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Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom

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POLITICAL INTERFERENCE IN LAW SCHOOL CLINICAL PROGRAMS: REFLECTIONS ON OUTSIDE INTERFERENCE AND ACADEMIC FREEDOM

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INTRODUCTION

Over the last twenty years, the academic curriculum of American law schools has been substantially changed through the development of law school clinical programs in which students work on actual legal cases and/or simulated problems for academic credit.[1] The move toward clinical education, particularly "live-case" clinics, resulted from a growing interest in delivery of legal services to the poor, law as a tool for social change in the 1960s, and a recognition that the traditional law school curriculum was not sufficiently focused on the development of problem-solving and other lawyering skills.[2] Interest in clinical education has also been fueled recently by the increased attention that the legal community and public generally have paid to issues of lawyer com-

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Professors James Stark of the University of Connecticut Law School, Elliott Milstein of American University Law School and Dean Rivkin of the University of Tennessee Law School made important contributions to the work of the Committee on Political Interference and provided helpful comments on an earlier draft of this article. Sections I and II of this article are adapted from *Political Interference in Law School Clinical Programs*, Tentative Final Draft, Report of the Committee on Political Interference, AALS Section on Clinical Legal Education (November 1982), which was jointly written by Professor Stark and this author. An earlier version of this article entitled *Law School Clinical Programs and Academic Freedom* was published in REGULATING THE INTELLECTUALS: PERSPECTIVES ON ACADEMIC FREEDOM IN THE 1980'S, (C. Kaplan & E. Schrecker, eds. 1983).Judy Fensterman, Christiana Clark, Diane Lutwak, and Ann Ryan, students at Brooklyn Law School, provided invaluable research assistance for this version.

[1] The terms "clinical programs" and "clinical education" in this article are meant to refer to "live-case" in-house clinical programs.

[2] *See generally* CLINICAL LEGAL EDUCATION: Report of the Association of American Law Schools—American Bar Association Committee on Guidelines for Clinical Legal Education (1980); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227 (1973);

petency and professional responsibility.[3] Clinical legal education is now part of the academic curriculum of most law schools.[4] Many law schools have "live-case" clinical programs which function as part of the law school in which students get academic credit for work on actual cases, under the supervision of attorney-teachers paid by the law school. The majority of these "live-case" clinics still handle public interest cases involving civil rights, civil liberties, poverty law, or environmental law.[5]

Since the early years of clinical education, state legislators and private groups have attempted to interfere with the curriculum of law school clinical programs, particularly at state law schools. The goal has been clearly expressed: to stop law school "live-case" clinics from involvement in public interest litigation. Recently there has been a resurgence of attacks on clinical programs through legislation, litigation, and public pressure, as part of a broader war on legal services and public interest legal groups spearheaded by the Reagan administration and supported by legislators, private right-wing groups, and corporations.[6] Forces external to the law school are thus attempting to restrict the content of clinic litigation and interfere with basic litigation decisions which are at the heart of the educational function of clinical programs. Because clinical programs operate as intrinsic parts of the overall educational program of law schools, these attacks have been perceived and articulated as an infringement of academic freedom, both "individual" academic freedom,[7] the ability of individual clinical teachers to teach what they want and carry on the litigation they need to teach with, as well as "institutional" academic freedom,[8] the law school's ability to regulate its curriculum and fulfill its educational task.

Meltsner & Schrag, *Report from a CLEPR Colony*, 76 COLUM L. REV. 581, 584-87 (1976); American Bar Association Section of Legal Education and Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools (1979); Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD. L. REV. 203 (1981), American Bar Association *Task Force on Professional Competence*, Interim Report (1982).

[3] *Clinical Legal Education*, supra note 2, at 7.

[4] *Id.*

[5] Appendices, *Selected Summaries of Law School Clinical Programs*, 29 CLEV. ST. L. REV. 735-815 (1980).

[6] *See Insult to the Poor and the Constitution*, N.Y Times, December 13, 1982, at A22; Pollack, *President Proposes the Elimination of Legal Services for the Poor*, (memorandum circulated to law schools, 1981).

[7] Schrecker, *Academic Freedom: The Historical View* in REGULATING THE INTELLECTUALS: PERSPECTIVES ON ACADEMIC FREEDOM IN THE 1980's (C. Kaplan & E. Schrecker eds. 1983) at pp. 25-43; Levinson, *Princeton versus Free Speech: A Post Mortem*, in REGULATING THE INTELLECTUALS at pp. 189-208; see *generally* H. EDWARDS & V. NORDIN, HIGHER EDUCATION AND THE LAW (1979) at 4.

[8] EDWARDS & NORDIN, supra, note 7, at 4. Although the term "institutional autonomy" is more precise, the terms "institutional autonomy" and "institutional academic freedom" are both used in this article. A recent spate of law review articles discuss the institutional autonomy aspect of academic freedom. See Finkin, *On "Institutional" Academic Freedom*, 61 TEX L. REV. 817 (1983); Katz, *The First Amendment's Protection of Expressive Activity*

In response to these attacks, efforts have been made to mobilize a national constituency of legal educators' and lawyers' groups. The Clinical Legal Education Section of the Association of American Law Schools, the membership organization of law schools, convened a Committee on Political Interference[9] in 1982 to investigate the problem. This committee's work has primarily involved the preparation of a report, which was written by Professor James Stark of the University of Connecticut Law School and this author as chair of the Committee. The report of the Committee on Political Interference, *Political Interference in Law School Clinical Programs*[10] (the *Report*), proposed that the American Bar Association (ABA) adopt an accreditation Standard linking law schools' affirmative protection of clinic independence from outside interference to law school accreditation. The *Report*, and the problem of political interference in law school clinical programs, have received national attention.[11]

The assertion by clinical law teachers of equal entitlement to the protection of academic freedom afforded regular law teachers is not entirely new, but the *Report* represents a significant effort to expand the reach of the concept to include a less traditional segment of legal academia. While clinical education is now a mainstay of American legal education, it has still not overcome its second-class status. Within many law schools, clinical programs are not perceived by deans and regular faculty to be as important as traditional classroom courses. Clinical work or methodology is not integrated into the regular classroom,[12] and

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in the University Classroom: A Constitutional Myth 16 U.C. DAVIS L. REV. 857 (1983); Tepker, *Title VII, Equal Employment Opportunity and Academic Autonomy: Toward A Principled Deference*, 16 U.C. DAVIS L. REV. 1047 (1983); Note, *The Challenge to Antidiscrimination Enforcement on Campus: Consideration of An Academic Freedom Privilege*, 57 ST. JOHNS L. REV. 546 (1983); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538 (1981); Yurko, *Judicial Recognition of Academic Collective Interests, A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473 (1980); Note, *Testing the Limits of Academic Freedom*, 130 U. PA. L. REV. 712 (1982).

[9] Although the Committee and the *Report* have used the term "political interference," this article uses the terms "outside interference" and "political interference" interchangeably.

[10] *Political Interference in Law School Clinical Programs*, Tentative Final Draft, Report of the AALS Section on Clinical Legal Education, Committee on Political Interference (November 1982). A copy of the *Report* is on file with the author.

[11] *See Limits Urged on the Litigation that Law Schools May Undertake in Clinics*, THE CHRON. HIGHER EDUC., January 26, 1983, at 8; *Report Scores "Political Interference" in Clinics*, NAT'L L.J., February 28, 1983, at 4; *Council States Policy on Clinic Interference*, SYLLABUS (American Bar Association Section of Legal Education and Admissions to the Bar, June 1983) at 4.

[12] See Amsterdam, *Clinical Legal Education—A Twenty-First Century Perspective*, __ J. LEGAL EDUC. ____ (forthcoming 1984); Michelman, Committee Report on Curriculum of Harvard Law School (1982); Munger, *Clinical Legal Education: The Case Against Separatism*, 29 CLEV. ST. L. REV. 715 (1980); Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980).

clinical teachers are not accorded equal status, salary, or treatment with the regular faculty.[13] Most clinical teachers are not on a tenure track, but have short term contracts or limited appointments.[14] Thus, there are frequently tensions between clinical teachers, deans, and regular faculty members, many of whom have mixed feelings about clinical education and the public interest content of much clinical work. In addition, "live-case" clinical programs are expensive, thereby severely taxing the resources of many law schools.[15] As a result of these financial burdens, as well as other factors, many law schools are now developing simulation programs in which students deal with hypothetical, as opposed to actual cases, or placement programs in which students are placed for supervision with lawyers outside the law school, as opposed to "in-house" clinical programs.

Because clinical education has a second-class status within legal education, it needs the "protection" afforded by academic freedom. Although this protection may be somewhat limited, since academic freedom has not historically protected all segments of the academy[16] but only the more established segments, it can have an important practical impact on the maintenance and expansion of "live-case" clinical programs. In addition, because the ideology of academic freedom plays an important legitimating role, the claim that clinical education is equally entitled to the protection of academic freedom can make a crucial link between the educational function of clinical and traditional classroom teaching, a link which could have profound implications for the form and content of legal education.

This Article examines the problem of political interference in law school clinical programs and its implications for academic freedom. The first section gives an historical overview of the problem of political in-

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[13] Watkins, *Teachers of Clinical Law Seek Recognition, Better Treatment*, THE CHRON. HIGHER EDUC., January 19, 1983, at 14; Gee, *Survey of Clinical Legal Education in* SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-79 (CLEPR 1979) at xvii; Tyler and Catz, *The Contradictions of Clinical Legal Education*, 29 CLEV. ST. L. REV. 693 (1980).

[14] Watkins, *supra* note 13. *See also* Report of the Clinical Faculty Group to the Personnel Committee on the Status of Clinical Faculty at New York University Law School, March 23, 1983, at 14-17 (on file with author).

On December 3, 1983, the Council of the ABA Section of Legal Education and Admissions to the Bar gave notice of its intent to adopt accreditation Standard 405 (e) on the status of law school clinical faculty. Standard 405 (e) provides that " (t)he law school shall afford to full-time faculty members whose primary responsibilities are in its professional skills program a form of position *reasonably similar* to those provided other full-time faculty members" (emphasis supplied). In August 1984, the ABA voted to approve 405(e) in a modified form. In the version that passed, the phrase "the law schools should afford" replaced "shall afford." 53 U.S.L.W. 2084 (Aug. 14, 1984). The impact of adoption of the standard on the status of clinical faculty at law schools across the country is unclear. *See A Clinical Tenure Track?* NAT'L L.J., January 23, 1984, at 4.

[15] *See* Swords & Walwer, *Cost Aspects of Clinical Education* in CLINICAL LEGAL EDUC., *supra* note 2, at 133.

[16] *See generally* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955); Schrecker, *supra* note 7.

terference in law school clinical programs. The second section summarizes the Report of the Committee on Political Interference. The third section considers the problem of political interference in law school clinical programs and the approach of the *Report* from the broader perspective of outside interference struggles, the particular problems of American legal education, and the interrelationship between "individual" and "institutional" academic freedom.

I. THE PROBLEM OF POLITICAL INTERFERENCE IN LAW SCHOOL CLINICAL PROGRAMS

Efforts by groups outside the law school to restrict the public interest content of law school clinical programs began as early as the 1960s when clinical legal education first developed. In 1968 two faculty members of the University of Mississippi Law School who taught a clinical program affiliated with North Mississippi Rural Legal Services were dismissed. Their dismissal resulted from pressure placed on the law school by members of the Board of Trustees and members of the state legislature who were unhappy with the legal services program, particularly the filing of a school desegregation suit.[17] State legislative hearings were held, and the Chancellor terminated the law school's agreement with legal services. The Chancellor then promulgated a rule that stated that "no person who is employed by the Rural Legal Services Program of the Office of Economic Opportunity shall be employed as a member of the faculty of the University of Mississippi nor shall the employment of any member of the faculty of the School of Law of the University of Mississippi be continued if such faculty member elects to be employed concurrently by the Rural Legal Services Program of the Office of Economic Opportunity."[18] The two law professors sued the University and Chancellor, the Dean of the Law School, and the Executive Secretary and members of the Board of Trustees of State Institutions of Higher Learning for violation of their civil rights.[19] They claimed that the law school had singled out the legal services program as the sole activity in which faculty members could not be employed outside their law teaching although it permitted other outside and part-time employment. The district court upheld the dismissal, but the Fifth Circuit reversed on the ground that the law school's imposition of different and more onerous restrictions than those imposed upon other law

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[17] Trister v. University of Miss., 420 F.2d 499 (5th Cir. 1969).

[18] *Id.* at 501.

[19] This suit was brought under 42 U.S.C. § 1983 which provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

professors in the same category violated plaintiffs' rights to equal protection.[20]

In 1969, a joint committee of the American Association of University Professors (AAUP) and the Association of American Law Schools (AALS) investigated the claims of political interference in the University of Mississippi Law School case. The committee issued a report which concluded that political pressure by members of the state bar, state legislators, and the governor's office caused the law school to sever its clinical affiliation with the legal services program on the ground that it had been involved in "civil rights activities," and to terminate illegally the contracts of the two professors who wished to remain connected with the clinic.[21]

Threats by state legislators in New Jersey and Connecticut to clinical programs at Rutgers Law School-Newark[22] and the University of Connecticut Law School[23] followed in the early 1970s. The Governor of Connecticut labelled the University of Connecticut legal clinic as "nothing more than an agency designed to destroy our government and its institutions" and threatened to cut off state funding.[24]

In 1975, a special appropriations bill was passed by the Arkansas legislature in response to controversial civil liberties litigation opposing the state handled by a law professor at the University of Arkansas in his private capacity, which made it "unlawful for any person employed by the School of Law of the University of Arkansas . . . to handle or assist in the handling of any lawsuit in any of the courts of this State or of the federal courts."[25] This bill was challenged by twenty-five members of the faculty of the law school, who sued the Board of Trustees of the University, the President of the University, and the Dean of the Law School.[26] The Arkansas Supreme Court held that the bill denied the plaintiffs equal protection since it was limited to certain categories of members of the faculty.[27] The appropriations bill expired at the end of the year and was not resubmitted.[28]

Over the last several years, political interference appears to be on

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[20] *Trister* at 504.

[21] *The University of Mississippi* AAUP BULLETIN (Spring 1970) at 75-86.

[22] Conversation with Professor Frank Askin, Rutgers Law School-Newark, June 30, 1982.

[23] Conversation with Professor Elliott Milstein, American University Law School, July 6, 1982.

[24] *Id.*

[25] Atkinson v. Board of Trustees of the Univ. of Ark., 262 Ark. 552, 554, 559 S.W.2d 473, 474 (1977).

[26] *Id.*

[27] *Id.* at 556, 559 S.W. 2d at 475. Ironically, the primary case on which the Arkansas Supreme Court relied was *Trister*, see text accompanying notes 17-20. Both the AALS and the Society of American Law Teachers (SALT) filed *amicus* briefs in support of the law professors challenging the bill.

[28] Telephone conversation with Professor Morton Gitelman, University of Arkansas Law School at Fayetteville (January 12, 1984.)

the rise, particularly in state law schools. The focus has been on clinics and other litigation enterprises engaged in public interest representation in such areas as civil rights, civil liberties, environmental law, and prisoners' rights.[29] These attacks have been directed at clinic litigation efforts perceived as threatening the financial or political interests of the state or private groups.

Legislators have attempted to restrict the types of cases which law school litigation programs at the Universities of Iowa, Colorado, and Idaho handle. Iowa's "in-house" Prisoner Assistance Clinic, Complex Civil Litigation Clinic, and Legal Services externship program were threatened with termination by a bill introduced in the 1981 legislative session by six members of the Iowa House of Representatives in retaliation for the clinic's successful prosecution of several large scale prison condition suits against the state penitentiary. The bill would have prohibited the expenditure of any state funds for the representation of clients in litigation against any governmental body, and specifically the representation of inmates, by persons associated with the law school's clinical program.[30]

A similar bill, introduced twice in the Colorado state legislature, was directed against a seminar on constitutional litigation at the University of Colorado Law School, taught by Professor Jonathan "Skip" Chase, in which students worked on civil rights cases. This bill, apparently a response to a lawsuit handled by Professor Chase which challenged a nativity scene, focused on him, not the seminar program, since it prohibited "law professors at the University of Colorado from assisting in

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[29] However, members of a civil rights group recently sued to prevent a clinic attorney from private *pro bono* representation of the Ku Klux Klan in a demonstration case on the ground that the use of state facilities in connection with this case violated state antidiscrimination statutes. Telephone conversations with Professor James Stark, University of Connecticut Law School (June 16, 1983 and July 3, 1984).

[30] Memorandum from Professor Barbara Schwartz, University of Iowa Law School to author (June 25, 1982) (on file with author). On February 12, 1981, House Bill #374 was introduced into the Iowa Legislature. The proposed bill, "relating to the use of educational funds under designated circumstances," would have effectively eliminated the legal assistance clinic at the University of Iowa Law School. The bill provided that:

> 1. Funds available to state educational institutions shall not be used to provide legal assistance to any person bringing a civil action against the state, a political subdivision of the state or an employee of the state or of a political subdivision acting in an official capacity.
>
> 2. The state board of regents shall not maintain programs and state funds shall not be used for programs providing civil legal assistance to inmates of the Iowa correctional system.

The bill did not make it out of committee. Subsequently, one of the sponsoring state legislators proposed an amendment to the Regent's appropriation bill, whereby "as a condition of the appropriation made in this paragraph, funds appropriated in this paragraph shall not be used for programs providing legal assistance to inmates of the Iowa correctional system." However, on May 15, 1981, this amendment was defeated by a 53-42 (and 5 abstentions) vote of the full house body. Telephone conversation with Iowa Legislative Service Bureau (September 30, 1983).

litigation against a governmental unit or political subdivision."[31] In 1981, this so-called "Skip Chase" bill passed both houses of the legislature but was postponed indefinitely.[32]

In Idaho, the Idaho House of Representatives voted to prohibit any public institution of higher education from offering "courses, clinics or classes in which a student assists or participates in any suit or litigation against the State, its agencies or its political subdivisions."[33] This measure was defeated in Senate Committee.[34] In Connecticut, a high-ranking state official threatened to introduce legislation to curtail the activities of the law school's criminal law clinic, which had successfully challenged a provision of Connecticut's death penalty statute.[35]

Outside interference has also resulted from litigation. The University of Tennessee's Law School clinical program was investigated by the University as a result of motions made by the State Attorney General to dismiss the clinic's application for attorneys' fees in a clinic civil rights case on the ground that clinic attorneys were state employees and that the fee request circumvened the budget process.[36] This led the university board of trustees to convene a special committee to study the clinic. This inquiry led to an unwritten "agreement" that the clinic would not initiate any "significant" suits against the state, and to the severance of the clinic from the legal services program with which it was previously joined.[37]

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[31] Telephone conversation with Professor Jonathan Chase, now Dean of Vermont Law School (July 7, 1982).

[32] House Bill #1315 was introduced in the State Affairs Committee of the Colorado House of Representatives on February 5, 1981. It provided that " (n)o employee or agent of the University of Colorado shall assist, represent or provide legal services to any person in any civil action against the state, any department or agency thereof, unless such employee or agent or the University of Colorado is a party in such action." The bill was reported out of the House Committee, and, introduced in the Senate, assigned to the Senate Judiciary Committee, reported out of committee but then postponed indefinitely. Telephone conversation with Karen E. Stewart, librarian, Colorado Legislative Bill Information Bureau (October 1, 1983).

[33] This bill, House Bill #800, was introduced in the Idaho House of Representatives on March 8, 1982. It "prohibited higher education faculty members and students from participating in actions against the state, its agencies or political subdivisions," and provided that "no institution of higher education shall offer courses, clinics, or classes in which a student assists or participates in suits or litigation against the state, its agencies or political subdivisions." On March 15, 1982, it passed with a 50-17 (3 abstentions) vote. Telephone conversation with Idaho Legislative Information Center (September 28, 1983).

[34] The Bill was referred to the Senate Judiciary and Rules Committee on March 16, 1982, but was defeated in the Senate Committee. Telephone conversation with Idaho Legislative Information Center (September 28, 1983).

[35] Telephone conversation with Professor James Stark, University of Connecticut Law School (June 16, 1983).

[36] Telephone conversation with Professor Dean Rivkin, University of Tennessee Law School (June 16, 1983).

[37] Telephone conversation with Professor Jerry Black, University of Tennessee Law School (June 20, 1983).

Attacks on a University of Oregon Law School clinic, the Pacific Northwest Resources Center, have been repeatedly mounted by private groups through the courts and through pressure on the State Board of Higher Education.[38] In one incident in 1981 the clinic, funded at that time by the National Wildlife Federation, angered powerful members of the timber industry by bringing a lawsuit to halt timbercutting practices in Idaho. Lawyers for the timber industry were able to question two clinical instructors, the dean of the law school, two former clinic students, and several university officials under oath concerning the clinic's relationship with the university, methods of clinic decision-making, and student supervision.[39] In addition, the timber groups pressured university officials and the Board of Higher Education to restrict the clinic's legal work and lobbied the legislature over the university's budget.[40] A recent attempt by one of the same private timber companies to harass the Oregon clinic in another environmental lawsuit spurred the Committee on Political Interference to enlist the AALS to file an *amicus curiae* brief on behalf of the plaintiffs. This brief argued that

> it will harm American legal education if the fact that a party is represented by a law school clinic can be used to divert the time and attention of the court from the merits of the litigation and to burden that party and the law school with annoying discovery and other wasteful pre-trial proceedings.[41]

Although there may be particular cases in which there is a conflict of interest between a state law school clinical program and a suit against the state, flat rules prohibiting a clinic program from suing the state *in all circumstances* are not sufficiently narrowly drawn and/or directed at specific conflict. Conflict of interest restrictions are for the benefit of the client, and following full disclosure to the client, the client may choose to continue with the representation. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), EC 5-21 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). In New Jersey, an Advisory Opinion of the State Executive Commission on Ethical Standards interpreted the New Jersey Conflicts of Interest Law to provide that " (a) state officer or employee may appear for or represent any person or party without limitation in a proceeding before a court of record, whether or not the state is a party, and regardless of whether or not it is an adverse party." Advisory Opinion No. 38, 105 N.J.L.J. 130 (February 11, 1980).

[38] *See generally Seeing the Forest for the Trees*, Willamette Week, December 29, 1980—January 5, 1981, at 3.

[39] Letter from Professor John Bonine, University of Oregon Law School, to Professor Elliott Milstein (November 12, 1982) (on file with author).

In July 1983, the Oregon Department of Justice issued an opinion letter which concluded that the handling of this case by the Pacific Northwest Resources Clinic did not involve the improper use of state funds, and that the University of Oregon was "acting for an educational purpose it is authorized to undertake." Letter from Donald C. Arnold, Chief Counsel, General Counsel Division, Oregon Department of Justice to William E. Davis, Chancellor, Oregon State System of Higher Education, and Max Simpson, Oregon State Representative (July 11, 1983) (on file with author).

[40] *Id.*

[41] Thomas v. Petersen, Civ. No. 82-2056 (D. Idaho 1982). Memorandum of Association of American Law Schools as *Amicus Curiae* with respect to Plaintiffs' Motion to Strike, at 2 (on file with author).

These instances of documented attacks against law school clinical teachers, and other faculty members who do public interest litigation, university administrators, and clinical programs share a common goal. They are determined efforts to restrict the content of the litigation which law school clinics and litigation enterprises handle. Individually and collectively, they constitute a significant chill on the educational independence of American law schools. As one clinical teacher has stated, "there is no question that we worry constantly that our willingness to represent unpopular clients and our success in suing governmental bodies will cost us our chances to provide high quality clinical training to our students."[42]

II. The Report on Political Interference

The Report on Political Interference in Law School Clinical Programs identified four different grounds on which outside interference with the operation of law school clinical programs is unwarranted and perhaps unlawful. First, outside attacks on law school educational programs threaten the institutional independence of law schools, their institutional academic freedom.[43] Second, these attacks undermine the academic freedom of individual clinicians in their capacity as teachers.[44] Third, externally imposed restrictions on law school clinics conflict with the ethical obligation of clinicians, as attorneys, to exercise independent judgment on behalf of their clients and to take controversial cases.[45] Fourth, interference with clinical curricula impinges upon protected first amendment[46] rights of associational and academic freedom, and raises serious constitutional problems.

A. *Institutional Academic Freedom*

As developed in the *Report*, external attacks on law school clinics constitute a serious challenge to the independence and institutional integrity of American law schools.[47] The choice of subject matter or emphasis, choice of the type of cases which the clinic will handle, and litigation decisions are important educational decisions. Law school faculties commonly review proposed subject matter guidelines for clinics, just as they review course coverage and catalog descriptions for substantive courses in their curricula. To the extent that outside individuals or groups interfere with this process, they are challenging perhaps the most critical academic function of law school faculties.

In 1966, the AAUP published a Statement on Government of Colleges and Universities. This policy states that "[w]hen an educational

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[42] Memorandum from Professor Barbara Schwartz, *supra* note 30.

[43] The Report at 3.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

goal has been established, it becomes the responsibility primarily of the faculty to determine appropriate curriculum and procedures of student instruction."[48] It states further that when "external requirements influence course content and manner of instruction or research, they impair the educational effectiveness of the institution."[49] Section V contains the following language:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances and for reasons communicated to the faculty.[50]

Outside political interference with law school clinical programs violates this policy statement and threatens the autonomy of law school faculties in designing high quality skills training programs for their students.

However, the institutional academic freedom issues posed by outside efforts to regulate legal educational curriculum are particularly complex because of the "outside" regulation which the ABA and other groups already exercise directly or indirectly. In recent years, for example, the Indiana Supreme Court and the South Carolina Supreme Court have adopted rules mandating extensive curricular requirements for students who wish to take bar examinations in those states, a development assailed by many law teachers.[51] In addition, several high-level committees of legal educators and the ABA Section of Legal Education and Admissions to the Bar have incurred criticism for their efforts to suggest or mandate skills training in American law schools.[52]

It has been argued that these outside efforts to regulate law school curriculum are different because their impetus is presumptively educational—to enhance the professional preparation of law students in the practice of law.[53] By contrast, the impetus for the outside attacks on clinical education is manifestly political and ideological. These efforts can result in restrictions on clinics which threaten the ability of law schools to provide first-rate skills training. In addition they can impair, however subtly, the ability of law schools to inculcate in students traditional values of zealous advocacy and professional independence. Outside political attacks on clinical programs thus pose dangers to the institutional independence of law schools—different in kind from forms of professional regulation.

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[48] AAUP Statement on Government of Colleges and Universities at 44 (1966).

[49] *Id.*

[50] *Id.* at 43.

[51] *See, e.g.*, NAHSTOLL, *Current Dilemmas in Law School Accreditation*, 32 J. LEGAL EDUC. 236, 241 nn.8,9 (1982).

[52] *Id.* at 241-42.

[53] The Report at 4.

B. *Individual Academic Freedom*

In addition to undermining the institutional autonomy of law schools, political interference with clinical programs threatens the academic freedom of individual clinical teachers. At the present time, AALS bylaws and ABA Standards both incorporate AAUP principles of academic freedom and tenure.[54] Under AAUP guidelines, a teacher is entitled to "full freedom in research and in the publication of the results" and "to freedom in the classroom in discussing his subject," as long as he is "careful not to introduce into his teaching controversial matter which has no relation to his subject."[55]

Neither the AALS nor the ABA presently has specific guidelines regarding academic freedom for clinical faculty. But, as argued in the *Report*,[56] clinical teachers are—first and foremost—teachers and should be recognized as such. Selection of individual cases to handle and methods of handling those cases, like the selection of casebooks and classroom teaching approaches, lies at the very heart of the educational function of clinical programs. So long as the decisions made by a clinical teacher reasonably serve that educational function, a judgment that only the law school faculty is capable of making, these decisions should be protected by academic freedom. This is true particularly since, to a greater extent than the decisions of classroom teachers, decisions made by clinical teachers are made in a public forum.

C. *Professional Responsibility*

Outside interference with clinical programs poses especially sensitive problems because clinical faculty act in a dual capacity, as teachers and as attorneys. Thus, in addition to the academic freedom issues raised by interference with clinicians' exercise of independent judgment and, particularly, the decision to undertake controversial cases, it was suggested in the *Report* that political attacks on clinicians may violate fundamental ethical principles including those contained in the ABA Code of Professional Responsibility which sets forth binding standards of conduct for lawyers.[57]

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[54] AALS BYLAWS, §6-8(d) states: "A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors."

The ABA Standards and Rules of Procedures for Approval of Law Schools contain *verbatim* the text of the 1940 AAUP statement of principles on academic freedom and tenure in Annex 1 to its rules.

[55] 1940 Statement of Principles on Academic Freedom and Tenure, in the *Report* at 5.

[56] The *Report* at 5.

[57] *Id.* at 5-6. Since the *Report* was written, the American Bar Association has replaced the ABA *Code of Professional Responsibility* (hereinafter Code) with the *Model Rules of Professional Conduct* (hereinafter Model Rules), 52 U.S.L.W.1 (August 16, 1983). At this time the Model Rules have not been adopted by any state. Nonetheless, provisions of both the Code and the Model Rules are cited here where applicable.

Interpretation of the Code of Professional Responsibility suggests that outside interference with a clinical teacher's legal decisions concerning the handling of clinic cases—decisions such as choice of parties, forum, and legal remedies—is prohibited.[58] In addition, Canon 5 of the code states the fundamental principle that "[a] lawyer should exercise independent professional judgment on behalf of a client."[59] The ethical considerations which explain these rules provide that a lawyer must "disregard the desires of others that might impair his free judgment."[60] Since "[n]either his personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client,"[61] a lawyer must resist employer pressures against independent judgment.[62] He "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."[63]

Another section of the code stresses that every lawyer should aid in making legal services fully available,[64] and, the accompanying ethical considerations require each lawyer to accept his share of the burden of rendering legal services in those matters unattractive to the bar in general.[65] Thus, a lawyer cannot justify refusal to handle cases on the ground of his "personal preference...to avoid adversary alignment against judges, other lawyers, public officials or influential members of the community,"[66] and cannot decline to handle legal matters which are "repugnant" because of "the subject matter of the proceeding, [or] the identity or position of a person involved in the case."[67] Similarly, an ABA ethical opinion on this issue states that

> [J]ust as an individual attorney should not decline representation of an unpopular client or cause, an attorney member of a legal aid society's board of directors is under a similar obligation not to reject certain types of clients or particular kinds of cases merely because of their controversial nature,

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[58] The *Report* at 6; *see* ABA Formal Op. No. 324 (1970); ABA Formal Op. 334 (1974).

[59] Code at Canon 5.

[60] *Id.* at EC 5-21; *see generally* Model Rules at Rule 1.7.

[61] Code at EC 5-1; *see generally* Model Rules at Rule 1.7.

[62] Code at EC 5-23; see generally Model Rules at Rule 1.7.

[63] Code at DR 5-107(B); *see generally* Model Rules at Rule 1.7.

[64] Code at Canon 2; *see generally* Model Rules at Rules 6.1, 6.2 and Comments.

[65] Code at EC 2-26; Model Rules at Comment to Rule 6.2.

[66] Code at EC 2-28; Model Rules at Rule 6.2 and Comment.

[67] Code at EC 2-29; *but see* Model Rules at Rule 6.2 (c) which provides that:

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as... the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

The Comment to Rule 6.2 states that "[a] lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant."

> anticipated adverse community reaction, or because of a desire to avoid alignment against public officials, governmental agencies, or influential members of the community.[68]

These principles have been held to apply equally to law school clinical programs.[69] In Informal Opinion No. 1208, the ABA Ethics Committee considered the ethical implications of law school guidelines which would bar clinics from suits against the state, as well as guidelines which would require prior approval for such suits from a clinic governing board on a case-by-case basis.[70] The opinion concluded that neither set of restrictions was ethically permissible on the ground that "[l]awyer-members of a governing body of a legal aid clinic should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases."[71] Thus, Opinion No. 1208 clearly suggests that law schools should resist efforts at interference with the attorney-client relationship when they arise.

D. *Constitutional Considerations*

The Report on Political Interference in Law School Clinical Programs argues that law school clinical programs are protected by the first amendment from state interference.[72] Outside interference with clinical curricula restricts law teachers' and law schools' rights of academic freedom as well as clients', teachers', and students' rights of association for the purpose of litigation. While any form of interference burdens the exercise of these rights, state legislation which conditions funding of state law school clinics on the non-exercise of these rights raises particular constitutional problems. Bills like those proposed in Iowa, Colorado, and Idaho impermissibly dictate the subject matter and content of law

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[68] ABA Comm. on Professional Ethics, Formal Op. 324 at 5 (1970).

[69] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1208 (1972), reprinted in INFORMAL ETHICS OPINIONS, Vol. II at 441.

[70] *Id.* at 442. This ethical opinion was written in response to threats made by the Governor of Connecticut to the University of Connecticut Law School clinical program in the 1970s. The opinion assumed that "the governing body of the law school clinic is a hierarchy consisting of the law school faculty and its committees and its Dean, the university administration and the university board of trustees. Some of the individuals in this hierarchy are lawyers and some are not." *Id.* The Guidelines for Clinical Legal Education note that "[t]he functioning of a [clinic] advisory group raises problems, however, particularly in the area of interfering with the attorney-client relationship. ABA Formal Opinions 324 and 334 indicate that an advisory board is significantly limited in its role once a case has been accepted." CLINICAL LEGAL EDUCATION, *supra* note 2, at 90.

[71] However, the Opinion suggests that lawyer-members of the board would only be subject to a disciplinary sanction for establishment of and participation in a prior approval, case-by-case clinic case selection process, although across-the-board restrictions on suing the state are "counter to the ethical precepts urged upon lawyers in the Code of Professional Responsibility." ABA Comm. on Ethics and Professional Responsibility, Informal Opinion 1208 (1972) reprinted in INFORMAL ETHICS OPINIONS, Vol. III at 44.

[72] The *Report* at 8.

school curriculum by effectively prohibiting state law school clinics from engaging in the very type of public interest litigation which has been the educational mainstay of most clinical programs.

The *Report* suggests that the crucial educational function served by law school clinical programs protects clinic decisions concerning case selection and choice of defendants from state interference as an academic freedom interest.[73] The Supreme Court has recognized an academic freedom interest derived from the rights of expression and association guaranteed by the first and fourteenth amendments[74] for individual teachers.[75] An institutional right to protection against "governmental intervention in the intellectual life of a university" has also been recognized by some justices.[76] The Court recently reaffirmed that "the first amendment . . . does not tolerate laws which cast a pall of orthodoxy over the classroom"[77] and has stated that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[78] The *Report* contends that restricting clinic litigation to cases which do not challenge state action unconstitutionally "impose[s] [a] strait jacket" on law school curricular choices and casts a prohibited "pall of orthodoxy" over the law school.[79]

Law school clinical programs generally involve representation of individuals or groups exercising rights to association through litigation. Clinical teachers and student interns are also exercising these rights through participation in litigation. An unbroken line of Supreme Court decisions establishes that activities related to association for the purpose of litigation are protected against state action by the first and fourteenth amendments, and that state restrictions on the exercise of associational rights must be justified by proof of actual harm to a compelling state interest.[80] Indeed, the Supreme Court has recognized that "association [for the purpose] of litigation may be the most effective form of political association,"[81] and thus has affirmatively sought to protect public interest litigation. The *Report* suggests that the right to sue the state is implicit in this protection of first amendment associational rights expressed through litigation.[82] Just as the freedom to criticize the govern-

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[73] *Id.*

[74] U.S. CONST. amends. I and XIV.

[75] Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[76] Cannon v. University of Chicago, 441 U.S. 677, 730, 747 (1979) (Powell, J., dissenting); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 311-315 (1978) (Powell, J., concurring); *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring in result.)

[77] Board of Educ. v. Pico, 457 U.S. 853, 870 (1982) (quoting *Keyishian*, 385 U.S. at 603).

[78] *Sweezy*, 354 U.S. at 250.

[79] The *Report* at 8.

[80] *See* NAACP v. Button, 371 U.S. 415 (1963); *In re* Primus, 436 U.S. 412 (1978).

[81] *Button*, 371 U.S. at 431.

[82] The *Report* at 9.

ment is essential to meaningful exercise of free speech rights, freedom to sue the state is essential to a meaningful exercise of associational rights.[83]

The *Report* concludes that laws which restrict clinical programs from initiating suits against the state, particularly clinical programs at state law schools, suffer from serious constitutional defects.[84] Efforts to limit first amendment activity through the threat of withdrawal of state funds rather than outright prohibition appear to violate the constitutional requirement that the state cannot condition receipt of state funds on the waiver of constitutional rights.[85] Differential treatment of state law school

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[83] In an analogous context, the Third Circuit rejected an effort to enforce Pennsylvania's contract provision between the state and Community Legal Services (CLS) which barred the award of attorney's fees in civil rights actions to state-funded legal services offices. Shadis v. Beal, 685 F.2d 824 (3d Cir. 1982), *cert. denied sub nom.* O'Bannon v. Shadis, 103 S. Ct. 300 (1982). It held that the contract provision violated public policy in favor of enforcement in civil rights actions as expressed in 42 U.S.C. § 1988. Indeed, in *Shadis* the Third Circuit emphasized the illegitimacy of Pennsylvania's even less direct effort at stifling the prosecution of public interest suits.

> What the Commonwealth has attempted to do here is to buy immunity from CLS lawyers. In return for a steady, partial subsidy, the Commonwealth has demanded that CLS not seek attorneys' fees in cases brought against the Commonwealth. *The obvious effect of this, if the agreement is enforced, is to cause CLS not to bring actions against the Commonwealth.* In end result, an important member of the plaintiffs' civil rights bar would be removed from the scene, and the vigorous enforcement of the laws would be materially quelled.

Shadis, 685 F.2d at 831 (citing Shadis v. Beal, 520 F. Supp. 858, 864 (E.D. Pa. 1981), (emphasis supplied).

[84] The *Report* at 9.

[85] The Supreme Court has repeatedly held that the state cannot condition receipt of funds on a waiver of first amendment rights. Sherbert v. Verner, 374 U.S. 398 (1963) (state may not condition receipt of unemployment benefits on person's willingness to accept Saturday employment that violates her beliefs); Pickering v. Board of Educ., 391 U.S. 563 (1968) (board of education may not dismiss teacher on the grounds that teacher wrote letter critical of board); Shelton v. Tucker, 364 U.S. 479 (1960) (school may not condition teacher's re-employment on teacher's signing of affidavit that lists all organizations to which teacher belongs or contributes). The Supreme Court has explained why this is impermissible:

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.... For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Based on this line of authority, the *Report* argued that since the state cannot directly dictate the subject matter of law school curriculum or prohibit public interest litigation challenging state action, it cannot "produc[e] that result" through the threat of denial of funds to state law schools. The *Report* at 9-10.

However, this argument may not be so compelling in the context of legislative restrictions on state law schools since it is not clear that the state cannot (and does not) effectively dictate the subject matter of the law school curriculum through funding decisions.

clinical programs based on the subject matter of their curricula also raises problems of unequal treatment for clinical programs which may violate the constitutional guarantee of equal protection.[86]

Although there is little litigation directly challenging the scope of state legislative authority to control curriculum except in the context of a state criminal prohibition against lower school curriculum, Epperson v. Arkansas, 393 U.S. 97 (1968), as a practical matter state legislatures do control curriculum decisions through their exercise over funding decisions. Katz, *supra* note 8, at 916-17; O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970); R.W. FLEMING, AMERICAN HIGHER EDUCATION: TOWARD AN UNCERTAIN FUTURE 12 (1974-75).

The scope of legislative authority respecting funding may vary according to the legal status of the university. A statutorily organized university is primarily a state agency which can be regulated by the legislature or controlled by the governor in any way which does not violate a constitution. *See generally* L. GLENNY & T. DALGLISH, PUBLIC UNIVERSITIES, STATE AGENCIES AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE (1973); EDWARDS & NORDIN, *supra* note 7, at 95-100. If the state university has constitutional status the institution has greater autonomy since it elevates the institution to the level of a distinct governmental branch. *See generally* GLENNY & DALGLISH, *supra*; EDWARDS & NORDIN, *supra* note 7, at 57-79; Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 176 (1978); Note, *State Universities: Legislative Control of a Constitutional Corporation*, 55 MICH. L. REV. 728 (1957). Even though both statuses are subject to the appropriations power of the states, the conditions attached to the appropriations vary depending on the status and whether there is a state board of higher education. *See* GLENNY & DALGLISH, *supra*, at 117-23; Crockett, *Constitutional Autonomy and the North Dakota State Board of Higher Education*, 54 N.D.L. REV. 529 (1978). A constitutionally organized school is in a stronger bargaining position than a comparably situated statutory school since its status gives it greater independence and stronger legal arguments to challenge appropriations conditions.

However, decisions on funding involving universities with constitutional status indicate that even where schools are most autonomous there can be direct funding controls. Appropriation conditions requiring the "fair and equitable" distribution of funds, Board of Regents of Univ. of Mich. v. Auditor Gen., 167 Mich. 444, 132 N.W. 1037 (1911), loyalty oaths, Tolman v. Underhill, 39 Cal. 2d 708, 249 P.2d 280 (1952), accounting procedures, State *ex rel.* Black v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921) and general health and safety measures, *see* BECKHAM *supra*, at 182; GLENNY & DALGLISH *supra*, at 149, have been upheld. Nonetheless, conditions with more direct impact on curriculum decisions have been struck down. Constitutionally organized universities have successfully challenged attempts to relocate the medical school, Sterling v. Regents of the Univ. of Mich., 68 N.W. 253 (Mich. 1896), to control faculty wages and reduce teaching hours, Regents of the Univ. of Mich. v. State of Mich., 47 Mich. App. 23, 208 N.W.2d 871 (1973), *modified*, 395 Mich. 52, 235 N.W.2d 1 (1975), to set the maximum on out-of-state enrollment, to prohibit scholarships, and, most importantly, to limit funds that can be spent for a given department. State Bd. of Agriculture v. Foller, 180 Mich. 349, 147 N.W. 529 (1914).

But even if it were clear that the states could not dictate educational curriculum through funding decisions, the Supreme Court has refused to recognize that states have an obligation to subsidize even constitutionally protected rights and has repeatedly refused to view state refusal to subsidize as a form of constitutional infringement. See Maher v. Roe, 432 U.S. 454, 474 (1977) (constitutional protection afforded a woman's reproductive choice did not prevent Connecticut from making "a value judgment favoring childbirth over abortion and implemen[ting] that judgment by the allocation of public funds"). For analysis of this argument see *infra* note 106 and accompanying text.

[86] The *Report* argued that differential treatment of state law school clinics on the basis of whether they sue the state raised serious issues of equal protection as "informed

E. *Need for an ABA Standard*

Finally, the *Report* points out that there is a need for an ABA Standard as a means of affirmatively encouraging law schools to protect and ensure clinic independence from outside interference. It proposed that the law school's responsibility to do so should be explicitly tied to the ABA's professional accreditation process in order to have a potential sanction for non-compliance.[87]

The primary argument made in support of a Standard is economic. Outside interference in clinical programs is increasing at the same time that budgetary pressures, particularly on state law schools, have intensified. The present economic situation underscores the need for a vigorous defense of "live-case" clinical education, because law school administrators are now even more likely to feel substantial pressure from legislators and private groups who control the university's financial purse-strings. Implementation of an ABA Standard would be an important means of supporting resistance to those pressures.

The proposed Standard requires "law schools...[to] ensure that clinical or other litigation-related programs are free from political

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by" the first amendment. The *Report* at 10. *See* Carey v. Brown, 447 U.S. 455, 460-61, 466-71 (1980) (state statute allowing the picketing of a workplace but not of a residence is invalid); *see also* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 802-03 (1981); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 134-39 (1981). The *Report* also argued that state refusal to fund law school clinic public interest litigation serves no legitimate governmental interest but is instead "aimed at the supression of (the) dangerous ideas" advanced by practice of public interest litigation, *Speiser*, 357 U.S. at 519 (citing American Communications Assoc. v. Douds, 339 U.S. 382, 402 (1949)), and thus requires review by strict scrutiny and a showing of a substantial governmental interest under the first amendment. *See Pico*, 457 U.S. at 871 (school board's exercise of discretion concerning a library's contents is unconstitutional if it is "*intended*...to deny access to ideas with which [they] disagree...."). Where state legislation has been proposed, it is designed to stifle the exercise of first amendment activity and deny students access to first amendment protected litigation and educational experiences with which the state disagrees.

However, several months after the *Report* was written, the Supreme Court decided Regan v. Taxation with Representation of Wash., 103 S. Ct. 1997 (1983), in which it held that lobbying restrictions on non-veterans tax-exempt organizations, not applied to veterans organizations, do not violate equal protection. In *Regan*, Justice Rehnquist's majority opinion reaffirms the Court's analysis of subsidization; namely, that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 2003. However, the opinion specifically states that "[t]he case would be different *if Congress were to discriminate invidiously* in its subsidies in such a way as to 'aim at the suppression of dangerous ideas,'" Id. at 2002 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959), (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)) (emphasis supplied), and suggests that in this situation, governmental power may be narrowed. *Id.* at 2003. Despite this explicit limitation to the precise argument made in the *Report*, the Supreme Court's analysis in *Regan* raises questions concerning the strength of this argument.

[87] The *Report* at 12.

interference."[88] It defines litigation enterprises within law schools as educational programs and specifies that decisions concerning subject matter emphasis and case selection and handling are both educational and legal decisions. It affirmatively states that "basic tenets of academic freedom and principles of institutional self-governance require that these decisions be made by clinic teachers and law schools" free from outside interference.[89] It explicitly argues that "choice of individual cases and methods for handling those cases" must be "left to the discretion" of teachers in charge of the clinic program, "provided such choices serve the educational objectives of the enterprise."[90] Finally, it urges law schools to "avoid establishing guidelines that prohibit acceptance of controversial clients or cases or cases aligning the clinical program against public officials, government agencies or influential members of the community."[91]

While the proposed Standard is still under consideration by the ABA, the Council of the Section of Legal Education and Admissions to the Bar of the ABA has, as a result of the *Report*, adopted a policy statement on the problem, which it has sent to all deans of ABA-approved law schools. The policy statement incorporates the arguments made in the *Report* and reads as follows:

> The Council has received several reports of inappropriate interference in law school clinical activities. Improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of

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[88] *Id.* The accreditation Standard proposed in the *Report* reads as follows:

Interference in Law School Clinic or Litigation-Related Programs

Law schools should ensure that clinical or other litigation-related programs are free from political interference. Litigation enterprises within law schools are educational programs; decisions concerning subject matter emphasis, case selection and handling are both educational and legal decisions. Ethical precepts governing legal practice, [and] basic tenets of academic freedom and principles of institutional self-governance require that these decisions be made by clinic teachers and law schools free from unwarranted interference by outside agencies.

In the interest of principles of academic freedom and to safeguard the independence of the lawyer-client relationship, choice of individual cases and methods of handling those cases (including such issues as choice of parties, forum and remedies) must be left to the discretion of teachers in charge of the clinic or litigation-related program, provided such choices serve the educational objectives of the enterprise. Law schools must affirmatively protect the independence of both the case selection and the case handling process.

Law schools should seek to avoid establishing guidelines that prohibit acceptance of controversial clients or cases or that prohibit acceptance of cases aligning the clinical program against public officials, government agencies or influential members of the community. Acceptance of such cases is in line with the highest aspirations of the bar to make legal services available to all.

[89] *Id.*

[90] *Id.*

[91] *Id.*

> the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility. In appropriate ways, the Council shall assist law schools in preserving the independence of law school clinical programs and courses.[92]

In considering the effectiveness of the committee's approach it is worth noting that since the committee was convened, the deans of both the University of Oregon Law School and Cleveland-Marshall Law School have responded to threats of outside interference with clinical programs at their schools by wholeheartedly supporting the programs.[93]

III. Outside Interference, Legal Education, and Academic Freedom

The problem of outside interference in the American university has a long history. Outside interference has come from both private and government sources. For example, Richard Ely's dismissal from the University of Wisconsin was sought by a former member of the Wisconsin Board of Regents in 1894 because Ely believed in "strikes and boycotts, justifying and encouraging the one while practicing the other."[94] However, during the first World War and in the latter half of this century, outside interference came more from an alliance of government and private sources. In World War I, "[a]ll over the nation, patriotic zealots on boards of trustees, in the community, and on the faculties themselves, harassed those college teachers whose passion for fighting

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[92] Memorandum D8383-25 to Deans of ABA Approved Law Schools from James P. White, Consultant on Legal Education to the American Bar Association re: Statement of Council Policy Regarding Interference in Law School Clinical Activities (February 21, 1983), reprinted in SYLLABUS (American Bar Association Section of Legal Education and Admissions to the Bar) (June 1983) at 4.

[93] Letter from Dean Derrick A. Bell Jr., University of Oregon Law School to Provost Richard J. Hill, University of Oregon (January 22, 1983); letter from Dean Robert J. Bogomolny, Dean, Cleveland-Marshall College of Law to Dr. Walter V. Waetjen, President, Cleveland State University (October 7, 1982) (on file with author).

[94] HOFSTADTER & METZGER, *supra* note 16, at 426.

> Ely was alleged to have threatened to boycott a local firm whose workers were on strike; to have said that a union man, no matter how dirty or dissipated, was always to be employed in preference to a nonunion man, no matter how industrious and trustworthy; to have entertained and advised a union delegate in his home. Ely's books... contained "essentially the same principles," provided a "moral justification of attack upon life and property," and were "utopian, impracticable or pernicious."

There are additional examples. In 1894, Edward Bemis was dismissed from the University of Chicago for a speech against the railroad companies while the Pullman Strike was going on, which was reported in the press. This speech caused the President of the University "a great deal of annoyance." *Id.* at 427. In 1903, Edward Ross was threatened because Jane Stanford, the influential widow of Leland Stanford, was outraged because of his public support of Eugene V. Debs, and advocacy of municipal ownership of railroads. *Id.* at 438-39. Scott Nearing was fired from the University of Pennsylvania for publicly oppos-

the war was somewhat less flaming than their own."[95] The McCarthy period saw the rise of outside interference in the form of loyalty oaths, legislation, and government investigations, as exemplified by the cases of Paul Sweezy, and then, more recently, Harry Keyishian.[96]

In few of these instances of private or governmental interference did the universities come to the aid of the threatened individual teacher and consider the threat to individual academic freedom to be a threat to institutional academic freedom. The case of Richard Ely was one; he was ultimately exonerated by the Wisconsin Board of Regents who issued a report which defended the threat to academic freedom on institutional grounds.[97] Walter Metzger concludes that the different resolution of Ely's case rested on the key role of the President of the University—his relationship with Ely and his evaluation of the potential loss to Wisconsin because of Ely's stature.[98] Others have concluded that it was due to Ely's concession that the charges, if proven, would constitute unfitness.[99] In any case, the Ely case highlights the critical role that a supportive university administration can play in responding to threats to individual academic freedom.

In analyzing the problem of outside interference and its implications for academic freedom, it is important to identify the different

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ing the use of child labor in coal mines in 1915 because an influential mine owner member of the Board of Trustees pressured the President of the University. *Id.* at 479.

[95] *Id.* at 495-6.

[96] Paul Sweezy was convicted of contempt for failing to answer questions asked by the New Hampshire Attorney General acting pursuant to legislative authority to investigate subversive activities. The questions concerned the content of his lectures at the University of New Hampshire and his knowledge of New Hampshire's Progressive Party and its membership. The Supreme Court held that the contempt conviction invaded Sweezy's academic freedom and rights to political expression. *Sweezy*, 354 U.S. 234.

Harry Keyishian and other faculty members of the State University of New York at Buffalo refused to sign forms stating that they were not and never had been members of the Communist Party, pursuant to New York state regulations. They brought a declaratory judgment action challenging the New York Civil Service Law which prohibited the appointment or retention of subversive employees in the public school system. The Supreme Court held that the statute was unconstitutionally vague and violated the first amendment because it was impermissible to sanction mere knowing membership without any showing of specific intent to further the unlawful arms of the Communist Party. *Keyishian*, 385 U.S. 629.

[97] The Regents report stated:

> As Regents of a University with over a hundred instructors supported by nearly two millions of people who hold a vast diversity of views regarding the great questions which at present agitate the human mind, we could not for a moment think of recommending the dismissal or even the criticism of a teacher even if some of his opinions should, in some quarters, be regarded as visionary. Such a course would be equivalent to saying that no professor should teach anything which is not accepted by everybody as true. This would cut our curriculum down to very small proportions.

Hofstadter & Metzger, *supra* note 16 at 427.

[98] *Id.* at 431.

[99] SCHRECKER, *supra* note 7, at 27.

sources of outside interference, the different interest groups affected, and their different perceptions of the threat to academic freedom.[100] There are five different interest groups within the university whose interests may be affected: trustees, administrators, the faculty as a whole, individual teachers, and students. Where the threat to academic decision-making takes the form of outright government intervention into such traditionally autonomous areas as faculty hiring or promotion and student selection or student funding, the interests of several of these groups may coincide. The case against government intervention usually commands the greatest support in these areas, and threats to institutional autonomy are quickly perceived.

Where outside interference, whether governmental or private, is directed at the elimination of individual teachers who are controversial and/or programs which are controversial, the interests of these groups may well diverge. Outside pressures in the affairs of the academy in this context have traditionally resulted in an internal self-policing mechanism where the university acts as a transmission belt for these pressures.[101] University trustees, administrators, and faculties, have frequently sacrificed outspoken or controversial professors in the name of "defend[ing] their collective freedom" to keep outsiders from interfering with issues such as curriculum development, hiring, or promotion.[102] The ideological means for this process has been the espousal of objectivity as a fixed principle of scholarship and the elimination of open advocacy of controversial ideas or social change from acceptable academic discourse. Thus, university presidents, boards of trustees, and faculties who are subject to outside pressure, and do not want to support outspoken teachers or advocacy programs which are attacked from the outside, may also pose a danger to academic freedom. They may either define the teacher or program's work as failing to meet an objectivity standard or may simply not consider their interest in institutional autonomy to be threatened by these attacks.

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[100] Thomas Emerson notes that the problem of academic freedom "deal(s) with the complex situation of a university functioning as an autonomous institution and composed of the different groups, having different rights and obligations, that make up the university community." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 617 (1969). He further suggests that

> [a] university community is composed of different kinds of persons. The governing board (trustees), the administration, the faculty, and the students are all distinct groups, performing different functions. Many of the issues of academic freedom that arise concern the relationships among these groups. Thus the right to freedom of expression of a faculty member may depend much more on the controls which the governing board or the administration seek to exercise over him than those imposed by the government itself. In such a context the normal rules of the First Amendment may require substantial adaption.

Id. at 617-18.

[101] SCHRECKER, *supra* note 7, at 26.

[102] *Id.*

The problem of political interference in the law school clinical context highlights some of these issues with some additional wrinkles. First, law schools have a mixed identity: part traditional academic institution where scholarly objectivity is the rule, and part trade school. This results in dichotomized thinking concerning the form and content of curriculum: theoretical and scholarly work vs. advocacy activities; classroom teaching vs. clinical activities; simulation vs. "live-case" clinics; appellate case analysis based on the notion that there are objective legal principles vs. analysis of social and political values and the manipulability of legal doctrine.[103] The trade school aspect, and the close link between law schools and the legal profession has also meant that law schools have submitted to a greater degree of outside regulation and control over accreditation and curriculum content than other academic institutions or professional schools.[104]

Second, the subject of interference in the clinical context is activity which constitutes open advocacy of one side—litigation. While there have been incidents of outside interference involving law teachers who have been involved in public interest litigation on the side,[105] litigation conducted on behalf of an educational program of the law school itself directly engages the institution in a form of direct action and violates fundamental norms concerning the ideological neutrality of the academy. Thus it is not surprising that most of the attacks have been directed at state law schools, since there are greater pressures in favor of ideological neutrality, particularly respecting the state, at state law schools.[106]

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[103] *See generally, Michelman Report, supra* note 12; Munger, *supra* note 12; Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907 (1933); G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); Bellow, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as *Methodology*, CLINICAL EDUCATION FOR THE LAW STUDENT (1973); D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983); THE POLITICS OF LAW (D. Kairys, ed. 1982).

[104] *See* R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980's (1983), particularly Chapter 13; Slonim, *New Accreditation Proposal Criticized*, 66 A.B.A.J. 1505 (1980); Slonim, *State Court Tells Law Schools What to Teach*, 67 A.B.A.J. 26 (1981).

[105] At least one of the attacks has been focused on a law teacher engaged in civil liberties litigation against the state in his private capacity. *See* Atkinson, 262 Ark. 552, 559 S.W.2d 473 (Arkansas appropriations bill directed at Professor Morton Gitelman), while one other involved a law professor's seminar in constitutional litigation, not a clinic. *Supra* notes 31-32 (Colorado bill directed against Professor Jonathan "Skip" Chase). Significantly, in both the Arkansas and Mississippi struggles, the State of Arkansas and the Chancellor of the University of Mississippi claimed that the law professors' litigation activities violated rules restricting outside employment, and in both cases, the states' application of these rules was held to have denied the law professors equal protection. See text and notes, at 183-84.

[106] Although there are theoretical and practical differences between state and private law schools respecting political interference by the state, the *Report* did not directly address these issues for strategic reasons.

Third, the controversial nature and second-class status of clinical education as perceived by many law school administrators and faculties mean that these groups do not necessarily view their interests in institutional autonomy as threatened by outside attacks on law school clinics. Since clinical education is seen as less important and expensive, outside pressure might well be successful in pushing law schools to simply sacrifice clinical programs. It thus becomes crucial to per-

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Since the first amendment applies only to state action, the traditional view has been that there is greater academic freedom in the state university context. At the same time, state universities are subject to greater control by state legislatures, both directly and indirectly through the power of the purse. In contrast, private universities are not subject to first amendment requirements, and state legislatures have minimal controls through statutory accreditation or curriculum requirements.

But the parameters of permissible state control over protected first amendment curricular choices in the state university context are unclear, precisely because there has been little litigation on the subject. Courts have not been the vehicle for defining the scope of freedom of curricular inquiry and expression in the state university classroom. *See Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1052 (1968); Katz, *supra* note 8. *Epperson*, 393 U.S. 97, is one of the only cases involving state legislative restriction on curricular choices. However, *Epperson* is not helpful in resolving this issue because it involved a high school, not a university; the regulation was effected through a criminal prohibition; and the Supreme Court did not rule on the issues of academic freedom, but instead, on whether the criminal statute violated the establishment clause.

Katz suggests that lack of judicial clarity on the constitutional boundaries of state university teachers' expressive activity comes from the fact that content-based decisions respecting curriculum are not clearly articulated and can always be couched in financial terms. However, she also suggests that state legislation such as that introduced in Iowa and Colorado might cross the permissible line.

> [W]ho is to determine the mission of [a state university's] enterprise—the judiciary, or the educational institution with the aid of the legislature. Clearly the legislature cannot work towards an impermissible purpose, nor can the institution. "Stifling dissent" through budget cuts absent a clear and present danger of disorder, for example, has a reek of unconstitutionality, but such illegal purposes are not articulated often enough to give the courts an opportunity to address the issue of a university's failure to provide opportunities to study controversial and unpopular topics. A decision to phase out a program or not to create it in the first place can always be couched in terms of financial exigency and institutional needs, even though the effect is to limit discourse and keep certain ideas from gaining academic respectability....
>
> The constitutional truth is that university administrators have virtually unfettered discretion to make curricular decisions, hire faculty members on the basis of philosophical bent, fail to continue the employment of those hired, eliminate courses or indeed whole departments, sometimes on a statewide basis, and evaluate classroom performance—all on the basis of content-based criteria—and all in the name of academic freedom. Were some fool of an administrator to announce publically for the record that a particular decision was made to cast a pall of orthodoxy over the intellectual life of the university, or were a state legislature to prohibit the teaching of a certain subject matter, a constitutional violation might ensue. In the real world, however, state colleges and universities, free in theory from direct political control—although the most important educational decisions are undoubtedly made in the budget office of any state government—are free to exercise virtually unfettered administrative discretion.

suade law school administrators and faculties that "live-case" clinical education is an essential part of the law school curriculum so that they will perceive that their institutional autonomy over curriculum is threatened, and support, rather than sacrifice, the clinics.

The *Report* attempts to respond to these particular problems. Its approach, to use the pressure of the "outside" national legal organization, the ABA, which accredits law schools, as the means of encouraging law school administrators and faculties to stand behind clinical education is an effort to use the external regulatory mechanism of accreditation which already exists in an affirmative way.[107] The committee believed that without "outside" pressure many law school deans and faculties would not come to the defense of law school clinics and perceive that their institutional autonomy was threatened. This was a risky strategy, because law school faculties have occasionally reacted negatively to the role of the ABA and "outside" groups in regulating curriculum and viewed it as a threat to institutional autonomy. The *Report* recognizes this tension. It attempts to distinguish between "outside" regulation of educational matters and "outside" attacks on clinical education on ideological grounds. "Outside" (ABA) assistance is argued as necessary to protect law schools' institutional autonomy.[108]

The committee recognized the need to persuade law school administrators and faculties that their institutional autonomy was threatened by outside attacks on their clinical programs, and that resistance was important. The committee understood that institutional autonomy arguments had strong appeal and sought to utilize them. Particularly in light of the uncertain status of clinical education, institutional support is necessary to protect the academic freedom of individual clinical teachers. The *Report* therefore emphasizes the institutional prong of the academic freedom argument and gives it priority.

Katz, *supra* note 8, at 916-18.

The historic distinction between the scope of state regulation of the state college or university and the private college flows from Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). In *Dartmouth College*, Justice John Marshall perceived the distinction as between "a civil institution to be employed in the administration of government" and a private eleemosynary institution whose character New Hampshire could not alter by mere legislation. O'Neil, *supra* note 85, at 156. The sharpness of this distinction has been challenged by an increasing number of commentators who see the scope of governmental regulation in the area of education as rendering the distinction between public and private less useful. Katz, *supra* note 8, at 865; O'Neil, *supra* note 85, at 171.

Acceptance of a rigid public/private distinction in the discourse of academic freedom would legitimize the state's argument that clinical programs at state law schools should not be able to sue the state. Reevaluation of the distinction in this area of the law is necessary and consistent with the rethinking of the public/private dichotomy developing in other areas of the law. *See generally Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

[107] The *Report* at 12.

[108] *Id.* at 4.

Finally, the *Report* recognizes the necessity of persuading law school deans and faculties that the content of the threats to both individual and institutional academic freedom is the same in the clinical context as it is in the traditional academic setting. The *Report* expands the definition of what is appropriately "academic" by arguing that clinic litigation decisions fall within the traditional rubric of protections of academic freedom.[109] This argument links the educational nature of decisions made about which cases to litigate and how to handle them with decisions respecting choice of substantive law and pedagogic approach in the regular classroom. The *Report* argues that outside interference with clinical caseloads impinges on the individual academic freedom of clinical teachers by limiting clinical teachers' ability to teach what they believe.[110] Thus, institutional autonomy is affected by interference with the clinical educational process in the same way as interference with the traditional classroom.

The connection that this argument makes between clinical and classroom teaching, and its underlying premise, that there is a crucial similarity in clinical and nonclinical educational functions, have not been widely accepted within the legal educational community. Law school deans and faculties do not always see these academic enterprises as similar or equal. Lack of perception of this similarity has traditionally been an obstacle to both full recognition of the importance of clinical education within the law school curriculum and efforts to integrate clinical and classroom approaches.

The claim of academic freedom in this context performs both important ideological and pragmatic functions. It empowers clinical education by putting it on par with more traditional academic enterprises. It contains a transformative seed—the notion of the similarity of the pedagogic function and analytic task of both clinical and classroom teaching—[111] and attempts to transcend the theory-practice, scholar-litigator, objective-subjective dichotomies which hamper the development of innovative legal educational curriculum.[112] As a practical matter, assertion of academic freedom may also provide a basis—albeit

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[109] *Id.* at 5.

[110] *Id.*

[111] See *generally* Amsterdam, *supra* note 12.

> Clinical legal education is not a separate substantive subject or set of substantive subjects, but a mode of teaching. Its objectives are very much the same as those of more traditional modes of law school teaching: to provide our students with the opportunity to develop—and to guide them in developing—a breadth of perspectives, a depth of insight, and a rigorously systematic set of analytic and behavioral techniques which they can train on the varied problems that confront lawyers and the law.

REPORT OF THE CLINICAL FACULTY GROUP TO THE PERSONNEL COMMITTEE ON THE STATUS OF CLINICAL FACULTY AT NEW YORK UNIVERSITY LAW SCHOOL, (March 23, 1983). See also supra notes 12 & 103.

[112] See *supra* note 103.

limited—to unify the regular faculty, law school administration, and clinical teachers in response to outside threats to clinical education.[113]

However, because of the status of clinical education within the law school, there are serious limitations to the assertion of the institutional as well as the individual claim of academic freedom. The individual claim is inherently limited because many clinical teachers are not equal members of the regular faculty, are not on tenure tracks, and have short-term contracts. The institutional claim is limited because many law school faculties do not see clinical education as on par with traditional courses, and because "live-case" clinics often impose special financial burdens. Indeed there is a real risk that one way law schools may respond to increased outside pressure, financial or otherwise, without appearing to modify curriculum or sacrifice institutional control, is to simply substitute simulation or placement clinics for more expensive "live-case" clinics, a result which many clinic teachers believe is educationally unsound.[114]

The emphasis in the *Report* on the arguments concerning institutional autonomy, rather than individual academic freedom, reflects this reality. For most "live-case" clinics, there is still a basic question of survival within law school academic programs. Because of the need to unify law school faculties in support of still marginal clinical programs and teachers, the argument on institutional autonomy in the *Report* is primary.[115] Without institutional support, there can be no protection of academic freedom for individual clinic teachers. Success of the individual academic freedom argument rests on the institution's view that interference with "live-case" clinics threatens an essential aspect of the curriculum. Thus, recognition of a threat to institutional autonomy as well as a threat to individual academic freedom is necessary to any unified response to outside interference. The uncertain status of clinical education underscores the strategic importance of the institutional autonomy argument.

However, the institutional autonomy argument is also problematic. The assertion of institutional autonomy raises serious questions as to who speaks for and defines both the institution and its definition of "autonomy," and highlights important issues of self-governance and control of educational decisions. In the *Report* this comes down to the ques-

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[113] For example, the Arkansas legislature's response to Professor Morton Gitelman's representation of controversial clients by passage of an appropriations bill which curbed some law professors from undertaking outside litigation, resulted in the filing of the *Atkinson* case by twenty-five members of the law faculty at the University of Arkansas. *See supra* notes 25-28 and accompanying text.

[114] *The Report of the Clinical Faculty Group at the New York University Law School* to the Personnel Committee on the Status of Clinical Faculty, *supra* note 14, at 10, concludes that "an effective clinical program should offer students the opportunities for both simulation and fieldwork." For a different view, namely that simulation programs should replace "live-case" clinics, see Tyler & Catz, *supra* note 13.

[115] The *Report* at 3-5.

tion of who controls or should control clinic litigation decisions—deans, law faculties, or clinic teachers—a question which the proposed Standard does not clearly answer. Moreover, institutional autonomy is increasingly being asserted as the basis of a new claim of academic freedom made by universities to support their definition of their corporate interests and to immunize them from outside regulation. The sweep of the claim goes beyond the scope of the institutional autonomy argument presented in the *Report*: that which is necessary to support individual academic freedom. The scope of the claim of institutional autonomy and its relationship to individual academic freedom merits further examination.

The classic view of academic freedom in this country has been that it protects the individual scholar's ability to teach. This individual prong of academic freedom has been viewed as the "genuine tradition of 'academic freedom.' "[116] However, the vague rhetoric of academic freedom, expressed in legal doctrine, has blurred the difference between protection of the individual's right to teach and publish and protection of the corporate interests of the university,[117] and conceals the potential conflicts between them. Outside interference directed against a controversial teacher or program necessarily highlights these conflicts. It heightens the "fundamental tension between the academic freedom of the teacher to be free from the university administration, and the academic freedom of the university to be free of government, including judicial, interference."[118] At the same time, outside interference situations reveal the way in which individual academic freedom and institutional autonomy can reinforce and mutually support each other.[119]

Although case law over the last several years "indicates a greater growth of individual academic freedom as a 'penumbra' right under the first amendment than much judicial recognition of institutional autonomy, there has been substantial dicta on the importance of institutional freedom."[120] During the McCarthy era, Justice Frankfurter wrote

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[116] Levinson, *supra* note 7, at 195.

[117] Others have noted the confusion between the concepts of institutional autonomy and individual academic freedom in legal doctrine of academic freedom. Finkin, *supra* note 8; Katz, *supra* note 8.

[118] Cooper v. Ross, 472 F. Supp. 802, 813 (E.D. Ark. 979) (assistant professor not reappointed to the faculty because of both internal and external pressure claimed that his membership in the Progressive Labor Party and his public acknowledgment of his Communist beliefs were protected under the first and fourteenth amendments; the court ruled that he was entitled to reinstatement but not back pay).

[119] Matthew Finkin agrees that institutional autonomy and individual academic freedom are distinct ideas which may "reinforce one another at some points, (but) straightforwardly conflict at others." Finkin, *supra* note 8, at 818.

[120] EDWARDS & NORDIN, *supra* note 7, at 4. For general background on academic freedom and the law, see Murphy, *Academic Freedom:-An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447 (1968); Tisdel, *Academic Freedom—Its Constitutional Context*, 40 U. COLO. L. REV. 600 (1968); *Developments in the Law-Academic Freedom*, *supra* note 106.

that "the dependence of a free society on free universities...means the exclusion of governmental intervention in the intellectual life of a university."[121] Justice Powell emphasized the importance of university autonomy in *Regents of the University of California v. Bakke*.[122] Justice Powell's dissent in *Cannon v. University of Chicago* suggests that "Title IX...trenches on the authority of the academic community to govern itself."[123] Justice Steven's concurrence in *Widmar v. Vincent*,[124] observes that academic freedom may "adher[e] to the institution rather than the individual."[125] However, the vagueness of the concept may suggest that institutional autonomy is "more an ideological expression of academic custom and usage than a specifically enunciated legal doctrine."[126]

However, arguments based on institutional autonomy are becoming popular. Recently, institutional autonomy has been argued as a basis for private university exclusion of leafletters on campus,[127] against federal regulation of universities, programs, and policies under Title IX,[128] and

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[121] *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

[122] *Bakke*, 438 U.S. at 312 (Opinion by Powell, J.).

[123] *Cannon*, 441 U.S. at 747 (Powell, J., dissenting).

[124] 454 U.S. 263 (1981).

[125] Katz, *supra* note 8, at 930.

[126] EDWARDS & NORDIN, *supra* note 7, at 17. For cases involving claims of institutional autonomy, although not necessarily explicitly characterized as such, *see* Corporation of Haverford College v. Reeher, 329 F. Supp. 1196 (E.D. Pa. 1971); Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977); Wayne State Univ. v. Cleland, 590 F.2d 627 (6th Cir. 1978) *cert. dismissed*, 434 U.S. 978 (1977); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980).

[127] Princeton Univ. v. Schmid, 455 U.S. 100 (1982). *See* Note, *Testing the Limits of Academic Freedom*, *supra* note 8; Levinson, *supra* note 7.

[128] In *Cannon*, the University of Chicago argued that admissions decisions of private universities should not be subject to judicial scrutiny because it would have "an adverse effect on the independence of members of university committees." 441 U.S. at 709.

In *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982) *aff'd in pertinent part* 104 S.Ct. 1211 (1984), Grove City College had argued that the Department of Education could not force it to comply with Title IX because enforcement of the regulation would curtail the college's freedom of association and that of the students. The College asserted that enforcement would "impermissibly interfere with the College's autonomy and the values which it seeks to promote among its students." *Id.* at 701. The Third Circuit rejected this argument. The petition for *certiorari* presented this issue for review by the Supreme Court, 51 U.S.L.W. 3428 (Nov. 30, 1982).

In the Supreme Court, Justice White's majority opinion addressed Grove City's first amendment claim in a perfunctory manner. Justice White explained that Grove City's "challenge—that conditioning federal assistance with Title IX infringes First Amendment Rights of the College and its Students—warrants only brief consideration." 104 S.Ct. at 1223. He stated:

> Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.... Grove City may terminate its participation in the [Basic Educational Opportunity Grant] program and thus avoid the requirements of §901(a). Students affected by the Department's action may either take their BEOGs elsewhere or attend Grove City without federal financial assistance. Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students.

as the basis for a privilege protecting the university from disclosure of information concerning faculty hiring, promotion, and tenure in employment discrimination cases.[129] In each of these contexts, institutional

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Id. (citation omitted). *See* Note, *Academic Freedom and Federal Regulation of University Hiring, supra* note 8; Kroll, *Title IX Sex Discrimination Regulation: Private Colleges and Academic Freedom*, 13 URB. L. ANN. 107 (1977).

[129] *See generally*, Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, supra* note 8; Note, *The Challenge to Anti-discrimination Enforcement on Campus, supra* note 8. In Blaubergs v. Board of Regents, No. 79-42 (M.D. Ga. May 24, 1979) *aff'd*, 661 F.2d 426 (5th Cir. 1981). Maija Blaubergs, an assistant professor at the University of Georgia sued the Board of Regents of the University and others because she had been denied promotion to the rank of associate professor and her employment was terminated. During discovery, she sought to depose a professor, Professor James A. Dinnan, who had served on the College of Education Promotion Review Committee that had considered her application for promotion. During the deposition he refused to answer how he voted, asserting an "academic freedom" privilege. The district court rejected his claim and ordered him to testify. He refused and was held in contempt, ordered to pay a fine of $100 per day for thirty days and if he continued to refuse, to serve ninety days in prison. The Fifth Circuit denied his motion for habeas corpus or mandamus, but granted his motion for expedited appeal. Dinnan v. Board of Regents of Univ. Sys. of Ga., 625 F.2d 1146 (5th Cir. 1980) *aff'd* 661 F.2d 426 (5th Cir. 1981). On the merits of the appeal, the Fifth Circuit affirmed the district court's rejection of Professor Dinnan's claim of privilege. In re Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

Both the Fifth Circuit opinion and the question presented to the Supreme Court in the petition for *certiorari* do not clearly distinguish whether Professor Dinnan's claim of academic freedom was individual or institutional, although the Fifth Circuit opinion treats it effectively as an institutional claim. According to one commentator, Professor Dinnan argued that his individual right of academic freedom was violated, misapplying the individual strand of academic freedom, and he should have claimed an institutional right of academic freedom. Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, supra* note 8, at 1546 n.59. It is not clear from the opinions whether the Board of Regents or other administrators asserted an independent institutional academic freedom privilege, since the case was on appeal from Professor Dinnan's contempt order. However, the American Association of University Professors issued a statement expressing its fear that access to university records in faculty renewal cases will jeopardize academic freedom. AAUP Reports, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, ACADEME at 27 (Feb. - March, 1981) and the case has received much national attention. *See* Tunure, *Sexism and Jail*, The Washington Star, Oct. 20, 1980 at SIA, col. 1; *Jailing of a Professor Heightens Fears for Campus Independence*, N.Y. Times, Sept. 14, 1980, at 1, col. 3; *The Professor and the Judge*, Washington Post, Oct. 14, 1980, at A 14, col. 1; *Professor's Jailing: Is Academic Freedom at Issue?*, Boston Globe, Aug. 3, 1980, at 41, col. 2, cited in Note: *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, supra* note 8, at 1539 n.13.

See also Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982), in which the Second Circuit adopted the policy and procedure recommended by the AAUP, applying a balancing test to the plaintiff's need for evidence, and the college's claim of privilege. The court held that "absent a statement of reasons" for denial of tenure the balance between a plaintiff's need for evidence to establish a case of *prima facie* discrimination and the college's need for confidentiality tips to the plaintiff. *Id.* at 908.

In Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) the Second Circuit held that proof of discrimination in tenure decisions rests on a showing that "some signifi-

autonomy is asserted to protect the university administration's view of "the university's" self-interest. The unstated assumption implicit in these formulations is that the interests of the university administration, the interests of the faculty as a whole, and the interests of individual teachers are the same.[130]

This assumption is made explicit in the decision of the United States Supreme Court in *NLRB v. Yeshiva*.[131] In *Yeshiva* the Court refused to enforce an order of the NLRB requiring collective bargaining between the faculty and administration at a private university, on the ground that the faculty played a managerial role in the governance of the university.[132] The Court rejected the Board's argument that the professional interests of the faculty and interests of the institution were "distinct separable entities with which a faculty member could not simultaneously be aligned."[133] Instead, the Court ruled that the faculty's professional interests could not be separated from those of the institution.[134]

Justice Brennan dissented on the ground that the majority failed to understand the nature of the faculty's role in university governance.[135] In his view the majority wrongly decided the case precisely because it confused the individual interests of the faculty with the institutional

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cant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the [tenure] question." *Id.* at 94. The language of the opinion suggests considerable deference to institutional autonomy concerns.

> For a plaintiff to succeed in carrying the burden of persuasion, the evidence as a whole must show more than a denial of tenure in the content of disagreement about scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or the university. Absent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities."

Id.

[130] Finkin concurs with the view that the notion of "institutional" academic freedom collapses these distinctions. Since "the interests insulated are not necessarily those of teachers and researchers but of the administration and governing board; the effect is to insulate managerial decisionmaking from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution's administration." Finkin, *supra* note 8, at 851 (quoting Finkin, *Some Thoughts on the Powell Opinion in* Bakke, 65 Academe 192, 196 (1979)).

[131] 444 U.S. 672 (1980).

[132] It has been suggested that the decision in *Yeshiva* resulted from the Supreme Court's inability to translate traditional "images" of employee status embedded in labor law, such as hierarchical organization, powerlessness, intellectual incapacity, and shared interests with management within the workplace to the particular experience of academic employment. Klare, *The Bitter and The Sweet: Reflections on the Supreme Court's* Yeshiva *Decision*, 62 SOCIALIST REV. 99 (1983).

[133] 444 U.S. at 688.

[134] *Id.*

[135] *Id.* at 702.

interests of the university and saw them as "one and the same."[136] Brennan's opinion emphasizes that although these interests may coincide, they may also diverge since "[t]he university administrator has certain economic and fiduciary responsibilities that are not shared by the faculty, whose primary concerns are academic and relate solely to its own professional reputation."[137] Significantly, he notes that "the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom."[138] He concludes that the majority's "rose-colored" view of governance as "collegial decision making" fails to take account of the degree to which education has become "big business," the work of operating the university transferred from the faculty to an autonomous administration, which "faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization."[139]

This blurring of distinctions between the interests of the administration, the interests of the faculty as a whole, and the interests of individual faculty members reflected in *Yeshiva* is also manifested in recent legal writing endorsing the institutional claim of academic freedom. For example, a theory of "academic collective interests" has been proposed based on a view of a coincidence of interests between the faculty and administration as a way of resolving individual Title VII[140] employment challenges in academic institutions. Under this approach, the administration can assert these "collective" interests.[141] Others have argued that the university's choice of educational philosophy (read "administration's") should be protected under the first amendment,[142] that the university should have an independent claim of freedom of association and a right of free speech in hiring and promotion practices,[143] and that institutional academic freedom should be viewed as a right "derived" from the individual faculty members' academic freedom.[144]

These approaches seem to overstate the convergence of interests and minimize the divergence of interests and potential conflicts between faculty and administration over governance. Although the interests of university administration, faculty generally, and individual faculty members may sometimes converge (on issues of governmental regulation, for example), they more frequently diverge and may even be in conflict. Without confusing these separate interests as identical, the maximum possibility of alliances in resisting outside threats to individual

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[136] *Id.* at 700.

[137] *Id.* at 701.

[138] *Id.* at 700.

[139] Id. at 702-03.

[140] 42 U.S.C. § 2000e *et. seq.* (1980).

[141] *Yurko, supra* note 8, at 525.

[142] Note, *Testing the Limits of Academic Freedom, supra* note 8, at 723.

[143] Note, *Academic Freedom and Federal Regulation of University Hiring, supra* note 8, at 886, 888.

[144] Note *Testing the Limits of Academic Freedom, supra* note 8, at 723-24.

academic freedom should be preserved. Spelling out the permissible governance roles in practice, however, may be difficult.

The inherent tension between these divergent interests emerged in the drafting of the proposed Standard on Political Interference. Most clinical teachers believe that once a general subject area like civil or criminal law or women's rights is approved by the faculty, clinical teachers should have primary control over caseload decisions. Questions of case selection and handling must ultimately be left to clinical teachers both because of academic freedom and the additional ethical obligations of the attorney-client relationship. ABA ethical opinions relevant to clinic interference clearly reject case by case approval by members of a governing board and approve only broad guidelines.[145] Case handling decisions are a necessary aspect of an ongoing attorney-client relationship. However, the faculty as a whole clearly has residual power over the educational objectives of the program.

The proposed Standard acknowledges both institutional and individual responsibility. It states that both clinical teachers and law schools have authority over "decisions concerning subject matter emphasis, case selection and handling," and then specifies that "choice of individual cases and methods of handling these cases (including such issues as choice of parties, forum and remedies) must be left to the discretion of teachers in charge of the clinic or litigation-related program, provided such choices serve the educational objectives of the enterprise."[146] It leaves authority over content and litigation decisions to the individual clinical teacher, while acknowledging ultimate authority in the "law school" to determine whether educational objectives are met.[147] However the Standard fails to explicitly define who the "law school" is—the administration or the faculty.

The language of the proposed Standard reflects the difficulty in resolving these tensions. The committee did not want to spell out the respective roles of clinical teachers, faculty, and administration because it did not know what governance structure would best protect clinic independence. What was clear was that it was important to give primary authority over pedagogical content, subject matter, and approach to clinical teachers. However, it was not clear how to define the respective roles of faculty and law school administration. In some schools, neither faculty nor administration support "live-case" clinical programs, while in others, both do. However, since the parameters of institutional authority and control over clinical programs are not well-defined in many schools, there was a fear that by delineating the roles too specifically, the committee might ultimately hurt clinic independence.

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[145] ABA Comm. on Professional Ethics, Formal Op. 324 (1970); ABA Comm. on Professional Ethics, Formal Op. 334 (1974); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1208 (1972) reprinted in INFORMAL ETHICS OPINIONS, vol. II at 441.

[146] *Supra* note 88.

[147] *Id.*

But, even if the institutional claim of academic freedom may be dangerous because it tends to blur the distinct and sometimes conflicting interests of the administration, faculty, and individual faculty members, the question still remains as to the proper scope of the claim. Does arguing institutional autonomy necessarily endorse a corporate view of academic freedom which asserts the primacy of the administration's interest in all circumstances? In the *Report*, the institutional autonomy argument has been made to ensure the traditional protection of academic freedom to individual clinical teachers and programs.[148] The law school's perception that its institutional autonomy is threatened by outside interference is necessary to establish institutional support and develop a united response, precisely because clinical teachers and clinical education have an uncertain status in legal education. Institutional autonomy is the means to protect the individual clinician's freedom to teach.

In this sense, the institutional autonomy argument is developed as a kind of collective means to protect the individual teacher's academic freedom. The individual prong of academic freedom doctrine alone is inadequate to protect individual academic freedom because genuine protection of individual academic freedom rests on the collective determination of the institution as a whole to protect it. Viewed from this perspective, an institutional claim of academic freedom is necessary to the exercise of individual academic freedom.[149] It is essential to protect the institutional "robust exchange of ideas" which is at the heart of the vision, if not the reality, of academic freedom. It is also an affirmative support against interference with critical and controversial teaching and scholarship. This suggests that an institutional claim of academic freedom, applicable to both private and public universities, should "only be invoked by universities dedicated to defending the traditional academic freedom of their faculty,"[150] and limited to those circumstances where the claim of institutional autonomy will support and strengthen the individual claim.

A final question remains as to whether the *Report*'s affirmative use of the rhetoric of academic freedom is purely instrumental, perhaps even dangerous because it reinforces a sense that the rhetoric is meaningful, that the vision of academic freedom is borne out by practice, or that

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[148] The *Report* at 3-5.

[149] Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, supra note 8, at 1549.

[150] Gutmann, *Is Freedom Academic?: The Relative Autonomy of Universities in a Liberal Democracy*, in LIBERAL DEMOCRACY at 276 (Pennock and Chapman, eds. 1983). Gutmann further suggests that the claim of institutional autonomy "should not be so broad as to permit any university to defend itself aainst those governmental regulations that are compatible with or instrumental to achieving a university's self-proclaimed educational purposes." *Id.*

there is such a thing as "academic freedom."[151] The rhetoric of academic freedom does not take account of the realities of inequality and control within the academy and can, therefore, mystify and obscure these issues.[152] Most significantly, it does not start us on the process of defining the vision of the academy that we want. However, distinguishing and delineating the individual and institutional prongs of academic freedom doctrine and understanding their possible inter-relationship is an important first step toward demystifying academic freedom, exposing the conflicts in the ideology, and identifying what we want to maintain. Experience with the *Report* suggests that assertion of academic freedom from a self-conscious perspective which understands its uses and limitations, allows for the possibility of gaining space and building alliances for genuinely critical teaching and scholarship, and provides a context for the articulation of transformative educational projects.

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[151] For differing views on this issue of reliance on rights generally, see Sparer, *Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement* 36 STAN. L. REV. 509 (1984); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981); Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981); THE POLITICS OF LAW (D. Kairys, ed. 1982); Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229 (1983).

[152] For a recent anthology of essays on academic freedom discussing these issues, see REGULATING THE INTELLECTUALS, *supra* note 7.