COLUMBIA UNDERGRADUATE LAW REVIEW

Volume XVI | Fall 2019 | Issue I

ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

VOLUME XVI | ISSUE I | Fall 2019

LETTER FROM THE EDITORS-IN-CHIEF

Dear Reader,

As the year comes to a close, the Editors-in-Chief are proud to present the Fall 2019 issue of the *Columbia Undergraduate Law Review*. In line with our launch event theme this year—"Speech, Race, and Privacy: Breaking Barriers"—our four articles cover a range of pressing legal issues, from the regulation of hate speech to race-based admissions in affirmative action.

In addition to our print articles, the *Columbia Undergraduate Law Review* reaffirmed its role this semester as a publication intended to promote the lively discussion of important socio-legal issues, providing a public forum and platform for important activism and engagement. In October, we co-hosted an event called *The Inhumanity of the Death Penalty*, wherein we helped raise awareness for Rodney Reed, an innocent man who was set to be executed mid-November. Attendees were able to learn more about his case through a documentary screening and a conversation with his brother, Rodrick Reed. Just two weeks later, the Texas Court of Criminal Appeals granted him an indefinite stay.

Finally, the Editorial Board emphasized organizational changes within the club, such as electing a new Director of Communications, developing introductory legal workshops and editing workshops for staff writers and editors, as well as co-sponsoring events with the school-wide student council. We have also expanded our total membership to over 70 undergraduate students—an almost twofold increase from just two years ago.

Without your readership and the incredible work of our Print, Online, and Business teams, CULR would not exist. We hope you enjoy leafing through our Fall 2019 issue, and we look forward to your continued readership of the *Columbia Undergraduate Law Review*.

Sincerely,
Zain Athar and Sarah Lu
Editors-in-Chief

LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Editorial Board, I am proud to present the Fall 2019 issue of the *Columbia Undergraduate Law Review*'s print journal. We are thrilled to publish the following articles, which offer fresh perspectives on familiar legal problems.

In "Pedagogical Panopticon: Public School Surveillance of Students' Off-Campus Speech," Michael Deneroff analyzes public school systems' surveillance programs for monitoring online, off-campus speech. Using local examples, he identifies discrepancies in regulatory standards that result from gaps in the legal system.

In his article, "Freedom from Fear: Hate Speech as True Threat," Griffin Jones examines the doctrine of "true threat," recommending a two-tiered test for its evaluation. His model seeks to balance freedom of speech with a provision of security for protected classes, which carries distinct applicability for the university setting.

Marissa Uri, in "Toward Improved Indigent Defense Services: A Critique of Current Public Defense Practices and an Analysis of Reform Efforts," exposes the unfulfilled promise made by *Gideon v. Wainwright* to provide adequate public defense for indigent clients. To counter this, she proposes reform that both reallocates resources and integrates community-focused services.

Finally, in "Another Way to Promote Diversity: Class-Based Affirmative Action as an Alternative for Race-Based Policies," Jason Zhang argues that race-based affirmative action violates Supreme Court precedent on equal protection. He instead advocates for class-based affirmative action, which would continue to promote diversity in higher education under different conditions.

With each successive publication, the *Columbia Undergraduate Law Review* strives to cultivate legal discourse, especially among undergraduates. We hope that you enjoy reading our print journal.

Sincerely,
Caroline Zupan
Executive Editor, Print

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

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Pedagogical Panopticon: Public School Surveillance of Students' Off-Campus Speech

Michael Deneroff | Northwestern University

Edited By: Arianna Scott, Kay Barber, Olivia Choi, Jacob Mazzarella, Jenna Rackerby

Abstract

The overlapping layers of the U.S. legal system, from the municipal to federal level, leave room for local governmental employees to exercise policymaking discretion. This issue is manifest—and has traditionally been examined—in how school administrators tackle issues of discipline and free speech within the school environment. However, related scholarship has yet to determine how school administrators combat the threat of alarming online speech created by students while outside of school premises. This thesis analyzes federal and state law to determine how school districts in southeastern Michigan may surveil and discipline students' online, off-campus speech. Documents acquired through Freedom of Information Act requests reveal that a hodgepodge of surveillance systems have emerged among different school districts due to ambiguous or missing guidance from higher levels of government. Accordingly, I argue that legal pluralism can create unpredictable applications of law and legal rights within different jurisdictions.

I. Introduction and Background

United States federalism grants local school districts significant discretion over their students' education. Legislators and judges often defer to the expertise of school staff, who better understand the unique features of the school environment, creating wide latitude for superintendents, principals, and teachers to shape their schools' pedagogical and disciplinary practices according to their own values. As a result, each district's students must adapt to a unique set of guidelines to avoid punishment.

Regardless of the district in which they are enrolled, public school students are not completely at their school's mercy, as they retain certain constitutional rights. For example, the Supreme Court of the United States has repeatedly held that students' right to free speech is mostly protected in schools, so long as they do not create a substantial disruption or invade upon the rights of their peers.[1] The Court, however, has yet to provide any guidance on how students' First Amendment rights vary when their speech is made online and off-campus. Filling the void, many school districts have employed a variety of tactics to surveil this type of student speech.

Systems of surveillance raise several issues around privacy, equity, and the durability of students' belief in our society's commitment to free speech. Given the inter-district inconsistency of monitoring and haphazard disclosure of surveillance, students are likely unable to know if their school is watching their online activities. This constant threat of punishment may alter students' digital behavior as they seek to avoid discipline. Schools could deter legitimate, non-disruptive speech, such as posts that are merely critical of the school, if students are frightened of posting their beliefs online.[2] In fact, the Supreme Court warned over seventy-five years ago in its first case on student speech that wantonly punishing dissent threatens "to teach youth to discount important principles of our government as mere platitudes."[4] Furthermore, surveillance

is laced with serious equity questions if only students in certain school districts are subject to monitoring—especially as the district boundaries in southeastern Michigan fall predominantly along racial and socioeconomic lines.[5]

II. Literature Review

Many legal scholars have analyzed how discretion born from American federalism can lead to the inconsistent application of laws. In her overview to *Invitation to Law and Society*, criminologist Kitty Calavita deconstructs legal pluralism—a system in which multiple levels of law are simultaneously in effect—as with the US system of local, state, and federal governments.[6] She argues that legally pluralistic societies breed gaps at lower levels of government, where there is no higher level of law to explicitly guide officials. The result is what criminologist Frank Zimring calls a "Frankenstein's monster" of varying laws created by divergent standards across states and disparate applications of those standards on a county-by-county basis.[7] Within these gaps, local actors, such as principals and teachers, are left to subjectively decide how to proceed.[8]

Educational scholars have outlined competing factors with which school authorities grapple when regulating student speech. Ohio State University professor Bryan Warnick argues that there are two pedagogical approaches schools can take: 1) the inculcative method, which seeks to socialize students into preexisting norms and value systems, or 2) the liberal path, which seeks to help students decide for themselves which values and lifestyles to adhere to.[9] Warnick notes that free speech is valued by both approaches, given that schools teach students about American democratic values.[10] University of Connecticut professor Kenneth Dautrich argues that children undergo a "political growth spurt" during adolescence, which makes it critical for schools to respect their students' right to free speech.[11] Opposing scholars have warned

that student speech can go too far, causing a disruption of school operations.[12] A literature review of school discipline practices found that disturbances stemming from out of control student speech contributes to teacher burnout, diverts administrative resources, and interferes with learning.[13] Accordingly, Georgia University Law professor Anne Proffitt Dupre argues that student free speech is inherently a paradox, as schools must restrict some speech in order to protect it for others.[14]

French philosopher Michel Foucault famously explored the consequences of monitoring in his seminal work, *Discipline and Punish*. Foucault compared surveillance to Bentham's panopticon, a circular prison within which incarcerated individuals are constantly exposed to the view of guards but cannot determine if the guards are watching them at any given moment.[15] Under this eternal threat of potential punishment for misbehavior, prisoners are incentivized to follow the rules, which enables the guards to maintain control. [16] Governmental surveillance operates much in the same manner: citizens, fearing negative consequences, alter their behavior to comply with the State's expectations under its unrelenting gaze.[17] Illustrating this effect, an article in the Berkeley Technology Law Journal reveals that Wikipedia searches for terms related to national security and terrorism plummeted following the 2013 leak that exposed the NSA's domestic surveillance program.[18]

Several scholars have explored how surveillance manifests in the educational arena. Gary Marx and Valerie Steeves—professors at Massachusetts Institute of Technology and the University of Ottawa, respectively—argue that schools have increasingly adopted surveillance technology as districts seek to control misbehavior and increase student safety.[19] The integration of these technologies marks a massive expansion of schools' disciplinary jurisdiction.[20] While scholars focusing on school order contend that schools should preserve environments conducive to learning, Pace University Law professor Emily Waldman cautions that students' fear of nonstop

surveillance can produce a chilling effect on legitimate speech, reducing the likelihood that students will express their beliefs related to school even at home.[21]

Scholarship has yet to examine how school officials within a single metropolitan area have navigated vague federal and state regulations to combat alarming online speech created by students while off school premises. This article examines how schools in three southeastern Michigan counties – Wayne, Oakland, and Macomb – manage this challenge. To determine how school's strategies relate to federal and state legal constraints, Freedom of Information Act (FOIA) requests were sent to all public-school districts within the three counties to determine which, if any, methods are used to surveil students' off-campus Internet activity.

III. Findings and Analysis

In recent years, public school administrators have been under intense pressure from parents, students, and the media to guard against the threat of shootings.[22] The massacre at Columbine High School that left thirteen dead marked the first time that school shootings entered the national discourse.[23] From Virginia Tech to Sandy Hook to Parkland, U.S. school shootings have increased in frequency over the last decade. With each shooting, communities subject their school districts to renewed fervor over what could have been done to prevent the violence.[24] While there have been no school shootings in Michigan over the last five years, school districts have faced a significant uptick in threats of violence.[25] In the two weeks after the Parkland massacre, districts across the state received forty-one such threats.[26]

Additionally, in the past decade, school administrators have been grappling with the threat of cyberbullying—which can include harassment, intimidation, and humiliation via social media or messaging platforms. This type of misconduct is especially

pernicious because online communication reaches wider audiences, lasts longer, and occurs without supervision.[27] Surveys of high school student health and online activity have found a correlation between cyberbullying and negative mental health outcomes, including suicide.[28] According to a 2018 Pew Research poll, 59% of teenagers have reported that they were victims of cyberbullying at least once.[29] The same percentage of parents also worry that their child is getting bullied online.[30]

IV. Case Analysis: Federal Level

While Michigan school administrators face pressure to respond to these new safety threats, the Supreme Court's rulings on students' First Amendment rights regulate how schools can discipline on-campus speech. In *West Virginia Board of Education v. Barnette* (1943), the Court ruled that public schools violate the First Amendment by requiring students to salute the flag and recite the Pledge of Allegiance.[31] The Court recognized that it must be careful in questioning the decisions of more experienced school boards; however, it also contended that "small and local authority may feel less sense of responsibility to the Constitution," yet they still must "perform within the limits of the Bill of Rights."[32]

Similarly, in *Tinker v. Des Moines Community Schools* (1969), the Court corrected what it saw as a violation of the First Amendment. During the Vietnam War, students in Des Moines hatched a plan to protest the war by wearing black armbands during school. After learning of the plan, the district passed a policy to suspend any student wearing an armband to school.[33] The protesting students defied the policy, silently wearing the armbands to school, resulting in their suspension.[34] The Court reaffirmed that "[i] t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[35] In order to censor speech, schools need to

forecast or prove it "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students."[36] The Court was clear, however, that "undifferentiated fear or apprehension of disturbance is not enough" to constitute a disruption.[37] Still, the Court acknowledged that there are "special characteristics of the school environment" that change the extent of students' constitutional rights.[38]

In subsequent cases, the Court gave school districts further guidance on how on-campus speech may be regulated, carving out several exceptions to *Tinker* that buoy staffs' ability to punish certain speech at school. First, in *Bethel School District v. Fraser* (1986), the Court held schools can restrict "lewd or vulgar" or "plainly offensive speech" without offending *Tinker*.[39] Second, in *Hazelwood School District v. Kuhlmeier* (1988), the Supreme Court ruled that schools may censor articles in a student newspaper. The majority decided that with activities bearing the "imprimatur" of the school—like school newspapers—staff can restrict speech in a way that is "reasonably related to legitimate pedagogical concerns."[40] In other words, schools are not required, in the name of the First Amendment, to promote speech that runs counter to their educational mission. Finally, in *Morse v. Frederick* (2007), the Court ruled that a school can punish a student for unfurling a banner promoting drug use at a school-sponsored activity. This case permits districts to discipline speech in two cases. First, speech is punishable if it promotes illegal drug use. Second, any speech may be disciplined at school-sponsored activities, even if the activity is technically outside the school building.[41]

Additionally, the Court provides schools guidance, albeit ambiguously, on what speech can be construed as a threat. The Court defined what constitutes a "true threat" in *Watts v. United States* (1969).[42] To qualify, courts must weigh four factors: first, whether the speech was conditional; second, whether it was political hyperbole; third, the immediate reactions of listeners; and fourth, the overall

context and background of the threat.[43] School administrators are free to discipline students when they make a true threat.[44] However, *Watts* was decided in a case unrelated to the "special characteristics of the school environment," and the Court has yet to rule on this issue in the school context.[45] This means that it is unclear what standard school administrators are held to when deciding what constitutes a threat. It is possible that the threshold of a true threat could be even lower in the school environment, as administrators know more about the context of the threat and have a pedagogical interest in imparting civility to their students.[46]

The Supreme Court has also held that school administrators' investigatory powers are constrained by the Fourth Amendment. In *New Jersey v. T.L.O* (1985), the Court established the rule for in-school searches of students, holding that officials only need "reasonable suspicion" that a school policy or law has been violated to search.[47] *T.L.O*, however, only applies in cases in which school officials have a reason to believe a student was participating in a concerning activity.[48] In *Vernonia School District 47J v. Acton* (1995), the Court permits schools to conduct in-school searches of students in certain cases, regardless of whether or not there is reasonable suspicion.[49] The majority held that the nature of schools' power over students allows for "a degree of supervision and control that could not be exercised over free adults."[50] To determine whether a search without suspicion is justified, the Court must weigh the level of intrusion imposed on students by the search, as well as the nature and immediacy of the government's justification for conducting the search.[51]

Federal courts have largely left school districts in the dark, however, about how students' constitutional rights operate off-campus. Supreme Court cases above only discuss authorities' ability to overpower students' First and Fourth amendment rights *within schools*. There has yet to be any guidance from the high court on how staff may search for and exert discipline concerning online

speech created *off-campus.* Without Supreme Court precedent, federal appellate courts have given schools ambiguous directions, as relevant circuit court rulings—even within the same circuit—often directly conflict with each other.[52] Thus, it is difficult to classify the frameworks used at the circuit level. Still, the rulings can be sorted into the following categories. Some circuits simply apply *Tinker* to online, off-campus speech, requiring that the speech causes a material disruption at school before it can be disciplined. Alternatively, other circuits employ a more expansive approach, calling for "reasonable forecasting," which allows schools to punish online, off-campus speech if they can reasonably predict that it would cause a disruption at school.[53] Finally, a few circuits apply a nexus approach, holding that online speech must first be accessed at or physically brought to school before a student can be punished for it.[54] Nevertheless, the Federal Court of Appeals for the Sixth Circuit, which includes Michigan, has not ruled on any case related to the discipline of a students' online, off-campus speech.[55] Thus, it is unclear which—if any—of these approaches would apply in Michigan.

V. Case Analysis: State Level — Michigan

At the state level, Michigan public schools have received some concrete direction on how to combat cyberbullying. In 2014, state lawmakers passed an amendment to the Matt Epling Safe School Act, requiring that schools prohibit cyberbullying under their codes of conduct, although specific penalties were left for each district to decide.[56] Furthermore, the law encourages schools to train staff on "preventing, identifying, responding to, and reporting incidents of bullying," including cyberbullying.[57] In 2018, Michigan lawmakers went further, amending the penal code to classify cyberbullying as a criminal offense.[58] Following the law's passage, a county sheriff department released a Facebook video targeted towards parents, which advised them on how to protect their children from harm and

criminal liability.[59] While it is too soon to determine the full impact of the 2018 law, there have been no related charges reported thus far.

Despite Michigan's strong stance against cyberbullying, the 2014 and 2018 laws present incomplete and mixed messages to schools on how to proceed. The 2014 law's encouragement to train staff on anti-cyberbullying tactics does not obligate schools to search for concerning online content; however, the suggestion does not stop schools from searching for it.[60] Despite this permission, the Michigan House Committee on Law and Justice's analysis of the 2018 penal code change stated that while "schools have anti-cyberbullying provisions within their anti-bullying policies, there is little school officials can do about conduct occurring off campus or when school is not in session."[61] This conclusion makes little sense, however, as almost all cyberbullying occurs off campus, which lawmakers were well aware of when they enacted the 2014 law directing schools to prohibit such conduct.[62] Furthermore, the Matt Epling Safe School Act contains no enforcement measures, leaving each district to decide whether it is in compliance with the laws. In fact, one of the sponsors of the bill, then Senator Gretchen Whitmer, opined that the original bill had "more teeth" to it, allowing the State Board of Education to sanction schools that do not produce bullying policies in accordance with the law.[63]

On the other hand, the Michigan legislature has provided one clear instruction to schools by limiting how aggressively they can investigate concerning online content. The 2012 Internet Privacy Protection Act prohibited schools from requiring students to disclose their login information to personal online accounts, including social media, private email, or blogs.[64] Credentials for any device or service paid for by a school district are exempt from this law.[65] The law does not prohibit school staff from viewing or using publicly-available information posted by students on personal online accounts, making students vulnerable to discipline for information posted on these social media accounts.[66]

With the 2013 School Safety Act, Michigan created a state-operated online platform called Ok2Say where students, teachers, and community members can report concerning online content, including "self-harm and potential harm or criminal acts directed at school students, school employees, or schools."[67] However, local school districts are not obliged to use Ok2Say in their efforts to combat cyberbullying.[68]

VI. Case Analysis: Local Level — Districts in Macomb, Oakland, and Wayne County

Within this web of federal and state limitations and authorizations, southeastern Michigan school districts have created unique systems to surveil students' online, off-campus speech. These strategies can occur on two distinct media: 1) school-sponsored platforms and devices and 2) personal online accounts.

Speech on School-Sponsored Platforms and Devices

With the rise of the digital age, schools are incorporating technological tools meant for off-campus use into their educational practices, increasing the jurisdictional reach of districts to punish behaviors like cyberbullying or threatening speech. These technologies fall under two main categories. The first is cloud-based platforms, which allow students to work, share, and store documents over the internet on any computer. The second is one-to-one technology, which are physical devices that students can take home to use.

Since both of these technologies are provided to students by schools, speech on these devices likely falls under *Hazelwood*'s category of "school-sponsored."[69] If a school can reasonably argue that speech made with these tools is contrary to its educational mission, the school can punish students for the content, regardless of

where it was made. This overall expansion in educational surveillance abilities results in a constant monitoring of the technology platforms, even if there is no evidence of suspicious use.

Cloud-Based Platforms

Forty-three southeastern Michigan districts use one of two cloud-based platforms: Google's G Suite for Education (G Suite) and Microsoft Office 365 Education (Office 365).[71] This technology provides students with email, word processing software, slide shows, spreadsheets, calendars, and video-calling that can be used on any computer.[72] With these platforms, schools can investigate any content made on them, regardless of where it was created. Before the advent of these technologies, staff could only see virtual documents if they were created on school networks or submitted to teachers. Now, even if a document is created at home on G Suite or Office 365, the content can be seen by school staff.[73] The storage abilities of these platforms are like lockers in the sense that students legally have a lower expectation of privacy over the content kept in them because the space is owned by the school.[74] However, neither G Suite nor Office 365 have inherent monitoring tools, meaning that staff must manually search for content on the platforms.

To remedy this limitation, some schools employ companies to search the content created by *all* students, not just those suspected of misconduct. For example, Novi Community School District hired Gaggle to conduct a demo safety audit of their G Suite.[75] Gaggle searches through emails and documents, flagging for school administrators any content with keywords and phrases related to violence, self-harm, illegal substances, harassment, profanity, or sexuality.[76] L'Anse Creuse Public Schools and New Haven Community Schools both use a comparable service offered by SchoolMessenger—called SafeMail—that surveils students' Office 365 or G Suite data.[77] The broad searches of students' cloud-

based documents are likely justified by the *Vernonia* ruling, as they meet both of the Court's criteria. First, there is minimal intrusion to students, as they have little expectation of privacy on school-provided services. Second, schools have an immediate and serious justification: discovering threats of harm to students.[78]

Southeastern Michigan schools do not consistently inform students about their privacy rights on school-provided, cloud-based platforms. All districts have an internet acceptable use policy (AUP), which informs students about their lack of privacy when using on-campus internet.[79] Yet only half of the 43 schools offering G Suite or Office 365 explicitly state in their AUPs that they monitor the off-campus usage of these platforms.[80] Many of these schools give students a separate policy about G Suite or Office 365 use; however students in over a dozen districts are never told the extent of their schools' ability to surveil documents created on these services.[81] Furthermore, there is no evidence to suggest that AUPs are even read or understood by students.

Under certain circumstances, school staff can even access individual students' off-campus online activity that is unrelated to G Suite. For this to happen, a student need only 1) log onto their school G Suite account at home, 2) use Chrome–Google's Internet browser, and 3) turn on Chrome's sync function.[82] Then, the next time that the student logs onto their G Suite using school Wi-Fi, administrators are able to access the student's off-campus search history.[83] Furthermore, administrators can reset a student's login credentials and sign onto their account, and if the same three criteria were met, staff can access a student's at-home browser and search history.[84] While staff cannot attempt to access students' personal online accounts under the 2012 Michigan Internet Privacy Act, the law allows administrators to do so on school-provided accounts and services, regardless of what data those accounts track.[85] None of the studied schools have AUPs or other policies that inform students that their at home browser and search histories could be searched

by staff.[86]

One-to-One Devices and Bring Your Own Devices

With only limited federal and state regulations of 1:1 devices, the ten southeastern Michigan public school districts with these programs have significant discretion to control and monitor students' online activities both on and off campus. [87] All districts are required by the federal Children's Internet Protection Act (CIPA) to filter Internet searches on school-provided devices for obscenity, pornography, or content otherwise harmful to children.[88] Wyandotte City School District goes further in its filtering efforts by blocking all social media platforms on their 1:1 devices.[89] Romeo Community Schools takes an even more involved approach, installing an app called Securly on each device. Securly tracks and records a device's entire Internet activity history. Any concerning online activities are flagged or blocked by the service. Securly then sends a weekly report to both school officials and the student's caregivers.[90]

In addition to 1:1 programs, five schools have a bring your own device policy (BYOD).[91] In lieu of school-provided technology, students in these schools can bring their own device to school, opting out of the 1:1 program. Students must connect their personal device to the school's wifi network, which subjects their devices to the same Internet filtering on any school desktop computer, but not the additional restrictions 1:1 devices may have.[92]

Schools with 1:1 programs and BYOD policies risk exploiting conditions of socioeconomic disparity, by subjecting lower-income students to off-campus surveillance while allowing higher-income ones to evade detection.[93] Wealthier students are more likely to have the resources to afford their own devices.[94] By contrast, more than 28% of students from families who make less than $35,000 a year do not even have access to a home computer, meaning that 1:1 computers would be their sole personal computer outside of school.[95]

This inequity will likely increase the number of lower-income students disciplined by their school. Through mere probability, constant surveillance by school staff increases the likelihood that a student will be caught and punished, regardless of whether or not one group of students is committing more infractions.[96]

Speech on Personal Online Accounts

Without clear direction from federal or state authorities, southeastern Michigan schools have filled the void, taking a variety of approaches to mitigate negative impacts of social media. The different approaches that districts take mirror McCubbins and Schwartz's model of oversight as either "fire-alarm" or "police-patrol".[97] In fire-alarm oversight, the governmental agency relies on citizens, interest groups, or whistleblowers to sound the alarm and report concerning activities.[98] On the other hand, police-patrol oversight uses surveillance to discourage violations in the first place.[99] In the case of Michigan, some districts use reactive, fire-alarm type oversight of students' social media, while others also utilize proactive, police-patrol surveillance of students' online activities.

Reactive Approaches

The majority of southeastern Michigan school districts take a reactive approach to monitoring students' online activities. Forty of the seventy schools have a publicly-accessible platform on their websites where any community stakeholder—from students to parents to unaffiliated neighbors—can submit reports to administrators.[100] These platforms require officials to wait for someone to report concerning online content before staff can react to any potential issues. Once the school staff receives a submission, they can take whatever actions they deem fit.

Six districts use privately-operated platforms, which are not exclusively utilized for reporting concerning online content.[101] One platform—called Let's Talk—allows individuals submitting reports to select from among a range of other feedback types.[102] Only one of these options invites the report of alarming online content. Alternatively, another platform—called SchoolMessenger—advertises its platform to schools as a way to improve their capacity to respond to acts of violence and mental health challenges.[103] SchoolMessenger's fact sheet on its Quick Tip submission system states that "reported issues range from peer pressure, campus violence, depression, suicide and bullying."[104]

The most widely utilized reporting platform is Michigan's state-run Ok2Say system. Unlike the private platforms, the explicit purpose of Ok2Say is to report online content.[105] Thirty-three school districts in the three counties include a link to Ok2Say on their websites.[106] Several schools even have links to both Ok2Say and a private reporting system. Given the high cost of private platforms–around $9,500 annually–schools likely do not intend for the private platform to play the same role as the free, state-run reporting system.[107] Ok2Say does not provide additional services, such as the ability to submit questions or suggestions to the district, like the private platforms do.[108] Nevertheless, reports within Ok2Say are not limited to online content and can include testimony of in-school misconduct.[109] Furthermore, school administrators depend on reports through Ok2Say before they can take action.

Proactive Approaches

In addition to the reactionary approaches, a handful of school districts in the three counties also take a more proactive approach by actively searching for concerning online content rather than waiting for others to report it. For example, Livonia Public Schools use a service called Meltwater, which flags any time there is an online

mention of the schools' names or other keywords determined by the district. While administrators could access the specific content of flagged material, Meltwater is primarily a brand management tool that aggregates posts and identifies trends in online sentiments.[110] Staff would have to search through all of the flagged posts to find any concerning content. Accordingly, it would be difficult for a district to use a brand management tool like Meltwater as an online surveillance tool.

Three districts—Dearborn Public Schools, Novi Community School District, and Walled Lake Consolidated Schools—use even more proactive service, called Social Sentinel, to locate concerning online content.[111] Similar to Gaggle, Social Sentinel searches for questionable posts, flagging any publicly-accessible social media post that contains keywords determined by each district and the service.[112] The company's algorithms make it much more effective at identifying alarming online content than a service like Meltwater, where the ability to surveil online content for threats is only possible through extensive manual searches by school staff.[113] The upside of Social Sentinel's monitoring is explained in its marketing material provided to Novi Community School District: "Reactive is a tragedy. Proactive is a strategy."[114] The service gives school districts the ability to respond to potential threats as they are made, rather than waiting for someone to submit a report about an online post, which allows them more control over the consequences.

Schools stand on relatively solid Fourth Amendment grounds when allowing Social Sentinel to conduct these searches. Since the company only looks at *publicly*-available social media content, students cannot easily claim they have a reasonable expectation of privacy over their public posts.[115] To avoid detection, students could simply switch their accounts to private or write in code.[116] Accordingly, it is unlikely that cases like *T.L.O.* or *Vernonia* would even apply to public social media surveillance.

Nevertheless, services like Social Sentinel pose serious

student privacy concerns despite the supposed protections taken by the company. In its contract with schools, Social Sentinel explicitly states that its service is not intended to surveil individuals or groups of students.[117] The service is only meant to flag concerning content posted by *anyone* within the geofence.[118] However, in the same contract, schools are prohibited from publicly disclosing Social Sentinel's "past, present, and future keywords/phrases, refined keywords/phrases, filters, library, topic areas."[119] This non-disclosure clause means that schools and Social Sentinel are holding themselves accountable to this ban on surveilling individuals or groups because no one else knows the contents of the algorithm. School administrators could easily circumvent this prohibition by adding common words or phrases unique to their school's context—which are only used by specific students—to the algorithm. Social Sentinel staff cannot possibly know the significance of added keywords in each school environment, so they would have limited ability to determine whether a school is violating the service's terms and conditions.

Additionally, the search algorithm – particularly when districts add their own keywords and phrases – has the ability to capture online content that does not constitute a threat, but instead represents the school or its staff in a bad light. For example, a student in Syracuse, New York was suspended after starting the Twitter hashtag #shitCNSshouldcut in response to rumored budget cuts. Similarly, a student in Wichita, Kansas was disciplined for criticizing the losing record of his school's football team on Facebook.[120] Despite not constituting threats, Social Sentinel's algorithm would flag posts like these given their relevance to any school district. The service places no restrictions on how each school responds to alerts, and federal and state law provide few answers on how schools are permitted to discipline online speech, especially on non-school-sponsored platforms.[121]

Each district has the discretion to decide the extent of its

surveillance of both school-sponsored off-campus technology and students' personal online accounts. Even districts using the same monitoring technology can implement it differently, with unique keywords or geofences. Furthermore, the schools in this analysis inconsistently inform students of surveillance. All of these factors make it hard for students to know the scope of their schools' authority and the extent of their own privacy while off campus.[122]

The varying and ambiguous nature of school surveillance programs has the potential to severely hinder students' willingness to express themselves freely online.[123] In the first Supreme Court case on domestic surveillance, the American Civil Liberties Union argue that chilling effects arise in the "absence of predictability" of governmental action, which creates "uncertainty and anxiety" leading to altered behavior.[124] This assertion was backed up decades later in Penney's study of Internet activity following the 2013 NSA leaks.[125] The Court has never considered surveillance's chilling effect on student free speech; however, it has raised the issue in *Barnette* and *Tinker*, warning that schools may teach students to discount democratic principles through harsh discipline of expression.[126] Thus, it is possible that these negative effects of surveillance place schools on less legally justified grounds with their monitoring efforts.

VII. Conclusion

This argument has explored how southeastern Michigan schools have used their discretion to disparately monitor their students' online, off-campus activities. While the U.S.' legal pluralism framework provides officials some guidance on how to approach these challenges, gaps in the law persist. In the shadow of the law, school staff members have turned to surveillance to combat the harms of cyberbullying and school violence.

In the future, scholars should examine how surveillance

decision-making unfolds in other aspects of technological surveillance. For instance, the Chicago Public Schools' use of social media monitoring to determine their students' potential gang affiliation raises additional questions about the scope of school surveillance.[127] Additionally, scholars should interview students to assess their understanding of Internet surveillance at their respective schools, particularly to determine the extent to which students are cognizant of official policies. Finally, scholars should analyze technology companies such as Google, Microsoft, and Facebook to see which—if any—methods they take to combat harassment and threatening behavior on their platforms.

Appendix A: FOIA Request Sent to Schools
Dear ___,

Under the Michigan Freedom of Information Act § 15.231 et seq., I am requesting an opportunity to inspect or obtain copies of public records that deal with ___ school district's [past, present, or future] contracting or potential contracting with any third-party companies that provide services or platforms (from here on referred to as "monitoring service"), which monitor the online activities of students at your school — both on and off school premises. Examples of such companies include, but are not limited to, Geo Listening, Social Sentinel, Firestorm, CompuGuardian, SnapTrends, Digital Fly, Varsity Monitor, Let's Talk, K12 Social, Impero, LifeRaft, Media Sonar.

The specific documents that I am requesting include — but are not limited to — reports; legal analyses; contracts; policies; memos; internal emails; any communication sent to students and parents about any monitoring service; and school board minutes and recordings relating to the potential or actual contracting, appropriation, or implementation of any monitoring service (if this last category is already on the website, please direct me to the date of said meetings).

The Michigan Freedom of Information Act requires a response to this request within five days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If there are any fees for searching or copying these records, please inform me of the costs, before I am charged. However, I would also like to request a waiver of all fees in that the disclosure of the

requested information is in the public interest and will contribute significantly to the public's understanding of the monitoring of student's social media, as a part of my senior thesis. This information is not being sought for commercial purposes.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,
Michael Deneroff
Northwestern University '19
Phone: 248-979-4968 | Email: Michaeldeneroff2019@u.northwestern.edu

Appendix B: School Districts that use cloud-based platforms or with 1:1 and BYOD policies

	Total	Oakland	Macomb	Wayne
Google	32	15	4	13
Microsoft	11	3	3	5
Total w/ Cloud-Based Platforms	43	18	7	18
1:1	11	2	2	7
1:1 + BYOD	5	2	0	3
Total Districts	70	27	17	26

Appendix C: Schools by county that use each type approach to monitor private online speech

	Total	Oakland	Macomb	Wayne
Reactive – Ok2Say	33	15	7	11

Reactive – Private Reporting or School-Run Form	7	3	1	3
Proactive – Social Media Monitoring	4	2	0	2

Appendix D: Full footnotes for referenced School Policies

Acceptable Use Policies and Other Related Policies

Allen Park Public School. *Code of Conduct*, 27-28; Anchor Bay School District. *Internet Policy*; Avondale School District. *Acceptable Use of Technology Guidelines*; Berkley Schools. *STUDENT EDUCATION TECHNOLOGY ACCEPTABLE USE AND SAFETY*; Birmingham Public Schools. *Technology Acceptable Use*; Bloomfield Hills Schools. *Bloomfield Hills Schools Acceptable Use Policy (AUP) Technology Use for Educational Purposes Student Acceptable Use Policy Agreement;*; Brandon School District. *Student Network and Internet Acceptable Use and Safety Policy (AUSP);* Center Line Public Schools. *Student Technology Acceptable Use and Safety*; Chippewa Valley Schools. *CHIPPEWA VALLEY SCHOOLS SECONDARY SCHOOLS STUDENT-PARENT HANDBOOK 201 6 -2017*, Appendix E; Clarenceville School District. *Computer Use*; Clarkston Community Schools. *Student Education Technology Acceptable Use and Safety*; Clawson Public Schools. *Student Education Technology Acceptable Use and Safety*; Crestwood School District. *ACCEPTABLE TECHNOLOGY USE GUIDELINES ON-LINE CODE OF ETHICS*; Dearborn Heights School District. *Student Education Technology Acceptable Use and Safety*; Dearborn Public Schools *Student AUG*; Detroit Public Schools. *Acceptable Usage Policy For Students And Staff*; Eastpointe Community Schools. *Acceptable Use Policy;* Farmington Public Schools. *TECHNOLOGY/NETWORK ACCEPTABLE USE;* Ferndale Schools. *Student Education Technology Acceptable Use and Safety*; Fitzgerald Public Schools. *ACCEPTABLE USE OF TECHNOLOGY & INTERNET SAFETY POLICY.*; Flat Rock Community Schools. *Agreement for Acceptable Use of Technology Resources Students Grades 6 and Above;* Fraser Public Schools. *ACCEPTABLE USE OF TECHNOLOGY & INTERNET SAFETY POLICY*; Garden City School District. *Student Code of Conduct*, 9; Gibraltar School District. *Acceptable Use Policy;;* Grosse Ile Township Schools. *Student Education Technology Acceptable Use and Safety*; Hamtramck Public Schools. *Student Code of Conduct 2017/2018*, 17-19; Harper Woods Public School District. *Student Education Technology Acceptable Use and Safety*; Hazel Park Schools. *Student Handbook 2018-2019*, 74; Holly Area Schools. *Student Education Technology Acceptable Use and Safety*; Huron Valley Schools.

Secondary Student Technology Acceptable Use Agreement; L'anse Creuse Public Schools. *Student Education Technology Acceptable Use and Safety;* Lake Orion Community Schools. *PROCEDURES FOR THE ACCEPTABLE USE OF TECHNOLOGY RESOURCES AND PERSONAL TECHNOLOGY DEVICES;* Lake Shore Public Schools. *TECHNOLOGY ACCEPTABLE USE / PHOTO PERMISSION FORM*; Lakeview Public Schools. *NETWORK AND INTERNET ACCESS AGREEMENT FOR STUDENTS;* Lincoln Park Public Schools. *Code of Conduct*, 52; Livonia Public Schools. *INSTRUCTIONAL PROGRAM STUDENT INTERNET SAFETY POLICY,* 357; Melvindale Northern Allen Park Public Schools. *Student Education Technology Acceptable Use and Safety;* Mt Clemens Community Schools. *Student Education Technology Acceptable Use and Safety;* New Haven Community Schools. *Student Education Technology Acceptable Use and Safety;* Northville Public Schools. *Agreement for Acceptable Use of Technology Resources Students Grades 4 and Above*; Novi Community School District. *Internet and Email Acceptable Use Policy for Students*; Oak Park Schools. *Student Education Technology Acceptable Use and Safety;* Oxford Community Schools. *Student Education Technology Acceptable Use and Safety;* Plymouth Canton Community Schools. *Responsible Use of Technology*; Pontiac School District. *Student Education Technology Acceptable Use and Safety.* Redford Union School District. *ACCEPTABLE USE POLICY USE OF TECHNOLOGY AND ELECTRONIC RESOURCES*; Riverview School District. *Computer Use Agreement for Students;* Rochester Community Schools. *PROCEDURES FOR ELECTRONIC INFORMATION ACCESS AND USE;* Romeo Community Schools. *Staff, Student & Parent Technology Handbook;* Royal Oak Schools. *Student Education Technology Acceptable Use and Safety;* South Lake Schools. *Student Education Technology Acceptable Use and Safety;* South Lyon Community Schools. *Acceptable Use Policy for Technology*; Southfield Public Schools. *Student Code of Conduct,* 4; Southgate Community Schools. *SCSD Acceptable Use Policy for Students;* Taylor School District. *Student Education Technology Acceptable Use and Safety;* Trenton School District. *Student Education Technology Acceptable Use and Safety;* Lamphere Schools. *The Lamphere Schools Student Handbook Lamphere High School;* Troy Public School District. *Board of Education Policies and Bylaws,* 30; Utica Community Schools. *6600 POLICY - Acceptable Use of Technology/Internet Safety.* Van Buren Public Schools. *Student Education Technology Acceptable Use and Safety;* Walled Lake Consolidated Schools. *Student Code of Conduct*, 27-29; Warren Woods Public Schools. *Acceptable Use Agreement for Computers and Other Technology*; Waterford School District. *Student Education Technology*

Acceptable Use and Safety; Wayne-Westland Community Schools. *Acceptable Use and Data Protection*; West Bloomfield School District. *RULES FOR THE ACCEPTABLE USE OF TECHNOLOGY RESOURCES AND PERSONAL TECHNOLOGY DEVICES*; Westwood Community Schools. *Improper Use of Technology*, 94-95; Woodhaven-Brownstown. *Acceptable Use*, 33; Wyandotte City School District. *Acceptable Use Policy*.

One-to-One Programs

Bloomfield Hills Schools. *One-to-World;* Dearborn Heights School District. *DISTRICT 7: EDUCATIONAL EXCELLENCE & LIFELONG SUCCESS;* Fraser Public Schools. *Why Choose Fraser?;* Gibraltar School District. *I WAS VERY NERVOUS TO START MY NEW SCHOOL*; Lake Shore Public Schools. *One to One - Frequently Asked Questions*; Plymouth Canton Community Schools. *Always. On. Learning;* Riverview School District. *Frequently Asked Questions - Initiative*; Romeo Community Schools. *Staff, Student & Parent Technology Handbook*; Troy Public School District. *iPad Help & FAQ's*; West Bloomfield School District. *Technology Plan*, Appendix E;
Wyandotte City School District. *Wyandotte's 1-to-1 Parent FAQ "Frequently Asked Questions."*

BYOD Policies

Bloomfield Hills Schools. *BYOD Technology*; Fraser Public Schools. *Bring Your Own Technology (BYOT) Policy;* Plymouth Canton Community Schools. *Bring Your Own Device;*Troy Public School District. *TSD High School BYOD FAQ's & Information;* West Bloomfield School District. *1:! Technology Tools*.

Ok2Say

The Ok2Say Confidential Tip Form can be accessed at: https://ok2say.state.mi.us/. A link to Tip Form was included on all of the school's websites home pages or student safety resources page that were indicated as using the service.

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[3] Kenneth Dautrich, *The Future of the First Amendment: The Digital Media, Civic Education, and Free Expression Rights in America's High Schools*. (Lanham, MD: Rowman & Littlefield Publishers, 2008); Bryan R. Warnick, "Student Speech Rights and the Special Characteristics of the School Environment," *Educational Researcher* 38 (2009): 200–215.
[4] *West Virginia Board of Education v. Barnette,* 319 U.S. 638 (1943).
[5] Richard Rothstein, "The racial achievement gap, segregated schools, and segregated neighborhoods: A constitutional insult," *Race and social problems* 7 (2015): 21-30; Joe Darden, Ron Malega, and Rebecca Stallings, "Social and Economic Consequences of Black Residential Segregation by Neighbourhood Socioeconomic Characteristics: The Case of Metropolitan Detroit," *Urban Studies* 56, (2019): 115–30.
[6] Kitty Calavita, *Invitation to Law & Society: An Introduction to the Study of Real Law*. (Chicago: University of Chicago Press, 2010).
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[8] Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. (New York: Russell Sage Foundation, 2010); Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication Feature," *Stanford Law Review* 60 (2008): 295–412; Margaret H. Taylor, "Refugee Roulette in an Administrative Law Context: The Deja vu of Decisional Disparities in Agency Adjudication Response," *Stanford Law Review* 60 (2008): 475–502; Janet A. Gilboy, "Penetrability of Administrative System: Political Casework and Immigration Inspections Context and Process in Court and Bureaucracy," *Law & Society Review* 26 (1992): 273–314; Robert M. Emerson, "Case Processing and Interorganizational Knowledge: Detecting the Real Reasons for Referrals Explaining Reactions to Deviance," *Social Problems*

38 (1991): 198–212; Handler, *The Conditions of Discretion*.
[9] Warnick, "Student Speech Rights," 200-215.
[10] Ibid.
[11] Dautrich, *The Future of the First Amendment*, 27.
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[13] Cornell and Mayer, "Why Do School Order and Safety Matter?" 7–15.
[14] Anne Proffitt Dupre, *Speaking up: The Unintended Costs of Free Speech in Public Schools*, (Cambridge, Mass.: Harvard University Press, 2009).
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[18] Penney, "Chilling Effects," 117-182.
[19] Gary Marx and Valerie Steeves, "From the Beginning: Children as Subjects and Agents of Surveillance," *Surveillance & Society* 7 (2010): 192–230.
[20] Ahrens, "Schools, Cyberbullies, and the Surveillance State," 1669-1722.; Mendola, "Big Brother as Parent," 153-92; Suski, "Beyond the Schoolhouse Gates," 63-120.
[21] Way, "SCHOOL DISCIPLIN fE AND DISRUPTIVE CLASSROOM BEHAVIOR," 346–75; Waldman, "Badmouthing Authority," 591–660; Cornell and Mayer, "Why Do School Order and Safety Matter?" Osher, Bear, Sprague, and Doyle, "How Can We Improve School Discipline?" 48–58; Waldman, "Badmouthing Authority," 591–660; Mendola, "Big Brother as Parent," 153-92; Richards, "The Dangers of Surveillance," 1934-65; Solove, "A Taxonomy of Privacy," 477-564; Penney, "Chilling Effects," 117-182; Askin, "Surveillance," 59-88.
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[37] Ibid, 509.
[38] Ibid, 506.
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[40] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 274 (1988).
[41] *Morse v. Frederick*, 551 U.S. 393 (2007).
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[66] Ibid.
[67] Ibid, § 37.276-7 (2012).
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[69] *Hazelwood*, 484 U.S. 260; Nance, "School Surveillance and the Fourth Amendment," 79-138; Suski, "Beyond the Schoolhouse Gates," 63-120.
[70] Waldman, "Badmouthing Authority," 591–660; Richards, "The Dangers of Surveillance," 1934-65; Solove, "A Taxonomy of Privacy," 477-564; Penney, "Chilling Effects," 117-182; Askin, "Surveillance," 59-88.
[71] See Appendix D for complete list of referenced school policies.
[72] Google. "Spark Learning with G Suite for Education"; Microsoft. "Office 365 Education."
[73] Microsoft. "eDiscovery in Office 365." June 28, 2018; Google "What is Google Vault?"
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[75] Gaggle Safety Audit. Obtained through FOIA request to Novi Community School District.
[76] Gaggle offers the same service for Office 365; Gaggle. "Gaggle Safety Management."
[77] SchoolMessenger contracts. Obtained through FOIA requests to L'Anse Creuse Public Schools and New Haven Community Schools.
[78] *T.L.O.*, 469 U.S. 325; *Vernonia*, 515 U.S. 646.

[79] See Appendix D for a full list of referenced AUPs.
[80] See Appendix D for a full list of referenced AUPs.
[81] See Appendix D for a full list of referenced AUPs and other relevant policies.
[82] It is unclear if this is also possible under Microsoft's Office 365, as Google presently has more advanced syncing features between G Suite and Chrome.
[83] Google. "Data from Chrome sync."
[84] Jorge (Google Cloud Support Representative) email to Carrie Willis (Northwestern University Information Technology), January 30, 2019; It is likely that even more school districts actively monitor their email and cloud-based platforms, but this was not explicitly requested in my FOIA request, so most schools did not provide documents related to this kind of surveillance.
[85] Internet Privacy Protection Act. 478 Mich. § 37.276(1)(b) (2012).
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[87] Federal Communications Commission. "Children's Internet Protection Act."
[88] Christine Hensley (Executive Assistant to the Superintendent of Wyandotte City School District), email to Michael Deneroff in response to FOIA request, November 26, 2018.
[89] Romeo Community Schools' Technology Department Letter to Parents re: Securly. Obtained via FOIA request to Romeo Community Schools.
[90] See Appendix D for a full list of referenced BYOD policies.
[91] See Appendix D for a full list of referenced BYOD policies.
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[96] Mathew D McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28 (1984): 165–79.
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[98] Ibid.
[99] See Appendix D; For some schools, parts of their websites are password protected – only accessible by students, caregivers, and staff. It's possible there are online reporting mechanisms in these parts of the websites.
[100] School Messenger Renewal Authorization. Obtained through FOIA request to Novi Community School District; Farmington Public Schools. "FPS Feedback Form"; Harper Woods Public School District. "Talk to Us"; Romeo Community Schools. "Talk to Us"; Birmingham Public Schools. "Welcome to Let's Talk"; Flat Rock Community Schools. "Anonymous Bully/Harassment Form."
[101] Birmingham Public Schools. "Welcome to Let's Talk."

[102] SchoolMessenger Quick Tip. Obtained through FOIA request to Novi Community School District.
[103] Ibid.
[104] Student Safety Act. 183 Mich. § 752.913 (2013).
[105] It's possible that more schools inform their students of Ok2Say, but do not include a direct link on their website. For example, South Lake Schools does not have publically-accessible Ok2Say link on its website, but it did host an in-school assembly for its students earlier in the year to explain the service.
[106] School Messenger Renewal Authorization. Obtained through FOIA request to Novi Community School District; Email correspondence on Let's Talk Renewal. Obtained through FOIA request to Novi Community School District.
[107] Ibid.
[108] Student Safety Act. 183 Mich. § 752.913 (2013).
[109] Ibid.
[110] Meltwater, "News and Social Monitoring."
[111] Social Sentinel Contracts, obtained through Obtained through FOIA request to Novi Community School District, Walled Lake Consolidated Schools, and Dearborn Public Schools.
[112] Ibid.
[113] Social Sentinel Contracts, obtained through Obtained through FOIA request to Novi Community School District, Walled Lake Consolidated Schools, and Dearborn Public Schools; "Including Social Media in Your Safety Strategy." Obtained through FOIA request to Novi Community School District.
[114] "Including Social Media in Your Safety Strategy." Obtained through FOIA request to Novi Community School District.
[115] Social Sentinel Contact. Obtained through FOIA requests to Dearborn Public Schools, Novi Community School District, & Walled Lake Consolidated Schools.
[116] Marx and Steeves, "From the Beginning," 192-230; Suski, "Beyond the Schoolhouse Gates," 63-120; Waldman, "Badmouthing Authority," 591–660.
[117] Social Sentinel Contact. Obtained through FOIA requests to Dearborn Public Schools, Novi Community School District, & Walled Lake Consolidated Schools.
[118] Ibid.
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[122] Waldman, "Badmouthing Authority," 591–660.
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[124] Askin, "Surveillance," 59-88.
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Freedom from Fear: Hate Speech as True Threat

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Abstract

Current First Amendment jurisprudence regarding hate speech is exceptionally limited. There exist two schools of thought: the first suggests that no interference should be made, for fear of governmental abuse and curtailment of public debate. The other emphasizes the harms of hate speech and recommends government action. After laying out both sides of the debate, this paper examines the underdeveloped doctrine of "true threat," an issue on which the Supreme Court has been remarkably silent and federal courts have established competing standards. Acknowledging that true threat doctrine often takes context into account, and the harm of a true threat is in the fear it engenders, this analysis recommends a two-tiered test that provides stronger immunity for members of protected classes who reasonably feel threatened due to the history of violence against members of their class. By examining both landmark and recent Supreme Court decisions, this analysis finds that the test is entirely consistent with First Amendment jurisprudence while remaining sufficiently objective to prevent governmental overreach. Finally, the test is applied within the unique context of the university, using an adapted version of the test that accommodates the academic setting.

I. Introduction and Background

There is scarcely a concept as intensely debated, both within and without the legal world, as that of hate speech. The conflict is endless: should we let the harms fall where they may for the sake

of robust debate or should the government take a proactive stance against hate speech, regardless of the dangers inherent in regulation? I suggest a carefully constructed middle ground—a narrow area of hate speech that can be carefully proscribed while maintaining the integrity of the marketplace of ideas. Using the currently underdeveloped true threat doctrine, a narrow area of unprotected speech that includes threats of violence, I suggest there is ample room to create a comfortable compromise that will retain First Amendment principles while protecting vulnerable populations. I also consider the application of the true threat model to the unique characteristics inherent in the university setting and propose a separate adaption of the model in order to carefully balance its most consequential implications within that space.

II. The Great Debate: Speech as Self-Representative Democracy or Self-Restriction?

The pro-speech camp's arguments coalesce around a single set of values critical to democracy. One of the most prominent theories on the philosophy of free speech was put forward by Professor Alexander Meiklejohn. He argues that the impetus for the First Amendment is the protection of political speech. Political speech, he says, is the foundation of self-representative democracy.[1] All viewpoints, regardless of our agreement with them, ought to be heard for the electorate to become informed and properly function.[2] This point of view has been adopted by the Court and has formed a critical component of First Amendment jurisprudence. In the 1964 landmark case *New York Times v. Sullivan*, the Court decided to provide newspapers with immunity from most libel cases, barring serious misconduct.[3] The decision was rendered on the basis that the United States has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Other cases have used similar justifications. In *Garrison v.*

Louisiana (1964) the Court echoed Meiklejohn's idea when it declared "speech concerning public affairs is more than self-expression; it is the essence of self-government."[4] This reasoning has clashed with varying modern discourses on democratic multiculturalism and the impact of speech on marginalized groups, especially when speech targets those groups. Most members of society recognize that speech can be harmful or hurtful. Yet, when such speech has come into conflict with the First Amendment, the courts have consistently decided in favor of the speech. In *R.A.V v. City of St. Paul* (1992), the Court unanimously overturned a city ordinance banning the use of symbols that arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"—in this case, a burning cross erected by the Ku Klux Klan.[5] The decision to overturn the ordinance was made because it selectively targeted viewpoints; the law restricted expressions opposing specific characteristics of identity but did not restrict expressions in support of those same characteristics. Additionally, the law only targeted speech that focused on specific characteristics: attacks involving "race, color, creed, religion or gender" were prohibited, but other characteristics, such as sexual orientation, remained outside its scope. The specificity of the restrictions outlined by the St. Paul ordinance meant that the law constituted viewpoint discrimination, which is unconstitutional.[6] *Snyder v. Phelps* is also of particular interest. In this case, it was determined that the Westboro Baptist Church, infamous for waving offensive flags with statements such as "God Hates Fags" and "Thank God for 9/11," had a First Amendment right to picket the funeral of a dead soldier.[7] Chief Justice Roberts, delivering an 8-1 opinion, neatly encapsulated the argument of those who favor speech when he wrote "[o]n the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[8]

Critical race theorist Mari Matsuda disagrees. Although Chief

Justice Roberts says that "[a]s a Nation we have chosen a different course," the truth is, she would argue, that those who have made the decision are not those who are incurring its costs. She states, "[t]olerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay."[9] That tax is manifested in numerous ways, she says, such as "fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[10] This can lead to severe self-restrictions, most notably chilling, or limiting, one's own freedom of speech to avoid being targeted by hate.[11]

That deliberate self-restriction on speech has profound effects on the marketplace of ideas. Law Professor Alexander Tsesis of Loyola University proposes that the chilling factor prevents those marginalized voices from entering the "deliberative process."[12] He adds that this "stymies policy and legislative debates."[13] Take Keeanga-Yamahtta Taylor, for example—a Black professor at Princeton University. After attacking President Donald Trump in a commencement speech—arguably an exercise of political speech, not hate speech—Taylor received numerous death threats that eventually forced her to cancel several events she had planned, chilling her speech.[14] Thus, a paradox emerges. The process through which we supposedly "ensure that we do not stifle public debate" does, in fact, stifle debate. Marginalized voices, like Taylor, bear disproportionate costs to their speech, impeding their ability to speak freely. In turn, the processes of self-governance of which Meiklejohn speaks fails to function, which undermines democracy. If the marketplace of ideas is so flawed, perhaps some form of market regulation is in order.

III. The Regulator Problem

Yet, such a paradox is not so easily resolved. In order to

regulate hate speech, there needs to be a regulator. That regulator would have to incorporate the government in some capacity, as it holds a monopoly on regulation. Yet, can the government be trusted with that power? Justice Samuel Alito summarized the prevailing argument succinctly in his concurring opinion in *Iancu v. Brunetti*, a case that overturned restrictions on the trademarking of "immoral or scandalous material."[15] Alito wrote, "[o]ur decision is not based on moral relativism but on the recognition that a law banning speech deemed by government officials to be 'immoral' or 'scandalous' can easily be exploited for illegitimate ends."[16] Although not concerned with hate speech, comparisons can be drawn. Allowing the government free reign to decide what is and is not acceptable is a power too great to be free of corrupting influence. In fact, whether the government would abuse censorial power is not a hypothetical, but historical, fact. Indeed, the very beginnings of First Amendment jurisprudence reveal such a trend. In the earliest First Amendment case to come before the Court, *Schenck v. United States* (1919), the Court unanimously determined that the distribution of leaflets advocating peaceful disobedience of the draft would impede the army's conscription process and thus was not protected under the First Amendment but rather a violation of the Espionage Act of 1917.[17] *Whitney v. California* (1927), also demonstrates the use of governmental power to crush disfavored viewpoints. In that case, a woman accused of government criticism was allowed to be convicted because of her Communist party affiliation.[18] Syracuse University law professor William M. Wiecek notes that association with the Communist party was found undeserving of First Amendment protection during the Red Scare because "[a] majority of the Justices regarded Communists and their Party as *sui generis*, different from other radical groups like the Klan, uniquely threatening to America's national security."[19] If the government has used censorial power injudiciously before, surely it can do so again.

In fact, University of California Hastings College of the

Law professor Zachary Price argues that the lack of government regulation under the current model has actually helped human and civil rights discourse. He notes that the vast protections for hateful speech were born during the civil rights movement as a method of protecting civil rights activists from "bigoted government repression."[20] In *NAACP v. Alabama* (1958), the Court unanimously defended the NAACP's right to free association against the attempts of the government of Alabama to stifle them.[21] What if the Court had taken the same approach it had during cases such as *Whitney*? Then a Court opposed to the civil rights movement could have easily declared organizations like the NAACP outside the protection of the First Amendment, gutting the right of free expression granted to civil rights activists and potentially crippling the movement as a whole. One could even consider the possibility that the ability for movements to criticize First Amendment jurisprudence is a result of that same jurisprudence. Thus, it would be foolish and counterproductive to give the government too much power to regulate speech.

IV. Hate Speech as True Threat Theory

Currently, those who favor allowing all speech so as to not intrude on political speech, and those who advocate the regulation of political speech, even if it may stifle the marketplace of ideas, seem to take on diametrically opposed positions. However, there may prove to be a middle ground. The existing doctrine of "true threat" could be expanded to include harmful fear-inducing speech in a way that balances both interests. First brought before the Supreme Court in *Watts v. United States* (1969), true threats have since become one of the few areas of speech that do not fall under the domain of the First Amendment. The Supreme Court has only addressed the concept of true threat once since then, in *Virginia v. Black* (2003).[22] The Court has not been particularly clear on the doctrine either. In *Black*, Justice Sandra Day O'Connor, laid out the definition of true threat

as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[23] The Court also explained why true threats fall outside First Amendment protection, as "a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[24] Justice O'Connor adds, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat."[25] That is essential. Intimidation is only a *type* of true threat, leaving open the possibility that types of true threat exist beyond what has been explored in *Watts* and *Black*. It is within reason that methods of inflicting fear that do not involve intimidation through the threat of violence may constitute true threats. Of course, fear is a subjective metric and the Court has left it unclear exactly how much fear one has to feel to constitute a true threat. I suggest a true threat must be significant enough to cause disruption or some other adverse effect.

There are two competing standards used by lower courts to determine true threat; these are the key to the reason true threat can be expanded to strike a perfect balance. *Watts* put forth no test, leaving lower courts to create their own. Most decided on an objective test, which only requires that a reasonable person would interpret the speech as a threat.[26] In *Black*, however, a subjective test was proscribed, it indicates that the speaker needs to intend to have inflicted fear.[27] The difference between the two decisions, made more complicated by the fact that the *Black* opinion does not address the decision in *Watts*, has left lower courts confused, with jurisdictions interpreting the decisions in various ways.[28] A number have made use of what have been referred to as "*Watts* factors," as described by Professor Paul Crane. He lists the *Watts* factors that led to Court in *Watts* to determine Watts's speech was not a true threat because "the statement (1) was made during a political debate, (2) was expressly

conditional in nature, and (3) caused the listeners to laugh."[29] In other words, context is key in an objective analysis. Crane, however, argues that the subjective test of *Black* is superior, as requiring the intent of the speaker forms a more speech-protective test.[30]

A simple objective test is insufficient to properly protect speech, however. All speech should not be made less protectable in order to guard the most vulnerable, particularly speech that is of political import. What I propose instead is a two-tiered approach to true threat analysis that would both protect those who currently bear the brunt of current hate speech jurisprudence while also ensuring that political speech is as robustly protected as it is currently. The first tier would use the objective test given a history of violence against a protected class, while the second tier would use the subjective test.

As mentioned previously, the great harm of hate speech is its ability to imbue the recipient with a great fear, leading to various harmful effects, both psychological or physiological. The Eight Circuit found in *United States v. Hart* that in order to find a true threat, "a court must analyze the alleged threat in light of its entire factual context."[31] Let us consider the "factual context" of the United States. When a speaker engages in harmful rhetoric against a disadvantaged group, they are not speaking into a vacuum, devoid of context. Rather, the dark history of the United States offers a plethora of evidence that suggests that such violence is not a hypothetical, but a reality. The spectre of violence against minority groups looms large in America; the victims of hate speech have often become the victims of hate crimes. O'Connor even mentions in her opinion in *Black* that burning crosses directed as true threats engender such fear because "the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical."[32] Due to this context of violence, it is reasonable that one may begin to fear for their safety, even if the speaker did not intend the threat to be carried out. O'Connor's opinion also recognizes that "[t]he speaker need not actually intend to carry out the threat" to hold them

accountable.[33] In other words, there need not be the intent to perform the act for the threat to hold water. Thus, the first tier should be able to punish speech that instills intense fear and causes a listener of a protected class to feel reasonably threatened given a past history of violence against members of their class. Protected class, in this instance, would refer to characteristics such as race, gender, sexual orientation, ethnicity, or other such aspects that are inherent and immutable aspects of one's identity. Speech in this category would still be subject to other context-based analyses, but the history of violence against marginalized groups would be taken into account.

The second tier would encompass all other speech, so long as it does not incite violence against a protected class. It is critical to note that hate speech that does not incite violence would fall under the reasoning within this tier. As mentioned earlier, hate speech cannot be banned or targeted outright if it is to be combated. This tier would make use of the more protective subjective test, requiring that intent to threaten is proven in order to be punished. In this manner reprehensible speech is still protected, ensuring that no "slippery slope" is reached.

While the Supreme Court has historically ruled against regulations on free speech, case law demonstrates that the true threat hate speech model actually works well within the speech-permissive jurisprudence. In the *R.A.V.* decision, Justice Scalia explains why fighting words are unprotected by the First Amendment, stating "for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication."[34] Instead, they are a "particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey," their restriction is thus allowed so long as the government does not "regulate use based on hostility—or favoritism—towards the underlying message expressed."[35] The true threat model does not regulate speech, then, but rather a *mode* of speech. It is not the words that are the target in the *Watts* context,

but their threatening capacity. Whether those words are in favor or against carries no importance; the fear engendered is all that matters. Similarly, because the model is applied to a member of any protected class, rather than naming any particular characteristics to be protected, as the overturned ordinance in *R.A.V.* did, it is not so overly narrow or broad as to run afoul of current jurisprudence.

Alito's concurrence in *Iancu v. Brunetti*, in which he discusses the ease of government abuse of restrictions against concepts such as "immorality," demonstrates that such thinking is applicable even in the current Court. His concurrence states, "[o]ur decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas."[36] Again, a key separation is demonstrated between speech regulation based on the ideas expressed and that which is based on the mode of communicating the speech. So long as only the mode is infringed upon, regulation may stand.

The Court has even recognized that limiting the psychological damage caused by hate is of valid governmental interest. A unanimous Court decided in *Wisconsin v. Mitchell* (1993) that the First Amendment allows governments to punish a hate crime more severely than a similar, unbiased crime. Chief Justice William Rehnquist acknowledged in his opinion that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[37] Rehnquist continued, "The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases." Thus, Rehnquist conveys that the government has a valid interest in seeking to prevent those sorts of harms. That interest is not tied to hate crimes; rather, that interest exists independently and was pursued in this instance through a greater penalty on hate crimes. Thus, the government's compelling interest in preventing

the harm done in such instances should be interpreted by courts in with reference to the two-tiered test of the true threat hate speech model.

The question of the regulator is also dealt with under the true threat model of hate speech regulation. The introduction of multiple levels of tests is meant to dilute the possibility of governmental or judicial abuse. In the first level of the test, a court determines whether one's identity is protected based on a past context of violence and oppression. This is meant to be as objective a test as possible. If a history can be established to the extent a reasonable person of that class would feel threatened, then the speech may be proscribed. That reasonable person standard forms the second layer of the test. By determining which tier of the model speech falls under through an objective standard, it reduces the amount of leeway that regulators have in determining scope, while still leaving room for judicial discretion. The reasonable person standard, of course, has already been proven a useful test in other areas of First Amendment jurisprudence and so needs no further question as to its efficacy. The rigid application of this model should prove sufficient to ensure that no political speech is infringed upon, neither by design nor misuse. Additionally, while every regulation does pose some risk of a chilling effect, the limited nature of the model is intended to keep that possibility in check.

V. Universities and the True Threat Model

The debate on hate speech has been particularly pronounced on college campuses nationwide. Recently, contention has arisen over issues such as the presence of controversial speakers on campus. Given the unique nature of the university, it seems judicious to take it under special consideration. More than almost anyplace else, the university is a place that encourages free and open debate on a vast range of issues. Those debates are the core of a university's purpose;

indeed, a former president of the University of Chicago once declared, "without a vibrant commitment to free and open inquiry, a university ceases to be a university."[38] In many ways, the fundamental values of the university mirror those of the First Amendment. The Court has even said, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[39] Yet, the college campus has another important role: that of a protective space. It is nourishing *alma mater* in whose arms fledgling adults are nurtured, their psyches still young and developing. It is possible that those who have only just been thrust into the world at large, leaving home and family for the first time, are at particular risk of severe psychological harm from exposure to hateful speech. Given the higher stakes on both sides, it is worth examining whether the true threat hate speech model should still be applied the same way on college campuses as it is elsewhere. Of course, the First Amendment does not apply to the many private universities across the nation, but I shall assume it could, perhaps through some form of internal school regulation.

Antidiscrimination law scholar Charles Lawrence III argues that students in a university are a "captive audience," unlike those in other contexts.[40] A captive audience situation, one where the speech recipient is unable to avoid the speech, is one of the few instances in which First Amendment restrictions are permitted.[41] The home is one of those places where one is considered a captive audience.[42] The university is indeed like a home for its students, often they will work, sleep, and interact almost entirely within the boundaries of the campus for the duration of their time there. Lawrence adds, "[m]inority students should not be required to remain in their rooms to avoid racial assault."[43] That would obviously be an injustice, but it would also impact the academics of the university. If minority students feel unsafe venturing onto the campus they are also unable to share their views and contribute to the academic environment of the university.

Yet, one could argue that it is the core mission of the university

to promote dialogue, especially challenging dialogue. Students are unlikely to escape confrontation with ignorant and repugnant ideas, but it would be wise to recall the words of Justice Louis Brandeis in his concurrence in *Whitney v. California*. He wrote, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[44] If the university is not the appropriate setting to apply the "processes of education," then where is? Minority students are not the only ones still maturing on college campuses, so too are their detractors. Bigoted thought is perhaps the greatest mark of immaturity. Oftentimes, students who espouse hate have grown up knowing a single narrative and were never exposed to an environment that challenged their imperfect thoughts. Only through the "processes of education," not censorship, can they be shown the error of their ways.

By engaging in the "processes of education" and debate, all involved stand to benefit. Such is the argument of Vincent Blasi: He writes that the protection of expressive liberty in society "nurtures in its members certain character traits such as inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil."[45] These are essential skills for any budding researcher or member of a democratic society. A student that does not graduate with the ability to think critically and question assumptions has not truly learned. Most notably for our purposes, Blasi explains that free speech "requir[es] those who would beat back bad ideas and contain evil demagogues to pursue those worthy objectives in the most arduous way: engagement rather than prohibition."[46] When students confront bigotry on their campus they become involved in a process larger than themselves; they are inserting themselves into the democratic machine, the essence of self-government that Meiklejohn praises. Confronting, for example, a white supremacist speaker through picketing and protest trains students in essential changemaking; it

motivates students to look beyond the borders of their campus and to the issues awaiting them in the larger world. This activism imbues meaning that remains past graduation. Students emerge not only as scholars but as engaged citizens.

Yet, if a student feels so threatened that their education is affected, then freedom of speech will have undermined the very academic environment it is supposed to serve. As Matsuda describes, Black students that experience racial harassment and violence respond by isolating themselves and become alienated from campus. The resulting distance and estrangement negatively affects their academic performance.[47] Students are both particularly vulnerable and also in the most need of engaging with challenging viewpoints. In this context, we can still apply the true threat hate speech model, albeit with modifications.[48] In line with the Court's statement that First Amendment rights are "applied in light of the special characteristics of the school environment," I suggest a modified version of *Tinker v. Des Moines*'s substantial disruption test. If speech has so "materially and substantially interfere[d]" in the education of other students as to impact their academics through the creation of an atmosphere of fear then the speech would fall under the first tier of the true threat hate speech model.[49]

Controversial speakers and the commitment to eliminating true threat hate speech can coexist without great issue. It is rare that a case arises where a controversial speaker has so transcended the realm of acceptable political speech as to fall under true threat. Perhaps the only instance in memory is when right-ring provocateur Milo Yiannopoulos spoke at the University of Wisconsin-Milwaukee and singled out for harassment and insult a particular transgender student who was not present at his speech.[50] In comparison, the planned debate on immigration and globalization with Steve Bannon at the University of Chicago that sparked debate in 2018 would have proved no such threat, since he showed no signs of engaging in the type of harassment Yiannopoulos did or in causing violence

on campus in any way.[51] Instead, his intention was to engage in academic debate. Students would have not only been able to hear his views but also see them confronted, enhancing their own abilities to confront abhorrent views. The eventual cancellation of the event was a loss for the student body and damaging to free speech as a whole.

A notable example of the sort of speech that would qualify as a substantial interference under the true threat hate speech test is present in *B.W.A. v. Farmington* (2009). In that case, the Eighth Circuit affirmed a judgment that a school district prohibition against disruptive clothing did not violate the First Amendment rights of students to wear the Confederate flag.[52] The school had a history of violent racist incidents connected to the Confederate flag. One Black student was urinated on by a white student while being told, "this is what Black people deserve."[53] In another incident, white students, one with an aluminum bat, threatened a Black student at his house, which resulted in a fight.[54] In both instances, the Black student involved withdrew from the school. The Eighth Circuit decided that although racist speech cannot be prohibited merely on the basis of its offensive nature, it could be prohibited in an "educational and social context" where administrators can "reasonably suspect material and substantial discipline disruption," such as the context of racial violence in the school.[55] Viewing the case under the true threat hate speech model, one can reason that the violent racist incidents surrounding the Confederate flag at the school might justify a Black student's fear. We can see from the context surrounding the students' actions that others had their education substantially disrupted; one Black student withdrew from school as they were "uncomfortable due to the racial tension."[56] Thus, the offending students would fall under the first tier of the true threat hate speech test and have their speech limited. The Eighth Circuit came to the same conclusion, but by applying only the *Tinker* standard, which may not work under all such situations on a college campus. A controversial speaker may

cause a substantial disruption, after all, but should still be protected.

Using a modified true threat test for hate speech carefully weighs the competing interests at play on the university campus to provide for an environment that is both safe and intellectually challenging. It is as protective of free speech as can be while also ensuring that the interests and education of vulnerable students are kept firmly in consideration. An overly zealous approach to regulation would do more harm than good, and it could undermine the very purpose of the university—to foster the growth of scholars and citizens.

This should not be taken as an indictment of the "emotional safe space" concept, here taken to mean a group or private area free of conflict or criticism meant to help relieve stress and provide a small retreat and place of reflection for marginalized groups. Although some would argue that safe spaces and free speech are at odds, I find no such tension between the two. Rendering an entire university as a safe space would, of course, be untenable, but having select areas available for students to find community and respite from the burdens they bear is no liability, but rather an asset to the university. Stable mental health results in better academic involvement and performance, which fosters improved contributions to university discourse and debate.[57] Essentially, the marketplace of ideas may actually be ameliorated, rather than degraded, by the limited presence of safe spaces.

VI. Conclusion

The research of Matsuda and Tsesis has demonstrated that hate speech has such a pernicious effect upon those it victimizes in that it can undermine the core tenets underlying the First Amendment tradition. If only *some* people feel sufficiently safe to contribute to the marketplace of ideas and the most marginalized do not, it cannot truly be said that the First Amendment provides an environment

that is "uninhibited, robust, and wide-open." Our understanding of the First Amendment should thus be adjusted to accommodate the needs of our pluralistic democracy. Only when all of us feel safe and confident participating in the marketplace of ideas can our democracy reach its zenith. Yet, we must be always mindful of the real possibility of governmental abuse of power. In the interest of improving democracy, we may find ourselves harming it instead.

The true threat hate speech model offers a rare opportunity for the modification of First Amendment jurisprudence that does not fundamentally alter the system at its core. The principles of democratic self-governance, free debate, and self-development are untouched—even when expanded upon to include marginalized populations. Admittedly, this model is not a perfect solution, but it is an appropriate start. Matsuda warns us that "[f]or fear of falling, we are warned against taking a first step."[58] Unless we take that first step, there is little hope of rectifying the injustices that plague Americans daily. Until some attempt at justice is made, the truest threat is our own inaction.

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Toward Improved Indigent Defense Services: A Critique of Current Public Defense Practices and an Analysis of Reform Efforts

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Abstract

Over fifty years ago, the U.S. Supreme Court granted defendants the right to public defense as part of the right to a fair trial in *Gideon v. Wainwright*. Defendants who cannot afford private counsel to navigate the legal system rely on this promise for adequate representation. However, in practice, the local and state public defender systems today have left this promise largely unfulfilled. Public defender offices are plagued by underfunding, extreme caseloads, and disproportionate prosecutorial power, which has resulted in high rates of plea deals and excessive or incorrect sentencing. Current reform efforts include greater state-wide oversight, structural funding systems, and caseload limits, which would help allow public defenders adequate time and resources for each individual case. Innovative public defender offices, like the Bronx Defenders, have championed holistic public defense practices that prioritize clients and offer interdisciplinary and comprehensive services to communities. By analyzing efforts to revolutionize public defense, we can understand which cost-effective and substantive reforms must be made to fulfill the promises of *Gideon v. Wainwright*.

I. Introduction and Background

In *Gideon v. Wainwright* (1963), the U.S. Supreme Court ruled that, under the Sixth Amendment, states must provide public

counsel to all defendants who cannot afford private representation.[1] Defendants who cannot secure private attorneys rely on public defenders to help them navigate the legal system, learn the intricacies of their cases, and decide their best courses of action. However, the reality is that our current structures of public defense and the criminal justice system have inhibited this ideal of representation for indigent defendants. While prosecutors wield a disproportionate amount of power in the criminal-legal system, public defenders often struggle with excessive caseloads, underfunding, and the lack of training and resources, making it difficult to represent their clients effectively and equitably. Without adequate legal representation, defendants have resorted to educating themselves about the law or, more commonly, pleading guilty to crimes they might not have committed, believing that this is their best or only option.

The problems plaguing public defense services have contributed to the growing carceral state, which disproportionately targets and incarcerates poor individuals of color—many of which who do not have the resources to retain private counsel. An estimated 27% of incarcerated men in their early 30s constitute the bottom 10% of the income distribution.[2] Few reform efforts have been implemented to improve the public defender structure effectively. However, many counties and states are beginning to develop oversight committees, task forces, and resource allocation programs, which could lead to a greater understanding of which changes can successfully improve indigent defense in this country. Through increased oversight, resource accessibility, client-and community-oriented representation, structural funding changes, and state-initiated reforms, we can begin to level the playing field to guarantee poor defendants the promise that *Gideon* made fifty-five years ago.

II. The Impact of *Gideon* on Current Public Defender Structures

Gideon v. Wainwright (1963), a landmark Supreme Court case for indigent defense, afforded defendants the right to state-appointed counsel under the Sixth Amendment of the United States Constitution. When defendant Clarence Earl Gideon declared his indigency and asked for a court-appointed attorney for his trial, his request was denied. Gideon was forced to represent himself, since the State of Florida was only required to appoint counsel for defendants charged with capital offenses.[3] After being convicted, Gideon used the prison's law library to file an appeal to the U.S. Supreme Court, claiming a violation of his Sixth Amendment rights. The Court found in *Gideon* that a poor citizen's Sixth Amendment right to a fair trial was impeded by the inability to seek state-appointed defense.[4] The Supreme Court's ruling on *Gideon* thus expanded access to defense for all charges, establishing an "absolute right to counsel."[5] As a result of this ruling, states created or bolstered public defender programs to meet the increased demands of defendants who could not afford their own counsel. However, since the *Gideon* ruling, these state public defender programs have been destabilized by budget cuts and inadequate resourcing.[6]

Defendants who cannot afford their own attorneys rely on court-appointed public counsel to inform them of their rights and argue on their behalf for the fairest outcome. Indeed, in 2000, 82% of felony defendants in large state courts used public defenders or assigned counsel as legal representation, a statistic that reveals the disproportionate impact of mass incarceration on poor communities.[7] This significant dependence on indigent defense since its establishment in *Gideon* should reasonably suggest that the quality of and investment in public defender programs have improved or increased. However, the structure of public defense in this country was never equipped or funded to handle the inordinate

criminal caseload of the mass incarceration era, and few public defender offices today effectively and equitably represent all of their clients. This ineffective counsel can be largely attributed to the underfunding of indigent defense services, excessive caseloads for public defenders—which impacts the decisions that attorneys must make when choosing on which cases to focus—and the gap in power between prosecutors and public defenders.

The funding for indigent defense services varies by state and by county, which leads to a significant difference in the means and amount of funding that public defender programs receive. A study by the Bureau of Justice Statistics that tracked annual total state expenditures on indigent defense from 2008 to 2012 found that states vary widely in the funds they divert to public defender programs, with some states spending no more than $5,000 over the four year span, while others investing over $100,000 in these services.[8] The majority of states rely on counties, sometimes with limited help or oversight from the state, to fund their public defense programs. This results in inter-county disparities in the quality of indigent defense.[9] Moreover, most counties rely on fees and fines to fund these programs, illustrating the unwillingness of counties and states to establish steady and consistent structures to finance these important services.[10] It is important to note that these fees and fines are commonly used to create debt cycles that trap low-income communities and feed into the carceral state, further punishing poor residents who cannot afford these payments.[11]

The underfunding of public defense services makes it difficult for attorneys to dedicate sufficient time to their cases and has also led to a lower quality of training, research, investigation, and expertise in many public defender offices.[12] This directly disadvantages poor defendants, as "those with publicly funded counsel are more likely to be incarcerated for longer than those with privately paid attorneys."[13] Individuals who are receiving legal aid from public defenders can, at times, even be billed for these services, despite

the legal requirement that it be free.[14] Thus, poor individuals are doubly penalized for being unable to pay for an attorney and are faced with inadequate public defense and hefty court fees, which can accumulate into heavy debt and more criminal charges. While the *Gideon* decision intended to provide indigent clients with public defense attorneys, the lack of adequate funding from states and localities means that poor individuals are once again falling through the cracks of an inherently flawed criminal justice system.

Due to the underfunding of public defense programs and increasing demand for indigent defense services, public defenders are faced with excessive caseloads that inhibit them from providing effective counsel to their clients. National recommendations for individual attorney caseloads state the maximum number of cases that defenders should accept, based on statistical data, local practice, and the type of case (murder, misdemeanor, probation violation) to which the defender is assigned.[15] However, many public defenders overlook legal and ethical obligations and accept an excessive caseload. This is largely a result of public defense programs not having enough money to train and return new attorneys and "stress, burnout, and compassion fatigue" among public defenders.[16] This impedes their ability to allocate adequate time and resources to understanding and building an argument for each individual case.[17]

A study by the Bureau of Justice Statistics revealed that attorneys at 73% of the approximately 1,000 county public defender offices surveyed in forty-nine states "exceeded the maximum recommended limit of cases," and further, many offices were understaffed in attorneys, administrative staff, and investigators.[18] This often prevents public defenders from investigating and researching their cases, developing strong and trusting relationships with their clients, and being effective legal advocates for their clients. Excessive caseloads and impersonal attorney-client relationships have given public defenders the reputation of "meet 'em and plead 'em" lawyers, who often advise their clients to plead guilty and

accept a prosecutor's plea deal, sometimes as early as the day of arraignment, rather than argue the case in a courtroom.[19] In addition to excessive caseloads impeding public defenders' abilities to adequately represent their clients, most ineffective counsel arguments fail post-conviction, limiting the possibility for defendants to appeal their cases after the initial hearing.[20] The excessive caseloads of public defenders further punish poor individuals by failing to give them their right to full legal representation and depriving them of legal remedy when they do receive ineffective assistance of counsel.

The disparities in resources, funding, and power between public defenders and prosecutors have encouraged many defendants to waive their right to counsel and to a trial and accept a prosecutor's plea bargain instead. While the term "bargain" suggests that there is some type of negotiation between legal parties, prosecutors wield inordinate and unregulated power in creating a plea deal, sometimes with little or no concern for the actual law.[21] Jabbar Collins, for example, was wrongfully incarcerated for sixteen years before a key witness in the case admitted he was coerced by Brooklyn prosecutors to lie during testimony.[22] Over the past fifty years, approximately 97% of both state and federal defendants in criminal cases have accepted plea deals under the guise that they will receive a less harsh sentence than they would with a trial.[23] Plea-bargaining also maintains a lower case docket for prosecutors, defenders, and judges alike.[24] This practice, however, harms poor defendants who are told that a plea bargain is their best, or only, legal option. Defendants who maintain their innocence may be coerced into accepting a plea deal without knowing its full implications, meaning that they will still have a criminal record, even if their sentences are reduced to probation and they waive their right to appeal their case. With this prior conviction, an individual is likely to get a much harsher sentence if they reoffend and are labeled as a "felon," inhibiting them from finding jobs or receiving government assistance, even though they were never incarcerated.[25] A Florida study found that

those who carry this "felon label" are more likely to be reconvicted than those without this label, demonstrating the coercive effects of initial incarceration on subsequent recidivism.[26] Many defenders are forced to rely on plea-bargaining to alleviate their excessive caseloads, recommending plea deals while sometimes failing to review the intricacies of their clients' cases and "viable defenses" that would help their clients in a trial.[27] Foregoing a trial means the fate of poor defendants is negotiated behind closed doors, with an imbalance of power between the prosecutor and their public defender. This often leads to a less just sentence and illustrates how indigent defenders with excessive caseloads can irreversibly disadvantage their clients.

While many issues plague the public defender services provided to indigent defendants, the most significant contributors to this inequality are underfunding, excessive caseloads, and the prosecutor-defender power imbalance that has promoted plea deals. Past reform efforts have had minimal success in establishing an enduring structure under which strong indigent defense programs can exist. Reform efforts must include greater structural oversight, resource allocation, and client-oriented services in order to produce substantive change and adequate representation for poor defendants.

III. Current and Proposed Public Defense Reforms

Improving Oversight of Indigent Defense Services

The inter-county disparities that exist through county-based public defender offices contribute greatly to the quality of legal representation that indigent defendants receive. Moving public defender programs to a state-level structure would allow for greater oversight through a centralized system, requiring more consistency in office resources and funding. In 2003, Georgia successfully transferred its county-based public defender program to state-

funded "judicial circuit-based public defender offices."[28] Counties were given the option to "opt out" of the state-based structure, but county offices were still held accountable to state-established public defense standards.[29] Moving to a state-level structure forces public defender offices to adhere to a stronger set of guidelines, making it difficult to disregard state standards, like caseload limits, without repercussions.

While states need not centralize their public defender programs to improve legal representation for indigent defendants, they can establish oversight committees and task forces to better regulate local public defender offices. These agencies, whose explicit purpose is to maintain a high quality of defense, also work to fulfill the legal standard of "effective assistance of competent counsel" guaranteed by *Strickland v. Washington* (1984).[30] In 2001, Texas passed the Texas Fair Defense Act, establishing the Texas Task Force on Indigent Defense and initiating critical reform to its public defense services. Through this legislation, state funding was secured for indigent defense programs for the first time. The passage of the bill was a special effort involving state actors, special interest groups, and a political climate focused on more equitable public defense.[31] The overall quality and funding of indigent defense services have since improved, and each "indigent defense plan" must go through a rigorous standards review with the task force.[32] In 2013, the Michigan state legislature created the Michigan Indigent Defense Commission (MIDC) to review public defender offices in Michigan and generate a set of standards that can improve indigent defense practices across the state. Beyond merely demanding offices to follow this set of guidelines, the MIDC was also tasked with meeting with county offices to "design plans to meet the standards and measure the performance of counties in providing public defense services."[33] While the MIDC is still working to gather data and compile state-recommended standards, the recognition by state leaders that a commission needed to be established demonstrated

a shift toward critical public defense reform. These committees, once fully developed, can oversee public defender offices, lending the necessary oversight that will improve the quality of legal representation for indigent defendants.

Attempts to monitor and assess the quality of public defense services do not necessarily have to occur through state governments. Judges can also serve as "watchdogs" for inadequate indigent defense, reporting public defenders who cannot effectively represent their clients or prosecutors who use unregulated power to prey on defendants lacking representation.[34] This can be done through judges' refusals to accept legal counsel in their courtrooms that they see as inadequate or nonautonomous.[35] Bar associations and non-profit or public interest organizations can also play a role in overseeing indigent defense practices.[36] State and local bar associations are well situated to observe court activity and monitor the quality of indigent defense services. Organizations like the American Bar Association and the National Legal Aid & Defender Association have established national recommendations for public defense work, including ethical guidelines for maximum caseloads and performance standards.[37] These organizations, using their unique knowledge of legal processes, must bolster their efforts to regulate and oversee indigent defense practices. Their work and recommendations can inform state bar resolutions and state legislation, providing expert opinions on how to achieve greater equity in public defense.

Spurring Structural Funding Changes for Indigent Defense

Public defender services have become such a necessity for poor defendants that local, state, and federal funding for indigent defense services must be prioritized and improved. One way to ensure greater equity between prosecution and defense spending is to link them together. By granting subsidies to make funding for both parties more equitable, federal and state governments can provide

consistent indigent defense funding and to balance any abuses of prosecutorial power.[38]

The federal government must also assume more of a burden in funding public defender services. Federal grants through the Department of Justice already exist to fund prosecutors and police. The constitutional mandate of the Sixth Amendment and the *Gideon* ruling should call for an increased federal role in funding indigent defense.[39] States must also step in to assume some of the costs of public defense funding. Through established oversight by state committees and public interest organizations, state legislatures can begin to construct consistent funding structures for indigent defense programs in their budgets. Increased funding for struggling public defender offices can increase the amount of staff working on cases, reduce caseloads, improve quality of representation.[40] For example, in 2003, New York adopted legislation to significantly raise per-case pay for public defenders, which provided greater compensation to public defenders for their services and incentivized them to spend quality time on individual cases.[41] Additionally, proposed legislation in California would mandate pay equality between prosecutors and public defenders, in order to encourage uniformity in resources and legitimacy between offices.[42] A comparison of program financing for prosecutors and defenders reveals the inadequacies of indigent defense funding and the need for greater federal and state action to subsidize these services.

Combating Excessive Caseloads

Public defender offices must take initiative in ensuring that their attorneys do not accept undue caseloads. Greater oversight by state committees or task forces can help public defender offices adhere to recommendations and guidelines for maximum caseloads. Offices that do not have enough attorneys to handle increased caseloads or funding to hire more staff must look to alternative

solutions. For example, states like Maryland, North Carolina, and Wisconsin allow public defenders with unconscionable caseloads to assign overflow cases to private attorneys.[43] The private bar can play a role in advocating for decreased caseloads per attorney and cultivating resources for public defenders with excessive caseloads.[44] Other offices, like the Orleans Public Defenders Office (OPD), have played a more central and active role in limiting caseloads and prompting indigent defense reform.

The OPD, which is financed through municipal fees and fines, has historically struggled with a lack of steady funding, even though New Orleans pays relatively above average for law enforcement organizations.[45] A 2015 budget crisis in Louisiana led to an even more weakly funded public defense program in New Orleans, and public defenders expected that they would violate defendants' Sixth Amendment right to counsel with the inadequate resources and staff that their offices now had. Thus, the OPD initiated a "restriction of services plan," through which public attorneys began to reject new cases after reaching their maximum case limit, which created a waiting list for defendants in need of legal representation.[46] The OPD engaged in a hearing for the New Orleans criminal district courts on caseloads and prompted the Court to release many unrepresented defendants who had been waiting for months in jail without counsel.[47] The Court's release of these defendants sparked national attention and generated pressure on the state legislature to improve indigent defense funding. The OPD's "restriction of services plan" also prompted multiple class action lawsuits against the public defender system in Louisiana, as the defendants claimed the state had violated their Sixth and Fourteenth Amendment rights.[48] City councils and state legislatures have still been hesitant to create a steady funding structure for these services, but small annual city budget increases continue to be approved for indigent defense practices.[49] By creating and implementing structural safeguards against excessive caseloads, attorneys at the OPD demonstrated that public defenders can play an

active role in exposing undue working conditions, putting pressure on legislators to fund these critical services, and advocating for their clients' right to adequate and equitable legal representation.

Another effort to reduce caseloads for public defenders involves a "front-end" reform to reduce the overall number of cases that public defenders receive. Reclassification of crimes and diversion programs have become viable reform initiatives in the era of mass incarceration and have the potential to reduce the number of incarcerated people in this country.[50] Instead of leading to incarceration, the punishment for lower-level offenses can be reclassified to lesser infractions. Offenses like marijuana possession and driving with a suspended license can be punished through fines, community service requirements, or diversion and education programs.[51] Those with low-level drug offenses should enter treatment and rehabilitation programs rather than prisons, where their addiction would manifest and increase their likelihood of committing a re-offense post-incarceration.

Recent reform efforts in Texas, South Carolina, and Kentucky have all addressed reclassification and diversion efforts, and have led to a significant decrease in the incarcerated population and rate of crime.[52] This "smart on crime" approach to criminal justice will save money and resources for public defenders, police, and prosecutors, and focus public defenders' resources on higher-level offenses that require more nuance and investigation. By reclassifying and decriminalizing certain offenses and building effective diversion programs, we will see public defenders' caseloads decrease, which will allow them to focus more on the cases they receive. Consequently, the criminal justice system will become less punitive and more rehabilitative. The recent elections of District Attorneys Larry Krasner of Philadelphia and Chesa Boudin of San Francisco suggest that incorporating these transformative public defense reforms into the criminal justice system and reforming prosecutorial practices are becoming increasingly effective.[53]

Holistic, Client-Centered, and Community-Oriented Public Defense

Holistic public defense consists of interdisciplinary, sustained efforts to provide legal and social aid to understand and connect to communities served.[54] The Bronx Defenders is the flagship model of holistic, client-oriented, and community-centered legal representation. Holistic public defense offices address "both the circumstances driving people into the justice systems as well as the devastating consequences of that court involvement," reconceptualizing the idea of individuals as criminals who cannot be rehabilitated.[55] The attorney-client relationship is dynamic and cooperative throughout the legal process, and attorneys must strive to understand the structural and socioeconomic contexts which drove their clients to commit a crime. The Knox Public Defender's Community Law Office (CLO) of Knoxville, Tennessee has been a leading example of holistic representation. As its mission, the CLO recognizes the interaction between "individual conditions, socioeconomic structure, and environmental circumstances," which can give greater understanding to public defenders as they review cases and craft arguments.[56] The CLO has also incorporated social services, like screening for social and psychological determinants, release planning, and assistance in substance abuse, housing, driver's license, and education, into its public defense practices.[57] The CLO has illustrated that holistic models of public defense can be adopted by public defender offices, and that a greater understanding of clients and their communities can benefit the legal outcomes of cases.

Holistic public defense requires both client-centered and community-oriented practices to fully restructure indigent defense practices. Former Executive Director of the Bronx Defenders, Robin Steinberg, explains that client-centered public defense "marks a shift from a conservative, paternalistic attorney-as-decision-maker strategy, to an approach that considers the needs, wants, and values of

the client and includes the client in decision-making for the case."[58] Client-centered public defense works in partnership with clients, incorporating their goals and "striving to see the case through [the] client's eyes."[59] Instead of removing agency from defendants by allowing defenders and prosecutors to bargain for defendants behind closed doors, a client-oriented public defense model empowers defendants to seek out legal advice to inform their decisions. This enhances attorney-client relationships by encouraging both parties to work together to produce the best and fairest legal outcomes. By treating clients with greater dignity and taking a secondary role in legal decision-making, public defenders can give more agency to their clients, whose lives are most impacted by these outcomes.

Community-oriented public defense also empowers defendants and improves attorney-client relationships, as public defenders build relationships with and attempt to understand the communities in which they work. Individual cases become contextualized within the greater community, understanding that all communities are "a valuable resource and an ally in the effort to improve the justice system."[60] Further, building partnerships with local institutions and organizations gives public defender offices valuable connections. Public defenders can use these relationships to help their clients find, for instance, mental health counseling services or employment. Ultimately, community-oriented defenders serve as advocates for the community, realizing that much crime stems from more structural and contextual experiences rather than simply individual desires. Public defenders in Washington, for example, have partnered with grassroots advocacy organizations, like Voices of Community Activists and Leaders, to improve access to housing, HIV/AIDS medication, and resources for safer drug use.[61] The Bronx Defenders has both a community organizing division and a reentry division.[62] The shift towards community-oriented defense strategies means that communities who are generally distrusting of legal actors can begin to envision public defender offices as organizations who

seek to help, not incarcerate, defendants from the community.

The Bronx Defenders' Center for Holistic Defense trains public defenders in broad, interdisciplinary, and holistic practices. Instead of asking about witnesses or the nature of the crime during arraignments, these defenders also discuss their client's "immigration status, children, public benefits, mental health, employment, housing, student loans, and more."[63] This is achieved by staffing the center with immigration attorneys, civil attorneys, family attorneys, social workers, and investigators, all of whom are able to give greater holism to the resources provided through this office.[64] The Center for Holistic Defense also gathers research and data on their clients to identify which needs and services would be most useful if provided through the public defender office.[65] The Center's reach has gone beyond just helping defendants in need of legal representation; by hosting a "community intake program," their public defenders set aside time for walk-in appointments for community members to receive legal advice or explanation from attorneys or staff at the office, hold "Know Your Rights" workshops in the community, and host block parties to get to know Bronx residents and their stories.[66] In comparing defense cases using holistic and non-holistic defense practices, a RAND study finds statistically significant outcomes in reduction of pre-trial outcomes, case outcomes, and future encounters with the criminal justice system with the use of holistic public defense.[67] Indeed, Table 5 demonstrates that holistic representation has a statistically significant and practically large impact on punishment severity, reducing the likelihood of a jail sentence by 3.9 percentage points (16%) and the average length of the custodial sentence (including zero sentences) by 9.5 days (24%).[68] The Bronx Defenders offers integrated, interdisciplinary public defense practices that can tremendously improve legal representation, and overall aid, for those who are indigent.

While many argue that holistic, client-oriented public defense requires added funding or smaller caseloads to yield

successful results, the Bronx Defenders have demonstrated that this is not the case. The office's caseload and pay-per-case rate is comparable to most other New York City offices.[69] Additionally, this model encourages criminal and civil attorneys to collaborate on case triage, allowing for a greater intake of cases.[70] While some offices might not have the financial resources to provide social services to their clients, they can still be aware of local, accessible resources and refer their clients accordingly. Public defender offices can diversify their staff roles, assigning some employees to policy initiatives and impact litigation and others to research on community needs and organizations, in order to improve relationships within the community. Offices can also employ the help of volunteers, interns, or community members to improve their community outreach; the transition to a more holistic model of public defense does not necessarily require hiring more attorneys or exhausting funding routes.[71]

By cultivating and utilizing community resources, attorneys are not burdened with gathering information about housing and social services for clients on their own, and can instead focus more on improving legal arguments and representation.[72] While the holistic public defense model might seem daunting as it seeks to transform the entire nature and practice of indigent defense, it does not actually require excessive resources, and can yield a much greater quality of representation for poor defendants. Moreover, since holistic public defense simultaneously encourages more competent defense in criminal cases and "mitigates factors in defendants' lives that contribute to contacts with the criminal justice system," it also decreases the overall rate of incarceration.[73] In moving towards a system of holistic public defense, we are not only alleviating the ills of mass incarceration—we are fundamentally reforming the carceral society into a more just society for all.[74]

The Need for More Research to Inform Evidence-Based Reform Policies

An essential part of effective indigent defense reform is ensuring that policy efforts are informed by thorough research and evidence. The RAND study provides a comprehensive look at indigent defense and should serve as a model for research. However, more research needs to be conducted on indigent defense practices, especially regarding public defender triage, program funding, the number of cases that public defenders accept, and which reform efforts have yielded the most successful results. Collecting local and state data is critical to crafting policies that challenge existing structures and best target specific local or state public defense services. If specific states or counties struggle most with excessive caseloads, evidence-based policies should address "front-end" reform measures or processes for the delegation of overflow cases, rather than focusing on less relevant types of indigent defense reform. With the rise of popular discourses surrounding criminal justice reform and mass incarceration, the effects of current reform efforts must be analyzed in more detail to gather pertinent research that can inform future reform efforts. Additionally, research on public defense reform strategies must be widely disseminated and accessible so that legal, governmental, and community organizations can analyze its results and craft effective reform proposals. By dedicating more resources to the research of current indigent reform services and by making this information widely accessible, we can use innovative, data-driven reform to disrupt the inadequate public defense practices that have persisted since *Gideon*.

IV. Shortcomings of Reform Efforts

As many of the reforms covered in this paper are still in their infancies, only limited analyses of outcomes are available.

We must, therefore, be cautiously optimistic of the effectiveness of these policies and programs. Generally, increased oversight, improved state and federal roles in funding indigent defense services, adoption of holistic practices, and measures to decrease caseloads to improve the quality of representation are all significant steps toward strengthening the public defender system. However, each of these tasks alone may not be enough to deliver substantial improvements to the quality of representation for poor defendants.

In 2007, Louisiana passed the Public Defender Act, creating a state-wide oversight board to monitor public defense programs, much like the oversight committees discussed in the "Improving Oversight of Indigent Defense Services" section of this paper.[75] The Louisiana Public Defender Board made recommendations based on observations and analysis of local public defender offices, replacing decentralized oversight committees. Public defenders across the state began to protest the way that the state board was allocating money and monitoring defenders, and few offices made structural changes to adhere to the board's recommendations. The board's suggestions were crafted irrespective of some offices' opinions and criticized for failing to involve local public defenders in the drafting process.[76] The Louisiana State Legislature adopted amendments to the act in response to these criticisms in 2016. However, it is imperative that the initial shortcomings of Louisiana's public oversight committee inform future indigent defense reform efforts. States cannot simply pass legislation to create these committees and claim to have improved indigent defense services for their residents. Reform must reach beyond legislative reactions to badly planned initiatives, and those who spearhead public defense reform, whether it be through oversight committees, state legislatures, or public defenders themselves, must continually be held accountable. Topical and transient reform efforts, especially those that do not consider the realities of public defenders, will not deliver substantive legal aid to the poor defendants who require it. Reform efforts must be active

and intentional in order to establish or reorient structures to create true change.

V. Conclusion

Since *Gideon v. Wainwright* established the constitutional right to public defender services, federal, state, and local governments have failed to create and maintain strong indigent defense programs. In the fifty-five years since this ruling, public defender offices have become grossly underfunded and under-resourced, which deprives poor defendants of their right to effective and state-provided legal representation. Excessive caseloads, understaffing, and underfunding have pushed public defenders to overlook the intricacies of each case and neglect to build strong, trusting relationships with their clients. Poor defendants, who do not have the resources to afford an attorney or the legal education to navigate this system by themselves, are forced to accept inadequate public defense. These public defenders are inundated with an unreasonable amount of cases, limiting the possible attention and time that can be given to individual clients. This gives poor defendants an unfair possibility at justice. Coupled with the structural imbalance of prosecutorial power, these unreasonable caseloads result in the wrongful or excessive incarceration of many poor defendants and defendants of color whose communities have been unduly impacted by the rise of mass incarceration. The tragic lack of resources and funding for indigent defense programs has only recently become a significant focus of criminal justice reform, and the effects of efforts in many states to create greater oversight, allocate more funds, or combat excessive caseloads are still being measured.

State governments, in consultation with public interest and legal organizations, must continue to create innovative, data-driven, and politically-viable reform policies. Several factors make this reform challenging. The disenfranchisement and neglect of

poor citizens is an American political tradition, and state-initiated attempts to improve resource accessibility for poor communities is continually framed as another "big government" welfare initiative. In light of these factors, the most actionable piece of proposed public defense reform is reorienting public defender offices to deliver holistic, client-oriented, and community-centered services. This delegates the responsibility of reform to public defenders instead of states. While this will not solve structurally salient issues regarding funding and resources, it can vastly improve the quality of legal representation and client-attorney relationships. Although some reform requires institutional change, the discussed efforts must all be evaluated in terms of their ability to elicit substantive change for indigent defendants navigating the carceral state and not for the purposes of political convenience. Poor defendants are forced to grapple with a criminal justice system that flatly ignores the constitutional right guaranteed by *Gideon*. States must begin to prioritize indigent defense and implement effective reform policies to establish a path through which poor defendants can receive the high-quality counsel and resources to which they are entitled.

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Another Way to Promote Diversity: Class-Based Affirmative Action as an Alternative for Race-Based Policies

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Abstract

Forty years after it was first upheld by the Supreme Court in *Regents of the University of California v. Bakke*, affirmative action once again came under attack in *SFFA v. Harvard*. Though the District Court of Massachusetts recently decided in favor of Harvard, the case has garnered national attention and is likely to make its way to the Supreme Court. This essay aims to explore whether the race-based admissions policies used by many U.S. institutions of higher education are truly necessary to maintain the diversity of their student bodies. First, it will discuss the legal history of race-based affirmative action in higher education, and then it will analyze these precedents using the framework the Court has used with race-conscious policies in the past. After attempting to provide a clear definition of diversity as the Court upheld as valuable in *Bakke*, it will consider class-based admissions policies under the Court's jurisprudence. From this analysis, it is clear that race-based affirmative action is inconsistent with Supreme Court precedent. Rather, this essay argues that race-based policies should be replaced with class-based affirmative action, which is both constitutional and more effective in creating diversity—a different kind of diversity than the type provided by race-based affirmative action, but one which nonetheless contributes to the educational missions of these higher educational institutions, in a way thus far neglected by race-conscious policies.

I. Introduction and Background

First upheld by the Supreme Court in *Regents of the University of California v. Bakke*,[1] affirmative action is now facing legal challenges. In October, the District Court of Massachusetts decided *SFFA v. Harvard*, in which a group of rejected and aspiring Asian-American applicants to Harvard University alleged that they were denied "equal footing with other applicants on the basis of race or ethnicity due to Harvard's discriminatory admissions policies" in violation of Title VI of the Civil Rights Act of 1964.[2] While the court decided in favor of Harvard, the SFFA has already appealed, and it is likely that the case will reach the Supreme Court. This case has garnered national attention and caused the U.S. Department of Justice to file a statement of interest against Harvard,[3] on the same day that 531 social scientists and scholars[4] and sixteen notable economists[5] filed opposing briefs. *SFFA* marks just the latest development in a recent resurgence of interest in the legality and effectiveness of affirmative action. The stakes are high: only ten years remain until the suggested removal of race-based affirmative action, as held in the guidelines of *Grutter v. Bollinger*.[6] But many U.S. institutions, including all eight Ivy League colleges, still claim that the consideration of race as they use it in admissions decisions is needed to maintain the diversity of their student bodies, which is "essential" to their educational missions.[7] These policies, they allege, create a sort of diversity which cannot be duplicated with alternatives such as class-based affirmative action and are therefore still valuable today.

This essay aims to explore whether this is in fact the case. After a brief discussion of the ambiguous legal history of race-based affirmative action in higher education, these precedents will be examined using the Court's traditional analysis when faced with race-conscious policies. Then, following an attempt to define diversity as the Court upheld as valuable in *Bakke*, class-based admissions

policies are considered under the Court's jurisprudence. From these analyses, this essay will argue that race-based affirmative action is inconsistent with Supreme Court precedent. Such policies should be replaced with class-based affirmative action, because it is both constitutional and more effective in creating diversity. While this policy would provide a different type of diversity than that which is created through race-based affirmative action, it would nevertheless contribute to the educational missions of these schools in a way that has perhaps been neglected by race-conscious policies.

II. A History of Half-Hearted Affirmations

The Court's jurisprudence has, to date, only supported narrow instances of race-based affirmative action.[8] In *Bakke*, a plurality of the Court struck down racial quotas when applied to higher education admissions, holding such an effort to "assure within its student body some specified percentage of a particular group" to be immediately "regarded as suspect" and viewed as "discrimination for its own sake."[9] Nor was an effort to help "victims of 'societal discrimination'" determined to be a valid reason for race-conscious policies; the Court ruled that imposing disadvantages on any party "who bear no responsibilities for whatever harm the beneficiaries of the special admissions program are thought to have suffered" was not justified.[10] On the other hand, a majority of the Court was able to agree that affirmative action policies in general were constitutional,[11] a decision indicative of the trend of conflicting opinions regarding affirmative action to come. For instance, fourteen years later in *Hopwood v. Texas*, the Fifth Circuit Court of Appeals ruled that law schools may not consider race as a factor in admissions, directly contravening *Bakke* and essentially prohibiting race-based affirmative action in Louisiana, Mississippi, and Texas.[12] This decision was denied certiorari by the Court, and so its effects held until the Court's 2003 decision in *Grutter v. Bollinger*.[13]

Crucially, however, *Bakke* upheld the use of race as one of many factors in admissions decisions so as to help produce a diverse student body, which was held to contribute to the "'robust exchange of ideas'" promoted by universities (the diversity interest); however, *Bakke* gave no clear definition of what "attainment of ethnic diversity" entails.[14] Based on this, the Court continued to uphold limited affirmative action while striking down those plans it deemed not to "narrowly tailor" their "use of race in selecting applicants for admission."[15] In *Grutter*, for instance, a university's desire to achieve a "critical mass" of minority students was ruled by the Court under a strict scrutiny standard to be constitutional since it did not operate as a quota and gave "substantial weight to diversity factors besides race."[16] However, in *Gratz v. Bollinger*, a 20-point benefit given to "underrepresented minority" applicants (who needed 100 points to guarantee admission) was held unconstitutional and not narrowly tailored because it did not treat "each particular applicant as an individual" and used race only as a "'plus factor in a particular applicant's file."[17] *Grutter* and *Gratz* clearly held that race-based affirmative action programs needed to consider applicants as individuals—rather than as percentages of admitted student bodies—and that race could only be used as one of many plus factors which contribute to diversity. However, they failed to iterate a concrete set of guidelines for the policies, leading to concerns from dissenting justices that the plans, as authorized, could create legal plans aimed at creating a "critical mass" of minorities which operate in practice as "*de facto* quota system[s]."[18] This problem continued to pervade the legal system, as evidenced by *Parents Involved v. Seattle*, where the Court ruled that a system using race as a tiebreaker in high schools was not narrowly tailored and translated into racial balancing, overruling lower District Court and Appeals Court decisions that the practice had in fact satisfied strict scrutiny as applied by Supreme Court precedent in *Grutter* and *Gratz*.[19] In doing so, it struck down one more non-individualized

preferencing system but abstained from yet another opportunity to clearly define permissible affirmative action plans, continuing an ambiguity which would no doubt lead to future litigation.

Indeed, a few years later in *Fisher v. University of Texas 2013* (*Fisher I*), such an issue rose again over the University of Texas' plan to offer admission to in-state students within the top 10% of their respective high school classes.[20] Again, the Court had an opportunity to definitively correct ambiguity in its affirmative action rulings or to strike down the policies altogether. It did neither. In a surprisingly deferential[21] decision, the Court ruled that the lower court failed to apply strict scrutiny and remanded to the Fifth Circuit.[22] Upon its return to the Supreme Court three years later in *Fisher v. University of Texas 2016* (*Fisher II*), a split Court narrowly decided that the school had met the strict scrutiny burden, with four justices affirming and three justices dissenting.[23] Notably, while the dissenting justices deemed the reasons given by the university for its program "not concrete or precise" enough to evaluate, the majority concluded that they were "sufficiently measurable."[24] *Fisher I* and *II* therefore had the unfortunate effect of injecting more uncertainty into the question of which affirmative action policies were tangible enough to be evaluated, which qualified as constitutional under strict scrutiny, and which were prohibited.

Thus, the Court's record concerning racial affirmative action conveys an ambiguous and half-hearted assent to the practice, since it has historically legitimized it only as needed and only on narrow and individualized grounds. The Court seems to be reluctant to offer a full-throated affirmation of affirmative action, as seen by its stipulation in *Grutter* that in 25 years, it expects "the use of racial preferences" to "no longer be necessary" to further the diversity interest.[25] This is likely due to the Court's precedent on school segregation and on racial preferencing conflict. On one hand, the Court has a long and clear tradition of subjecting any regulation which preferences on the basis of race to strict scrutiny without

exception.[26] Derived from *U.S. v. Carolene Products*' presumptive reservation of higher standards for laws regulating "discrete and insular minorities" who lack normal access to the political market,[27] this standard forces all race-conscious affirmative action plans to withstand strict scrutiny burdens. Specifically, under strict scrutiny, the plan in question must be justified "only by a 'compelling state interest,'" and be "narrowly drawn to express only the legitimate state interests at stake."[28] Accordingly, in cases like *Bob Jones University v. U.S.*, the Court has found that state interests such as ensuring the unburdened free exercise of religion do not survive a strict scrutiny analysis when compared to the "fundamental, overriding interest in eradicating racial discrimination in education."[29] This begs the question of why the diversity interest of a school, which seems obviously subordinate to the enumerated First Amendment right to free exercise of religion, should justify racial preferences in education when freedom of religion does not.

This question might be answered by looking at the predecessor to affirmative action: school desegregation. After its ruling in *Brown v. Board of Education 1954* (*Brown I*) that "segregation of children in public schools solely on the basis of race…deprives the children of the minority group of equal educational opportunities,"[30] the Court further stipulated in *Brown v. Board of Education 1955* (*Brown II*) that local authorities were the parties obligated to apply the decision of *Brown I*, since solutions may require "varied" approaches depending on "local conditions."[31] Thus, the Court relegated to school-specific administrators the power to decide which policies would combat the deprivation of equal educational opportunity. Plainly said, the Court gave the responsibility of ending educational segregation to individual schools. The other significant impact of *Brown I* and *II* was, obviously, to ban segregation, but the Court did not decide whether this should take the form of an elimination of all-white and all-black schools, a system of conscious racial balancing within school districts, a system of transporting students to different

schools to mitigate the effects of segregation, or some combination of the above. The result was to give a large number of individual schools the duty to eliminate segregation, but to offer little guidance on what that would entail—specifically, on whether solutions to this problem ought to be race-conscious or race-neutral.

Throughout ensuing cases, the Court has espoused differing views on this subject. In *Swann v. Charlotte-Mecklenburg Board of Education*, for instance, the Court ruled that neither race-conscious balancing of student bodies nor race-conscious "gerrymandering of school districts" is permitted,[32] and ruled similarly in *Milliken v. Bradley*.[33] Later, in *Parents Involved*, Chief Justice Roberts would offer the Court's clearest rejection of race-conscious policies yet: "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[34] But although these cases would seem to put to rest the issue of whether race-conscious policies are acceptable to "eliminate from the public schools all vestiges of state-imposed segregation," countervailing examples exist. In the aforementioned affirmative action cases (i.e. *Bakke*, *Grutter*, *Gratz*, and etc.) the Court has offered an endorsement of race-conscious policies when used to further the state's diversity interest. This falls in line with a commonly subscribed view that the spirit of *Brown* and other desegregation cases provide an "intellectual and analytic tradition" which "finds in the equal protection clause a commitment to the eradication of the legacies of group-based disadvantage" using race-conscious policies.[35] These opposing views on whether race-conscious policies have a place in education have, as seen, created no shortage of confusion and ambiguity in the Court's position on affirmative action.

In sum, then, it is clear that the strict scrutiny used by the Court to evaluate racial preferencing conflicts to some degree with the Court's history regarding school desegregation and is responsible—at least in part—for its ambiguous stance on race-based affirmative action. On one hand, in line with the spirit of *Brown*, the Court

seems to want to allow certain race-conscious policies on the basis of bringing diversity to student bodies, though it has refused similar reasoning in its other judgments on desegregation. On the other hand, the Court seems to want to limit these race-based policies to ones which can survive strict scrutiny, at least in theory. Faced with these legitimate and conflicting desires, how does affirmative action as currently practiced in colleges fare today?

III. The Inconsistencies of Race-Based Affirmative Action and Precedent

In appearance, the affirmative action plans used by today's colleges seem perfectly acceptable. *Bakke* even cited Harvard's system as an acceptable example of race-based policy, still used in many ways today, which considers race as "a factor in some admissions decisions" to "tip the balance" in difficult decisions while refraining from setting "target quotas."[36] But as previously seen, the foundations relied upon by race-based policies are clearly conflicted. Moreover, even if such policies are clearly supported in theory by Court precedent, whether they remain so in practice is another question entirely. In *SFFA*, for instance, Harvard is accused of practicing its announced affirmative action program in name only, using it to hide a purportedly systematic and invidious discrimination of racial balancing against Asians.[37] Thus in analyzing the current state of race-based admissions policies, two issues must be explored: firstly, whether the affirmative action precedents themselves align with traditional Court rulings, and, if so, whether current practices are permitted under these precedents.

On the first question, the conflicting nature of the Court's desire to apply strict scrutiny and its opposing wish to allow race-conscious policies in the spirit of *Brown* has already been discussed. Aside from this, however, the Court also seems to have failed to consider certain key qualifications when deciding affirmative action

cases like *Bakke*, *Grutter*, and *Gratz*, weakening their applicability today.[38] For one, the Court has largely neglected to consider the historical animosity borne by many colleges against groups which might be considered "discrete and insular minorities."[39] Harvard in particular has a clear history of discrimination against Jews; at one point, Harvard President A. Lawrence Lowell publicly responded to an accusation made by a Jewish graduate that the school was anti-Semitic by replying that Harvard's stated policy of restricting the enrollment of Jewish students was to *help* Jews at Harvard by limiting racial tensions, since "the anti-Semitic feeling among the students…grows in proportion to the increase in the number of Jews."[40] Similar quotas on Jewish enrollment[41] were prevalent throughout the 1920s, especially in "elite Eastern colleges" which sought to preserve their "upper-class and Protestant character[s]."[42] Although this is not meant to suggest that similar discriminatory measures against Jews exist today at these colleges, it does bring into acute suspicion Harvard's current affirmative action procedures. In cases such as *Arlington Heights v. Metropolitan Housing Corp.*, the Supreme Court has repeatedly affirmed its reasoning that "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into… circumstantial and direct evidence of intent."[43] Previous intent to discriminate against racial groups, such as the history of many colleges in using admissions practices to discriminate against Jews, must qualify as at least circumstantial evidence of an intent to discriminate today; as the Court states in *Arlington Heights*, "the historical background of the decision [to regulate] is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.[44] However, the Court's failure to consider the history of prejudice against Jews and Asians in higher education as a significant factor in its strict scrutiny analysis sheds doubt on the validity of its decisions.[45]

However, the most serious problem with Court precedents

like *Bakke*, *Grutter*, and *Gratz* is their inconsistency with precedent and traditional Court jurisprudence involving equal protection. In cases applying equal protection analysis to traditionally suspect classifications other than race—to same-sex couples, for instance—the Court has held that equal protection dictates equal treatment of all classes of citizens.[46] Even in gender classifications, which have never been ruled to merit strict scrutiny, the Court has ruled that dissimilar treatment of different classes is unconstitutional.[47] Contrast this to race-conscious affirmative action policies, which, even when applied as narrowly as a mere "plus factor" alongside other individualized non-race considerations, still by nature treat members of some races differently than members of other races. This is a clear violation of the principles otherwise consistently held by the Court in relation to equal protection.[48] Indeed, these affirmative action precedents are even inconsistent amongst themselves; whereas *Bakke* ruled that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color,"[49] the Court has continued to allow race-conscious affirmative action due to its diversity benefit without considering that the downside of reaping this benefit is the denial of true equal protection. This "contradictory" reading therefore has the unfortunate effect of implying that "discrimination against whites is every bit as prohibited against blacks, except that just a little bit would be okay" as long as it furthers diversity.[50] Faced with this dilemma, the Court then has a clear choice: either reject its long history of guaranteeing equal protection of the laws, or strike down race-conscious admissions policies even though doing so may force colleges to seek other avenues of furthering diversity. Unquestionably, it should choose the latter.

Proponents of affirmative action might reply that a disparate impact on certain minority groups by itself is insufficient to merit an equal protection violation. In *Washington v. Davis*, for instance, the use of certain recruiting procedures for police officers that

affected a disproportionate number of black applications was held constitutional since the policies were racially neutral.[51] However, despite the fact that the disparate impact affirmative action policies have on minority applicants is just one of many signals of an equal protection violation, and that affirmative action is not racially neutral, the Court has also held in racial redistricting cases such as *Miller v. Johnson* that when the effects of a policy create an effect "so highly irregular that, on its face, it rationally cannot be understood as anything other than" an attempt to distinguish based on race, it may well serve as evidence of an equal protection violation.[52] These cases, moreover, also showcase the inconsistencies between traditional equal protection analysis and the affirmative action issue; the facially neutral legislation in *Miller* was held by the Court to be "covert" discrimination and subsequently struck down after being subjected to strict scrutiny, unlike similar "covert" forms of discrimination used by affirmative action policies accepted by the Court.[53]

Advocates for affirmative action have also argued that a "corrective justice rationale" exists for affirmative action to "compensate individuals for wrongful injuries," and in fact, "many commentators believe that corrective justice provides the most persuasive moral justification for affirmative action."[54] Arguments to this effect are flawed in several ways. Not only does an equally persuasive moral justification exist to refrain from imposing burdens on those who did nothing to effect the regrettable wrongful injuries of such minorities, but the Court has also explicitly rejected this rationale as a legitimate justification for affirmative action,[55] barring its use in legal arguments. Even if such a rationale were to be accepted by the Court, current policies are "a travesty from the standpoint of…compensatory justice" in that they "ignor[e] Chinese and Japanese-Americans' powerful claims for compensation."[56] It is evident, then, that affirmative action is shakily permissible at best and wholly unconstitutional at worst when precedent is confronted

with these considerations.

Even if these objections to existing precedent are brushed aside in accordance with *stare decisis*, race-conscious admissions as they are practiced today still face complaints when analyzed in accordance with precedent. Chief among these is the concern that current admissions policies act as *de facto* quotas, just as Justice Scalia feared in his dissent to *Grutter*.[57] Arguments in this vein have largely centered upon the treatment of Asians in admissions policies. In *Fisher*, for instance, amicus briefs opposing the university alleged that race is often the largest factor considered by admissions officers, effectively playing a decisive role in who is admitted—evidenced by the fact that "Asian American enrollment rises dramatically when race-conscious admission standards are eliminated," as seen in California after voters decided to ban the practice in passing Proposition 209.[58] Additionally, the *Grutter*-established rationale of "enrolling a 'critical mass' of minority students" to further a diversity interest can in fact be used to limit Asians and effect a "*de facto* quota system."[59] After all, any effort to enroll minority students in the hope of obtaining critical mass, especially when "zealously" applied, by definition seeks to admit a given number of minorities.[60] Contrary to what amicus briefs supporting the university argued, the fact that this critical mass "is not a fixed number or percentage"[61] does not make it any less of a quota system. Even though this number undoubtedly changes from year to year, it is undeniable that in each successive year an exact number—likely unknown—of minority students exists above which critical mass is achieved and below which it is not. In seeking to meet this threshold each year, universities operate on a quota system in all but name; the fact that the number of spots sought to be given to minorities or the number of spots available in total is "dynamic"[62] does nothing to refute this claim. When combined, the decisive role of race in admissions decisions and the goal of creating a critical mass of minority students result in "invidious" discrimination

against Asian-Americans, amici argued.[63] Similar opinions have been presented in *SFFA*: like in *Fisher*, the Department of Justice has argued that race plays a "driving" role in admissions decisions, this time in the form of a "vague personal rating" that has the potential to "significantly diminish Asian-American applicants' chances for admission" and "intentionally considers race," and which has been shown by Harvard itself to potentially be "infected with racial bias against Asian Americans."[64] And, just as in *Fisher*, Harvard is accused of operating a *de facto* quota by engineering its admissions process to accept the same racial balance each year. Harvard, of course, denied these allegations, issuing a point-by-point response to the Justice Department's statement of interest. But with Harvard relying overwhelmingly on the "testimony" of its own admissions officers as well as on an expert witness who chose not to include personal ratings in his analysis,[65] and the Justice Department largely trusting SFFA's account, there is little which can be definitively said before a verdict has been reached. However, the explanations of how Court-approved mechanisms such as critical mass have been used to effectively discriminate against Asians are compelling. It indicates that Court precedent could merit striking down affirmative action on as-applied challenges in the case of SFFA.

In summary, even if one accepts the flawed argument that the Court's decisions on affirmative action do not irreconcilably conflict with its historical standards of equal protection analysis, race-conscious admissions policies as they are currently applied have the potential to perpetuate discrimination against minorities in ways contrary to the Court's rulings. Such instances, while unfortunate, are to be expected, given the Court's history of ambiguity when it comes to race-based affirmative action.

IV. Defining Diversity

Given such ambiguity, then, the question follows as to

how a legitimate alternative to race-conscious affirmative action processes might be evaluated. It is critical that the Court's notion of the diversity interest be clearly defined, as diversity is the sole compelling interest[66] for which affirmative action is allowable. The sole clause in *Bakke*[67] which helps narrow the scope of diversity is how the diversity interest is meant to further the First Amendment commitment to a "robust exchange" of ideas. It also seems to be true; studies do show that "students learn more" as "their horizons are expanded," and that "they are forced to think in original and less automatic ways when they live and come into contact with other students whose backgrounds and perspectives differ from their own."[68] In Louisville, Kentucky, for instance, high school juniors were found to have benefited significantly in terms of "critical skills, future educational goals, and principles of citizenship" from diversity.[69] How, then, might universities achieve this robust exchange?[70] The enrollment of racial minorities would seem to be one way, given the Court's affirmations of race-based policies. Arguably, however, the use of race to further diversity is an imperfect measure better rejected for other classifications. Race may seem to be the most likely candidate on which to base affirmative action due to its "salient" nature and "predominance" within the national consciousness.[71] Race is salient because it is an easy proxy to represent a variety of characteristics relevant to diversity, such as "physical features" as well as "social and cultural" features.[72] But race is also a necessarily insufficient proxy with respect to these characteristics; an individual can be defined in terms of race using a single adjective, but race carries a variety of physical, societal, and cultural characteristics which a description of "white," or "black," or "Hispanic" or "Asian" can never hope to fully encapsulate. Therefore, while it may be simpler to advance the diversity interest through race, such race-conscious policies create a meager form of diversity only indirectly linked to these characteristics. The use of race in admissions decisions should therefore be substituted for a

holistic combination of the characteristics which it proxies—cultural backgrounds, physical traits, societal expectations, and so on.

Those advocating for race-based affirmative action might respond that colleges need not commit to advancing a broader and more substantial version of diversity, in accordance with *Dandridge v. Williams*' ruling that states need not "choose between attacking every aspect of a problem or not attacking a problem at all."[73] But not only does race-based affirmative action create detrimental effects for certain groups of minorities as previously discussed, it also has the potential to hurt diversity as well. Imagine a scenario similar to *Mississippi University for Women v. Hogan*, for instance, where dissenting Justices objected that forced gender integration of universities limited the opportunity of women to experience the "special benefits of same-sex institutions…[which] provide an element of diversity."[74] Similarly, race-based policies could in the future limit the ability of minorities to access the special benefits of primarily single-race institutions.[75] For instance, the use of racial affirmative action at historically black colleges would force them to accept larger numbers of non-black students, mitigating any past benefit black students might have experienced from attending a predominantly black college.

Colleges and proponents of race-based affirmative action also assert that though race-neutral factors are taken into account during the admissions process, race remains a necessary part because "the reality is that 'race does matter.'"[76] Students who have experienced discrimination on account of race, for instance, may not experience a full evaluation of their potential impact on campus diversity if race could not be accounted for during the admissions process; as many colleges note, "race and ethnic background may significantly impact applicants' experiences, perspectives, and areas of accomplishment."[77] This is a compelling argument, but it does not clearly capture the extent to which race is a proxy for the characteristics actually relevant to diversity. Discrimination, for instance, might

still be evaluated in applicants because discrimination based on race is frequently built upon a specific reason—prejudice against a race's perceived physical or cultural traits, for instance. In any case, such discrimination could be evaluated based on an applicant's life experiences, a race-neutral measure that compels individualized review—avoiding affirmative action policies devolving into group assessments based predominantly on race. As colleges themselves have noted, "race continues to shape the backgrounds, perspectives, and experiences of many in our society."[78] It follows that these "backgrounds, perspectives, and experiences" should be evaluated in place of race for a more nuanced understanding of each individual applicant.

In an ideal world, colleges would use such a broad range of factors extending through the full characteristics of the applicant, both immutable and experiential. Any and all such factors could be seen to contribute to a "robust exchange" of ideas as envisioned by the Court. However, faced with time and resource constraints, admissions officers must confine themselves to easily identified proxies such as race. Instead, if universities seek to better advance the diversity interest, they should use socioeconomic class as a proxy instead of race. The benefits of this are clear. For one, the use of class-based affirmative action avoids the equal protection analyses needed to evaluate race-based policies, since they make no distinctions based on traditionally suspect descriptors such as race. Class-based policies would also at least produce some heterogeneity along racial lines, although admittedly not necessarily as much as has been produced under race-based policies, since America's poorest citizens are disproportionately non-white. Most significantly, however, class-based affirmative action embraces economic inequality as a much-needed dimension of diversity in colleges. Unlike race, class does not serve as a salient proxy for other cultural attributes—while race derives in great part from culture and ethnic background, classes are built upon the individual and family

backgrounds which are directly relevant to diversity. In fact, classes are "not like races and cultures" at all, commentators have argued;[79] American society has long avoided the problem of "minimizing or eliminating" the influences of class, preferring instead to leave "the class structure of American society…unchallenged" and focusing on racial issues instead.[80] The introduction of class-conscious affirmative action policies would ensure that colleges experience an influx of socioeconomically-diverse student bodies which create an undoubtedly more "robust" environment for the exchange of ideas.

V. Class-Based Affirmative Action: A Return to Precedent

All that remains is to show that class-based schemes conform with Court precedent regarding affirmative action. This demonstration is relatively straightforward, since the Court's "legal system and jurisprudence has never fully recognized economic condition as a suspect class for the purposes of equal protection,"[81] and therefore would likely subject methods of categorization such as class-based affirmative action only to rational basis review, a much lower standard than the strict scrutiny applied to race-conscious policies. In *San Antonio School District v. Rodriguez*, for instance, the Court ruled that a system of financing public schools accused of violating the equal protection clause was not subject to strict scrutiny because economic classes were not a "suspect class," nor did the system "impinge upon a fundamental right explicitly or implicitly protected by the Constitution."[82] As a result, such classifications based on economic class are subject only to rational-basis review, which class-based affirmative action clearly passes: the diversity interest of the state as established in *Bakke* in having colleges comprised of students from different socioeconomic classes is unquestionably rationally related to the process of using economic class as a factor in admissions decisions.

The use of rational basis review has other advantages as well,

aside from the exceedingly minimal burden it imposes on class-based policies. For instance, the deference which rational basis review shows to the legislature's ability to decide policy matters means that similar deference will likely be shown to universities in their attempts to implement class-based affirmative action, supporting *Bakke*'s embrace of the "freedom of a university to make its own judgments as to education" with regard to "selection of its student body." In the same spirit as *Brown II*, control of such policy decisions would remain at the local level; individual colleges would be free to experiment with class-based policies as they wished, undisturbed by the courts so long as they maintained a rational relationship to the diversity interest. This would create new opportunities to explore how diversity and the educational benefits it confers to students can be further enhanced, and how the previously discussed weaknesses of class-based policies (the achievement gap, stigma, and so on) can be addressed and mitigated. Contrast this, however, with the current state of the diversity interest under race-conscious policies. Confined by the heavy burden of strict scrutiny under equal protection analysis and by Court precedent limiting race-based affirmative action to none but the narrowest of procedures (i.e. individualized consideration of race as one factor among many other racially-neutral characteristics), colleges have had limited means to engage in such exploration. It is therefore entirely possible and even likely that an adoption of class-based equal protection will benefit the diversity interest in new, unforeseen, and unpredictable ways.

Additionally, consider the fact that the Court has held the "corrective justice rationale" for race-based affirmative action unconstitutional because it "aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals."[83] However, the Court has never held this to be true of class-based affirmative action systems, particularly since it has never held those in lower economic classes as members of relatively victimized groups worthy of being deemed a suspect classification.

Because of the lower rational basis standard it employs regarding economic regulations, it is unlikely to do so in the future as well. This allows for some semblance of a corrective justice rationale to be able to be developed in economic-based affirmative action, in contrast to race-based plans, where it was stifled by the Court.

In any case, even if class-based affirmative action plans were to undergo strict scrutiny, every indication exists that it would still be constitutional. After all, just as with race-based classifications, the state still has a compelling interest in furthering socioeconomic diversity in education—just as the diversity interest is furthered when more minority students are enrolled, it is furthered when more students of lower socioeconomic backgrounds are enrolled. Nor would class-based policies be used to further animus against minority groups, since they are facially neutral. And as discussed in the previous sections, class-based systems are undoubtedly narrowly tailored, perhaps even more so than their race-conscious counterparts, because they remain race-neutral while still furthering the diversity interest. Of course, some might still argue that class-based policies are less effective at promoting diversity along purely racial lines. However, the Court has traditionally refused to rule based on the effectiveness of legislative-enacted policies, unless they create an adverse impact on traditionally suspect classes (no such risk applies here). In *Griswold v. Connecticut*, for instance, the Court explicitly stated that it does not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[84] As such, the claim that class-based affirmative action policies are more narrowly tailored than race-conscious affirmative action depends solely on the fact that the class-based model achieves diversity through race-neutral means.

Class-based economic policies are not only more effective than race-based alternatives, but also easily conform within the

framework laid down by Court precedents. As with race-based policies, many challenges to proposed class-based schemes would likely be required before a precise definition of a Court-permitted, constitutional class-based policy can be fully articulated. But such a definition is likely to be broader and more deferential to school policy than in the case of race-based affirmative action, creating broad opportunities for the further development of diversity.

VI. Conclusion

Although *SFFA* is primed for the Supreme Court, it will take years of litigation to get there. Even when it does, the Court may decline to take the case and choose to avoid such questions until the 25-year deadline given by *Grutter* is up, or take a less aggressive stance as it did in *Fisher*, especially in accordance with *stare decisis*. In the meantime, using the ambiguity prevalent in Court precedent, colleges will no doubt continue to use race-conscious affirmative action policies in their quest to create more "diverse" environments, which—as currently practiced—is contrary to existing precedent on affirmative action and the Court's long-standing rulings on race-conscious regulations. As a more effective alternative, higher education institutions should instead transition to class-based affirmative action policies, which are not only wholly consistent with Court precedent but also contribute to a far more beneficial form of diversity. Class-based policies are no doubt imperfect. They leave out a variety of factors which might contribute to the "robust exchange" necessary for a diverse learning environment. However, they are undoubtedly more effective than race-based policies, and may well be the best option we currently have.

Courts can do little to impose class-based affirmative action, just as they did not have the power to order colleges to adopt race-based policies. They can only compel schools to refrain from implementing race-based policies and suggest class-based ones

as alternatives. The easiest (but by no means easy) way, then, to reject race-conscious admissions policies is through public opinion. Voters would need to effect change at the ballot box as they have done in California and Michigan. Additionally, colleges, spurred on by popular sentiment, academic and activist voices, and its own students, would need to take it upon themselves to enact class-based affirmative action. It is only with the actual and widespread use of these policies that researchers will have enough data to truly evaluate its effects on diversity. For now, these policies will remain simply the best hypothetical solution, especially when compared to race-conscious affirmative action.

[1] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).
[2] *SFFA v. Harvard*, No. 1 Complaint against defendants 1, 8-10 (D. Mass. Nov. 17, 2014).
[3] *SFFA v. Harvard*, No. 497 United States' Statement of Interested in Opposition to Defendant's Motion for Summary Judgment, Redacted (D. Mass. Aug. 30, 2018).
[4] *SFFA v. Harvard*, No. 494 Amicus Brief filed by Social Scientists and Scholars in Support of Defendant (D. Mass. Aug. 30, 2018).
[5] *SFFA v. Harvard*, No. 499 Amicus Brief filed by Amici Curiae Professors of Economics Susan Dynarski, et al., in Support of Defendant (D. Mass. Aug. 30, 2018).
[6] *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003), "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today."
[7] *SFFA v. Harvard*, No. 445 Amicus Brief filed by Amici Curiae Brown Univ., et al., in support of Defendant (D. Mass. Jul. 30, 2018).
[8] To be clear, the Court has no power to order colleges to engage in affirmative action along racial lines. It is generally accepted that the "Constitution is a charter of negative rather than positive liberties," a view supported both by consistent Court precedent and the legislative history of the Constitution. *SeeJackson v. City of Joliet*, 715 F.2d 1200, 1203 (7thCir.), *cert. denied*, 465 U.S. 1049 (1983). *See also*David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 865-866 (1986). As such, the Court never has the power to compel government to grant a certain service, only that it refrain from infringing upon rights. In this case, while the Court may plainly rule that a practice such as racial quotas violates the right to equal protection, it is evident that it has no power to force colleges to use race-based affirmative action. Schools are therefore free to refrain from using these policies, and voters are similarly free to forbid such use within their states—California, for instance, passed Proposition 209 in 1996 to amend the state Constitution and effectively forbid race- and gender-based affirmative action in its public schools (although this was challenged in court, the Ninth Circuit affirmed the amendment and the Supreme Court denied certiorari). Nebraska also effectively banned affirmative action within the state in 2008 with the passage of Initiative 424.*See also Coalition for Economic Equity v. Wilson*, 4 Race & Ethnic Anc. L. J. 47 (1998), citing *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N. D. Cal. 1996).
[9] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
[10] Ibid.
[11] Ibid.

[12] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).
[13] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[14] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
[15] Ibid.
[16] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[17] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[18] *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., dissenting).
[19] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).
[20] *Fisher v. University of Texas*, 570 U.S. ___ (2013).
[21] *Fisher v. University of Texas at Austin*, 127 Harv. L. Rev. 258, 260 (2013).
[22] *Fisher v. University of Texas*, 570 U.S. ___ (2013).
[23] *Fisher v. University of Texas*, 579 U.S. ___ (2016).
[24] *Fisher v. University of Texas*, 579 U.S. ___ (2016).
[25] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[26] *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995), "strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by a federal, state, or local actor." *See also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."
[27] *United States v. Carolene Products Co*., 304 U.S. 144 (1938).
[28] *Roe v. Wade*, 410 U.S. 113, 155 (1973), citing *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940); *Eisenstadt v. Baird*, 405 U.S. 438, 460, 463-464 (White, J., concurring in result).
[29] *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).
[30] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[31] *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).
[32] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
[33] *Milliken v. Bradley*, 433 U.S. 267 (1977).
[34] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).
[35] Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action,* 2002 U. Chi. Legal F. 11, 42 (2002). *See also, e.g.*, Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized*

Consideration, 56 Duke L. J. 781, 808 (2006), regarding the "race-conscious remedies mandated by *Brown*."

[36] *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

[37] *SFFA v. Harvard*, No. 497 United States' Statement of Interested in Opposition to Defendant's Motion for Summary Judgment, Redacted (D. Mass. Aug. 30, 2018).

[38] The Court has clearly ruled, as considered in the preceding section, that race-based classifications are subject to strict scrutiny. However, a legitimate argument exists that affirmative action in particular might not be worthy of strict scrutiny. The rationale for this derives from the Court's tradition of reserving suspect classifications worthy of strict scrutiny to only those groups with (among other qualities) a "history of…discrimination." *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684. And white students applying for admission can hardly be said to have experienced such a history. However, this was explicitly rejected in *Bakke*, in the Court's holding that "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals," and that the "guarantees of the Fourteenth Amendment extend to all persons." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 295, 289-290. *See also Fisher v. University of Texas*, 570 U.S. ___ (2013) (Fisher I), "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." In any case, Asians as a minority group have undoubtedly faced this sort of discrimination at the hands of the state, and are therefore suitable as a replacement for whites in meriting strict scrutiny; *see, e.g.*, *Korematsu v. U.S.*, 323 U.S. 214 (1944).

[39] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

[40] The New York Times (1922), "Lowell Tells Jews Limit at Colleges Might Help Them, Says It Might Tend to Combat the Increasing Tendency to Anti-Semitism."

[41] Not to mention a similar pattern of discrimination in higher education against Asians. *See, e.g., Fisher v. University of Texas*, Amicus Brief filed by the Asian American Legal Foundation and the Asian American Coalition for Education in Support of Petitioner 16 (2016), "discrimination against Asian American schoolchildren has a long and shameful history, beginning with the outright exclusion, then tracking the evolution of the 'separate but equal doctrine' as applied to education, and finally evolving into racial balancing schemes such as the one at issue here," followed by a summary of precedents in support.

[42] Stephen Steinberg, *How Jewish Quotas Began*, Commentary Magazine (1971).

[43] *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, (1977). *See also Washington v. Davis*, 426 U.S. 229 (1976).

[44] Ibid.

[45] For instance, within *Bakke*, *Grutter*, *Gratz*, and *Fisher I* and *II*, the Court has only mentioned discrimination against Jews once (in *Grutter*), and briefly at that. *Bakke* frequently relied on *United Jewish Organizations v. Carey*, a case regarding the vote apportionment of a Hasidic Jewish community, but this can hardly be equated to the history of discrimination against Jews in higher education. *See Regents of the Univ. of Calif. v. Bakke,* 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. University of Texas,* 570 U.S. ___ (2013); *Fisher v. University of Texas*, 579 U.S. ___ (2016).

[46] *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996), "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."

[47] *See, e.g.*, *Reed v. Reed*, 404 U.S. 71, 74 (1971), in which a unanimous Court ruled that "the arbitrary preference established in favor of males…cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws."

[48] "But even while *Fisher* places a higher burden on overt uses of race in admissions, it continues the Court's practice of allowing, in the affirmative action context, race-conscious but facially neutral policies intended to increase student body diversity. This practice contrasts with the Court's general practice of disallowing such policies in other contexts." *See Fisher v. University of Texas at Austin*, 127 Harv. L. Rev. 258, 267 (2013).

[49] *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

[50] Lino A. Graglia, Grutter *and* Gratz*: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity,"* 78 Tul. L. Rev. 2037, 2038, 2040 (2004).

[51] *Washington v. Davis*, 426 U.S. 229 (1976).

[52] *Miller v. Johnson*, 515 U.S. 900 (1995). *See also Shaw v. Reno,* 509 U.S. 630 (1993).

[53] "The Court's recent redistricting cases, Miller v. Johnson, Shaw v. Hunt("Shaw II"), and Bush v. Vera, suggest that such [covert discrimination] is unconstitutional in affirmative action programs as well." Chapin Cimino, Class-Based Preferences in Affirmative Action Programs After Miller v Johnson: A Race-Neutral Option, or Subterfuge?, 64 U. Chi. L. Rev. 1289, 1291 (1997).

[54] Paul Brest and Miranda Oshige, *Affirmative Action for Whom?*, 47 Stan. L. Rev. 855, 865 (1995). *See also*Lena Martinez-Watts, *Reforming Diversity: Finding Our Way to a more Inclusive Affirmative Action Jurisprudence*, 5 Geo. J. L. & Mod. Critical Race Persp. 51, 52 (2013), contending that "the Supreme Court should expand its limited 'diversity' justification for affirmative action and embrace

Justice Thurgood Marshall's proposed interest in remedying racial disadvantage as standard doctrine." *See also* Elise C. Boddie, *The Future of Affirmative Action*, 130 Harv. L. Rev. Forum 38, 48 (2016), asking "if what really matters is the kind of institutional transparency that guarantees meaningful judicial review…, then why not allow racial considerations for the purpose of redressing racial disadvantage?"

[55] *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

[56] *Ilya Somin, Asian-Americans, Affirmative Action, and Fisher v. Texas*, 3 J. L. 179, 182 (2013).

[57] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[58] *Fisher v. University of Texas*, Amicus Brief filed by the Louis D. Brandeis Center for Human Rights Under Law, the 80-20 National Asian-American Educational Foundation, et. al., in Support of Petitioner 7 (2016).

[59] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[60] Ibid.

[61] *Fisher v. University of Texas*, Amicus Brief filed by the American Educational Research Association et. al., in Support of Respondents 18 (2016).

[62] Ibid., 19.

[63] *Fisher v. University of Texas*, Amicus Brief filed by the Asian American Legal Foundation and the Asian American Coalition for Education in Support of Petitioner 1, 10 (2016).

[64] *SFFA v. Harvard*, No. 497 United States' Statement of Interest in Opposition to Defendant's Motion for Summary Judgment, Redacted (D. Mass. Aug. 30, 2018).

[65] *SFFA v. Harvard*, Amended Amicus Brief filed by Professors of Economics in Support of Defendant (2018).

[66] Whether diversity is a compelling interest at all is itself a controversial topic. Some justices have long expressed the view that the legitimacy of practices with "a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic" must be changed "not by court decree, but because the people, through their elected representatives, decreed a change." *U.S. v. Virginia* (Scalia, J., dissenting). It is unclear whether affirmative action qualifies as having this long tradition; however, the creation of the notion that a state has an interest in diversity at its schools in *Bakke* certainly counts as a change using the courts rather than through the people. The question then follows as to whether the issue of affirmative action would be better off if left in the hands of the legislatures—which in some cases have been challenged by the courts on this issue; in 2006, for instance, Michigan passed Proposal 2, effectively banning affirmative action within the state. After a federal ruling in which the Sixth Circuit Appeals Court held Proposal 2 unconstitutional, the Supreme Court reversed. *See Schuette v. Coalition to Defend Affirmative Action*, Integration, and Immigration Rights, 572

U.S. ___ (2014). Whether affirmative action is a policy decision best left to the legislature is beyond the scope of this essay; however, what is relevant here is that it is not entirely settled whether diversity is a compelling government interest at all.

[67] *Regents of the Univ. of Calif. v. Bakke,* 438 U.S. 265 (1978).

[68] For a concise summary on such studies, *see* Thomas J. Espenshade and Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life*, Princeton University Press 307-315 (2009) (Print).

[69] Michal Kurlaender and John T. Yun, "Is Diversity a Compelling Educational Interest? Evidence from Louisville," in *Diversity Challenged: Evidence on the Impact of Affirmative Action*, Harvard Education Publishing Group 111 (2001).

[70] It is unclear whether a robust exchange is in fact the goal here. Colleges have generally done little to promote inclusion, either in undergraduate or in professional schools, of other underrepresented groups (LGBTQ, single parent, disabled, conservative, religious minorities, foreigners, and etc.) As Issacharoff mentions, his home institution, Columbia Law School, "is as abstractly dedicated to the concept of diversity as any in the country. Yet…there are but a handful of Republicans, despite the fact that Republicans must constitute about half of the national population. Similarly,…few of [his] colleagues [are] religiously devout despite the clear prevalence of such views in the population. But in the endless discussions of diversity, [he has] never heard the term seriously engaged on behalf of a Republican, a fundamentalist Christian, or a Muslim." Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action,* 2002 U. Chi. Legal F. 11, 15 (2002).

[71] R. Richard Banks, *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause* 240.

[72] Ibid., in which Banks explains how racial groupings used in "describing criminal perpetrators" are derived not only from "physical features" but also "social and cultural connections between race and crime," all of which together "may render race especially salient" since "racial groupings also structure perception and memory."

[73] *Dandridge v. Williams*, 397 U.S. 471 (1970). *See also Geduldig v. Aiello*, 417 U.S. 484 (1974), holding that "nothing in the Constitution…requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program that it already has."

[74] *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

[75] *See also U.S. v. Virginia*, 518 U.S. 515 (1996) (Scalia, J., dissenting), where

Scalia protested that although though there is "an important state interest in providing effective college education for its citizens," "single-sex instruction is an approach substantially related to that interest" and ought not to be struck down by the Court but rather changed through the legislature.

[76] *SFFA v. Harvard*, Amicus Brief filed by Brown University, Case Western Reserve University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, George Washington University, Johns Hopkins University, Massachusetts Institute of Technology, Princeton University, Stanford University, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University in Support of Defendants (2018).

[77] Ibid.

[78] Ibid.

[79] Walter Benn Michaels, *The Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality*, Metropolitan Books 10, 19 (2006) (Print).

[80] Ibid.

[81] Kent Kostka, *Higher Education, Hopwood, and Homogeneity*, 74 Denv. U. S. Rev. 265 fn. 14. *See also U.S. v. Kras*, 409 U.S. 434, 450 (1973) (upholding mandatory filing fees for bankruptcy); *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (outlawing fees imposed on poor people filing for divorce); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 688 (1966) (stating "(l)ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.").

[82] San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

[83] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 307 (1978).

[84] Griswold v. Connecticut, 381 U.S. 479 (1965).

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