantly from education that takes place within a diverse setting.”<sup>247</sup> They declared that “[a] very substantial portion of our curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students.”<sup>248</sup> And they asserted that “[i]f our institutional capacity to bring together a genuinely diverse group of students is removed—or severely reduced—then the quality and texture of the education we provide will be significantly diminished.”<sup>249</sup>

Legal education has if anything been even more proactive than the rest of higher education in these matters. A broad spectrum of key actors in legal education filed briefs supporting the positions taken by the University of Michigan in the *Grutter* and *Gratz* litigation. These filings stressed both the moral and practical dimensions of legal education’s commitment. For example, the primary “trade association” for legal education, the Association of American Law Schools, argued that “[r]ace-conscious admissions policies are necessary to achieve the paramount government objective of ensuring equal access to legal education, the legal profession, and the process of self-government.”<sup>250</sup> A group of law deans echoed these sentiments, stressing “the harm to legal education, to the [law] schools as institutions, and to society” if race could not be considered in the admissions process.<sup>251</sup> The Law School Admissions Council, which develops and administers the primary screening tool for law school admissions, the Law School Admissions Test, stressed its “strong interest in ensuring that standardized test scores are given the proper weight in the admissions process, and . . . longstanding commitment to ensuring equal access to legal education for members of minority groups.”<sup>252</sup> It then argued that “[t]he inescapable lesson of the statistical evidence compiled year after year by LSAC is that unless America’s law schools are allowed to adopt race-conscious admissions policies, many of the nation’s lawyers will be trained in an environment of racial homogeneity that bears almost no relation to the world in which they will work, and in which all of us live.”<sup>253</sup>

The most telling arguments were arguably those made by the American Bar Association. It stressed that it “has worked to ensure that members of

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247. Association of American Universities, *On the Importance of Diversity in University Admissions*, N.Y. TIMES, Apr. 24, 1997, at A17.

248. *Id.*

249. *Id.*

250. Brief of the Association of American Law Schools as Amicus Curiae Supporting Respondents at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

251. Brief of the American Law Deans Association as Amicus Curiae Supporting Respondents at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

252. Brief of the Law School Admissions Council as Amicus Curiae Supporting Respondents at 2, *Grutter v. Bollinger*, 535 U.S. 306 (2003) (No. 02-241) [hereinafter LSAC Brief].

253. *Id.*

all racial and ethnic groups are represented in the legal profession.”<sup>254</sup> It declared that “[f]ull participation in the legal profession by racial and ethnic minorities is a sine qua non for the effective functioning of the legal system and for the legitimacy of our system of government.”<sup>255</sup> And, echoing a reality documented by a number of other parties by the Court,<sup>256</sup> it stressed that “[s]hould the Court proscribe these race-conscious admissions programs, the likely result will be a precipitous decline in the number of lawyers from under-represented racial and ethnic groups.”<sup>257</sup>

These sentiments eventually became an accreditation reality. In August 2006, slightly over one year after *Grutter* and *Gratz* were decided, the ABA House of Delegates approved Standard 212(a), which states that all law schools “shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”<sup>258</sup> Although the Interpretations of Standard 212 states that the Standard “does not specify the forms of concrete actions a law school must take,”<sup>259</sup> the ABA does not appear to treat the pursuit of diversity as optional. It has made it quite clear that the mandate applies even in the face of “a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions.”<sup>260</sup> And it has in fact insisted on substantial alterations in admissions practices as part of the

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254. Brief of the American Bar Association as Amicus Curiae Supporting Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter ABA Brief].

255. *Id.* at 8–9.

256. See, e.g., LSAC Brief, *supra* note 249, at 3 (“The simple, demonstrable statistical fact is that most selective law schools in this country will have almost no students of certain races unless they adopt admissions policies designed to alter that outcome.”); *id.* at 8–9 (indicating, for example, that “[f]or the fall 1997 entering class, the year petitioner applied to Michigan Law School, there were 3,447 applicants nationwide in” the statistical range threshold for admission to Michigan, only “17 of whom were black”).

257. ABA Brief, *supra* note 254, at 5. It is worth noting that the focus here seems to be on “representation” and “participation,” rather than on the educational process itself. That is, the ABA argued largely for what I will describe as “structural” diversity. See *infra* text accompanying note 286.

258. AMERICAN BAR ASSOCIATION, 2008–09 STANDARDS FOR APPROVAL OF LAW SCHOOLS, CHAPTER 2: ORGANIZATION AND ADMINISTRATION, Standard 212(a) [hereinafter ABA STANDARDS], available at <http://www.abanet.org/legaled/standards/standards.html>. A parallel provision, Standard 212(b), imposes a similar requirement regarding the need to have “faculty and staff that are diverse with respect to gender, race, and ethnicity.”

259. ABA STANDARDS, *supra* note 258, at Interpretation 212-13.

260. ABA STANDARDS, *supra* note 258, at Interpretation 212-1.

accreditation process.<sup>261</sup>

The official explanation for the revision was that the prior standard, which spoke simply of the need for an “equal opportunity effort,”<sup>262</sup> had “not been revised in 15 years [and] needed to be updated in the light of” *Grutter* and *Gratz*.<sup>263</sup> Its exact meaning has, in turn, been disputed,<sup>264</sup> prompting Dean Steven R. Smith, speaking as a representative of the ABA, to assail “misconceptions” about the nature and effect of the revisions in testimony before the United States Commission on Civil Rights.<sup>265</sup> Nevertheless, the mandatory nature of the requirement seems clear: law schools *shall* demonstrate a commitment to affirmative action and diversity by taking *concrete steps* towards those ends. Moreover, while Dean Smith was arguably correct that “[t]he ABA is hardly unique in expecting the institutions it accredits to be committed to diversity,”<sup>266</sup> the examples he lists of such requirements do not speak in such stark terms. The business college standard, for example, states simply that “[a]s a condition of eligibility to pursue business and accounting accreditation (and for maintenance of accreditation as well) the school must first define and

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261. The most visible and controversial example of this is the case of the George Mason University Law School, which was criticized when “the site evaluation team for the ABA” discovered that “only 6.5% of the law school’s entering students were minorities.” Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON U. CIV. RTS. L.J. 77, 109 (2008). In the wake of that finding, “the school was forced to implement significant racial preferences, despite its opposition to such practices.” *Id.* See also Gail Heriot, *Affirmative Action in American Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 237, 274–79 (2008) (discussing George Mason’s experiences).

262. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW, Standard 211, at 36–38.

263. Katherine S. Mangan, *Bar Association Moves to Strengthen Diversity Requirements for Accreditation of Law Schools*, CHRON. HIGHER EDUC. DAILY NEWS, Feb. 12, 2006 (citing John Sebert, ABA Consultant on Legal Education), available at <http://chronicle.com/daily/2006/02/2006021401n.htm>.

264. For example, Professor David Bernstein, who teaches at George Mason, argued that the revised standard meant that “[r]acial preferences will thus generally be necessary to comply” with the accreditation standards. David E. Bernstein, *Affirmative Blackmail*, WALL ST. J., Feb. 11, 2006, at A9. John Sebert, who was the ABA Consultant on Legal Education at the time the standards were revised, disagreed, declaring that Bernstein “got it completely wrong” and that “the revised standard clarifies that law schools *may* consider race and ethnicity in admissions . . . but does not require them to take that approach.” Mangan, *supra* note 263 (quoting John Sebert). Sebert went on to state, however, that the net effect of Interpretation 212-2 was exactly what it said: “the mere fact that you may be in a state that has a statutory provision prohibiting the consideration of race in the admissions process does not relieve you” of the obligation to enroll a diverse student body that has the traits mentioned in the standard. *Id.*

265. Steven R. Smith, *Opening Statement Before the United States Civil Rights Commission*, at 84, 87–89, in U.S. COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS: A BRIEFING REPORT (April 2007).

266. *Id.* at 87.

support the concept of diversity appropriate to its culture, historical traditions, and legal and regulatory environment.”<sup>267</sup> The one that comes closest to the ABA approach, in turn, is in the standards for programs in Journalism and Mass Communications.<sup>268</sup> Even here, however, the standards require simply that a program have a “written plan for achieving an inclusive curriculum, a diverse faculty and student population”<sup>269</sup> and “demonstrates effective efforts to help recruit and retain a student population eligible to enroll in institutions of higher education in the region or population it serves, with special attention to recruiting under-represented groups.”<sup>270</sup>

That said, the ABA approach is certainly consistent with the rhetoric that invariably accompanies discussions of diversity by the higher education establishment. In this respect, these standards seem to be suggestive harbingers of what the future likely holds. Higher education figures clearly believe that diversity is an essential element in educational excellence. It seems only logical then that these same individuals would expect accreditation standards and processes to take these beliefs into account.

It is also worth noting that the ABA is now moving from an “input” to an “outcomes” model for law school accreditation.<sup>271</sup> Although the specific

267. ASSOCIATION TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS, ELIGIBILITY PROCEDURES AND ACCREDITATION STANDARDS FOR BUSINESS ACCREDITATION 13 (Revised, July 1, 2009), available at <http://www.aacsb.edu/accreditation/Business-Standards-2009-Final.pdf>.

268. THE ACCREDITING COUNCIL ON EDUCATION IN JOURNALISM AND MASS COMMUNICATIONS, ACEJMC ACCREDITING STANDARDS (Sept. 2003), available at <http://www2.ku.edu/~acejmc/PROGRAM/STANDARDS.SHTML>.

269. *Id.* at Standard 3(a).

270. *Id.* at Standard 3(d). Dean Smith listed four other accrediting bodies, none of whose standards approximate those of the ABA. See COUNCIL OF THE AMERICAN LIBRARY ASSOCIATION, STANDARDS FOR ACCREDITATION OF MASTER’S PROGRAMS IN LIBRARY & INFORMATION STUDIES 9 (Jan. 15, 2008) (Standard IV.1, “The school has policies to recruit and retain students who reflect the diversity of North America’s communities.”); LIAISON COMMITTEE ON MEDICAL EDUCATION, FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE 17 (June 2008) (Standard MS-8, “Each medical school must develop programs or partnerships aimed at broadening diversity among qualified applicants for medical school admission.”); MIDDLE STATES COMMISSION ON HIGHER EDUCATION, CHARACTERISTICS OF EXCELLENCE IN HIGHER EDUCATION: REQUIREMENTS OF AFFILIATION AND STANDARDS FOR ACCREDITATION 31-33 (Revised, March 2009) (Standard 8, Student Admissions and Retention, silent regarding diversity); *id.* at 37 (Standard 10, Faculty, stating “[f]aculty selection processes should give appropriate consideration to the value of faculty diversity, consistent with institutional mission”); PLANNING ACCREDITATION BOARD, THE ACCREDITATION DOCUMENT: CRITERIA AND PROCEDURES OF THE PLANNING ACCREDITATION PROGRAM 27 (Nov. 2006) (Standard 9.4, “The program shall document its progress in reaching its aspirations for the quantity, quality, and diversity of its student body.”).

271. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE 1 (July 27,



requirements that this will impose have not yet been determined, law schools will presumably be required in the future to prove through outcomes data that their graduates have indeed acquired both the theoretical knowledge and professional skills necessary to function as attorneys. This shift reveals a professional and educational commitment to assessing program outcomes “by the facts” or by the numbers. In the past, legal education was arguably subject to only a single quantitative measure of the actual success of its educational programs, the bar examination. A shift to an outcomes based accreditation model will likely add additional parameters. It would be remarkable if the ABA, having made such an issue of diversity, did not also take the benefits associated with it into account in any outcomes-based approach. And, as law schools gear up to measure the outcomes of their educational programs, it would be remarkable if they did not also measure the educational benefits of their race-conscious admissions policies and practices, policies and practices that they have argued are central to their missions.

#### B. Institutional and Programmatic Considerations in Planning for a Diverse Learning Environment

As I indicated in Part I of this article, the *Grutter* majority relied heavily on “expert studies and reports entered into evidence at trial.”<sup>272</sup> In particular, Justice O’Connor and her colleagues stressed that the applicable social science showed that the “benefits” of student body diversity are “substantial,” leading to cross-racial understanding and to reductions in racial stereotypes, as well as enabling students to better understand persons of different races.<sup>273</sup> They also declared that student body diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”<sup>274</sup>

These findings are significant in and of themselves, as they provided the foundations for a holding that the student body diversity is a compelling constitutional interest. Their importance has in turn been amplified by the ABA, which modified its accreditation standards to take them into account, declaring in language which tracks closely to Justice O’Connor’s opinion that “a law school *shall* take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups, and backgrounds.”<sup>275</sup>

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2008) (“T[h]is report recommends that the Section re-examine the current ABA Accreditation Standards and reframe them, as needed, to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”).

272. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

273. *Id.*

274. *Id.*

275. ABA STANDARDS, *supra* note 258, at Interpretation 212-2 (emphasis added).

The Court's use of social science materials as a basis for judicial decision-making has been and remains controversial.<sup>276</sup> For example, some scholars have characterized this portion of the *Grutter* opinion as "secondary" and the use of social science evidence as "cautious."<sup>277</sup> There are good reasons to be careful. Considerable skill must be exercised, given both the methodological errors that can taint some social science research,<sup>278</sup> and the need to make certain that the studies relied on are in fact generalizable to the environment at issue.<sup>279</sup> That said, I believe that the critics of social science in the courts are wrong, both as a general matter,<sup>280</sup> and specifically in the context of *Grutter* and *Gratz*. As I have argued and documented in this Article, social science materials helped inform Justice O'Connor's approach to these issues. More to the point, they can provide valuable assistance to law schools as they structure and assess their efforts to make the benefits they associate with diversity a reality for their students.

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276. The literature discussing this is substantial and a full examination of the issues beyond the scope of this article. Two useful starting points for those wishing to review the history and arguments, pro and con, are Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61 (2008), and Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

277. Steven L. Willborn, *Social Science in the Courts; The View from Michigan*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 144 (Richard L. Wiener et al. eds., 2007).

278. A number of individuals, for example, have criticized the quality of the materials that Michigan relied on. See, e.g., James H. Kuklinski, *Review: The Scientific Study of Campus Diversity and Students' Educational Outcomes*, 70 PUB. OPINION Q. 1 (2006); Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625 (2005–06); Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761 (2006–07).

279. For example, most of the studies used by Michigan and its *amici* to bolster their case before the Court involved undergraduate education. See, e.g., Brief for Respondents at 22, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (noting the "powerful and essentially uncontested evidentiary record in this case" and the expert reports filed at the district court level, which discussed only undergraduate education). The district court opinion in turn cited only the trial testimony of various administrators and faculty at the Law School, see *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 833–36 (E.D. Mich. 2001), and a single social science study, the Gurin Report, see *id.* at 850, which examined only undergraduate experiences. The perspectives offered by such materials are valuable and instructive. It remains to be seen, however, whether all of the conclusions drawn from the studies of undergraduate students apply equally to law students in a professional school setting.

280. I tend to agree with Judge Posner that in areas like this "[t]he big problem is not lack of theory, but lack of knowledge—lack of the very knowledge that [social science] research, rather than the litigation process, is best designed to produce." Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 3 (1998). There are nevertheless good arguments on both sides of this debate that I do not have the time or space to explore in this article.

For example, the claim that a diverse learning environment can in fact influence actual educational outcomes has a strong basis in core social science research. I do not intend to explore those materials at length here. Instead, I simply note that it has long been a central tenet in developmental psychology that there are important post-childhood stages during which attitudes are influenced and values formed. For example, the pioneering work of Erik Erikson established that adolescents and young adults experience a number of important developmental stages, during which a sense of both personal and social identity is developed.<sup>281</sup> One of the key experts in the Michigan litigation was Professor Patricia Y. Gurin. As she explained in the study she prepared for those cases, Erikson theorized that:

[I]dentity develops best when young people are given a psycho-social moratorium—a time and a place in which they can experiment with different social roles before making permanent commitments to an occupation, to intimate relationships, to social groups and communities, and to a philosophy of life. Ideally, the moratorium will involve confrontation with diversity and complexity, lest young people passively make commitments that follow their past, rather than being obliged to think and make decisions that fit their talents and feel authentic.<sup>282</sup>

The unique nature of legal education, furthermore, means that there is still room for the diversity imperative to operate. Marvin Peterson, for example, notes that professional schools have a particularly strong socializing influence on their students.<sup>283</sup> Indeed, a number of commentators have emphasized the extraordinary psychological impact of law school on students. James Elkins describes the first year of law school as “a powerful, transformative experience in which the soul as well as the mind is at stake.”<sup>284</sup> John Bonsignore agrees, arguing that within the first few months of attending law school, there is a “vigorous institutional effort to cut the individual loose from all . . . psychological anchoring points.”<sup>285</sup> Law school, these individuals maintain, epitomizes a clash of competing cultures, creating a contest of wills between a student’s values and the

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281. See ERIK H. ERIKSON, *YOUTH: CHANGE AND CHALLENGE* (1963); ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (2d ed. 1963); ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE: SELECTED PAPERS* (1959).

282. *Expert Report of Patricia Gurin*, in *THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION*, at 101 (John A. Payton ed., 1999), reprinted in 5 *MICH. J. RACE & L.* 363 (1999) [hereinafter Gurin Report]. The Payton compilation was the original document prepared for the trial court.

283. MARVIN W. PETERSON, *ASHE READER ON ORGANIZATION AND GOVERNANCE IN HIGHER EDUCATION* (5th ed. 2000).

284. James R. Elkins, *Rites of Passage: Law Students “Telling Their Lives,”* 35 *J. LEGAL EDUC.* 27, 28 (1985).

285. John J. Bonsignore, *Law School: Caught in the Paradigmatic Squeeze*, in *BEFORE THE LAW*, at 259 (John J. Bonsignore et al. eds., 3d. ed. 1984).

institution's values. The net effect, as described by Rand Jack and Dana Crowley Jack, is that "no one who attends law school for three years completely escapes the thorns that excise prior vision and implant new."<sup>286</sup>

This literature suggests that legal education's strong institutional culture may substantially influence student attitudes and beliefs, even after relatively brief exposure to the environment. More to the point, certain aspects of how legal education is provided may play an important role in influencing students' racial attitudes and beliefs. Paul Brest and Miranda Oshige maintain that "law students, like members of all segments of society, hold stereotypes, preconceptions, and prejudices based on group membership."<sup>287</sup> Thus, they argue, an institutional culture that embraces diversity and fosters "encounters among students from different backgrounds [will] tend to reduce prejudice and alienation."<sup>288</sup>

There are, however, two major problems that must be addressed. The first is that there may be some law schools whose administrators believe that the admissions decision is dispositive. This leads to an emphasis on "structural diversity," generally defined as the numerical representation of a critical mass of minority students.<sup>289</sup> The underlying assumption at such institutions is that structural diversity alone will provide "students with opportunities to interact with peers who are different from themselves and that these interactions ultimately contribute to a supportive campus environment and mediate students' intellectual and personal development."<sup>290</sup> This is arguably the focus of the current ABA accreditation standard, which addresses only the admissions process and decision and seems to assume that all of the benefits it embraces will inevitably follow. The ABA acknowledged when it undertook the recent revisions that this effort was undertaken in the light of the goals that

286. RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 47 (1989). The "thorns" in question are those of the "bramble bush." See KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY (1930).

287. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 863 (1995).

288. *Id.*

289. This is also called "representational diversity" or "numeric diversity." Even here, there are nuances. For example, "unitary" structural diversity simply measures the number of white students to the number of minority students. See Pidot, *supra* note 278, at page 767. "Heterogenic" diversity considers the number of different racial and ethnic groups represented in the student body. *Id.* Finally, "multifaceted" diversity considers the race and ethnicity of individuals as well as other attributes including socioeconomic, geographic, and ideological considerations as well as a diversity of skills, interests, and experiences, including the demonstrated ability to overcome different kinds of disadvantages. See Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. L. REV. COLLOQUY 163, 164 (2008).

290. Gary R. Pike & George D. Kuh, *Relationships among Structural Diversity, Informal Peer Interactions and Perceptions of Campus Environment*, 29 REV. HIGHER EDUC. 445, 426 (2006).

diversity is presumed to achieve.<sup>291</sup> But the segments of the current ABA standards actually dealing with the “Program of Legal Education” are silent in this regard, emphasizing simply the need for an “educational program that “prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”<sup>292</sup>

Institutions and individuals who are content with simple structural diversity do not necessarily dispute the need for or value of “provid[ing] an environment in which students learn how to approach legal problems, as well as life itself, from multiple perspectives or viewpoints.”<sup>293</sup> Rather, they suggest that structural diversity, “in and of itself,”<sup>294</sup> is sufficient to meet their constitutional obligations.<sup>295</sup> And they seem to believe that the educational goals that flow from diversity will be easily achieved “given the inevitable ways in which a critical mass of minority students will lead all students to confront and embrace alternative perspectives and viewpoints.”<sup>296</sup>

Admitting a wide array of students is clearly an important first step. As one recent study notes, “[s]tructural diversity is perceived as a catalyst for promoting a more hospitable campus racial climate.”<sup>297</sup> That same study stresses, however, that “[d]espite its importance” research has revealed “that the singular act of increasing the number of people of color on a campus will not create a more positive racial climate.”<sup>298</sup> Structural diversity is accordingly “a necessary, but not sufficient, factor” if the goal is to actually create “a more comfortable and less hostile environment for all.”<sup>299</sup>

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291. See *supra* text accompanying notes 255 and 260.

292. ABA STANDARDS, *supra* note 258, at Standard 301(a) (Objectives). Hopefully the revision process currently underway, which will result in a shift to an outcomes-based accreditation model, will take these matters into account.

293. Caminker, *supra* note 26, at 38.

294. *Id.* at 41. See also *id.* at 50 (noting that “Michigan Law School’s admissions program passed constitutional muster despite the absence of proactive programming”).

295. *Id.* at 40 (arguing that *Grutter* made structural diversity “sufficient” for constitutional purposes).

296. *Id.* at 41. It is not my intention here to pick on Dean Caminker and make him the spokesman for all legal education. That said, as Dean at Michigan, his statements are presumably accorded great weight in these matters, and I believe that individuals at that institution in particular should not convey the impression that structural diversity is sufficient. More importantly, Dean Caminker is not the only prominent spokesman with Michigan connections to speak in this vein. See, e.g., Bollinger, *supra* note 28, at 1591 (describing the goal of diversity as “help[ing] students expand their capacities to imagine other ways of experiencing life and of seeing the world” and stating that “being around people who are in some ways different from you, or whom you perceive to be different, is one of many ways of developing this mentality”).

297. Sylvia Hurtado et al., *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. DIVERSITY HIGHER EDUC. 204, 207 (2008).

298. *Id.*

299. *Id.* See also Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment*

This perspective is not new. Patricia Gurin was one of the experts whose research Michigan supported and relied on as it fashioned its litigation strategy.<sup>300</sup> She argues that “[i]f diversity is really going to mean anything, it is not just having students [of different races] in the same place. They have to interact. They need to learn to have deep and meaningful conversations about topics that people want to avoid.”<sup>301</sup> As she and her colleagues noted even before *Grutter* was decided, “[a]lthough structural diversity increases the probability that students will encounter others of diverse backgrounds, given the U.S. history of race relations, simply attending an ethnically diverse college does not guarantee that students will have the meaningful intergroup interactions that . . . are important for the reduction of racial prejudice.”<sup>302</sup> These interactions must, moreover, be conducted with care, as simply “[t]alking about these topics can blow up if you don’t do it right.”<sup>303</sup>

The single most important consideration for all institutions, and in particular for law schools, is then to understand that it is not enough to simply admit a diverse class. The constitutional expectation in the wake of *Grutter* and *Gratz* is that the benefits associated with diversity will be *real*, that is, that they will actually occur. The educational policy expectation in turn is that there will be proactive programming. The clear consensus on the part of the experts in the field of measuring the educational benefits of student body diversity is that structural diversity is a necessary but not sufficient condition to achieve the educational benefits that institutions presumably seek when they consciously fashion a diverse student body.<sup>304</sup> Rather, “substantial and meaningful interaction” between different racial and ethnic groups is central to the “development of democratic sensibilities”<sup>305</sup> that is the professed objective of diversity. Moreover,

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*of the Educational Benefits of Interaction Across Racial Boundaries*, 50 J. COLL. STUD. DEV. 67, 84 (2009) (“Structural diversity is only the first step in a journey of a thousand miles to capitalize on the educational value of multicultural diversity.”).

300. See *supra* text accompanying notes 279 and 282.

301. Peter Schmidt, ‘Intergroup Dialogue’ Promoted as Using Racial Tension to Teach, CHRON. HIGHER EDUC. DAILY NEWS, July 16, 2008, available at <http://chronicle.com/daily/2008/07/3829n.htm>.

302. Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact of Educational Outcomes*, 72 HARV. EDUC. REV. 330, 331 (2002).

303. Schmidt, *supra* note 301 (quoting Patricia Gurin).

304. See, e.g., ALEXANDER ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 362 (1997); Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J. 322, 324 (2009) (a diverse environment is primarily important as it increases the chances that students will engage in more frequent cross-race interaction); Hurtado, *Linking Diversity*, *supra* note 149, at 190 (“[I]t is clear that enhancing the structural diversity of a student body is a necessary but not sufficient condition to produce these outcomes.”).

305. Hurtado, *Linking Diversity*, *supra* note 149, at 190. See also Lisa B. Spanierman et al., *Participation in Formal and Informal Campus Diversity*

developmental theories indicate that social interaction is necessary to elicit the cognitive disequilibria that spur growth and development in students.<sup>306</sup>

This is why I noted at the outset of this Article that the manner in which the Court proceeded in *Grutter* and *Gratz* made those cases a “good news-bad news” scenario for higher education in general and legal education in particular. Higher education in general, and legal education in particular, are arguably committed to diversity because educators believe that it will have a positive educational impact on its students. If that is indeed the case then law schools must take positive steps to see that there is *substantial* and *meaningful* interaction between students of different racial and ethnic groups. At the risk of repetition, these sorts of contacts are the keys to student socio-cognitive growth.

Diversity research builds “on the theory and research of developmental and cognitive psychologists” who have found that “discontinuity” is necessary to encourage “more active thinking processes among students, moving them from their own embedded worldviews to consider those of another (or those of their diverse peers).”<sup>307</sup> Dissonance “occurs when students encounter unfamiliar and novel situations, people, and experiences and they cannot continue to rely on familiar ways of thinking and acting.”<sup>308</sup> The sorts of learning and individual growth associated with diversity take place when individuals recognize cognitive conflicts or contradictions.<sup>309</sup> These encounters “may lead to a state of uncertainty, instability, and anxiety.”<sup>310</sup> However, “with the right amount of support and challenge, these moments of instability can lead to many dimensions of growth.”<sup>311</sup>

There are a number of ways in which law schools can facilitate the sorts of encounters that I have described here. The most obvious and most frequently discussed is through the content and process of classroom

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*Experiences: Effects on Students' Racial Democratic Beliefs*, 1 J. DIVERSITY HIGHER EDUC. 108, 124 (2008) (“[P]articipation in formal campus experiences is important for White, Black, and Latino students in predicting critical awareness of racial issues and diversity appreciation.”).

306. See ARTHUR W. CHICKERING & LINDA REISSER, *EDUCATION AND IDENTITY* (Jossey-Bass 2d ed. 1993); ROLF E. H. MUUSS, *THEORIES OF ADOLESCENCE* (Random House 5th ed. 1988); WILLIAM GRAVES PERRY, *FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME* (Holt Rinehart & Winston 1970); and JEAN PIAGET, *THE EQUILIBRATION OF COGNITIVE STRUCTURES: THE CENTRAL PROBLEM OF INTELLECTUAL DEVELOPMENT* (1985).

307. Hurtado, *Linking Diversity*, *supra* note 149, at 189.

308. *Id.* See also Gurin Report, *supra* note 282, *appendices available at* <http://www.vpcomm.umich.edu/admissions/legal/expert/gurinapd.html>. Gurin discusses evidence about automatic thinking can be challenged by “discontinuity” and “incongruity” that can lead students to more sophisticated thinking. *Id.* at 369–70.

309. Hurtado, *Linking Diversity*, *supra* note 149, at 190.

310. *Id.*

311. *Id.*

instruction. Much of the attention in the post-*Grutter* literature has focused on this. Professor Brown, for example, has argued that Critical Race Theory should be an integral aspect of instruction across the curriculum.<sup>312</sup> Professor Chambers-Goodman has suggested a number of ways in which classroom instruction can be shaped to maximize the potential benefits of diversity.<sup>313</sup> And Professor Bruckner has touted the value of cooperative learning, arguing in particular that this approach best takes into account critical differences in the cultures and learning styles of diverse groups.<sup>314</sup> In each instance, however, the argument is, as it should be, that the positive outcomes sought are best pursued as a matter of conscious planning and course design, rather than happenstance.

For example, both positive institutional support of cross-race student interaction<sup>315</sup> and directed intergroup dialogues<sup>316</sup> have been found to provide the necessary “cognitive dissonance” that has been shown to promote the broad-based set of socio-cognitive skills, democratic values, and enhanced complex thinking skills noted in both *Grutter* and the ABA Standards. Structured intergroup dialogues in particular provide “opportunities for facilitated, extended discussions about diversity”<sup>317</sup> and are associated with increases in students’ perspective-taking skills.<sup>318</sup> This pedagogical technique could be used in the classroom setting to help equip

312. See Brown, *supra* note 25, at 27–34. See also Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55 (2006).

313. Chris Chambers-Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663 (2008).

314. Carole J. Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity”—Transforming Aspirational Rhetoric into Experience*, 72 U.M.K.C. L. REV. 877 (2004).

315. See, e.g., Mitchell J. Chang et al., *Cross-racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529 (2004); Nisha C. Gottfredson et al., *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Variable Models in Data with Categorical Indicators*, 44 MULTIVARIATE BEHAV. RES. 305, 319 (2009); Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in U.S. Medical Schools*, 300 J. AM. MED. ASS’N 1135, 1139 (2009); Patrick J. Terenzini et al., *Racial and Ethnic Diversity in the Classroom: Does It Promote Student Learning?*, 72 J. HIGHER EDUC. 509 (2001).

316. See, e.g., INTERGROUP DIALOGUE: DELIBERATIVE DEMOCRACY IN SCHOOL, COLLEGE, COMMUNITY, AND WORKPLACE (David Schoem & Sylvia Hurtado, eds., 2001); Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 507 (2004); Schmidt, *supra* note 301 (discussing the Gurin intergroup dialogue project).

317. Hurtado, *Linking Diversity*, *supra* note 149, at 192. See also Schoem & Hurtado, *supra* note 316.

318. *Id.* See also Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino and White College Students*, 48 RES. HIGHER EDUC. 1 (2007).



students with the tools for engaging in civil discourse about difficult social issues.<sup>319</sup> Indeed, virtually any technique that calls attention to the interaction between law and racial or ethnic status could be utilized in one or more courses, providing parameters for targeted discussion to probe social dimensions of law and policy that might otherwise go unnoticed.<sup>320</sup> The research stresses, however, that success is almost invariably associated with active institutional involvement.

It is also critical to understand that both positive and negative effects may occur from increased diversity.<sup>321</sup> For example, Professor Sylvia Hurtado, a nationally known scholar and past president of the Association for the Study of Higher Education (ASHE), recently noted that “students who reported positive, informal interactions with diverse peers had higher scores on measures of more complex thinking about people and their behavior, cultural awareness, and perspective-taking skills (i.e., the ability to see the world from someone else’s perspective).”<sup>322</sup> In contrast, “students who had negative interactions with diverse peers (conflict or hostility) were not only least skilled in intergroup relations but also demonstrated lower scores on the outcomes, indicating that they were also least likely to develop the habits of mind to function in a diverse and global world.”<sup>323</sup> Positive student interactions, embraced and supported by key institutional constructs, are then crucial to achieving positive, as opposed to negative, learning outcomes.

Two recent studies involving professional-level students are instructive. The first involved a national sample of law students and found that “racial diversity increases intergroup contact” and “that intergroup contact increases perceived diversity of ideas” and “decreases prejudiced attitudes.”<sup>324</sup> The authors note that “the perceived openness of the intellectual atmosphere” is key to the reduction in prejudiced attitudes.<sup>325</sup> These results are consistent with one of the central tenets in developmental psychology, the “the contact theory,” which posits that positive attitude change among group members is most likely to be achieved when there are institutional supports in place that foster and embrace such cognitive and attitudinal change.<sup>326</sup>

A second study surveyed over 20,000 graduates from 118 allopathic

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319. Hurtado, *Linking Diversity*, *supra* note 149, at 192. See also Schoem & Hurtado, *supra* note 313.

320. See, e.g., Brown, *supra* note 24; Rebecca Tsosie, *Engaging the Spirit of Racial Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005).

321. Denson & Chang, *supra* note 304, at 324.

322. Hurtado, *Linking Diversity*, *supra* note 149, at 191.

323. *Id.*

324. Gottfredson et al., *supra* note 315, at 319.

325. *Id.*

326. *Id.* See also GORDON D. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

medical schools in the United States and found, after adjusting for student and school characteristics, that white students who attended the most diverse schools had greater odds of high self-rated cultural competence compared with students at schools with less racial diversity.<sup>327</sup> In addition, white students in the high diversity schools also had higher odds of having strong attitudes endorsing equitable access to care compared with those in the lowest diversity schools.<sup>328</sup> Further, the authors found a “significant interaction between school institutional climate” and white students’ self-rated cultural competence.<sup>329</sup> Specifically, the presence of a higher proportion of underrepresented racial minority students “was associated with higher self-rated cultural competence among white students when the institutional climate was perceived to be more positive.”<sup>330</sup>

These studies suggest the types of programming that might be undertaken. I cannot at this time offer a specific curricular and institutional plan for law schools to follow to ensure that educational benefits of racial diversity are occurring at their institutions. Indeed, I shouldn’t: one of the most important considerations is that diversity efforts match institutional mission, a key dynamic that will vary from institution to institution. I can emphasize that the relevant social science studies do tell us that students must be able to interact with students of other races in a variety of ways. Sometimes the topics will be specifically related to race. In other instances they will not. The one constant, however, is that these interactions take place in a positive and supportive institutional environment. This requires a significant amount of intentional institutional effort, and it is important for law schools to recognize and act on this reality.

To their credit, many key figures in legal education seem to recognize this. Dean Caminker, for example, acknowledges the existence, and “critical importance” of this “second-generation question,” conceding that “[t]here is a meaningful distinction between simply creating a diverse community and actually getting the community to function so as to achieve the goals of diversity.”<sup>331</sup> He then dilutes the force of that concession by arguing that structural diversity is all that *Grutter* and *Gratz* require.<sup>332</sup> I disagree. I see in those opinions the expectation that law schools will undertake the programming necessary to achieve their professed goals. Even were that not the case, I see such activities as the only educationally responsible way in which to proceed.

I do agree with Dean Caminker that the problems associated with this

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327. Saha et al., *supra* note 315, at 1139.

328. *Id.*

329. *Id.* at 1140.

330. *Id.*

331. Caminker, *supra* note 26, at 38.

332. *See supra* text accompanying note 290–96.

“second phase” are likely to prove “vexing.”<sup>333</sup> Professor Gurin’s observations about both the risks and rewards inherent in diversity programming are telling.<sup>334</sup> Such programming is, nevertheless, the necessary next step for law schools if they are to achieve anything more than what has appropriately been characterized as “classroom aesthetics”<sup>335</sup> and “viewbook diversity.”<sup>336</sup>

### C. Assessment and the True Commitment to Diversity

Without assessment, the rhetoric extolling the centrality of race-conscious admissions plans rings hollow. As noted above,<sup>337</sup> social science provides us with some basic considerations for structuring the educational experiences to support the important learning outcomes linked to racial diversity. In particular, these studies reveal that diversity may have no effect, or even negative effects, on learning outcomes if careful attention is not paid to the nature of cross-race student interaction and dialogue.<sup>338</sup> If institutions using race-based admissions policies truly are committed to achieving the outcomes that they assert are related to diversity, then they must create and carry out an assessment plan that will measure whether these outcomes are indeed occurring. More to the point, they must make certain that they have the information necessary to assist them in the event that find it necessary to re-examine their institutional climate and programs and move toward actually achieving these outcomes if they are not already occurring.

The ultimate goal of an outcomes-based assessment scheme is to measure learning outcomes and to use the results of the assessment to plan improvements and make recommendations for future action consistent with the findings of the study.<sup>339</sup> There a number of steps in any sound academic assessment plan, including: articulating the institution’s or program’s “mission”; based on that mission, specifying the intended results of discrete academic programs or practices; purposefully planning curricular or institutional points of access so that those results (or outcomes) can be achieved; implementing methods to systematically identify whether the end results *have* been achieved; and finally, using the results to plan improvements in the programs or practices that will create

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333. Caminker, *supra* note 26, at 38.

334. *See supra* text accompanying notes 300–03.

335. *See Grutter*, 539 U.S. at 355 (Thomas, J., concurring and dissenting).

336. *See* Scott Jaschik, *Viewbook Diversity vs. Real Diversity*, INSIDE HIGHER EDUC., July 2, 2008, available at <http://www.insidehighered.com/news/2008/07/02/viewbooks>.

337. *See supra* text accompanying notes 273–277.

338. *See supra* text accompanying notes 309–320.

339. MARILEE J. BRESCIANI, OUTCOMES-BASED ACADEMIC AND CO-CURRICULAR PROGRAM REVIEW: A COMPILATION OF INSTITUTIONAL GOOD PRACTICES 14 (2006).

enhanced opportunities for these outcomes to occur.<sup>340</sup>

Both *Grutter* and the ABA Standards articulate the key outcomes that should be associated with race-conscious diversity initiatives at law schools.<sup>341</sup> Again, at the risk of repetition, these include: promoting cross-racial understanding; breaking down racial stereotypes; enabling students to better understand persons of different races; promoting better classroom discussion; better preparing students for an increasingly diverse workforce and society; better preparing students to become professionals; and finally, providing pathways to positions of leadership in society. Depending on the school's mission, an individual law school might choose somewhat different outcomes or articulate them in a different manner. Either way, a truly narrowly tailored diversity plan must stress the development and identification of the curricular and institutional processes by which students can make progress along the articulated learning dimensions.

Assuming an institution adopts the learning outcomes noted by *Grutter* and embraced by the ABA, it might include a range of curricular interventions. For example, it could incorporate at least one targeted racial awareness dialogue in an established orientation program for first year students, and follow that with requiring student participation in a course that utilizes Critical Race Theory, or any other related technique, in the analysis of substantive law. If institutions do not have such targeted and institutionally supported opportunities for students to benefit from racial diversity, such curricular interventions and institutional climate issues must be developed and addressed.

Thereafter, an assessment plan must be created and implemented. The key here is to understand that the assessments must be longitudinal.<sup>342</sup> That is, meaningful data must be collected both before and after exposure to the diversity experience in order to determine whether the experience itself produced the learning outcomes. Careful attention must also be paid to the means of testing for the required outcomes. For example, a survey that simply asks the students just prior to graduation to "self assess" whether they are "more open to people of another race" or "whether they are less prejudiced now than when they entered law school" is replete with methodological errors.<sup>343</sup> Rather, the institution must develop methods of

340. *Id.*

341. *See supra* text accompanying notes 265–272.

342. That is, there must be some basis for comparison, as basic social science principles instruct that "[c]omparisons need to be made between students who experience different types of education. The term *comparison* should be stressed because survey research done on a single group often leads to invalid conclusions about cause-and-effect relationships." BRUCE W. TUCKMAN, *CONDUCTING EDUCATIONAL RESEARCH* 235 (4th ed. 1994).

343. *See, e.g., id.* ("The more transparent or obvious the purpose of a questionnaire, the more likely respondents are to provide the answers they want others to hear about themselves rather than the ones that may be true."). *See generally* EDWARD L.

testing whether the learning outcomes were achieved without the responses being subject to “social desirability” effects. Affirmative action and diversity are controversial and contentious subjects. Studies that probe those topics directly run into concern with respondents who give a “socially desirable” answer rather than a “true” answer. As Maria Krysan notes, “self-reports of any socially sensitive topic, including race, are subject to social desirability pressures.”<sup>344</sup> Individuals wish “to be and appear to be good people.”<sup>345</sup> This is sometimes problematic in an environment where institutional leaders create the impression that opposition to affirmative action or diversity runs the risk of being labeled, for example, as “telling the world, ‘Women and minorities need not apply.’”<sup>346</sup>

Further, law schools should collect a range of data from incoming students, assess again after each year of law school, and then collect data upon graduation. The information should be detailed and wide-ranging. In addition to basic background characteristics, the law school should gather attitudinal data on entry to law school, including attitudes that might be subject to change based on the various programming efforts undertaken, for example, in-depth intergroup dialogues, or the use targeted instruction techniques in the classroom. It should then measure the same attitudes again at the end of law school. A supplemental approach is to use a series of vignettes that are stacked with a range of issues for the students to identify and discuss. So, for example, analysis of such vignettes might show a marked sophistication in student analysis of those scenarios by displaying a greater level of critical thinking and the reduction in the use of racial stereotypes. Students might also offer a more nuanced solution to a

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VOCKELL & J. WILLIAM ASHER, EDUCATIONAL RESEARCH (2d ed. 1995).

344. Maria Krysan, *Prejudice, Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 ANN. REV. SOC. 135, 138 (2000).

345. SEYMOUR SUDMAN & NORMAN H. BRADBURN, ASKING QUESTIONS: A PRACTICAL GUIDE TO QUESTIONNAIRE DESIGN 6 (1982).

346. Mary Sue Coleman, *Oppose Prop 2; affirmative action helps economy*, LANSING ST. J., Sept. 24, 2006, available at <http://www.diversity.umich.edu/research/msc-editorial.php>. Such rhetoric is, unfortunately, coin of the realm for both supporters and opponents of affirmative action and diversity. Compare Thomas C. Wilson, *Whites' Opposition to Affirmative Action: Rejection of Group-based Preferences as well as Rejection of Blacks*, 85 SOC. FORCES 111, 111 (2006) (“Research clearly shows that whites’ opposition to race-based preferences is motivated by ‘new, but not old-fashioned’ racism.”), and Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, IND. L.J. (characterizing opposition to affirmative action as the feelings of “Whites who felt displaced from their throne of entitlement [and] began to push back”) (forthcoming 2010), with Paul Craig Roberts & Lawrence M. Stratton, Jr., *Color Code*, NAT’L REV., Mar. 20, 1995, at 36 (characterizing affirmative action as “reverse discrimination [that] violates fundamental norms of fair play”), and David G. Rosenbaum, *Files From 80’s Lay Out Stance of Bush Nominee*, N.Y. TIMES, July 27, 2005, at A1 (quoting a 1981 report written by now Chief Justice John G. Roberts, Jr., to the effect that “the ‘obvious reason’ affirmative action programs had failed was that they ‘required the recruiting of inadequately prepared candidates.’”).

problem-involving scenario, such as a client interview, that requires students to draw upon cross-cultural experiences and knowledge. Data documenting such positive changes would provide solid information to show that the learning outcomes are being achieved. Finally, since some of the outcomes, such as an improved ability to work in a diverse setting, suggest they might be achieved after graduation, data collection should continue at regular intervals post-graduation.

When the data is collected and analyzed, the schools can use it to target strengths and weaknesses in the law school experience. As part of this process law schools should seek assistance from internal sources who have program assessment or statistical experience and/or they should call upon campus or community resources to assist them in this process. This process might not be easy, but a program of outcomes assessment will underscore a true commitment to diversity for those institutions using race as a factor in admissions decisions.

#### IV. CONCLUSION

One of the true ironies in the debate about affirmative action and diversity is the deep disconnect that exists between higher education's embrace of diversity and the general public's seeming lack of support for it, especially if achieving diversity involves the use of race-related preferences. Higher education has always led the way in what Justice Blackmun characterized as the need for "first taking race into account."<sup>347</sup> The commitment on the part of legal education is, if anything, even more pronounced given the decision to mandate the pursuit of diversity as part of the accreditation process.<sup>348</sup> The general public, however, does not seem to share these convictions. In May 2009, for example, the Pew Research Center released the results of polling data that found that while "public . . . support of the principle of equal *opportunity* for all" remains high,<sup>349</sup> only 31% of the public supported minority preferences and 65% of them opposed them.<sup>350</sup> These data reflect consistent realities in recent years: public support for racial preferences is comparatively low, and the opponents of such preferences have had near complete success at the polls when they place ballot measures banning affirmative action before the

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347. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.).

348. *See supra* text accompanying notes 255–258.

349. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987–2009* at 56 (May 21, 2009), *available at* <http://people-press.org/reports/pdf/517.pdf> (noting that "[n]early nine-in-ten (87%) agree that: 'Our society should do what is necessary to make sure that everyone has an equal opportunity to succeed'").

350. *Id.* The report notes that the trend since 1987 has been fairly constant, with support increasing slightly, from 24% to 31%, while opposition has declined slightly, from 71% to 65%. *Id.*

voting public.<sup>351</sup>

The University of Michigan's own experiences in the wake of *Grutter* and *Gratz* are instructive in this regard. Slightly over one year after the decisions were handed down the people of the state of Michigan approved a ballot initiative amending the state constitution, declaring that "[t]he University of Michigan . . . shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin."<sup>352</sup> The measure was styled as the Michigan Civil Rights Initiative and was championed by, among others, Jennifer Gratz, the named plaintiff in the case challenging the undergraduate admissions program invalidated by the Court.<sup>353</sup>

The University fought the measure tooth and nail. It became an active member of One Michigan United, a broad, well-funded coalition that vigorously opposed passage of the proposition.<sup>354</sup> In an editorial statement, President Mary Sue Coleman declared that "our state stands on the brink of telling the world, 'Women and minorities need not apply.'"<sup>355</sup> And she made largely the same case the University had pressed before the Court three years earlier: "Affirmative action works; it is a targeted, not heavy-handed, tool. Impressive social science research demonstrates the positive educational outcomes linked with diverse classrooms. Students learn better in a diverse class. They are more open to different perspectives, and are

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351. See *supra* text accompanying notes 115–118 (discussing the ballot measures and votes in California and Washington). The only state-wide measure to be defeated was the one on the Colorado ballot during the general election in November, 2008, which failed by a narrow margin. The defeat was a setback for the anti-affirmative action movement, but may also have been a product of the unique dynamics created by the Obama campaign's substantial efforts to win the state. See Reeves Wiedman, *Colorado's Singular 'No'*, CHRON. HIGHER EDUC., Nov. 21, 2008, at A4 ("Supporters of affirmative action have finally found a way to defeat state ballot measures that would ban such programs: Latch onto an inspirational presidential candidate with piles of cash and an unprecedented voter-turnout machine."). In Nebraska, a state in which candidate Obama "never set foot . . . after the primary season," *id.*, a "nearly identical" measure "passed easily with nearly 58 percent of the vote." Dan Frosch, *Vote Results Are Mixed On a Ban On Preference*, N.Y. TIMES, Nov. 8, 2008, at A19.

352. MICH. CONST. art. I, § 26, cl. 1. For a detailed history of the referendum from the point of view of those supporting it, see CAROL M. ALLEN, *ENDING RACIAL PREFERENCES: THE MICHIGAN STORY* (2008).

353. See Peter Schmidt, *A Referendum on Race Preferences Divides Michigan*, CHRON. HIGHER EDUC., Oct. 27, 2006, at A21 ("Jennifer Gratz is at it again . . . trying to accomplish at the polls what she could not in the courts.").

354. See Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*, N. Y. TIMES, Oct. 31, 2006, at A1 (noting that One United Michigan had "raised and spent \$3.3 million"). The Law School Admission Council, which oversees the development and administration of the LSAT, was also an active opponent of the measure. See Schmidt, *supra* note 350, at A23 (noting that LSAC donated \$250,000 to One United Michigan).

355. Coleman, *supra* note 343.

better prepared to participate in a global economy.”<sup>356</sup> Her pleas fell on deaf ears. The measure was approved by substantial majority of those voting,<sup>357</sup> in what one of its proponents called a “dramatic victory” in a “very tough state.”<sup>358</sup> It then survived a series of legal challenges questioning both the manner in which the measure was placed on the ballot<sup>359</sup> and its constitutionality.<sup>360</sup>

Colleges and universities do not function in a vacuum. They exist, and are valued and valuable, precisely because they serve the needs and interests of the communities that support them. This is especially true for public colleges and universities, which depend on public financing. It is also a special concern for law schools, whose core mission is to provide well-trained professionals, able and willing to provide the sorts of legal services required by their communities. The challenges posed by public opposition to affirmative action and diversity are accordingly significant.

Both scholars<sup>361</sup> and individual members of the Court<sup>362</sup> have suggested that race-conscious admissions plans are likely to remain targets of further litigation. The public interest law firms that pursue such lawsuits have in turn made it quite clear that they are ready, willing, and able to bring such actions.<sup>363</sup> Now is not the time for diversity’s champions to rest on their

356. *Id.*

357. See *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 529 F. Supp. 2d 924, 931 (E.D. Mich. 2008) (noting that the final margin was 57.9% for and 43.1% against and that “[o]nly three of Michigan’s 83 counties rejected the measure”).

358. Peter Schmidt, *Michigan Overwhelmingly Adopts Ban on Affirmative-Action Preferences*, CHRON. HIGHER EDUC., Nov. 17, 2006, at A23 (quoting Ward Connerly). Connerly is a former regent of the University of California and has been one of the major forces behind the passage these measures, in particular Proposition 209 in California. See Lewin, *supra* note 351, at A20.

359. See *Operation King’s Dream v. Connerly*, 501 F.3d 584, 589 (6th Cir. 2007) (noting that the district court in this action found “widespread fraud” on the part of individuals securing signatures to place the measure on the ballot). The court ultimately held that the passage of the measure rendered claims related to this moot. *Id.* at 592.

360. See *Coalition to Defend Affirmative Action*, 529 F. Supp. 2d at 294 (rejecting the constitutional challenges).

361. See, e.g., Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889, 896 (2004) (“Justices Scalia and Thomas . . . basically tr[ie]d to foment, in their separate opinions, further litigation.”).

362. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 348 (Scalia, J., concurring and dissenting) (“[T]oday’s *Grutter-Gratz* split doubleheader seems perversely designed to prolong the controversy and the litigation.”).

363. See, e.g., CIR Press Release, *supra* note 9 (“Although the court upheld the law school system, this too, will end up as cold comfort for Michigan and schools with similar practices. Anything they do will likely be a smokescreen for quotas—and that just puts us back in litigation.”). See also Scott Jaschik, *Is Affirmative Action in Decline or Out of Control?*, INSIDE HIGHER EDUC., Oct. 9, 2008, available at <http://www.insidehighered.com/news/2008/10/09/affirm> (discussing the Fall 2008 ballot initiatives and noting CEO’s extensive studies challenging various affirmative



laurels. New challenges to affirmative action and diversity are inevitable and will almost certainly be more sophisticated than those mounted in the past. In particular, guided by the Court, sophisticated plaintiffs are likely to attack many of the basic assumptions that inform the case for diversity<sup>364</sup> and, in particular, the extent to which a given affirmative action plan comports with the true rigors of the *Grutter* analysis. Michigan was in certain respects fortunate, as the plaintiffs in *Grutter* and *Gratz* conceded the point that diversity could have positive educational outcomes. The few attacks on that point made in those cases were too little and came too late.<sup>365</sup> Future defendants may not be so fortunate.<sup>366</sup>

The ability to successfully resist future sallies may well depend on the extent to which individual institutions live up to the new realities posed by what Justice O'Connor and her colleagues actually did when they gave *Bakke* its teeth. Serious, good-faith programming tailored to the actual institutional mission is essential. So is ongoing, comprehensive assessment. Both of these will provide valuable support in the face of future litigation. They will also offer a means to persuade an otherwise skeptical public that racially-defined admissions preferences serve important social interests. Public support for race-based affirmative action measures is essential, and institutions should seize the opportunity they now have to develop and make available information demonstrating that

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action policies).

364. For example, Roger Clegg, the President and General Counsel of the Center for Equal Opportunity, has stressed that “[l]ike generals, lawyers often err by preparing to fight the just-past war rather than the next one . . . .” Roger Clegg, *Attacking “Diversity”: A Review of Peter Wood’s Diversity: The Invention of a Concept*, 31 J. C. & U. L. 417, 425 (2005). He suggests six arguments that should be made in future litigation, the first of which is to “[a]ttack the social science evidence that diversity provides ‘educational benefits.’” *Id.*

365. See, e.g., Brief for National Association of Scholars as Amicus Curiae Supporting Petitioners at 18–21, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (citing a single study that showed that the “fostering of group over individual identity by universities has led to *more*, not less racial balkanization on our nation’s campuses”).

366. In one such lawsuit working its way through the federal courts, a challenge to the system now employed by the University of Texas, the plaintiffs to date do not appear to have read Clegg, *see supra* note 361, or to have learned from past litigation mistakes, conceding the question of whether diversity in fact constituted a compelling constitutional interest. See Complaint for Declaratory, Injunctive, and Other Relief at ¶ 123, *Fisher v. Texas*, No. A-08-CA-263-SS, (W.D. Tex April 7, 2008) (“To the extent that UT Austin articulates an interest in promoting ‘student body diversity,’ Plaintiff does not challenge this interest.”). The policies at issue have, at least for the time being, been held to be in compliance with the mandates of *Grutter* and *Gratz*. See *Fisher v. Univ. of Tex. at Austin*, No. A-08-CA-263-SS (W.D. Tex Aug. 17, 2009) (order granting summary judgment in favor of all defendants). The organization that brought the suit, the Project for Fair Representation, has, however, “vowed to appeal as far as necessary.” Scott Jaschik, *Court Win for Affirmative Action*, INSIDE HIGHER EDUC., Aug. 19, 2009, available at <http://www.insidehighered.com/news/2009/08/18/texas>.

their assumptions about the benefits of a diverse learning environment are now supported by compelling educational facts.

As Professor Hurtado has argued, “[w]hile [*Grutter* and *Gratz* have] allowed institutions to better articulate how diversity can ideally work in an educational setting, it is important for campuses to consider how diversity initiatives are central to their key mission in practice.”<sup>367</sup> Once again, Professor Hurtado eloquently expressed the challenge when she observes that “[t]he institutions that take the least transformative approach to educating diverse students risk criticism and attack when diversity initiatives are considered ‘add ons’ or marginal to the institutional functioning.”<sup>368</sup>

Our nation’s colleges and universities now have the opportunity to show a true commitment to diversity, not because it offers political or social cover, but because of the educational benefits it arguably confers. It would be unfortunate, at best, if institutions with race-conscious admissions programs—programs that may well be achieving their intended goals—are challenged to produce evidence to that effect, and are unable to do so because they have failed to recognize both the opportunities and challenges offered by *Grutter* and *Gratz*. *Bakke* now has teeth. It is time to recognize this and act accordingly. That is the best possible defense in future litigation and the surest route for gaining public trust and support. It is also the surest way to discharge higher education’s most fundamental obligation: providing sound educational programs and experiences for the students it serves.

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367. Hurtado, *Linking Diversity*, *supra* note 149, at 189.

368. *Id.*

GUN REGULATION ON CAMPUS:  
UNDERSTANDING *HELLER* AND PREPARING  
FOR SUBSEQUENT LITIGATION AND  
LEGISLATION

DEREK P. LANGHAUSER\*

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INTRODUCTION

The issue of whether to regulate, prohibit, or allow guns on campus remains important and visible for colleges and universities across the country. In 2009, twenty states considered various reforms to campus weapon laws,<sup>1</sup> up from the seventeen states that attempted such reforms in

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\* The author is General Counsel of the Maine Community College System. This article is dedicated to the memory of Charles A. Harvey, Jr. whose own scholarship and practice in the most challenging areas of law set a standard for care, excellence, and reason.

It bears emphasizing at the outset that it is not a purpose of this article to argue whether gun regulation is or is not a good idea, or whether *District of Columbia v. Heller* 128 S.Ct. 2783 (2008), was correctly decided. Those tasks are for others; see, for example, *infra* note 20. Instead, the purpose of this article is to accept the reality as college and university counsel find it; i.e., that many of their clients currently restrict, and want to continue to restrict, gun possession on their campuses. Given that reality, this article focuses only on how to help such counsel defend their clients' interests in doing so.

1. *Report of the National Conference of State Legislatures, Carrying Guns on Post-Secondary Campuses: 2009 Legislation* (Aug. 11, 2009) (password access through state law librarian or legislative staff) [hereinafter NCSL Report] at <http://www.ncsl.org>.

As of October 15, 2009 there were five states with active or enacted legislation to allow all or some individuals with Concealed Carry Weapon (“CCW”) permits to carry weapons on college and university campuses. See e.g., KAN. STAT. ANN. § 75-

2008.<sup>2</sup> Currently, approximately twenty-six states prohibit guns on public

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7c10(14) (effective July 7, 2009) (prohibiting CCWs on “any . . . college or university facility”); ME. REV. STAT. ANN. tit. 20-A, § 10009 (effective Sept. 12, 2009) (stipulating that colleges and universities have the power to regulate the possession of firearms on campus); S.C. CODE ANN. § 16-23-430 (effective June 2, 2009) (allowing CCWs in a motor vehicle, but not on campus); H.R. 4348, 95th Leg., Reg. Sess. (Mich. 2009) (proposing to eliminate the list of specified premises, including college and university campuses, where CCW licensed persons may not carry a weapon); H.R. 129, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (eliminating public and private institutions of higher learning from a list of premises on which CCWs are prohibited).

There were also fourteen states where CCW legislation was defeated. *See, e.g.*, S. 310, 2009 Leg., Reg. Sess. (Ala. 2009) (prohibiting a state-supported college or university from adopting a policy prohibiting persons employed as a professor at the college or university from carrying a firearm on campus if the professor has any required license); H.R. 2607, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (allowing a governing board, officer, faculty member, staff member or other employee to prohibit the lawful possession of concealed weapon by persons with valid permits on property of an educational institution); H.R. 1097, 87th Gen. Assem., Reg. Sess. (Ark. 2009) (allowing an individual with a concealed permit to have a firearm in a locked car on campus); S. 493, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009) (prohibiting a state college or university from regulating in any manner the ownership, possession, carrying, or transportation of firearms or ammunition); H.R. 419, 2009 Leg., Reg. Sess. (Ky. 2009) (prohibiting colleges and universities from prohibiting employees from keeping a loaded firearm in their car); H.R. 27, 2009 Leg., Reg. Sess. (La. 2009) (authorizing concealed handgun permit holders to carry concealed weapons on campuses); H.R. 353, 424th Gen. Assem., Reg. Sess. (Md. 2009) (prohibiting the carrying or possession of firearms, knives, and deadly weapons on the property of public institutions of higher education); H.R. 645, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009) (removing the prohibition on persons with concealed carry endorsements carrying concealed firearms into an institution of higher education); Leg. B. 145, 101st Leg., 1st Reg. Sess. (Neb. 2009) (prohibiting firearms at schools, colleges and universities as prescribed); H.R. 1348, 61st Leg. Assem., Reg. Sess. (N.D. 2009) (governing the possession of a firearm or dangerous weapon by a person licensed to carry a concealed weapon); H.R. 1084, 2009 Leg., 52d Sess. (Okla. 2009) (authorizing the establishment of concealed handgun policies or rules for certain college or university events); H.R. 1257, 84th Leg. Assem., Reg. Sess. (S.D. 2009) (providing for the right to possess a firearm on the campuses of public institutions of higher education); H.R. 1893, 81st Leg., Reg. Sess. (Tex. 2009) (relating to the carrying of concealed handguns on the campuses of institutions of higher education); H.R. 1656, 2009 Leg., Reg. Sess. (Va. 2009) (allowing full-time faculty members of state institutions of higher education who possess a valid Virginia concealed handgun permit to carry a concealed handgun on campus); S. 245, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (allowing persons with handgun carry permit to carry in public postsecondary institutions); H.R. 724, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (authorizing full-time faculty and staff at public schools, colleges and universities to carry handguns if not otherwise prohibited by law); H.B. 823, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (authorizing certain law enforcement officers and military personnel to carry weapons on public college and university campuses).

2. *See* THOMAS HARNISCH, AM. ASS’N OF STATE COLLS. & UNIVS., CONCEALED WEAPONS ON STATE COLLEGE CAMPUSES: IN PURSUIT OF INDIVIDUAL LIBERTY AND COLLECTIVE SECURITY 2 (2008), available at <http://www.aascu.org/media/pm/pdf/pmdec08.pdf>. *See also* Sara Lipka, *Campaigns to Overrule Campus Gun Bans Have Failed in Many States*, CHRON. HIGHER EDUC.

college and university campuses.<sup>3</sup> Another twenty-three states allow public colleges and universities to determine their own weapons policies, with nearly all choosing to be “gun-free.”<sup>4</sup>

Debates about campus weapon regulations are continuing as courts and legislatures alike consider the authority of both public and private institutions to regulate guns on campus.<sup>5</sup> Increasingly, these reviews are being driven and/or shaped by the United States Supreme Court’s landmark decision in *District of Columbia v. Heller*.<sup>6</sup> There, the Court decided that the Second Amendment includes, in addition to rights related to organizing and maintaining state militias, a personal gun possession right unconnected to such militia service, and that such personal right extends “in case of confrontation”<sup>7</sup> to “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>8</sup> The Court also stated in dicta that its ruling should not be construed to “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>9</sup>

*Heller* may be viewed as posing little direct threat to colleges and universities that regulate gun possession on campus. Its particular holding is limited to a complete federal handgun ban in the privacy of a home. Extension of *Heller* to a like prohibition on state powers, and/or extension to weapons other than handguns and locations other than a private home, will have to come in subsequent cases. The *Heller* majority stated in dicta support for “longstanding” exercises of police power in regulating firearms “in sensitive places such as . . . schools and government buildings,”<sup>10</sup> and that “nothing in [its] opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms,”<sup>11</sup> or possession by “felons and the mentally ill,”<sup>12</sup> areas of ongoing concern for college or university administrators. Finally, recent litigation outside of

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(Wash., D.C.), Apr. 18, 2008, available at <http://chronicle.com/article/Campaigns-to-Overrule-Campu/9639/>.

3. HARNISCH, *supra* note 2, at 2.

4. *Id.*

5. *Id.*

6. 128 S. Ct. 2783 (2008).

7. *Id.* at 2797.

8. *Id.* at 2821.

9. *Id.* at 2816–17. The Court also recognized the validity of “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 2817. The Court went on to state that “we identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 2817 n.26.

10. *Id.* at 2816–17.

11. *Id.*

12. *Heller*, 128 S. Ct. at 2817.

the higher education context attempting to achieve a broader application of *Heller* beyond its immediate holding have thus far not been successful, leading some commentators to suggest that it will not have a broad precedential impact.<sup>13</sup>

However, higher education counsel anxious to preserve their institution's authority to regulate guns on campus should not overlook *Heller*. For example, gun possession advocates are filing cases to extend the Second Amendment's restriction on Congressional power to a restriction on state actors such as public colleges and universities,<sup>14</sup> introducing bills to provide concealed possession rights on college and university campuses,<sup>15</sup> and bringing cases to challenge the power of public housing authorities—whose operations can look a lot like campus residence halls—to restrict weapons.<sup>16</sup> Moreover, *Heller* did not define the term “home” so to clarify whether a college or university residence hall qualifies as a “home” and did not define “school”—a term typically associated with K–12, not post-secondary, institutions.<sup>17</sup> Nor did the Court define the standard—rational basis, heightened or strict scrutiny—by which regulations that affect the interests of colleges and universities, such as gun bans in residence halls, will be judged for their constitutionality, if, in fact, the Second Amendment is eventually held to be applicable to the states.<sup>18</sup>

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13. See, e.g., Adam Liptak, *Few Ripples from Supreme Court Ruling on Guns*, N.Y. TIMES, Mar. 17, 2009, available at <http://www.nytimes.com/2009/03/17/us/17bar.html> (“Lower federal courts have decided more than 80 cases interpreting [*Heller*], and . . . [s]o far, [it] is firing blanks.”).

14. See *infra* Part IV.E.

15. See sources cited *supra* note 1; see also *infra* Part IV.G. And in most states, private colleges and universities adopt their own restrictions in conformity with state concealed weapons laws. See HARNISCH, *supra* note 2, at 2.

16. See *infra* Part IV.H.; see also Sandra J. Mclelland & Steven D. Frenkil, *Banning Weapons on Campuses: The Battle is Far from Won*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 13, 2009, available at <http://chronicle.com/article/Banning-Weapons-on-Campuses-/21678>.

17. See *United States v. Booker*, No. CR-08-19-B-W, at \*2–5 (D. Me. Aug. 11, 2008), available at [http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW\\_08112008\\_1-08cr19\\_USA\\_V\\_BOOKER.pdf](http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW_08112008_1-08cr19_USA_V_BOOKER.pdf) (upholding 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence, against an argument based on *Heller*); see also Eric Kelderman & Sara Lipka, *Supreme Court Strikes Down a Gun Ban and Raises Questions for College Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), July 11, 2008, available at <http://chronicle.com/article/Supreme-Court-Strikes-Down-a/15127>. See e.g., *infra* Part IV.C.

18. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2783 (2008). The question of such application is now before the United States Supreme Court. See *National Rifle Association of America v. City of Chicago*, No. 08-4241 et al, 567 F.3d 856 (7th Cir. 2009), cert. granted *sub nom* *McDonald v. City of Chicago*, 78 U.S.L.W. 3169 (U.S. Sept. 30, 2009) (No. 08-1521). See also discussion in Part IV.E, *infra*.

Given these issues, *Heller* and its effects must be acknowledged by college and university counsel. The purpose of this article is to explain the legal and historical rationale of *Heller*, and to suggest how counsel can prepare for the judicial and legislative challenges that *Heller* is already bringing their way. Part I of this article summarizes *Heller*. Parts II and III explain how the Court interpreted the text and history of the Second Amendment. These textual and historical frameworks are important because they may guide state courts as they construe the scope of their own state constitutions after *Heller*.<sup>19</sup> Finally, Part IV suggests steps that counsel can take to prepare for judicial or legislative efforts to limit college and university regulation of firearm possession on campus.<sup>20</sup> Part IV

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19. State courts may or may not use *Heller* as a baseline in interpreting state constitutional provisions related to firearms. State constitutional provisions frequently have a different wording and many were adopted well after the National Framing era. While some state courts generally assume that a state constitutional provision has the same substantive meaning as its federal counterpart, others—particularly those that disapprove of recent United States Supreme Court decisions—have ruled that their state constitutions have a different meaning. Indeed, for the last thirty-five years, there has been a revival of state constitutional law. See William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

A judge who believes that her role is to be part of the democratic dialogue will study *Heller* when interpreting a state constitutional provision, whereas a judge who believes that interpretation turns on text as understood at the time the provision was adopted—which might be the 20th rather than the 18th Century—may well discount *Heller* if the text or date of adoption at issue is significantly different. It is beyond the scope of this article to detail how and why state constitutions pose significantly different jurisprudential questions from the federal constitution, but see *infra* note 118, for a brief identification of some of the primary differences.

20. It is not a purpose of this article to argue for or against the merits of the *Heller* decision, or to argue for or against the issues of gun rights more broadly. Those tasks are for others. For example, Justice Scalia sharply criticized Justice Stevens' opinion, calling Justice Stevens' rationale "dead wrong." *Heller*, 128 S. Ct. at 2790 n.5. Justice Scalia also found Justice Stevens' rationale to be "manufacture[d]" and "grotesque." *Id.* at 2794. It was "irrelevant," *id.* at 2795, "faulty," *id.*, "perilous," *id.* at 2796, "usefully eva[sive]," *id.* at 2797, "worthy of the mad hatter," *id.*, "bizarre," *id.* at 2797 n.14, "whit[less]" *id.*, "erroneous," *id.* at 2804, "unsupported" *id.*, "not comport[ing] with . . . widely understood liberties," *id.*, and a "betray[al of] a fundamental understanding of a Court's interpretive task" *id.* at 2805. Stevens' rationale did "not make sense," *id.* at 2806, and it was "particularly wrongheaded," *id.* at 2814.

In addition, critics of Justice Scalia's majority opinion have challenged its judicial methodology for employing analytical techniques typically criticized by Justice Scalia himself. These include analyzing terms out of their particular order, looking past a natural reading, relying on post-enactment sources as evidence of the drafter's pre-enactment intent, deviating from precedent without expressly overruling it, crafting seemingly new standards, and deciding a big case outright without remanding some part to a lower court for further narrowing. See J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265118](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265118); but see Alan Gura,

focuses on the statutory issues of pre-emption as it applies to the regulation of concealed weapons, the emerging constitutional issue of incorporation, and the current litigation on the related issue of public housing authority regulations, and practical legislative strategies relating to higher education specific issues.

This article concludes that although *Heller* will be used to launch certain judicial and legislative challenges against college and university policies that prohibit guns on campus, colleges and universities can withstand these challenges if that is what they choose to do. Even if the Second Amendment is incorporated against the states, colleges and universities can successfully defend their campus and/or dorm policies against concealed and/or non-concealed weapons if the colleges and universities have clear state statutory delegations of firearm regulatory authority. Such express delegations will likely defeat both statutory arguments based on pre-emption and constitutional arguments based on individual rights.

#### I. CASE SUMMARY OF *HELLER*

Since 1976, the District of Columbia (“D.C.”) banned handgun possession and required residents to keep all other firearms,<sup>21</sup> such as rifles and shotguns, bound by trigger locks.<sup>22</sup> Dick Heller was a special policeman at the Thurgood Marshall Judicial Building in D.C., and he applied to register a handgun that he sought to keep without a trigger lock at his home for self-defense. Pursuant to its ordinance, D.C. refused to register Mr. Heller’s handgun.

Mr. Heller then filed suit against D.C., arguing that D.C.’s handgun ban and firearm trigger lock requirement violated the Second Amendment of

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*Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1129 (2009), available at <http://ssrn.com/abstract=1430680>.

Instead of entering into these methodological and related policy debates, the sole purpose of this article is to focus on reality as college and university counsel find it: most of their clients currently restrict, and/or want to continue to restrict, gun possession on their campuses. Given that reality, this article focuses on helping such counsel perform their job and defend their clients’ interests in doing so.

21. The definition of “firearm” varies depending upon the regulation, ordinance or statute at issue. Maine, for example, provides by statute a fairly common definition:

[A]ny weapon, whether loaded or unloaded, which is designed to expel a projectile by the action of an explosive and includes any such weapon commonly referred to as a pistol, revolver, rifle, gun, machine gun or shotgun. Any weapon which can be made into a firearm by the insertion of a firing pin, or other similar thing, or by repair, is a firearm.

ME. REV. STAT. ANN. tit. 17-A, § 2(12-A) (2009). The principle definitions under federal law are similar. See 18 U.S.C. § 921(a)(3) (2006); 26 U.S.C. § 5845 (2006).

22. *Heller*, 128 S. Ct. at 2788 (citing D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)).



the United States Constitution. The Second Amendment provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>23</sup> The suit sought to enjoin D.C. from enforcing both provisions. The United States District Court for the District of Columbia ruled in favor of D.C. and dismissed the suit.<sup>24</sup> Mr. Heller appealed to the Court of Appeals for the District of Columbia Circuit, which reversed<sup>25</sup> and D.C. appealed to the United States Supreme Court.<sup>26</sup>

The Supreme Court, by a 5-4 vote, ruled for Mr. Heller. In the majority, Justices Scalia, Kennedy, Thomas, Alito, and Chief Justice Roberts ruled for Mr. Heller, and Justices Stevens, Breyer, Ginsburg and Souter (with Justices Stevens and Breyer each writing separately) dissented.<sup>27</sup> The majority found that the handgun ban “amount[ed] to a prohibition of an entire class of ‘arms’ that Americans overwhelmingly choose for . . . [the] lawful purpose of [self-defense],” and that the trigger lock requirement “ma[de] it impossible for citizens to use [arms] for the core lawful purpose of self-defense and [wa]s hence unconstitutional.”<sup>28</sup>

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23. U.S. CONST. amend. II.

24. *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004).

25. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

26. Vice President Richard Cheney joined as *amicus curiae* supporting Mr. Heller on all arguments. Brief for Amici Curiae 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). He did so after the United States Solicitor General filed a full-party brief supporting Mr. Heller’s general personal right of possession, but also supporting the District’s argument that the case should not be decided at that time and, instead, should be sent back to the lower court for further findings. Brief of United States as Amicus Curiae, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). This unique posture placed the Bush Administration on both sides of the case. For a fuller explanation of the Solicitor General’s position, see *infra*, note 136 and accompanying text.

27. This article focuses on Justice Stevens’s dissent because it addressed the primary issue: whether Mr. Heller had a personal, non-militia related right. *Heller*, 128 S. Ct. at 2822–47 (Stevens, J., dissenting). Justice Breyer’s dissent pursued a secondary analysis: that even if Mr. Heller has such a personal right, the public safety interests protected by the D.C. ordinance outweighed that right. *Id.* at 2847–70 (Breyer, J. dissenting).

28. *Id.* at 2817 (majority opinion).

The American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

Deviating from the rationale of, but not expressly overruling *United States v. Miller*,<sup>29</sup> a Supreme Court decision from 1939, the *Heller* majority concluded that the Second Amendment includes, in addition to rights related to organizing and maintaining state militias, a personal right unconnected to such militia service, and that such personal right extends to “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>30</sup> Moreover, this right to lawfully defend “self, family, and property”<sup>31</sup> is “elevate[d] above all other interests” protected by the Second Amendment.<sup>32</sup>

To limit the reach of this ruling, the majority added at the end of its opinion that “like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>33</sup> For example, the Court noted that:

[n]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>34</sup>

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*Id.* at 2818.

29. 307 U.S. 174 (1939).

30. *Heller*, 128 S. Ct. at 2821.

31. *Id.* at 2817.

32. *Id.* at 2821.

33. *Id.* at 2816.

34. *Id.* at 2816–17. This language responded to the brief of the United States Solicitor General whose primary interest in *Heller* was to make sure that the comprehensive scheme of federal laws regulating firearm type, manufacture, sale, possession and use by some or all people remained intact even if Mr. Heller won. The Solicitor General sought primarily to protect the Gun Control Act of 1968 which aims to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetence, and to prevent certain categories of persons from shipping, transporting, receiving or possessing firearms. See Gun Control Act of 1968, 18 U.S.C. § 922(g) (2006). The Solicitor General also sought to protect the National Firearms Act of 1934 which regulates firearms, such as machine guns, short-barrel rifles, short-barrel shotguns, silencers and certain destructive devices, and also requires that these weapons be registered by their makers, manufacturers and importers. See National Firearms Act of 1934, 26 U.S.C. § 5841 (2006). For a helpful and detailed summary of federal firearms laws, see DEPT. OF JUSTICE, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE 2005 (2005), available at [http://www.atf.gov/pub/fire-explo\\_pub/2005/p53004/index.htm](http://www.atf.gov/pub/fire-explo_pub/2005/p53004/index.htm).

Every state, of course, also has its own comprehensive laws regulating firearm possession by certain persons (e.g., felons, minors and incompetents), in certain locations (e.g., courthouses, schools and the capitol complex), and for particular uses (e.g., hunting at night or in residential areas). See Legal Community Against Violence,

## II. HOW THE *HELLER* COURT INTERPRETED THE TEXT OF THE SECOND AMENDMENT

This Part focuses on the *Heller* Court's interpretation of the text of the Second Amendment, and Part III focuses on the Court's interpretation of the history of the Amendment. Together, these interpretations are likely to guide state courts as they construe the scope of their own state constitutions after *Heller*.

### A. Militia vs. Personal Use

Both the majority and Justice Stevens, in his dissent, (hereinafter "Justice Stevens"),<sup>35</sup> agreed that the Second Amendment was a response to the concern of the anti-Federalists who worried that the new federal government would emasculate state powers by disarming the states. Specifically, the anti-Federalists worried that Congress would use its Article I powers to "raise and support [national] armies"<sup>36</sup> and to "provide for organizing, arming and disciplining"<sup>37</sup> the national army in order to disband or disarm the state militias, rendering the states powerless.<sup>38</sup> Indeed, the full Court essentially agreed that it was exactly those provisions that the Second Amendment intended to "amend" in 1791.<sup>39</sup>

The majority and the Stevens dissent nonetheless disagreed about the scope of the Framers' intent in so amending Article I. The majority found that, prior to 1791, citizens already had a right to possess and use firearms, and that this individual right was just as important to state security as the exercise of any formal militia rights. As a result, the majority read the Second Amendment as an effort—not just to codify a narrow militia gun right—but to codify the broader individual right, as well.<sup>40</sup>

Justice Stevens disagreed, arguing that, had the Framers intended to provide such an individual non-militia right, they could have done so expressly, just as several states had done at that time in their own

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at [http://lcav.org/content/state\\_local.asp](http://lcav.org/content/state_local.asp) (linking to state gun laws).

35. Justice Stevens' dissent was joined by Justices Souter, Ginsburg, and Breyer. Justice Breyer also wrote a separate dissent, which Justices Stevens, Souter, and Ginsburg joined, but, as discussed *supra* note 27, this dissent addressed a secondary analysis outside the scope of this article.

36. U.S. CONST. art. I, § 8, cl. 12.

37. *Id.*, art. I, § 8, cl. 16.

38. *Heller*, 128 S. Ct. at 2801.

39. Former United States Solicitor General Walter Dellinger, who argued orally on behalf of D.C., expressed his thoughts after the decision that the *Heller* Court read the Second Amendment not just as amending the Article I powers that the anti-Federalists feared would be used to disarm state militias, but also as amending the individual liberty clause of the Preamble. A video of Mr. Dellinger's comments is available at <http://fora.tv/2008/07/25/>.

40. *Heller*, 128 S. Ct. at 2797–98, 2801–02, 2804.

constitutions.<sup>41</sup> For example, the 1777 Vermont Declaration of Rights guaranteed “[t]hat the people have a right to bear arms for the defence of themselves and the State.”<sup>42</sup> Pennsylvania’s 1776 Declaration of Rights expressly provided its citizens with self-defense and sporting rights: “[T]he people have a right to bear arms for the defence of themselves and the state” and “shall have the liberty to *fowl and hunt* in seasonable times on the lands they hold, and on all other lands therein not inclosed.”<sup>43</sup>

### B. Prefatory vs. Operative Clause

Both the majority and Justice Stevens agreed that the twenty-seven word Second Amendment has two distinct clauses. The first clause is “[a] well regulated Militia, being necessary to the security of a free State,”<sup>44</sup> and the second clause is “the right of the people to keep and bear Arms, shall not be infringed.”<sup>45</sup>

The majority began its analysis by setting aside the first clause and, instead, focusing on the second clause.<sup>46</sup> They did so by concluding that the essential purpose of the Amendment was to protect gun rights and not to protect militia rights.<sup>47</sup> Accordingly, the majority considered the first clause to be a mere “prefatory” clause, and the second clause to be the “operative” clause.<sup>48</sup>

Having reasoned that the first clause was merely “prefatory” in nature, the majority then concluded that the first clause only “announces a purpose, but does not limit or expand the scope” of the second clause.<sup>49</sup> The purpose in interpreting the “prefatory” clause was, the majority wrote, “to ensure that our reading of the operative clause is consistent with the announced purpose.”<sup>50</sup> In other words, because the recognition of a personal firearm right adds to, but does not interfere with, any militia-related rights, that recognition is warranted.

Justice Stevens sharply disagreed not only with this conclusion but, more importantly, with the methodology. Criticizing the majority’s complicated reversing analysis, Justice Stevens stated tersely:

That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the

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41. *Id.* at 2825–26 (Stevens, J., dissenting).

42. *Id.* at 2826 (citing 1 B. SCHWARTZ, BILL OF RIGHTS 235, 324 (1971)).

43. *Id.* at 2825–26 (citing SCHWARTZ, *supra* note 42, at 266, 274).

44. U.S. CONST. amend II, cl. 1.

45. *Id.*, cl. 2.

46. *Heller*, 128 S. Ct. at 2789–90 (majority opinion).

47. *Id.*

48. Compare *id.* at 2789 with *id.* at 2803.

49. See *id.* at 2789.

50. See *id.* at 2790.

Amendment was adopted. . . . Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.<sup>51</sup>

Instead, Justice Stevens would have accorded more meaning to the first clause and, in so doing, would have recognized the reference to militia as a substantive limitation on the second clause.<sup>52</sup>

### C. Key Terms of the Prefatory Clause

Carrying forward their methodological differences, described above, the majority and dissent then interpreted the key terms of the first, or "prefatory", clause—"A well regulated Militia, being necessary to the security of a free State"—as follows.

#### 1. "Well-regulated militia"

Both the majority and Justice Stevens agreed that the term "militia" was intended to refer to the state militias. They also agreed that "well-regulated" referred to the many organizational attributes of these militias.<sup>53</sup> They disagreed, however, on how broadly the Framers intended to define the term "militia."

The majority read "militia" to be not only *formal* state sanctioned groups, but also *informal* groups of citizens, who gathered with arms to pursue some common interest.<sup>54</sup> The majority found that the Framers had a broad concern to ensure that the people could arm and protect themselves from a variety of possible sudden threats: foreign invasions, domestic insurrections, ineffectiveness of an inadequately trained and maintained militia to defend against such threats, and, as noted above, usurpation of power by rulers, particularly the new federal government.<sup>55</sup> In sum, the Framers' goal was to protect the opportunity for resistance, not to protect some standard of formality. Accordingly, the majority "start[ed] . . . with a strong presumption that the Second Amendment right is exercised

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51. See *id.* at 2826 (Stevens, J., dissenting).

52. See *Heller*, 128 S. Ct. at 2824–26. Justice Stevens's analysis implies that the analysis employed by the majority effectively and improperly shifted the burden of proof from Mr. Heller—to show that his claimed right was valid—to the District—to show that Mr. Heller's claim was invalid.

53. These attributes include the creation of regiments, brigades and divisions; command structures; appointment of officers; how the militia assembled and provided for training; how they prescribed penalties for nonappearance, delinquency, and failure to keep the required weapons, ammunition and other necessary equipment. See *Heller*, 128 S. Ct. at 2825 n.6 (citations omitted).

54. See *id.* at 2790–91 (majority opinion).

55. See *id.* at 2800–01.

individually and belongs to all Americans.”<sup>56</sup>

Justice Stevens disagreed, essentially arguing that “informal” militias were, by definition, not regulated at all, let alone “well-regulated.”<sup>57</sup> Because the Amendment referred only and specifically to “well-regulated” militia, the Framers could not have intended the broader reading given by the majority.<sup>58</sup>

## 2. “Being necessary to the security of a free State”

Despite their differences, both the majority and Justice Stevens agreed that “security” meant both political sovereignty and social stability, and included the range of threats described above.<sup>59</sup> They also agreed that the principal threat to security was a new federal government that could disarm or disable the citizens’ militia, enable a politicized standing army, or enable a select militia to rule in its place.<sup>60</sup>

### D. Key Terms of the Operative Clause

Still carrying forward their methodological differences, the *Heller* majority and Justice Stevens then interpreted the key terms of the second or “operative” clause—“*the right of the people to keep and bear Arms, shall not be infringed*”—as follows.

#### 1. “The people”

The majority found that “the people” referred to all citizens, not just a militia-specific subset of the citizenry.<sup>61</sup> That interpretation, the majority wrote, was consistent with the way the term “people” is used and construed elsewhere in the Constitution, such as in the Preamble, Article II, and the First and Fourth Amendments.<sup>62</sup>

Justice Stevens agreed that those other parts of the Constitution use “people” to convey a broad meaning. However, Justice Stevens found that, as used in the Second Amendment, the word “people” does not “enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.”<sup>63</sup>

56. *Id.* at 2791.

57. *See id.* at 2825 n.6 (Stevens, J., dissenting).

58. *Id.* at 2840 (citing *Miller*, 307 U.S. at 182).

59. *Compare Heller*, 128 S. Ct. at 2800–01 (majority opinion) *with id.* at 2840 n.34 (Stevens, J., dissenting) (citing *Miller*, 307 U.S. at 182).

60. *Compare id.* at 2800–01 (majority opinion) *with id.* at 2840 n.34 (Stevens, J., dissenting) (citing *Miller*, 307 U.S. at 182).

61. *See id.* at 2790–91 (majority opinion).

62. *See id.*

63. *Id.* at 2827 (Stevens, J., dissenting).

## 2. “Keep and Bear Arms”

Both the majority and Justice Stevens found that “keep” meant “maintain,” and that “bear” meant “to use.”<sup>64</sup> The majority found that this “right,” although stated in the singular, is actually two separate rights—one to keep and one to bear<sup>65</sup>—neither of which has an exclusively military connotation.<sup>66</sup> For example, the majority argued that a military connotation is appropriate only when “bear arms” is expressed as “bear arms *against*”—as in “bear arms against an enemy.”<sup>67</sup> Because the Second Amendment does not use the word “against” to modify “bear,” the majority rejected a militia-centered interpretation.

Justice Stevens found that “‘bear arms’ is a familiar idiom [and] when used unadorned by any additional words, its meaning is ‘to serve as a soldier, do military service, fight.’”<sup>68</sup> The term is derived from the Latin *arma ferre*, which, “translated literally, means ‘to bear [*ferre*] war equipment [*arma*].”<sup>69</sup> Justice Stevens wrote that “keep” and “bear” describe “most naturally” a unitary, military-focused right: “to have arms available and ready for military service, and to use them for military purposes when necessary.”<sup>70</sup> Finally, Justice Stevens again argued that, had the Framers intended “bear arms” to encompass civilian possession and use, they could have done so simply by adding the phrase “for the defense of themselves” as Pennsylvania and Vermont had done. This approach, Justice Stevens wrote, was well known to the Framers had they intended to follow it.<sup>71</sup>

### III. HOW THE *HELLER* COURT INTERPRETED THE HISTORY OF THE SECOND AMENDMENT

Both the *Heller* majority and both dissenting opinions were heavy with analysis of historical sources from before, during and after the time that the Second Amendment was ratified.<sup>72</sup> Again, this analysis may serve, depending upon the age and text of each state’s own constitutional

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64. *See id.* at 2791–97 (majority opinion); *see also id.* at 2827–31 (Stevens, J., dissenting).

65. *See Heller*, 128 S. Ct. at 2797 (majority opinion).

66. *See id.* at 2792.

67. *See id.* at 2794.

68. *Id.* at 2828 (Stevens, J., dissenting) (quoting OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989)).

69. *Id.* (citations omitted).

70. *Id.* at 2829–30.

71. *Heller*, 128 S. Ct. at 2825–26.

72. Again, it is beyond the scope of this article to explore the voluminous history that scholars and advocates argue is relevant here. This article, therefore, has selected those sources that exemplify the nature and range of such history.

provision, as an important reference point for how state courts will construe the history of their own state constitutions.<sup>73</sup>

#### A. Sources Before Ratification

Both the majority and Justice Stevens examined several English sources from before the Second Amendment was adopted in 1791.

##### 1. English Bill of Rights

Article VII of the English Bill of Rights from the 17th Century guaranteed that “the Subjects which are Protestants may have Arms for their defense, Suitable to their condition and as allowed by Law.”<sup>74</sup> The majority found this right to be a root of the Second Amendment and an affirmation of the Framers’ intent to accord an individual right to protect personal liberty.<sup>75</sup>

Justice Stevens found more narrowly that this English right was a specific response to abuses by the Stuart monarchs who had caused the “Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law.”<sup>76</sup> As such, it had no bearing on the American Framers’ intent in crafting the Second Amendment.<sup>77</sup>

##### 2. English Common Law

The authoritative record of law established by English judges in the 17th and 18th Centuries was transcribed by the scholarly lawyer, William Blackstone. Blackstone’s works are significant to this analysis because they were an important source for the Framers when writing the American Constitution.

Blackstone wrote in the early 18th Century of the Englishman’s “natural right[s] of resistance and self-preservation . . . [and] of having and using arms for self-preservation and defence.”<sup>78</sup> Because he did so citing Article VII in the English Bill of Rights discussed above, the majority found Blackstone’s writings to be further historical affirmation, and therefore evidence of the Framers’ intent, to accord an individual right to protect personal liberty.<sup>79</sup>

73. See *supra* note 19 and *infra* Part IV.B.

74. *Heller*, 128 S. Ct. at 2798 (majority opinion) (quoting Bill of Rights, 1689, 1 W. & M., c. 2, § 7 (Eng.)).

75. See *id.* at 2798–99.

76. *Id.* at 2838 (Stevens, J., dissenting) (quoting Bill of Rights, 1689, 1 W. & M., c. 1, § 6 (Eng.)).

77. *Id.* at 2838–39.

78. *Id.* at 2838 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*140).

79. *Id.* at 2798–99 (majority opinion).



Justice Stevens replied that Blackstone was simply interpreting Article VII of the English Bill of Rights, a document “very differently worded, and differently historically situated from the Second Amendment.”<sup>80</sup> Moreover, Justice Stevens turned Blackstone back on the majority as follows:

What *is* important about Blackstone is the instruction he provided on reading the sort of text before us today. Blackstone described an interpretive approach that gave far more weight to preambles than the Court allows. . . . Blackstone explained that “[i]f words happen to be . . . dubious, . . . ambiguous, equivocal, or intricate . . . [a] preamble is often called in to help the construction . . . .”<sup>81</sup>

Justice Stevens then used that observation to admonish the majority for not—as discussed above—giving due weight to the prefatory clause of the Second Amendment in defining the proper scope of the operative clause.

## B. Sources During Ratification

The majority found sources during the Second Amendment’s ratification process to be of “dubious” interpretive worth, and Justice Stevens all but agreed.<sup>82</sup> Instead, both sides looked to the following sources, other than the Framers’ own records.

### 1. Three State Proposals

The majority found “three state Second Amendment proposals that unequivocally referred to an individual right to bear arms.”<sup>83</sup> For example, the Massachusetts Ratification Convention entertained a motion to add the following language: “[T]hat the said Constitution never be construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms.”<sup>84</sup> The majority viewed this, and like proposals, as evidence that personal, non-militia gun rights were important at the time of ratification.

Nonetheless, Justice Stevens noted that this motion, and those like it from other state ratification conventions, failed to pass. Moreover, other

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80. *Heller*, 128 S. Ct. at 2838 (Stevens, J., dissenting).

81. *Id.* at 2838 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*59–60).

82. *Compare id.* at 2804 (majority opinion) *with id.* at 2839 (Stevens, J., dissenting).

83. *Id.* at 2804 (majority opinion) (referring to New Hampshire, Massachusetts, and Pennsylvania and citing CREATING THE BILL OF RIGHTS 16, 17 (Helen E. Veit et al. eds., 1991) (New Hampshire proposal); 6 DOCUMENTARY HIST. 1452, 1453 (J. Kaminski & G. Saladino eds. 2000) (Massachusetts proposal); 2 DOCUMENTARY HIST. 624 (J. Kaminski & G. Saladino eds. 2000) (Pennsylvania proposal)).

84. *Id.* at 2834–35 (Stevens, J., dissenting) (quoting 1 B. SCHWARTZ, BILL OF RIGHTS 235, 665 (1971)) (citations omitted).

states—Virginia, New York, and North Carolina—all had proposals that Justice Stevens argued “embedded the phrase within a group of principles that are distinctly military in meaning.”<sup>85</sup> So no such conclusion can be drawn, according to Justice Stevens.

## 2. Contemporaneous State Constitutions

The majority found that its interpretation was confirmed by “analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment.”<sup>86</sup> Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two states, Pennsylvania and Vermont, “clearly adopted individual rights unconnected to militia service.”<sup>87</sup> North Carolina and Massachusetts referred to common defense or defense of the State, but the supreme court in each state has since construed these provisions to include an individual right.<sup>88</sup> All told, the majority construed these state constitutions as evidence that personal, non-militia, gun rights were important at the time of ratification.

Justice Stevens responded that if the Framers had intended to provide individual non-militia rights like those in Pennsylvania and Vermont, they would have done so expressly. Justice Stevens further compared the Framers to the committee tasked with drafting the Virginia Declaration of Rights. That committee considered a proposal by Thomas Jefferson that would have included within the Virginia Declaration the following language: “No freeman shall ever be debarred the use of arms [within his own lands or tenements].”<sup>89</sup> Yet the committee rejected that language, just like Justice Stevens believed the Framers did when the Framers did not follow the Pennsylvania and Vermont models.<sup>90</sup>

## C. Sources After Ratification

Both the majority and Justice Stevens also examined various, mostly post-Civil War, sources from after the Second Amendment was adopted in 1791.

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85. *Id.* at 2834.

86. *Heller*, 128 S. Ct. at 2802 (majority opinion) (“Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights.”).

87. *Id.*

88. *See id.* 2802–03 (citations omitted).

89. *Id.* at 2835 (Stevens, J., dissenting).

90. *See id.* at 2835 n.23 (Stevens, J., dissenting).

### 1. New State Constitutions

The majority summarized and characterized the state constitutions adopted after the Second Amendment was ratified as follows:

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them—Kentucky, Ohio, Indiana, and Missouri—referred to the right of the people to “bear arms in defence of themselves and the State.” Another three States—Mississippi, Connecticut, and Alabama—used the even more individualistic phrasing that each citizen has the “right to bear arms in defence of himself and the State.” Finally, two States—Tennessee and Maine—used the “common defence” language of Massachusetts. That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789, at least seven unequivocally protected an individual citizen’s right to self-defense is strong evidence that that is how the founding generation conceived of the right.<sup>91</sup>

Justice Stevens replied that post-ratification sources, by their very nature “shed only indirect light[,] offer little support[, and are] the least reliable source of authority for ascertaining the intent of any provision’s drafters.”<sup>92</sup> Moreover, “there is no indication that any of them engaged in a careful textual or historical analysis of the federal constitutional provision,” so the interpretation of the Second Amendment advanced in those cases is “not as clear as the Court apparently believes.”<sup>93</sup>

### 2. Scholarship

The majority found, from a variety of scholarly sources, that, by the post-Civil War period, the Second Amendment was widely understood to secure a right to firearm use and ownership for purely private purposes, like personal self-defense.<sup>94</sup> Justice Stevens regarded these sources as simply unreliable and irrelevant. All such sources, Justice Stevens noted, were written

long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.<sup>95</sup>

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91. *Id.* at 2803 (majority opinion) (citations omitted).

92. *Heller*, 128 S. Ct. at 2837 n.28 (Stevens, J., dissenting).

93. *Id.* at 2837 n.29.

94. *See id.* at 2811-12 (majority opinion).

95. *Id.* at 2841 (Stevens, J., dissenting).

### 3. Legislation

Both the majority and Justice Stevens examined the 1927 federal statute prohibiting mail delivery of firearms capable of being concealed on one's person and the 1934 federal statute prohibiting the possession of sawed-off shotguns and machine guns.<sup>96</sup> The majority did not find any legislative debate during the enactment of these statutes regarding their constitutionality under the Second Amendment and the majority used the absence of debate to conclude, in effect, that nothing then refuted its interpretation.<sup>97</sup>

Justice Stevens viewed the absence of Second Amendment debate to be more telling:

[The 1927 and 1934 laws] were enacted over minor Second Amendment objections dismissed by the vast majority of the legislators who participated in the debates. Members of Congress clashed over the wisdom and efficacy of such laws as crime-control measures. But since the statutes did not infringe upon the military use or possession of weapons, for most legislators they did not even raise the specter of possible conflict with the Second Amendment. Indeed, the Second Amendment was not even mentioned in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act.<sup>98</sup>

Justice Stevens's point was that if legislators at the time understood the Second Amendment to accord an individual right of self-defense, surely they would have debated such concerns given the nature and reach of those two laws.

### 4. Court Decisions

Finally, the majority and Justice Stevens sparred extensively over the meaning—and precedential constraint—of the Supreme Court's prior Second Amendment decisions.

Prior to *Heller*, the Supreme Court interpreted the core of the Second Amendment just four times in 217 years.<sup>99</sup> The key case, *United States v. Miller* in 1939, held that the Second Amendment is not a bar to federal

96. See sources cited *supra* note 34.

97. *Heller*, 128 S. Ct. at 2813.

98. *Id.* at 2842, 2844–45 (Stevens, J., dissenting).

99. The first two cases were *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886). See discussion *infra* Part IV.E. The majority and Justice Stevens in *Heller* sparred at length over the degree to which these cases supported their conclusions. Compare *Heller*, 128 S.Ct. at 2812–13 (majority opinion), with *id.* at 2842–43 (Stevens, J., dissenting).

controls on firearms not related to preserving a state militia.<sup>100</sup> The Supreme Court then affirmed *Miller* in 1980, holding that the “Second Amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>101</sup>

The majority found, however, that neither precedent expressly “refute[d] the individual-rights interpretation.”<sup>102</sup> In particular, the majority described *Miller* as an “uncontested and virtually unreasoned” opinion because Mr. Miller did not file a brief or make an appearance in the case.<sup>103</sup> On the merits, the majority wrote that *Miller* does not limit the right to keep and bear arms to militia purposes, but rather limits the “type of weapon”<sup>104</sup> to which the right applies to those weapons used by the militia (i.e., weapons in common use for “lawful purposes”).<sup>105</sup>

Justice Stevens responded sharply, writing that the majority was either ignoring or re-writing *Miller*:

The key to that decision did not, as the Court belatedly suggests . . . , turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes . . . ?

The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.<sup>106</sup>

Justice Stevens further noted that *Miller*’s militia-focused interpretation of the Second Amendment has been relied upon for decades by the lower

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100. 307 U. S. 174 (1939).

101. *Lewis v. United States*, 445 U. S. 55, 65 (1980) (citing *Miller*, 307 U.S. at 178).

102. *Heller*, 128 S. Ct. at 2813 (majority opinion).

103. *Id.* at 2814–15.

104. *Id.* at 2814.

105. *Id.* at 2813 n.22.

106. *Id.* at 2845–46 (Stevens, J., dissenting).

federal courts.<sup>107</sup> For example, *Miller* has been cited approvingly between 1971 and 2004 by nine of the eleven federal appeals courts, as well as the Court of Appeals for the District of Columbia and Armed Forces Court of Criminal Appeals.<sup>108</sup> The majority replied tersely that those courts had all simply read *Miller* incorrectly.<sup>109</sup>

#### IV. PREPARING FOR POST-*HELLER* LITIGATION AND LEGISLATION

To prepare college and university attorneys for litigation or legislation seeking to apply and/or expand *Heller* to the campus setting, it is first helpful to survey the present regulatory environment. As noted in the Introduction, approximately twenty-six states prohibit guns on public college and university campuses, and twenty-three states allow public colleges and universities to determine their own weapons policies.<sup>110</sup> Because the issue remains active legislatively, the numbers and approaches of the states remain in flux. Twenty states in 2009 considered various reforms to campus weapon laws, with fourteen states defeating, five states passing and one state carrying over such measures. These numbers were up from the seventeen states that attempted such reforms in 2008, with most of these attempts failing. Likewise, post-*Heller* litigation remains very visible as well. Given this fluid legislative and litigation environment, college and university counsel can best prepare to meet any judicial and legislative challenges to their institutions' firearms possession policy by reviewing the following issues.

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107. *See id.* at 2845 n.38.

108. *See, e.g.*, *United States v. Haney*, 264 F.3d 1161, 1164–1166 (10th Cir. 2001), *United States v. Napier*, 233 F.3d 394, 402–404 (6th Cir. 2000), *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710–711 (7th Cir. 1999), *United States v. Scanio*, No. 97–1584, 1998 WL 802060, at \*2 (2d Cir. Nov. 12, 1998), *United States v. Wright*, 117 F.3d 1265, 1271–1274 (11th Cir. 1997), *United States v. Rybar*, 103 F.3d 273, 285–286 (3d Cir. 1996), *Hickman v. Block*, 81 F.3d 98, 100–103 (9th Cir. 1996), *United States v. Hale*, 978 F.2d 1016, 1018–1020 (8th Cir. 1992), *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam), *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam), *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *see also Sandidge v. United States*, 520 A.2d 1057, 1058–1059 (D.C. 1987).

A number of courts have remained firm in their prior positions even after considering a competing conclusion from the Fifth Circuit Court of Appeals in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). *See e.g.*, *United States v. Lippman*, 369 F.3d 1039, 1043–1045 (8th Cir. 2004), *United States v. Parker*, 362 F.3d 1279, 1282–1284 (10th Cir. 2004), *United States v. Jackubowski*, 63 Fed. App'x 959, 961 (7th Cir. 2003), *Silveira v. Lockyer*, 312 F.3d 1052, 1060–1066 (9th Cir. 2002), *Bach v. Pataki*, 289 F. Supp. 2d 217, 224–226 (N.D.N.Y. 2003), *United States v. Milheron*, 231 F. Supp. 2d 376, 378 (D. Me. 2002), *United States v. Smith*, 56 M.J. 711, 716 (A.F. Ct. Crim. App. 2001).

109. *Heller*, 128 S. Ct. at 2815 n.24.

110. *See supra* notes 3 and 4.

### A. Understand the Issue of Pre-emption

The key statutory question that often precedes, and is frequently confused with, any constitutional questions arising from the Second Amendment, is whether the state has pre-empted regulation of firearms in a manner precluding a public college or university from adopting gun regulations. Maine offers a good example of a general pre-emption statute:

The State intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition, and supplies . . . . [A]ny existing or future order, ordinance, rule, or regulation in this field of any political subdivision of the State is void . . . . [N]o political subdivision of the State, including, but not limited to, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies.<sup>111</sup>

Such laws can impose possible barriers to a college or university's authority to adopt regulations.<sup>112</sup> For example, pre-emption is currently at the heart of a case challenging the University of Colorado's authority to regulate concealed weapons on campus,<sup>113</sup> and was at the heart of the litigation in *University of Utah v. Shurtleff*.<sup>114</sup> In *Shurtleff*, the Utah legislature enacted a law barring "state and local entities from enacting or enforcing any [rule] that in 'any way inhibits or restricts the possession or use of firearms on either public or private property.'"<sup>115</sup> The University of Utah, which generally banned students and employees from carrying guns while "on campus and 'while conducting university business off campus,'" claimed the state law interfered with its autonomy conferred by the state

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111. ME. REV. STAT. ANN. tit. 25, § 2011(1)–(2) (2007).

112. It is also important to distinguish state statutory authority to regulate guns from a municipally imposed obligation to do so. If the source is municipal, then the issue of their pre-emption by a counter-veiling state bar is implicated. The issue of breadth may also be implicated, since municipalities often take broad positions. This is one lesson of *Heller* under the D.C. ordinance, and is the focus of the NRA's current litigation efforts. The lesson is that specifically delegated authority and/or specific exercises of broadly delegated authority may be more secure than broad delegations and broad exercises.

113. *Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, No. 2008-CV-492, slip op. (D. Colo. 2008). The University successfully defended its policy broadly as compliant with the Colorado Constitution, state pre-emption statutes and pertinent Attorney General Opinions.

114. 144 P.3d 1109 (2006).

115. *Id.* at 1111 (quoting UTAH CODE ANN. § 63-98-102 (Supp. 2004)).

constitution. The Utah Supreme Court rejected the claim, concluding that the Utah Constitution does not give the University autonomy; like other state government entities, the legislature has the “ability to generally manage all aspects of the University.”<sup>116</sup>

The key point is this: To overcome a pre-emption challenge, a college or university should have its authority to regulate firearms set out in an express statutory grant of authority. An express statute either restricting possession or authorizing the institution to restrict possession is the strongest defense against a pre-emption challenge. College or university assertions of such an implied power are less secure; this is one of the central lessons from *Shurtleff*.

Nonetheless, if a campus does not have an express power to regulate firearms, the argument can still be made that such power is implied from other sources, such as the express authority to provide for safety or, even less directly, manage property. Consider, for example, this discussion by the California Supreme Court upholding a county ordinance banning certain gun possession on the county’s property:

[T]he Ordinance does not propose a complete ban on gun shows within the county, but only disallows gun show sales on County property. Even assuming arguendo that a county is prevented from instituting a general ban on gun shows within its jurisdiction, it is nonetheless empowered to ban such shows on its own property. Government Code section 23004, subdivision (d), gives a county the authority to “[m]anage . . . its property as the interests of its inhabitants require.” To “manage” property must necessarily include the fundamental decision as to how the property will be used . . . . [I]t cannot be doubted that the County has the continuing authority . . . to make decisions about how its property will be used pursuant to Government Code section 23004, subdivision (d). It may exercise that discretion through ordinances . . . . None of the gun show statutes reviewed above impliedly seek to override the discretion a county retains in the use of its property.<sup>117</sup>

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116. *Id.* at 1112. The Utah Supreme Court did not reach the University’s claimed First Amendment academic freedom right to exclude guns on the theory that the presence of guns on campus would hamper the free exchange of ideas. *Id.* at 1112, 1121. That issue was to be litigated in federal court, but the case reportedly settled without decision.

117. *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120, 129–30 (Cal. 2002) (holding that state law did not pre-empt cities and counties from banning gun shows on their property) (citations omitted), *reh’g denied*, 229 F.3d 1258 (9th Cir. 2000). In 2000, the Ninth Circuit certified certain state law issues to the California Supreme Court in connection with a gun show operator’s challenge to a county ordinance banning gun sales on county-owned property. *Great Western* was one of



Such an implied power argument may prove persuasive, but any questions may be removed by obtaining either an express statute restricting possession or an express statute authorizing the institution itself to restrict possession. Section IV.I below discusses strategies to pass legislation expressly delegating such regulatory authority.

B. Identify the Degree to which a State Constitution Provides an Express or Implied “Self-Defense” Right

The next important issue applies to cases presenting state constitutional claims.<sup>118</sup> There, an important starting point for defining the scope of an individual constitutional right to possess a firearm is to review the degree to which the state constitution expressly refers to common defense, sporting and/or personal defense. For example, as discussed in Section III.B.2 above, Pennsylvania’s constitution referred to “the defence of themselves and the state”<sup>119</sup> and “the liberty to fowl and hunt.”<sup>120</sup>

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two decisions the California Supreme Court issued in 2002 rejecting state law challenges to county or city ordinances banning the sale of firearms on county or city property. *Id.* The Ninth Circuit then rejected the First and Second Amendment challenges to the ordinance. *See Nordyke v. King*, 44 P.3d 133 (Cal. 2002), *certifying questions to*, 229 F.3d 1266 (9th Cir. 2000). The Nordykes have continued their battle. *See infra* Part IV.E.

118. It is beyond the scope or ability of this article to detail how and why state constitutions pose significantly different jurisprudential questions from the federal Constitution. Nonetheless, NACUA Fellow and constitutional scholar William E. Thro has succinctly explained the primary differences and identified several informative resources as follows:

First, state constitutions are limitations on power rather than grants of power. Second, state constitutions are also much more ‘political’ in that they can be easily amended to reflect the current values. In addition, state constitutions often protect individual rights, such as the right to an education, which are not guaranteed by the federal charter. Finally, unlike the federal constitution that has been amended only seventeen times since 1791, state constitutions are frequently amended and often completely rewritten and revised.

William E. Thro, *The Judicial Enforcement of Educational Finance Reform: American Lessons for South Africa*, in FINANCIAL MANAGEMENT IN SOUTH AFRICAN PUBLIC EDUCATION (Jean Van Rooyean ed., forthcoming 2009) (citing *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 785 (Md. 1983); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 n.5 (N.Y. 1982); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241–42 (Bradely D. McGraw ed., 1984); Charles G. Douglas III, *State Judicial Activism, The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1144–45 (1978); A. E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1 (1974); Janice May, *Texas Constitutional Revision: Lessons and Laments*, 66 NAT’L CIVIC REV. 64 (1977)).

119. PA. CONST. of 1776, art. XIII, in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 266 (Chelsea House Publishers 1971). *Heller*, 128 S. Ct. at 2825–26 (Stevens, J., dissenting).

Likewise, Vermont's constitution referred to the "right to bear arms for the defence of themselves and the State."<sup>121</sup> By contrast, Massachusetts is textually a common defense state—" [t]he people have a right to keep and to bear arms for the common defence."<sup>122</sup> That provision was first construed by the Massachusetts Supreme Court to include a personal right,<sup>123</sup> and then construed in favor of a more narrow collective rights interpretation.<sup>124</sup> Then there are states like Maine, which started with an express common defense clause and then amended it to imply, but not expressly state, a broader individual right.<sup>125</sup> Again, in cases presenting state constitutional claims, this issue will be an important starting point for defining the scope of the individual state constitutional right.

### C. Anticipate Whether a Regulation will be Tested for a "Rational Basis" or by Some Higher Standard

The next question is: Even if there are personal or sporting rights clauses in one's state constitution, by what standard is their scope balanced against the state constitution's police powers clause?<sup>126</sup> Such clauses typically

120. PA. CONST. of 1776, § 43, in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 274 (Chelsea House Publishers 1971). *Heller*, 128 S. Ct. at 2826 (Stevens, J., dissenting).

121. VT. CONST. of 1777, ch. 1, § 15, in 6 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 3741 (Francis Newton Thorpe ed., 1909). Recently drafted state constitutions often contain even more expressly worded provisions. *See, e.g.*, W. VA. CONST. art. III, § 22 (1986) ("A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."); WIS. CONST. art. I, § 25 (1998) ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."). For a concise listing of state constitutional provisions that have been interpreted to protect an individual right to arms for self-defense, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 *TEX. REV. L. & POL.* 191 (2006).

122. *Heller*, 128 S. Ct. at 2802 (majority opinion) (citing MASS. CONST. art. XVII (amended 2003)).

123. *Id.* at 2803 (citing *Commonwealth v. Blanding*, 20 Mass. (1 Pick.) 304 (1825)).

124. *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976).

125. The Maine Constitution, by comparison, originally provided in 1820 that "[e]very citizen has a right to keep and bear arms for the *common defense* and this right shall never be questioned." ME. CONST. art. I, § 16 (emphasis added). In 1986, the Maine Supreme Court interpreted this right narrowly, ruling that the words "for the common defense" limited the right to "organized militia" purposes. *State v. Friel*, 508 A.2d 123, 125–26 (Me. 1986). In response to that decision, the People of Maine amended the Maine Constitution in 1987 and deleted reference to the "common defense" in order to establish a clearer non-militia right to possess and use firearms. *See* ME. CONST. art. I, § 16 (amended 1987).

126. The Maine Supreme Judicial Court has, for example, continued to construe the police powers clause of the Maine Constitution to permit regulation of personal

provide, as Maine does, that “[t]he Legislature . . . shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.”<sup>127</sup> A common test of a police power is whether the law or regulation is “reasonable” and “[r]easonableness in the exercise of the State’s police power requires that the purpose of the enactment be in the interest of the public welfare and that the methods utilized bear a *rational relationship* to the intended goals.”<sup>128</sup>

The bar can also be higher. “Intermediate” or “heightened” scrutiny has been applied to classifications based on gender and illegitimacy, and is met only if the regulation involves “important” governmental interests that are furthered by “substantially related” means. This contrasts with “strict scrutiny,” which requires “narrowly tailored” regulation and “least restrictive” means to further a “compelling” governmental interest. To date, strict scrutiny has been applied when a “fundamental” constitutional right is infringed, particularly those rights listed in the Bill of Rights and those the courts have deemed a fundamental right protected by the liberty provision of the Fourteenth Amendment.<sup>129</sup> It also has been applied when the government action involves the use of a “suspect classification,” such as race or national origin, that may render the action void under the Equal Protection Clause.<sup>130</sup>

So, with these options in mind, what scrutiny applies to Second Amendment claims after *Heller* (assuming, that is, that *Heller* will be found to be applicable to the states)? Scholars and commentators are currently debating this issue because the majority, despite Justice Breyer’s urging, did not give the answer to this question.<sup>131</sup> The majority only wrote: “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to keep and use for protection of one’s home and family’ . . . would fail constitutional muster.”<sup>132</sup> The Court explained further in a footnote:

[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are

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possession and use. *Friel*, 508 A.2d at 125.

127. ME. CONST. art. IV, pt. 3, § 1.

128. *Hilly v. City of Portland*, 582 A.2d 1213, 1215 (Me. 1990) (emphasis added).

129. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996), *Silveira v. Lockyear*, 312 F.3d 1052 (9th Cir. 2003).

130. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

131. *Heller*, 128 S. Ct. at 2817–18, 2821. Justice Breyer criticized the majority for not setting the pertinent standard. *Id.* at 2851–53 (Breyer, J., dissenting). He also argued that the pertinent standard is rational basis and the D.C. ordinance satisfied that standard. *Id.*

132. *Id.* at 2817–18 (citation omitted).

themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee.<sup>133</sup>

Obviously, the rational basis test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right—be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.<sup>134</sup>

So, again, what level of scrutiny applies? The above quote appears to exclude rational basis. Is it strict scrutiny because attributes of the Second Amendment’s right are “expressly enumerated” or otherwise deemed “fundamental” by the Court?<sup>135</sup> Or is it heightened scrutiny, as argued by the Solicitor General in *Heller*, when “a law directly limits the private possession of ‘Arms’ in a way that has no grounding in Framing-era practice?”<sup>136</sup> Regrettably, the answer is uncertain. As one commentator

133. *Id.* at 2818, n.27.

134. *Id.* (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (“There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”).

135. *Heller* did say that the right to lawfully defend “self, family, and property,” *id.* at 2817, is “elevate[d] above all other interests” protected by the Second Amendment,” *id.* at 2821.

136. The Solicitor General, fearful that “strict scrutiny in theory” could be “fatal in fact” argued this in his brief to the *Heller* Court:

When, as here, a law directly limits the private possession of “Arms” in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny that considers (a) the practical impact of the challenged restrictions on the plaintiff’s ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives), and (b) the strength of the government’s interest in enforcement of the relevant restriction. Under that intermediate level of review, the “rigorousness” of the inquiry depends on the degree of the burden on protected conduct, and important regulatory interests are typically sufficient to justify reasonable restrictions. The court of appeals, by contrast, appears to have adopted a more categorical approach. The court’s decision could be read to hold that the Second Amendment *categorically* precludes any ban on a category of “Arms” that can be traced back to the Founding era. If adopted by this Court, such an analysis could cast doubt on the constitutionality of existing federal legislation prohibiting the possession of certain firearms, including machine guns. However, the text and history of the Second Amendment point to a more flexible standard of review. Just as the Second Congress expressed judgments about what “Arms” were appropriate for certain members of the militia, Congress today retains discretion in regulating “Arms,” including those with military uses, in ways

wrote:

[*Heller*] leaves lower courts free to conclude, by analogy to First Amendment case law, that strict scrutiny applies to Second Amendment claims, but they also would not violate the import of the *Heller* opinion by adopting intermediate scrutiny instead.<sup>137</sup>

The U.S. District Court for the District of Maine thoughtfully avoided this uncertain choice and focused instead on *Heller*'s important reference to "longstanding" prohibitions:

*Heller* left unanswered a significant question: The level of scrutiny the Court must apply to the restriction on Mr. Booker's individual right to bear arms. . . . Rather than tackle this complex and unanswered question, [this] Court starts from a different place. *Heller* teaches that even though the Second Amendment guarantees an individual right to bear arms, it is "not unlimited." *Heller* states that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ."

A useful approach is to ask whether a statutory prohibition against the possession of firearms by felons and the mentally ill is similar enough to the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence to justify its inclusion in the list of "longstanding prohibitions" that survive Second Amendment scrutiny.

[This c]ourt concludes it does. . . . [T]he manifest need to protect the victims of domestic violence and to keep guns from the hands of the people who perpetrate such acts is well-

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that further legitimate government interests. Under an appropriate standard of review, existing federal regulations, such as the prohibition on machine guns, readily pass constitutional muster.

Brief for the United States as Amicus Curiae at 8–9, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (citations omitted).

137. See Posting of Mike O'Shea to Concurring Opinions, [http://www.concurringopinions.com/archives/2008/06/meet\\_your\\_secon\\_2.html](http://www.concurringopinions.com/archives/2008/06/meet_your_secon_2.html) (June 26, 2008, 15:03 EST); but see Posting of David Hardy to Of Arms & the Law, [http://armsandthelaw.com/archives/2008/02/hellerparker\\_an.php](http://armsandthelaw.com/archives/2008/02/hellerparker_an.php) (Feb. 2, 2008, 08:48 EST):

The dilemma that those who argue for such a conclusion have to confront is to somehow justify using only a 'rational basis' for a right explicitly listed in the text of the Bill of Rights, while at the same time demanding 'strict scrutiny' for other rights that appear only as emanations or penumbra from some text, e.g., the 9th Amendment, and to do it in such a way that some shred of credibility for the Court is maintained.

documented and requires no further elaboration.<sup>138</sup>

This analysis<sup>139</sup> is very similar to that of the Solicitor General in *Heller*<sup>140</sup> and, until the higher courts resolve more clearly the question of which standard applies, Judge Woodcock's thoughtful approach may be helpful to college or university counsel in framing their defenses.<sup>141</sup>

D. Regardless of Standard, Identify the Specific "Rational,"  
"Important" or "Compelling" Basis for a Regulation

The next issue is that, regardless of which standard may come to apply, a college or university needs to be prepared to articulate the factual basis for its regulations of weapons if it hopes to keep those regulations in place. For example, a common argument now is that campus regulations are necessary to help avoid the premeditated psychotic tragedy that occurred at Virginia Tech in April of 2007.<sup>142</sup> An additional or even alternative argument, however, is that such regulations are necessary to help prevent a homicidal rampage by a non-psychotic person. Such events are typically precipitated by a tipping event—such as a breakup, firing, fight, or becoming intoxicated—and by their very nature present perhaps the more likely threat to a campus.

Consider, for example, a Maine law recently enacted based on just that rationale.<sup>143</sup> There, an experienced former member of the Maine State Police Tactical Team reported that the vast majority of armed incidents to which that team responds involve spontaneous, rather than premeditated, events. He further reported that, in such spontaneous events, the time it takes to access a weapon is a critical factor in predicting whether an enraged individual will act on his/her plan of harm. The longer it takes for the individual to access a weapon, the greater the likelihood that the individual will cool off and abandon the plan of harm. So if the gun is not

138. *United States v. Booker*, No. CR-08-19-B-W, at \*2–5 (D. Me. Aug. 11, 2008), available at [http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW\\_08112008\\_1-08cr19\\_USA\\_V\\_BOOKER.pdf](http://www.med.uscourts.gov/Opinions/Woodcock/2008/JAW_08112008_1-08cr19_USA_V_BOOKER.pdf).

139. *Id.*

140. *See supra* note 136.

141. For a thoughtful commentary on how courts should apply a deferential standard of scrutiny to Second Amendment claims, see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

142. *See* Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, available at <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html>.

143. ME. REV. STAT. ANN. tit. 20-A, § 6552(1) (2007) ("A person may not possess a firearm on public school property or discharge a firearm within 500 feet of school property. For purposes of this subsection, public school property includes property of a community college that adopts a policy imposing such a prohibition.") (emphasis added).

in, for example, a car at the school, but is instead at a home several miles away, the college or university stands a much higher chance of avoiding a tragedy. This argument was central in persuading the Maine Legislature to authorize Maine's community colleges to regulate firearm possession on campus and should withstand judicial scrutiny if challenged.

#### E. Track the Current Incorporation Cases

Another timely and important issue concerns the "incorporation" doctrine: Does the federal Bill of Rights offers protection from just federal law? Or does it also offer protection from state law? Before discussing the incorporation doctrine as applied to the Second Amendment, a brief background on the doctrine itself is helpful.

In 1833, forty years after the Bill of Rights was ratified, the Supreme Court held that the protections of the Bill of Rights applied only against acts of the federal government, and not also against the acts of state governments.<sup>144</sup> When the Fourteenth Amendment was ratified thirty-five years later, with both its Privileges and Immunities and Due Process clauses,<sup>145</sup> the question arose whether either or both of those clauses applied, or "incorporated," the individual rights accorded in the first ten Amendments<sup>146</sup> against the states because those rights were either "privileges," "immunities" or rights under "due process." In 1873, the Court narrowly interpreted "privileges and immunities" in a manner that effectively foreclosed incorporation through that clause.<sup>147</sup> By the 1920s, the Court began in earnest to address the degree to which certain parts of the Amendments were to be construed as incorporated through the Due Process clause.<sup>148</sup> In such cases the debates were forceful,<sup>149</sup> the results

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144. *Barron ex rel. Tiernon v. Mayor of Baltimore*, 32 U.S. 243 (1833).

145. U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.").

146. While the issue is commonly discussed in terms of the first ten Amendments, the doctrine applies most practically to the first eight Amendments because the last two amendments are not sources of rights. The Ninth Amendment (non-enumerated rights) is a rule of construction and the Tenth Amendment (rights reserved to the states) is instead a reservation of powers. U.S. CONST. amends. IX, X. *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 776 n.14 (2nd ed. 1998).

147. *Slaughterhouse Cases*, 83 U.S. 36 (1873).

148. *See Gitlow v. New York*, 268 U.S. 652 (1925).

149. While the practice has been for the Court to select on a case-by-case basis those amendments that qualify for incorporation, there has been a significant debate about whether the doctrine should have a more uniform application. *Compare Adamson v. California*, 332 U.S. 46 (1947) (rejecting the argument that the Fifth Amendment right against self-incrimination applied to the states through the Fourteenth Amendment). *Compare id.* at 59–68 (Frankfurter, J., concurring) (arguing that some rights guaranteed by the Fourteenth Amendment may overlap with the

were selective,<sup>150</sup> and the standards for decision were relatively broad. For example, incorporation was reserved for those substantive rights “implicit in the concept of ordered liberty;”<sup>151</sup> for procedural rights “necessary to an Anglo-American regime of ordered liberty;”<sup>152</sup> or, borrowing from the law of substantive due process, for those rights “deeply rooted in the Nation’s history and tradition.”<sup>153</sup> Nonetheless, by the end of the 1960s, most provisions of the Bill of Rights had been incorporated.<sup>154</sup>

The path of the Second Amendment through questions of incorporation has, to date, been less searching. As long ago as 1876, the Supreme Court ruled in *United States v. Cruikshank* that the Second Amendment has “no other effect than to restrict the powers of the national government.”<sup>155</sup> Ten years later, the Court in *Presser v. Illinois*, again wrote that the Second Amendment is a “limitation only upon the power of congress and the national government, and not upon that of the state.”<sup>156</sup> Finally, in 1894, the Court affirmed *Cruikshank* and *Presser*, writing in *Miller v. Texas* that “it is well settled that the restrictions of [the Second Amendment] operate only upon the federal power, and have no reference whatever to proceedings in state courts.”<sup>157</sup>

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guarantees of the Bill of Rights, but are not based directly upon such rights) *with id.* at 68–92 (Black, J. dissenting) (arguing that the Fourteenth Amendment incorporated all aspects of the Bill of Rights and applied them to the states).

150. Amendments have been incorporated entirely, partially and not at all. For example, the First (rights of speech, assembly, press, exercise and establishment) and Fourth (rights regarding warrants, searches and seizures) Amendments have essentially been entirely incorporated. The Fifth (rights against double jeopardy and self-incrimination, but not the right to Grand Jury) and Eighth (right against the imposition of cruel and unusual punishments, but not the right to be free from excessive bail and fines) Amendments have only been partially incorporated. The Seventh (right to a civil jury trial) Amendment has not been incorporated. U.S. CONST. amends. I, IV, V, VII, VIII. For a helpful summary of such a broad subject, see Ernest H. Schopler, Annotation: Comment Note, *What Provisions of the Federal Constitution’s Bill of Rights are Applicable to the States*, 23 L. Ed. 2d 985 (2008), available at LexisNexis. Note also that circuit courts have issued incorporation decisions that have not received Supreme Court review. *See, e.g.,* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (applying the Third Amendment to the states). This case is binding authority over Connecticut, New York and Vermont, but is only persuasive authority over the remaining states.

151. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

152. *Nordyke v. King*, 563 F.3d 439, 449 (9th Cir. 2009) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)) (stating that the “actual system bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country” should be incorporated).

153. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

154. *See generally* Schopler, *supra* note 150.

155. 92 U.S. 542, 553 (1876).

156. 116 U.S. 252, 265 (1886).

157. 153 U.S. 535, 538 (1894).



These three long-standing precedents have been consistently construed by state and federal courts around the country not to incorporate the Second Amendment.<sup>158</sup> However, *Heller* raises anew the question of whether these precedents are still valid. On the one hand, the *Heller* majority opinion expressly states that the Court was *not* deciding the incorporation question,<sup>159</sup> and recognized that the Court's decisions in *Presser* and *Miller* "reaffirmed that the Second Amendment applies only to the Federal Government."<sup>160</sup> On the other hand, the Court cast doubt on "*Cruikshank*'s continuing validity on incorporation" by "not[ing] that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."<sup>161</sup> Moreover, *Heller*, of course, also identified the protected individual right of possession as emanating from sources as early as Blackstone,<sup>162</sup> thereby establishing presumably that the right is "deeply rooted in this Nation's history and tradition."<sup>163</sup>

At least three recent cases have tested these new arguments. The first case, *Maloney v. Cuomo*, from the Second Circuit, relied on the *Cruikshank* precedents, rejected a claim to incorporate, and upheld a New York ban on possession of a martial arts weapon.<sup>164</sup> On the incorporation question, the Second Circuit reasoned that while *Heller* may have signaled an eventual change from the *Cruikshank* line of cases, *Heller* itself expressly reserved the question, and it was not for a circuit court to act on any such signal in light of that express reservation.<sup>165</sup>

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158. See, e.g., Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. FED. 696 (2008). See also *State v. Friel*, 508 A.2d 123, 125 (Me. 1986) ("The Second Amendment . . . is simply inapplicable to the instant case. This Amendment operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms.") (citing *Miller*, 153 U.S. at 538; *Presser*, 116 U.S. at 265; *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269–70 (7th Cir. 1982)).

159. *Heller*, 128 S. Ct. at 2813 n.23.

160. *Id.*

161. *Id.*

162. *Id.* at 2798.

163. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

164. 554 F.3d 56 (2d Cir. 2009).

165. *Id.* at 58–59:

It is settled law . . . that the Second Amendment applies only to limitations the federal government seeks to impose on this right. And to the extent that *Heller* might be read to question the continuing validity of this principle, we "must follow *Presser* [because w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'"

*Id.* (citations omitted).

The second case, *Nordyke v. King*, from a Ninth Circuit panel, upheld a municipal ban on possession on government-owned, nonresidential property that prevented plaintiffs from holding gun shows on County property.<sup>166</sup> In doing so, however, the panel accepted the argument that the Second Amendment is incorporated against states and local governments. The panel concluded, for three primary reasons, that the *Cruikshank* line of reasoning was both obsolete and not controlling. First, *Cruikshank* did not fully examine an incorporation argument based on the Due Process clause.<sup>167</sup> Second, as the *Heller* majority suggested, *Cruikshank* was not, consistent with the Court's more recent incorporation jurisprudence.<sup>168</sup> Finally, *Heller's* recognition of an individual right as emanating from the Nation's founding yielded a newer and stronger basis for incorporation.<sup>169</sup> However, three months after the *Nordyke* panel rendered its decision, the full court agreed upon the request of a Ninth Circuit judge to rehear the case en banc.<sup>170</sup> After rehearing, the Ninth Circuit issued an order which places the case on hold until the Supreme Court makes a decision concerning three pending cases.<sup>171</sup>

The third case, *National Rifle Association v. City of Chicago*, from a Seventh Circuit panel, upheld two municipal ordinances banning possession of most handguns and, in doing so, rejected a claim to incorporate.<sup>172</sup> The panel agreed with the *Maloney* court rationale and sharply criticized the *Nordyke* panel decision for disregarding its obligation to follow precedent.<sup>173</sup>

If the Ninth Circuit en banc affirms its panel's decision in *Nordyke*, there will be a clear split in the circuits (Ninth versus Second and Seventh), increasing the chances that the Supreme Court may revisit the issue. If an incorporation case reaches the Court, *Heller* certainly provides a basis upon which to reconsider and even overrule the *Cruikshank* precedents, and apply the limitations of the Second Amendment to state and local entities, including public colleges and universities.<sup>174</sup> A decision to incorporate will

166. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

167. *Id.* at 448.

168. *Id.* at 449–50.

169. *Id.* at 451–57.

170. *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009).

171. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/9th-ca-gun-case-on-hold> (Sept. 24, 2009, 20:30 EST).

172. *Nat'l Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009).

173. The Seventh Circuit panel wrote that *Heller* did not “license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision.” *Id.* at 858.

174. Even if the Second Amendment is incorporated against the states, the

mean that all state actors will have to meet current and future minimal federal standards under the Second Amendment. Such actors, including public colleges and universities, are of course already subject to the standards permitted or set by state law. The question, therefore, about how significant a decision to incorporate will have on a public college or university seeking to regulate firearm possession on its campuses will depend on how protective state law currently is regarding personal possession rights. In states where the state law protects personal rights, the impact will be negligible. But in states where the state law provides less protection of personal rights, the impact will be more significant.

F. Understand the Distinction between Government as Regulator and Government as Proprietor

As just noted above, and as noted in the *Great Western* opinion quoted in Part IV.A, another important issue is that the First and Fourth Amendments often, though not always, apply differently to the government as proprietor from the way they apply to the government as regulator of what happens on private property.<sup>175</sup> For example, in the First Amendment context, the Supreme Court has discussed the regulator-proprietor distinction this way:

[I]t is . . . well settled that the government need not permit all forms of speech on property that it owns and controls. Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district.<sup>176</sup>

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Fourteenth Amendment applies only to state actors such as public colleges and universities and not, ordinarily, to private institutions. *See* *Sanford v. Howard Univ.*, 415 F. Supp. 23, 29 (D.D.C. 1976) (“A showing of general governmental involvement in a private educational institution is not enough to convert essentially private activity into governmental activity for purposes of a due process claim. [Howard] is not to be treated as a state university.”); *see also* *Harris v. Ladner*, 127 F.3d 1121, 1125 (D.C. 1997) (“[B]ecause Howard University is a private institution, the plaintiff must show more than ‘general governmental involvement’ in the University’s affairs before constitutional protections are implicated.”).

175. *See supra* Parts IV.A., IV.E.

176. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (citations omitted).

As observed in *Great Western*, this same rationale can apply to Second Amendment analyses and may help give public colleges and universities the room they need to uphold their restrictions, if that is what they want to do. Likewise, it is important to note that different uses may lead to different results. For example, it is “possible that there may be a right to possess a gun in self-defense on government property, but no right to possess a gun for purpose of selling it.”<sup>177</sup>

### G. Monitor Concealed Weapon Bills

Turning from legal issues to political issues, college and university counsel must be mindful of legislative efforts to have state concealed weapon laws trump campus regulations. As noted above, twenty states in 2009 considered various reforms to campus weapon laws, and many related to treatment of concealed weapons.<sup>178</sup> The American Association of State Colleges and Universities reported that recent efforts have not yielded any victories for gun-rights advocates in part because college and university administrators, law enforcement personnel, and students have all vehemently spoken out against the proposals.<sup>179</sup> Leading the effort to enact such bills authorizing gun possession on campus is a group called Students for Concealed Carry on Campus (“SCCC”)<sup>180</sup> SCCC’s stated goal is to enact state laws granting students the right to possess weapons—and more particularly, concealed weapons—on campus.<sup>181</sup> Their efforts, regarding both concealed and non-concealed weapons, are opposed by the International Association of Campus Law Enforcement Administrators.<sup>182</sup>

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177. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/2008/09/12/briefs-on-whether-the-second-amendment-should-apply-to-the-states-via-the-fourteenth> (Sept. 12, 2008, 18:33 EST).

178. See NCSL Report, *supra* note 1.

179. HARNISCH, *supra* note 2, at 2.

180. Students for Concealed Carry on Campus (“SCCC”), <http://www.concealedcampus.org> (last visited Oct. 15, 2009).

181. *Id.* See also Paula Reed Ward, *Dead Student Talked of Police Career*, PITTSBURGH POST-GAZETTE, Feb. 16, 2009, available at <http://www.post-gazette.com/pg/09047/949492-85.stm> (reporting that the Facebook page of an armed student killed in a standoff at a private college in Pennsylvania indicated that the student supported SCCC).

182. See International Association of Campus Law Enforcement Administrators (“IACLEA”), <http://www.iaclea.org> (last visited Oct. 15, 2009). See also Revised Concealed Weapon Statement of August 2008, <http://www.iaclea.org/visitors/about/positonstatements.cfm> (last visited Oct. 15, 2009) (laying out IACLEA’s policy). Regarding the underlying law on concealed weapons, the core principles are clear.

The question now before us is whether requiring citizens to obtain permits to carry concealed firearms constitutes reasonable regulation. We hold that it does. Reasonableness in the exercise of the State’s police power requires that the purpose of the enactment be in the interest of the public welfare and that the methods utilized bear a rational relationship to the intended goals.

A less obvious approach by gun possession advocates would be to amend state law to define a college or university dorm or residence hall as a “home” for purposes of possession rights. If that occurred, and the Second Amendment was incorporated against the states, *Heller* could be argued to pre-empt dorm possession restrictions. Of course, the state can argue that the restriction is a reasonable and necessary exercise of its police power, but such a “dorm as home” statute would certainly help the advocates.<sup>183</sup>

College and university counsel whose institution opposes the “dorm as home” approach should keep three issues in mind. First, concealed weapon laws typically give a right to possess a concealed weapon only where weapon possession itself is allowed.<sup>184</sup> For example, a concealed weapon permit does not authorize a person to carry a firearm in a courthouse. So a concealed weapon rights bill should not be used to establish both the fundamental right of possession and the subsequent, narrower right of concealment. Second, counsel in these circumstances may want to remind the legislature of the propriety of deferring to the body—the Trustees—that the legislature previously charged to superintend the institution on difficult issues such as these.

Finally, the legislature will have competing pressure from sportsmen and other gun advocates not to restrict possession, and deference is often a “content-neutral” way for the legislature to act. Counsel may want to suggest that the State Police be allowed to speak at the hearing on just that subject. The State Police will also explain why, in their view, only trained law enforcement officers should be authorized to defend the citizens. The State Police may have more credibility with a legislative committee than would any college or university administrator, including college or

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Recognizing the threat to public safety posed by the carrying of concealed weapons, state courts have held that statutes regulating the carrying of such weapons are constitutional. Maine’s concealed firearms statute is a reasonable response to the justifiable public safety concern engendered by the carrying of concealed firearms. The permit requirements pass constitutional muster as an acceptable regulation of the individual’s right to keep and bear arms.

*Hilly v. City of Portland*, 582 A.2d 1213, 1215 (Me. 1990) (citations omitted).

SCCC unsuccessfully sued the Regents of the University of Colorado for its restrictions on concealed possession. *See Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, No. 2008-CV-492, slip op. (D. Colo. 2008).

183. Sometimes this legislation does not target but nonetheless captures colleges and universities in other ways as well. For example, a recent statute in Oklahoma prohibits any “person, property owner, tenant, employer, or business entity” from “establish[ing] any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle.” OKLA. STAT. ANN. tit. 21, § 1289.7a(A) (2008). This provision, which appears to reach public and private colleges and universities, has survived challenge. *See Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

184. OKLA. STAT. ANN. tit. 21, § 1277(A)(3) (2009).

university security officers.

#### H. Track the Current Public Housing Authority Cases

Because colleges and universities are not the only public entities wrestling with these issues of gun regulation, another important task for a college or university lawyer who wants to protect his or her institution's gun-control laws is to keep track of the cases challenging the authority of public housing authorities to adopt and enforce such regulations.<sup>185</sup> Indeed, cases involving public housing authorities can be informative to college and university counsel for at least three reasons. First, they may provide insights into the reach and scope of state pre-emption law. Second, they may provide insights into development of the incorporation doctrine discussed above. And finally, they may foretell whether *Heller's* "defense of home" constitutional doctrine could implicate college and university housing.

Note that the pre-emption doctrine, discussed above in Section IV.A, is often at the heart of the analogous public housing authority cases. For example, the Maine Supreme Court ruled that Maine pre-emption law prevented a municipal housing authority from requiring, as a condition of a lease, a ban against tenants having firearms in the housing project.<sup>186</sup>

The Court did not reach the issue of whether the state constitution dictated the same result because the Court voided the lease provision on statutory pre-emption grounds.<sup>187</sup> No matter how styled, these public housing authority cases are worth watching.

#### I. Lobby for Legislation Strategically

Finally, if a public college or university does not currently have an express grant of statutory authority to regulate firearm possession on campus, the following legislative strategies may be helpful.

First, the bill need not amend the state's pre-emption statute and may, in fact, be more appropriate if it amends an education—even a K–12—statute instead. For example, state K–12 law typically prevents possession in "schools," and a bill could amend the defined term "school" to include a "post-secondary institution." In a case of this sort, colleges and universities

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185. The San Francisco Housing Authority settled just such a suit. *See* Complaint for Declaratory and Injunctive Relief, *Doe v. San Francisco Hous. Auth.*, No. CV-08-03112 (N.D. Cal. June 26, 2008), available at <http://www.nraila.org/pdfs/sfha.pdf>; *see also* Stipulation re Settlement and Dismissal of Defendants San Francisco Hous. Auth. and Henry Alvarez III Without Prejudice, *Doe v. San Francisco Hous. Auth.*, No. CV-08-03112 (N.D. Cal. Jan. 12, 2009), available at <http://volokh.com/files/sfpublichousingguns.pdf>.

186. *Doe v. Portland Hous. Auth.*, 656 A.2d 1200, 1205 (Me. 1995).

187. *Id.* at 1201.

can argue that the interests served by a K–12 ban—protecting student safety—are the same in both secondary and post-secondary education. Second, college and university counsel may attempt to get the bills in question referred to an education committee and not to a governmental affairs or judiciary committee. An education committee may be more informed about and receptive to the college’s or university’s needs. Third, counsel might remind legislators that they have seen fit to ban weapons in their workplace—capitol complexes routinely do so—and that college and university employees and students should receive no less protection. Fourth, as stated previously, counsel could ask the State Police to testify in support of the bill, explaining why they support disarming, rather than arming, students and others. Finally, counsel need not be afraid to go it alone; that is, to draft a bill to apply only to one campus or system and not to all of the state’s higher education systems.<sup>188</sup> Although there is clear benefit to having colleagues join a bill, perhaps less opposition may be created by a more narrowly tailored measure.

#### V. CONCLUSION

*Heller* sets an important standard in recognizing personal firearm use and sets an analytical baseline for how state courts may construe the text and history of their own state constitutions. Whether *Heller* proves to have a direct or significant impact on college and university operations waits to be seen. In the interim, gun advocates continue their attempts to apply and/or expand *Heller* in legislation and litigation to advance their interests. To that end, proposed concealed weapons legislation, incorporation cases, and public housing challenges bear watching closely. Although we will see where these efforts, already underway, will lead, public colleges and universities that secure express statutory authority to regulate possession on campus should be able to withstand the challenges that *Heller* is likely to spawn.

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188. Compare, e.g., ME. REV. STAT. ANN. tit. 20-A, § 6552(1) (2007) (applying only to Maine’s community colleges), with ME. REV. STAT. ANN. tit. 20-A, § 10009 (effective Sept. 12, 2009) (applying to all Maine public colleges).

# DATA PROTECTION BASICS: A PRIMER FOR COLLEGE AND UNIVERSITY COUNSEL

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## INTRODUCTION

American colleges and universities are subject to significant regulation with respect to how they collect, store, and use personal information they compile. United States federal laws provide a fragmented, “sectoral” approach to data-privacy protection, offering separate laws protecting students’ rights through the Family Educational Rights and Privacy Act (“FERPA”),<sup>1</sup> patients’ rights through the Health Insurance Portability and Accountability Act (“HIPAA”),<sup>2</sup> as well as personal financial information

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1. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2006) [hereinafter FERPA].

2. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) [hereinafter HIPAA] (codified as scattered sections



through the Gramm-Leach-Bliley Act (“GLBA”).<sup>3</sup> In addition to these federal laws, institutions may be required to comply with various state laws related to the protection of personal information, including requirements that range from regulating the collection and use of information to data-breach-notification provisions to restricting the use of students’ personal information for credit card marketing.<sup>4</sup> As if those requirements were not enough, various campus business operations may be required to comply with the Payment Card Industry Data Security Standards (“PCI DSS”).<sup>5</sup>

For educational institutions with foreign students and international campuses, international regulations, such as the European Union’s directive regarding the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (the “EU Directive”)<sup>6</sup> and Canada’s Personal Information Protection and Electronic Documents Act,<sup>7</sup> impose restrictions on the transborder transfer of personal data. Colleges and universities should also be aware of the efforts underway in the Pacific Rim countries to adopt the Asia-Pacific Economic Cooperation’s (“APEC”) Privacy Framework.<sup>8</sup> New and evolving data-privacy protections in South America and the Middle East are also important to understand as educational institutions expand their campuses to these regions.<sup>9</sup>

This article offers college and university legal counsel an overview of the current status of the various privacy laws, regulations, and standards that could apply to their institutions, as well as some insight into current developments related to these laws.<sup>10</sup> The article opens by providing an

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of U.S.C. titles 29 and 42 (2006)).

3. Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–09 (2006) [hereinafter GLBA].

4. See discussion *infra* Part I.E.

5. Security Standards Council, Payment Card Industry Data Security Standard (PCI DSS) Requirements and Security Assessment Procedures, v. 1.2.1, Req. 3 (Oct. 2008), [http://www.pcisecuritystandards.org/security\\_standards/pci\\_dss\\_download.html](http://www.pcisecuritystandards.org/security_standards/pci_dss_download.html) (last visited Oct. 14, 2009).

6. Council Directive 95/46, The Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281) 31 (EU) [hereinafter EU Directive].

7. Personal Information Protection and Electronic Documents Act, 2000 S.C., ch. 5 (Can.) [hereinafter PIPEDA].

8. See APEC Privacy Framework, [http://www.apec.org/apec/news\\_\\_media/fact\\_sheets/200908fs\\_privacyframework.html](http://www.apec.org/apec/news__media/fact_sheets/200908fs_privacyframework.html) (last visited Oct. 14, 2009).

9. See, e.g., Law No. 25.326, Oct. 4, 2000, [No. 29.517] B.O. 1 (Argentina’s law for the protection of personal data); Lei No. 9.507, de 12 de novembro de 1997, D.O. 220: 26025, nov. 1997 (Brazil’s habeas data law); Law No. 17.838, Oct. 2004 (Uruguay’s law for the protection of personal data); DIFC Data Protection Law of 2007, Law. No. 1, Jan. 2007.

10. The purpose of this article is not to provide an in-depth coverage or analysis of any of these laws or regulations. Readers experienced at dealing with these areas will recognize that there are nuances and exceptions too detailed to be covered in a survey article, and each of these areas have been the subject of numerous detailed articles (and

overview of applicable U.S. privacy authorities and continues by exploring the practical applications of these legal authorities to many of the traditional activities of colleges and universities. The article then goes on to explore some of the international privacy considerations facing institutions with foreign students and campuses. Finally, the conclusion outlines steps that college and university counsel can take to comply with the myriad of federal, state, and international laws and standards that apply to educational institutions.

#### I. OVERVIEW OF U.S. DOMESTIC PRIVACY AUTHORITIES APPLICABLE TO COLLEGES AND UNIVERSITIES

The U.S. has no single definition of protected personal information; the definitions that exist are provided in the specific statutes and regulations to which they apply. Unlike other countries and the European Union, Congress has been reluctant to enact comprehensive legislation protecting all of an individual's private information. Instead, federal privacy laws are focused on a few industries and sectors where it has been deemed that disclosure of personal information could result in significant harm to the individual. These industries include health care, with the passing of HIPAA in 1996<sup>11</sup> and its recent modification by the Health Information Technology for Economic and Clinical Health Act (the "HITECH Act"), part of the American Recovery and Reinvestment Act of 2009,<sup>12</sup> and financial institutions, with the enactment of GLBA in 1999.<sup>13</sup> Additionally, and most relevant to colleges and universities, Congress enacted FERPA in 1974 to protect personal information contained within education records.<sup>14</sup> FERPA and its supporting regulations have been amended a number of times since being adopted, most recently in 2008.<sup>15</sup>

Due to the lack of comprehensive federal legislation, states have assumed a role in data protection, forcing organizations to comply with similar, but slightly varying, laws across the different jurisdictions where such organizations may be held accountable. Data-breach-notification laws provide the best example of the variation among states. Many states have started to apply their data protection laws broadly to organizations that

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books) in their own right.

11. See HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as scattered sections of U.S.C. titles 29 and 42 (2006)).

12. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (parts codified as scattered sections of U.S.C.).

13. GLBA, 15 U.S.C. §§ 6801-09 (2006).

14. See FERPA, 20 U.S.C. § 1232g (2006).

15. See *id.*; United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as scattered sections of U.S.C. (2006)); *see, e.g.*, Family Educational Rights and Privacy, 34 C.F.R. §§ 99.3, 99.5 (2009).

have only modest interaction with the particular state and its residents.<sup>16</sup> California's data-breach-notification law, as discussed in Part I.E.1, was one of the first state laws to impose one state's data protection authorities on individuals and businesses outside its borders. To date, the extra-territorial reach of these state laws has not been tested, primarily due to the proliferation of other similar notification laws.

Non-governmental data protection standards are also becoming increasingly relevant to colleges and universities. One of the most significant for educational institutions is PCI DSS. Colleges and universities should be familiar with PCI DSS and some of the other data protection standards<sup>17</sup> as many of these industry best practices are now becoming codified in laws that apply to educational institutions.

Up to this point, the U.S. Congress, states, and other regulatory bodies have been reactive, rather than proactive, in passing data-privacy laws, but this may be changing as states become more active in protecting the personal information of their citizens.<sup>18</sup> For colleges and universities, the

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16. See discussion Part I.E *infra*.

17. See, e.g., International Organization for Standardization, *ISO/IEC 27001: 2005 Information Security Management Systems – Requirements* (Oct. 15, 2008), [http://www.iso.org/iso/catalogue\\_detail?csnumber=42103](http://www.iso.org/iso/catalogue_detail?csnumber=42103) (last visited Oct. 14, 2009); *ISO 2007/2005 Code of Practice for Information Security Management* (Apr. 22, 2008), [http://www.iso.org/iso/iso\\_catalogue/catalogue\\_tc/catalogue\\_detail.htm?csnumber=50297](http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=50297) (last visited Oct. 14, 2009); National Institute of Standards and Technology, Computer Security Division, *Minimum Security Requirements for Federal Information and Information Systems* (Mar. 2006), available at <http://www.csrc.nist.gov/publications/fips/fips200/FIPS-200-final-march.pdf>.

18. For example, the Video Privacy Protection Act of 1988 was passed after reporters gained access to titles of videos rented by Supreme Court nominee Robert Bork, which led some critics to joke that in the United States “video rentals are afforded more federal protection than are medical records.” Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Data Privacy Standards*, 25 YALE J. INT'L L. 1, 25 (2000); see also Trevor Shaw, Dir. Gen., Audit & Review, Office of the Privacy Comm'r of Can., *International Perspectives on Privacy & Security*, Address to the Dep't of Homeland Sec. Data Privacy & Integrity Comm. (Sept. 28, 2005), [http://www.privcom.gc.ca/speech/2005/sp-d\\_050928\\_ts\\_e.asp](http://www.privcom.gc.ca/speech/2005/sp-d_050928_ts_e.asp) (last visited Oct 14, 2009). The murder of Hollywood actress Rebecca Shaffer by a stalker who got her address from the California Department of Motor Vehicles led to the enactment of the U.S. Driver's Privacy Protection Act of 1994. Francesca Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, 26 MICH. J. INT'L L. 807, 814 (2005). Consumer concerns over misuse of their phone numbers by telemarketers led to the Do-Not-Call Implementation Act of 2003, establishing the Do-Not-Call Registry administered by the Federal Trade Commission. See Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (2003). Similarly, growing concerns from Internet Service Providers (ISPs) and consumers regarding e-mail spam resulted in the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) of 2003. See CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified at 15 U.S.C. §§ 7701–13 (2006)).

result is a variety of continually evolving legal authorities that may now apply to campus activities. The most relevant legal authorities for colleges and universities are outlined in the remainder of this section. This patchwork of federal and state privacy laws and standards intersects with the traditional activities of colleges and universities in a number of unique ways. The various campus activities implicated by many of the privacy authorities are also discussed in this Section. Naturally, an educational institution's specific activities will dictate the degree to which these and other state and federal authorities may apply, and those activities and each of these privacy authorities need to be monitored and evaluated as they change over time.

#### A. Family Educational Rights and Privacy Act (FERPA)

FERPA currently governs the privacy of students' education records in the United States. Originally enacted in 1974, Congress has amended FERPA nearly a dozen times.<sup>19</sup> FERPA regulates the access to, amendment of, and disclosure by schools of education records.<sup>20</sup> All schools receiving funds from any U.S. Department of Education program must comply with FERPA, and parents or eligible students either over the age of eighteen or attending post-secondary schools are protected by FERPA.<sup>21</sup> It is important to note, however, that FERPA is an education-record-privacy law, not a student-privacy law. For the purposes of FERPA, "education records" means any information that is recorded in any way (but does not include personal knowledge) that (1) directly relates to a student (i.e., it contains personally identifiable information about the student) and (2) is maintained by an educational agency or institution or by a party acting for the agency or institution.<sup>22</sup> FERPA covers education records for any individual who is or has been in attendance at the educational institution, regardless of whether such attendance has been in person or via correspondence or the internet.<sup>23</sup>

FERPA provides that post-secondary level educational institutions may not disclose or provide unauthorized access to personally identifiable student information from the education records maintained by that

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19. See 20 U.S.C. § 1232g (2006).

20. See *id.*; 34 C.F.R. § 99.3 (2009).

21. Under FERPA, parents have the right to control disclosure of and access to, and seek amendment of, education records until the student turns eighteen or attends a post-secondary institution. Once an eligible student possesses FERPA rights, there are only very limited circumstances under which a parent may, at the institution's discretion, access the eligible student's records (*e.g.* if the parents claim the eligible student as a dependent under the federal tax regime). See Family Educational Rights and Privacy, 34 C.F.R. §§ 99.10–99.12 (2009).

22. 20 U.S.C. § 1232g(a) (2006).

23. *Id.*

institution without either the signed, written consent of the student<sup>24</sup> or as otherwise specifically authorized by FERPA.<sup>25</sup> To provide consent, the student must be informed of the records that may be disclosed, the purpose for which they may be disclosed, and the person or classes to whom they may be disclosed.<sup>26</sup> In general, an education record may be disclosed only on the condition that the information will not be redisclosed without the student's consent, and the recipients may only use the disclosed information for the specified purpose.<sup>27</sup> The disclosures authorized directly by FERPA include disclosure to other school officials with a "legitimate educational interest," to other schools to which a student is transferring or has transferred, and to authorities performing audits or enforcing relevant state or federal laws.<sup>28</sup> There is also an exception to the disclosure requirement rooted in the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) that allows the U.S. Attorney General, through an *ex parte* court order, to collect and use education records to investigate and prosecute acts of terrorism.<sup>29</sup>

In addition to the above exceptions, schools may also disclose information from education records pursuant to a subpoena or court order. A school may also disclose, among other things, any information that constitutes "directory information."<sup>30</sup> According to the current rules under FERPA, directory information can include, at the institution's discretion, an eligible student's name, address, telephone number, date and place of birth, honors and awards, dates of attendance, and certain similar items of information.<sup>31</sup>

As part of complying with FERPA, an educational institution must make a record of each request for education records, and each disclosure of such education records, and maintain it with the relevant education record. In addition, educational institutions must allow students to inspect and review their own education records within forty-five days of the student's request. The institution is not required to provide the student with copies of the

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24. See 34 C.F.R. § 99.30.

25. See *id.* §§ 99.5, 99.31.

26. See *id.* § 99.30.

27. See *id.* § 99.33.

28. 20 U.S.C. § 1232g.

29. See *id.* Exemptions to FERPA with potential implications for foreign students on U.S. campuses include the PATRIOT Act, Pub. L. No. 107-56, title IV, subtitle B, § 416, 115 Stat. 272 (2001) and section 641(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1372(a) (2006). In addition to other FERPA exemptions implemented by the PATRIOT Act, the U.S. Attorney General is permitted to access student records and information collected through the Student Exchange and Visitor Information System ("SEVIS") by educational institutions on foreign students, including name, address, and visa classification.

30. 20 U.S.C. § 1232g.

31. *Id.*

records unless circumstances effectively prevent the student from exercising his or her right to inspect and review without receiving the copies. This right does not include financial aid records of the student's parents or confidential letters of recommendation to which the student has waived the right of access. If the student's records include personally identifiable information about any other student, the information must be redacted or the other student must consent. FERPA also enables a student to request amendment of any records containing information that is inaccurate, misleading, or in violation of the student's privacy rights. The student cannot force the institution to make the amendment; if the request is denied, however, the student must have an opportunity for a hearing and the ability to include a statement about the desired amendment with the disputed record.<sup>32</sup>

FERPA also requires educational institutions to provide an annual privacy notice that must include a statement of students' rights to inspect and review their own education records and seek amendment of inaccurate or misleading records, along with the procedures for doing so; to consent to most disclosures; and to file a complaint with the U.S. Department of Education related to their education records.<sup>33</sup>

In 2008, the Department of Education amended and adopted several FERPA regulations.<sup>34</sup> The changes sought to incorporate prior legislative amendments and two Supreme Court FERPA decisions, as well as to address disclosure concerns raised by the tragic shootings that occurred at Virginia Tech in 2007.<sup>35</sup> The changes, which focused primarily on clarifying privacy rules governing the release of confidential student information in health and safety emergencies, took effect on January 8, 2009.<sup>36</sup>

In particular, the changes clarify the existing right of parents to access information about eligible students; the scope of the term "school official" defining to whom a disclosure may be made without prior written consent; and permissible redisclosures of student information by third parties.<sup>37</sup> In

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32. See Family Educational Rights and Privacy, 34 C.F.R. §§ 99.20–99.22 (2009).

33. For an example of a "model notice," see United States Department of Education, *Model Notification of Rights Under FERPA for Postsecondary Institutions*, <http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html> (last visited Oct. 14, 2009).

34. See Family Educational Rights and Privacy, 73 Fed. Reg. 74,806–855 (Dec. 9, 2008) (codified at 34 C.F.R. §§ 99.1–99.67 (2009)).

35. Bureau of National Affairs, *Privacy Law Watch*, "Education Department Issues Amendments to FERPA Privacy Requirements in Final Rule" (Dec. 10, 2008).

36. See *id.*; Alyson Klein, *Ed. Dept. Releases New Rules on Privacy*, EDUC. WK. (Bethesda, MD), Jan. 7, 2009, at 4; see also Elizabeth Bernstein, *Education Department Reworks Privacy Regulations*, WALL ST. J., Dec. 9, 2008, available at [http://online.wsj.com/article/SB122878222728889843.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB122878222728889843.html?mod=googlenews_wsj).

37. See FERPA, 20 U.S.C. § 1232g(b) (2006).

addition, the new regulations expand the scope of information traditionally covered under the law to include “biometric information,” which includes such things as fingerprints, retina and iris patterns, DNA sequences, and so forth.<sup>38</sup>

The revised regulations also provide greater flexibility for institutions to disclose private student information to various parties in certain health- and safety-emergency situations. While institutions were previously permitted to disclose confidential student information without consent if necessary to protect the health and safety of the student or other individuals, the regulations previously stated that this exception must be “strictly construed.”<sup>39</sup> This limiting language has been removed and the new regulations permit institutions to make such disclosures “if there is an articulable and significant threat to the health or safety of a student or other individuals.”<sup>40</sup> However, under these new regulations, institutions that rely upon the health and safety exception to justify the disclosure of student information must now also record the threat that formed the basis for the disclosure as well as the identity of the parties to whom the disclosure was made.<sup>41</sup>

Another significant change to the regulations was the revision of the definition of what information qualifies as “personally identifiable information.” Prior regulations defined personally identifiable information to include any information “that would make the student’s identity easily traceable.”<sup>42</sup> The new definition removes this language and provides a more objective standard for determining when information is properly “de-identified.” Under the new definition, personally identifiable information is “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,” which could include indirect information, such as an address or place of birth, that can be used to identify an individual.<sup>43</sup> The revised regulations also prohibit the use of Social Security numbers and, in some cases, student identification numbers in student directories.<sup>44</sup> The regulations further clarify that when responding to “targeted” requests for information, an educational institution may not release information from a student’s education records if the institution has reason to believe that the person requesting the information knows the identity of the student to whom the

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38. *See id.* § 1232g.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See* 34 C.F.R. § 99.37 (2009).

record relates.<sup>45</sup> These changes were made to provide greater clarity in responding to requests related to identifiable students or requests made in the wake of highly publicized incidents within the school environment.<sup>46</sup>

Additional significant changes encompassed by the amendments include: including outside contractors, volunteers, and other third parties conducting business on behalf of a school in the definition of “school officials” with whom data may be shared (so as to permit schools to disclose information pursuant to an outsourcing relationship); requiring schools without physical or technological access restrictions to adopt policies for controlling access; and allowing schools to share protected information with other schools whenever the sharing is related to the student’s enrollment or transfer.<sup>47</sup>

Finally, the new regulations expand the scope of the FERPA enforcement procedures. In particular, the regulations broaden the scope of materials that the Family Policy Compliance Office (FPCO), the Federal body authorized by the Secretary of Education to conduct FERPA investigations, can require an educational institution to provide during the course of an investigation.<sup>48</sup>

#### B. Gramm-Leach Bliley Act (GLBA)

GLBA is recognized as a financial industry privacy authority; however, U.S. colleges and universities are also potentially subject to GLBA. To the extent that an educational institution engages in lending funds (whether to students or faculty), collecting loan payments, or facilitating the process of applying for financial aid, the institution may be considered a “financial institution” subject to GLBA regulation.<sup>49</sup>

There are two categories of compliance requirements under GLBA: (1) the Privacy Rules, and (2) the Safeguarding Rules.<sup>50</sup> The Privacy Rules govern the use and disclosure of personal nonpublic information (“NPI”) while the Safeguarding Rules set forth requirements with respect to the manner in which financial institutions are expected to protect NPI in their custody or control.<sup>51</sup> Any institution of higher learning that complies with FERPA and the regulations promulgated pursuant to FERPA is considered to be in compliance with the Privacy Rules. However, there is no similar accommodation for institutions of higher learning in connection with the

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45. *See id.* § 99.3.

46. *See* 73 Fed. Reg. 74,806 (Dec. 9, 2008).

47. Family Educational Rights and Privacy, 34 C.F.R. §§ 99.1–99.67 (2009); *see also* Bernstein, *supra* note 36.

48. *See* 34 C.F.R. §§ 99.1–99.67 (2009).

49. *See* 15 U.S.C. § 6809(3) (2006).

50. 15 U.S.C. §§ 6801(a)–(b).

51. *See id.*



Safeguarding Rules. The Safeguarding Rules require financial institutions to develop, implement, and maintain a comprehensive security program consisting of administrative, technical, and physical safeguards to protect against the unauthorized use or disclosure of NPI.<sup>52</sup> However, the GLBA Safeguarding Rules provide financial institutions some flexibility when developing and administering security programs. Notably, the Safeguarding Rules include a reasonableness standard, which means that the security measures required will be dependent on the institution in question and the NPI collected.<sup>53</sup> Colleges and universities that may be subject to GLBA should evaluate their information security policies in light of this reasonableness standard and be able to justify decisions and trade-offs made.

### C. Health Insurance Portability and Accounting Act (HIPAA)

HIPAA is a complex framework of privacy laws and regulations that govern the safeguarding and privacy of individuals' health information.<sup>54</sup> U.S. colleges and universities should be aware of HIPAA due to its application to college and university health centers, medical schools, and hospitals. HIPAA is the federal statute that provides for privacy and standardized transmission of health records and information.<sup>55</sup> This statute specifically applies to health plans, health care clearinghouses, and regulation-specified providers (called "Covered Entities") that transmit health records.<sup>56</sup> HIPAA protects "individually identifiable health information," which includes demographic information collected from an individual that is either created by a health care provider or relates to treatment of an individual.<sup>57</sup> The lead agency for HIPAA management and enforcement is the Department of Health and Human Services ("HHS").<sup>58</sup>

Like GLBA, HIPAA includes both a Privacy Rule and a Security Rule.<sup>59</sup> The Privacy Rule requires Covered Entities to have in place appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information ("PHI") whereas the Security Rule outlines the framework for organizations to exercise the privacy requirement and

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52. *Id.* § 6801(b).

53. 16 C.F.R. § 314.3 (2009) (stating that safeguards "shall be reasonably designed" to insure the security and confidentiality of customer information).

54. *See* HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as scattered sections of U.S.C. titles 29 and 42 (2006)).

55. *Id.* § 261.

56. *Id.* § 1172.

57. *Id.* § 1177.

58. *See* Dep't of Health and Human Servs., HIPAA Privacy Rule Enforcement, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement> (last visited Oct. 14, 2009).

59. *See generally* HIPAA.

secure PHI.<sup>60</sup> Notably, the Security Rule applies to both paper and electronic PHI and is aimed at protecting against any reasonably anticipated threats to the security of PHI (including uses and disclosures of PHI that are not permitted or required).<sup>61</sup> Colleges and universities should be most concerned with the HIPAA Security Rule since HHS, through the Centers for Medicare and Medicaid Services (“CMS”), has recently begun to step up enforcement. In 2008, Providence Health Services became the first entity to be fined for non-compliance with the HIPAA Security Rule.<sup>62</sup> The health provider was fined \$100,000 for failing to provide adequate safeguards for PHI on backup media and laptops.<sup>63</sup>

Until recently, there has been a great deal of confusion over the boundaries of HIPAA and FERPA related to student health records. In response to the Virginia Tech incident, the Department of Health and Human Services and the Department of Education issued guidance (the “Joint Guidance”) in November 2008 to clarify the intersection between these two privacy laws.<sup>64</sup> The Joint Guidance explains that colleges and universities providing healthcare to students are accurately categorized as health care providers under HIPAA. If, however, the only health records the school maintains fall within the definition of education records or “treatment records”<sup>65</sup> under FERPA, a HIPAA exemption applies and FERPA governs.<sup>66</sup> Notably, if the educational institution’s health clinic provides healthcare services to non-students (e.g., staff, faculty, the public, etc.) the information maintained for those patients is governed by HIPAA.<sup>67</sup> Additionally, the Joint Guidance highlights that university hospitals are

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60. *Id.* § 1173.

61. *Id.*

62. See Thompson, *Providence to Pay First HIPAA Fine of \$100,000*, EMPLOYEE BENEFITS NEWSBRIEFS, Jul. 18, 2008, <http://www.thompson.com/public/newsbrief.jsp?cat=BENEFITS&id=1853> (last visited Oct 16, 2009).

63. *Id.*

64. United States Dep’t of Educ. and Health and Human Servs., Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records (Nov. 2008), available at <http://www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf> [hereinafter Joint Guidance].

65. “Treatment Records” are excluded from the definition of education records and are defined as records on a student who is eighteen years of age or older or who is attending an institution of post-secondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2006); 34 C.F.R. § 99.3 (2009).

66. Joint Guidance, *supra* note 64.

67. *See id.*

distinct from university health clinics and HIPAA typically governs all patients treated at such hospitals regardless of their status as students.<sup>68</sup> This distinction is due to the fact that university hospitals provide healthcare services without regard to the patient's status as a student and are not providing care on behalf of the educational institution.<sup>69</sup>

As mentioned above, HIPAA was recently modified as part of the American Recovery and Reinvestment Act of 2009.<sup>70</sup> In addition to a number of provisions addressing the development, implementation, and use of electronic health records ("EHRs"), the HITECH Act substantially modified the HIPAA Privacy Rule and Security Rule to provide additional privacy and security rights and requirements. In general, the effective date of these new provisions is February 17, 2010 (i.e., twelve months from the date of enactment of the HITECH Act).<sup>71</sup>

Prior to the passage of the HITECH Act, Covered Entities were required to enter into specialized confidentiality agreements with third parties that perform business functions on behalf of Covered Entities (e.g., outsourced service providers, subcontractors and consultants, collectively "Business Associates").<sup>72</sup> Business Associates were not specifically required to comply with HIPAA, but, rather, were only subject to a claim of contractual breach if they failed to comply with the terms of their contract with the Covered Entity (the "Business Associate Agreement").<sup>73</sup> Under the HITECH Act, Business Associates are directly subject to HIPAA's privacy and security requirements, including being required to implement administrative, physical, and technical safeguards, as well as HIPAA's criminal and civil fines and penalties.<sup>74</sup> Also, the HITECH Act extends the reach of the HIPAA requirements by providing that organizations that provide data transmission of PHI to Covered Entities or their Business Associates, such as health information exchange organizations, regional health information organizations, or vendors that contract with a Covered Entity to offer a personal health record ("PHR") to patients as part of its EHR, are considered Business Associates and must have a Business Associate Agreement with such Covered Entities.<sup>75</sup> However, these PHR vendors and related entities are subject to regulations promulgated by the

68. *See id.*

69. *See id.*

70. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (some sections codified as scattered sections of U.S.C.).

71. *See id.*

72. *See* DECHERT, LLP, HEALTHCARE REFORM UPDATE, available at [http://www.dechert.com/library/hru\\_02-26-09.pdf](http://www.dechert.com/library/hru_02-26-09.pdf).

73. *See id.*; *see also* American Chiropractic Association, Business Association Agreement, <http://www.acatoday.org/pdf/businessassociate.pdf> (last visited Oct. 14, 2009).

74. *See* §§ 13401, 13404, 123 Stat. at 260, 264.

75. *See id.* § 13408.

U.S. Federal Trade Commission (“FTC”) rather than those promulgated by HHS.<sup>76</sup>

The HITECH Act provides numerous restrictions and obligations with regard to PHI. Among other things, an individual may also request that his or her PHI not be disclosed to his or her health plan if the individual pays for medical care in full.<sup>77</sup> Covered Entities must, to the extent practicable, disclose only the “minimum necessary” information to accomplish the intended purpose for such disclosure.<sup>78</sup> In addition, an individual may request an accounting of the disclosures of his or her electronic PHI, as contained in the EHR, over the preceding three years.<sup>79</sup> Therefore, educational institutions that are Covered Entities using EHRs may want to begin accounting for disclosures as early as January 1, 2011, depending on when they acquire and begin to use an EHR. Under the HITECH Act, the sale of PHI by a Covered Entity or a Business Associate is prohibited without patient authorization except in certain specified circumstances.<sup>80</sup>

The HITECH Act also provides new data-breach-notification obligations that require Covered Entities and Business Associates to report most security breaches directly to affected individuals.<sup>81</sup> In general, notices provided under these provisions must be sent within sixty days,<sup>82</sup> which may be a short period of time to investigate and mitigate a data breach. Covered Entities and Business Associates are also required on an annual basis to notify the Secretary of HHS of all data breaches, and must provide notice of any breach of more than 500 records immediately.<sup>83</sup> These notice provisions apply to “unsecured” PHI<sup>84</sup> which the Secretary of HHS has defined as information that has not been rendered “unusable, unreadable, or indecipherable to unauthorized individuals,” either through encryption or destruction.<sup>85</sup> As required by the HITECH Act, on April 27, 2009, the

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76. See FTC Health Breach Notification Rule, 74 Fed. Reg. 42962, 42962–82 (April 25, 2009) (to be codified at 16 C.F.R. pt 318), <http://www.ftc.gov/os/fedreg/2009/august/090825healthbreachrule.pdf>.

77. *Id.* § 13405(a).

78. *Id.* § 13405(b). The HITECH Act specifies that the government will provide new guidance with regard to what constitutes the “minimum necessary” for disclosures under the Privacy Rule within eighteen months after the enactment of the HITECH Act (i.e. by August 17, 2010).

79. *Id.* § 13405(c).

80. *Id.* § 13405(d).

81. *Id.* § 13402.

82. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 13402(d)(1), 123 Stat. 115, 261 (2009) (§ 13402 codified at 42 U.S.C. § 17932).

83. *Id.* § 13402(e).

84. *Id.* § 13402.

85. Guidance Specifying the Technologies and Methodologies That Render Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals for Purposes of the Breach Notification Requirements Under Section 13402 of Title XIII of the American Recovery and Reinvestment Act of 2009, 74 Fed. Reg.

Secretary provided guidance regarding acceptable technologies for securing PHI, and will update that definition on an annual basis.<sup>86</sup>

As a result of these changes, educational institutions that are Covered Entities should take steps to review their current privacy and security practices to confirm that they are in compliance with the law, update their privacy and security policies, develop a data-breach-notification policy that complies with the HITECH Act (and state law counterparts), and update any Business Associate Agreements to reflect the new obligations under the HITECH Act. Because of the recent nature of the HITECH Act and the number of requirements that have yet to be defined or clarified, educational institutions should pay close attention to developments in this area.

#### D. Red Flag Rules

Colleges and universities are likely to be subject to one or more of the three new rules on Identity Theft Red Flags and Address Discrepancies under the Fair and Accurate Credit Transactions Act of 2003 (the “Red Flag Rules”).<sup>87</sup> These rules implement sections 114 and 315 of the Fair and Accurate Credit Transactions (“FACT”) Act, which specifically call for “establishment of procedures for the identification of possible instances of identity theft” and “reconciling addresses.”<sup>88</sup>

The Red Flag Rules are not limited to financial organizations traditionally regulated by the federal government. In fact, because the FTC is one of the six agencies that issued the Red Flag Rules, a broad cross-section of organizations must comply.<sup>89</sup>

The Red Flag Rules contain three requirements:

1. Debit and credit card issuers must develop policies and procedures to assess the validity of a request for a change of address that is followed closely by a request for an

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19006, 19006–10) (to be codified at 45 C.F.R. pt. 160, 164), <http://edocket.access.gpo.gov/2009/pdf/E9-9512.pdf>.

86. *Id.* See also 42 U.S.C. § 13402(h).

87. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), 72 Fed. Reg. 63,718, 63,719–721 (Nov. 9, 2007) (codified as scattered sections of 12 C.F.R. and 16 C.F.R. pt. 681). The rules have been promulgated by the Department of Treasury Office of the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Department of Treasury Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission.

88. Fair and Credit Transactions Act of 2003 (FACT Act), Pub. L. No. 108-159, §§ 114, 315, 117 Stat. 1952, 1960, 1996 (2003) (codified as elements of 15 U.S.C. §§ 1681c, 1681m (2006)).

89. See 72 Fed. Reg. at 63,727–728.

additional or replacement card.<sup>90</sup>

Most colleges and universities now have some type of payment card system in place that allows students, faculty, and staff to pay for goods and/or services at multiple locations on campus, and in some cases even at off-campus venues. While this shift to a cash-free environment has eased certain aspects of student life, the result is an activity that may implicate the Red Flag Rules, since institutions engaging in such activities may fall within the definition of “creditor.”<sup>91</sup> If the program in question is more like a credit card, for which the user is billed by the educational institution “after delivery,” or if use of the card debits money from a personal account established by the student with the educational institution, then the educational institution is likely to be considered a creditor.<sup>92</sup> If the program in question is more like a stored-value card (where the usable amount is stored on the card itself, not in a separate account that is debited as a result of the transaction), the educational institution is probably not a creditor.<sup>93</sup> This provision could implicate student IDs that also can be used as part of a national debit card network, such as Visa or MasterCard.<sup>94</sup> Educational institutions that offer such a payment card program will need to develop policies and procedures for handling student (or other user) changes of address and requests for new cards.

2. Users of consumer reports must develop reasonable policies and procedures to apply when they receive notice of an address discrepancy from a consumer reporting

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90. *Id.* at 63,733.

91. *See* FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 C.F.R. § 681.2 (2008) (FACTA defines “creditor” the same way as the Equal Credit Opportunity Act (ECOA): any entity that “regularly extends, renews, or continues credit; any [entity] that regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew, or continue credit.” 15 U.S.C. § 1691(a) (2006). The ECOA definition of “credit” includes a right granted to defer payment for any purchase. Thus, any entity who delivers a service or product for which the consumer pays after delivery is a “creditor.” *See id.*)

92. *See* 72 Fed. Reg. at 63,718.

93. *See id.* at 63,734 (where the definition of “debit card” specifically does not include stored-value cards).

94. The Red Flag Rules also applies to “financial institutions.” 15 U.S.C. § 6827(4)(A) defines a “financial institution” as “any institution engaged in the business of providing financial services to customers who maintain a credit, deposit, trust, or other financial account or relationship with the institution.” Transaction accounts include checking accounts, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers, and share draft accounts. *See* 12 U.S.C. § 461(b)(1)(C) (2006). Colleges and universities that offer students the option of having their student ID also operate as a Visa or MasterCard debit card should coordinate with the bank through which such services are offered to ensure that the bank has an adequate Identity Theft Prevention Program in place.

agency.<sup>95</sup>

This provision will apply to educational institutions when they use consumer credit reports to conduct credit or background checks on prospective employees or applicants for credit.

3. Financial institutions and “creditors” holding “covered accounts” must develop and implement a written identity theft prevention program for both new and existing accounts.<sup>96</sup>

Organizations subject to the Red Flag Rules are categorized as either financial institutions or creditors.<sup>97</sup> The term “creditors” includes any person or organization that regularly extends, renews, or continues credit; who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.<sup>98</sup> Since the definition is so broad, colleges and universities that have payment card programs described above or that extend credit in their bookstores or through meal plans or other campus lending programs could be held to comply with the Red Flag Rules. In fact, the FTC stated “[w]here non-profit and government entities defer payment for goods or services, they, too, are to be considered creditors.”<sup>99</sup>

Activities that could cause educational institutions to be considered “creditors” under the Red Flag Rules may include:

- Participating in the Federal Perkins Loan program;
- Participating as a school lender in the Federal Family Education Loan Program;
- Offering institutional loans to students, faculty, or staff; or
- Offering a plan for payment of tuition throughout the semester rather than requiring full payment at the beginning of the semester.

Under the Red Flag Rules, if an institution is a creditor, the institution must determine if any of its extensions of credit are “covered accounts.”<sup>100</sup> Under the Red Flag Rules, a “covered account” is a consumer account that involves multiple payments or transactions, such as a loan that is billed or

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95. 16 C.F.R. § 681.2 (2009).

96. *Id.*

97. *See* 72 Fed. Reg. at 63,719.

98. 15 U.S.C. § 1691a(e) (2006).

99. FTC Business Alert, *New “Red Flag” Requirements for Financial Institutions and Creditors Will Help Fight Identity Theft*, June 2008, <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm> (last visited Oct. 14, 2009).

100. 72 Fed. Reg. at 63,754.

payable monthly.<sup>101</sup> The Red Flag Rules and the FTC's guidance on it indicate that covered accounts include certain types of arrangements in which an individual establishes a "continuing relationship" with the enterprise, including billing for previous services rendered.<sup>102</sup> Any type of account or payment plan that involves multiple transactions or multiple payments in arrears (as opposed, for example, to payment of a semester's tuition in full in advance), however, likely is a "covered account."<sup>103</sup>

The Red Flag Rules mandate that financial institutions and creditors develop and implement a written "Identity Theft Prevention Program" (a "Program") to identify relevant "red flags" (patterns, practices, and specific activities that signal possible identity theft) and incorporate them into the program; detect the red flags that the Program incorporates; respond appropriately to detected red flags to prevent and mitigate identity theft; and ensure that the Program is updated periodically to reflect changes in risks.<sup>104</sup> The board of directors (or appropriate board committee) of the financial institution or creditor must approve the initial written Program.<sup>105</sup> Board approval may be necessary only for the first written Program if the board delegates to appropriate senior management further responsibility.<sup>106</sup> The new identity theft and address discrepancy rules took effect on January 1, 2008, and, originally, entities under FTC jurisdiction had until November 1, 2008, to review their current practices, develop their Programs, and implement the necessary changes before full compliance was expected.<sup>107</sup> However, due to repeated requests from organizations for more time, and, most recently, a request from Congress, the FTC has delayed the compliance date at total of four times and it is currently June 1, 2010.<sup>108</sup>

The path to developing a Program will vary and will depend in large part on each institution's existing fraud and compliance programs and experience with identity theft. The Red Flag Rules permit flexibility in the scope of the Program, depending on the creditors' activities and level of identity theft risk associated with the relevant covered accounts. In

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101. *Id.* at 63,721.

102. *Id.*

103. *Id.* at 63,719.

104. *Id.* at 63,720.

105. *Id.* at 63,718.

106. Press Release, Federal Trade Commission, FTC Will Grant Three-Month Delay of Enforcement of "Red Flags" Rules Requiring Creditors and Financial Institutions to Adopt Identity Theft Prevention Programs (April 30, 2009), <http://www.ftc.gov/opa/2009/04/redflagsrule.shtm> (last visited Oct. 16, 2009).

107. 72 Fed. Reg. at 63,718. See Press Release, Federal Trade Commission, FTC Announces Expanded Business Education Campaign on the 'Red Flags' Rule, (July 29, 2009), [www.ftc.gov/opa/2009/07/redflag.shtm](http://www.ftc.gov/opa/2009/07/redflag.shtm) (last visited Nov. 11, 2009).

108. FTC Moves 'Red Flag' Deadline to June Following Request from House Lawmakers, Privacy Watch (BNA) No. 209 (Nov. 2, 2009).



developing a Program, educational institutions should assess whether they have “covered accounts,” as described above. Such analysis and an initial risk assessment will enable the educational institution to identify types of accounts the Program must address and identify the risks the institution faces, based in large part on the institution’s previous experiences with identity theft. An appropriate identity theft prevention program may not need to be detailed or complex, but should be written, duly approved, and implemented.

Appendix J to the Red Flag Rules, the “Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation,”<sup>109</sup> provides an outline for developing a Program. The document provides 26 sample “red flags” that could be incorporated into an educational institution’s Program. Examples include:

- Address discrepancy;
- Name discrepancy on identification and insurance information;
- Presentation of suspicious documents;
- Personal information inconsistent with information already on file;
- Unusual use or suspicious activity related to a covered account;
- Notice from customers, law enforcement, or others of unusual activity related to that covered account.<sup>110</sup>

In addition to addressing relevant red flags, an educational institution subject to the Red Flag Rules must “train staff, as necessary” to implement the Program effectively.<sup>111</sup> According to the preamble to the Red Flag Rules, institutions need train only “relevant staff” and only insofar as necessary to supplement other training programs.<sup>112</sup> The Red Flag Rules also require covered institutions to exercise “appropriate and effective oversight” of service provider arrangements.<sup>113</sup> According to the preamble to the Red Flag Rules, this provision is intended to remind covered institutions that they remain responsible for compliance with the rule even if they outsource operations to a third party.<sup>114</sup> Educational institutions that outsource operations that would be impacted by the Red Flag Rules should review existing contracts to determine whether the service provider is obligated to have policies and procedures that would be sufficient to comply with the Red Flag Rules, and future service contracts should include specific requirements to comply with the Red Flag Rules.<sup>115</sup>

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109. *Id.* at 63,754.

110. *Id.*

111. *Id.* at 63,731.

112. *Id.* at 63,718.

113. 16 C.F.R. § 681.1 (2009).

114. 72 Fed. Reg. at 63,723.

115. A general obligation to comply with laws may not be sufficient, since, frequently, such provisions are drafted in a manner that requires the service provider to comply with all laws and regulations applicable to the service provider’s business and

### E. Key State Laws

States have also assumed a prominent role in regulating data privacy and security, thus necessitating educational institutions' compliance with another layer of laws. A significant element of many of these state data-privacy laws is that many states have started to impose their data protection laws on "foreign" entities. This means that a physical presence in the state is often not required for an institution to be subject to the law. The two most popular standards for being covered under a particular state's data-privacy laws include "doing business" in that particular state and holding a resident's personal information.<sup>116</sup> The "doing business" standard is the more traditional standard applied by states when determining whether the state's laws apply to out-of-state entities.<sup>117</sup> As mentioned in the introductory section, the extended reach of laws applying simply due to the data held by an entity has yet to be challenged. If, however, an educational institution's marketing and recruiting practices were to rise to the level of "doing business" in a state with such an extended reach statute, the question might never need to be reached by a court. Assuming that the laws are valid and enforceable, for colleges and universities, this means being subject to state laws and regulations based on the geographic makeup of their applicant pool and student body, and not merely the physical location of the institution. Some of the more significant state laws applicable to educational institutions are outlined in this section, but colleges and universities should institute a compliance program that actively monitors developments in state and local data-privacy laws.

#### 1. California

California was one of the first states in the country to regulate privacy, and today it has the most comprehensive framework of state-level privacy laws in the country.<sup>118</sup> California privacy laws are also some of the most stringent in the country, requiring safeguards for a wide variety of personal

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operations. Unless a service provider is also held to be a creditor or financial institution, such a general compliance obligation would not require the service provider to comply with the Red Flag Rules.

116. See Christopher Wolf and Timothy P. Tobin, *Privacy, Data Security and Outsourcing*, in 93 PRACTICING L. INST.: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES 57, 63–64 (2007); Jennifer Chandler, *Negligence Liability for Breaches of Data Security*, 23 BANKING & FIN. L. REV. 223, 226 (2008).

117. See generally Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001).

118. See generally CAL. CONST. art. 1, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

information.<sup>119</sup> As such, most of the privacy laws in existence in other states encompass some aspect of the California privacy framework. Understanding California's privacy laws offers insight into the breadth of state privacy laws in existence throughout the country.

California privacy laws cover a broad set of subject areas, including: arrest records, cable television subscriber information, check printing, computer crimes, credit card numbers, credit reporting, debt collection processing, motor vehicle records, e-commerce, employment records, false impersonation, financial records, invasion of privacy, investigative consumer reports, insurance information, medical records, police records, school records, sex offender registration, stalking, tax records, telephone records and solicitation, video store lists, voter registration records, and wiretapping.<sup>120</sup> A notable component of California's privacy laws is that some of the laws reach beyond California state borders. Many of the state's privacy laws apply to any entity that stores a California resident's information or transacts business with a Californian, regardless of where that entity is located.<sup>121</sup> While the enforceability of this extended reach has yet to be tested, for colleges and universities, this means that, unless the institution wants to risk being the test case for the enforceability of the provision, as long as one student on campus is from California, the institution may be subject to California privacy laws with regard to that person's information. The unfortunate consequence of laws drafted in this way is that the most stringent law becomes the *de facto* standard, since the alternative is for institutions to implement multiple policies and procedures depending on the home residence of their prospective and actual students, parents, donors, faculty, and alumni.

## 2. Minnesota

In 2007 Minnesota was the first state to codify elements of the PCI DSS.<sup>122</sup> In response to the TJX Companies, Inc., credit card data breach, which compromised over 45 million cardholders' information, Minnesota enacted the Plastic Card Security Act.<sup>123</sup> This law imposes strict liability

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119. The California Office of Privacy Protection is a valuable resource for counsel who wish to acquire a broader understanding of the various types of state privacy laws in existence. Cal. Office of Privacy Prot., [http://www.oispp.ca.gov/consumer\\_privacy/default.asp](http://www.oispp.ca.gov/consumer_privacy/default.asp) (last visited Oct. 14, 2009).

120. Cal. Office of Privacy Prot., *Privacy Laws*, [http://www.oispp.ca.gov/consumer\\_privacy/laws/#two](http://www.oispp.ca.gov/consumer_privacy/laws/#two) (last visited Oct. 14, 2009).

121. See, e.g., California's Online Privacy Protection Act of 2003, CAL. BUS. & PROF. CODE §§ 22575–79 (West 2008) (requiring website operators who collect personally identifiable information on California residents to post a privacy policy on their websites describing their data practices, regardless of the operator's location).

122. See discussion *infra* Part I.F.

123. H.F. 1758, 2007–08 Leg., 85th Sess. (Minn. 2007); see also Joseph Pereira, *Breaking The Code: How Credit-Card Data Went Out Wireless Door – In Biggest*

on any entity that retains credit or debit card security data.<sup>124</sup> Any organization conducting business in Minnesota after August 1, 2007, may not keep “card security code data, the PIN verification code number, or the full contents of any track of magnetic stripe data” after a transaction is authorized.<sup>125</sup> In the event of a security breach, the Plastic Card Security Act imposes strict liability, meaning entities will be liable regardless of whether the security breach was the result of negligence or some other factor such as poor security.<sup>126</sup> The law also holds organizations responsible for violation of the data retention requirements by their service providers.<sup>127</sup>

Where security data has been retained in violation of the law and a data breach occurs, organizations will be liable to any financial institution for the costs incurred to remediate and recover from the breach.<sup>128</sup> Entities will also be liable for damages that financial institutions pay to injured cardholders as a result of the security breach.<sup>129</sup> The costs imposed by this new Minnesota law are in addition to any other remedies that are already available to financial institutions.<sup>130</sup>

Even organizations not physically located in Minnesota potentially face liability under this law, since the statute applies to anyone *conducting business* in Minnesota.<sup>131</sup> Since many transactions with and on college and university campuses, including application fees paid online and bookstore, cafeteria, and tuition payments, are conducted using credit cards, the Minnesota Plastic Card Security Act likely applies to many educational

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*Known Theft, Retailer's Weak Security Lost Millions of Numbers*, WALL ST. J., May 4, 2007, at A1.

124. MINN. STAT. ANN. § 325E.64(2) (West Supp. 2008).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. MINN. STAT. ANN. § 325E.64(3) (West Supp. 2008).

130. *Id.*

131. Determining whether a particular merchant is conducting business in Minnesota for purposes of this statute is a fact-specific inquiry. Rather than list activities that *are* considered conducting business in Minnesota, the Minnesota Foreign Corporation Act identifies a number of activities that *are not* considered to be conducting business in the state. *See* MINN. STAT. ANN. § 303.03 (West Supp. 2008). In particular, the statute notes that a foreign corporation will *not* be transacting business in the state if it is “conducting an isolated transaction completed within a period of 30 days and not in the course of a number of repeated transactions of like nature.” *See id.* § 303.03(h). Furthermore, Minnesota’s long-arm statute asserts personal jurisdiction over foreign corporations causing injury within the state, subject to a pair of exceptions probably included for due-process reasons. *See id.* § 543.19. Merchants conducting business with Minnesotans will need to determine whether their conduct constitutes conducting business within Minnesota and whether any data breach would constitute an injury there. Given the current public sensitivity to the consequences of data breaches and the potential cost of violations of the Plastic Card Security Act, merchants may wish to err on the side of caution and comply with the Minnesota requirements.

institutions' activities. In particular, if any students on a campus are from Minnesota, the Plastic Card Security Act could apply. The Act may likewise apply if there are repeat transactions conducted within Minnesota's borders that rise to the level of "conducting business" in Minnesota. Colleges and universities that accept credit cards should already be working with their banks to comply with PCI DSS, regardless of whether they are covered by the Minnesota law. Institutions covered by the Minnesota law may limit their exposure under the law by taking the following steps: (1) educational institutions in, or that do regular business with residents of, Minnesota should confirm that they are not storing security card data in violation of the Minnesota law, including auditing their existing data retention policies and practices and updating them where appropriate; (2) existing contracts with service providers should be reviewed and updated to reflect the new data retention provisions. As appropriate, educational institutions should work with their third party providers to ensure compliance with the Minnesota law. Additionally, service provider contracts should include provisions to indemnify the merchant in cases where the service provider has breached the Plastic Security Card Act; and (3) any educational institution handling credit card data should regularly monitor PCI DSS updates and modify its security practices accordingly.

### 3. Massachusetts

Originally set to be phased in during 2009 and 2010, and now delayed to a single compliance date of March 1, 2010,<sup>132</sup> Massachusetts has released regulations, entitled "Standards for the Protection of Personal Information of Residents of the Commonwealth" ("the MA Regulations"), that establish data security standards for any entity that "own[s], license[s], store[s], or maintain[s] personal information about a resident of the Commonwealth of Massachusetts."<sup>133</sup> The purpose of the MA Regulations is to establish "minimum standards to safeguard personal information in both paper and electronic records."<sup>134</sup> Similar to many other state data protection laws, the MA Regulations apply broadly to businesses located outside of Massachusetts' borders. Even if an organization does not have a significant presence in the state, the MA Regulations may still apply if the

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132. Press Release, Massachusetts Office of Consumer Affairs & Business Regulation, Patrick Administration's Final Data Security Regulations Filed and Take Effect March 1, 2010; State Received Notice of More than 1 Million Instances of Exposure in Two Years (Nov. 4, 2009), [http://www.mass.gov/?pageID=ocapressrelease&L=1&L0=Home&sid=Eoca&b=pressrelease&f=20091104\\_idtheft&csid=Eoca](http://www.mass.gov/?pageID=ocapressrelease&L=1&L0=Home&sid=Eoca&b=pressrelease&f=20091104_idtheft&csid=Eoca) (last visited Nov. 22, 2009).

133. 201 MASS CODE REGS. 17.01(1) (2009).

134. *Id.*

organization holds personal information about a Massachusetts resident.<sup>135</sup> As with other similar statutes, the enforceability of this extended reach has yet to be tested.

The MA Regulations govern both paper and electronic records and require entities to develop and implement a comprehensive, written information security program for personal information (“Program”).<sup>136</sup> Each such Program must follow industry standards and include certain administrative, technical, and physical safeguards, as well as specific encryption requirements for electronic records containing personal information.<sup>137</sup> Under the MA Regulations, personal information includes a Massachusetts resident’s first and last name, or first initial and last name in combination with any one or more of the following data elements: (a) Social Security number; (b) driver’s license number or state-issued identification card number; or (c) financial account number, or credit or debit card number, with or without any pin number or password.<sup>138</sup> The MA Regulations allow for tailoring each entity’s Program based on the size and type of business, resources available to the business, amount of personal data stored, and need for security and confidentiality of the information.<sup>139</sup> Despite the flexibility granted under the MA Regulations, each Program must address certain activities defined in the MA Regulations.<sup>140</sup>

As mentioned above, the MA Regulations also include specific encryption requirements for any electronic transmission or storage of

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135. *See id.*

136. The Regulations were adopted pursuant to chapter 93H, section 2 of the Massachusetts General Laws, which grants the Department of Consumer Affairs and Business Regulation the authority to adopt regulations that “safeguard the personal information of residents of the Commonwealth . . . .” This same law also grants the Supervisor of Records the authority to create similar rules and regulations applicable to Massachusetts Executive Offices. *See* MASS. GEN. LAWS. ch. 93H, § 2(b) (2008).

137. 201 MASS. CODE REGS. 17.03 (2008).

138. *Id.* 17.02.

139. *Id.* 17.03.

140. *Id.* These required activities include: designating employee(s) to maintain the Program; identifying and assessing the risks associated with electronic or paper records containing personal information; developing security policies for employees, including measures related to transport of personal information outside of the business’ premises; imposing disciplinary measures for violations of the Program; preventing terminated employees from accessing records containing personal information; taking reasonable steps to verify that third-party service providers with access to personal information can provide adequate protections; limiting the amount of personal information collected; identifying records, media, and devices that contain personal information; applying reasonable restrictions on physical access to records containing personal information; monitoring and upgrading the Program to ensure that it is operating to prevent unauthorized access to personal information; reviewing the Program annually; and documenting actions taken in response to a breach of security and implementing post-incident reviews of such events. *Id.*

personal information.<sup>141</sup> The statute defines “encryption” to require the use of a 128-bit or higher algorithmic process, unless further defined by the MA Regulations.<sup>142</sup> Specifically, the MA Regulations require businesses storing or transmitting personal information to address the following in their Program: (1) user authentication protocols; (2) secure access control measures; (3) encryption of records that travel across public networks or wirelessly; (4) monitoring systems for unauthorized access; (5) encryption of personal information stored on portable devices; (6) updating firewalls and system security; (7) maintaining current virus protections; and (8) training for employees on computer security and protecting personal information.<sup>143</sup>

Most significantly, and in response to the countless data breaches involving lost or stolen laptops, the MA Regulations require businesses to encrypt personal information stored on portable devices.<sup>144</sup> Compliance with this requirement means equipping laptops and other similar devices with encrypted hard drives or installing data encryption software to protect sensitive data.

Finally, the MA Regulations require businesses to take a closer look at outsourcing arrangements. In particular, businesses must verify that third-party service providers with access to personal information about Massachusetts’ residents have the capacity to protect that data.<sup>145</sup> This includes:

1. [t]aking reasonable steps to select and retain third-party service providers that are capable of maintaining appropriate security measure to protect such personal information consistent with these regulations and any applicable federal regulations; and
2. Requiring such third-party service providers by contract to implement and maintain such appropriate security measures for personal information.<sup>146</sup>

Massachusetts has provided a grace period for this element of the MA Regulations: until March 1, 2012, this requirement will not be applicable for contracts with an effective date prior to March 1, 2010. All contracts with effective dates after March 1, 2010, must comply with this element of

141. *Id.* 17.04(3), (5).

142. MASS. GEN. LAWS ch. 93H, § 1 (2008).

143. 201 MASS. CODE REGS. 17.04. Massachusetts is one of the states specifying a particular level of encryption. As computers become more powerful, this level of encryption will become easier to break, potentially requiring Massachusetts to increase the required level of encryption. Legally mandated higher levels of encryption, however, could place organizations at risk of violating the federal government’s restrictions on exporting strong encryption technologies.

144. *Id.* 17.04(5).

145. *Id.* 17.03(3).

146. *Id.* 17.03(3)(f).

the MA Regulations.<sup>147</sup> In advance of the March 1, 2012, deadline, educational institutions that may collect Massachusetts residents' personal information should revisit existing outsourcing agreements to verify that compliance by their service providers is addressed.

Like many of the other state laws analyzed in this section, the Massachusetts law applies to colleges and universities that hold the personal information of a Massachusetts resident.<sup>148</sup> This means if the student body is comprised of any Massachusetts residents, compliance with the MA Regulations is warranted. Furthermore, colleges and universities with hospitals will want to examine how the Massachusetts law applies to their medical records, since medical records both at rest and in transit may require encryption, depending on the personal information contained therein (e.g., SSNs, credit card information, etc.). An important consideration regarding such records will be the extent to which existing electronic filing systems at such hospitals possess the capability to encrypt these records at rest. While the MA Regulations do not specifically include medical records, the fact that California<sup>149</sup> and certain other states have included medical records in the definition of personally identifiable information covered by those state's data-breach-notification laws means that Massachusetts' definition could easily be extended to include such information in the future.

#### 4. Nevada

In 2008, Nevada enacted the "Restrictions on Transfer of Personal Information through Electronic Transmission" law, which became effective on October 1, 2008.<sup>150</sup> This law requires businesses in the state to encrypt all electronic transfers of a customer's personal information.<sup>151</sup> In Nevada, personal information includes the following unencrypted data: a person's first name or first initial and last name in combination with a social security number; driver's license number or identification card number; and/or account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.<sup>152</sup> Significantly, the Nevada law also caps damages at \$1,000 per customer for companies that comply with

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147. Press Release, Massachusetts Office of Consumer Affairs & Business Regulation, Patrick Administration's Final Data Security Regulations Filed and Take Effect March 1, 2010; State Received Notice of More than 1 Million Instances of Exposure in Two Years (Nov. 4, 2009), [http://www.mass.gov/?pageID=ocapressrelease&L=1&L0=Home&sid=Eoca&b=pressrelease&f=20091104\\_idtheft&csid=Eoca](http://www.mass.gov/?pageID=ocapressrelease&L=1&L0=Home&sid=Eoca&b=pressrelease&f=20091104_idtheft&csid=Eoca)

148. 201 MASS. CODE REGS. 17.01.

149. CAL. CIV. CODE § 1798.3 (West 2009).

150. NEV. REV. STAT. § 597.970 (2008).

151. *Id.* The law excludes transfers using facsimile.

152. NEV. REV. STAT. § 603A.040.



the law but none-the-less suffer a data breach whereas those companies not complying face unlimited damages.<sup>153</sup>

Nevada is not the only state to mandating data security measures for personal information, but the Nevada encryption law is unique in mandating the use of a particular security measure, rather than “reasonable” security procedures. For example, the California Security Safeguard Act<sup>154</sup> requires a company that owns or licenses unencrypted “personal information” about California residents to implement and maintain “reasonable security procedures and practices” to protect such data. Texas<sup>155</sup> and Rhode Island<sup>156</sup> have enacted similar laws requiring companies to adopt procedures relating to information security, but neither of those are as specific as the Nevada encryption law.

While the Nevada encryption law is specific in requiring encryption, it is far less specific in several other areas. First, it does not define a “customer.” Because neither the “personal information” nor the “customer” covered by the Nevada encryption law is limited with respect to a Nevada resident, the law could be interpreted as applying to a covered entity’s transmission of “any personal information of a customer,” regardless of where the customer resides. Second, the Nevada encryption law does not define the scope of “[a] business in this state” that is subject to the law. However, in addressing whether a foreign corporation had satisfied qualification requirements under Nevada law, the Nevada Supreme Court interpreted “doing business” in Nevada by approvingly citing a two-pronged standard: (a) the nature of the company’s business in the state; and (b) the quantity of business conducted by the company in the state. In that case, the Court noted that assessing whether a foreign company is “doing business” in the state is “often a laborious, fact-intensive inquiry resolved on a case-by-case basis.”<sup>157</sup> Like the Minnesota Plastic Card Security Act, the more interaction an educational institution has with individuals in Nevada, the more likely the institution will be to be subject to the Nevada encryption law.

On May 29, 2009, Nevada became the second state to require compliance with the PCI DSS when Nevada governor Jim Gibbons approved Senate Bill No. 227 (the “Amendment”), which amended Nevada’s Security of Personal Information law.<sup>158</sup> The Security of Personal Information law

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153. Ben Worthen, “*New Data Privacy Laws Set for Firms*,” WALL ST. J. (October 16, 2008).

154. CAL. CIV. CODE § 1798.81.5(b).

155. TEX. BUS. & COM. CODE § 48.102(a) (2006).

156. R.I. GEN. LAWS § 11-49.2-2(2) (2006).

157. *Executive Mgmt. Ltd. v. Tigor Title Ins. Co.*, 38 P. 3d 872 (Nev. 2002).

158. NEV. REV. STAT. §603A. For text of the amendment, see [https://www.leg.state.nv.us/75th2009/Bills/SB/SB227\\_EN.pdf](https://www.leg.state.nv.us/75th2009/Bills/SB/SB227_EN.pdf) (last visited Sept. 9, 2009).

establishes requirements with respect to the destruction of records containing personal information;<sup>159</sup> the maintenance of reasonable security measures;<sup>160</sup> and the disclosure of security breaches impacting personal information.<sup>161</sup>

The Amendment provides that, if a data collector doing business in Nevada accepts a payment card in connection with a sale of goods or services, the data collector must comply with the current version of the PCI DSS.<sup>162</sup> Furthermore the data collector's compliance must not be later than the date set forth in the PCI DSS.<sup>163</sup> Under the Amendment, a data collector means any governmental agency, institution of higher education, corporation, financial institution or retail operator or any other type of business entity or association that, for any purpose, whether by automated collection or otherwise, handles, collects, disseminates or otherwise deals with nonpublic personal information.<sup>164</sup>

The Amendment provides a safe harbor by stating that a data collector shall not be liable for damages for a breach of security if the data collector is in compliance with the PCI DSS *and* the breach is not caused by gross negligence or intentional misconduct.<sup>165</sup> Previously, an affected party would have recourse under various theories of law, with varying (and often undefined) standards of care or duty. Absent gross negligence or willful misconduct, an otherwise PCI-compliant merchant that suffers a data loss could arguably escape liability in Nevada.

The Amendment also expands on the obligations under the encryption laws by providing that organizations not involved in payment card transactions, but that transmit personally identifiable information outside of their own secure systems (either via electronic transmission or through the movement of physical data storage devices), must use encryption to ensure the security of the information. Unlike many other laws in this area, the amendment provides a very precise definition of what constitutes satisfactory encryption, "the protection of data in electronic or optical form, in storage or in transit, using: (1) An encryption technology that has been adopted by an established standards setting body, including, but not limited to, the Federal Information Processing Standards issued by the National Institute of Standards and Technology, which renders such data indecipherable in the absence of associated cryptographic keys necessary to

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159. *Id.* at § 603A.200.

160. *Id.* at § 603A.210.

161. *Id.* at § 603A.220.

162. For the latest PCI DSS requirements, see [https://www.pcisecuritystandards.org/security\\_standards/pci\\_dss.shtml](https://www.pcisecuritystandards.org/security_standards/pci_dss.shtml).

163. It should be noted that the current version of the PCI DSS does not provide compliance deadlines which are instead set by the individual payment card contracts.

164. NEV. REV. STAT. § 603A.030.

165. S.B. 227, 2009 Leg., 75th Sess. (Nev. 2009).

enable decryption of such data; and (2) Appropriate management and safeguards of cryptographic keys to protect the integrity of the encryption using guidelines promulgated by an established standards setting body, including, but not limited to, the National Institute of Standards and Technology.”<sup>166</sup>

Although the effect of the Amendment with regard to PCI DSS compliance may be somewhat academic, since all entities covered by it are already contractually obligated to comply with the PCI DSS, this new law, in combination with Minnesota’s Plastic Card Security Act, may inspire other states to legislate compliance with the PCI DSS.

### 5. State Data-breach-notification Laws

One of the most significant areas of state-level data-privacy regulation relates to data-breach-notification. As of the date of this article, at least forty-three states, the District of Columbia, and Puerto Rico have enacted data-breach-notification laws.<sup>167</sup> The primary purpose of these laws is to

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166. *Id.* at Section 5(b).

167. Alaska (ALASKA STAT. §§ 45.48.010–.090 (2009)); Arizona (ARIZ. REV. STAT. § 44-7501 (Supp. 2008)); Arkansas (ARK. CODE ANN. §§ 4-110-101 to -107 (Supp. 2007)); California (CAL. CIV. CODE § 1798.92 (West 2009)); Colorado (COLO. REV. STAT. ANN. § 6-1-716 (West Supp. 2008)); Connecticut (CONN. GEN. STAT. § 36a-701(b) (West Supp. 2009)); Delaware (DEL. CODE ANN. tit. 6, §§ 12B-101 to -104 (Supp. 2008)); District of Columbia (D.C. CODE ANN. §§ 28-3851 to -3853 (LexisNexis Supp. 2009)); Florida (FLA. STAT. ANN. § 817.5681 (West 2006)); Georgia (GA. CODE ANN. §§ 10-1-910 to -912 (2009)); Hawaii (HAW. REV. STAT. § 487N-2 (LexisNexis Supp. 2009)); Idaho (IDAHO CODE ANN. §§ 28-51-104 to -107 (Supp. 2009)); Illinois (815 ILL. COMP. STAT. 530/1–30 (West 2008)); Indiana (IND. CODE § 4-1-11-1 to -10 (2005)); Iowa (IOWA CODE § 715C.1–C.2 (2008)); Kansas (KAN. STAT. ANN. § 50-7a02 (Supp. 2008)); Louisiana (LA. REV. STAT. ANN. § 51:3071–:3076 (Supp. 2009)); Maine (ME. REV. STAT. ANN. tit. 10, §§ 1347–1350-B (Supp. 2008)); Maryland (MD. CODE ANN., COM. LAW § 14-3501 to -3506 (LexisNexis Supp. 2008)); Massachusetts (2007 H.B. 4144, Chapter 82); Michigan (MICH. COMP. LAWS §§ 445.61–.77 (Supp. 2009)); Minnesota (MINN. STAT. ANN. §§ 325E.61, 325E.64 (West Supp. 2008)); Missouri (MO. REV. STAT. § 407.1500 (2009 H.B. 62)); Montana (MONT. CODE ANN. § 30-14-1701 to -1736 (2007)); Nebraska (NEB. REV. STAT. §§ 87-801 to -807 (2008)); Nevada (NEV. REV. STAT. §§ 603A.010–.920 (LexisNexis Supp. 2007)); New Hampshire (N.H. REV. STAT. ANN. §§ 359-C:19 to :21 (LexisNexis 2008)); New Jersey (N.J. STAT. ANN. § 56:8-163 (West Supp. 2009)); New York (N.Y. GEN. BUS. LAW § 899-aa (McKinney Supp. 2009)); North Carolina (N.C. GEN. STAT. § 75-65 (2007)); North Dakota (N.D. CENT. CODE § 51-30-01 to -07 (2005)); Ohio (OHIO REV. CODE ANN. §§ 1347.12, 1349.19, 1349.191–.192 (LexisNexis 2006)); Oklahoma (OKLA. STAT. tit. 74, § 3113.1 (West Supp. 2009)); Oregon (2007 S.B. 583, Chapter 759); Pennsylvania (73 PA. CONS. STAT. ANN. § 2303 (West 2008)); Puerto Rico (P.R. LAWS ANN. tit. 10, §§ 4051–4053 (Supp. 2007)); Rhode Island (R.I. GEN. LAWS § 11-49.2-1 to -7 (2005)); South Carolina (S.C. CODE ANN. § 1-11-490 (Supp. 2008)); Tennessee (TENN. CODE ANN. § 47-18-2107 (Supp. 2008)); Texas (TEX. BUS. & COM. CODE ANN. § 521.053 (Vernon Supp. 2008)); Utah (UTAH CODE ANN. §§ 13-44-101 to -102, -201 to -202, -310 (Supp. 2009)); Vermont (VT. STAT. ANN. tit. 9 § 2430–2435 (2007)); Virginia (VA. CODE § 18.2-186.6 (2009));

establish guidelines for when entities that store personal information must inform individuals that their information has been compromised.

California's data-breach-notification law, which was the first law of its kind when adopted, now serves as the model for most other states.<sup>168</sup> California's law requires an entity to disclose the unauthorized access to unencrypted personal information if the breached personal information is coupled with the resident's first name, or first initial, and last name. The personal information that triggers the California statute includes: (1) Social Security number; (2) driver's license number or California Identification Card number; (3) account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; (4) medical information; or (5) health insurance information.<sup>169</sup> Under this law, notice must be given in "the most expedient time possible and without unreasonable delay."<sup>170</sup> Furthermore, if immediate notice is not offered, residents have a private cause of action for damages and injunctive relief.<sup>171</sup>

The goal of tying the notice requirement to the lack of encryption was intended to cause companies to encrypt their data, on the theory that organizations would rather spend the time and resources necessary to encrypt than risk disclosing a data breach to the public. This premise failed for two major reasons: (1) encryption of stored data proved more difficult than the legislators imagined, and (2) increases in computing power made it easier to break higher-level encryptions, meaning that data holders could not guarantee that encrypted information subject to unauthorized access had not been decrypted, thus requiring them to notify the data subjects despite the encryption.

While California has served as the model, there is still tremendous variation among each of the existing state data-breach-notification statutes. In particular, most data-breach-notice laws have divergent standards related to the type of breach that triggers notice, the timing requirements of notice, and exemptions for notification if encrypted data is compromised or other factors are satisfied. For example, Kansas, Colorado, and Delaware "have provisions exempting companies from disclosure if, upon investigation, it is believed that the stolen data will likely not be misused."<sup>172</sup> Some states'

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Washington (WASH. REV. CODE § 19.255.010 (West Supp. 2007)); West Virginia (W. VA. CODE ANN. §§ 46A-2A-101 to -105 (LexisNexis Supp. 2009)); Wisconsin (WIS. STAT. ANN. § 895.507 (2006)); Wyoming (WYO. STAT. ANN. § 40-12-501 to -509 (2007)).

168. CAL. CIV. CODE §§ 1798.29, 1798.82 (West 2009).

169. *Id.* § 1798.29(e).

170. *Id.* § 1798.82(a).

171. *Id.* § 1798.84(a).

172. Philip Alexander, *Data Breach Notification Laws: A State-by-State Perspective*, INTELLIGENT ENTERPRISE, Apr. 9, 2007, <http://www.intelligententerprise.com/showArticle.jhtml?articleID=198800638> (last

laws specifically exempt compromised redacted data from notification requirements.<sup>173</sup> For example, in Maryland, notice must first be given to the state attorney general or other regulator prior to notifying the data subject.<sup>174</sup> And, in a handful of states, including California, New York, Utah, Vermont, and Virginia, the data-breach-notification laws are not limited to electronic data, but also apply to data printed on paper.<sup>175</sup> These divergent data-breach-notification standards present compliance challenges, and the data-breach-notification provisions of the HITECH Act have made the situation even more complex. While national legislation to unify these standards has been debated,<sup>176</sup> and such action has been recommended by the FTC on several occasions, including in its recent report on Social Security Numbers and Identity Theft,<sup>177</sup> as of yet, no action on the national stage has been taken.

As numerous industry reports indicate, colleges and universities are particularly susceptible to data breaches. In fact, some studies indicate that one in four data security breaches involves educational institutions.<sup>178</sup> As such, for most colleges or universities, the question is not whether a data breach will happen, but when and how severe it will be. Colleges and universities must acquire expertise in complying with state data-breach-notification laws. In particular, having a data-breach response plan is a critical component of effectively responding to a breach and maintaining compliance with the various state laws implicated in the event of a breach.

At present, there is no seamless mechanism for data-breach-notification compliance. Since most data-breach-notification laws apply when a state resident's personal information has been compromised, colleges and universities will often face a situation where they must comply with multiple states' statutes. The geographic diversity of the institution's student body will dictate the applicable state laws. As such, many colleges and universities will opt to build a response plan that abides by the most stringent state law in effect at the time. However, notice requirements to the individuals whose personal information has been breached and to the

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visited Oct. 14, 2009).

173. For example, Ohio's breach notification law is not triggered if data elements are redacted to four digits or otherwise made to be unreadable. OHIO REV. CODE § 1349.19 (LexisNexis 2009).

174. MD. CODE ANN., COM. LAW § 14-3504(h) (LexisNexis Supp. 2008).

175. See CAL. CIV. CODE § 1798.92 (2009); N.Y. GEN. BUS. LAW § 899-aa (Supp. 2008); UTAH CODE ANN. §§ 13-44-101 to -102, -201 to -202, -310 (Supp. 2009); VT. STAT. ANN. tit. 9 §§ 2430-2435 (2006); VA. CODE § 18.2-186.6 (2009).

176. See Data Accountability and Trust Act, H.R. 958, 110th Cong. (2007); Personal Data Privacy and Security Act of 2007, S. 495, 110th Cong. (2007).

177. See FED. TRADE COMM'N, SECURITY IN NUMBERS: SSNS AND ID THEFT (Dec. 2008), available at [www.ftc.gov/os/2008/12/P075414ssnreport.pdf](http://www.ftc.gov/os/2008/12/P075414ssnreport.pdf) [hereinafter SECURITY IN NUMBERS].

178. Schools Account for 25% of Data Breaches, 8 THE PRIVACY ADVISOR, INT'L ASSOC. OF PRIVACY PROFESSIONALS, August 2008.

appropriate state regulatory authority will vary. Colleges and universities should clearly understand what personal information they are storing, how to best protect that information, and the requirements of the state that each of its students declares as his or her residence.

## 6. Social Security Number Protection

The use of Social Security numbers (“SSN”) by colleges and universities raises a number of privacy considerations. Many educational institutions use SSNs as the primary means of tracking students, alumni, and donors. The recent amendments to FERPA prohibit publication of SSNs in student directories.<sup>179</sup> Many colleges and universities, however, still use SSNs for administrative purposes and store this information electronically.<sup>180</sup> For example, many colleges and universities used the SSN as a student identification number for a long time, and, for that reason, continue to track alumni using the SSN despite having changed to an assigned numbering system for new students.

The use of SSNs by organizations as a unique identifier or for administrative purposes has long raised identity-theft concerns. In May 2006, the President’s Identity Theft Task Force was established and their work subsequently recommended (1) studying how the private sector uses consumer SSNs, (2) developing a deeper understanding of the relationship between SSNs and identity theft, and (3) exploring approaches to preserve beneficial use of SSNs while limiting availability and value to identity thieves.<sup>181</sup> The FTC issued its report in December 2008 and made several recommendations to strengthen the methods by which businesses authenticate customers, while reducing unnecessary display and transmission of SSNs.<sup>182</sup>

In addition to the attention that SSN use is receiving at the federal level, many states have enacted legislative protections for SSNs. All but eight<sup>183</sup> states, as well as the District of Columbia, currently have statutes that provide some form of SSN protection. These laws vary from comprehensive to very specific statutes that protect SSNs from disclosure.

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179. 34 C.F.R. §§ 99.1–99.67 (2009).

180. See, e.g., Northwestern Univ., Secured Handling of Social Security Numbers: Approved Uses of SSNs, available at <http://www.it.northwestern.edu/bin/docs/ApprovedUsesAppB.pdf>.

181. The President’s Identity Theft Task Force Report (Sept. 2008), available at [www.idtheft.gov/reports/IDTReport2008.pdf](http://www.idtheft.gov/reports/IDTReport2008.pdf).

182. See SECURITY IN NUMBERS, *supra* note 177.

183. Alaska, Iowa, Kentucky, Massachusetts, New Hampshire, Ohio, West Virginia, and Wyoming. Fed. Trade Comm’n, *State Laws: Social Security Numbers*, <http://www.ftc.gov/bcp/edu/microsites/idtheft/law-enforcement/state-laws-social-security.html> (last visited Oct. 15, 2009); ANDREW B. SERWIN, 2 INFORMATION SECURITY AND PRIVACY: A PRACTICAL GUIDE TO FEDERAL, STATE AND INTERNATIONAL LAW, 84–172 (Thompson Reuters/West 2008).

Most notably, many states have enacted laws that restrict the use and display of an individual's SSN, printing of SSNs on identification cards, and the mailing of SSNs.<sup>184</sup> Colleges and universities should be cognizant of these laws, especially if using SSNs as unique identifiers for students, alumni, or donors.

### 7. Marketing

Two states (Maine and Illinois) have recently enacted statutory provisions which impact the method and extent to which student information can be shared with companies for marketing purposes.

Illinois: A recent Illinois law has expanded the state's restrictions on sharing student personal information with credit card companies. The Credit Card Marketing Act of 2009, set to take effect on January 1, 2010, applies to all Illinois colleges and universities, and their affiliates such as student groups and alumni organizations.<sup>185</sup> The law prohibits institutions of higher education from providing debit or credit card issuers the personal information of students under the age of twenty-one. Previously, the Illinois restrictions were limited to public schools and did not apply to educational affiliates that typically act as intermediaries for credit card marketing efforts to students. Illinois colleges and universities should focus on educating all organizations on campus about the law's implications and prohibited information sharing with credit card companies. The law carries a potential penalty of up to \$1,000 per incident.<sup>186</sup>

Maine: This summer, Maine enacted legislation that would effectively prohibit direct marketing of products and services to Maine residents under the age of 18.<sup>187</sup> As drafted, Maine's "Act to Prevent Predatory Marketing Practices Against Minors" could significantly impact the way that educational institutions gather information about and market to potential students, and how they can collect essential information about students who have selected to attend their institutions.

The new law, scheduled to go into effect on September 12, 2009, prohibits the collection of "personal information" or "health-related information" from a minor<sup>188</sup> without first obtaining "verifiable consent" from the minor's parent or legal guardian. Under the law, "Personal Information" is defined to mean (1) the minor's first name or first initial

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184. See Consumers Union, Social Security Number Protection Legislation for States, <http://www.consumersunion.org/pub/2007/11/004801print.html> (last visited Oct. 15, 2009).

185. Credit Card Marketing Act of 2009, 110 ILL. COMP. STAT. 26/25 (West 2009).

186. *Id.* at 26/30.

187. ME. REV. STAT. ANN. tit. 10, §§ 9551–54 (2009).

188. *Id.* at § 9552 (1). Although the term "minor" is not defined in the law, presumably it is intended to mean anyone under 18.

and last name, (2) the minor's home or other physical address, (3) the minor's Social Security number, (4) the minor's driver's license or state identification card number, and (5) any information concerning the minor that is collected in combination with one of the identifiers described above.<sup>189</sup> "Health-Related Information" is defined as any information about an individual or a member of the individual's family relating to health, nutrition, drug or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or other similar data.<sup>190</sup> The law defines "Verifiable Consent" as any reasonable effort, taking into consideration available technology, including a request for authorization for future collection, use and disclosure described in the notice, to ensure that a parent of a minor receives notice of the collection, use and disclosure practices and authorizes the collection, use and disclosure, as applicable, of Personal Information and the subsequent use of the information before that information is collected from that minor.

The law prohibits the sale (including offering for sale) or transfer to another person of a minor's Health-Related Information or Personal Information if the information was collected in violation of the statute, individually identifies the minor, or will be used for the purpose of marketing a product or service to that minor.<sup>191</sup> As drafted, the law appears to be somewhat internally inconsistent, so it may be ripe for amendment. The law prohibits the use of a minor's Personal Information or any Health-Related Information for the purpose of marketing any product or service to that minor, even if the information was collected with parental consent and the marketing activities also received advance parental consent.<sup>192</sup> Similarly, the restriction on the sale or transfer of any information that "individually identifies the minor" seems to cast an overly broad net over the Personal Information of all minors, even if their parents have consented to the collection and transfer. Such a provision could prevent college testing organizations from passing information about potential applicants to colleges and universities even if such transfer of information were requested by the minor. The law also gives private litigants the right to sue for damages and injunctive relief and to recover attorneys' fees in the event of a successful lawsuit.<sup>193</sup>

As of early September, the law's future is unclear. A group of parties that includes the Maine Independent Colleges Association has filed suit to obtain an injunction blocking the legislation from going into effect.<sup>194</sup> On

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189. *Id.* at § 9551 (4).

190. *Id.* at § 9551 (1).

191. *Id.* at § 9552.

192. *Id.* at §§ 9552–3.

193. *Id.* at § 9554 (3).

194. Marisa Taylor, *Maine Backs Away From Marketing-Privacy Law*, WALL ST. J. BLOGS, Sept. 2, 2009, <http://blogs.wsj.com/digits/2009/09/02/maine-backs-away-from->



September 9, 2009, the U.S. District Court of Maine agreed with the plaintiffs that the law is likely unconstitutional, but dismissed the suit on the grounds that Maine's Attorney General has stated that she will not prosecute companies that do not comply with the law.<sup>195</sup> The Maine Senate will review the bill before the next legislative session in January 2010.<sup>196</sup> Unfortunately, private parties can still file costly class action lawsuits and the law provides significant financial incentives for them to do so, although the court stated that such private causes of action could suffer from the same Constitutional infirmities.<sup>197</sup> In anticipation of the law being amended, educational institutions should evaluate where and whether it is feasible to implement age and residency screening measures where consumer data is collected and, if necessary, how to prevent Maine residents who are minors to participate in activities that require the collection of personal information, such as signing up for online newsletters.

#### F. Payment Card Industry Data Security Standard (PCI DSS)

The PCI DSS is not a law but applies to any institution that processes credit card payments (e.g., at the campus bookstore, restaurants, or dining halls, or for tuition or donations).<sup>198</sup> In December 2004, Visa and MasterCard announced an agreement to align their data security programs for merchants and third-party processors, which led to the creation of a standard known as the Payment Card Industry Data Security Standard ("PCI DSS").<sup>199</sup> The PCI DSS was designed to guard against attacks that involve theft and subsequent misuse of cardholder information, and

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marketing-privacy-law.

195. *Me. Indep. Colls. Ass'n v. Baldacci*, No. 09-cv-00396 (D. Me., Sept. 9, 2009) (stipulated order of dismissal), stating:

The Court finds that the Plaintiffs have met their burden of establishing a likelihood of success on the merits of their claims that Chapter 230 is overbroad and violates the First Amendment. The Attorney General has acknowledged her concerns over the substantial overbreadth of the statute and the implications of Chapter 230 on the exercise of First Amendment rights and accordingly has committed not to enforce it. She has also represented that the Legislature will be reconsidering the statute when it reconvenes. As a result, third parties are on notice that a private cause of action under Chapter 230 could suffer from the same constitutional infirmities. In light of these considerations, the parties have agreed to a dismissal of this action without prejudice and the Court hereby SO ORDERS.

196. Taylor, *supra* note 194.

197. Sheri Qualters, *Maine Agrees Not to Enforce Predatory Marketing Law*, NAT'L L. J., Sept. 11, 2009, <http://www.law.com/jsp/article.jsp?id=1202433718455>, (last visited Nov. 22, 2009).

198. See Payment Card Industry Data Security Standard, *supra* note 5.

199. *Id.*

consists of twelve requirements (though each requirement includes a few sub-requirements).<sup>200</sup>

Depending upon how many payment transactions a college or a university processes each year, the payment card associations may require the school to validate its compliance with PCI DSS through an on-site assessment performed by an independent assessor.<sup>201</sup> For example, Level 1 compliance is reserved for more than 6 million Visa or MasterCard transactions per year or more than 2.5 million American Express transactions a year. Level 2 covers 150,000 to 6 million transactions for MasterCard; 1 million to 6 million transactions for Visa; and 50,000 to 2.5 million American Express transactions. Level 3 covers 20,000 to 1 million Visa e-commerce transaction; 20,000 to 150,000 e-commerce MasterCard transactions; and less than 50,000 American Express transactions. Levels 1 and 2 require an annual on-site PCI DSS data security assessment performed by a qualified auditor and signed by an officer of the complying school, and a quarterly network scan performed by a qualified independent vendor.<sup>202</sup> Level 3 requires an annual PCI DSS self-assessment questionnaire by the school and a quarterly network scan performed by a qualified vendor.<sup>203</sup>

Most colleges and universities accept credit card payments in one or multiple outlets on campus. Depending on the credit card company requirements and card processor mandates, colleges and universities may be required to comply with PCI DSS. The degree to which the PCI DSS applies to an educational institution's activities is dictated by the number of transactions processed. As such, the requirements for larger colleges and universities, where there is likely to be a high volume of transactions, will be more stringent than at smaller colleges and universities that process fewer transactions.

## II. INTERNATIONAL DATA PROTECTION CONSIDERATIONS

Colleges and universities no longer exist on isolated campuses, but, rather, often have an international dimension to their student bodies and

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200. The twelve PCI DSS requirements include: (1) installing and maintaining a firewall configuration to protect cardholder data; (2) not using vendor-supplied defaults for system passwords and other security parameters; (3) protecting stored cardholder data; (4) encrypting transmission of cardholder data across open, public networks; (5) using and regularly updating anti-virus software; (6) developing and maintaining secure systems and applications; (7) restricting access to cardholder data by business need-to-know; (8) assigning a unique ID to each person with computer access; (9) restricting physical access to cardholder data; (10) tracking and monitoring all access to network resources and cardholder data; (11) regularly testing security systems and processes; and (12) maintaining a policy that addresses information security. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

operations. Student exchange programs have been popular for many years but, more recently, many colleges and universities have been opening independent campuses overseas.<sup>204</sup> Both the recruiting of foreign students, faculty, and staff and the management of overseas campuses implicate international privacy laws from jurisdictions that have data-privacy laws very different from the domestic approach to data protection.

Nations around the world have enacted various laws designed to protect data privacy. At this time, it is difficult to pinpoint how many countries have such data-privacy laws. Most developed and developing countries, however, offer some form of data-privacy protection.<sup>205</sup> The groundwork for the international data-privacy regime was laid in the 1970s, with the development and adoption of the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data promulgated by the Organization for Economic Cooperation and Development (“OECD”).<sup>206</sup> The OECD Guidelines include provisions regarding notice, consent, transfers, access, integrity, and safety of personal information.<sup>207</sup>

This Section outlines some of the international data-privacy authorities applicable in different regions of the world and the implications each presents for colleges and universities that have campuses in those regions.

#### A. European Union and Canada

In 1995, the European Union (“EU”) Parliament passed the EU Directive, which set a minimum standard for EU member states’ comprehensive legislation on data-privacy protection.<sup>208</sup> Broadly speaking, the EU Directive allows private entities to collect only a limited amount of protected personal data and only for a specific permitted purpose.<sup>209</sup> Further, any private entity collecting protected personal data is required to provide notice to data subjects regarding the purpose for which the information is being gathered, and also may be required to obtain consent from the data subjects in order to use or disclose the information to a third party.<sup>210</sup> Finally, the EU Directive closely regulates transborder transfers of protected data, and allows for imposition of serious sanctions against

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204. See Public Broadcasting Service, NOW: U.S. Colleges with Foreign Campuses, <http://www.pbs.org/nov/shows/420/foreign-campuses.html> (last visited Oct. 16, 2009).

205. See Information Shield, Inc., International Privacy Laws, <http://www.informationshield.com/intprivacylaws.html> (last visited Oct. 15, 2009).

206. Org. for Econ. Co-Operation and Dev., *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, [http://www.oecd.org/document/18/0,2340,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html) (last visited Oct. 15, 2009).

207. *Id.*

208. See EU Directive, *supra* note 6.

209. *Id.*

210. *Id.*

violators.<sup>211</sup>

The EU and the U.S. approach the protection of personal information from very different perspectives.<sup>212</sup> Much of this cultural difference stems from the extreme abuse of personal information that occurred under Nazi leadership during World War II.<sup>213</sup> The EU begins with the premise that information belongs to the data subject and the data subject should have the right to control how that data is used and to whom it is disclosed.<sup>214</sup> The U.S., on the other hand, starts from a tradition of freedom of speech and, thus, free use of information,<sup>215</sup> and generally treats the possessor of information as the owner of that information and, until recently, when a data subject provided personal information to a business entity, it was treated more like a sales transaction.<sup>216</sup> The “privacy contract” between the U.S. data subject and the business is monitored by the FTC, but as long as that contract is honored, the business could do whatever it wished with the personal information. In the U.S., only information that was deemed to have potentially harmful effects if disclosed in an unregulated manner (i.e., financial information (GLBA, FACT Act, etc.), health information (HIPAA), and children’s information (FERPA and the Children’s Online Privacy and Protection Act) has been subject to regulation.<sup>217</sup> Understanding the difference between the European approach and the American approach is essential for U.S. entities dealing with many foreign countries’ data protection regimes.

The EU places severe restrictions on the export of personal information from the EU by private actors.<sup>218</sup> Protected data may be transferred outside

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211. *Id.*

212. *See* Int’l Trade Admin., *Safe Harbor Overview*, EXPORT.GOV, [http://www.export.gov/safeharbor/eg\\_main\\_018236.asp](http://www.export.gov/safeharbor/eg_main_018236.asp) (last visited Nov. 22, 2009).

213. PRACTISING LAW INSTITUTE, INTERNATIONAL CORPORATE PRACTICE § 24.2.2 (1st ed. 2009).

214. *Id.* (stating that the object of the Directive is to “protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data”).

215. INTERNATIONAL CORPORATE PRACTICE, *supra* note 213, § 24.2.2.

216. *See, e.g.* Dwyer v. American Express Co., (App. Ct. of Ill.) 652 N.E.2d 1351 (1995). American Express cardholders sued American Express for renting their names to merchants under theories of both invasion of privacy and appropriation. The court held that when a cardholder uses a credit card, the cardholder is giving information to the credit card company that reveals the cardholder’s spending habits and shopping preferences, which led the court to conclude that there was no invasion of privacy. On the appropriate claim, the court reasoned that one individual’s information had little value, and the value of the personal information is only created through the aggregation by American Express. .

217. *See* Int’l Trade Admin., *Safe Harbor Overview*, EXPORT.GOV, [http://www.export.gov/safeharbor/eg\\_main\\_018236.asp](http://www.export.gov/safeharbor/eg_main_018236.asp) (last visited Nov. 22, 2009).

218. Public actors are allowed much more leeway in using or disclosing personal information to a third party for diplomatic or national security reasons. *See* EU Directive, *supra* note 6.

of the EU only to a country with “adequate” data-privacy protections, meaning protections substantially similar to or greater than those offered by the EU Directive.<sup>219</sup> The EU Directive does permit transfers of personal data to countries that have not received an adequacy ruling through (1) model contracts, or (2) in the case of the U.S., the U.S. Department of Commerce’s Safe Harbor Program.<sup>220</sup> Model contracts are contractual agreements between the data exporter in the EU and the foreign entity that will be receiving the personal information (known as the data importer)<sup>221</sup> that provide for security and protection of the transferred personal information in accordance with the requirements of the EU Directive. The Safe Harbor Program is unique to the U.S. and is a means by which U.S. businesses that are regulated by the FTC can be certified as possessing policies and procedures that conform to the requirements of the EU Directive, and, therefore, import protected data from the EU without further administrative requirements.<sup>222</sup> Additionally, transfers of personal information to an entity in a country that does not guarantee an adequate level of privacy protection and that has not completed a model contract or assented to Safe Harbor are permitted if: (1) the data subject unambiguously consents to the transfer; (2) transfer is necessary for the performance of a contract between the data subject and the organization; (3) transfer is necessary for the entry into, performance, or both, of a contract between the organization and a third party for the data subject’s benefit; (4) transfer is justified on “important public interest grounds” or for purposes of a lawsuit; (5) transfer is necessary to protect the vital interests of the data subject; or (6) information is from a database to which the public has routine access because of national laws on access to documents.<sup>223</sup> EU member states may create other exceptions to the transborder transfer restrictions, but they must notify the European Commission and other member states of any such exemptions.<sup>224</sup>

Canada occupies the middle of the spectrum of data-privacy protection,

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219. *Id.* Those jurisdictions that have received an adequacy ruling from the EU include: Argentina, Comm’n Decision 1731 of 30 June 2003, 2003 O.J. (L168) 19; Canada, Council Decision of 18 July 2005, 2006 O.J. (L82) 14; Guernsey, Comm’n Decision of 21 November 2003, 2003 O.J. (L308) 27; Isle of Man, Comm’n Decision of 28 April 2004, 2004 O.J. (L151) 48; Jersey, Comm’n Decision of 8 May 2008, 2008 O.J. (L138) 21; and Switzerland, Comm’n Decision of 26 July 2000, 2000 O.J. (L215) 1. [hereinafter collectively Commission Decisions].

220. See EU Directive, *supra* note 6.

221. *Id.*

222. See Int’l Trade Admin., *Safe Harbor Overview*, EXPORT.GOV, [http://www.export.gov/safeharbor/eg\\_main\\_018236.asp](http://www.export.gov/safeharbor/eg_main_018236.asp) (last visited Oct. 15, 2009).

223. See Bignami, *supra* note 18, at 826; see also EU Directive, *supra* note 6, art. 7.

224. One example of an exception is allowing a transborder transfer if a contract between a member and a receiving party outside the EU—specifically, not a “safe” country for personal information—renders that party liable in tort for any loss or theft of the personal information. See Bignami, *supra* note 18, at 826.

somewhere between the *laissez-faire* approach of the United States and the strictly regulated EU model.<sup>225</sup> However, Canada began moving closer to the EU approach with the passage of the Personal Information Protection and Electronic Documents Act (“PIPEDA”).<sup>226</sup> With PIPEDA’s passage in 2000 and its full implementation in 2004, the EU recognized Canada as providing “adequate” data-privacy protection, which connotes protection at least equal to that afforded by the EU Directive.<sup>227</sup> PIPEDA brought significant changes to how businesses use Canadians’ personal information.

PIPEDA also regulates transborder transfers of protected data.<sup>228</sup> PIPEDA applies to information gathered prior to its enactment, and applies to non-Canadian businesses gathering information about Canadians.<sup>229</sup> PIPEDA follows an organization-to-organization approach and does not prohibit organizations from transferring personal information to another jurisdiction for processing; PIPEDA, however, holds organizations accountable for the protection of personal information transferred in any such arrangement.<sup>230</sup> American colleges and universities gathering information on prospective students, employees, or other individuals, such as alumni and parents, may be affected by PIPEDA while collecting the information in Canada, or acquiring it from a Canadian partner, because PIPEDA’s secondary data transfer requirement forces Canadian businesses to include PIPEDA’s privacy requirements in all contracts contemplating transfer of Canadians’ personal information abroad.<sup>231</sup>

Both the EU Directive and PIPEDA adopt an extraordinarily broad definition of “personal information.”<sup>232</sup> The EU Directive covers all information “relating to an identified or identifiable natural person.”<sup>233</sup> Specifically, the European Union’s definition of “personal data” means “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”<sup>234</sup> PIPEDA applies to entities using or disclosing such information during the course of a “commercial activity,” which includes selling or leasing donor, membership or other

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225. See PIPEDA, 2000 S.C., ch. 5.

226. See *id.*

227. See Commission Decisions, *supra* note 184.

228. See PIPEDA.

229. See *id.* § 4.

230. OFFICE OF THE PRIVACY COMM’R OF CAN., CROSS-BORDER PERSONAL DATA TRANSFERS, available at [http://www.privcom.gc.ca/information/guide/2009/gl\\_dab\\_090127\\_e.pdf](http://www.privcom.gc.ca/information/guide/2009/gl_dab_090127_e.pdf) (last visited Oct. 15, 2009).

231. *Id.*

232. See EU Directive, *supra* note 6, art. 2(a); PIPEDA, 2000 S.C. ch. 5, § 2(1).

233. See EU Directive, *supra* note 6.

234. *Id.*

fundraising lists (the latter being crucial to any development efforts for educational institutions or hospitals).<sup>235</sup> Protected personal data under both the EU Directive and PIPEDA includes (but is not limited to): first name or initials, last name, e-mail address, phone numbers, credit reports, and, most relevant to colleges and universities, education records.<sup>236</sup> Notably, in the EU, IP addresses are also considered to be protected personal information.<sup>237</sup>

The EU Directive and PIPEDA are significant to any college or university that operates a campus in either location or that attempts to transfer student information back to its U.S. campus. Under the data-privacy laws of both regions, education records are clearly personally identifiable information requiring stringent protection. For educational institutions in the U.S., transfer of such information outside of the EU is limited to situations where student consent is provided or a contractual arrangement has been instituted to assure security protections equivalent to the EU's requirements.<sup>238</sup> Satisfying the data transfer requirements of the EU is burdensome for even large corporations, and, as such, presents challenges for any U.S. based college or university operating in the EU or Canada. The EU's privacy regime is particularly daunting, considering that the EU has twenty-seven members, each with its own set of privacy laws.

#### B. Asia: Asia-Pacific Economic Cooperation (APEC) Privacy Framework

Colleges and universities operating in and around Asia should become familiar with the data-privacy framework currently being developed by the Asia-Pacific Economic Cooperation ("APEC"). APEC is an intergovernmental group comprised of "Member Economies" along the Pacific Rim that work to enhance economic growth for the region and to strengthen the Asia-Pacific community.<sup>239</sup> In 2002, the APEC Privacy Subgroup was formed to develop a privacy framework for the region. The APEC Privacy Framework (the "Framework"), which is still under development, is a permissive set of privacy principles that, once fully developed, will become the accepted standards for any business that

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235. PIPEDA, § 4. Canadian law gives an equally broad scope to the definition of "commercial activity," defining it as "any particular transaction, act, or conduct that is of a commercial character, including selling, bartering or leasing of donor, membership, or other fundraising lists." *Id.*

236. See, e.g., Rebecca Herold, *Privacy, Compliance and International Data Flows: White Paper*, NETIQ, June 2006, at 4.

237. Data Protection Working Party, *Opinion 1/2008 on Data Protection Issues Related to Search Engines* (April 4, 2008) available at [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/wpdocs/2008/wp148\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2008/wp148_en.pdf) (last visited Oct. 15, 2009).

238. See EU Directive, *supra* note 6.

239. See generally Asia-Pacific Econ. Cooperation, About APEC, [http://www.apec.org/apec/about\\_apec.html](http://www.apec.org/apec/about_apec.html) (last visited Oct. 15, 2009).

chooses to operate in any of the APEC Member Economies.<sup>240</sup>

Recognizing that there must be a balance between free flow of information and privacy protections for personal information, the Framework provides guidance to APEC Member Economies that have not yet addressed privacy issues from a regulatory or policy standpoint.<sup>241</sup> The Framework aids global organizations that collect personal data in APEC Member Economies to develop consistency within their organizations with regards to the use of that information.<sup>242</sup> The Framework balances information privacy with business needs and commercial interests, while recognizing cultural and other diversities that exist between nations.<sup>243</sup> While the Framework is intended to promote a consistent approach to information privacy protection throughout APEC, the privacy principles specified in the Framework are aspirational rather than binding. Thus, there is no person or entity that actively enforces the Framework.

Despite still being under development, colleges and universities with operations in APEC Member Economies should monitor progress on the APEC Privacy Framework and make adjustments to their data protection compliance programs as the Framework evolves.

### C. Other Regions

Approaches to data protection in other regions of the world range from totalitarian to non-existent, and from the United States' *laissez-faire* sectoral approach to the comprehensive European framework. The data protection laws in other regions of the world with which colleges and universities may wish to become familiar include some of the South American countries, notably Argentina, and the Middle East. In South America, particularly Argentina, the notion of "Habeas Data" governs the protection of personal information.<sup>244</sup> Habeas Data is a constitutional right found in several Latin-American countries. The concept varies from country to country, but, in general, is designed to protect, by means of an individual complaint presented to a constitutional court, the image, privacy, honor, information self-determination, and freedom of information of a person.<sup>245</sup> Additionally, as U.S. campuses expand into the Middle East, educational institutions should monitor developments in that part of the world. Most recently the United Arab Emirates created the Federal Data Privacy Commission: a comprehensive data-privacy law for the country is

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240. See APEC Privacy Framework, *supra* note 8.

241. *Id.*

242. *Id.*

243. *Id.*

244. Privacy International, *Argentine Republic*, <http://www.privacyinternational.org/survey/phr2003/countries/argentina.htm> (last visited Oct. 15, 2009).

245. See *id.*



expected.<sup>246</sup> Institutions wishing to recruit or operate in these countries may be required to negotiate a data export agreement with the relevant governmental agency. In these cases, engaging local counsel is strongly recommended.

### III. CONCLUSION

U.S. colleges and universities are subject to significant regulation with respect to how they collect, store, and use personal information. Educational institutions collect and use information from prospective applicants (both students, many of whom are under the age of eighteen, and potential employees), parents of applicants and students, alumni and their spouses, and, of course, donors. Colleges and universities also collect personal information, including sensitive financial information, in a variety of ways: over the internet, through mail and telephone solicitation, at campus health centers and hospitals, and at campus events. Finally, educational institutions collect information across a wide range of geographies, including numerous U.S. states and foreign countries. Thus, most institutions must comply with the various data-privacy-protection regulations. In conclusion, this article suggests the following general guidelines for attempting to comply with both domestic and international data protection laws.

First, accountability serves as the cornerstone of compliance with privacy laws. Every educational institution collects, stores, and uses personal information, and each school is ultimately responsible for keeping all such personal information safe. This means that colleges and universities should adopt privacy and security policies that comply with basic principles of data-privacy protection and train the relevant staff with respect to these policies. Institutions should appoint an individual or team (e.g., a chief privacy officer or a similar senior administration official) who will be responsible for compliance and will have the ability to address complaints. In the for-profit higher education industry, it is important to note that subsidiaries and affiliates may be considered separate entities under international privacy laws, and may require additional staff and resources for compliance. Significantly, academic administrations must provide meaningful support and sponsorship to their privacy specialists.

Unfortunately, a recent study indicated that, unlike corporations, many of which have hired Chief Privacy Officers (“CPO”), colleges and universities have been slow to adapt.<sup>247</sup> The decentralized operations of

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246. See Privacy International, *PHR2006 – United Arab Emirates*, <http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-559480> (last visited Oct. 15, 2009).

247. Lisa Guernsey, *A Wealth of Data, and Nobody in Charge*, CHRON. OF HIGHER EDUC. (Washington, D.C.), Nov 21, 2008, available at <http://chronicle.com/weekly/v55/i13/13a00103.htm>.

most educational institutions may be one of the primary reasons that the CPO role is more difficult to define and fill at educational institutions. Since data privacy at colleges and universities spans across academic departments, administration, the affiliated hospital system, residence life, vendor relationships, and on-campus concessions, training must be an integral part of any institution's privacy compliance program. Such training should be tailored to the various organizations on campus and their distinctive requirements.

Second, colleges and universities should also consider using waiver and consent forms for their applicants, potential applicants, and students, and implementing clear privacy policies for visitors to their web sites. Educational institutions must make their privacy policies and procedures transparent. They have to make readily available to individuals specific information about their policies and practices relating to the management of personal information.

Third, colleges and universities should develop and implement procedures to assure that the personal information collected is necessary, accurate, complete, and up-to-date (including, where applicable, whether the identified purpose for collecting and using such information is accurate and up-to-date). The data subject should have the right to access the information held by the institution. In some instances, schools may be required to inform the data subject (upon request) of the existence, use, and disclosure of his personal information and provide access to that information. Data subjects must be able to challenge the accuracy and completeness of the information, and schools must amend the information accordingly. The simplest way for any institution to comply with these requirements is to include contact information for its privacy office on its web site, in its published privacy policy, or both. Also, data subjects should have the ability to file a complaint directly with the college or university regarding the school's use of personal information. The Safe Harbor program and its privacy principles articulate sound data-privacy practices that colleges and universities can emulate.<sup>248</sup>

Educational institutions should also implement policies to safeguard protected information (such as classification or authorization schemes for accessing information) and have the technological savvy to protect such data from loss or theft. One of the surest ways to safeguard personal information is not to keep it at all. Among other things, schools should work to minimize or eliminate the use of Social Security numbers. In fact, the PCI DSS standards demand that all credit card data (including magnetic data) be purged within hours of the relevant payment transaction. Therefore, schools should regularly dispose of protected personal

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248. The Safe Harbor Privacy Principles cover (1) notice, (2) choice, (3) onward transfer, (4) security, (5) data integrity, (6) access, and (7) enforcement. See Int'l Trade Admin, *supra* note 212.

information, especially once the original purpose for collecting such information is fulfilled, and should provide training to faculty and administrative staff regarding the financial, operational, and reputational risks associated with unauthorized disclosure of data.

Finally, some international jurisdictions, particularly the EU countries and Canada, may require the “knowledge and consent” of the data subject for collection, use, or disclosure of personal information. Consequently, schools should be aware of what data they are collecting, using, or disclosing, and whether the data is from international locations. International data-privacy laws are extremely complex and varied, and it is important for colleges and university administrators to seek counsel from in-house or outside privacy experts on compliance issues.

# A CONFUSED CONCERN OF THE FIRST AMENDMENT: THE UNCERTAIN STATUS OF CONSTITUTIONAL PROTECTION FOR INDIVIDUAL ACADEMIC FREEDOM

NEAL H. HUTCHENS\*

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## INTRODUCTION

The question of whether the First Amendment protects the individual academic freedom of faculty members at public colleges and universities has resulted in divergent views among courts<sup>1</sup> and legal scholars.<sup>2</sup> In joining the ongoing discourse regarding constitutional protection for academic freedom, this article considers using academic freedom policies and standards voluntarily adopted by institutions as a basis to provide First

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1. Compare, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) (stating that “to the extent the 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 . . .”), with *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985) (describing academic freedom as an “equivocal” term that “is used to denote both the freedom of the academy . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy . . .”). Part II of this article discusses treatment of academic freedom by the U.S. Supreme Court, and Part III discusses treatment of academic freedom issues by lower federal courts.

2. For a discussion of various positions taken by authors, see *infra* Part IV.

Amendment protection for faculty speech at public colleges and universities. The article proposes that such policies present one alternative to help clear some of the legal fog regarding First Amendment protection for individual academic freedom, especially in relation to the U.S. Supreme Court's decision in *Garcetti v. Ceballos* and its applicability to public higher education.<sup>3</sup> I suggest that it is legally inconsistent to permit colleges and universities to tout adoption of academic freedom policies and standards but then rely on *Garcetti* when facing a speech claim by a faculty member.

Uncertainty concerning constitutional protection for individual academic freedom represents a longstanding issue, but *Garcetti* marked a new phase in the ongoing debate. In the decision, the Supreme Court held that statements made by a public employee pursuant to carrying out his or her official duties do not constitute speech for First Amendment purposes.<sup>4</sup> While acknowledging that applying the decision's standards to speech by faculty members at public colleges and universities potentially raised thorny First Amendment concerns related to individual academic freedom, the majority opinion in *Garcetti* stated that such an issue was not before the Court.<sup>5</sup> In leaving the issue unaddressed, the case opened a new chapter in legal wrangling over constitutional protection for individual academic freedom in public higher education. Several recent cases where courts have unflinchingly applied the decision's standards to faculty speech<sup>6</sup> show that the potential impact of the decision on faculty speech rights in public higher education is poised to become more than speculative.

Following an overview of the *Garcetti* decision in Part I, in Part II the article reviews several key U.S. Supreme Court decisions dealing with issues related to academic freedom. Part III of the article examines positions taken by lower federal courts regarding First Amendment protection for individual academic freedom, including discussion of several post-*Garcetti* cases. Part IV examines the position that constitutional academic freedom should only apply to institutions and not to individual faculty members.

The article considers in Part V using academic freedom policies and standards voluntarily adopted by public colleges and universities as a basis to ground legal protection for individual academic freedom, including limiting application of *Garcetti* to faculty speech. I conclude that courts

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3. 547 U.S. 410 (2006).

4. *Id.* at 421.

5. *Id.* at 425.

6. *See, e.g.,* *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007). As discussed *infra* Part III.A, the decisions did not address issues involving speech related to research or classroom matters, but the courts did not hesitate in applying the *Garcetti* standards to the faculty members' speech.

should give serious consideration to such policies and standards as creating zones of legally protected faculty speech. Rather than supplanting the established system of peer review and professional norms widely accepted by colleges and universities, judicial inquiry would focus on whether institutions had in fact adhered to their own voluntarily adopted policies and standards. Such policies, in blunting the potential impact of *Garcetti*, could provide a basis to give some degree of First Amendment protection to faculty speech in the areas of scholarship, teaching, and intramural communications.

### I. OVERVIEW OF GARCETTI V. CEBALLOS

In *Garcetti*, a deputy district attorney, Richard Ceballos, recommended dismissal of a case based on alleged misrepresentations in an affidavit used to obtain a search warrant.<sup>7</sup> Besides discussing his concerns with supervisors, Ceballos wrote a memorandum recommending the case's dismissal.<sup>8</sup> Ceballos' supervisors refused to heed his recommendations, and he eventually revealed his views concerning the warrant during questioning by the defense.<sup>9</sup> In a lawsuit, Ceballos argued that his employer retaliated against him for views expressed in or related to the memorandum in violation of his First Amendment rights.<sup>10</sup> While the district court held that the memorandum contained no protected speech, the U.S. Court of Appeals for the Ninth Circuit decided that it did.<sup>11</sup>

The Supreme Court, reversing the Ninth Circuit, held that because Ceballos made the communications pursuant to carrying out his official duties, they did not constitute speech protected by the First Amendment.<sup>12</sup> While noting that public employees do not forfeit all their First Amendment rights,<sup>13</sup> Justice Kennedy's majority opinion determined that the balancing test articulated in *Pickering v. Board of Education*<sup>14</sup> and later

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7. *Garcetti*, 547 U.S. at 414–15.

8. *Id.* at 414.

9. *Id.* at 414–15.

10. *Id.* at 415.

11. *Id.* at 415–16.

12. *Id.* at 421.

13. *Garcetti*, 547 U.S. at 417.

14. 391 U.S. 563 (1968). In *Pickering*, the Supreme Court held that a school district could not dismiss a teacher for submitting a letter critical of the financial practices of the school board to a newspaper. *Id.* at 566. The majority stated that the school district had not shown that the writing of the letter had interfered with the teacher carrying out his “daily duties . . . or [had] interfered with the regular operation of the schools generally.” *Id.* at 572–73. The Court held that “in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Id.* at 574 (footnote omitted).

public employee speech cases<sup>15</sup> did not apply to Ceballos' communications.<sup>16</sup> The *Garcetti* decision separated employee speech into two distinct categories: speaking as a private citizen or speaking as an employee carrying out official employment duties.<sup>17</sup> If speaking as a private citizen on a matter of public concern, an employee's speech receives First Amendment protection absent a sufficient justification by the employer to restrict such speech.<sup>18</sup> But when speaking pursuant to performing official employment duties, public employees do not speak as "citizens for *First Amendment* purposes, and the Constitution does not insulate their communication from employer discipline."<sup>19</sup>

In a dissenting opinion, Justice Souter stated that he hoped that the majority did not intend for the standards announced in the case to apply to public college and university professors, which he wrote would hamper their intellectual freedom.<sup>20</sup> While declining to address the decision's applicability to faculty members in public higher education, the majority opinion acknowledged that "expression related to academic scholarship or classroom instruction" might raise constitutional issues not considered by the Court in its decision.<sup>21</sup> Justice Kennedy stated, however, that the issue of additional constitutional protections for the speech rights of faculty members at public colleges and universities was not before the Court.<sup>22</sup>

The *Garcetti* decision added a new wrinkle to ongoing debates regarding First Amendment protection for individual academic freedom at public colleges and universities. At least one federal circuit has already applied the case's holding to intramural speech by a faculty member.<sup>23</sup> In an opinion issued before *Garcetti*, the Fourth Circuit took the position that if First Amendment protection for academic freedom exists at all, then it accrues to the institution rather than the individual scholar.<sup>24</sup> The Fourth Circuit stated that faculty members at public colleges and universities should not possess any additional First Amendment rights other than those

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15. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983). The Supreme Court rejected a First Amendment challenge by an assistant district attorney who claimed that she was terminated, in part, for distributing a questionnaire to co-workers seeking their views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141 (footnote omitted).

16. *Garcetti*, 547 U.S. at 420–21.

17. *Id.* at 420–22.

18. *Id.* at 420–21.

19. *Id.* at 421 (emphasis added).

20. *Id.* at 438–39 (Souter, J., dissenting).

21. *Id.* at 425.

22. *Garcetti*, 547 U.S. at 425.

23. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008). *See infra* Part III.A.

24. *Urofsky v. Gilmore*, 216 F.3d 401, 409–11 (4th Cir. 2000) (en banc). *See infra* Part III.B.

granted to all other public employees.<sup>25</sup> If other courts adopt this rationale, then the *Garcetti* standards would arguably mean that faculty members in public higher education enjoy little to no First Amendment protection for many communications made in relation to teaching, research, or intramural speech. Such a result remains far from settled, especially given the majority's hesitation in *Garcetti* to suggest that the standards announced in the case should presumably apply to faculty members in public higher education.<sup>26</sup>

## II. AMBIGUITY IN SUPREME COURT ACADEMIC FREEDOM DECISIONS

Despite statements strongly supportive of academic freedom in several opinions, 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.<sup>27</sup> A clear divide which has emerged centers on whether First Amendment protection for academic freedom applies to individual scholars or is limited to institutions.<sup>28</sup> While the decision in *Grutter v. Bollinger*,<sup>29</sup> which permitted the use of race as a factor in higher education admissions,<sup>30</sup> seemingly represents recent affirmation of some type of First Amendment protection for institutions,<sup>31</sup> division exists over how to interpret precedent in relation to individual scholars. This section provides an overview of several key Supreme Court cases dealing with academic freedom, before the article turns to various positions taken by lower federal courts and legal scholars regarding constitutional protection for academic freedom.

Supreme Court decisions addressing academic freedom have received discussion from many able scholars,<sup>32</sup> but an overview of several pivotal

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25. *Id.* at 412 n.13.

26. *Garcetti*, 547 U.S. at 425.

27. See, e.g., J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 257–58 (1989); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 (2006); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 469 (2005).

28. Compare, e.g., Byrne, *supra* note 27, with Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1333–43 (1988).

29. 539 U.S. 306 (2003).

30. *Id.* at 325.

31. J. Peter Byrne, *Constitutional Academic Freedom after Grutter: Getting Real about the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 929 (2006); Horwitz, *supra* note 27, at 466–72.

32. See generally, e.g., Byrne, *supra* note 27; Finkin, *supra* note 28; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990).



decisions is helpful in understanding the legal fault lines that have developed regarding First Amendment protection for academic freedom. Academic freedom first received mention as deserving of constitutional protection in a dissenting opinion by Justice Douglas in *Adler v. Board of Education*.<sup>33</sup> The case dealt with the validity of a state law that, among other proscribed activities, prohibited employment in a public educational institution of any individual identified as a member of an organization designated as subversive.<sup>34</sup> The *Adler* majority determined that the state possessed a legitimate interest in excluding individuals who supported or belonged to groups advocating the unlawful overthrow of the government from employment in public education.<sup>35</sup> In a dissenting opinion, Justice Douglas stated that no individuals are more deserving of intellectual freedom than teachers.<sup>36</sup> Describing the public school as the “cradle of our democracy,” Justice Douglas wrote that the law threatened to “raise havoc with academic freedom” by turning schools into places of distrust and spying instead of an arena for the open exchange of ideas.<sup>37</sup>

In the same year that *Adler* was decided, the Supreme Court, in a case that included higher education faculty, refused to uphold an Oklahoma law requiring state employees to take loyalty oaths.<sup>38</sup> Reversing the Supreme Court of Oklahoma, the Supreme Court held that it was impermissible to punish individuals who had unknowingly belonged to an organization deemed subversive.<sup>39</sup> In a concurring opinion, Justice Frankfurter discussed the importance of protecting the First Amendment rights of educators:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered

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33. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

34. *Id.* at 486–91. The law was known as the Feinberg Law. *Id.* at 487.

35. *Id.* at 492.

36. *Id.* at 508.

37. *Id.* at 508–509.

38. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

39. *Id.* at 190.

history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government. The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power.<sup>40</sup>

Five years later, in *Sweezy v. New Hampshire*,<sup>41</sup> academic freedom again received significant attention in an often cited concurring opinion by Justice Frankfurter.<sup>42</sup> The case dealt with an individual refusing to respond to questions from the New Hampshire attorney general's office about lectures given by him at the University of New Hampshire, his scholarship, and his personal life.<sup>43</sup> In a concurring opinion, Justice Frankfurter stated that protecting inquiry at colleges and universities is of vital importance to the nation and that governmental intrusion into the affairs of these institutions should be minimized.<sup>44</sup> According to his opinion, in order to allow unfettered inquiry in higher education, "[p]olitical power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."<sup>45</sup> Quoting from a statement by South African scholars, Justice Frankfurter offered four essential freedoms of the higher education institution: "[the freedom] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>46</sup>

With *Keyishian v. Board of Regents*,<sup>47</sup> discussion of academic freedom found its way into a majority opinion. In the decision, the Supreme Court once again dealt with New York's education law prohibiting employees from belonging to organizations deemed subversive.<sup>48</sup> This time, a majority of the Court invalidated requirements in the law.<sup>49</sup> While acknowledging the state's interest in preventing the "subversion" of students by teachers and professors, the opinion pointed out the importance

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40. *Id.* at 194, 196–97 (Frankfurter, J., concurring).

41. 354 U.S. 234 (1957).

42. *Id.* at 255 (Frankfurter, J., concurring).

43. *Id.* at 238–44.

44. *Id.* at 261–62.

45. *Id.* at 262.

46. *Id.* at 263.

47. 385 U.S. 589 (1967).

48. *Id.* at 593.

49. *Id.* at 604, 609–10.

of protecting constitutional rights of speech, press, and assembly, which also included free inquiry for educators.<sup>50</sup> In a well-known passage, the Court stated:

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 therefore is a special concern of the *First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>51</sup>

Periodically, the Supreme Court has referred to the importance of protecting academic freedom announced in earlier cases. In *Regents of the University of Michigan v. Ewing*,<sup>52</sup> for instance, the Court upheld the dismissal of a student from a combined undergraduate/medical degree program.<sup>53</sup> In rejecting the student's substantive due process claim, the opinion discussed the need to "safeguard" the university's academic freedom.<sup>54</sup> *Ewing* is noteworthy among the academic freedom cases because the Court also acknowledged in a footnote the potential tension between academic freedom for the individual and the institution: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself . . ." <sup>55</sup>

More recent Supreme Court opinions, while not addressing the potential conflict mentioned in *Ewing*, have demonstrated continued concern with protecting principles associated with academic freedom. In *Board of Regents v. Southworth*,<sup>56</sup> the Supreme Court held that the University of Wisconsin could charge students a mandatory activity fee to fund extracurricular student speech.<sup>57</sup> In the case, students objecting to certain speakers supported by the fee contended that such a funding mechanism resulted in compelled speech in violation of their First Amendment rights.<sup>58</sup> The Supreme Court had previously struck down somewhat analogous fees in other contexts. In one decision, non-union teachers challenged a requirement for them to pay a fee to a union serving as the school district's exclusive bargaining agent that went to support political speech that was objectionable to the non-union teachers.<sup>59</sup> Another case dealt with

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50. *Id.* at 602.

51. *Id.* at 603 (emphasis added).

52. 474 U.S. 214 (1985).

53. *Id.* at 215.

54. *Id.* at 226.

55. *Id.* at 226 n.12 (citations omitted).

56. 529 U.S. 217 (2000).

57. *Id.* at 221.

58. *Id.*

59. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

mandatory attorney bar dues being used to support political speech.<sup>60</sup> In those cases, the Court held that the mandatory fees could be used to support speech “germane” to the organizations’ core functions but not to support political speech unrelated to such activities.<sup>61</sup>

In *Southworth*, the Court determined that such a germaneness standard was unworkable at public colleges and universities, where institutions seek to promote speech on an array of issues.<sup>62</sup> The opinion stated: “To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.”<sup>63</sup> While the majority did not expressly rely on academic freedom as a basis for its determination (though Justice Souter did in a concurring opinion)<sup>64</sup> the Court acknowledged the special environment of higher education in declining to impose the same standard for compelled speech applied in other contexts.

The Supreme Court explicitly upheld the continuing place of academic freedom as a special concern of the First Amendment, at least in relation to institutional interests, in *Grutter v. Bollinger*.<sup>65</sup> In that decision, the Court relied on principles associated with academic freedom to support the use of race as a permissible factor in higher education admissions.<sup>66</sup> Writing for the majority, Justice O’Connor referred to how in *Bakke v. Regents of the University of California*,<sup>67</sup> Justice Powell had “grounded his analysis . . . in academic freedom.”<sup>68</sup> The Court in *Grutter* accepted Justice Powell’s argument that compelling reasons, including academic freedom concerns, permitted the use of race as a factor in higher education admissions.<sup>69</sup> The decision in *Grutter* appears to reaffirm that First Amendment protection exists for academic freedom, at least at the institutional level.<sup>70</sup>

While *Grutter* marks a recent Supreme Court recognition of constitutional protection for some type of academic freedom, important

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60. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

61. *Southworth*, 529 U.S. at 231–32.

62. *Id.* at 232.

63. *Id.*

64. *Id.* at 236, 237–38 (Souter, J., concurring). In a similar vein, Barbara K. Bucholtz has criticized the majority’s reliance in *Southworth* on viewpoint neutrality as not affording sufficient deference to the academic freedom and associational rights of public colleges and universities. *What Goes Around, Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 318–326 (2007).

65. 539 U.S. 306 (2003).

66. *Id.* at 325.

67. 438 U.S. 265 (1978).

68. *Grutter*, 539 U.S. at 324.

69. *Id.* at 325.

70. *See* Byrne, *supra* note 31, at 929.

questions regarding the contours of First Amendment protection for academic freedom remain unanswered. Despite lofty rhetoric in decisions such as *Keyishian* concerning the importance of academic freedom, the Supreme Court has failed to articulate the extent to which First Amendment protection for academic freedom extends to faculty members, including those in public higher education. Ambiguity over constitutional protection for individual academic freedom has resulted in differing views among lower federal courts and legal scholars. The *Garcetti* decision and questions over its applicability to faculty members at public colleges and universities added another layer of uncertainty to ongoing debate regarding First Amendment protection for individual academic freedom. The article now turns to how lower federal courts and legal scholars have addressed issues related to academic freedom.

### III. LOWER FEDERAL COURTS AND ACADEMIC FREEDOM

As highlighted in the previous section, the Supreme Court has consistently espoused support for academic freedom. Unfortunately, decisions have not provided clear standards detailing the nature of First Amendment protection for academic freedom, including whether protection applies to institutions, individuals, or both. While the Court noted apparent tension between individual and institutional protection for academic freedom in *Ewing*,<sup>71</sup> it did not address how to resolve the issue. Faced with ambiguous Supreme Court precedent, lower federal courts have taken differing stances regarding First Amendment protection for individual academic freedom in public higher education. This section looks at how several federal courts have already applied the *Garcetti* standards to faculty speech as well as how lower federal courts dealt with First Amendment protection for faculty speech in several pre-*Garcetti* decisions.

#### A. Post-*Garcetti* Decisions

Before the *Garcetti* decision, rather than directly addressing the issue of independent constitutional protection for academic freedom, courts faced with an individual academic freedom claim could turn to the public employee speech cases and consider whether the faculty member had addressed a matter of public concern.<sup>72</sup> Using this standard, courts at times

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71. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985).

72. *See, e.g., Burnham v. Ianni*, 119 F.3d 668, 679–80 (8th Cir. 1997) (determining that faculty members had engaged in speech related to matters of public concern in relation to objects displayed in a history exhibit). *See also* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 976 (2009) (stating that “after *Pickering*, most lower courts treated faculty-initiated internal disputes as ordinary public-employee speech cases”).

have determined that faculty members engaged in protected speech in contexts such as the classroom, but under *Garcetti*, such speech would now arguably relate to a faculty member's official employment duties. Post-*Garcetti*, it appears courts cannot easily sidestep the question of individual academic freedom under the First Amendment by relying on the public employee speech cases to consider whether a professor had addressed an issue of public concern that merits First Amendment protection. Cases decided after *Garcetti* have not yet directly addressed the issue of individual academic freedom under the First Amendment, but several courts have without hesitation applied the decision's standards to faculty speech.

In *Renken v. Gregory*,<sup>73</sup> a tenured professor claimed that his employer university violated his First Amendment rights by reducing his pay and terminating a grant because he had criticized the university's use of grant funds.<sup>74</sup> The faculty member, Renken, had served as a principal investigator on a grant that was funded by the National Science Foundation (NSF).<sup>75</sup> Renken and another member of the grant team sent their dean a letter objecting to proposed conditions on grant funds and other issues related to the grant's administration.<sup>76</sup> Among their complaints, the professors contended that certain of the proposed conditions violated NSF regulations.<sup>77</sup> As part of the ongoing dispute, Renken filed grievances against the dean and also emailed his allegations to the board of regents.<sup>78</sup> After Renken and a fellow professor rejected a compromise to settle the dispute, the university chose to terminate the grant project and return the funds to the NSF.<sup>79</sup> In the ensuing lawsuit, Renken claimed that the institution had violated his First Amendment rights by reducing his pay and terminating the grant to retaliate against him for complaining about its administration.<sup>80</sup>

In seeking to avoid the strictures of *Garcetti*, Renken argued that tasks carried out and communications made in relation to the grant constituted discretionary activities on his part and were not a ““*requirement* of his job.””<sup>81</sup> A panel for the Seventh Circuit rejected this argument, interpreting a faculty member's official employment duties related to teaching, research, and service broadly.<sup>82</sup> In defining Renken's official duties, the

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73. 541 F.3d 769 (7th Cir. 2008).

74. *Id.* at 773.

75. *Id.* at 770–71.

76. *Id.* at 771.

77. *Id.*

78. *Id.* at 771–72.

79. *Renken*, 541 F.3d at 773.

80. *Id.*

81. *Id.*

82. *Id.*

court looked to the university's manual for policies and procedures, which described faculty members as responsible for teaching, research, and service.<sup>83</sup> Based on this open-ended view of a professor's job duties, the Seventh Circuit panel determined that Renken's activities as a principal investigator on the grant fell within his official duties related to research.<sup>84</sup> Therefore, the communications at issue were made by Renken in his role as an employee and not as a private citizen.<sup>85</sup>

Another case, *Hong v. Grant*,<sup>86</sup> resulted in a similar outcome regarding the applicability of *Garcetti* to faculty speech. In the case, a professor, Hong, alleged that he was denied a merit salary increase because of criticisms of the university's hiring and promotion decisions and of the institution using lecturers to teach certain classes rather than tenured or tenure-track faculty members.<sup>87</sup> In one instance, the professor raised concerns that a faculty member who had been awarded a matching institutional grant had not received the initial grant through a competitive, refereed process, but, instead, through a company owned by the professor's spouse.<sup>88</sup> Two other incidents also involved hiring or promotion decisions,<sup>89</sup> and in one of these, Hong sent a reply to all members of a listserv stating that a professor's receipt of a merit increase had been made improperly and that an investigation into the matter was warranted.<sup>90</sup>

In reviewing Hong's claims, a federal district court applied the *Garcetti* standards, stating that a public employer "is extended unfettered discretion to regulate employee speech that it has 'commissioned or created.'"<sup>91</sup> In addition to activities related to teaching and research, the district court stated that Hong's official employment duties "also include a wide range of academic, administrative and personnel functions."<sup>92</sup> According to the opinion, "[a]s an active participant in his institution's self-governance, Mr. Hong has a professional responsibility to offer feedback, advice and criticism about his department's administration and operation from his

83. *Id.* at 770.

84. *Id.* at 774.

85. *Renken*, 541 F.3d at 774.

86. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

87. *Id.* at 1160.

88. *Id.* at 1162. According to the opinion, the professor in question had resigned, but it is not clear if the allegations raised by Hong were related to the departure. *Id.*

89. *Id.* at 1162-64.

90. *Id.* at 1163. The email to which Hong replied was a message sent by the professor-in-question thanking colleagues for their support in relation to the promotion. *Id.* Hong had stated that he had doubts about the faculty member's integrity based on his determination that the professor had improperly listed two doctoral students as under the faculty member's supervision and had listed two papers presented at conferences as refereed publications. *Id.*

91. *Id.* at 1165 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006)).

92. *Hong*, 516 F. Supp. 2d at 1166.

perspective as a tenured, experienced professor.”<sup>93</sup> As in *Renken*, the district court described a faculty member’s employment responsibilities expansively and determined that Hong had made the communications at issue pursuant to carrying out his official employment duties.<sup>94</sup> *Hong*, like *Renken*, did not address whether any First Amendment protection exists for individual academic freedom.<sup>95</sup>

In contrast, the decision in *Gorum v. Sessoms*<sup>96</sup> did consider that faculty speech may not fall under the purview of *Garcetti*. In that case, a panel for the Third Circuit considered claims from a department chair who had been dismissed for improperly awarding or altering grades for numerous students.<sup>97</sup> The faculty member, Gorum, alleged that, rather than for the grading improprieties, he was fired for opposing the selection of the university’s president in 2003, for his efforts to intercede on behalf of a star student athlete facing disciplinary actions for violating the school’s ban on weapons possession, and for the withdrawal of a speaking invitation to the university’s president that had been accidentally extended.<sup>98</sup>

The court held that Gorum did not engage in protected First Amendment speech in any of these circumstances.<sup>99</sup> In relation to the assistance provided to the student athlete, the opinion stated that even though his activities perhaps went beyond the specific duties outlined in the collective bargaining agreement, the faculty member’s special knowledge relating to the drafting of the student disciplinary code and attempting to exert his influence in the matter in his role as a department chair meant that the professor acted within the scope of his official employment duties.<sup>100</sup> Similarly, in relation to the withdrawal of the speaking invitation, the opinion stated that the faculty bylaws directed professors to assist student and alumni organizations and that the incident took place in relation to Gorum fulfilling that faculty role.<sup>101</sup> The court also determined that none of the incidents raised by the professor involved matters of public concern.<sup>102</sup>

In *Gorum*, the court did discuss that a question existed regarding application of the *Garcetti* standards to faculty speech related to teaching

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93. *Id.* at 1167.

94. *Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008); *Hong*, 516 F. Supp. 2d at 1168.

95. *Hong*, 516 F. Supp. 2d at 1168.

96. 561 F.3d 179 (3d Cir. 2009).

97. *Id.* at 182–83.

98. *Id.* at 183.

99. *Id.* at 185.

100. *Id.* at 185–86.

101. *Id.* at 186.

102. *Gorum*, 561 F.3d at 187. Any communications regarding the selection of the president were not considered to have been made in the course of carrying out official employment duties. *Id.*



and research, though no such type of speech was at issue in the case.<sup>103</sup> In a footnote, the opinion noted that circuits had disagreed over the application of *Garcetti* to issues related to teaching and scholarship,<sup>104</sup> comparing the approach in *Renken* with a Fourth Circuit decision involving a secondary teacher, *Lee v. York County School Division*.<sup>105</sup> While noting the division among courts regarding *Garcetti* and faculty speech, the court did not look to principles of academic freedom as a potential avenue to evaluate faculty communications related to teaching and scholarship. Instead, the opinion referred to the *Pickering* two-step analysis of whether the communication dealt with a matter of public concern and, if so, the extent of the employer's interest in regulating the speech.<sup>106</sup> Still, the court did not automatically assume that *Garcetti* covers all forms of faculty speech.

In *Piggee v. Carl Sandburg College*,<sup>107</sup> a panel for the Seventh Circuit also discussed the idea that faculty members may possess speech rights that protect their communications related to scholarship and teaching. A part-time instructor, Piggee, who had worked in a student beauty clinic operated by the college, sued after she was not retained by the institution to teach in its cosmetology department.<sup>108</sup> The former instructor claimed that she was not retained because she had distributed two religious pamphlets, which espoused disapproval of homosexuality, to a student who was gay.<sup>109</sup> The student complained to college officials, and following an investigation, Piggee and another teacher were instructed to stop seeking to influence students' religious, social, and sexual beliefs.<sup>110</sup> Following the incident, the college did not offer Piggee a teaching position for the following semester.<sup>111</sup>

In assessing Piggee's claims, the panel for the Seventh Circuit, unlike in *Renken* and *Hong*, considered that limits may exist on *Garcetti*'s application to faculty speech, noting that such an inquiry "require[d] an appreciation of the way in which teachers, professors, or instructors

103. *Id.* at 186.

104. *Id.* at 186, n.6.

105. 484 F.3d 687, 695 n.11 (4th Cir. 2007) (stating that because *Garcetti* did not determine whether the case applied to "speech related to teaching," the court would "continue to apply the *Pickering-Connick* standard"). In *Lee*, a teacher challenged a school district's authority to make him remove items posted on a bulletin board in his classroom. *Id.* at 689.

106. *Gorum*, 561 F.3d at 186 n.6.

107. 464 F.3d 667 (7th Cir. 2006).

108. *Id.* at 668.

109. 464 F.3d at 668. For example, one of the pamphlets had a character threatening "that all gay males will pollute the blood supply unless people give more money for AIDS research." *Id.* Both pamphlets drew a comparison between support for homosexuality and the biblical tale of Sodom and Gomorrah. *Id.*

110. *Id.* at 669.

111. *Id.*

communicate with their students.”<sup>112</sup> In relation to faculty speech rights, the opinion stated “that ‘the First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries’ and to discuss ideas. The idea of some kind of government-sponsored orthodoxy in the classroom is repugnant to our values.”<sup>113</sup> But the opinion also pointed out that institutions possess considerable authority to set curricula and that “[c]lassroom or instructional speech . . . is inevitably speech that is part of the instructor’s official duties, even though at the same time the instructor’s freedom to express her views on the assigned course is protected.”<sup>114</sup>

The court held that the college possessed “an interest in ensuring that its instructors stay on message while they were supervising the beauty clinic, just as it had an interest in ensuring that the instructors do the same while in the classroom.”<sup>115</sup> While noting that *Garcetti* was “not directly relevant” to the speech at issue in the case since the instructor had made the comments outside of any formal instructional context, the court stated that the decision did “signal the Court’s concern that courts give appropriate weight to the public employer’s interests.”<sup>116</sup> As with *Gorum*, the court was sensitive to the fact that it represents an open question whether *Garcetti* applies to all types of faculty speech.

As Leonard M. Niehoff discusses, the *Renken* and *Hong* cases “are not remarkable because they reveal the tension between *Garcetti* and academic freedom. Rather, they are remarkable because the discussion of any such tension is almost wholly absent.”<sup>117</sup> He states that the overall lack of discussion in the small pool of cases dealing with faculty speech and the appropriate role of *Garcetti* may be attributable to the “idiosyncratic nature of these cases” or, alternatively, the cases may serve as a bellwether of the willingness of courts to apply the *Garcetti* standards to faculty speech.<sup>118</sup> According to Niehoff, while enough cases have not yet been decided by courts to predict how courts will apply *Garcetti* to faculty speech:

[I]f the courts decide a dozen or so more faculty speech cases through a simple application of *Garcetti*—with no consideration of competing academic freedom considerations—then a precedential consensus will begin to emerge. That consensus

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112. *Id.* at 670–171.

113. *Piggee*, 464 F.3d at 671 (quoting *Trejo v. Shoben*, 319 F.3d 878, 884 (7th Cir. 2003)).

114. *Id.*

115. *Id.* at 672. The former instructor had placed the pamphlets with the students in a clinical salon that was operated by the school and that was open to the public. *Id.* at 668.

116. *Id.* at 672.

117. Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75, 92 (2008).

118. *Id.*

would probably have no impact on *institutional* academic freedom. But it could effectively extinguish constitutionally based faculty academic freedom in the classroom.<sup>119</sup>

While it still remains unclear what impact *Garcetti* may have on faculty speech, the cases decided thus far demonstrate that some courts have shown little hesitation in applying the *Garcetti* standards to faculty speech.

#### B. Pre-*Garcetti* Decisions from Lower Federal Courts

The courts in *Renken* and *Hong* closely followed the approach by the Fourth Circuit in a pre-*Garcetti* decision, *Urofsky v. Gilmore*, which concluded that faculty members at public colleges and universities enjoy no other First Amendment protections than those available to other public employees.<sup>120</sup> The *Urofsky* opinion squarely rejected the position that faculty members at public colleges and universities possess any First Amendment protection for academic freedom.<sup>121</sup> The Fourth Circuit, sitting en banc, considered whether a Virginia law that prohibited public employees from accessing sexually explicit material on computers owned or leased by the state violated the First Amendment rights of professors employed at public higher education institutions.<sup>122</sup> The professors argued that the law prohibited them from engaging in legitimate research activities.<sup>123</sup> While the district court had ruled in favor of the professors, a panel for the Fourth Circuit reversed.<sup>124</sup>

In reviewing the panel's decision, the full court applied a public employee speech framework to assess the professors' claims, turning to the standards of *Pickering* and *Connick*.<sup>125</sup> Foreshadowing the decision in *Garcetti*, the court stated that because the speech at issue took place in relation to the faculty members "carrying out [their] employment duties," the law did not regulate their speech as private citizens.<sup>126</sup> The opinion also considered whether the employees' status as professors should affect the law's applicability to them based on academic freedom considerations.<sup>127</sup> The majority opinion, describing academic freedom as an ambiguous concept applied unevenly by courts, stated: "Our review of the law . . . leads us to conclude that to the extent the 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

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119. *Id.* at 96.

120. 216 F.3d 401, 412 n.13, 415 (4th Cir. 2000) (en banc).

121. *Id.* at 415.

122. *Id.* at 404.

123. *Id.* at 405–06.

124. *Id.* at 404.

125. *Id.* at 406–07.

126. *Urofsky*, 216 F.3d at 408–09 (emphasis added).

127. *Id.* at 409.

individual professors.”<sup>128</sup>

The court argued that Justice Frankfurter’s often cited concurring opinion in *Sweezy* conceived of institutional rights enjoyed by an institution rather than of individual First Amendment academic freedom rights also possessed by faculty members.<sup>129</sup> Additionally, the court stated that *Sweezy* dealt with a professor seeking to speak in his capacity as a private citizen.<sup>130</sup> The opinion also questioned the fairness of granting professors a constitutional right not given to other public employees.<sup>131</sup> To support the view that individual academic freedom does not have a constitutional basis, the majority discussed how the concept of academic freedom did not exist early in the history of American higher education and how it emerged as the result of looking to the German system of higher education.<sup>132</sup> When the idea of academic freedom began to emerge in this country, the opinion stressed that the American Association of University Professors’ (“AAUP”) initial efforts to promote and establish individual academic freedom did not rely on First Amendment justifications.<sup>133</sup> Accordingly, for the *Urofsky* court, the issue of individual protection for academic freedom, while representing an important facet of higher education, did not trigger any special First Amendment safeguards for faculty members.

Several other pre-*Garcetti* decisions also emphasized institutional interests, especially in classroom related matters, when denying First Amendment claims by faculty members. In *Brown v. Armenti*,<sup>134</sup> for example, the Third Circuit stated that precedent had established that “in the classroom, the university was the speaker and the professor was the agent of the university for *First Amendment* purposes.”<sup>135</sup> Based on this standard, the court determined that grading fell under an institution’s right to determine how a course is taught and did not infringe on a professor’s First Amendment rights.<sup>136</sup> The court refused to recognize that an instructor possessed any independent First Amendment right to assign grades, though the court did not address individual academic freedom rights that might exist for scholarship-related activities.<sup>137</sup>

In another case dealing with speech related to the classroom and

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128. *Id.* at 410.

129. *Id.* at 412–13.

130. *Id.* at 413.

131. *Id.* at 411 n.13.

132. *Urofsky*, 216 F.3d at 410–11.

133. *Id.* at 411.

134. 247 F.3d 69 (3d Cir. 2001).

135. *Id.* at 74 (emphasis added).

136. *Id.* at 74–75.

137. *Id.* See also *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (stating “a public university professor does not have a First Amendment right to decide what will be taught in the classroom”). In *Edwards*, the court also expressly rejected the professor’s academic freedom claims. *Id.* at 491–92.

teaching, *Johnson-Kurek v. Abu-Absi*,<sup>138</sup> the Sixth Circuit considered claims by an instructor, Johnson-Kurek, that her First Amendment rights were violated when administrators ordered her to send letters to students that included more detailed reasons for why they had received grades of incomplete in a course and that described how to fix deficiencies in their work in order to obtain a final grade in the class.<sup>139</sup> The court distinguished the case from the decision in *Parate v. Isibor*,<sup>140</sup> discussed below, where the court held that grading represented protected First Amendment speech.<sup>141</sup> Rather than being required to communicate a particular message of university officials, Johnson-Kurek was required to communicate her particular standards of evaluation to students, with the court comparing the request similar to the requirements of making a course syllabus.<sup>142</sup> According to the opinion:

While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of the university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.<sup>143</sup>

While the Sixth Circuit emphasized institutional authority to control conditions in the classroom, as the Third Circuit did in *Brown*, the *Johnson-Kurek* decision did not address whether under certain circumstances a professor might still possess some type of constitutional protection for academic freedom.

The approach toward individual academic freedom taken in pre-*Garcetti* cases such as *Urofsky* has certainly not been followed by all courts. For instance, some courts, though in pre-*Garcetti* decisions, have determined that professors possess some First Amendment protection for comments made in the classroom.<sup>144</sup> In a case in stark contrast to *Brown*, the Sixth

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138. 423 F.3d 590 (6th Cir. 2005).

139. *Id.* at 591–92.

140. 868 F.2d 821 (6th Cir. 1989).

141. *Johnson-Kurek*, 423 F.3d at 594.

142. *Id.* at 595.

143. *Id.*

144. *See, e.g., Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990) (“Assuming the defendants retaliated against Dube based upon the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable.”); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 315 (D.N.H. 1994) (holding that disciplinary actions taken by a professor based on statements made in class violated the professor’s First Amendment rights). Cases relying on a *Pickering* approach as a basis to find protection for speech by faculty members in the classroom, however, rest on uncertain legal ground with the *Garcetti* decision and its emphasis that no First Amendment

Circuit held in *Parate v. Isibor*<sup>145</sup> that a professor had communicated for First Amendment purposes when assigning grades.<sup>146</sup> Looking to Judge Posner's opinion in *Piarowski v. Illinois Community College District 515*,<sup>147</sup> discussed below, the Sixth Circuit stated that both the school and the professor may raise academic freedom concerns protected by the First Amendment.<sup>148</sup> The Sixth Circuit in *Parate* described a grade assignment as a form of symbolic speech.<sup>149</sup> In discussing the professor's role in assigning grades as involving the "professional judgment"<sup>150</sup> of the faculty member, the court in *Parate* sounded a different chord than that heard in *Brown*, which described a professor as a spokesperson for the university in the classroom.

In *Piarowski*, a case involving placement of an exhibition of a professor's art work that was sexual in nature,<sup>151</sup> Judge Posner's opinion for the Seventh Circuit discussed the "equivocal" nature of academic freedom: "It is used to denote both the freedom of the academy to pursue its ends without interference from the government. . . . and the freedom of the individual teacher (or in some versions—indeed most cases—the student) to pursue his ends without interference from the academy."<sup>152</sup> The opinion stated that both the community college and the professor possessed interests in the location of a sexually explicit art display that might offend some viewers.<sup>153</sup> Rather than using a bright-line test, Judge Posner balanced the interests of the academic institution and the professor. For instance, the opinion stated that had the exhibit contained a likeness of the chair of the board of trustees or presented female students in a sexually graphic manner, then the community college arguably enjoyed an interest

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protection exists for speech made pursuant to fulfilling employment duties. *See, e.g., Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) ("Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.'").

145. 868 F.2d 821 (6th Cir. 1989).

146. *Id.* at 827–28.

147. 759 F.2d 625 (7th Cir. 1985).

148. *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989).

149. *Id.*

150. *Id.* at 828.

151. *Piarowski*, 759 F.2d at 627–28.

152. *Id.* at 629. This statement also raises the issue that students should also perhaps possess some type of academic freedom rights. *See Byrne, supra* note 27, at 262, (contending that students may possess substantial First Amendment rights, but not ones that should be considered to flow from some form of constitutional academic freedom).

153. *Piarowski*, 759 F.2d at 627–28. Though noting the "equivocal" status of constitutional protection for academic freedom, the court stated that it could "assume . . . that public colleges do not have carte blanche to regulate the expression of ideas by faculty members in the parts of the college that are not public forums." *Id.* at 629.

in moving the exhibit to a more “inconspicuous” area of campus.<sup>154</sup> Judge Posner noted that the faculty members, in conceding that the school could have placed blinds up to screen the exhibit, acknowledged “some scope for a managerial judgment concerning access to sexually frank pictorial art.”<sup>155</sup> The court, after weighing the interests of the professor and the institution, held that the community college did not violate the professor’s First Amendment rights in ordering the exhibit moved to another area of campus.<sup>156</sup>

The pre-*Garcetti* cases illustrate the divergent stances among lower federal courts regarding individual academic freedom. At times, courts have referred to individual academic freedom as protected by the First Amendment, as in *Piarowski*. Still, even when viewing individual academic freedom as protected under the First Amendment, courts have often relied on the public employee speech cases and determined that a professor had addressed an issue of public concern, and therefore engaged in protected speech.<sup>157</sup> That option, of course, faces significant hurdles following *Garcetti*. Courts are now more likely faced with directly addressing the issue of constitutional protection for individual academic freedom.

#### IV. VIEW OF CONSTITUTIONAL ACADEMIC FREEDOM AS ACCRUING ONLY TO INSTITUTIONS

##### A. Supporters of Institutional Perspective

Other than their consensus that First Amendment academic freedom represents a hazy legal doctrine, legal scholars have taken divergent positions regarding academic freedom under the First Amendment. Major fault lines have developed concerning whether First Amendment academic freedom is limited to institutions or also includes individuals; or whether it is restricted to individuals, to the exclusion of institutions. Given the importance of this issue concerning the overall contours of academic freedom protected by the First Amendment, the article first examines the view that constitutional academic freedom attaches only to institutions before turning to individual faculty members and academic freedom.

J. Peter Byrne, a leading figure on issues related to academic freedom, represents one of the foremost voices for the position that First Amendment academic freedom applies to institutions rather than directly protecting the individual scholar.<sup>158</sup> In his analysis, Byrne criticizes how academic

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154. *Id.* at 630.

155. *Id.*

156. *Id.* at 632.

157. *See, e.g.*, *Omosegbon v. Wells*, 335 F.3d 668, 676–77 (7th Cir. 2003); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001).

158. *See generally* Byrne, *supra* note 27.

freedom “has been thought to encompass all First Amendment rights exercisable on campus or by members of the academic community.”<sup>159</sup> He argues that the “term ‘academic freedom’ should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching.”<sup>160</sup> For Byrne, student speech and what he terms “faculty political speech,” while potentially covered by the First Amendment, should not constitute speech covered by principles of constitutional academic freedom.<sup>161</sup>

In asserting that First Amendment academic freedom should not apply directly to individual scholars,<sup>162</sup> Byrne argues that focusing on protecting institutions does not place courts in the position of second guessing evaluations of academic speech they are ill equipped to assess.<sup>163</sup> Courts should limit their inquiry to whether institutions have followed accepted academic standards in making decisions.<sup>164</sup> According to Byrne, the system of peer review established in higher education represents a more appropriate means to evaluate academic speech.<sup>165</sup> He also states that an inconsistency exists in providing First Amendment academic freedom protection to faculty members at public colleges and universities but denying such protection to professors in private higher education.<sup>166</sup>

As conceived by Byrne, armed with institutional protection for academic freedom, colleges and universities are placed in a position to fend off excessive interference with their internal functions.<sup>167</sup> This institutional academic freedom, according to Byrne, extends to both public and private institutions.<sup>168</sup> Thus, in the case of public institutions, institutional academic freedom, as interpreted by Byrne, also places limits on state governmental interference.<sup>169</sup> To support his position for institutional academic freedom as the proper concern of the First Amendment, Byrne looks to the historic reliance by courts on academic abstention in matters involving colleges and universities<sup>170</sup> as well as to the use of constitutional provisions in some states to shield institutions from undue interference from state government.<sup>171</sup>

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159. *Id.* at 262.

160. *Id.*

161. *Id.* at 262–64.

162. *Id.* at 310–12.

163. *Id.* at 304–07.

164. Byrne, *supra* note 27, at 308.

165. *Id.* at 310–11.

166. *Id.* at 299.

167. *Id.* at 301–04.

168. *Id.* at 299–300.

169. *Id.* at 300, 320.

170. Byrne, *supra* note 27, at 323–27.

171. *Id.* at 327–31.



Seeking to expand accepted legal views of institutional speech rights, Paul Horowitz has argued that in addition to colleges and universities, other entities in society such as the press and libraries should receive special First Amendment deference.<sup>172</sup> In relation to colleges and universities, as with Byrne, he describes First Amendment autonomy for institutions of higher education as coming into play when a school adheres to accepted academic norms and practices.<sup>173</sup> Like Byrne, Horowitz asserts that public higher education institutions should possess First Amendment rights that shield them from the authority of other state actors.<sup>174</sup> He recognizes that permitting a public college or university to exercise a First Amendment right against state government “presents an awkward fit with standard assumptions about the limited or nonexistent nature of First Amendment rights for state actors.”<sup>175</sup> Still, he advocates that important considerations related to safeguarding and promoting free speech merit First Amendment protection for certain institutions, both public and private.<sup>176</sup> Horowitz also argues for a potentially broader view of First Amendment discretion for public colleges and universities than that envisioned by Byrne.<sup>177</sup> He contends that colleges and universities should receive considerable discretion to determine “what their academic mission requires, and their own sense of what academic freedom entails, rather than evaluate those claims against a top-down judicially imposed understanding of academic freedom.”<sup>178</sup>

Other commentators have also determined that First Amendment protection for academic freedom should reside at the institutional level. Lawrence Rosenthal, an advocate of *Garcetti*'s application to public employees, contends the decision reflected a “new inquiry” by the Supreme Court that gave appropriate deference to the “managerial prerogative” of public employers to control the speech of subordinates.<sup>179</sup> Rosenthal states that “public employees who are hired to speak (and write) are not hired to say just anything, but are hired to speak (and write) in the fashion desired by their superiors.”<sup>180</sup> He points to *Garcetti* as properly placing control over government activities and “speech-related duties” in the hands of individuals subject to political accountability.<sup>181</sup> Turning to public colleges

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172. Paul Horowitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1502 (2007).

173. *Id.* at 1518.

174. *Id.* at 1526–30.

175. *Id.* at 1526–27.

176. *Id.* at 1526–30.

177. *Id.* at 1547–49.

178. Horowitz, *supra* note 172, at 1547–48.

179. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 39 (2008).

180. *Id.* at 45–46.

181. *Id.* at 46–47.

and universities, Rosenthal cites cases involving government sponsored funding of art and broadcasting as providing a basis for public universities to exercise their managerial prerogative in a manner that permits them to make content and viewpoint distinctions in carrying out their missions.<sup>182</sup>

According to him:

The First Amendment concept of academic freedom . . . reflects the influence of the managerial prerogative. The Court has invoked academic freedom when it has granted academics protection from forms of coerced ideological conformity, but in this line of cases, the coercion was imposed by external forces rather than by the university leadership.<sup>183</sup>

For Rosenthal, academic freedom cases support the managerial prerogative and should be viewed as emphasizing an institutional right.<sup>184</sup>

In relation to faculty speech, Rosenthal, though making it clear that courts may eventually realize an exception under *Garcetti* for faculty speech, discusses how one could interpret the decision as permitting an institution to treat extramural speech by a professor as constituting part of a faculty member's employment duties.<sup>185</sup> He states that faculty members are hired to express their ideas to the public and that communications such as those engaged in by Ward Churchill should potentially be viewed as related to a professor's employment duties.<sup>186</sup> This view of the official employment duties of faculty members would seem to provide even less First Amendment protection than that given to other public employees under *Garcetti*. He does state, though, that limits exist on the managerial prerogative and that institutional regulation of faculty speech should be consistent with scholarly norms and not the product of external political interference.<sup>187</sup>

Some writers view colleges and universities as receiving a special deference from courts to promote principles associated with academic freedom but do not agree that institutions possess special First Amendment academic freedom rights. Larry D. Spurgeon, for instance, contends that while neither institutions nor individuals possess any special First Amendment academic freedom rights, colleges and universities receive special judicial deference:

The premise of this article is that the Supreme Court has never recognized a distinct constitutional right of academic freedom, either for professors or colleges and universities. It did not need

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182. *Id.* at 100–01.

183. *Id.* at 97.

184. *Id.* at 98.

185. Rosenthal, *supra* note 179, at 105–09.

186. *Id.* at 108–09.

187. *Id.* at 109.

to do so for professors because the First Amendment already covers individuals. Moreover, the Court has not extended such a “right” to colleges and universities to be exercised affirmatively. Rather, the Court has expressed a policy that the academic community should make academic decisions with minimal court interference. In short, institutional academic freedom is a sort of qualified immunity to be used as a shield against unwarranted interference by the state, not a right to be wielded as a sword.<sup>188</sup>

Spurgeon points to Byrne’s discussion of academic abstention in relation to colleges and universities as providing support for the view that institutions should receive special judicial deference.<sup>189</sup>

Given disagreements over the nature of constitutional academic freedom, not surprisingly, other commentators dispute the view of constitutional academic freedom as reserved to institutions. Richard H. Hiers contends that any notion of institutional academic freedom is misplaced, arguing that the view is largely attributable to a flawed opinion by Justice Powell in *Bakke*.<sup>190</sup> He states that Justice Powell mistakenly interpreted language in previous Supreme Court opinions addressing academic freedom in conceiving of some sort of institutional academic freedom right.<sup>191</sup> Matthew W. Finkin has argued that judicial acceptance of institutional academic freedom threatens the constitutional protection of individual faculty members.<sup>192</sup> While stating that protection of institutions could be viewed as permissible at times as “a necessary condition for freedom of teaching and inquiry,” Finkin rejects the idea that academic freedom represents an institutional prerogative, and, instead, would protect the speech of individual scholars.<sup>193</sup>

David M. Rabban has contended that the concept of academic freedom exists as “more than just a desirable policy promoted by the AAUP and adopted within the academic world. Core [F]irst [A]mendment values—such as critical inquiry, the search for knowledge, and toleration of dissent—support constitutionalizing some, but not all, of the speech covered by the professional definition of academic freedom.”<sup>194</sup> Beyond a concern for protecting the individual interests of faculty members, Rabban argues that “constitutional academic freedom promotes [F]irst

188. Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 150 (2007).

189. *Id.* at 164.

190. Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1, 3–4 (2007).

191. *Id.* at 5.

192. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 851 (1982–1983). *See generally* Finkin, *supra* note 28.

193. Finkin, *supra* note 192, at 856.

194. Rabban, *supra* note 32, at 230.

[A]mendment values of general concern to all citizens in a democracy.”<sup>195</sup> Looking to general societal benefits of academic freedom identified in Supreme Court cases, including *Sweezy* and *Keyishian*, Rabban points to discussion in the cases of the importance to a democratic society of unencumbered critical inquiry and of how intellectual freedom also “promotes discoveries and understanding necessary for civilization.”<sup>196</sup>

In defending constitutional protection for individual professors, Rabban discusses that “understandable skepticism” results from viewing faculty members as possessing First Amendment rights not available to other citizens,<sup>197</sup> but points out:

[T]he institutional context of speech often has [F]irst [A]mendment significance. Under this approach, constitutional academic freedom is simply a convenient name to describe special speech rules governed by the functions of professors and universities, just as other special speech rules, which may not have been separately named, are required by the distinctive yet different functions of institutions as varied as prisons, libraries, the military, the civil service, public schools, and the media.<sup>198</sup>

In challenging the position taken by Byrne, Rabban argues that such an approach “would heighten the danger that administrators and trustees might violate the academic freedom of professors.”<sup>199</sup> He also disputes the assertion that courts would unduly interfere with academic decisions, stating that “[c]ourts are likely to be more sensitive than legislators or members of the executive branch to the need for independent critical inquiry in universities and to their democratic role as sanctuaries for unpopular ideas.”<sup>200</sup> He looks to Title VII cases as providing an example of courts being able to evaluate “whether stated academic grounds are pretexts.”<sup>201</sup> But Rabban does agree with Byrne that courts should limit their inquiries to whether institutions had demonstrated academic good faith.<sup>202</sup>

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195. *Id.*

196. *Id.* at 239.

197. *Id.* at 246.

198. *Id.* at 247.

199. *Id.* at 284.

200. Rabban, *supra* note 32, at 286–87.

201. *Id.* at 287.

202. *Id.* at 291–92. While wary of including intramural faculty speech under the umbrella of First Amendment protection for institutional academic freedom, Rabban expressed this view before *Garcetti*. He stated that certain types of intramural speech related to “critical inquiry” constituted an appropriate area to be protected by constitutional academic freedom. *Id.* at 295–96. I contend that considerations of First Amendment protection for faculty speech should take into account the realm of intramural speech. Otherwise, as in *Hong* and *Renken*, such speech could be denied constitutional protection.

Caution is warranted in adopting an overly simplistic view of the debate over institutional versus individual academic freedom under the First Amendment. Byrne, for instance, views institutional academic freedom as the most appropriate and workable mechanism to ultimately safeguard the academic freedom of individual scholars.<sup>203</sup> Accordingly, one should not assume that a supporter of institutional academic freedom is opposed to academic freedom for individual faculty members. Instead, as the preceding discussion illustrates, disagreement tends to center on the appropriate means to safeguard individual academic freedom. Advocates of institutions as the proper concern of constitutional academic freedom, then, should not be viewed as necessarily antagonistic to protecting the intellectual freedom of the individual scholar. Still, as the next section discusses, obstacles exist for the view that institutional academic freedom sufficiently protects the academic freedom of individual professors at public colleges and universities.

#### B. Potential Pitfalls with Limiting Constitutional Academic Freedom to Institutions

A significant hurdle institutional academic freedom must overcome in relation to public colleges and universities concerns the extent to which these institutions possess federal constitutional academic freedom rights easily wielded against state governments.<sup>204</sup> In support of this position, Byrne, as noted, discusses how some states have provided special autonomy to public colleges and universities in their state constitutions<sup>205</sup> and also looks to the concept of academic abstention<sup>206</sup> as legal doctrines that help justify judicial recognition of institutional academic freedom under the Federal Constitution. He conceives of institutional academic freedom as restricted to when institutions make judgments and decisions that are academic in nature and related to core enterprises of the college or university in the areas of teaching and scholarship.<sup>207</sup> According to Byrne, institutional academic freedom for public colleges and universities means, for instance, that they may include race as a factor in their admissions, even if voters or legislatures have approved measures rejecting race-conscious admission policies.<sup>208</sup> As another example, he states that adoption by a state legislature of a form of the Academic Bill of Rights advocated by David Horowitz would seemingly violate institutional academic freedom.<sup>209</sup>

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203. Byrne, *supra* note 27, at 331–39.

204. See Byrne, *supra* note 31, at 934–38.

205. Byrne, *supra* note 27, at 327–31.

206. *Id.* at 323–27.

207. *Id.* at 301–11.

208. Byrne, *supra* note 31, at 937.

209. *Id.* at 939–44. The Academic Bill of Rights represents draft legislation

As Byrne points out,<sup>210</sup> a select number of states, with California, Michigan, and Minnesota serving as the foremost examples,<sup>211</sup> have enacted constitutional provisions meant to shield public colleges and universities from undue legislative influence.<sup>212</sup> This special grant of independence is often referred to as constitutional autonomy.<sup>213</sup> Like Byrne, Horowitz also looks to the existence of constitutional autonomy provisions as well as statutes in some states granting considerable autonomy to public colleges and universities as justifications for First Amendment rights for institutions.<sup>214</sup> He states that while the people of a state are not required to support and maintain a public college or university, “[s]o long as the people have chosen to maintain . . . a university, however, they must stand by the bargain.”<sup>215</sup>

While Horowitz and Byrne may certainly be correct that public institutions enjoy substantial constitutional academic freedom rights that may be exercised against state government, such a result is far from settled. Robert O’Neil, in discussing the Academic Bill of Rights,<sup>216</sup> states that considerable uncertainty exists as to whether a public college or university could successfully assert a federal constitutional right grounded in institutional academic freedom against a state government seeking to

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promoted by David Horowitz as a means to address alleged ideological bias at colleges and universities against conservative students and faculty members. ROBERT O’NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD* 241 (2008). Supporters of the measure have sought to have it included in federal and state legislation, though they have so far achieved little success. *Id.* at 241–55.

210. Byrne, *supra* note 27, at 327–28.

211. Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 181 (1978).

212. Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271, 271–72, 275 (2009).

213. Beckham, *supra* note 211, at 179; Hutchens, *supra* note 212, at 272. To gain a better understanding of the similarities and differences between academic freedom law and constitutional autonomy, see Karen Petroski’s comparison of constitutional autonomy in California with concepts of academic freedom as developed in federal law. *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005).

214. Horowitz, *supra* note 172, at 1529.

215. *Id.* at 1551. Jeff Todd has also examined issues related to institutional academic freedom for public colleges and universities and the authority of state government. Jeff Todd, Note, *State University v. State Government: Applying Academic Freedom to Curriculum, Pedagogy, & Assessment*, 33 J.C. & U.L. 387 (2007). While also supportive of institutional academic freedom and looking to Supreme Court cases, academic abstention, and separation of powers as potential legal sources to support institutional independence from state government, he acknowledges uncertainty with the degree to which public colleges and universities can claim such autonomy from governmental regulation. *Id.* at 398–402.

216. See O’NEIL, *supra* note 209.

impose governance changes.<sup>217</sup> Rabban has also noted that public institutions may not be able to rely on institutional academic freedom to the same extent as private institutions, noting that cases make it uncertain the degree to which a public institution could use institutional academic freedom to fend off state legislative initiatives.<sup>218</sup> He states, “[t]he extent to which institutional academic freedom insulates state universities from other branches of government, though presenting numerous complicated and unresolved issues, remains largely hypothetical.”<sup>219</sup> Rabban does suggest that, under certain conditions, limits may exist on external governmental control over public colleges and universities. He discusses *Federal Communications Commission v. League of Women Voters*<sup>220</sup> as instructive of when First Amendment limits may exist on “government regulation of its own institutions.”<sup>221</sup>

The view that public colleges and universities should enjoy considerable autonomy in the control of their internal affairs is strongly shared by this author, but I also believe that considerable difficulties exist in establishing that state-supported public colleges and universities possess significant federal constitutional independence from state governmental control. In contrast to Byrne and Horowitz, I contend that the existence of constitutional autonomy provisions actually may make it more difficult to establish that state public colleges and universities possess institutional academic freedom rights easily asserted against state government.

In the majority of states, authorization for public higher education has stemmed from legislative enactments, with the state constitution often at most only establishing an institution and/or its governing board.<sup>222</sup> In contrast, states with constitutional autonomy for public colleges and universities have made a deliberate political decision to grant some degree of state constitutional independence for public higher education.<sup>223</sup> Several states, such as Utah and Missouri, have had explicit legal battles regarding the issue of constitutional autonomy under the state constitution, where

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217. *Id.* at 259.

218. Rabban, *supra* note 32, at 278–79. As an example, Rabban asks what would be the outcome in relation to the First Amendment and institutional academic freedom if a Texas law required state-supported colleges or universities to offer a government or political science course that included consideration of the United States and Texas Constitutions and also required the offering of courses in American or Texas history. *Id.*

219. *Id.* at 280.

220. 468 U.S. 364 (1984). In the case, the Supreme Court struck down a provision that prohibited editorializing by stations that received grants from the Corporation for Public Broadcasting. *Id.* at 402–03.

221. Rabban, *supra* note 32, at 273.

222. See Education Commission of the States, Postsecondary Governance Structures Database, <http://www.ecs.org/clearinghouse/31/02/3102.htm> (last visited Nov. 4, 2009).

223. See generally Hutchens, *supra* note 212.

courts have refused to recognize independent constitutional authority for public institutions, despite constitutional language seeming to indicate otherwise.<sup>224</sup> In a relatively recent case in Utah, the state's supreme court considered a constitutional autonomy claim in relation to a state law permitting possession of concealed weapons in public places, including at colleges and universities in the state.<sup>225</sup> In the decision, the court, in rejecting constitutional autonomy for the University of Utah, described the university as completely subject to the authority of the legislative and executive branches of government.<sup>226</sup> Even in Michigan, and in other states with judicial recognition for constitutional autonomy, courts have fashioned an exception to constitutional independence where a clearly determined statement of public policy by the legislature may override constitutional autonomy.<sup>227</sup> A federal court considering recognition of an institutional academic freedom right that operates against state government might well hesitate to do so when faced with the fact that a number of states have already made deliberate legislative and judicial choices regarding state control over public colleges and universities, including whether to grant constitutional autonomy.

Rather than as a justification for an independent grant of federal constitutional autonomy for public institutions to shield them from undue interference by state government, constitutional autonomy provisions could actually be used to demonstrate that state legislatures have been quite conscious regarding issues related to any independent state constitutional authority that public higher education institutions should possess. Recognition of an extensive institutional academic freedom right that operates against state government could strike some, if not many courts, as overriding the deliberate choices made by states in relation to public higher education governance. It is far from certain the extent to which courts would recognize such an institutional academic freedom right in relation to state government, and constitutional autonomy provisions and litigation related to such provisions might actually undercut judicial support for such a position.

Still, commentators have looked to cases dealing with arts funding<sup>228</sup> and control over school libraries<sup>229</sup> to suggest that limits may exist on political

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224. *Id.* at 309–10.

225. *Univ. of Utah v. Shurtleff*, 144 P.3d 1109, 1118–21 (Utah 2006).

226. *Id.* at 1118.

227. *Hutchens*, *supra* note 212, at 282–92.

228. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (rejecting a claim that standards imposed on the National Endowment for the Arts to consider factors that included standards related to decency in awarding grants violated the First Amendment).

229. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that a local board of education violated the First Amendment in removing certain books from a school library because of disagreement with ideas contained in the works).



interference with state entities under certain circumstances. Frederick Schauer discusses that some sort of First Amendment protection for public colleges and universities against state government might come into play when “decisions made by primary professionals inside some speech-focused institution” are subjected to external interference from other officials.<sup>230</sup> Such meddling could trigger First Amendment concerns based on governmental officials seeming to impose particular viewpoints on institutional decisions.<sup>231</sup> Under certain circumstances, then, institutions might be able to assert a First Amendment right against state government, but the contours of such an institutional right are unclear and may apply only in limited circumstances.

It should be pointed out that in contrast to an institutional academic freedom right that limits state government, some form of First Amendment right for public institutions in relation to the federal government seemingly faces fewer difficulties. Cases such as *Grutter*,<sup>232</sup> *Ewing*,<sup>233</sup> and *Southworth*<sup>234</sup> already have dealt with the Supreme Court applying federal constitutional standards to public higher education and recognizing some degree of First Amendment consideration for institutional academic freedom. One justification for such an institutional right is to view the state government (a public college or university) as exercising a special educational function. Under this view, protection of institutional academic freedom places emphasis on respecting the role of states in educational matters, including higher education. In *Grutter*, for instance, the Supreme Court recognized a compelling governmental interest in using race as a factor in higher education admissions.<sup>235</sup> Similarly, in *Southworth* the Court took into account the unique context of public higher education in applying its compelled speech standards under the First Amendment.<sup>236</sup> Thus, constitutional protection for institutional academic freedom appears more viable in relation to public colleges and universities and the federal government than to state governments.

Recognition of some form of constitutional protection for institutional academic freedom that applies to the federal government still leaves the problem, however, of defining an institutional right in relation to state government. Beyond this obstacle, limiting academic freedom to institutions may also provide insufficient constitutional protection for the

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230. Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 922–23 (2006).

231. *Id.* See also Laura A. Jeltama, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U.L. REV. 215 (2004)

232. See *infra* Part II.

233. *Id.*

234. See *infra* Part II.

235. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

236. *Bd. of Regents v. Southworth*, 529 U.S. 217, 221 (2000).

individual scholar. Alan K. Chen, for instance, warns of the threats that arise in showing too much deference to institutions.<sup>237</sup> He discusses several factors that may undermine institutional support for academic freedom: (1) institutions are subject to external boards that may not be sensitive enough to protecting the intellectual freedom of faculty members; (2) college and university presidents now often come from non-academic backgrounds; and (3) schools increasingly rely on part-time instructors or ones employed full time but not on the tenure track.<sup>238</sup> He also discusses the growing importance of corporate funding for higher education, which raises additional academic freedom concerns.<sup>239</sup>

Another potential issue, when considering the protection of individual academic freedom, stems from an increased scrutiny of particular scholars by political leaders and in the media. Writing in 1989, Byrne stated that “[t]oday, few politicians seek political capital by attacking academics for their political opinions, and those who do only provide their victims with lawsuits that usually fortify their academic positions against more subtle or justifiable assault.”<sup>240</sup> Such a statement arguably has diminished currency in the years since Byrne’s article. As indicated by several authors, individual scholars have now indeed become the targets of individual attacks by politicians and other figures.<sup>241</sup>

Accordingly, beyond difficulties with establishing an institutional right that significantly restricts interference from state government, individual faculty members have now become the targets of politicians and other individuals and groups critical of higher education. Especially given the emergence of alternative media and the ease with which groups or individuals may post information (accurate or otherwise) on the internet, faculty members are increasingly susceptible to individual critiques and attacks. Depending on the politically charged nature of such instances and the level of media coverage, some institutions might be slow in moving to

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237. Chen, *supra* note 27, at 970–72.

238. *Id.* at 972.

239. *Id.* For additional discussion of potential problems for academic freedom stemming from increased corporate influence in higher education and institutions assuming a more market oriented approach to research, see Risa L. Lieberwitz, *Education Law: The Corporatization of Academic Research: Whose Interests are Served?*, 38 AKRON L. REV. 759 (2005).

240. Byrne, *supra* note 27, at 298.

241. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 2–3 (2009) (discussing the backlash that ensued based on the selection of a particular book for a common reading for incoming freshman at the University of North Carolina, including a state senator asking for the political affiliations of professors on the committee that selected the work); O’NEIL, *supra* note 209, at 235–56 (offering several examples of increasing allegations of bias against faculty members, including the publishing of a list by David Horowitz, drafter of the Academic Bill of Rights, containing the names of 101 professors he deemed politically biased and harmful to higher education).

defend their faculty members in certain instances. Robust constitutional protection for academic freedom may be incomplete without an individual dimension, and the article now shifts to consideration of one alternative upon which to base First Amendment protection for individual academic freedom.

## V. INDIVIDUAL ACADEMIC FREEDOM

### A. Institutional Policies: A Potential Justification for Constitutional Protection

Articulating a framework for constitutional protection of individual academic freedom requires addressing the legal justification for such a right and defining workable standards for courts to employ in assessing individual academic freedom claims. In considering First Amendment protection for individual academic freedom, one view is that Supreme Court opinions have established an independent constitutional right for faculty members that public colleges and universities are bound to respect.<sup>242</sup> This article certainly does not reject the position that such an independent First Amendment right for individual academic freedom conceivably exists based on Supreme Court decisions. While not seeking to undercut the viability of such a position, I do consider a somewhat alternative basis to ground First Amendment protection for individual academic freedom at public colleges and universities: the academic freedom policies and standards voluntarily adopted by institutions.

In light of *Garcetti*'s emphasis on the control that public employers exercise over employee speech made pursuant to carrying out official duties, it seems relevant to consider the legal significance of speech policies voluntarily adopted by public employers. In the context of public colleges and universities, it is legally incongruous for institutions to adopt and tout academic freedom policies, which encourage professors to express their views openly, but then to fall back on *Garcetti* when a faculty member claims that he or she has suffered retaliation for accepting the invitation to engage in free speech. While the court in *Urofsky* complained about treating public higher education faculty members differently from other public employees,<sup>243</sup> public colleges and universities have made a deliberate decision to treat their employees in a way distinct from other public employees.<sup>244</sup> It seems reasonable therefore for courts to consider

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242. See generally Areen, *supra* note 72; Finkin, *supra* note 28; Rabban, *supra* note 32.

243. *Urofsky v. Gilmore*, 216 F.3d 401, 412 n.13 (4th Cir. 2000) (en banc).

244. For instance, what if Ceballos had worked in an office with an established formal policy that employees possessed discretion to express their views on any legal matters pending in the office to superiors and even to external audiences as long as such communications were handled with civility and related to an area of expertise of

how institutional policies and standards should impact the speech claims of faculty members.

Giving legal weight to the academic freedom policies and standards adopted by public colleges and universities can also be grounded in a broader conception of these institutions as occupying a special governmental role. Along these lines, Judith Areen contends that in evaluating the First Amendment academic freedom rights of faculty members, courts should distinguish between the government (a public college or university) as educator versus as an employer.<sup>245</sup> Areen looks to *Rust v. Sullivan*<sup>246</sup> as an instance of the Supreme Court recognizing the government as the speaker<sup>247</sup> and contrasts it with *Legal Services Corporation v. Velazquez*,<sup>248</sup> where the Court invalidated a rule that legal services attorneys could not represent clients seeking to challenge existing welfare law.<sup>249</sup> In *Velazquez*, the Court stated that the regulation could interfere with the established role of attorneys in the judicial system.<sup>250</sup> According to Areen, “restricting faculty to promote governmental messages would [also] alter their traditional role and distort public higher education.”<sup>251</sup> She also distinguishes government as educator from its role as sovereign, where content neutrality is often the First Amendment touchstone.<sup>252</sup> In performing its role as educator, a public college or university would be able to make content and viewpoint distinctions in fulfilling its teaching and research functions.<sup>253</sup>

Along somewhat similar lines, Robert M. O’Neil discusses how *Rust* contained language from Chief Justice Rehnquist regarding the special nature of higher education in approving restrictions on federal funding for family planning clinics that disallowed the funds from being used in programs that provided abortions or counseling about abortion.<sup>254</sup> O’Neil writes that one lesson from *Rust* could be to limit application of *Garcetti* in circumstances when “government control of the employee’s message is integral to the agency’s responsibility for management of the workplace and those [situations] in which such government power or control is

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the attorney? No such policy appeared to exist in Ceballos’s office, but faculty members at public colleges and universities indeed work in environments in which official institutional policy encourages them to speak as independent voices.

245. Areen, *supra* note 72, at 989–90.

246. 500 U.S. 173 (1991).

247. Areen, *supra* note 72, at 991.

248. 531 U.S. 533 (2001).

249. Areen, *supra* note 72, at 992.

250. *Velazquez*, 531 U.S. at 544.

251. Areen, *supra* note 72, at 992.

252. *Id.* at 992–93.

253. *Id.*

254. Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 15 (2008).

incidental to performance of the tasks and functions of the workplace.”<sup>255</sup> He states that “[t]he setting in which such an approach might most effectively mitigate government speech restriction would, of course, be that of the university campus.”<sup>256</sup>

O’Neil points out how previous Supreme Court cases have recognized the uniqueness of the higher education environment, including Justice Kennedy’s statement in *Garcetti* that it was not settled that the holding would apply to professors in public higher education.<sup>257</sup> Looking to the *Yeshiva* decision, O’Neil notes how court cases have previously recognized that the work of faculty members in higher education differs from the functions of other employees.<sup>258</sup> He also discusses that applying *Garcetti* to the speech of faculty members would create a result in which faculty members would “be able to speak freely only about matters that are remote from their academic disciplines and expertise, while being denied such protection when speaking or writing within that realm.”<sup>259</sup>

The difficulties with applying *Garcetti* within the context of the college or university environment have also been noted by supporters of institutional academic freedom. Spurgeon predicts that the Supreme Court will carve out some sort of exception to the *Garcetti* standards that protects faculty members, though he states that any exception will not be based on an individual right to academic freedom.<sup>260</sup> While an advocate of *Garcetti*, Rosenthal writes that though scholarly speech by faculty members might appear “within the scope of managerial prerogative . . . because they are incidents of academic duties,” the speech at issue involved “public employees acting as agents of the government,” and “[i]t is far from clear that scholarly work can be described in a similar fashion.”<sup>261</sup> Accordingly, even to some generally supportive of *Garcetti*, the decision appears ill suited to apply to the work of faculty members.

The academic freedom policies and standards voluntarily adopted by institutions provide one specific basis upon which to craft an exception to the *Garcetti* standards and also emphasize the special role of government as educator in a higher education context. While often discussed in relation to the professional norms safeguarding academic freedom, the AAUP standards on faculty speech and shared governance<sup>262</sup> which have been

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255. *Id.* at 16.

256. *Id.* at 17.

257. *Id.*

258. *Id.* at 18 (citing *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980)).

259. *Id.* at 20.

260. Spurgeon, *supra* note 188, at 167.

261. Rosenthal, *supra* note 179, at 97.

262. Am. Ass’n of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, in *POLICY DOCUMENTS & REPORTS* 3–4 (9th ed. 2001).

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to adequate performance of their other academic duties . . .

adopted in one form or another by the overwhelming majority of public colleges and universities also could be viewed as relevant to First Amendment faculty claims, especially in light of *Garcetti*. Permitting public colleges and universities, after they have voluntarily adopted policies that encourage faculty members to express their views, to then pick and choose favored and disfavored faculty speech and rely on *Garcetti* to deny faculty legal protection for such invited speech is troubling and turns notions of basic legal fairness on its head.

While the focus of this article is faculty members and their speech, the standard I am discussing could be applied to the *Garcetti* standards more generally, though, as a practical matter, most public employers do not have official speech policies like those adopted by colleges and universities. Even assuming a governmental employer may, in general, exercise almost complete control over employee speech related to official employment duties, it seems reasonable that the employer should be able to relinquish such control and designate an employee as speaking in an individual capacity for First Amendment purposes. That is, an employer's own actions could be viewed as being able to trigger an exception to the general standards announced in *Garcetti*.

The notion that voluntary governmental action may result in constitutional obligations for government in relation to free speech is not novel. Legal standards related to the designated or limited public forum are somewhat analogous to how a public institution's voluntary actions could be viewed as resulting in First Amendment constraints on colleges or universities in relation to their academic freedom policies.<sup>263</sup> While this

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(b) 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 which has not relation to their subject . . . (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

*Id.* at 3–4. The AAUP has also adopted a statement entitled *On the Relationship of Faculty Governance to Academic Freedom*. *Id.* at 224. According to the statement:

The academic freedom of faculty members includes the freedom to express their views (1) on academic matters in the classroom and in the conduct of research, (2) on matters having to do with their institution and its policies, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom . . . . Protecting academic freedom on campus requires ensuring that a particular of faculty speech will be subject to discipline only where that speech violates some central principle of academic morality . . . . *Id.* at 226.

263. Sheldon Nahmod has made similar points in arguing that classroom-related

article does not argue that institutional policies related to faculty speech should be viewed as creating some type of limited or designated public forum,<sup>264</sup> the voluntary nature of the creation of such forums is relevant. Once a college or university chooses to open a limited or designated public forum then it must follow certain constitutional standards in how the forum operates.<sup>265</sup> Similarly, I argue that when a public college or university through official policy encourages and expects its faculty members to espouse independent views in relation to teaching, research, and intramural issues, the institution should have to operate by the speech standards that it has voluntarily established.

Looking to institutional policies as a source of constitutional protection for individual academic freedom does raise several questions. One issue deals with using the standards to help shore up constitutional protection for individual academic freedom rather than looking to such language as only raising contractual concerns. Viewing the policies and standards as only implicating contractual issues would avoid making distinctions between

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speech and scholarship should not be viewed as falling under the *Garcetti* standards. *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 69 (2008). He describes the classroom as “an intentionally created educational forum for the enabling of professorial (and student) speech” as opposed to representing government speech. *Id.* According to Nahmod, faculty scholarship is also not some form of government speech and should be viewed as “an intentionally created metaphorical educational forum for the dissemination of knowledge by academics.” *Id.*

264. My emphasis is to point out the well-established acceptance of the concept that voluntary action by the government can create First Amendment protection for speech. Reasons not to extend an analogy with the designated or limited public forum too far involve uncertainties that generally exist with forum analysis and the fact that courts have been reluctant to apply forum analysis to the classroom and certain other educational contexts.

A designated public forum is one that the government, though not required to, has opened to the public. Once the forum has been created, however, the same governmental restrictions that exist with a traditional public forum come into play. But when the government limits access to a forum it has voluntarily created, based on subject matter or particular groups such as student organizations, this gives rise to what has been termed the “designated limited public forum” or “limited public forum[.]” Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1403–04 (2001) or “limited-purposed designated public forum.” Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1149 (2005). Some commentators do not even consider the limited public forum (or limited designated public forum) a meaningful subset of forum analysis, with one writer describing it as “a doctrinally incoherent concept.” Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 449 (2006). Other questions also exist regarding distinctions dealing with forums and the government as “regulator” versus when the government is exercising more of a communicative role. *See generally* Bezanson & Buss, *supra*. In addition to these general issues regarding forum analysis, courts have also been resistant to extended forum analysis to the “school, curriculum, laboratory, and the classroom.” Bezanson & Buss, *supra*, at 1422.

265. *See, e.g.,* *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981).

faculty members in public colleges and universities and those in private institutions. Another issue involves the ability of institutions to alter the terms of these policies as a way to restrict the academic freedom rights of faculty members. An additional question relates to whether relying on institutional speech policies for First Amendment academic freedom purposes would elevate other institutional policies to some sort of constitutional status.

In relation to contractual standards and institutional standards, while suggesting that academic freedom policies should trigger First Amendment concerns, I am not necessarily opposed to the contractual approach and view it as an option with merit to blunt the potential impact of *Garcetti*. To strengthen the connection between institutional academic freedom policies and contractual obligations to faculty members, some advocates support the insertion of language in contracts or collective bargaining agreements which would emphasize this relationship.<sup>266</sup> While not addressing the issue at length, I suggest, however, that some difficulties might arise with reliance on contract principles. One potential pitfall is that institutions would be able to tweak the language in individual contracts or of small numbers of faculty members without drawing as much attention as an alteration to an institution-wide policy. This might be especially true for faculty members who fill contingent teaching positions.

Another potential problem is that courts, in applying the *Garcetti* standards, may not look to such policies as raising a legal impediment through contractual principles. In *Hong*, for instance, the court referred to official institutional policies concerning teaching, research, and service to describe the official employment duties of faculty members broadly.<sup>267</sup> But the court seemingly ignored institutional policy statements that referred to academic freedom standards for faculty members in carrying out their employment duties.<sup>268</sup> The court did not find such language regarding

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266. Peter Schmidt, *Under Multiple Assaults, Academic Freedom is Poorly Defended, Scholars Warn*, CHRON. HIGHER EDUC., June 22, 2009, available at <http://chronicle.com/article/Under-Multiple-Assaults-Ac/444498>. The article, covering an AAUP conference on academic freedom and shared governance, notes how Richard J. Peltz, a professor of law at the University of Arkansas at Little Rock, sought to have additional language added to faculty contracts to cover faculty speech related to intramural issues such as student advising. *Id.*

267. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1166–67 (C.D. Cal. 2007).

268. See, for example, UNIV. OF CAL. OFFICE OF THE PRESIDENT, ACADEMIC PERS. MANUAL 010, (1995), available at <http://www.ucop.edu/acadadv/acadpers/apm/apm010.pdf>, which states:

The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University's fundamental mission, which is to discover knowledge and to disseminate it to its students and to society at large. The principles of academic freedom protect freedom of inquiry and research, freedom of teaching, and freedom of expression and publication. These freedoms enable the University to advance



academic freedom important to mention when describing a faculty member's official employment duties. Despite noting some potential problems, I am not suggesting these kinds of concerns are insurmountable, only that viewing academic freedom policies as limited to contractual concerns may make it easier and/or more likely for institutions to weaken possible legal protections otherwise provided through such policies.

The issue of creating differences in the legal treatment between public and private institutions is also one reason to rely on contractual principles. Byrne, as pointed out, has argued that avoiding such distinctions between faculty members at public and private colleges and universities is one mark against individual academic freedom.<sup>269</sup> As discussed previously, however, significant differences may exist in the type of institutional academic freedom possessed by public and private institutions.<sup>270</sup> Institutional protection for academic freedom as a mechanism to protect ultimately the academic freedom of individual faculty members may fall short in relation to public colleges and universities. These institutions may not be able to assert institutional academic freedom as the kind of shield from external interference Byrne envisions.

Besides the fact that important differences may exist between constitutional academic freedom for public and private institutions in relation to state government, public colleges and universities may also face pressure from external governmental actors because of their state-supported status, which is not present at private institutions. Legislators, for instance, may be more likely to assume a prerogative, with some justification, to affect the internal operations of a public college or university. Thus, these institutions might possess less constitutional protection for institutional academic freedom to protect their faculty members but then also be subject to more external pressure from state governmental actors. Giving a constitutional dimension to the academic policies and standards at public institutions which protects individual academic freedom provides one

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knowledge and to transmit it effectively to its students and to the public. The University also seeks to foster in its students a mature independence of mind, and this purpose cannot be achieved unless students and faculty are free within the classroom to express the widest range of viewpoints in accord with the standards of scholarly inquiry and professional ethics. The exercise of academic freedom entails correlative duties of professional care when teaching, conducting research, or otherwise acting as a member of the faculty.

*Hong*, of course, dealt with a First Amendment analysis, and the court did not engage in a contractual analysis regarding these policies. Perhaps one lesson from cases such as *Hong* and *Renken* is that faculty claimants need to raise contractual claims based on academic freedom policies when challenging regulation of faculty speech under *Garcetti*. Another potential message is that faculty members may need to make sure that such academic freedom statements are clearly incorporated into faculty contracts as a matter of standard practice or into collective bargaining agreements.

269. Byrne, *supra* note 27, at 299.

270. See *infra* Part IV.B.

avenue to counterbalance some of these forces.

Another issue deals with the ability of colleges and universities to alter their academic freedom policies and standards, and this also raises an interesting point. Holding aside the fact that other constitutional grounds may exist to protect individual academic freedom independent of such policies, there are good reasons to think that institutions would not lightly seek to alter their academic freedom policies. I do not assume that institutions are run by officials actively seeking to subvert the intellectual freedom of professors. Instead, a premise of the article is that most institutional officials and officers generally support the academic freedom of individual professors. I am viewing the policies as a safeguard to protect individual faculty members when the normal operation of the peer review system has gone awry.

Beyond this general institutional support for individual academic freedom, however, several other factors would also likely make institutions hesitant to repeal or revise significantly their academic freedom standards. Byrne and Horowitz highlight the importance of colleges and universities adhering to accepted professional norms and standards as a condition of receiving constitutional academic freedom for institutional decisions.<sup>271</sup> A college or university that strays from its academic freedom policies and standards has arguably lost a major justification to rely on institutional academic freedom under the First Amendment. Additionally, a school that has retreated from academic freedom for individual faculty members would lose not only institutional prestige but also diminish its ability to attract and retain high quality academic talent.

As an additional matter, vesting institutional academic freedom policies with a constitutional dimension does not automatically elevate all other institutional policies to some kind of constitutional significance. I suggest that the close relationship of these policies to speech and academic freedom, areas clearly touching on matters of First Amendment concern, raise particular constitutional issues, ones not necessarily present with other types of institutional policies and standards. In particular, institutional academic freedom policies could provide something of a constitutional counterbalance to the *Garcetti* standards in public higher education, where the decision's standards appear ill suited to apply to faculty speech. In a more general sense, I am suggesting that at least one avenue to construct a sensible exception to *Garcetti* could come from recognizing that a public employer (a college or university for purposes of this article) may waive some or much of its autonomy over employee speech. This waiver of employer control over speech could be viewed as the constitutional trigger that permits an institution's academic freedom policies to have constitutional significance.

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271. Byrne, *supra* note 27, at 308; Horowitz, *supra* note 172, at 1518.

Public colleges and universities have adopted official policies and standards, based on accepted professional norms in higher education, that encourage faculty members to speak as independent voices. In *Garcetti*, the Supreme Court simply did not consider the potential constitutional implications of such an official employee speech policy. Once a public college or university has sought to encourage faculty speech, essentially creating a sort of free speech zone for professors, it should not then be allowed arbitrarily to select favored and disfavored speech. Viewing institutional academic freedom policies as triggering constitutional protection for faculty speech and preventing application of the *Garcetti* standards recognizes that schools have not hired professors to serve simply as institutional spokespersons. *Garcetti* is premised on the notion that public employees are speaking for their employers,<sup>272</sup> but faculty members are hired because of their educational background and special expertise to engage in independent thought and speech.<sup>273</sup>

In relation to government speech cases and the view I am offering of faculty speech as distinct from that of many public employees, consideration of *Rust v. Sullivan*<sup>274</sup> is useful. In *Rust*, the Supreme Court upheld regulations that limited physicians and other employees in federally supported family planning facilities from giving information about abortion-related services as part of family planning counseling.<sup>275</sup> The Court held that the government could choose to favor a particular view when it was acting as the speaker:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>276</sup>

One way to consider application of the *Rust* principles to our discussion of institutional academic freedom policies and standards is to reflect on the case's outcome under an altered set of governmental regulations. What if the rules at issue had expressly encouraged physicians to provide

272. *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

273. See, e.g., Areen, *supra* note 72, at 991–92 (“The job of faculty is to produce and disseminate new knowledge and to encourage critical thinking, not to indoctrinate students with ideas selected by the government.”); Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1, 62 (2004) (stating that “the current version of the public employee speech doctrine . . . is an uncomfortable and uneven fit between the purposes of higher education and the principles of the First Amendment”).

274. 500 U.S. 173 (1991).

275. *Id.* at 177–78.

276. *Id.* at 193.

counseling related to family planning without restriction other than adhering to accepted professional standards, but government officials had then, with no prior warning, chosen to retaliate against physicians who, for our speculative purposes, had decided to provide information and counseling regarding adoption as one family planning option? The facts, of course, were not so in *Rust*, but such a scenario is much more akin to permitting colleges and universities to rely on *Garcetti* and cases like *Rust* despite the fact that faculty members have been offered an invitation through official institutional policy to engage in free speech, consistent with professional norms, in carrying out their employment duties.

Constitutional standards related to academic freedom and faculty speech should reflect the fact that public colleges and universities have voluntarily adopted policies and standards meant to safeguard and promote intellectual freedom for faculty members. Courts should take these policies and practices into account when assessing speech claims by faculty members, including the applicability of the *Garcetti* standards to faculty speech. Permitting institutional officials in an arbitrary manner to select favored and disfavored speech despite the existence of academic speech policies, rather than simply respecting the managerial prerogative, actually undercuts the roles and missions of public colleges and universities.

#### B. Academic Standards and Judicial Scrutiny of Individual Academic Freedom Claims

Giving more legal weight to the academic freedom policies and standards adopted by institutions could play a useful role as well in establishing standards for courts to follow when dealing with professors' speech claims. Some commentators have already looked to professional practices and norms and institutional missions as a basis to structure judicial inquiry into individual academic freedom claims. Accordingly, in addition to providing a potential justification for constitutional protection for individual academic freedom and limiting application of the *Garcetti* standards to faculty speech, institutional policies could provide guidance as well in crafting workable legal standards in relation to faculty speech claims.

Chen proposes a germaneness test for individual academic freedom, defining "germaneness as the degree or closeness of connection between an individual academic's speech or the state's interest in restricting that speech and a specifically articulated component of the university's academic mission."<sup>277</sup> For this approach to have "teeth," Chen states that public colleges and universities must develop their "academic mission interests as specifically as possible."<sup>278</sup> I suggest that the academic

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277. Chen, *supra* note 27, at 976.

278. *Id.* at 978. Rebecca Gose Lynch states that courts should engage in a

freedom policies adopted by numerous public colleges and universities provide an existing source to discern the relevancy or germaneness of an institutional regulation of faculty professional speech. These standards already represent an institutional commitment to adhere to the professional standards related to academic freedom commonly shared and accepted in higher education.

Vesting institutional policies with a certain degree of constitutional significance would not require courts to second guess professional judgments regarding faculty speech made in good faith. Courts would limit their inquiry to make sure that an institution has followed policies and practices already in place. Julie H. Margetta, for example, in contending that institutional academic freedom fails to adequately protect individual faculty members,<sup>279</sup> states that colleges and universities should have to satisfy such a “good faith” standard before being able to restrict the speech of professors.<sup>280</sup> She describes the proposed standard as similar to Byrne’s position regarding how institutions must function to merit institutional academic freedom.<sup>281</sup> Since many public institutions have adopted the AAUP’s standards on academic freedom, courts would not be faced with interpreting wildly divergent policies and practices among public institutions in making a “good faith” inquiry. This consistency in academic freedom policies among institutions provides a standardized framework for accepted professional standards and practices that would aid courts in evaluating whether an institution had acted in good faith in making decisions related to faculty speech.

As Matthew W. Finkin and Robert C. Post discuss, the AAUP’s committee charged with investigating academic freedom violations (known as Committee A)<sup>282</sup> “has systematically developed the principles of the 1915 *Declaration* by applying them to the circumstances of concrete cases. Its decisions have been carefully reasoned and have largely adhered to the rule-of-law discipline of *stare decisis*. Taken together, these decisions provide a rich and useful common law of academic freedom.”<sup>283</sup> It perhaps cannot be overemphasized that this article does not suggest that courts

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“functional necessity” approach in considering whether a college or university “regulation is necessary for the institution to achieve its objectives.” Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 CAL. L. REV. 1061, 1074, 1078 (2003). While perhaps arguing for more of an inquiry than that called for by Chen, Lynch’s proposed standard still would seem to relate to an institution’s established mission and the academic freedom policies and practices it has adopted.

279. Julie H. Margetta, *Taking Academic Freedom Back to the Future: Refining the “Special Concern of the First Amendment,”* 7 LOY. J. PUB. INT. L. 1, 31 (2005).

280. *Id.* at 32–33.

281. *Id.*

282. FINKIN & POST, *supra* note 241, at 1, 48–52.

283. *Id.* at 6.

should displace the system of peer review established in higher education. Rather, this system provides a set of established standards to evaluate whether institutions have acted in good faith in following their voluntarily adopted statements and policies related to academic freedom. Finkin and Post point out how “academic freedom has assumed a surprising uniformity of meaning throughout the United States.”<sup>284</sup> The role of courts, then, would not be to supplant accepted professional standards, but to make sure that institutions had acted in good faith and followed commonly accepted academic freedom norms and practices when assessing a faculty member’s speech claim.

Looking to the widely accepted professional norms in higher education related to academic freedom that have been incorporated through institutional policies and practices would also help courts make useful legal distinctions in a good faith inquiry regarding faculty speech related to research and scholarship, to the classroom and teaching, or to intramural contexts such as that taking place in departmental meetings. In relation to scholarship, the peer review process requires institutions to make content-based judgments concerning the quality of a faculty member’s scholarship. Recognition of legal protection for scholarship-related speech would still permit institutions to make the kinds of content-based decisions that are integral to the peer review process and academic life.

Limitations on institutional discretion would arise when a college or university takes action against a faculty member based on his or her scholarship outside the normal channels of the peer review process. For example, a decision not to renew a professor’s contract because of displeasure with the faculty member’s research by an influential state legislator would not be permitted. At the same time, courts would not be placed in the position of second guessing good faith professional evaluations of scholarship that are part and parcel of the peer review process. As Byrne states, courts are not well suited to engage in such independent inquiries of academic speech, especially that related to scholarship,<sup>285</sup> but a standard based on ensuring that a college or university had followed accepted professional practices as voluntarily adopted in institutional policy would not place courts in such a position.

In the context of intramural speech, where institutions have already relied on *Garcetti* in responding to faculty speech claims,<sup>286</sup> academic freedom policies and shared governance statements adopted by numerous institutions suggest that faculty members should enjoy considerable protection for this category of speech. While institutions should arguably enjoy latitude in such matters as requiring a certain level of civility in

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284. *Id.* at 52.

285. *Id.* at 305–06.

286. See *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

intramural speech as an attribute of professional conduct, if a college or university has adopted policies that encourage faculty members to engage in open discourse in relation to an institution's internal affairs, then it should arguably not be able to rely on *Garcetti* once a faculty member has accepted the invitation to engage in free speech. The institution should not be able, after the fact, to withdraw an invitation to speak freely on intramural matters simply because it does not approve of the views expressed by a particular faculty member. Absent an important institutional interest, such as prohibiting abusive language that falls outside the boundary of acceptable professional behavior, the institution would not be able to punish faculty members for the content of their intramural speech.

The classroom environment and teaching-related speech represents a somewhat thornier context to establish a workable standard for courts to employ when faced with an individual academic freedom claim by a faculty member. Faculty members arguably should not have unilateral control over the classroom, at least from a constitutional perspective, and legitimate institutional interests should be recognized. Still, the policies and practices adopted by institutions could still provide courts with guidance on how to address academic freedom claims related to teaching and the classroom. As with other types of faculty speech, the key inquiry for courts would be to assess whether a college or university had followed its own policies and practices and adhered to the accepted professional norms that undergird such institutional policies.

Buss discusses that university policies and practices may create a classroom environment that is akin to a limited public forum for purposes of a faculty member's speech.<sup>287</sup> While this article does not take such a position, at a minimum, a faculty member's speech based on his or her professional expertise would seem most likely to garner protection. In assessing claims involving faculty speech in the classroom, courts could also recognize that in teaching-related matters, institutional interests merit considerable weight, even if professors have been granted substantial discretion under relevant institutional policies and standards. For instance, as in *Parate*, the court determined that the assigning of a grade represented a form of communication on the part of the professor, but still allowed the institution discretion to change a grade assigned by the professor.<sup>288</sup> Providing some degree of First Amendment protection for classroom speech by faculty members does not mean ignoring important institutional interests. Just as with faculty speech related to scholarship and intramural matters, though, public colleges and universities should be made to adhere to their own standards.

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287. William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 276-77 (1999).

288. *Parate v. Isibor*, 868 F.2d 821, 827-28 (6th Cir. 1989).

Academic freedom policies indicate a public institution's intent to permit open dialogue, along accepted professional norms and practices, for its faculty members. These policies, resting on a commonly accepted set of academic values in higher education, provide a basis for courts to make an inquiry regarding whether an institution acted in good faith in relation to regulating faculty speech. Instead of substituting their own version of the peer review process, courts could limit their inquiry into making sure that a public college or university had honored an institutional commitment to respect standards of academic freedom that are commonly shared and embraced in higher education.

#### VI. CONCLUSION

First Amendment protection for academic freedom represents a contested issue, and the *Garcetti* decision further roiled the constitutional waters regarding individual academic freedom for professors at public colleges and universities. While some scholars and courts argue that the institution represents the appropriate concern of constitutional academic freedom, such a position may fail to protect sufficiently the intellectual freedom of faculty members at public colleges and universities, especially given the potential impact of *Garcetti*. This article suggests that courts should give greater legal consideration to the academic freedom policies and standards adopted by institutions as a basis to exclude faculty members at public colleges and universities from the purview of *Garcetti* and to provide some degree of First Amendment protection for faculty speech.

Rather than second guessing the peer review process and good faith academic decisions by schools, courts would inquire whether a public college or university had adhered to standards voluntarily adopted by the institution. Given the widespread acceptance by colleges and universities of a common set of professional norms related to academic freedom, courts would not be faced with construing widely divergent standards. Drawing upon notions of academic freedom commonly shared in higher education, courts would assess whether a college or university had in acted in good faith in making decisions related to a faculty member's speech.



# DOCUMENTING LEARNING DISABILITIES: LAW SCHOOLS' RESPONSIBILITY TO SET CLEAR GUIDELINES

SUSAN E. MCGUIGAN\*

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## INTRODUCTION

*In his freshman year of college, Tommy was diagnosed with a learning disability. A school psychologist, using two primary test instruments for adults,<sup>1</sup> determined that, while Tommy's aptitude was strong, he displayed significant weaknesses in several areas and suffered from a Mathematics Disorder (DSM-IV-TR, 315.1) and a Disorder of Written Expression (DSM-IV-TR 315.2).<sup>2</sup> The college's office of disability services granted Tommy accommodations, including lengthy assignments broken down into smaller components, extended time for written tests, and a peer note taker. Tommy blossomed, successfully graduating from college with honors. After six months in the workforce, Tommy decided to apply to law school. He applied and was accepted at four prestigious law schools. To help make his decision as to which school to attend, Tommy searched each law school's website for information about receiving help for his learning disability. For one school he gave up after finding no*

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1. Woodcock-Johnson Psychoeducational Battery-Revised: Test of Cognitive Ability and Test of Achievement.

2. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 53-56 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

*information. One school referred him to its Disabilities Services Office for a copy of its Disability Policy. The two other schools each had somewhat different policies for what documentation was necessary to establish eligibility for accommodations for his learning disability. Both required that tests for learning disabilities be conducted by a licensed physician or clinical psychologist or an adult learning disability specialist but each recommended different adult testing instruments. Furthermore, one school required that the documentation not be more than three years old, while the other school recommended that testing be completed within the past five years. It appeared probable that neither school would accept his previous documentation. Costs for additional testing might reach \$1,500 and might take several months to complete.*

Tommy's situation is not unique. Every year, several thousand individuals who have received accommodations during college move onto graduate and professional schools and face the daunting task of demonstrating anew that they have a disability under the framework of the Americans with Disabilities Act (ADA).<sup>3</sup> Because of the differences between the Individuals with Disabilities Education Act (IDEA)<sup>4</sup> and the ADA,<sup>5</sup> students' transition from high school to college and college to graduate or professional school is not often a smooth one.<sup>6</sup> This is particularly true for students with learning disabilities.

Central to a postsecondary educational institution's inquiry into whether it should and is able to accommodate a student who claims to have a learning disability is the initial determination as to whether the student is an individual with a disability under Title II or III of the ADA. This

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3. National Center for Education Statistics, Digest of Educational Statistics: 2007, Table 221: Number and percentage of students enrolled in postsecondary institutions, by level, disability status, and selected student characteristics: 2003–04 (Mar. 2008), [http://nces.ed.gov/programs/digest/d07/tables/dt07\\_221.asp?referrer=list](http://nces.ed.gov/programs/digest/d07/tables/dt07_221.asp?referrer=list) (last visited Nov. 7, 2009). In fact, many graduate students, because their giftedness and work ethic in college tend to mask underlying learning disabilities, are first diagnosed with learning disabilities during graduate school. Loring C. Brinckerhoff, Joan M. McGuire & Stan F. Shaw, *Determining Eligibility for Services and Testing Accommodations*, in POSTSECONDARY EDUCATION AND TRANSITION FOR STUDENTS WITH LEARNING DISABILITIES 215, 218 (2d ed. 2002) [hereinafter POSTSECONDARY EDUCATION].

4. Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400–87 (West 2000 & Supp. 2009) [hereinafter IDEA].

5. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009) [hereinafter ADA].

6. NATIONAL JOINT COMMITTEE ON LEARNING DISABILITIES (NJCLD), THE DOCUMENTATION DISCONNECT FOR STUDENTS WITH LEARNING DISABILITIES: IMPROVING ACCESS TO POSTSECONDARY DISABILITY SERVICES 2 (July 2007), [http://www.ahead.org/uploads/docs/resources/njld\\_paper.pdf](http://www.ahead.org/uploads/docs/resources/njld_paper.pdf) [hereinafter DOCUMENTATION DISCONNECT].

Article asks whether law schools, or their associated universities, have employed adequate guidelines to identify for their students the type and content of documentation necessary to demonstrate that a learning disability is a “disability” under the ADA.

Part II will review the meaning of “disability,” evaluating clinical definitions of learning disability and focusing on the disability-related statutes which apply to education, including the IDEA and the ADA. Part III will describe the deficiencies currently existing in documentation and analyze the components of documentation necessary to establish the existence of a learning disability. Part IV will look at the legal requirements for postsecondary educational institutions’ guidelines for documenting disabilities. Part V will evaluate the efficacy of current law school disability documentation guidelines and Part VI will propose more effective guidelines for documenting learning disabilities.

### I. THE MEANING OF DISABILITY

For an educational institution to determine whether a student can receive disability services, the disability services provider must first assess whether the student has a disability under the relevant law, not an easy task given the disparate definitions of learning disability in clinical and legal authority. Not only do diagnosticians disagree as to how to determine whether a learning disability exists, but professionals assessing whether a student has a learning disability face strikingly different legal treatment of disabilities under the IDEA special education model versus the disability and accommodation framework of the ADA and the Rehabilitation Act.

#### A. Learning Disabilities

Before 1962, learning disabilities were not generally recognized by the medical community.<sup>7</sup> Since that time, however, while professional understanding of learning disabilities has evolved, there is still no set agreement on a consistent clinical definition of learning disabilities.<sup>8</sup> Part of the difficulty arises from the different disciplines contributing to the

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7. Barbara J. Lorry, *Language-Based Learning Disabilities, in ACCOMMODATIONS IN HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT (ADA): A NO-NONSENSE GUIDE FOR CLINICIANS, EDUCATORS, ADMINISTRATORS, AND LAWYERS* 130, 131 (Michael Gordon & Shelby Keiser eds., 2000) [hereinafter *ACCOMMODATIONS IN HIGHER EDUCATION*]. Dr. Samuel Kirk offered the first definition of learning disability in his textbook, *Educating Exceptional Children*. Donald D. Hammill, *On Defining Learning Disabilities: An Emerging Consensus*, 23 *J. LEARNING DISABILITIES* 74, 75 (1990).

8. Jim Brackett & Anne McPherson, *Learning Disabilities Diagnosis in Postsecondary Students: A Comparison of Discrepancy-Based Diagnostic Models, in ADULTS WITH LEARNING DISABILITIES: THEORETICAL AND PRACTICAL PERSPECTIVE* 68, 69 (Noel Gregg, Cheri Hoy & Alice F. Gay eds., 1996) [hereinafter *ADULTS WITH LEARNING DISABILITIES*]. Nearly a dozen different definitions of learning disabilities have been proposed over the past 40 years. See Hammill, *supra* note 7, at 75–79.

understanding of learning disabilities: medicine, education, psychology, and speech and language pathology.<sup>9</sup> Of the many definitions of learning disability, several are most commonly accepted. One of the most frequently used definitions that reflects a medical or psychological approach to learning disability is expressed in the American Psychiatric Association's Diagnostic and Statistics Manual (DSM).<sup>10</sup> The DSM-IV, the most recent edition, defines "learning disorder," as follows: "when the individual's achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence. The learning problems significantly interfere with academic achievement or activities of daily living that require reading, mathematical, or writing skills."<sup>11</sup> These learning difficulties can last through adulthood.<sup>12</sup> A DSM-IV diagnosis of a learning disorder generally requires that there be a significant discrepancy between cognitive ability and academic achievement, defining significant discrepancy as more than two standard deviations.<sup>13</sup>

Under an educational approach to learning disabilities, the United States Office of Education's definition of learning disability governs diagnosis of learning disability for school-aged children.<sup>14</sup> Originally developed in 1976, the Office of Education's definition of "specific learning disability" had developed over time. "Specific learning disability" is currently defined in the regulations as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."<sup>15</sup> Because this definition was developed for the limited purpose of guiding state agencies in adopting criteria to determine if children were eligible for special education, it was never intended to be used outside this context or to serve as a "comprehensive theoretical statement about the nature of learning disabilities."<sup>16</sup>

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9. See Donald D. Hammill, *A Brief Look at the Learning Disabilities Movement in the United States*, 26 J. LEARNING DISABILITIES 295, 299–301 (1993); see also Laura E. Naistadt, *Understanding Learning Disabilities*, 42 S. TEX. L. REV. 97, 100–01 (2000).

10. See Naistadt, *supra* note 9, at 100.

11. DSM-IV-TR, *supra* note 2, at 49. The DSM-IV-TR classifies learning disorders into four categories: 315.00 Reading Disorder, 315.1 Mathematics Disorder, 315.2 Disorder of Written Expression, and 315.9 Learning Disorder Not Otherwise Specified. *Id.* at 49–56.

12. *Id.* at 50.

13. *Id.* at 49–50.

14. Yuri Nicholas Walker, *Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disability Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities*, 15 MARQ. SPORTS L. REV. 601, 605 (2005).

15. 34 C.F.R. § 300.8(c)(10)(i) (2008).

16. Hammill, *supra* note 7, at 77.

Another commonly accepted definition was derived by the National Joint Committee on Learning Disabilities (NJCLD).<sup>17</sup> NJCLD defines the term learning disability as:

a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual and presumed to be due to a central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behaviors, social perception, and social interaction may exist with the learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (for example, sensory impairment, mental retardation, serious emotional disturbance), or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction) they are not the direct result of those conditions or influences.<sup>18</sup>

Thus, under the NJCLD permutation, learning disabilities involve developmental dysfunctions in the acquisition and use of language that are cognitive, rather than psychiatric or environmental in nature.<sup>19</sup> They are life-long in nature, though the range and severity of the dysfunction may change over time.<sup>20</sup>

Generally, these various definitions seem to have evolved into three diagnostic models of identifying learning disabilities: discrepancy model, clinical model, and the responsiveness to intervention model.

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17. NJCLD is a national committee comprised of eleven organizations concerned about individuals with learning disabilities. NJCLD, Fact Sheet, 1 (2005), [http://www.ldonline.org/pdfs/njclد\\_factsheet.pdf](http://www.ldonline.org/pdfs/njclد_factsheet.pdf).

18. NJCLD, LEARNING DISABILITIES: ISSUES ON DEFINITION 3 (Jan. 28, 1990), <http://www.ldonline.org/?module=uploads&func=download&fileId=514>.

19. Lorry, *supra* note 7, at 132–33.

20. NJCLD, *Operationalizing the NJCLD Definition of Learning Disabilities for Ongoing Assessment in Schools*, in III AM. SPEECH-LANGUAGE HEARING ASS'N, ASHA DESK REFERENCE 258a, 258a–258b (Feb. 1, 1997). Another widely recognized definition of learning disabilities was devised by the Learning Disability Association of America (LDA). After rejecting the NJCLD definition, LDA formulated the following definition: “Specific Learning Disabilities is a chronic condition of neurological origin which selectively interferes with the development, integration, and/or demonstration of verbal and/or nonverbal abilities. Specific Learning Disabilities exist as a distinct handicapping condition and varies[sic] in its manifestations and in degree of severity. Throughout life, the condition can affect self esteem, education, vocation, socialization, and/or daily living activities.” DALE S. BROWN, STEPS TO INDEPENDENCE FOR PEOPLE WITH LEARNING DISABILITIES 8–9 (2005), <http://www.ldaamerica.org/pdf/StepstoIndependence.pdf> (citing Association for Children with Learning Disabilities, *ACLD Description: Specific Learning Disabilities*, ACLD NEWSBRIEFS, Sept.–Oct. 1986, at 15).

### 1. Discrepancy Models

The most commonly accepted means of diagnosing learning disabilities is the discrepancy model.<sup>21</sup> The most frequently employed category of discrepancy focuses on the relative differences between achievement and aptitude, generally using IQ testing as the measure of aptitude.<sup>22</sup> The most common embodiment of this model is expressed in the American Psychiatric Association's Diagnostic and Statistics Manual (DSM). Generally, those diagnosticians working primarily in the elementary and secondary school context use this discrepancy model for diagnosing learning disabilities since this model is inherent in the IDEA.<sup>23</sup>

Despite this model's entrenched use, critics have identified several problems with the discrepancy model. First, using the discrepancy between aptitude and achievement to identify learning disabilities tends to rely only on test scores rather than the underlying difficulties that may be causing the disability.<sup>24</sup> Next, critics argue that the discrepancy model uses intelligence testing as the primary predictor of academic potential, rather than other measures of success such as "social abilities, motivation, socioeconomic status, psychiatric functioning, and circumstances."<sup>25</sup> Additionally, reliance on the aptitude-achievement discrepancy tends to over identify students with above average intelligence and under identify those with below average intelligence.<sup>26</sup> Finally, critics of the discrepancy model claim that its use is inappropriate for adults since learning disabilities can, over time, adversely affect IQ testing and thus decrease the discrepancy despite the clear existence of cognitive difficulties.<sup>27</sup>

### 2. Clinical Model

A second model of determining whether an individual has a learning disability focuses on a more general clinical assessment of a student's condition. The clinical model "integrates (1) quantitative data, (2) qualitative data, (3) self-reported background information, and (4) the clinical judgment of a multidisciplinary team to determine learning disabilities eligible for special services."<sup>28</sup> The clinical assessment model

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21. Cheri Hoy, Noel Gregg, Joseph Wisenbaker, Susan Sigalas Bonham, Michael King & Carolyn Moreland, *Clinical Model versus Discrepancy Model in Determining Eligibility for Learning Disabilities Services at a Rehabilitation Setting*, in ADULTS WITH LEARNING DISABILITIES, *supra* note 8, at 55, 57.

22. Lorry, *supra* note 7, at 133. Three other categories of discrepancy models include: regression, intracognitive, and intraachievement. Hoy et al., *supra* note 21, at 57-58.

23. Lorry, *supra* note 7, at 133.

24. *Id.*

25. *Id.* at 134.

26. Brackett & McPherson, *supra* note 8, at 79.

27. Lorry, *supra* note 7, at 134.

28. Hoy et al., *supra* note 21, at 58.

relies not just on test scores, but on a combination of factors to assess whether a student has a learning disability. A clinical approach permits the dynamic assessment of the nature of learning by considering various factors including gender, age, ethnicity, motivation, experience, etc., that impact a student's learning.<sup>29</sup> Clinical assessment provides background information that gives a more thorough understanding of the individual student's learning strengths and weaknesses while at the same time differentiating between non-learning disabled, underprepared, underachieving students and actual learning disabled students.<sup>30</sup>

### 3. Responsiveness to Intervention Model

More recently, in response to concerns about the ability-achievement discrepancy model, researchers have proposed an alternative model for assessing and implementing special education services: responsiveness to intervention (RTI).<sup>31</sup> Under RTI, a student who demonstrates significantly low achievement and insufficient responsiveness to "high quality, scientific, research-based intervention" may be regarded as a student with a disability who should be referred for special education.<sup>32</sup> The underlying assumption in RTI is that a student without disabilities will generally respond to high caliber remedial instruction.<sup>33</sup> The IDEA now permits schools to determine that a student has a learning disability without using the discrepancy model by using a "process that determines if the child responds to scientific, research based-intervention as a part of evaluation."<sup>34</sup> RTI is not without its problems, however. Multiple methods of assessing responsiveness are used to determine which students do not respond to intervention, possibly yielding "different subgroups of responsive and nonresponsive children with similar or dissimilar profiles of disability."<sup>35</sup> RTI's relevance to middle and high school students and

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29. *Id.* at 58, 65.

30. Brackett & McPherson, *supra* note 8, at 81.

31. NJCLD, RESPONSIVENESS TO INTERVENTION AND LEARNING DISABILITIES 2 (June 2005), <http://www.ldonline.org/about/partners/njclcd#reports> [hereinafter RESPONSIVENESS].

32. *Id.* at 1, 5. Generally, under RTI, children who do not perform at their grade level are exposed to three or four tiers of increasingly more specialized instruction. If these children do not respond after this intervention, they may be designated as students with learning disabilities who need special education. Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 127-29 (2009).

33. RESPONSIVENESS, *supra* note 31, at 1.

34. IDEA, 20 U.S.C.A. § 1414(b)(6)(A) (West Supp. 2009). To identify children with learning disabilities, researchers suggest that RTI be used in conjunction with an assessment of low achievement and the application of exclusionary criteria to rule out other causes of low achievement. Jack M. Fletcher & Sharon Vaughn, *Response to Intervention: Preventing and Remediating Academic Difficulties*, 3 CHILD DEV. PERSPECTIVES 30, 35 (2009).

35. Donald Fuchs & Donald D. Deshler, *What We Need to Know about Responsiveness to Intervention (and Shouldn't Be Afraid to Ask)*, 22 LEARNING

beyond and its application to disciplines other than early reading also present issues yet to be addressed.<sup>36</sup>

While there exists some agreement among experts in the learning disability community as to the major attributes of a learning disability, the lack of consensus as to the appropriate diagnostic criteria makes the translation from the clinical to the legal even more difficult.

#### B. Individuals with Disabilities Education Act and the Americans with Disabilities Act

Regardless of a professional's diagnosis of learning disability under any clinical definition, a student must still demonstrate that she is an individual with a disability under the appropriate legal framework. In the educational context, three federal statutes address students with disabilities' access to education: the Individuals with Disabilities Education Act (IDEA),<sup>37</sup> which governs preschool, elementary, and secondary school students,<sup>38</sup> section 504 of the Rehabilitation Act,<sup>39</sup> which applies to elementary, secondary and postsecondary educational programs which receive federal funding,<sup>40</sup> and the Americans with Disabilities Act (ADA),<sup>41</sup> which pertains primarily to both public and private postsecondary educational institutions.<sup>42</sup> Even though the IDEA, the Rehabilitation Act, and the ADA all address the rights of students with disabilities, little relationship exists between who is entitled to services under the IDEA and who is disabled under the Rehabilitation Act and ADA.

The purpose of the IDEA is to provide equal educational opportunities for all children. Under the IDEA, every child with a disability is entitled to a "free appropriate public education."<sup>43</sup> Students are qualified for services because of their attendance at school and the confirmed presence of a disability.<sup>44</sup> To receive special education and other related services, a child

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DISABILITIES 129, 133 (2007); *see also* MARK C. WEBER, UNDERSTANDING DISABILITY LAW 104 (2007).

36. Fuchs & Deshler, *supra* note 35, at 134; Weber, *supra* note 32, at 136–38.

37. IDEA, 20 U.S.C.A. §§ 1400–87 (West 2000 & Supp. 2009).

38. *Id.* § 1401(9)(C) (West Supp. 2009).

39. Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701–96 (West 2008 & Supp. 2009).

40. *Id.* § 794 (West 2008).

41. ADA, 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009).

42. *Id.* § 12131(1)(B) (West 2005) (applies to public entities, instrumentalities of state), § 12181(7)(J) (West 2005) (applies to public accommodations, undergraduate or postgraduate private schools).

43. IDEA, 20 U.S.C.A. § 1400(d)(1)(A) (West Supp. 2009).

44. Jo Ann Simon, *Legal Issues in Serving Postsecondary Students with Disabilities*, 21 TOPICS IN LANGUAGE DISORDERS 1, 2, 4 (2001). The zero reject principle provides that school districts must provide all age-eligible children with special education; *see also* Laura Rothstein, *Judicial Intent and Legal Precedents*, in POSTSECONDARY EDUCATION, *supra* note 32, at 71, 73.



must be a “child with a disability,” which is defined as a child who needs special education and related services because of various impairments including specific learning disabilities.<sup>45</sup> Specific learning disabilities means: “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”<sup>46</sup> The burden is on the school district to identify and evaluate a student’s disability.<sup>47</sup>

A child can be identified as having a specific learning disability if the child does not achieve adequately for the child’s age or grade level in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving.<sup>48</sup> The child’s inadequate performance is judged by using either “a process based on the child’s response to scientific, research-based intervention”<sup>49</sup> or by considering “a pattern of strengths and weaknesses in performance, achievement, or both” relative to the child’s age, grade level, or intelligence.<sup>50</sup> In the alternate, the IDEA allows schools to provide services based on a general designation as “child with a disability.”<sup>51</sup> Once a student’s disability is classified, school personnel, in conjunction with counselors and parents, must develop an Individualized Education Program (IEP) for each student,<sup>52</sup> ensuring that each student receives “specially

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45. IDEA, 20 U.S.C.A. § 1401(3)(A)(i–ii) (West Supp. 2009).

46. *Id.* § 1401(30); *see also* 34 C.F.R. § 300.8(c)(10)(i) (2008). Types of learning disabilities include: “perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” § 1401(30)(B).

47. Joseph W. Madaus & Melissa M.R. Madaus, *Effective Practices for the Documentation of Learning Disabilities at the Postsecondary Level*, 11 LEARNING DISABILITIES 31, 31 (2001); IDEA, 20 U.S.C.A. § 1414(a)(1)(A).

48. 34 C.F.R. § 300.309(a)(1)(i)–(viii) (2008).

49. *See supra* notes 31–36 and accompanying text.

50. 34 C.F.R. § 300.309(a)(2)(ii). A learning disability cannot be attributed to lack of appropriate instruction, a visual, hearing, or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. *Id.* § 300.309 (a)(3)–(b). Regulations implementing the most recent amendments to the IDEA mandate that states adopt new criteria for determining whether a child has a specific learning disability. Because of the trend away from the discrepancy model to identify learning disabilities, the Department of Education dictated that states could not require “the use of a severe discrepancy between intellectual ability and achievement,” “must permit use of process based on the child’s response to scientific, research-based intervention,” and may use other, alternative ways of determining that a child has a learning disability. *Id.* § 300.307(a)(1)–(3).

51. Children ages three through nine can be classified as children with disabilities if they have been appropriately diagnosed as experiencing delays in physical, cognitive, communication, social, emotional, or adaptive development so as to need special education and related services. IDEA, 20 U.S.C.A. § 1401(3)(B)(i)–(ii).

52. IDEA, 20 U.S.C.A. § 1414(d).

designed instruction to meet [his or her] unique needs.”<sup>53</sup>

In contrast, the stated purpose, structure, and content of the ADA, and the Rehabilitation Act before it, are intended to redress potential wrongs, to ensure that individuals with disabilities are not excluded from or denied the benefits of programs, and are not subject to discrimination.<sup>54</sup> The ADA provides equivalent access to existing programs, not separate special education.<sup>55</sup> Based on Section 504 of the Rehabilitation Act of 1974,<sup>56</sup> Congress passed the Americans with Disabilities Act in 1990.<sup>57</sup> The purpose of the ADA is to thwart discrimination against qualified individuals with a disability, because of that disability, in the context of employment,<sup>58</sup> education, government entities, and other public accommodations.<sup>59</sup> Public entities, including public colleges and universities fall under Title II;<sup>60</sup> public accommodations, including private undergraduate and graduate institutions, are addressed by Title III.<sup>61</sup>

All Titles of the Act set out three ways an individual can be considered an individual with a disability: an individual with a present disability, one demonstrating a record of a disability, or one perceived as having a disability.<sup>62</sup> Under each means of demonstrating disability, disability

53. *Id.* §1401(d)(1)(B)(iv)(I); *see also id.* § 1401(29).

54. ADA, 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009).

55. Simon, *supra* note 44, at 2.

56. The purpose of the Rehabilitation Act is to “empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.” 29 U.S.C.A. § 701(b)(1) (West 2008). The Rehabilitation Act applies to programs that receive federal financial assistance. *Id.* § 794(a). It now imports the ADA definition of an individual with a disability into its construction. *Id.* § 705(20)(B).

57. ADA, 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009).

58. Title I of the ADA applies to employment prohibiting discrimination “against a qualified individual with a disability because of a disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* § 12112(a).

59. *Id.* § 12101(a)(3).

60. *Id.* § 12132. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” *Id.*

61. *Id.* § 12182. Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.* Title III does not apply to private, postsecondary institutions controlled by religious organizations. *Id.* § 12187. If, however, private schools run by religious organizations receive federal financial assistance, they are obligated not to discriminate against individuals with disabilities under the Rehabilitation Act, 29 U.S.C.A. § 794. *See Cain v. Archdiocese of Kan. City*, 508 F. Supp. 1021, 1023 (D. Kan. 1981).

62. 42 U.S.C.A. § 12102(2).

means “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>63</sup> Under courts’ interpretation of the ADA, there is no presumption that an individual has a disability.<sup>64</sup> The burden lies with the individual to self-identify and provide adequate documentation of his or her disability.<sup>65</sup> An individual who meets the definition of disability is entitled to be free from discrimination, but is not necessarily entitled to accommodations.<sup>66</sup>

### C. ADA Case Law & Regulations

Significant case law and a number of regulations have spoken to the requirements for establishing that an individual has a disability under the ADA. Generally, the ADA definition of disability, “a physical or mental impairment that substantially limits one or more major life activities,” embodies three major concepts: impairment, major life activity, substantial limitation, and two interrelated ideas: the effect of mitigating measures on the impairment and the comparison group used to assess whether an impairment is substantially limiting.

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63. *Id.* § 12102(2)(A). Although this language only appears in the “present” disability category, courts have incorporated this definition into their analysis of whether a person has a record of a disability or is perceived as having a disability. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

64. Before the ADA was passed, courts interpreting the Rehabilitation Act generally accepted a plaintiff’s assertion that she or he was handicapped. *Cf. Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 281–86 (1987). Recent amendments to the ADA have now attempted to restore that presumption. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008) (“[T]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”).

65. Madaus & Madaus, *supra* note 47, at 31.

66. See Joan M. McGuire, *Educational Accommodations: A University Administrators View*, in ACCOMMODATIONS IN HIGHER EDUCATION, *supra* note 7, at 20, 26–27. An entity cannot establish discriminatory eligibility criteria “unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.” 42 U.S.C.A. § 12182(b)(2)(A)(i). Likewise, places of public accommodation must make reasonable modifications in their policies, practices, and procedures, and must take steps to ensure no individual is denied services, unless that entity can demonstrate that doing so would fundamentally alter the nature of its goods, services, or facilities or would result in an undue burden. *Id.* § 12182(b)(2)(A)(ii)–(iii).

Interpreting the “regarded as” prong of the definition of disability, a number of cases ruled that individuals who were only “regarded as” having an impairment were entitled to accommodations. See David K. Fram, *The ADA Amendments Act: Dramatic Changes in Coverage*, 26 HOFSTRA LAB. & EMP. L.J. 193, 219–20 n. 298 (2008). Bucking that trend, Congress definitively stated that covered parties need not provide reasonable accommodations or modifications to those individuals who satisfy the “regarded as” prong of the definition of disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a)(1)(e)–(h), 122 Stat. 3553, 3558 (2008) (codified at 42 U.S.C.A. § 12201(h)). Those individuals claiming they were regarded as having a disability are still entitled to sue for discrimination.

### 1. Impairment

An impairment can be either physical or mental.<sup>67</sup> Department of Justice regulations, which govern both public and private educational institutions,<sup>68</sup> define physical or mental impairment to include any neurological disorder or condition, including: “Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”<sup>69</sup>

### 2. Major Life Activity

Regulations define major life activity as: “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>70</sup> Courts have not, however, interpreted this list to be exhaustive.<sup>71</sup> The U.S. Supreme Court in *Sutton v. United Air Lines*, when considering the effect of the impairment on the life of the individual, assessed whether the impairment limited his or her “daily activities.”<sup>72</sup> In *Toyota Motor Manufacturing v. Williams*, the Supreme Court focused on those “activities that are of central importance to most people’s daily lives.”<sup>73</sup>

### 3. Substantial Limitation

Whether an individual meets the definition of disability has been one of the most litigated issues under the ADA.<sup>74</sup> The central principal of that

67. 42 U.S.C.A. § 12102(2)(A).

68. Title 28 of the Code of Federal Regulations governs disability discrimination in State and Local Government Services under Title II of the ADA, 28 C.F.R. § 35.101 (2008), and disability discrimination in Public Accommodations under Title III of the ADA, 28 C.F.R. § 36.101 (2008). *See also* 29 C.F.R. § 1630.1(a)–(b) (2008) (EEOC regulations apply to Title I regarding employment).

69. 28 C.F.R. §§ 35.104, 36.104 (2008). Physical or mental impairment does not include “environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. . . . Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder.” 28 C.F.R. pt. 35, app. A, pt. 36, app. B; *see also* *Bragdon v. Abbott*, 524 U.S. 624, 633 (1998) (HIV infection constituted a physical impairment under the ADA, despite the condition not occurring in an HEW representative list of disorders accompanying the regulations).

70. 28 C.F.R. §§ 35.104, 36.104.

71. Thinking, interacting with others, reading, sleeping, reproducing, drinking, and eating have all been major life activities considered by the courts. Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 225–26 (2003).

72. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

73. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002).

74. *See* Scott Burris & Kathryn Moss, *The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact*, 25 HOFSTRA LAB. & EMP. L.J. 1, 22 (2007); Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC’s “Disability” Regulations under the ADA*, 39

definition is whether an impairment “substantially limits one or more of the major life activities.”<sup>75</sup> Regulations for Title II and III do not directly define “substantially limited.” However, both Appendices to the regulations discuss substantial limitation in some detail. A person is substantially limited “when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed.”<sup>76</sup> A minor trivial impairment would not be substantially limiting, while a temporary impairment could, under rare circumstances, be substantially limiting if the degree of the limitation and its expected duration were substantial.<sup>77</sup> The Equal Employment Opportunity Commission (EEOC) regulations under Title I go further and directly define “substantially limits” in the employment context as unable to perform a major life activity or “significantly restricted as to the condition, manner, or duration under which an individual can perform the major life activity.”<sup>78</sup> The regulations recommend that an employer consider: “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”<sup>79</sup>

In an employment context, the Supreme Court in *Sutton* relied on Webster’s Dictionary to find that “substantially” suggests “considerable” or “specified to a large degree or in the main.”<sup>80</sup> The Court also cited the Oxford Dictionary, which indicated that “substantially” meant: “relating to or proceeding from the essence of a thing; essential,” or “of ample or considerable amount, quantity or dimensions.”<sup>81</sup> The Court concluded that an individual could be substantially limited in a major life activity even if he or she is still capable of functioning in society.<sup>82</sup> In the *Toyota* case, the Supreme Court looked to the EEOC’s regulations to restrict its

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WAKE FOREST L. REV. 177, 177 (2004).

75. ADA, 42 U.S.C.A. § 12102(1)(A).

76. 28 C.F.R. § 35.104, app. A; 28 C.F.R. § 36.104, app. B.

77. 28 C.F.R. § 35.104, app. A; 28 C.F.R. § 36.104, app. B.

78. 29 C.F.R. § 1630.2(j)(1)(i)–(ii) (2008). Condition “relates to the elements that surround the activity and are necessary for its occurrence.” James M. Zappa, Note, *The Americans with Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual is “Substantially Limited”*, 75 MINN. L. REV. 1303, 1327–28 (1991). Manner refers to “the procedure [or general processes] of conducting the activity itself.” *Id.* Duration considers “the length of time in which a person can partake in a life activity.” *Id.* But see ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(8), 122 Stat. 3553, 3554 (2008) (codified at 42 U.S.C. § 12102(2)(A)) (EEOC defining “substantially limits” as “significantly restricted” is inconsistent with congressional intent and sets the standard too high).

79. 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (2008).

80. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 491 (1999) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).

81. *Id.*

82. *Id.* at 488.

interpretation of substantially limited by focusing on whether the impairment prevented or severely restricted the individual from doing major life activities.<sup>83</sup>

#### 4. Mitigating Measures

In *Sutton*, the Court took a new direction by requiring that employers consider the effects of mitigating or corrective measures when assessing whether an employee is an individual with a disability.<sup>84</sup> The Court concluded that individuals whose impairments are “corrected,”<sup>85</sup> “largely corrected,”<sup>86</sup> or “cured”<sup>87</sup> are not currently disabled. The Court ruled that Congress did not intend to protect “those whose uncorrected conditions amounted to disabilities.”<sup>88</sup> ADA coverage is “restricted to only those whose impairments are not mitigated by corrective measures.”<sup>89</sup> An individual only has a disability if, “notwithstanding the use of a corrective device,” the individual is still substantially limited in a major life activity.<sup>90</sup> While the dissent argued that the Court was excluding individuals with controllable conditions such as diabetes, hypertension, and epilepsy,<sup>91</sup> the majority rejoined that individuals could still be substantially limited even if they take medication to lessen symptoms of impairment so that they can function.<sup>92</sup> The Court determined that the ADA required courts to look at limitations individuals actually face.<sup>93</sup>

#### 5. Comparison Group

Differences between the regulations under Title I as compared to Titles II and III have created some confusion in the courts as to the basis of comparison for determining whether an individual’s ability to perform is substantially limited. Interpreting Title I, the EEOC regulations specify that the employer consider the ability to perform “as compared to the average person in the general population.”<sup>94</sup> For Titles II and III, although the Department of Justice regulations themselves do not speak to whether an individual’s abilities should be considered in relation to other members of the population, the appendices note that an individual has a disability if the person’s activities are “restricted as to the conditions, manner, or

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83. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002).

84. *Sutton*, 527 U.S. at 482.

85. *Id.*

86. *Id.* at 486.

87. *Id.* at 488.

88. *Id.* at 484.

89. *Id.* at 487.

90. *Id.* at 488.

91. *Id.* at 509, 512.

92. *Id.* at 488.

93. *Id.*

94. 29 C.F.R. § 1630.2(j)(1)(ii) (2008).

duration under which they can be performed *in comparison to most people*.<sup>95</sup> In the educational context, courts have generally compared students to “most people” when analyzing whether they are substantially limited in learning.<sup>96</sup> This interpretation raises the question as to whether comparison to others to determine if a student has a disability is even appropriate in an educational context where disability is often determined by whether the student is performing to his or her own abilities.<sup>97</sup>

#### D. ADA Amendments Act

In response to the growing dissatisfaction with the Supreme Court’s interpretation of disability under the ADA, Congress passed the ADA Amendments Act in 2008.<sup>98</sup> While Congress did not fundamentally alter the ADA’s definition of disability, the Act renounced the Supreme Court’s restrictive interpretations of disability in *Sutton v. United Air Lines* and *Toyota Motor Manufacturing v. Williams*.<sup>99</sup> Effective January 1, 2009, one

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95. 28 C.F.R. § 35.104, app. A; 28 C.F.R. § 36.104, app. B (emphasis added).

96. See *Singh v. George Washington Univ. Sch. of Med. & Health*, 508 F.3d 1097, 1100–04 (D.C. Cir. 2007) (concluding that proper comparison is to average person in general population in assessing plaintiff’s learning disability); *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1065 (9th Cir. 2005) (assessing whether learning disability limited ability to learn as compared to most people); *Betts v. Rector of Univ. of Va.*, 18 F. App’x 114, 118 (4th Cir. 2001) (comparing learning abilities to those of the general population); *Gonzalez v. Natl. Bd. of Med. Exam’rs*, 60 F. Supp. 2d 703, 708 (E.D. Mich. 1999) (equating comparison to “most people” in DOJ regulations to “average person in general population” when analyzing whether plaintiff’s claimed learning disorder was a disability); *Price v. Natl. Bd. Med. Exam’rs*, 966 F. Supp. 419, 426 (S.D. W.Va. 1997) (comparing students’ impaired functioning with the functioning of most unimpaired people). *But see* *Vinson v. Thomas*, 288 F.3d 1145, 1152–53 (9th Cir. 2002) (no comparison when assessing whether plaintiff’s dyslexia was a disability under the Rehabilitation Act); *Bartlett v. N.Y. State Bd. of Law Exam’rs*, No. 93 Civ. 4986(SS), 2001 WL 930792, at \*36 (S.D.N.Y. Aug. 15, 2001) (while comparing plaintiff’s limitations to “most people,” court concluded that clinical judgment must be used when comparing test scores).

97. MARK C. WEBER, *UNDERSTANDING DISABILITY LAW* 133 (2007). This is particularly troubling when applied to graduate education, where presumably all students, whether learning disabled or not, would be performing at a higher level than the general population. Accepting this interpretation might lead to the conclusion that no graduate students have learning “disabilities” under the ADA. See Melissa M. Krueger, Comment, *The Future of ADA Protection for Students with Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607, 625 (2000); see also Sara N. Barker, *A False Sense of Security: Is Protection for Employees with Learning Disabilities under the Americans with Disabilities Act Merely an Illusion?*, 9 U. PA. J. LAB. & EMP. L. 325, 345–48 (2007) (proposing that, when assessing learning disabilities, the more appropriate comparison group should be the average person with comparable education, skills, and abilities).

98. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

99. *Id.* § 2(b)(2)–(5). The Act was amended to read:

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

of the Act's primary purposes was to reject the *Sutton* Court's reasoning that "whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."<sup>100</sup> Furthermore, the Act scorned *Toyota* and the EEOC's direction that "substantially limited" be interpreted to mean prevent or severely or significantly restrict.<sup>101</sup> The Act indicates that the Court had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and that Congress intended that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."<sup>102</sup>

The ADA's definition of disability remains intact, though the Act elaborates on the definition in a manner that would more clearly protect students with learning disabilities. The Act expands upon the regulations' definition of major life activity to include reading, concentrating, thinking, and communicating, in addition to learning.<sup>103</sup> Furthermore, potentially important to students seeking eligibility for accommodations due to learning disabilities, the term major life activities now includes major bodily functions such as neurological and brain functions.<sup>104</sup> An impairment need only limit one of these major life activities and can be episodic or in remission if the impairment would substantially limit the major life activity when it is active.<sup>105</sup> In general, the Act mandates broad coverage of individuals under the "maximum extent permitted,"<sup>106</sup> and that the term "substantially limits" should be interpreted consistent with this broad scope of protection.<sup>107</sup>

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(I) medication, medical supplies, equipment, or appliances, low-vision devices . . . , prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

42 U.S.C.A. § 12102(4)(E)(i)(I)–(IV) (West Supp. 2009).

100. ADA Amendments Act of 2008 § 2(b)(2) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999)).

101. *Id.* §§ 2(b)(4), (6) (citing *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002)).

102. *Id.* § 2(b)(5).

103. 42 U.S.C.A. § 12102(2)(A) (West Supp. 2009).

104. *Id.* § 12102(2)(B). Recent research theorizes that some forms of learning disabilities, specifically impairments in reading abilities, have a neurological basis. See Michel Habib, *The Neurological Basis of Developmental Dyslexia: An Overview and Working Hypothesis*, 123 *BRAIN* 2373 (2000); Bruce F. Pennington, *Toward an Integrated Understanding of Dyslexia: Genetic, Neurological, and Cognitive Mechanisms*, 11 *DEV. & PSYCHOPATHOLOGY* 629 (1999).

105. 42 U.S.C.A. §§ 12102(4)(C)–(D) (West Supp. 2009).

106. *Id.* § 12102(4)(A).

107. *Id.* § 12102(4)(B).



While the Act goes a long way toward correcting the restrictive interpretations of the Supreme Court and the EEOC, the Act neglects to intervene on a number of issues important to students with learning disabilities, including what appropriate comparison population employers and disability service providers should use to assess whether an individual's impairment substantially limits a major life activity.

## II. DOCUMENTING LEARNING DISABILITIES

Given the ADA's definition of disability and its component parts, students with learning disabilities should provide disability service providers with documentation that gives the providers sufficient information relevant to whether students are "individuals with disabilities" from which providers can make reasoned decisions regarding eligibility for services. For an institution's disability service provider to assess a student's eligibility for accommodations under the ADA, the provider must have adequate documentation.<sup>108</sup> The adequacy of the documentation often depends on the purpose of the documentation, the clarity of the diagnostician's understanding of the ADA's requirements, and the adequacy of the educational institution's guidelines.

### A. Purposes of Documentation

Different purposes require different types of documentation. To protect an individual from discrimination, documentation of a disability need only be minimal.<sup>109</sup> In educational settings, however, most students' primary purpose in seeking help from disability service providers is not to seek redress for the institution's discriminatory actions, but to request accommodations for their disabilities. For disability service providers to provide accommodations, the students' documentation must "both establish disability and provide adequate information on the functional impact of the

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108. An employer or other institution does not have to accept an employee's subjective belief that he is disabled and may rely on medical information. *See, e.g.*, *Tyler v. Ispat Inland, Inc.* 245 F.3d 969, 974 n.1 (7th Cir. 2001) (employer's request for release of medical records was not improper); *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 656 (6th Cir. 2000) (employer entitled to require employee to provide medical documentation, including submitting to a medical examination); *Brettler v. Purdue Univ.*, 408 F. Supp. 2d 640, 663–64 (N.D. Ind. 2006) (plaintiff's general statements about his condition in his affidavit did not suffice to support conclusion that he suffered from a physical impairment without medical records); *Abdo v. Univ. of Vt.*, 263 F. Supp. 2d 772, 777–78 (D. Vt. 2003) (appropriate for university to request diagnostic information regarding plaintiff's condition, rather than rely on plaintiff's statements).

109. Association on Higher Education and Disabilities (AHEAD), AHEAD BEST PRACTICES: DISABILITY DOCUMENTATION IN HIGHER EDUCATION 2 (2005), [http://www.ahead.org/uploads/docs/resources/AHEAD\\_Documentation\\_Best\\_Practice\\_Resource.doc](http://www.ahead.org/uploads/docs/resources/AHEAD_Documentation_Best_Practice_Resource.doc) [hereinafter AHEAD BEST PRACTICES].

disability so that effective accommodations can be identified.”<sup>110</sup>

Using independent judgment,<sup>111</sup> a disability service provider must initially determine whether each student is eligible for accommodations. To do so, the disability service provider must be familiar with the ADA definition of disability. Consequently, under the first component of disability, the provider must decide whether the student has a physical or mental impairment. This requires a documented diagnosis from a professional trained and experienced in diagnosing the type of impairment the student claims. The provider must also determine if that impairment is current or whether the student merely has a record of impairment. To provide accommodations based on a present disability, the diagnostician’s documentation must be reasonably current.

The provider must then determine what major life activities the student’s impairment impacts: learning, reading, speaking, concentrating, thinking, communicating, operation of a neurological or brain function, etc. Therefore the documentation must evaluate the student’s performance in these activities. Next, because the provider must determine whether the impairment substantially limits those major life activities, the documentation must address the nature and severity of the impairment’s impact on the student’s education. Finally, the provider must determine what accommodations are appropriate to meet the student’s needs. As a result, the documentation should recommend necessary accommodations particular to the program the student is participating in and include a rationale for each recommendation.

#### B. Deficiencies in Documentation

While the legal determination of whether the student is an individual with a disability is the responsibility of the disability service provider, not the diagnostician, a disability service provider cannot carry out his or her obligations without significant and adequate direction from the student’s diagnostician.<sup>112</sup> Generally, however, that direction is lacking.

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110. *Id.* Ideally, assessment should be twofold. After documentation establishes eligibility for services and initial accommodations, ongoing assessment should take place to identify the strengths and weaknesses of any given accommodation. See Noelle Gregg & Cheri Hoy, *Identifying the Learning Disabled*, 129 J.C. ADMISSIONS 30, 31 (1990).

111. Courts generally defer to educational institutions’ academic judgments under the ADA and the Rehabilitation Act. See *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 436 (6th Cir. 1998); *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 859 (5th Cir. 1993); *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1991); *Doe v. New York Univ.*, 666 F.2d 761, 775–76 (2d Cir. 1981).

112. The quality of the diagnostician’s documentation is a major factor in demonstrating the credibility of the student’s request for accommodations. See Rosa A. Hagin, *See You in Court!: Documenting Learning Disabilities*, 10 LEARNING DISABILITIES 43, 43 (2001); see also Loring C. Brinckerhoff & Manju Banerjee,

A number of studies of learning disability documentation which students and their diagnosticians have submitted to demonstrate eligibility for accommodations have demonstrated that documentation of learning disabilities has been and continues to be deficient. Several studies in Canada and the United States have found that a significant percentage of the documentation was inadequate even to demonstrate a diagnosis of a learning disability.<sup>113</sup> Many students requesting accommodations did not provide any documentation whatsoever.<sup>114</sup> Problems with documentation included: lack of a formal diagnosis,<sup>115</sup> incomplete or inappropriate battery of tests,<sup>116</sup> biased and jargon-filled case histories,<sup>117</sup> and dated documentation.<sup>118</sup>

Various causes account for deficiencies in learning disability documentation. Disagreement among diagnosticians about the definition of learning disability<sup>119</sup> and use of inappropriate test instruments for

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*Misconceptions Regarding Accommodations of High-Stakes Tests: Recommendations for Preparing Disability Documentation for Test Takers with Learning Disabilities*, 22 LEARNING DISABILITIES RES. & PRAC. 246, 250 (2007) (more likely that test taker will receive the accommodations requested if the documentation is well written and complete); Nanette M. Hatzes, Henry B. Reiff & Michael H. Bramel, *The Documentation Dilemma: Access and Accommodations for Postsecondary Students with Learning Disabilities*, 27 ASSESSMENT FOR EFFECTIVE INTERVENTION 37, 45 (2002) (more than 2/3 of institutions which participated in a study reported relying on recommendations in documentation to make their accommodation decisions).

113. Allyson G. Harrison, Eva Nichols & Anne-Claire Larochette, *Investigating the Quality of Learning Disability Documentation Provided by Students in Higher Education*, 23 CAN. J. SCH. PSYCHOL. 161, 167 (Dec. 2008) (of the 133 students who actually submitted psychological reports, only 44% included a clear diagnostic statement, though not always diagnosing a learning disability); Gregg & Hoy, *supra* note 110, at 31 (documentation of only 15 of 110 students contained diagnostic information). Diagnosticians used vague language to describe the disability and failed to support diagnoses with standard diagnostic criteria under DSM-IV-TR. See Joan M. McGuire, Joseph W. Madaus, A. Vivienne Litt & Michele O. Ramirez, *An Investigation of Documentation Submitted by University Students to Verify Their Learning Disabilities*, 29 J. LEARNING DISABILITIES 297, 299 (1996).

114. Gregg & Hoy, *supra* note 110, at 31 (only 35 of 110 students requesting accommodations for a learning disability submitted documentation); Harrison et al., *supra* note 113, at 166 (61 of 247 participating in the study submitted no documentation).

115. Harrison et al., *supra* note 113, at 168; Madaus & Madaus, *supra* note 47, at 34; Gregg & Hoy, *supra* note 110 at 31 (only 15 of 110 students requesting accommodations specifically identified learning disability).

116. Harrison et al., *supra* note 113, at 168; Madaus & Madaus, *supra* note 47, at 33; McGuire et al., *supra* note 113, at 301.

117. Madaus & Madaus, *supra* note 47, at 33; Gregg & Hoy, *supra* note 110, at 32.

118. Harrison et al., *supra* note 113, at 170 (average report was more than four years old); Hatzes et al., *supra* note 112, at 44 (67% of institutions surveyed reported that they would reject documentation if it were not current).

119. In a 2002 study, 65% of postsecondary institutions responding to a survey reported that they do not require a discrepancy between a student's ability and achievement to diagnose a learning disability, while 34% of the institutions did have a discrepancy requirement. Hatzes et al., *supra* note 112, at 43. In fact, scholarship

diagnosis along with over-interpretation of test results<sup>120</sup> contribute to inadequate documentation. Likewise, deficient documentation has also resulted from diagnosticians' lack of understanding of requirements of the ADA,<sup>121</sup> and a disconnect between documentation required to establish a disability under the IDEA and the ADA.<sup>122</sup> A survey of nearly 150 clinicians assessed their understanding of learning disabilities and the ADA.<sup>123</sup> While the survey showed that generally clinicians understood that the ADA required more and different information than just a clinical diagnosis of learning disability, there was much less understanding that ADA is intended to prevent discrimination rather than help individuals "improve their academic success and testing performance."<sup>124</sup> Furthermore, a significant number of clinicians did not clearly understand the extent of the impairment necessary to receive accommodations under the ADA.<sup>125</sup>

Two major outcomes occur as a result of inadequate documentation. First, the institution will reject questionable documentation and truly learning disabled students do not receive accommodations they need to succeed.<sup>126</sup> Second, institutions may accept inadequate documentation and over-accommodate a larger number of individuals, either temporarily or on an ongoing basis.<sup>127</sup> As a consequence, institutions will expend greater

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indicates that discrepancies between ability and achievement may not be an accurate measure of the existence of a learning disability. *Id.* at 46; *see also* Brackett & McPherson, *supra* note 8, at 78–80; Gregg & Hoy, *supra* note 110, at 32.

120. Hatzes et al., *supra* note 112, at 42–43 & Table 2; Lorry, *supra* note 7, at 146–48.

121. Michael Gordon, Lawrence Lewandowski, Kevin Murphy & Kim Dempsey, *ADA-Based Accommodation in Higher Education: A Survey of Clinicians about Documentation Requirements and Diagnostic Standards*, 35 J. LEARNING DISABILITIES 357, 358 (2002) (34% of 147 clinicians working in the learning disabilities field had no training about how to prepare ADA documentation).

122. DOCUMENTATION DISCONNECT, *supra* note 6, at 1. In the IDEA, Congress's findings highlight providing effective transition services to allow students to succeed in postsecondary education as a measure of the Act's success. IDEA, 20 U.S.C.A. § 1400(c)(14). Transition services are merely described as "a coordinated set of activities" designed to facilitate a child's advancement to postsecondary education. *Id.* § 1401(34)(A).

123. Gordon et al., *supra* note 121, at 358.

124. *Id.* at 359–60.

125. *Id.* at 361; *see also* Lorry, *supra* note 7, at 149 (single most common deficit in documentation is that diagnosticians fail to provide evidence demonstrating "a substantial limitation in a major life activity").

126. Brackett & McPherson, *supra* note 8, at 69–70.

127. Hoy et al., *supra* note 21, at 56. Postsecondary educational institutions seem to err on the side of accepting a student's eligibility for accommodations even if documentation appears inconsistent with institutional guidelines or the mandates of the ADA. *See* Hatzes et al., *supra* note 112, at 47. Providing unsupported or unnecessary accommodations can create a backlash from those non-disabled students who must perform without accommodations. *See* Holly A. Currier, *The ADA Reasonable Accommodation Requirement and the Development of University Services Policies:*

resources on students who may or may not be entitled to accommodations or, when resources are limited, they may provide fewer and poorer quality services for those individuals whose documentation does demonstrate that they have a learning disability.<sup>128</sup> Furthermore, variations in documentation and the underlying testing process often create skepticism about whether learning disabilities are real or not.<sup>129</sup> In any event, when inadequate documentation influences which individuals receive accommodations, the ADA's purposes of eliminating discrimination and enabling individuals with disabilities "to fully participate in all aspects of society" are not fulfilled.<sup>130</sup>

### C. Factors Addressed by Documentation

One means of addressing the prevalent deficiencies in disability documentation is for institutions to develop specific documentation guidelines. The Association of Higher Education and Disabilities (AHEAD),<sup>131</sup> has issued foundational principles and essential elements for adequately documenting disabilities.<sup>132</sup> AHEAD makes the following recommendations for essential components of documentation:

1. The credentials of the evaluator(s).<sup>133</sup>
2. A diagnostic statement identifying the disability.<sup>134</sup>
3. A description of the diagnostic methodology used.<sup>135</sup>
4. A description of the current functional limitations.<sup>136</sup>

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*Helping or Hindering Students with Learning Disabilities*, 30 U. BALT. L. F. 42, 51 (2000).

128. Hoy et al., *supra* note 21, at 56.

129. Krueger, *supra* note 97, at 618.

130. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553 (2008).

131. AHEAD is "a professional membership organization for individuals involved in the development of policy and in the provision of quality services to meet the needs of persons with disabilities involved in all areas of higher education." AHEAD Home Page, <http://www.ahead.org/about>. AHEAD has more than 2,500 members in a dozen countries. *Id.*

132. AHEAD BEST PRACTICES, *supra* note 109, at 4–8. In 1997, AHEAD drafted documentation guidelines specifically for learning disabilities. AHEAD, GUIDELINES FOR DOCUMENTATION OF A LEARNING DISABILITY IN ADOLESCENTS AND ADULTS (July 1997), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/17/53/e4.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/53/e4.pdf) [hereinafter AHEAD LEARNING DISABILITY GUIDELINES]. However, in 2004, AHEAD removed the learning disability guidelines from distribution because "they were out of date, were deemed not reflective of good practice, and were being used inappropriately as basic standards for documentation of many disabilities beyond [learning disabilities]." AHEAD, ALERT, From the President (Sept. 2005), <http://www.ahead.org/publications/alert/sept-05>. Instead, AHEAD drafted Best Practices for documenting all types of disabilities.

133. See *infra* notes 156–161 and accompanying text.

134. See *infra* notes 162–166 and accompanying text.

135. See *infra* notes 167–169 and accompanying text.

136. See *infra* notes 144–155, 170–171 and accompanying text.

5. A description of the expected progression or stability of the disability.<sup>137</sup>
6. A description of current and past accommodations, services, and/or medications.<sup>138</sup>
7. Recommendations for accommodations, adaptive devices, assistive services, compensatory strategies, and/or collateral support services.<sup>139</sup>

Testing agencies such as the Educational Testing Service (ETS), the Law School Admissions Council (LSAC), and the American Association of Medical Colleges (AAMC), have all issued specific guidelines for documentation.<sup>140</sup> Guidelines for documentation submitted to the ETS for standardized testing accommodations address several areas: (1) qualifications of the evaluator; (2) recency of the documentation; (3) appropriate clinical documentation to substantiate the disability, including a) a diagnostic interview, b) a psychometric assessment in the areas of aptitude/ability, achievement, and cognitive and information processing with accompanying test scores, and c) a specific diagnosis, and interpretive summary; and (4) evidence to establish a rationale supporting the need for accommodations.<sup>141</sup> Likewise, the LSAC guidelines describe similar requirements: (1) evaluator's qualifications; (2) assessment's currency; (3) neuropsychological or neuroeducational evaluation, including: a) diagnostic interview, and b) testing in the areas of aptitude, achievement, information processing, and personality with accompanying test scores; (4) a specific diagnosis; and (5) recommended specific accommodations.<sup>142</sup> Similarly, the AAMC guidelines cover: (1) evaluator's qualifications; (2) assessment's currency; (3) psychoeducational evaluation, including: a)

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137. AHEAD recommends that documentation include information on the "episodic nature of the disability and known or suspected environmental triggers to episodes." AHEAD BEST PRACTICES, *supra* note 109, at 7.

138. A description of "current and past medications [including side effects], auxiliary aids, assistive devices, support services, and accommodations" and their "effectiveness in ameliorating functional impacts of the disability" should be documented. *Id.*

139. Although the postsecondary educational institution is not obligated to accept a diagnostician's recommendation, it is useful for documentation to include recommended accommodations which are "logically related to functional limitations." *Id.*; see *infra* notes 172–176 and accompanying text.

140. Organizations like ETS, LSAC, and AAMC, which are involved in administering such high-stakes tests such as the GRE, GMAT, LSAT, and MCAT, have seen a tremendous increase in the number of requests for accommodations. ETS received over 10,000 requests for accommodations in 2005. Brinckerhoff & Banerjee, *supra* note 112, at 247.

141. Educational Testing Service (ETS), *Policy Statement for Documentation of a Learning Disability in Adolescents and Adults 5-17* (2d ed. 2007), <http://www.ets.org/> (last visited Nov. 11, 2009).

142. Law School Admissions Council (LSAC), *Guidelines for Documentation of Cognitive Impairments 1-3* (Apr. 2008), <http://www.lsac.org/pdfs/2008-2009/GuidelinesCognitive-2008.pdf> (last visited Nov. 11, 2009).

history and background and b) testing in the areas of aptitude, achievement, information processing, with accompanying test scores; (4) a specific diagnosis; and (5) recommended individualized accommodations.<sup>143</sup>

The common threads throughout each organization's guidelines indicate that documentation should address several specific areas: recency of documentation; qualifications of the evaluator; diagnosis of condition; domains of testing and testing instruments; description of limitations; and recommendations for accommodations.

### 1. Recency of Documentation

A prior diagnosis of disability seldom automatically qualifies students to be eligible for postsecondary accommodations.<sup>144</sup> An institution may require that a student provide current documentation and may deny an accommodation if a student does not do so.<sup>145</sup> Indeed, an institution's disability service provider will often reject documentation which is not recent, even if the documentation meets institutional guidelines in all other respects.<sup>146</sup> There is, however, little consensus about when documentation is "current" or "recent." A NJCLD survey indicated that 45% of postsecondary institutions surveyed considered documentation to be current if it were three years old or less.<sup>147</sup>

A distinction can be drawn, however, between how recent testing and assessment of that testing should be and how current the overall documentation package itself should be. When assessing the existence of learning disabilities, testing should be current since studies show that the developmental effects of learning disabilities change throughout childhood.<sup>148</sup> However, imposing a requirement that an adult college student be reassessed every three years has been considered overly burdensome considering the costly nature of assessments and the lack of research supporting the need for reassessment of a chronic, life-long condition like learning disabilities.<sup>149</sup> Despite a lack of support for

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143. Association of American Medical Colleges (AAMC), *Documentation Requirements for MCAT Accommodations: Documenting Learning Disabilities 4-11* (2007), <http://www.aamc.org/students/mcat/ld.pdf> (last visited Nov. 11, 2009)

144. Hatzes et al., *supra* note 112, at 47 (eighty-six percent of surveyed institutions did not accept previous diagnosis alone).

145. Ivy Tech Community College, OCR Case No. 05-06-2028, 107 LRP 2642, 13 Disability Compliance for Higher Educ. (Midwestern Div., May 6, 2006) (College did not discriminate when student failed to follow College's request for updated documentation).

146. Hatzes et al., *supra* note 112, at 47.

147. DOCUMENTATION DISCONNECT, *supra* note 6, at 8. Three percent of institutions found documentation 5 years old or less to be current, while 17% of institutions only generally required that documentation be "recent." *Id.*

148. Harrison et al., *supra* note 113, at 171.

149. Guckenberger v. Trustees of Boston Univ., 974 F. Supp. 106, 138-39 (D. Ma. 1997). In contrast, for a student diagnosed with ADHD, three year periodic

restrictive date limitations, the testing agencies all set specific time limits for when assessment of learning disabilities must occur. The ETS specifically requires testing of adults within the last five years.<sup>150</sup> The LSAC requires that testing be conducted within three years of a request for accommodation or within five years if the individual was tested as an adult,<sup>151</sup> while AAMC requires that the evaluation have been conducted within the past three years.<sup>152</sup>

In contrast, AHEAD guidelines give no specific recommendation as to how dated testing can be.<sup>153</sup> Instead, AHEAD focuses on the date of the documentation rather than the testing, generally recommending “relatively recent documentation.”<sup>154</sup> AHEAD recommends that institutions be flexible in accepting older documentation when conditions are permanent or non-varying as long as the documentation reflects how the condition “currently impacts the individual.”<sup>155</sup>

## 2. Qualifications of the Diagnostician

The qualifications of the diagnostician reflect on the credibility of his or her findings and recommendations for accommodations.<sup>156</sup> Ideally, a “licensed or otherwise properly credentialed professional who has undergone appropriate and comprehensive training, has relevant experience, and has no personal relationship with the individual being evaluated” should provide the documentation.<sup>157</sup> To assess learning disabilities, the evaluator should have extensive graduate-level training in “the history, nature, identification, and remediation of learning disabilities.”<sup>158</sup> The evaluator’s training and experience must be with regard to adults.<sup>159</sup> An evaluator’s sensitivity to cultural and linguistic differences is also very important.<sup>160</sup> The ETS lists a number of professionals who could provide evaluations, provided they have had

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assessments were not overly burdensome given the evidence that ADHD symptoms could diminish over time. *Id.* at 139.

150. ETS, *supra* note 141, at 6.

151. LSAC, *supra* note 142, at 1.

152. AAMC, *supra* note 143, at 3.

153. AHEAD’s previous documentation guidelines for learning disabilities indicated only that test scores be standardized for the adult/adolescent population. AHEAD LEARNING DISABILITY GUIDELINES, *supra* note 132, at 5.

154. AHEAD BEST PRACTICES, *supra* note 109, at 6. Conditions which change over time might require more frequent evaluation. *Id.*

155. *Id.* at 6–7. “[D]ocumentation is not time-bound; the need for recent documentation depends on the facts and circumstances of the individual’s condition.” *Id.* at 7.

156. Hagin, *supra* note 112, at 46.

157. AHEAD BEST PRACTICES, *supra* note 109, at 5.

158. AAMC, *supra* note 143, at 3.

159. LSAC, *supra* note 142, at 1.

160. ETS, *supra* note 141, at 5.



adequate training in learning disabilities: “clinical or educational psychologists; school psychologists; neuropsychologists; learning disabilities specialists; and medical doctors.”<sup>161</sup>

### 3. Diagnosis of Condition

A diagnostician must make a clear diagnostic statement of the student’s condition, describing the nature and severity of the condition.<sup>162</sup> Documentation should describe the functional impact of the condition and detail “the typical progression or prognosis of the condition.”<sup>163</sup> The evaluator should rule out any alternate explanations for the student’s condition.<sup>164</sup> Both AHEAD and the AAMC recommend that the evaluator refer to specific diagnostic codes such as the DSM or International Classification of Functioning, Disability and Health (ICF)<sup>165</sup> of the World Health Organization.<sup>166</sup>

### 4. Domains of Testing and Testing Instruments

Documentation should describe evaluation methods, procedures, and testing instruments, including “both summary data and specific test scores (with the norming population identified).”<sup>167</sup> In the context of learning disabilities, all testing agencies require that testing track the discrepancy model of learning disabilities, addressing the domains of aptitude, achievement, and information processing.<sup>168</sup> Both ETS and the LSAC list specific approved testing instruments for each domain.<sup>169</sup> No agency

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161. *Id.*

162. *Id.* at 14; *see also* Dubois v. Alderson-Broadus College, Inc., 950 F. Supp. 754, 758 (N.D. W. Va. 1997) (documentation stating that student “might suffer from a specific learning disability” was inadequate to support a clear diagnosis of an impairment). *But see* Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 778 (D. Vt. 2003) (evidence that fails to identify the precise medical diagnosis is not necessarily legally insufficient).

163. AHEAD BEST PRACTICES, *supra* note 109, at 5.

164. LSAC, *supra* note 142, at 3; ETS, *supra* note 141, at 14; AAMC, *supra* note 144, at 6.

165. The ICF sets out categories of mental functions, including Thought Functions, Higher-Level Cognitive Functions, Mental Functions of Language, and Calculation Functions, from which a diagnostician could identify potential deficits. WORLD HEALTH ORGANIZATION, INTERNATIONAL CLASSIFICATION OF FUNCTIONING, DISABILITY AND HEALTH (ICF) 156–61 (2001).

166. AHEAD BEST PRACTICES, *supra* note 109, at 3; AAMC, *supra* note 143, at 6; *see also* Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794, 803 (E.D. Va. 1992) (plaintiff did not have a learning disability because the physician’s diagnosis was not found in the DSM), *rev’d on other grounds*, 13 F.3d 823 (4th Cir. 1994).

167. AHEAD BEST PRACTICES, *supra* note 109, at 6.

168. ETS, *supra* note 141, at 12; AAMC, *supra* note 143, at 4; LSAC, *supra* note 142, at 2.

169. ETS, *supra* note 141, at 21–22; LSAC, *supra* note 142, at 2. *But see* Hagin, *supra* note 112, at 44 (choice of specific diagnostic tests should be the prerogative of

accepts using the RTI model for diagnosing learning disabilities, nor do they address how to deal with students who have been previously diagnosed under a RTI model.

### 5. Description of Limitations

Documentation should specify how the student's condition meets the ADA definition of disability. Quality documentation should describe "whether and how a major life activity is substantially limited by providing a clear sense of the severity, frequency, and pervasiveness of the condition(s)."<sup>170</sup> Students with learning disabilities must demonstrate the functional impact on their learning.<sup>171</sup>

### 6. Recommendations for Accommodations

Documentation should include specific recommendations for accommodations, including a detailed rationale for each recommendation.<sup>172</sup> An educational institution need not provide a specific accommodation if the student's documentation fails to request or support that accommodation; the absence of a recommendation for a specific accommodation can demonstrate that a requested academic adjustment is not necessary to accommodate a student's disability.<sup>173</sup>

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the diagnostician, "provided the tests elicit the necessary information").

170. AHEAD BEST PRACTICES, *supra* note 109, at 7. Diagnosticians should base their determination that an individual's impairment substantially limits a major life activity on how the impairment affects the specific individual, not on mere generalizations about the impairment itself. EEOC, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (Mar. 25, 1997), <http://www.eeoc.gov/policy/docs/psych.html> (last visited Nov. 11, 2009).

171. See LSAC, *supra* note 142, at 3; ETS, *supra* note 141, at 12; AAMC, *supra* note 143, at 5 (guidelines include detailed explanation of requirements of ADA in the context of learning disabilities).

172. LSAC, *supra* note 142, at 2; ETS, *supra* note 141, at 16; AAMC, *supra* note 143, at 6; see also Hagin, *supra* note 112, at 45–46.

173. Hudson County Community College, OCR Case No. 02-05-2154, 33 Nat'l Disability L. Rep. (LRP) ¶ 198 (Mar. 27, 2006) (College did not discriminate in denying complainant's request for course waiver when psychologist's evaluation did not recommend that math courses be waived); Fayetteville Technical Community College, OCR Case No. 11-05-2007, 31 Nat'l Disability L. Rep. (LRP) ¶ 26 (Mar. 31, 2005) (College did not discriminate in denying complainant's request for waiver of requirement when doctor's note did not recommend requirement be waived); Oregon State University, OCR Case No. 10-98-2071 (W. Div. Feb. 25, 1999) (letter ruling on file with author) (University did not discriminate in denying accommodations in oral examination when medical documentation did not provide input regarding effective accommodation); Minnesota Board of Teaching, OCR Case No. 05-97-4018 (Midwestern Div. June 10, 1998) (letter ruling on file with author) (Board did not discriminate in denying waiver of Pre-Professional Skills Test when student did not provide documentation requesting such a waiver); College of DuPage, OCR Case No. 05-98-2033 (Midwestern Div. June 29, 1998) (College's action of requesting documentation indicating amount of extended time necessary for student was consistent with OCR policy).

While diagnosticians should recommend individualized accommodations for each student's disability, the disability service provider may accept or reject the diagnostician's recommendations.<sup>174</sup> It is the disability service provider's responsibility to make ultimate decisions on whether the student has a disability and what type of accommodations are appropriate in that educational setting, given the nature of the program.<sup>175</sup> Nevertheless, diagnosticians need to understand what will be expected of students in the specific program to tailor accommodations to meet the demands of that program.<sup>176</sup>

Overall, the more precise, thorough, and recent the documentation is, the more likely a disability service provider will be able to determine if a student is eligible for accommodations.

### III. LEGAL REQUIREMENTS FOR DOCUMENTATION GUIDELINES

For disability service providers to obtain the information they need from students and their diagnosticians, the most effective approach would be to adopt disability policies and guidelines to implement those policies. Specific guidelines will fulfill two purposes: first, to provide consistent direction to students and professionals who conduct psychoeducational testing as to what documentation a service provider needs to provide accommodations, and second, to provide "a common base of understanding among service providers regarding the components of psychoeducational evaluations."<sup>177</sup>

However, neither the ADA nor the Rehabilitation Act requires postsecondary institutions to develop and implement policies for assessing eligibility for disability services. Presumably, any guidelines an institution would adopt should provide "clear, strong, consistent, enforceable standards" to fulfill the broad scope of protection afforded by the ADA.<sup>178</sup> They should provide consistency within an institution and between institutions, but should be sufficiently flexible so as not to exclude students who can, in the institution's professional judgment, demonstrate they have

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174. James G. Frierson, *Legal Requirements for Clinical Evaluations*, in ACCOMMODATIONS IN HIGHER EDUCATION, *supra* note 7, at 73, 82.

175. Hatzes et al., *supra* note 112, at 47-48; *see also* Currier, *supra* note 127, at 48 (for disability service providers to formulate and implement appropriate accommodations, they must understand the student's learning disability).

176. *See* Brinckerhoff & Banerjee, *supra* note 112, at 248; Rothstein, *supra* note 44, at 94 (without specific information about the program, evaluators can only make general recommendations). Keeping the diagnostician informed about what will be required of the student in a particular program does not shift the responsibility from the disability service provider to the diagnostician. Only the disability service provider truly knows the program and its essential functions and can adequately assess how a student's limitations will affect his or her success in the program.

177. Cyndi Jordan, *Using Documentation Guidelines: Applications to Clinical Service*, 10 LEARNING DISABILITIES 37, 37 (2001).

178. 42 U.S.C.A. § 12101(b)(2).

a disability under the ADA.<sup>179</sup>

While the ADA itself gives little direction regarding disability policies, courts' interpretations of the ADA support institutional (and employer) use of guidelines to set forth institutional policies so long as they are not discriminatory.<sup>180</sup> An institution discriminates by failing to take necessary steps "to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals."<sup>181</sup> Using criteria that screens out individuals with disabilities, however, constitutes discrimination unless the criteria are necessary.<sup>182</sup> It is discriminatory to impose policies that "while not creating a direct bar to individuals with disabilities, diminish an individual's chance of . . . participation" in programs.<sup>183</sup> An institution may not employ "unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodations."<sup>184</sup> Generally, postsecondary institutions may not "establish criteria that are inconsistent with accepted practice, especially where accepted practice requires clinical judgment."<sup>185</sup>

Very little legal authority exists as to specific content of policies or guidelines a postsecondary institution should provide to its students and their diagnosticians. The *Guckenberger v. Boston University* case most clearly addresses the question of the validity of educational ADA policies.<sup>186</sup> Plaintiffs, who claimed they had learning disabilities or

179. Hatzes et al., *supra* note 112, at 46. "The guidelines should not be interpreted as advocating an arbitrary cut-off for services." Jordan, *supra* note 177, at 40.

180. See *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 91, 135 (D. Mass. 1998); *Abdo v. Univ. of Vt.*, 263 F. Supp. 2d 772, 777 (D. Vt. 2003).

181. *Guckenberger v. Boston Univ.*, 974 F. Supp., 106, 114 (D. Mass. 1997). A public entity under Title II has an "affirmative duty to establish a comprehensive policy" to address requests for services. California State University – Long Beach, OCR Case No. 09-99-2041 (Southwestern Reg. Apr. 20, 1999), <http://www.bcm.edu/ilru/dlrp/html/topical/FAPSI/OCR/csu-lb.html>.

Failure to notify individuals that the institution does not discriminate on the basis of disability would violate federal law. 34 C.F.R. § 104.8 (applicable to Rehabilitation Act). The notice must also designate the person at the institution who is responsible for coordinating the institution's disability services. 34 C.F.R. § 104.7(a). Also, it must include this notice in its recruitment materials. 34 C.F.R. § 104.8(b).

182. 42 U.S.C.A. § 12182(b)(2)(i); see also *Colo. Cross Disability Coal. v. Hermanson Family Ltd. P'ship I*, 264 F.3d 999, 1003 (10th Cir. 2001); *Hahn ex rel. Barta v. Inn County, Iowa*, 130 F. Supp. 2d 1036, 1055 (N.D. Iowa 2001); *Bowers v. Nat'l Collegiate Athletic Assoc.*, 118 F. Supp. 2d 494, 518 (D.N.J. 2000); *Guckenberger*, 974 F. Supp. at 134.

183. *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 426 (D.N.H. 1996).

184. *Guckenberger*, 974 F. Supp. at 135; see also *Abdo*, 263 F. Supp. 2d at 778; *Dubois v. Alderson-Broadus College, Inc.*, 950 F. Supp. 754 (N.D. W. Va. 1997); *Coleman v. Zatechka*, 824 F. Supp. 1360, 1368 (D. Neb. 1993).

185. *Simon*, *supra* note 44, at 11.

186. *Guckenberger*, 974 F. Supp. at 106; see also *Kaltenberger v. Ohio Coll. of*

ADHD, challenged the discriminatory nature of several aspects of the Boston University (BU) disability policy.<sup>187</sup> BU's guidelines required students to be retested every three years<sup>188</sup> by a diagnostician with the following credentials: physician, licensed clinical psychologist, or a person with a doctorate in neuropsychology, education, or child psychology, all with at least three years of experience in diagnosing learning disabilities.<sup>189</sup> During litigation, BU restructured its policy to permit students to obtain a waiver of the three-year retesting requirement if retesting was medically unnecessary.<sup>190</sup> Also during litigation, BU changed its process for evaluating a student's accommodation request from permitting the President and his assistant to evaluate the files to requiring a professional highly trained in the area of learning disabilities to evaluate the students' requests.<sup>191</sup>

Plaintiffs first claimed that BU's eligibility criteria were unreasonably harsh.<sup>192</sup> For those students undergoing initial testing, the District Court held that BU's requirement that evaluators possess certain credentials did not violate the ADA.<sup>193</sup> The requirement for retesting did violate the ADA because the time, expense, and anxiety of retesting by an evaluator who met BU's credentials tended to screen out learning disabled students.<sup>194</sup> Furthermore, the court held that the credential requirements were not necessary to achieve its goal of properly documenting learning disabilities since BU had presented no evidence that testing by an evaluator with a masters degree was less accurate than testing by a Ph.D.<sup>195</sup> Likewise, the court found that BU's initial three-year retesting requirement was unnecessary since testimony indicated that deficits in learning did not change after adulthood.<sup>196</sup> However, with the addition of the ability to waive BU's three-year retesting requirement, the new policy was not

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Podiatric Med., 162 F.3d 432, 437 (6th Cir. 1998) (college's rejection of handwritten note from doctor stating plaintiff was being treated was reasonable); *Abdo v. Univ. of Vt.*, 263 F. Supp. 2d 772, 778 (D. Vt. 2003) (university's request for documentation from licensed professional, which includes diagnostic information and explanation of functional impact of condition on student's major life activities, was reasonable).

187. *Guckenberger*, 974 F. Supp. at 114.

188. *Id.*

189. *Id.* Initially BU's policy prohibited evaluators who were not physicians or clinical or licensed psychologists, but the policy was changed during the litigation. *Id.* at 114–15.

190. *Id.* at 115.

191. *Id.* at 140–42.

192. *Id.* at 122.

193. *Id.* at 136–37.

194. *Id.*

195. *Id.* at 140. However, the court did conclude that the clinical evaluations necessary for ADHD diagnosis did necessitate evaluation by a professional with doctorate level credentials. *Id.*

196. *Id.* at 138–39. However, the court did hold that reevaluating ADHD student was essential since the symptoms change over time and in different settings. *Id.* at 139.

discriminatory since it did not screen out students with disabilities.<sup>197</sup>

Next, plaintiffs argued that BU's process for evaluating a student's accommodation request was discriminatory.<sup>198</sup> The court held that BU's previous evaluation procedure constituted a method of administration that had the effect of discriminating on the basis of disability when the President and his assistant, neither of whom had training in assessing learning disabilities and who were motivated by false stereotypes of students with learning disabilities, conducted closed door evaluations of student files.<sup>199</sup> Nevertheless, the change in procedure, whereby a trained professional reviewed the files, corrected the previous procedural defects, was sufficiently interactive, and did not have the effect of discriminating against the learning disabled students.<sup>200</sup> Overall, the *Guckenberger* case emphasized flexibility in procedures yet tailored requirements for specific disabilities.

The Department of Education's Office of Civil Rights (OCR), which enforces Section 504 of the Rehabilitation Act and Title II of the ADA, has recommended that postsecondary institutions adopt policies and procedures for addressing student requests for accommodations.<sup>201</sup> Those policies should designate clear procedures for when and how the institution will provide accommodations.<sup>202</sup> "[A]n institution may make a reasonable request that the student provide sufficient supporting medical evidence as to the functional impact of the disability on the student's ability to meet the academic and technical standards requisite to the program or degree for which an adjustment or modification is sought."<sup>203</sup> OCR conveys to students that a school may require documentation that includes: current diagnosis of disability; "the date of the diagnosis; how the diagnosis was reached; the credentials of the professional; how [the] disability affects a major life activity; and how the disability affects . . . academic performance."<sup>204</sup>

197. *Id.* at 136.

198. *Id.* at 140.

199. *Id.* at 140-41.

200. *Id.* at 141-42. The court also addressed the validity of BU's appeals procedure and its policy of refusing to authorize course substitutions. *See id.* at 142-49; *see also* *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82 (D. Mass. 1998).

201. Simon, *supra* note 44, at 6.

202. *See id.*; Ranch Santiago Community College, OCR Case No. 09-92-2049, 3 Nat'l Disability L. Rep. 52 (Region IX July 22, 1992) (recommended written policies).

203. Oregon State Univ., OCR Case No. 10-98-2071 at 11 (Feb. 25, 1999) (letter ruling on file with author). A student may be required to provide results of medical, psychological, or educational diagnostic testing. University of Mississippi, OCR Case No. 06-01-2023 at 2 (July 20, 2001)(letter ruling on file with author).

204. OCR, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities* 2 (2007), <http://www.ed.gov/print/about/offices/list/ocr/transition.html>; *see also* Univ. of Utah, OCR Case No. 08-05-2023 at 3 (May 23, 2005), <http://lexisnexis.com/us/lnacademic> (University policies, which required statement of evaluator's credentials, evaluative

The EEOC gives further guidance in the employment context about when and what an employer may ask for documentation of a disability. “If the need for accommodation is not obvious, an employer may ask an employee for *reasonable* documentation about his/her disability. . . . So, the applicant may be required to provide documentation from an appropriate professional, such as a doctor or a rehabilitation counselor, concerning the applicant’s disability and functional limitations.”<sup>205</sup> The documentation should be sufficient to substantiate that the employee falls with the ADA definition of disability and that the accommodations the employee requests are necessary.<sup>206</sup> Documentation is sufficient when it: “(1) describes the nature, severity, and duration of the employee’s impairment, the activity, or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and (2) substantiates why the requested reasonable accommodation is needed.”<sup>207</sup> If an employee offers the employer insufficient documentation, then the employer must explain why the documentation is insufficient and give the employee the opportunity to provide the necessary information.<sup>208</sup>

The Department of Justice, in discussing regulation of private organizations which offer entrance or certification examinations, agreed that the organizations could require applicants to submit documentation of disabilities.<sup>209</sup> “[D]ocumentation must be reasonable and must be limited to the need for the modification or aid requested. Appropriate documentation might include a letter from a physician or other professional, or evidence of a prior diagnosis or accommodation, such as eligibility for a special education program.”<sup>210</sup>

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data for three years, and a comprehensive narrative report listing tests administered, analyzing test results, discussing functional impact on student learning, and recommending accommodations, were reasonable); Univ. of Utah, OCR Case No. 08-05-2023 at 3 (Reg. VII May 23, 2005) (letter ruling on file with author) (University documentation guidelines that required students to submit documentation prepared by an appropriate professional which included “a diagnosis of a current disability, the date of the diagnosis, how the diagnosis was reached, the credentials of the professional preparing the diagnosis, how the disability affects a major life activity, and how the disability affects academic performance and other information,” were reasonable).

205. EEOC, *Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations* 5 (1995), <http://www.eeoc.gov/policy/docs/medfin5.pdf> (last visited Nov. 11, 2009).

206. EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* 11 (2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (last visited Nov. 11, 2009).

207. *Id.*

208. *Id.* Documentation is insufficient if: (1) it does not identify the disability; (2) it does not explain the need for accommodations; (3) it does not indicate the functional limitations imposed by the medical condition; or (4) the medical professional conducting the examination is not qualified. *Id.*

209. 28 C.F.R. pt. 36, app. B.

210. *Id.*

Overall, interpretations of the ADA support institutional development of documentation guidelines indicating the type, content, source, and recency of documentation to assist disability service providers in assessing students' eligibility for accommodations so long as the guidelines do not attempt to screen out students on the basis of disability. Further, guidelines can also assist disability service providers in fashioning individualized and effective accommodations.

#### IV. LAW SCHOOL DOCUMENTATION GUIDELINES

A review of disability documentation guidelines posted by ABA-accredited law schools and their associated colleges and universities reveals that most institutions do not adequately convey, either to the students petitioning for accommodations or their diagnosticians, what their expectations are for documenting learning disabilities and what the ADA requires students to document in order to demonstrate that they are individuals with disabilities. In assessing the adequacy of documentation guidelines, I reviewed 196 law school websites,<sup>211</sup> discovering that a majority of institutions have posted some form of documentation guidelines on their websites.<sup>212</sup> If the institution posted documentation guidelines specifically for learning disabilities, I focused on those guidelines. If not, then I reviewed the institution's general documentation policy.<sup>213</sup> In reviewing the documentation guidelines, I concentrated on two components: accessibility and content.

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211. Overall, I reviewed the websites of 200 fully or provisionally ABA-accredited law schools. I eliminated from consideration three schools that had websites in Spanish, and one school that did not permit public access. I only reviewed the schools' websites to locate documentation guidelines; I did not consider what documentation guidelines an institution might have that were not posted on its website. The statistics included in this section are based on my assessment of each institution's disability policies and guidelines. The data was current as of September 15, 2009.

212. Of the 196 law schools I reviewed, 157 institutions posted some type of documentation guidelines, while 39 only included general references to disability policies, merely referred students to their Dean of Students or disability services office for additional information, or had no information I could locate. Of those 157 law schools, 47 had law school specific guidelines, while the other 110 either referred the student to the general college or university website (70) or did not have any link, but I located the policy directly through the university's website (40). Appendix A lists websites for each school I reviewed. The list includes websites which link directly to a school's specific guidelines for documenting learning disabilities, if any. Otherwise, the websites link to general documentation guidelines or general disability information. If I could not locate disability information on the school's website, the list states Not Available

213. Of the 140 schools which posted some form of documentation guidelines, 114 had either separate guidelines for learning disabilities or included specific requirements for learning disabilities within its general guidelines. Twenty-six institutions only included general guidelines, or guidelines for documenting disabilities other than learning disabilities.



### A. Accessibility

In general, few institutions' disability policies and documentation guidelines were easy to access from the law school's home page. Generally, the most efficient way to access an institution's guidelines was to search the site.<sup>214</sup> Guidelines were usually located at the school's Disability Services/Resources Office page. Otherwise, the institution's Student Handbook sometimes set out the documentation guidelines or general policies, gave general contact information, or provided links to the guidelines.<sup>215</sup> Few institutions had guidelines directly on the law school's webpage; guidelines were generally located on the associated university's webpage.<sup>216</sup> Seldom did law schools have a link from their Admissions or Prospective Students page, a place where most incoming students might look for information.<sup>217</sup>

A little less than half of the institutions that had documentation guidelines included them in easily printable format, where the other half required a student to print from multiple web pages, with content sometimes running off the page's margins.<sup>218</sup> About one third of the institutions required students to look both at general guidelines and then at more specific guidelines for learning disabled students.<sup>219</sup> Fewer than twenty-five institutions provided forms that were written specifically for the student's diagnostician.

### B. Content

In reviewing content of each institution's guidelines,<sup>220</sup> I considered whether the institutional guidelines required the student's documentation to specify: a) the recency of testing or documentation of testing; b) the diagnostician's qualifications; c) the diagnosis of disability; d) the domains

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214. For 117 of the 157 schools which posted some guidelines, searching the site was easier to locate guidelines than clicking under either Prospective or Current Students. The most effective search terms were: disability, disability services, disability resource center, or accommodations.

215. For 38 of the 196 schools, students would have to look at the school's Student Handbook for disability information. However, specific document guidelines were incorporated into the Student Handbook on only nine occasions.

216. Guidelines for 110 out of 157 schools were located on the college or university site.

217. Only thirteen schools listed disability under Admissions or Prospective Students.

218. Guidelines from seventy schools were either in PDF or other easily printable format.

219. Sometimes, there were differences between the general and learning disability guidelines, which required the student to decide which guidelines took precedence.

220. A number of guidelines tracked the AHEAD Guidelines for Documenting Learning Disabilities, despite AHEAD withdrawing those guidelines in 2004. See *supra* note 132. Very few guidelines modeled AHEAD's Best Practices. See AHEAD BEST PRACTICES, *supra* note 109, at 5–6.

and types of acceptable testing instruments; and e) recommendations for accommodations.

### 1. Recency of Documentation

Twenty-eight out of the 157 documentation guidelines did not indicate how current the student's documentation must be. Of the remaining 129 guidelines, institutions set out 21 different prescriptions for the age of documentation. The most common requirement was that testing had been completed within the last three years.<sup>221</sup> The next most common prescription was that documentation of testing be "current."<sup>222</sup> Other institutions made how recent testing must be dependent on the age of the student.<sup>223</sup> A small number of institutions only accepted documentation when testing had been done as an adult, without defining adult.<sup>224</sup> Several institutions indicated that whether the documentation was sufficiently current would be judged on a case-by-case basis.<sup>225</sup> While fifty institutions set precise, rigid guidelines, an equal number set a guideline, but allowed for flexibility in accepting documentation outside the guidelines, depending on the circumstances.<sup>226</sup>

Few if any institutions where the documentation policy was found at the institution's website rather than on the law school site specified if the currency requirement was different when the student was applying to law school or other graduate schools.<sup>227</sup> The assumption of most college and universities' documentation guidelines was that students were applying to the institution as undergraduates.

### 2. Qualifications of Diagnosticians

Only a dozen institutions did not indicate the type of diagnostician or

221. Sixty-five of the 157 schools set a three year guideline for the age of documentation. Seven schools set five year guidelines; four schools indicated three to five years, two schools indicated four years, and one required testing within the past two years.

222. Twenty-one schools only required that documentation be current without specifying any further date requirements. Nine schools required that documentation be "recent."

223. The most common requirement was that if the testing were completed during adulthood, it should have been completed with the past five years (nine schools); if testing were completed as a high school student, the testing could not be more than three years old (thirteen schools).

224. Four institutions only accepted documentation completed during adulthood; three schools did not accept documentation completed prior to college.

225. Three schools used case-by-case language.

226. Forty-seven schools.

227. Only one school indicated whether documentation must be updated when a student graduated from one degree program and enrolled in another. Of course those schools which had law school specific guidelines presumably drafted those guidelines knowing that their students would all be adults.

evaluator that must document a student's disability. The most common description of the diagnostician was: a qualified, certified, licensed professional, trained and experienced in the area of learning disabilities.<sup>228</sup> Most other institutions set out a non-exclusive list of acceptable professionals, most often including: licensed, clinical psychologist,<sup>229</sup> school or educational psychologist,<sup>230</sup> licensed physician or medical doctor with experience diagnosing learning disabilities,<sup>231</sup> neuropsychologist,<sup>232</sup> learning disability specialist,<sup>233</sup> and licensed psychiatrist.<sup>234</sup> Other acceptable diagnosticians included: psychometrist, speech-language pathologist, neuropsychiatrist, clinical social worker, counseling psychiatrist, psycho-educational professional, neurologist, psychological examiner, licensed counselor, supervised student clinician, and "other professional."<sup>235</sup> Forty-five policies indicated that the diagnostician could not be related to the students.<sup>236</sup>

### 3. Diagnosis of Disability

While very few of the guidelines actually included a definition of "learning disability,"<sup>237</sup> forty-four institutions required diagnosticians to include a specific DSM-IV diagnosis of disability.<sup>238</sup> A majority of learning disability guidelines dictated that diagnosticians use the aptitude-achievement discrepancy model to assess whether a student had a learning disability.<sup>239</sup>

Nearly all institutions' disability policies referred to the ADA and the Rehabilitation Act as the controlling law,<sup>240</sup> although only ninety-five of the institutions' policies actually used the language from the ADA's

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228. Fifty-two of the 157 schools with guidelines used this type of terminology.

229. Sixty-three institutions specified licensed or clinical psychologist, while seventeen institutions indicated psychologist.

230. Thirty-four institutions indicated school psychologist; twenty-two specified educational psychologist. An additional eight schools included educational therapist and six schools listed educational diagnostician.

231. Thirty-nine schools used this terminology.

232. Thirty-nine schools.

233. Forty-eight schools.

234. Nine schools.

235. Fewer than four institutions listed any one of these individual diagnosticians. Seventeen schools added "other professional" to round out their lists.

236. One institution stated that a licensed clinical social worker was not a qualified professional.

237. Eight of the 157 institutions included the NJCLD definition of learning disability. *See supra* note 18 and accompanying text. Three policies, however, included other definitions.

238. Eleven of those institutions also permitted a diagnosis under ICD-9 or ICD-10, or ICF.

239. Fourteen schools relied on a similar three or four criteria model for diagnosing learning disabilities using the discrepancy mode

240. Two institutions only mentioned the Rehabilitation Act.

definition of disability, directing diagnosticians to conclude whether the student was substantially limited in a major life activity, generally of learning. Yet, contrary to the majority of cases,<sup>241</sup> only five policies specified that the impact of the student's impairment would be compared to that of the general population.

#### 4. Testing Instruments

Consistent with the discrepancy model for diagnosing learning disabilities, most learning disability guidelines required testing in the areas of aptitude or cognitive ability and academic achievement.<sup>242</sup> In addition, eighty-five policies also required testing a student's information processing. Not a single school addressed how to deal with a student who had not undergone aptitude or achievement testing, but had been previously deemed eligible for special education using RTI.<sup>243</sup> Nearly all schools recommended a comprehensive test assessment battery, most recommending at least one test in each of its required domains.

There was actually significant uniformity in the specific testing instruments each institution recommended.<sup>244</sup> To test aptitude, most institutions recommended the Wechsler Adult Intelligence Scale (WAIS-R, or WISC-III) or the Woodcock-Johnson Psychoeducational Battery III (WJ), Test of Cognitive Ability.<sup>245</sup> To test achievement, the most commonly recommended test instruments were: the Woodcock-Johnson Psychoeducational Battery III, Test of Achievement,<sup>246</sup> the Wechsler Individualized Achievement Test - II (WIAT-II),<sup>247</sup> the Stanford Test of Academic Skills (TASK),<sup>248</sup> and the Scholastic Abilities Test for Adults (SATA).<sup>249</sup> To test information processing, those schools which

241. See *supra* notes 94-97 and accompanying text.

242. 104 schools.

243. As students diagnosed with learning disabilities using RTI begin to move through the elementary and secondary school systems, more data will be available demonstrating the viability of RTI for older students, including those participating in undergraduate and graduate programs.

244. Of the 123 learning disability guidelines, thirty-five did not recommend any specific testing instruments.

245. Seventy-nine schools recommended WAIS and seventy-four recommended WJ. Two other common recommendations were the Stanford Binet Intelligence Scale IV or V (forty schools) and the Kaufman Adolescent and Adult Intelligence Test (KAAIT) (twenty-eight schools).

246. Seventy-four schools recommended this test instrument.

247. Forty-one schools.

248. Thirty-three schools.

249. Thirty-six schools recommended this test instrument. In addition, a number of schools also recommended additional tests in reading and math using Test of Written Language 3 (TOWL 3) (thirty-three schools); Woodcock Reading Mastery Test (WRMT) (thirty-five schools); the Nelson-Denny Reading Test (forty-one schools); and Stanford Diagnostic Mathematics Test (SDMT) (twenty-six schools). Twenty-seven other tests were recommended by fewer than five schools.

recommend testing listed the Detroit Tests of Learning Aptitude – 3 or Adult (DTLA-3 or A)<sup>250</sup> or the Wechsler Memory Scale (WMS-R or III).<sup>251</sup> Interestingly, while thirty-three schools noted that the Wide Range Achievement Test (WRAT-3) was an unacceptable testing instrument, eight schools included the test on their recommended list.<sup>252</sup>

#### 5. Recommendations for Accommodations

Most institutions required diagnosticians to make individualized recommendations for accommodations that directly addressed the student's limitations in learning and state a rationale as to why the proposed accommodations were necessary.<sup>253</sup> While nearly all schools' general disability policies described the types of available accommodations,<sup>254</sup> few listed those in their documentation policies.<sup>255</sup> Furthermore, no guidelines described the nature of the program for which students would be receiving accommodations.

### V. RECOMMENDATIONS

Given the history of pervasive deficiencies in learning disability documentation and the wide variation in law school documentation guidelines, law schools, or any postsecondary educational institution for that matter, should set out clear and specific guidelines for the source, type, recency, and content of documentation that students must produce to obtain accommodations for learning disabilities. While under the Rehabilitation Act, institutions technically need only give notice of who the disability contact person is,<sup>256</sup> the more comprehensive and accessible guidelines are, the more effective and efficient the process will become. Furthermore, the easier it is for students and diagnosticians to understand and access the institutions' guidelines, the more likely they will be able to comply with them.

To improve postsecondary educational institutions' disability services and the documentation they receive from diagnosticians, institutions should implement several changes:

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250. Twenty-eight schools.

251. Eighteen schools.

252. Likewise, three schools stated that the Wechsler Intelligence Scale for Children (WISC) was not an acceptable measure, but two schools recommended the test.

253. Only forty-six of the 157 schools with guidelines did not specifically note that diagnosticians should describe appropriate accommodations.

254. Extended test time, distraction free testing environments, notetakers, etc.

255. Twenty-four schools.

256. 34 C.F.R. § 104.8 (2008).

*Guidelines to Assist Diagnosticians*

## 1. Give clear notice of what the applicable law is.

Institutions should give diagnosticians clear notice of the ADA standards for assessing students' eligibility for accommodations. Documentation guidelines should reflect the requirements of the ADA and not the IDEA or state educational guidelines. The guidelines should explain in plain language, but in some detail, the ADA's definition of an individual with a disability, so that the diagnostician can clearly understand the distinction between the IDEA and the ADA. The diagnostician must be prepared to describe, if he or she concludes the student has a learning disorder, how the student's disorder substantially limits the student's ability to learn, speak, read, concentrate, think, or communicate, or the student's brain function. For those jurisdictions which judge whether an individual's impairment substantially limits major life activities compared to the general population, the institution should clearly convey this standard to the diagnostician.

## 2. Give clear notice as to which learning disability definition or model the institution subscribes to, if any.

To aid diagnosticians, guidelines should clearly indicate what definition or model of learning disability the institution is relying on. As elementary and secondary schools move away from an aptitude-achievement discrepancy model of identifying learning disabilities, law schools and universities should adapt as well. In particular, law schools should address how they will handle those students previously diagnosed with a learning disability through the RTI or other clinical model. Clinging to DSM diagnosis as the only acceptable measure of learning disabilities when elementary and secondary schools are moving away from discrepancy as a measure of assessment will further widen the disconnect between secondary and postsecondary disability services.

## 3. Give clear notice of the components the documentation should address.

Guidelines should describe what should be included in disability documentation. The documentation should address: background information about the student's history of learning disabilities; a clear diagnosis including an explanation of how the student's impairment substantially limits the student's learning or other major life activities; results of psychoeducational testing using appropriate test instruments and an explanation of those test results; and recommendations for accommodations with an explanation of why each accommodation will help the student overcome deficits in learning particular to the law school program. Also, if institutions look to diagnosticians to recommend

individualized accommodations, they will only receive informed recommendations if they educate the diagnostician about the nature of the law school program and the evaluation methods used in that program. Without a clear explanation of what will be expected of the student during law school, the diagnostician cannot tailor accommodations to the student's needs.

The guidelines should also be in a form that can be given directly to diagnosticians. Institutions should make it as easy as possible for the diagnostician to provide the necessary information. Inadequate documentation causes delay for the student and inconvenience for the institution. Providing forms and checklists for diagnosticians to complete might be the easiest way to get them to comply with documentation guidelines. A sample form for diagnosticians to complete is included as Appendix B.

Even though guidelines should be specific and clear about what they require of diagnosticians, they should also be flexible, allowing for different methods and sources of documentation.<sup>257</sup>

#### *Guidelines to Assist Students*

1. Give students clear notice how recent testing and/or documentation must be.

Guidelines should be clear about how recent documentation must be. Law students who have undergone testing for learning disabilities as adults should not have to be retested. According to *Guckenberger*, institutions should steer away from definitive date limits, and should allow for flexibility in the age of documentation.<sup>258</sup> Despite requirements to the contrary by many institutions and most testing agencies, retesting to establish the existence of an ADA disability, i.e., a learning disorder which substantially limits a major life activity, is not usually necessary given that learning disabilities do not generally change during adulthood. However, the recommendations for accommodations should be updated regularly, specifically addressing the requirements of the program to which the student is applying.

Currently, because most documentation guidelines are written by the disability services office which is generally situated at the undergraduate campus, most guidelines assume that students are coming immediately from high school. When institutions frame the guidelines for how current a student's documentation must be, they should consider that students may

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257. AHEAD BEST PRACTICES, *supra* note 109, at 4.

258. *Guckenberger v. Trustees of Boston Univ.*, 974 F. Supp. 106, 138–39 (D. Mass. 1997). Institutions could certainly require testing to take place while students are adults rather than accept testing that took place when they were children and when their learning disability was documented under the IDEA.

be applying to graduate programs, including law school.

2. Give students clear notice of what their responsibilities are.

Institutional guidelines should be written in plain language students can understand and should be easily accessible. Institutions should post direct links to guidelines in places that incoming students generally access, namely, the institution's website and in particular, the Admissions or Prospective Students webpage, and make links to disability information obvious.<sup>259</sup> To ensure that students understand what information they should provide to whom and when, institutions should furnish students with checklists which outline the process for determining eligibility for accommodations and appropriateness of individualized accommodations.

Students should be prepared to participate in a follow-up interview with the institution's disability service provider to fill in any gaps in the diagnostician's documentation.<sup>260</sup>

#### *General Recommendations*

1. Create disability-specific documentation guidelines as recommended by AHEAD.<sup>261</sup>

Different disabilities require different documentation and a school cannot expect a student or a diagnostician to guess about what would be acceptable in each instance. Likewise, students and diagnosticians should not be expected to consult both general and learning disability-specific guidelines to both connect and reconcile any differences.

2. Collaborate through organizations like AHEAD to develop consistent documentation guidelines between schools.

Institutions should avoid outdated guideline models. Guidelines should be revised regularly to be consistent with current methods of assessing learning disabilities and changes in the law.

3. Law schools should set good examples for their universities and colleges by assisting disability service offices to understand the law and formulate disability policies consistent with the law.

And, if law students must go to the university campus to receive

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259. Given how web-users generally navigate web pages, namely, scanning, focusing on key words, and clicking a minimal number of times to find information, institutions should make disability information easy to access, in obvious places that require little thought to locate. See STEVE KRUG, *DON'T MAKE ME THINK! A COMMON SENSE APPROACH TO WEB USABILITY* 14, 21–23 (2d ed. 2006).

260. *Documentation Process Should Include a Personal Narrative of Disability*, 11 *DISABILITY COMPL. FOR HIGHER EDUC.*, Sept. 1, 2005.

261. AHEAD BEST PRACTICES, *supra* note 109, at 8.



disability services, the law school should provide clear guidance to its students as to how to do so. There should be clear links to the disability services office on the law school's web page for both incoming and current students.

The goal of each law school should be: to comply with the requirements of the ADA; to provide students who have learning disabilities an opportunity to succeed in the law school environment; and to implement a process for assessing eligibility for accommodations that is fair and efficient. Generating clear, specific, and thorough documentation guidelines is a step in the right direction.

APPENDIX A

Appendix A lists websites for each school I reviewed. The website listed links either directly to the law school website if disability information was located there or to their associated university website. The list primarily includes websites which link directly to a school's specific guidelines for documenting learning disabilities, if any. Otherwise, the websites link to general documentation guidelines or general disability information. If I could not locate disability information on the school's website, the list states information was Not Available. The links in this list were current as of September 2009.

SCHOOL	WEBSITE
University of Akron - C. Blake McDowell Law Center	<a href="http://www.uakron.edu/access/Accommodations_Services/lawstudents.php">http://www.uakron.edu/access/Accommodations_Services/lawstudents.php</a>
University of Alabama School of Law	<a href="http://ods.ua.edu/documentation/ld.htm">http://ods.ua.edu/documentation/ld.htm</a>
Albany Law School	<a href="http://www.albanylaw.edu/media/user/student_affairs/albanylawstudenthandbook.pdf">http://www.albanylaw.edu/media/user/student_affairs/albanylawstudenthandbook.pdf</a>
American University, Washington College of Law	<a href="http://www.wcl.american.edu/studentaffairs/disabilities.cfm">http://www.wcl.american.edu/studentaffairs/disabilities.cfm</a>
Appalachian School of Law	<a href="http://www.asl.edu/documents/standards.pdf">http://www.asl.edu/documents/standards.pdf</a>
University of Arizona - James E. Rogers College of Law	<a href="http://drc.arizona.edu/ada/documentation.html">http://drc.arizona.edu/ada/documentation.html</a>
Arizona State University - Sandra Day O'Connor College of Law	<a href="http://www.asu.edu/aad/manuals/usi/usi701-02.html">http://www.asu.edu/aad/manuals/usi/usi701-02.html</a>
University of Arkansas, Fayetteville - Leflar Law Center	<a href="http://www.uark.edu/ua/csd/applications.htm">http://www.uark.edu/ua/csd/applications.htm</a>
University of Arkansas at Little Rock, William H. Bowen School of Law	<a href="http://www.uarl.edu/disability/index.php/student-handbook#5">http://www.uarl.edu/disability/index.php/student-handbook#5</a>
Ave Maria School of Law	Not Available
University of Baltimore School of Law	<a href="http://www.ubalt.edu/template.cfm?page=953">http://www.ubalt.edu/template.cfm?page=953</a>
Barry University Dwayne O. Andreas School of Law	<a href="http://www.barry.edu/disabilityservices/guidelines/specific.htm">http://www.barry.edu/disabilityservices/guidelines/specific.htm</a>
Baylor University School of Law	<a href="http://www.baylor.edu/oala/index.php?id=26133">http://www.baylor.edu/oala/index.php?id=26133</a>
Benjamin N. Cardozo School of Law, Yeshiva University	<a href="http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&amp;ucmd=UserDisplay&amp;userid=10356&amp;contentid=4076&amp;folderid=0">http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&amp;ucmd=UserDisplay&amp;userid=10356&amp;contentid=4076&amp;folderid=0</a>
Boston College Law School	<a href="http://www.bc.edu/schools/law/services/deanstudent/disability.html">http://www.bc.edu/schools/law/services/deanstudent/disability.html</a>
Boston University School of Law	<a href="http://www.bu.edu/disability/policies/eval-learning.html">http://www.bu.edu/disability/policies/eval-learning.html</a>
Brigham Young University - J. Reuben Clark Law School	<a href="http://www.law2.byu.edu/admissions/prepforadmission#services">http://www.law2.byu.edu/admissions/prepforadmission#services</a>
Brooklyn Law School	<a href="http://www.brooklaw.edu/CityCampus/Student%20Life/Campus%20Services.aspx">http://www.brooklaw.edu/CityCampus/Student%20Life/Campus%20Services.aspx</a>
University at Buffalo Law School	<a href="http://law.buffalo.edu/Student_Life_And_Services/default.asp?firstlevel=4&amp;filename=student_support">http://law.buffalo.edu/Student_Life_And_Services/default.asp?firstlevel=4&amp;filename=student_support</a>
University of California, Berkeley, School of Law	<a href="http://www.dsp.berkeley.edu/learningdisability.html">http://www.dsp.berkeley.edu/learningdisability.html</a>
University of California, Davis, School of Law	<a href="http://sdc.ucdavis.edu/fliers/LD_flier.html">http://sdc.ucdavis.edu/fliers/LD_flier.html</a>

SCHOOL	WEBSITE
University of California, Hastings College of the Law	<a href="http://www.uchastings.edu/disability/forms.html">http://www.uchastings.edu/disability/forms.html</a>
University of California, Los Angeles School of Law	<a href="http://www.osd.ucla.edu/docs/Guidelines/ucdssld.html">http://www.osd.ucla.edu/docs/Guidelines/ucdssld.html</a>
California Western School of Law	<a href="http://www.cwsl.edu/content/diversity/Accommodations%20Complete%20Packet%20-%20ONLINE.pdf">http://www.cwsl.edu/content/diversity/Accommodations%20Complete%20Packet%20-%20ONLINE.pdf</a>
Campbell University of Norman Adrian Jiggins School of Law	<a href="http://www.campbell.edu/content/682/ds-guide.pdf">http://www.campbell.edu/content/682/ds-guide.pdf</a>
Capital University Law School	<a href="https://culsnet.law.capital.edu/Manual/6_06.asp">https://culsnet.law.capital.edu/Manual/6_06.asp</a>
Case Western Reserve School of Law	<a href="http://law.case.edu/student_life/content.asp?id=111">http://law.case.edu/student_life/content.asp?id=111</a>
The Catholic University of America, Columbus School of Law	<a href="http://dss.cua.edu/res/docs/2009-2010-LD-Documentation-Guidelines.pdf">http://dss.cua.edu/res/docs/2009-2010-LD-Documentation-Guidelines.pdf</a>
Chapman University School of Law	<a href="http://www.chapman.edu/images/userImages/loge/Pge_4217/Handbook07-08.pdf">http://www.chapman.edu/images/userImages/loge/Pge_4217/Handbook07-08.pdf</a>
Charleston School of Law	<a href="http://charlestonlaw.indigofiles.com/Law_Student_Handbook_09-10.pdf">http://charlestonlaw.indigofiles.com/Law_Student_Handbook_09-10.pdf</a>
Charlotte School of Law	<a href="http://www.charlottelaw.edu/studentervices/default.asp?PageID=191">http://www.charlottelaw.edu/studentervices/default.asp?PageID=191</a>
The University of Chicago, The Law School	<a href="http://disabilities.uchicago.edu/accommodation_process/Protocol%20for%20LD%20Documentation%20-%2012-13-08%20EAF%20draft.pdf">http://disabilities.uchicago.edu/accommodation_process/Protocol%20for%20LD%20Documentation%20-%2012-13-08%20EAF%20draft.pdf</a>
Chicago-Kent College of Law, Illinois Institute of Technology	<a href="http://www.iit.edu/cdr/guidelines/learning_disabilities_documentation_guidelines.shtml">http://www.iit.edu/cdr/guidelines/learning_disabilities_documentation_guidelines.shtml</a>
University of Cincinnati College of Law	<a href="http://www.uc.edu/sas/disability/students.html">http://www.uc.edu/sas/disability/students.html</a>
City University of New York, School of Law	<a href="http://www.law.cuny.edu/student/StudentServices/StudentswithDisabilities/Guidelines.html#Learning%20Disability">http://www.law.cuny.edu/student/StudentServices/StudentswithDisabilities/Guidelines.html#Learning%20Disability</a>
Cleveland State University, Cleveland-Marshall College of Law	<a href="http://www.csuohio.edu/offices/disability/students/handbook/accom2.html#docs">http://www.csuohio.edu/offices/disability/students/handbook/accom2.html#docs</a>
University of Colorado School of Law	<a href="http://www.colorado.edu/disabilityservices/learning/docs.html">http://www.colorado.edu/disabilityservices/learning/docs.html</a>
Columbia University School of Law	<a href="http://www.health.columbia.edu/pdfs/ods_learning_disabilities_guidelines.pdf">http://www.health.columbia.edu/pdfs/ods_learning_disabilities_guidelines.pdf</a>
University of Connecticut School of Law	<a href="http://www.csd.uconn.edu/doc_profiles.html">http://www.csd.uconn.edu/doc_profiles.html</a>
Thomas M. Cooley Law School	<a href="http://www.cooley.edu/students/Disability_Access_Guide.pdf">http://www.cooley.edu/students/Disability_Access_Guide.pdf</a>
Cornell Law School	<a href="http://sds.cornell.edu/Brochures/LD_Guidelines.pdf">http://sds.cornell.edu/Brochures/LD_Guidelines.pdf</a>
Creighton University School of Law	<a href="http://www.creighton.edu/EOP/Disability.html">http://www.creighton.edu/EOP/Disability.html</a>
University of Dayton School of Law	<a href="http://law.udayton.edu/NR/rdonlyres/0173D87E-25A-46DA-B5A7-2FD95142308/0/AppendixF1.pdf">http://law.udayton.edu/NR/rdonlyres/0173D87E-25A-46DA-B5A7-2FD95142308/0/AppendixF1.pdf</a>
University of Denver College of Law	<a href="http://www.du.edu/studentlife/disability/dsp/doc_guidelines.html">http://www.du.edu/studentlife/disability/dsp/doc_guidelines.html</a>
DePaul University College of Law	<a href="http://www.law.depaul.edu/students/pdf/student_handbook.pdf">http://www.law.depaul.edu/students/pdf/student_handbook.pdf</a>
University of Detroit Mercy School of Law	<a href="http://www.law.udmercy.edu/students/academicsupport/disabilities.php">http://www.law.udmercy.edu/students/academicsupport/disabilities.php</a>
University of the District of Columbia, David A. Clarke School of Law	<a href="http://www.law.udc.edu/resource/collection/522B22A-7345-44EF-9C15-30C54025B36/disability_memo.pdf">http://www.law.udc.edu/resource/collection/522B22A-7345-44EF-9C15-30C54025B36/disability_memo.pdf</a>

SCHOOL	WEBSITE
Drake University Law School	<a href="http://www.drake.edu/acadassist/disability/studresp/onsillity.php">http://www.drake.edu/acadassist/disability/studresp/onsillity.php</a>
Duke University School of Law	<a href="http://www.access.duke.edu/pdf/SAOGuideLns/SA_guidelns_LD.pdf">http://www.access.duke.edu/pdf/SAOGuideLns/SA_guidelns_LD.pdf</a>
Duquesne University School of Law	<a href="http://www.sites.duq.edu/special-students/learning-disability.cfm">http://www.sites.duq.edu/special-students/learning-disability.cfm</a>
Earle Mack School of Law at Drexel	<a href="http://www.drexel.edu/law/PDFs/osa-disability-policy.pdf">http://www.drexel.edu/law/PDFs/osa-disability-policy.pdf</a>
Elon University School of Law	<a href="http://www.elon.edu/docs/e-web/academics/advising/ds/guidebook.pdf">http://www.elon.edu/docs/e-web/academics/advising/ds/guidebook.pdf</a>
Emory University School of Law	<a href="http://www.ods.emory.edu/ldcriteria.htm">http://www.ods.emory.edu/ldcriteria.htm</a>
Faulkner University of Thomas Goode Jones School of Law	<a href="http://www.faulkner.edu/jsl/info/disabilities.asp">http://www.faulkner.edu/jsl/info/disabilities.asp</a>
University of Florida, Fredric G. Levin College of Law	<a href="http://www.dso.ufl.edu/drc/documents/Learning%20Disability%20Evaluation%20Process%20II.pdf">http://www.dso.ufl.edu/drc/documents/Learning%20Disability%20Evaluation%20Process%20II.pdf</a>
Florida A&M University College of Law	<a href="http://law.famu.edu/go.cfm/do/Page.View/pid/28/t/Student-Handbook">http://law.famu.edu/go.cfm/do/Page.View/pid/28/t/Student-Handbook</a>
Florida Coastal School of Law	<a href="http://www.fcsl.edu/sites/fcsl.edu/files/FCSL%20Student%20Handbook-%208-6-09.pdf">http://www.fcsl.edu/sites/fcsl.edu/files/FCSL%20Student%20Handbook-%208-6-09.pdf</a>
Florida International University College of Law	<a href="http://law.fiu.edu/images/docs/Student_Information/policy%20for%20students%20and%20applicants%20with%20disability.pdf">http://law.fiu.edu/images/docs/Student_Information/policy%20for%20students%20and%20applicants%20with%20disability.pdf</a>
Florida State University College of Law	<a href="http://www.law.fsu.edu/current_students/rules/exams.pdf">http://www.law.fsu.edu/current_students/rules/exams.pdf</a>
Fordham University School of Law	<a href="http://law.fordham.edu/office-of-student-affairs/2821.htm">http://law.fordham.edu/office-of-student-affairs/2821.htm</a>
Franklin Pierce Law Center	<a href="http://www.piercelaw.edu/assets/pdf/studenthandbook/16-17.pdf">http://www.piercelaw.edu/assets/pdf/studenthandbook/16-17.pdf</a>
George Mason University School of Law	<a href="http://ods.gmu.edu/students/documentation.php">http://ods.gmu.edu/students/documentation.php</a>
The George Washington University Law School	<a href="http://gwired.gwu.edu/dss/students/eligibility/LD/">http://gwired.gwu.edu/dss/students/eligibility/LD/</a>
Georgetown University Law Center	<a href="http://www.law.georgetown.edu/counseling/disabilities.html">http://www.law.georgetown.edu/counseling/disabilities.html</a>
University of Georgia School of Law	<a href="http://drc.uga.edu/disabilities/eligibilityofd.php">http://drc.uga.edu/disabilities/eligibilityofd.php</a>
Georgia State University College of Law	<a href="http://www2.gsu.edu/~wwwoods/documentation_guidelines/index.htm">http://www2.gsu.edu/~wwwoods/documentation_guidelines/index.htm</a>
Golden Gate University School of Law	<a href="http://www.ggu.edu/school_of_law/law_student_services/disability_services">http://www.ggu.edu/school_of_law/law_student_services/disability_services</a>
Gonzaga University School of Law	<a href="http://www.gonzaga.edu/Campus-Resources/Offices-and-Services-A-Z/Disability-Resources-Education-and-Access-Management/Prospective-Students/Documentation-Policies/default.asp">http://www.gonzaga.edu/Campus-Resources/Offices-and-Services-A-Z/Disability-Resources-Education-and-Access-Management/Prospective-Students/Documentation-Policies/default.asp</a>
Hamline University School of Law	<a href="http://www.hamline.edu/hamline_info/offices_services/student_relations/studentaffairs/disabilities_services/documentation_guidelines.html">http://www.hamline.edu/hamline_info/offices_services/student_relations/studentaffairs/disabilities_services/documentation_guidelines.html</a>
Harvard Law School	<a href="http://www.law.harvard.edu/students/disability.php">http://www.law.harvard.edu/students/disability.php</a>
University of Hawaii, William S. Richardson School of Law	<a href="http://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/StudentHandbookJuly182008.pdf">http://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/StudentHandbookJuly182008.pdf</a>
Hofstra University School of Law	<a href="http://law.hofstra.edu/StudentLife/StudentAffairs/Handbook/stuhb_chapter_07.html">http://law.hofstra.edu/StudentLife/StudentAffairs/Handbook/stuhb_chapter_07.html</a>
University of Houston Law Center	<a href="http://www.uh.edu/csd/ld.htm">http://www.uh.edu/csd/ld.htm</a>

SCHOOL	WEBSITE
Howard University School of Law	<a href="http://www.law.howard.edu/377">http://www.law.howard.edu/377</a>
University of Idaho College of Law	<a href="http://www.access.uidaho.edu/default.aspx?pid=9639">http://www.access.uidaho.edu/default.aspx?pid=9639</a>
University of Illinois College of Law	<a href="http://www.disability.uiuc.edu/page.php?id=23">http://www.disability.uiuc.edu/page.php?id=23</a>
Indiana University School of Law, Indianapolis	<a href="http://indylaw.indiana.edu/students/handbook/">http://indylaw.indiana.edu/students/handbook/</a>
Indiana University Maurer School of Law	<a href="http://129.79.17.23/dss/forms/new/adhd.pdf">http://129.79.17.23/dss/forms/new/adhd.pdf</a>
University of Iowa College of Law	<a href="http://www.law.uiowa.edu/documents/2006-7_handbook_web-final.pdf">http://www.law.uiowa.edu/documents/2006-7_handbook_web-final.pdf</a>
Atlanta's John Marshall Law School	<a href="http://www.johnmarshall.edu/images/pdf/Student_Handbook.pdf">http://www.johnmarshall.edu/images/pdf/Student_Handbook.pdf</a>
The John Marshall Law School	<a href="http://www.jmls.edu/registrar/disability%20Acc%20req%20form.pdf">http://www.jmls.edu/registrar/disability%20Acc%20req%20form.pdf</a>
University of Kansas School of Law	<a href="http://www.disability.ku.edu/~disability/documentation/general_documentation.shtml">http://www.disability.ku.edu/~disability/documentation/general_documentation.shtml</a>
University of Kentucky College of Law	<a href="http://www.uky.edu/StudentAffairs/DisabilityResourceCenter/ldGuidelines.html">http://www.uky.edu/StudentAffairs/DisabilityResourceCenter/ldGuidelines.html</a>
University of La Verne College of Law	<a href="http://law.ulv.edu/student_services/students_with_disabilities.html">http://law.ulv.edu/student_services/students_with_disabilities.html</a>
Lewis and Clark Law School	<a href="http://www.lclark.edu/dept/access/policy.html">http://www.lclark.edu/dept/access/policy.html</a>
Liberty University School of Law	<a href="http://www.liberty.edu/academics/law/index.cfm?PID=6253">http://www.liberty.edu/academics/law/index.cfm?PID=6253</a>
Louisiana State University Law Center	<a href="http://appl003.lsu.edu/slas/ods.nsf/\$Content/Learning+Disabilities?OpenDocument">http://appl003.lsu.edu/slas/ods.nsf/\$Content/Learning+Disabilities?OpenDocument</a>
University of Louisville, Louis D. Brandeis School of Law	<a href="http://www.law.louisville.edu/sites/www.law.louisville.edu/files/disabilities_handbook_0.pdf">http://www.law.louisville.edu/sites/www.law.louisville.edu/files/disabilities_handbook_0.pdf</a>
Loyola Law School, Los Angeles	<a href="http://intranet.lls.edu/studentaffairs/disability.html">http://intranet.lls.edu/studentaffairs/disability.html</a>
Loyola University, Chicago, School of Law	<a href="http://www.luc.edu/sswd/documentation.shtml">http://www.luc.edu/sswd/documentation.shtml</a>
Loyola University, New Orleans, School of Law	<a href="http://www.loyno.edu/arc/disability-services-faqs">http://www.loyno.edu/arc/disability-services-faqs</a>
University of Maine School of Law	<a href="http://www.usm.maine.edu/~oassd/policynprocedures/ld.htm">http://www.usm.maine.edu/~oassd/policynprocedures/ld.htm</a>
Marquette University Law School	<a href="http://www.marquette.edu/oses/disabilityservices/documents/PDFMarquetteUniversityDisabilityDocumentationGuidelines.pdf">http://www.marquette.edu/oses/disabilityservices/documents/PDFMarquetteUniversityDisabilityDocumentationGuidelines.pdf</a>
University of Maryland School of Law	<a href="http://www.law.umaryland.edu/students/resources/policies/documents/ADA_policy_11272007.pdf">http://www.law.umaryland.edu/students/resources/policies/documents/ADA_policy_11272007.pdf</a>
University of the Pacific, McGeorge School of Law	<a href="http://www.mcgeorge.edu/x579.xml">http://www.mcgeorge.edu/x579.xml</a>
The University of Memphis, Cecil C. Humphreys School of Law	<a href="http://www.memphis.edu/sds/disabilitysvcs/pdfs/Guidelines_for_Documentation_-_LD.pdf">http://www.memphis.edu/sds/disabilitysvcs/pdfs/Guidelines_for_Documentation_-_LD.pdf</a>
Mercer University Law School	<a href="http://www.law.mercer.edu/life/studenthandbook.pdf">http://www.law.mercer.edu/life/studenthandbook.pdf</a>
University of Miami School of Law	<a href="http://www.umarc.miami.edu/pages/ld.html">http://www.umarc.miami.edu/pages/ld.html</a>
The University of Michigan Law School	<a href="http://www.umich.edu/~sswd/resources/forms/index.html">http://www.umich.edu/~sswd/resources/forms/index.html</a>
Michigan State University College of Law	<a href="http://www.law.msu.edu/academics/ac-police-exam.html">http://www.law.msu.edu/academics/ac-police-exam.html</a>
University of Minnesota	<a href="http://ds.umn.edu/Students/Documented%20Disability/AdditionalDocumentationGuidelinesforLearningDisabilities.htm">http://ds.umn.edu/Students/Documented%20Disability/AdditionalDocumentationGuidelinesforLearningDisabilities.htm</a>

SCHOOL	WEBSITE
Mississippi College School of Law	<a href="http://law.mc.edu/student/accommodations.htm">http://law.mc.edu/student/accommodations.htm</a>
University of Mississippi School of Law	<a href="http://www.olemiss.edu/depts/sds/SDSDocLD.htm">http://www.olemiss.edu/depts/sds/SDSDocLD.htm</a>
University of Missouri School of Law (Columbia)	<a href="http://law.missouri.edu/students/policies/disabilitieshandbook.html">http://law.missouri.edu/students/policies/disabilitieshandbook.html</a>
University of Missouri-Kansas City School of Law	<a href="http://www.umkc.edu/disability/images/documentin_id.pdf">http://www.umkc.edu/disability/images/documentin_id.pdf</a>
University of Montana School of Law	<a href="http://life.umt.edu/dss/name/documentation">http://life.umt.edu/dss/name/documentation</a>
University of Nebraska College of Law	<a href="http://www.unl.edu/ssd/services/">http://www.unl.edu/ssd/services/</a>
University of Nevada, Las Vegas, William S. Boyd School of Law	<a href="http://www.law.unlv.edu/pdf/StudentHandbook.pdf">http://www.law.unlv.edu/pdf/StudentHandbook.pdf</a>
New England School of Law	<a href="http://www.nesl.edu/students/exam_schedule.cfm">http://www.nesl.edu/students/exam_schedule.cfm</a>
University of New Mexico School of Law	<a href="http://lawschool.unm.edu/academics/policies/bulletin-handbook-policies.pdf">http://lawschool.unm.edu/academics/policies/bulletin-handbook-policies.pdf</a>
New York Law School	<a href="http://www.nyls.edu/pages/5993.asp">http://www.nyls.edu/pages/5993.asp</a>
New York University School of Law	<a href="http://www.nyu.edu/csd/forms/LD_documentation.pdf">http://www.nyu.edu/csd/forms/LD_documentation.pdf</a>
North Carolina Central University School of Law	<a href="http://disabilityservices.unc.edu/eligibility/documentation-guidelines.html">http://disabilityservices.unc.edu/eligibility/documentation-guidelines.html</a>
University of North Carolina School of Law	<a href="http://disabilityservices.unc.edu/eligibility/documentation-guidelines.html">http://disabilityservices.unc.edu/eligibility/documentation-guidelines.html</a>
University of North Dakota School of Law	<a href="http://www.und.edu/dept/dss/html/disability%20documentation%20guidelines.html">http://www.und.edu/dept/dss/html/disability%20documentation%20guidelines.html</a>
Northeastern University School of Law	<a href="http://www.slaw.neu.edu/asp/aspguide.pdf">http://www.slaw.neu.edu/asp/aspguide.pdf</a>
Northern Illinois University College of Law	<a href="http://www.niu.edu/caar/guidelines/guidelines_id.html">http://www.niu.edu/caar/guidelines/guidelines_id.html</a>
Northern Kentucky University, Salmon P. Chase College of Law	<a href="http://www.nku.edu/~disability/accommodations/register.php">http://www.nku.edu/~disability/accommodations/register.php</a>
Northwestern University School of Law	<a href="http://www.northwestern.edu/disability/students/considering/documentation/learning-disabilities.html">http://www.northwestern.edu/disability/students/considering/documentation/learning-disabilities.html</a>
Notre Dame Law School	<a href="http://law.nd.edu/student-life/student-services/policies">http://law.nd.edu/student-life/student-services/policies</a>
Nova Southeastern University, Shepard Road Law Center	<a href="http://www.nova.edu/disabilityservices/forms/special_learning_disability.pdf">http://www.nova.edu/disabilityservices/forms/special_learning_disability.pdf</a>
Ohio Northern University, Pettit College of Law	<a href="http://www.law.onu.edu/academics/disability/disabilityservices.html">http://www.law.onu.edu/academics/disability/disabilityservices.html</a>
The Ohio State University, Michael E. Moritz College of Law	<a href="http://www.ods.ohio-state.edu/prospective-students/learning-disability-documentation-guidelines/">http://www.ods.ohio-state.edu/prospective-students/learning-disability-documentation-guidelines/</a>
University of Oklahoma College of Law	<a href="http://www.ou.edu/drc/home/students/documentation_guidelines.html#Learning%20Disability">http://www.ou.edu/drc/home/students/documentation_guidelines.html#Learning%20Disability</a>
Oklahoma City University School of Law	<a href="http://www.okcu.edu/law/admittedstudents/AdmissionDisabilityAccommodations.php">http://www.okcu.edu/law/admittedstudents/AdmissionDisabilityAccommodations.php</a>
University of Oregon School of Law	<a href="http://www.law.uoregon.edu/students/disabilities/">http://www.law.uoregon.edu/students/disabilities/</a>
Pace University School of Law	<a href="http://www.pace.edu/emplibrary/student%20handbook.pdf">http://www.pace.edu/emplibrary/student%20handbook.pdf</a>
University of Pennsylvania Law School	<a href="http://www.vpul.upenn.edu/lrc/sds/Documentation%20Guidelines/Learning%20Disability%20Documentation%20Guidelines.pdf">http://www.vpul.upenn.edu/lrc/sds/Documentation%20Guidelines/Learning%20Disability%20Documentation%20Guidelines.pdf</a>

SCHOOL	WEBSITE
Pennsylvania State University, The Dickinson School of Law	<a href="http://law.psu.edu/office_for_student_services">http://law.psu.edu/office_for_student_services</a>
Pepperdine University School of Law	<a href="http://www.pepperdine.edu/disabilityservices/students/guidelines/learning.htm">http://www.pepperdine.edu/disabilityservices/students/guidelines/learning.htm</a>
University of Pittsburgh School of Law	<a href="http://www.drs.pitt.edu/documentation.html#ld">http://www.drs.pitt.edu/documentation.html#ld</a>
Phoenix School of Law	<a href="http://www.phoenixlaw.edu/downloads/PhoenixLaw_Student_Handbook.pdf">http://www.phoenixlaw.edu/downloads/PhoenixLaw_Student_Handbook.pdf</a>
Quinnipiac University School of Law	<a href="http://law.quinnipiac.edu/prebuilt/pdf/student_handbook07-08.pdf">http://law.quinnipiac.edu/prebuilt/pdf/student_handbook07-08.pdf</a>
The University of Richmond School of Law	<a href="http://law.richmond.edu/about/disabpol.php">http://law.richmond.edu/about/disabpol.php</a>
Regent University School of Law	<a href="http://www.regent.edu/admin/stusrv/student_handbook.cfm#disabled_students">http://www.regent.edu/admin/stusrv/student_handbook.cfm#disabled_students</a>
Roger Williams University School of Law	<a href="http://law.rwu.edu/content/pdf/studenthandbook.pdf">http://law.rwu.edu/content/pdf/studenthandbook.pdf</a>
Rutgers School of Law - Camden	<a href="http://disabilityservices.rutgers.edu/docs/ld.pdf">http://disabilityservices.rutgers.edu/docs/ld.pdf</a>
Rutgers School of Law - Newark	<a href="http://law.newark.rutgers.edu/files/u/RUGuidelinesforDisabilityAccommodations.pdf">http://law.newark.rutgers.edu/files/u/RUGuidelinesforDisabilityAccommodations.pdf</a>
Saint Louis University School of Law	<a href="http://law.slu.edu/handbook/chapters/ch14/D.html">http://law.slu.edu/handbook/chapters/ch14/D.html</a>
St. John's University School of Law	<a href="http://www.stjohns.edu/campus/handbook/chapter6/disabilities.sju">http://www.stjohns.edu/campus/handbook/chapter6/disabilities.sju</a>
St. Mary's University of San Antonio School of Law	<a href="http://www.stmarytx.edu/disability/?go=proc">http://www.stmarytx.edu/disability/?go=proc</a>
University of St. Thomas School of Law	<a href="http://www.stthomas.edu/enhancementprog/policies/docRequirementsProcedures.html">http://www.stthomas.edu/enhancementprog/policies/docRequirementsProcedures.html</a>
St. Thomas University School of Law	<a href="http://www.stu.edu/IMG/pdf/DisabilityGuidelines.pdf">http://www.stu.edu/IMG/pdf/DisabilityGuidelines.pdf</a>
Samford University, Cumberland School of Law	<a href="http://cumberland.samford.edu/files/Student%20Handbook%2009-10.pdf">http://cumberland.samford.edu/files/Student%20Handbook%2009-10.pdf</a>
University of San Diego School of Law	<a href="http://www.sandiego.edu/law/documents/admissionorientation/DisabilityServices.pdf">http://www.sandiego.edu/law/documents/admissionorientation/DisabilityServices.pdf</a>
University of San Francisco School of Law	<a href="http://web.usfca.edu/templates/sds_inside.aspx?id=2147488007">http://web.usfca.edu/templates/sds_inside.aspx?id=2147488007</a>
Santa Clara University School of Law	<a href="http://www.scu.edu/advising/learning/disabilities/index.cfm">http://www.scu.edu/advising/learning/disabilities/index.cfm</a>
Seattle University School of Law	<a href="http://www.law.seattleu.edu/Student_Life/Student_Resources/Disability_Services.xml">http://www.law.seattleu.edu/Student_Life/Student_Resources/Disability_Services.xml</a>
Shelton Hall University School of Law	<a href="http://law.shu.edu/Students/support/disability-support-service.cfm">http://law.shu.edu/Students/support/disability-support-service.cfm</a>
University of South Carolina School of Law	<a href="http://www.sa.sc.edu/sds/Guidelines.htm">http://www.sa.sc.edu/sds/Guidelines.htm</a>
University of South Dakota School of Law	<a href="http://www.usd.edu/academics/disability-services/accommodation-process.cfm">http://www.usd.edu/academics/disability-services/accommodation-process.cfm</a>
South Texas College of Law	<a href="http://www.stcl.edu/registrar/StudentHandbk0708.pdf">http://www.stcl.edu/registrar/StudentHandbk0708.pdf</a>
Southern University Law Center	<a href="http://www.sulc.edu/administration/academic-support/specialaccommodations.htm">http://www.sulc.edu/administration/academic-support/specialaccommodations.htm</a>
University of Southern California Gould School of Law	<a href="http://sait.usc.edu/academicsupport/centerprograms/dsp/registration/guidelines/guidelines_sld.html">http://sait.usc.edu/academicsupport/centerprograms/dsp/registration/guidelines/guidelines_sld.html</a>
Southern Illinois University School of Law	<a href="http://www.law.siu.edu/studentlife/Students%20With%20Special%20Needs.pdf">http://www.law.siu.edu/studentlife/Students%20With%20Special%20Needs.pdf</a>
Southern Methodist University, Dedman School of Law	<a href="http://smu.edu/studentlife/SSD/OSSD_Eligibility.asp">http://smu.edu/studentlife/SSD/OSSD_Eligibility.asp</a>
Southwestern School of Law	<a href="http://www.swlaw.edu/studentservices/deanofstudents/disabilitypolicy">http://www.swlaw.edu/studentservices/deanofstudents/disabilitypolicy</a>

SCHOOL	WEBSITE
Stanford Law School	<a href="http://www.stanford.edu/group/DRC/index.html">http://www.stanford.edu/group/DRC/index.html</a>
Stetson University College of Law	<a href="http://www.law.stetson.edu/tmpl/about/internal-asp?id=7777">http://www.law.stetson.edu/tmpl/about/internal-asp?id=7777</a>
Suffolk University Law School	<a href="http://www.law.suffolk.edu/offices/deanofstu/disability/guidelines1.cfm">http://www.law.suffolk.edu/offices/deanofstu/disability/guidelines1.cfm</a>
Syracuse University College of Law	<a href="http://provost.syr.edu/documents/2008/4/21/Guidelines_for_documenting_a_Learning_Disability.pdf">http://provost.syr.edu/documents/2008/4/21/Guidelines_for_documenting_a_Learning_Disability.pdf</a>
Temple University, James E. Beardsley School of Law	<a href="http://www.temple.edu/disability/documentation.html">http://www.temple.edu/disability/documentation.html</a>
University of Tennessee College of Law	<a href="http://ods.utk.edu/files/guidelines/learning.pdf">http://ods.utk.edu/files/guidelines/learning.pdf</a>
The University of Texas School of Law	<a href="http://www.utexas.edu/diversity/ddce/ssd/doc_ld.php">http://www.utexas.edu/diversity/ddce/ssd/doc_ld.php</a>
Texas Southern University Thurgood Marshall School of Law	<a href="http://www.tsulaw.edu/life/orientation/accHandbook.pdf">http://www.tsulaw.edu/life/orientation/accHandbook.pdf</a>
Texas Tech University School of Law	<a href="http://www.depts.ttu.edu/studentaffairs/sds/DocumentationGuidelines.asp">http://www.depts.ttu.edu/studentaffairs/sds/DocumentationGuidelines.asp</a>
Texas Wesleyan University School of Law	<a href="http://www.txwes.edu/provost/documents/DisabilityPolicySummary.pdf">http://www.txwes.edu/provost/documents/DisabilityPolicySummary.pdf</a>
Thomas Jefferson School of Law	<a href="http://www.tjsl.edu/disability_services">http://www.tjsl.edu/disability_services</a>
University of Toledo College of Law	<a href="http://utoledo.edu/studentaffairs/accessibility/">http://utoledo.edu/studentaffairs/accessibility/</a>
Touro College, Jacob D. Fuchsberg Law Center	<a href="http://www.tourolaw.edu/about/touro_law_center_policies.asp">http://www.tourolaw.edu/about/touro_law_center_policies.asp</a>
Tulane University School of Law	<a href="http://erc.tulane.edu/disability/documents/AccompanetPDF.pdf">http://erc.tulane.edu/disability/documents/AccompanetPDF.pdf</a>
The University of Tulsa College of Law	<a href="http://www.utulsa.edu/student-life/Student-Academic-Support/Disability-Services.aspx">http://www.utulsa.edu/student-life/Student-Academic-Support/Disability-Services.aspx</a>
University of Utah, S.J. Quinney College of Law	<a href="http://www.sa.utah.edu/ds/documents/ADD-DHD-Learning.pdf">http://www.sa.utah.edu/ds/documents/ADD-DHD-Learning.pdf</a>
Valparaiso University School of Law	<a href="http://www.valpo.edu/cas/support/dss.php#statement">http://www.valpo.edu/cas/support/dss.php#statement</a>
Vanderbilt University Law School	<a href="http://www.vanderbilt.edu/odc/ds_students.html#a2">http://www.vanderbilt.edu/odc/ds_students.html#a2</a>
Vermont Law School	<a href="http://www.vermontlaw.edu/Documents/disabilityPolicy-080708.pdf">http://www.vermontlaw.edu/Documents/disabilityPolicy-080708.pdf</a>
Villanova University School of Law	<a href="http://www.villanova.edu/vpaa/learningsupport/docs/guidelines/learningdisability.htm">http://www.villanova.edu/vpaa/learningsupport/docs/guidelines/learningdisability.htm</a>
University of Virginia School of Law	<a href="http://www.law.virginia.edu/main/COD%2BDisability%2BAccomm">http://www.law.virginia.edu/main/COD%2BDisability%2BAccomm</a>
Wake Forest University School of Law	<a href="http://www.wfu.edu/lac/LD-Guidelines.pdf">http://www.wfu.edu/lac/LD-Guidelines.pdf</a>
Washburn University School of Law	<a href="http://washburnlaw.edu/policies/disabilities.php">http://washburnlaw.edu/policies/disabilities.php</a>
Washington and Lee University School of Law	<a href="http://counsel.wlu.edu/policy/CognitiveDisabilityGuidelines.pdf">http://counsel.wlu.edu/policy/CognitiveDisabilityGuidelines.pdf</a>
University of Washington School of Law	<a href="http://www.washington.edu/students/drs/">http://www.washington.edu/students/drs/</a>
Washington University School of Law	<a href="http://cornerstone.wustl.edu/disabilityResources/critlearning.htm">http://cornerstone.wustl.edu/disabilityResources/critlearning.htm</a>
Wayne State University Law School	<a href="http://www.law.wayne.edu/current/academic_services.html#ada">http://www.law.wayne.edu/current/academic_services.html#ada</a>
Western New England College School of Law	<a href="http://www1.wnec.edu/academicaffairs/index.cfm?section=doc.6659">http://www1.wnec.edu/academicaffairs/index.cfm?section=doc.6659</a>
Western State University College of Law	<a href="http://www.wsulaw.edu/current-students/disabled-services.aspx">http://www.wsulaw.edu/current-students/disabled-services.aspx</a>
West Virginia University College of Law	<a href="http://law.wvu.edu/r/download/14295">http://law.wvu.edu/r/download/14295</a>
Whittier Law School	<a href="http://www.law.whittier.edu/pdfs/disability.pdf">http://www.law.whittier.edu/pdfs/disability.pdf</a>



SCHOOL	WEBSITE
Widener University School of Law, Harrisburg	<a href="http://law.widener.edu/CampusLife/AdvisingandCounseling/OfficeofStudentAffairsHarrisburg/~media/Files/studentaffairshb/2009_10HSBGHANDBOOKv3.ashx">http://law.widener.edu/CampusLife/AdvisingandCounseling/OfficeofStudentAffairsHarrisburg/~media/Files/studentaffairshb/2009_10HSBGHANDBOOKv3.ashx</a>
Widener University School of Law, Wilmington	<a href="http://law.widener.edu/CampusLife/AdvisingandCounseling/OfficeofStudentAffairsDelaware/~media/Files/studentaffairsde/2009_10DelawareHandbook.ashx">http://law.widener.edu/CampusLife/AdvisingandCounseling/OfficeofStudentAffairsDelaware/~media/Files/studentaffairsde/2009_10DelawareHandbook.ashx</a>
Willamette University College of Law	<a href="http://www.willamette.edu/dept/disability/pdf/mini_um_standards.pdf">http://www.willamette.edu/dept/disability/pdf/mini_um_standards.pdf</a>
College of William and Mary, Marshall- Wythe School of Law	<a href="http://www.wm.edu/offices/deanofstudents/services/disabilityservices/disabilityregistration/documentation/index.php">http://www.wm.edu/offices/deanofstudents/services/disabilityservices/disabilityregistration/documentation/index.php</a>
William Mitchell College of Law	<a href="http://issuu.com/mitchell/docs/2009-10-william-mitchell-student-handbook?mode=embed&amp;viewMode=presentation&amp;layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fcolor%2Flayout.xml&amp;backgroundColor=9a0000&amp;showFlipBtn=true">http://issuu.com/mitchell/docs/2009-10-william-mitchell-student-handbook?mode=embed&amp;viewMode=presentation&amp;layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fcolor%2Flayout.xml&amp;backgroundColor=9a0000&amp;showFlipBtn=true</a>
University of Wisconsin Law School	<a href="http://www.mcburney.wisc.edu/information/documentation/disdocguide.php">http://www.mcburney.wisc.edu/information/documentation/disdocguide.php</a>
University of Wyoming College of Law	<a href="http://uwadmnweb.uwyo.edu/udss/info.asp?p=5892">http://uwadmnweb.uwyo.edu/udss/info.asp?p=5892</a>
Yale Law School	<a href="http://www.yale.edu/rod/student_info.html">http://www.yale.edu/rod/student_info.html</a>

## APPENDIX B

### UNIVERSITY SCHOOL OF LAW

#### LEARNING DISABILITIES VERIFICATION FORM

The Disability Services Office (DSO) provides academic services and accommodations for students with diagnosed disabilities. It is the student's responsibility to provide documentation that identifies a diagnosed disability covered under Section 504 of the Rehabilitation Act of 1973 and Titles II or III of the Americans with Disabilities Act (ADA) of 1990. Under the ADA, students with learning disabilities must provide documentation demonstrating that the student is an individual with a disability, which means that: 1) the individual has a physical or mental impairment such as a diagnosed learning disability; 2) the impairment limits one or more major life activities, including speaking, learning, reading, concentrating, thinking, communicating, or neurological or brain function; and 3) the extent of the limitation on the major life activity is substantial. A student can still have a disability under the ADA even if he or she takes medication or has learned behavioral techniques to help ameliorate the effects of his or her learning disability. In the employment context, courts have usually assessed whether an individual's activities are substantially limited by comparing the individual's ability to perform to the general population, but in an educational setting, the law is less clear.

The DSO requires current and comprehensive documentation from a qualified professional to determine students' eligibility for services and to identify individualized accommodations appropriate for the law school program. A qualified professional can be any licensed or other properly credentialed professional who has training and experience in diagnosing learning disabilities. Documentation is current if it documents that the student was assessed for and diagnosed with learning disabilities as an adult and it incorporates recommendations for accommodations specific to the law school program.

#### **Description of Law Program**

##### Classroom Skills:

- Sitting for 1–3 hours at one sitting, possibly 6 hours a day
- Standing for 10–30 minutes, occasionally
- Comprehending oral and written material, daily
- Reading 50–150 pages, daily
- Listening to lectures 1–3 hours at one sitting, possibly 6 hours a day
- Participating in small group discussions, weekly
- Taking notes, handwritten or typed, 4–6 hours daily

Responding when questioned in class, weekly  
 Participating in classroom discussions, daily  
 Researching using print materials or online databases, weekly  
 Analyzing course or research materials, 4–6 courses, daily  
 Organizing course and research materials, 4–6 course, daily

**Evaluation Methods:**

Essay examinations, 1–4 hours, typed or handwritten, 3–5 examinations, mid-term and end of each semester  
 Multiple choice examinations, 1–2 hours, Scantron forms, 1–3 examinations, mid-term and end of each semester  
 Written memorandum, 2–4 week process, 8–25 pages, 2–4 times per semester  
 Oral argument or presentation, once or twice per semester

The DSO does not subscribe to a single model for diagnosing learning disabilities. The DSO recommends that health care professionals rely on a combination of factors including: the student's history of learning deficits as reported by the student, his or her family, and previous school records; data from testing in the areas of achievement, information processing, and cognitive ability, if appropriate; and the professional's clinical judgment. Regardless of the approach the health care professional takes, the documentation must clearly support a diagnosis of learning disability and the diagnosis must clearly support the recommended accommodations.

**STUDENT'S CONSENT FOR RELEASE OF INFORMATION**

Name (Last, First, Middle): \_\_\_\_\_

Date of Birth: \_\_\_\_\_ SSN or ID#: \_\_\_\_\_

Status (check one):  Prospective Student

Current Student

Transfer Student

Telephone: (\_\_\_\_) \_\_\_\_\_ - \_\_\_\_\_ Cell Phone: (\_\_\_\_) \_\_\_\_\_ - \_\_\_\_\_

University Email Address: \_\_\_\_\_

Personal Email Address: \_\_\_\_\_

I hereby authorize my Health Care Professional to release information requested in this document and further authorize DSO to communicate with the individual or entity identified below to obtain clarification as needed to determine my eligibility for disability services at University School of Law. This authorization is valid for six months.

Student Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Parent Signature

(if student is under 18): \_\_\_\_\_ Date: \_\_\_\_\_

## DIAGNOSTIC INFORMATION

### I. Learning Disability Diagnosis

#### A. Diagnostic Criteria (check all that apply):

##### 1. DSM-IV

- 315.0 Reading Disorder
- 315.1 Mathematics Disorder
- 315.2 Disorder of Written Expression
- 315.3 Learning Disorder NOS
- \_\_\_\_\_

##### 2. ICF

- b160\_\_ Thought Functions: \_\_\_\_\_
- b164\_\_ Higher-Level Cognitive Functions: \_\_\_\_\_
- b167\_\_ Mental Functions of Language: \_\_\_\_\_
- b172\_\_ Calculation Functions: \_\_\_\_\_
- b189\_\_ Specific Mental Functions, Other Specified and Unspecified
- b\_\_\_\_\_

##### 3. ICD

- F81.0 Specific reading disorder
- F81.1 Specific spelling disorder
- F81.2 Specific disorder of arithmetical skills
- F81.3 Mixed disorder of scholastic skills
- F81.8 Other developmental disorders of scholastic skills
- F81.9 Developmental disorder of scholastic skills, unspecified
- \_\_\_\_\_

##### 4. Other Diagnostic Tool

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#### B. Date of Diagnosis (check one):

- I diagnosed patient on \_\_\_\_\_ (date) when s/he was \_\_\_\_\_ years old.
- Patient was previously diagnosed on \_\_\_\_\_ (date) when s/he was \_\_\_\_\_ years old by \_\_\_\_\_

\_\_\_\_\_  
(state name, address, and telephone number of professional who made the initial diagnosis).

C. To confirm the learning disability diagnosis, I have (check all that apply):

Conducted a diagnostic interview with the student and gathered background information regarding the student's:

- developmental history
- family history
- medical history
- academic history
- behavior

Conducted a cognitive assessment on \_\_\_\_\_ (date) using the following test instruments (check all that apply & attach test scores):

- Wechsler Adult Intelligence Scale-III
- Woodcock-Johnson Psychoeducational Battery Revised: Test of Cognitive Ability
- Kaufman Adolescent and Adult Intelligence Test
- Stanford-Binet Intelligence Scale – 4<sup>th</sup> ed.
- \_\_\_\_\_

Conducted an achievement assessment on \_\_\_\_\_ (date) using the following test instruments (check all that apply & attach test scores):

- Wechsler Individualized Achievement Test
- Woodcock-Johnson Psychoeducational Battery Revised: Test of Achievement
- Scholastic Abilities Test for Adults
- Stanford Test of Academic Skills
- Test of Written Language 3
- Woodcock Reading Mastery Test
- Nelson-Denny Reading Test
- Stanford Diagnostic Mathematics Test
- \_\_\_\_\_

Conducted an information processing assessment on \_\_\_\_\_ (date) using the following test instruments (check all that apply and attach test scores):

- Detroit Tests of Learning Aptitude 3 or Adult
- Wechsler Memory Scale
- \_\_\_\_\_

Conducted other assessments on \_\_\_\_\_ (date) using the following assessment technique:

- \_\_\_\_\_
- \_\_\_\_\_

II. Functional Limitations of Learning Disability in Law School Setting

A. Address how the student’s learning disability will affect the student’s ability to perform as compared to the general population in the law school **classroom** as described above:

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B. Address how the student’s learning disability will affect the student’s ability to perform as compared to the general population in law school **evaluations** as described above:

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C. Check below the level of limitation the student’s learning disability creates for each major life activity:

Major Life Activity	No Limitation	Moderate Limitation	Substantial Limitation	Not Applicable
Speaking				
Learning				
Reading				
Concentrating				
Thinking				
Communicating				
Brain Function				
Neurological Function				

D. Briefly describe any treatment, medications, accommodations, etc. the student has received in the past and/or is currently receiving and their effect on the student's learning disability:

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E. Briefly describe any associated impairments and their effect on the student's learning disability:

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III. Recommendations for Accommodations & Program Modifications

Note: The DSO will make a final determination of the appropriateness of accommodations recommended by the health care professional.

A. Classroom Accommodations

Accommodations	Used in Past?	Recommended?	Explain why accommodation is necessary
Books on CD	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Audio books	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Notetakers	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Tape-recorded lectures	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Extended time on written assignments <hr/> (amount of extra time)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Reduced Course Load	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Other: _____ _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	

B. Evaluation Accommodations



Accommodations	Used in Past?	Recommended?	Explain why accommodation is necessary
Extended time on Examinations: Essay <hr/> (amount of extra time)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Extended time on Examinations: Multiple Choice <hr/> (amount of extra time)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Distraction-reduced test environment	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Rest time during examination <hr/> (amount of rest time per exam hour)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Use of reader	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Use of dictating software	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Use of spellcheck software	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Alternative test format, i.e., no scantron, larger print, etc. Describe: _____ _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Other: _____ _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	

IV. Additional Information: Briefly describe any additional information about this student and his or her learning disability that would help the DSO is assessing whether the student is eligible for services and what types of accommodations are necessary:

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HEALTH CARE PROFESSIONAL INFORMATION

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name (Print): \_\_\_\_\_

Title: \_\_\_\_\_

License or Certification #: \_\_\_\_\_

Training or Experience in Diagnosing Learning Disabilities:

\_\_\_\_\_

\_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Phone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_

The information you provide will not become part of the student's academic record, but will be stored in a separate file with the DSO. The DSO may release this form to the student at the student's request.

# AFTER THE GOLD RUSH?

## GRUTTER, SANDER, AND ‘AFFIRMATIVE ACTION’ “ON THE RUN” IN THE TWENTY-FIRST CENTURY\*

ANTHONY V. BAKER\*\*

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### I. INTRODUCTION: “A SYSTEM OF RACIAL PREFERENCES”<sup>1</sup>

*What I find and describe . . . is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries.*<sup>2</sup>

To tag ‘affirmative action’ efforts in higher education with the adjectives “factious,” “choleric” or “inflammatory” is to court no controversy among the many interested sub-communities focusing on the matter in twenty-first century America. Developed in the fertile, turbulent 1960s, directly in consequence of the American civil rights revolution touched off the decade before, ‘affirmative action’ has proven controversial in each of its forms,

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\* With apologies to legendary—and, with regard to the particular creative work sampled here, prescient—singer/song writer/performer, Neil Young.

\*\* Professor of Law, Norman Adrian Wiggins School of Law, Campbell University. I dedicate this wholly to my wife, who has supported me at every turn in all aspects of my work, and who deliberately made encouragement of me in this piece one of the very last acts of her beautiful life. Thank you, Huguette.

1. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371 (2004).

2. *Id.*

for every moment of its institutional existence since then.<sup>3</sup> It has commanded inordinate political attention, involving both houses of Congress and each of the more than fifty state and territorial legislatures, generating testimony, debate, and reams of written recordation across its lifespan.<sup>4</sup> It has invaded political campaigns across the face of American electoral democracy—from local ward plebiscites to federal Presidential elections and all in-between—for the last third of the twentieth century at least. It has received an intensity of consideration and review by the federal government’s ‘least dangerous branch,’ which that body has reserved for few such issues in recent history,<sup>5</sup> with no clear end to the trend anticipated any time soon.<sup>6</sup>

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3. I should explain my preference for quotation marks highlighting the operative term. As an African-American who has been intimately connected with the impetus of the project since the early 1970s at least, I applaud its timeliness and its direction, though I share with many others less enthusiasm about its ultimate outcomes. Indeed, given the kinds of rhetoric surrounding it over the last generation or so, I have an increasingly difficult time endorsing the ‘affirmativeness’ of ‘affirmative action’ in its broadest and most energetic sense. As my reasons for moving in this direction are tangential to the theme of this paper, there is little more for me to do here than highlight the fact and move on. Indeed, some of my reasons for so stressing the phrase will be alluded to at least in the later stages of this paper, and in any event ought to be intuitive throughout, to the careful reader.

4. This is not putting the matter too strongly. Following closely and remedially on the heels of American hyper-focus on matters of race and racial politics, the remedy has proven to be every bit as ubiquitous as the problem it was designed to address.

5. Beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954), the ‘race case’ that in many ways started it all, ‘affirmative action’ rulings following in its wake read like a ‘greatest hits’ of that Tribunal, commanding public attention at a level reserved for few other issues coming before it. They include in their ranks *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev’d*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, *Texas v. Hopwood*, 518 U.S. 1033 (1996); and *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003). Of course, to this point we must add, as something of a capstone to this juridical edifice, the Court’s most recent missive on the subject, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (U.S. Reports citation is pending), which in many ways is the most important comment from that Tribunal yet in this contentious debate. Clearly the ‘last judicial word’ in the matter has yet to be spoken.

6. With her famous and portentous “25 year” dicta, Justice O’Connor assured that ‘affirmative action’ and its ancillary policies and programs will be within the consciousness of that Court—and therefore this nation, in some form—for that period of time at least:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

*Grutter*, 539 U.S. at 343 (citation omitted). See also, in support of this premise, *Ricci*, of course.

The deep controversy engendered by the ‘affirmative action’ experiment has spread across the entire face of American culture as well. Liberal analysis has supported the appropriateness of the effort as a necessary and natural outworking of the spirit of American civil rights reform, though a conservative contingent has decried the supposed discriminatory engine at its heart.<sup>7</sup> Similar disharmony also is found in the minority culture, particularly African-America, where the ‘party line’ defends the sheer necessity of ‘affirmative action’ against all comers, while deliberately isolating its own dissenting voices as contentious outliers.<sup>8</sup> Academicians and social scientists struggle to give deeper meaning to American ‘affirmative action’ initiatives, obliquely reflecting their sponsoring institutions’ bland endorsements as ‘necessary evils’—emphasis falling on the first of the two-word defensive. Buried deep within the nether regions of this important American controversy is the one question most naturally at the core of its self-commending character as *the* prescriptive palliation for the American tragedy of race: Does ‘affirmative action’ work?

A clear answer for the critical question has proven frustratingly elusive, and the reasons for this are by no means difficult to appreciate. First and foremost is the daunting task of imagining appropriate meaning for, and measurable significance of, the concept ‘*work*’ within the particular context with which it is referenced. By ‘work,’ ought we to focus on sheer numbers of minorities entering historically dammed professional streams, or on individuals gaining access to previously restricted vocational avenues, or on cultural areas enhanced by ‘affirmative action’ beneficiaries, or all of these, or something else? And how ought ‘works’ be rightly measured beyond definition: by socio-economic data, or by ‘quality of life’ indicators, or by theories of majority culture ‘value added’ through exposure to the ‘minority experience,’ or something different from any of these? Intransigent difficulties aside, with each year of the controversial life of ‘affirmative action’ in the warp and woof of the American body-politic, the question has gained vitality while its answer grows more elusive, hanging just beyond reach of its variously motivated seekers.

That is, until Professor Richard H. Sander came along. Sporting the right political pedigree,<sup>9</sup> from the right sort of academic institution<sup>10</sup>

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7. There is an anti-pathetic irony in the passionate reference to the term ‘reverse discrimination’ by majority-culture individuals who, in too many instances, did nothing to combat the worst of American discrimination when it did not involve them. Nevertheless, this particular reference/argument forms one of the key tension points in the ‘affirmative action’ debate in the 21<sup>st</sup> century.

8. Included among the more notorious of these ‘outliers’ are Justice Thomas and the famous Californian Mr. Ward Connerly, though in point of fact, and for a host of complex reasons, ‘affirmative action’ critics and skeptics among African-Americans are growing significantly in number and in sophistication of thought as the years go by.

9. If one is to undertake a thorough critique of ‘affirmative action,’ one’s credibility in both synthesizing and broadcasting definitive conclusions—especially

publishing in the right kind of journal,<sup>11</sup> with the right pair of institutional contestants in his crosshairs,<sup>12</sup> and wielding an impressive array of charts and graphs, the sum of the Professor's immense work seems to be this: No, it doesn't work, as evidenced by any number of precise and relatively easily distilled indicators.<sup>13</sup> Whether via the 'cascading effect'<sup>14</sup> or by the

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where those conclusions are not entirely supportive of the initiative—is enhanced in the academic community by mild liberal leanings, I would think. Support for this supposition lies in common sense: When someone who 'ought' to be in favor of something is not, the reasons for their perceived deviance command more attention. From his interesting opening prose outlining his background and related experiences, Professor Sander would appear to fill this bill, if only with regard to issues related to 'affirmative action.'

10. In our business, it is difficult to deny that credibility often follows pedigree, slavishly; though the essential anti-intellectuality of this condition is remarkable, it remains very real. As applicable here, Professor Sander is writing from the rarified perch of one of the most 'elite' law schools in America, UCLA—to employ a term and concept prominently featured in his own work—and publishing in an even more prestigious academic journal, Stanford. This commands for him more attention from the academy and beyond.

11. The same argument presented above would apply with equal force here.

12. Nothing sinister is meant by this particular comment, and Professor Sander's explication of the reasons for the 'battle lines' chosen do not ring disingenuous:

My exposition and analysis in this Article focus on blacks and whites. I do this principally for the sake of simplicity and concreteness. Many of the ideas that follow are complicated; to discuss them in the nuanced way necessary to take account of American Indians, Hispanics, and Asians would force me to make the narrative either hopelessly tangled or unacceptably long. And if one is going to choose a single group to highlight, blacks are the obvious choice: the case for affirmative action is most compelling for blacks; the data on blacks is the most extensive; and law school admissions offices treat "blacks" as a group quite uniformly.

Sander, *supra* note 1, at 370. Still, even if only by happenstance, for sheer drama and notoriety in terms of public attention and response to a work in the American context, it is unarguably fortunate when the protagonists in a compelling story are two in number, pitted in contradistinction, one against the other, 'black' v. 'white.' That is to say there is something prosaically American about this which works to Professor Sander's advantage here.

13. To be precise—and fair—Professor Sander's work considers the effects of 'affirmative action' initiatives in the area of professional legal education alone. However, given the direction of his thesis and the precision and energy of his conclusions, it is by no means untoward to consider his outcomes as readily transferrable to the effects of the palliative more broadly than that.

14. As did Professor Sander himself in his work, I reference here the phrase effectively coined by Clyde Summers in *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. REV. 377 (1970); Sander lays out this important concept in clear, even transparent terms:

Affirmative action thus has a cascading effect through American legal education. The use of large boosts for black applicants at the top law schools means that the highest-scoring blacks are almost entirely absorbed by the highest tier. Schools in the next tier have no choice but to either enroll very few blacks or use racial boosts or segregated admissions tracks to the same degree as the top-tier schools. The same pattern continues all the way down

various consequences of his interesting ‘mismatch hypothesis’<sup>15</sup>—mean end-of-law school GPA; numbers of black graduates, bar passers and/or practitioners, etc.—‘affirmative action’ for its most needy target group amounts to something nearing a complete ‘zero’ or worse.<sup>16</sup> Leaving the ‘good hearted’ motivation behind the “massive social experiment” unchallenged, he is nevertheless categorical and well-nigh apocalyptic regarding their ultimate, unintended and even unanticipated results: “Taken as a whole, racial preferences in law schools lower black academic performance and place individual blacks at a substantially higher risk of not graduating from law school and of not passing the bar.”<sup>17</sup> The storm of controversy naturally anticipated to follow his well-conceived work and challenging outcomes has thrown the interested academy into a necessary and difficult review of ‘affirmative action’ in the context of American education and, indeed, American life.

Interestingly enough, the question at the heart of the intense and necessary review following his study’s publication has been as elegantly simple as the one at the center of his own ambitious and important academic agenda: Does Sander ‘work?’<sup>18</sup> It was a question that the

the hierarchy.

Sander, *supra* note 1, at 416–17.

15. In Professor Sander’s own words:

The premise of the mismatch theory is simple: [I]f there is a very large disparity at a school between the entering credentials of the “median” student and the credentials of students receiving large preferences, then the credentials gap will hurt those the preferences are intended to help. A large number of those receiving large preferences will struggle academically, receive low grades and actually learn less in some important sense than they would have at another school where their credentials were closer to the school median. The low grades will lower their graduation rates, bar passage rates, and prospects in the job market.

Richard H. Sander, *Reply: A Reply to Critics*, 57 STAN. L. REV. 1963, 1966 (2005).

16. Professor Sander is unequivocal in the inevitability of this untoward outcome resulting from ‘affirmative action,’ as he believes his numbers clearly capture the story:

[A] strong case can be made that . . . racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system. Affirmative action . . . does not, therefore, pass even the easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.

Sander, *supra* note 1, at 372 (footnote omitted).

17. Sander, *supra* note 1, at 454. The categoricalness of this statement remains remarkable to me.

18. My much preferred pattern in referencing named individuals in the breadth of any of my work is to use their full names or, when applicable, their earned professional titles. I generally find the reference to an individual by their last name alone in published prose to be familiar and vaguely disrespectful, and for this reason I consciously try to avoid it. However, since Professor Sander’s work is at the center of this reflective response, and as it is thus necessary to refer to him regularly throughout, I will forego my custom for the sake of convenience, confident that neither the Professor nor the present readers will find any slight in this, as none is intended.

accomplished scholar and ambitious author had to anticipate, and one that has occupied since the legal academy and a host of other interested social scientists. Predictably, ‘affirmative action’ apologists have come at his daunting numbers and startling categorical results with greater or lesser intensity, seeking thereby to rescue the pith of the social strategy from its growing army of detractors.<sup>19</sup> Empiricists on both sides of the divide have taken refuge in their own multiple regressions and standard deviations, alternately bolstering or attacking his work with the energy and passion the study both elicits and deserves.<sup>20</sup> But even as the smoke begins to clear and the implications of his categorical conclusions on the future of ‘affirmative action’ are anticipated and imagined, the critical question remains, and does not easily go away: Does Sander ‘work?’<sup>21</sup>

While I am neither an empiricist nor particularly professionally committed to the question occupying Professor Sander and the many other sympathetic academics taken by various aspects of his inquiry,<sup>22</sup> it is one I am simply unable to escape. As a law professor of color teaching in a

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19. See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); andré douglas pond cummings, “Open Water”: *Affirmative Action, Mismatch Theory and Swarming Predators: A Response to Richard Sander*, 44 BRANDEIS L.J. 795 (2006); Daniel E. Ho, *Affirmative Action’s Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011 (2005); Kevin R. Johnson & Angela Onwuanchi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools,”* 7 AFR.-AM. L. & POL’Y REP. 1 (2005); and Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005).

20. See generally Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007); David L. Chambers, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Jesse Rothstein & Albert Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?* 75 U. CHI. L. REV. 649 (2008); and L. Darnell Weeden, *Raising the Bar in the Affirmative Action Debate: A Pragmatic Comment on Professor Richard H. Sander’s Systemic Analysis of Affirmative Action in American Law Schools Article*, 15 S. CAL. REV. L. & WOMEN’S STUD. 195 (2006).

21. The continuing freshness of this question has been dramatically underscored by the U.S. Commission on Civil Rights itself, in the 2007 release of its own report entitled *Affirmative Action in American Law Schools*. There the Commission received direct testimony on the matter from Professor Sander himself, and heavily relied on his statistical work and his conclusions following in conceiving and drafting their own. For this and many other reasons, the ineluctability and importance of the simple question I put here should naturally be impressed on all students of this aspect of Sander’s work. Beyond the numbers, his conclusions are so categorically conceived and forcefully presented, and their implications so dramatically clear, that the academy must of necessity be very, very certain about each and every aspect of his work before taking even the first step in the ‘direction’ clearly implicated.

22. Indeed my scholarly interest is in American legal history: focusing on the root of the problem of race in the American context, the matter at the base of Professor Sander’s concern, and examining the effectiveness of the solution presently in use.



school deeply enmeshed in the struggle of defining, creating, and nurturing a spirit of diversity against majority culture rip-currents, decency and professionalism all but require my vocational interest in the topic. Further, my own students of color have required it of me, focusing on the Sander piece and its out-workings with an intensity which I suspect is ubiquitous among similarly situated African-American law students, and which strikes me as vaguely inappropriate, and deeply worrisome.<sup>23</sup> As well as the question at the heart of his study resonates with the more visceral general considerations of race in American cultural context, I must maintain an interest in its broader implications as a concerned post-civil rights movement African-American. And so, for the next few pages at least, the question occupying empiricists, policy managers, and social scientists in and out of the legal academy has been adopted as my own: Does Sander ‘work?’

In adequately setting out the thesis of this paper it is useful first to reiterate what it will not attempt, in order to highlight better what it will. As should be plain from the above, I intend to leave all the raw number data results of Sander’s study unchallenged and, indeed, effectively untouched. First, while interested readers may be piqued by various details from his careful work, anecdotally at least, the broader story of African-American achievement-malaise in the face of ‘affirmative action’ efforts is neither new nor surprising.<sup>24</sup> More importantly, beyond the skill-set deficits already revealed (making such a task unwise on my part), I believe a confrontation with Sander on this familiar ground is, at its most basic level, wrong.<sup>25</sup> It is my position that the problem here lies not in his math-

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23. While the response was not immediately intuitive to me, I was initially drawn to the Sander piece by one of my students of color who had carefully digested each of its many lines and had been left profoundly troubled and even shaken by its prose, process, and direction. Having taken the opportunity to encourage her, I thought thereafter about the implications for the present generation of African-Americans currently involved in legal study, imagining a similar response in a good number of them. Such a response within this community does not undercut the appropriateness or validity of Sander’s work, though, I believe, it does require attention to it. This essay represents the out-workings of the attention which his scholarly work product has demanded of me, as a colleague and a teacher of this generation of African-American students, among others.

24. Of course, the true innovation of Sander’s work here is not in the highlighting of a problem already well known to the academy, but rests in so clearly placing the source of the problem within the intended remediation itself. This is a powerful and important conclusion, of course, *but only if it is correct*. After carefully reading all that Sander has to say on the matter, for reasons I hope to lay out herein, in clarifying detail, my strong doubt in this remains.

25. It is interesting—though not at all surprising—that a good bit of the scholarship following and directly addressing Sander’s alarming work has done so at the numbers level. Both critics and apologists have taken to their own sets of regressions and standard deviations to present their own responses, against or for him. In the end, this impresses me as beside the point. His numbers are what they are; if anywhere at all, the problem with his work lies not in the numbers themselves nor in

work (*systemic*) but, rather, in his derivative conclusions (*analysis*)—not in his data results but in the ultimate meanings he assigns to them—and, for that reason, direct engagement with his numbers work would be beside-the-point and even counterproductive.

Instead, I will focus on the conclusions themselves, highlighting several background factors inherent in and derivative from his work, challenging his own outcomes and questioning the linearity of his conclusions. I will commence my critique with Sander himself, looking generally at the matter of *personal bias* shadowing the outcomes he reaches, and suggesting, in the broadest terms, how that human constant may have affected the researcher's work and his preferred outcomes. Next, I will take the quickest look at the analytics themselves, not to refute his work, but, rather, to isolate possible *shadows* in it—contrapuntal echoes in his own numbers phalanx which point quietly in a direction opposite the one at which he blithely arrives. Finally, and most significantly, I will highlight what I believe is plainly missing in Sander's methodology, thereby suggesting an alternative universe to the one to which he stays comfortably tethered, one offering quite different outcomes from those he too firmly advances. I will close by suggesting appropriate alternative remedies to those naturally following Sander's harsh conclusions, remedies which may prove constructively and even therapeutically significant in fully addressing the difficult situation highlighted by his work.

## II. THE INNER LANDSCAPE OF 'BIAS': "A MASSIVE SOCIAL EXPERIMENT. . ."<sup>26</sup>

*For the past thirty-five years, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society.*<sup>27</sup>

Before commencing a constructive review of Professor Sander's important work, I begin by stating my own strong intellectual tendency: Where human beings are at 'ground zero' in any statistical review, numbers (of any kind, no matter how definitive or thorough) never ever (ever) tell the 'whole story' (creating one set of inescapable conclusions, and one set only) about anything (anything), period (period).<sup>28</sup> While I am no

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the stories they tell, but rather in the meanings he subjectively derives from them. It is at the level of his subjective 'truths,' derived from the numbers, to be sure, but existing outside and apart from them in the end, that he should be met and challenged.

26. Sander, *supra* note 1, at 368.

27. *Id.*

28. In my family it is called the 'celebration of the irrational,' and there I am famous for it. I do not mean here to cast aspersions at numbers and their inherent value in quantifying the human, and, hence, gaining some understanding of it, but I do

empiricist, I have just enough facility with ‘numbers’ to have arrived at the above-stated position honestly,<sup>29</sup> and to have extensively tested it over the last 30 years of my personal and professional life. The simple fact is that *all* numbers under-girding social observations and related public policies, however well grounded in pristine logic, pass through the most illogical ‘inner landscape’ in existence in achieving their goals of education and action: the human mind. There, external logic meets internal *bias*: the individualistic internal topography of human illogic and para-rationality influencing even the most erudite empiricism, from the conception of the hypotheses addressed by the data to the subjective outcomes derived from the quantitative pictures. The data-monger who does not fully appreciate this truth severely hampers the ultimate effectiveness of her work; she believes too strongly in the single ‘story’ that her inner biases inevitably prefer, and thereby appreciates too vaguely and, even too little, the full potential of the empirical data disclosed.

Sander seems at least cognizant of this reality, and candidly goes about the useful exercise of “disclos[ing] my own peculiar mix [of biases]”<sup>30</sup> at the outset of his work. However, upon even semi-careful review, his disclosed ‘biases’ at this point are not really biases at all, as I mean the term. Aside from outlining his credentials as a socially active person likely cast in the ‘liberal’ mode of American politics,<sup>31</sup> he gives no real attention to the sorts of things of which fully engaged empiricism must be self-aware in order to be fully self-actualizing.

By ‘bias’ I mean the subjective lenses reflexively preferred by researchers, the subtle ‘inner landscape’ which, though resisting easy human exposure, resides in every human being and influences the most logical of human reasoning in seeking to define outcome. These things deeply influence the individual in question; have profound sway over the way in which the empiricist *sees* the breadth of the number story before her; and inform the subjective qualitative of the conclusions at which she

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remain ever vigilant to their limits which, for all things human, are not insubstantial.

29. My undergraduate work in public policy sciences brought me into rudimentary contact with the tools of the econometrician—macro and micro economics, statistics, stats-based policy analysis and decision-making, *etc.*—allowing me some literacy with the symbolic language of ‘numbers’; nevertheless, my strengths in these matters, if any at all, clearly lie on the qualitative side of policy analysis, and not on the quantitative side. Those who operate out of similar gift/skill areas will not be surprised to know that for this I feel no ‘second class’ citizenry, nor offer any apology. While less enamored with the true power of numbers than perhaps I should be, I have always been left keenly aware of their natural limitations.

30. Sander, *supra* note 1, at 370.

31. In this capacity he discusses in his graduate work ‘heartland’ Midwestern American roots, community organizing in South Side Chicago, and liberal agenda research related to housing. He marks his continued activist housing work in his post-graduate life, and his own special attention to racial issues deriving from his parenting, as fostering a race consciousness naturally carried into his professional life.

arrives. While Sander's own admissions yield nothing regarding these important biases, the ease and honesty with which he writes and presents his work, in my view, conveniently leave their evidence strewn across its face for the critical reviewer to both consider and appreciate.<sup>32</sup>

Sander conveniently provides the first glimpse of the contours of his own 'inner landscape' in the very opening statement of his substantial work, when he innocently avers: "For the past thirty-five years, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society."<sup>33</sup>

What an interesting, telling way of summarizing the pith, substance and impetus of the 'affirmative action' movement over the length of its history, coming as it does at the very outset of his study. Many reviewers would conceive that impetus in very different terms, stressing equality of opportunity or reparative response to historical injustice beyond the almost epithetical 'full integration' thesis that he references,<sup>34</sup> and Sander would disavow none of these. Yet the language he has self-consciously selected through which to frame the debate may tip his hand as a 'top-down, bottom-up' person, imagining the impetus, goal and success of American 'affirmative action' in narrow, *status quo* terms: welcoming African-America as a full member in what steadfastly remains the 'majority culture' fold. Not wrong in itself, it is nevertheless socially conservative and, as a *bias*—a 'lens' through which the empirical yield is evaluated and given meaning—implicates the way in which the researcher will determine 'success' from the raw numbers used. We must keep this uppermost in mind in assessing—and, necessarily, challenging—the conclusions at

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32. Let me be clear in stating that I mean Professor Sander no ill will nor poor intention in the exercise that follows. That he *has* subjective bias which may impinge upon, if not hamstring, the good work he has endeavored to address is not a question; his full membership in the odd fraternity of the 'human race' settles that matter beyond rational contest. The shape and contour of those biases is of no consequence to anyone beyond the close group of *confreres* of which his daily discourse brings him into contact. But they *may*—and almost incontestably *do*—inform his work, and his work here is very, very important. This reality justifies, if not necessitates, the exercise following.

33. Sander, *supra* note 1, at 368.

34. Here I mean only to tip my hat to the not insubstantial argument to be made challenging the values of the 'integration' heuristic when it is couched in 'majority culture' terms, as is too often and perhaps even inevitably the case. In this way, 'integration' may mean injection into the 'majority culture' paradigm *as it is*, necessarily shedding as many of the things as possible not valued by that culture as an 'entrance fee' of sorts. This 'whitening' effect among the various minority culture integrators is the cost of integration at this level, rendering it ultimately suspect on these grounds. I do not mean here to suggest this as Sander's meaning by use of the term, but simply instead to point out the problem deriving from its unalloyed preference.

which Professor Sander too confidently and too conveniently arrives from the information his careful work has produced.<sup>35</sup>

More problematic for present purposes is the remarkably clear and uncontested *elitism* with which Professor Sander seems to imagine the world he is studying and African-America's place within it. He directly references the term three separate times in the first two paragraphs alone of his study: 1) "in giving nonwhites in America access to higher education, entrée to the national *elite*;"<sup>36</sup> 2) "beneficiaries of affirmative action at the most *elite* universities;"<sup>37</sup> 3) "[a]nd how do these preferences play out across the entire spectrum of education, from the most *elite* institutions to the local night schools?"<sup>38</sup> It is riddled with alarming ease throughout the

35. I do not intend any slight to Professor Sander in these comments and I trust there will be none received or taken. I mean only to underscore the extremely conservative parameters with which he purposefully frames the 'affirmative action' story—the 'whiteness' of his perspective, in the American context—and to highlight the undoubted effect that posture will have on his assessment of outcomes and policies following from his work, in the end.

36. Sander, *supra* note 1, at 368 (emphasis added). This reference is especially unfortunate, in my view—or perhaps telling—in that it initially frames the debate in highly troubling and problematic dichotomous terms: "Few of *us* would enthusiastically support *preferential* admissions policies if *we* did not believe they played a powerful, irreplaceable role in giving *nonwhites* in America access to higher education, entrée to the national elite, and a chance of correcting historic underrepresentations in the leading professions." *Id.* (emphasis added). Sander conveniently names the 'them' in his dichotomy: nonwhites. While it is not immediately apparent who the 'us' is in the calculus, three things are troublingly clear: 1) he is writing to—or for—the 'us'; 2) the 'us' seem to be at the center of the power of change; and 3) the dynamic flow in question is from the 'them' to the 'us' or, if you will, 'them' eventually becoming 'us', with our help ('preferential'). I may be over-reading matters here, or I may be pointing to clear evidence of unintended bias on the part of the author, through his own self-selected and telling prose. In any event, from this African-American's scholarly perspective, on its face at least, and coming at the very outset of his involved study—paragraph 1, to be precise—the above-quoted passage is problematic in no small number of ways, clearly implicating if not 'coloring' the breadth of the work that follows, if you will. If only intellectually, this is deeply concerning.

37. *Id.* (emphasis added).

38. *Id.* (emphasis added). This is my personal favorite. Running squarely into one of my own irrational biases—an almost iconoclastic suspicion of hierarchy in all its forms—this last example of his is particularly frustrating to me, and troubling. I can illustrate my point here by referencing a conversation I had recently with a prospective law student, who asked me to name "the best law school to attend in North Carolina" his state of preference for both study and practice. I responded with a definitive "It depends." "While you can get anywhere from anywhere, each law school arguably has its own definable mission, and the answer to your question thus depends directly on the needs driving you as a prospective student. If you see yourself in a national/international practice setting, the very best North Carolina law school would likely be Duke or, as an alternative, Chapel Hill. If you see yourself in high profile state/regional practice or high level state political administration or judicial office, Chapel Hill would likely stand out, and not Duke. If you want to be part of a reasonably close-knit alumni network, in practice in the large North Carolina

rest of the piece. While each of us in the academy knows exactly what Sander means here, it is not at all clear that we understand its possible reflection—*bias* on the part of the empiricist—or its effect with regard to the full veracity of his ‘results.’ In the present circumstances, I suggest that this is a matter of significance and urgency. The problem at the heart of the potential bias in question involves *positioning* and *result*, for both the academy and the “nonwhites”—the subject of this grand “social experiment”—and deserves a word more of explanation to be fully explicated with regard to this critique of Sander.

Frankly, elitism always commences—and usually concludes—with assigned positions and expected outcomes, and it will surprise no one that the defining elite begins with themselves in the ‘high place,’ with all other comers situated somewhere below. In self-reflexively opening its own ranks to these comers, the elite are inevitably invested in their own personal status as the *right cultural norm*,<sup>39</sup> and are inclined to measure the success of its integration efforts against that norm. Should the ‘experiment’ be less than successful and the elite be honestly inclined to examine the experiment in quest of the reasons for that outcome, its own predilection too often becomes a bias in the effort, affecting the result. Simply put, the elite is preternaturally disposed to reifying its own institutional norm in assigning blame for the failure. Should the true nature of the problem lie outside the elitist norm, results are not going to be affected in any way by the bias suggested here. However, in the case of the elite itself, to the extent that “the problem, dear Brutus, lies not in our stars, but in ourselves”,<sup>40</sup> this bias is very much at issue.

The suggested implication with regard to Sander’s efforts and the possible effect of the bias in question here should be plain. Sander’s

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demographic markets, Wake Forest would be worth a close look. If you envision yourself in small practice in ‘small town’ North Carolina, or ‘solo’ practice, Campbell would seem your best bet. If you are hoping to transition into a legal career from another active career over a period of time, N.C. Central is the place, as they have both a program and a special expertise in this area for these kinds of students. If you add a bit of the adventurer/pioneer to your other ‘success’ qualities, both Elon and Charlotte offer opportunities to “get on the ground floor” in the building of new and potentially innovative legal education paradigms. Thus, the ‘best’ (the ‘most elite’ in a more serviceable rendering of that term, I would suggest) North Carolina law school would depend entirely on the student asking the question.” In this view ‘hierarchy’ is subjective rather than systemic, as it ever ought to be.

Against this backdrop my problem with Sander’s comment here—and the bias it transparently reflects, I believe—should be plain. Indeed, it is a bias rife across the academy, and reflexively ought to raise questions for anyone trying to understand the problem Sander claims to have solved.

39. Think ‘British high tea at 4:00 pm,’ across the face of the Empire at its apex, as incongruous as that no doubt appeared in places like Mumbai, Beijing, Kingston Jamaica, Accra, Beirut, the Falklands, etc.

40. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

numbers reflect, with some valuable empirical precision, a problem that was well known anecdotally across the face of the academy prior to his work—even if it was not fully appreciated. And the conclusions that he draws from his data more or less precisely fix responsibility for the failure in particularized places involving some combination of institutional process and intellectual deficit on the part of the intended beneficiaries. If this outcome is practically correct, the bias of elitism clearly reflected across the face of Sander's work is not implicated and is effectively of no consequence, whatever the extent of its activity. However, to the extent that the problems fueling the crisis outlined by Sander's numbers actually lie *somewhere within the construct of the academy itself*,<sup>41</sup> it will take a critical, even skeptical eye to locate them. From his repeated reference to elitism itself and the bias underlying that reference, which stems from his own self-selected and self-reflexive prose, Sander simply is not the critical skeptic needed for this task.<sup>42</sup>

A third area of 'inner bias' operating in the shadowy ethos of Sander's work lies in his own self-limiting expectations—"[t]he results in this article are not intended to be definitive"<sup>43</sup>—contrasting with the striking definitude of his final conclusions. His above-quoted caveat is the correct one, amounting to a boilerplate disclaimer necessary in any thoughtful empirically based presentation. However, just four pages into the one-hundred-fifty page article, and six paragraphs removed from his above-referenced caveat, we learn, categorically, "What I find and describe in this Article is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries."<sup>44</sup> Later in that paragraph Sander does employ the modifier "a strong case can be made" to properly couch his results, but he then closes that very paragraph in the following uncompromising fashion: "Affirmative action as currently practiced by the nation's law schools does not, therefore, pass even the

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41. Along with its inevitable following implications, this possibility will be more fully addressed herein.

42. Again, I mean no disrespect to Professor Sander. As I reference qualitative consideration over quantitative review herein, and suggest other reasonable problem areas from the data different than the single one Sander repeats—academic 'mismatch'—I mean only that it is his self-reflected status as a "child of the system" which may have blurred his vision to other sources of the problem his data at least suggests.

43. Sander, *supra* note 1, at 369.

44. *Id.* at 371. The problem in this context, of course, is the linear use of the unalloyed verb 'produces . . .' without out any modifying, mediative languages. His numbers can outline the fact of a problem and even its reach and extent, and they do this in fact here. However, the source of the problem can only ever be *hinted at* by the numbers and is always open to counter-conjectures therefrom, by nature of the natural limitations framing empiricism. They simply cannot categorically establish the source or sources with any degree of precision, Sander's own confidential pronouncements notwithstanding. This will be further developed *infra*.

easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.”<sup>45</sup> This unadulterated causative definitude is repeated by Sander again and again, in unblushing terms, throughout the length of his not insubstantial piece.<sup>46</sup>

The bias I am highlighting here is the one to which quantitative analysts are most susceptible and the one of which they are usually most aware and most wary: the sirenic seduction of numbers. There is a significant difference between *correlation* and *causation*, of course; the thorough econometrician keeps a very close eye on the two, holding them in artful balance throughout the creative process of giving real meaning to quantitative information. The failure to maintain that vigilance and that balance may indicate bias in that regard on the part of the researcher, a bias which would have its most potent negative impact on the outcomes derived from the data and on the policy implications that appear to follow from those outcomes. In summarizing his striking statistical information, it is statements like the following that raise in Sander’s work the issue of bias suggested here: “This data tells a powerful story: racial preferences in law school admissions significantly worsen blacks’ individual chances of passing the bar by moving them up to schools at which they will frequently perform badly. I cannot think of an alternative, plausible explanation.”<sup>47</sup>

Lacking even the most benign ameliorating pejoratives—*e.g.*, “would seem to,” “is strongly suggestive of,” or “seems positively correlated to”—we are forced to consider a telling reality from the above: Sander’s view of causation, in such uncompromising terms, may evidence the bias in question, implicating all of the results he presents in conclusion. That is no small or impotent critique of his important work.

In summary, this quick review of possible biases implicating Sander’s valuable work should not be marginalized to the trifling category of

45. *Id.* at 372.

46. With regard to the categorical nature of his results, Professor Sander becomes even more uncompromising as he progresses. Thus, “Because of low grades, blacks complete law school less often than they would if law schools ignored race in their admissions process.” *Id.* at 373. Sander speaks of “the low grades that are a by-product of affirmative action,” *id.* at 432, directly connects “[t]he weaknesses in black [law school] performance” to “large admissions preferences based on race,” *id.* at 436, and notes that “black attrition rates are substantially higher than white rates, simply because racial preferences advance students into schools where they will get low grades.” *Id.* at 441. Each and every one of the connections Sander makes could do with qualitative information providing needed and valuable underpinning, though Sander proves completely averse to this throughout his entire article. Under the circumstances, and repeated often across the entire face of his prose, the lack of modifying language accompanying the stark recitation of his results is remarkable.

47. *Id.* at 447. In its naked definitude and veiled if no doubt unintended hubris, this strikes me still as a startling, most remarkable statement. Thankfully, that Professor Sander cannot think of meanings alternative to his own, almost apocalyptic vision, does not foreclose their possible existence.



“scholarly ‘nit-picking;’” far from it. Rather, because empirically grounded presentations tend to bear particular weight in any academic community receiving them, the empiricist bears particular responsibility with regard to possible existing bias influencing her work. Further, because the end result of effective empirical work is often policy decisions and the creation of particular programs—programs impacting human lives—it is incumbent upon the empiricist to address bias and to carefully craft causation conclusions. Given the heft of his work and the delicate subject at its heart, Sander’s responsibilities in this regard are great indeed. It is in this context that the above review of possible biases affecting the messenger’s message is offered, in the spirit of scholarly caution and thorough consideration of the quality of the ultimate outcomes of his work.

### III. QUANTITATIVE QUANDRY: “SHORT SHRIFT, FOR THE MOST PART”<sup>48</sup>

*The “costs” to blacks that flow from racial preferences are often thought of, in the affirmative action literature, as rather subtle matters . . . that might result from differential admissions standards. These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough and objective enough for my purposes.*<sup>49</sup>

In introducing this second area of critique of Professor Sander’s work, it is necessary for us to be bluntly honest with ourselves here: Beyond their uncontested utility, numbers can be slippery, tricky, worrisome things. To begin with, they feed our concrete, rational side like nothing else: Conceptually constant and apparently solid, they allow us to enforce order and to add predictive measurability to the vast subjectivity and irrationality of human life. However, at their very real center, frustratingly but undeniably, they are very much like Satchel Paige’s anecdotally famous beard: They are air.<sup>50</sup> They are valuable when quantifying tendencies that

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48. Sander, *supra* note 1, at 369.

49. *Id.*

50. Among the many rich, colorful stories associated with legendary Negro League baseball pitcher, showman, and legitimate icon and artifact of twentieth century Americana, Leroy ‘Satchel’ Paige, is one related both to pitching—of which he was the acknowledged master among his peers—and beards. Competing in the barn-storming circuits crisscrossing America throughout the Great Depression years, he one day faced a baseball team made up entirely of orthodox Jews, touring under the provocative team name *The House of David*. Known for their unique uniforms and, particularly, their long, majestic beards worn consistently with their cultural and religious customs, the colorful players utterly fascinated Paige. As batter after batter came to the plate to face him, Paige’s fascination grew to a fixation, until at last he could resist it no longer. Uncorking one of his famous fastballs, and relying upon his legendary pitching accuracy, his toss ran precisely where he had intended it to run: right through the very long beard of the surprised batter standing before him at the plate. When the umpire managing the game rightly applied the “hit batsman” rule and awarded the startled

seem to highlight consistent human outcomes or patterns of behavior—correlatives—but must always be held in a weightless, skeptical hand if they are to retain that value and descriptive power. And sometimes their best value lies not in their light—what they seem to say, aver, and predict with consistent accuracy—but in their *shadows*: what they allude to and hint at, even in their own internal and inevitable inconsistencies.

As stated at the outset, I am here neither capable of nor interested in ‘attacking the numbers’ undergirding Professor Sander’s work. Indeed, for purposes of this response, I would be prepared to join Sander himself in his otherwise self-serving claim that, “[m]ost of the [countervailing] contributors concede (and none dispute) the basic facts that frame *Systemic Analysis*.”<sup>51</sup> However, in assigning ultimate quantitative meaning to the information Sander has uncovered, in adding depth and clarity—and even accuracy—to the story it tells, much must be made of the *shadows* in his work: those numbers that pointedly ‘belie the numbers.’ Small but nevertheless significant, these are the ‘echoes’ in Sander’s data, the places that do not follow the general sweep and tide of the numbers before the researcher and even deny them in some not insubstantial way. In these places, “[s]omething else is going on”<sup>52</sup>—something *qualitative* I suggest, with explication to follow: shadows putting into sharp relief Sander’s quantitative work, allowing us to consider—and even to recover, if it is there—the ‘real story.’<sup>53</sup>

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batter first base, Paige was reportedly incensed: Charging home plate, he exclaimed for the benefit of both the offending umpire and any other interested by-stander, “A beard ain’t no part of a man. A beard are air!” Among the many touring baseball teams for which he played thereafter, Paige—an African-American—was reported to have donned a long, obviously fake beard on occasion, and gleefully pitch for the *House of David*.

51. Sander, *Reply*, *supra* note 15, at 1964. The full form of Sander’s claim bears repeating here:

Most of the contributors concede (and none dispute) the basic facts that frame *Systemic Analysis*: [B]lacks are nearly two-and-a-half times more likely than whites not to graduate from law school, are four times more likely to fail the bar on their first attempt, and are six times more likely to fail after multiple attempts.

*Id.* at 1964-65. Setting aside the fact that he is somewhat over-optimistic in the observation, where it is in fact made, this is no concession at all, in reality. Even taking the raw numbers for what Sander determines them to be, contrapuntal commentators instead struggle with Sander’s take on the seminal matter of *causation*, which, in my view, even at the close of his ambitious work, remains very much ‘up for debate.’

52. Sander, *supra* note 1, at 449. Here I quote one of the few handfuls of phrases in Sander’s otherwise sprawling prose which reflects even a hint of the “qualitative story” that no doubt lies beneath his avalanche of numbers.

53. I use the term ‘real’ here almost cavalierly, personally subscribing in fact to the post-modern ‘truth’ that all of human experience is mired in the subjective. However, I do mean to suggest that we do not come closer to whatever objective truth may be ‘out there’ either by qualitative review of a problem alone, or by quantitative review of it, but always by a careful marriage of the two. That marriage isn’t even

The first of these ‘shadows’ is not really a shadow at all, but rather a simple statement found in the historical portion of the introduction to his topic, which while true on its face, nevertheless raises the most cynical of ‘conspiracy theory’ scenarios in the diligent skeptic’s hand. In laying out the chronology of events presaging and implementing the integration of American law schools in the 1960s, Sander notes: “Ironically, during the same period when law schools were eliminating the last vestiges of discrimination and finally reaching out to blacks, the schools were also becoming transformed into more selective institutions.”<sup>54</sup> In the face of the effective reality that “[t]he rise of more competitive admissions placed a new hurdle in the path of blacks just getting a foothold in mainstream American education,”<sup>55</sup> this matter, in the *status quo* hands of Sander, is merely ‘ironic.’ However, even Sander must acknowledge the convenience of the ‘irony’ when considering this troubling fact: It is the out-workings of that very selectivity trend by which African-American success is presently measured, by Sander and others, that is found wanting. While this is not to say that the academy has been complicit here,<sup>56</sup> it may suggest this at least: that the source of some of the African-American ‘numbers deficit’ struggle may lie within the coincidentally and deliberately changed structure of the academy itself.<sup>57</sup>

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hinted at by Sander, who seems comfortable relying on quantitative analysis only to reflect the ‘whole story’. Indeed given his consistent preference for categorical quantitative flourish in framing his discovered ‘truths,’ there is little evidence that he appreciates the supportive value of qualitative process at all.

54. Sander, *supra* note 1, at 377.

55. *Id.*

56. And it is not to say it is not. I simply cannot leave this point without highlighting the unfortunate equivocal evidence in this regard: the academy that preferred competitive numbers-based admissions decisions, coincidentally with African-American admissions—and by which African-Americans placed in the academy would ultimately be reified as wanting thereafter—is the same academy that resisted African-American full access and inclusion in the first place, for as long as it was politically possible to do so.

57. I am putting the matter as kindly as I can here. Recognizing the potential irresponsibility of this statement, I should be very clear about what I mean—and do not mean—to say. Sander rightly puts the integration of the American legal academy and its lurch toward selectivity, and all that has followed, at roughly the same place on the relevant time line. And if his own work is to be both understood and accepted, it is that very trend toward selectivity—hierarchical disposition and elitism—that is the means by which African-American academic success is conceived, measured and, in the present case, found lacking. He denominates that connection ‘ironic,’ and that may be all that it reasonably could be. However, given the full history of the academy regarding race over that time, some of its number—and many among its African-American members—would be excused for seeing a bit more in the marriage in question than irony alone. In any event, my simple point here is this: If the heuristic numbers selectivity trend originated at precisely the time African-Americans were finally admitted to broader American legal education, and if African-American success (or its lack) is measured by that very standard, it is irresponsible not to look beyond the numbers *simpliciter* to uncover all of the possible sources of the current problem. For

A second ‘blip’ in Sander’s numbers, and, in my view, a true ‘shadow,’ would appear to lie in his presentation of the decile distribution of “*First-Year Grade Performance of Black Students* (Table 5.3),”<sup>58</sup> where he notes:

Since, as we have seen, large racial preferences at the top of the law school hierarchy reproduce themselves at the vast majority of other law schools, we would expect to see similar patterns of black performance across most of the spectrum of legal education. Table 5.3 confirms that this is so. . . . Generally, around fifty percent of black students are in the bottom tenth of the class, and around two-thirds of black students are in the bottom fifth. . . . *Only in Group 6, made up of the seven historically minority law schools, is the credentials gap, and the performance gap, much smaller.*<sup>59</sup>

That is to say, in comparison with majority culture colleagues, black students ‘under-perform’ in all law school settings—‘elite’ national schools, mid-range public schools, lower range private schools—with the exception of the ‘historically black’ law programs. Adding the ‘index gap’ figures to the discussion, this notable anomaly would seem to have only two possible explanations: Either black students in historically black programs are outperforming their counterparts in all other law school environments (this is Sander’s decile distinction), or white students are underachieving at these ‘black’ law schools (Sander’s ‘index gap’ treatments), or some combination of these.<sup>60</sup> Perhaps because the statistical facts lay outside his ‘mismatch theory’—or because a suitable explanation could be found only in murkier ‘qualitative review’—Sander makes no attempt at harmonization whatsoever, other than to note it in reporting the data. Given the definitude with which he cites ‘mismatch’ alone as the culprit in the numbers crisis, this is a blind spot in his work, one which holds great potential for those seeking ‘depth’ beyond ‘breadth’ in addressing and understanding the mystery behind the statistical puzzle.<sup>61</sup>

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the academy this is a test of sincerity regarding the breadth of the problem in its midst and of its own integrity in looking into every reasonable place—including to itself and its own ministrations regarding the historical disempowerment of minorities—for sources and following solutions.

58. Sander, *supra* note 1, at 431.

59. *Id.* at 430 (emphasis added).

60. *Id.*

61. I would take great issue with any of the ‘numbers’ types who might be inclined to put off Sander’s failure to address this statistical anomaly as due to the relatively minor numbers-profile involved. To begin with, the numbers point in something of the spiritually opposite direction from his ‘mismatch’ declaration. For that reason alone the depth of his work *requires* him to directly address and explain this aberration if he can—or to candidly admit the fact if he cannot—to add necessary support for his categorical conclusions. In my view, given the incendiary nature of his meta-theory and the extreme conclusions that follow from it, his failure on this point might be considered mildly irresponsible.

The academy cannot afford to do as the confident statistician has done and ignore this ‘blind spot.’ Simply put, hidden deep within the phalanx of numbers supporting his ‘mismatch theory’ is one set, small but significant, echoing an opposite story and contrary conclusion, and of a discrete, telling character. If we are to continue to suggest with authority that black underachievement in legal education is owing to the remedy of ‘affirmative action’ itself, as Sander insists,<sup>62</sup> we must understand why the trend is at least mildly contradicted in ‘historically black’ institutions. Put another way, to the extent the unbroken pattern of comparative African-American failure in historically hostile majority-culture law schools is broken in schools of these students’ own cultural affinity, the ‘mismatch theory’ is legitimately challenged while other possible sources of the problem are concomitantly highlighted. Sander’s failure to attempt to address this matter casts a long shadow across his too-quick conclusions, one that the academy receiving his work cannot afford to similarly ignore.<sup>63</sup>

A third ‘shadow’ across the face of Sander’s ‘mismatch’ tableau—if only a slight one—is captured by a single word looking askance at every hard-and-fast statistical rule and presents a ‘bug’ in Sander’s own numbers machine: *outliers*. Sander notes their existence in his statistical horizon with only a few words, making not even the merest attempt at harmonization with his own categorical meta-theory: “Other black students (about 10%) will significantly outperform predictions based on their credentials, and will also be in the middle of the class or higher. Some white students . . . who significantly underperform their credentials, will

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The second point should be intuitively obvious to any interested observer. In considering this aberration, we are not suggesting that the anomalies to the numbers story are showing up at Midwestern Jesuit law schools, for example. The one place where black students are moving away from Sander’s ‘mismatch’ morass is in schools that share the one characteristic most at issue in and at the heart of Sander’s own study: *race*, or, if you will, *racial diversity* at a unique quality and level within the American legal academy. *Black students are resisting ‘mismatch’ in statistically significant numbers at black law schools and at black law schools only.* Absent a credible and persuasive harmonizing of this ‘shadow’ fact with the remainder of his ‘mismatch’ panacea, that explanatory theory is done measurable harm by this number. That harm is only increased—and markedly so—when the author uncovering the statistical anomaly offers no explanation for it whatsoever.

62. See Sander, *supra* note 1, at 482.

63. Clearly Sander has rightly done a service to his readers by remaining on the ethical high road and following the numbers wherever they lead and reporting the results. Given the unvarnished certitude with which he presents his conclusions, however, and the peculiar quality of the conclusions offered, his failure to at least attempt to address the contra-shadow of the numbers in question is beyond puzzling. He is too thorough a researcher to have missed the implications of this mild aberration from his theory, and should not have failed to appreciate the necessity of some harmony between the two in fully supporting his adopted conclusions.

fall into the bottom quarter of the distribution.”<sup>64</sup>

Indeed, the Law School Admissions Council (LSAC) notes similar statistical results: Up to 15% of all students entering law school with ‘bottom quartile’ statistical predictors will graduate in the top quartile, with an equivalent distribution for those entering law schools with top quartile predictors.<sup>65</sup> These are Sander’s *outliers* in the purest employment of that term, and they are of particular importance in the face of a study expressing its conclusions in such uncompromising language as the following: “It is only a slight oversimplification to say that the performance gap [between white and black law students] . . . is a by-product of affirmative action.”<sup>66</sup> These individuals challenge his bald conclusions—oppose and deny them, in fact—and in not insignificant numbers; if they did not succeed in warning Sander that the ‘black and white’ story he confidently relates may be qualitatively nuanced in ways his quantitative empiricism has not disclosed to him, they must not be consigned to a similar fate by others of us.<sup>67</sup>

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64. Sander, *supra* note 1, at 431–32.

65. Admittedly, this statistical profile is ‘anecdotal’ rather than ‘hard.’ I was introduced to it during a presentation by a senior representative of the Law School Admissions Council (LSAC) at a conference sponsored by that group in Seattle, Washington in November, 2003, titled *Dreamkeeping: Empowering Minority Faculty—a Dialogue*. While the number itself may vary from year to year, law school to law school and situation to situation, its underlying truth is consistent and anecdotally attested to by everyone who has taught students in this business. Indeed, at the conference mentioned above, LSAC officials used this fact to underscore what it plainly called misuse of Law School Admissions Test (LSAT) results in admissions decisions, misuse religiously adhered to by law school admissions offices across America. In its official presentations the LSAC is more anecdotal than statistical, though the message is the same: “The LSAT, like any admission test, is not a perfect predictor of law school performance. The predictive power of an admission test is limited by many factors, such as the complexity of the skills the test is designed to measure and the immeasurable factors that can affect students’ performances. . . .” <http://www.lsac.org/pdfs/InformationBookweb.pdf>. In the case of African-American students, within the context of the general tone of Sander’s work, such ‘immeasurable factors’ may nevertheless be very important indeed.

For a more general discussion of possible discriminatory effects of the present use of the LSAT in admissions decisions, see Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN’S L. REV. 107 (2006) and Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41 (2006).

66. Sander, *supra* note 1, at 429. In seeking a suitable reference for the point here, Sander’s work presented a veritable host of possible choices.

67. Disturbingly, this is not the only place where ‘outliers’ challenge Sander’s neat statistical picture, nor even its most significant challenge. On the other end of the quantitative spectrum, Sander’s numbers define another group of outliers moving in the opposite direction, the *negative outliers* that present their own discrete challenges to quantitative analysts determined to do things ‘by the numbers’ only. These are the “black students with good [numbers],” *id.* at 448, who ought to perform well according to the very quantitative story Sander presents and relies upon, but whose actual

The reasons behind this necessary added attention should be obvious to anyone interested in the problem and who is committed to developing an appropriate, effective solution. First, the numbers represented by this shadow group—one or more in ten—are by no means so statistically insignificant as to warrant the relative short shrift afforded them by Sander himself. Second, and most importantly, the individuals populating this vital sub-group are practical and statistical *overcomers*. They have slipped the surly bonds of Sander's erstwhile ironclad 'mismatch' in ways which should command our full attention rather than receiving our bland lack of interest. They may in fact be harboring a pristine story, one lying utterly outside the ability of Sander's numbers to even begin to recover, no matter how thorough his regressions nor how ambitious or careful his math. They may offer a *key*, a *holy grail* of sorts, in the present, important debate, one which is both incisive and hopeful in an area badly in need of both, and if Sander is effectively under-impressed with that possibility, the remainder of the academy must not be.

In summary, it is very important to understand the two terms at the heart of all econometric analysis, engaging econometricians at the deepest level of their work—*correlation* and *causation*—and, further, to appreciate their complex interaction. Numbers can establish correlations between discrete factors—say, 'African-American students' and 'law school 'success''—to a great degree of certitude, and correlations can allow reasonable connection to *causation*, depending on the level of their strength. However, causation is always a matter of guesswork from correlation, no matter how strong the 'numbers story': Results can be connected to

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performance seems unmoored from the numbers and dependent instead on *the 'eliteness' of the school to which they matriculate*. Sander sets out this statistical reality ("The basic idea is that a black student who, because of racial preferences, gets into a relatively high-ranked school . . . will have a significantly lower chance of passing the bar than the same student would have had if she had attended a [less 'elite'] school. . . ." *Id.*), dutifully presenting the important question: "But why exactly should the same student have a lower chance of passing the bar [because of this] . . . ?" *Id.* at 449. Why indeed. Interestingly enough—and tellingly—it is here that Sander first and finally moves out of his quantitative haven, referencing rudimentary qualitative considerations to explain a dilemma resisting quantitative explanation. Waxing somewhat lyrical about his own earlier challenges when an undergraduate at Harvard, he spins this qualitative experience into his own intellectually interesting 'mismatch hypothesis,' settling the matter quantitatively thereafter. But his qualitative foray is *not broad*, and therefore it is *not strong*: There may be *many* more things qualitatively at work in these students than 'mismatch' alone (or even 'at all'), giving rise to these important and troubling outcomes. As it is, however, the one qualitative theory most consistent and easily harmonized with his previously developed and preferred quantitative thrust, assumes first place in 'explaining' this critically important counter-trend. I address Sander's qualitative debilities in more detail in the following section of this paper, but I must not leave this discussion without highlighting this significant 'negative outlier' story, or without suggesting the ultimate inadequacy of Sander's qualitative attempts at categorical explanation.

particular factors to a significant statistical level, but numbers alone should *never* blind a researcher to the complexity of any problem involving human beings, nor to the vast vagaries of their possible ‘causes.’ The fact remains that there is *always* a margin of error between ‘correlation’ and ‘causation,’ however slim, and that ought to remain uppermost in the mind of the econometrician, and be plainly disclosed in her final presentation. This would appear to be a place of strength and also of weakness in Sander’s work here, when taken as a whole.

These ‘shadows’ are made more significant by two internal, interactive tendencies in Sander’s work, focusing the pith of his outcomes and ultimately challenging their reliability. The first is his failure to address them in any satisfactory way, and the second is the utter fundamentalism of his conclusions despite this failure. If, through his world of numbers, Sander tells us categorically how things *are*—and he does this in spades—his ‘shadows’ insistently whisper a subtler, but perhaps even more important, (and more wholesome and robust) counter-message: “not so fast.” If Sander is confident enough in his numbers to measure out their ‘truths’ with algebraic precision, his ‘shadows’ remind us of the intense *humanity* of his subject of study, and the inevitable truth that follows that humanity with its own internal precision: No human story can *ever* be fully understood through numbers alone, no matter how concrete they may appear. Simply put, there is a gloriously irrational aspect to every rational human story,<sup>68</sup> lying so far outside the reach of ‘numbers’ that their inabilities—or, more precisely, their *disabilities*—are substantial when seeking to fully uncover that story. To assay these critical ‘shadows’ and determine the substance, if any, behind their significance, we must bolster quantitative empirical work with *qualitative* review, for it is in the *quality* of a matter, and not in its quantity alone, that any truly human story gains sharp focus.

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68. I use the adverb ‘gloriously’ here quite deliberately, and, in its use, effectively come ‘out of the closet’ as an unapologetic ‘qualitativist’ in all that I do. Understanding the relative comfort in rational consistency and the objective universe it seems to create, for the life of me I have never completely grasped the concomitant resistance by rationalists to acknowledge and even embrace the reality of the irrational and the subjective in each individual human story. Indeed, as a historian who must work in the world of the subjective, I find this ‘truth’ inevitable, and its avoidance completely undesirable, even if it were possible to do so. While rationality gives our lives necessary rhythm and pace, form and structure, and even substance, it is *irrationality* which gives them their color and life, and makes them uniquely *human*. While much of our human actions are grounded in the rational, some of the most important of our motivations are not, and this whole reality cannot be clearly captured with quantitative tools alone. The implications of this truth against the backdrop of Sander’s work will be carefully considered and fully explored *infra*.



IV. SOME 'QUALITATIVE' TRUTHS: "LET US PONDER THIS A LITTLE."<sup>69</sup>

*But it may not be obvious to many readers why it should be that black students with good credentials should lower their chances of passing the bar simply by attending a better school. Let us ponder this a little.*<sup>70</sup>

My final critique of Professor Sander's *Systemic Analysis*, and in many ways the pith of my concerns with it, is best illustrated by referencing a personal anecdote demonstrating the *quantitative/qualitative* interface being here advanced. Among the many students greeting me several years ago at the small, private, conservative institution to which I had just moved to teach were four African-American males bunched together at the front of the classroom auditorium, right before my podium. They each came from an historically black university very different from the law school at which they had arrived, and, though I had no actual knowledge, each almost assuredly benefited from admissions preferences of the kind at the heart of Professor Sander's study. They impressed me as being 'at ease' in my classroom, maintained punctuality and diligence in class attendance, and remained prepared enough to voluntarily engage in group discussion throughout the semester; the four apparently forming a valuable support group for one another. Each weathered what came to be vilified as a horrific examination at semester's close,<sup>71</sup> and together they all outperformed on my examination their other final examination grades, I came to understand afterward.<sup>72</sup>

Now here is a 'mismatch' worthy of Sander's own hypothesizing and theorizing: In a law program prototypically struggling to add African-Americans to the legal profession in just the ways Sander's work has highlighted across the academy, each performed in my classroom at a level different from their performance in their other classes, well beyond the outcome which the *Systemic* regressions would have warned them to expect.<sup>73</sup> When a colleague good-naturedly questioned the relative over-

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69. Sander, *supra* note 1, at 448.

70. *Id.* (emphasis added).

71. This was my fault alone, of course. Reflecting ambivalence at least, if not ability, the examination-drafting skill remains, in my view, the one teaching skill in which I remain measurably deficient.

72. Indeed, one in that group of four, about whom I had harbored some real reservations based on classroom performance, performed very well, and another wrote what remains the very best examination paper I have read from a first year student in the years I have been teaching.

73. Put loosely in Sander's terms, they seemed to follow his 'mismatch' hypothesis across all of their individual classes save for my own where, for them, the school became akin to a HBCU (Historically Black Colleges and Universities), in effect. This is very interesting, of course.

And with regard to those particular students, they did not stop there. Despite the dire graveyard of buried hopes that Sander's 'irrefutable' numbers prognosticated for

performance of these students in the only African-American professor's class, I chuckled along, as required, though I did extensively consider the interesting aberration.<sup>74</sup> Might their performance have depended even somewhat on the 'statistical anomaly' of what they saw when they walked into my classroom, different from the others in which they were invited to learn? Might the clear portent of 'business not as usual'—my simple African-American presence at the point-end of their hierarchically designed classroom—have awakened in them unique dreams of their own possibilities in consequence of my apparent achievements?<sup>75</sup> Might the peculiar, unique environment in which they were called to learn in my classroom have had some spiritually ameliorating effect on what they learned and, indeed, on their very ability *to* learn, despite the 'mismatch' echoes all around them?<sup>76</sup>

These are *qualitative* questions backing *qualitative* considerations, and they stand in marked contra-distinction to the quantitative methods deliberately framing the whole of Sander's work and driving his conclusions. They depend for their energy on a very different sort of consideration—*micro* rather than *macro*, *individual story* over and against *group character*—and they provide very different information and therefore may yield very different conclusions. They do not stand in

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each or some active subset of this small group, each of them graduated, each 'passed the bar,' and each is in the process of becoming a great addition to the profession in which they are all growing.

74. In the interest of full disclosure I must say that I do not have even anecdotal evidence that their experience is replicated by every African-American student whom I teach. Nevertheless, the value of the point being advanced here remains.

75. I mean by this to be deliberately and transparently utopian, even to the point of naiveté, and I reference my own educational experiences in support. From my earliest education at an 'elite' private university and through stints at two different 'elite' public programs, I typically took no great notice of the professors managing my classrooms, with one notable and consistent exception: the rare classroom experiences directed by people that 'looked like me' to put the matter concisely and familiarly. Of them I took immediate and deliberate notice: I was extra-critical of their performances and extra-interested in their routes to 'success.' While I cannot say that my extra attention always translated into superior academic performances in those classes, I can definitively aver that their individual achievements always stimulated in me a sort of 'possibility thinking' that was encouraging all along my way. This is a *qualitative* truth, lying quite outside the reach of quantitative analysis, and it is important.

76. In support of this point, I recall—anecdotally and always with amusement—the first criminal law lecture I delivered in my then new law school, experienced by the four African-Americans in question along with their many other classmates. One of the four came up to me immediately afterward and, with a measure of wonder, excitement and, noticeably, to my mind at least, relief, proclaimed in almost reverential terms, "That was one of the most remarkable lectures I have ever heard. . . ." I viscerally understood his feeling.

Though I never felt similarly regarding any of my majority culture professors, I inevitably breathed out a reflexively subconscious prayer before my African-American professor's first lectures— "Please don't screw up" —and a less subconscious sigh of relief when they did not. This strikes me as sad, interesting, and important.

opposition to quantitative analysis, but rather, in the best of circumstances, would *augment* quantitative information in key ways, nuancing numbers and teasing from them different views on the possible stories to be rightly derived from the statistical outcomes. That is to say, Sander's *quantitative* analysis provides information, but is naturally short on *story* following from the numbers it finds; meanwhile *qualitative* considerations in effect provide the story itself, and, as such, provide the best means by which full, right conclusions might be recovered from that information. Without solid qualitative review, one can *never* be sure of the story quantitative analysis isolates and, concomitantly, can never be confident that the remedies suggested by the analysis are the *right remedies* to palliate the real problems that the numbers have highlighted.

More must be said to appreciate fully the relevance and weight of this point. Anyone even casually familiar with the pristine psycho-spirituality of learning and academic achievement knows the key place of *personal confidence* in the process, and the devastating potential effects of the lack of it on ultimate outcome. And any African-American coming under the glaring benefit of 'affirmative action,' in any of its many manifestations, will qualitatively reflect that its naturally attendant by-products—"stigma and stereotypes that might result from differential admissions standards"<sup>77</sup> among others—inevitably threaten that confidence in just these sorts of ways.<sup>78</sup> Yet as powerful as these configuring qualitative truths might very well prove to be, they become here for the quantitative analyst, "rather subtle matters . . . interesting and important"<sup>79</sup> though given only "short

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77. Sander, *supra* note 1, at 369.

78. My first iteration of this paper came several years ago in the form of a presentation at a 'debate' on 'affirmative action' conducted by the Young Lawyers Division of the North Carolina Bar. I was recruited by the Division President to take the 'anti-' side and only did so because he found it difficult to find someone willing to take that position, and that 'he' was my younger brother! Taking a tack very different than that anticipated by my 'pro-' side debating partner, I had occasion during my presentation to reference the inevitable negative effects of such programs as usually experienced by their erstwhile beneficiaries: mild guilt, confidence loss, 'outsider' feelings, *etc.* At a reception following I was approached by every African-American in the audience, it seemed, who individually and conspiratorially thanked me for voicing what they each had felt in their 'affirmative action' histories but had never shared, guessing that they were alone in these reactive responses. Though anecdotal only, my strong suspicion lies toward the ubiquity of these negative feelings with the majority of said 'beneficiaries,' and in fact strongly echo my own.

79. Sander, *supra* note 1, at 369. By use of the term 'subtle' to describe these things, Sander may be referring only to their measurability using the traditional econometric tools of the day, though his characterization remains stark, uncomfortably spare, and wrong, I believe, at least where African-Americans are concerned. The net negative message of present 'affirmative action' initiatives, whether benignly or acerbically communicated and received, are by no means 'subtle' for the African-American. They do not speak their messages into an experiential vacuum, but rather against a deep backdrop of similar messages for the typical African-American, even one of 'high achievement.' Thus, the 'affirmative action' impetus becomes but one

shrifft” by Sander, in the end.<sup>80</sup> That taken care of, he is then free to prosaically fix the source of the problem quantitatively in the *action* part of the ‘affirmative action’ construct, while wholly ignoring the qualitative *affirmativeness* part of the curative, where the problem is in fact equally free to reside.<sup>81</sup>

In the spirit of full understanding and critical self-investigation, if nothing else, in order to be as certain itself of Sander’s cathartic conclusions as he is, the academy must be prepared to do the very thing he has dismissed and ignored, to go where he has refused to go. It must ask the *qualitative* question, taking an unvarnished, critical look at the ‘affirmativeness’ of the environments into which the “intended beneficiaries”<sup>82</sup> are invited to learn and achieve—“from the most elite

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more ‘handout’ from the ‘majority culture’ downward to the minority individual, reinforcing ‘difference’ and ‘disability’ in the process, rather than reifying ‘competence’ and ‘ability.’ And all this occurs on terms created by and managed for the synthesizing culture, to the decided detriment of the minority ‘beneficiary’. If this is not the direct communication, it is the subordinate message for the African-American: in receiving ‘affirmative action’ support, business is decidedly ‘as usual’ in every way for both the proponent and the recipient, with the usual results expected to follow.

80. Sander, *supra* note 1, at 369. A full rendering of the above truncated quote puts the matter in its most revealing light. In addressing in his introduction the issue of “‘costs’ to blacks that flow from racial preferences,” *id.*, Sander casually lists them—“the stigma and stereotypes that might result from differential admissions standards”—and just as quickly dismisses them:

These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough or objective enough for my purposes. The principal “cost” I focus on is the lower actual performance that usually results from preferential admissions.

*Id.* at 369–70. In truth it is difficult to know where to begin in critiquing this remarkable statement. That he dismisses with such confident ease these essentially qualitative matters about which reams of critical literature have been produced is in itself problematic, though his reasons for such dismissal, plainly presented, deepen the problems many-fold. Recognizing that such matters resist easy quantification and numbers profiling, he is prepared for this reason alone to effectively ignore them, preferring instead the ‘story’ his numbers can directly get at. His not-so-subtle message might reasonably be summed up as follows: For a problem whose true sources may lie in any number of reasonably anticipated directions, Sander is prepared to follow only those leads lying in his strength areas. He will neither shore up his weak areas nor enlist the services of someone who could do this for him, but rather ignore these matters altogether, or at most only give them the rather unfortunately phrased ‘short shrift.’ Of course, the biggest problem lies in the reality that his own categorical conclusions are undercut significantly by this failure on his part. For the many gifted investigators strongly encouraging sourcing black under-performance in these very qualitative areas which Sander gives short-shrift, he has no cogent critiques and, therefore, nothing to say. This will be referenced further and more directly *infra*.

81. The problems naturally following from this choice on the part of the quantitative analyst, problems extending to the very core of his extensive work and terse conclusions, should be plain.

82. Sander, *supra* note 1, at 368–69.

institutions to the local night schools”<sup>83</sup>—the *affirmativeness* of ‘affirmative action,’ if you will. It might conveniently begin at the very foundational basis and deliberately articulated motivation of the action itself. Repetitively relying on such loaded rhetorical standards such as “special admission[s],”<sup>84</sup> “racial preferences;”<sup>85</sup> and their equally pernicious cousins—“preferential admissions policies”<sup>86</sup> or, more tersely, “preferences”<sup>87</sup>—the modus and message behind presently conceived ‘affirmative action’ initiatives is inescapable: It declares, “By present day strictures of the legal academy you are at a competitive disadvantage and do not really belong. Further, you do not measure up to the standards of the community to which you have been ‘admitted’—majority culture standards, through and through—though you will be rigorously judged by them, and likely found wanting. Welcome to law school!”<sup>88</sup>

Though different individuals would respond to these systemic, constructed challenges very differently,<sup>89</sup> the question nevertheless survives Sander’s ‘mismatch’ magic: What, pray tell, is *affirmatory* in any way by such ‘affirmative action,’<sup>90</sup> and, in its plainly imagined disability, might it

83. *Id.* at 368. The phrase is deliberately referenced for its irony.

84. *Id.* at 370.

85. *Id.* at 368–69.

86. *Id.* at 368.

87. *Id.*

88. In a curriculum and program which has proven challenging for both African-Americans and transfer students, among others, an African-American transferee to my school reported that she was greeted with that very information, followed by the comment “I wonder how long you will last?” It was a triumph of that student’s character that she did graduate, though it was a very unfortunate beginning at her new law school.

89. In the early days of ‘affirmative action’ the architects were not subtle about their message. In the early 1970s my own oldest sibling surprisingly gained admission to an excellent public university on the strength of a thoroughly pedestrian secondary school record, through hard but uninspired work. In the days far prior to the politically correct era still to come, the admission process had no need to be coy; in deciding the matter, the university used raw data to project a final grade-point average in the 1.75 range, in circumstances where minimum graduation standards were institutionally set at 2.0. Yet admission was forthcoming for my sibling for one articulated reason alone: at that time the federal government had put a financial ‘bounty’ on the heads of African-American matriculates as an incentive favoring institutional desegregation. The motivational effect of that letter may simply be ‘family lore,’ but the results in the case of my stubborn and provoked sibling were remarkable: graduating from that institution ‘with honors’ in a difficult ‘hard sciences’ program, he carried his record into medical school and a productive medical career. My sibling’s actions represent a ‘right response’ to the unfortunate challenges placed before him, but a difficult and increasingly rare one across the breadth of today’s African-American culture, for complex reasons, I am sure.

90. This challenge is by no means novel nor singular. Apart from the much-to-be-expected reactionary attacks on affirmative action as a conceptual whole, the numbers of thoughtful minority scholars challenging the ‘affirmativeness’ of present initiatives is by no means insubstantial. Derrick Bell has criticized presently conceived

itself be a source of its own outcome-poverty?

Neither would the liberal spirit and positive intention of the action be redeemed in any effective way by its amalgamation with more constructive and less attenuated notions of *diversity*—the latest rallying point undergirding the value and necessity of ‘affirmative action.’ For the ‘student of color,’ lurking just behind the bright and inviting façade of the otherwise benign, positive notion of ‘diversity’ is the dual reality of how it actually looks and what it impliedly means for the parties in question. Unable to enter the arena through the ‘front door’ of competitive ability, ‘diversity’ hallmarks the academy’s willingness to forge an alternative entrance<sup>91</sup> for these individuals who bring something else with them that it independently recognizes, values and ‘needs.’ Whether for mere color alone,<sup>92</sup> or for the useful experiences with which diversity is stereotypically expected to enrich teaching environments and class discussions,<sup>93</sup> or some

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affirmative action initiatives as essentially giving “blacks the sense of equality while withholding its substance.” Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1598 (1989). In this way, “affirmative action remedies have flourished because they offer more benefit to the institutions that adopt them than they do to the minorities whom they’re nominally intended to serve.” Derrick Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 154 (1987). For Richard Delgado, affirmative action “is at best a mixed blessing” for its intended beneficiaries. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1230 (1991) (stating that its programs are “designed by others to promote their purposes, not ours.” *Id.* at 1226). Stephen Carter notes that “the durable and demeaning stereotype of black people as unable to compete with white ones is reinforced by advocates of certain forms of affirmative action.” STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49-50 (1991). To be sure, there are many minority scholars who support presently conceived affirmative action initiatives. Nevertheless, thoughtful and committed scholars have raised the very issue of the true ‘affirmativeness’ of ‘affirmative action,’ and this from the perspective of the supposed direct beneficiaries.

91. Dare we denominate this a ‘back door’?

92. This enables the academy and its individual members to create a picture more sympathetic to its own practical and political convictions.

93. One moment of real and lingering regret in my teaching experience came during a class discussion in a seminar on *Issues in American Justice*. The topic at issue concerned aggressive policing tactics and, frustrated with the timid, theoretical nature of the discussion among the ten majority culture students, I broke my own self-imposed rule against “calling on” seminar students, and invited/required the one African-American student to weigh in. He was reluctant, as expected, and I ought to have respected this. Nevertheless—admittedly for my own purposes, irrespective of his—I pulled him into the discussion, and he obliged with the well-anticipated egregious stories of personally experienced police excess, uncomfortably relived in the classroom retelling. His participation had the anticipated and intended effect of electrifying class discussion thereafter, but at a cost which left me deeply dissatisfied, now as then. The simple fact was that I was using this young man’s experience for some shapeless, anticipated benefit of the other students who had no similar stories to tell, likely sacrificing his privacy and, in some way, his ‘self,’ in the process. It struck me at the time, and continues to impress me today, that this was/is the *dark side* of ‘diversity’: the using of a human being’s hard gained experiences for some benefit in which that

other anticipated 'value added,' the message is clear: Having previously highlighted competitive disadvantage, law schools are then prepared to notoriously ignore it in seeking some other benefit on behalf of the broader community being served. This is a cynical perspective, of course, but it is not an unreasonable one; to the extent it accurately reflects the pith of 'diversity' in legal education, it is potentially as debilitating as the qualitative non-affirmation of present-day 'affirmative action' initiatives.

Separate from each of the above, though alluded to by both in combination, is the general atmosphere which greets the African-American student on 'day one' of their law school experience and which continues for every day thereafter.<sup>94</sup> The law school is its own unique world, to be sure, but to the extent that it is a truly *foreign* cultural community, for most African-Americans, its 'foreignness' tracks much closer to majority-culture values than minority. From the 'minority' student status greeting them, the majority-culture dominated faculty and administrations in visible authority positions, to even the pseudo-Socratic classroom tones,<sup>95</sup> these students see precious little of 'themselves' in the typical law schools. Here, then, is a 'mismatch' of a very real sort, though not of the quantitative, cognitive type Sander points to with such confidence in outlining the source of the 'success' problem.<sup>96</sup> What might be the independent effect of *this* mismatch on the ultimate outcomes expected of those coming directly under its discomfiting influence?<sup>97</sup>

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same human being cannot equally participate, and at some likely personal cost to that person. I am doubtful that any of the majority culture students received any deep thing from the experience other than the cheap chance to gawk at another person's difficulties, with myself orchestrating the viewing as a kind of culpable 'ringmaster.' At its rawest level, is this what we mean to value by referencing 'diversity of experiences' in the classroom? Does this take even the merest step toward really addressing cultural injustice in America, or does it instead merely reference and highlight it to some ignoble and visceral end and this in the most cynical of ways?

94. The only real exception to this for these students is the atmosphere in historically black law schools, the very exception to the 'performance gap' rule outlined by Sander in his own empirical profiles.

95. Its origins are western European in both form and effect, of course, and 'after all.'

96. Sander, *supra* note 1, at 429.

97. Here let me indulge my own qualitative story by way of example. Different from Professor Sander's foreign language woe (further referenced *infra*), my own undergraduate 'waterloo' came in the form of freshman calculus. Already reeling from the utter 'foreignness' of the frighteningly different place in which I had landed in my 'elite' private university, my undoing came in that first class of a subject I had reasonably expected to enjoy. Intimidated by the sheer size of the course's text, I had just attained a measure of calm and resolve in that first class meeting when a 'wise guy' (of the type I have since come to understand as a 'prep school all-star') called out, for all to hear, "Are you serious? This is the text we used in *high school!*" I heard. Though hours of fretting and avoidance and general discomfort lay ahead of me before I dutifully picked up my dismal grade at semester's end, on reflection I have since realized that I 'lost it' at that very moment. I was *intimidated*, and in a way that was

I do not mean here to suggest that these things are always active for each minority law student, but that they *may* be, singly or in combination, and that where active, the trajectory of their effect on educational outcomes is not greatly a matter of guesswork. Individually representing powerful impediments to a full-orbed, positive, *successful* law school experience, the actual effects of these things can be isolated and defined through qualitative considerations only, and not through quantitative analysis. They stand independent of any cognitive disadvantages reflected in a quantitative story and, in combination with those disadvantages, where existing, form a potent tandem threatening the way of the hopeful African-American achiever. They originate outside of the innate abilities of the student, are *systemic* in nature, to use Sander's own term, and raise the central question in a way that calls the academy to self-examination in fully appreciating the problem and properly developing its solution. This qualitative consideration is *important*; indeed, it is so critical to any such quintessentially human question that its absence represents a major flaw in any complementary quantitative study, clouding its vision and challenging its conclusions in the most foundational of ways.<sup>98</sup>

These qualitative considerations are entirely absent from Professor Sander's sprawling study, and their absence is of no small import to the breadth of its clarity or the right weight of its categorically presented

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new and daunting for me. It was not the subject that overcame me, but instead the atmosphere in which I was invited to master it. While all of my concentration would have been necessary in the best of circumstances to manage the class well, the distinct feeling of being on the short side of a 'stacked deck' made sure that that would not happen. I disconnected from the learning process altogether at that moment, with untoward results naturally following. The 'mismatch' which derailed my academic experience was not one of cognitive ability, in that case, but was instead the '*mismatch of experience*, with the crisis of confidence naturally following and with its pernicious intimidation in tow, having its ultimate effect on my success, or lack thereof.

98. The stronger the argument for these independent factors at work in the experience of the minority law student, the weaker Sander's 'mismatch hypothesis' becomes, of course. In any event, even apart from qualitative analysis addressing these issues, their possible existence alone rightly challenges the definitude with which Sander presents his related conclusions. Sander's data can highlight the fact that African-American law students are 'mismatched' in their law school placements and can separately note that they are doing very poorly in those placements, underscoring the reality that they are 'unconnected' from the educational process in some palpably negative way. However, by virtue of the numbers alone, the best he can reasonably suggest is the strength of the correlation between the two factors; he cannot conclude the existence of the one from the other (the very thing he does, over and over again, wrongly, in his piece). Qualitative work is necessary to establish—or refute—his correlative conclusion. If African-Americans are standing apart from the educational process for reasons having to do with the environment itself, for example, the ubiquity of the 'mismatch' across the law school spectrum renders it nothing more than a 'false positive,' a statistical echo which gives the appearance of a true correlation, without substance in fact. In any event, apart from supportive qualitative analysis—talking with these persons and finding out *from them* what is actually going on—Sander's correlations remain suspect, and his conclusions, therefore, palpably dangerous.



conclusions. This absence is no mystery, of course, as the careful reader explores all that Sander has to say. Yet, the matter bears repeating here: These very qualitative issues are among the “rather subtle matters” deliberately given “short shrift” by Sander’s own candid admission. They are “hard to measure” through his constricted quantitative work; but, they are, nonetheless, absolutely essential, as set out above.<sup>99</sup> In their absence, the ultimate utility of Sander’s study is drastically limited: It can tell the academy *that* there is a problem (which the academy already knew), and can put that problem in the important declarative perspective which only numbers can manage (genuinely helpful in this case), *but it must necessarily be made to stop there*. Until capable qualitative analysis comes alongside to complement—and challenge—Sander’s quantitative work,<sup>100</sup> his quantifiably neat, apocalyptic ‘mismatch hypothesis’ remains only that—a hypothesis—interesting, and possible, but *nothing more*; such is the case for all the conclusions following from his numbers.

V. CONCLUSION: “[S]IMPLY STOP USING RACIAL PREFERENCES.”<sup>101</sup>

*Once some honest conversation about affirmative action practices is underway, it will be much easier to talk about constructive solutions. The most obvious solution is for schools to simply stop using racial preferences. . . . [B]lacks as a whole would be unambiguously better off in a system without any racial preferences at all than they are under the current regime.*<sup>102</sup>

Several years ago, in the midst of the exciting, frenetic world of ‘summertime Washington D.C.,’<sup>103</sup> my then 19-year-old son and I met a

99. Sander, *supra* note 1, at 369.

100. The two forms of analysis are not mutually exclusive, of course. Indeed, in a study as ambitious in nature as the one Sander takes on, either form of analysis alone would likely reach only half the story at best. Both would be needed to fully address such an undeniably human story: *quantitative* analysis, to concretize parameters and variables in a way unavailable through any other medium of inquiry, and *qualitative* consideration to rightly give the numbers story depth and true meaning. Let me be very clear in saying here that, while I respect the work Professor Sander has completed, the lack of comparative and contrasting qualitative considerations—readily attainable but wholly lacking here—leaves me very distrustful of his too confident conclusions and the outcomes too naturally following. I ‘know’ there is ‘another story’ out there, contrapuntal to the one to which Sander has been led by his numbers, and I ‘know’ (qualitatively!) he has not reached it through his numbers (and never would, through them alone). I know this as well: Full understanding of the problem and its solutions lies in the *quality* of its review and, given its importance and the urgency of its solution, I for one cannot wait to see the progress that thorough qualitative review promises in this regard.

101. Sander, *supra* note 1, at 482.

102. *Id.* at 482-83.

103. Its unique identity as the seat of American political power, in combination with its warm summer climate, ease of access through efficient mass transit, magnetic pull for tourists and relative ease of internal navigation, makes the District of Columbia

young man who sought my signature on a petition for the defendants in the then highly anticipated *Grutter v. Bollinger et al.* case. He was a locally based law student, intellectually committed enough to the heart of the matter at issue—‘affirmative action’—that he would use his time to get involved at this level of direct action.<sup>104</sup> In acceding to his request, I could not resist asking a ‘gut’ question related to the issue with which he so passionately identified: “If matters came to it, would you be willing to yield your place to an African-American, under the aegis of ‘affirmative action?’” His response was so coldly matter-of-fact that he seemed to have anticipated the question, or had labored through it to completion at some earlier time at least: “I favor an expanding of the pie so that opportunity can be shared by all.” Repeating the question, with slightly less ‘wiggle room’ and greater emphatic inflection, his verbatim response was more categorical, with even less accompanying emotion than before: “I favor expanding the pie so that opportunity can be shared by all.”

While I might concede without contest the unfairness of the question posed in those circumstances, for me the experience has nevertheless taken on the character of something like a parable as I have considered it over the ensuing years. While the student was committed enough to the issue to have added shoe-leather to his talk, there remained in him a severe limit to that commitment, a possible personal cost he was simply not willing to consider in imagining resolution. But without that added, deeper commitment, his efforts and the solutions they anticipated were destined to be *conservative* in the most restrictive application of that term, notwithstanding the genuineness of his desire to see the problem really solved. Resisting even modestly radical reconsiderations of the problem, his limitation would preserve the *status quo*, maintaining the ‘us/them’ distinction, a distinction at the heart of the academy’s approach to equal educational access for as long as it has considered the question. The final end of the impetus seems clear: effectively mobilizing ‘us’ to reach out (down) to ‘them,’ it allows as many of ‘them’ to become ‘us’ as is reasonably to be expected,<sup>105</sup> leaving undisturbed the very structure

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a hotbed of activity of all sorts at that time of year: family tourism, indoor and outdoor cultural attractions and, of course, the ubiquitous political protest. It was the latter that had drawn my son and myself that particular weekend, he having just finished a book on the ‘protest years’ of late 1960s and early 1970s America, and wishing to experience something of that time in his own right. With the concurrent ‘gay/anti-gay’ rallies and the first well organized ‘anti-Iraq war’ protests on for that weekend, the city did not disappoint.

104. Admiring his commitment and seeking to encourage his energetic involvement, I resisted the urge to challenge this anomalous admixing of hyper-democracy—in the form of populist government petitions—with the Delphic, distanced reality that is constitutionally controlled Supreme Court politics, garrisoned as it is from popular contact.

105. Sander himself might practically place that figure at “4% of total [law school]

implicated in the perpetuation of the problem.

The academy would do well to acknowledge the unalloyed value of Professor Sander's important work, while taking special precautions regarding its profound limitations. In its favor, the study has carefully outlined the contours of the very real problem of black achievement after a generation-and-a-half of 'affirmative action,' and has done so in a richness of detail simply unavailable prior to its completion. However, to its measured detriment at best, it relies exclusively on quantitative tools to fix the locus of the problem in the numbers being used, and the 'affirmative action' flowing from their use. That African-Americans of some ability and achievement are 'disconnecting' from the American law school experience in great numbers and in professionally destructive ways was appreciated before Sander, and remains even clearer as a result of his work. But without sound qualitative analysis supporting his massive numbers regime, the academy cannot and must not be seduced by his too easy conclusions, or the plain, conservative solutions that seem to follow so naturally from them.<sup>106</sup>

Instead, the academy must take the best of what Sander has to offer and deliberately move forward from there. It must court qualitative review of the problem of a caliber akin to Sander's quantitative work—or it must commission that work itself—allowing African-Americans to 'tell their stories' to sympathetic professionals able to make good use of them. It must be prepared to take a good, hard look at what it finds—from Sander's results in combination with the all-important 'stories' that qualitative work might reasonably add—and to take a good, hard look at itself in the process.<sup>107</sup> This is not conservative; it is radical and curative and perhaps even transformative in the end, in a situation where the effects of such an

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enrollment." Sander, *supra* note 1, at 483. While many within the academy would perhaps see this as a fair and even generous proposed solution to the problem, I trust that my thinking is clear in challenging it as 'wrong headed' in every way. It is conservative at its core—even paternalistically so—and thus provides reinforcement of the flawed academy heuristic at a time when challenge is what is called for, and so badly needed.

106. And that's not all. Does anyone miss the odd retrograde force at the ultimate core of Sander's 'mismatch' hypothesis, against the telling backdrop of 'elitism' deliberately anchoring his work? As he puts it, unfortunately but clearly, the breadth of the scope of his thesis seems to be disturbingly vulnerable to the following chilling reworking: in the end, after all, there is 'ability'; thus, 'affirmative action' reifies a 'false positive' in which African-Americans—inferior as they are in these circumstances—simply cannot compete with their majority culture counterparts. A new song, with an odd, old, unsettlingly familiar refrain. And one many African-Americans like myself are tired of hearing.

107. This is not without precedent, of course. This is the very thing the academy refused to do at the time that African-Americans were first seeking entry in numbers to the segregated law schools of America. Now, in light of Sander's work and the general malaise of African-Americans in law schools today, the academy has another opportunity to proactively attend to the problem.

outcome could have both broad and deep positive effects. And, given the particular circumstances attending the question at hand, including those highlighted in Sander's work, this must occur soon.

In the meantime, for the African-American members of the academy, the matter is at once simpler yet more profound. As for its members in a 'management' capacity—minority culture administrators, professors, etc.—we must take very seriously the depth of the problems affecting African-American law students, problems that are underscored and highlighted by Sander's work. We must consider very carefully his suggestion that 'affirmative action' is itself creating devastating difficulties for our community, even while rejecting outright his misapprehended reasons as to 'why.'<sup>108</sup> We must be diligent in demanding of the academy that it ask the right questions in the wake of Sander's work, and we must be vigilant in helping it to arrive at the right conclusions and develop the right solutions

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108. My first 'post-*Grutter*' academic conference happened to be a particularized gathering of 'law professors of color' convened to consider some of the very questions at the heart of this paper. Incidentally, I was perplexed by the group response to the then just-released opinion, particularly the over-focus on Justice O'Connor's notorious "25-year" *dictum*. See *Grutter*, 539 U.S. at 343. (For my 'take' on the Supreme Court's *unconstitutional* focus on the creation of 'constitutional rules,' please see Anthony Baker, "So Extraordinary, So Unprecedented an Authority:" *A Conceptual Reconsideration of the Singular Doctrine of Judicial Review*, 39 DUQ. L. REV. 729 (2001)). To begin with, it was on the lips of everyone at the conference, it seemed, and with an urgency that verged on desperation. The general tenor of the discussion was plain: "We only have 25 more years of 'affirmative action,' and we must determine how to use that time to greatest effect!" I must admit to having been put off by that reaction. My own initial response to that particular aspect of the Court's opinion was quite different: "You can keep your '25 years'; we don't need it, and we don't need you." (This last comment was not meant as a sign of disrespect, but comes directly out of my work as an historian, well familiar with the cathartic interaction of that body and African-America from the 19<sup>th</sup> century forward.) Through continued consideration of the same question in the ensuing years, I feel no different today from the way I felt then. As the academy's 'members of color,' we must challenge our own over-commitment to the 'false idol' of 'affirmative action' and negotiate our place within the whole of the academy against this vital backdrop: In the end, we do not need it. Indeed, as it has been both conceived and administered in the American context, with its fixed reliance on the active-negative language of "racial preferences" and "diversity justifications" as the cornerstones of our admittance, we cannot afford it. For African-Americans generally, the value system on which 'affirmative action' is *affirmatively grounded* is a false and debilitating one, and that has only grown worse with the academy's recent and ongoing self-gentrification through reactive application of the *U.S. News* profiles. The consistent, persistent 'ranking' of those law schools that are of the most practically proven value to our people, and which are historically and presently at the bottom of that gentrified 'pecking order,' ought to be our first clue. Where have we seen this before? We must reject outright the foundational constraints of 'affirmative action' and the over-narrow heuristic of 'success' on which it depends, for the benefit of ourselves and our people, and we must carefully and patiently explain to our colleagues "why." Until we do this, given the clear context of 'affirmative action' today, we are under-serving both our own people seeking entrance into the law school academy, and the academy that is actively determining their admittance.

to the problems that he has identified. And we must do all of this *with purpose*, in a collaborative spirit of collegiality and constructive cooperation.

For its African-American consumers—students presently seeking entrance into the profession through its one narrow door and its unique halls—the matter is more urgent. In a vaguely paternalistic spirit of ‘full disclosure,’ Sander suggests that law schools give African-American applicants the whole dismal numbers profile in advance,<sup>109</sup> but we should go one step further: We should request the information ourselves, for our own use and benefit.<sup>110</sup> The same thing applies to his misapprehended solution “for schools to simply stop using racial preferences.”<sup>111</sup> We ought to count the cost, appreciating the value of ‘first strike’ in this regard, and turn the ‘racial preferences’ back outright, ourselves.<sup>112</sup> We must

109. Sander states the matter plainly:

More specifically, each law school that takes race into account in its admissions should provide to all applicants a document that lists: (1) the median academic index . . . of admitted and enrolled applicants, by race; (2) the median class rank of each racial or ethnic group whose identity is a factor in admissions; and (3) the pass rate of recent graduates from each group on the bar of the school’s home state. This information would of course greatly aid applicants (particularly those who receive preferences) in evaluating the potential costs of attending a given school.

Sander, *supra* note 1, at 482. This last sentence is reflective of his own ‘mismatch hypothesis’ and adds the vague paternalism of which I have complained above. I cannot resist noting what a wonderful suggestion this is: singling out a group of persons ‘benefiting’ from preferences they did not create, highlighting the fact of their benefit, their comparatively non-competitive class status and the long chances of their final success, all before their first law school class, and then inviting them in to compete ‘on an even playing field.’ Under the circumstances, to describe this as a “great aid” for these students is to miscomprehend fundamentally the basic trajectory of human nature.

110. Requesting that information for ourselves is significant, and significantly different from receiving it from the institution, as Sander suggests. The act of requesting affords for the requesters the important feeling of taking a hand in their own destiny, gathering information for their own purposes and use. It also serves notice to the institution receiving the request of the same thing. It has practical benefit as well. It allows African-Americans to determine ‘who’s who’ in legal education while simultaneously affording each institution an opportunity for self-reflection, measuring its own progress towards the necessary goal of creating a nurturing, enabling environment for all its constituents.

111. Sander, *supra* note 1, at 482. Sander’s thinking here also derives directly from his ‘mismatch hypothesis.’

112. Here I highlight again the empowering effect of such an action, suggesting it as a valuable and necessary action as well. Sander augments this suggestion with the colorful observation, “this is not an unthinkable Armageddon,” *id.*, and for once he and I are *ad idem*, though again for different, almost opposite reasons. We must train ourselves not to fear the outcomes of such a plan, while at the same time fully understanding the ancillary benefits of meeting these challenges before us in circumstances reifying our own discrete and important cultural values. If a refusal of racial preferences means marginally fewer colored faces at ‘elite’ institutions, what

fundamentally challenge the ‘success’ paradigm currently segregating the American legal academy and holding it hostage in the process, and we must do so in terms compatible with our own discrete character. We must declare ourselves no longer ‘for sale,’<sup>113</sup> refusing to chase after bright promises that too often hold a different reality for us than the one it holds for others in the American spectrum,<sup>114</sup> and we must chart our own

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does that really matter to us in the end? The attending cost is the fundamental challenge of the achievement and ability for every African-American throughout the system, and it is a cost our people cannot afford to pay, and should not have to. Indeed, the entire ‘elite success’ paradigm is one running naturally counter to some of our own bedrock cultural values at least, and ought to be held in some suspicion by virtue of its unremitting ‘whiteness’ alone. The ‘best’ American law school for the African-American, now as ever, does not depend on institutional reputation. That school is the one that will encourage us in the realization of our goals without great sacrifice to our values, values which are quintessentially American even if uniquely so, given our unique experience in American history. The list of those law schools is different for each of us though likely not long for any of us—or at least not as long as it might be, or should be—and it simply does not show up anywhere on the *U.S. News* profile. A thoughtful rejection of ‘racial preferences’ would aid us in identifying those law schools more naturally compatible with our direct needs while highlighting as well, for ourselves and themselves, those that are less so. And we need not fear a dearth of our own anywhere, even at the most ‘elite’ American law schools: God scatters ability across cultures indiscriminately, and those of us most suited to those particular environments will find our way there without question, and, finally, and refreshingly, on our own terms.

113. Here I mean to challenge our often under-considered, too quick grasping at financial incentives in the form of ‘scholarship offers,’ proactively and cynically designed to ‘buy us’ for particular programs. This is ‘trophy hunting’ at its base, and it unfairly and unwisely favors the ‘biggest players’ in the student enrollment sweepstakes, too often at great personal cost to the individual taking the bait. The prospect of a relatively debt-free education is of value only if the individual is able to *get the education*—in the form of the *degree*—in the end. In a case where that outcome is reasonably in the balance, students would be far more greatly benefited by forgoing the windfall and accepting debt-financed education if they can reasonably look forward to employment in their profession of choice in retiring that debt. The prospects of ruined professional opportunities and the accompanying loss of personal worth and self-esteem that accompanies failure does not justify the risks associated with being ‘bought’ into an institution which holds for that student little ability to deliver on its elite promise. Besides, the ‘buying’ prospect references its own peculiar and troubling historical echoes with regard to African-America, echoes that ought to produce concern and even skepticism in all of us.

114. Someone must say it, and we must hear and understand it: Like much in the American experience, the promise of the ‘elite’ success paradigm—the better the law school the better the job prospects—does not always translate for African-Americans. In a conversation with Justice Clarence Thomas some years ago, I was fascinated by his confessed initial job difficulties on graduation from an ‘elite’ northeastern law school. He alluded to some surprise and disappointment at the time, his experiences differing from many of his majority culture colleagues, undoubtedly. Even if the promise of ‘elite’ benefits is available to us, they can be realized only by completing the program in question, and doing so in good standing, a matter which remains connected to the particular institutions we attend.

‘success’ in unique, circumstantially relevant ways.<sup>115</sup>

In closing, if the post-civil rights ‘affirmative action’ movement in higher education were analogized to a three-act passion play, Act I would have to be considered a grand beginning indeed. Full of promise and energy, purpose, and hope,<sup>116</sup> its goal was noble—full access to professional education and experience for all ably gifted Americans, race being deliberately excepted. And its means were direct—preference to those most cruelly denied it throughout America’s apartheid past.<sup>117</sup> Sander’s *Systemic Analysis* rings down the curtain on Act I on a clear and sober note: whatever the laudable social and political intentions of ‘affirmative action,’ at its thirty-five year mark there exists ample evidence from many sources that it is not working as intended nor achieving what it should. In our play, Act II will focus on the question raised by the final scene of Act I—why?—and it falls to the academy itself to dutifully consider the proper answer. Much depends on the care given to Act II’s question, as the answer preferred will wholly define the all-important closing for Act III, the *what-to-do-about-it* act.

That Act III’s character is dependent entirely on Act II’s outcome should be plain to the most casual observer of the matters at the heart of Professor Sander’s daunting, vital study, and of this reply. For Sander the ‘why?’ is quantitatively clear—*mismatch*—and his Act III remedies are dour and

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115. While this is comparatively less often the case for our majority culture colleagues, many African-Americans currently entering the stream of higher education represent the first generation of their respective families to do so. For those persons, ‘success’ must be carefully defined in both circumstantial and culturally relevant terms. For us, merely attending a higher ranked law school is clearly secondary in value to graduating from any law school, period. While it does happen on rare occasion—and almost always regarding individuals of inordinate natural ability—seldom does an individual gaining initial entrance into any competitive arena start their journey at the very apex. For such individuals, the ‘best’ law school is not the one with the highest reputation, by any measure, but rather the one at which they individually can learn, grow, mature, develop professionally and *graduate*, wherever it finds itself in the status order. The typical rhythm of things is not necessarily wrong: My African-American father and mother took college courses, their children graduated from four-year institutions and it is their grandchildren that are now walking ‘ivy halls.’ This must be foremost in the thinking of those of us who are not simply seeking to walk halls of ‘prestige’ for a time, but rather to establish our families for generations to come, as did my own parents, patiently and realistically.

116. I am idealizing things here, of course. ‘Affirmative action’ has always had its army of detractors, some well-meaning and many otherwise. However, as a search for a viable solution to a problem, and as a byproduct of America’s tortured racial past, it was naturally visited with utopian aura in some form, an exercise focusing on harmonizing America’s practical reality with its ideal. Such an endeavor is always tinged with hope and expectation.

117. This is my personal take on the true engine behind the program’s drive—remedy and justice—rather than Professor Sander’s preferred “speed[ing] the process of fully integrating American society.” Sander, *supra* note 1, at 368. My guess is that he and I would not actually be far apart on this matter, though it is no surprise to me that our starting points are so different, in quality and character.

lifeless indeed, even if efficiently so, bleeding out color or real drama as they set about their prescriptive work. However, a thorough qualitative review of the Act II question, one seeking out the story beyond the numbers, should provide a very different answer at the end of the inquiry; this African-American writer, more intimately familiar with all aspects of the “massive social experiment”<sup>118</sup> than the Professor, is all but certain of it. And should this prove to be the case, what a different Act III remedy would be called for from the one that caps Sander’s work. Then the spotlight would turn from the victim-beneficiaries to the academy itself, locating the problem in its own processes and commitments rather than in its beneficiaries’ lack, and seeking solutions closer to home, in itself, as it has the stomach and courage to discover and implement them.

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118. *Id.* at 368.





# FISH'S PURIFIED IVORY TOWER: A REVIEW OF STANLEY FISH'S *SAVE THE WORLD ON YOUR OWN TIME*

BY GREGORY BASSHAM\*

This is vintage Stanley Fish—brash, pugnacious, immensely readable, but ultimately outrageous.<sup>1</sup> The book's central claims fall apart on the slightest inspection. Nevertheless, the problems Fish addresses are real, and some of the radical solutions he proposes do at least point in the right direction.

Fish is a prime specimen of that rare breed, the academic celebrity. Author of ten books and a former Dean at the University of Illinois at Chicago, Fish is currently Davidson-Kahn Distinguished University Professor and Professor of Law at Florida International University. A sober Milton scholar in an earlier incarnation, Fish has become a talking head in the culture wars, regularly contributing to leading newspapers and magazines and appearing on television shows such as *The O'Reilly Factor* and *Hardball with Chris Matthews*. Hard to pigeon-hole in terms of conventional left-right polarities, Fish can always be counted on for the barbed *bon mot* and the hyperbolic sound bite.

*Save the World on Your Own Time* is assembled from previously published essays, and many of which appeared in the *Chronicle of Higher Education*. Wide-ranging and sometimes repetitive, the book weighs in on many of the hot-button academic issues of the past decade, from Ward Churchill to Intelligent Design to David Horowitz's Academic Bill of Rights. A colorful "Interlude" on the travails of academic administration adds spice to the mix. But the central thread of the book deals with the role of ideology and character education in higher education. Specifically, it asks: Should colleges and universities seek to positively influence the ethical, cultural, and civic values of its students? Fish's answer is an unequivocal, "No." He calls for a "purified academic enterprise"<sup>2</sup> in which professors stick to their knitting, never confusing a lectern with either a soapbox or a pulpit. Only in this way, he thinks, can higher education fend off attacks from the right that America's "colleges and universities are

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1. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008).

2. *Id.* at 153.

hotbeds of radicalism and pedagogical irresponsibility where dollars are wasted, nonsense is propagated, students are indoctrinated, religion is disrespected, and patriotism is scorned.”<sup>3</sup> It is my contention that Fish points in the right direction, but that he seriously overstates the case for an advocacy-free academy.

First, what precisely is Fish claiming when he calls for a “purified” model of higher education? There is a positive and negative side to his thesis. What professors should be doing in the classroom is (1) introducing “students to bodies of knowledge and traditions of inquiry that had not previously been part of their experience,” and (2) equipping “those same students with the analytical skills—of argument, statistical modeling, laboratory procedure—that will enable them to move confidently within those traditions and to engage in independent research after a course is over.”<sup>4</sup> What professors should not be doing in the classroom is (1) consciously aiming to shape students’ moral, political or civic values, or (2) taking partisan stands, endorsing contestable ideas or policies, or advocating any values other than those that are immanent in the academic enterprise itself (honesty, thoroughness, rigor, and so forth).<sup>5</sup> In other words, professors should seek only to transmit knowledge and impart analytical skills, not endorse values, policies, or ideals. Just as governments should be scrupulously neutral on questions of religious truth, colleges and universities should be strictly neutral on all questions of the right and the good. Fish’s “purified” academy is thus a values-free zone in which instructors never step over the line between is and ought.

Fish acknowledges that this view is “severe” and iconoclastic.<sup>6</sup> He admits that colleges and universities have never conceived their missions in value-neutral terms, and that most academics today, on both the left and the right, would reject his view out of hand.<sup>7</sup> But Fish vigorously defends his neutralist model of higher education on several independent grounds. Let’s see if his arguments hold up.

#### THE RESPONSIBILITY ARGUMENT

Why should professors not try to make their students into “good people”—or, more modestly, positively impact their moral, political, and civic values and commitments? One argument Fish offers is modeled on tort liability law. Instructors, he says, have a “fighting chance” of imparting disciplinary knowledge and analytical skills to their students, but

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3. *Id.* at 117.

4. *Id.* at 12–13.

5. *Id.* at 19–30. Fish exempts “avowedly sectarian universities” from these neutralist restrictions. *Id.* at 68. It is unclear, however, whether this exemption is consistent with many of his arguments.

6. FISH, *supra* note 1, at 22.

7. *Id.* at 15.

they have “no chance at all . . . of determining what their behavior and values will be”<sup>8</sup> outside the classroom or after graduation. People are responsible only for things in their power. It is not in instructors’ power to determine students’ non-academic values or behaviors. Moreover, instructors should only aim to achieve what they are responsible for, not things that are unforeseeable and contingent. Thus, instructors should not aim to influence students’ moral, political, civic, or other non-academic values and behaviors.<sup>9</sup>

There are two confusions in this argument.

First, Fish’s claim that people are responsible only for things in their power is an oversimplification. Responsibility is not an all-or-nothing thing; it comes in degrees, and can be shared. Suppose I give a violent, hate-filled speech (“Death to the San Pedrans!”). Suppose, further, that a reasonable person would have known that there is a small but not negligible chance that at least one member of my audience would be incited by the speech to commit murder. Am I to blame for that murder? Yes, partly (although, of course, the murderer bears primary responsibility). It may not have been “in my power” to have prevented the murder, once the speech was given, but I still bear a measure of responsibility for the killing because of my negligent incitement to violence.

In a similar way, college and university professors can bear partial responsibility for their students’ nonacademic values and behavior, even though, of course, it is not in professors’ “power” (i.e., full or even substantial control) how students will react to their teaching. If I am a business professor and I spend the whole semester undermining ethics and praising the most callous forms of amoral capitalism, I bear at least some responsibility if one of my students takes me at my word and gets caught up in an Enron-like scandal. It is true, as Fish argues, that college and university professors have very limited ability to influence their students’ behavior and values, for either good or ill. But that is not the issue. Limited influence is not the same as no influence. The question is whether there are things professors can do that will positively impact their students’ moral and civic behavior, and whether these are things that professors should be doing in light of their other responsibilities.

Second, Fish’s claim that people should aim to achieve only what they are responsible for is an overgeneralization. Imagine if parents or church leaders adopted this principle. Parents clearly cannot “determine” whether their kids will respect their prohibitions on underage drinking or risky sexual behavior. Should they, therefore, “aim low” and avoid such topics altogether? Should pastors stop exhorting their flocks to live righteous lives because they cannot “determine” how their congregations will react to

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8. *Id.* at 58–59.

9. *Id.* at 59.

such teaching?

Fish might object that these analogies are faulty—that it is parents' and pastors' jobs to engage in such character formation, but that the case is very different with college and university professors. This, however, begs the question, for what advocates of collegiate character education claim is precisely that: professors do have some responsibility—consistent with their other and more primary duties—to positively shape students' moral and civic attitudes.

#### THE NOT-ENOUGH-TIME ARGUMENT

Another argument Fish gives for resisting calls for character and civic education is that teaching purely academic knowledge and skills is a full-time job, and that these essential academic tasks will suffer if professors devote precious class time to moral and civic education.<sup>10</sup> A clear example of this unfortunate trade-off, Fish claims, is evident in the sorry state of college and university writing courses. Too often, he says, such courses get hijacked by leftist pedagogical agendas and little genuine writing instruction occurs.<sup>11</sup>

Fish has a point, but he pushes it too far. Clearly, it is possible to go overboard in teaching values, so that conventional academic instruction gets short shrift. Instructors who transform English composition classes into courses in Palestinian radicalism or Latina bisexual activism are obviously not doing their jobs. However, it does not follow that any use of class time to encourage positive moral and civic values is illegitimate. In a typical English, Politics, or Philosophy course, for example, there are plenty of opportunities to read and discuss materials that are worthwhile both for their intrinsic academic merit and their potential for provoking lively normative debate and shaping desirable values. Often, it is not a question of either/or, but of both/and.

#### THE PRACTICING-WITHOUT-A-LICENSE ARGUMENT

College and university professors are well-qualified, in virtue of their professional training, to teach scholarly and intellectual skills. But professors rarely have training or expertise in character or civic education. Relatively few, for example, can claim to be experts on moral psychology, virtue theory, or normative political philosophy. Fish argues that instructors who step outside their areas of expertise and presume to teach or advocate moral and political values are guilty of “practicing without a license and in all likelihood doing a bad job at a job they shouldn't be doing at all.”<sup>12</sup>

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10. *Id.* at 13.

11. *Id.* at 40–49.

12. FISH, *supra* note 1, at 14.

This argument proves both too much and too little. If it were sound, it would show that nearly all parents, coaches, scout leaders, pastors, and elementary education teachers should refrain from all moral instruction or exhortation. After all, how many of them can claim to be experts on moral psychology, virtue theory, and other scientific and normative disciplines bearing on ethical and civic formation? The argument also proves too little, because it is not necessary to be an expert on ethical theory or politics to contribute in positive ways to students' values and commitments. For instance, one need not be an expert on moral development to know that values such as honesty, responsibility, fairness, prudence, helpfulness, and self-discipline are positive ethical and social values. As educator Thomas Lickona notes, these are consensus or overlapping values that are recognized as desirable character traits in virtually all ethical and religious traditions.<sup>13</sup> Instructors who choose to teach in ways that foster and respect such values cannot be faulted for "practicing without a license."

#### THE CULTURE-WARS ARGUMENT

Fish's main argument for "purifying" higher education of all partisan or normative advocacy is that doing so would neutralize the powerful and increasingly effective argument from the right that America's colleges and universities have been commandeered by 'tenured radicals' who trash patriotism and religion, preach moral relativism, and seek to indoctrinate students with their left-wing politics.<sup>14</sup> The issue, Fish thinks, is not whether this indictment is sound—he thinks it is overblown but not wholly off-base—but what must be done to counter it in state legislatures and in the forum of public opinion. Fish believes that conservatives are winning the public relations war, and that as a result public colleges and universities are likely to face further cuts in state funding as well as intensified efforts by political conservatives to interfere with college and university hiring, retention, and curricular decisions in the name of "ideological balance" and "intellectual diversity."<sup>15</sup> By insisting that all professors—liberal or conservative—avoid ideological politics in the classroom, Fish believes that this potent conservative public relations campaign can be neutralized and the autonomy of America's colleges and universities be preserved.<sup>16</sup>

Is Fish right? The issues involved are complex, and readers will no doubt respond in varying ways. My own view is that Fish's solution would be over-kill. Fish's "purification" would certainly neutralize the conservatives' tenured-radicals argument, but it would also have other very

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13. THOMAS LICKONA, *EDUCATING FOR CHARACTER: HOW OUR SCHOOLS CAN TEACH RESPECT AND RESPONSIBILITY* 37–47 (1991). See generally C.S. LEWIS, *THE ABOLITION OF MAN* (The MacMillan Company 1943).

14. FISH, *supra* note 1, at 117.

15. *Id.* at 117–24.

16. *Id.* at 150–52.

negative effects that would far outweigh this advantage. In addition, I shall argue, Fish's fears of crippling state funding cuts and a right-wing intrusion into college and university staffing and curricular decisions are overblown.

What negative effects would Fish's purification proposal have on college and university teaching? Recall that Fish does not just impose a moratorium on overt political or ideological advocacy. He rejects any endorsement of a contestable idea, policy, or value. Professors on his view should transmit knowledge, impart analytical skills, teach debates, dissect and weigh arguments—but never draw conclusions. They should be rigorously neutral and non-committal on all issues that are open to debate or imply a commitment to action. Even in an Ethics class, he says,

[S]tudents shouldn't be arguing about whether stem cell research is a good or bad idea. They should be studying the arguments various parties have made about stem cell research . . . . Analyzing ethical issues is one thing; deciding them is another, and only the first is an appropriate academic activity.<sup>17</sup>

As someone who regularly teaches Ethics, I find this view unreal. The kind of neat separation Fish calls for between weighing arguments and drawing conclusions is impossible. If, in classroom discussion, it becomes clear that view A is true and view B is false, it would be wholly artificial to perform an *argumentum interruptus* and refuse to draw the conclusion that A is true and B is false. By refusing to draw this obvious conclusion, the only lesson you would be teaching your students is the bad one that well-supported conclusions need not be drawn from compelling arguments.

Moreover, how would Fish's ban on classroom advocacy be enforced? Would chairs and deans conduct classroom observations to monitor the ideological and normative neutrality of professors' classes? The very idea shreds any concept of academic freedom.

Finally, one must consider how Fish's proposal would affect the attractiveness of college and university teaching as a career choice. A great many college and university professors—myself included—chose teaching as a profession because we hoped to have a positive impact on young peoples' lives. America's colleges and universities have been very successful in attracting highly qualified faculty. Would they still be as successful if it were known that professors are barred from making value judgments or attempting to influence their students' values and commitments?

But what of Fish's fears about the effectiveness of the right's public relations campaign against radical left-wing professors? If the very existence and autonomy of America's colleges and universities are imperiled, shouldn't we bite the bullet and "purify" our campuses as Fish recommends?

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17. *Id.* at 26–27.

Fish is crying wolf. For all the complaints about rising costs and tenured radicals, Americans are justly proud of their institutions of higher education and understand their value in keeping America strong, safe, and prosperous. To suggest that either we make our campuses ideologically pure or we put our world-class system of higher education at risk is to pose a false choice. The right-wingers may be scoring points, but they are a long way from winning.



# ACADEMIC FREEDOM'S DUTIES: A REVIEW OF STANLEY FISH'S *SAVE THE WORLD ON YOUR OWN TIME*

NEIL HAMILTON\*

Stanley Fish's *Save the World On Your Own Time* is a “medley of disparate essays”<sup>1</sup> collected into a book whose theme is to exhort each liberal arts professor to “just do your job” in terms of the mission of the college or university and the professor’s specific teaching duties to serve the mission.<sup>2</sup> The collected essays sometimes struggle with the linear flow of the analysis, repetition, and tangents, but the book’s overall emphasis on the professorate’s academic duties is much needed.

Whether the reader agrees or disagrees with some of Fish’s analysis (and I disagree with a number of points, as indicated below), the book forces thought, and I hope debate, on the mission of colleges and universities, the academic profession’s role in serving the mission, and each professor’s specific rights and duties. Self-assessment and reflection about failures of duty and their impact on the public trust are particularly timely given the steady erosion of the academic profession’s control over and autonomy in academic work in recent decades, particularly in institutions other than the research universities and elite liberal arts colleges.<sup>3</sup>

## THE MISSION OF THE UNIVERSITY AND THE DUTIES OF THE PROFESSORATE

Understanding the analysis supporting Fish’s exhortation to “just do your job” is a good first step. Fish argues that a college or university’s mission is “to produce and disseminate (through teaching and research)

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1. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME*, Acknowledgments (2008).

2. *Id.* at 16, 153, 178.

3. See Neil Hamilton, *Pro-actively Justifying the Academic Profession’s Social Contract*, in NEIL HAMILTON & JERRY GAFF, *THE FUTURE OF THE PROFESSORATE: ACADEMIC FREEDOM, PEER REVIEW AND SHARED GOVERNANCE* (American Association of Colleges & Universities Academy in Transition Series, forthcoming 2009) [hereinafter Hamilton, *Pro-actively Justifying the Academic Profession’s Social Contract*].

academic knowledge and to train those who take up this task in the future.”<sup>4</sup> In producing and disseminating academic knowledge, institutions embrace “the pursuit of truth” as their “central purpose.”<sup>5</sup> In their research and teaching, faculty members are held to serve the morality that follows from the institution’s truth-seeking purpose.<sup>6</sup> The pursuit of truth is thus the cardinal value of the academic profession in carrying out the mission of the college or university.<sup>7</sup> Fish believes this truth-seeking morality is “not the whole of morality,” but “it is, or should be, the whole of academic morality.”<sup>8</sup>

The “truth” for Fish has an objective validity, but not in the sense of a standard of validity “independent of any historically emergent and therefore revisable system of thought and practice.”<sup>9</sup> Fish’s standard of validity is truth claims “backed up by the tried-and-true procedures and protocols of a well-developed practice or discipline—history, physics, economics, psychology, etc. . . .”<sup>10</sup> A professor can hold “firmly to judgments of truth, accuracy, correctness, and error as they are made in the precincts of some particular realm of inquiry.”<sup>11</sup> A truth claim must stand up against challenges involving “the quality and quantity of evidence, the cogency of arguments, the soundness of conclusions and so forth.”<sup>12</sup> Postmodern reasoning (a version of fallibilism) surmises that because accounts emerge in the course of history and come to us in vocabularies that belong to a particular moment in the adventure of inquiry, it is always possible, and perhaps probable, that in time new vocabularies will replace the old ones and bring with them new, and newly authoritative, accounts.<sup>13</sup>

“The mistake” for some postmodern thinkers, “is to go from this perfectly ordinary description of how knowledge is established, tested, and sometimes dislodged—this, after all, *is* the scientific method—to the extraordinary and unearned conclusion that nothing that has been established as knowledge is to be trusted.”<sup>14</sup>

It follows that Fish defines “academic morality”<sup>15</sup> in terms of “being conscientious in the pursuit of truth” including the “intellectual virtues of thoroughness, perseverance, [and] intellectual honesty.”<sup>16</sup> Academic

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4. FISH, *supra* note 1, at 99.

5. *Id.* at 38, 118–19.

6. *Id.* at 101.

7. *Id.* at 20, 118–19.

8. *Id.* at 101–02.

9. *Id.* at 139.

10. FISH, *supra* note 1, at 139.

11. *Id.* at 134.

12. *Id.* at 39–40.

13. *Id.* at 132.

14. *Id.*

15. *Id.* at 102.

16. FISH, *supra* note 1, at 20 (quoting James Bernard Murphy, Op-Ed., *Good*

morality condemns cheating, academic fraud, plagiarism and all actions “antithetical to the search for truth.”<sup>17</sup>

Explaining what he means by “just do your job,” Fish says almost nothing about faculty research to produce academic knowledge and focuses specifically on the professorate’s teaching duties to serve the institution’s mission to disseminate knowledge. The “job” of liberal arts teaching is:

[D]o two things: (1) introduce students to bodies of knowledge and traditions of inquiry that had not previously been part of their experience; and (2) equip those same students with the analytical skills—of argument, statistical modeling, laboratory procedure—that will enable them to move confidently within those traditions and to engage in independent research after a course is over.<sup>18</sup>

The professor and students are to subject all ideas to a “certain kind of interrogation”<sup>19</sup> that Fish calls “academicizing”<sup>20</sup> an issue or question. Every topic becomes “a basis for analysis rather than as a stimulus to some moral, political, or existential commitment.”<sup>21</sup> All topics are subject to the canons of argument and evidence of a discipline.<sup>22</sup>

Fish points out that academic freedom is a necessary condition for professors to carry out the college or university’s mission of producing and disseminating academic knowledge.<sup>23</sup> He defines academic freedom as “the freedom to do one’s academic job without interference from external constituencies like legislators, boards of trustees, donors, and even parents. . . . Academic freedom, correctly (and modestly) understood, is not a challenge to the imperative always to academicize; it is the *name* of that imperative . . . .”<sup>24</sup> In other words, a professor must be trying to meet the duty to academicize teaching for the rights of academic freedom to apply. Fish points out that academic tradition articulated in the American Association of University Professors’ (AAUP) 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* links the rights of academic freedom in research and teaching to the correlative duty that the claim of academic freedom can be asserted only by “those who carry on their work in the temper of the scientific inquirer” and never by those who would use it “for uncritical and intemperate partisanship.”<sup>25</sup> These

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*Students and Good Citizens*, N.Y. TIMES, Sept. 15, 2002, § 4, at 15).

17. *Id.* at 101 (quoting John J. Mearsheimer, *The Aims of Education*, 22 PHIL. & LITERATURE 137, 149 (1998)).

18. *Id.* at 12–13.

19. *Id.* at 24.

20. *Id.* at 27.

21. *Id.* at 169.

22. FISH, *supra* note 1, at 170.

23. *Id.* at 82.

24. *Id.* at 80.

25. *Id.* (quoting AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915),

correlative duties are part of the academic morality discussed earlier. Fish cites the 1915 *Declaration of Principles* again later for its warning that if the faculty does not clean up its own shop, external constituencies with motives more political than educational will step in and do it for the faculty.<sup>26</sup>

*Save the World on Your Own Time* asks liberal arts faculty members to focus on specific and clear teaching duties (“just do your job” by teaching both disciplinary knowledge and analytical skills) while understanding those duties in the context of the mission of the college or university and the responsibilities of the professorate in serving the mission. I agree that these two duties are the core of every professor’s teaching obligations, and that each professor should at a minimum meet some floor of competence in achieving them. Discussion below will focus on the role of peer review, which Fish does not analyze, in setting this floor of competence. The AAUP’s 1966 *Statement on Professional Ethics* also states the special responsibility of faculty members in teaching to “hold before [students] the best scholarly and ethical standards of their discipline.”<sup>27</sup> Fish argues that fulfilling these two core teaching duties is all a liberal arts faculty member can realistically achieve and that adding the goal of the moral formation of students is not within the competence of faculty and is a diversion from the core teaching duties.<sup>28</sup> It is true that scholars are only beginning to understand and assess which learning models, curriculum, and pedagogies are most effective in fostering adult moral formation,<sup>29</sup> but it is clear that undergraduate liberal arts education does foster increases in moral reasoning.<sup>30</sup> As academic knowledge on how to foster adult moral formation develops, some liberal arts professors could learn how to do this effectively.

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reprinted in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS & REPORTS app. 1 at 298 (10th ed. 2006) [hereinafter 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM].

26. *Id.* at 152.

27. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS (1966), reprinted in POLICY DOCUMENTS & REPORTS 171, 171 (10th ed. 2006). See generally Neil Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609, 638–39 (2001) [hereinafter Hamilton, *Academic Tradition*].

28. FISH, *supra* note 1, at 13–14, 58.

29. See Muriel Bebeau, *Promoting Ethical Development and Professionalism: Insights From Educational Research in the Professions*, 5 U. ST. THOMAS L.J. 366, 384–92 (2008); Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 484–88, 503–06 (2008) [hereinafter Hamilton, *Assessing Professionalism*]; Darcia Narvaez, *Integrative Ethical Education*, in HANDBOOK OF MORAL DEVELOPMENT 703, 708–09 (Melanie Killen & Judith G. Smetana eds. 2006).

30. Anne Colby, *Fostering the Moral and Civic Development of College Students*, in HANDBOOK OF MORAL AND CHARACTER EDUCATION 391, 396–97 (Larry P. Nucci & Darcia Narvaez eds. 2008).

## PROBLEMS WITH FISH'S ANALYSIS

The book's strength is Fish's emphasis that academic freedom grants rights but also has correlative duties, but the book does not give a complete picture of all the interrelated concepts defining the academic profession's social contract:<sup>31</sup> academic freedom, peer review, shared governance, and faculty professionalism. Fish does cite with approval the AAUP's *1915 Declaration of Principles*' warning that if the faculty does not clean up its own shop, more political external constituencies may fill that void.<sup>32</sup> Implicit in this reference to the *1915 Declaration of Principles* is the importance of peer review with respect to academic freedom, but the book does not analyze peer review. The book also fails to analyze how shared governance is the corollary—a natural consequence—of academic freedom and peer review. The concept of faculty professionalism discussed below also adds to a fuller understanding of a faculty member's rights and duties.

The *1915 Declaration of Principles* states the social contract of the academic profession:

It is conceivable that our profession may prove unworthy of its high calling, and unfit to exercise the responsibilities that belong to it . . . . And the existence of this Association . . . must be construed as a pledge, not only that the profession will earnestly guard those liberties without which it cannot rightly render its distinctive and indispensable service to society, but also that it will with equal earnestness seek to maintain such standards of professional character, and of scientific integrity and competency, as shall make it a fit instrument for that service.<sup>33</sup>

The profession's "high calling" is service to the college or university's mission of creating and disseminating academic knowledge. College and university boards of trustees or regents represent the public with respect to the social contract between society and the academic profession to serve this public purpose. The *1915 Declaration of Principles* states that the boards are in a position of "public trust" to represent the public's interest in realizing the mission of the university.<sup>34</sup>

As the American tradition of academic freedom evolved over the course of the past century, boards acknowledged the importance of freedom of inquiry and speech to the college or university's and the academic

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31. The social contract of each peer-review profession is the tacit agreement between society and members of a profession that regulates their relationship with each other, in particular the profession's control over professional work.

32. FISH, *supra* note 1, at 152.

33. 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM, *supra* note 25, at 291, 300.

34. *Id.* at 292–93.

profession's mission of creating and disseminating knowledge. Fish's definition of academic freedom discussed earlier is incomplete. The term "academic freedom" describes the mutual understanding or tradition between boards and faculty where the boards, as employers serving the unique mission of the college or university, have agreed to grant rights of exceptional vocational freedom of speech to professors in teaching, research, and extramural utterance without interference by the board or administration, on the condition that individual professors must meet correlative duties of professional competence and ethical conduct. The faculty as a collegial body also has correlative duties to enforce the obligations of individual professors.<sup>35</sup> This tradition of faculty autonomy in and board deference to peer review of professional competence and ethical conduct is essential to academic freedom in the United States. Fish's analysis of "academic morality," while pointing in the right direction, is also incomplete. A professor's duties of competence and ethical conduct in research, teaching, and extramural utterance extend substantially beyond Fish's analysis.<sup>36</sup>

With respect to decisions on matters other than faculty competence and ethical conduct, Fish's analysis is incorrect in stating "[t]he question of who does and does not participate in governance is logically independent of the question of whether the work being done is good or bad."<sup>37</sup> Peer review of professional competence and ethical conduct is the linchpin of academic freedom in the United States. Freedom to teach, for example, does not mean the freedom to say anything and call it teaching; with respect to teaching, a peer-review paradigm means that peers determine the curriculum, the general parameters of the content of a course, grading standards that should apply, and the range of pedagogies meeting standards of minimum competence which will engage the students. Shared governance on matters relating to the curriculum and pedagogy are thus necessary conditions for effective peer review and academic freedom.<sup>38</sup>

AAUP documents during the last century softened the idea of board legal control into a concept of shared governance in decision making. While it concedes that the governing board is by law the final institutional authority, the concept of shared governance urges that the missions of the college or university and the academic profession are best realized by granting varying degrees of deference to faculty decisions, depending on how closely a faculty decision relates to the faculty's expert disciplinary knowledge concerning teaching and research. The faculty deserves

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35. NEIL HAMILTON, *ACADEMIC ETHICS: PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE* 20 (2002) [hereinafter HAMILTON, *ACADEMIC ETHICS*].

36. Hamilton, *Academic Tradition*, *supra* note 27, at 627–48, app.

37. FISH, *supra* note 1, at 110.

38. HAMILTON, *ACADEMIC ETHICS*, *supra* note 35, at 50–51.

maximum deference on core academic issues such as appointments, promotion and tenure, and the curriculum. Both peer review and shared governance are embedded in an earned deference tradition.<sup>39</sup> If the faculty does not meet its duties with professionalism, it does not deserve deference.

“Faculty professionalism” defines the ethical duties required by the social contract for each professor as well as for the relevant groups of professional peers. The greater the faculty’s professionalism, the greater the deference the faculty merits. The core of faculty professionalism is that: (1) each professor agrees both to meet the ethics of duty (the minimum standards of competence and ethical conduct set by peers) and to strive to realize the ideals and core values of the profession; and (2) the faculty as a collegial body agrees both to hold each other accountable for the minimum standards and to encourage each other to realize the ideals and core values of the profession.<sup>40</sup>

The book’s analysis of the courts’ protection for academic freedom under the First Amendment is also flawed. For example, Fish’s initial analysis of the First Amendment involves the disruption of a graduation speaker at Rockford College.<sup>41</sup> The easy answer, not mentioned by Fish, is that Rockford College, as a private institution, is not a government actor so the First Amendment does not apply to its actions. While there is an overlapping rationale in the tradition of academic freedom applicable to all of higher education and the First Amendment jurisprudence applicable only to government actors in higher education, there are substantial differences in analysis among the tradition of academic freedom and the First Amendment doctrines of Constitutional academic freedom and public employee free speech.<sup>42</sup> Fish does not analyze these differences.

#### ACCULTURATING PROFESSORS TO “JUST DO YOUR JOB”

Fish points out that some faculty members understand academic freedom as “not only freedom from external intrusions into the everyday business of [the] workplace, but freedom from the everyday obligations of the work place [sic].”<sup>43</sup> He assumes throughout the book that a significant subset of faculty do not understand the rights and correlative duties of academic freedom.<sup>44</sup> All the available empirical evidence supports Fish’s conclusion that many faculty do not understand the academic profession’s social contract and the relationships among the mission of the college or university—academic freedom, peer review, shared governance, and

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39. *Id.* at 60–61.

40. See Hamilton, *Pro-actively Justifying the Academic Profession’s Social Contract*, *supra* note 3.

41. FISH, *supra* note 1, at 73.

42. HAMILTON, *ACADEMIC ETHICS*, *supra* note 35, at 21–25.

43. FISH, *supra* note 1, at 113.

44. *Id.* at 7, 96.

faculty professionalism.<sup>45</sup> They do not understand how failures of faculty professionalism undermine the social contract and lead the boards to renegotiate the contract with a consequent loss of professional autonomy for the faculty.

Fish points out that if faculty members understood academic freedom and reflected high professionalism in their teaching, “you [would] be able to defend [academic freedom] both from those who see it as an unwarranted indulgence of pampered professors and from those pampered professors who would extend it into a general principle that allows them to say and do, or not do, whatever they like.”<sup>46</sup> While the implication here is that education of faculty regarding the rights and correlative duties of academic freedom, peer review and shared governance would be helpful, Fish does not make any specific recommendations on how to acculturate faculty “to just do your job.”

The other peer-review professions are exploring the most effective educational engagements to help students and new entrants both understand the duties of the profession and internalize an ethical professional identity that informs the professional’s other skills.<sup>47</sup> It is obvious that a professional will not live out duties that he or she does not know, nor can a professional defend a social contract and professional autonomy when he or she does not understand the analytical foundation for occupational control over the work.

In a market economy, the strong presumption is that competitive markets—where management of each competing enterprise exercises control over employee’s work—will maximize consumer welfare. All of the older peer-review professions including law, medicine, the professorate, the clergy; and newer peer-review professions like accounting and engineering, carry an ongoing burden to justify occupational control over work and professional autonomy different from typical competitive market arrangements between either employer and employee or service provider and consumer. Essentially the members of each peer-review profession must continually demonstrate, through attention to duty and education of the public about the societal benefits of professional autonomy, that the profession merits the public’s trust in exercising the profession’s unique

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45. The academic profession tends not to study itself. The data available all support significant failures in faculty understanding of their duties. Neil Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. TEX. L. REV. 227, 257–65 (2001); Hamilton, *Academic Tradition*, *supra* note 27, at 612–13, 653–54; HAMILTON, *ACADEMIC ETHICS*, *supra* note 35, at 6–8.

46. FISH, *supra* note 1, at 82. For similar arguments, see *id.* at 97, 153, 169, 176.

47. See WILLIAM M. SULLIVAN ET AL., *EDUCATION LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 21–33 (2007); Neil Hamilton, *Foreword: The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 U. ST. THOMAS L.J. 361, 362–65 (2008).



control over work.<sup>48</sup> The academic profession is failing to do this.<sup>49</sup>

Fish, based on his personal experience as a dean attempting to educate board members and the public about academic freedom and the tradition of the profession, is pessimistic that it can be done.<sup>50</sup> But Fish as a dean is limited to sound bites in short conversations. If the faculty at a particular institution were to undertake self education and education of the board and administration on the rights and duties of academic freedom, and were to commit themselves to high professionalism at these duties, I am optimistic that the board and the public would react very favorably. We are educators. At least we should first make every effort at education to help faculty both to “just do your job” and to equip them to educate others to understand the benefit to the public of doing the job.

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48. See Hamilton, *Assessing Professionalism*, *supra* note 29, at 473–75.

49. Hamilton, *Pro-actively Justifying the Academic Profession's Social Contract*, *supra* note 3.

50. FISH, *supra* note 1, at 153–67.



## REVIEW OF STANLEY FISH'S *SAVE THE WORLD ON YOUR OWN TIME*

ROBERT M. O'NEIL\*

We have come to expect provocative (even impertinent) views about American higher education from seasoned scholar-administrator Stanley Fish, the putative prototype for David Lodge's entrepreneurial and peripatetic academic Morris Zapp.<sup>1</sup> Once again, readers of *Save the World on Your Own Time* will not be disappointed—though they may be surprised. In this slender but trenchant volume, Fish offers advice to his faculty colleagues, to the institutions at which they teach, and incidentally to those who nurture and support higher education, from alumni and parents to legislators and other benefactors. Many readers from the academic community may not relish such counsel, but we would disregard it at our peril.

Central to Fish's thesis is that college and university professors should avoid intruding political, social, and moral views into the classroom, however benign or innocent may be their motive for doing so (for example, to enliven classroom discussion or to engage students in more timely and "realistic" exchanges). The basis for such caution is less the obvious risk of politicizing the classroom, and far more an abiding concern for the quality and stature of a college or university education. In contrast to politically oriented pedagogy, Fish posits the goal of "academicizing" (a novel term for which he deserves both praise and blame)—that is, "to detach [a topic] from the context of its real world urgency, where there is a vote to be taken or an agenda to be embraced, and insert it into a context of academic urgency, where there is an account to be offered or an analysis to be performed."<sup>2</sup>

The skeptic might venture that here (as in several other sections of the book) Fish poses an incomplete disjunction, or perhaps even a false dichotomy. Here, for example, he seems to discount substantially the genuine potential for engaging students on truly "academic" matters through careful and selective citation of current issues that afflict society.

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1. See DAVID LODGE, *CHANGING PLACES: A TALE OF TWO CAMPUSES* (Penguin Books 1975).

2. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* 27 (2008).

His premise is that “the genuinely academic classroom [is] full of passion and commitment. . . . The really dull classroom would be the one in which a bunch of nineteen or twenty-year-olds debate assisted suicide, physician-prescribed marijuana, or the war in Iraq in response to the question ‘What do you think?’”<sup>3</sup>

One might observe, in substantial agreement with Fish’s central thesis, that politicizing the classroom can be both tempting and pernicious. Yet there are myriad variant forms of politicization—some are reprehensible, but others are not only permissible but even laudable. At one extreme, efforts from the podium to proselytize students to a political, social, or moral cause—especially by straying from the assigned and expected coverage of the course—should be condemned for the reasons that Fish articulates clearly and forcefully. But what of the political science professor who, the morning after a hotly contested primary or election, is urged by students to share with the class his or her personal preference? Arguably the teacher who refuses even under such conditions to reveal such a preference could be faulted for “hiding the ball” from students to whom such information has not only curricular relevance but pedagogical value—and which could not possibly serve to proselytize. The point is that the distinction between “politicizing” and “academicizing” the college or university classroom—appealing though it is in the abstract—turns out in the real life of the academy to be infinitely subtle and complex.<sup>4</sup>

What would be immensely helpful here, and would comport nicely with most of *Save the World*’s thesis, is a continuum or range of circumstances under which introduction into the classroom of currently controversial social or moral issues may be more or less acceptable. There are obvious differences between the professor who gratuitously inflicts partisan views on the class and one who is simply responding to a student inquiry. There is also a clear contrast between unabashed campaigning, on one hand, and scholarly consideration even of issues that invite emotional response and may sharply divide members of the class. The manner in which any possibly contentious view is prefaced and explained may also affect any judgment by the academic community; a preliminary caution may substantially calm or mitigate an otherwise potentially divisive discussion. While this is not the time or place to refine such counsel, an otherwise appreciative reader nonetheless regrets a lost opportunity to hear more from this author on a set of issues with which he is intimately familiar and has compelling views.

Curiously, Professor Fish’s constraint upon colleagues who are tempted to politicize their teaching applies only in the classroom; “[a]fter hours, on

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3. *Id.* at 39.

4. See Robert M. O’Neil, *What Not to Say in Class During an Election Season*, CHRON. OF HIGHER EDUC. (Wash. D.C.), Sept. 19, 2008, at A104, available at <http://chronicle.com/article/What-Not-to-Say-in-Class-Du/33228/>.

their own time, when they write . . . or speak at campus rallies, they can be as vocal as they like about anything and everything.”<sup>5</sup> What never becomes quite clear is the rationale for such a separation, especially in times such as these when learning and teaching occur less and less within the four walls of the traditional physical classroom and more and more in electronic communications that transcend familiarly confining dimensions of the historic campus. Indeed, Fish’s whole approach to current academic issues might fairly be faulted for a surprising lack of attention to the profound effect on pedagogy of rapidly evolving new information technologies. While the resulting cautions would doubtless remain, their application would be rather different in an age when the “in and out of classroom” distinction seems rather quaint and archaic.

With equal conviction, Fish urges institutions themselves to eschew moral or political judgments and statements. However tempting (or exigent) such posturing may seem, he wisely warns of the perils that accompany such a course:

Those who think that by insisting on a moral yardstick, the university protects its integrity have it all wrong; the university forsakes its integrity when it takes upon itself the task of making judgments that belong to the electorate and to history. A university’s obligation is to choose things worthy of study, not to study only things that it finds worthy.<sup>6</sup>

Thus, for example, a responsible college or university does not legitimately adopt or articulate an institutional position even with respect to investments in companies that manufacture cigarettes or do business in South Africa without regard for internationally accepted principles. Even more clearly, presidents and chancellors—even when pressed by indignant students—may not purport to express such views on the institution’s behalf, though (with exceptions to be noted a bit later) they remain free to express personal abhorrence of corporate indifference or abuse.

For lawyers and legal scholars, certain facets of *Save the World on Your Own Time* merit special attention, and are well worth perusing. Late in the book, Fish briefly addresses the topic of campus speech codes, which he claims to be a “fake issue.”<sup>7</sup> While many attorneys might share that view, Fish’s rationale for rejection is strikingly different: since “[e]very speech code that has been tested in the courts has been struck down”—an indisputably accurate premise—“[s]tudents don’t have to worry about speech codes.”<sup>8</sup> The problem is that many such codes which have been invalidated (mainly on First Amendment grounds) were successfully

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5. FISH, *supra* note 2, at 29.

6. *Id.* at 37.

7. *Id.* at 149.

8. *Id.*

challenged precisely because (in the courts' view) students had ample reason "to worry" and brought those worries before a federal district judge.

One who thus dismisses the issue might have gone on to note that speech codes are invariably misguided for some of the very reasons that Fish decries institutional posturing on contentious political, moral and social issues. One might have observed that speech codes are ineffectual in redressing campus racism, sexism, or homophobia since they are unlikely to alter attitudes—or, even worse, that they are counterproductive to the degree they create false and unrealistic hopes among disadvantaged and excluded groups. Ironically, this topic represents a clearly missed opportunity. A more elaborate analysis (and denunciation) of campus speech codes would admirably have exemplified Fish's plea for institutional neutrality; when a college or university seeks through coercive sanctions to inhibit or suppress speech on one side of racial, religious, gender, or sexual orientation issues—which is precisely what a speech code seeks to do—the most basic concept of neutrality is disregarded. Sadly, that opportunity eluded the author who persuasively framed the argument.

It is, however, on the subject of academic freedom that Fish's comments may have greatest interest for college and university attorneys and other lawyers. He launches this inquiry by identifying several situations in which academic freedom claims have been made, but in his view inappropriately or unjustifiably. For example, he cites the shouting down of several controversial commencement speakers, and the withdrawal or cancellation of invitations to others, in the period following the invasion of Iraq.<sup>9</sup> While free speech may have been placed at risk on such occasions, Fish insists that academic freedom was never abridged by such actions. He is then highly critical of the way in which Columbia University President Lee Bollinger sought to distance himself (and implicitly also his institution) from the campus appearance of Iranian President Mahmoud Ahmadinejad soon after the latter's shocking excoriation of Israel. His conclusion, again, has the virtues of clarity and simplicity: "Columbia [University] does not, or at least should not, stand anywhere on the vexed issues of the day, and neither should its chief executive, at least publicly."<sup>10</sup>

Here, too, Professor Fish risks posing a distorted, if not false, dichotomy. Though he concedes that President Bollinger was effectively sandbagged by the Ahmadinejad invitation that one of Columbia's deans had extended without senior review, he seems to insufficiently appreciate the acute exigency of the situation as it played out that fall in New York City. He seems also to undervalue—indeed almost to disdain—the capacity of a college or university president to express personal views on contentious current issues without necessarily implicating the institution

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9. *Id.* at 73.

10. *Id.* at 78.

over which he or she presides. The distinction is subtle but crucial: while the college or university clearly should not take or express positions on the Middle East, and while professors may freely (save from the classroom podium) convey their views, the president's position is somewhere between and thus not easily defined. Whether Bollinger overdid his ungracious greeting to President Ahmadinejad is a fair question; whether as president he should have felt free to express deeply personal aversion or even revulsion to his anti-Semitic guest, is a vastly different question to which no formula neatly applies.

Precisely that question played out at another Ivy League institution in ways that nicely illustrate the paradox. Fish briefly mentions the case of then Harvard President Lawrence Summers, but by calling it simply a "failure of judgment,"<sup>11</sup> he understates the dilemma and misses a splendid opportunity for illustration. What this eminent economist failed to appreciate is that the academic freedom which Professor Summers clearly enjoyed—including freedom to speak disparagingly of the role of women in science—did not extend to the same economist who happened also to be President of Harvard. Nor did so visible a chief executive have the luxury of briefly exiting his official role to address fellow economists as a scholar and teacher; a prominent college or university president may no more enjoy such latitude than the Pope may ever speak *ex cathedra*—as in fact the current Pope discovered to his dismay soon after the denouement of the Summers Presidency.

The point is elusive and poorly understood even by seasoned administrators. Department chairs, deans, provosts, and even presidents do have academic freedom; most of them hold tenured faculty appointments, from which they may not be removed any more readily than their non-administrative colleagues may be dismissed. And even as administrators they enjoy certain (if imperfectly defined) latitude by reason of their positions. But when they publicly express contentious views—e.g., Summers on women in science—they may place their official appointments at risk to a degree that does not endanger purely professorial posts. Professor Fish appreciates the ultimate lesson, if not all the refinements, when he concludes that President Summers "spoke freely, and if he suffered the consequences, they are not consequences from which the First Amendment protected him."<sup>12</sup>

The relationship between academic freedom and free speech plays out in different ways elsewhere in this volume. The case of University of Colorado Professor Ward Churchill receives substantial attention in an earlier section.<sup>13</sup> Fish seems puzzled by apparent dissonance between the

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11. FISH, *supra* note 2, at 92.

12. *Id.* at 93.

13. *Id.* at 84–86.

disposition of two quite separate charges brought against Churchill—that his outspoken comments about “Little Eichmanns” among the World Trade Center victims and his seeming praise for the hijackers were found to be protected speech, while demonstrated research conduct ultimately brought about his dismissal from a tenured position on the Boulder faculty.

In fact, however, the seemingly disparate outcomes reflect a striking symmetry of values distinctive to the academic community. Academic freedom (and in the case of state college or university faculty, free expression as well) protects even outrageous and shocking statements such as those in Churchill’s “Little Eichmanns” essay. Colleges and universities must tolerate a far broader range of such speech and writing than do other institutions—as Northwestern University has repeatedly declared in its refusal to seek the dismissal of persistent Holocaust-denier Arthur Butz from its engineering faculty.

Yet when it comes to integrity in scholarship, the dynamic is reversed; colleges and universities are substantially less tolerant of plagiarism and non-attribution than are other institutions or the general legal system. Plagiarism, specifically, is deemed unacceptable and offers a potential basis for dismissal even at levels that fall far below the threshold for actionable infringement under Copyright Law. Paradoxical though this juxtaposition may appear, the contrasting results accurately reflect two values deeply ingrained in the academic culture. Most remarkably, each illustrates a different dimension of academic freedom.

Professor Fish tells us much of what he believes academic freedom does not include, but offers far less insight into what he believes is (or should be) protected. Indeed, one would welcome a more extensive discussion than the tantalizing bits the author offers. “[O]ne exercises academic freedom,” he explains, “when determining for oneself (within the limits prescribed by departmental regulations and graduation requirements) what texts, assignments and exam questions will best serve an academic purpose . . . .”<sup>14</sup> His rationale is equally compelling: to those who find academic freedom “an unwarranted indulgence,” the answer is that such a safeguard is “a necessary condition for engaging in this enterprise, and if you want this enterprise to flourish, you must grant it . . . .”<sup>15</sup> Yet such statements fall short of an unequivocal endorsement, and import qualifications which make the endorsement even seem grudging; the earlier of the two just-quoted sentences ends with this ominous warning: “one violates academic freedom by deciding to set aside academic purposes for others thought to be more noble or urgent.”<sup>16</sup>

In fairness, Professor Fish did not set out to glorify either academic

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14. *Id.* at 81.

15. *Id.* at 82.

16. *Id.* at 81.



freedom or free speech in the college or university community, but rather to caution his colleagues against the exaggeration of both values in the current uncertain climate for higher education. His concluding chapter notes (and laments) waning public enthusiasm for post-secondary education under the title “Higher Education Under Attack.”<sup>17</sup> The nexus between this loss of grace and some of the transgressions on which earlier chapters focus is hardly accidental, even though causal links are not easily established. What Professor Fish has done is to get our attention to conditions of which we are keenly aware but may too readily condone. That he has done this with a firmness and clarity (as well as an insider’s perspective) is likely to command respect if not admiration on America’s college and university campuses.

A recent review by conservative columnist George F. Will characterizes *Save the World* as “often intelligent but ultimately sly and evasive.”<sup>18</sup> Mr. Will claims (somewhat unfairly) that there is less to this book than meets at least the author’s eye:

Suggesting bravery on his part, Fish says his views are those of an excoriated academic minority. Actually, it is doubtful that a majority of professors claim a right and duty to explicitly indoctrinate students. But if they do, Fish should be neither surprised nor scandalized—he is both—that support for public universities has declined.<sup>19</sup>

With all deference to Mr. Will, many within the academic community should be more appreciative than he would ask us to be of an author who has brought an unusual blend of candor and compassion to academic life in the early twenty-first century.

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17. FISH, *supra* note 2, at 153.

18. George F. Will, Op-Ed., *Free Ride for the Campus Left*, WASH. POST, Nov. 27, 2008, at A29.

19. *Id.*

# A SIMPLE MORAL: KNOW YOUR JOB AND DO IT

STANLEY FISH\*

I am grateful to Gregory Bassham, Neil Hamilton, and Robert O’Neil for their serious consideration of *Save the World on Your Own Time*, and in what follows, I shall briefly take up some of the issues they raise.

While Professor Bassham conducts an argument with my arguments, Professors Hamilton and O’Neil speak to issues they feel I do not address or address with insufficient nuance.

Bassham begins by objecting to an argument I do not make. “Fish’s ‘purified’ academy is . . . a values-free zone in which instructors never step over the line between is and ought.”<sup>1</sup> No, in the academy I envision and urge, instructors adhere to the values that belong appropriately to the profession: honesty in research, a commitment to truth, a sustained attention to the academic need of students, etc. It is not a matter of being values-free, but of resisting the lure of values (worthy though they may be) that belong to other enterprises. Everything I say depends on the notion (borrowed from legal theorist Ernest Weinrib) of the distinctiveness of tasks. If one begins by asking and answering the question “what is it that we are trained to do?”—which is also the answer to the question “what services does our training authorize us to offer?”—the “appropriate values” will identify themselves, and fidelity to them will be the content of responsible behavior. No task can claim to offer everything, and it is important to understand the scope and limits of a task so that legitimate and illegitimate actions can be distinguished.

Bassham believes that my notion of responsible behavior is overly restrictive, for “[r]esponsibility is not an all-or-nothing thing; it comes in degrees . . . .”<sup>2</sup> Yes it does, but those degrees correspond to the difference between responsibilities that are yours by contract and responsibilities that are yours because you are a human being. If I miss classes or come unprepared or never return papers or teach from outdated materials, I am

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1. Gregory Bassham, *Fish’s Purified Ivory Tower: A Review of Stanley Fish’s Save the World on Your Own Time*, 36 J.C. & U.L. 289, 290 (book review).

2. *Id.* at 291.

defaulting on my responsibilities in ways that can lead to rebuke, discipline, and even dismissal. And this is so because the obligations I have failed to meet are constitutive of the discipline; ignoring them is tantamount to saying “I’m not doing this job any longer” which could lead to my employer’s deciding that there is no longer any reason to pay me. But if I do all the things the job requires, yet do them churlishly and with insufficient attention to the feelings of my colleagues and students, my behavior is certainly irresponsible in a human sense, but not (unless I am an administrator at a certain level) in a professional sense. I may be in danger of being heartily disliked, but not in danger of being fired.

As a philosopher, Bascham is interested in parsing responsibility as a general concept, so he poses hypotheticals like this one: “Suppose I give a violent, hate-filled speech (‘Death to the San Pedrans!’),” and “there is a small but not negligible chance that at least one member of my audience would be incited by the speech to commit murder. Am I to blame for that murder?”<sup>3</sup> It depends on what context of judgment is presupposed. If the context is legal, then the possibility of criminal responsibility is very real under the rubric of “incitement to violence.” It was J.S. Mill who in *On Liberty* formulated the relevant distinction when he remarked on the difference between publishing the opinion that corn dealers starve the poor and delivering the same opinion “to an excited mob assembled before the house of a corn dealer.”<sup>4</sup> The person who performs the second act may, says Mill, “justly incur punishment.”<sup>5</sup>

Of course expressing an opinion in a newspaper op-ed could also lead a member of the paper’s audience to commit violence, but the chain of causality would be so etiolated that no one—except someone living in a totalitarian state, where the desire (certain to be frustrated) is to control every effect—would think to assign responsibility. The effect would be regarded as one contingently achieved; the op-ed writer’s goal is to express his view, not to provoke violence. While contingent effects are real, they can neither be designed nor become a basis for blame-finding unless one wants to hold people responsible for any action that can be traced back, by however circuitous and unpredictable a route, to something they said or did. The law’s desire to limit responsibility to consequences that could be anticipated—I am thinking of tort law’s categories of foreseeability, proximate cause, and duty of care—reflects a general truth about the way we think about such matters. We ask, given the institutional or professional setting, which consequences can be reasonably aimed at and which consequences, even if they occur, should be regarded as the results of accident and chance.

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3. *Id.*

4. JOHN STUART MILL, ON LIBERTY 55 (Alburey Castell ed., Harlan Davidson, Inc. 1947) (1859).

5. *Id.*

Rather than beginning, as I do, with professional and institutional settings and reasoning from them to questions of what can be responsibly done, Bassham begins with a general analysis of responsibility and reasons from it to professional and institutional settings. In the process, the differences I want to emphasize are flattened out. Thus, for example, he objects to my “claim that people should aim to achieve only what they are responsible for”<sup>6</sup> by invoking the practice of parenthood: “Parents clearly can’t ‘determine’ whether their kids will respect their prohibitions on underage drinking or risky sexual behavior.”<sup>7</sup> But it is a parent’s job to announce such prohibitions independently of whether they are heeded; it is not a teacher’s job, however, to pronounce on matters of personal morality (unless the morality involves cheating and plagiarism, sins that undermine the pedagogical enterprise). When you sign up for the task of raising children, every aspect of their growth is an appropriate matter of concern, even if your efforts may not bear immediate fruit and you do not have degrees in psychology and ethics. When the task you have signed up for is the bringing of young adults to a mastery of the forms and traditions of inquiry, the only appropriate matter of concern is their intellectual growth. This is not only a matter of definition—teaching chemistry is different from teaching respect for others—but a matter of material conditions: on the one hand, a structured three hours per week for a four month semester; on the other, an open ended and evolving relationship that lasts for a lifetime.

Bassham argues that, in saying this, I am begging the question, assuming what I should be proving. What about those educational theorists whose “claim is precisely that professors *do* have some responsibility . . . to positively shape students’ moral and civic attitudes”?<sup>8</sup> My answer is, first, that they are wrong, and second, that I will listen to their claim only if it is supported by an analysis of the ways in which academic training equips instructors to perform these moral and civic tasks. Bassham offers no such analysis and the fact that some theorists have a characterization of teaching opposed to mine is not itself an argument.

On another point, Bassham is simply incorrect. I do not reject “*any* endorsement of a contestable idea, policy, or value.”<sup>9</sup> I reject endorsement of ideas, policies, or values that would send students out of class with marching orders (to achieve social justice, or gun control or health-care reform). I do not reject ideas about the rightness of an interpretation or the accuracy of a description or the coherence of an argument. When I teach legal interpretation, I am not shy about saying that textualism is a misguided and impossible enterprise and that intentional originalism is not an option, but the very definition of what interpretation is. I do stop short,

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6. Bassham, *supra* note 1, at 291.

7. *Id.*

8. *Id.* at 292 (emphasis added).

9. *Id.* at 294 (emphasis added).

however, of recommending that courts should decide this way rather than that; analyzing policies and urging policies are entirely different things.

Bassham wonders “how would Fish’s ban on classroom advocacy be enforced?”<sup>10</sup> He imagines chairs and deans monitoring professors’ classes, and he worries that this would mean the shredding of “any concept of academic freedom.”<sup>11</sup> No, it would mean the honoring of academic freedom which, as I say repeatedly, is the freedom to do the job, not the freedom either to shirk it or do other jobs.

Academic freedom is the focus of Professor Hamilton’s essay. He is in general agreement with my strictures, but he complains that “the book does not give a complete picture of all the interrelated concepts defining the academic profession’s social contract: academic freedom, peer review, shared governance, and faculty professionalism.”<sup>12</sup> He is especially bothered by my lack of attention to peer review and my skepticism about shared governance. A peer-review paradigm, he explains, “means that peers determine the curriculum, the general parameters of the content of a course, grading standards . . . and the range of pedagogies meeting standards of minimum competence which will engage the students.”<sup>13</sup> And he concludes that “[s]hared governance on matters relating to the curriculum and pedagogy are thus necessary conditions for effective peer review and academic freedom.”<sup>14</sup>

But this is to make academic freedom something that faculty members define and enforce, whereas I would say that the definition of academic freedom should follow from a specification of what properly belongs to the academic task. Faculty members should be guided by that specification and not sit around in meetings debating it. I agree that the missions of the college and university and the academic profession “are best realized by granting varying degrees of deference to faculty decisions”<sup>15</sup> (something courts already do), but I don’t believe that faculty members should be empowered to determine by vote what that mission is. Were they to be so empowered, you can bet that many of them would decide that their mission was to save the world and that they had a positive duty to point their students in the right (meaning left) direction.

Hamilton declares that the “tradition of faculty autonomy” is the “linchpin of academic freedom;”<sup>16</sup> but this is true only in the sense that faculty must be protected from the intrusive monitoring of external

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10. *Id.*

11. *Id.*

12. Neil Hamilton, *Academic Freedom’s Duties: A Review of Stanley Fish’s Save the World on Your Own Time*, 36 J.C. & U.L. 297, 301 (2009) (book review) (footnote omitted).

13. *Id.* at 302.

14. *Id.*

15. *Id.* at 303.

16. *Id.* at 302.

constituencies (politicians, donors, parents). Independence from external impositions cannot mean that faculty members are unconstrained by a standard, and the standard that constrains them is not something faculty members should be free to nominate. Here Hamilton and I are in agreement: “Freedom to teach . . . does not mean the freedom to say anything and call it teaching . . . .”<sup>17</sup> But he courts the danger of such license when he ties academic freedom to a form of governance rather than to a hard bright line that determines what academic work is and thereby determines what it is not. If that bright line has been drawn and everyone is pledged to respect it, the form of governance that happens to be in place will not endanger it. And if that line has not been drawn and is continually up for grabs, no form of governance will inscribe it. Questions of governance—who gets the vote on what issues—are only obliquely related to the question of the proper forms of academic work. This does not mean that different forms of governance do not have different effects on a scholarly community: collegiality, morale, self-esteem, efficiency, economics—all these may be affected by the governance structure of a department, college, or university; but what will not be affected is the integrity of the classroom.

Robert O’Neil writes mostly in praise, but he believes that some of the distinctions I insist on are too absolute and insufficiently nuanced. He agrees with me “that politicizing the classroom can be both tempting and pernicious,” but he thinks that “there are myriad variant forms of politicization, some reprehensible but others not only permissible but even laudable.”<sup>18</sup> He asks, “what of the political science professor who, the morning after a hotly contested primary or election, is urged by students to share with the class his or her personal preference?”<sup>19</sup> Wouldn’t the teacher who said no to that urging “be faulted for ‘hiding the ball’ from students to whom such information has not only curricular relevance but pedagogical value?”<sup>20</sup> Quite the contrary. This *is* a teaching moment, but not of the kind O’Neil imagines. The teacher should not only refuse to declare his preference; he should explain why, which would also involve explaining the difference between academic work and political work, a difference that would be blurred and perhaps lost sight of if he gave into the temptation to bring his partisan views into the classroom.

O’Neil wishes that I had traced out “a continuum or range of circumstances under which introduction into the classroom of currently controversial social or moral issues may be . . . acceptable.”<sup>21</sup> It is always

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17. *Id.*

18. Robert M. O’Neil, *Review of Stanley Fish’s Save the World on Your Own Time*, 36 J.C. & U.L. 307, 308 (2009) (book review).

19. *Id.*

20. *Id.*

21. *Id.*

acceptable as long as the issues are made the object of study rather than the occasion of a decision or commitment. Any issue can be the focal point of an academic discussion; it is just that care must be taken that the discussion remain academic and not veer into the realm of the political. (Analyzing political issues is one thing, taking a stand on them quite another.) The slightest relaxing of this discipline opens a door that will then be very hard to close. That is why I cannot assent to the “obvious differences between the professor who gratuitously inflicts partisan views on the class and one who is simply responding to a student inquiry.”<sup>22</sup> The difference, as I see it, is between bringing politics in directly and allowing politics in through a back door. What “curricular relevance” could there be to the revelation by a professor of his voting record? The only point (and effect) of providing that information is to open up the classroom to “real life.” But the classroom is not real life; it is a controlled environment structured by task-specific protocols and those protocols do not include taking sides on questions that should be the object of analysis.

O’Neil comes closer to my position when he asserts “a clear contrast between unabashed campaigning, on one hand, and scholarly consideration even of issues that invite emotional response and may sharply divide members of the class.”<sup>23</sup> If the class is being taught properly—that is, academically—the emotional responses provoked should not be to the issues but to different (and possibly opposing) analyses of those issues. Members of a class can be as sharply divided on an academic matter, as they might be on matter that involves their ideological allegiances and affiliations.

O’Neil notes correctly that that there are topics I do not consider; he calls these “missed opportunit[ies].”<sup>24</sup> Two he mentions are speech codes and the case of Larry Summers, former president of Harvard University. I am on record on both matters, but my judgment was that the argument I was making in *Save the World on Your Own Time* would have been sidetracked if I had explored them fully. I mentioned speech codes in response to conservative charges that they constitute a threat to academic freedom. My point was that the threat was exaggerated because speech codes have been repeatedly struck down by the courts. My general view of speech codes was not to that point, and I did not offer it although I have elaborated it elsewhere.

As to former president Summers, O’Neil believes that I miss the essential distinction between a faculty member and a senior administrator, even if they are the same person: “[W]hen [administrators] publicly express contentious views . . . they may place their official appointments at

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22. *Id.*

23. *Id.*

24. O’Neil, *supra* note 18, at 310.

risk to a degree that does not endanger purely professional posts.”<sup>25</sup> That is precisely the distinction I make in several essays published in *The Chronicle of Higher Education*, but I acknowledge that explaining it once again would have been pertinent to the argument of *Save The World*. Indeed the lesson of that episode as I saw it—Summers was forced to resign not because he was politically incorrect, but because he was professionally incorrect; he didn’t know what his job was—is the lesson of the book.

It is a lesson O’Neil falls away from when he says that while Lee Bollinger, president of Columbia University, “overdid his ungracious greeting” to President Mahmoud Ahmadinejad of Iran, he perhaps “should have felt free to express deeply personal aversion . . . to his anti-Semitic guest.”<sup>26</sup> Free as a citizen, even free as a university president, but not free in the sense of being free of the consequences he, like Summers, made himself vulnerable to when he allowed his “deeply personal” views to take center stage during the performance of his official duties. My moral as always is simple: know your job, do it, and don’t confuse it with other jobs.

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25. *Id.* at 311.

26. *Id.*





# A CASEBOOK, YET MORE THAN A BOOK OF CASES—JUDITH AREEN’S *HIGHER EDUCATION AND THE LAW*

MARTIN MICHAELSON\*

Reader, beware: Your reviewer has apparent conflict of interest in respect of this book. He teaches a class annually in the author’s course, is outside counsel to the university that employs the author, and, albeit for reasons he does not know, is listed among some thirty persons the author acknowledges in her Preface. Whether, reader, these circumstances are in your estimation fatal to the reviewer’s objectivity, whether this review informs and is useful to you, whether on reading this book you will rush to rebut, you, dear reader, must be, in the memorable usage of a former head of state, the decider.

Professor Areen, former dean of Georgetown University Law Center, has produced a work that is bound to engross any serious student of its subject. *Higher Education and the Law*<sup>1</sup> traverses monumental themes, themes of enduring consequence that pulsate like green-yellow-red lights at the intersection of the American academy and American jurisprudence. These themes embed questions so vexing that notwithstanding the sometimes torrential address the questions have attracted over decades and centuries, they remain the subject of continuing dissection, experimentation, and often fevered argument. For instance:

- Given that public and private colleges and universities are linked in so many ways to government and deem themselves publicly accountable, what should be the limits of government control of them?
- To what extent should college and university boards of trustees, in whom ultimate corporate authority over the institutions is vested, be permitted to influence academic decision-making?
- What *is* academic decision-making?
- Whatever academic decision-making is, when in principle is judicial overriding of it wise?
- How should the law mediate collisions between invoked religious

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1. *Higher Education and the Law* is published by Foundation Press, and first appeared in 2008.

doctrine and conventional academic mores?

- To what extent does the United States Constitution cabin, or liberate, the academic life?
- What should be the rights, *vis-à-vis* each other, of students, faculty, and the corporate institution?

Those and like conundrums Professor Areen's casebook implicitly and explicitly challenges us to confront anew.

The book is in six parts and 18 sub-parts, thusly: Section I focuses on higher education in the United States (formation; distinguishing private from public institutions; religion and higher education; state and local government regulation; financing higher education); Section II, faculty matters (academic freedom and tenure; teaching, research, and shared governance; denying and terminating tenure; the college or university as employer—academic freedom or unlawful discrimination?); Section III, student access (admissions; financial aid); Section IV, students and the law (student rights and responsibilities; student First Amendment rights; obligations of the institutions to students); Section V, college and university governance (governing boards and presidents; managing the academic corporation); finally, Section VI—the promise and peril of regulation (licensure and accreditation; federal regulation).

This is not a do-it-yourself handbook for college or university counsel. It is a casebook, not a treatise. It does not attempt to face most of, let alone exhaust, the arcane particulars and peculiarities that daily congest NACUANET, the non-public listserv in which college and university lawyers scratch their heads in full view of their peers (except, that is, for the participants who send up anonymous questions). Do not look here for how to structure or document a study-abroad program, or how to lessen potential liability from a clinical trial gone awry. Do not expect from this book self-executing guidance on what should and should not be said in a staff member's exit interview, or whether the expense of maintaining the president's study at his home is allocable to indirect-cost recovery under federal grants and contracts.

In other words, if you are a college or university lawyer who seeks hand-holding on exactly how to navigate your everyday work, this book isn't for you—except, that is, in possibly the most useful way of all, to wit, to remind and often inform you of the principles and concepts that underlie many of the professional judgments you are called upon to make.

A canon of higher education court opinions exists in the minds of most of us in this field, although there will of course, as with all literary canons, be disagreement among us on what some of that canon should be or is. Almost no one would dispute that such offerings as these are in the higher education law canon: *Trustees of Dartmouth College v. Woodard* (p. 42 of this book), *Sweatt v. Painter* (p. 92), *Healy v. James* (p. 119), *Sweezy v. New Hampshire* (p. 314), *Regents of the University of Michigan v. Ewing*

(p. 341), and *Perry v. Sindermann* (p. 542). If among the dozens of important decisions in this casebook any of canonical standing are omitted, your reviewer, notwithstanding some effort, failed to identify them.

As casebooks these days seem to do to a greater extent than in years gone by, this one sets out (1) after the included opinion, questions that dig into the student's mind and prompt discussion of the issues; and (2) after the respective chapter heads, narrative by the casebook author, here including a remarkable number and variety of citations to and quotations from cognate sources, judicial and other. The case-related questions are hard and generously studded with citations to other texts that can entice a reader farther into the matter at hand. These rich chapter- and case-specific "intellectual brackets" reflect the author's curiosity and disciplined research. The arc from these pages to inflamed dialectic requires but the spark of willingness to think, engage, and contest.

Possibly the best merit of the work, and its most attractive and distinguishing feature, lies elsewhere than in laying out the canonical decisions and other court rulings, the introductory remarks, and the supplementary questions. What sets apart *Higher Education and the Law* for this reader is its inclusion of eye-opening writings by persons other than judges, many of them not otherwise readily accessible, that depict in higher education what Mortimer Adler, the Aristotelian moving force behind the series Great Books of the Western World, styled in that yet broader context *The Great Conversation*. Those writings, which are a considerable part of this book, help us to appreciate why the cases in it are so resonant today.

What a conversation on higher education it has been and is! In these pages we are treated to essays and other writings on the higher education enterprise by Michael Oakeshott, Edward Said, Henry Rosovsky, Benjamin Franklin, George Washington, Thomas Jefferson, Henry Tappan, Andrew Dickson White, Andrew Carnegie, Clark Kerr, Mario Savio, Stanley Katz, the American Association of University Professors, Michael McConnell, A. Bartlett Giamatti, and Derek Bok, among others. Taken *en masse*, these essays—which are placed hard-by the related cases—do not and cannot be intended to simplify higher education's Great Conversation. Instead they serve to tether the life of higher education law—in this respect, mainly what judges and legislatures have had to say—to the academy's puzzles, aims, impediments, hopes, frustrations, and resources, as conceived and as lived by some of the most original and dauntless thinkers in this field. Sleep through this and you will sleep through a thunder and lightning storm.

Above, the framework of the book is described. Let us now turn to the candy-store side of the work—the sometimes delightful, often surprising, and occasionally obscure, but still arresting facts that are lavishly sprinkled throughout it. The reader can choose favorites among them. Some of these thousands of tidbits might even make for banter at

what used to be called the water cooler and now is known as e-mail.

We learn at page 14, for example, that although Harvard's charter was drafted for compliance with a fund Parliament set up to pay for conversion of "Indian youth" to Christianity, only one Native American was enrolled at Harvard in the University's first forty years. At pages 36–37 we read Jefferson's epistolary argument with John Adams over whether professors should be imported from Europe (Jefferson), or home-grown (Adams). A quote at page 54 from Laurence R. Veysey's *The Emergence of the American University* (1965) tells us that while in the 1870's the U.S. population soared 23 percent, attendance at twenty of the oldest leading colleges in that decade rose only 3.5 percent.

By way of dramatic contrast with that last point, we see at page 85 that the 1.2 million U.S. veterans who attended colleges and universities in 1947—exceeding by more than a million the number Congress expected to attend when it passed the G.I. Bill—were 49 percent of all students enrolled, and that at least ten of the G.I. Bill vets went on to win a Nobel Prize.

Inevitably, some of the aforementioned "candy" in this book makes for indigestion. For instance, at page 136, in a 2002 account quoted at length from *The Economist* ("Meritocracy in America"), we find reference to an Economic Policy Institute study that shows a marked decline in social mobility in this country. Thus, while in the 1970's 28 percent of Americans in the second-poorest group remained stuck there, in the 1990's 36 percent did. So much, it would appear, for the ballyhooed belief that the nation's higher education institutions, which enormously expanded enrollment during those years, are an automatic engine for national socioeconomic gain. And we see at page 139, that by 2005 the United States, hitherto internationally preeminent in higher education demographics, had sunk to fifteenth among the countries of the world in educational attainment of young adults. Too many young people are not going to college; many too many are not graduating. We see a citation, at page 289, to a 2007 *New York Times* account which reports that the nation's largest university, the for-profit University of Phoenix, had a paltry 16 percent graduation rate, measured by the number of first-time undergraduates who receive the degree within six years (the University, we are told, considers that measure inapposite to its population of older students.)

In a more upbeat vein, we read at pages 81–82 excerpts from *Science—The Endless Frontier*, the seminal report by Vannevar Bush that laid a broad and broadly adopted groundwork for the enormous infusions of federal research dollars into colleges and universities, beginning after World War II. Where would America be today had Congress not adopted that policy? Far-reaching ramifications of Vannevar Bush's analysis are most recently manifest by the astonishing addition, in the Obama

Administration's stimulus law, of more than \$10 billion in research dollars to be awarded by the National Institutes of Health, plus billions more new funding from such agencies as the National Science Foundation.<sup>2</sup> Vannevar Bush's general recipe is well known. Unknown to many of us, however, is that, as quoted here, he recommended that the federal government's science-funding agency "should not operate any laboratories of its own."<sup>3</sup> Can we imagine what the effects would have been on science had that advice been taken?

In short, if reading court decisions is not your cup of tea, the rest of this book is still likely to fascinate the student of higher education in America.

Yet even a reader whose idea of a good time is not reading judicial decisions or who might read an opinion or two as therapy for insomnia is likely to be startled awake by some of the judicial pronouncements in this book. When first exposed to casebooks at law school, most of us were probably so distracted and confused by the unfamiliar doctrines they mapped that we focused little if at all on the underlying drama and melodrama the cases often depicted. How to compare the dramatics of higher education court decisions to those of decisions in other fields such as torts and contracts is neither obvious nor attempted here; all comparisons, it is said, are invidious. But such comparison is not required for a judgment that some of the yarns these cases relate are right up there with John Mortimer's *Rumpole of the Bailey* and other classics of the genre. In this casebook we find entertaining proof of the thesis that hard cases make bad law.

Take for example the unforgettable yet widely forgotten lawsuit involving the renowned British philosopher Bertrand Russell, *Kay v. Board of Education of the City of New York*, a 1940 New York court of general trial jurisdiction ruling reported here beginning at page 300. While serving on UCLA's faculty and after having been invited by Harvard to give its William James Lectures on philosophy, Russell was offered a professorial appointment by City University of New York. The offer seemed to CUNY a great idea at the time. But the institution failed to foresee local political ramifications of Russell's written work. Fearless to a fault, in his far-ranging essays Russell had advocated no few provocative opinions—indeed, provocation in the Socratic tradition is a motif of his published work—such as these he advanced in *Marriage and Morals*:

I think that all sex relations that do not involve children should be regarded as a purely private affair, and that if a man and woman choose to live together without having children, that should be no one's business but their own. I should not hold it desirable that

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2. Gardiner Harris & Kenneth Chang, *Beaker-Ready Projects? Colleges Have Quite a Few*, N.Y. TIMES, Feb 29, 2009, at D1.

3. JUDITH AREEN, HIGHER EDUCATION AND THE LAW 82.

either a man or a woman should enter upon the serious business of marriage intended to lead to children without having had previous sexual experience.<sup>4</sup>

Those and like utterances by Russell, as Professor Areen documents at page 304, n.3, prompted the head of New York's Episcopal Diocese to send the city's major newspapers a denunciatory letter in which he described Russell as a "propagandist against religion and morality . . . who specifically defends adultery."<sup>5</sup> Two weeks of public protests against the appointment erupted; the City Council passed a resolution calling for the appointment to be rescinded; and the Board of Higher Education, although more divided than when it initially extended the offer, voted not to renege on it. In the seemingly legally attenuated capacity of mother of two New York schoolchildren, Mrs. Kay then sued to block the appointment. A week later the court heard the case.

On the preposterous ground that although the subject of the lawsuit, Russell had no legally cognizable interest in it, the judge denied the learned scholar's motion to intervene in the case.

Proceeding speedily to opine that "it is contended that Bertrand Russell is extraordinary. That makes him the more dangerous", and "[a]cademic freedom . . . cannot teach that adultery is attractive and good for the community," the trial court, McGeehan, J., concluded that "appointment of Dr. Russell is an insult to the people of the City of New York," Russell's appointment would be to a "chair of indecency", and Mrs. Kay would have an order revoking the appointment.<sup>6</sup> New York's appellate courts upheld both the denial of intervention by Russell and the trial court merits ruling. Thus was Bertrand Russell barred by operation of law from CUNY's faculty.

Harsh and fitting irony was sequel to the case. As Professor Areen informs us at 305, "[i]n 1944 Russell returned to England. In 1950 he was awarded the Nobel Prize for literature, in part for the writings that had been so controversial in New York."

Professor Areen observes, at 304, that *Kay* is the first court opinion in the United States to use the term "academic freedom." She asks the student, "Do you agree with the court's assertion that academic freedom is the 'freedom to do good and not to teach evil'?" Well, do we? Where shall we look for an answer to that one? The American Association of University Professors' landmark 1915 and 1940 statements shed scant light on it, or, more exactly, shed hazy, pale light. Is the issue in *Kay* in the category once addressed by a University of Chicago philosophy professor to his impressionable student, when the professor said that some questions are best unasked? Can higher education institutions and judges continue to

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4. *Id.* at 301.

5. *Id.* at 304.

6. *Id.* at 302-03.

duck announcement of a principle that corresponds comprehensively to this question? Should they? Is higher education relegated to—perhaps “saved by” is more apt—ad hoc decision-making? What would Plato do with the issue in *Kay*? (More accurately: What *did* Plato do with the issue in *Kay*?) Come to think of it, what would Bentham or Mill or Justice Frankfurter or Judge Posner or Chief Justice Roberts do with it? If Cardinal Newman held with the New York courts’ decision, could he look himself in the mirror without wincing? Would Harvard’s President Nathan Pusey, who bravely stood up to Senator Joseph McCarthy, have faced down the Episcopal bishop who agitated against Bertrand Russell? What would a public poll of state flagship university presidents today conclude on the issue in *Kay*?

Comparably intriguing questions, if in some cases less basic than those *Kay* stimulates, abound in *Higher Education and the Law*. When is a college’s financial trouble so acute that the institution can break tenure (e.g., *American Association of University Professors v. Bloomfield College*, at page 527 of the casebook)? What standard is a court to apply in gauging whether a college or university treated a student unfairly (e.g., *Board of Curators of the University of Missouri v. Horowitz*, at 685)? Do alumni have rights against the institution, such as the right to use its name over its objection (e.g., *Ad Hoc Committee of the Baruch Black and Hispanic Alumni Association v. Baruch College*, at 931)? What authority over student grades is the institution’s rather than the professor’s (e.g., *Lovelace v. Southeastern Massachusetts University*, at 405)? When should the law find the relations of board to president so cozy as to entail a breach of fiduciary duty by both (e.g., *In the Matter of Adelphi University v. Board of Regents of the State of New York*, at 892)? When it commands colleges and universities to do this or that to stay eligible for federal money, must Congress expressly foreclose a private right of action for breach of the commanded conduct (e.g., *Gonzaga University v. Doe*, at 973)? What extent of institutional entanglement with state government causes a private university’s action to be state action (e.g., *Hack v. President and Fellows of Yale College*, at 149)? Here, few answers are easy.

A review of a casebook would be incomplete if it failed to address what is in the book that shouldn’t be and what isn’t in it that should. Those questions are not meaningfully answerable except by reference to such factors as the publisher’s permissible length of the book (let us assume that at about one thousand pages, *Higher Education and the Law* approaches that limit), the presumed intended use as a course syllabus (surely students cannot be expected to absorb in one semester all that is in *Higher Education and the Law*, much less more), and the audience.

Although this book in a better world, a world in which time had not shrunk and the Internet had not overtaken books, might justly attract several major audiences, each in large numbers—practitioners, public-



policy makers, college administrators, and scholars of higher education among them—law students and the faculty who teach them will almost certainly be its main audience. The higher education legal field has grown much in size and quality in recent years. Colleges and universities today need exceedingly able lawyers. To that end, higher education law courses that attract and inspire highly talented law students to this practice and to higher education administration are valuable. A considerable attention by this book to student issues, which are likely to attract student interest, is thus not to be gainsaid.

Although common sense might suggest that higher education law, taken as a whole, is student-centric, as practiced it generally is not. Although most students in American higher education (including community colleges and for-profit colleges) study at institutions that are not research oriented, research-related legal issues account for a larger part of the academy's legal agenda than the allocation to them in *Higher Education and the Law* might imply.

A practitioner would probably like to see more here on law of the workplace, too. Employment, labor-management, related tax and benefits, and other legal matters that connect to the employment status generally account for at least half of a college's or university's legal work.

Your reviewer would have liked to have more included on the interplay of federal, state, and local law in matters that affect institutional life, such as connected to privacy rights and the role of the Higher Education Act (now, the Higher Education Opportunity Act) *vis-à-vis* accountability of state higher education institutions, which answer directly to state government as well as federal government masters. More on technology transfer, town-gown relations (such as in land-use matters), and faculty grievance proceedings would have been welcomed.

Yet, if a signal purpose of a higher education law course is to ignite students' curiosity and attract them to the field, to have devoted as much space to student issues as this book does—several hundred pages, approximately—seems well warranted even at the price of less extensive treatment of such matters as those identified above.

Indeed, the observations in the preceding few paragraphs have the aspect of criticism of a mouthwatering smorgasbord on the ground that it includes neither melon nor figs and perhaps slightly too few kinds of smoked fish. One can eat only so much. Had your reviewer been offered *Higher Education and the Law* as a law student, he might not have spun his wheels for 15 years in other, less absorbing precincts of the profession before with relief he luckily found his way to this one.



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# NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

The Association's purpose is to improve the quality of legal assistance to colleges and universities by educating attorneys and administrators on legal issues in higher education. NACUA accomplishes this goal through its publications, conferences, and workshops. NACUA also operates a clearinghouse for references through which attorneys share knowledge and work products on current legal problems. With its headquarters in Washington, D.C., NACUA monitors governmental developments having significant legal implications for its member institutions, coordinates the exchange of information concerning all aspects of law affecting higher education, and cooperates with other higher education associations to provide general legal information and assistance.

Accredited institutions of higher education in the United States and Canada are the primary constituents of NACUA. Each member institution may be represented by several attorneys, any of whom may attend NACUA meetings, perform work on committees, and serve on the Board of Directors.

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Notre Dame Law School, the oldest Roman Catholic law school in the United States, was founded in 1869 as the nation's third law school. The Notre Dame program educates men and women to become lawyers of extraordinary professional competence who possess a passion for justice, an ability to respond to human need, and a compassion for their clients and colleagues. Notre Dame Law School equips its students to practice law in every state and in several foreign nations. The school raises and explores the moral and religious questions presented by the law. The learning program is geared to skill and service. Thus, the school is committed to small classes, especially in the second and third years, and emphasizes student participation.

In order to further its goal of creating lawyers who are both competent and compassionate, Notre Dame Law School is relatively small. The Admissions Committee makes its decisions based on a concept of the "whole person." The Law School offers several joint degree programs, including M.B.A./J.D. and M.Div./J.D. Notre Dame Law School is the only law school in the United States that offers study abroad for credit on both a summer and year-round basis. Instruction is given in Notre Dame's own London Law Centre under both American and English professors. The Center for Civil and Human Rights, which is located on the home campus, adds an international dimension to the educational program that is offered there. Notre Dame Law School serves as the headquarters for the *Journal of College and University Law*.

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The Journal of College and University Law  
(ISSN 0093-8688)

The *Journal of College and University Law* is the official publication of the National Association of College and University Attorneys (NACUA). It is published three times per year by the National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036 and indexed to *Callaghan's Law Review Digest*, *Contents of Current Legal Periodicals*, *Contents Pages in Education*, *Current Index to Journals in Education*, *Current Index to Legal Periodicals*, *Current Law Index*, *Index to Current Periodicals Related to Law*, *Index to Legal Periodicals*, *LegalTrac*, *National Law Review Reporters*, *Shepard's Citators*, and *Legal Resource Index* on Westlaw.

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Library of Congress Catalog No. 74-642623

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