
THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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and Institutional Autonomy

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Nathan A. Adams, IV

Academic freedom is a constitutional doctrine in shambles. Although nowhere to be found in the Bill of Rights and bereft of evidence the founders intended it for constitutional status,¹ the U.S. Supreme Court has considered its “essentiality” nearly “self-evident,” and has deemed the “uninhibited exchange of ideas” that academic freedom is designed to promote a vital prerequisite of democracy. The liberty is associated with the First and Fourteenth Amendments, but whether it has independent constitutional significance is a source of considerable disagreement due in part to the sorry state of its doctrinal development.

pg 1

Title VI, Anti-Semitism, and the Problem of Compliance

Frederick P. Schaffer

On December 11, 2019, President Trump issued an “Executive Order on Combatting Anti-Semitism” (the Executive Order), which in section 1 announced the policy of his administration “to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI.” The Executive Order was met with strong expressions of both approval and disapproval. For the reasons discussed below, the Executive Order is salutary in applying Title VI’s ban on national origin discrimination to anti-Semitism, but its definition of anti-Semitism is likely to have a chilling effect on protected speech relating to Israel. In the final analysis, much will depend on how the US Department of Education (ED) acts to enforce it. In the meantime, given the uncertainties created by the Executive Order, it will be difficult for college and university administrators to know how to fulfill their obligation to comply with Title VI in this context without infringing on the freedom of speech of students and faculty and academic freedom of their institutions as a whole.

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Enhancing Enforceability of Exculpatory Clauses in Education Abroad Programming Through Examination of Three Pillars

Michael R. Pfahl

The safety of our students is our top priority.

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The litigation appears to be premised on a belief that the university is the guarantor of the student's safety. Unfortunately, this is neither physically possible nor realistic.

Over the last fifteen years (with one exception during the 2008–09 year and excluding the extenuating circumstances of the 2019–20 academic year due to COVID-19), more students engaged in education abroad opportunities than in the previous year. For institutions of higher education, these programs can be incredibly broad, with experiences lasting from one week to one year. One program can involve a short trip abroad to a nearby country, while another can be a fully immersive experience in a different culture. Of those studying abroad, students in the STEM majors (science, technology, engineering, and math) are outpacing those in other degree programs. For institutions of higher education, education abroad programming continues to represent an essential component for ensuring competitiveness in their institutions as well as an opportunity for students and faculty alike to remove the traditional boundaries of the classroom in exchange for an entire world of learning possibilities.

A Privilege to Speak Without Fear: Defamation Claims in Higher Education

Adam J. Wolkoff

Defamation claims highlight the extraordinary tensions in higher education today between academic freedom and the duty not to harm others with that freedom. Faculty, administrators, and students have all brought campus disputes to court, seeking to vindicate their reputations from accusations and findings of incompetence, academic and research misconduct, and sexual harassment and violence. Defamation claims may also arise from a negative tenure review, a failing grade, a poor reference, or offensive comments posted in university-affiliated publications and websites.¹ Still, over decades, academia has carved a significant zone of legal privilege around these internal affairs. Only in the exceptional case, where a declarant's disregard for the truth is plain to see, will a defamation claim be actionable.

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BOOK REVIEWS

Review of Jeffrey Selingo's "Who Gets In And Why: A Year Inside College Admissions"

Elizabeth Meers

A college or university attorney might fear that a book promising an inside view of admissions by an award-winning journalist could be effort by a muckraker to expose corruption and create scandal. Although Jeffrey Selingo's book has moments of cynicism, on the whole he takes a higher road. While he is critical of hypercompetitive admissions and proposes ameliorative measures to be taken by colleges, universities, and the federal government, his principal aim is to inform high school students and their parents about the process so that they can be better equipped to find colleges best suited to the student and family. His welcome message is that "plenty of schools offer a top-notch education and have high acceptance rates" and that students and families should avoid the "mythical quest to get into the rights schools at any cost." The book is a readable analysis of the complex dynamics of college admissions, with suggested remedies to simplify the process and increase transparency, fairness, and access. The book will be interesting and useful, whether one is a lawyer advising colleges and universities on admissions and financial aid, a college or university attorney focused on other areas of the institution, a parent of a college-bound student, or someone simply curious about the way the process works. This review focuses on topics likely of greatest interest to college and university attorneys, regardless of whether they have children in the next cohort of undergraduate applicants.

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Review of Michael A. Olivas's "Perchance to Dream: a Legal and Political History of The Dream Act and DACA"

Shoba Sivaprasad Wadhia

Perchance to DREAM: A Legal and Political History of The DREAM Act and DACA (NYU Press, 2020) traces the history of the DREAM Act and DACA, with a detail and experience that only Professor Olivas can bring. The book is comprehensive and a must read for understanding the location and scope of solutions for immigrant youth who call America home but who, for more than a decade, have lived in limbo under a form of prosecutorial discretion and under an administration that has wavered on their fate. With deep expertise in higher education and immigration, Professor Olivas is the ideal historian to narrate the story of the DREAM Act and DACA. His credibility and authority to write such a book are clear, as the reader considers the first step to legally recognizing the rights of children to attend school without regard to their status movement that has followed in the post-K-12 space.

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RESOLVING ENMITY BETWEEN ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY

NATHAN A. ADAMS, IV*

Abstract

This article contends that if academic freedom has independent constitutional significance it must be, as originally conceived, to promote the marketplace of ideas as a collective good in pursuit of truth and to avoid the pall of orthodoxy that stymies innovation. In this event, it is best to view academic freedom narrowly as a one-way ratchet in favor of expanding the marketplace of ideas in public institutions and to distinguish academic freedom from institutional academic autonomy. Much of what passes as academic freedom has never been within its scope and should be permanently carved out, for example, intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter. Institutional academic autonomy is not the same as academic freedom, but this is not to say it is unimportant. When enumerated constitutional liberties are not jeopardized, deference to institutional educational judgment is reasonable because of the special importance of education in our society and the limits of judicial review. Church autonomy doctrine offers a partial analogy. Institutional academic autonomy does not merit deference when it infringes enumerated constitutional liberties or becomes a pretext for viewpoint discrimination or retaliation.

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INTRODUCTION

Academic freedom is a constitutional doctrine in shambles. Although nowhere to be found in the Bill of Rights and bereft of evidence the founders intended it for constitutional status,¹ the U.S. Supreme Court has considered its “essentiality” nearly “self-evident,”¹ and has deemed the “uninhibited exchange of ideas” that academic freedom is designed to promote a vital prerequisite of democracy.² The liberty is associated with the First and Fourteenth Amendments,³ but whether it has independent constitutional significance is a source of considerable disagreement due in part to the sorry state of its doctrinal development.⁴

A majority of courts now insist that, if an independent liberty, academic freedom is institutional,⁵ notwithstanding that it was conceptualized originally as protecting faculty from interference by university trustees. Tension is the result, according to the U.S. Supreme Court, between the wielding of academic freedom by faculty and academic institutions.⁶ This is a charitable summation. Another way to put it is that the freedom has become self-annulling. When the two kinds of academic freedom cross swords, institutional freedom generally prevails.

1 J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 312, 331 (1989).

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

2 *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *accord Sweezy*, 354 U.S. at 250.

3 *See Wieman v. Updegraff*, 344 U.S. 183, 221 (1952) (Frankfurter and Douglas, JJ., concurring) (associating academic freedom with due process); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”)).

4 *See Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005) (“[W]e agree with the magistrate judge that an independent right to academic freedom does not arise under the First Amendment without reference to the attendant right of free expression. Thus, the right to academic freedom is not cognizable without a protected free speech or associational right.”); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 n.14 (10th Cir. 2004) (“Although we recognize and apply this principle [of judicial restraint in reviewing academic decisions] in our analysis, we do not view it as constituting a separate right apart from the operation of the First Amendment within the university setting.”); *Emergency Coalition to Defend Educ. Travel v. U.S. Dep’t of the Treasury*, 545 F.3d 4, 19 (D.C. Cir. 2008) (Silberman, J. concurring) (“I therefore share the doubts of our Fourth Circuit colleagues as to the notion that ‘academic freedom’ is a constitutional right at all and that, should it exist, it inheres in individual professors.”) (citing *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 1998), *cert. denied*, 531 U.S. 1070 (2001)).

5 *See Urofsky*, 216 F.3d at 414–15; *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006); *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001), *cert. denied*, 533 U.S. 903 (2001); *Stronach v. Va. State Univ.*, No. 3:07CV646-HEH, 2008 WL 161304 (E.D. Va. Jan. 15, 2008); *Martinez v. Univ. of P.R.*, No. CIV 061713 JAF (D.P.R. Dec. 22, 2006).

6 *See Ewing*, 474 U.S. at 226 n.12 (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself.”) (citations omitted); *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (the term “academic freedom” “is used to denote both the freedom of the academy to pursue its end without interference from the government ... and the freedom of the individual teacher ... to pursue his ends without interference from the academy; and these two freedoms are in conflict.”) (citation omitted).

Another consequence of a dimly lit constitutional liberty is that academic freedom is over-utilized as if any time academicians are involved, so is academic freedom. Faculty dress petty individual employment grievances with constitutional garb. Institutions treat their decisions as matters of academic freedom even when the outcome shrinks the marketplace of ideas. Each treat academic freedom as a private right, although it was conceptualized as a public good to ensure a free exchange of ideas in search of truth and its liberal exposition.

Lacking any independent test for the exercise of academic freedom, courts draw from a variety of ill-fitting legal paradigms. These include (1) the *Wieman-Sweezy* paradigm, (2) the curricular speech doctrine associated with *Hazelwood School District v. Kuhlmeier*,⁷ (3) the *Connick-Pickering* balancing test,⁸ and (4) the *Garcetti* test.⁹ Most of these paradigms favor institutions over faculty, especially when the subject matter is religious speech.¹⁰ Public forum analysis and viewpoint discrimination law rarely have a seat at the table. Because these paradigms depend upon the First Amendment, faculty of private universities lack constitutional protection.¹¹

It is time either to jettison academic freedom as an ill-conceived constitutional liberty that almost was, or to revisit the doctrine and provide it with a foundation consistent with its conceptualization as a public good in a manner consistent with collective action theory. If the doctrine has any independent constitutional significance, it must be, as originally described, to promote the marketplace of non-obscene ideas to avoid the pall of orthodoxy that stymies innovation. In this event, it is best to view academic freedom narrowly as a one-way ratchet in favor of expanding that marketplace of ideas in public institutions (and by contract in private institutions).

The easiest cases in which to find common ground about academic freedom arise a “pall of orthodoxy” imposed externally, for example, as happened during McCarthyism. In this event, faculty, students and many institutions shared congruent interests. Academic freedom was birthed as a constitutional liberty in this milieu, leaving it incompletely articulated. Harder cases followed, arising from intramural disputes between academic institutions and faculty or students. In these cases, academic freedom may be pitted against express constitutional rights. The doctrine has floundered here.

Several schools of thought have emerged about what to do in these circumstances. On the one hand, some like Professor Judith Areen recommend that courts enforce

7 484 U.S. 20, 270–71 (1988); *see also* *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

8 Referring to a four-part test premised upon *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

9 Referring to *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

10 *See* *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, *Bishop v. Delchamps*, 505 U.S. 1218 (1992); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006).

11 Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1286 (June 1988) (“[S]tate action doctrine ... leave[s] academics in private colleges and universities wholly unprotected.”).

academic freedom as an independent implied constitutional liberty, superseding the express constitutional liberties of faculty.¹² Professor Scott Bauries views academic freedom as a contractual tenure right.¹³ In between, but favoring the institution, Professor Matthew W. Finkin believes academic freedom requires supplementing the *Connick* test with contract rights reflecting professional norms.¹⁴ There is general consensus among these scholars that viewpoint and content-based discrimination against faculty and students coheres with academic freedom.¹⁵

This thinking is inconsistent with the origins of academic freedom, not to mention the First Amendment. The position of this article is that if academic freedom is a constitutional right, it cannot be detrimental to free expression; it must be supplemental. In particular, academic freedom should not be a tool to be brandished by institutions against faculty and student viewpoint or vice-versa, as if a mere implied constitutional right could tip the scale against either side's express liberties. We most respect the concept of academic freedom and resolve enmity with institutional autonomy by not referencing it when it is unlikely to liberate thought and expression, regardless whether it is in furtherance of an academic or professional norm. There is a major caveat. Much of what passes as the subject matter of academic freedom has never been within its scope and should be permanently carved-out; for example, intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter.

Academic freedom is not the same as institutional academic autonomy, but this is not to say it is unimportant. Courts lack the wherewithal to second-guess pedagogical and credentialing decisions, to name just a couple areas requiring educational judgment. Deference to educational judgment is appropriate when constitutional liberties are not imperiled and especially when academic freedom is furthered. It would be better to disentangle institutional academic autonomy from academic freedom to explore the proper contours of both and allow them to flourish rather than to suppress academic freedom as originally articulated in a thicket of doctrinal confusion.¹⁶ There is one other exception and implied right known as the

12 Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 949, 957 (2009) (“[W]hen there is a conflict between an individual faculty member and her faculty over an institutional academic matter, the claim of the individual member of the faculty normally should yield.”); see also Byrne, *supra* note 1, at 312, 339 (“[R]outine protection of the rights of individual professors against academic officers is excessively problematic.”; “[F]aculty should not be able legally to challenge good faith, internal personnel decisions as violations of academic freedom.”).

13 Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 743 (2014).

14 Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1348 (1988).

15 Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530, 533 (2015); Areen, *supra* note 13, at 992; Byrne, *supra* note 1, at 283 (“[A]cademic freedom does not insulate speakers from being penalized for the content of their speech. Academic freedom only requires that speakers be evaluated by their peers for relative professional competence and within the procedural restraints of the tenure system.”); MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 43 (2009).

16 Alisa W. Chang, Note, *Resuscitating the Constitutional ‘Theory’ of Academic Freedom: A Search*

church autonomy doctrine, specially designed to protect religious organizations' employment and governance decisions. In both cases, courts recognize that they lack the institutional competence to decide the implicated disputes.

There are admonitions and recommendations in this article regarding academic freedom as a potential constitutional liberty. Do not confuse academic freedom with institutional academic autonomy. Do not invoke academic freedom when it has no relevance to a dispute. Use academic freedom only in connection with expanding the public marketplace of non-obscene ideas or do not use it at all, and distinguish it from any presumption in favor of institutional academic autonomy. Do not supersede an express constitutional liberty with an implied one. It is better to interpret academic freedom narrowly than to distort or impoverish it or, worse, describe it at enmity with itself in the form of institutional academic autonomy.

Part I of this article reviews the roots of academic freedom. Part II explores the modern constitutional paradigms used to articulate the freedom to teach. Part III explores modern constitutional law regarding the freedom to learn. Part IV proposes a restatement of academic freedom as a constitutional norm distinct from institutional academic autonomy. Part V is the conclusion.

I. The Roots of Academic Freedom

The source of decisional disagreement over academic freedom as a constitutional liberty has much to do with the circumstances of the freedom's recent origins in Germany, the memorialization of academic freedom in *The 1915 Declaration of Principles* and the articulation of academic freedom as a constitutional norm during McCarthyism. We explore these roots of academic freedom in this section.

A. *Academic Freedom in Germany*

Faculty first asserted academic freedom in the early-1900s, purportedly to achieve a degree of professional autonomy from the trustees controlling their institutions. Until then, "institutions of higher education in this country were not considered centers of research and scholarship, but rather were viewed as a means of passing received wisdom on to the next generation."¹⁷ They "were characterized by 'legal control by non-academic trustees; effective governance by administrators set apart from the faculty by political allegiance and professional orientation; [and a] dependent and insecure faculty.'"¹⁸ German universities were then considered the best in the world and, although governmental institutions, had carved-out

for a Standard Beyond Pickering and Connick, 53 STAN. L. REV. 915, 933 (2001) ("Indecision regarding whether academic freedom should be viewed primarily as an institutional or an individual right prevents any coherent, precise understanding of what the Supreme Court professes to protect.").

17 Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001) (citing RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 278-79 (1955); W Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998)).

18 Urofsky, 216 F.3d at 410 (citing HOFSTADTER, *supra* note 18, at 268-69).

greater freedom of expression for professors than other public employees.¹⁹ No lay board was interposed between government and faculty as is true in America today.²⁰

A movement developed to adopt two German notions of academic freedom at odds with the current conception:

- *Lehrfreiheit*, or “teaching freedom,” embodying the idea that “professors should be free to conduct research and publish findings without fear of reproof from the church or state”; and denoting “the authority to determine the content of courses and lectures”; and
- *Lehrfreiheit*, or “learning freedom,” which was “a corollary right of students to determine the course of their studies for themselves.”²¹

B. *The 1915 Declaration of Principles*

The Committee on Academic Freedom and Academic Tenure of the American Association of University Professors (“AAUP”) formulated a statement of principles on academic freedom and academic tenure known as *The 1915 Declaration of Principles* (the “Declaration”), stating that the term “academic freedom” has two applications defined by these two concepts.²² But the Declaration adapted just the concept of *Lehrfreiheit* to the American university, with the goal of gaining a measure of professional autonomy from lay administrators and trustees.²³ This statement was amended in 1925, and later codified in a 1940 *Statement of Principles on Academic Freedom and Tenure* (the “1940 Statement”), which has been endorsed since by most American universities.²⁴

19 Areen, *supra* note 13, at 955.

20 *Id.* at 955–56.

21 *Urofsky*, 216 F.3d at 410; *see also* Metzger, *supra* note 12, at 1269 (“In its native habitat,” *Lehrfreiheit* “referred to the statutory right of full and associate professors, who were salaried civil servants, to discharge their professional duties outside the chain of command that encompassed other government officials. It allowed them to decide on the content of their lectures and to publish the findings of their research without seeking prior ministerial or ecclesiastical approval or fearing state or church reproof; it protected the restiveness of academic intellect from the obedience norms of hierarchy.”; *Lernfreiheit* “amounted to a disclaimer by the university of any control over the students’ course of study save that which they needed to prepare them for state professional examinations or to qualify them for an academic teaching license. It also absolved the university of any responsibility for students’ private conduct, provided they kept the peace and paid their bills.”).

22 American Association of University Professors, *The 1915 Declaration of Principles*, in *ACADEMIC FREEDOM AND TENURE* 155 (Louis Joughin ed., 1969) [hereinafter Declaration].

23 *Urofsky*, 216 F.3d at 410 (citing also Byrne, *supra* note 1, at 253); *see also* Metzger, *supra* note 12, at 1271 (“One alteration was tantamount to an amputation: on the opening page of its report, the members of the Seligman committee announced that they would dispense with the principle of *Lernfreiheit*.”).

24 *Urofsky*, 216 F.3d at 411 (citing Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?*, 40 *WAYNE L. REV.* 1, 4–5 (1993)).

The AAUP defined academic freedom as the “freedom of inquiry and research, freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”²⁵ The last of these was a material expansion on *Lehrfreiheit*, as extramural utterances that do not relate to teaching or research and do not fall in the area of the speaker’s acknowledged expertise.²⁶ Concerning whose right it was to assert these freedoms, the AAUP said academic freedom is “a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation or penalization....”²⁷

Academic freedom, as conceptualized in the Declaration, made the rights of individual faculty preeminent.²⁸ It recognized just two notable limitations: First, the so-called “limitations clause” of the Declaration exempted “proprietary school[s] or college[s] designed for the propagation of specific doctrines,” serving a proprietary trust instead of public trust, and fit within this category certain private and religious institutions, provided they make full disclosure of the restrictions on academic freedom to prospective faculty and donors.²⁹ By 1970, when the AAUP added interpretive comments to the 1940 Statement, the AAUP concluded that most church-related institutions no longer needed or desired the departure and decided no longer to endorse it, although it is plain that many private colleges have more narrowly interpreted academic freedom than public academic institutions, as was their right from the beginning.

Second, the Declaration indicated that academic freedom was not a defense to “charges of habitual neglect of assigned duties, on the part of individual teachers, and concerning charges of grave moral delinquency,” concerning which the AAUP stated lay governing boards are “competent to judge.”³⁰ According to the 1940 Statement, teachers “should be careful not to introduce into their teaching controversial matter which has no relation to their subject.”³¹ Beginning in 1915, faculty were expected to display “dignity, courtesy and temperateness,” to have a “fair and judicial mind,” and demonstrate “patient and sincere inquiry.”³² The “academic profession” itself could exercise judgment about the content of faculty teaching, discussion and inquiry.³³ The 1970 interpretive comments anticipated

25 *Id.*

26 Metzger, *supra* note 12, at 1274.

27 *Urofsky*, 216 F.3d at 411 (citing Stuller, *supra* note 18, at 302 (citing Declaration, *supra* note 23, at 155).

28 Metzger, *supra* note 12, at 1284 (“[A]cademic freedom stood for the freedom of the academic, not for the freedom of the academy.”); Elizabeth Mertz, Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?* 82 Nw. U. L. REV. 492, 518 (1988).

29 Declaration, *supra* note 23, at 155.

30 *Id.*

31 Am. Ass’n of Univ. Professors, The 1940 Statement of Principles on Academic Freedom and Tenure, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [hereinafter 1940 Statement].

32 *Id.*

33 *Id.* (“The responsibility of the university teacher is primarily to the public itself, and to the

that any dismissal for cause of a continuous appointment would be considered by both a faculty committee and the governing board of the institution after a hearing if facts are in dispute.³⁴ Exclusively in the event of “moral turpitude,” teachers on continuous appointment would be entitled to at least one year’s salary following dismissal.³⁵ Moral turpitude involved not merely behavior warranting discharge, but that which “would evoke condemnation by the academic community generally.”³⁶

Set aside by the Declaration was not only *Lernfreiheit*, but also the German concept known as *Freiheit der Wissenschaft* or literally “freedom of science,” where science meant the study of everything taught by the university or the study of things for themselves and for their ultimate meanings.³⁷ Professor Metzger refers to the *Freiheit der Wissenschaft* as the tertium quid of academic freedom. It was “the university’s right, under the direction of its senior professors organized into separate faculties and a common senate, to control its internal affairs.”³⁸ Without specific reference to *Freiheit der Wissenschaft*, Professor Areen described something like it as the “governance dimension” of academic freedom.³⁹ Whereas Professor Metzger concluded the Declaration is silent on *Freiheit der Wissenschaft*,⁴⁰ Professor Areen finds this support for it in the Declaration: “It is ... not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by this declaration of principles.”⁴¹ Either way, the governance dimension is not a prominent theme of the Declaration remotely like *Lehrfreiheit*.

As grounds for academic freedom, the Declaration dipped into what today we might call public goods or collective action theory associated with Paul Samuelson and Mancur Olson.⁴² Academic freedom was justified “as a means of advancing the search for truth,” rather than as a manifestation of a First Amendment right.⁴³

judgment of his own profession.”); *id.* (“It is ... inadmissible that the power of determining when departures from the requirements of the scientific spirit and method have occurred, should be vested in bodies not composed of members of the academic profession.”); *id.* (“It is ... the absolute freedom of thought, of inquiry, of discussion, and of teaching, of the academic profession, that is asserted by this declaration of principles.”).

34 *Id.*

35 *Id.*

36 *Id.*

37 HOFSTADTER & METZGER, *supra* note 18, at 373.

38 Metzger, *supra* note 12, at 1270.

39 Areen, *supra* note 13, at 947.

40 Metzger, *supra* note 12, at 1277 (“Of the link between individual freedom and corporate autonomy—the link formed in the long historic struggle of the studium against the imperium and sacerdotium—the [Declaration] had nothing to say.”).

41 Areen, *supra* note 13, at 956.

42 Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

43 *Urofsky*, 216 F.3d at 411.

It was in furtherance of a “public trust.”⁴⁴ In fact, the *Declaration* stated, “The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession.”⁴⁵ The 1940 Statement reaffirmed that academic freedom is essential to enable academic institutions to be “conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.”⁴⁶

Originally, academic freedom was a professional norm, rather than constitutional liberty. It could be vindicated by professors as a matter of contract law through tenure or otherwise. At the time, although there was tension between faculty and trustees, federal or state governments allegedly “largely refrained from any involvement in internal university affairs.”⁴⁷ But this was to change radically in the 1950s, as the long shadow of communism fell across Eastern Europe and fear gripped Americans concerning the communists who could be among us.

C. *Academic Freedom Meets McCarthyism*

Once McCarthyism took root in America, the focus of academic freedom was bound to shift as states enacted laws designed to root out communist sympathizers and required academic boards to enforce them. The cases *Adler v. Board of Education of City of N.Y.*,⁴⁸ *Wieman v. Updegraff*,⁴⁹ *Sweezy v. New Hampshire*,⁵⁰ *Barenblatt v. United States*,⁵¹ and *Shelton v. Tucker*⁵² were the first to invoke academic freedom, but they addressed quite different contests than the struggle between faculty and institution that was the soil from which the idea germinated. The issue in these cases was not the independence of faculty in teaching, research, or writing from the university board of trustees, but rather whether the state could test the democratic loyalty of faculty. The state was the university or its board of governors or regents. In this sense, the interests of the academic institution and of the faculty were formally at odds; however, many universities were reluctant participants in the enterprise. Academic freedom emerged in these cases in dissenting or concurring opinions as benefiting faculty. The idea of academic freedom benefiting universities and students also emerged but in a coordinate fashion supportive of faculty.

Irving Adler was a New York City high school teacher terminated for refusing to answer this question required by the 1949 New York State “Feinberg Law”: “Are you now or have you ever been a member of the Community Party?” In *Adler v.*

44 Declaration, *supra* note 23, at 155.

45 *Id.*

46 1940 Statement, *supra* note 32.

47 *Urofsky*, 216 F.3d at 411 n.10 (citing *Byrne*, *supra* note 1).

48 342 U.S. 485 (1952).

49 344 U.S. 183 (1952).

50 354 U.S. 234 (1957).

51 360 U.S. 109 (1959).

52 364 U.S. 479 (1960).

Board of Education, appellants sought a declaratory judgment against the Board of Education of the City of New York that the Feinberg Law, and rules of the State Board of Regents promulgated thereunder, violated free speech and assembly and the due process clause of the Fourteenth Amendment.⁵³ The Court disagreed and upheld the Feinberg Law, including its limitation on membership in certain organizations. "Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."⁵⁴ The faculty lost.

In dissent, Justices Douglas, formerly a tenured professor of law at Yale University, and Justice Black invoked academic freedom for the first time and opined, "There can be no real academic freedom" in a police state marked by "constant surveillance" and scrutiny of utterances.⁵⁵ They continued, "The very threat of such a procedure is certain to raise havoc with academic freedom":

The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should being. This, I think is what happens when a censor looks over a teacher's shoulder. This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect.⁵⁶

Justices Douglas and Black associated academic freedom with faculty, freedom of inquiry, and the pursuit of truth. In particular, Justices Douglas and Black wrote that a teacher's "private life, her political philosophy, her social creed should not be the cause of reprisals against her."⁵⁷ Justice Black added separately:

[A] policy of freedom is in my judgment embodied in the First Amendment and made applicable to the states by the Fourteenth. Because of this policy public officials cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with.⁵⁸

Justice Frankfurter, formerly a tenured professor of law at Harvard University, also dissented in *Adler* but on jurisdictional grounds such as standing and ripeness. For him there was too much uncertainty about the operation of the law and rules and too much at stake to decide the case. He wrote:

The broad, generalized claims urged at the bar touch the deepest interests of a democratic society: its right to self-preservation and ample scope for the

53 342 U.S. 485, 487 (1952).

54 *Id.* at 493.

55 *Id.* at 510 (Douglas and Black, JJ. dissenting).

56 *Id.* at 510–11 (Douglas and Black, JJ. dissenting).

57 *Id.* at 511.

58 *Id.* at 497 (Black, J. dissenting).

individual's freedom, especially the teacher's freedom of thought, inquiry and expression. No problem of a free society is probably more difficult than the reconciliation or accommodation of these too often conflicting interests.⁵⁹

Whereas McCarthyism prevailed in *Adler*, it did not in *Wieman v. Updegraff*.⁶⁰ The appellants were faculty members and staff of Oklahoma Agricultural and Mechanical College who declined to subscribe to a loyalty oath that they were not then or for five years before affiliated with or members of organizations listed by the U.S. Attorney General or other authorized federal agencies as communist front or subversive organizations.⁶¹ Appellee Updegraff and a few other citizen taxpayers took it upon themselves to bring suit to enjoin state officials from paying further compensation to the appellants, who intervened to challenge the validity of the Oklahoma law on the grounds that, inter alia, it violated due process.⁶² The Court struck the law as a violation of due process without reference to academic freedom. The faculty prevailed against the citizen taxpayer without any direct adversity to the college.

In concurrence, Justices Frankfurter and Douglass invoked academic freedom as follows:

By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition ... has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.⁶³

The two justices associated academic freedom with faculty as an enhanced First Amendment right critical to freedom of thought and, relatedly, democracy, because "public opinion is the ultimate reliance of our society" and the opinion can "be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens."⁶⁴ In contrast, they said, "no totalitarian government is prepared to face the consequences of creating free universities."⁶⁵ They continued by recognizing academic freedom as a liberty of teachers at all levels from the lowest grades to the highest:

59 *Id.* at 504 (Frankfurter, J. dissenting).

60 344 U.S. 183 (1952).

61 *Id.* at 216.

62 *Id.*

63 *Id.* at 221 (Frankfurter and Douglas, JJ., concurring).

64 *Id.*

65 *Id.* at 222 (Frankfurter and Douglas, JJ., concurring).

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 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.⁶⁶

In *Wieman*, academic freedom was to Justices Frankfurter and Douglas a supplemental First Amendment liberty available to faculty against an extramural threat by the state to freedom of thought and inquiry.

Following closely on the heels of this decision was *Sweezy v. New Hampshire*,⁶⁷ which addressed academic freedom in the plurality opinion in a similar way. Marxist economist Paul Sweezy was a lecturer at the University of New Hampshire. The New Hampshire Attorney General began investigating Professor Sweezy, pursuant to New Hampshire's law against "subversive activities" and "subversive organizations" enacted in 1951.⁶⁸ When he refused to answer questions about any socialistic content in his lecture or to disclose his knowledge of the Progressive Party and its adherents, the Attorney General tried to compel answers. When Professor Sweezy refused he was eventually jailed for contempt.⁶⁹ A plurality (Warren, Black, Douglas, Brennan, JJ.) ruled that the state "unquestionably" infringed the professor's "liberties in the areas of academic freedom and political expression"⁷⁰ but vacated his contempt conviction not on First Amendment grounds, but rather because it violated due process.⁷¹ The plurality observed,

66 *Id.* at 221 (Frankfurter and Douglas, JJ., concurring).

67 354 U.S. 234 (1957).

68 *Id.* at 236.

69 *See id.* at 240–45.

70 *Id.* at 250.

71 *Id.* at 255 (explained in *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) as follows: "[T]he plurality did not vacate Sweezy's contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process.").

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁷²

Here, the Court first seriously associated universities and students with academic freedom, although in a manner assumed congruent with faculty interests, all in furtherance of freedom of inquiry as a collective good critical to the nation.

Concurring in the result, Justices Frankfurter and Harlan relied explicitly on academic freedom in concluding that lecturer Sweezy's contempt citation offended the Constitution. They were no less insistent about identifying academic freedom with the public good and urged limiting intrusion into the freedom only "for reasons that are exigent and obviously compelling" for fear of otherwise chilling the "ardor and fearlessness" of academic inquiry⁷³ Justice Frankfurter wrote, and Justice Harlan agreed:

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—"to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself....

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study.⁷⁴

In *Sweezy*, academic freedom was to the concurrence a liberty benefiting academic institutions, faculty, and students, if not primarily the first of these,

72 *Id.* at 250.

73 *Id.* at 262 (Frankfurter and Harlan, JJ., concurring in result).

74 *Id.* at 262–63 (*quoting* from Conference of Representatives of the Univ. of Cape Town and the Univ. of the Witwatersrand, the Open Universities in South Africa iii (1957)).

counterpoised to external interference by the state.⁷⁵ The facts of the case did not require Justices Frankfurter or Harlan to consider how to sort out any divergent interests of institutions, faculty, and students. Nevertheless, courts have since construed the “four essential freedoms of a university” that they incanted to accord priority to the university.

Academic freedom came into focus again a couple years later in *Barenblatt v. United States*.⁷⁶ The Subcommittee of the House Committee on Un-American Activities summoned to testify Lloyd Barenblatt, a professor of psychology at Vassar College, after another witness claimed that Barenblatt was a communist. On the basis of freedom of speech, thought, press and association, Barenblatt refused to answer a series of questions such as “Have you ever been a member of the Communist Party?”⁷⁷ He did not invoke the Fifth Amendment. The Subcommittee certified the matter for contempt proceedings that led to a general sentence of six months’ imprisonment and fine. Notwithstanding *Sweezy*, which the Court said was not to the contrary,⁷⁸ the Court affirmed the conviction, explaining:

[B]roadly viewed, inquires cannot be made into the teaching that is pursued in any of our educational institutions. When *academic teaching-freedom* and its corollary *learning-freedom*, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.⁷⁹

The Court was not persuaded by Barenblatt, trying to analogize to Sweezy’s lecturing, that what was at stake in his case was the “theoretical classroom discussion of communism.”⁸⁰ Instead, the Court said this case concerned inquiry into the extent to which the Communist Party had infiltrated universities.⁸¹ As such, the Court implied that academic freedom was something belonging to Sweezy as a faculty member, in comparison to the university: “An educational institution is not a constitutional sanctuary from inquiry” by Congress into such matters.⁸² The use by the Court of the hyphenated phrase, “academic teaching-freedom,” is also telling about the meaning the Court gave to academic freedom. Academic freedom was about teaching, not the institution per se. Teaching was not at issue, so neither

75 *Grutter v. Bollinger*, 539 U.S. 306, 362 (2003) (Thomas and Scalia, JJ. concurring in part and dissenting in part) (“Much of the rhetoric in Justice Frankfurter’s opinion was devoted to the personal right of Sweezy to free speech.”).

76 360 U.S. 109 (1959).

77 *Id.* at 114.

78 *Id.* at 129.

79 *Id.* at 112 (emphasis added).

80 *Id.* at 130.

81 *Id.* at 129.

82 *Id.* at 112.

was academic teaching freedom. “[I]ts corollary learning freedom, so essential to the well-being of the Nation” is the first reference by the Court to *Lernfreiheit*.

Justices Black and Douglas bitterly dissented without reference to academic freedom, saying that the Court’s balancing test was “closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is reasonable to do so.”⁸³

One year later, the Court took up academic freedom again in *Shelton v. Tucker*.⁸⁴ Teachers and an associate professor declined to file an affidavit required by an Arkansas statute of all faculty in state-supported schools or colleges, asking them to list every organization to which they belonged or regularly contributed within the preceding five years. The scholars separately sued the school district and University of Arkansas on the basis of “their rights to personal, associational, and academic liberty, protected by the Due Process Clause of the Fourteenth Amendment.”⁸⁵ The Court (including Justice Douglas) struck the statute 5–4 due to its “unlimited and indiscriminate sweep” and “comprehensive interference with associational freedom,” going “far beyond what might be justified in the exercise of the State’s legitimate inquiry into the fitness and competency of its teachers.”⁸⁶ The Court quoted from Justice Frankfurter’s concurring opinion in *Wieman* and from *Sweezy* in connection with their warning against the “unwarranted inhibition upon the free spirit of teachers” and its chilling effect on scholarship.⁸⁷ Without specifically referencing academic freedom, the Court did so indirectly by invoking the constitutional freedoms available to teachers to protect “freedom of thought” and “freedom to inquire” under the Bill of Rights and Fourteenth Amendment.⁸⁸

As the first evidence of doctrinal confusion, Justice Frankfurter did not approve of the majority’s use of his concurrence. He and Justice Harlan, among others (i.e., Justices Clark and Whittaker), dissented. Justice Frankfurter said his dissent was not due to “put[ting] a low value on academic freedom,” but “because that very freedom in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers.”⁸⁹ Likewise, Justice Harlan argued, “It is surely indisputable that a State has the right to choose its teachers on the basis of fitness.”⁹⁰ Here was affirmation that in their view academic freedom is primarily an institutional liberty, in contrast to the majority’s reading of the same and earlier language treating academic freedom as an individual liberty benefiting faculty. Justice Frankfurter explained there was a limitation to institutional academic freedom: “if the information gathered by the required affidavits is used to further a

83 *Id.* at 143 (Douglas and Black, JJ dissenting); *accord id.* at 1114 (Brennan, J., dissenting).

84 364 U.S. 479, 480 (1960).

85 *Id.* at 484–85.

86 *Id.* at 490.

87 *Id.* at 487 (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring op.) and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

88 *Id.*

89 *Id.* at 495–96 (Frankfurter, J. dissenting).

90 *Id.* at 497 (Harlan, J. dissenting).

scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment."⁹¹ Put otherwise, some forms of viewpoint discrimination exercised by an academic institution would, in Justice Frankfurter's view, violate academic freedom.

Two more cases decided in 1967, but with roots in the McCarthyite period, may be viewed in some respects as a transition to modern litigation involving academic freedom. In both *Keyishian v. Board of Regents of University of State of N.Y.*⁹² and *Whitehill v. Elkins*,⁹³ the board of regents of the state university systems enforced laws against sedition stemming from the 1950s or earlier by adopting administrative rules.⁹⁴ Although not their direct employer, the board of regents also was not as independent from academics as the attorney generals who were central protagonists in the preceding cases besides *Adler*. A contest between professor and institutional governance reemerged but incident to the state's continuing interest in the loyalties of its employees. The majority in both cases aligned academic freedom predominately with faculty, but strong dissents in both cases denied that the liberty was even at issue as opposed to institutional autonomy in hiring.

In *Whitehill v. Elkins*,⁹⁵ an oath was required by a 1957 Maryland law and pursuant thereto the board of regents.⁹⁶ When appellant White refused to sign the oath, indicating that he would not engage in an attempt to overthrow federal, state or local government, he was denied employment in the state university as a temporary lecturer.⁹⁷ Quoting extensively from the majority decision in *Sweezy*, the Court observed, "The continuing surveillance which this type of law places on teachers is hostile to academic freedom."⁹⁸ Once again, the 6–3 majority, with Justice Douglas writing for the Court, conveyed its view that academic freedom benefits primarily faculty, but the Court struck the oath on the basis of overbreadth, which it said "may deter the flowering of academic freedom as much as successive suits for perjury."⁹⁹ Three justices in dissent, including Justice Harlan (Harlan, Stewart and White, JJ.), were not persuaded the oath had any bearing on freedom of speech or association.¹⁰⁰ They complained, "References to ... controversial discussions,

91 *Id.* at 496 (Frankfurter, J. dissenting).

92 385 U.S. 589 (1967).

93 389 U.S. 54 (1967).

94 *Whitehill*, 389 U.S. at 56 (oath "prepared by the Attorney General and approved by the Board of Regents that has exclusive management of the university"); *Keyishian*, 385 U.S. at 594–95 (oath was in the form of a certificate required by the Board of Regents).

95 389 U.S. 54.

96 *Id.* at 56.

97 *See id.* at 55–56; *accord id.* at 62 (Harlan, Stewart and White, JJ., dissenting); *cf.* *Barenblatt v. United States*, 360 U.S. 109, 112, 129, 130 (1959) (the Court recognized academic freedom element, but upheld contempt conviction of teaching fellow who refused to answer questions about Communist Party membership, since investigation was not directed at controlling what was taught at university but at overthrow of government).

98 *Whitehill*, 389 U.S. 59–60.

99 *Id.* at 62.

100 *Id.* at 63 (Harlan, Stewart and White, JJ., dissenting).

support of minority candidates, academic freedom and the like cannot disguise the fact that Whitehill was asked simply to disclaim actual, present activity amounting in effect to treasonable conduct.”¹⁰¹

In *Keyishian v. Board of Regents of University of State of N.Y.*,¹⁰² the Court once again considered the Feinberg Law and this time ruled it unconstitutional. At issue was an oath in the form of a certificate required by the board of regents pursuant to the Feinberg Law, asking appellants who were faculty and nonfaculty members of state universities whether they were communists, and if they were, whether they had communicated that fact to the president of the state university.¹⁰³ The New York statutory scheme was complex, listing as grounds for removal from the public school system or state employment treasonable or seditious words or acts, barring from employment in public universities any person willfully advocating or teaching a doctrine of forcible overthrow of government, and disqualifying public school employees involved with the distribution, advocacy of, or teaching of a doctrine of forcible overthrow of government.¹⁰⁴

The Court receded from *Adler* and decided 5–4 that the Feinberg Law was unconstitutionally vague under the First Amendment.¹⁰⁵ Quoting liberally from *Sweezy*, the Court expressed concern about the stifling and chilling impact of the New York law on faculty: “It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery.”¹⁰⁶ Interpreting its prior decisions, the Court ruled that *Keyishian* and *Sweezy* were reactions to “content-based regulation” or government efforts “to control or direct the content of the speech engaged in by the university or those affiliated with it.”¹⁰⁷ Justice Brennan, writing for the majority in *Keyishian*, famously observed,

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”-
“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. at 487.... The classroom is peculiarly the “marketplace of ideas.” The Nation’s

101 *Id.* at 62–63 (Harlan, Stewart and White, JJ., dissenting).

102 385 U.S. 589 (1967).

103 *Id.* at 594–95; *accord id.* at 621 (Clark, Harlan, Stewart, and White, JJ., dissenting).

104 *Id.* at 592–95.

105 *Id.* at 594 (“[T]o the extent that *Adler* sustained the provision of the Feinberg Law constituting membership in an organization advocating forcible overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested.”).

106 *Id.* at 604 (“The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”); *id.* at 607–08 n.12 (referencing various studies on the “stifling effect on the academic mind from curtailing freedom of association”).

107 *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198 (1990).

future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, (rather) than through any kind of authoritative selection.”¹⁰⁸

The dissent, including Justices Harlan, Clark, Stewart, and White, disagreed that the case had anything to do with “freedom of speech, freedom of thought, freedom of press, freedom of assembly or of association,” as opposed to the “narrow question” whether the state may disqualify from teaching in its university “one who, after a hearing with full judicial review, is found to have willfully and deliberately advocated, advised, or taught that our Government should be overthrown by force.”¹⁰⁹ Quoting from *Adler*, the dissent articulated the institutional academic autonomy doctrine that guides many courts today when they cautioned,

“A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted.”¹¹⁰

These words from *Adler*, rejected by the majority in *Keyishian*, may today be more influential than Justice Brennan’s memorable words about the transcendent collective good of academic freedom. Some like Professor Byrne now believe that academic freedom as a constitutional matter pertains solely in the event of extramural political inference.¹¹¹ At least during the McCarthyite era, the Court in every case post-*Adler* conceptualized academic freedom as protecting faculty at all grade levels. Beginning with *Sweezy*, the Court also conceived of academic freedom as benefiting institutions and students but in a fashion congruent with the interests of faculty. Even in *Shelton*, the dissent limited the right of the institution autonomously to select teachers by a teacher’s association rights.

No serious commentary during this period addressed how to resolve divergent interests of universities, faculty and students, because McCarthyism was largely an external threat. Universities and boards of regent were state actors required to enforce the law, but not all jumped at the chance. Citizen taxpayers had to step into the gap in *Wieman* and the attorney general in *Sweezy*. In every case except *Adler*, which was overturned in *Keyishian*, faculty prevailed. None of these cases was decided expressly on grounds of academic freedom, but all were decided on the basis of coordinate express liberties such as due process and freedom of association. The opinions emphasized the purpose of academic freedom was to safeguard freedom of inquiry, a “marketplace of ideas,” and “habits of open-mindedness.”

108 *Keyishian*, 385 U.S. at 603.

109 *Id.* at 628–29 (Clark, Harlan, Stewart, and White, JJ., dissenting).

110 *Id.* (quoting *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 493 (1952)).

111 Byrne, *supra* note 1, at 255.

II. Modern Constitutional Paradigms of the Freedom to Teach

The epic struggle between McCarthyism and academia took a back seat in the 1970s. The more fundamental contest over *Lehrfreiheit*, leading in the first place to the articulation of academic freedom, reappeared. Relying on the same case law, decisionmakers reached different conclusions about the lessons of the paeans of Justices Douglas, Frankfurter, and Brennan as relates to academic freedom. Summarizing the juxtaposed conclusions, the U.S. Supreme Court would later too charitably explain: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students,” citing *Keyishian* and *Sweezy*, “but also, and somewhat inconsistently, on autonomous decision making by the academy itself,” citing *Bakke* and Justice Frankfurter’s concurrence in *Sweezy*.¹¹²

No decision from the McCarthy period elaborated any test for lower courts to judge intramural academic disputes. They looked elsewhere to fill in the gap. Sometimes courts turned to First Amendment retaliation law, including the *Pickering* test, then *Connick-Pickering* test, and, most recently, occasionally to the *Garcetti* test. Relatedly, the curricular or school-sponsored speech doctrine began to influence courts in their consideration of academic freedom. Because the cases disproportionately have concerned religious expression, courts also turned to establishment clause precedent. University admissions cases also began to influence academic freedom, until the current period dominated by cases concerning antidiscrimination and antiharassment policies. We examine these modern constitutional paradigms next and their impact on academic freedom.

A. *The Pickering Test*

The U.S. Supreme Court decided *Pickering* in 1968, when Justices Douglas, Black, Harlan, and Brennan were still on the bench.¹¹³ The board of education dismissed a teacher for writing and publishing in a local newspaper a letter to the editor criticizing the board’s alleged overallocation of school funds to athletics and the board and superintendent for failing to share the real reasons they sought additional tax revenues. Relying upon *Wieman*, *Shelton*, and *Keyishian*, the Court

112 *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing *Keyishian*, 385 U.S. at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in result); and *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.)); *see also* *Cooper v. Ross*, 472 F. Supp. 802, 813 (D. Ark. 1979) (“The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference.”); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006) (citing *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146, 1149 (7th Cir. 1999)) (“As we have recognized in the past, academic freedom has two aspects.... ‘[T]he First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries’ and to discuss ideas.’... On the other hand, we have also recognized that a university’s ‘ability to set a curriculum is as much an element of academic freedom as any scholar’s right to express a point of view.’”); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); (citing *Ala. Student Party v. Student Gov’t Ass’n*, 867 F.2d 1344, 1347 (11th Cir. 1989) (citing *Ewing*, 474 U.S. at 226 n.12).

113 *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

roundly criticized the Illinois Supreme Court to the extent its opinion could be read to suggest that teachers may be compelled to relinquish their First Amendment rights to comment on matters of public concern.¹¹⁴

The Court ruled 8–1 that a balancing must occur between the interests of the teacher as a citizen to make these kinds of comments and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.¹¹⁵ In this instance, the Court determined that the teacher made erroneous public statements upon issues then currently the subject of public attention, critical of his employer, but that did not impede the teacher's proper performance of his daily duties in the classroom or interfere with the regular operation of the schools generally.¹¹⁶ In this circumstance, absent proof of false statements made knowingly or recklessly, the Court ruled that the teacher could not be dismissed for the letter.¹¹⁷

Through the early 1980s, the Court elaborated on *Pickering* in several more decisions such as *Perry v. Sindermann*,¹¹⁸ *Mt. Healthy City Board of Education v. Doyle*,¹¹⁹ *Givhan v. Western Line Consolidated School District*,¹²⁰ and *Connick v. Myers*.¹²¹ In *Perry*, the Court determined that the nontenured status of a junior college professor who publicly criticized the policies of the regents did not defeat his free speech claim and that he was entitled to procedural due process, including a hearing.¹²² In *Mt. Healthy*, the Court determined that a school district could still prevail if it would have dismissed a teacher even if his constitutionally protected conduct had not occurred.¹²³ *Givhan*, a junior high school teacher, was dismissed after meeting several times with the principal to complain about employment practices at the school, which she thought were racially discriminatory in purpose or effect.¹²⁴ The Court ruled that the private character of the communication did not negate her constitutional freedom of speech.¹²⁵

Following *Pickering*, courts of appeal have sought to balance the First Amendment rights of professors against the interests of academic institutions as employers in circumstances involving academic freedom, as if First Amendment retaliation law and academic freedom were synonymous concepts. Because the

114 *Id.* at 568.

115 *Id.*

116 *Id.* at 572–73.

117 *Id.* at 573.

118 408 U.S. 593 (1972).

119 429 U.S. 274 (1977).

120 439 U.S. 410 (1979).

121 461 U.S. 138 (1983).

122 408 U.S. at 598, 603.

123 429 U.S. at 576.

124 *Givhan*, 439 U.S. at 413.

125 *Id.* at 415.

costs and benefits to be weighed are so different, the balancing is subjective.¹²⁶ There is no common metric permitting objective comparison. When faculty have prevailed, the courts have emphasized the importance of academic freedom and lack of disruption caused by expression.¹²⁷ When universities have prevailed, the opposite has been true, and the courts have tended to focus on the “four essential freedoms of the university” outlined in *Sweezy*. Few red lines have emerged from the balancing except increasingly (as we shall see) relates to university control of curriculum and methodology, as well as limitations on profane, sexual and religious speech.

The earliest court of appeals decision to apply *Pickering* and *Keyishian* may be *Pred v. Board of Instruction of Dade County, Florida*, where the court ruled that teachers stated a First Amendment claim when they were denied fourth year contracts tantamount to tenure because of their participation in a teachers’ association and by one teacher for advancing demands for campus freedom in the classroom.¹²⁸ Expressly invoking academic freedom and properly conceiving it as about expanding the “marketplace of ideas,” the court emphasized that “[t]he protections of the First Amendment have been given special meaning when teachers have been involved.”¹²⁹

Another early decision reads like a page from Justice Harlan’s dissent in *Keyishian*. In 1969, the court in *Jones v. Hopper* relied on Colorado statutory law granting the board of trustees the control and management of Southern Colorado State College.¹³⁰ The court concluded that *Pickering* posed no obstacle to refuse to reappoint a professor after his term of employment expired, although he claimed it was due to his (1) anti-Vietnam War speech and activities, (2) objection to the disqualification of an applicant for his department because she was Oriental, and

126 The court in *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974), ruled that a nontenured associate professor of a junior college stated a claim for dismissal by reason of supporting a particular candidate for election and having opposed the college administration. Specifically, he was denied tenure because (1) the Young Democrats whom Smith served as sponsor circulated a flyer in a state senate election that upset some townspeople, and the president thought the professor authored it; (2) Smith presented a question about another instructor’s competence to the academic dean, which the dean of the college considered interference; and (3) Smith raised questions about the college administration’s misuse of funds. *Id.* at 336–37. The court determined that the college marshaled no evidence that Smith’s speech interfered with the operation of the college. *Id.* at 340.

127 *Id.*; *Pred v. Bd. of Pub. Inst. of Dade Cnty.*, 415 F.2d 851, 857-58 (5th Cir. 1969) (“[N]o question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.”; “There is no indication that the work of the school or any class was disrupted.”); *James v. Bd. of Educ.*, 461 F.2d 566, 572 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972) (“It is to be noted that in this case, the Board of Education has made no showing whatsoever at any stage of the proceedings that [English teacher] Charles James, by wearing a black armband, threatened to disrupt classroom activities or created any disruption in the school. Nor does the record demonstrate any facts ‘which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities....’”).

128 415 F.2d 851 (5th Cir. 1969).

129 *Id.* at 855–56.

130 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

(3) attack on an English department textbook in a student newspaper.¹³¹ The court offered a spirited defense of institutional academic autonomy as follows:

It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education.¹³²

Likewise, in *Hetrick v. Martin*, the court determined that a university, consistent with the First Amendment, was entitled not to renew a nontenured professor's contract because of displeasure with her pedagogical attitude and teaching methods.¹³³ The court began with what it said the case was not about: academic freedom as discussed in *Keyishian*, *Shelton*, or *Sweezy*; comments on matters of public concern as in *Pickering*; or "a state's effort to restrict in-class utterances or assignments in order to maintain curriculum control."¹³⁴ The court ruled:

Whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students, *Healy v. James*, 408 U.S. 169, 180-81 ... (1972) ... it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.¹³⁵

Institutional academic autonomy as relates to employment and pedagogy has become a theme of *Pickering* jurisprudence, as has protecting criticism against institutional administration as long as it is not too disruptive. Pedagogy was an early subject of *Lehrfreiheit* but not hiring decisions, neglect of duty, and certainly not moral delinquency. Neglect of duty and moral delinquency do not concern academic freedom, yet they repeatedly appear in case law as somehow connected.

On one end of the spectrum is *Mabey v. Reagan*. The court remanded the case due to a questions of fact as to whether the plaintiff's comments at an academic senate meeting, critical of the administration, were protected and whether his department was overstaffed as claimed by the state college.¹³⁶ According to the court, the college had become "one of the battlegrounds of the political and academic conflicts of the middle and late 1960s," when "[c]ivility, even among faculty and administrators, was a major casualty."¹³⁷ The administration was aligned with the "conservative faction," and was quoted in an article referring

131 *Id.* at 1326.

132 *Id.* at 1329.

133 480 F.2d 705 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973).

134 *Id.* at 708-09.

135 *Id.* at 709.

136 537 F.2d 1036 (9th Cir. 1976).

137 *Id.* at 1040.

to younger faculty as “punks” and “damned liars.”¹³⁸ The plaintiff returned the favor during the senate meeting.¹³⁹ Although it was clear that Mabey momentarily disrupted the senate meeting, the court questioned the severity of it, observed that Mabey did not use or incite violence, and determined that the “academic senate is one place where expression of opinions should be most unfettered.”¹⁴⁰ The court called for “a closer look at the facts than the summary disposition has allowed.”¹⁴¹

At the other end of the spectrum is *Adamian v. Lombardi*, where the court upheld dismissal of a professor who played a prominent role in unauthorized student protest during school hours on school property, led raucous catcalls after the university president had asked the audience to be quiet, attempted to stop the governor’s motorcade, and otherwise caused substantial disruption of a duly constituted university function and created a danger of violence.¹⁴²

Other cases in the middle of the disturbance spectrum are more complicated. For example, in *Duke v. North Texas State University*, the court determined that a university teaching assistant, who was dismissed for making speeches using profane language and criticizing university administration and policies, did not state a claim under *Pickering*.¹⁴³ The court decided that the university’s decision was pursuant to a legitimate interest in maintaining “competent faculty” and perpetuating “public confidence” in the university, which the professor’s conduct undermined.¹⁴⁴ The court explained that under *Pickering*, the court must give great weight to the factual findings of academic agencies when reached by correct procedure and supported by substantial evidence to avoid interfering in the “day-to-day operations of schools” and to avoid selecting faculty and staff for colleges and universities.¹⁴⁵ Furthermore, the court ruled that the professor “owed the university a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at the administrators of the university.”¹⁴⁶ Lack of civility is not protected by academic freedom.

Similarly, in *Megill v. Board of Regents*, the court ruled that the failure to grant tenure to a professor who made false and misleading public statements about the university and its president, used profanity and disrupted a meeting, combined one of his courses with another, and gave inadequate supervision to the course did not violate the First Amendment rights of the professor.¹⁴⁷ Neglect of duty is not protected by academic freedom. Nevertheless, balancing the plaintiff’s First

138 *Id.*

139 *Id.*

140 *Id.* at 1048–50.

141 *Id.* at 1051.

142 608 F.2d 1224, 1227–28 (9th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980).

143 469 F.2d 829 (5th Cir. 1973), *cert. denied*, 412 U.S. 932 (1973).

144 *Id.* at 839.

145 *Id.* at 838.

146 *Id.* at 840.

147 541 F.2d 1073 (5th Cir. 1976).

Amendment rights against those of the board of regents, the court determined that it had to favor the board due to the falsity and inaccuracy of the professors' statements and that doing so would not threaten academic freedom as articulated in *Keyishian* in circumstances where, at all levels of the administrative review process, his constitutional rights were recognized.¹⁴⁸ "When his statements and actions fell short of those that the board could rightfully expect of its tenured professors, the state's strong interest in a quality university system and effective teacher contribution to the educational process prevailed."¹⁴⁹

Professors also lost under *Pickering* when the university proved it would have dismissed a professor regardless of his speech; for example, in *Hillis v. Stephen F. Austin State University*, where the university proved dismissal was due to the professor's continual lack of cooperation, abrasive personality, and unacceptable conduct, including refusal to assign a grade to a student as instructed by the department head, which the court declined to treat as a fundamental violation of academic freedom.¹⁵⁰ In *Trotman v. Board of Trustees of Lincoln University*, the court determined that fourteen faculty members' criticism of the university president and his policies and their picketing was protected speech even if strident, but the court remanded for fact finding about whether the defendants would have taken retaliatory action against the faculty anyway due to the disruptive character of their speech.¹⁵¹ Incivility, profanity, and moral delinquency are not protected by academic freedom, yet the courts continue to link them.

B. The Connick-Pickering Test

Because not every appellate court treated, as a threshold question under *Pickering*, whether an employee's speech addresses a matter of public concern, the U.S. Supreme Court revisited *Pickering* in *Connick* in 1983.¹⁵² The result is the modern *Connick-Pickering* test, which examines (1) whether the employee's speech is fairly characterized as constituting speech as a citizen on a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service, (3) whether the speech played a substantial part in the government's challenged employment decision, and (4) whether the government has shown by a preponderance of the evidence that it would have made the same employment decision even in the absence of the protected conduct.¹⁵³ We discuss the first two *Connick-Pickering* tests next.

148 *Id.* at 1085.

149 *Id.* at 1086.

150 665 F.2d 547 (5th Cir. 1982).

151 635 F.2d 216 (3d Cir. 1980).

152 *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

153 *Battle v. Bd. of Regents*, 468 F.3d 755, 759–60 (11th Cir. 2006) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick*, 461 U.S. 138)).

1. *Matters of Public Concern*

In evaluating the threshold prong of the test, whether the employee's speech is a matter of public concern, courts ask whether the speech can fairly be considered to relate to "any matter of political, social or other concern to the community" and whether the "main thrust" of the speech is "essentially public in nature or private, whether the speech was communicated to the public at large or privately to an individual, and what the speaker's motivation in speaking was."¹⁵⁴ Criticizing the relevance of this prong to academics, one observer argued that two schools of thoughts are equally reasonable: (1) what a professor chooses to teach her students in a public university is inherently and always of public concern, as is any intramural speech about university governance; or (2) because a professor's selection of course material constitutes expression that relates only to the workplace, it is never a matter of general public interest.¹⁵⁵ There is a better way to reconcile these views by focusing on whether the speech expands the marketplace of ideas.

Hence, in *Adams v. Trustees of the University of N.C.-Wilmington*, the court determined that a professor's conservative speech regarding academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality in regular columns, books, and on radio and television broadcasts as a commentator were matters of public concern.¹⁵⁶ The speech expanded the marketplace of ideas pertaining to political and social matters. The court of appeals reversed the district court's finding that this speech became private once listed in the professor's promotion application.¹⁵⁷ The university denied him promotion, in the professor's view, because of retaliation and viewpoint discrimination.¹⁵⁸

In contrast, institutional academic autonomy properly took preeminence where a public employee's speech did not expand the marketplace of ideas and concerned matters only of personal interest.¹⁵⁹ For example, in *Clinger v. New Mexico Highlands University, Board of Regents*, the court reiterated that speech concerning individual personnel disputes or internal policies does not typically involve a matter of public concern.¹⁶⁰ The court ruled that a professor failed the first prong of the *Connick-Pickering* test when she (1) claimed retaliation for advocacy before the Faculty Senate of a "no confidence" vote with respect to members of the board of regents, due to their purported failure to comply with an internal policy on the appointment of a new president; (2) criticized a regent as untrustworthy based on the presidential appointment process; (3) criticized another for accepting the position of University President; and (4) criticized a proposed academic reorganization.¹⁶¹

154 *Connick*, 461 U.S. at 146; *Mitchell v. Hillsborough Cnty.*, 468 F.3d 1276, 1283 (11th Cir. 2006).

155 Chang, *supra* note 17, at 941–46.

156 640 F.3d 550, 565 (4th Cir. 2011).

157 *Id.* at 562.

158 *Id.* at 556.

159 *Connick*, 461 U.S. at 146–47.

160 215 F.3d 1162, 1166 (10th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

161 *Id.*

In two exceptional cases, the courts determined that faculty speech critical of their own departments were matters of public concern, but in a manner consistent with the legacy of *Pickering*. The court in *Demers v. Austin* ruled that a professor had addressed a matter of public concern when he wrote and distributed a pamphlet critical of the lack of professional orientation in the communications program of the school.¹⁶² The professor did not focus on personnel issues or internal disputes nor voice personal complaints as much as he made broad proposals to change the direction and focus of the school away from purely scholarly to professional journalism.¹⁶³ In this way, he expanded the marketplace of ideas. In addition, the professor widely distributed the pamphlet to broadcast media, which the court said “reinforce[d] its conclusion that it addressed matters of public concern.”¹⁶⁴

In *Johnson v. Lincoln University*, the court of appeals reversed the district court for determining as a matter of law that a faculty member did not address a matter of public concern in connection with controversies in which he was involved within the chemistry department that often degenerated into name-calling and shouting matches, and letters that he sent to the accreditor regarding the master of human services program and low academic standards generally.¹⁶⁵ Petty disputes with the administration are not protected speech. Academic freedom belongs only to faculty who display “dignity, courtesy and temperateness” and have a “fair and judicial mind.”¹⁶⁶ But the court also found evidence of controversy over educational standards and academic policies that it decided could relate to a matter of public concern and remanded for a trial on the matter.¹⁶⁷ For example, the professor was critical of a master’s degree program that admitted students without a bachelor’s degree and required only a tenth-grade literacy level, which he said would reinforce the view that the academic standards at Black institutions and the qualifications of their students are less than at others.¹⁶⁸

There was nothing so redeeming in *Brown v. Armenti*, where the court ruled a professor’s speech criticizing the university’s president on issues of morale and employee confidence did not involve a matter of public concern.¹⁶⁹ Likewise, in *Gorum v. Sessoms*, the same court added that a professor’s speech assisting and supporting a student with violating the university’s policy against weapons possession, then withdrawing the president’s invitation to speak at a fraternity’s prayer breakfast did not involve a matter of public concern.¹⁷⁰ Professor Finkin has alleged that, although this speech did not advance the search for truth, it should have been protected anyway up to some ill-defined communal standard of uncouth

162 746 F.3d 402, 414–15 (9th Cir. 2014).

163 *Id.* at 416.

164 *Id.*

165 776 F.2d 443, 451 (3d Cir. 1985).

166 *See* 1940 Statement, *supra* note 32.

167 *Id.* at 452.

168 *Id.*

169 247 F.3d 69 (3d Cir. 2001).

170 561 F.3d 179 (3d Cir. 2009).

civil intramural discourse because professors are not mere employees, servants, or agents.¹⁷¹ Professor Finkin draws the boundary at willful obstruction, defamation, and inciting to riot,¹⁷² but the bar set by the Declaration was not so high: “In their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements and to refrain from intemperate or sensational modes of expression.”¹⁷³

Sexual speech is not protected under the Declaration or first prong of *Connick-Pickering* either. The Declaration did not defend grave moral delinquency because it had no bona fide linkage to the public good that academic freedom was designed to protect. Therefore, in *Urofsky v. Gilmore*, the court declined to enjoin a statute restricting college professors from accessing sexually explicit material on computers that were owned or leased by the state. The court determined that the law regulated only the speech of state employees in their capacity as employees, and not as private citizens, and declined to identify any constitutional academic liberty at stake.¹⁷⁴

Similarly, in *Trejo v. Shoben*, the court ruled that a male assistant professor’s sexually charged comments made in the presence of male and female professors and students at an off-campus professional conference were designed to further the professor’s private interests in soliciting female companionship.¹⁷⁵ Likewise, in *Buchanan v. Alexander*, a court ruled that a former professor’s use of profanity and discussion about the professor’s sex life was not speech protected by the First Amendment, such that the university’s sexual harassment policies did not violate the First Amendment as applied to the professor.¹⁷⁶

There was no sharp departure from *Pickering*, once *Connick* became law in the area of personnel disputes, moral delinquency, or pedagogy. Rather, the *Connick-Pickering* test prolongs judicial deference toward pedagogy. For example, in *Boring v. Buncombe County Board of Education*, the court ruled that selection of a play for four students to perform in her advanced acting class involving a divorced mother and three daughters, one a lesbian and another pregnant with an illegitimate child, did not involve a matter of public concern and that even if it did, school officials had a legitimate pedagogical interest in regulating that speech.¹⁷⁷ According to the court, “the four essential freedoms” of a university outlined by Justice Frankfurter in *Sweezy* “should no less obtain in public schools unless quite impracticable or contrary to law.”¹⁷⁸

171 Finkin, *supra* note 15, at 1340.

172 *Id.* at 1345.

173 Declaration, *supra* note 23, at 155.

174 *Urofsky v. Gilmore*, 216 F.3d 401, 409, 415 (4th Cir. 1998), *cert. denied*, 531 U.S. 1070 (2001).

175 319 F.3d 878 (7th Cir. 2003).

176 919 F.3d 847 (5th Cir. 2019), *cert. denied*, 140 S.Ct. 432 (2019).

177 136 F.3d 364 (4th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998).

178 *Id.* at 370.

2. *Weighing Interests*

The second prong of the *Connick-Pickering* test, evaluating whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service, has also prolonged several themes that emerged under *Pickering*. Foremost among them is that disruptive speech by faculty is unprotected. Once again, intemperate speech lacking dignity and courtesy and grave moral delinquency never were protected under the Declaration. In *Jeffries v. Harleston*, the court determined that a Black studies professor who claimed he was removed as department chair (though retained as a tenured professor) due to controversial off-campus speech failed to state a claim because university officials were motivated by a reasonable prediction of disruption to university operations.¹⁷⁹

Similarly, in *Schrier v. University of Colorado*, the court determined that the speech of the terminated chair of the university's medical department criticizing the proposed relocation of the medical campus was on a matter of public concern, but he was unlikely to prevail because of the actual disruption that it caused by impairing the harmony among coworkers; detrimentally impacted working relationships within the school of medicine, impairing his performance as department chair; and interfering with the university's ability to implement the move.¹⁸⁰ The plaintiff maintained that as a professor, he possessed a special constitutional right of academic freedom not enjoyed by other public employees that must also be taken into account, but the court disagreed:

[A]n independent right to academic freedom does not arise under the First Amendment without reference to the attendant right of free expression. Thus, the right to academic freedom is not cognizable without a protected free speech or associational right. Dr. Schrier's argument implies that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees. We decline to construe the First Amendment in a manner that would promote such inequality among similarly situated citizens.¹⁸¹

Academic institutional autonomy also remains a pillar of *Connick-Pickering*. In *Feldman v. Ho*, the court determined that, assuming arguendo a professor's accusation that a colleague engaged in academic misconduct was an issue of public importance, it concerned the manner in which the mathematics department handled its core "business" of choosing and promoting scholars and, thus, was so central to the university's mission that its interests dominated over the professor's interest in speech.¹⁸² The court distinguished a mathematics professor's speech unrelated to his job, speech unrelated to mathematics, and about the rules by which the department evaluates charges of scholarly misconduct.¹⁸³ The court observed that "[a] university's academic independence is protected by the Constitution, just

179 52 F.3d 9 (2d Cir. 1995), *cert. denied*, 516 U.S. 862 (1995).

180 427 F.3d 1253 (10th Cir. 2005).

181 *Id.* at 1266.

182 171 F.3d 494 (7th Cir. 1999), *cert. denied*, 528 U.S. 928 (1999).

183 *Id.* at 497-98.

like a faculty member's own speech,"¹⁸⁴ and "the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."¹⁸⁵

Without another test to apply to lawsuits implicating academic freedom, courts have turned to the *Connick-Pickering* test and wound up merging academic freedom within the protections of First Amendment retaliation law, once again raising the question whether academic freedom has any independent legal significance. It plainly does, if academic freedom is the same as institutional academic autonomy, but, quoting from *Adler*, the dissent in *Keyishian* argued that academic freedom was different. Recognizing the right of institutions to forbid profane and sexual speech in the classroom and to determine the required curriculum for degree programs and minimum course content for professional programs is one thing. Beyond this, *Lehrfreiheit* confers on faculty the authority to determine course content and the content of lectures, excluding controversial subject matter unrelated to the subject. Inasmuch as academic freedom and institutional academic autonomy are not necessarily corollary, it does not benefit academic freedom to confuse them. This becomes even more evident when we consider the curricular speech doctrine.

C. Curricular or School-Sponsored Speech Doctrine

Another paradigm to which courts have turned to evaluate academic freedom as a constitutional liberty is the curricular or school-sponsored speech doctrine. "Curricular speech" has been expansively defined as "all planned school activities including, besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program."¹⁸⁶ It includes "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."¹⁸⁷ As these examples suggest, curriculum speech need not occur in the classroom, but it must be supervised by faculty and "designed to impart particular knowledge or skills to student participants and audiences."¹⁸⁸ It applies in the clinical setting,¹⁸⁹ even to extracurricular programs,¹⁹⁰ and to a school-sponsored social event or class trip, as long as the speech bears the school's imprimatur.¹⁹¹ It may be even broader than this as discussed below.

184 *Id.* at 495.

185 *Id.* at 497.

186 *Lee v. Cnty. Sch. Div.*, 418 F. Supp. 2d 816, 824 (E.D. Va. 2006), *aff'd*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007) (citing *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 367–68 (4th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998)).

187 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

188 *Hazelwood*, 484 U.S. at 271.

189 *See, e.g., Ward v. Members of Bd. of Control of E. Mich. Univ.*, 700 F. Supp. 2d 803, 814 (E.D. Mich. 2010) ("courts have traditionally given public colleges and graduate schools wide latitude 'to create curricular that fit schools' understandings of their educational missions.'... 'This judicial deference to educators in their curriculum decisions is no less applicable in a clinical setting....'").

190 *See, e.g., Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 687 (2010).

191 *See, e.g., Morse v. Frederick*, 551 U.S. 393, 405–06 (2007).

The curricular speech doctrine arose out of the primary and secondary grades and, therefore, has an uneasy fit in the postsecondary academy. In *Edwards v. Aguillard*, the issue was whether a law requiring the teaching of creation science when evolution was taught violated the Establishment Clause.¹⁹² Justice Brennan, writing for the Court, concluded that, especially when a state or local school board must monitor compliance with the Establishment Clause, it should have “considerable discretion” when operating elementary and secondary schools.¹⁹³ The majority considered creation science religious speech, rather than a scientific theory as alleged by the State. The Court expressed concern that students this age “are impressionable and their attendance is involuntary,” in contrast to “college students who voluntarily enroll in courses” and are less susceptible to “undue influence.”¹⁹⁴ Lacking a valid secular purpose, the court struck the “Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act” as in violation of the Establishment Clause.

The State argued that, rather than infringe academic freedom, the Act protected it by requiring a balanced presentation of the theories benefiting students.¹⁹⁵ The dissent led by Justices Scalia and Rehnquist agreed: “Witness after witness urged the legislators to support the Act, so that students would not be ‘indoctrinated’ but would instead be free to decide for themselves, based upon a fair presentation of the scientific evidence, about the origin of life.”¹⁹⁶ Record evidence pointed to “censorship and misrepresentation of scientific information” pertaining to evolution.¹⁹⁷ If true, *Edwards* is one of the few cases where the state sought to liberalize the marketplace of ideas, but the academy opposed and thwarted it.

The definition of academic freedom that the appellate court supplied was decidedly individual in orientation, similar to Justice Frankfurter’s articulation of it in *Wieman*: “Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.”¹⁹⁸ In contrast, the U.S. Supreme Court ruled that academic freedom was not relevant in the circumstances, because teachers are not free to

192 482 U.S. 578, 583 (1987).

193 *Id.* at 583–84; *accord* *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir.1998) (finding that school board had legitimate academic interest in promoting generally acceptable social standards and, thus, could punish teacher for allowing profanity and graphic displays of oral sex in student works); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (finding that state had compelling interest in selection of and requiring adherence to suitable curriculum and that individual teachers did not have right to make such curriculum choices (teacher classroom speech case)).

194 *Edwards*, 482 U.S. at 584 & n.5; *accord id.* at 607 n.7 (Powell and O’Connor, JJ., concurring) (“[T]he difference in maturity between college-age and secondary students may affect the constitutional analysis of a particular public school policy.”) This contrast is why, according to the majority, “the Court has not questioned the authority of state colleges and universities to offer courses on religion or theology.” *Id.* at 584 n.5.

195 *Id.* at 586.

196 *Id.* at 631 (Scalia and Rehnquist, JJ. dissenting).

197 *Id.* at 633; *accord id.* at 624–26.

198 *Id.* at 586 n.6.

teach courses other than as prescribed by the State Board of Education. In any event, the Court decided that the Act diminished academic freedom “by removing the flexibility to teach evolution without also teaching creation science.”¹⁹⁹ The first ruling negated any potential intra-First Amendment conflict between academic freedom and the Establishment Clause by eliminating a class of teachers who Justice Frankfurter had said could exercise academic freedom. *Edwards* establishes that K–12 teachers lack academic freedom.²⁰⁰

Justice Brennan switched sides in *Hazelwood School District v. Kuhlmeier*,²⁰¹ which concerned students in the *Journalism II* class at Hazelwood East High School who wanted to publish a story in the high school newspaper about their peers’ experiences with teen pregnancy and the impact of divorce. The school district prevented it. Justice Brennan was not convinced a high school newspaper amounted to curricular speech,²⁰² but the majority ruled otherwise and held that a school board had considerable leeway when regulating school-sponsored speech, defined generally as “speech that a school ‘affirmatively ... promotes,’ as opposed to speech that it ‘tolerates.’”²⁰³ The Court indicated that it wanted to empower school authorities to control pedagogy and to protect primary and secondary students from material they might not be mature enough to handle:

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school....

[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.²⁰⁴

The court reiterated the importance of showing “substantial deference” to secondary school officials’ decisions about curricular content,²⁰⁵ but specifically declined

199 *Id.*

200 As a result, it is hard to see why the Act’s imposition on the State Board of Education of a curricular requirement should have been actionable by teachers who were among those who brought the suit.

201 484 U.S. 260, 271 (1988).

202 *Id.* at 283.

203 *Id.* at 273 (noting that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

204 *Id.* at 271.

205 *Id.* at 273 (“the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”); *id.* at 273 n.7 (“[E]ducators’ decision with regard to the content of school sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference.”).

to decide “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”²⁰⁶

The curricular speech doctrine should have no bearing on cases at the heart of academic freedom. Both *Kuhlmeier* and *Edwards* arise from a more pedagogically regulated environment than postsecondary institutions, which themselves may fit along a continuum with community colleges and proprietary private schools the most like school districts and public research universities the least like them.²⁰⁷ Both cases also hinge on younger and more impressionable students compelled to attend K–12 school, as compared to postsecondary students who volunteer to enroll. More recently, the Court has tended to deemphasize a concern for the impressionability of youth even in K–12, and has drawn a clear distinction between the maturity of primary and even high school students.²⁰⁸ To the extent impressionability should be a concern at the postsecondary level, the differences between pedagogical regulation and student maturity at the secondary and postsecondary level should impact the applicability of curricular speech doctrine.

But there is little evidence lower courts have taken these differences into account. It has not mattered that neither *Kuhlmeier* nor *Edwards* pitted faculty against institution. Instead, lower courts have readily applied *Kuhlmeier* and *Edwards* to struggles between postsecondary institutions and faculty or students, with the result that when a university’s interests are juxtaposed, the university usually wins. As one district court put it bluntly, “‘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.’”²⁰⁹ The key case upon which this court and many others now rely is the Fourth Circuit’s decision in *Urofsky v. Gilmore*, which reviews the same case law this article examines and concludes as follows:

206 *Id.* at 273 n.7. The Court did not reference its earlier decision in *Ewing* requiring judges reviewing “the substance of a genuinely academic decision” to “show great respect for the faculty’s professional judgment.” *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 & n.11 (1985) (adding that “[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation”); *id.* at 226 (“Added to our concern for lack of standards is a reluctant to trench on the prerogatives of state and local educational institutions and our responsibilities to safeguard their academic freedom, ‘a special concern of the First Amendment.’”).

207 *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (“[W]e are not unmindful of the differences in maturity between university and high school students. Age, maturity, and sophistication level of the students will be factored in determining whether the restriction is reasonably related to legitimate pedagogical concerns.”).

208 *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (observing that “[w]e have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy”) (citing, *inter alia*, *Bd. of Educ. of Westside Comm. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

209 *Martinez v. Univ. of Puerto Rico*, No. CIV 061713 JAF, 2006 WL 3791360 (D.P.R. Dec. 22, 2006) (citing *Urofsky v. Gilmore*, 216 F.3d 401, 490 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *accord Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204, 216 (D. Conn. 2005) (“No court has ever held that a university professor has a First Amendment right of academic freedom to participate in ... performing research under any particular grant.”).

[C]ases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual.... [T]he [Supreme] Court has focused its discussions of academic freedom solely on issues of institutional autonomy.... Significantly, the Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so.²¹⁰

This outcome vindicating *Adler* is now the majority rule in contests between faculty and institutions that more often than not concern religion.²¹¹

Kuhlmeier influences application of the first prong of the *Connick-Pickering* test in classroom-related cases by undermining a professor's claim that speech in the classroom concerns the public. For example, in *Kenney v. Genesee Valley Board of Cooperative Education Services*, the district court considered a criminal justice instructor's presentation to other teachers on the topic of law enforcement and ballistics inclusive of an individual committing suicide curricular in nature and, therefore, not a matter of public concern.²¹² The instructor alleged that two of his supervisors approved use of the video and that the video was directly related to the curriculum that the plaintiff was employed to teach, but the superintendent terminated him anyway.²¹³ The court dismissed his free speech retaliation claim related to academic freedom.²¹⁴ Were the video shown merely to stoke controversy unrelated to the subject matter of the course, it would not have been protected by academic freedom, but in this case the video had no such purpose; it was shown to demonstrate the science and math of ballistics and the effects of bullets on human bodies.

Kuhlmeier also influences the second prong of the *Connick-Pickering* test when applied to instructor speech. For example, in *Evans-Marshall v. Board of Education*, a high school literature teacher alleged that she was retaliated against for the curricular and pedagogical choices she made while teaching, as well as for exercising her First Amendment rights.²¹⁵ The court agreed with her that teaching literature addressing homosexuality, drug abuse, rape, religious killing, and

210 *Urofsky*, 216 F.3d at 414–15.

211 *See, e.g.*, *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, *Bishop v. Delchamps*, 505 U.S. 1218 (1992); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006); *cf.* *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007) (elementary school teacher properly dismissed when a student complaint about her response to a student's question, asking whether she had participated in a political demonstration, and responded that she showed solidarity with antiwar demonstrators by honking her horn).

212 No. 07-CV-6442 CJS, 2008 WL 343110, at *4 (W.D.N.Y. Feb. 6, 2008) (citing *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 697 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988))).

213 *Id.*

214 *Id.* at *5.

215 *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, No. 3:03cv091, 2008 WL 2987174 (S.D. Ohio July 30, 2008) (“[I]t is not clear that *Garcetti* necessarily applies to the facts of this case. Thus, absent Sixth Circuit or further Supreme Court guidance to the contrary, this Court will continue to apply the traditional *Pickering-Connick* approach to cases involving in-class speech by primary and secondary public school teachers.”).

destruction of religious objects was a matter of public concern,²¹⁶ but the court found that the school district's "interest in regulating the Plaintiff's selection of instructional materials and methods of instruction far outweighed the Plaintiff's right to use whatever supplemental materials and methods she chose."²¹⁷ Citing *Kuhlmeier* with echoes from *Piggee*, the court explained:

While the Board's regular practice might have been to allow its teachers the latitude to select supplemental materials and incorporate instructional methods of their choosing, this does not give a teacher the 'right' to do so, if the administrators or the Board do not approve of such selections. For example, a Spanish teacher should not have the 'right' to supplement his Spanish textbook with instructional materials on how to speak Japanese, if the administrators do not approve. Or, a trigonometry teacher who decides that mathematical basics are 'passé' should not have the 'right' to implement a supplemental new-wave method of teaching mathematics, if the Board does not concur.²¹⁸

Of course, these hypotheticals are easier than the one the court confronted involving an instructor teaching the discipline she was hired to teach. Had the instructor been teaching college literature and touched on these subjects not merely to provoke controversy, but in furtherance of her assigned subject matter, this again would have been a core academic freedom concern. Teaching trigonometry in literature amounts to neglect of duty and was not protected by academic freedom as articulated in the Declaration. Institutional academic autonomy takes precedence in this event.

The district courts in *Evans-Marshall* and *Kenney* relied in part on *Lee v. York County School Division*, where the Fourth Circuit held (based on *Kuhlmeier*) religious speech posted by a high school teacher on her classroom bulletin board curricular in character and, thus, not of public interest.²¹⁹ In concluding this was "nothing more than an ordinary employment dispute," the court added, "A school need not tolerate student [or teacher] speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school."²²⁰ The idea that all religious speech is inconsistent with basic education is hardly self-evident and, in any event, once again veers toward a type of control over curriculum inconsistent with *Lehrfreiheit*, as long as the speech relates to course subject matter.

216 *Id.* at *10.

217 *Id.* at *13.

218 *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) ("Although neither the Supreme Court nor the Sixth Circuit has addressed the balance between a public primary or secondary school district's interest in dictating the curricular speech of its teachers with a teacher's interest in independently choosing such curriculum, without the factual component of preapproval of the speech in question, this holding is in concert with both Supreme Court and Sixth Circuit decisions on similar issues....")).

219 *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007).

220 *Id.* at 696.

Kuhlmeier is materially influencing two key *Connick-Pickering* tests that determine whether a professor's classroom-related speech is protected under the First Amendment, generally in a manner vindicating institutional academic autonomy at the expense of *Lehrfreiheit*. If all curricular speech is unprotected by academic freedom, then the doctrine has no relation any longer to its underpinnings. *Lehrfreiheit* always had curriculum within its sites, including course and lecture content, excluding profane and sexual speech and gratuitously controversial speech. Unless academic freedom now means something totally different than it did at the start, the *Kuhlmeier* paradigm should be abandoned when evaluating academic freedom.

D. Religious Speech in the Classroom

Courts remain especially wary of religious speech in universities in accord with the curricular speech doctrine stemming from *Edwards*, but then academic freedom and the liberalism in which it is grounded have long been at odds with strong religious belief.²²¹ For example, the Eleventh Circuit held in *Bishop v. Aronov*²²² that a public university did not infringe an exercise physiology professor's academic freedom or free speech rights when it directed him to discontinue "(1) the interjection of religious beliefs and/or preferences during instructional time periods and (2) optional classes where a 'Christian Perspective' of an academic topic is delivered."²²³ In class, Professor Bishop commented upon what, to his understanding, was evidence "of the creative force behind human physiology."²²⁴ He explained that Christianity colored his outlook and conduct, but added, "If that is not your bias, that is fine. You need, however, to filter everything I say with that (Christian bias) filter."²²⁵ He also organized an optional after-class meeting wherein he lectured on and discussed "Evidences of God in Human Physiology."²²⁶

Notably, Professor Bishop was teaching the course and curriculum assigned to him. These were not at issue, as compared to his lecture content at the core of academic freedom. Plaintiff's supervisor delivered a memorandum to him, ordering him to discontinue "interjection of religious beliefs and/or preferences, during instructional time periods and optional classes where a 'Christian Perspective' of an academic topic is delivered." The plaintiff filed suit against the board of trustees when the university refused to withdraw the memorandum order.

The Eleventh Circuit held that, although the university could not limit the professor's expression on his own time, in public forums on campus, or in

221 See Stanley Fish, *Academic Freedom: How Odd Is That?* 88 TEX. L. REV. 171, 173–74 (2009) ("Strong religious beliefs have always posed a problem for the doctrine of academic freedom because they pose a problem for liberalism in general.").

222 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992).

223 *Id.* at 1076.

224 *Id.* at 1068.

225 *Id.*

226 *Id.* at 1068–69.

publications,²²⁷ the university could direct him “to refrain from expression of religious viewpoints in the classroom” and, according to the court, “must have the final say” in a dispute about a “matter of content in the courses” taught.²²⁸ The Declaration emphasized that academic freedom must prevent exclusion “from the teachings of the university unpopular or dangerous subjects.”²²⁹ It specifically protected “freedom of teaching within the university or college and freedom of extramural utterance and action,” but the court ruled that “Dr. Bishop’s interest in academic freedom and free speech do not displace the University’s interest inside the classroom.”²³⁰

The court drew the principle of *Lehrfreiheit* into question when it opined, “[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.”²³¹ Courts have expressed the same sentiment about educator speech in K–12 classrooms to the point of stating that the school system “hires” their speech.²³²

The Seventh Circuit in *Piggee v. Carl Sandburg College* held similar to the Eleventh Circuit with respect to the religious expression of a cosmetology instructor at a community college during a clinic.²³³ The court vindicated the institution’s institutional autonomy over the instructor’s First Amendment liberties when a student complained about her placing religious pamphlets on the sinfulness of homosexuality in his smock during clinical instruction time as he was preparing to leave for the day and invited him to read and discuss them with her later.²³⁴ The college determined that the instructor had perpetrated sexual harassment and chose not to renew her contract.²³⁵ She sued and argued that the clinical beauty salon where the conduct occurred was located at a noncurricular site in a store, but the court held it “one of the places where cosmetology instruction was taking place” and, thus, compared her speech squarely to curricular speech within the control of the institution: “[T]he college had an interest in ensuring that its instructors stay

227 *Id.*

228 *Id.*

229 Declaration, *supra* note 23, at 155.

230 *Id.* at 1076.

231 *Bishop*, 926 F.2d at 1074 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

232 *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011). In *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), the court ruled that a fifth-grade teacher could not even read a Bible silently during the daily fifteen-minute mandatory “silent reading period.” The teacher objected that this violated his First Amendment rights of free speech and academic freedom, but the court ruled that his actions substantially infringed on the rights of his students who the court characterized as “impressionable ten-, eleven- and twelve-year old[s].” *Id.* at 1057–58. Reviewing this decision, another court concluded that its foundation was *Kuhlmeier*. *Bishop*, 926 F.2d at 1073.

233 464 F.3d 667 (7th Cir. 2006).

234 *Id.* at 668.

235 *Id.* at 669.

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."²³⁶ The court elaborated as follows:

"Universities are entitled to insist that members of the faculty (and their administrative aides) devote their energies to promoting goals such as research and teaching."... No college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce's demanding novel *Ulysses*, nor must it permit a professor of mathematics to fill her class hours with instruction on the law of torts. Classroom or instructional speech, in short, 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.²³⁷

The implication of *Piggee* is that academic freedom is unrelated to course content or, as the court would later say, her teaching duties. It sets up a distinction between this type of speech and speech related to course content embraced within the concept of *Lehrfreiheit* that, nevertheless, the court in *Bishop* would not protect in deference to institutional academic autonomy. To the extent this was because of the particular Christian message concerned, this case betrays viewpoint discrimination. To the extent the ruling can be generalized, it is facially inconsistent with the easier of the two curricular components of *Lehrfreiheit*. The harder element is freedom to determine the content of courses. The court in *Piggee* reasonably objects that academic freedom should not liberate the chemistry teacher from teaching chemistry. The chemistry teacher who instead taught literature would neglect her duty, which is not protected by the Declaration. But the same Declaration would have rejected the idea that a professor of political science may not design a course in political theory and lecture based on whatever political theorist the professor chose to feature germane to the topic.

Regardless, the conclusion that not only school districts, but also universities may determine what and how classes are taught has gained momentum at the expense of the original conception of academic freedom.²³⁸ Religious speech has

236 *Id.* at 672; *see also* *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007) (explaining the same court's earlier decision in *Piggee*).

237 *Piggee*, 464 F.3d at 671.

238 *See also* *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir.1998), *cert. denied*, 525 U.S. 1143 (1999) (the First Amendment does not allow a university professor to decide what is taught in the classroom, but rather protects the university's right to select the curriculum); *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) ("The university may constitutionally choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods do not conform to institutional standards. The First Amendment concept does not require that a nontenured professor be made a sovereign unto himself."); *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 595 (6th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006) ("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 a 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."); *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146, 1149 (7th Cir. 1999) (The university's "ability to set a curriculum is as much an element

uniquely propelled this doctrinal development, but it is by no means the exclusive reason. The contrast is stark with the U.S. Supreme Court's earlier explanation of the core of academic freedom as follows: "'Teachers and students must always remain free to inquiry, to study, and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.'"²³⁹ The Declaration even treated religion as one of the three fields of human inquiry worthy of study, including "the interpretation of the general meaning and ends of human existence and its relation to the universe."²⁴⁰ The Declaration insisted that "[i]n all three domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results."²⁴¹ By carving out a whole viewpoint from the marketplace of ideas, institutions have thwarted another key goal of academic freedom: to attract individuals of "high gifts and character" to academics.²⁴² The numbers of devoutly religious in academia are few. Here is an example of academic institutional autonomy precipitating a pall of orthodoxy, rather than undermining it.

E. The Garcetti Test

Subsequent to the advent of curricular speech doctrine, including its preoccupation with religious speech, the U.S. Supreme Court expressed concern that the *Connick-Pickering* test was not properly balancing the interests of public employees, as citizens, and the government, as employer, in circumstances when the employee's speech relates to the employee's job duties.²⁴³ Consequently, the Court interpolated a new threshold inquiry: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from further discipline."²⁴⁴ On the particular facts of *Garcetti v. Ceballos*, Richard Ceballos, a deputy district attorney, was fired after recommending dismissal of a case that was prosecuted and ultimately won. The court rejected his retaliation claim on the grounds that the First Amendment does not "constitutionalize the employee grievance."²⁴⁵ The dissent was generally critical of superseding the balancing test but especially so in relation to the academy.²⁴⁶

of academic freedom as any scholar's right to express a point of view.").

239 *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)); accord *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) (citing T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 594 (1970) ("[t]he heart of the system consists in the right of the individual faculty member to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members.")).

240 Declaration, *supra* note 23, at 155.

241 *Id.*

242 *Id.*

243 *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

244 *Id.* at 421.

245 *Id.* at 420.

246 *Id.* at 438 (Souter, Stevens, Ginsburg, JJ., dissenting).

Justice Souter’s dissent stated that he hoped the majority did not “mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to ... official duties.’”²⁴⁷ He did not distinguish curricular from noncurricular speech. In response, the majority did not “decide whether the analysis ... would apply in the same manner to a case involving speech related to scholarship or teaching.”²⁴⁸ The majority recognized that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this court’s customary employee-speech jurisprudence.”²⁴⁹ The Court did not endorse the idea that curricular speech may be protected, but neither did it undermine it.

Granted the discretion to apply the *Connick-Pickering* test without the *Garcetti* overlay, several courts of appeal have done so at the postsecondary level but not in a manner any more protective of an individual professor’s speech in light of the curricular speech doctrine.²⁵⁰ The Ninth Circuit ruled in *Demers v. Austin* that *Garcetti* could not, consistent with the First Amendment’s protection of academic freedom, apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor.²⁵¹ But restating the institutional autonomy doctrine, the court added that district courts applying the balancing prong of the *Connick-Pickering* test should “hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.”²⁵²

Demers was a professor who distributed a pamphlet including chapters of an in-progress book relating to scholarship and teaching and recommending restructuring in the communications school.²⁵³ In *The Ivory Tower of Babel*, he was critical of the lack of professional orientation in the communications program, which, to his mind, was not adequately preparing students for careers. Demers claimed that the school retaliated against him with negative evaluations, diminished his compensation and reputation, prevented him from serving on committees and teaching preferred classes, triggered internal audits, and spied on his classes.²⁵⁴ Similar to earlier cited cases involving critiques of a professor’s own department, the court concluded that Demers had addressed a matter of public interest, because his speech incorporated serious suggestions about the future

247 *Id.* (Souter, Stevens, Ginsburg, JJ. dissenting).

248 *Id.* at 425.

249 *Id.* at 425.

250 *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (case remanded to apply the *Connick-Pickering* balancing test after court ruled that professor’s accreditation plan for the communications department containing “serious suggestions about the future course of an important department ... at a time when the Murrow School itself was debating some of those very suggestions” was a matter of public concern).

251 746 F.3d at 412.

252 *Id.* at 417.

253 *Id.* at 407.

254 *Id.* at 408.

course of an important department then under debate at the school and because he distributed his views widely, including to local media.²⁵⁵ But the court remanded for the district court to undertake the remainder of the *Connick-Pickering* analysis, including the weighting of interests that has derailed other claims.²⁵⁶

In most other cases at both the postsecondary and K–12 level, where there is a split in the circuits as to whether *Garcetti* or *Connick-Pickering* applies,²⁵⁷ institutions have prevailed, regardless of the test applied. For example, in *Nichols v. University of Southern Mississippi*,²⁵⁸ a district court granted summary judgment to the University of Southern Mississippi against an adjunct music professor under *Garcetti* and *Connick-Pickering*. The professor was non-renewed for statements made in a classroom to a student about homosexuality and the entertainment industry in New York City.²⁵⁹ Nichols spent time working on Broadway and said that “he was warning Lunsford that ‘New York was morally challenging, that AIDS was a severe problem there, and that he should be careful how he handled himself there.’”²⁶⁰ A purpose of academic freedom was to protect against “overwhelming and concentrated public opinion,”²⁶¹ but the court ruled that Nichols’s speech “is best characterized” as “classroom speech” made in Dr. Nichols’s “official capacity.” Consequently, *Garcetti*, together with *Kuhlmeier*, barred his claim. But the court added that even if his speech was that of a citizen on a matter of public concern, he “failed to demonstrate that his interest in making these comments outweighed the University’s interest in promoting efficiency”²⁶² and, more particularly, its nondiscrimination policy. Consequently, the court ruled that his speech also violated the *Connick-Pickering* test.

The outcome in *Nichols* puts an exclamation point on curricular speech doctrine in the context of religious speech after *Garcetti*. Although some might consider the outcome appropriate, a less controversial case reveals the power of *Kuhlmeier* even

255 *Id.* at 417.

256 *Id.*

257 Compare *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 695 n.11 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007) (applying *Connick-Pickering* test to public high school teacher’s speech related to teaching); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009) (applying *Connick-Pickering* test to high school football coach’s acts of bowing his head and taking a knee with his team while they prayed without deciding whether *Garcetti* applies on the grounds that it did not matter because his speech was not on a matter of public concern) with *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011) (“*Garcetti*’s caveat offers no refuge to Evans-Marshall. She is not a teacher at a ‘public college[]’ or ‘universit[y]’ and thus falls outside of the group the dissent wished to protect.”); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007) (applying *Garcetti* to the curricular and pedagogical choices of primary and secondary school teachers); *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 716 (7th Cir. 2016) (similar); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007) (applying *Garcetti* and *Conner-Pickering* to charter school teachers).

258 669 F. Supp. 2d 684 (S.D. Miss. 2009).

259 *Id.* at 689, 696.

260 *Id.* at 689.

261 Declaration, *supra* note 23, at 155.

262 *Nichols*, 669 F. Supp. 2d at 699.

when diversity and religious speech are not at issue In *Mayer v. Monroe County Community School Corp.*,²⁶³ the Seventh Circuit granted summary judgment pursuant to *Garcetti* and *Kuhlmeier* to Monroe County Community School Corporation against an elementary school teacher when, in response to a student's question, she expressed solidarity with antiwar demonstrators, notwithstanding a general instruction not to teach about Iraq policy.²⁶⁴ She relied on *Piggee*, involving the cosmetology instructor who placed a religious pamphlet in a student's smock, to claim that "principles of academic freedom supersede *Garcetti*." Not so, ruled the court. In *Piggee*, the Seventh Circuit ruled that *Garcetti* was "not directly relevant to our problem, but it does signal the Court's concern that courts give appropriate weight to the public employer's interests."²⁶⁵ In *Monroe*, the court explained what it meant by that statement in an opaque manner:

Our remark that *Garcetti* was 'not directly relevant' [in *Piggee*] did not reflect doubt about the rule that employers are entitled to control speech from an instructor to a student on college grounds during working hours; it reflects, rather the fact that *Piggee* had not been hired to button hole cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin. The speech to which the student (and the college) objected was not part of *Piggee's* teaching duties. By contrast, *Mayer's* current-events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly.²⁶⁶

This passage is hard to square with the ruling in *Piggee* that the instructor's button holing was "curricular speech." In *Piggee*, the instructor objected that hers was extracurricular protected speech and lost. In this passage, the *Monroe* court articulated a new category of curricular speech not part of a faculty member's teaching duties: *Garcetti* "directly" applies to curricular speech that is part of a faculty member's teaching duties but not to curricular speech that is somehow not part of a faculty member's teaching duties. As if this were not incoherent enough, the court left open the possibility that *Garcetti* may apply "indirectly" to any "speech

263 474 F.3d 477 (7th Cir. 2007), cert. denied, 552 U.S. 823 (2007).

264 *Id.* (citing *Webster v. New Lenox Sch. Dist.* No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990) (citing *Kuhlmeier*, 484 U.S. at 273)).

265 *Piggee v. Carl Sandburg College*, 464 F.3d 667, 672 (7th Cir. 2006).

266 *Monroe*, 474 F. 3d at 480. See also *Panse v. Eastwood*, 303 Fed. App'x 933 (2d Cir. 2008) (stating that, although it was an open question whether *Garcetti* applies in the circuit to classroom instruction, a high school art teacher failed to state a first amendment claim because his statements encouraging students to participate in a for-profit course he planned to teach outside of school involving the drawing and sketching of nude models were made pursuant to his official job duties); *Shums v. N.Y. City Dep't of Educ.*, No. 04-CV-4589 (DLI)(LB), 2009 WL 750126 (E.D.N.Y. Mar. 17, 2009) (statements made in plaintiff's letters by former teacher of English as a Second Language about insufficient services or time for services for her students fell within the scope of her duties and, thus, were not afforded constitutional protection and were not the cause of the adverse employment action); *Weintraub v. Bd. of Educ.*, 489 F. Supp. 2d 209, 221 n.12 (E.D.N.Y. 2007), aff'd, 593 F. 3d 196 (2d Cir. 2010), cert. denied, 562 U.S. 995 (2010) (speech related to classroom discipline governed by *Garcetti*; plaintiff's effort to argue otherwise on the basis of academic freedom was "frivolous," because "[i]t is clear from the context of the court's statement its reference to 'teaching' refers to the substance of academic expression, not to the enforcement of disciplinary procedures in a public classroom").

from an instructor to a student on college grounds during working hours,"²⁶⁷ contrary to the carve-out in *Garcetti* for speech and writing of university faculty.

Academic institutional autonomy has now eclipsed other aspects of what courts still refer to as academic freedom. Even when faculty teach their assigned courses and content, but lecture from a minority viewpoint, there is not protection under *Garcetti* or the curricular speech doctrine. Institutional autonomy controls not only in these circumstances, but also when faculty speak in a noncurricular environment, irrespective whether the speech is profane, morally delinquent, or gratuitously controversial. If this is academic freedom, the concept now means the inverse of what it did in 1915.

E. Academic Freedom and Admissions

One more influence on the doctrinal development of academic freedom is race-sensitive admissions. Beginning with *Regents of the University of California v. Bakke*,²⁶⁸ Justice Powell discussed academic freedom as it related to a program of admissions quotas established by a medical school. Powell's opinion emerged as the linchpin of an otherwise splintered Court that produced six separate opinions, none of which commanded a majority of the Court. The only holding to emerge from the case was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."²⁶⁹ Powell provided the crucial fifth vote for invalidating the set-aside program and reversing the state court's injunction against any use of race whatsoever.²⁷⁰

Justice Powell quoted liberally from Justice Frankfurter's discussion in *Sweezy* of "the four essential freedoms of a university" and from *Keyishian*, which he described as announcing "[o]ur national commitment to the safeguarding of these freedoms within university communities."²⁷¹ Relying on *Keyishian*, he said, "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."²⁷² It was Powell who said academic freedom, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."²⁷³ He counted as a foremost freedom in this respect the right of a university "to make its own judgments as to education includ[ing] the selection of its student body."²⁷⁴ Powell's notion of academic freedom in *Bakke* was primarily institutional but to enable students corporately to realize their full academic

267 *Monroe*, 474 F. 3d at 480.

268 438 U.S. 265 (1978).

269 *Grutter v. Bollinger*, 539 U.S. 306, 322–23 (2003) (citing *Bakke*, 438 U.S. at 320).

270 *Id.* at 322.

271 *Id.* at 312.

272 *Id.* at 313.

273 *Id.* at 312.

274 *Id.*

potential even to the disadvantage of students (and their express constitutional liberties) who might otherwise be admitted to the university.

Several times since, the U.S. Supreme Court has explicitly endorsed Justice Powell's opinion that "student body diversity is a compelling state interest that can justify the use of race in university admissions" to benefit the student body.²⁷⁵ In *Grutter v. Bollinger*,²⁷⁶ the Court quoted extensively from Justice Powell to reaffirm a law school's race-conscious admissions policy and considered it "grounded ... in [] academic freedom."²⁷⁷ Justice O'Connor emphasized that the admissions policy had been crafted and approved by the faculty.²⁷⁸ The Court ruled, "In seeking the 'right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university seeks 'to achieve a goal that is of paramount importance in the fulfillment of its mission.'"²⁷⁹ It mentioned "a special niche in our constitutional tradition" occupied by universities,²⁸⁰ the "overriding importance of preparing students for work and citizenship,"²⁸¹ and considered its holding "in keeping with our tradition of giving a degree of deference to a university's academic decisions within constitutionally prescribed limits."²⁸² Dissenting, Justice Thomas objected that deference is not due when an express constitutional liberty, equal protection, is violated.²⁸³

The court continued Justice Powell's theme in *Fisher v. University of Texas at Austin*, where it reaffirmed that "[t]he academic mission of a university is 'a special concern of the First Amendment'" and ruled that courts must defer to a university's "educational judgment that [] diversity is essential to its educational mission."²⁸⁴ As approved pedagogical justifications for pursuing a diverse student body, the court once again mentioned corporate benefits for students, including "enhanced classroom dialogue," the "lessening of racial isolation and stereotypes," providing "that atmosphere which is most conducive to speculation, experiment and creation," promoting "learning outcomes" and "better prepar[ing] students for an increasingly diverse workforce and society."²⁸⁵

275 *Id.* at 325; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) [hereinafter *Fisher I*]; *Fisher v. Univ. of Tex. at Austin*, _ U.S. _ 136 S. Ct. 2198, 2210 (2016) [hereinafter *Fisher II*].

276 539 U.S. 306 (2003).

277 *Id.* at 324.

278 *Id.* at 314–15.

279 *Id.* (citing *Bakke*, 438 U.S. at 313).

280 *Id.* at 329.

281 *Id.* at 331.

282 *Id.* at 328.

283 *Id.* at 362 (Thomas and Scalia, JJ. concurring in part and dissenting in part) ("In my view, there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.").

284 *Fisher I*, 133 S. Ct. at 2418–19.

285 *Id.* at 2418; *Fisher II*, 136 S. Ct. at 2210; *see also* *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 188 (D Mass. 2019) (observing that judicial deference is proper with respect to the academic judgment that student body diversity is an educational benefit, but determining in accord with *Fisher II* that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals).

In the final analysis, the Court referred to this as “the business of a university.”²⁸⁶

Reviewing these admissions cases, lower courts have been reticent to decide that a right to academic freedom can be asserted by an individual professor,²⁸⁷ or affirmatively concluded that academic freedom is primarily institutional, rather than an individual.²⁸⁸ Yet, when the focus is on academic admission cases, the perspective is distorted because of the congruence in interests in these cases between the universities and faculty, similar to their common opposition to McCarthyism. There could be no compelling interest in achieving a diverse student body and, thus, no related academic freedom to favor minorities in admissions, unless the student body allegedly benefited; and there could be no race-sensitive admission policy without faculty support. It cannot reasonably be inferred from the congruence of interests in these cases that when they diverge, academic freedom is necessarily irrelevant or always the university’s to assert against individuals.

Although reluctant to find an individual right to academic freedom based on precedent relating to admissions, the D.C. Circuit took another path and said that if it does exist, “the right can be invoked only to prevent a governmental effort to regulate the *content* of a professor’s academic speech.”²⁸⁹ In this event, the regulation must be content neutral and satisfy intermediate scrutiny, meaning that any infringement must further an important or substantial government interest.²⁹⁰ Were this standard applied even in the context of curricular speech, it could reconcile the university’s interest in selecting curriculum with the faculty member’s interest in controlling pedagogy in a more robust way than academic freedom conceptualized as an extension of the *Connick-Pickering* test.

286 *Fisher I*, 570 U.S. at 308.

287 *See* Emergency Coalition to Defend Educ. Travel v. U.S. Dep’t of the Treasury, 545 F.3d 4, 12 (D.C. Cir. 2008) (“Assuming that the right to academic freedom exists and that it can be asserted by an individual professor, its contours in this case are certainly similar to those of the right of free speech.”); *id.* at 19 (Silberman, J concurring) (“I [] share the doubts of our Fourth Circuit colleagues as to the notion that ‘academic freedom’ is a constitutional right at all and that, should it exist, it inheres in individual professors.”). *See also* Heublein v. Wefald, 784 F. Supp. 2d 1186 (D. Kan. 2011) (uncertain whether a professor can state an academic freedom claim as opposed to an institution, but finding no claim stated).

288 *See, e.g.,* Urofsky v. Gilmore, 216 F.3d 401, 414 (4th Cir. 1998) (citing *Bakke*, 438 U.S. at 312) (“Other cases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual. . . . Significantly, the Court has never recognized the professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so.”); *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011) (“[I]t is the educational institution that has a right to academic freedom, not the individual teacher.”); *Stronach v. Va. State Univ.*, No. 3:07CV646-HEH, 2008 WL 161304 (E.D. Va. Jan. 15, 2008) (professor had no constitutional right to academic freedom preventing change of student grade by university officials) (citing *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001), *cert. denied*, 533 U.S. 903 (2001) (“No person has a fundamental right to teach undergraduate engineering classes without following the university’s grading rules.”); *Lovelace v. S.E. Mass. Univ.*, 793 F.2d 419, 425 (1st Cir. 1986) (similar); *Brown v. Amenti*, 247 F.3d 69, 75 (3d Cir. 2001) (similar); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999) (First Amendment does not allow university professor to decide what is taught in the classroom but rather protects the university’s right to select the curriculum.).

289 *Emergency Coalition*, 545 F.3d at 12 (emphasis original).

290 *Id.*

If academic freedom is a constitutional right, it cannot be detrimental to academic expression; it must be supplemental. We most respect the concept of academic freedom by not referencing it when it is unlikely to liberate thought and expression, regardless whether it is in furtherance of an academic or professional norm. To maintain connection to *Lehrfreiheit*, academic freedom must not be a tool to be brandished by postsecondary institutions against faculty and students or vice versa, as if a mere implied constitutional right could somehow tip the scale against either side's express constitutional rights. Academic freedom may be properly conceived as a defense to external interference with the academic teaching and research enterprise of the university and professor as originally conceived in *Wieman* and *Sweezy*. But that is quite different from academic freedom as a defense to internal interference with the same academic undertakings. Said infringement would be the opposite of the *Lehrfreiheit* that birthed academic freedom.

G. Public Forum Doctrine

Justice Powell authored another decision important for how it has distinguished academic freedom from public forum doctrine. In *Widmar v. Vincent*, student members of an on-campus religious group named Cornerstone sued the University of Missouri when it excluded them from using facilities "for purposes of religious worship or religious teaching" that were generally available for other activities of registered student groups.²⁹¹ The university said that the Establishment Clause and Missouri Constitution required it to discriminate. The U.S. Supreme Court disagreed and ruled that the Free Exercise Clause and Free Speech Clause constrained the state interest in vindicating separation of church and state. The Court determined that the university had created a forum generally open for use by student groups through its policy of accommodating their meetings.²⁹²

But the Court was quick to add that it did not mean to question "the right of the University to make academic judgments as to how best to allocate scarce resources or '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.'"²⁹³ Concurring, Justice Stevens was even more emphatic. He agreed that separation of church and state was an insufficient reason to exclude the religious group and went so far as to indicate that the school could not exclude usage on the basis of viewpoint. For example, the University "could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege."²⁹⁴ But the University could "exercise a measure of control over the agenda for student use of school facilities, preferring some subjects over others, without needing to identify

291 454 U.S. 263, 265 (1981).

292 *Id.* at 267–68.

293 *Id.* at 276–77 (Stevens, J. concurring) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957); *Bakke*, 438 U.S. at 312–13).

294 *Id.* at 281.

so-called ‘compelling state interests.’”²⁹⁵ In the final analysis, he wrote, “Judgments of this kind should be made by academicians, not by federal judges....”²⁹⁶

Professor Byrne called Justice Stevens’s concurrence “a refreshing acknowledgment that universities must and should distinguish among speakers on the basis of the content of their speech.”²⁹⁷ The Supreme Court has not agreed in several public forum cases since involving students.²⁹⁸ For example, in *Board of Regents of University of Wisconsin System v. Southworth*, the Court determined that “[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”²⁹⁹ If the university decides to impose a mandatory fee to “sustain an open dialogue” and “dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall,” the university must protect students’ First Amendment interests.³⁰⁰ Specially concurring, Justice Souter took up Justice Stevens’s mantle skeptical of “cast-iron viewpoint neutrality,” reiterating with the majority that government speech was not at issue and that “universities and schools should have the freedom to make decisions about how and what to teach.”³⁰¹ Yet, even Justice Souter observed, “[W]e have never held that universities lie entirely beyond the reach of students’ First Amendment rights.”³⁰²

Just a handful of courts have vindicated a professor’s First Amendment rights under public forum doctrine because here, too, the curricular speech doctrine casts a long shadow. The Supreme Court ruled in *Kuhlmeier* that “school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public’ ... or by some segment of the public, such as student organizations.... If the facilities have instead been reserved for other intended purposes ... then no public forum has been created, and school officials may impose *reasonable restrictions* on the speech of students, teachers, and other members of the school community.”³⁰³ In a nonpublic forum, school officials “may impose restrictions on speech that are reasonable and viewpoint neutral.”³⁰⁴ Discrimination against speech because of its message is unconstitutional even in a nonpublic forum.³⁰⁵ This principle is

295 *Id.*

296 *Id.* at 278–79.

297 Byrne, *supra* note 1, at 316.

298 See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

299 529 U.S. 217, 221 (2000).

300 *Id.* at 233.

301 *Id.* at 237 (Souter, Stevens, Breyer, JJ. concurring in judgment).

302 *Id.* at 239.

303 *Kuhlmeier*, 484 U.S. at 267.

304 *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

305 *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

in tension with the abundance of cases vindicating institutional autonomy over religious speech.

In light of *Kuhlmeier*, courts have ruled that any speech that occurs in a classroom or clinical practicum is school sponsored and distinguished speech within a public forum.³⁰⁶ Consequently, the Fourth Circuit granted summary judgment, pursuant to the *Connick-Pickering* test, to York County School Division against a high school Spanish teacher who brought suit when the principal removed articles from his bulletin board pertaining to religion.³⁰⁷ Relying in part on *Kuhlmeier*, the court ruled the postings “curricular speech,” although entirely unrelated to Spanish, and, thus, not matters of public concern as a matter of law.³⁰⁸

An exception is *Johnson v. Poway Unified School District*, where a high school math teacher was ordered to remove banners that he hung in his classroom, stating phrases such as “In God We Trust.”³⁰⁹ Distinguishing the many cases at the K–12 level holding that schools may control the speech of instructors, the court in *Johnson* focused on the school district’s policy, practice, and custom of allowing teachers to display messages in their classrooms, and the fact that the plaintiff designed, created, and paid for the banners that he hung. This case is unusual because the court was willing to examine the circumstances in the classroom to decide whether the hangings were part of a public forum, rather than adhere to a per se rule that classrooms are not public forums.³¹⁰ The court declined to dismiss the teacher’s case and in a later decision granted summary judgment for the teacher.³¹¹ On appeal, the court of appeals reversed and held the bulletin board was government speech; the court ruled against the math teacher, applying *Pickering* rather than public forum analysis.³¹²

H. Nondiscrimination and Harassment

Nondiscrimination and harassment policies have also had an influence on academic freedom in recent years. Sexual and profane speech not germane to the subject matter of a course was not protected by the Declaration. It is error to treat

306 See e.g., *Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 (10th Cir. 2004); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 872 (11th Cir. 2011) (counseling program constitutes a nonpublic forum) (citing *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289 (11th Cir. 2007)); *Ward v. Members of Bd. of Control of E. Mich. Univ.*, 700 F. Supp. 2d 803, 814 (E.D. Mich. 2010.) (treating counseling practicum as non-public forum).

307 *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007).

308 *Id.* at 695 (citing *Kuhlmeier*, 484 U.S. at 267) (“Courts have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board’s ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums.”).

309 No. 07cv783 BEN (LSP), 2008 WL 5657801 (S.D. Cal. Sept. 4, 2008).

310 *Bishop*, 926 F.2d at 1071; *Axson-Flynn*, 356 F.3d at 1284.

311 *Johnson v. Poway Unified Sch. Dist.*, No. 07cv783 BEN (NLS), 2010 WL 768856 (S.D. Cal. 2010).

312 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 969 (9th Cir. 2011), *cert. denied*, 566 U.S. 906 (2012).

this kind of speech as implicating academic freedom at all. One court explained the reason that academic freedom must yield to these policies as follows: “[I]f the concept [of academic freedom] is expanded too far it can cause other important societal goals (such as the elimination of discrimination in employment decisions) to be frustrated.”³¹³ “To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a *carte blanche* to practice discrimination of all types.”³¹⁴ It would “send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that whatever they say or do will be protected.”³¹⁵ States have the constitutional authority to enact legislation prohibiting invidious discrimination and a substantial or compelling interest in prohibiting various kinds of discrimination.³¹⁶

Consequently, courts have given wide latitude to postsecondary institutions to enforce nondiscrimination and antiharassment policies especially in the curricular setting.³¹⁷ For example, in *Corlett v. Oakland University Board of Trustees*,³¹⁸ the court granted the university’s motion to dismiss a fifty-six-year-old student’s challenge to a campus regulation providing, inter alia, that “[n]o person shall ... in any way intimidate, harass, threaten or assault any person engaged in lawful activities on campus,” under which he was suspended for three semesters for writing in a required *Writer’s Daybook* entries describing his lust for women’s breasts, generally, and for his teacher specifically. The *Writer’s Daybook* was to be “an ongoing volume that essentially functions as a place for a writer to try out ideas and record impressions and observations.”³¹⁹ In one journal entry, titled “Hot for Teacher,” the student described his instructor as “tall, blond [sic], stacked, skirt, heels, fingernails, smart, articulate, smile,” and in another entry described the student’s sexual preference for Ginger over Maryann—two character from the 1960s television sitcom *Gilligan’s Island*—and the student’s perception of the instructor as his “Ginger.”³²⁰

313 *In re Dinnan*, 661 F.2d 426, 430 (5th Cir. 1981).

314 *Id.* at 431.

315 *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001).

316 *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) (state had a compelling interest “of the highest order” in eradicating sex discrimination through public accommodations law, therefore, compelling the U.S. Jaycees to accept women, as regular members did not abridge either the male members’ freedom of intimate association or their freedom of expressive association).

317 The U.S. Supreme Court recognized a unique limitation on a university’s nondiscrimination policy in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), where the U.S. Supreme Court held that the federal government could condition funding on schools permitting military recruiters access at least equal to that provided other recruiters complying with the schools’ antidiscrimination policies, because the authorizing amendment regulated conduct, not speech. The court rejected the argument by an association of law schools that the Solomon Amendment was unconstitutional, because it infringed their associational expression rights to prohibit discrimination on the basis of sexual orientation. The Court emphasized that the schools remained at liberty to express whatever views they may have about the military’s employment policy, all the while retaining federal funding.

318 958 F. Supp. 2d 795 (E.D. Mich. 2013).

319 *Id.* at 799.

320 *Id.* at 799–800.

The district court looked to *Kuhlmeier* for direction, which the court said “granted schools particular leeway to restrict speech ‘which is an integral part of the classroom-teaching function of an educational institution.’”³²¹ Admitting that universities “may not bear the same responsibility as elementary and secondary schools to act in *loco parentis*,” the court nevertheless concluded that they “retain some responsibility to teach students proper professional behavior, in other words, to prepare students to behave and communicate properly in the workforce.”³²² The court explained that the particular speech in this case was not entitled to First Amendment protection as was student speech in *Tinker v. Des Moines Independent School District*³²³ and that, in any event, it could not “intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”³²⁴

Sexual speech in the classroom not germane to the course subject matter serves the private interest, rather than public good. Academic freedom is not at issue, but institutional academic autonomy deserves deference in these cases. Whereas student discipline in this case was appropriate, it was not because the school regulation was constitutional or the speech at issue was curricular, but because the speech was “offensively lewd and indecent,” as in *Bethel School District No. 403 v. Fraser*, where the U.S. Supreme Court upheld discipline of a student who, at a school assembly, gave a lewd speech replete with “elaborate, graphic and explicit sexual metaphor.”³²⁵ The court in *Bonnell* put this in terms of the *Connick-Pickering* test as follows: “The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is essentially the same character.”³²⁶ Speech that is vulgar or profane is not entitled to absolute constitutional protection and if not relevant to the subject matter of the course, does not implicate academic freedom.³²⁷ But institutional autonomy is pertinent.

Comparing *Tinker* with *Piggee*, the line drawn between curricular and noncurricular speech is sharper in the student context than in the faculty context, even when the speech at issue is discriminatory. For example, in *UWM Post, Inc. v.*

321 *Id.* at 806.

322 *Id.* at 805.

323 393 U.S. 503 (1969). In *Tinker*, students were suspended for wearing black arm bands in protest of the Vietnam War. Famously, the Court announced, “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students,” and added that neither “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Court announced that school officials may not limit speech based on “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 509. It emphasized that school officials “do not possess absolute authority over their students,” they may not conduct school so as to “‘foster a homogenous people,’” and students retain the right to express their opinions “even on controversial subjects,” as long as they do not “‘materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.” *Id.* at 511–13.

324 *Corlett*, 958 F. Supp. 2d at 809.

325 478 U.S. 675, 677 (1986).

326 *Bonnell v. Lorenzo*, 241 F.3d 800, 820 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001).

327 *Id.* at 821.

Board of Regents of University of Wisconsin System,³²⁸ the court struck a speech code that prohibited racist or discriminatory comments, epithets, or other expressive behavior when the conduct intentionally demeaned the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of another and created an intimidating, hostile or demeaning environment for university-related activities. The court found that it was not clear whether the regulated speech had to actually demean the listener and create an intimidating, hostile, or demeaning environment for education; or whether the speaker merely had to intend to demean the listener and create such an environment. The court concluded that the code had been inappropriately applied nine times to inappropriate comments by students.³²⁹

Sexual speech by students is typically more protected than religious speech by faculty. Recall *Bishop v. Aronov*, where the university instructed a professor, among other things, not to hold optional classes where a “Christian Perspective” of an academic topic is delivered.³³⁰ The court distinguished the applicability of *Tinker*. Although recognizing that *Tinker* involved “in-class conduct,”³³¹ the *Bishop* court stated that “[w]hile a student’s expression can be more readily identified as a thing independent of the school, a teacher’s speech can be taken as directly and deliberately representative of the school.”³³² The professor defended his religious speech, in part, based on the fact that the university had no policy for limiting the speech of its professors only to their subject areas.³³³ About this, the *Bishop* court stated:

One would not expect to find such a policy, and, to the contrary, as one would expect, there are various indications ... that the University generally endorses academic freedom for its faculty.... But plainly some topics understandably produce more apprehension than comfort in students. Just as women students would find no comfort in an openly sexist instructor, an Islamic or Jewish student will not likely savor the Christian bias that Dr. Bishop professes, much less seek camaraderie.... The opposite effect was apparently achieved. There is no suggestion that any other professor has produced student complaints or struck constitutional chords. Because the University may heretofore not have restricted the classroom speech of any other professor does not make out a case of overbreadth, vagueness, or infringement as to Dr. Bishop.³³⁴

Put simply, the court in *Bishop* concluded that academic freedom could not excuse the plaintiff instructor from observing nondiscriminatory norms, whether

328 774 F. Supp. 1163 (E.D. Wis. 1991).

329 *Id.* at 1168. For example, a male student yelled at a female student, “You’ve got nice tits,” a female student referred to a Black female student as a “fat-ass nigg--,” and a student sent an email message from a university computer stating “Death to all Arabs!! Die Islamic scumbags!”

330 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, *Bishop v. Delchamps*, 505 U.S. 1218 (1992).

331 *Id.* at 1073.

332 *Id.*

333 *Id.* at 1071.

334 *Id.* at 1071–72.

or not the university failed to take adverse action against other faculty for the same discriminatory classroom speech.

Even collectively students lack academic freedom rights adequate to supersede nondiscrimination policies. The comparison between the U.S. Supreme Court's decisions in *Healy v. James* and *Christian Legal Society v. Martinez* shows this.³³⁵ In *Healy*, a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society. The president of the college explicitly denied the student group official recognition because of the group's viewpoint. The Court opined, "[A] public educational institution exceeds constitutional bounds ... when it 'restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent.'"³³⁶ In contrast, in *Martinez*, when Hastings College of the Law rejected Christian Legal Society's application to become a registered student organization on the grounds that the group's bylaws did not comply with Hasting's nondiscrimination policy, the court affirmed summary judgment for the law school.³³⁷ The court ruled in a fashion, suggesting that it is willing to match the lower courts' expansive definition of curricular speech when students are plaintiffs:

Cognizant that judges lack the on-the-ground expertise and experience of school administrators, ... we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." ... *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273.... A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.... Schools, we have emphasized, enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate." ... We therefore "approach our task with special caution," ... mindful that Hastings' decisions about the character of its student-group program are due decent respect.³³⁸

Here is more evidence that the concept of "curricular speech" is broadening even for students from the classroom to extracurricular programs.³³⁹ In dissent, Justice Alito objected sharply that the majority's decision stood for the principle

335 Compare *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) with *Healy v. James*, 408 U.S. 169 (1972).

336 *Healy*, 408 U.S. at 187–88.

337 *Martinez*, 561 U.S. at 696.

338 *Id.* at 686–87.

339 The only exception to the rule that a school may enforce an "all comers policy" or a requirement that student groups "accept all comers as voting members even if those individuals disagree with the mission of the group," which federal courts have thus far recognized is when an academic institution selectively exempts organizations from its nondiscrimination policy. See *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 650 (9th Cir. 2008) ("to the extent [the plaintiff] argue[d] it was denied an exemption from the non-discrimination policy based on the content of its speech," the group "raised a triable issue of fact," where plaintiff showed evidence that other student groups had been granted official recognition, despite violating a nondiscrimination policy); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866–67 (7th Cir. 2006) (awarding injunction to group where, although the school's nondiscrimination policy was "viewpoint neutral on its face," there was "strong evidence that the policy had not been applied in a viewpoint neutral way.").

that there should be “no freedom for expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.”³⁴⁰

III. Modern Constitutional Paradigms of the Freedom to Learn

As a general matter, *Lernfreiheit* has not received as much mention in American constitutional law as *Lehrfreiheit*. “As a matter of fact,” wrote Professor Metzger, “it has never been declared on judicial authority at any level that students ‘have’ academic freedom.”³⁴¹ This is just as well, according to Professor Byrne, because “no recognized student right[] of free speech . . . has anything to do with scholarship or systematic learning.”³⁴² Two responses: First, and contrariwise, beginning with *Barenblatt*, the Court made reference to “learning-freedom,”³⁴³ and as recently as *Southworth*, again made reference to students’ First Amendment rights in the context of academic freedom.³⁴⁴ Second, if Professor Byrne is right, then it is hypocritical to invoke student interests at all in furtherance of institutional academic autonomy in admissions cases or as part of curricular speech doctrine.³⁴⁵

It is true that *Lernfreiheit* is even less well developed than *Lehrfreiheit*, in part due to the Supreme Court’s ruling in *Board of Curators of the University of Missouri v. Horowitz*³⁴⁶ and *Regents of the University of Michigan v. Ewing*.³⁴⁷ Neither case actually involved academic freedom, but both are treated as if they did. In both, students challenged their dismissal from medical degree programs not under the First Amendment, but the Due Process Clause. In *Horowitz*, the student was dismissed because her performance was below that of her peers in all clinical patient-oriented settings, she was erratic in her attendance at clinical sessions, and she lacked a critical concern for personal hygiene.³⁴⁸ In *Ewing*, the student was dismissed when he failed the NBME Part I examination with the lowest score recorded in the history of the program.

Ewing sued, alleging breach of contract and a property interest in his continued enrollment. Stating its “responsibility to safeguard” the “academic freedom” of “state and local educational institutions,” the U.S. Supreme Court rejected the claim.³⁴⁹ Judge Edwards observed in a concurrence that *Ewing* “gives some life to this idea” that academic freedom may include what Professor Areen refers to as

340 *Martinez*, 561 U.S. at 706 (Alito, J., dissenting).

341 Metzger, *supra* note 12, at 1304.

342 Byrne, *supra* note 1, at 262.

343 *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).

344 *Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 239 (2000). (Souter, Bryer, Stevens, JJ. concurring in judgment).

345 *Fisher I*, 570 U.S. at 308; *Fisher II*, 136 S. Ct. at 2210.

346 435 U.S. 78 (1978).

347 474 U.S. 214 (1985).

348 *Horowitz*, 435 U.S. at 81.

349 474 U.S. at 226.

“shared governance.”³⁵⁰ The court explained, “When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment.”³⁵¹ The court added, “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”³⁵² Concurring, Justice Powell stated that “[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed—as in this case.”³⁵³

The students’ claims in *Horowitz* and *Ewing* were perhaps the easiest kind for the Court to decide. Neither *Lernfreiheit* nor student speech was at issue. The right of a student to determine the course of his studies does not include the right to receive a degree despite failing test scores, below par clinical reviews, or personal hygiene deficiencies. The faculty and institution were in agreement. There was no student conscientious or religious objection at issue. As Justice Powell observed, “In view of Ewing’s academic record... this is a case that never should have been litigated.”³⁵⁴ Neither case should have precedential value in most modern lawsuits involving student speech in the classroom, yet it is often relied upon for the proposition that courts must not override a faculty member’s professional judgment, “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”³⁵⁵

Courts confronting modern claims by students that could be styled academic freedom claims have not addressed them as such.³⁵⁶ Instead, most have applied *Ewing* and/or the curricular speech doctrine and vindicated the professor and/or institution against the student.³⁵⁷ Once again, the cases typically involve religious speech. For example, in *Settle v. Dickson County School Board*,³⁵⁸ the Sixth Circuit ruled against a ninth grade student who wanted to write a required research paper on Jesus Christ, whereas the teacher would allow a paper no narrower than on

350 *Emergency Coalition*, 545 F.3d at 234 (J. Edwards, concurring).

351 *Id.* at 225.

352 *Id.* at 225 n.11.

353 *Ewing*, 474 U.S. at 230.

354 *Id.*

355 *Axson-Flynn*, 356 F.3d at 1292–93 (citing *Ewing*, 474 U.S. at 225).

356 *See Axson-Flynn*, 356 F.3d at n.14 (“In their pleadings, Defendants rely on the ill-defined right of ‘academic freedom’ when they reference this principle of judicial restraint in reviewing academic decisions. Although we recognize and apply this principle in our analysis, we do not view it as constituting a separate right apart from the operation of the First Amendment within the university setting.”).

357 *See, e.g., Ward v. Members of Bd. of Control of E. Mich. Univ.*, 700 F. Supp. 2d 803, 814 (E.D. Mich. 2010) (“courts have traditionally given public colleges and graduate schools wide latitude ‘to create curricular that fit schools’ understandings of their educational missions.’... ‘This judicial deference to educators in their curriculum decisions is no less applicable in a clinical setting....’”).

358 53 F.3d 152 (6th Cir. 1995), *cert. denied*, 516 U.S. 989 (1995).

religion in general. She gave several reasons such as that she thought it would be difficult to evaluate; the assignment required four sources, not just the Bible; and it is inappropriate to deal with “personal religion” in a public school.³⁵⁹ The administration supported the teacher. The student believed that the teacher was simply hostile to her faith. The court affirmed summary judgment for the defendants and reasoned as follows:

Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.³⁶⁰

According to the court, each of the teacher’s reasons for refusing to allow the student to write her paper were within the “broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students.”³⁶¹ The court concluded there was no basis for finding a dispute of fact about the teacher’s motives.³⁶²

Several other courts of appeal have ruled that religiously informed opinions at odds with professional standards voiced by students in the classroom are grounds for dismissal.³⁶³ For example, a student claimed that Arizona State University imposed a remediation plan on her because of her views on homosexuality as a form of viewpoint discrimination, but the Eleventh Circuit ruled it was because she expressed an intent to impose her personal religious views on her clients in alleged violation of the American Counseling Association Code of Ethics.³⁶⁴ In a case not dealing with religion, but a threat that a student posted on Facebook, the Eighth Circuit went even further in affirming removal of a student from a college’s associate degree nursing program for violation of professional standards. It ruled that “college administrators and educators in a professional school have discretion to require compliance with recognized standards of the [nursing] profession, both on and off campus, ‘so long as their actions are reasonably related to legitimate pedagogical concerns.’”³⁶⁵

359 *Id.* at 154.

360 *Id.* at 155.

361 *Id.* at 156.

362 *Id.*

363 *See, e.g., Oyama v. Univ. of Haw.*, 813 F.3d 850, 872 (9th Cir. 2015) (upholding dismissal of a student based “only upon statements Oyama made in the context of the certification program—in the classroom, in written assignments, and directly to the instructors responsible for evaluating his suitability for teaching”); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868 (11th Cir. 2011) (upholding university’s decision to sanction a student in a graduate-level school counseling program for stating that she “intended to attempt to convert students from being homosexual to heterosexual contrary to the American Counseling Association’s Code of Ethics”); *Hennessy v. City of Melrose*, 194 F.3d 237, 242–43 (1st Cir. 1999) (upholding termination of student teacher for repeatedly interrupting school events with religious “proselytizing,” such as showing a picture of an aborted fetus to another teacher and storming out of a presentation that he considered obscene as consistent with general professional standards and four “common teaching competencies” required for state certification).

364 *Keeton*, 664 F.3d at 872.

365 *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016), *cert. denied*, 137 S.Ct. 1448 (2017).

The exception that the courts have allowed is in the event of pretext for punishing a student for her race, gender, economic class, religion, or political persuasion.³⁶⁶ Thus, on the one hand, the Tenth Circuit in *Axson-Flynn v. Johnson* declined to second-guess the school's pedagogical interest in requiring a Mormon student to "modify [her] values" and curse to continue in a university actor training program but, on the other hand, determined that it would be abdicating its judicial duty if it failed to investigate whether the professors' pedagogical concern was pretextual religious discrimination.³⁶⁷ This is the foremost protective lesson several courts have taken from *Ewing*; i.e., that courts "may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive."³⁶⁸

Observing that "student speech doctrine fails to account for the vital importance of academic freedom at public colleges and universities," the Ninth Circuit, in *Oyama v. University of Hawaii*, adopted its own test that is not noticeably different.³⁶⁹ The court relied on "a set of decisions of other courts that have considered free speech claims," which "generally defer to certification decisions based on defined professional standards."³⁷⁰ Many of these cases rely upon *Kuhlmeier*.³⁷¹ Summarizing them, the court announced this rule: "[U]niversities may consider students' speech in making certification decisions, so long as their decisions are based on defined professional standards, and not an officials' personal disagreement with students' views."³⁷² The court went on to examine whether the university's decision denying a student's application to become a student teacher, a prerequisite for teacher certification, was narrowly tailored and, in a restatement of the pretext standard, asked whether the university's decision reflects a reasonable professional judgment. Applying this test, the court ruled that the denial did not violate the First Amendment, because it was based on their view that the student's comments approving consensual sex between adult teachers and minors and regarding educating disabled students violated professional standards. Sexual speech, such as this, is not protected by academic freedom and is generally disfavored under the *Connick-Pickering* test, although the more so when it is by instructors.

To the extent *Lernfreiheit* has any constitutional protection at all, both the Ninth and Tenth Circuits' rulings conceptualize student academic freedom after *Kuhlmeier*

366 See *Settle*, 53 F.3d at 156; *Axson-Flynn*, 356 F.3d at 1293.

367 356 F.3d at 1293.

368 *Id.*; see also *id.* at 1300 ("*Ewing*, 474 U.S. at 225 ... was clear in requiring courts to override faculty judgment when it is a pretext for an impermissibly ulterior motive.")

369 *Oyama*, 813 F.3d at 863 (denial of student's application to become a student teacher, a prerequisite for teacher certification, because of his comments approving sex between adults and minors and regarding educating disabled students did not violate his free speech rights);

370 *Id.* at 866.

371 *Id.* (citing these cases that rely upon *Kuhlmeier*: *Keeton*, 664 F.3d at 868; *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012); *Axson-Flynn*, 356 F.3d at 1292-93; and this case that relies upon *Pickering*: *Hennessy v. City of Melrose*, 194 F.3d 237 (1st Cir. 1999)).

372 *Id.* at 867-68.

and *Ewing* as, at best, a nondiscrimination or nonretaliation right.³⁷³ Students may determine the course of their studies contractually but constitutionally only in the sense that they are entitled to equal treatment. It is not obvious how this is a unique manifestation of student academic freedom as opposed to a particular application of the equal protection clause. So, it is especially intriguing that institutions invoke students as the foundation of their own academic freedoms when, in reality, student academic freedom rights barely register and are even dismissed by scholars such as Professor Bryne.³⁷⁴

IV. Restating Academic Freedom and Distinguishing Institutional Academic Autonomy

Academic freedom needs restatement as a constitutional liberty in light of its original purpose and conceptualization as a public good. The paradigms to which courts have turned to articulate the freedom to teach and freedom to learn do not achieve the purpose. Curricular speech doctrine undermines it. Conduct carved out of academic freedom is treated as subject to it. Courts have come to believe that institutional academic autonomy *is* academic freedom or at least supersedes any other variety of academic freedom. It is critical now to disentangle academic freedom from institutional academic autonomy, so that both can thrive in their respective spheres. This section proposes one way of restating academic freedom as a constitutional liberty and of distinguishing institutional academic autonomy.

A. Academic Freedom as a Public Good

The point of academic freedom as originally conceptualized and elaborated by the U.S. Supreme Court is to preserve a free exchange of ideas in search of truth and its liberal exposition, not merely as an end in itself but in furtherance of democracy and the national welfare. The Declaration treats academic freedom as a “public trust” and the responsibility of the university teacher as primarily to the public.³⁷⁵ The 1940 Statement reaffirmed that academic freedom is “for the common good and

373 Compare *Ward v. Members of Bd. of Control of E. Mich.*, 700 F. Supp. 2d 803 (E.D. Mich. 2010) (genuine issues of material fact existed as to whether university’s reasons for discharging a student from a graduate counseling program for her unwillingness to affirm a client’s homosexual behavior and, thus, request for the director to refer the client to another counselor were a mere pretext to retaliate against her for expressing her religious beliefs) with *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016), *cert. denied*, 137 S.Ct. 1448 (2017) (removal of student from nursing program for threatening Facebook postings made outside of class did not violate his free speech rights where removal was pursuant to professional nursing standards that a school has a legitimate pedagogical interest in enforcing on and off campus); *Keeton*, 664 F.3d at 868 (upholding university’s decision to require a student to complete a remediation plan to participate in its clinical counseling program for stating that she “intended to attempt to convert students from being homosexual to heterosexual”); *Jemaneh v. Univ. of Wyo.*, 82 F. Supp. 3d 1281 (D. Colo. 2015) (remediation plan, which student alleged contained compelled speech was reasonably related to pedagogical purposes and professors’ failure to give student credit for correct work on exam was not caused by student’s complaint of discrimination), *aff’d*, 622 Fed. Appx. 765 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 2419 (2016).

374 Bryne, *supra* note 1, at 262.

375 Declaration, *supra* note 23, at 155; *accord Metzger*, *supra* note 12, at 1279.

not to further the interest of either the individual teacher or the institution as a whole."³⁷⁶

The stakes are high, according to the Court: the "Nation's future" depends upon "leaders trained through wide exposure to that robust exchange of ideas which discover truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."³⁷⁷ The Court explained that it is essential to democracy to form habits of critical inquiry and public opinion.³⁷⁸ When, instead, principles are treated as absolutes and dogma goes unquestioned, civilization stagnates and dies.³⁷⁹ Public officials "cannot be constitutionally vested with powers to select ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with."³⁸⁰ "Inhibition of freedom of thought"³⁸¹ or "freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas"³⁸² stifles innovation and prevents us from realizing the "ideal of Socrates—to follow the argument where it leads."³⁸³

Not everyone will agree with these premises, but if academic freedom has currency as a constitutional liberty, it should take seriously these purposes and values articulated by the Court and try to vindicate them.

1. *Borrow from Collective Action Theory*

There is no better place to turn for assistance than public goods or collective action theory. The hallmark of a public or collective good is that it is both nonexcludable and nonrivalrous, meaning that (1) consumers cannot be excluded from use or could benefit from the good without paying for it and (2) use by one person does not reduce availability to others.³⁸⁴ One faculty member or institution can benefit from a free marketplace of ideas without derogating from another, and the marketplace of ideas cannot be ensured for just one of us without benefiting all of us. In practice, most goods may share characteristics of both purely private and purely public goods, making for quasi-public or quasi-private goods.³⁸⁵

Nonexcludability leads to what is termed the "free rider problem." The optimal level of the public good is typically under-produced because it is in each individual's

376 1940 Statement, *supra* note 32.

377 *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

378 *Wieman v. Updegraff*, 344 U.S. 183, 221 (1952) (Frankfurter and Douglas, JJ. concurring).

379 *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957).

380 *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 497 (1952) (Black, J. dissenting).

381 *Wieman*, 344 U.S. at 221 (Frankfurter and Douglas, JJ. concurring).

382 *Id.*

383 *Sweezy*, 354 U.S. at 262–63.

384 Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954); Paul A. Samuelson, *Diagrammatic Explanation of a Theory of Public Expenditure*, 376 Rev. Econ & Stat. 350, 350 (1955); DAVID A. STARRETT, FOUNDATIONS OF PUBLIC ECONOMICS 42-44 (1988).

385 ROGER W. BENJAMIN, THE LIMITS OF POLITICS 10 (1980); RICHARD CORNES AND TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 124-28 (1986).

interest to let somebody else pay the price for the public good. Worse, the “tragedy of the commons” is that individual consumers of the shared resource, acting in their own self-interest, behave contrary to the common good by depleting or spoiling the shared resource through their collective action.³⁸⁶ Commonly, the self-interest of faculty, students, and institutions eclipse the public good. Students try to free themselves from academic standards as a condition of graduation. Faculty invoke a public good for their private employment benefit. Institutions exclude or discriminate against faculty and students with views they disapprove.³⁸⁷ All three take advantage of their academic liberty to pick and choose from the marketplace of ideas, while censoring other views. None of this is consistent with academic freedom as a public good.³⁸⁸ The closest the Court has so far come to protect academic freedom as a collective good was when threats external to the academy would diminish or extinguish it for both faculty and academic institutions. During part of the 1950s, individual and institutional academic interests converged in opposition to McCarthyism. Both resisted shrinking the marketplace of ideas. The question the U.S. Supreme Court wrestled with was whether loyalty tests were in fact antithetical to expanding the marketplace of ideas. Originally, the court ruled the oaths constitutional, then changed sides based on due process without ever bridging the judicial fracture over their congruity with academic freedom.

At bottom, *Sweezy* and *Keyishian* were reactions to impermissible “content-based regulation” or government efforts “to control or direct the content of the speech engaged in by the university or those affiliated with it.”³⁸⁹ Not even Justice Frankfurter who would have required professors to file affidavits listing organizations to which they belonged or contributed as a term of employment, would have tolerated terminating faculty solely because of their membership in unpopular organizations.³⁹⁰ If academic freedom has currency as a constitutional liberty, it must be, as the D.C. Circuit concluded in *Emergency Coalition*, to prevent this sort of governmental or quasi-governmental regulation of the content of a professor’s or student’s academic speech.³⁹¹ A free marketplace of ideas, the collective good to be advanced, requires that regulation be content-neutral and satisfy intermediate scrutiny, meaning that any infringement must further an important or substantial government interest.³⁹²

2. *Police the Boundaries of the Collective Good*

The cases have not become easier as threats to the public good have arisen

386 Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244-45 (Dec. 13, 1968).

387 The Declaration is silent about ideological hiring as compared to ideological dismissal. The AAUP turns a blind eye to it. Metzger, *supra* note 12, at 1282.

388 *Accord* Areen, *supra* note 13, at 999 (“Academic freedom was never defended as a benefit for faculty, but for its value to the First Amendment and to the nation.”).

389 *Univ. of Pa.*, 493 U.S. at 198.

390 *Shelton*, 364 U.S. at 496 (Frankfurter, J. dissenting).

391 *Emergency Coalition*, 545 F. 3d at 12.

392 *Id.*

endogenously, pitting institutional interests squarely against individual interests. As the first step when approaching this intramural conflict, courts should strictly police the boundaries of the public good, thereby carving out a large swath of faculty and student speech and conduct from academic freedom protection. Most of these cases fail the threshold “matter of public concern” test of *Connick-Pickering* anyway. From the beginning, as articulated in the Declaration, academic freedom has not protected intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter. Whether or not faculty are more than employees, agents, or servants, they are not entitled, as Professor Finkin implies, to demean others pursuant to some university-specific uncivil communal standard.³⁹³ Yet in recent years “conflicts over parochial prides and precedences and charges of hierarchic insubordination and coworker friction, have far outnumbered disputes involving the content of teaching or research.”³⁹⁴

Dressing up in constitutional garb petty employment disputes arising from gratuitous profanity, sexually promiscuous speech or conduct, failure to show up at work, and failure to teach assigned courses does not change the fact that, in reality, they concern private interests, not public ones. Academic freedom is not at stake when professors speak solely with the purpose to degrade or humiliate a student or detract from the subject matter with speech irrelevant to the class material.³⁹⁵ The same is true of students who sexualize assignments and classroom discussion when not germane to the subject matter or when they communicate racial epithets. The Declaration indicated lay governing boards in the academy are competent to judge these matters. Their institutional decisions are properly due deference in court not because academic freedom is at issue, but because it is not. Furthermore, as Professor Byrne has observed, off-campus political activity of faculty should not qualify either, because faculty have no greater or lesser right to participate in political affairs than other government employees.³⁹⁶ Academic freedom concerns exclusively rights unique or necessary to the functions of higher education.³⁹⁷

3. *Determine Whether the Speech at Issue Expands the Marketplace of Ideas*

With that underbrush removed, the hard work of resolving serious intramural conflict between institutional and individual interests begins. The foremost question should be whether the civil speech at issue expands the marketplace of ideas at public institutions.³⁹⁸ Academic freedom as a constitutional liberty must act, if at all, as a one-way ratchet in favor of liberating thought and expression in public colleges and universities. In the employment context, a modified *Connick-Pickering*

393 Finkin, *supra* note 15, at 1340 et seq.

394 Metzger, *supra* note 12, at 1276.

395 Chang, *supra* note 17, at 954.

396 Byrne, *supra* note 1, at 264.

397 *Id.* at 264.

398 In private colleges and universities, academic freedom will be exclusively a matter of tenure and contract law.

test could serve this purpose. The threshold test of the *Connick-Pickering* test examines whether the employee's speech is fairly characterized as constituting speech as a citizen on a matter of public concern. Speech expanding the marketplace of ideas at public institutions generally should qualify. "The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character."³⁹⁹

Teaching subjects germane to a course with civility should generally qualify for protection. Extramural utterances concerning institutional academic matters may also qualify when they concern more than the private interests of faculty such as academic and admission standards. These may implicate openness and free expression within the academy. Extramural utterances regarding institutional academic matters such as personnel actions, salary, promotion, grading, testing, and degree program requirements rarely should qualify. It matters little whether the speech was "public in nature" or "communicated to the public at large." If the central object of the speech is to expand the marketplace of ideas at public institutions, it furthers the collective good, democracy, and the welfare of the nation even when conveyed privately. Regulation must be content-neutral and satisfy intermediate scrutiny, meaning that any infringement must further an important or substantial government interest.⁴⁰⁰

Deference is not due under this approach when speech of faculty or students that is shielded by academic freedom is jeopardized or institutional educational judgment is a pretext for viewpoint discrimination or retaliation. Because of the tragedy of the commons, the collective good is unlikely to be produced without judicial enforcement. Contrariwise, Professor Areen would turn over intramural disputes to faculty bodies and require deference to their decision, notwithstanding her full expectation that they will exercise viewpoint discrimination.⁴⁰¹ Although conceding that "[d]isciplines that do not encourage internal criticism risk atrophy and death," Professor Post agrees: "[D]isciplines that do not bound internal criticism risk disintegration and incoherence."⁴⁰² Likewise, Professor Byrne argues the academic enterprise requires censorship and "ineradicable elements of ideological partisanship."⁴⁰³ Faculty enforce standards for teaching and scholarship and reign in crackpot ideas or at least fail to hire or approve tenure for faculty who espouse them.⁴⁰⁴ Consequently, "[t]he same faculty candidate can be seen as a careful scholar, a tiresome grunt, an effective teacher, a shameless showman, a thoughtful conservative and a homophobic reactionary."⁴⁰⁵ Most likely, these commentators would say faculty may evaluate and grade students the same way, according to the content of their ideas, not merely the quality.

399 *Bonnell v. Lorenzo*, 241 F.3d 800, 820 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001) (citing *Dembrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1180 (6th Cir. 1995))

400 *Emergency Coalition*, 545 F.3d at 12.

401 Areen, *supra* note 13, at 992, 995.

402 Post, *supra* note 16, at 535.

403 *Id.* at 305.

404 Byrne, *supra* note 1, at 297.

405 *Id.*

The claim that faculty and students must be judged on not only the quality of their work, but also its viewpoint should be rejected or academic freedom itself abandoned as a constitutional freedom.⁴⁰⁶ This is not to deny the importance of socializing students in the key theorems of their disciplines.⁴⁰⁷ Students and faculty may certainly be expected to know and articulate a discipline's laws and theorems. It is instead to reject the idea that faculty and students may never disagree with or propose alternatives to theorems. There is a difference between laws and postulates or theorems. For example, it is one thing for a scholar to deny the law of gravity, the holocaust, or to teach that $2 + 2 = 8$.⁴⁰⁸ The academic guild may properly police these boundaries as a matter of institutional academic autonomy. The guild may insist upon work product capable of evaluation. But it is another thing to discriminate against faculty or students who thoughtfully disagree with mere theories or fashionable ideological convictions or whose sincere religious convictions preclude them from parroting or endorsing speech or conduct they consider immoral. When a public institution retaliates against that type of speech, it generates the pall of orthodoxy that academic freedom was intended to prevent.

When presented with claims by faculty or students that their rights have been violated, courts should, according to Professor Byrne, go no further than to assess whether academic grounds were given. Professor Areen offers little more: "An individual faculty-plaintiff could challenge a decision made by the faculty, but the bar would be set extremely high."⁴⁰⁹ The test she proposes would have two parts: (1) the faculty member would have the initial burden to allege that her speech leading to adverse action concerned an academic matter and (2) the university would then have to show that the adverse action was based on a policy approved by faculty or was made on an academic grounds and not in retaliation for the speech.⁴¹⁰ "Academic grounds" is so broad the faculty member would rarely prevail especially when academic grounds justify viewpoint discrimination. Hence, in recognition of the extent to which academic freedom has been flipped on its head, Professor Bauries refers to faculty speech rights as the least protected government employee speech rights, rather than most protected.⁴¹¹ When academic freedom is conceived of exclusively as a one-way ratchet in favor of liberating thought and expression in public colleges and universities and as supplemental to individual liberties and contract rights, and when the boundaries of academic freedom are strictly policed, the so-called tension between its exercise by individual

406 Areen, *supra* note 13, at 992.

407 Post, *supra* note 16, at 535 ("Continuity is maintained because dissenters must first be sufficiently socialized into existing disciplinary practices that their criticisms can be formulated in a manner that is intelligible to members of a discipline.").

408 See Stanley Fish, *Holocaust Denial and Academic Freedom*, *VAL. U. L. REV.* (2001); Chang, *supra* note 17, at 948.

409 Areen, *supra* note 13, at 995.

410 *Id.* at 998.

411 Bauries, *supra* note 14, at 715 ("[T]he academic speech of public university professors is among the least protected forms of speech. In fact, it stands on the same footing as obscenity, fighting words, incitement speech, and child pornography, which are all categorically unprotected under the First Amendment due to their "low-value.").

faculty members and institutions dissipates. No more than one of the parties to an intramural conflict ordinarily will be looking to expand the marketplace of ideas. When college speech policies go too far, academic freedom and other First Amendment doctrines such as overbreadth and vagueness are pertinent to prevent a pall of orthodoxy. But that is not to say that they will always prevail.

The intramural conflict could still turn on the remaining two *Connick-Pickering* tests: whether the speech played a substantial part in the government's challenged employment decision and whether the government has shown, by a preponderance of the evidence, that it would have made the same employment decision in the absence of the protected conduct. These tests inherently recognize the observation of Professors Finkin and Post, among others, that a scholar's right to assert academic freedom requires that the scholar act within the academic enterprise. If the institution would have taken adverse action against a scholar irrespective of his speech; for example, because repeated teaching evaluations by her students are poor, we can be certain that the action is unrelated to restricting the marketplace of ideas. Then, institutional academic autonomy is the most important concern.⁴¹²

4. *Jettison Unhelpful Precedent*

Some paradigms to which the courts have turned to assess academic freedom should be jettisoned. Curricular speech doctrine has no place in the academic freedom analysis because it privatizes the marketplace of ideas. The recent line of admissions cases confuse the meaning of academic freedom. As the Court has already allowed, *Garcetti* is not helpful either. Neither is the *Connick-Pickering* balancing test ordinarily helpful.

a. **Curricular Speech Doctrine Is Inimical to Academic Freedom.**

Whatever relevance *Kuhlmeier* may have to other disputes, its rationale; i.e., inuring impressionable students against certain speech, is inimical to academic freedom. *Lernfreiheit* demands the opposite. Curricular speech doctrine is also disproportionately adverse to religious speech and illiberal views. Talented, but sincerely religious faculty are endangered species on most public campuses because institutions have excluded them. As curricular speech doctrine has warped the marketplace of ideas, aligning the academy with one side of the culture war, distrust of the academy has deepened.⁴¹³ Whereas the Declaration emphasized the importance of universities being so free that no "fair-minded person" would find any excuse for doubting the professional neutrality of the academy, this is precisely what is now most doubted.⁴¹⁴

412 Private institutions were always exempt in their discretion from the academic freedom doctrine, leaving it up to them whether and how much academic freedom to accord faculty and students as a contractual matter.

413 See Paul Horwitz, Fisher, *Academic Freedom and Distrust*, 59 LOY. L. REV. 489, 494 (2013).

414 Declaration, *supra* note 23, at 155. Another warning sign that academic freedom is limited is the origins of America's most influential innovations. Microsoft, Apple, Google, and Amazon were birthed in garages, rather than universities. Cf. Areen, *supra* note 13, at 999 (Higher education is "a prime source of new ideas, which, from the earliest days of the republic, have stimulated the

The exclusionary effect of curricular speech doctrine extends to accreditors and professional associations, which attempt to compel private institutions to conform with their peers to exclude and discriminate against the same views rejected by public institutions, rather than leave them as counterweights in the marketplace of ideas. This is at odds with the limitations clause inserted in the Declaration,⁴¹⁵ which at least condescendingly recognized that religious and proprietary institutions are at liberty to define the scope of academic freedom they will offer faculty and students as a contractual matter. The choice faculty and students have to attend these institutions, learn and publish should not be truncated if the goal is academic freedom. Curricular speech doctrine should be discarded at the postsecondary level in connection with academic freedom disputes; and even at the secondary level, the rationale for imposing the doctrine would be adequately protected by policing the boundaries of academic freedom.

b. The Admissions Cases Confuse Interests.

Challenges to race-sensitive admissions policies present the most recent example of an external threat to academics uniting the interests of institutions and faculty. The majority of faculty and colleges consider race a proxy for ideas. No other demographic factors are typically as important surrogates and, in fact, some like religion are denigrated. Thus far, a majority on the Court has also agreed that race-sensitive admissions policies further academic freedom not only by promoting “the four essential freedoms of a university,” but also expanding the marketplace of ideas. In this case, *Lehrfreiheit* is not at issue; *Lernfreiheit* is. The conflict here is exogenous to the relationship between institutions and faculty but endogenous to the relationship between institutions and prospective students. Faculty have no adverse stake in the matter and, to the contrary, agree that race-sensitive policies benefit education.

The question indirectly at issue in the admissions cases is whether to expand the freedom to learn it is necessary simultaneously to limit it. Professor Metzger insists students do not have academic freedom interests,⁴¹⁶ yet the cases are grounded in the idea that the study body benefits from “enhanced classroom dialogue,” the “lessening of racial isolation and stereotypes,” providing “that atmosphere which is most conducive to speculation, experiment and creation,” promoting “learning outcomes” and “better prepar[ing] students for an increasingly diverse workforce and society.”⁴¹⁷ Not so students who would have been admitted but for the policy. As far as pure collective goods are concerned, here would be a unicorn: an institution excluding prospective students otherwise qualified from enjoying the collective good (i.e., learning) by denying them admission while somehow expanding the collective good through enhancing classroom dialogue. By cabining equal protection, the Court has not had to decide whether academic freedom overshadows it or whether *Lernfreiheit* is protected at all.

economy, strengthened national security, enhanced culture and enriched civic life.”).

415 See *supra* note 30 and related text.

416 Metzger, *supra* note 12, at 1304.

417 *Fisher I*, 570 U.S. at 308; *Fisher II*, 136 S. Ct. at 2210.

Confusing the matter is that there is a possibility that a quasi-public good is at stake, as well as another collective good: diversity. The implication of the admission cases may be that diversity is more important as a collective good than the freedom to learn. By failing to sort out the collective goods and their importance; the respective interests of institutions, faculty and students; and failing to define academic freedom and who is entitled to assert it, the admissions cases are not necessarily helpful for purposes of elucidating academic freedom as a nascent liberty.

c. Other Paradigms.

Garcetti is also no help to police the limits of academic freedom because, as Justice Souter pointed out, teachers necessarily speak and write pursuant to their official duties. The Court has conceded this point.⁴¹⁸ Neither does the weighing interests prong of the *Connick-Pickering* test (i.e., the original *Pickering* test) typically sort out things because there is ordinarily no objective basis for comparison purpose; the interests are generally categorically different as in *Demers* between the professor's interest in criticizing the lack of professional orientation in the communications program and the university's interest in ensuring that he appear in person for classes and publish scholarship. Set this test aside or presume it met when academic freedom is at stake unless there is an objective basis for comparison purpose.

5. Broaden Public Fora.

A final recommendation to expand the marketplace of ideas is to broaden public fora to provide an additional avenue to share views without biasing by reference to viewpoint the expression of ideas or associations that meet or post in the forum. "[A] public educational institution exceeds constitutional bounds ... when it 'restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent.'"⁴¹⁹ Curricular speech doctrine has expanded the "classroom" so much that there are precious little public fora left. Abandoning *Kuhlmeier* at the postsecondary level should concordantly help to expand public fora. Speakers in public fora will generally not wield the influence that the professor does in the classroom and research laboratory, and so will offer mere supplemental support for academic freedom, but public fora are still important to ensure a vibrant marketplace of ideas at public institutions.

B. Institutional Academic Autonomy Distinguished

Academic freedom is not the same as institutional academic autonomy, but this is not to say that the latter is unimportant. Professor Metzger called *Freiheit der Wissenschaft* a tertium quid to academic freedom, meaning it is related to, but distinct from, academic freedom.⁴²⁰ Justices Frankfurter and Harlan treated the four freedoms as the foundation for enabling colleges and universities—both

418 *Garcetti*, 547 U.S. at 425.

419 *Healy*, 408 U.S. at 187-88.

420 Metzger, *supra* note 12, at 1270.

public and private—to establish the framework for speculation, atmosphere, and creation. The academy has a decided collective aspect as if more than its constituent parts. This was Justices Frankfurter and Harlan’s point in *Sweezy* when they viewed academic autonomy as an expression of the collective scholarship of faculty and students, yet something also to be asserted independently by an academic institution itself. They called this academic freedom, which has led us to our contemporary constitutional morass, where individuals and institutions can assert the same freedom against each other with the result that the institution generally wins as if in its hands the same doctrine is more powerful.

If the same constitutional liberty may encompass both a professor’s freedom to teach and an institution’s freedom to limit teaching, besides the student’s freedom to learn and the institution’s freedom to limit that learning, it is easy to see that the liberty contains within itself its undoing. Trouble for the nascent constitutional liberty began when the side arguing no conflict between loyalty oaths and academic freedom sought to encompass within the liberty an institution’s right to decide who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Academic freedom defined as such fails the nonexcludability prong of public good analysis. Academic freedom becomes a quasi-private or purely private good that does not inherently expand the marketplace of ideas. In fact, academic freedom defined as such may commonly shrink it. There is a better approach that distinguishes academic freedom from institutional academic autonomy and allows both to thrive in their respective spheres.

1. *Deference to Educational Judgment*

When enumerated constitutional liberties and academic freedom are not jeopardized, deference to institutional educational judgment is reasonable because of the special importance of education in our society and the limits of judicial review. Intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter are matters for institutions to address. Determining what may be taught and how it shall be taught concerns pedagogy. All colleges and universities are in this business. Courts repeatedly state that they are reticent to second-guess pedagogical decisions. Determining who may teach and who may be admitted to study primarily concerns free association for private institutions. Even when the selection of the student body infringes equal protection, courts have extended considerable deference to the educational judgment of colleges and universities as relates to whom is admitted.

Both public and private colleges are entitled to impose bona fide occupational qualifications that enable them to insist on certain minimum credentials; e.g., astrophysics professors with related degrees. Courts are reticent to second-guess these mandatory professional qualifications or tenure decisions. Likewise, they believe universities should have wide discretion to judge the academic performance of students and their entitlement to graduation.⁴²¹ In *Ewing*, the court observed that judges are ill-equipped to make decisions concerning “the multitude of academic

421 *Emergency Coalition*, 545 F.3d at 234 (citing *Ewing*, 474 U.S. at 225 n.11).

decisions that are made daily by faculty members of public educational institutions—decisions that require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.’⁴²²

The deference due institutions in these circumstances we have referred to throughout as institutional “academic autonomy.” Elsewhere, it has been called “academic abstention.”⁴²³ “Abstention” has been defined as the act or practice of choosing not to do or have something.⁴²⁴ Choice is less the focus of the courts in academic freedom cases than lack of competence or even jurisdiction. “Autonomy” involves the right of self-government.⁴²⁵ Hence, autonomy seems more apt. As Professor Areen suggests, deference is especially appropriate when faculty bodies support the decision but not only in this event.⁴²⁶

2. Church Autonomy Doctrine

There is an interesting partial analogy also derivative of the First Amendment known as the church autonomy doctrine specially conceived to protect religious organizations’ employment and governance decisions. In *Watson v. Jones*, the U.S. Supreme Court announced the church autonomy doctrine by distinguishing the English common law.⁴²⁷ Lord Eldon’s Rule, as it was called, enabled the courts to inquire which party to an ecclesiastical dispute bore “the true standard of faith in the church organization.”⁴²⁸ In contrast, the U.S. Supreme Court held, “The law knows no heresy.”⁴²⁹ There is a sense in which the courts also “see the college as a separate realm, pursuing values different from those of society as a whole.”⁴³⁰ This is perhaps due to a common sacerdotal heritage (that many universities would now prefer to forget). The university is where knowledge and understanding should be pursued with detachment and disinterestedness without internal or external compulsion. In several states, public universities or boards of regents are constitutional bodies with, in some cases, separate branch-like powers.⁴³¹

In the same way that academic autonomy is said to be a function of the rights of scholars to teach, research, and inquire, and said to be supplemental to those rights in furtherance of the academic decisions of the collective faculty body, there

422 *Ewing*, 474 U.S. at 226.

423 *Byrne*, *supra* note 1, at 323.

424 MERRIAM-WEBSTER DICTIONARY (2020).

425 *Id.*

426 Areen, *supra* note 13, at 996-97.

427 80 U.S. 679 (1871).

428 *Id.* at 727.

429 *Id.* at 728.

430 *Byrne*, *supra* note 1, at 325.

431 *See, e.g.*, CAL. CONST. art. IX, § 9; FLA. CONST. art. IX, § 7; GA. CONST. art. VIII, § 4; HAW. CONST. art. X, § 6; IDAHO CONST. art. IX, § 10; MICH. CONST. art. VIII, § 5; MINN. CONST. art. XIII, § 3; MONT. CONST. art. X, § 9; NEB. CONST. art. VII, § 10; and OKLA. CONST. Art. XIII, § 8; *Regents of the Univ. of Mich. v. State*, 166 Mich. App. 314, 419 N.W. 2d 773 (1988).

is a sense in which church autonomy is both derivative of the rights of the faithful to free exercise of religion and separation of church and state, and supplemental to those rights in furtherance of the employment and governance decisions that only the collective body of believers organized as an institution can make. The U.S. Supreme Court recognized one variety of church autonomy known as the ministerial exception doctrine, when the court confirmed that a religious organization is entitled to select its ministers and, as a result, has an affirmative defense to various kinds of discrimination claims.⁴³² This is directly relevant to religious postsecondary institutions that would assert their institutional autonomy against challenges to their employment decisions and perhaps, by extension, student admissions, dismissal, and grading decisions.

There is no direct relevance to public institutions. Free speech and assembly belong to private parties.⁴³³ State actors do not have constitutional rights to exercise.⁴³⁴ Academic institutions deploy academic autonomy at odds with enumerated liberties, including those contained in the First Amendment, whereas religious institutions assert church autonomy incident to their First Amendment liberties. Some will reasonably conclude that this makes the analogy wholly inapt; and it is certainly true that academic autonomy cannot be used in this fashion for any symmetry to survive. But there remains in common several ideas, such as the grounding of academic freedom in the notion that faculty bodies should be free to act “according to their own consciences,”⁴³⁵ besides the idea that judges feel incompetent to decide who should teach, what should be taught, how it should be taught, and who should be admitted to study.⁴³⁶

Watson required civil courts to accept the decision of the highest church judicatory as authoritative because the courts are not “competent in the ecclesiastical law and religious faith...”⁴³⁷ Similarly, scholars like Professor Areen insist faculty bodies are best suited to judge faculty scholarship and conduct,⁴³⁸ and consider courts as out of their element. Church autonomy doctrine is jurisdictional in many state courts and was in federal court until the Court resolved a split in favor of it as an affirmative defense.⁴³⁹ Institutional academic autonomy is ordinarily not an affirmative defense, but functions like one, in the form of deference, when faculty and students file First Amendment retaliation instead of Title VII retaliation claims against universities.

432 *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady Guadalupe Sch. v. Morrissey-Berru*, _ U.S. _, 140 S. Ct. 2049 (2020).

433 Metzger, *supra* note 12, at 1291 (“The basic truth about the first amendment is that it protects the liberties of citizens solely against actions by the state.”)

434 Byrne, *supra* note 1, at 300 (“A final anomaly in the application of state action doctrine is that constitutional academic freedom is the only constitutional right exercised by state actors.”)

435 Declaration, *supra* note 23, at 155.

436 Bryne, *supra* note 1, at 325.

437 *Watson v. Jones*, 80 U.S. 679, 729 (1871).

438 Areen, *supra* note 13, at 992, 995.

439 *Hosanna-Tabor*, 565 U.S. at 709 n.4.

If in the exercise of their educational judgment, postsecondary institutions do not transgress enumerated constitutional liberties, courts should be reticent to second guess them. However, when the exercise of educational judgment by public institutions results in viewpoint or content-based discrimination against particular ideas, courts should step in to preserve the marketplace of ideas and academic autonomy must give way. If academic freedom exists as a constitutional matter at all, it must be in furtherance of this liberation of thought; otherwise, it should be abandoned altogether as a would-be constitutional liberty, so as not to justify infringement of enumerated constitutional liberties, and consigned exclusively to tenure and contract law.

V. Conclusion

The jurisprudence of academic freedom is now at enmity with the doctrinal statements out of which it grew in the early 1900s. Then, it was a professional norm, primarily concerned with liberating the professor's thought from the institution and assuring a vigorous exchange of ideas in the classroom benefiting students. In the 1950s-'60s, the norm was elevated to quasi-constitutional status to protect primarily the faculty, and incidentally universities, from the state's McCarthyite inquiries. Beginning in the 1970s, internal struggles within the academy between faculty and leadership reached the courts. A presumption arose in favor of academic institutional autonomy. In the 1980s, the U.S. Supreme Court articulated the curricular speech doctrine in reaction to secondary students who complained of interference with their speech rights. By the 2000s, religious speech and admissions cases led to an emerging consensus that academic freedom is primarily an institutional liberty, counterbalancing even enumerated liberties of individual faculty and students in intramural disputes with the institutions. Understood thus, academic freedom undermines its original purpose to expand the marketplace of ideas.

The easiest type of academic freedom to vindicate arises, as in the *Wieman-Sweezy* line of authority and admissions cases, when the interests of institutions and faculty are largely congruent. But when they diverge, a conception of academic freedom as both protecting faculty and institutions threatens to annul the doctrine. A better approach is to treat academic freedom as a public good and one-way ratchet in favor of liberating thought and expression in public colleges and universities, and as supplemental to individual liberties and contract rights, but to set it aside as inapplicable in situations where it would shrink the marketplace of ideas. The D.C. Circuit hypothesized that one way to do this is to invoke the doctrine "only to prevent a governmental effort to regulate the *content* of a professor's academic speech."⁴⁴⁰ In addition, public fora doctrine could be expanded to liberate speech.

The concept of academic freedom in the courts is both underinclusive to the extent it is conceived primarily as institutional in character and overinclusive to the extent individual plaintiffs seek to constitutionalize employment grievances. Even as originally ensconced in the Declaration, academic freedom was not relevant to many such disputes involving, for example, intemperateness, neglect of duty,

440 *Emergency Coalition*, 545 F.3d at 12 (emphasis original).

moral delinquency, and even the avoidance of controversial matter without relation to course subject matter. The reason is not that these activities constitute curricular speech but that they are outside the scope of academic freedom and within the purview of institutional academic autonomy. Admissions decisions have also historically been treated as fundamentally institutional, rather than matters of academic freedom. They primarily concern students who have generally received the shortest end of the academic freedom stick.

The applicability of the *Kuhlmeier* curricular speech doctrine at the postsecondary level deserves scrutiny because it is at war with the rationale of academic freedom to expand the “marketplace of ideas” in the pursuit of truth. From the beginning, academic freedom has concerned curricular speech. Curricular paternalism, as distinct from protection against obscenity, is least convincing as relates to professional and graduate students. Curricular speech conceptualized as inclusive of out-of-classroom statements seems oxymoronic and is in tension with the exercise of express constitutional rights.

Whether speech is curricular or not has become the real threshold inquiry determining whether a plaintiff states a claim under the *Connick-Pickering* or *Garcetti* test. Under current law, if speech is curricular, it is not of public interest and the government’s interest supersedes the individual’s interest, so the professor fails to state a claim under *Connick-Pickering*. This is all the more likely if the speech is religious. If speech is noncurricular, and in a professor’s official capacity, the professor fails to state a claim under *Garcetti*. Rather than ask the curricular question as the fundamental one, while paying lip service to academic freedom, courts should instead pose the threshold question whether academic freedom interests are at stake. To the extent the speech or conduct at issue is not excepted from the Declaration, and infringing upon it would tend to limit the marketplace of ideas, then the academic freedom interest is triggered but in a fashion accommodated to a public institution’s legitimate expectation of civility and professional duty.

Whereas institutional academic autonomy may be at odds with *Lehrfreiheit*, it makes no sense to continue to distinguish academic freedom from *Lehrfreiheit*. For the sake of doctrinal coherence, it would be best to distinguish institutional academic autonomy from academic freedom and when they come into tension to elaborate a more principled manner of deciding the case. If, in every such instance, academic freedom must lose and the only times it wins is when institutional academic autonomy points the same way, then truly there is no such liberty as academic freedom as originally conceptualized. Then, what passes for academic freedom is really institutional academic autonomy, and academic freedom is no more than an illusory transcendent value that contract law alone may protect. The worst possible jurisprudence would mistake academic freedom for institutional academic autonomy and supersede enumerated constitutional rights. The purpose of academic freedom is a limited one for the common good to ensure a free exchange of ideas in search of truth and its liberal exposition. It is better not to invoke academic freedom at all than be guilty of using it in a manner that would achieve the inverse of this objective.

TITLE VI, ANTI-SEMITISM, AND THE PROBLEM OF COMPLIANCE

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Abstract

The Executive Order on Combatting Anti-Semitism issued by President Trump in December 2019 serves the salutary purpose of continuing the policy of the Obama administration authorizing the Department of Education to enforce Title VI of the Civil Rights Act of 1964 against anti-Semitic harassment in educational institutions as discrimination based on national origin. However, the definition of anti-Semitism that the Executive Order requires educational institutions to “consider” appears to regulate core political speech. If that definition is actually applied by ED in enforcement proceedings, it will infringe on the right to free speech protected by the First Amendment.

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INTRODUCTION

On December 11, 2019, President Trump issued an “Executive Order on Combatting Anti-Semitism” (the Executive Order), which in section 1 announced the policy of his administration “to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI.”¹ The Executive Order was met with strong expressions of both approval and disapproval.² For the reasons discussed below, the Executive Order is salutary in applying Title VI’s ban on national origin discrimination to anti-Semitism, but its definition of anti-Semitism is likely to have a chilling effect on protected speech relating to Israel. In the final analysis, much will depend on how the US Department of Education (ED) acts to enforce it. In the meantime, given the uncertainties created by the Executive Order, it will be difficult for college and university administrators to know how to fulfill their obligation to comply with Title VI in this context without infringing on the freedom of speech of students and faculty and academic freedom of their institutions as a whole.³

I. Background and Contents of the Executive Order

Title VI of the Civil Rights Act of 1964 provides that no individual may be excluded from participation in, be denied the benefits of, or otherwise be subjected

1 <https://www.whitehouse.gov/presidential-actions/executive-order-combatting-anti-semitism/>.

2 On the pro side, see, for example, Jared Kushner, *President Trump Is Defending Jewish Students*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/opinion/hared-kushner-trump-anti-semitism.html>; Chandler Thornton, *Trump Is Right to Take Aim at Anti-Semitism on College Campuses* (Dec. 12, 2019), <https://www.cnn.com/2019/12/12/opinions/trump-is-right-to-take-aim-at-anti-semitism-on-college-campuses-thornton/index.html>; ADL Welcomes Executive Order Combatting Anti-Semitism, <https://www.adl.org/news/press-releases/adl-welcomes-executive-order-combatting-anti-semitism>; Allison Kaplan Sommer, “Harassment Is Not Free Speech”: Trump’s Anti-Semitism Czar Rejects Criticism Over Executive Order, HAARETZ (Dec. 18, 2019), <https://www.haaretz.com/us-news/premium-trump-s-anti-semitism-czar-rejects-criticism-over-executive-order-1.8288943>. On the con side, see, for example, Judith Butler, *Trump Elevates an Anti-Semitic Slur into Law*, FOREIGN POL’Y (Dec. 21, 2019), <https://foreignpolicy.com/2019/12/21/trump-elevates-an-anti-semitic-slur-into-law/>; Masha Gessen, *The Real Purpose of Trump’s Executive Order on Anti-Semitism*, NEW YORKER (Dec. 12, 2019), <https://newyorker.com/news/our-columnists/the-real-purpose-of-trumps-executive-order-on-anti-semitism>; Eric Alterman, *Trump’s Executive Order on Anti-Semitism Isn’t About Protecting Jews*, THE NATION (Dec. 19, 2019), <https://www.thenation.com/article/executive-order-anti-semitism/>; Michael Brenner, *Why President Trump’s Executive Order to Fight Anti-Semitism Is Dangerous for Jews*, WASHINGTON POST, Dec. 15, 2019. For views that are both sympathetic to and critical of the Executive Order, see, for example, Noah Feldman, *The Strange Thing About Trump’s Anti-Semitism Order*, BLOOMBERG (Dec. 12, 2019), <https://www.bloomberg.com/opinion/articles/2019-12-12/trump-s-strange-anti-semitism-executive-order>; Heather Mac Donald, *Opposing Anti-Semitism the Wrong Way*, CITY J. (Dec. 18, 2019), <https://www.cityjournal.org/executive-order-anti-semitism>; Tyler Coward, *Trump’s Anti-Semitism Executive Order Undermines Campus Free Speech*, NAT’L REV. (Dec. 16, 2019), <https://www.nationalreview.com/2019/12/trumps-anti-semitism-executive-order-undermines-campus-free-speech/>.

3 For a concise statement of the meaning of academic freedom, see *1940 Statement of Academic Freedom and Tenure*, AAUP, POLICY DOCUMENTS & REPORTS at 3–7 (10th ed. 2006), <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>. For a summary of the development of the principles of academic freedom and how its principles have been applied to a variety of issues, see Frederick P. Schaffer, *A Guide to Academic Freedom*, J. COLLECTIVE BARGAINING IN THE ACAD. (Apr. 2014), <https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1325&context=jcba>.

to discrimination on the ground of “race, color or national origin” in connection with any program or activity receiving federal financial assistance, which include virtually all public and private colleges and universities. Unlike Title VII, which prohibits certain forms of discrimination in employment, Title VI does not prohibit discrimination on the ground of religion. Accordingly, ED’s Office of Civil Rights (OCR) lacks authority to investigate and sanction incidences of religious discrimination in educational institutions.

The question of whether Title VI applies to anti-Semitism turns on the vexing issue of whether Jews are a group defined by religion only, or whether they also constitute a group defined by race or national origin. For more than forty years after the passage of Title VI, OCR apparently regarded Jews solely as a religious group and, accordingly, took no enforcement actions against complaints of anti-Semitism. This position became increasingly untenable as expressions of anti-Semitism on college campuses increased around the turn of the last century,⁴ and the Obama administration responded accordingly.⁵ A letter dated September 8, 2010, from Assistant Attorney for Civil Rights General Thomas E. Perez to Assistant Secretary of Education for Civil Rights Russlyn H. Ali stated that “[a]lthough Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other groups violates Title VI when that discrimination is based on the group’s actual or perceived shared ancestry or ethnic characteristics.”⁶ Then, in a guidance by Assistant Secretary Ali dated October 26, 2010, which dealt with the subject of bullying in educational institutions,⁷ ED announced its position that “anti-Semitic harassment can trigger responsibilities under Title VI.” The letter reasoned as follows:

While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry

4 See U.S. COMM’N ON CIV. RTS., *CAMPUS ANTI-SEMITISM* (2006). There is a vast literature on the resurgence of anti-Semitism more generally, in the United States and across the globe—a subject that is beyond the scope of this article. For the most recent factual contribution to this literature, see ADL, *AUDIT OF ANTI-SEMITIC INCIDENTS 2019* (released May 12, 2020), <https://www.adl.org/audit2019>.

5 For an interesting exploration of the relationship between anti-Semitism and anti-Zionism and the background to the policy adopted by the Obama administration, see KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* (2010). Mr. Marcus, in his earlier tenure as Assistant Secretary of Education for Civil Rights, issued a guidance dated September 13, 2004, that noted the increase in complaints of race or national origin discrimination commingled with aspects of religious discrimination against Arab Muslim, Sikh, and Jewish students; it went on to note that where such commingling occurred, OCR has jurisdiction to enforce Title VI’s prohibition of national origin discrimination notwithstanding the presence of religious discrimination. Kenneth L. Marcus, *The New OCR Anti-Semitism Policy*, *SCHOLARS FOR PEACE IN THE MIDDLE EAST* (Apr. 30, 2011), text at notes 7–12, https://spme.org/campus-news-climate/the-new-ocr-anti-semitism-policy/9758/#_ftnref7; Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 5 *WM. & MARY BILL RTS. J.* 837, 838 (2007), <https://scholarship.law.wm.edu/wmboj/vol15/iss3/4>. Mr. Marcus left OCR shortly thereafter, and his analysis did not result in any enforcement action until it was adopted by the Obama administration in 2011.

6 Marcus, *The New OCR Anti-Semitism Policy*, *supra* note 5, at text accompanying note 9. The link to the DOJ website cited by Mr. Marcus has been removed.

7 <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>. Such guidance is commonly referred to as “Dear Colleague” letters because they take the form of letters to educational institutions containing the salutation “Dear Colleague.”

or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs). Thus harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members religious practices. [footnotes omitted]

Although perhaps overdue, this policy was hardly unprecedented. In *Shaare Tefila Congregation v. Cobb*⁸ the Supreme Court held that Jews could bring a claim for racial discrimination under the Reconstruction era Civil Rights Act guaranteeing all citizens "the same right ... as is enjoyed by white citizens ... to inherit, purchase, lease, sell, hold, and convey real and personal property."⁹ The Court applied the reasoning of an earlier case involving Arabs¹⁰ that at the time the statute was enacted, "race" was understood differently than it is today and that the law was "'intended to protect from discrimination identifiable classes of persons who are subjected to intentional discriminations solely because of their ancestry or ethnic characteristics.'"¹¹ Similarly, Title VII prohibits employment discrimination on the ground of national origin, and the regulations implementing Title VII have long defined national origin discrimination as including the denial of equal employment opportunity "because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."¹² To use more recent vocabulary, the meaning of national origin includes ethnicity.¹³ Thus, it fits comfortably within established law and precedent to describe Jews as a group based on national origin as well as a religion.¹⁴

In sum, one thrust of the Executive Order is to reaffirm (in an admittedly dramatic fashion¹⁵) the policy of the Obama administration that Title VI prohibits anti-Semitic discrimination or harassment as well as discrimination against other

8 481 U.S. 615 (1987).

9 42 U.S.C. § 1982.

10 *St. Francis Coll. v. Al-Kazraji*, 481 U.S. 604 (1987).

11 *Id.* at 617.

12 29 C.F.R. § 1606.1.

13 This is quite explicit in the Equal Opportunity Employment Commission's (EEOC) Overview of Title VII and in its Compliance Guidance. See <https://www.eeoc.gov/laws/types/nationalorigin.cfm> and <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cf>.

14 Some of the most vehement criticism of the Executive Order came from those who viewed it as embodying the traditional anti-Semitic trope that Jews are a separate race or nationality, thus giving comfort to those who view Jews as the Other or believe they have dual loyalty. See, e.g., Brenner, *supra* note 2. While perhaps understandable, such criticism is based on a misunderstanding of the meaning of national origin in the context of the civil rights laws.

15 As the policy of the Obama administration was announced in an ED guidance letter, it might have been expected that the continuation of that policy would take the same form. The use of an executive order for this purpose would appear to have been designed to achieve maximum political effect.

ethnic groups who share a common religion.¹⁶ In that respect, and without regard to its political motivation, the Executive Order should be viewed as an unalloyed good.

II. The Executive Order's Definition of Anti-Semitism

However, the Executive Order goes on in section 2(a) to require federal agencies charged with enforcing Title VI to "consider" the following:

- (i) the non-legally binding working definition of anti-Semitism adopted on May 26, 2016, by the International Holocaust Remembrance Alliance (IHRA),¹⁷ which states, "antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities"; and
- (ii) The "Contemporary Examples of Anti-Semitism" identified by the IHRA, to the extent that any examples might be useful as evidence of discriminatory intent.

Prior efforts had been made to effectuate the same result as the Executive Order, including consideration of a similar definition of anti-Semitism, through federal legislation.¹⁸ Those efforts were unsuccessful largely due to concerns that the law would infringe on First Amendment rights.¹⁹

16 It should be noted in this connection that during the Obama administration, OCR was sensitive to the First Amendment issues involved in allegations of anti-Semitism based on speech critical of Israel and/or supportive of Palestinian rights and dismissed complaints that were based on constitutionally protected speech. *See, e.g.*, CTR. FOR CONSTITUTIONAL RTS., IN VICTORY FOR STUDENT FREE SPEECH, DEPARTMENT OF EDUCATION DISMISSES COMPLAINTS (Sept. 4, 2013), <https://ccrjustice.org/home/press-center/press-releases/victory-student-free-speech-department-education-dismisses>.

17 The IHRA is an intergovernmental organization that unites governments and experts to strengthen, advance, and promote Holocaust education, research, and remembrance, and to uphold the commitments to the 2000 Stockholm Declaration. It currently has thirty-four member countries. *See* <https://holocaustremembrance.com/about-us>.

18 S. 10, Anti-Semitism Awareness Act of 2016, <https://www.congress.gov/bill/114th-congress/senate-bill/10/text>. The bill proposed defining anti-Semitism in accordance with the definition set forth by the Special Envoy to Monitor and Combat Anti-Semitism of the Department of State in the Fact Sheet issued on June 8, 2010, as adapted from the Working Definition of Anti-Semitism of the European Center on Racism and Xenophobia (now known as the European Agency for Fundamental Rights). A slightly revised version of that working definition was adopted by the IHRA in 2016. The bill was passed by the Senate but stalled in the House of Representatives. A similar bill was introduced but went nowhere in 2018 and 2019. *See* H.R. 2940, Anti-Semitism Awareness Act of 2018, <https://www.congress.gov/bill/115th-congress/senate-bill/2940>; S. 852, Anti-Semitism Awareness Act of 2019, <https://www.congress.gov/bill/116th-congress/senate-bill/852/text>.

19 *See, e.g.*, ACLU LETTER, OPPOSE H.R. 6421/S. 10, THE ANTI-SEMITISM AWARENESS ACT OF 2016, <https://www.aclu.org/letter/oppose-hr-6421s-10-anti-semitism-awareness-act-2016>; Joe Cohn, *Problematic Campus Anti-Semitism Bill Clears Senate*, <https://www.thefire.org/problematic-campus-anti-semitism-bill-clears-senate/>; Carey Nelson et al., *What's Wrong with the Anti-Semitism Awareness Act*, INSIDE HIGHER EDUC. (June 12, 2018), <https://www.insidehighered.com/views/2018/06/12/criticism-anti-semitism-awareness-act-opinion>; ACLU Statement on Senate Introduction of "Anti-Semitism Awareness Act" (May 23, 2018), <https://www.aclu.org/press-releases/aclu-statement-senate-introduction-anti-semitism-awareness-act>; Joe Cohn, *Anti-Semitism Awareness Act continues to threaten free speech on*

The working definition of anti-Semitism adopted by the IHRA, like all IHRA decisions, is not legally binding. It is also not a particularly good one. In addition to the vagueness of the term “a certain perception of Jews,” the overall phrasing of the definition is exceedingly awkward; indeed, it reads as though it was translated from a language other than English. Moreover, the definition’s scope does not include expressions of feelings other than hatred (such as contempt or a sense of superiority), or cultural expressions of anti-Semitism or actions (such as acts of discrimination) that are not usually thought of as rhetorical or physical manifestations.²⁰

The more significant problem lies with the illustrations of anti-Semitism that accompany the IHRA working definition and that the Executive Order requires federal agencies to consider. Some of these illustrations involve familiar, historical stereotypes of and accusations against Jews as well as Holocaust denial.²¹ Others relate to criticism of Israel. In the latter category, the IHRA illustrations begin with the following:

Manifestations [of anti-Semitism] might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel

campus (Apr. 12, 2019), <https://www.thefire.org/anti-semitism-awareness-act-continues-to-threaten-free-speech-on-campus/>.

20 See, for example, the following definition of anti-Semitism: “A persisting latent structure of hostile beliefs towards *Jews as a collectivity* manifested in *individuals* as attitudes, and in *culture* as myth, ideology, folklore and imagery, and in *actions*—social or legal discrimination, political mobilization against Jews, and collective or state violence—which results in and/or is designed to distance, displace, or destroy Jew as Jews” (emphasis in original). Helen Fein, *Dimensions of Antisemitism: Attitudes, Collective Accusations, and Actions*, in *THE PERSISTING: SOCIOLOGICAL PERSPECTIVES AND SOCIAL CONTEXTS OF MODERN ANTISEMITISM* 67 (Helen Fein ed., 1987). See generally DEBORAH E. LIPSTADT, *ANTISEMITISM HERE AND NOW* (2019).

21 The examples include a general introductory statement that “[a]ntisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for ‘why things go wrong.’” It then lists specific examples, including the following:

- Making mendacious, dehumanizing, or stereotypical allegations about Jews as such or the power of Jews as collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible or real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope or mechanisms (*e.g.*, gas chambers) or intentionality of the genocide of the Jewish people at the hands of Nationalist Socialist Germany and its supporters and accomplices during World War II (the Holocaust).
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

Several others involve the application of certain traditional anti-Jewish stereotypes or accusations to Israel or Israelis or to Jews in light of the existence of Israel:

- Using the symbols and images associated with classic antisemitism (*e.g.*, claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.

* * *

- Holding Jews collectively responsible for actions of the state of Israel.

similar to that leveled against any other country cannot be regarded as antisemitic.

The IHRA definition goes on to list a number of contemporary examples of anti-Semitism including the following:

- Denying Jewish people their right to self-determination, e.g. by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.

* * *

- Drawing comparisons of contemporary Israeli policy to that of the Nazis.

These examples are connected to an ongoing and fraught debate as to the extent to which anti-Semitism overlaps with anti-Zionism or alternatively hostility to the State of Israel.²² On the one hand, arguments about Zionism and Israel are political arguments that are not logically connected to anti-Semitism and have not until recently been historically associated with anti-Semitism.²³ On the other hand, while criticism of Israeli policy is not necessarily anti-Semitic, it can be expressed in ways that indicate an underlying anti-Jewish animus or that help create an environment conducive to anti-Semitism. This is especially so when combined with the application of traditional anti-Semitic tropes and stereotypes to Israel and Israelis and/or what can be fairly characterized as an obsession with the injustices allegedly committed by Israel to the exclusion of all others.²⁴

22 See, e.g., *Debate: Anti-Zionism Is Anti-Semitism*, INTELLIGENCE2, <https://www.intelligencesquared.com/events/anti-zionism-is-anti-semitism/>. The first example quoted above does not explicitly mention anti-Zionism, but rather the denial of the Jewish people's "right to self-determination." However, for more than a century, the primary expression of that right to self-determination among the Jewish people has been the Zionist movement, and the primary goal of that movement for most of that period was the establishment of a homeland in Palestine in the form of a sovereign Jewish state. Moreover, the introduction to those illustrations and all of the examples cited refer to criticism of the State of Israel. Thus, the issue presented by the Executive Order concerns criticism of the State of Israel and its right to exist as a Jewish state; it matters not in this context whether the speech at issue is characterized as anti-Zionist or anti-Israel.

23 See, e.g., Michael Walzer, *Anti-Zionism and Anti-Semitism*, DISSENT MAG. (Fall 2019), <https://www.dissentmagazine.org/article/anti-zionism-and-anti-semitism>. Dr. Walzer, a well-known political theorist who supports the right of Jews to a sovereign state of their own in Israel but is highly critical of Israel's occupation of the West Bank and Gaza and its discrimination against Palestinian citizens of Israel, concludes that "[w]hat's wrong with anti-Zionism is anti-Zionism itself. Whether you are an anti-Semite, a philo-Semite, or Semitically indifferent, this is a very bad politics."

24 See, e.g., ADL, WHAT IS . . . ANTI-ISRAEL, ANTI-SEMITIC, ANTI-ZIONIST?, <https://www.adl.org/resources/tools-and-strategies/what-is-anti-israel-anti-semitic-anti-zionist>; AJC, ANTI-SEMITISM MASKED AS ANTI-ZIONISM, <https://www.ajc.org/antisemitism-masked-as-anti-zionism>. For rather more complex and sophisticated discussions of this issue, see David Hirsh, *Hostility to Israel and Antisemitism: Toward a Sociological Approach*, ENGAGEONLINE J. FOR THE STUDY OF ANTISEMITISM (2013), <https://engageonline.wordpress.com/2013/07/18/hostility-to-israel-and-antisemitism-toward-a-sociological-approach-david-hirsh/>; DAVID HIRSH, *Anti-Zionism and Antisemitism: Cosmopolitan Reflections*, Yale Initiative for the Interdisciplinary Study of Antisemitism Working Paper Series (2007), http://research.gold.ac.uk/2061/1/Hirsh_Yale_paper.pdf; ALVIN ROSENFELD, ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION (2019).

III. The Potential Conflict Between the Executive Order and Freedom of Speech

Whatever one's view of the extent to which speech that is critical of Zionism or of the State of Israel may be anti-Semitic, the more critical problem with the Executive Order is that the IHRA working definition of anti-Semitism, with its illustrations that include certain types of anti-Zionist or anti-Israel speech, when incorporated into a legally enforceable test for discrimination, is likely to curtail or shut down debate and thereby infringe on free speech and academic freedom.

To begin with, the terms "targeting," "racist," and "double standards" are inherently vague, subjective, and difficult to apply. The strength of a people's claim to a sovereign state of its own necessarily depends on numerous historical, political, and economic circumstances. The same is true of evaluations of conduct relating to war or military occupation. Moreover, it is far from clear what evidence is to be considered on the issue of double standards. Is it sufficient to point to the speaker's silence on allegedly similar misconduct by states other than Israel, or would it be necessary to interrogate the speaker to determine his or her views, for example, on China's occupation of Tibet or treatment of the Uighurs or Syria's brutality in suppressing the uprising of its own people? Furthermore, does proof of double standards necessarily demonstrate a discriminatory intent? Might it not rather be the result, say in the case of the Palestinians, of their devotion to what they consider their homeland and an indifference to the national claims of Catalonians or Kurds? If so, does that mean that the analysis might depend on the identity of the speaker?²⁵ The vagueness of these terms leaves colleges and universities in the dark as to how to comply and makes them vulnerable to selective enforcement based on political or ideological preferences. This, in turn, may tend to create a chilling effect on what colleges and universities teach or what speech they permit as they seek to avoid controversial issues. These consequences are, of course, the types of harm that the First Amendment vagueness doctrine is intended to prevent.²⁶

Furthermore, speech that denies the Jewish people the right to its own sovereign state or that criticizes Israeli government conduct is clearly core political speech. As the Supreme Court has reiterated on several occasions, "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"²⁷ Such speech is protected by the First Amendment regardless of the speaker's hypocrisy or use of harsh language or inappropriate historical comparisons. The use of those examples as part of the working definition of anti-Semitism, leading to a determination by ED to terminate federal funding to a university, makes that definition overbroad and therefore violative of the Free Speech Clause of the First Amendment.²⁸

25 For example, one might well reach a different conclusion in the case of the double standards applied by certain left-wing Western intellectuals. See Mitchell Cohen, *Anti-Semitism and the Left That Doesn't Learn*, DISSENT MAG. (Jan. 2008).

26 See, e.g., *Coates v. Cincinnati*, 402 U.S. 611 (1971).

27 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). See also *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984).

28 See, e.g., *Houston v. Hill*, 482 U.S. 451 (1987).

Persuasive arguments along these lines against the use of the IHRA working definition in a legal context, including Title VI, have been made by one of its principal authors.²⁹

The Executive Order does not ignore this issue entirely. It goes on to provide in section 2(b),

In considering the materials described in subsections (a)(i) and (a)(ii) of this section, agencies shall not diminish or infringe upon any right protected under Federal law or under the First Amendment. As with all other Title VI complaints, the inquiry into whether a particular act constitutes discrimination prohibited by Title VI will require detailed analysis of the allegations.

The first sentence of that caveat may be seen as merely a restatement of the obvious—that the Executive Order cannot validly require consideration of the IHRA working definition and examples of anti-Semitism, if such consideration would engender a violation of First Amendment rights. Nevertheless, there is perhaps some benefit in reminding federal agencies of their obligation to interpret and apply the Executive Order in a manner consistent with those rights.³⁰ The

29 See, e.g., WRITTEN TESTIMONY OF KENNETH S. STERN BEFORE THE HOUSE JUDICIARY COMMITTEE (Nov. 7, 2017), <https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-SternK-20171107.pdf>. Indeed, a well-known scholar of anti-Semitism, who believes that denying the right of Israel to exist as a Jewish state is anti-Semitic, nevertheless expresses strong opposition to efforts to restrict “offensive” speech on campus, including to “pass legislation defining anti-Semitism and determining when anti-Israel speech crosses the line into antisemitism,” arguing that should restrictions on “offensive” speech be enacted, “those who speak on Israel’s behalf would soon find themselves disinclined because they might make some students ‘uncomfortable.’” LIPSTADT, *supra* note 20, at 189–90.

30 This is consistent with the long-standing policy of OCR that “the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution’s First Amendment.” OCR, FAQs ON RACE AND NATIONAL ORIGIN DISCRIMINATION, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>. OCR’s answer to this particular FAQ on discrimination and the First Amendment goes on to state,

The fact that discriminatory harassment involves speech, however, does not relieve the school of its obligation to respond if the speech contributes to a hostile environment. Schools can protect students from such harassment without running afoul of students’ and staff First Amendment rights. For instance, in a situation where the First Amendment prohibits a public university from restricting the right of students to express persistent and pervasive derogatory opinions about a particular ethnic group, the university can instead meet its obligation by, among other steps, communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard. Similarly, educational institutions can establish a campus culture that is welcoming and respectful of the diverse linguistic, cultural, racial, and ethnic backgrounds of all students and institute campus climate checks to assess the effectiveness of the school’s efforts to ensure that it is free from harassment. Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct.

These types of responses appear consistent with the protection of First Amendment rights and should be sufficient to comply with Title VI’s provision prohibiting discrimination.

second sentence of section 2(b), read together with the final phrase of section 2(a) (ii), appears designed to give guidance on how to reconcile the Executive Order with the First Amendment by suggesting that speech falling within the examples accompanying the IHRA definition should be considered only as some evidence of an anti-Semitic intent and that such evidence must be evaluated in light of all the facts. For the reasons set forth below, that does not obviate the problem.

IV. Freedom of Speech and Hostile Environment Discrimination

Defenders of the approach taken by the Executive Order start with the well-established principle that national origin discrimination under Title VI may be proved by actions and/or speech that create a hostile environment—that is, that are sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the [educational] services, activities or privileges provided by a [college and university].³¹ In this context, anti-Semitic speech is relevant evidence in determining both (1) whether the alleged discrimination is on the basis of national origin—in this case, whether it relates to the Jewishness of the target and (2) whether the speech is sufficiently severe (i.e., offensive) to create a hostile environment. Thus, it is argued, those forms of anti-Israel speech falling within the examples of anti-Semitic speech accompanying the IHRA working definition may be used to establish harassment on the basis of national origins even though the definition and accompanying illustrations constitute content-based regulation of speech.

This argument is in a sense an alternative approach to resolving the tension between free speech and the struggle against racial, sexual, and religious discrimination. One approach is to define and outlaw “hate speech,” particularly within the university setting. This was attempted on several college campuses beginning approximately twenty years ago and was the subject of lively scholarly debate.³² However, the courts made clear that “hate speech” was constitutionally protected speech and that efforts to ban it violated the First Amendment.³³ The courts applied those holdings

31 OCR, Guidance on Racial Incidences and Harassment Against Students, 59 Fed. Reg. No. 47 (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

32 For views supporting the regulation of “hate speech”, see, for example, J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO L.J. 399 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 N.W. U. L. REV. 343 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2370–73 (1989). For views opposing the regulation of “hate speech”, see, for example, Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1 (1991); David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991); Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech*, 39 EMORY L.J. 1351 (1990); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484. For a nuanced account of the issues and values involved that places the burden of persuasion on those who would restrict racist speech, see Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

33 See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

to university settings, and consistently struck down their speech codes.³⁴

The second approach is to regulate offensive speech (as well as conduct, of course) as harassment creating a hostile environment depriving women and racial minorities of their equal rights. The relevant case law relates almost entirely to claims of employment discrimination in the workplace under Title VII of the Civil Rights Act of 1964.³⁵ Most of those claims, to the extent they depend on speech as well as action, involve speech consisting of epithets or sexually explicit images. However, as a number of scholars have pointed out, those epithets and images for the most part constitute speech protected by the First Amendment in other contexts; furthermore, courts have also considered core political or religious speech as evidence of the creation of a hostile environment.³⁶

For the most part, parties have not raised free speech issues in these cases. Accordingly, courts have rarely had to consider the question of how to justify the regulation of speech in the context of workplace harassment claims. A few courts have addressed the issue and concluded that the imposition of liability on the employer, based on harassing speech, was proper because the employees were a captive audience.³⁷ The Supreme Court has not addressed the issue directly, although there are suggestive *dicta* in the Court's opinion in *R.A.V. v. City of St. Paul*.³⁸

In that case, the Supreme Court struck down a St. Paul Bias-Motivated Crime Ordinance, which prohibited persons from placing "on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others *on the basis of race, color, creed,*

34 See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182–85 (6th Cir. 1995); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 867–73 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *UMW Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

35 Title VII makes it unlawful for an employer "to discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). According to EEOC Guidelines, which the courts have followed, such unlawful discrimination includes sexual harassment, which includes both "*quid pro quo*" harassment and "hostile environment" harassment. The latter form of harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1993). See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), which added the requirement that to establish a claim for harassment, plaintiff must prove that the workplace conduct was sufficiently severe or pervasive to alter the condition of the victim's employment and create an abusive working environment.

36 See Richard J. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 8–9; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800–16 (1992); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO STATE L.J. 481, 491–98 (1991).

37 See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991); *Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383, 402 (E.D. Pa. 1980).

38 505 U.S. 377 (1992).

religion or gender."³⁹ In an opinion by Justice Scalia for a five-member majority, the Court accepted as authoritative the holding of the Minnesota Supreme Court that the ordinance reaches only those expressions that constitute "fighting words" within the meaning of *Chaplinsky v. New Hampshire*⁴⁰ and accepted without deciding that *Chaplinsky* remained good law. However, the opinion reasoned that even within the context of speech not protected by the First Amendment, the "government may not regulate on the basis of hostility—or favoritism—towards the underlying message expressed."⁴¹ The Court therefore concluded that the ordinance was facially unconstitutional because the italicized language above, by selectively limiting the scope of the prohibition, made it impermissibly content-based and therefore violated the First Amendment.⁴² The opinion acknowledged, however, that the prohibition against content discrimination is not absolute. It stated that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'"⁴³ As an example, the Court noted that "sexually derogatory 'fighting words', among other words, may produce a violation of Title VII's prohibition against sexual discrimination in employment practices."⁴⁴ That language was specifically in response to the statement in the concurring opinion of Justice White that the reasoning of the Court's opinion would mean that "hostile work environment claims based on sexual harassment should fail First Amendment review."⁴⁵

It therefore appears that all members of the Court in *R.A.V.* (the five Justices who joined the opinion of Justice Scalia and the four concurring Justices) agree that speech, including unprotected "fighting words," as well as certain presumably protected "other words," may produce a hostile environment in violation of Title VII without infringing on the right of free speech. However, the opinion gives no clue as to what, if any, First Amendment limitations might apply. The Court has not addressed the issue again since *R.A.V.*⁴⁶

Where the courts have been mostly silent, legal scholars have filled the gap. Professor Browne concludes that Title VII's prohibition of speech that creates a hostile environment is unconstitutional because it is vague, overbroad, and violative of the fundamental principle of First Amendment jurisprudence that government regulation of speech must be content neutral.⁴⁷ He specifically rejects

39 *Id.* at 379 (emphasis added).

40 315 U.S. 568 (1942).

41 *R.A.V.*, 505 U.S. at 386.

42 *Id.* at 391–96.

43 *Id.*

44 *Id.*

45 *Id.* at 409–10.

46 The Court had an opportunity but declined to do so in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), discussed in Fallon, *supra* note 36, at 1–12.

47 Browne, *supra* note 36, at 481.

the application of the “captive audience” doctrine to the workplace, arguing persuasively that the case law limits that doctrine to the home and that in any event it has never been used to justify content-based limitations on speech.⁴⁸

Others have concluded that it is permissible for speech that would be protected from censorship under the First Amendment in other contexts to create liability for discrimination under Title VII but differ on the reasons why this should be so. Professor Post contends that racist speech may be regulated in the workplace because it is not an appropriate place for “public discourse,” that is, the “communicative processes necessary for the formation of public opinion” or a “dialogue among autonomous self-governing citizens.”⁴⁹

Professor Volokh argues that harassment law suppresses speech by creating an incentive for employers to do so because offensive speech creates the risk of liability and is of no benefit to the employer. Moreover, that incentive is not mitigated by the requirement that the offensive speech be severe and pervasive. Employers are in no position to predict how courts will apply those vague terms to particular examples of speech that may offend some of their employees or to know how often the offensive speech has occurred in the past or will occur in the future. Accordingly, employers will tend to err on the side of caution and ban offensive speech regardless of whether a court might find it sufficient to create a hostile environment.⁵⁰ Professor Volokh further argues that none of the existing First Amendment exceptions apply to claims of hostile environment harassment.⁵¹ He rejects Professor Post’s approach on the ground that it ignores the fact that much public discourse does, in fact, take place in the workplace and that inasmuch as the First Amendment protects many categories of speech that do not qualify as “public discourse” as defined by Professor Post, there is no reason why it should not do so in the workplace.⁵² Like Professor Browne, and for similar reasons, Professor Volokh also rejects the application of the “captive audience” doctrine to the workplace.⁵³ Instead, Professor Volokh argues that the regulation of certain speech in the workplace can be justified only by balancing the right of employees to free speech against the important governmental interest in preventing discrimination on the grounds of race, sex, or religion.⁵⁴ He proposes as the key factor in determining the outcome of such a balancing whether the harassing speech is directed to an unwilling listener who finds it offensive (which may give

48 *Id.* at 516–20.

49 Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 288–89 (1990).

50 Volokh, *supra* note 36, at 1809–14.

51 *Id.* at 1819–43.

52 *Id.* at 1824–26. Professor Browne makes similar arguments against Professor Post’s approach. Browne, *supra* note 36, at ____.

53 Volokh, *supra* note 36, at 1832–43.

54 Professor Strossen also adopts a balancing approach that is sensitive to the context and specific facts of each case but leaves uncertain the weight to be given to various factors and therefore precisely how a balancing test should be applied. Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757, 767–68 (1992).

rise to Title VII liability) or whether such speech is undirected (which may not give rise to Title VII liability).⁵⁵ In that connection, he argues against distinctions, based on a theory of a hierarchy of First Amendment values, between relatively low value speech, such as epithets, and high value speech, such as core political speech.⁵⁶

Professor Fallon begins by agreeing with Professor Volokh that at least some of the speech that has been used to establish sexual harassment under Title VII does not fall within any of the exceptions to the First Amendment and cannot be regulated under any of the theories applicable to other contexts.⁵⁷ In addition, like Professor Volokh, Professor Fallon argues that there is a meaningful distinction between targeted and nontargeted speech.⁵⁸ However, Professor Fallon disagrees with Professor Volokh on at least three critical points. First, Professor Fallon argues that weight must be given to the particular characteristics of the workplace. Although he recognizes that the Supreme Court has hesitated to extend the “captive audience” doctrine, he nevertheless argues that a strong case can be made for treating employees as a captive audience because of the economic necessity of work, the high cost of changing jobs, the amount of time spent at the workplace, and the difficulty in responding to harassment, especially when it comes from or is sanctioned by those with authority.⁵⁹ Second, Professor Fallon argues that the tension between the First Amendment and the claim of harassment under Title VII is mitigated by the requirement that actionable harassment has an objective component—that is, plaintiff must prove that the harassing speech is sufficiently “severe or pervasive to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile.”⁶⁰ Third, and most importantly, in balancing the right to free speech and against the interest in combatting discrimination, Professor Fallon argues that account must be taken of the relative value of the speech, with particular protection afforded to “reasoned contributions to political debate” as opposed to “gratuitously offensive or abusive but non-targeted speech.”⁶¹

V. The Constitutionality of the Executive Order on Anti-Semitism

For the most part, the same factors relevant to the constitutionality of harassment law in the workplace setting under Title VII apply in the university setting under Title VI, whether or not account is taken of the Executive Order. What the Executive Order does, however, is make clear the precise extent to which protected speech may underlie claims of hostile environment and thereby give

55 Volokh, *supra* note 36, at 1843–67.

56 *Id.* at 1855–57.

57 Fallon, *supra* note 36, at 12–20.

58 *Id.* at 42.

59 *Id.* at 43.

60 *Id.* at 44–46 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). According to Professor Fallon, “a reasonableness standard seems crucial to the Supreme Court’s understanding of the sphere of permissible regulation, and a ‘reasonable victim’ test provides the best mechanism yet proposed for accommodating the conflicting values at stake.” *Id.* at 46.

61 *Id.* at 47.

specific focus to the First Amendment analysis. For the reasons discussed below, a finding of harassment based on the types of anti-Israel speech identified in the examples accompanying the IHRA working definition of anti-Semitism referenced in the Executive Order would be unconstitutional.

Let us consider first the setting. Some have argued that universities are an especially appropriate context for the regulation of “hate speech.” There are several reasons why this might be so. First, the university should have the authority to regulate speech in furtherance of their educational mission and academic values, including speech not only as part of the curriculum and classroom instruction, but also within the wider university setting of the university.⁶² Second, universities owe a duty of care to a young and vulnerable population.⁶³ Third, universities resemble workplaces in that it may be hard for students to avoid harassers on a college campus; harassment may interfere with the enjoyment of educational opportunities: and it is difficult and burdensome to change universities. Thus, like employees, students are a “captive audience.”⁶⁴

Others have argued that universities are an especially inappropriate place for the regulation of “hate speech.” The weightiest of those arguments is that the universities are among the most important venues for the “marketplace of ideas” in which free and unrestricted speech is critical to their mission.⁶⁵ This is, of course, an idea to which the Supreme Court has lent support in its jurisprudence on the intersection between free speech and academic freedom.⁶⁶ Indeed, it appears well settled, despite some scholarly criticism of this conclusion, that state universities are state actors subject to *at least* the same First Amendment limitation in their regulation of speech as would apply to other venues.⁶⁷ In addition, except perhaps in the residential housing setting, students are not a “captive audience”; they are free to select their courses and extracurricular activities and programs and can choose whom to eat, drink, and hang out with. It is true that one often encounters some of the same people in dormitory, cafeteria, and classroom settings; however, one can usually avoid conversation with those whom one finds offensive. In any event, the “captive audience” doctrine does not apply to the type of content-based regulation of core political speech envisioned by the working definition of anti-

62 Byrne, *supra* note 32, at 417–27.

63 Matsuda, *supra* note 32, at 2370–71; *See also* Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations*, 82 CAL. L. REV. 871, 887 (1994).

64 , *supra* note 36, at 52 . *See also* Note, *Racist Speech on Campus: A Title VII Slution to a First Amendment Problem*, 64 S. CAL. L. REV. 105, 126 (1990).

65 *See, e.g.*, NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* 18–19 (2018).

66 *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

67 *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169, 200 (1972). Indeed, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court noted in *dicta* that “the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”

Semitism referred to in the Executive Order.⁶⁸ Finally, it is clear from First Amendment case law that the courts do not regard university students as a particularly vulnerable population that needs protection from speech they may find offensive.⁶⁹

In any event, two of the other, more critical factors, weigh against the effort to regulate as harassment the types of anti-Israel speech identified in the Executive Order. First, judging from reported incidents, such speech is usually nontargeted—generally occurring in the context of public lectures, demonstrations, handouts, and classrooms. To take a paradigmatic example, a student alleges that he is the victim of anti-Semitism and feels unwelcome and intimidated because of a number of forums and speeches sponsored by student groups at which speakers denounce Israel as an apartheid state, and students wave Palestinian flags and chant “from the river to the sea, Palestine shall be free.” Such protected, nontargeted speech in a public place is clearly a case where students can and are required to avert their eyes and ears.⁷⁰

The classroom setting may occasionally present a more complicated situation. Certainly, most classroom speech is directed to all members of the class and is therefore nontargeted. However, it may sometimes be directed at a particular student. For example, a teacher’s statement in a class on the Israeli–Palestinian conflict that the Israeli Defense Forces had committed war crimes in connection with a particular military operation is nontargeted; however, if the teacher singles out a particular student who had served in the Israeli Defense Forces and for that reason calls her a murderer, it would be targeted.⁷¹

68 See *Cohen v. Cal.*, 403 U.S. 15 (1971), where the the Court reversed the conviction, under a statute that prohibited “‘maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by] offensive conduct,’ of a man who wore a jacket in the corridor outside a court bearing the words ‘Fuck the Draft.’ The Court found that the words on the jacket were not ‘fighting words’ and were therefore protected by the First Amendment, because (1) they were not clearly directed to a particular hearer; (2) they were not intended to provoke a given group to a hostile reaction; and (3) persons confronted and offended by the jacket could simply avert their eyes and were thus not a captive audience, like persons subjected to a sound truck in their homes. *Id.* at 20–22. Instead, the Court found that this was a case that fell within ‘the usual rule that governmental bodies may not prescribe the form or content of individual expression.’ *Id.* at 24. The Court adopted a similar approach in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), striking down an ordinance that prohibited drive-in movie theaters with screens visible from public streets from showing films containing nudity. The Court reasoned that “[s]uch selective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure” and, quoting *Cohen*, that otherwise “the burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities simply by averting his eyes.’” *Id.* at 211.

69 The Supreme Court has never upheld a content-based restriction of speech in a university setting on that ground. On the contrary, it has consistently applied the same First Amendment analysis with respect to content-based regulations in the university settings as it does elsewhere. See, e.g., *Rosenberger*, 515 U.S. 819. Indeed, even in the context of public secondary schools, where the Court has upheld speech regulation that would not survive constitutional challenge in a university context, the Court has rejected the broad argument in favor of proscribing “offensive” speech because “much political speech might be offensive to some.” *Morse v. Frederick*, 551 U.S. 393, 409 (2007). See also cases cited *supra* note 34.

70 See *Cohen*, 403 U.S. at 22.

71 See, e.g., *Hayut v. State University N.Y.*, 352 F.3d 733 (2d Cir. 2003), where the court found that a professor’s classroom comments to a female student were sufficiently offensive, severe, and

Second, and most importantly, whatever characterizations one may choose to use, the examples of anti-Semitic speech relating to criticism of Israel that are part of the IHRA working definition of anti-Semitism represent core political speech, public discourse, or reasoned contributions to political debate, and thus deserving the highest level of protection under the First Amendment.⁷² If such speech can serve as the basis for a finding of a hostile environment under Title VI, then no speech that some students may find offensive is safe on university campuses—whether it is criticism of affirmative action or of white privilege, condemnation of cultural appropriation or appreciation of intercultural exchange, critiques of colonialism or defenses, or colonialism. The current administration has chosen to focus on anti-Semitism; a future administration may focus on Islamophobia. It is noteworthy in this regard that even those who favor regulation of “hate speech” in university settings have generally limited it to epithets and other gross expressions of racial contempt and hostility.⁷³ Otherwise, the regulation of “hate speech,” even if accomplished through the enforcement of laws against prohibited categories of harassment, rather than through speech codes, threatens to suppress any expression of controversial views.

Occasionally students (and even faculty) undertake to suppress views they consider offensive by interfering with the presentation of lectures or other forms of speech. This has occurred in several cases involving Israeli speakers or speakers viewed as pro-Israel.⁷⁴ Appropriate punitive and/or remedial action should be

pervasive that a reasonable person could conclude that he had created a hostile environment. The professor repeatedly called the student “Monica” because of a purported resemblance to Monica Lewinsky and would ask her in class about “her weekend with Bill” and make other sexually suggestive remarks such as “[b]e quiet Monica, I will give you a cigar later.”

72 The First Amendment analysis would be different in a case where personally abusive anti-Semitic epithets were directed at a Jewish student or a group of Jewish students for the purpose of evoking a hostile reaction. See discussion of *Cohen*, *supra* note 68.

73 For example, Professor Byrne argues in support of regulating only “racial insults,” which he defines “as a verbal or symbolic expression by a member of one ethnic group that describes another ethnic group or an individual member of another group in terms conventionally derogatory, that offends members of the target group, and that a reasonable and unbiased observer, who understands the meaning of the words and the context of their use, would conclude was purposefully or recklessly abusive. Excluded from this definition are expressions that convey rational but offensive propositions that can be disputed by argument and evidence. An insult, so conceived, refers to a manner of speech that seeks to demean rather than to criticize, and to appeal to irrational fears and prejudices rather than to respect for others and informed judgment.” Byrne, *supra* note 32, at 400. Professor Lawrence defended the Stanford University speech code, which provided that “[s]peech or other expression constitutes harassment by personal vilification if it: a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and c) makes use of insulting or ‘fighting’ words or non-verbal symbols.” Lawrence, *supra* note 32, at 450–51. And Professor Matsuda would outlaw messages “of racial inferiority . . . directed against a historically oppressed group” which are “prosecutorial, hateful, and degrading.” Matsuda, *supra* note 32, at 2357. None of these formulations appears to apply to the examples of anti-Israel speech cited by the IHRA working definition of anti-Semitism.

74 See, e.g., Lucy Sheriff, *Kings College Investigates “Hate Attack” Against Israel’s Ex-Secret Service Chief Ami Ayalon*, HUFFINGTONPOST UK (Jan. 21, 2016), https://www.huffingtonpost.co.uk/2016/01/21/kings-college-london-hate-attack-israeli-ex-secret-service-ami-ayalon_n_9037882; Dale Carpenter, *Israeli Academic Shouted Down in Lecture at University of Minnesota*, WASH. POST, Nov. 14, 2015; Justus

taken regarding such misconduct that deprives other students of their opportunity and right to hear the speakers. However, unless the interference is accompanied by epithets or other clearly anti-Semitic language besides opposition to Israel, such incidents would appear to be based on political differences rather than harassment on the basis of national origin.⁷⁵

It may be argued in defense of the Executive Order, as Professor Fallon argues in defense of harassment law generally under Title VII, that the impact on free speech is somewhat lessened by the objective test under Title VI requiring that the offensive speech be “sufficiently severe that it would have adversely affected the enjoyment of some aspect of the recipient’s educational program by a reasonable person, of the same age and race as the victim, under similar circumstances.”⁷⁶ Thus, for example, a Jewish student offended by anti-Israel speech would be required to establish that its impact is severe to a reasonable Jewish student.⁷⁷ Although there are clearly differing attitudes among Jewish students (as there are among other racial and ethnic groups), it would seem a plausible argument that Zionism is a central part of the Jewish identity of many students, and therefore harsh or unfair criticism of Israel has a severe effect.⁷⁸

Reid Weiner, *The Threat to Freedom of Speech About Israel: Campus Shout-Downs and the Spirit of the First Amendment*, JEWISH POL. STUD. REV. 6 (Spring 2013), https://www.jstor.org/stable/23611126?read-now=1&seq=1#metadata_info_tab_contents.

75 Cf. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), where the Court upheld a state hate-crimes statute that enhanced the sentence for bias-motivated assaults. The Court reasoned that a defendant’s motive for committing an offense is traditionally a factor to be considered at sentencing and that “motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge.” *Id.* at 487. It distinguished *R.A.V.* on the ground that “[w]hereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, ‘speech’ or ‘messages’), the statute in this case is aimed at conduct unprotected by the First Amendment.” *Id.* at 487–88. The case presented by the Executive Order is more like *R.A.V.* than *Mitchell*. The IHRA working definition of anti-Semitism is directed at expression, not conduct. Moreover, there is nothing in *Mitchell* to support the use of core political speech as evidence of a bias-motivated offense. On the contrary, the evidence of bias there was the assailant’s words: “There goes a white boy; go get him.” *Id.* at 480.

76 OCR, *dsupra* note 31. This standard follows the precedents in sexual harassment cases under Title VII that define reasonableness from the perspective of a reasonable woman. See, e.g., *Andrews v. Phila.*, 895 F.2d 1469, 1483 (3d Cir. 1990); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

77 Professor Fallon contends that in the context of sexual harassment cases under Title VII, a “reasonable woman standard should survive First Amendment scrutiny. Men can fairly be asked to take into account, and substantially adapt their behavior to, the understanding of reasonable women that speech is sufficiently threatening, abusive, demeaning, or unreasonably recurring to create a hostile and unequal work environment.” Fallon, *supra* note 36, at 46. This makes sense in part because all men grow up and live their lives among women—mothers, sisters, friends, girlfriends, and/or wives. It is unclear whether the same always applies to racial, ethnic or religious minorities. For example, Jews make up approximately two percent of the U.S. population. It is doubtful whether most non-Jews even know which anti-Israel speech is offensive and severe to a “reasonable Jew”; however, it seems pretty clear that Palestinians and their supporters on college campuses are aware that for many Jews, their connection to Israel is a key part of their identity and that attacks on Israel, especially its right to exist as a Jewish state, are deeply offensive.

78 In a recent settlement of a lawsuit alleging discrimination against Jewish students at San Francisco State University prior to the issuance of the Executive Order, the university agreed to a number of remedial actions, including a public statement that “it understands that, for many Jews, Zionism is an important part of their identity.” See The Lawfare Project Press Release, California

Moreover, as noted above, Professor Volokh casts doubt on the mitigating effect of an objective standard, pointing out the practical incentives for an employer to err on the side of caution by prohibiting any instance of speech that anyone might find offensive and without regard as to how pervasive it is be found as the employer usually cannot know what other employees may find offensive or how pervasive such speech may be. It is unclear, however, and Professor Volokh cites no data, that harassment law has had the effect he predicts. In light of what appears to be the continued prevalence of offensive sexual and racial talk in the workplace, there is room for doubt. The reason for that may be that it takes a particularly determined employee to make a complaint to the employer and a particularly resourced or knowledgeable employee to obtain legal counsel to bring a lawsuit. However, as discussed below, the situation is quite different under Title VI and the university setting, where complaints are easy to make, and the chilling effect is likely to be real despite the “reasonable victim” standard.

VI. The Relevance of Government Enforcement of Title VI

When Title VI was enacted, its focus was to prohibit discrimination by the recipient of federal financial assistance—in this case colleges and universities. It was generally assumed at that time, in light of the history of segregation, that acts of discrimination would be by the administration or employees of the college or university. Over time, however, Title VI, like Title IX, was extended to include acts of discrimination or harassment by students against other students on the plausible theory that colleges and universities may not turn a blind eye to such misconduct but have a responsibility to respond in ways designed to discourage and/or remedy it.

Both OCR and university procedures make it easy for students to make complaints of racial and national origin discrimination.⁷⁹ In addition, a number of local and national organizations are available to assist them or to allege harassment even in the absence of a named complainant.⁸⁰ In response to a complaint, colleges and universities are required to conduct an investigation and then take any appropriate

State University (CSU) Agrees to Landmark Settlement with the Lawfare Project and Winston & Strawn LLP to Safeguard Jewish Students’ Rights (Mar. 20, 2019), <https://www.thelawfareproject.org/releases/2019/3/20/sfsu-settlement>.

⁷⁹ OCR provides an electronic complaint form for any claims of discrimination under Title VI. <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt>. It is anomalous that although OCR mandates rather specific procedures at universities to ensure that students know how and where they can file complaints of gender discrimination under Title IX, it does not do so for complaints of racial or national origin discrimination under Title VI. However, it is common for universities to follow similar procedures with respect to the filing of all student complaints of discrimination. See, e.g., THE CITY UNIVERSITY OF NEW YORK POLICY ON EQUAL OPPORTUNITY AND NON-DISCRIMINATION, <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-procedures/equal-opportunity-and-non-discrimination-policy/>.

⁸⁰ For a list of recent allegations of anti-Semitism on college campuses, virtually all of which involve to some degree of core political speech critical of Israel, see Lara Friedman, *Weaponizing Antisemitism Fears to Quash Campus Free Speech—Case Tracker*, FOUNDATION FOR MIDDLE EAST PEACE, <https://fmep.org/wp/wp-content/uploads/Targeting-US-AcademiaTitle-VI.pdf>.

action in light of its findings.⁸¹ OCR enforcement of Title VI usually takes the form of a review of the adequacy of such an investigation of and response to a complaint, although students or advocacy organizations sometimes file complaints directly with OCR.⁸² In either case, because of the standard of “severe and pervasive,” even if OCR is nominally addressing only a single complaint, it will often investigate and evaluate the institution’s response to an aggregation or accumulation of complaints, or even of incidents that did not produce any complaint.⁸³ ED periodically makes the fact of such investigations public,⁸⁴ thereby impacting the reputation of the university, even when it later turns out there was no Title VI violation. And, of course, the ultimate sanction threatened by such investigations is loss of federal funds.

What this means for university administrators is that they must be exquisitely responsive to complaints of harassment, including anti-Semitic harassment, usually finding it necessary to conduct thorough (and therefore lengthy) investigations, sometimes with the assistance and expense of outside counsel.⁸⁵ If OCR opens an

81 According to OCR’s response to a frequently asked question concerning the responsibility of universities to address racial and national origin discrimination under Title VI: “When an educational institution knows or reasonably should know of possible racial or national origin harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that the harassment created a hostile environment, the educational institution must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.” <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>. OCR has applied that requirement in connection with its investigations of complaints against universities. See Letter dated April 16, 2012 from OCR to the University of California, San Diego, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>.

82 According to OCR’s response to a frequently asked question concerning how it addresses racial and national origin discrimination against students, “OCR investigates and resolves allegations that educational institutions that are recipients of federal funds have failed to protect students from harassment based on race, color or national origin. Where OCR identifies concerns or violations, educational institutions often resolve them with agreements requiring the educational institutions to adopt effective anti-harassment policies and procedures, train staff and students, address the incidents in question, and take other steps to restore a nondiscriminatory environment.” <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>.

83 This statement is based on the author’s experience as general counsel of the largest urban public university system in the United States and discussions with other university counsel around the country.

84 See OCR, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of October 2, 2020 7:30am Search*, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html>. See also OCR, U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

85 For example, in a case in which the author was personally involved, on February 22, 2016, the Zionist Organization of America wrote a letter to the Chancellor of the City University of New York setting forth numerous allegations of anti-Semitism. <https://zoa.org/2016/02/10315402-letter-to-cuny-chancellor-and-board-of-trustees-jew-haters-spread-fear-at-cuny-colleges/>. These allegations covered an extended period of time and several different campuses of the university system; many had previously been investigated and responded to. Nevertheless, the administration felt it necessary to retain a law firm to conduct a new and independent investigation. After six months, the investigators, who were both prominent lawyers—both former prosecutors and one a

investigation into the matter, the burden, expense, and publicity increase, and the university is under significant pressure to consider entering into an enforcement agreement with OCR, even when the facts do not seem to warrant a finding of a hostile environment. This does not necessarily mean that the prospect of Title VI enforcement has actually induced universities to regulate speech in ways that impinge on First Amendment rights or academic freedom. As with the workplace setting under Title VII, it is difficult to find good evidence supporting or rebutting the existence of a chilling effect. However, what is clear is that universities that permit or encourage a wide range of opinion and events on the issue of Israel/Palestine will pay a price in terms of the burden and expense of investigating complaints and responding to OCR investigations.

VII. The Challenge of Compliance with the Executive Order

Of course, universities and their communities will pay an even greater price—in the actual suppression of free speech—if the anti-Israel speech examples accompanying the IHRA working definition of anti-Semitism are in fact applied by ED to find harassment under Title VI. As noted above, the Executive Order does not explicitly adopt this definition but only requires that universities “consider” it. It is possible that ED will not rely on it, or will give it very little weight, as it evaluates the response of universities to particular claims of anti-Semitism. Accordingly, any constitutional challenge to the Executive Order on its face at this time would likely fail.⁸⁶

Nevertheless, it would appear entirely possible that this administration will give priority to combating the resurgence of anti-Semitism on college campuses by vigorously enforcing compliance with the IHRA working definition of anti-Semitism over protecting First Amendment rights. Concern in this regard is increased by

former federal judge—issued a report that “found that almost all of the alleged offensive speech was protected under the First Amendment, and that a few incidents of alleged conduct subject to discipline involved perpetrators who could not be identified. In one case where individuals could be identified, the report noted, the college in question disciplined the students responsible for violating university policy. The report also acknowledged that CUNY officials responded promptly and appropriately in condemning hateful speech and threatening conduct.” See CUNY ANTI-SEMITISM REPORT (Oct. 10, 2016), <https://www1.cuny.edu/mu/forum/2016/10/10/cuny-anti-semitism-report/>.

86 Challenges may often be made to the constitutionality of a statute or regulation on its face on the ground that it is vague and/or overbroad. However, where there is real uncertainty as to whether or how a government agency ED will apply the challenged provision, a court will be hesitant to entertain such a challenge. See *Nat'l Endowment for the Arts [NEA] v. Finley*, 524 U.S. 569 (1998). In that case, the Court rejected a facial challenge to a federal law authorizing NEA to make artistic grants on the basis of “artistic excellence and artistic merit . . . taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” *Id.* at 576. As part of its reason for the decision, the Court held, “Given the varied interpretations of the criteria and the vague exhortation to ‘take them into consideration’, it seems unlikely that this provision will introduce any greater element of selectivity than the determination of ‘artistic excellence’ itself. And we are reluctant, in any event, to invalidate legislation ‘on the basis of its hypothetical application to situations not before the Court.’” (Citation omitted.) *Id.* at 583–84. The Court, however, went on to note that particular applications of the statutory criteria might violate the Free Speech Clause if the denial of a grant were shown to be based on invidious viewpoint discrimination. *Id.* at 587. Here, too, it is likely that a court would decline to rule on the facial validity of the Executive Order, which requires only that the IHRA working definition of anti-Semitism be “considered”; rather, it would likely wait for a challenge to the Executive Order as applied.

Jared Kushner's op-ed in the *New York Times* in support of the Executive Order, stating that the IHRA definition "makes clear what our administration has stated publicly and on the record: Anti-Zionism is anti-Semitism."⁸⁷ That statement flatly contradicts the caveat contained in the Executive Order and portends an approach to enforcement that would completely ignore free speech rights.

In the meantime, universities must wait and see how OCR proceeds to enforce Title VI in light of the Executive Order in order to understand how to deal with its potentially conflicting obligations to prevent unlawful discrimination and to protect free speech. They are likely to remain in the dark for a long time. OCR investigations often take years to complete, and only when the results of a number of such investigations are known is it likely that colleges and universities will gain any sense of how OCR proposes to interpret and enforce the Executive Order. Other forms of guidance are not likely to be forthcoming.⁸⁸

In sum, for the foreseeable future, colleges and universities must struggle as best they can to discourage and respond to campus anti-Semitism while adhering strictly to their obligation to protect free speech. When those goals appear to be in conflict, because of the examples accompanying the IHRA working definition of anti-Semitism referenced by the Executive Order, colleges and universities should adhere to the Executive Order's caveat that nothing in it is intended to infringe on the right of free speech. And in seeking to protect the right to free speech and academic freedom on campus,⁸⁹ they should act forcefully and even-handedly in response to *all* incidents in which students or faculty seek to suppress free speech—whether favorable to or critical of Israel.

87 See *supra* note 2.

88 ED rarely promulgates formal regulations in the area of civil rights and generally issues guidance letters in a particular area only after it has completed a number of investigations and developed a consistent approach.

89 It is noteworthy that the first two complaints filed with OCR alleging anti-Semitic discrimination under Title VI, against Columbia University and UCLA, respectively, both involve allegations about criticism of Israel by professors or a visiting professor made in class. The details of the UCLA complaint, including a video of the lecture, can be found at <https://equity.ucla.edu/public-accountability/transparent-progress/incident-in-anthro-lecture/>. The Columbia complaint is not yet publicly available; an article based on a view of a redacted copy of the complaint, can be found at Rachel Frazin, *Columbia University Student First to File Anti-Semitism Complaint Under Trump Order*, THE HILL (Dec. 26, 2019), <https://thehill.com/homenews/administration/475980-columbia-university-student-first-to-file-anti-semitism-complaint>. Since the speech in question was delivered by a teacher in a class in which the subject of Israel was relevant to the subject being taught, these claims appear to raise a core issue of academic freedom as well as free speech generally. More recently, OCR settled a complaint of anti-Semitism against New York University that predated the Executive Order. Although there was no finding of wrongdoing, the parties entered into an agreement in which the university agreed to add discrimination based on shared ancestry and ethnic characteristics, including anti-Semitism, to its nondiscrimination and antiharassment policy. According to the attorney for the complainant, NYU also agreed to adopt the IHRA working definition of anti-Semitism. However, according to a spokesman for NYU, the university agreed to adopt only the core definition without the examples and "will devise its own examples to implement the new policies and, in a statement, will affirm its long-held commitment to academic freedom and free speech." See Kery Murakami, *NYU Settles Anti-Semitism Case*, INSIDE HIGHER EDUC. (Oct. 2, 2020), <https://www.insidehighered.com/news/2020/10/02/new-york-university-settles-anti-semitism-case-education-department>.

ENHANCING ENFORCEABILITY OF EXCULPATORY CLAUSES IN EDUCATION ABROAD PROGRAMMING THROUGH EXAMINATION OF THREE PILLARS

MICHAEL R. PFAHL *

Abstract

This article provides an overview of the current legal landscape related to considerations of duty of care and the special relationships that may accrue when an institution of higher education engages students in education abroad programming. In consideration of the continuing bend of the courts toward expanding the scope of liability an institution may find itself exposed to, while also questioning the enforceability of the waivers executed by its students, this article proposes adoption of three pillars in both the waiver and the processes attached thereto in order to provide further support should it later be produced under the spotlight of litigation.

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INTRODUCTION

*The safety of our students is our top priority.*¹

*The litigation appears to be premised on a belief that the university is the guarantor of the student's safety. Unfortunately, this is neither physically possible nor realistic.*²

Over the last fifteen years (with one exception during the 2008–09 year and excluding the extenuating circumstances of the 2019–20 academic year due to COVID-19), more students engaged in education abroad opportunities than in the previous year.³ For institutions of higher education, these programs can be incredibly broad, with experiences lasting from one week to one year. One program can involve a short trip abroad to a nearby country, while another can be a fully immersive experience in a different culture.⁴ Of those studying abroad,⁵ students in the STEM majors (science, technology, engineering, and math) are outpacing those in other degree programs.⁶ For institutions of higher education, education abroad programming continues to represent an essential component for ensuring competitiveness in their institutions as well as an opportunity for students and faculty alike to remove the traditional boundaries of the classroom in exchange for an entire world of learning possibilities.

Removing traditional educational boundaries comes with potential exposure to additional dangers for trip participants and, accordingly, questions regarding potential exposure to liability for institutions of higher education. Occasionally, institutions are reminded of the often unpredictable and uncontrollable nature of traveling overseas.⁷

1 University of Wisconsin-Madison (JCU) Settlement, *quoted* in Elizabeth Redden. *Settlement in Wrongful-Death Suit for Study Abroad Student*. INSIDER HIGHER EDUC. (February 27, 2019), <https://www.insidehighered.com/quicktakes/2019/02/27/settlement-wrongful-death-suit-study-abroad-student#:~:text=The%20family%20of%20a%20University,the%20settlement%20was%20reached%20Feb.&text=John%20Cabot%20University%20also%20declined%20comment>.

2 Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661, 666 (Minn. Ct. App. 1999).

3 INST. OF INT'L EDUC., *2020 Open Doors Report on International Education Exchange*, <https://opendoorsdata.org/data/us-study-abroad/u-s-study-abroad-for-academic-credit-trends/> (January 31, 2021).

4 As an example of the commitment given by institutions to education abroad, in the 2016 academic year alone, the University of North Carolina at Chapel Hill awarded over \$900,000 in financial aid to its students for international programs. *How Some Students Study Abroad on a Budget*, MUSTANG NEWS/MUSTANG MEDIA GRP. (Feb. 27, 2020), <https://mustangnews.net/how-some-students-study-abroad-on-a-budget/>.

5 For the purpose this article, *education abroad* and *study abroad* are used interchangeably.

6 Lekan Oguntoyinbo. *STEM Students Leading Charge to Study Abroad*, DIVERSE ISSUES IN HIGHER EDUC. (June 17, 2015), <http://diverseeducation.com/article/73887/>.

7 See Kerri O'Brien, *A Mother's Warning for Students Considering Study Abroad*, WFRXTV.COM (Apr. 5, 2018), <https://www.wfrxtv.com/news/local-news/a-mothers-warning-for-students-considering-study-abroad-programs/>; Kerri O'Brien, *After Tragedy, Moms Demand Transparency from Study Abroad Programs*, WRIC.COM (Aug. 24, 2018), <https://www.wric.com/news/taking-action/after-tragedy-moms-demand-transparency-from-study-abroad-programs/>; Brett Clarkson, *Group of 19 University of Florida Students Robbed at Gunpoint in South Africa*, SUN-SENTINAL.COM

The courts that have ruled in cases involving attempts by students, their parents, or their estates to hold an institution liable for an injury or death of a student have generally held that a university's duty of care to its students is similar to that of a business invitee,⁸ but conversely courts have generally upheld the principle that the university itself is not generally the "insurer of the safety of its students" absent further action and affirmation.⁹ However, as one can imagine, the spectrum of liability widens, depending on the specific circumstances of the case and the individual state laws that may be applicable. All such decisions as to whether a legal duty of care exists are examined by the courts as a matter of law, based on the circumstances presented by the parties.

Similar to the analysis courts have engaged in regarding on-campus or off-campus events and as further discussed herein, courts have addressed questions of the existence or scope of an institution's duty to protect a student from harm within the context of study abroad programming. However, in recent years, several courts have developed more fully the *special relationship* doctrine toward decisions that affirm institutional liability.

As the plaintiffs' bar has continued to thrust special relationship claims into each filing, institutions have attempted to shield themselves from tort liability

(May 15, 2019), <https://www.sun-sentinel.com/news/florida/fl-ne-university-of-florida-robbed-south-africa-20190515-bo3y432xajgbi5ywqiwfmbmpy-story.html>; Ariana Garcia & Mary Huber, Texas Tech Student Dies After Fall on UT Study Abroad Trip in Russia, STATESMAN.COM (Sept. 22, 2018), <https://www.statesman.com/NEWS/20180617/Texas-Tech-student-dies-after-fall-on-UT-study-abroad-trip-in-Russia>.

8 RESTATEMENT OF TORTS § 341 (AM. L. INST. 1934) Activities Dangerous to Licensees, "A possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensees know or from facts known to them should know of the possessor's activities and of the risk involved therein." Also consider, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §3 (AM. L. INST. 2010), "A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the persons' conduct lacks reasonable care are the foreseeable likelihood that the persons' conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." See generally *Regents of Univ. of Cal. v. Super. Ct.*, 29 Cal. App. 5th 890 (2d Dist. 2018). On remand, the court engages in a brief analysis beginning with the general duty of a university to its students before addressing other issues such as a special relationship and public policy.

9 *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir.1979). See also *Johnson v. State*, 894 P.2d 1366, 1369 (Ct. App. Wash. 1995), "... no special duty arises merely from Johnson's status as a student" but finding that student was entitled to invitee status since she lived in a university dormitory. See *Shimer v. Bowling Green State University*, 96 Ohio Misc. 2d 12, 16 (Ohio Ct. Cl. 1999), "The duty of care owed to plaintiff as a student of a state university is that of an invitee. ... Therefore, defendant owed plaintiff a duty to exercise ordinary and reasonable care to protect her from unreasonable risks of physical harm of which the university knew or had reason to know. ... However, where an invitee voluntarily exposes herself to a hazard, the owner or occupier of the premises will not be the insurer of her safety, since an invitee is required to exercise some degree of care for her own safety," citing *Thompson v. Kent State Univ.*, 36 Ohio Misc. 2d 16 (Ohio Ct. Cl. 1987)). See also *A.M. v. Miami Univ.*, 88 N.E.3d 1013 (10th Dist. Ohio 2017). See generally William P. Hoye J.D., *The Legal Liability Risks Associated with International Study Abroad Programs*, 131 Educ. Law Rep. (West) 7 (Feb. 4, 1999); Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309 (2006); Kathleen M. Burch, *Going Global: Managing Liability in International Externship Programs—A Case Study*, 36 J.C. & U.L. 455 (2010).

claims by injured students by requiring students to sign waivers. The use of waivers within the study abroad context has been a topic of constant consideration across international student operations and the legal offices that provided advice to these clients. However, since institutional waivers and their enforceability are usually a matter addressed through the application of state law and are thus subject to the varying scrutiny of individual state courts, the seemingly impenetrable shield from liability is showing signs of weakening. As evidenced by several recent decisions, courts are looking to factors surrounding the execution of the waiver rather than just the language of the waiver itself. In response, this article proposes that institutions reimagine the institutional waiver as a process leading to the assumption of risk by the student rather than just a piece of paper to hold high in the event of injury or death—a process that involves the exchange of information, thoughtful discussion of risks and the environment, as well as pre-departure orientation. This process, at a minimum, should be developed to satisfy three pillars of enforceability in that the student's consent to the conditions provided therein must be made knowingly, voluntarily, and with valuable consideration.

This article will first summarize the institution's duty to students as found in tort law. It will then move to a discussion of the special relationship doctrine that is gaining strength with respect to institutional liability in general, with potential application to liability for injuries related to study abroad programs.¹⁰ The article then turns to an analysis of jurisprudence related to the concept of duty and special relationships in cases involving study abroad.¹¹ Next, it discusses the use of waivers of liability within the context of both domestic and study abroad programming. This article will then engage in a more focused discussion of each pillar of enforceability and what institutional measures may be available to further establish the stability of each pillar relative to an individual study abroad program. Finally, the article proposes the adoption of assumption of risk affirmations as a core component accompanying any exculpatory language as well as encouraging discussions of potential dangers to students as a core component of pre-departure orientation programming.

10 This article focuses only on education abroad programming in the context of those programs that are *institutionally owned/operated programs*. See generally W.P. Hoye & G.M. Rhodes, *An Ounce of Prevention Is Worth ... the Life of a Student: Reducing Risk in International Programs*, 27 J.C. & U.L. 151 (2000); also presented at the National Association of College & University Attorneys Symposium on International Programs, 2000, Hoye and Rhodes categorized programs into four types: institutionally owned/operated programs; contractual program (where the institution contracts with a third party to provide the program); permissive programs (the institution knows about the program but there is no formal relationship in place—for example, ads on a bulletin board in the education abroad office); and unsponsored, unapproved. For an examination of a possible fifth type of program, the student-organized trip, see also *Boisson v. Arizona Board of Regents*, 236 Ariz. 619; 315 Educ. Law Rep. (West) 511 (Ariz. Ct. App. 2015).

11 For the purposes of this article, and unless otherwise mentioned within the context of the specific cases mentioned herein, issues regarding the extraterritorial application of U.S. and/or state law will not be discussed. While certainly an important consideration when seeking to determine whether a legal duty provided for by federal or state law and regulation applies, the enforcement of the exculpatory clauses in assumption of risk forms is primarily an issue of state law. Also not discussed herein, even if perhaps briefly addressed, is the application of state immunity and indemnity protections often available to state institutions and other public entities and employees in the course and scope of their employment such as was the case in *Griffen v. State*, 767 N.W.2d 633 (Iowa 2009).

I. The Institution's Duty to Its Students

Whether an institution owes a legal duty of care to its students within the context of a negligence cause of action is a matter of law to be determined by the courts.¹² Conversely, in the event a legal duty of care is established, foreseeability of the harm alleged and/or breach of the standard of care are questions of fact left to the discretion of the jury.¹³ For the plaintiff to prevail in a negligence action, the plaintiff must prove (1) the existence of the duty, (2) a breach of the same, and (3) an injury proximately related from such breach (i.e., causal connection).¹⁴ This analysis is used most often when the cause of action is perceived to be direct (i.e., a student is injured due an institution's action or inaction, or program under the institution's direct control). However, in cases where there is not a clear direct relationship between the cause of action claimed by the student and the perceived duty from the institution, such a presumption does not completely exonerate the institution from a legal obligation to the student for injury resulting from the acts of third parties.¹⁵ The *Restatement (Second) of Torts* section 315 provides that there is generally no duty to be responsible for the conduct of third parties, *unless* a special relationship exists between the institution and the third party that requires the institution to control the third party's conduct (or, in some cases, if there exists a special relationship between the institution and the student, which presumes that the institution will protect or otherwise be responsible for the student's safety).¹⁶ Absent such a relationship, the institution would not otherwise be responsible for the injury to a student at the hand of a third party.¹⁷

In *Bradshaw*, a student attended a class picnic held at an off-campus location. A faculty member who served as the sophomore faculty advisor at Delaware Valley

12 *University of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987) (en banc), determining within the context of Denver's state law "whether a particular defendant owes a legal duty to a particular plaintiff is a question of law" (citing *Imperial Distribution Services, Inc., v. Forrest*, 741 P.2d 1251, 1253-54 (Colo. 1987), finding that the university did not owe a duty of care to students related to an injury at an off-campus fraternity house); see also *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1366 (3d Cir. 1993), applying Pennsylvania law within the federal court context to determine whether the defendant college owed a duty to the defendant lacrosse player who died during a practice session.

13 *Regents of Univ. of Cal. v. Super. Ct.*, 29 Cal. App. 5th 890, 912 (2d Dist. 2018).

14 *A.M.*, 88 N.E.3d at 1022. See also *Dzung Duy Nguyen v. Massachusetts Institute of Technology*, 479 Mass. 436, 448 (2018), recognizing that a special relationship may lead to a "duty to prevent suicide," while also citing existing Massachusetts case law for the general principle that, "we do not owe others a duty to take action to rescue or protect them from conditions we have not created." The case also contains an analysis of the "modern university-student relationship" beginning with the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 40(a)(2012), and continuing with excerpts from across federal circuits and state courts.

15 For example, in *Munn et al. v. The Hotchkiss School*, 24 F. Supp. 3d 155, 170 (D. Conn. 2014), the court found that Hotchkiss's mere presence as a secondary school through the invocation of the "custodial" duty was enough to invoke a special relationship between Hotchkiss and Munn.

16 *Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979).

17 In *Bradshaw*, the plaintiff attempted to prove this custodial relationship by arguing that the university's policy prohibiting alcohol on campus or at campus events created such a duty for third-party actions. The court responded that it was unlikely that a court would find that by even having such a policy, "the college had voluntarily taken custody of Bradshaw so as to deprive him or his normal power of self-protection or to subject him to association with persons likely to cause him harm." *Id.* at 141.

College knew about the picnic but was not present. Alcohol was served at the picnic, having been procured by one of the underage attendees. Bradshaw leaves in a car driven by another student who is intoxicated. The car is involved in an accident, Bradshaw is injured, and sues the college. The court in *Bradshaw* ended where it began, "... the modern American college is not an insurer of the safety of its students."¹⁸

In a more recent case within the study abroad context, *Doe v. Rhode Island School of Design*, the court considered five factors before determining that a duty existed between a student who was sexually assaulted in housing procured by the institution during a study abroad trip to Ireland:

(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden of the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.¹⁹

Growing in tenor and tenacity, courts have been continually challenged by the plaintiffs' bar to ignore *Bradshaw's* and *Bradshaw*-esque abandonment of the previous doctrine of *in loco parentis* and adopt the more subjective interpretation turning upon the specific circumstances of each relationship at each institution in each program.²⁰ In this article, there are several examples where the arguments between plaintiff and defendant seek to continually redefine the legal distance between obligation by the university and autonomy of the student. Whether courts will continue to lean back toward *in loco parentis* or some replacement is yet to be determined. Notwithstanding, institutions of higher education should take notice that their duties may not be limited to words in statutes and regulations but may now be established through e-mails and web pages.

II. The Special Relationship Doctrine

As a general concept, it has been argued that an institution of higher education may owe a reasonable duty of care with regard to its study abroad programming if the activity exposes the student to harm that is reasonably foreseeable (e.g., taking soil samples from a vineyard vs. rappelling into the mouth of an active volcano to collect rock samples), to the extent that such duty is not already mitigated through an informed assumption of risk or the engagement in an activity involves an

18 *Id.* at 138.

19 432 F.Supp.3d 35, 41 (D.R.I. 2019). The particulars of this case are discussed later in this article.

20 See generally Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485 (2003). This article provides a survey of higher education tort liability through the lens of several paradigms: the purely educational, the college as insurer, the bystander, the college as custodian, the business invitee, and the facilitator university. See also Louis A. Lehr, Jr., *The In Loco Parentis Standard*, 1 PREMISES LIABILITY 3d § 3H:2 (Louis A. Lehr, Jr., Ed., 2020) for a brief summary of the doctrine.

open and obviously visible (or inherent) risk or danger.²¹ In the presence of such a general duty of care, the institution may therein be expected to take actions to mitigate against such reasonably foreseeable harm if possible or, if such measures are unavailable or too burdensome, to provide notice to the students so that the students can make their own choices in moving forward.²² However, once the institution assumes the duty (i.e., through affirmation, information, or contract), it may be considered to have established a special relationship with the student beyond that which is normally present either in common law or through policy or procedure. Once the special relationship is assumed, further liability may thereafter attach. All this notwithstanding, in the absence of a special relationship in the education abroad context, the institution should not otherwise be automatically liable to its students and other participants in its education abroad programming.²³

Going back to *Bradshaw*, the court initially recognized that a special relationship existed at one time between a university and its students.²⁴ However the court walked through the evolution of this relationship by reasoning that when students were given more formal freedoms (the right to vote is an example provided in the ruling), the student's emerging role as a legally entitled individual also represented a change in the previous assumption that such relationship between the university and student was automatically established upon enrollment.²⁵ To this effect, the court in *Bradshaw* found the absence of a "custodial relationship" in consideration of current Pennsylvania law.²⁶ Without the proverbial legal strings to bind the university to the student, the special relationship shared between them post-*Bradshaw* would require more than just mere enrollment and attendance. In several decisions since *Bradshaw*, the courts have turned to state law, previous cases, or sections of the *Restatements* (as referenced further herein) in determining as a matter of law whether a special duty exists between the institution and student involved in one of its education abroad programs; usually any determination regarding the breach of such duty is a matter of fact.²⁷

21 Johnson, *Americans Abroad*, *supra* note 9, at 339

22 *Id.* at 344. See also William Hoyer & Natalie A. Mello, *Study Abroad: Legal and Operational Guidance Contained Within the Standards of Good Practice for Education Abroad*, Paper presented at the 2015 Annual Conference of the National Association of College and University Attorneys, Washington D.C., June 30, 2015. See also Burch, *supra* note 9, at 462-66.

23 This section does not directly address the potential custodial relationship incurred by an institution for a minor student enrolled in an education abroad program in its analysis of the cases presented and associated restatements. However, this section does conclude with an analysis addressing the intersection of differing responsibilities placed upon institutions with regard to minors participating amongst the majority adult population of students engaged in education abroad in light of *Munn*.

24 *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir.1979).

25 *Id.* The court also interweaved the decision of the court in *Healy v. James*, 408 U.S. 169 (1972) in determining that society itself "considers the modern college student an adult." *Bradshaw*, 612 F.2d at 140.

26 *Bradshaw*, 612 F.2d at 140-41.

27 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353, 363 (2011). See also *Cope v. Utah Valley State Coll.*, 290 P.3d 314, 325 (Utah Ct. App. 2012). However, at least one court made the determination that the existence of a special duty was a matter for the jury to decide. In the wake of the Ninth Circuit's

III. The Institution's Duty in Education Abroad

A. Relationships, obligations, and assumptions as addressed by the courts

In the context of education abroad programming, the story of Adrienne Bloss offers an early post-*Bradshaw* glimpse of the relationship shared between a university and student when abroad.²⁸ Ms. Bloss was sexually assaulted by a cab driver after leaving her host family's house to travel to another student's home in Cuernavaca, Mexico, during a study abroad experience.²⁹ The question at issue was whether the university was negligent for its failure to secure housing closer to the campus, failure to provide transportation, and failure to warn the students of the dangers of the city—all allegations claimed by the plaintiff that could have prevented the attack.³⁰ The court again looked to state law to determine the scope of immunities provided to the university in an examination of its ultimate liability toward the claims put forth by Bloss. In determining that the university retained its immunity with regard to discretionary programmatic decisions (that included considerations for housing, transportation, and notice), the court issued a *Bradshaw*-esque determination before further defining the boundaries of its duty during the course of its study abroad programs:

The litigation appears to be premised on a belief that the University is the guarantor of the student's safety. Unfortunately, this is neither physically possible nor realistic.³¹

Much of the finding in *Bloss* related to the court's deference to what it considered to be the *discretionary* powers of the university in creating the study abroad program. As long as the program was related to the academic pursuits of the institution, then the court would provide to it the same deference in defining its boundaries as provided to other academic pursuits.³²

As previously mentioned, perhaps no case is more often cited in education abroad literature than that of *Fay v. Thiel College*.³³ *Fay* involves an equally disturbing set of circumstances in which a student became ill on a study abroad

decision in *Bird v. Lewis & Clark College*, 303 F.3d 1015 (9th Cir. 2002), the Eastern District of Washington found, in *Jacky v. Webster University*, 2:02-cv-00197-EFS (E.D. Wash. 2004), that while "the parties cited to no case in the Washington state courts or the Ninth Circuit holding that a university that offers its students the opportunity to participate in an education abroad program, without more, has a special relationship with those students and therefore, a duty to them. Nor did the Court find one," the Court used *Bird* and the reasoning of the Ninth Circuit to ultimately decide in *Jacky* that "the Court holds that the issue of whether there was probably a special relationship between Ms. Jacky and Webster University creating a duty on the part of Webster University is one best decided by a jury." *Id.* On this point, the court denied the partial motion for summary judgment. However, the question put forth ultimately was never answered as the parties entered into a settlement sixteen days after the denial was filed.

28 Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999).

29 *Id.* at 662–63.

30 *Id.* at 663.

31 *Id.* at 666.

32 *Id.*

33 55 Pa. D & C4th 353 (2011). See also Redden, *supra* note 1.

trip to Peru.³⁴ Upon admittance to the clinic, the faculty supervisors for the trip and other students moved on, leaving Fay under the supervision of a Lutheran missionary who was not an employee of (nor had any formal relationship to) Thiel College.³⁵ Soon after admittance, the doctors informed the student that surgery was “absolutely necessary.”³⁶ Once under local anesthesia, the doctor and the anesthesiologist sexually assaulted Fay.³⁷

In seeking a motion for summary judgment, the defendant institution sought to use a pre-trip waiver of liability form as a defense against Fay’s claims for her injuries.³⁸ The court rejected the validity of the waiver and its exculpatory clause for not meeting the standard of Pennsylvania law as a valid clause and concluded that the form ultimately was invalid as a contract of adhesion.³⁹ With the release essentially thrown out, the court then proceeded to the defendant college’s claim that it held no special relationship with Fay and thus was only held to a “reasonable standard of care” which it satisfied in delivering her to and leaving her at the clinic.⁴⁰ Ms. Fay claimed that such a special relationship existed because of the consent form that was signed at the same time as the waiver with specific reliance on the language: “In the event of sickness or injury of my / our / daughter / son / ward / spouse / myself, [name hiel College to secure whatever treatment is necessary, including the administration of an anesthetic and surgery.”⁴¹

Holding that the consent form itself could not be considered a de facto waiver form, since it lacked any references to such purpose, and thus the defendant institution could not find shelter from its negligence under such theory, the court determined that the form in and of itself consummated the special relationship between the student and the college. This meant that in consenting to allow the college to “secure whatever treatment is necessary,” that language created an expectation from the student’s perspective and an enhanced duty of care for the faculty supervisor in the event of an injury.⁴² In reaching this conclusion, the court provided significant weight to section 323 of the *Restatement (Second) of Torts*, in that through the form, the college specifically undertook a special duty to care for the student in the event of an injury and failed in this obligation.⁴³ In applying the restatement to the specific circumstances of the case, the court reasoned that the plaintiff possessed the burden of proving that the failure of the college to perform its duty increased the risk of harm to the student, and such negligence was a

34 *Fay*, 55 Pa. D & C4th at 355.

35 *Id.* at 356.

36 *Id.*

37 *Id.*

38 *Id.* at 358.

39 *Id.* at 361.

40 *Id.*

41 *Id.* at 368.

42 *Id.* at 363.

43 *Id.* at 365.

“substantial factor” in the actual harm suffered by Fay.⁴⁴ This would ultimately be a genuine issue of material fact to be presented to a jury; the court ultimately denied the motion for summary judgment.⁴⁵

Several cases cited by other scholars⁴⁶ show similar efforts by the courts to consider the creation/assumption of special duties and relationships by colleges and universities for student participants in education abroad programs. For example, in the 1998 case of *McNeil v. Wagner College*,⁴⁷ the appellate division of the New York Supreme Court denied relief to a student who suffered nerve damage while undergoing surgery at an Austrian hospital for injuries sustained while on a study abroad program through the college.⁴⁸ The student claimed that when the administrator of the program acted as an interpreter at the Austrian hospital, the administrator immediately assumed a duty of care for the student’s well-being.⁴⁹ The court disagreed, citing New York’s continued rejection of the *in loco parentis* doctrine as applied to higher education and noted that the student failed to show any duty assumed by the administrator in agreeing to serve as the interpreter.⁵⁰ In contrast to *Fay*, *McNeil* represents an examination of an assumed duty of a college through an action of its employee in the absence of such obligation memorialized in a pre-trip waiver or consent forms, ultimately finding that the assumption of one task did not automatically mean the assumption of a special duty of care.

A possible outlier to either conceptual framework of whether such action is contemplated in writing between a student and university is *Ju v. Washington*,⁵¹ where a faculty advisor on a study abroad trip to Cuba took action to preserve the immediate health of a student by sending her home from the experience, wherein the student then sued for breach of contract stating that she was sent home “against her free will.”⁵² In light of the perceived immediate danger to the student’s health by the program coordinator, as well as local doctors, the court declined to find the university in breach of contract for sending her home, without reference in the court’s analysis of any pre-trip waivers or agreements that provided the university with such right. Nevertheless, the case demonstrates that while the assumption of a special duty may be related directly to the action taken or a specific provision of a document agreed to by both parties, some courts may be willing to extend the

44 *Id.* at 366.

45 *Id.*

46 *See supra* notes 9 and 10.

47 246 A.D.2d 516; 667 N.Y.S.2d 397 (N.Y. App. Div. 1998). *See also* Burch, *supra* note 9, at 483.

48 *McNeil*, 246 A.D.2d at 516.

49 *Id.* The student’s theory of recovery was that during the interpretation, the administrator withheld information regarding a doctor’s recommendation for immediate surgery and that such negligence was a proximate cause of the student’s nerve damage. *Id.*

50 The court’s reasoning went further in that, even if there was a relationship, the student failed to prove the allegations that the administrator withheld information regarding the doctor’s recommendation. *McNeil*, 246 A.D.2d at 517.

51 156 Wash. App. 107 (2010).

52 *Id.*

discretion of the institution in the context of education abroad programs where the safety of the student is a primary concern without addressing whether the institution assumed a special duty or had the obligation to take such action.⁵³

Outside the context of education abroad, several cases are instructive for further examining the boundaries of creation of a special relationship based on the factual patterns of institutional activities and actions occurring on and off campus. For example, an institution of higher education can be held liable for the dangerous conditions of a mandatory internship if the institution was in a position to have direct knowledge about such conditions and failed to provide a warning to the student prior to the start of the experience.⁵⁴ However, there may not be a special duty owed by an institution to a student who was injured in a zip line incident at a “wilderness leadership training course” that he enrolled in through the university, but was administered by an independent third-party provider, especially since the university had no similar ties to or control over the program or its supervision.⁵⁵ Further, in support of theories supporting the creation of special relationships in education abroad programming, an institution may incur liability by creating a special relationship, if the overseas experience is in direct furtherance of a programmatic requirement (presumably more than just merely satisfying credit hours), and the institution holds sole discretion of site selection. Such liability may be mitigated, if the site is controlled and operated by a third-party provider through which the institution has contracted to perform certain educational services. However, even where the site is operated by

53 See generally Brittney Kern, *Balancing Prevention and Liability: The Use of Waiver to Limit University Liability for Student Suicide*, 2015 B.Y.U. EDUC. & L.J. 227 (2015). Further complicating the issue is the continued emergence of mental health issues on campus and the inevitability that such health crises would continue to occur in the education abroad context. In Kern’s examination of mental health issues relative to the special relationships that may be created or asserted between a university and student contemplating or attempting suicide, she provided an examination of several cases that involved *suicide waivers* as well as whether the university was put on notice of a student’s mental instability and should have a duty to act. Kern’s work is instructive in the event that a similar issue would arise during the course of an education abroad program, in which both the pre-trip waivers and any actions undertaken by the faculty advisor may be later argued to have created a special relationship requiring further care and attention to a student with mental health issues or a student who may be contemplating or attempting to complete suicide. See generally *Connor v. Wright State Univ.*, 2013 Ohio 5701 (10th Dist. 2013). Responding to a call, campus police officers contacted medics who transported a student to a hospital after the department received a call that the student overdosed on prescription medication. *Id.* at ¶ 2. A short while later, the campus police officers received another call about the student’s attempts to harm himself, and after a brief conversation, the officers did not believe the student represented a harm to himself or others. *Id.* at ¶ 4. A short while after that, the student completed suicide. The court relied upon the four-part test provided for in Ohio Revised Code section 2743.02(A)(3)(b), and while it ultimately found that such test could not be completely satisfied, it is of significance that the court found that a special relationship could arise from the police officers’ statement to the student that, “if he needed someone to talk to that he could call the police department and [they] would be more than happy to help him out.” *Id.* at ¶ 16.

54 *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000). The court determined that because the placement office had the final determination as to where students were placed, “students ... could reasonably expect that the school’s placement office would make some effort to avoid placing [students] with an employer likely to harm them.” *Id.* at 90 (citing *Silvers v. Associated Tech. Inst., Inc.*, No. 93-4253, 1994 WL 879600 (Mass. Super. Ct. Oct. 12, 1994)).

55 *Van Maanen v. Youth with a Mission-Bishop, et al.*, 852 F. Supp. 2d 1232 (E.D. Cal. 2012).

a third party, liability may still attach as in the case of *Doe v. Rhode Island School of Design*.⁵⁶

The Rhode Island School of Design (RISD) sponsored an education abroad experience in Ireland and used a local third party, Burren College, to provide on-ground logistics, including housing. Upon Burren College's recommendation, RISD quartered its students in three houses close to the college. Doe was unable to lock her bedroom. On the very first night of the education abroad experience, she was raped by another program participant who was immediately dismissed from the program thereafter. Doe alleged negligence against RISD for "failing to provide her with reasonable safe housing accommodations."⁵⁷ Despite RISD's objections to the same, the court determined that a special relationship did exist, that RISD owed a duty to exercise reasonable care in providing secure housing, and thus it failed in its duty. Furthermore, the court determined that it was "reasonably foreseeable that one of RISD's students could be the victim of an attack if reasonable safe housing accommodations were not provided"⁵⁸ and looked to the *Restatement (Second) of Torts* section 314A for support. According to the court, while RISD did not have direct knowledge of the assaulting student's violent nature, it did have constructive knowledge that an assault, in general, could occur, stating,

As the record makes clear, prior to the start of this program, RISD, was aware that sexual assaults or misconduct could occur during its international study abroad programs. In fact, RISD, like so many universities, has had to deal with this reality, including with respect to an allegation of sexual misconduct during a study abroad program two years prior to the Ireland Program.⁵⁹

Ultimately, the bulk of the decisions cited regarding institutional liability through special relationships in education abroad programming and other contexts are largely determinative on state law considerations, previous court decisions, as well as various provisions of the Restatements. While state law standards for assigning a special relationship to one of its state institutions vary, the courts' consistent consideration of the restatement as a keyhole through which the state-related issues and interpretations could be viewed leaves open the possibility that the individual state cases considered together could provide additional inroads supporting the further expansion of the application of the special relationship. Restatements are often relied on by courts to further establish issues of liability and duty of care in cases of first impression, especially when such liability is predicated upon the actions of a third party or a condition seemingly outside the control of one of the primary actors (i.e., the institution and the student).⁶⁰

56 432 F. Supp. 3d 35 (D.R.I. 2019).

57 *Id.* at 40

58 *Id.* at 45.

59 *Id.*

60 See *Creppel v. Geco-Prakla, Inc.*, 1994 WL 50241, Civ. A. No. 93-1994 (E.D. La. February 11, 1994), unreported, "A persuasive authority on the general law of torts is The Restatement (Second) of Torts." See also David A. Logan, *When the Restatement Is Not a Restatement, The Curious Case of the "Flagrant Trespasser,"* 37 WM. MITCHELL L. REV. 1448 (2011). According to Logan, "There were more than

B. Continued focus turned to the Restatements

In the context of education abroad programming, the three restatements cited by the courts in *Bradshaw*,⁶¹ *Fay*,⁶² and *Boisson*⁶³ provide further insight into analyzing the existence of a special relationship between the student and the administering institution. First, is the activity one that is directly related to the education program in which the student is enrolled? In *Boisson*,⁶⁴ one of the first considerations applied by the Court of Appeals of Arizona to a case involving liability for the death of a student in a student-organized study abroad experience to Mount Everest was a concept introduced in the *Restatement (Third) of Torts* section 40(a). This restatement provides generally that, in the presence of a special relationship, one party owes another a reasonable duty of care with regard to the risks that may “arise within the scope of the relationship.”⁶⁵ *Restatement (Third) of Torts* section 40(b)(5) provides, among the several categories of special relationships, “a school and its students.” According to the reporter’s notes of the restatement, there is a “substantial acceptance” of this relationship by courts, but (as cited in *Boisson*) such relationship is often applied in the limited context for “risks that occur while the student is at school or otherwise engaged in school activities.”⁶⁶ The court ultimately concluded that the trip to Mount Everest was not an, *off-campus* university-sponsored trip as the plaintiffs asserted (even if the university on-site staff did have knowledge of it) and that the university did not owe a duty of care to the student. Notwithstanding the decision, the restatement itself is important as the first waypoint in considering whether the activity itself is directly related to an institutional activity or program before moving on to whether the actions of an individual faculty or staff member may create a special relationship or a special duty of care on behalf of the institution.⁶⁷

160,000 judicial citations to restatements by 2004, with the largest single number, by a considerable margin, involving torts” *Id.* at 1449. “During this time, there were more than 67,000 citations to the torts restatements, with the contracts restatements a distant second with slightly less than 29,000 citations.” *Id.* at n.3. The court in *Munn et al. v. The Hotchkiss School*, 24 F. Supp. 3d 155 (D. Conn. 2014), *appealed*, 795 F.3d 324 (2d Cir. 2015) cited several restatements in its reasoning on foreseeability, risk, duty, and harm.

61 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

62 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353 (2011).

63 *Boisson v. Ariz. Bd. of Regents*, 236 Ariz. 619; 315 Educ. Law Rep. (West) 511 (Ariz. Ct. App. 2015).

64 *Id.*

65 RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 (a)(AM. L. INST. 2012).

66 RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §40, Reporters’ Note, § 1 (AM. L. INST. (2012). *Boisson*, 236 Ariz. at 623. This *Boisson* decision is cited by the Connecticut Supreme Court in *Munn* (326 Conn. 540, 552, Conn. 2017) with regard to duty of care, “The duty is tied to the expected activities within the relationship. Therefore, in the student-school relationship, the duty of care is bounded by geography and time, encompassing risks such as those that occur while the student is at school or otherwise under the school’s control.” Of note, “engaged in school activities” was revised to state “under the school’s control” by the Connecticut Supreme Court in *Munn* (citing RESTATEMENT (THIRD) OF TORTS § 40, cmt. 1).

67 It could be argued that the court in *Boisson* actually made a leap in interpretation by assuming that the term *schools* in section 40 of the Restatement (Third) applies to postsecondary education. As inferred in the reporters’ note, the term may be limited to secondary schools through its references to the “custodial relationship,” which is not a comparison usually made to the relationship between

Second, after establishing the activity is a university activity or program, the court in *Fay* cited *Restatement (Second) of Torts* section 323 for its proposition that

one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to the liability to the other for physical harm resulting from this failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.⁶⁸

Essentially, if a person says he or she will take an action, another relies upon that action, and there is either an increase in probability of harm and the other person is actually harmed, then the duty of care has been breached and liability may accrue. In the context of *Fay*, this assumption took the form of a single statement in a pre-trip document consenting to allow the college representative to take action in the event the student needed medical treatment.⁶⁹ While providing the student with the boundaries of acceptable behavior and the terms of the educational program, these documents may also contain assumed duties undertaken by the institutional representative—both directly and indirectly—upon which the student may rely during the course of the education abroad opportunity, and thereby imposing on the institution an unintended special relationship and increased duty of care.

C. A minor exception?

It is important to note, however, that the imposition of a special relationship and the duties associated therein by a court may not follow this same reasoning in the event the participant in the education abroad program is a minor. For example, in the case of *Munn et al. v. The Hotchkiss School*, Munn was a fifteen-year-old student at the Hotchkiss School who was on an education abroad experience in China when Munn received a tick bite during her visit to Mount Panshan. As an eventual and tragic consequence of this one bite, Munn was left with severe brain damage in which “she had limited control over her facial muscles, so that she drools, has difficulty eating and swallowing, and exhibits socially inappropriate expressions.”⁷⁰ While the district court noted that Munn “is in other ways normal” despite certain cognitive impairments, the court also noted testimony where she contemplated suicide and her hidden rage when people think she suffers from mental retardation while all the while she remains acutely conscious and self-aware of her condition.⁷¹ As further explained herein, the courts rendered (and

students and a postsecondary institution. Even the court itself noted, “The parties have cited, and the court has found, no Arizona case addressing whether a college or university owes its students a duty of reasonable care for off-campus activities. . . . No Arizona case has recognized a duty by a university or a college in any context comparable to this case.” *Boisson*, 236 Ariz. at 623.

68 *Fay*, 55 Pa. D & C4th at 365 (citing RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965).

69 *Id.* at 368.

70 *Munn et al. v. The Hotchkiss School*, 24 F. Supp. 3d 155, 166 (D. Conn. 2014).

71 *Id.*

upheld) a decision against the Hotchkiss School in the amount of a little north of \$41 million—finding that Munn’s injuries were “reasonably foreseeable” and that the school failed in its duty to warn Munn and her parents of the dangers associated with the trip. What if Munn was a minor high school student participating in a university study abroad experience through a pathway program to earn college credits?⁷² Referred to most commonly as dual enrollment, several institutions in nearly every state participate in a program that encourages high school students to gain college credits through established partnerships either at the state level or those school-to-institution agreements.⁷³ While the students involved in *Bradshaw*⁷⁴ were clearly college students and the student at the center of *Munn* was clearly a secondary school student, a court may not see the dually enrolled student as belonging clearly to either category, thus leaving open the possibility of engaging *in loco parentis* as the legal standard of care even while the student participates in a study abroad opportunity at an institution of higher education. Much like the adoption of the First Amendment framework for free speech analysis from the secondary contexts of *Hazelwood School District v. Kuhlmeier*⁷⁵ to institutions of higher education,⁷⁶ it is not outside the boundaries of legal jurisprudence for courts to begin to parse participation in study abroad experiences by age in applying the duty and liability of the institution in the event of a claim: one standard of duty for students above the age of majority and a more custodial standard for those below. With the emergence of gap year study abroad programs, the line in the sand previously established between secondary and postsecondary schools regarding the role and duty of the institution in the safety of its students grows even more gray.

Offered by both large education abroad providers as well as individual institutions, these programs take advantage of the growing trend where newly minted high school graduates take a *year off* before formally enrolling in an institution of higher education.⁷⁷ Students can then apply this gap year study abroad experience as course credit at their future institutions of higher education. Many of these providers are partners with institutions of higher education, and now some institutions of higher education are offering their own gap year enrollment options. As the population of students engaged in dual enrollment and/or gap year study abroad activities increases, it is not outside the realm of possibility for a

72 For example, in Ohio the dual enrollment opportunity offered to high school students is called “College Credit Plus.” During the 2015–16 school year, over 54,000 students participated in the program by enrolling in twenty-three community colleges, thirteen universities, and thirty-five private higher education institutions. https://www.ohiohighered.org/content/college_credit_plus_info_students_families. See also, https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/CCP/CCP_overview_2016_11032016.pdf.

73 Find a state-by-state analysis by the Education Commission of the States at <http://ecs.force.com/mbdata/mbprofallIRT?Rep=DE15A>.

74 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

75 484 U.S. 260 (1988).

76 See *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), applying *Hazelwood* in the context of a subsidized student newspaper and citing *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). See also *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012).

77 Discussion of the gap year phenomena, as well as several programmatic options, is found at <https://www.studyabroad.com/gap-year-worldwide>.

claim to arise that asks the court to parse the obligations of the institution to minor participants separate and apart from those who have reached the age of majority. Some institutions of higher education may be able to avoid such a possibility, if there are examples of policies in place either prohibiting dual enrollment students from participating in study abroad or preventing participation by minor students altogether.⁷⁸ However, the remaining institutions that have not addressed this issue may be left to wait until the spotlight shone upon *Munn* turns its focus toward higher education.

IV. The Rise (and Fall?) of the Institutional Waiver

Even in the event of a duty or special relationship, institutional waivers requiring the student to *release, indemnify, and hold harmless* the institution are often portrayed as a mainstay component in the practice of education abroad.⁷⁹ However, in a study conducted and reported by United Educators, “institutions could produce a signed pre-travel waiver in only fifteen percent of the study’s claims.”⁸⁰ Whether through failure to implement the waiver as part of the program’s application process or a failure after the fact to maintain the document in accordance with institutional retention schedules, the absence of the waiver can substantially limit an institution’s defense in mitigating liability. Yet, even its production during discovery is not a guarantee against liability.

For example, the waiver produced in *Fay*⁸¹ failed to absolve the college of its duty to remain with the student in the event of a medical emergency *because* of the language in the waiver, and the *Munn*⁸² case was decided based upon what was *not* in the waiver. This preclusion of the waiver became a crucial decision that removed a significant barrier toward a determination of liability against the school.⁸³ The pretrial ruling precluded the introduction of the pre-trip release on

78 For example, the University of Cincinnati by policy prohibits the participation of College Credit Plus (dual enrollment) students altogether in study abroad, while also limiting participation by minors enrolled in regular coursework. See <https://www.uc.edu/campus-life/study-abroad/apply/minors.html> (last visited January 31, 2021).

79 See Hoye, *supra* note 22. See also Eric LeBlanc, *Limiting Risk and Responsibility in Study Abroad: Are Waivers Good Enough?*, 6 Coll. Q. 1 (2003), <http://collegequarterly.ca/2003-vol06-num01-fall/leblanc.html>. This article demonstrates an early adoption of the standard waiver as a component of mitigating study abroad liability through the perspective of Canadian institutions of higher education.

80 United Educators, *At Risk Abroad: Lessons from Higher Ed Claims* 10 (February 2016), edurisksolutions.org.

81 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353, 363 (2011).

82 *Munn et al. v. The Hotchkiss Sch.*, 795 F.3d 324 (2nd Cir. 2015).

83 In its discussion, the court examined several factors from previous case law before focusing on the issue as to whether the waiver represented a contract of adhesion. While a common argument when examining releases, the court’s rationale in *Munn* (933 F. Supp.2d 343, D. Conn. 2013) made comparison to the 2005 case, *Hanks v. Powder Ridge Restaurant Corp.*, 276 Conn. 314, 322 (Conn. 2005). The court compared the release executed in *Hanks* (where skiers were presented with the release while already on the slope) with the release executed in *Munn* at 345-346 (offered three months before the trip was to commence),

the basis that the release lacked the unambiguous waiver in regard to negligence committed by the Hotchkiss School (“Thus, the release speaks with clarity about the “negligence of everyone but the Hotchkiss School”),⁸⁴ and even if the release had contained such language, the court considered it void as a matter of public policy since “Hotchkiss school’s employees were in the exclusive position to evaluate the risks Cara encountered on her trip and to ensure that Cara had the resources to protect herself against those risks.”⁸⁵ The district court ultimately found that the school was negligent in its duty to notify Munn and the other students of the dangerous health conditions present at Mount Panshan and also found that the presence of these dangers was not only foreseeable but was inferred by the existence of Centers for Disease Control advisories in place before the trip began.⁸⁶ With a reduction in prior economic damages for amounts covered by insurance, the jury awarded damages in the amount of \$41,465,905.39.⁸⁷ Several higher education associations immediately took notice and then action.⁸⁸ The Hotchkiss

before coming to the conclusion: “But like the patrons in *Hanks*, Cara and her parents had no meaningful exit option.” In its determination, the court ignored the fact that the course was not a required part of the curriculum, but rather a completely optional trip provided for “enrichment,” not satisfying any criteria that must be completed prior to commencement. Munn was not compelled to go on the trip and possessed the option to decline both the release and the trip itself. Instead, the court hinged its decision on the custodial relationship between the school and the student: the school had some “control” over Munn’s exposure to the risks that a trip to China posed.

84 *Munn et al. v. The Hotchkiss Sch.*, 933 F. Supp. 2d 343, 346 (D. Conn 2013).

85 *Id.* at 348.

86 *Munn et al. v. The Hotchkiss Sch.*, 24 F. Supp. 3d 155, 177 (D. Conn. 2014). The court recognized that the advisory provided by Plaintiff Munn was issued after the incident occurred and the court then only theorizes through footnotes, “The jury could easily and reasonably have inferred that the August 2007 webpage contained the same basic information as the late spring 2007 page.” The advisory in question did state that precautions such as insect repellent and “long sleeved shirts” should be taken as a precaution.

87 *Id.* at 214. It should be noted that the school, through the motion, introduced several claims including assumption of risk, contributory negligence by the parents (“negligent supervision”), and public policy, whereby the school argued that if this case were permitted to stand it would open up litigation against schools across the country for any extracurricular activity.

88 E.g., Kaitlin Mulhere, *Higher Ed Groups Caution Court Decision Could Discourage Study Abroad*, INSIDE HIGHER EDUC. (October 24, 2014), <https://www.insidehighered.com>. Accord Julianna Renzi, *Column: Travel Risk Is Not School’s Responsibility*, DAILY WILDCAT (November 11, 2014), <http://www.wildcat.arizona.edu/article/2014/11/column-travel-risk-is-not-schools-responsibility>; Hon. Thomas A. Dickerson, *Dangerous Student Tours: The Chinese Tick Case*, GLOBAL TRAVEL INDUS. NEWS (August 28, 2014), <http://www.eturbonews.com/49598/dangerous-student-tours-chinese-tick-case>; Liz Klimas, *Student Wins \$41.7 Million Settlement for Disease She Contracted on School Trip*, THE BLAZE (Mar. 29, 2013), <http://www.theblaze.com/stories/2013/03/29/student-wins-41-7-million-settlement-for-disease-she-contracted-on-school-trip/>. Representative of this case’s relevance to the higher education landscape, over forty organizations had submitted or otherwise joined as amicus curiae to the Second Circuit case including NASPA: Student Affairs Administrators in Higher Education, NAFSA: Association of International Educators, Forum on Education Abroad, Institute for International Education, and the American Council on Education. Relative to the Connecticut Supreme Court case, twenty-three organizations signed on to another amicus curiae brief submitted to the court.

School soon after appealed the decision to the Second Circuit.⁸⁹ The Second Circuit rejected the argument put forth by the Hotchkiss School and upheld the decision that the student's injuries were foreseeable. In addressing the public policy with regard to the school's duty of care brought by the Hotchkiss School on appeal, the circuit court certified two questions to be thereafter considered by the Connecticut Supreme Court: (1) Does Connecticut public policy support imposing a duty on a school to warn or protect against the risk of a serious insect-borne disease when it organizes a trip abroad? (2) If so, does an award of approximately \$41.5 million in favor of the plaintiffs, \$31.5 million of which are noneconomic damages, warrant remittitur?⁹⁰ The Connecticut Supreme Court answered in the affirmative on the first question and upheld the original \$41.5 million award (which included \$31.5 million in no-economic damages). Accordingly, upon its return, the Second Circuit affirmed the decision of the district court in a summary order published on February 6, 2018.⁹¹ In responding to the public policy concerns, the Connecticut Supreme Court offered the following:

The public policy of Connecticut does not preclude imposing a duty on a school to warn about or to protect against the risk of a serious insect-borne disease when organizing a trip abroad, as it is widely recognized that schools generally are obligated to exercise reasonable care to protect students in their charge from foreseeable harms ... the normal expectations of participants in a school sponsored educational trip abroad involving minor children supported the imposition of a duty on the defense to warn about and to protect against serious insect-borne diseases in the areas to be visited on the trip.⁹²

Conversely, in *Thackurdeen v. Duke University*,⁹³ the waiver was upheld based upon the plain language of its content in consideration of the circumstances under which it was intended to apply. Ravi Thackurdeen was a student enrolled in an education abroad program to Costa Rica administered by Duke and the Organization for Tropical Studies (OTS). During a trip to a local beach, Thackurdeen was pulled far away from shore by a rip current and subsequently drowned. His family sued Duke for negligence, amongst other claims, claiming that Duke and OTS had a duty to exercise reasonable care with regard to Thackurdeen and that the duty was breached by taking him to a beach known for having strong rip currents. Within the pleadings, Thackurdeen's claim (brought by his parents) listed twelve specific duties that had been breached.⁹⁴ Duke and OTS moved to dismiss Thackurdeen's claim based upon the contractual waivers and releases presented by Duke and OTS, and signed by Thackurdeen and his father prior to the trip.⁹⁵

89 Munn et al., v. The Hotchkiss Sch., 795 F.3d 324 (2d Cir. 2015).

90 *Id.* at 335.

91 Munn et al. v. The Hotchkiss Sch., 724 Fed.Appx. 25 (2d Cir. February 6, 2018).

92 Munn et al., v. The Hotchkiss Sch., 326 Conn.540 (Conn. 2017), *Syllabus*.

93 1:16CV1108, 2018 WL 1478131 (M.D.N.C. March 23, 2018)

94 *Id.* at *9.

95 *Id.* at *6.

Statement of Authorization and Consent: We understand that participation in the

The Thackurdeens countered that the claim was not barred by the waivers because (1) Duke and OTS's actions represented gross negligence, which cannot be waived under North Carolina law; (2) even if the waiver was effective, the trip to the breach was outside the scope of the waiver; and (3) even if it could be waived, it was against public policy to do so and therefore is unenforceable.⁹⁶

Relative to the first two claims, the court found that Duke and OTS's actions did not meet the standard for gross negligence and that the plain language of the waiver included the entire trip from start to finish (and not just certain individual activities in between). However, the adjudication of the final claim hinged upon the court's acceptance of Thackurdeen's argument that because higher education is a highly regulated activity, public policy would not favor the enforcement of the waiver because of the substantial safety interest the public has in sending their children off to college.⁹⁷ The court did not accept this argument. Instead, rather than focus on the practice of higher education, the court focused on the activity itself—swimming in the ocean.

program is voluntary and that any program of travel involves some element of risk. We agree that in partial consideration of Duke University sponsoring this activity and permitting the student to participate, we will not attempt to hold Duke University, its trustees, officers, agents and employees liable in damages for any injury or loss to person or property the student might sustain while so participating; and we hereby release Duke University, its trustees, officers, agents and employees from any liability whatsoever for any personal injury ... arising from participation in the program. ... Release, Assumption of Risk, Waiver of Liability, and Hold Harmless Agreement: In return for the Organization for Tropical Studies and Duke University allowing me to participate in this activity and having read and understood this Participation Agreement, I hereby state that I agree to the following: A. I hereby RELEASE, WAIVE, DISCHARGE, AND COVENANT NOT TO SUE the Organization for Tropical Studies, Duke University, its trustees, officers, employees, or agents (hereinafter referred to as RELEASEES) ... for any liability, claim and/or cause of action arising out of or related to any loss, damage, or injury, including death, that may be sustained by me ... that occurs as a result of my traveling to and from, and participation in this activity. B. I agree to INDEMNIFY AND HOLD HARMLESS the RELEASEES whether injury or damage is caused by my negligence, the negligence of the RELEASEES, or the negligence of any third party from any loss, liability, damages or costs, including court costs and attorneys' fees, that RELEASEES may incur due to may traveling to and from, and participation in this activity. C. It is my express intent that this RELEASE and HOLD HARMLESS AGREEMENT shall bind the members of my family ... if I am alive, and my heirs, assigns and personal representative, if I am deceased, and shall be deemed as a RELEASE, WAIVER, DISCHARGE, and COVENANT NOT TO SUE the above-named RELEASEES. F. I understand that by participating in this activity I will ASSUME THE RISK of injury and damage from risks and damages that are inherent in any activity.

96 *Id.*

97 *See generally* Robert J. Aalberts et al., *Studying Is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 J.C. & U.L. 189 (2015), which provides for an interesting discussion of the involvement of the federal government and state legislatures in public policy discussions involving study abroad programming and its purposes as well as a proposition for a federal standard for study abroad liability.

Here, Ravi and his father signed two waivers. The language of the waivers is clear and includes a release from any liability arising out of the injury or death of a participant while on the Global Health Program. The beach trip where this tragic event took place was an activity sponsored by the Global Health Program and Ravi's death occurred while he was swimming in the ocean during the beach outing. There is nothing to support a finding that swimming in the ocean is the type of highly regulated activity that triggers the substantial public interest exception to the enforceability of the waivers Ravi and his father signed.⁹⁸

While these cases and others mentioned herein are not dispositive toward a determination as to the current enforceability of waivers within the education abroad context, they certainly provide three key perspective for reviewing both the enforceability and exposure of current and future waiver, release, and assumption of risk documents for education abroad programs: (1) Does the document cover the entire scope of the program (time, place, activities). (2) Does the document specifically state the indemnified institutional parties. (3) Is the document enforceable in consideration of the laws and decisions within the institution's jurisdiction? Furthermore, enforceability should be viewed not only from the lens of the adult student as the participant but through that of the parents who may be asked to sign on behalf of their minor child.

V. Three Pillars as a Foundation for Enforceability

In consideration of the duties and special relationships that may be formed, and the varied and evolving nature of the educational abroad experiences available to students, waivers and releases have to be more than just a piece of paper. Moving forward, waivers and releases should be adopted as a component of a systematic orientation program adopted by the institution that includes a reasonable opportunity for each student to be notified of the reasonably foreseeable risks involved in the experience and allows the student the opportunity to make an informed decision whether or not to assume those risks (and sign the release). The three pillars supporting the release of claims demands that such release be made knowingly, voluntarily, and with valuable consideration between the parties. The institutional waiver should be able to stand upon the foundation provided by these three pillars. Instead of being reduced to a perfunctory component inwardly protecting the institution, waivers and releases should be viewed as the culmination of a process through which the participant is aware of the risks, understands the risks, has voluntarily agreed to assume the risks, and has voluntarily agreed to release the institution from the consequences of the program in consideration for the opportunity to participate in the program itself. For its part, the institution should engage the student in an examination of the reasonably foreseeable risks throughout the course of the education abroad experience and provide the student with the resources through which the student can knowingly and voluntarily assume the risk, while also taking personal steps to mitigate the dangers inherent therein.

⁹⁸ *Thackurdeen*, 2018 WL 1478131 at *11. Contrast *Downes v. Oglethorpe University, Inc.*, 342 Ga. App. 250 (2017), finding that where a student drowned while on an education abroad trip, "the student assumed the specific risk of drowning posed by entering a body of water so inherently dangerous as the ocean."

A. *Knowingly*

Consistent throughout the few cases that exist regarding the applicability of waivers within higher education is that the “contract or exculpatory clause must be clear and explicit.”⁹⁹ A clear and explicit release can provide the foundation for the defense that the student executed the document aware of the consequences of such a release and assumed the risks associated therein. However, that same clear and explicit release of claims may not provide a sufficient foundation in the event that the student was not aware of the consequences of the activity itself and therefore did not knowingly assume any such risk.¹⁰⁰ To strengthen the argument that a release is made knowingly by the student and that the student is knowingly assuming the risks associated with the activity, institutions must engage in a comprehensive review of the risks associated with the activity prior to its commencement. This review should ensure that the reasonably foreseeable risks are explained to the student so that the student has the knowledge to then assume those risks as a component of the release itself. *Solomon v. John Cabot University*,

99 *Roe v. Saint Louis Univ.*, No. 4:08CV1474 HEA, 2012 WL 6757558 (E.D. Mo. 2012). In finding for the defendant with regard to a back injury suffered by a female athlete, the court examined the following language, “I agree to release and hold harmless Saint Louis University, its employees, agents, representatives, coaches, physicians, athletic trainers, student-athletic trainers, and volunteers (collectively “Releasees”), from any and all liability, actions, cause of action, debts.... I FURTHER UNDERSTAND AND AGREE THAT THIS RELEASE COVERS ANY LIABILITY, CLAIM AND ACTION CAUSED ENTIRELY OR IN PART BY ANY ACT, FAILURE TO ACT, MISTAKE, FAILURE TO SUPERVISE, OR NEGLIGENCE ON THE PART OF ANY OF THE RELEASEES.” before determining that, “there is no question that the language above is clear and explicit.” In the same decision, the court also revived the previous precedent of the Eighth Circuit that “the college is not an insurer of the safety of its students” absent a special relationship, citing *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003).

100 *See Turnbough v. Ladner*, 754 So. 2d 467 (S.C. Miss. 1999), *reh’g denied*, April 20, 2000. Despite signing a release before engaging in the activity, the court determined that even though a student who suffered injuries while engaged in a diving course executed a release, the student “did not knowingly waive his right to seek recover for injuries caused by [the diving instructor’s] failure to follow basic safety guidelines that should be common knowledge to any instructor of novice students.” (*Id.* at 470). The court further opined that if it was the intent of the diving school to protect itself from the negligence of its own instructors, it should have provided such language in “specific and unmistakable terms” in the release itself. *Id.* at 470. *Contra Morgan v. Kent State University*, 54 N.E.3d 1284 (10th Dist. Ohio 2016), where a student suffered an injury after being punched in the face by the instructor during a novice karate lesson. The court determined: “As danger is inherent in karate, it is common knowledge that such danger exists, and appellant’s injury occurred during the course of participating in the inherently dangerous activity, we find that the doctrine of primary assumption of risk applies in this case” (*Id.* at 1292). *Contra Valdosta State University v. Davis*, 356 Ga.App. 397 (Ga. App. 2020), where the court overturned a previous denial of summary judgment, finding for the defendant where a student suffered injuries after falling from a lofted bed. The court applied the superior-or-equal knowledge rule stating that “a knowledgeable plaintiff cannot recover damages if by ordinary care [she] could have avoided the consequences of defendant’s negligence.” In short, the court determined that the dangers presented by a lofted bad are “open and obvious.” *Id.* at 399-400. *Contra Spears v. Association of Illinois Electric Cooperatives*, 986 N.E.2d 216 (4th Dist. Ill. App. 2013), in which the court determined that the question of unequal bargaining position raised by the plaintiff is a question of fact that could not be resolved as a matter of law by the court. *Contra Wheeler v. Owens Community College*, 2005-Ohio-181, (Ct. Cl. Ohio 2005), finding that a release signed by a student injured during a peace officer training course was “too general to be enforceable.” *Id.* at ¶ 27.

*Inc.*¹⁰¹ is an example of the importance of a well-documented and thorough pre-departure orientation program as a means of establishing the knowledge held by the parties of the risks associated with a study abroad program. Beau Solomon was a student at the University of Wisconsin-Madison (UW) who was murdered in Rome while attending a study abroad opportunity provided by John Cabot University (JCU), which had a contractual relationship with UW. Solomon first learned of the opportunity when attending a study abroad fair sponsored by UW. He signed up for the opportunity and later attended the mandatory orientation sessions for students conducted by a JCU representative (i.e., pre-departure). Upon arrival in Rome, Solomon attended another mandatory session (i.e., post-arrival). Several days later, Solomon's body was recovered from the Tiber River, and Italian authorities had an Italian citizen in custody. Solomon's estate sued JCU alleging that both during the fair and the subsequent orientation sessions that followed, JCU failed to provide notice to their son of "the known dangers in the area surrounding JCU campus, and he therefore traveled to Rome unaware of those dangers."¹⁰² JCU denied knowledge of previous individuals who died "under suspicious circumstances" but did acknowledge that it was aware of one student from the University of Iowa who had died near the Tiber River (while also confirming that JCU affirmatively alleged that the student's death was "ruled accidental and non-criminal by Italian authorities").¹⁰³ While the case itself did not ultimately rule on the negligence of the parties, as it was settled in 2019,¹⁰⁴ the tragic story of Beau Solomon highlights the importance of every pre-departure orientation as a means of establishing the knowledge of the parties while seeking to secure the validity of the assumption of risk by the student and provide a defense for failure to warn by the university.¹⁰⁵

Further punctuating the importance of information conveyed during pre-departure activities, as a means of establishing the boundaries of foreseeability within the study abroad program, is the case of *Downes v. Oglethorpe University*.¹⁰⁶ Two professors leading an education abroad experience engaged in several pre-trip meetings with students where various issues regarding their upcoming travel to Costa Rica were discussed. In one particular meeting, both instructors discussed swimming in the ocean with the students. Despite the warnings provided in those meetings, "the students continued to express that they were good swimmers."¹⁰⁷ Six days into the trip, the group drove to a nearby beach. Soon after arriving Downes ventured into deeper water with some of the other students but unfortunately drowned. The defendant university relied upon the assumption of risk theory

101 3:17-cv-00621-jdp, 2018 WL 2452775 (W.D. Wisc., May 31, 2018) (unreported).

102 *Id.* at *4.

103 *Solomon et al., v. John Cabot University, Inc. and ACE American Insurance Company*, 3:17-CV-00621, Defendant's Answer to First Amended Complaint, filed June 14, 2018, page 11.

104 *See Redden, supra* note 1.

105 The case also provides an example of the threshold arguments that must be satisfied by a plaintiff for a federal court to exercise its jurisdiction over a foreign study abroad programming provider.

106 342 Ga. App. 250, 802 S.E.2d 437 (2017).

107 *Id.*

as an affirmative defense in that (1) Downes had knowledge of the danger (i.e., swimming in the ocean had been directly discussed by the group); (2) Downes understood and appreciated the risk associated with such danger (i.e., drowning); and (3) Downes voluntarily exposed himself to those risks.¹⁰⁸ Downes's parents sued claiming that it was the institution's negligence that caused the student's death, both through failing to exercise "ordinary care" in its planning of the trip as well as its failure to train its professors in "supervising swimming students" and supplying safety equipment. The appellate court, perhaps echoing *Bradshaw*¹⁰⁹ and *Bloss*,¹¹⁰ denied the parents' claim and upheld the state court's grant of summary judgment, stating,

Appellants do not show, however, that Oglethorpe was under a statutory or common law duty to provide safety equipment to its students during an excursion to the beach, or that the ocean is analogous to a nonresidential swimming pool. Nor can we conclude that Oglethorpe became an insurer for the safety of its students by undertaking a study-abroad program, or that it was responsible for the peril encountered by Downes in that it transported him to the beach.¹¹¹

While the court appeared to provide more weight to the obvious risk posed by swimming in the ocean, the case is nonetheless instructive as to the importance of pre-trip meetings and communication of risk (even, *inherently dangerous* risks that should be apparent to a *competent adult*). Nonetheless, without even a cursory explanation of the reasonably foreseeable risks known by the institution and the effects of an exculpatory clause contained within the waiver, courts seem more willing to engage in a theoretical exploration of what is and is not reasonably foreseeable and what the individuals executing the waiver may or may not have known.¹¹² For example, would another institution be required to have provided more detailed information regarding the strong currents in the waters off Costa Rica, a detail in the discussion in *Downes*? Would another court provide less deference to an institution for the warnings provided in the orientation session to students in *Bloss*, or would the court agree with the court in *Bloss* that "to rebalance the extent of the warnings would represent judicial interference with executive policy-making and affect the program's design...?"¹¹³

108 *Downes*, 342 Ga. App. at 251.

109 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

110 *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999).

111 *Downes*, 342 Ga. App. at 255.

112 *Munn et al. v. The Hotchkiss School*, 933 F. Supp. 2d 343, 347 (D. Conn. 2013), ruling regarding waiver upheld by *Munn v. The Hotchkiss School*, 724 F. App'x 25 (2d Cir. 2018). In interpreting the intent of the Hotchkiss School in creating the waiver and its intended scope, the court said "But the school's intent does not matter. What matters is whether lay people, in this case a fifteen year-old student and her parents who lack legal training, would have understood that by only holding the school responsible for its 'sole negligence,' they were in effect waiving the school for any responsibility for its comparative fault. The answer can only be no. An average person would reasonably believe that the school meant to remain responsible solely for any harm that its negligence caused."

113 *Bloss*, 590 N.W.2d at 666.

All information provided to the student throughout the study abroad program (from ads to postarrival orientation) should be dedicated toward ensuring that the scope of such knowledge has been provided, received, and understood by the student so that a shared understanding can be achieved. Only through a thoughtful and diligent conversation with the students regarding these issues can the theoretical exploration become a statement of fact that moves the inquiry further along to the next pillar.

B. Voluntarily

Even assuming that the parties have reached an understanding as to the risk accompanying the education abroad experience and the consequences of the exculpatory clause presented before the participant student, the process itself should be as transparent as possible with regard to the document's execution as a programmatic requirement. For example, the Waiver of Liability form as presented to the students in the case of *Fay* and the Pennsylvania court of common pleas decision to reject its enforceability as a means to quell the student's claims should be considered:

Both plaintiff and defendants agree that the waiver of liability form was presented to plaintiff on a take-it-or-leave-it basis, i.e., plaintiff either signed the form or she did not go on the Thiel-sponsored trip to Peru. The terms of the waiver of liability form were not bargained for by plaintiff and, in fact, plaintiff had no choice in its terms and provisions. Plaintiff simply executed the waiver of liability form, which she was powerless to alter, because she was told that she had to sign that form in order to go on the study abroad trip to Peru. Because rejecting the transaction entirely was plaintiff's only option other than accepting the contract with the exculpatory clause, this court finds that the subject waiver of liability form is a contract of adhesion.¹¹⁴

The decision in *Fay* should be contrasted with the D.C. Circuit Court in *Bradley v. National College Athletic Association* finding that, "... even if a contract is one of adhesion, it is enforceable unless it is deemed unconscionable upon judicial scrutiny."¹¹⁵ Taking the analysis further, the court in *Bradley* required the plaintiff to prove that even if the contract was one of adhesion, the plaintiff student still had to demonstrate that the contract was unconscionable. To this end, the court imposed a two-part standard: (1) that the student lacked a meaningful choice and (2) that the terms were unreasonable to the one party.¹¹⁶ This two-part standard represents

114 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353, 360–61 (2011).

115 464 F.Supp.3d 273 (D.D.C. 2020), finding in relevant part, "Here, even if the plaintiff had shown that the Acknowledgement of Risk form was procedurally unconscionable, which she has failed to do, the plaintiff has failed to make any argument, let alone a showing—and the Court cannot find any evidence in the record to suggest that she has—that the Acknowledgement of Risk form is substantively unconscionable or that this case involves an egregious situation. Accordingly, the Court concludes that the plaintiff has failed to demonstrate that the Acknowledgement of Risk form was adhesiary and therefore unenforceable." This case involved a student who allegedly sustained a head injury during a NCAA-sanctioned field hockey game.

116 *Id.*

the traditional test used by many state courts to examine the enforceability of an agreement within the context of whether that agreement through its creation or its terms is unconscionable as determined by the court.¹¹⁷ The court in *Bradley* utilized the traditional two-part test before finding that the plaintiff had failed to present any procedural or substantive facts that would render the Acknowledgment of Risk form unenforceable.¹¹⁸

Unconscionability is not just an examination of bargaining power; it is also an examination of whether the bargain itself was truly entered into voluntarily. The scales between procedural and substantive unconscionability may not always be level, which in and of itself does not prevent enforceability. However, if one party is sufficiently disadvantaged during the contracting process, then it can be argued that the person's assent to the terms was not voluntary, and thus certain terms of the contract which are disadvantageous to that party should not be enforced. Within the context of education abroad and the exculpatory waiver, the argument for unconscionability is not so much about the bargaining power between the parties but whether the process was so one sided and the terms so unfair that the student did not voluntarily agree to its terms, and thus they should be found to be unenforceable. Or, is the student assumed to be knowledgeable enough to understand the agreement when the terms are commercially reasonable for the activity?¹¹⁹

Aside from the knowledge held by the student at the time of execution, did the student have the opportunity to make a meaningful choice not to enter into the contract at all? There is an obvious difference between documentation presented weeks—even months—before the trip's departure and a demand for signatures as the plane readies to pull away from the gate. While unconscionability rests upon the examination of the bargaining power of the parties, even a waiver that is assumed to be commercially reasonable in consideration of its place within the marketplace may still be scrutinized to determine if its execution was the result of a voluntary transaction.¹²⁰ Even if the student was presented with the waiver long before departure, were the circumstances under which the waiver was presented sufficient enough to lead to voluntary assent? Suppose the education

117 See Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1 (2012). This note outlines three approaches taken by courts to address the issue of unconscionability in contracting: (1) the traditional approach of providing equal weight and importance to the presence of both procedural and substantive unconscionability, (2) the sliding scale approach where both procedural and substantive considerations are taken in totality without requiring one to be satisfied with equal balance to the other, and (3) the single-prong approach employed by a minority of courts where the presence of either procedural or substantive unconscionability is sufficient to defeat enforceability of the agreement.

118 Of note, the court in *Bradley* briefly considered applicability of the "single-prong" approach, but ultimately determined that the plaintiff had also failed to present any facts that the bargain itself met the "egregious" standard already established by the D.C. courts. *Bradley*, 464 F.Supp.3d 273 at *294.

119 See Howard O. Hunter, § 19:41 *Procedural and Substantive Distinction*, in MODERN LAW OF CONTRACTS (March 2020). This note provides examples of three case studies examining various considerations of the "dichotomy between procedural and substantive unconscionability and the confusion that sometimes occurs in trying to determine whether unconscionability is the result of a problem in the bargaining process or in the underlying agreement."

120 See *Bradley*, 464 F.Supp.3d 273 at *295

abroad experience itself was required for graduation. Does the institution offer an alternative? Was this requirement present and known to the student upon enrollment in the program? While the absence of an alternative may not be dispositive to upholding an exculpatory clause executed between the adult student and the institution, the circumstances under which the language was presented, discussed, and executed may ultimately determine whether it was voluntary.

C. With Valuable Consideration

*As a condition of participation, For good and valuable consideration given herein, and several similar phrases are often found in the releases presented to students prior to their departure on an education abroad experience. One important aspect of whether a release is voluntary depends upon the relative bargaining position of each of the parties. However, going a bit further to the bargain itself between the parties, the third and perhaps most loadbearing of the pillars is that the agreement itself must have valuable consideration. As provided for by an Illinois court as an example, "Valuable consideration for a contract consists either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other."¹²¹ The court also limited the applicability of this bargain based upon the "pre-existing duty rule" when one party's consideration is essentially based on what it is already "legally obligated to do."¹²² The legal obligation is not limited to statute as it was in *White*, but may also accrue due to a previous agreement between the parties.¹²³*

Within the context of an institution of higher education, an important preliminary consideration is whether the release presented prior to the education abroad experience falls within the preexisting duty rule. Several courts have found that there may be a contractual relationship between an institution of higher education and its student upon the student's admission and enrollment courses.¹²⁴

121 *White v. Vill. of Homewood*, 256 Ill. App. 3d 354, 356 (Ill. App. 1993). In *White*, the plaintiff was injured during the administration of a physical agility test that was a prerequisite to joining the Homewood Fire Department (HFD). Prior to the plaintiff's test, she signed a "release of all liabilities." However, since HFD was required by statute to administer the test, the court found in favor of the plaintiff for want of consideration.

122 *Id.* at 357, ultimately finding, "consideration cannot flow from an act performed pursuant to a pre-existing legal duty. As a result, the exculpatory agreement is unenforceable as a matter of law."

123 3 WILLISTON ON CONTRACTS §7:36 (4th ed. 2019). PROMISE TO PERFORM OR PERFORMANCE OF PREEXISTING OBLIGATION OTHER THAN DEBT; CONTRACTUAL PREEXISTING DUTY RULE, 2000.

124 The purpose of this note is not to provide a debate as to whether a catalog or other documents represent a contract between the institution and the student; only that several courts have found such a contract exists. See *Brody v. University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 154 (2d Dist. 1998), supporting "A contractual relationship exists between a college or university and its students, and the terms of the contract are generally set forth in the school's catalogs, bulletins, and brochures" (citing *Frederick v. Nw. Univ. Dental Sch.*, 247 Ill. App. 3d 464, 471 (1st Dist. 1993)). See also *Andersen v. Regents of University of California*, 22 Cal. App. 3d 763, 769 (1st Dist. 1972), stating "That, by reason of plaintiff's enrollment as a student, there arose a contract between him and the university may not be questioned." See also *Niedermeyer v. Curators of University of Missouri*, 61 Mo. App. 654, 657 (Kansas City 1895), stating, "The paragraph in the catalogue of 1892 and 1893 was by its very terms, a public offer to admit persons as students to any of the classes of the law department of the University, on payment of the sum of \$50 for the first year and \$40 for

Even assuming such a relationship exists, is participation in an education abroad course valuable consideration? Since the education abroad course exists outside of the traditional boundaries of the classroom, and assuming the release is presented for the specific purpose of the course itself, is participation itself valuable consideration? Several courts have found that releases for individual programmatic courses outside the traditional classroom are valid, thus suggesting that perhaps it is.¹²⁵ However if the course itself is a prerequisite to graduation and the institution offers no other alternative, the release itself may require further consideration to mitigate exposure to a claim of adhesion or being rendered unenforceable as a matter of law.

VI. Application and Conclusion

By transitioning from the focus on waivers to assumption of risk as a standard practice within the education abroad context, institutions of higher education should ensure that the release itself stands upon the support provided by the three pillars: that the student enters into the release knowing the scope of risk and specific circumstances of the environment in which the release seeks to encompass, that the student enters into the release voluntarily, and that the student and institution have engaged in the exchange of consideration where both parties have benefitted but also sacrificed. The three pillars may not always stand with equal length and equal weight. Perhaps the consideration offered shoulders more of the burden than whether the acceptance itself is voluntary. For example, in consideration for gaining the unique experience of participating in a survey of Italian architecture throughout the Tuscany region, a student who has never traveled outside the United States may not fully know or appreciate the risks inherent in overseas travel—but through the implementation of the three pillars, the student will at least be able to make an informed decision. Regardless, the days of the general release are numbered. With information readily available and constantly updated on the day's events the world over, recent decisions, such as *Munn*, demonstrate that institutions should adapt the circumstances under which the waiver is presented, explained, and executed. While several pre-twenty-first-century court decisions

each successive year. The plaintiff's payment of \$50 and receipt of his matriculation card for the years 1892 and 1893, constituted an implied acceptance and also notice of such acceptance. The contractual relations created between the parties thus became complete and binding."

125 *Boyce v. West*, 71 Wash. App. 657 (Div. 3 1993), upholding the use of a release for an elective scuba diving course despite a challenge that the release was against public policy. See also *Lemoine v. Cornell University*, 2 A.D.3d 1017 (N.Y. 2003), declining to void a release signed by a student prior to a basic rock-climbing course on statutory grounds. See also *Thompson v. Otterbein College*, No. 95APE08-1009, 1996 WL 52901 at *4 (10th Dist. Ohio, February 6, 1996) (unreported), stating, "Contrary to appellant's assertions, this was not an adhesion contract. The situation might be different had appellee required all students to sign such a release for all physical education courses. There is no evidence that this was the case. As stated above, apparently appellant was not required to take the equestrian course. As such, appellant would not be in such an unequal bargaining position as to make a release unconscionable. She could have chosen not to sign the release and chosen instead to take another physical education course."

echoed the reasoning explained in *Bradshaw*¹²⁶ and *Bloss*,¹²⁷ twenty-first-century courts appear to be ready to broaden the institution's obligation to explain the reasonably foreseeable risks to the student prior to asking the student to execute an exculpatory clause regarding the same. While courts have not appeared yet to attach institutional liability for third-party actions, they do appear ready to do so in the event the third-party actions were reasonably foreseeable, such as most recently demonstrated in *RISD*,¹²⁸ and that such third parties were procured to perform a duty that the institution itself would normally perform or that represents a core component of the program. As education abroad programs begin to revive themselves in a post-COVID-19 world, institutions should take the opportunity provided by this most recent pause in operations to adapt their current orientation programs with these three pillars in mind.

The purpose of this article is not to invalidate the enforceability of releases and waivers already a part of the normal education abroad process as a best practice across institutions of higher education. The three pillars presented serve to provide institutions with recognizable waypoints to strengthen the current processes already in place. This article also encourages institutions, which have not already adopted a pre-departure orientation process, to do so. As found by United Educators, "a review of UE claims involving pre-departure risk orientations indicates the liability is decreased when institutions educate travelers on the dangers involved before the trip."¹²⁹ Partnered with assumption of risk language that precedes exculpatory clauses in the release form presented to participants well in advance, the pre-departure orientation is essential for informing the student of known and potential dangers inherent in the intended area of travel while affording them the opportunity to ask questions and consider their participation moving forward. This partnership between forms and process with regard to exculpatory clauses and the three pillars will continue to evolve as education abroad opportunities become more prevalent in undergraduate and graduate programs as well as the emergence of "gap year" programs where high school graduates take their entire first year of undergraduate coursework through a completely international sequence of education abroad programs and service opportunities sponsored by the institution of higher education.¹³⁰

126 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir.1979).

127 *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999).

128 *Doe v. R.I. Sch. of Design*, 432 F. Supp. 3d 35 (D.R.I. 2019).

129 *See supra* note 77, at 12.

130 With regard to those participants enrolled in gap year programming, institutions will not only have to be concerned with the circumstances through which a student executes the exculpatory clause; those programs may also have to ensure, subject to state law requirements, that the process also encompasses the involvement of parents or guardians who may be required to execute the release on the minor child's behalf in order for it to be enforceable. *See generally* *Thackurdeen v. Duke Univ.*, 1:16CV1108, 2018 WL 1478131 (M.D.N.C., March 23, 2018) (both the student and his father signed the waiver documents, and collectively both the student and his father were deemed to have waived recovery for negligence and wrongful death).

A PRIVILEGE TO SPEAK WITHOUT FEAR: DEFAMATION CLAIMS IN HIGHER EDUCATION

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Abstract

Defamation law has drawn renewed attention in recent years within higher education. Defamation claims test core principles of academic freedom, including the right to state unpopular opinions, even those that might offend the listener or reader. These claims also test the limits of colleges and universities' authority and discretion, in both informal and formal settings, to make judgments about the competence and qualifications of their faculty, staff, and students; evaluate whether those community members have engaged in research or academic misconduct; and determine if they have violated a policy, contract, or code of conduct. Depending on state law, and the institution type, such judgments may be absolutely shielded from a defamation lawsuit. More often, courts will grant decision-makers significant latitude to make these statements, subject to a qualified privilege that can only be overcome through evidence of actual malice or, depending on state legal precedent, common law malice.

In most academic settings, without some allegations about the speaker or writer's disregard for the truth or retaliatory motivations, assertions of actual or common law malice will rarely overcome qualified privilege. Increasingly, the exception arises from sexual misconduct investigations and adjudications. By claiming they were wrongly accused, students and faculty have overcome privilege on the ground that making a false accusation constitutes actual or common law malice. These determinations put the parties in the position of relitigating the merits of a matter ordinarily reserved for the institution. This article urges expansion of privilege for sexual misconduct proceedings to promote full disclosure without fear of retaliatory litigation.

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INTRODUCTION

Defamation claims highlight the extraordinary tensions in higher education today between academic freedom and the duty not to harm others with that freedom. Faculty, administrators, and students have all brought campus disputes to court, seeking to vindicate their reputations from accusations and findings of incompetence, academic and research misconduct, and sexual harassment and violence. Defamation claims may also arise from a negative tenure review, a failing grade, a poor reference, or offensive comments posted in university-affiliated publications and websites.¹ Still, over decades, academia has carved a significant zone of legal privilege around these internal affairs. Only in the exceptional case, where a declarant's disregard for the truth is plain to see, will a defamation claim be actionable.

Yet some of the most vulnerable members of the college and university community do not share this privilege not to fear when they speak out. Studies of sexual and interpersonal violence on college campuses have found a prevalence ranging between twenty and twenty-five percent for undergraduate women and about seven percent for undergraduate men.² And the number of incidents actually reported remains far lower than the prevalence of this violence, with fear of retaliation playing a significant part in the choice not to come forward.³ Students who report sexual harassment and violence have been sued or threatened with suit by the accused for defamation, often putting their names and details of the incidents into public view and forcing the accusers to defend themselves in state and federal court.⁴ "This is one of the greatest challenges survivors will face," notes one commenter, "because it requires the survivor to publicly present the details of their traumatic experience to prove their own truthfulness, when there is often minimal evidence of the violence other than the survivor's own testimony."⁵

1 Case law analyzing these scenarios will follow throughout the article. Please note that this article does not distinguish between "libel" and "slander" case law, but groups all of these cases under the framework of defamation. Furthermore, in using the broad language of "speech" rights, all forms of communication are included, verbal, nonverbal, or otherwise. When discussing parties to a sexual misconduct process, the article will generally use the term "complainant" to refer to the reporting party and "respondent" to the accused person in conformance with the terms used in the federal Title IX regulations. 34 C.F.R. § 160.30(a) (2020).

2 Joseph Storch & Andrea Stagg, *Missoula: Jon Krakauer's Story of College Sexual Violence That Is Both Complex and Entirely Common*, 42 J.C. & U.L. 451, 474 (2016); David Cantor et al., Westat, *Report on the Association of American Universities Campus Climate Survey on Sexual Assault and Sexual Misconduct* (rev. Jan 17, 2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf); Christopher Krebs et al., *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUST. STAT. 75 (Jan. 2016), <https://perma.cc/V7D4-BGXL>; Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000 to 2015*, 19 TRAUMA, VIOLENCE, & ABUSE 76 (2016), <https://doi.org/10.1177/1524838016631129>.

3 Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 329 (2017).

4 *Id.* at 314.

5 Shaina Weisbrot, *The Impact of the #MeToo Movement on Defamation Claims Against Survivors*, 23 CUNY L. REV. 332, 339 (2020).

Even as the threat of defamation liability hovers over these campus adjudications, the judicial reasoning perpetuating the status quo appears increasingly out-of-step with developments in case law and regulation. Until recently, courts have treated campus investigations and adjudications of sexual misconduct differently than “quasi-judicial” and judicial proceedings, declining to extend an “absolute privilege” that would shield statements made in those cases from defamation liability. They reasoned that campus proceedings would not necessarily have the due process guarantees, such as the right to question witnesses, available in a typical administrative hearing.⁶ But courts have begun reconsidering the balance at hand, identifying that without privilege, parties and witnesses will fear retaliation from making reports and giving statements within those processes.⁷ Moreover, the heightened level of due process afforded to parties within those proceedings under the developing case law and state and federal regulations limits the risk that the parties will not have a fair hearing on the merits on campus.⁸ After reaching the end of a rigorous campus investigation, students should not have to put on their case again in open court in defense of a defamation lawsuit, possibly without their college or university’s support.

To unpack these tensions, and build a route for greater equity, this article focuses on state and federal case law from the past twenty years involving students, faculty, and staff who have brought defamation claims against institutions of higher education and individual members of the college and university community.⁹

This article begins, in Part I, by analyzing the elements of a defamation complaint, with a focus on several key issues within the higher education context arising from the substantive question of what makes a statement defamatory as a matter of law. Neither truthful statements, nor statements of opinion, are generally actionable, but many cases end up somewhere in the middle, making an understanding of the subtext of the statement as critical as the text itself.

Next, in Part II, the article examines several threshold issues in evaluating defamation complaints. Then, in Parts III and IV, the article looks at how immunity, absolute privilege, and qualified privilege shape defamation claims in higher education, including where the analysis varies between public and private institutions and the impact of state tort claims acts on defamation lawsuits. The article will then address absolute and qualified privilege in a variety of typical higher education scenarios and their limitations.

Finally, in Part V, this article closely examines an emerging flashpoint in this area of law: the intersection of defamation law and nonacademic misconduct claims, particularly those arising from Title IX sexual misconduct charges against

6 See *infra* Part V.B.2.

7 See *infra* V.B.1.

8 See *infra* Part V.A.

9 In highlighting the most recent case law, this article builds on fundamental research by Francine Tilewick Bazluke & ROBERT C. CLOTHIER FOR THE NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS (NACUA). See FRANCINE Tilewick Bazluke and Robert C. Clothier, DEFAMATION ISSUES IN HIGHER EDUCATION (2004).

students, faculty, and staff. As these processes become more regulated and take on the procedural trappings of a courtroom, statements made within them are beginning to secure greater privilege. This article urges the expansion of absolute privilege in campus-based sexual misconduct investigations and adjudications and encourages institutions to take affirmative steps to address the impact of defamation claims, both threatened and realized, on their campus Title IX process.

I. Defamation Defined

Defamation claims are meant to protect the subject of a written or verbal statement from reputational harm.¹⁰ “Libel” generally refers to recorded defamation, while “slander” is spoken.¹¹ Though the components of defamation vary by state, they generally involve a similar analysis:

- Did the speaker or writer make a false statement of fact about another person?
- Was that statement made to a third party?
- Was the publisher at fault, either through negligence or a higher standard?
- Did the publication harm the defamed person’s reputation?¹²

Where a plaintiff can establish these elements, the speaker or writer may assert that they had a privilege to make the statement. The plaintiff then has the burden to establish that the speaker or writer abused that privilege.¹³ The issue of privilege is central to understanding the intersection of defamation law and Title IX misconduct complaints and will be the focus of Parts IV and V.

A. False Statement

Defamation claims rest on the allegation of a false statement made about another person. As a result, if statement is true, its declarant cannot be liable for defamation, even if sharing that statement causes harm.¹⁴ At the same time, to be actionable, the statement must communicate an assertion of fact, rather than purely an opinion; it has to be capable of being proven false.¹⁵

The U.S. Supreme Court has declined to create “an artificial dichotomy between ‘opinion’ and fact,” and, in practice, opinion and fact will be hard to untangle in

10 50 AM. JUR. 2D LIBEL AND SLANDER § 2 (2021).

11 128 AM. JUR. *Trials* 1 (originally published in 2013).

12 RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

13 BAZLUKE & CLOTHIER, *supra* note 9, at 1.

14 *E.g.*, *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991); *Averett v. Hardy*, No. 3:19-CV-116-DJH-RSE, 2020 WL 1033543, at *9 (W.D. Ky. Mar. 3, 2020) (university administrators’ statements that a student accused the defamation-plaintiff of sexual assault was truthful, as it accurately related the accusation, and therefore was not actionable as the basis for a defamation claim).

15 *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 16 (1990).

many defamation claims arising from academic life.¹⁶ A defamatory statement is not protected if it will “imply an assertion of false objective fact.”¹⁷ In other words, cases will rise and fall on subtext: a message within a statement that listeners or readers would understand to have a defamatory meaning, even if the statement itself is, on its face, an opinion.¹⁸

A perennial example of a mixed fact-and-opinion claim is where faculty signal that another professor or a student is “incompetent.” Generally, such evaluations are considered opinions, and “the qualified privilege of employment-related communications often dovetails with the absolute privileges of truth and opinion.”¹⁹ Yet, depending on the context, a statement that a professional is “incompetent” could be defamatory if it implies that the person making the statement knows facts undisclosed to the listener that led them to that opinion.²⁰

The case law on statements regarding competence ranges. In one case, a professor’s communication to students that their former advisor, who resigned following a poor performance review, was “incompetent” was potentially defamatory; it was not simply an opinion, because the communication, which followed the professor’s resignation, implied facts not disclosed to the students.²¹ By contrast, a statement that an employee was discharged because they were “incompetent” was held to be nonactionable because it was “too vague” to be anything other than opinion.²² While courts tend to follow this distinction—“that the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law”—

16 Id. at 19.

17 Kern v. Univ. of S. Cal., No. B173959, 2005 WL 3539792, at *6 (Cal. Ct. App. Dec. 28, 2005) (internal quotation marks omitted).

18 For example, New York courts outline a four-factor test for determining if a statement is fact or opinion:

1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.

Donofrio-Ferrezza v. Nier, No. 04 CIV. 1162 (PKC), 2005 WL 2312477, at *6 (S.D.N.Y. Sept. 21, 2005), *aff’d*, 178 F. App’x 74 (2d Cir. 2006) (internal quotation marks omitted).

19 Id. at *7. *On qualified privilege in the employment context, see infra Part IV.B.*

20 Gill v. Hughes, 227 Cal. App. 3d 1299, 1309 (Cal. Ct. App. 1991) (statement that plaintiff was an “incompetent surgeon and needs more training” was defamatory because it implied “a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false,” and the plaintiff also faced an evidentiary hearing about his surgical technique and judgment).

21 Kantz v. Univ. of the Virgin Is., No. CV 2008-0047 (WAL), 2016 WL 2997115, at *22 (D.V.I. May 19, 2016).

22 Roberts v. Columbia Coll. Chic., 102 F. Supp. 3d 994, 1007 (N.D. Ill. 2015), *aff’d*, 821 F.3d 855 (7th Cir. 2016).

critics note that vague statements may simply “encourage the listener to infer underlying, verifiable facts.”²³

Regardless, it is firmly within the bounds of academic life for faculty to reach an opinion about a colleague or student’s professional competence based on their collection of “verifiable assertions of fact”: those opinions are “purely subjective assertions” rooted in facts.²⁴ A faculty member who has a responsibility to judge another faculty member’s fitness may state their opinion about that faculty member’s competence and ability to handle situations based on their experience observing their work.²⁵ Faculty may express their belief that a colleague has failed to live up to the institution’s code of professional ethics or that a researcher has engaged in falsification of data and other forms of research misconduct.²⁶ A faculty member may also share with other faculty in a department that a student should be terminated from a doctoral program on public safety grounds; this was judged an opinion based on facts already known to the colleagues who received this information.²⁷

Likewise, a critique is not a declaration of incompetence. “Criticism of the work of scholars is generally commonplace and acceptable in academic circles.”²⁸ Academic audiences recognize the “subjective character” of a critique and will “discount them accordingly.”²⁹ Statements that may appear defamatory in isolation—like that a faculty member is “unqualified” to undertake a research project—fall within the acceptable boundaries of academic criticism, and those that hear the criticism will not give the statements defamatory meaning.³⁰ Similarly, a written critique of a graduate student’s preliminary examination was not actionable, as it contained numerous statements not capable of being proven or disproven: that the exam lacked “sufficient rationale,” was “not clear,” and was “impractical,” “conceptually flawed” and “illogical.”³¹

23 Seitz-Partridge v. Loyola Univ. of Chi., 2013 IL App (1st) 113409, ¶ 29, 987 N.E.2d 34 (Ill. Ct. App. 2013) (internal quotation marks omitted); John B. O’Keefe, *Occupational Reputation, Opinion, and the Law of Defamation in Virginia*, 5 APPALACHIAN J.L. 35, 40 (2006) (contending that listeners will engage in “reverse-deductive” reasoning when they hear “general and conclusory statements” and “assume both the existence and truth of supportive facts.”).

24 Hadlock v. Tex. Christian Univ., No. 2-07-290-CV, 2009 WL 485669, at *5 (Tex. App. Ct. Feb. 26, 2009).

25 Owen v. Liberty Univ., No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *13 (W.D. Va. Apr. 13, 2020).

26 *Hadlock*, 2009 WL 485669, at *4; *Croce v. Sanders*, 459 F. Supp. 3d 997, 1023 (S.D. Ohio 2020), *aff’d*, No. 20-3577, 2021 WL 387489 (6th Cir. Feb. 3, 2021) (applying Ohio law, holding that expressions of opinion are generally accorded absolute immunity from liability under the First Amendment).

27 *Mehta v. Fairleigh Dickinson Univ.*, 530 F. App’x 191, 198 (3d Cir. 2013).

28 *Fikes v. Furst*, 81 P.3d 545, 551 (N.M. 2003).

29 *Freyd v. Whitfield*, 972 F. Supp. 940, 946 (D. Md. 1997).

30 *Fikes*, 81 P.3d at 550–51.

31 *Seitz-Partridge v. Loyola Univ. of Chi.*, 2013 IL App (1st) 113409, ¶ 30, 987 N.E.2d 34 (Ill. Ct. App. 2013) (internal quotation marks omitted); *See also Nigro v. Va. Commonwealth Univ./Med. Coll. of Va.*, 492 F. App’x 347, 356 (4th Cir. 2012) (program director’s statements regarding resident’s lack of progress and apparent lack of interest in rotations were opinion statements about performance incapable of being proven false).

Similarly, in the context of faculty performance reviews, statements regarding a faculty member's lack of professionalism may fall squarely within the realm of opinion: "What is considered rude or unprofessional differs from person to person."³² Statements in a disciplinary letter that a faculty member spoke "disparagingly," had a "meltdown," a "temper tantrum," or did not "properly contribute" to the university's mission were opinion.³³ The same for disclosing that a faculty member had received several complaints from students about unprofessional behavior; these complaints need not reflect the professor's lack of professional competence, but could simply reflect that the professor's approach to teaching did not "mesh" with the university's philosophy.³⁴ Commentary that a professor was "disgruntled" or "angry" likewise would reflect an opinion about his motivations or character, rather than a statement of objective and disprovable fact.³⁵

Furthermore, certain statements and conduct, even if "false, abusive, unpleasant, or objectionable to the plaintiff," will not be defamatory in context.³⁶ For instance, satirical remarks and jokes, even if painful to hear or read, would not be defamatory if a reasonable person would not interpret them to be truthful.³⁷ Hostile gestures, such as slamming a door on a colleague, are not, on their face, defamatory.³⁸

But "rhetorical name calling" may move into the realm of actionable statements where the accusations "convey an air of truth" suggestive of "unknown facts": an assertion that someone is a "liar" may simply lead a reasonable listener to believe the insult was hyperbole, or it may let them believe that undisclosed facts show the defamation plaintiff committed perjury.³⁹ In one example, a federal district court in Connecticut denied a university's motion for summary judgment on a defamation claim where a university dean allegedly stated at an open forum that a

32 *Green v. Trinity Int'l Univ.*, 344 Ill. App. 3d 1079, 1093, 801 N.E.2d 1208, 1220 (Ill. Ct. App. 2003).

33 *Dragulescu v. Va. Union Univ.*, 223 F. Supp. 3d 499, 510 (E.D. Va. 2016) (internal quotation marks omitted).

34 *Green*, 344 Ill. App. 3d at 1094.

35 *Hascall v. Duquesne Univ. of the Holy Spirit*, No. CV 14-1489 (CB), 2016 WL 3521971, at *2 (W.D. Pa. June 28, 2016) (university's statement to a newspaper that a faculty member filed a lawsuit following her tenure denial because she was "disgruntled" reflected an opinion about her motives and so was nonactionable opinion); *McReady v. O'Malley*, 804 F. Supp. 2d 427, 442 (D. Md. 2011), *aff'd*, 468 F. App'x 391 (4th Cir. 2012) (public university official's statements that she perceived professor as an "angry workplace guy" who was "rabid with bitterness" were opinion statements based on personal beliefs, not objective facts).

36 *Sansing v. Garcia*, No. 13-08-00211-CV, 2009 WL 3385247, at *5 (Tex. App. Ct. Oct. 22, 2009) (internal quotation marks omitted).

37 *Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998) (article calling university official "Director of Butt Licking" was "rhetorical hyperbole" that "cannot reasonably be understood as stating an actual fact" about her job title, conduct, or commitment of crime of moral turpitude); *Walko v. Kean Coll. of New Jersey*, 235 N.J. Super. 139, 148, 561 A.2d 680, 684 (N.J. Law. Div. 1988) ("spooof" edition of college newspaper stating that college official could be reached at "Whoreline" for "good telephone sex" could not reasonably be understood as factual statement).

38 *Hadlock v. Tex. Christian Univ.*, No. 2-07-290-CV, 2009 WL 485669, at *5 (Tex. App. Ct. Feb. 26, 2009).

39 *McNamee v. Clemens*, 762 F. Supp. 2d 584, 602 (E.D.N.Y. 2011).

sexual assault complainant had not suffered “legal rape,” which the complainant contended was a statement “implying that she was lying about the incident.”⁴⁰

Courts have also shielded statements that a person is “racist” as nonactionable opinion not conveying a factual assertion.⁴¹ In a recent example, the chancellor of a private university in New York’s description of videos of a fraternity’s “roast” for prospective members as “racist, anti-semitic, homophobic, sexist, and hostile to people with disabilities” was held nonactionable under New York law, as it conveyed the chancellor’s opinion about the videos, rather than a factual assertion about what they depicted.⁴²

But an accusation of racism may become actionable where it could be construed to mean that the defamation plaintiff “was acting in a racist manner” in performing their duties, which would harm their reputation and be tantamount to misconduct in office.⁴³ Ultimately, the analysis will be contextual, resting on the common understanding of the readers or listeners to whom the statements were addressed.⁴⁴

Courts may also examine the surrounding context to determine if a purportedly false statement actually was defamatory.⁴⁵ Virginia courts have determined that even “technically false” statements may not be defamatory if they would not actually “deter third persons from associating or dealing” with the plaintiff or make them “appear odious, infamous, or ridiculous.”⁴⁶ Even where a potentially

40 Kelly v. Yale Univ., No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *5 (D. Conn. Mar. 26, 2003) (denying summary judgment on defamation claim regarding whether dean’s statement was false, defamatory, or a statement of fact).

41 Cummings v. City of New York, No. 19-CV-7723 (CM) (OTW), 2020 WL 882335, at *20 (S.D.N.Y. Feb. 24, 2020). See also Garrard v. Charleston Cty. Sch. Dist., 429 S.C. 170, 200, 838 (S.C. Ct. App. 2019) (opinion article stating that coach was removed amid allegations that his players “behaved like racist douchebags” and the coach “condoned” a “racist ritual” were opinions not actionable under South Carolina law); Stevens v. Tillman, 855 F.2d 394, 402 (7th Cir. 1988) (parent-teacher organization president’s statement calling school principal “racist” was opinion not actionable under Illinois law).

42 Doe #1 v. Syracuse Univ., 468 F. Supp. 3d 489, 512 (N.D.N.Y. 2020).

43 MacElree v. Phila. Newspapers, Inc., 544 Pa. 117, 126 (Pa. 1996). See also David A. Elder, “Hostile Environment” Charges and the ABA/aals Accreditation/Membership Imbroglio, *Post-Modernism’s “No Country for Old Men”: Why Defamed Law Professors Should “Not Go Gentle into That Good Night,”* 6 RUTGERS J.L. & PUB. POL’Y 434, 468–69 (2009) (“In light of the severe penalties imposable by educational institutions for such egregious misconduct, the potential for civil liability, possible professional sanction by the bar, and the extraordinary societal opprobrium, if not ostracism that such charges entail, it is difficult to imagine any modern court concluding that a law professor is not defamed by ‘pervasive hostile environment’ charges imputed to him or her.”).

44 Klayman v. Segal, 783 A.2d 607, 616 (D.C. 2001).

45 Hannoum v. Simon’s Rock Coll. of Bard, No. CV 06-30064 (KPN), 2008 WL 11409146, at *2 (D. Mass. May 7, 2008) (while some faculty members appeared to have made false statements about nonrenewed faculty member, no evidence that defendants or the college communicated those statements or were vicariously liable for them).

46 Nigro v. Va. Commonwealth Univ./Med. Coll. of Va., 492 F. App’x 347, 356 (4th Cir. 2012) (program director’s statement that resident “failed” rotation, “while technically false, would not deter third persons from associating or dealing with resident or make her appear odious, infamous, or ridiculous”).

defamatory statement is published, if it remains within a narrow and intended audience, it may not actually result in defamation; a small audience of reviewers of a faculty member's teaching ability, for example, is trained to assess faculty merit, so that "this audience would not as likely be affected by any derogatory inference in the letters as might the public at large."⁴⁷ The published statement, in other words, was not defamatory because the plaintiff's reputation was not actually harmed.

Finally, courts may consider investigative determinations to be opinion and therefore not actionable. In *Doe v. Stonehill College*, a federal district court in Massachusetts held that the recommendation of campus investigators that a student "more likely than not" committed sexual assault was opinion where this determination followed an investigation and was based on "disclosed, non-defamatory facts" within the evidentiary file.⁴⁸ The investigators' finding was based on their evaluation of the gathered evidence and interviews; having provided the factual basis underlying their conclusions, the investigators offered an opinion rather than assertion of disprovable fact.⁴⁹

But other courts have found that statements of fact incorporated within an investigative report could be disproven and therefore would be actionable in a defamation complaint. In one example, *Heineke v. Santa Clara University*, a campus investigation of faculty-on-student sexual assault produced a report containing the complainant's statements about a faculty member's misconduct, which the respondent wholly contested.⁵⁰ While the court considered that the report contained "a range of opinions," it found that the report "characterized [complainant's] allegations as facts and explicitly based its opinions on its finding that [complainant's] allegations were credible."⁵¹ These assertions were enough to meet the element of demonstrating a false statement of fact, particularly as the university "explicitly adopted the findings of the investigation."⁵²

Likewise, statements regarding a conduct board's findings may also meet the

47 *Constantino v. Univ. of Pittsburgh*, 201 PA Super. 4, ¶ 17, 766 A.2d 1265, 1270 (Pa. Super. 2001).

48 No. CV 20-10468 (LTS), 2021 WL 706228, at *16 (D. Mass. Feb. 23, 2021) (declining to reach the issue of privilege because plaintiff had not established false statement element of defamation claim). Notably, this decision appears to stem from a "single-investigator" model of adjudication, where the investigators reached a determination of responsibility without submission of the evidence to a separate hearing body. This practice would violate present Title IX regulations for "sexual harassment" falling within Title IX's regulatory scope. See 34 C.F.R. § 106.45(b) (2020). On the liability of investigators for defamation, see also *Mills v. Iowa*, 924 F. Supp. 2d 1016, 1031 (S.D. Iowa 2013) (special counsel hired to review university's response to sexual assault incident were not liable for defamatory statements simply by recounting facts and opinions that witnesses communicated to them and reaching conclusion that response was "consistent with a culture of a lack of transparency"; investigators' finding was opinion protected by First Amendment).

49 *Doe v. Stonehill Coll.*, 2021 WL 706228, at *16. The *Stonehill* court distinguished the instant matter from cases where the publisher makes a statement that appears to be opinion but implies the existence of undisclosed facts, relying on Massachusetts precedent holding that an opinion is not actionable where it is based on disclosed or assumed nondefamatory facts. *E.g.*, *Piccone v. Bartels*, 785 F.3d 766, 774 (1st Cir. 2015).

50 No. 17-CV-05285 (LHK), 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017).

51 *Id.*

52 *Id.*

falsity element where the plaintiff alleges that they did not commit the violation for which they were found responsible, and the underlying proceeding was erroneous. For instance, in *Wells v. Xavier University*, the university found a student-athlete responsible for sexual assault, expelled him, and then issued a statement that he had been found responsible and expelled “for a serious violation of the Code of Student Conduct” which, according to the plaintiff, “everyone knew” concerned an alleged sexual assault.⁵³ While the court found the case to be a “close call,” it concluded that this statement could support a libel claim because the proceeding itself was allegedly “invalid” owing to a variety of alleged due process issues, including the student’s denial of access to an attorney, inability to cross-examine his accuser, inability to access character witnesses on equal terms with his accuser, and the hearing board’s lack of training in handling sexual misconduct cases.⁵⁴ Strengthening the libel claim was the student’s position that he was a “scapegoat” for the university as it responded to investigations from the U.S. Department of Education’s Office for Civil Rights for its prior mishandling of sexual assault cases and that the county prosecutor reached out to campus officials to communicate his doubts about the accusations.⁵⁵

B. Publication

The second defamation element, publication, refers broadly to the intentional or negligent sharing of a defamatory statement to at least one other person.⁵⁶ People who then reshare the defamatory statement with others, like a campus newspaper publisher, could be liable for “re-publication” under the theory that the republisher has adopted the statement, making them equally liable for damages as the original speaker or writer.⁵⁷

While establishing publication is typically straightforward, complexities arise in the minority of jurisdictions that apply the “intracorporate communications no-publication” rule, which imputes a lack of publication to statements made within an enterprise; statements made by one employee to another in the course of their employment would not be considered published, because the institution is effectively communicating with itself.⁵⁸

53 7 F. Supp. 3d 746, 750 (S.D. Ohio 2014).

54 *Id.*

55 *Id.*, at 747. Effectively, both the defamation claim in *Wells* and the accompanying Title IX “erroneous outcome” claim rested on similar factual allegations of a flawed decision-making process combined with a context suggesting that the accused student’s gender was decisive in the outcome. *Id.* at 751.

56 RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 1977).

57 *Id.* § 578.

58 *Newell v. JDS Holdings, L.L.C.*, 834 N.W.2d 463, 471 (Iowa Ct. App. 2013) (citing cases); Doris DelTosto Brogan, *Reviving the Intracorporate Communications No-Publication Rule: A Strategy to Encourage Effective Investigation of Internal Misconduct*, 71 BAYLOR L. REV. 620 (2019) (reviewing conflict among jurisdictions about validity of the no-publication rule, and noting its continued application in Alabama, Missouri, Oklahoma, Tennessee, and Washington State). *The no-publication intracorporate communications doctrine is a distinct defense from the qualified privilege, but courts may conflate them.* See also Anthony W. Kraus, *Absolute Protection for Intracorporate Personnel Communications Under Defamation Law: A Philosophical Reappraisal of the Nonpublication Doctrine*, 25 U. Mem. L. Rev. 155 (1994).

Another minority rule to consider, depending on jurisdiction, is “compelled self-publication,” wherein a defamation suit against a former employer can satisfy the publication element because its former employee (who is the person being defamed) is forced to tell a prospective employer about issues with their past job performance or the reasons they were dismissed from employment.⁵⁹ Under such circumstances, some state courts may apply a “foreseeability” exception to the publication rule, even where the statements are not disclosed to an identifiable third person; if the defamatory statements remain in a personnel file, and it is likely that the employee will have to explain the statements to subsequent employers who investigate their background, then it will be considered published for purposes of satisfying this element.⁶⁰

C. Fault

Along with establishing the falsity of the statement and its publication to a third party, a defamation plaintiff must also allege the requisite degree of fault on the maker of the statement.

For public officials and public figures, the U.S. Supreme Court requires proof by clear and convincing evidence of “actual malice” in making the statement.⁶¹ But it is a different story with “private” persons; the U.S. Supreme Court has since distinguished the “reduced constitutional value of speech involving no matters of public concern” and therefore has permitted courts to award presumed and punitive damages without a showing of “actual malice.”⁶² State courts typically only require a showing of negligence in cases involving “private” plaintiffs.⁶³

What is “actual malice”? In *New York Times Co. v. Sullivan*, the Court held that a public official could not recover damages from a defamatory statement about his official conduct unless the official proved “actual malice,” meaning that the statement was made with the knowledge that it was false or with reckless disregard of whether it was false.⁶⁴ “Actual malice” does not require proof that the speaker or writer harbored any particular animus toward the defamed person but focuses only on the speaker or writer’s attitude toward the truth in making the statement.⁶⁵ The U.S. Supreme Court has subsequently extended this fault requirement more

59 *Lewis v. Equitable Life Assur. Soc’y of the U.S.*, 389 N.W.2d 876, 886 (Minn. 1986). The Connecticut Supreme Court, reviewing the state of the law in 2004, concluded that most jurisdictions have either not recognized compelled self-publication or expressly rejected it. *Cweklinsky v. Mobil Chem. Co.*, 267 Conn. 210, 219, 837 A.2d 759, 765 (Conn. 2004).

60 *Heineke v. Santa Clara Univ.*, No. 17-CV-05285 (LHK), 2017 WL 6026248, at *13 (N.D. Cal. Dec. 5, 2017) (finding foreseeable publication in evidence collected in faculty sexual misconduct investigation and saved in a personnel file).

61 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

62 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

63 *E.g., Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pennsylvania*, 592 Pa. 66, 84, (Pa. 2007); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

64 376 U.S. 254.

65 *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991).

broadly to “public figures,” who may be either general-purpose public figures or limited-purpose public figures (who are only public figures for a limited set of issues surrounding a public issue).⁶⁶

Courts have considered a variety of university officials and community members to be “public officials” or “public figures” who cannot recover without showing “actual malice” in the making of the statement regarding that plaintiff’s official conduct.⁶⁷ No “bright line” rule exists here:

Persons held to be “public officials,” for example, include a vice president of external affairs, university purchasing agent, police official, law professor and vice chancellor for research, and state college director of financial aid. “Public figures” have included protestors, a college, an institute, a research scientist, coaches, law school dean, college dean, vice president of external affairs, state college accounting professor, a group of junior college professors, a state university athletic director, and a former college football player; but not a former head community college basketball coach, assistant basketball coach, behavioral scientist, department chair or certain university professors.⁶⁸

Given this diversity of opinion, it may be difficult to predict if a defendant is a public figure, with courts often drawing distinctions according to the individual’s “access to the media” (and consequent ability to respond publicly to accusations) and “assumption of risk” in engaging in public life.⁶⁹

D. Proof of Harm and Damages

The last element in a defamation claim is proof of reputational harm and damages. A web of state law rules overlay whether a plaintiff’s damages will be presumed from the statement itself or whether the plaintiff will have to prove “special damages” stemming from the statement.⁷⁰

Initially, consider the plaintiff’s status as a public official or figure; as described above, reputation harm and damages are not presumed in cases involving public officials and figures, who must prove “actual malice” by clear and convincing evidence to recover damages.⁷¹

In turn, proof of harm in cases involving “private” figures may hinge on whether they involve statements that are defamatory *per quod*, meaning that they require extrinsic facts to explain what made them defamatory, or defamatory *per*

66 Gertz, 418 U.S. at 351.

67 *Who Is a ‘Public Figure’ for Purposes of a Defamation Action*, 19 A.L.R.5th 1 (originally published in 1994) (noting university officials falling within this category).

68 *Bazluke and Clothier*, supra note 9, at 7–8.

69 *Id.* at 7.

70 For an overview of state laws regarding damages, see 128 AM. JUR. TRIALS 1, *Litigating Defamation Claims* § 12 (originally published in 2013).

71 *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 16 (1990).

se, meaning “obviously and naturally harmful to a person.”⁷² Where a statement falls within the categorical definitions of defamatory *per se*, the plaintiff does not need to allege damages, as the remark is considered actionable without regard to harm.⁷³ Put another way, there is no need to prove a “context indicating malice” for a statement that is *per se* defamatory.⁷⁴ There is no situation where the words could possibly have an “innocent” meaning.⁷⁵

As with the public figure analysis, it can be challenging to determine which statements are defamatory *per se* under state law. Accusations that a faculty or student committed sexual misconduct will generally fall into this category, as they implicate a criminal or moral offense.⁷⁶ Statements that a person engaged in racial discrimination may also be defamatory *per se*.⁷⁷ Less certain are statements that an individual committed a civil wrong, like claiming the plaintiff entered a contract without authorization, which would not be a criminal offense or an attack on one’s moral standing.⁷⁸

Case law also varies about what statements tend to harm a person in their profession to the point that they constitute defamation *per se*. Most states consider attacks on a person’s professional competence to fall within that category.⁷⁹ But a minority of states, including Michigan, specifically exclude “disparagement of one’s profession” under this framework, yet retain crimes of moral turpitude as a *per se* ground.⁸⁰ Accusations of academic or research misconduct may also be

72 Kyung Hye Yano v. City Colls. of Chi., No. 08 CV 4492, 2013 WL 842644, at *6 (N.D. Ill. Mar. 6, 2013), *aff’d* sub nom. Kyung Hye Yano v. El-Maazawi, 651 F. App’x 543 (7th Cir. 2016) (applying Illinois law).

73 Kantz v. Univ. of the Virgin Is., No. CV 2008-0047 (WAL), 2016 WL 2997115, at *22 (D.V.I. May 19, 2016).

74 Harstad v. Whiteman, 338 S.W.3d 804, 810 (Ky. Ct. App. 2011). As will be discussed *infra* Part IV.B, while the law presumes malice where a statement is defamatory *per se*, if the statement is subject to a qualified privilege, the statement “is relieved of that presumption and the burden is on the plaintiff to prove actual malice.” *Id.*

75 Woods v. Capital Univ., 2009-Ohio-5672, ¶ 29, 2009 WL 3465827 (10th Dist. 2009).

76 Fox v. Parker, 98 S.W.3d 713, 726 (Tex. App. Ct. 2003) (statements by student who testified against a professor in a sexual harassment hearing were defamatory *per se*).

77 Goodwin v. Kennedy, 347 S.C. 30, 38, 552 S.E.2d 319, 324 (S.C. Ct. App. 2001) (statement that assistant principal disciplined students in a racially discriminatory way was defamatory *per se*).

78 Nehls v. Hillsdale Coll., 65 F. App’x 984, 990 (6th Cir. 2003) (college officials’ statement to journalists that a student was expelled for entering a contract without authorization was not actionable as defamation *per se*). Michigan law requires allegations of a crime of moral turpitude for the statement to be actionable, making, for example, a claim of intellectual property theft outside the definition of defamation *per se* because it is not a crime and would not subject the accused to “an infamous punishment.” Daneshvar v. Kipke, 266 F. Supp. 3d 1031, 1058 (E.D. Mich. 2017), *aff’d*, 749 F. App’x 986 (Fed. Cir. 2018).

79 E.g., Wilson v. New York, No. 15-CV-23 (CBA) (VMS), 2018 WL 1466770, at *4 (E.D.N.Y. Mar. 26, 2018); Seitz-Partridge v. Loyola Univ. of Chi., 2013 IL App (1st) 113409, ¶ 36, 987 N.E.2d 34 (Ill. Ct. App. 2013); Owen v. Liberty Univ., No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *11 (W.D. Va. Apr. 13, 2020); Kantz v. Univ. of the Virgin Is., No. CV 2008-0047 (WAL), 2016 WL 2997115, at *21 (D.V.I. May 19, 2016).

80 Daneshvar, 266 F. Supp. 3d at 1058.

considered defamatory *per se*, given their grave impact on an academic or student's professional career.⁸¹ Yet a faculty member's evaluation of a student's professional competence based on coursework and tests is likely not defamatory *per se*, "as one critical purpose of evaluating and grading students is to *specifically determine* which students are fit for the practice."⁸²

Now that we have discussed the prima facie elements of a defamation claim, we will cover some threshold issues in litigation and then review immunity laws and "absolute" and "qualified" privileges.

II. Threshold Issues in Litigation

When a college or university is served with a complaint containing defamation claims, several issues may be considered before engaging with elements of the claim itself. These may include indemnification, statute of limitations, and jurisdiction.

A. Indemnification

Defamation claims often name both the institutional defendant and specific employees or students who made the defamatory statements. While employees are generally indemnified for discretionary acts taken during their employment, intentional torts may fall outside the scope of coverage. Moreover, where an employee acts against their employer's interest by committing an intentional tort, their interests may not align as codefendants, raising ethical concerns when the employee is represented by institutional counsel.

These ethical issues may be more acute when both students and employees are named as codefendants such as in a Title IX lawsuit arising from student discipline. For example, public institutions and public employees are often entitled to state tort claim law protections (see Part III), while student defendants generally are not, leaving the codefendants in very different positions when evaluating the strength of the complaint and interest in settlement.⁸³

Courts may evaluate the defamation claims against specific employees before inquiring into the institution's liability; as Virginia courts hold, defamation claims

81 *Castelino v. Rose-Hulman Inst. of Tech.*, No. 2:17-CV-139 (WTL) (MJD), 2019 WL 367623, at *16 (S.D. Ind. Jan. 30, 2019), *appeal dismissed*, No. 19-1719, 2019 WL 5212232 (7th Cir. May 20, 2019) (in dictum).

82 *Zwick v. Regents of the Univ. of Mich.*, No. CV 06-12639 (MOB), 2008 WL 11356797, at *2 (E.D. Mich. June 9, 2008) (emphasis in original). *See also* *Hodge v. Coll. of S. Maryland*, 121 F. Supp. 3d 486, 504 (D. Md. 2015) (receipt of unwanted grade on a transcript was not defamatory, as it was unlikely that any grade could "engender hate or ridicule" and no harm shown because student was accepted for transfer to another institution); *Kyung Hye Yano v. City Colls. of Chi.*, No. 08 CV 4492, 2013 WL 842644, at *6 (N.D. Ill. Mar. 6, 2013), *aff'd sub nom.* *Kyung Hye Yano v. El-Maazawi*, 651 F. App'x 543 (7th Cir. 2016) (a full-time student is "by definition not engaged in a trade, profession, or business" and therefore statements regarding student performance would not fall within defamation *per se* definition of a statement regarding a person's professional competence).

83 *E.g.*, *Ali v. Univ. of Louisville*, No. 3:17-CV-00638 (RGJ), 2019 WL 539098, at *9 (W.D. Ky. Feb. 11, 2019) (dismissing claims against officials on sovereign immunity grounds, while remanding claims against student to state court).

against the institutional employer are “derivative” of any claims against individual faculty acting in their official capacity.⁸⁴ But if the employee is acting outside the scope of employment, the court may dismiss the defamation claims against the employer, even should the claims stand against the individual employee. As a result, an individual’s liability may also depend on how narrowly state law and judicial precedent construes the concept of scope of employment, as discussed in Part III.

B. Statute of Limitations

Often, defamation claims are dismissed in the pleading stage based on the age of the statement itself. Statutes of limitations for defamation claims are generally short (often one year from publication) under most state laws, and will be even more curtailed for public institutions subject to notice of claim requirements.⁸⁵ Moreover, under the “single publication rule,” the clock on defamation claims will not restart every time the allegedly false statement is republished; counsel may expect issues of fact to arise regarding when the act of publication occurred (i.e., at intake of the misconduct report versus in the final determination). But if the statement was made in the campus proceeding, and then repeated a year later to different parties, the statute of limitations might restart.⁸⁶

C. Supplemental Jurisdiction

Where the case is filed in federal court, counsel may also consider their legal strategy for addressing state-based tort claims, such as defamation, which are attached to a federal civil rights and discrimination complaint. If the federal claims appear unlikely to survive scrutiny through the pleadings phase, then counsel may anticipate that the court will decline to exercise jurisdiction over the remaining state-law claims.⁸⁷ In turn, counsel may seek to dismiss the federal claims, and have the suit dismissed from federal court, before answering the state-law defamation claims and entering into the potentially prolonged discovery and fact-finding process necessitated by fact-specific defenses and rebuttals inherent in a defamation case.

⁸⁴ Owen v. Liberty Univ., No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *16 (W.D. Va. Apr. 13, 2020); Dragulescu v. Va. Union Univ., 223 F. Supp. 3d 499, 509 (E.D. Va. 2016)

⁸⁵ Unknown Party v. Ariz. Bd. of Regents, No. CV-18-01623 (PHX) (DWL), 2019 WL 7282027, at *17 (D. Ariz. Dec. 27, 2019) (defamation claim against public university subject to 180-day notice of claim had to be filed within 180 days after defamatory statements made within the proceeding; as such, only timely statement *within* notice of claim period was the final decision itself finding him responsible). See also Harrick v. Bd. of Regents of the Univ. Sys. of Ga., No. 1:04-CV-0541 (RWS), 2005 WL 8154395, at *5 (N.D. Ga. Aug. 1, 2005) (defamation claims dismissed where plaintiff failed to file a timely notice of claim under Georgia Tort Claims Act).

⁸⁶ Schaumleffel v. Muskingum Univ., No. 2:17-CV-463 (GCS), 2018 WL 1173043, at *7 (S.D. Ohio Mar. 6, 2018).

⁸⁷ E.g., Seals v. Miss., 998 F. Supp. 2d 509, 526 (N.D. Miss. 2014); Ali, 2019 WL 539098, at *9; Roe v. St. John’s Univ., No. 19-CV-4694 (PKC) (RER), 2021 WL 1224895, at *23 (E.D.N.Y. Mar. 31, 2021) (declining to exercise supplemental jurisdiction over state law defamation claims brought against student-complainant as co-defendant).

D. Ministerial Exception

Finally, some academic defamation claims arise from disputes within religious orders about a faculty, staff, or students' false understanding or application of doctrine. Courts roundly hold that they simply lack competence to handle such disputes as a matter of law and will dismiss them under the ministerial exception.⁸⁸

III. Immunity for Public Officials and Employees

Counsel representing public colleges and universities and any individually named members of the college or university community should determine if the defamation allegations arise from actions taken within the scope of employment. State tort claims acts and judicial precedent may shield government entities from liability for discretionary actions taken by public officers and employees acting within the scope of their duties.

A. Immunity for Statements Made Within Scope of Employment

The scope of state sovereign immunity will vary by jurisdiction, and not all state colleges and universities will have immunity to the same extent as other state entities. And even where state law waives sovereign immunity for tort claims, it may restrict recovery for intentional torts, which are generally considered outside the scope of employment. Some state tort claims acts specifically prohibit claims arising from libel or slander.⁸⁹ Where those torts are not specifically named in the statute, but state law otherwise prohibits lawsuits against the state based on intentional torts, courts have identified defamation as an intentional tort for which the state has not waived sovereign immunity.⁹⁰

As such, courts have held that if an employee is required, as a part of their official duties, to give statements in an administrative grievance process, then state law may absolutely shield them from civil liability from defamation.⁹¹ For example, a faculty member at a public college serving as a witness during a faculty disciplinary grievance was considered a public official under Florida law and therefore absolutely immune from suit.⁹² Likewise, university officials required to give public statements about the outcome of a faculty disciplinary case were immune from a defamation action under Indiana's Tort Claims Act.⁹³

University officials engaged in performance reviews of faculty may also enjoy

88 *Sumner v. Simpson Univ.*, 27 Cal. App. 5th 577, 596 (Cal. Ct. App. 2018).

89 ALASKA STAT. § 09.50.250 (2021); GA. CODE ANN. § 50-21-24 (West 2021); MISS. CODE ANN. § 11-46-5(2) (West 2021).

90 *Leatherwood v. Prairie View A & M Univ.*, No. 01-02-01334-CV, 2004 WL 253275, at *3 (Tex. App. Ct. Feb. 12, 2004), *applying* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (2021).

91 *delPino Allen v. Santelises*, 271 So. 3d 1112, 1116 (Fla. Dist. Ct. App. 2019), *reh'g denied* (Mar. 22, 2019), *review denied sub nom.* *Allen v. Santelises*, No. SC19-496, 2019 WL 2428454 (Fla. June 11, 2019).

92 *Id.* at 1116, *applying* FLA. STAT. ANN § 1004.65 (West 2021).

93 *Bull v. Bd. of Trustees of Ball State Univ.*, No. 1:10-CV-00878 (JMS), 2012 WL 1564061, at *9 (S.D. Ind. May 2, 2012), *applying* Ind. Code Ann. § 34-13-3-3(6)-(7) (West 2021).

immunity.⁹⁴ A Mississippi professor was absolutely immune from a defamation suit under that state's Tort Claims Act, as she was acting in the scope of her duties when making employment decisions about a faculty member. Even if she exercised poor judgment in that discretionary function, she remained absolutely immune.⁹⁵ A faculty supervisor was likewise immunized from a Texas defamation lawsuit arising from statements made in a faculty meeting as this conduct occurred within the scope of employment.⁹⁶ Pennsylvania courts similarly find that public university faculty are acting within their scope of employment in reviewing tenure candidates; as such, even if "personal animosity" drove the evaluation's outcome, the faculty were protected by sovereign immunity from a defamation claim arising from the review.⁹⁷

While some state laws will bar recovery against the state or public university for defamatory statements made within an appropriate employment context regardless of fault, not all states will extend this immunity to individual employees. For example, Florida has not waived sovereign immunity for "intentional or malicious torts" committed by state employees, making a state university immune from a defamation suit based on an "intentionally malicious" evaluation of an instructor.⁹⁸ But a similar claim rooted in bad faith could be brought against that public employee individually.⁹⁹ By contrast, Georgia shields both the state entity and its employees from tort liability for actions taken within their official duties "without regard to their intent or malice"; as such, comments made by a faculty member during a tenure revocation process were immunized, as the allegedly defamatory statements about a professor's private behavior and domestic abuse were made in the course of the faculty member's official duties.¹⁰⁰

B. Malice and the Immunity Analysis

In states without such blanket protections, however, statute and judicial precedent may limit a state actor's immunity where the statement is made with

94 *White v. Trew*, 366 N.C. 360, 364, 736 S.E.2d 166, 169 (N.C. 2013) (holding that North Carolina Tort Claims Act bars claims for intentional torts, which would include libel, making a suit against a faculty member for a performance review in their official capacity barred by sovereign immunity; in dictum, holding that even if the faculty member were sued in their personal capacity, the suit would be barred for public policy reasons).

95 *DePree v. Saunders*, No. 207-CV-185 (KS) (MTP), 2008 WL 4457796, at *9 (S.D. Miss. Sept. 30, 2008), *aff'd*, 588 F.3d 282 (5th Cir. 2009).

96 *Wetherbe v. Laverie*, No. 07-17-00306-CV, 2019 WL 3756911, at *3 (Tex. App. Ct. Aug. 8, 2019) (noting that "[t]he scope-of-employment inquiry under section 101.106(f) is not concerned with the reasons motivating the complained-of conduct but whether the conduct fell within the general scope of the employee's employment.")

97 *Kull v. Guisse*, 81 A.3d 148, 158 (Pa. Commw. Ct. 2013).

98 *Beaulieu v. Bd. of Trustees of Univ. of W. Fla.*, No. 3:07 CV-30 (RV) (EMT), 2007 WL 2900332, at *4 (N.D. Fla. Oct. 2, 2007).

99 Fla. Stat. Ann. § 768.28(9)(a) (West 2021) (public officers and employees may be held personally liable in tort for actions taken within the scope of employment when acting "in bad faith or with malicious purpose").

100 *Brown v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:14-CV-0365 (LMM) (LTW), 2015 WL 12591794, at *4 (N.D. Ga. Jan. 12, 2015), report and recommendation adopted, No. 1:14-CV-0365 (LMM) (LTW), 2015 WL 12600344 (N.D. Ga. Feb. 3, 2015).

malicious intent.¹⁰¹ For example, Ohio law extends “personal immunity” to state employees acting in the scope of their employment and without “malicious purpose, in bad faith, or in a wanton or reckless manner”; under this statute, a faculty member who drafted a negative recommendation for a student was immunized from liability because there was no evidence that the faculty wrote the letter in bad faith.¹⁰²

But where the declarant is acting *outside* the scope of their employment, immunity would not apply. So, under Arizona’s Tort Claims Act, a faculty member who wrote comments to a newspaper article posted on the Internet that allegedly defamed a former faculty member would not necessarily have immunity, as that posting was not within the scope of employment.¹⁰³

And where the state tort claims act makes an exception for malicious conduct, courts may decline to apply immunity for defamatory remarks allegedly made with improper intent. Compare two Maryland cases applying the state’s Tort Claims Act. In one, faculty members who exchanged e-mails about a professor’s hostile behavior and insubordination enjoyed statutory immunity because any remarks they made in those e-mails were within the scope of their employment.¹⁰⁴ But in another, a faculty member’s e-mail to various university officials about a student’s alleged misappropriation of funds from a prelaw organization, which the faculty member admitted she did not think the student actually committed, would not be shielded by Maryland’s Tort Claims Act immunity.¹⁰⁵

The difference was context. In the latter case, the court identified that the faculty member and accused student had “at the very least, an unusual student-professor relationship” that included the professor asking the student for two loans, discussing her personal life and sexual history with him, leaving “lewd” messages on his voicemail, and wanting sex from him—conduct that led the student to resign from the organization.¹⁰⁶ While the professor’s issuance of the accusatory e-mail, standing alone, would not be outside the scope of employment, even if it violated university policy, the surrounding circumstances, including that the professor was subject to a disciplinary grievance for her conduct toward the student, pointed to an improper motive other than an interest in correcting financial issues.¹⁰⁷ Ultimately, a jury awarded the student \$50,000 in compensatory

101 Slack v. Stream, 988 So. 2d 516, 530 (Ala. 2008) (state-agency immunity not applied where professor acted beyond authority as department chair to disseminate plaintiff’s letter of reprimand for plagiarism to various institutions, and chair stated in phone call “that he was going to see to it that [plaintiff] never worked in academia again”).

102 Ostasz v. Med. Coll. of Ohio, 114 Ohio App.3d 391 (10th Dist. 1996), *applying* OHIO REV. CODE § 9.86 (2021).

103 Rodriguez v. Serna, No. 1:17-CV-01147 (WJ) (LF), 2019 WL 2340958, at *10 (D.N.M. June 3, 2019).

104 McReady v. O’Malley, 804 F. Supp. 2d 427, 444 (D. Md. 2011), *aff’d*, 468 F. App’x 391 (4th Cir. 2012) (applying MD. CODE ANN., CTS. & JUDIC. PROC. § 5-522(b) (West 2021)).

105 Brown v. Brockett, No. CIV. JFM-11-240, 2012 WL 1552783, at *5-6 (D. Md. Apr. 27, 2012).

106 *Id.* at *5, 1.

107 *Id.* at *5.

damages and \$150,000 in punitive damages, which the court lowered to \$20,000 in compensatory damages and \$20,000 in punitive damages because the student “suffered virtually no damage.”¹⁰⁸

Similarly, where the statutory immunity is limited to statements made in good faith, courts may find a waiver of immunity. So, allegedly bad faith omissions within a faculty review committee were sufficient to overcome immunity provided under Washington State law.¹⁰⁹ Likewise, even where the Utah Governmental Immunity Act barred libel and slander suits for negligent acts or omissions, a faculty advisor would not be immune from injuries stemming from “fraud or willful misconduct” in statements about a doctoral student’s purported research misconduct where those statements resulted from a serious conflict of interest.¹¹⁰ According to the complaint, the advisor recommended that the student use a device for recording seizure information in mice that the advisor had a financial and scientific stake in promoting; when the student found negative results from using that device, the advisor told her to revise her results, removed her from his laboratory, and informed the dissertation committee that she falsified data, resulting in her dismissal.¹¹¹

IV. Privilege

Where state sovereign immunity does not otherwise bar a defamation claim for statements made within the scope of employment, the statements may still be privileged from suit under the doctrines of absolute or qualified privilege.

A. Absolute Privilege

Traditionally, statements made in judicial and “quasi-judicial” proceedings, like administrative hearings, enjoy “absolute” privilege from liability to encourage open reporting.¹¹² As will be discussed in Part IV.B, most campus decision-making does not enjoy such encompassing privilege from liability. Still, in what appears

108 Specifically, the student was unharmed because he was accepted to law school and could not suffer any reasonable fear that he would not be admitted to the bar from the incident, as the university investigated the incident and issued a written finding that he was not responsible for misappropriating organizational funds. *Brown v. Brockett*, No. CIV. JFM-11-240, 2013 WL 8705901, at *1 (D. Md. Sept. 12, 2013), *aff’d*, 585 F. App’x 133 (4th Cir. 2014).

109 *Davidson v. Glenny*, 14 Wash. App. 2d 370, 386, 470 P.3d 549, 559 (Wash. Ct. App. 2020). Washington law confers civil immunity upon “[e]mployees, agents, or students of institutions of higher education serving on peer review committees which recommend or decide on appointment, reappointment, tenure, promotion, merit raises, dismissal, or other disciplinary measures for employees of the institution” so long as their performance on the committee was in good faith. The same provision also shields “[i]ndividuals who provide written or oral statements in support of or against a person reviewed ... if their statements are made in good faith.” WASH. REV. CODE ANN. § 28B.10.648 (West 2021).

110 *Rossi v. Univ. of Utah*, No. 2:15-CV-00767, 2016 WL 3570620, at *7 (D. Utah June 24, 2016).

111 *Id.* at *4.

112 *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983). Note that allegedly defamatory statements made during litigation would similarly enjoy absolute privilege, even if they desc]ribed statements that would enjoy a lesser privilege if uttered in a nonjudicial campus forum. *Hascall v. Duquesne Univ. of the Holy Spirit*, No. CV 14-1489 (CB), 2016 WL 3521971, at *2 (W.D. Pa. June 28, 2016).

to signal an emerging trend, judicial precedent in several states has declared some college and university grievance processes to be quasi-judicial proceedings entitled to absolute privilege.¹¹³

For one, some state appellate courts have declared statements made within campus sexual misconduct proceedings, including Title IX investigations and adjudications, to be covered under the absolute privilege. In 2008, Indiana's Supreme Court applied absolute privilege to the complaints of two public university students of sexual harassment against a professor.¹¹⁴ But this precedent remains limited to student-reported misconduct; in 2011, Indiana's intermediate appellate court stopped short of applying absolute privilege to sexual harassment complaints brought by faculty members against fellow faculty, reasoning that a qualified privilege adequately protects the interests of an employee bringing a complaint.¹¹⁵

Illinois appellate courts have also moved in the direction of widening absolute privilege for reports of sexual misconduct. In the 2016 and 2018 *Razavi* decisions, the Illinois Appellate Court, First District, applied absolute privilege to a complainant's statements to campus security and college officials at a private college made during the initiation, investigation, and adjudication of a campus sexual assault complaint.¹¹⁶

Along with sexual misconduct investigations and hearings, courts have held in a scattering of decisions that statements made within certain research misconduct proceedings may be subject to absolute privilege. In a decision later affirmed by the New York Appellate Division, First Department, a New York trial court applied absolute privilege to a private college's faculty advisory committee, a research misconduct board that it considered a quasi-judicial proceeding.¹¹⁷ Underlying the court's determination was evidence that the misconduct board was requested by the plaintiff, allowed for the submission of evidence and cross-examination, and provided for review of its outcomes through petition to the state trial courts.¹¹⁸

113 The developing state of the law regarding privilege in reporting sexual harassment and sexual violence will be discussed in detail *infra* Part V.

114 *Hartman v. Keri*, 883 N.E.2d 774, 778 (Ind. 2008).

115 *Haegert v. McMullan*, 953 N.E.2d 1223, 1231 (Ind. Ct. App. 2011).

116 *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶ 11, 55 N.E.3d 252, 255 (Ill. Ct. App. 2016) ("absolute privilege extends to statements made by alleged *campus crime victims to campus security*"); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom.* *Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019) (complainant's statements made in a campus adjudication of sexual violence were absolutely privileged); *See also* *Murauskas v. Rosa*, 2019 IL App (1st) 190480-U, ¶ 28, 2019 WL 6050008 (Ill. Ct. App. 2019) (employee's statements made to university law enforcement requesting an investigation of her complaint against a police sergeant for sexual harassment and retaliation were absolutely privileged from defamation lawsuit).

117 *Constantine v. Teachers Coll.*, 29 Misc. 3d 1214(A), 918 N.Y.S.2d 397 (Sup. Ct. 2010), *aff'd*, 93 A.D.3d 493, 940 N.Y.S.2d 75 (N.Y. App. Div. 2012).

118 *Id.* *But see* *Tacka v. Georgetown Univ.*, 193 F. Supp. 2d 43, 52 (D.D.C. 2001) (applying qualified privilege where department chair allegedly published accusations of plagiarism to tenure committee, but stating in dictum that absolute privilege might be appropriately applied where plaintiffs explicitly consent to a disclosure, such as by voluntarily submitting their work to a research integrity committee charged with evaluating plagiarism); *Hengjun Chao v. Mount Sinai Hosp.*, 476 F.

A federal district court applying New Jersey law also extended absolute privilege to a public university's academic misconduct proceedings.¹¹⁹ It found that its due process guarantees, including notice of charges and hearing and a two-day inquiry attended by a court reporter that included cross-examination of adverse witnesses, were sufficient to establish the hearing as a "quasi-judicial" process.¹²⁰

But absent some clear statute or precedent, courts have often declined to extend absolute privilege to colleges and university investigations on their own authority, particularly at private universities. As Justice Samuel Alito, then sitting on the Third Circuit Court of Appeals, wrote of an attempt to extend absolute privilege to a private university's discrimination grievance process in Pennsylvania, "the present case involves an entirely private grievance procedure. No state or federal statute authorized it, and no public officials presided over it. Nor was it the product of a collective bargaining agreement."¹²¹ The lack of public oversight, due process guarantees, and judicial precedent suggesting its applicability in a private setting was determinative. Similarly, California courts have declined to apply the state's litigation privilege under California Code section 47(b) for judicial or quasi-judicial proceedings to a private university's internal sexual harassment investigations because they were not a government proceeding subject to mandamus review.¹²²

As will be discussed in Part V, the distinction between absolute and qualified privilege ends up having critical ramifications in sexual misconduct proceedings brought under Title IX of the Education Amendments of 1972. In turn, as colleges and universities increasingly converge on rigorous due process requirements for these cases, courts may prove willing to extend absolute privilege to statements made within a campus sexual harassment proceeding.

B. Qualified Privilege

While courts have generally declined to grant postsecondary institutions and members of the college and university community absolute privilege from defamation claims, they more often afford a "qualified," "conditional," or "common interest" privilege to communications among people who have some interest or duty in sharing that information amongst themselves. When this type of privilege attaches, the defamation plaintiff's fault requirement generally raises from negligence to "actual malice," although in some jurisdictions, common law malice (consideration of the speaker or writer's ill intent) may also form a separate ground for overcoming qualified or conditional privilege.

App'x 892, 895 (2d Cir. 2012) ("common interest" qualified privilege applied to research misconduct proceeding).

119 *Le v. Univ. of Med. & Dentistry*, No. CIV.A. 08-991 (SRC), 2009 WL 1209233, at *6 (D.N.J. May 4, 2009), *aff'd sub nom.* *Phat Van Le v. Univ. of Med. & Dentistry of N.J.*, 379 F. App'x 171 (3d Cir. 2010).

120 *Id.*

121 *Overall v. Univ. of Pa.*, 412 F.3d 492, 498 (3d Cir. 2005).

122 *Heineke v. Santa Clara Univ.*, No. 17-CV-05285 (LHK), 2017 WL 6026248, at *12 (N.D. Cal. Dec. 5, 2017).

As discussed above, “actual malice” means that the statement was made with the knowledge it was false or with reckless disregard of the truth.¹²³ Some states courts also permit plaintiffs to assert a common law theory of malice, which is that “spite or ill will” was “the one and only cause for the publication” of the statement.¹²⁴ Simply put, “[a]ctual malice focuses on the defendant’s attitude towards the truth, whereas common law malice focuses on a defendant’s attitude towards the plaintiff.”¹²⁵ Where state courts recognize both types of malice, plausibly alleging either type of malice suffices to overcome qualified privilege.¹²⁶

A broad range of campus situations may fall within the qualified privilege:

- Communications among members of a faculty search committee.¹²⁷
- Communications among interested parties about a faculty member’s fitness for duty examination.¹²⁸
- Departmental communications about faculty members’ performance and suitability for rehiring or tenure.¹²⁹
- Department chair’s annual faculty performance evaluations.¹³⁰

123 *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 845 (N.D. Ill. 2015).

124 *Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011).

125 *DeMary v. Latrobe Printing & Pub. Co.*, 2000 PA Super 339, ¶ 13, 762 A.2d 758, 764 (Pa. Super. Ct. 2000).

126 *Aslin v. Univ. of Rochester*, No. 6:17-CV-06847 (LJV), 2019 WL 4112130, at *20 (W.D.N.Y. Aug. 28, 2019).

127 *Pratt v. Univ. of Cincinnati*, 2018-Ohio-2162, ¶ 18, 2018 WL 2715377, at *3 (10th Dist. 2018) (qualified interest privilege applied, and no actual malice shown in faculty discussion).

128 *Kao v. Univ. of San Francisco*, 229 Cal. App. 4th 437, 453 (Cal. Ct. App. 2014) (state law “qualified common interest privilege” applied, and no “malice” shown in faculty or institution’s reporting).

129 *Oller v. Roussel*, No. CIV.A. 11-02207 (RTH), 2014 WL 4204834, at *5 (W.D. La. Aug. 22, 2014), *aff’d*, 609 F. App’x 770 (5th Cir. 2015) (applying conditional privilege and finding no showing “the defendants knew the matter to be false or acted in reckless disregard as to its truth or falsity”); *Saha v. Ohio State Univ.*, 2011-Ohio-3824, ¶ 66, 2011 WL 3359704 (10th Dist. 2011) (applying qualified privilege and finding insufficient allegations of “actual malice”); *Donofrio-Ferrezza v. Nier*, No. 04 CIV. 1162 (PKC), 2005 WL 2312477, at *1 (S.D.N.Y. Sept. 21, 2005), *aff’d*, 178 F. App’x 74 (2d Cir. 2006) (applying qualified privilege and finding insufficient allegations of actual or common law malice); *Larimore v. Blaylock*, 528 S.E.2d 119, 121 (Va. 2000) (applying qualified privilege, and rejecting theory of absolute “intra-corporate immunity”). Note that Missouri law applies an “intra-corporate” privilege to communications made as part of an institution’s evaluative process, as long as the comments are received by an “officer” responsible for making performance determinations, under the theory that communications made within an organization are not published to a third-party. *Rice v. St. Louis Univ.*, No. 4:19-CV-03166 (SEP), 2020 WL 3000431, at *6 (E.D. Mo. June 4, 2020). On the intra-corporate communications “no publication” rule, *see Brogan, supra* note 58.

130 *Mbarika v. Bd. of Sup’rs of La. State Univ.*, 992 So. 2d 551, 565 (La. App. 1 Cir. 2008), *writ denied sub nom. Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 1019 (La. 2008) (applying conditional privilege and finding support in the record that statements were made in “good faith” because the reviewer “had a reasonable basis for believing them to be true”).

- Communications among interested faculty members regarding a student's academic progress.¹³¹
- Faculty research misconduct proceedings.<?>
- Faculty member's reporting of a student's plagiarism to appropriate authorities.<?>
- Faculty member's statements to a student academic integrity proceeding.<?>
- Faculty or administrator's statements to other faculty members about an employee's sexual misconduct with a student.<?>
- Faculty or administrator's statements to appropriate officials asking them to investigate a physical assault.<?>
- Faculty or administrator's statements used within a faculty disciplinary proceeding.<?>

131 *Lipsky v. Gonzalez*, 39 Misc. 3d 1202(A), 969 N.Y.S.2d 804 (N.Y. Sup. Ct. 2013) (applying common interest privilege and finding insufficient allegations of actual malice); *Leitner v. Liberty Univ., Inc.*, No. 6:19-CV-00029 (NKM), 2020 WL 7128972, at *12 (W.D. Va. Dec. 4, 2020) (applying qualified privilege and finding insufficient allegations of "malice").

132 *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 78, 987 N.E.2d 864, 884 (Ill. Ct. App. 2013) (applying qualified privilege and finding sufficient allegations that statements were made with "malice or a reckless disregard for their truth" to overcome dismissal); *Hengjun Chao v. Mount Sinai Hosp.*, 476 F. App'x 892, 895 (2d Cir. 2012) (applying common interest privilege and finding insufficient allegations of common law or actual malice); *Cf. Constantine v. Teachers Coll.*, 29 Misc. 3d 1214(A), 918 N.Y.S.2d 397 (Sup. Ct. 2010), *aff'd*, 93 A.D.3d 493, 940 N.Y.S.2d 75 (N.Y. App. Div. 2012) (applying absolute privilege under New York law to research misconduct proceeding).

133 *Beauchene v. Miss. Coll.*, 986 F. Supp. 2d 755, 767 (S.D. Miss. 2013) (qualified privilege applied because it was faculty and dean's "duty to report, investigate and impose discipline for the violations. Universities have the highest obligation to ferret out such conduct because when an academic institution confers a degree, it is certifying to other academic institutions, the private and public sector and the world at large that a student has met the academic standards of the institution." Statement was made "without malice and in good faith.").

134 *Castelino v. Rose-Hulman Inst. of Tech.*, No. 2:17-CV-139 (WTL) (MJD), 2019 WL 367623, at *17 (S.D. Ind. Jan. 30, 2019), *appeal dismissed*, No. 19-1719, 2019 WL 5212232 (7th Cir. May 20, 2019) (applying qualified privilege and finding insufficient allegations that the "letter was written and published without belief or grounds for belief in its truth.").

135 *Harstad v. Whiteman*, 338 S.W.3d 804, 811 (Ky. Ct. App. 2011). (applying qualified privilege and finding insufficient evidence to create a genuine issue of material fact concerning the existence of actual malice).

136 *Izadifar v. Loyola Univ.*, No. 03 C 2550, 2005 WL 1563170, at *6 (N.D. Ill. June 7, 2005) (Qualified privilege "is accorded to statements made by an employer in attempting to investigate and correct misconduct on behalf of its employees" and its abuse was not shown through evidence of "a direct intention to injure her or a reckless disregard of her rights" such as through "the failure to engage in a proper pre-publication investigation of the truth of a statement.").

137 *Owen v. Liberty Univ.*, No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *13 (W.D. Va. Apr. 13, 2020). (applying qualified privilege and finding insufficient allegations of "actual, common-law malice"); *Fischer v. Kent State Univ.*, 2015-Ohio-3569, ¶ 26, 41 N.E.3d 840, 846 (10th Dist. 2015)

- Hearing board's discussion of statements made by accusers who did not appear to testify at a faculty disciplinary proceeding.¹³⁸
- Statements made within an investigation of student sexual misconduct¹³⁹ (which, in some jurisdictions, will also be afforded absolute privilege¹⁴⁰).
- Faculty or administrator's statements used within a student disciplinary proceeding.¹⁴¹
- Public statements that a student was found responsible and sanctioned for committing sexual violence.<?>
- Public statements regarding a faculty or staff member's dismissal for sexual misconduct.<?>

(applying qualified privilege and finding insufficient allegations of actual malice).

138 *Guarino v. MGH Inst. of Health Professions, Inc.*, No. 1784CV0055 (BLS), 2019 WL 1141308, at *13 (Mass. Super. Jan. 16, 2019) (hearing board had conditional privilege to discuss these statements, and no malice was shown, as there was no evidence that faculty presenting statements would know if they were false; no evidence the statements were disseminated beyond the hearing board; and no evidence that they recklessly conveyed those allegations).

139 *Childers v. Fla. Gulf Coast Univ. Bd. of Trustees*, No. 2:15-CV-722 (FTM) (MRM), 2017 WL 1196575, at *6 (M.D. Fla. Mar. 31, 2017) (applying conditional privilege and finding insufficient allegations of "express malice," meaning "ill will, hostility and an evil intention to defame and injure"); *Doe v. Erskine Coll.*, No. CIV.A. 8:04-23001 (RBH), 2006 WL 1473853, at *15 (D.S.C. May 25, 2006) (applying qualified privilege and finding no evidence that administrator's statements made in connection with hearing "inaccurately or falsely recounted" the substance of her communications with complainant or that her actions were "malicious or reckless").

140 *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom. Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019) ("Absolute privilege in this context encourages victims to report crimes and misconduct promptly without fear of explicating the facts and circumstances surrounding any attack as the investigation unfolds.").

141 *Wertz v. Allen*, 721 S.E.2d 122, 126 (Ga. Ct. App. 2011), *adopted*, Ga. Super. Jan. 11, 2012 (applying conditional privilege and finding insufficient allegations of actual or express malice).

142 *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 226–27 (D. Mass. 2017) (statements within e-mail notification about unnamed respondent were "objectively true": that a hearing was held, that respondent was found in violation, and that he was expelled based on that finding; no implication that other, defamatory facts existed in the statement); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 44 (D. Me. 2005) (conditional privilege applied and no evidence that statements about respondents by dean to a local newspaper or by university's attorney to the NCAA were made knowing they were false, in reckless disregard of their truth or falsity, or made with ill will or spite). *But see Mallory v. Ohio Univ.*, 2001-Ohio-8762 (10th Dist. 2001) (campus administrator's statement to newspaper that student who had been expelled for sexual assault, but was not convicted at a criminal trial, "definitely committed a sexual battery" was not protected by qualified privilege because it was unnecessary to protect the university's interest and exceeded the scope of the interest to be upheld; the administrator could have explained her position and the university's position "without slandering plaintiff.").

143 *Naca v. Macalester Coll.*, No. 16-CV-3263 (PJS) (BRT), 2017 WL 4122601, at *3 (D. Minn. Sept. 18, 2017) (college president's statement to college newspaper that professor was terminated based on serious Title IX violation following a student's accusation was subject to qualified privilege and that privilege was not abused; his motive was appropriate, and the comments "succinctly, accurately, and in a non-inflammatory manner summarized the college's position").

- A “crime alert” issued pursuant to the Clery Act, 20 U.S.C. section 1092(f).¹⁴⁴
- Public safety warnings to avoid contact with a faculty member who had been barred from campus following an arrest.¹⁴⁵
- Notation of a disciplinary expulsion on a student transcript.¹⁴⁶
- Communication among colleges or universities regarding a student’s disciplinary history.¹⁴⁷
- Communications between a postsecondary institution and an accreditation or licensing board.¹⁴⁸

These cases suggest a general unwillingness among courts to second-guess the intentions of faculty and staff sharing information as part of their institutional responsibilities, including as members of faculty or student review committees and disciplinary bodies. The exceptional cases will usually involve allegations of retaliation or false accusations underlying the defamatory statement. Retaliation is usually the distinguishing element where malice can be shown. As such, in the higher education context, successful assertions of actual malice often arise from purported backlash against faculty or staff for speaking out, whether in support of controversial political views or in defense of those accused of misconduct.¹⁴⁹ Actual

144 *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 33 (1st Cir. 2007) (qualified privilege applied to “crime alert” that contained a respondent’s name and fraternity affiliation, and no malice, ill will, or spite shown where campus counsel had a “reasonable” belief that this information was necessary to preventing future incidents and retaliation).

145 *Collins v. Univ. of N.H.*, 746 F. Supp. 2d 358, 374 (D.N.H. 2010), *aff’d*, 664 F.3d 8 (1st Cir. 2011) (conditional privilege applied and no evidence in the record of actual malice). *Cf. Williams v. Mass. Coll. of Pharmacy & Allied Health Scis.*, No. CIV.A. 12-10313-DJC, 2013 WL 1308621, at *7 (D. Mass. Mar. 31, 2013) (common interest privilege may not extend to photograph of plaintiff posted by an “unidentified faculty member” in plain view of any passerby in the campus security office).

146 *Amherst Coll.*, 238 F. Supp. 3d at , 227. The court noted, without deciding, that the transcript notation likely would also not satisfy the publication element of a defamation claim, as Massachusetts state courts do not recognize “self-publication” as an alternative route for establishing publication, and “[c]olleges prepare and disseminate academic transcripts in connection with their core educational functions and Massachusetts courts have recognized that a person may possess a conditional privilege to publish defamatory material if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest.” *Id.* at 227 n.7 (internal quotation marks omitted). On “self-publication,” see *Lewis Lewis v. Equitable Life Assur. Soc’y of the U.S.*, 389 N.W.2d 876, 886 (Minn. 1986).

147 *Oirya v. Brigham Young Univ.*, No. 2:16-CV-01121-BSJ, 2020 WL 110280, at *8 (D. Utah Jan. 9, 2020), *aff’d*, No. 20-4052, 2021 WL 1904863 (10th Cir. May 12, 2021) (“It is simply a question of sharing disciplinary files school-to-school, as permitted by law. This kind of candor must be permitted or universities will have to remain silent even when a transferring student may pose a danger.”).

148 *Eiland v. Blagburn*, No. 305-CV-459 (WKW), 2007 WL 2926863, at *13 (M.D. Ala. Oct. 5, 2007) (applying Alabama law regarding disclosures to a “Wellness Committee,” holding that reporter “made a conditionally privileged communication, which by definition is not defamation” under Alabama Code section 34-29-111(f)).

149 E.g., *Porter v. Sergeant*, No. CV 5:19-455 (KKC), 2020 WL 4495465 (E.D. Ky. Aug. 4, 2020). On potential defamation claims arising from “hostile environment” charges against faculty, see generally *Elder*, *supra* note 43.

malice assertions have also overcome qualified privilege where plaintiffs allege retaliation for complaining about misconduct by faculty and staff.¹⁵⁰

In a recent example, a federal district court in Kentucky allowed a professor's defamation claim against his employer to proceed despite the college's assertion of qualified privilege, holding that statements made in e-mails regarding the professor were sufficient to allege actual malice.¹⁵¹ There, the professor, Porter, had served as faculty advisor to a fellow faculty member, Messer, who was found responsible for creating a hostile work environment. Porter, upset about the college's "extreme political correctness," subsequently distributed a survey to the student body and faculty to assess "attitudes about academic freedom, freedom of speech, and hostile work environments under civil rights law." A college dean allegedly demanded that the professor pull the survey and apologize, and charges of incompetence were brought to a faculty status committee, which resulted in Porter's suspension. Nevertheless, the student government association gave Porter an award. In reaction, Porter alleged that a fellow professor, Sergent (named as a codefendant in the defamation lawsuit) e-mailed the student government association to disparage Porter's fitness for the award. Porter asserted that Sergent knew the statements in the e-mail were false, and the publication was done in retaliation for Porter's representation of Messer; Sergent's spouse was one of the professors who accused Messer of discrimination. Porter also claimed that Sergent published the defamatory e-mail in retaliation for the survey. Although Sergent had a qualified privilege to send the e-mail, these allegations were enough to demonstrate actual malice.

Tied in with retaliation-focused arguments are assertions of actual or common law malice rooted in allegedly false accusations. In several recent cases, respondents in campus sexual misconduct investigations have successfully overcome qualified privilege in suits against their accusers by asserting that those complainants were untruthful in bringing the complaint.¹⁵² This article now turns to a close examination of these cases.

150 E.g., *Aslin v. Univ. of Rochester*, No. 6:17-CV-06847 (LJV), 2019 WL 4112130, at *20 (W.D.N.Y. Aug. 28, 2019).

151 The facts in this paragraph are those pleaded in *Porter*, 2020 WL 4495465.

152 See *Heineke v. Santa Clara Univ.*, No. 17-CV-05285 (LHK), 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017) (faculty sexual harassment investigation; student-accuser's knowledge of the falsity of her allegations was sufficient to overcome privilege under both common law and actual malice standards); *Doe v. Roe*, 295 F. Supp. 3d 664, 677 (E.D. Va. 2018) (student sexual misconduct investigation; applying "qualified immunity" and finding sufficient allegations that student "had no good faith reason for reporting a sexual assault and that instead, she was motivated by personal spite or ill will"); *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *9 (N.D. Ohio Feb. 13, 2018) (student sexual misconduct investigation; establishing false accusations by clear and convincing evidence would show actual malice sufficient to overcome qualified privilege); *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *14 (W.D. Va. Aug. 3, 2017) (student sexual misconduct investigation; false accusations sufficient to plausibly show "actual, common-law malice" meaning "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made"); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 213-14 (W.D.N.Y. 2013) (student sexual misconduct investigation; establishing false accusation would defeat "common interest" privilege under actual and common law malice standards).

V. Defamation and Campus Sexual Misconduct Claims

Perhaps the most contested aspect of defamation law in academic life surrounds statements made within sexual misconduct proceedings.¹⁵³ The final section of this article will closely examine the rapid changes in this area of law, including a reshaping of the nature of legal privilege in sexual misconduct proceedings.

A. *The Intersection of Title IX and Defamation Law*

In a growing trend, courts across the country have heard defamation cases brought by individuals accused of sexual misconduct (“respondents”) against those that brought forth the accusation (“complainants”), along with the college or university itself and faculty and staff involved in the investigation and adjudication.¹⁵⁴

These cases test several structural issues within proceedings governed by Title IX of the Educational Amendments of 1972. In May 2020, the U.S. Department of Education issued final regulations (“Title IX Final Rules”) governing how both public and private educational institutions respond to “sexual harassment,” including sexual violence.¹⁵⁵ Among their most controversial provisions, the Title IX Final Rules mandate that offenses falling within its scope (including crimes of sexual violence defined in the 2013 Violence Against Women Act amendments to the Clery Act¹⁵⁶) be investigated and adjudicated according to a grievance process that includes live cross-examination by advisors for the complainant and respondent.¹⁵⁷

No hearsay exceptions appear to apply within this forum; if a party or witness gives a statement to investigators, parties, or witnesses before hearing, they *must* submit to cross-examination at a live hearing to be questioned about that statement.¹⁵⁸ Otherwise, the statement cannot be considered in the decision-maker’s

153 Some sexual misconduct allegations will be brought under an institution’s Title IX process, while others, if falling outside the institution’s Title IX jurisdiction, may constitute policy violations adjudicated according to a code of conduct or handbook. 34 C.F.R. § 106.45 (b)(3)(i) (2020) (institution may apply code of conduct to adjudicate complaints falling outside Title IX education program or activity or outside United States). This distinction may be relevant to whether a court will apply absolute or qualified privilege depending on the procedures applied in the investigation and adjudication.

154 *E.g.*, *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom.* *Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019); *Doe v. Univ. of Dayton*, No. 3:17-CV-134, 2018 WL 1393894, at *3 (S.D. Ohio Mar. 20, 2018), *aff’d*, 766 F. App’x 275 (6th Cir. 2019). Witnesses have also been subject to defamation suit by the accused individual. *E.g.*, *Lozier v. Quincy Univ. Corp.*, No. 18-CV-3077, 2021 WL 981278, at *1 (C.D. Ill. Mar. 16, 2021) (student-athlete who gave testimony in ongoing sexual misconduct investigation of coach sued for defamation). Notably, courts have considered, and rejected, the theory that Title IX preempts state defamation law claims. *Coll. of Wooster*, 2018 WL 838630, at *8.

155 85 Fed. Reg. 30026 (May 19, 2020).

156 34 C.F.R. § 668.46 (2015).

157 34 C.F.R. § 106.45(b) (2020).

158 See 34 C.F.R. § 106.45(b)(6)(i) (“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”).

determination regarding responsibility.¹⁵⁹ In an effort to maintain an “education” process free of “complicated rules of evidence, the Department has mandated due process protections exceeding those even present in civil and criminal trials.¹⁶⁰ Courts applying defamation law may grapple with whether these heightened protections merit application of absolute privilege for statements made within the Title IX process.

Also potentially at issue in defamation suits is Title IX’s prohibition against retaliation. Title IX has long been interpreted to require colleges and universities to protect students from retaliation for exercising rights under the statute, including when they participate in a disciplinary process. The challenge of protecting students from retaliation heightens when parties introduce defamation claims. Parties may seek to protect their reputations through the threat, or actual filing, of state-law defamation claims during or after the campus process. Parties or fact witnesses may recant their statements or avoid participating in the campus process, knowing that they might have to defend themselves in courtroom litigation, which could expose their identities and traumatic experiences.

In turn, Title IX disciplinary cases are pushing courts to reconsider the line between judicial and nonjudicial proceedings. As discussed in Part IV, the absolute privilege for statements made in judicial proceedings is usually not available for statements made in a conduct proceeding; such statements are afforded a more limited qualified privilege. But as campus proceedings increasingly acquire the formalities of a judicial process, including cross-examination, the absolute privilege may expand.

This trend is likely to continue, even if the Title IX Final Rules are modified or rescinded.¹⁶¹ Courts evaluating sexual misconduct adjudications have elevated the standards of due process or fair process in these proceedings, for example, by expecting access to adversarial questioning, either indirectly through a decision-maker or through direct cross-examination of the witness by the parties or their representatives, as a minimal requirement.¹⁶²

159 In the Preamble to the Title IX Final Rules, the U.S. Department of Education wrote that it “believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements. If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process.” 85 Fed. Reg. at 30347.

160 *Id.*

161 In April 2021, the U.S. Department of Education’s Office for Civil Rights announced it will issue a notice of proposed rulemaking to amend the Title IX regulations under Executive Order 14021. *See* U.S. Dep’t of Educ., Office for Civil Rights, Letter to Students, Educators, and other Stakeholders re Executive Order 14021 (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

162 While federal circuit courts of appeal remain split about whether sexual misconduct proceedings must include live cross-examination by the parties or their representatives, most have concluded that “some” form of questioning among the parties is a due process minimum, such as by questions posed to parties and witnesses through a hearing panel. *Compare* *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020) (“fair process” at private university would require “the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses’ credibility

Ultimately, the outcome of this judicial boundary-making may have a significant impact on the future of Title IX and the risks that campus community members take when they seek a formal resolution of a sexual misconduct complaint. The treatment of statements made in misconduct complaints and any resulting proceedings as entitled to absolute privilege promotes a college or university's ability to conduct an effective investigatory and hearing procedure, encouraging the free and open disclosure of information related to an accusation and ensuring that parties and witnesses can come forward without fear of legal retaliation. Some courts continue to apply qualified privilege in these cases, reasoning that "because a plaintiff bears the burden proving the privilege was lost or abused, there is a presumption that the reports of victims of sexual assault are truthful."¹⁶³ But that presumption may require prolonged, expensive, and traumatic litigation to vindicate; securing absolute privilege may mean the difference between the early dismissal of vexatious claims, and a long discovery process, and even trial, on the truth of the underlying misconduct allegations.

B. Absolute and Qualified Privilege in Sexual Misconduct Proceedings

1. Cases Extending Absolute Privilege

Beginning with the Indiana Supreme Court in 2008, courts in Connecticut, Illinois, and Indiana have published decisions extending absolute privilege to campus sexual misconduct proceedings involving student complainants.¹⁶⁴ Pennsylvania courts have also applied absolute privilege in certain private and public university conduct proceedings but not in a consistent way.¹⁶⁵ And Ohio

through some method of cross-examination") and *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (due process would require some form of live cross-examination in "credibility" cases) *with Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 68 (1st Cir. 2019) (indirect questioning through hearing panel satisfactory for "critical administrative decisions" such as expulsion); *Doe v. Colgate Univ.*, 760 F. App'x 22, 33 (2d Cir. 2019) (indirect questioning through hearing panel and use of hearsay evidence was not violative of Title IX); *Doe v. Loh*, No. CV PX-16-3314, 2018 WL 1535495, at *7 (D. Md. Mar. 29, 2018), *aff'd*, 767 Fed. App'x 489 (4th Cir. 2019) (due process in sexual misconduct adjudication did not require cross-examination); *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020) (due process satisfied by "some" opportunity to question, such as through a hearing panel, but direct cross-examination not necessary); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) (holding that hearing body's failure to question complainant or provide respondent with opportunity to review evidence or submit impeachment evidence was due process violation, and declining to address if due process required live cross-examination); *Doe v. Univ. of Arkansas—Fayetteville*, 974 F.3d 858, 867 (8th Cir. 2020) (indirect questioning through panel was not a due process violation); and, *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (adversarial questioning not a due process requirement in academic dishonesty hearing). California state appellate courts also require some form of cross-examination "directly or indirectly, at a hearing in which the witnesses appear in person or by other means" in campus sexual misconduct investigations involving "credibility." *Doe v. Allee*, 30 Cal. App. 5th 1036, 1069 (Cal. Ct. App. 2019).

163 *Doe v. Roe*, 295 F. Supp. 3d 664, 677 (E.D. Va. 2018).

164 *Hartman v. Keri*, 883 N.E.2d 774, 778 (Ind. 2008); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom. Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019); *Khan v. Yale Univ.*, No. 3:19-CV-01966 (KAD), 2021 WL 66458, at *8 (D. Conn. Jan. 7, 2021).

165 The Pennsylvania Supreme Court has held that absolute privilege would *not* apply to a

courts have extended absolute privilege where the conduct proceeding “requires notice, a hearing, and provides the student with an opportunity to present evidence.”¹⁶⁶

In 2008, Indiana’s Supreme Court applied absolute privilege to the complaints of two public university students of sexual harassment against a professor that were filed under the university’s antiharassment policy and processed through the appropriate institutional office.¹⁶⁷ The court drew on public policy grounds for extending absolute privilege to sexual misconduct proceedings, reasoning that “Protecting their complaints with anything less than an absolute privilege could chill some legitimate complaints for fear of retaliatory litigation.”¹⁶⁸

Then, in *Razavi v. School of the Art Institute of Chicago*, the Appellate Court of Illinois, First District, held that a student’s statements to college officials at a private college made during the initiation, investigation, and adjudication of a campus sexual assault complaint were absolutely privileged against a defamation action.¹⁶⁹ The court reasoned that the campus code of conduct, which encouraged victims to report sexual assault to police or university officials, was based on the federal Campus SaVE Act (enacted into law through the Clery Act amendments to the 2013 reauthorization of the Violence Against Women Act), and permitted those university officials to investigate the violation and question anyone, including the victim and accused. As the university was “legally required” to investigate the report under federal law, any statements made during that investigation were absolutely privileged.

In 2019, the Sixth Circuit Court of Appeals, applying Ohio law, held that a Title IX complainant’s “statements made in preparation for and during the disciplinary hearing are entitled to absolute immunity.”¹⁷⁰ But the court engaged in little

former student’s allegations of sexual misconduct against a teacher where that student does not intend to initiate a judicial or quasi-judicial proceeding against the teacher. *Schanne v. Addis*, 632 Pa. 545, 562 (Pa. 2015) The court expressly declined to reach the issue of whether absolute privilege would apply for statements made in furtherance of a quasi-judicial proceeding. *Id.* at 560 n.7. For cases applying (or declining to apply) absolute privilege in the postsecondary disciplinary context, compare *Harris v. Saint Joseph’s University*, No. CIV.A. 13-3937, 2014 WL 1910242, at *9 (E.D. Pa. May 13, 2014) (government involvement is necessary to make a private university’s disciplinary procedures quasi-judicial and therefore eligible for absolute privilege), with *Fogel v. University of the Arts*, No. CV 18-5137, 2019 WL 1384577, at *11 (E.D. Pa. Mar. 27, 2019) (at private university, holding that complainant’s statements to Title IX officials initiating investigation of faculty member were absolutely privileged), and *Dempsey v. Bucknell University*, No. 4:11-CV-1679, 2012 WL 1569826, at *15 (M.D. Pa. May 3, 2012) (holding that a statement made *outside* a private university’s disciplinary proceeding was not covered under the absolute privilege afforded to judicial proceedings).

166 *Savoy v. Univ. of Akron*, 15 N.E.3d 430, 435 n.3 (Ohio Ct. App. 2014).

167 *Hartman*, 883 N.E.2d at 778.

168 *Id.*

169 2018 IL App (1st) 171409, at ¶ 29 This decision was preceded by a 2016 opinion holding that a student complainant’s reports to campus security about sexual violence were absolutely privileged. *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶ 11, 55 N.E.3d 252, 255 (Ill. Ct. App. 2016).

170 *Doe v. Univ. of Dayton*, 766 F. App’x 275, 290 (6th Cir. 2019) (citing *Savoy*, 15 N.E.3d at 435 n.3). See also *Schaumleffel v. Muskingum Univ.*, No. 2:17-CV-463 (GCS), 2018 WL 1173043, at *86 (S.D. Ohio Mar. 6, 2018). (in dictum, holding that conduct proceeding was quasi-judicial under *Savoy*). A 2018 decision by a federal court of the Northern District of Ohio, however, did not find that

discussion about the policy balance underlying this immunity, as the defamation-plaintiff (the respondent in the underlying Title IX case) did not dispute that absolute immunity applied.¹⁷¹ The Sixth Circuit did carve out a distinction for statements made outside the proceeding to friends and roommates about the assault, and held that only qualified privilege would apply to statements that did not have a “reasonable relation” to the disciplinary proceedings.¹⁷²

More recently, in *Khan v. Yale University*, a federal district court in Connecticut, considering state judicial precedent and the reasoning from *Razavi*, applied “absolute immunity” to statements made within a private university’s sexual misconduct proceeding, determining that the same policy grounds supporting immunity in an ordinary judicial process to encourage testimony without fear of defamation suits “applies equally in the circumstances presented here—an alleged sexual assault or sexual harassment victim testifying before a university fact-finding body at a proceeding convened pursuant to Title IX or comparable state statute.”¹⁷³

While the *Khan* court wrote that it was “reluctant” to modify Connecticut’s law regarding absolute immunity, particularly when addressing a private university’s grievance process, it found support for extending privilege in state court precedent declaring a private university’s judicial board procedures to be quasi-judicial, and state appellate court pronouncements that the absolute immunity analysis should not rest solely on the public-private distinction.¹⁷⁴ The court noted that the private university’s misconduct proceeding “was one authorized by federal law” that applied equally to private and public institutions, and the plaintiff (a student-respondent) could identify “no substantive difference” between the Title IX proceedings held at a public or private university that would justify applying absolute immunity only in public institutions.¹⁷⁵

Savoy would absolutely privilege statements made in a private university’s conduct proceedings. *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *8 (N.D. Ohio Feb. 13, 2018) (finding it “unlikely” that Ohio Supreme Court would extend absolute immunity to statements made in private university disciplinary proceedings).

171 *Univ. of Dayton*, 766 F. App’x at 290. Notably, the Sixth Circuit Court of Appeals requires a higher level of due process for conduct proceedings held at public colleges and universities than demanded by other circuit courts of appeal, including “some form of cross-examination” in the case “when the university’s determination turns on the credibility of the accuser, the accused, or witnesses.” *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). Consequently, even without the present Title IX mandates imposed under the final rule, conduct proceedings held at public institutions under Sixth Circuit precedent would likely satisfy the expectations of a “quasi-judicial” hearing. See discussion *supra* note 162.

172 *Univ. of Dayton*, 766 F. App’x at 290. For further discussion of privilege for statements made outside the investigation and hearing, see *infra* Part V.B.3.

173 No. 3:19-CV-01966 (KAD), 2021 WL 66458, at *8 (D. Conn. Jan. 7, 2021).

174 *Id.* at *7–8, citing *Rom v. Fairfield University*, No. CV020391512S, 2006 WL 390448, at *5 (Conn. Super. Ct. Jan. 30, 2006) (holding that private university’s judicial hearing board was quasi-judicial but declining to extend absolute privilege to statements made in that proceeding) and *Preston v. O’Rourke*, 74 Conn. App. 301, 313–14 (Conn. App. Ct. 2002) (holding that labor arbitration was quasi-judicial proceeding entitled to absolute immunity, and declining to draw distinction “between purely private labor arbitration and the actions of public administrative officers or bodies”). The *Khan* court, of course, did not follow the Superior Court’s decision in *Rom* to apply only qualified immunity to a quasi-judicial proceeding, and applied absolute immunity. *Id.* at *7 n.11.

175 *Id.* at *8. The *Khan* court also noted that the private university was bound by state law

As these cases suggest, the central policy question driving the analysis is whether the campus process is sufficiently “judicial” in nature to allow the respondent to dispute the accuracy of any statements. If it is not, courts reason, then a defamation claim may be appropriate to clear the accused student’s name.

2. Cases Maintaining Qualified Privilege

In turn, courts have offered two theories about why the campus disciplinary process is not “quasi-judicial,” meaning that witnesses would only have qualified privilege in their statements.

One theory is that, at least for private institutions, there is no governmental involvement in the disciplinary process. Courts reason that without this oversight the proceedings may lack due process safeguards that would attach in a state-supervised administrative hearing.¹⁷⁶

For example, in *Bose v. Bea*, the Sixth Circuit Court of Appeals, applying Tennessee law, held that the absolute privilege did not apply to allegedly defamatory statements made about a student accused of honor code violations by a faculty member in a private college’s campus disciplinary proceeding.¹⁷⁷ Even though the process contained certain “procedural safeguards,” the court reasoned that Tennessee law did not intend to “cloak” a private entity with the privilege, but only judicial or quasi-judicial proceedings held by public entities. Therefore, a disciplinary proceeding held at a private college would not enjoy that privilege without a clear signal from the legislature. Both the Third Circuit and Fifth Circuit Courts of Appeals have also applied this governmental involvement theory to defamation claims arising from campus disciplinary proceedings.¹⁷⁸

It is unclear whether the Title IX Final Rules will moot the governmental involvement analysis; as the reasoning in *Razavi* and *Khan* suggests, the expansive scope of the regulations may collapse any meaningful public-private distinction should courts view the Final Rules as establishing government-mandated procedural safeguards for both public and private institutions handling the types of misconduct and locations falling within Title IX’s scope.¹⁷⁹

mandating a series of due process protections for both private and public postsecondary institutions hearing sexual misconduct proceedings. See CONN. GEN. STAT. § 10a-55m (b)(6) (2021).

176 *Bose v. Bea*, 947 F.3d 983, 996 (6th Cir. 2020); *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *7 (N.D. Ohio Feb. 13, 2018) (“existence of governmental presence is a common thread” under Ohio law of absolute immunity and other jurisdictions).

177 947 F.3d at 996.

178 See *Cuba v. Pylant*, 814 F.3d 701, 716 (5th Cir. 2016) (applying Texas law, holding that Southern Methodist University, “a private institution that does not have any law enforcement or law interpreting authority,” cannot hold quasi-judicial proceedings, and therefore statements made by complainant were not shielded by absolute immunity); *Overall v. Univ. of Pa.*, 412 F.3d 492, 497–98 (3d Cir. 2005) (holding private institution’s proceedings were not quasi-judicial, so no absolute immunity, as Pennsylvania law requires governmental involvement in the proceeding; policy reasons include that private proceedings may lack “basic procedural safeguards”).

179 See generally 85 Fed. Reg. 30026 (May 19, 2020); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 24, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom.* *Razavi v. Sch.*

A related approach focuses less on formal state involvement but on the specific due process protections applied to the parties. Effectively, the more trial-like the proceedings, the more likely that absolute privilege will apply.

For instance, a federal district court of the Eastern District of Virginia held that a private university's disciplinary process did not have sufficient guarantees of due process, so it was not "quasi-judicial" so as to allow a complainant to claim "absolute immunity" from a respondent's defamation claim; instead, the court applied "qualified immunity" to the students' statements in the Title IX proceeding, and denied a motion to dismiss based on allegations that the complainant's statements were driven by malice.¹⁸⁰ As examples of insufficient due process, the court noted the respondent's inability to have an in-person hearing, to present exculpatory or documentary evidence, to call witnesses, or to cross-examine his accuser.¹⁸¹

Likewise, courts that otherwise might extend absolute privilege under state law have declined to do so where the statements are not in furtherance of the investigation itself. For example, a report made to a private university's Title IX office was absolutely privileged under Pennsylvania law, but statements about that misconduct made *before* the report, to attendees at a conference, were not.¹⁸² And if a statement was made in a disciplinary proceeding, and then repeated *a year later* to different parties, then it might not be protected, even if shielded by Ohio's absolute privilege during the proceeding itself.¹⁸³

The takeaway is that due process for the respondent and absolute privilege for the reporting party are mutually reinforcing: as institutions increasingly converge on similar standards of due process in cases arising from sexual and interpersonal violence, we may see more courts apply absolute privilege for statements made within those proceedings.

3. *Privilege for Statements Made Outside the Proceeding*

Even where a court recognizes absolute privilege within the Title IX or conduct

of Art Inst. of Chi., 124 N.E.3d 475 (Ill. 2019) (statements made in private university's investigation and adjudication of sexual misconduct proceeding "were made as part of communications required by law"); *Khan*, 2021 WL 66458, at *8 ("the fact that Title IX applies equally to private and public institutions would tend to undermine such a claim" that public and private institutions should be subject to different standards of privilege).

180 *Doe v. Roe*, 295 F. Supp. 3d 664, 675 (E.D. Va. 2018). Other cases from courts within the Fourth Circuit include *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *13 (W.D. Va. Aug. 3, 2017) (holding that a private institution's Title IX grievance process was not a "legal proceeding" suited for a claim of malicious abuse of the legal process under Virginia law, and assuming without deciding that defamation claim arising from allegedly false accusation was subject to qualified privilege); and *Doe v. Erskine Coll.*, No. CIV.A. 8:04-23001 (RBH), 2006 WL 1473853, at *15 (D.S.C. May 25, 2006) (assuming, without deciding, that qualified privilege attached to private college's Title IX disciplinary proceeding under South Carolina law).

181 *Doe v. Roe*, 295 F. Supp. 3d at 674-75 (noting that "it is questionable" whether a private university's grievance process could ever be considered "quasi-judicial").

182 *Fogel v. Univ. of the Arts*, No. CV 18-5137, 2019 WL 1384577, at *11 (E.D. Pa. Mar. 27, 2019).

183 *Schaumleffel v. Muskingum Univ.*, No. 2:17-CV-463 (GCS), 2018 WL 1173043, at *7 (S.D. Ohio Mar. 6, 2018).

proceeding, it may not apply this privilege to statements made outside of it. Rather than extend absolute privilege, courts may apply qualified privilege to statements made by a complainant to a small circle of friends and colleagues about the underlying sexual misconduct.

In a decision later affirmed by the Sixth Circuit Court of Appeals, a federal judge in Ohio reasoned that it was not “in the public interest” to subject a reporting party to a defamation claim when “speaking privately about their experiences” with a roommate or close friend, particularly where the respondent had admitted to much of the misconduct.¹⁸⁴ Dismissal was appropriate on qualified privilege grounds, “even in the absence of certainty with regard to good faith” to facilitate the ability of victims of sexual assault to speak privately about their experience or seek necessary medical treatment or counseling.¹⁸⁵

The Sixth Circuit affirmed that qualified privilege provided the appropriate level of protection for these conversations, considering that “[p]rivate statements to friends are not the type of utterances commonly thought of as giving rise to defamation claims.”¹⁸⁶ The court acknowledged “the risk that victims of sexual assault could be dissuaded from sharing their experiences—and so from seeking support, justice, and treatment—by looming defamation suits.”¹⁸⁷ But it declined to extend absolute immunity to private conversations and affirmed the lower court’s application of qualified privilege, holding that a complainant’s statements made outside the disciplinary proceeding to friends and roommates about the assault did not have a “reasonable relation” to the disciplinary proceedings to encompass them under absolute immunity.¹⁸⁸

184 *Doe v. Univ. of Dayton*, No. 3:17-CV-134, 2018 WL 1393894, at *5 (S.D. Ohio Mar. 20, 2018), *aff’d*, 766 F. App’x 275 (6th Cir. 2019) (“It cannot be that when someone is involved in sexual activity, which arguably turns into unwanted sexual contact, discussing this with a roommate or close friend would open them to a defamation claim. It cannot be in the public interest that when a student brings a claim of sexual assault in a proper college disciplinary proceeding and has *her claim vindicated*, she becomes a ripe target for a retaliatory defamation lawsuit.”).

185 *Id.* See also *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 758–59 (D. Md. 2015) (recognizing Maryland’s “conditional privilege” and noting, in dictum, that statements were likely privileged because “probably made in furtherance of her legitimate interest in personal safety and the safety of those closest to her.” These statements were not made “to a broad public forum such as the school newspaper or a social media network” but to “close friends and family” who were “rightly understood” to be part of her support system). But see *Schaumleffel*, 2018 WL 1173043, at *9. (a complainant’s statements “made to her friends immediately prior to her traveling to a hospital to have a rape kit taken and receive the ‘morning after’ pill” were not shielded by absolute or qualified privilege) and *Doe v. Washington Univ.*, No. 16SL-CC04392 (Cir. Ct., St. Louis Cty., Sept. 25, 2017) (unreported) (allowing defamation claims against complainant to overcome dismissal, without consideration of absolute or qualified privilege, based on text messages sent to a friend saying plaintiff had raped her). For a link to the *Washington University* opinion and further discussion, see Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 5, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [<https://perma.cc/3BLX-F55E>].

186 *Univ. of Dayton*, 766 F. App’x at 290.

187 *Id.*

188 *Id.*

While qualified privilege may apply to statements made to a small circle of friends in connection with the proceeding, it is unlikely to extend more broadly to statements made in public and on social media.¹⁸⁹ Indeed, even where a respondent is found in violation of campus policy, the complainant may risk defamation liability by identifying that respondent as a “rapist” through social media and other public communications.¹⁹⁰

In *Goldman v. Reddington*, a federal district court for the Eastern District of New York held that a complainant could potentially be sued for defamation *per se* under New York law for posting social media posts and text messages describing the respondent as a “violent rapist,” “rapist,” and “monster,” and sending disparaging messages to an employer. The respondent was previously expelled by a private university for sexual assault of the complainant, but criminal charges had been dropped. The complainant allegedly “published numerous statements, viewed by hundreds or thousands of people,” accusing the respondent of rape; if that accusation was untrue, the complainant could be liable for defamation because rape is a sufficiently “serious” crime to support a defamation *per se* claim.¹⁹¹

Notably, the *Goldman* court did not consider the campus’ finding of responsibility to be enough to establish “truth” and dismissed the complaint on the ground that the plaintiff had not pleaded the existence of a false statement of fact: the allegation that the county district attorney found no corroborating evidence or physical evidence of “any sexual contact,” consensual or nonconsensual, created an issue of fact about the truthfulness of the allegations sufficient to overcome a motion to dismiss the defamation *per se* claim. Because the parties were “worlds apart” in their positions on the facts, the court allowed the case to go forward.¹⁹²

4. Privilege and False Reports

As described in Part IV.B, qualified privilege will be overcome where the defamation plaintiff plausibly asserts the statements were made with “actual malice” or, in some states, “common law malice,” which considers the speaker or writer’s ill intent, rather than their regard for the truth.¹⁹³ In several published

189 For a broader discussion of defamation claims arising from survivors sharing stories in public forums including the Internet, rather than in civil or criminal litigation, see Weisbrot, *supra* note 5. See also *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 367 (S.D.N.Y. 2016) (dismissing Title IX claim brought by student against university after he was publicly identified as a “rapist” by his accuser, and noting, in dictum, that the defamation tort provides a remedy for “a student who is the victim of sexually charged slander”).

190 *Goldman v. Reddington*, 417 F. Supp. 3d 163, 169, 173 (E.D.N.Y. 2019).

191 *Id.*

192 *Id.* The facts alleged suggest that the finding of responsibility was made through a “single-investigator” model: The Title IX investigator “concluded that Goldman had violated the Student Code of Conduct, and he was expelled.” *Id.* at 168. But the court did not discuss what level of privilege would apply to statements made through such a process where the investigator also reaches the determination of responsibility. The issue of absolute or qualified privilege within the campus investigation was not decided in the *Goldman* case, perhaps because the allegedly defamatory statements were not made within the investigation, but only afterward in a public forum.

193 *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 718 (N.Y. 2015).

decisions, defamation plaintiffs who claim to have been falsely accused of sexual misconduct in campus disciplinary proceedings have overcome privilege this way.¹⁹⁴ A false accusation of a serious crime is defamatory; in turn, a claim that the complainant falsely accused the plaintiff of sexual assault may result in a court allowing the case to proceed forward.

In one example, a federal district court in Virginia allowed a respondent to proceed on a defamation claim against a complainant based on the allegation that the complainant made false accusations to punish him and other members of the football team.¹⁹⁵ The respondent also alleged that the complainant specifically asked university officials whether she should say she was raped before making the accusations. Under these allegations, the court declined to dismiss the defamation claim.¹⁹⁶

C. Other Protections for Parties and Witnesses

At the state level, lawmakers have expanded certain protections for parties and witnesses from defamation lawsuits. For example, campus disciplinary proceedings (at least those arising at public institutions) may be covered under Anti-SLAPP (“Strategic Lawsuit Against Public Participation”) legislation, which would provide students with an expedited procedure for dismissing vexatious claims and the potential for recovery of attorney’s fees, costs, and sanctions. California and Texas courts, in fact, have allowed reporting parties to apply their Anti-SLAPP statutes against defamation claims arising from the reporting of sexual misconduct at public universities.¹⁹⁷

Another approach, adopted by New York under its 2015 “Enough is Enough” campus sexual assault response and prevention law, is to reduce the risk of retaliation by making the confidentiality of student information the default in any

194 *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *9 (N.D. Ohio Feb. 13, 2018); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 213–14 (W.D.N.Y. 2013). *But see Doe v. Univ. of Dayton*, 766 F. App’x 275, 290 (6th Cir. 2019) (legal conclusions dressed as factual allegations cannot be the basis for a showing of malice sufficient to overcome a motion to dismiss a defamation claim).

195 *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *14 (W.D. Va. Aug. 3, 2017).

196 For other examples, see the cases cited supra note 152.

197 *Vander-Plas v. May*, No. 07-15-00454-CV, 2016 WL 5851913, at *1 (Tex. App. Ct. Oct. 4, 2016), reh’g denied Tex. App. Ct. Nov. 14, 2016, and review denied Tex. Feb. 24, 2017; *Laker v. Bd. of Trustees of Cal. State Univ.*, 32 Cal. App. 5th 745, 765 (Cal. Ct. App. 2019) (internal investigations by schools into claims of sexual and racial discrimination qualify as “official proceedings authorized by law” that receive the protections of the anti-SLAPP statute); *Doe v. Roe*, No. G057780, 2021 WL 118820, at *1 (Cal. Ct. App. Jan. 13, 2021) (statements to campus police and to university administrators at public university charged with investigating sexual misconduct fell within petitioning activity protected by the anti-SLAPP statute). See Alyssa R. Leader, *A “SLAPP” in the Face of Free Speech: Protecting Survivors’ Rights to Speak Up in the “Me Too” Era*, 17 FIRST AMEND. L. REV. 441 (2019). Scholars have also proposed expansion of federal and state whistleblower protections “to protect individuals who publicly disclose, either to their employer’s internal corporate HR department, their college or university’s Title IX office, or to the public, that they have experienced sexual violence.” Kendra Doty, *“Girl Riot, Not Gonna Be Quiet” — Riot Grrrl, #MeToo, and the Possibility of Blowing the Whistle on Sexual Harassment*, 31 HASTINGS WOMEN’S L.J. 41, 65 (2020).

legal “proceeding” arising from campus discipline.¹⁹⁸ In building such protections, however, lawmakers should be careful to include defamation actions within the “proceedings” covered under the confidentiality law.¹⁹⁹

State court judges and lawmakers may also consider revisiting the intracorporate communications no-publication rule, which has been raised as an alternative to the qualified privilege for shielding statements made within a campus sexual assault grievance process. As Doris DelTosto Brogan writes, even if a defendant is entitled to invoke the privilege, they must expose themselves to the hazards of a trial: “Too risky for the entity, and even more daunting for the individual within the organization.”²⁰⁰ By covering statements made within the investigation and adjudication under the no-publication rule, the defamation plaintiff cannot use them to plead a prima facie case because there is no publication; as a result, parties and witnesses may be less afraid of retaliation and concern they will not be believed.²⁰¹

Ultimately, the strongest defense colleges and universities can offer to parties and witnesses from defamation lawsuits is an investigation and hearing that provides the respondent a meaningful opportunity to be heard. Due process and absolute privilege go hand in hand. As institutions adopt heightened due process or fair process protections in compliance with federal and state regulations, courts may correspondingly expand absolute privilege to the reporting parties and witnesses to those proceedings. This approach should benefit all parties, balancing the right of witnesses to be free of retaliation and fear of litigation, with a single, but full and meaningful, opportunity to be heard.

D. Antiretaliation Policies

Finally, postsecondary institutions should consider whether their existing antiretaliation policies protect parties and witnesses from potential defamation liability. Antiretaliation protections have been part of the Department of Education’s Title IX guidance for decades and have been expanded and clarified under the 2020 Title IX Final Rule.²⁰² Various forms of potentially retaliatory conduct could

198 New York Education Law section 6448 shields personally identifying information from disclosure “in any proceeding brought against an institution which seeks to vacate or modify a finding that a student was responsible for violating an institution’s rules” regarding a sexual misconduct violation. In comparison, Federal Rule of Civil Procedure 10(a) requires that “[t]he title of the complaint must name all parties.” Parties must specifically request (and, in cases involving student-on-student sexual misconduct, are usually granted) anonymity.

199 While most would interpret it as within the spirit of the law, New York Education Law section 6448 does not specifically prevent the naming of parties in court proceedings not seeking to vacate or modify a finding of responsibility.

200 Brogan, *supra* note 58, at 651.

201 *Id.* at 664–65. Brogan describes this rule as a kind of necessary legal fiction by which “there is no publication as defined in defamation law.” On balance, liability is foreclosed “because the important social interest of empowering organizations to discover and address internal wrongdoing outweighs the interest in providing a means to protect reputation.” *Id.* at 666.

202 U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE 17, 20 (2001); U.S. Dep’t of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 42–43 (Apr. 29, 2014);

foster defamation claims. Foreseeable examples include respondents or their advisors threatening complainants or witnesses with defamation lawsuits for any statements made during any investigation or adjudication process in advance of their participation. Likewise, reporting parties or their peers may “name and shame” those accused of harassment and violence publicly outside of the process. And, all sides may threaten to, or actually, release confidential information obtained through the investigatory or hearing process.

Considering these possibilities, a student may decide they do not want to face the risk of exposure, if not legal liability, through their involvement, and a campus cannot compel participation without violating Title IX’s antiretaliation prohibition. But an institution can address these fears by developing clear and consistent policies for handling retaliation within its Title IX process.

From the start of the process, parties and witnesses should be informed of their right to be free from intimidation, threats, or coercion from anyone, including the institution, “because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under Title IX.²⁰³ Within this broad prohibition, campuses may define specific examples of these rights, and the parties’ responsibilities toward one another, in their Title IX policies. Because retaliation policies must be applied equally to the parties, any examples used to educate students should be balanced to reflect potential misconduct by both respondents and complainants.

In these discussions, parties and witnesses can be alerted to applicable retaliation policies, and the broader risks present from disseminating confidential and private information. For instance, while these conversations may be difficult, students may benefit from guidance on their potential legal exposure from “unofficial reporting.”²⁰⁴ Institutional policy may cover certain behavior in this sphere through retaliation provisions, likewise addressed in section 106.71 of the Title IX Final Rule. But respondents may be able to bring a private cause of action for defamation against such posters, be they parties, witnesses, or friends, independent of any college process. As described above, such civil proceedings are generally outside the scope of college jurisdiction or responsibility, but students participating from all sides may benefit from education (ideally before the content is posted) for parties to understand the ramifications of such actions.

Plainly, a campus cannot impose a blanket prohibition on the threat or actual filing of defamation litigation—that would chill First Amendment rights protected under the Final Rule²⁰⁵—but the campus can make clear that such threats or

34 C.F.R. § 106.71 (2020).

203 34 C.F.R. § 106.71(a).

204 Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo ERA*, 2019 U. Chi. Legal F. 273, 297 (2019) (“In an ironic twist, a survivor who eschewed formal reporting channels may ultimately find herself in a courtroom, telling her story under the most formal conditions possible, having expended enormous resources along the way in exclusive service of beating back a claim that she lied about her abuse.”).

205 34 C.F.R. § 106.6(d) (2020).

filings could be grounds for conduct charges if they tend to show an intention to intimidate a party or witness seeking to participate in the process.²⁰⁶ Likewise, a campus would not be engaging in retaliation if it brought conduct charges against a student for making a “materially false statement in bad faith” during the grievance proceeding.²⁰⁷ But the simple fact that a student was found not responsible would not, on its own, be sufficient to conclude that any party made a materially false statement in bad faith.²⁰⁸

Another issue to address from the start is confidentiality, which is guaranteed under Title IX, subject to the various exceptions described in the Final Rule.²⁰⁹ An institution can set reasonable rules applied to all parties regarding the protection of confidentiality, including asking parties and advisors not to disclose any relevant information directly related to the allegations obtained through the investigatory process.²¹⁰

The parties’ advisors may also be notified regarding the scope of their responsibilities, including the antiretaliation rules, when they enter the process. Advisors can be advised that, even if they are attorneys, no duty of “zealous advocacy” is inferred or enforced within their role in this context, and the institution’s grievance procedure prohibits the treatment of parties and witnesses “in an abusive, intimidating, or disrespectful manner.”²¹¹ The Department of Education allows campuses to enforce rules of decorum regarding advisor behavior, including through the removal of advisors from their role.²¹²

Advisors who are attorneys may also be notified that the institution expects advisors to understand their ethical obligations under the American Bar

206 85 Fed. Reg. 30026, 30296 n.1161 (May 19, 2020) (noting that “abuse of speech unprotected by the First Amendment, when such speech amounts to intimidation, threats, or coercion for the purpose of chilling exercise of a person’s Title IX rights, is prohibited retaliation.”).

207 34 C.F.R. § 106.71(b)(2).

208 85 Fed. Reg. at 30537.

209 34 C.F.R. § 106.71(a).

210 In the Preamble to the Title IX Final Rules, the Department of Education indicates that the parties, advisors, and the institution may enter an agreement not to discuss information that does not consist of the allegations under investigation, including evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation, or the investigative report summarizing relevant evidence sent to the parties and their advisors. 85 Fed. Reg. at 30295. Any such agreements should be entered voluntarily, and parties cannot be compelled to enter them as a condition of receiving the evidence gathered or investigative report. Whether such agreements, in turn, would amount to “prior restraint” when imposed by a state institution remains an open question; as the Sixth Circuit Court of Appeals has recently written, it cannot identify “any cases holding that a non-disclosure agreement alone (as opposed to an injunction enforcing one) amounts to a prior restraint.” *Ostergren v. Frick*, No. 20-1285, 2021 WL 1307433, at *6 (6th Cir. Apr. 8, 2021). An agreement entered voluntarily (that is, without “a *unilateral* command”) is more likely to survive constitutional scrutiny. *Id.*

211 85 Fed. Reg. at 30319.

212 *Id.* at 30320.

Association's Model Rule of Professional Conduct 2.1, which states that attorneys, in giving advice, "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."²¹³ Such considerations would include a responsibility not to use the conduct or legal process to advance vexatious claims and litigation but more broadly would promote the institution's educational mission and the goals of the grievance process of ensuring equal access to education without discrimination on the basis of sex.

In sum, institutions of higher education should take affirmative steps to address the impact of defamation claims, both threatened and realized, on their campus Title IX process. They must balance the rights of accused persons to clear their name and participate in a fair and equitable process while ensuring that no party or witness suffers retaliation for giving testimony or evidence in the investigation or hearing. Such strategies include the adoption of rigorous due process standards to bolster the "quasi-judicial" nature of the campus proceeding; the implementation of clear retaliation policies and confidentiality expectations; and education on the scope of these policies for parties, witnesses, and advisors of choice.

VI. Conclusion

This article has explored several decades of case law surrounding defamation claims brought against colleges, universities, and members of their communities, and come to two major conclusions. The first is that the various privileges and immunities afforded to postsecondary institutions, whether through state tort claim immunity acts or common law privileges, have largely taken the sting out of the defamation tort within the higher education context. Some of these make the declarant absolutely shielded from liability, and others place a hard burden on plaintiffs to show actual malice in the making of the statement.

The second point, however, is that the current state of the law insufficiently protects the interests of participants in sexual misconduct investigations and adjudications regulated by Title IX and other federal and state laws. This article has proposed that statements made within those processes should be treated the same as those made within other "quasi-judicial" and judicial proceedings and be shielded from defamation suit. The rationale, as adopted in courts in Connecticut, Indiana, Illinois, Ohio, and Pennsylvania, is that without this privilege, participants will justifiably fear retaliation from making reports and giving statements within those processes. Moreover, the heightened level of due process afforded to parties within those proceedings mitigates the risk that the parties will not have a fair hearing on the merits on campus. Courts should not require a student to put on their case again in open court, possibly without their institution's support, after undergoing the rigors of a campus investigation.

213 ABA Model Rule of Prof. Conduct 2.1: Advisor, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/.

*Review of Jeffrey Selingo's***WHO GETS IN AND WHY:
A YEAR INSIDE COLLEGE ADMISSIONS**

ELIZABETH MEERS*

INTRODUCTION

A college or university attorney might fear that a book promising an inside view of admissions by an award-winning journalist could be effort by a muckraker to expose corruption and create scandal. Although Jeffrey Selingo's book has moments of cynicism, on the whole he takes a higher road. While he is critical of hypercompetitive admissions and proposes ameliorative measures to be taken by colleges, universities, and the federal government, his principal aim is to inform high school students and their parents about the process so that they can be better equipped to find colleges best suited to the student and family.¹ His welcome message is that "plenty of schools offer a top-notch education and have high acceptance rates" and that students and families should avoid the "mythical quest to get into the rights schools at any cost."² The book is a readable analysis of the complex dynamics of college admissions, with suggested remedies to simplify the process and increase transparency, fairness, and access. The book will be interesting and useful, whether one is a lawyer advising colleges and universities on admissions and financial aid, a college or university attorney focused on other areas of the institution, a parent of a college-bound student, or someone simply curious about the way the process works. This review focuses on topics likely of greatest interest to college and university attorneys, regardless of whether they have children in the next cohort of undergraduate applicants.

I. Scope of Book

Selingo researched his book from the fall of 2018 through 2019, prepandemic. The book was published in 2020, and he updates the narrative with a preface focused on COVID-19. He mentions trends such as "test-optional" policies, but says nothing about the legislative and regulatory pandemic relief measures or the refund class actions that students filed against a number of institutions in the wake of the transition to online courses. He concludes that "[t]he underlying process

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1 Selingo focuses on undergraduate admissions and often uses the term "college" to refer not only to four-year institutions, but to the undergraduate component of universities. This review adopts the same usage.

2 JEFFREY SELINGO, *Who Gets In and Why: A Year Inside College Admissions* 5 (2020); see *id.* at 55.

that drives the selection machine at an elite college . . . remains in place.”³ Yet the full effects of the pandemic on the college admissions process, various types of financial aid, and enrollments at different kinds of colleges and universities remain to be seen.⁴

Seligo structures his book around the traditional admissions cycle—“Fall: Recruitment Season,” “Winter: Reading Season,” and “Spring: Decision Season.”⁵ While cautioning that the division “is not a reflection of the actual educational quality of the school,” he categorizes colleges as “sellers”—the “haves” of admissions—and “buyers”—the “have-nots.”⁶ He similarly characterizes students as two types—“drivers” and “passengers”—those who “start[] early as voracious consumers of information” and those who go “along for the ride.”⁷ Much of his book is designed to help “drivers” better map their journeys and encourage “passengers” to take the driver’s seat.

Seligo received permission from Davidson College, Emory University, and the University of Washington to sit in on their admissions processes for a year—a seat that even most college and university lawyers have not occupied. Lafayette University also gave Seligo access to its process for financial aid awards. In addition to following these institutions, Seligo accompanies three high school students on their college searches.

Some of the most intriguing parts of *Who Gets In and Why* are Seligo’s historical perspectives on the admissions process. For example, he recounts Bill Royall’s impact on institutional marketing, the origins and consequences of *U.S. News & World Report* college rankings, the rise of “enrollment management” and the application of *Moneyball*-type analytics to recruitment and admissions, and the trend to contract with vendors to transform college tours from a “death march” to an experience of “storytelling” and “authenticity.”⁸ College and university lawyers who would like more background on the mechanics of the admissions process may learn from those sections.

II. Legal Issues

Although Seligo does not focus on legal issues, he refers to various legal matters that have shaped higher education admissions in the context of his overall description and analysis of the admissions process. He highlights three significant legal developments:

3 *Id.* at xii.

4 An update based on the fall 2020 semester appears in Scott Jaschik, *Admissions Have and Have Nots*, *INSIDE HIGHER ED*, Jan. 11, 2021, <https://www.insidehighered.com/admissions/article/2021/01/11/admissions-cycle-favors-institutions-prestige-and-money>.

5 SELINGO, *supra* note 2, at ix.

6 *Id.* at 48–49, 51.

7 *Id.* at 52.

8 *Id.* at 239 (internal quotation marks omitted).

Antitrust investigations: Selingo notes the U.S. Department of Justice (DOJ) investigations and lawsuits involving the “Overlap Group” and the National Association of College Admission Counseling (NACAC) for alleged anticompetitive behavior. The DOJ alleged that the Overlap Group engaged in price-fixing in financial aid awards, and although Selingo does not mention the legal outcome, the litigation resulted in settlements with several universities and a subsequent, limited legislative exemption from antitrust laws.⁹ The DOJ alleged that the NACAC improperly “banned schools from offering incentives to encourage students to apply early decision or continuing to recruit applicants after the May 1 decision deadline.”¹⁰ As Selingo reports, the association modified its rules in response to DOJ’s actions.

Fraud: Selingo mentions the “Varsity Blues” scandal as a starting place for a broader discussion of the role of athletics in admissions. Like colleges and universities, he condemns the “out-right cheating, stunning in both its audacity and sprawling scale.”¹¹ While colleges and universities have improved internal controls to avoid such misconduct in the future, Selingo laments that Varsity Blues had a counterintuitive result—reaffirming the belief of many parents and high school students that going to a brand-name college matters because celebrities and other well-to-do parents engaged in fraud and other criminal conduct to get their children into such schools.

Diversity: Selingo devotes much of *Who Gets In and Why* to issues of access to higher education. He begins with the historical context of the gradual expansion of higher education in the United States from “preserving the admission of white men”¹² to the pending litigation over Harvard University’s race-conscious admissions process to foster student body diversity.

Selingo refers only in passing to race-neutral alternatives to race-conscious admissions. He observes that under state law the University of Washington cannot use race or ethnicity as a consideration in admissions. Instead, the university employs a “personal score [that] allows creativity in improving racial diversity by using criteria that are often alternatives to race—students’ socioeconomic profiles and the hardships they have overcome.”¹³

In accordance with U.S. Supreme Court precedent, many colleges and universities have adopted a “holistic” approach that includes consideration of race among other characteristics in the admissions process. Selingo observes that “[w]hen it comes to the diversity of elite college campuses, students of color and first-generation students receive the most attention these days. But colleges are also struggling to maintain a gender balance. . . .”¹⁴

9 See 15 U.S.C § 1 note (Extension Relating to the Application of the Antitrust Laws to the Award of Need-Based Educational Aid).

10 SELINGO, *supra* note 2, at 254.

11 *Id.* at 146.

12 *Id.* at 87.

13 *Id.* at 97.

14 *Id.* at 216.

Selingo criticizes “holistic admissions” as a “cloak . . . nearly ubiquitous among selective schools.”¹⁵ Perhaps reflecting his own journalistic desire to search out facts, he observes that “[h]uman beings like certainty and admissions procedures provide anything but.”¹⁶ “Affirmative action,” he contends, “is just another way that holistic admissions have helped colleges create a black box that only they can see inside.”¹⁷

Selingo emphasizes the differences in access to higher education embedded in American society. “We like to talk about our higher education system as the linchpin of meritocracy. But . . . it never was that, and likely never will be.”¹⁸ “To put it in blunt terms: upper-middle-class and wealthy kids search for the perfect fit; poor and working-class kids usually don’t have choices or don’t go to college at all.”¹⁹ Noting that government in the United States generally funds public schools through property taxes, Selingo agrees with a former admissions director for the Massachusetts Institute of Technology who observed that “most of the real screening for selective colleges is rooted in the home and school environment of children from infancy on.”²⁰ Ironically, much of Selingo’s book seems geared to helping well-to-do families find the right fit with less anxiety.

Selingo criticizes two “hooks that . . . perpetuate a culture of privilege and entitlement among students at selective colleges: legacies and athletics.”²¹ He notes that “[t]o many, college admissions has turned into a zero-sum game,” but he explains that “[t]he reality is that two applicants are rarely, if ever, pitted side by side.”²² As an exception to this general rule, he contends that “[o]n campuses where the competition to get in is stiff and seats severely limited, admissions is often turned into a zero-sum game because of athletics.”²³ He also argues that research shows that legacies are not as academically qualified as other applicants and that consideration of legacy status does not affect alumni contributions.

Selingo focuses a chapter on the final stage of the admissions process, dubbed “shaping the class” or “lopping.”²⁴ He observes, “This is the break point between fair and unfair, between a selection based on some measure of traditional criteria and one based on a variety of other factors: money, race, gender, and major.”²⁵ In explaining why admissions sometimes seem irrational, Selingo observes that

15 *Id.* at 10; *see id.* at 116.

16 *Id.* at 10.

17 *Id.* at 113.

18 *Id.* at 8.

19 *Id.* at 63.

20 *Id.* at 167 (QUOTING BRAINERD ALDEN THRESHER, *COLLEGE ADMISSIONS AND THE PUBLIC INTEREST* (1966)) (internal quotation marks omitted).

21 *Id.* at 147.

22 *Id.* at 6–7.

23 *Id.* at 155.

24 *Id.* at 205–06 (internal quotation marks omitted).

25 *Id.* at 205.

“[c]ollege admissions is not about you, the prospective student or parent of a student, it’s about the college. It’s not about being ‘worthy,’ per se, it’s more about fitting into a college’s agenda, whatever that might be.”²⁶ He observes that “[l]egacies, children of faculty and staff, and applicants under the watchful eye of a college’s president or fund-raising office usually receive their biggest boost” at the final stage.²⁷ In addition, he comments that “[t]his is where racial and ethnic diversity comes into play”,²⁸ but he does not offer support for the point. He notes that “[t]he selection process at top colleges is particularly tough on qualified women. That’s especially the case in regular decision when colleges might need to make up for shortages of men from early decision, when women are more likely to apply”²⁹

Discussing the role of a family’s ability to pay, he criticizes colleges that “claim they’re ‘need blind’ in making admissions decisions, but . . . give students only a fraction of the money a federal financial formula or the institution’s own aid recipe determines a family can afford to pay for college”—a result known as “gapping.”³⁰ He highlights “need-aware colleges [that] typically provide financial aid that satisfies a student’s requirements, without a gap,” considering it “fairer to reject a student than accept them along with a \$20,000 bill they can’t really pay.”³¹

III. Call for Change

Selingo argues for more and earlier transparency about the cost of college—and more and earlier attention to the cost of undergraduate education on the part of high school students and their parents. He observes, “Schools want to offer enough money to lure students away from other schools where they were also accepted. But they need to collect sufficient tuition revenue to operate, too. Figuring out that sweet spot is the job of *Moneyball*-inspired quants who have brought sophisticated statistical approaches from Wall Street and Fortune 500 companies to higher education.”³²

Selingo critiques the process for financial aid awards and notes a few government efforts to provide additional consumer information. He points out that “[u]nlike the government-required forms that spell out the details of a home mortgage, there is no common document that colleges must send to explain what you’ll be paying and how.”³³ And he warns that “half of colleges practice what is known as front-loading—giving bigger grants to first-year students than to everyone else.”³⁴ He objects that “[i]n the search for a college, the real cost of the

26 *Id.* at 10.

27 *Id.* at 206.

28 *Id.* at 207.

29 *Id.* at 216.

30 *Id.* at 211.

31 *Id.* at 212.

32 *Id.* at 221.

33 *Id.* at 225.

34 *Id.* at 226.

purchase is revealed only at the back end of the process instead of at the front, unlike most big-ticket items we buy.”³⁵ He notes that the federally mandated net-price calculators “help families estimate what they might pay . . . , but the results don’t usually take into consideration merit aid that is a significant chunk of a financial aid award at many schools.”³⁶ He also highlights the U.S. Department of Education’s College Scorecard, which “allow[s] students to take a more granular look at what graduates earn and how much debt they take on broken out by academic program, not just the college they attend.”³⁷

Selingo closes his book with a chapter on “Charting the Future.” He comments that “[c]olleges and universities operate like a cartel.”³⁸ He observes that “[u]nlike in most other industries, a new entrant can’t knock off established players.”³⁹ Given the number and variety of higher education institutions, it is hard to see how such a cartel would operate. Surely barriers to new higher education institutions are substantial, requiring significant time and capital to hire faculty and staff, acquire facilities and technological infrastructure, and develop educational programs and marketing and recruitment tools; to obtain education licensure, accreditation, and eligibility for federal student financial aid; and to recruit, admit, and enroll students. But those barriers have not precluded nonprofit, public, and for-profit start-ups and innovative transactions, to say nothing of the less regulated service providers that have sprung up to offer a wide range of support to higher education institutions as well as courses directly to consumers.

Selingo predicts that “gradual changes in admissions are coming, driven by teenagers, the government, and colleges themselves.”⁴⁰ He warns that “the federal government has opened up the floodgates to potentially even more aggressive sales pitches from colleges” by forcing NACAC to repeal its guidelines, which it had “designed to protect students from being poached by schools with a vested financial interest in filling their classes.”⁴¹ He also highlights “the declining significance of standardized test scores”⁴² in college admissions. (Indeed, the pandemic-inspired flight from standardized tests has resulted in a surge of applications to selective schools.⁴³) He emphasizes the changing demographics of the United States, with fewer high school graduates, particularly in the Northeast and Midwest, beginning in 2026 and proportionately more Latino and first-generation college-bound students.

35 *Id.* at 227–28.

36 *Id.* at 230.

37 *Id.* at 245–46.

38 *Id.* at 253.

39 *Id.*

40 *Id.* at 254.

41 *Id.* at 254–55.

42 *Id.* at 255.

43 JASCHIK, *supra* note 4.

Selingo predicts that “[h]igher education in the United States is increasingly headed toward even more of a two-tier system, with accelerating polarization between the wealthiest colleges and the rest.”⁴⁴ He notes that “[a]bout a dozen colleges have closed each year since 2015—double the number at the beginning of the century—a trend that, along with mergers, is projected only to increase.”⁴⁵ While “buyers” are pressed to meet enrollment goals, the challenge for “elite campuses will be . . . to enroll the significant numbers of low-income, first-generation, and minority students coming down the pike.”⁴⁶ Whereas colleges and universities, in order to elicit government support, often argue that higher education is a public good rather than a private benefit, Selingo turns the argument into one for access: “After all,” he observes, “colleges are not another set of private clubs but rather a public good that receive billions in tax breaks because of their role in serving broader society.”⁴⁷

Selingo “imagine[s] a more revolutionary overhaul.”⁴⁸ He notes the “popular suggestion” for an admissions lottery,⁴⁹ but does not identify any arguments against such a process, including intrusion on the academy’s institutional autonomy and recognized right to choose “who may be admitted to study.”⁵⁰ He raises a matching system such as the rank-order system used for medical residencies, but recognizes that to mount a national system would be “a daunting task and . . . probably wouldn’t pass muster with federal antitrust lawyers”⁵¹ Revealing himself as a devotee of Adam Smith, he posits a more efficient marketplace for admissions: “a national clearinghouse created by colleges or another entity, such as the U.S. Department of Education” that would provide an open exchange of information between high school students and colleges and universities.⁵²

Dialing back his imagination, Selingo urges colleges to make four changes in their admissions processes: (1) eliminate binding early decision, which “rushes a process that should be a journey of discovery and reflection for teenagers and their families”;⁵³ (2) redesign the application to focus on key considerations (primarily high school courses and grades), including forcing changes to the Common Application; (3) for selective colleges, expand class size, including with more federal support for low- and middle-income students, reciprocated by expansion of the range of institutions considered by college-bound students; and (4) allow high school students, early in their college search, to see the total price that they would likely pay, including through a searchable database of financial aid offers.

44 SELINGO, *supra* note 2, at 256.

45 *Id.* at 257.

46 *Id.*

47 *Id.*

48 *Id.* at 258.

49 *Id.*

50 *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., with Harlan, J., concurring).

51 SELINGO, *supra* note 2, at 258.

52 *Id.* at 260.

53 *Id.* at 261.

IV. Takeaways

Who Gets In and Why is worth a few hours of precious time for college and university attorneys who want a fuller understanding of the admission process. Given his intended audience, it is understandable that Selingo does not dwell on legal aspects of college and university admissions.

Although some of Selingo's proposed reforms seem flights of fancy, some steps that he suggests, such as a mandatory uniform financial aid disclosure form, have been publicly debated. It is possible that Congress or the Biden Administration will take steps along those lines. But most of Selingo's ideas would be policy decisions on the part of colleges and universities. A few institutions have experimented with elimination of binding early decision, only to revert to it under competitive pressures.⁵⁴ Given Selingo's acknowledgment that each college has its own priorities for selection of an incoming class, it seems unlikely that the Common Application would be streamlined to the extent he suggests; if it were, colleges would likely expand supplemental questions relevant to their particular criteria. As Selingo notes, a few selective colleges have expanded their class size in an effort to foster access and diversity, but there may be legal and regulatory constraints, as well as financial, geographic, and other practical limits, on their ability to increase their residential campuses, particularly during the pandemic. Certainly, the pandemic has brought home more powerfully than ever the racial, ethnic, and economic disparities endemic in our society, including in access to higher education. Colleges and universities are acutely aware of those structural problems and increasingly purposeful in addressing them.

Selingo's book is not primarily intended as a policy white paper, and he does succeed in his basic purpose—to explain college admissions in a way that should help high school students and their families gain a fuller understanding of the process and tailor their college searches accordingly. Selingo's guidance in itself may help promote the access to higher education that he, like colleges and universities, hopes to increase.

⁵⁴ Contrary to Selingo's hopes, in the fall of 2020, apparently thanks to test-optional policies, many selective institutions not only experienced a leap in applications, but increased the number of early decision admissions. Jaschik, *supra* note 4.

Review of Michael A. Olivas's

PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA

SHOBA SIVAPRASAD WADHIA*

Perchance to DREAM: A Legal and Political History of The DREAM Act and DACA (NYU Press, 2020) traces the history of the DREAM Act and DACA, with a detail and experience that only Professor Olivas can bring. The book is comprehensive and a must read for understanding the location and scope of solutions for immigrant youth who call America home but who, for more than a decade, have lived in limbo under a form of prosecutorial discretion and under an administration that has wavered on their fate. With deep expertise in higher education and immigration, Professor Olivas is the ideal historian to narrate the story of the DREAM Act and DACA. His credibility and authority to write such a book are clear, as the reader considers the first step to legally recognizing the rights of children to attend school without regard to their status movement that has followed in the post-K–12 space.

Divided into seven chapters, *Perchance to DREAM* commences with college residency, describing its legal history and significance for undocumented students. The second chapter covers the state DREAM Acts legislation and litigation comprehensively, and really shows how states worked to help or derail opportunities for undocumented kids in higher education. In chapter three, Professor Olivas covers the federal action around the Development, Relief, and Education for Alien Minors (DREAM) Act, a bill that has been introduced in every Congress since 2001, and if enacted would provide a legal pathway and eventual citizenship to qualifying noncitizens who entered the United States as minors. In chapter four, Professor Olivas takes the reader through the politics of the DREAM Act and the failure to move it past the finish line when a vote to move the bill forward was taken in 2010.

Chapter five of *Perchance to DREAM* centers on the DREAM Act and prosecutorial discretion, an issue I have sat with for some time. Appropriately, Professor Olivas begins with the immigration case of the late Beatle, John Lennon, and the plight by his attorney, Leon Wildes, to secure a form of prosecutorial discretion known as “deferred action.” He describes the evolution of deferred action, and how it served as the foundation for Deferred Action for Childhood Arrivals (DACA), a policy enacted in the Obama administration that allows certain individuals who arrived in the United States as youth to request deferred action and work authorization.

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The chronology of *Perchance to DREAM* is significant and communicates the relationship between the demise of the DREAM Act and the birth and endurance of DACA. Professor Olivas also laments the role DACA could have played in the national discourse: “DACA was cut down in its prime, and instead of morphing into a significant playbook for a form of comprehensive immigration reform, it became a pawn in national politics” (p. 81). Professor Olivas also explains how DACA has been challenged during the Trump administration.

In *Perchance to DREAM*, Professor Olivas details undocumented lawyers, DACA, and occupational licensing in chapter six, which serves as a treatise on the licensing of undocumented and DACA-mented people in the United States. I am aware of no other monograph that offers a national picture of the licensing requirements laid against the national backdrop.

Finally, the book includes several appendices that will long serve as a rich resource to those studying the history of and relationship between states and state laws and undocumented college students.

Professor Olivas is the author of more than one dozen books, but *Perchance to DREAM* is special, binding together his life’s work and commitment to immigrant youth, starting with the Supreme Court decision in *Plyler v. Doe*. The impact of the book will be tremendous as a new administration and Congress decide how to protect immigrant youth and their families moving forward.