

# **LAW AND POLICY 1995: A DISCUSSION**

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LAW AND POLICY 1995

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William A. Kaplin and Gary Pavela

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THE DISCUSSION FORMAT

This presentation will be in a discussion format, comparable to interviews with Professor Kaplin conducted by Gary Pavela for *Synthesis: Law and Policy in Higher Education*.

The presentation is not rehearsed. It is designed to be an informal, wide-ranging, conversational overview of key law and policy issues likely to be important for higher education administrators in 1995.

Audience participation is encouraged. Gary Pavela will stop at various points in the discussion to solicit relevant questions and comments from the audience. Please direct your questions or comments to the topic being addressed at the time.

Both Professor Kaplin and Gary Pavela will be available immediately after the presentation for individual questions.

## INTRODUCTION

This session will focus on the following law and policy issues:

1. The scope of academic freedom.
2. The Americans with Disabilities Act and faculty autonomy in testing, grading, and classroom management.
3. Rights of religious organizations on campus; graduation prayers.
4. Affirmative action in the 1990s.
5. New Title IX issues.
6. Personal liability of faculty, administrators, and students serving on campus hearing boards.

To provide background and perspective on the topics, Professor Kaplin has prepared a list of cases, and Gary Pavela has included several recent articles from *Synfax Weekly Report*.

## CASE REFERENCES

### ACADEMIC FREEDOM

Silva v. University of New Hampshire, 1994 WL 504417 (D. N.H. 1994) (tenured professor's classroom comments are likely protected by First Amendment against charges of hostile environment sexual harassment).

Harleston v. Jeffries, 21 F. 3d 1238 (2nd Cir. 1994), cert. granted and case remanded, 115 S. Ct. 502 (1994) (validity, under First Amendment, of termination of professor's administrative appointment for comments made during an off-campus speech).

Walters v. Churchill, 114 S. Ct. 1878 (1994) (public employer has obligation to make a reasonable investigation of the facts before dismissing an employee because of statements he/she made, but employer may dismiss upon a "reasonable belief" regarding accuracy of the facts).

San Filippo v. Bongiovanni, 30 F. 3d 424 (3rd Cir. 1994) (public university professors are protected by petition clause of First Amendment against university retaliation for having filed a

grievance, even if grievance does not address a matter of "public concern").

#### **TESTING, GRADING, AND CLASSROOM MANAGEMENT WITH RESPECT TO DISABLED STUDENTS**

Wynne v. Tufts University School of Medicine, 976 F. 2d 791 (1st Cir. 1992) (school's determination not to provide alternative testing method for disabled student upheld under Section 504 of Rehabilitation Act).

Halasz v. University of New England, 816 F. Supp. 37 (D. Me. 1993) (dismissal of learning disabled student is upheld; no further accommodations were required under Section 504).

#### **RIGHTS OF STUDENT RELIGIOUS ORGANIZATIONS ON CAMPUS**

Rosenberger v. University of Virginia, 18 F. 3d 269 (4th Cir. 1994), cert. granted, 115 S. Ct. 417 (1994) (validity of university's prohibition on use of student activities fees for religious activities).

#### **AFFIRMATIVE ACTION PROGRAMS: ADMISSIONS AND FINANCIAL AID:**

Podberesky v. Kirwan, 38 F. 3d 147 (4th Cir. 1994) (University scholarship program restricted to African-American students violates equal protection clause).

Hopwood v. State of Texas, 861 F. Supp. 551 (W.D. Tex. 1994) (affirmative action plan for admissions violates equal protection when it evaluates minority applicants as a separate class apart from other applicants).

#### **TITLE IX ISSUES**

Patricia H. v. Berkeley Unified School Dist., 830 F. Supp. 1288 (N.D. Calif. 1993) (Title IX covers "hostile environment" sexual harassment; retention of teacher who had allegedly molested a student could constitute hostile environment harassment).

Kelley v. Bd. of Trustees, University of Illinois, 35 F. 3d 265 (7th Cir. 1994) (termination of men's but not women's intercollegiate swimming team does not violate Title IX).

Favia v. Indiana University of Pennsylvania, 7 F. 3d 332 (3rd Cir. 1993) (termination of women's gymnastics and field hockey teams violates Title IX).

## ARTICLES FROM SFAX WEEKLY REPORT

94.67 SEXUAL HARASSMENT/ACADEMIC FREEDOM

### Professor reinstated in sexual harassment case

One of the most closely watched sexual harassment cases in higher education involves J. Donald Silva, a tenured English professor at the University of New Hampshire (UNH). Professor Silva claims he was wrongly suspended after eight female students complained about his classroom comments (See "University of New Hampshire Wrestles With Issue of Sexual Harassment in Wake of Professor's Suspension," *Chronicle of Higher Education* January 12, 1994, A18).

Saturday's *New York Times* reports that Professor Silva has won an important first round in his law suit, and that a federal judge has ordered him reinstated, pending a full trial ("Professor ousted for lecture gets job back," September 17, 1994, p. 9).

Professor Silva has made a variety of questionable sexual references in comments to students over the years, including an instance in 1990 when he found it necessary to apologize to an entire class. The comments that prompted his suspension without pay last year involved a metaphor and an example--both of which, he claims, were designed to improve the skills of his technical writing students at the Thompson School of Applied Science, a two-year college associated with UNH.

The classroom metaphor used by Professor Silva pertained to the concept of "focus" in writing:

Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.

Professor Silva also offered the same class an example of a simile: "Belly dancing," he observed, "is like jello on a plate with a vibrator under the plate."

A number of female students were offended by these remarks, and filed a complaint that eventually found its way to Brian Giles, Dean of the Thompson School. Dean Giles concluded that sexual harassment had occurred, and wrote Silva that his "pattern of sexual remarks in an out of the classroom...created an intimidating, hostile, and offensive academic environment..."

Dean Giles proposed an informal settlement that included requiring Silva to issue a written apology, and undergo weekly counseling with a University approved psychotherapist. Silva rejected the proposal, and was eventually suspended after two campus panels concluded that he had engaged in sexual harassment. The final penalty also included required counseling.

Professor Silva initiated his lawsuit last October, contending that his due process and academic freedom rights had been violated. His case is being heard by federal district judge Shane Devine, appointed in 1978 by President Carter. Judge Devine ruled last Friday that there was a "substantial likelihood" that Silva would prevail on his First Amendment (academic freedom) claim, since his classroom comments did not meet the legal definition of sexual harassment, and were motivated by "legitimate pedagogical reasons."

The *New York Times* account indicates Professor Silva is likely to be the focus of continuing attention, both locally and nationally:

Asked after yesterday's decision whether his experience would prompt him to speak guardedly in the future, Professor Silva said: 'A writing class should be a place where all sorts of language can be used. I stood tall for academic freedom and the First Amendment, and I intend to continue.'

#### **Practice Implications:**

[ ] We've drawn our description of the facts in this case from articles in the national media, and a telephone conversation on Monday September 19 with Ronald Rogers, General Counsel for the University System of New Hampshire. Mr. Rogers is sending us a copy of Judge Devine's 103 page opinion, and we may print extended excerpts later, either in a *Bulletin* or a *Weekly Report*.

Most articles we've seen favor Professor Silva's position. We recommend Richard Bernstein's "Guilty If Charged" in the January 13, 1994 *New York Review of Books* (p. 11) and Nat Hentoff's "Is This Sexual Harassment?" and "The Banishment of Professor Silva" in the December 14 and December 21, 1993 *Village Voice*, pp. 28 and 22, respectively.

[ ] We explored the issue of sexual harassment and academic freedom in our Summer 1994 *Synthesis* interview with William A. Kaplin, Professor of Law at the Catholic University of America, and author of *The Law of Higher Education*. Much of what Professor Kaplin had to say is pertinent to the Silva case:

**SYNTHESIS:** Let's shift our focus to academic freedom in the classroom. For example, what if a faculty member in the heat of the moment addressed an epithet to a student, does that fall within the protection of academic freedom, both legally and professionally?

**KAPLIN:** If we know no more than the facts of your example, I think it would be protected by either version of academic freedom, at least in the sense that this single incident, standing alone, is probably not a sufficient basis for dismissing or otherwise penalizing the professor.

Clearly the professor's conduct didn't correspond with professional norms, and it may be the basis for discussion or counseling. Still, anyone can make one slip in the classroom, but that shouldn't be the basis for ruining a career.

**SYNTHESIS:** Probably one of the most famous slips, outside the classroom setting, was Jesse Jackson's reference to New York City as "hymietown." That suggests to me that even the most sensitive individuals can make these kinds of blunders, and learn from them.

Do we have any guidance from the cases about when even tenured professors can be fired for using epithets in the classroom?

**KAPLIN:** The best guidance comes from Title VII employment discrimination suits, when the discrimination is at least part harassment. In those cases the courts generally look for a pattern of harassment. Sometimes the word "pervasive" is used as a key word: a "pervasive pattern of harassment" that constitutes discrimination. I think there would be a rough parallel with your classroom epithet example. For really punitive action, either legally or professionally, the harassment must be so pervasive that it has

the effect of excluding students from the educational process.

- [ ] A "pro" and "con" debate about the Silva case appears in the February 1994 issue of the *ABA Journal*. Michel S. Greve, director of the Center for Individual Rights in Washington, D.C. supported Silva's position:

Academia cannot function under a legal regime that punishes speech in the name of combating a 'hostile environment...' [T]he question is not what Professor Silva said; it is what professors and students on campuses across the country will refrain from saying...

The current legal rules, which define a 'hostile environment' on the basis of case-by-case, multifactor analysis and with reference to the perception of a "reasonable person," are exceedingly vague. By that very virtue, they deter not only genuine harassment but also harmless and desirable speech...

A more reasonable set of rules would afford comprehensive First Amendment protection for all academic speech: Subject to liability only speech that is targeted at particular individuals and amounts to an intentional infliction of severe emotional distress; and authorize disciplinary measures...against individuals who knowingly bring false and frivolous charges... (p.40).

The "con" position was argued by attorney Linda Hirshman, a former law professor voted "best teacher of the year" at the Northwestern University School of Law:

College tuition these days is a pretty high price to pay for something you can get from a 900 number for a lot less money...

Professors like Silva and their defenders say that the students should lighten up. Such sex talk is important, they say. Yet the more I know about the offending teachers, the more I realize that what really matters to them is the privilege of sexual abuse...

Consider [an] example... from my past: During the 1960s, philosophy students at Harvard would copy drafts of John Rawls' work in progress and send them to other departments around the country so students elsewhere could study them as soon as possible...No one ever suggested that John Rawls felt compelled to compare any aspect of his magisterial and revolutionary theory of political philosophy to sexual intercourse... (p. 41).



[] We think Ms. Hirshman has a point regarding the professional competency of professors who insist on using gratuitous sexual references in their courses, especially when a significant number of students find such references offensive and distracting. It's probably a mistake, however, to try to address the problem by invoking the law of sexual harassment.

The risks of disciplining boorish professors through sexual harassment policies outweigh the benefits, given the importance of uninhibited discussion in the classroom, and the likely evolution of sexual harassment law. We think the latter--at least in the educational setting--will be limited to extreme forms of sexually demeaning expression, directed at specific individuals or a small group, which become so severe or frequent as to poison the educational environment.

A better approach--with a long history, generally accepted definitions, and less ideologically motivated peer review--is to focus on the overall quality of a professor's teaching. Was the course material covered clearly and competently? Was the class frequently diverted to extraneous issues or topics? Were students treated with civility?

There certainly should be ample room for professors to display unusual or eccentric personalities. Good professors often do. An important distinction needs to be made, however, between a professor's use of "personality" to motivate and instruct students, and the tendency for personality to become an end in itself; a way for professors to assume and maintain center stage--even at the expense of learning.

Ultimately, professors who are consistently bad teachers should be dismissed. In many instances, even those with tenure can be fired if they are proven to be incompetent. See, generally, Patricia Hollander "Evaluating Tenured Professors," *The Chronicle of Higher Education* June 17, 1992, p. 27.

[] Some advocates of broadly applied sexual harassment policies seemed relatively unconcerned about the potential impact those policies might have on freedom of expression. For example, Barbara White, an associate professor of woman's studies at UNH, distributed a letter on campus last year that contained the following observation:

[A]cademia...has traditionally been dominated by white heterosexual men and the First Amendment and Academic Freedom (I'll call them FAF) have traditionally protected the rights of white heterosexual men. Most of

us are silenced by existing social conditions before we get the power to speak out in any way where FAF might protect us. So forgive us if we don't get all teary-eyed about FAF. Perhaps to you it's as sacrosanct as the flag or the national anthem; to us strict construction of the First Amendment is just another yoke around our necks (cited in Bernstein, supra, p. 14).

We thought of Ms. White's views when we received an e-mail message last week titled "Urgent Cry for Free Speech From Iowa." The authors reported that:

...a group called Campaign for Academic Freedom (CAF) at the University of Iowa is fighting a "classroom materials policy." The policy was installed after students complained about being "exposed" to films in classes that depicted homosexual lifestyles. The policy was originally worded BY THE REGENTS to require instructors to inform students about any sexual materials used in classes...Pres. Hunter Rawlings...added the words "and to give students adequate indication of any unusual or unexpected class presentations or materials."

Those of you sensitive to the power of language...can probably already see the problem brewing...

First, it arises out of a context in which the words "unusual and unexpected" are used as euphemisms for homosexual content. ALL CASES of complaints have been against graduate instructors, and the drive for the policy was begun by a handful of students complaining about the films "taxi zum Klo" and "Paris is Burning." Second, it ignores the fact that the ideas that change human history, which the university is supposed to encourage and debate, are unusual and unexpected...

DO YOU SEE WHAT THIS IS? The University is trying to take away our right...to...free speech...They are actively suppressing us...WE WILL NOT BE SILENCED.

An interview with Nadine Strossen, the first woman to head the American Civil Liberties Union, appears in the March 1994 issue of *The Progressive* (p. 34). We think--given the experiences of our colleagues in Iowa, and elsewhere--that her insights have proven to be prophetic:

I find the pro-censorship feminists politically naive. And I would put the people wanting to institute "hate-speech" regulations on campus in the same category. When the pro-censorship feminists and the anti-hate-

speech people say that there is a power establishment in this country from which women and minorities have ben systematically excluded, they are right, of course. But then they go on to give this new tool to the power structure--the open-ended power to punish or suppress words that may be subordinating or degrading to women...

The power structure will use hate-speech regulations and censorship laws against the very groups that are themselves the most marginalized: women, minorities, lesbians and gay men.

#### 94.69 FREEDOM OF EXPRESSION

##### *Silva v. University of New Hampshire*

We reported last week on a preliminary injunction issued by federal district court judge Shane Devine in Concord, New Hampshire, reinstating University of New Hampshire (UNH) professor J. Donald Silva. Professor Silva was suspended after a group of female students in his technical writing class complained that comments he made in and out of class constituted "hostile environment" sexual harassment.

Professor Silva, who has a history of using sexual references in his classes, contended that UNH violated his First Amendment and due process rights. Judge Devine concluded Silva was likely to prevail on First Amendment grounds, but granted summary judgment for UNH on several of Silva's due process claims.

First Amendment/academic freedom issues are especially important in this case. What follows are pertinent excerpts from Judge Devine's 103 page opinion.

##### [Limits may be set on classroom expression]

In *Mailloux v. Kiley*, 448 F. 2d 1242 (1st Cir. 1971)..., the First Circuit stated its test for determining the validity of a governmental regulation affecting a teacher's classroom speech.

[F]ree speech does not grant teachers a license to say or write in class whatever they may feel like...and the propriety of regulations or sanctions must depend on such circumstances as *the age and sophistication of the students, the closeness of the relation between the specific technique used and the concededly valid*

educational objective, and the context and manner of presentation... Id., 448 F.2d at 1243... (emphasis added).

[Professor Silva's comments are suitable and relevant]

(i) Age and Sophistication of the Students

The students at issue in this case are exclusively adult college students. Accordingly, said students are presumed to have possessed the sophistication of adults.

(ii) Relationship Between Teaching Method and Valid Educational Objective

The court finds that Silva's classroom statements [comparing the concept of "focus" in technical writing to sexual intercourse, and stating as an example of a simile that "belly dancing is like jello on a plate with a vibrator under the plate"] advanced his valid educational objective of conveying certain principles related to the subject matter of his course.

(iii) Context and Manner of Presentation

The record demonstrates that Silva's classroom statements were made in a professionally appropriate manner as part of a college class lecture.

(iv) Analysis

The evidence before the court shows that Silva's classroom speech was subject to discipline simply because six adult students found his choice of words to be outrageous. In this regard, the Supreme Court has stated,

"Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression... *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1987)...

In light of the foregoing, and recognizing that "academic freedom [is not] a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution," *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972)... the court concludes that the [UNH] Sexual Harassment Policy as applied to Silva's classroom speech is not reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an

impermissibly subjective standard that fails to take into account the nation's interest in academic freedom...Accordingly, the court finds and rules that the application of the [UNH] sexual harassment Policy to Silva's classroom statements violates the First Amendment...

**[Professor Silva spoke on "matters of public concern"]**

Defendants argue that under *Connick v. Myers* 461 U.S. 138 (1983), Silva's classroom speech is unprotected by the First Amendment because it is not related to any "matter of public concern." The court disagrees... "Whether an employee's speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement, as revealed by the whole record." [*Connick, supra*] at 147-48 (emphasis added)...

The evidence before the court demonstrates that Silva's classroom statements were not statements "upon matters only of personal interest," [as defined in *Connick*] but rather were made for the legitimate pedagogical, *public* purpose of conveying certain principles related to the subject matter of the course. Further the content, form, and context of said statements demonstrate that they are directly related to (1) the preservation of academic freedom and (2) the issue of whether speech which is offensive to a particular class of individuals should be tolerated in American schools. Accordingly the court finds and rules that Silva's classroom statements were related to matters of public interest...

**[A balancing test applied]**

Because...the [UNH] sexual harassment policy as applied to Silva's classroom speech employs an impermissibly subjective standard that fails to take into account the nation's interest in academic freedom and...said policy was erroneously applied in this case, the court finds that under the *Connick-Pickering* balancing test Silva's First Amendment interest in the speech issue is overwhelmingly superior to UNH's interest in proscribing said speech.

**Practice Implications:**

- [ ] The result in this case may be affirmed in an appeal, but the district court's opinion is not well-reasoned. The judge seems to believe virtually anything a teacher says in the classroom is a matter of public concern (and entitled to First Amendment protection at public institutions) simply because the teacher invokes a talismanic claim of "academic freedom," and articulates even the most contrived

educational justification for the language in question. Under this reasoning, a teacher could regularly address his or her class as "dumb dorks" (or worse) for the "valid educational objective" of "gaining the attention" of students the teacher thinks are "too sensitive" to "robust classroom discussion." It may be true that flexibility is required in defining "a matter of public concern" (see our discussion in "The harassment policy is invalid, but the coach stays fired," *Synfax Weekly Report*, 94.5, p. 176), but Judge Devine's analysis gives teachers at public institutions the "grant of immunity" specifically rejected in *Connick*. We don't think it will stand.

- [] The court in this case appears to have been influenced by the general press reaction to "political correctness" on college campuses. Nearly two pages of the judge's opinion were devoted to a listing of pertinent citations. For this reason--and the fact that many courts are starting to define "hostile environment" sexual harassment more narrowly than is widely recognized--we think colleges should treat comparable incidents as matters of professional competence.

Even a commentator friendly to Professor Silva suggested that Silva's reported comments and actions were "perhaps tasteless or inappropriate...in some cases showing a middle-aged man doing nothing more offensive than trying, clumsily, to banter with his students. He seems to have foolishly wanted to appear 'hip'" (Richard Bernstein, "Guilty if Charged," *New York Review of Books*, January 13, 1994, p. 11). This charitable interpretation makes sense only if one ignores Professor Silver's history of gratuitous sexual innuendo, the fact that he was previously reprimanded for it, and his reported statement to a UNH hearing panel that he would use the same "examples" in his classes "tomorrow."

Twenty-six students left Professor Silva's class sections when given an opportunity to do so. This isn't the reaction of a hysterical few. It seems to reflect, instead, a response to precisely the kind of teaching that is *not* protected by academic freedom--as identified by the AAUP in its 1940 "Statement of Principles on Academic Freedom and Tenure:"

The teacher is entitled to academic freedom in the classroom in discussing his subject, *but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject...* (emphasis supplied).

- [] We've been predicting for some time that the scope of academic freedom in the classroom will become one of the two or three most pressing issues in higher education law. It's

essential for colleges to prepare for inevitable challenges by clarifying standards for professional competency in teaching. Those standards--developed by appropriate faculty committees--need to be expressed in the faculty handbook, reviewed and discussed on a regular basis (especially with new faculty members), monitored through a performance review system (including classroom visitations), and enforced through progressive discipline with significant peer involvement, and/or the involvement of outside evaluators. Student teaching evaluations should play an important role in this process, provided those evaluations are viewed in the aggregate, over extended periods, and compared with the evaluations of other teachers--including teachers with comparable grading standards. An example of what appears to be a well-developed teaching evaluation system at Vassar College (albeit allegedly ignored by a tenure review committee) is outlined in *Fisher v. Vassar College* 852 F. Supp. 1193, 1211-1212 (S.D.N.Y. 1994).

[ ] For a decision affirming the right of colleges to hold even tenured professors to minimum levels of professional competence see *Riggin v. Board of Trustees of Ball State University*, 489 N.E. 2d 616 (Ind. App. 1986). A detailed outline on this topic by Patricia Hollander (General Counsel for the American Association of University Administrators) appears in the conference manual for the "14 Annual Conference on Law and Higher Education" (1993), sponsored by the Stetson University College of Law.

[ ] Yesterday's *Wall Street Journal* contains a front page story about the effort to fire Gerald Gee, a white teacher at predominantly black Florida Agricultural and Mechanical University (FAMU) ("White Teacher's Use Of a Racial Pejorative Roils a Black Campus," September 26, 1994). The *Journal* reports that:

[t]he matter began when Mr. Gee, an untenured associate professor, was listening to his students...complain about the lack of on-campus opportunities in their field...Mr. Gee warned them that he was about to say something 'which may upset some of you, because I'm going to use a term that I myself consider offensive...' Adding that his comments weren't aimed at anyone in particular but designed to give students something 'to think about,' he recalls saying: 'Anyone who doesn't take advantage of the opportunities that are there, or who doesn't make opportunities for themselves, may be guilty of having what some would call a 'nigger mentality'--the sort of thinking that can keep us all on the back of the bus forever.'

Some may try to compare Professor Gee's comment to Professor

Silva's case. There is, however, a fundamental difference between an isolated instance of bad judgment (which may merit a reprimand) and a long, unremitting, and defiant pattern of bad judgment (which ought to be ground for termination). This is a distinction implicitly recognized by the student newspaper at FAMU, when it suggested that a decision to fire Professor Gee--an otherwise well-respected professor--might be "a little extreme."

- [ ] Finally, a particularly worrisome aspect of the *Silva* case is the court's holding that various administrators at UNH -- as well as faculty and student hearing board members--might be held personally liable if Professor Silva prevails. Those administrators, faculty members, and students, Judge Devine concluded, may have lost their "qualified immunity" as public officials, since it remained a "relevant question" whether a "reasonable official would have believed his actions were lawful in light of clearly established law..." We must say in this regard that more college administrators will start applying "clearly established" standards for hostile environment sexual harassment if more judges would tell us what those standards are.

#### 94.85 ACADEMIC FREEDOM

##### Supreme Court vacates Jeffries ruling

Last week, in a two-sentence order, the United States Supreme Court vacated the Second Circuit decision in *Jeffries v. Harleston* (see *Synfax Weekly Report* 94.43, p. 231 and *Synfax Bulletin* 93.135, p. 124) and directed the decision be reconsidered in light of the May 31, 1994 holding in *Waters v. Churchill* 128 L.Ed. 2d 686.

You've probably read news accounts of the Supreme Court's order, but few publications have given a detailed account of the *Waters* decision. That's because the Justices expressed a cacophony of conflicting views about the First Amendment rights of government employees.

Justice O'Connor announced the judgment of the Court in *Waters*, and wrote a plurality opinion, joined by Chief Justice Rehnquist, and Justices Souter and Ginsburg. It was her view that an administrator at a public institution could take disciplinary action against an employee for what the employee "supposedly" said, even on a matter of public concern, if the administrator made factual determinations in a reasonable manner, and reasonably predicted the employee's expression would be disruptive.

Justice O'Connor was trying to prevent juries from substituting their factual determinations for the determinations of public employers. However, by fashioning a "reasonableness" test, she also sought to protect public employees from decisions that were



arbitrary and capricious. Justices Stevens and Blackmun thought she offered too much protection to employers. Justices Scalia, Kennedy, and Thomas, too little.

What follows is a short excerpt from Justice O'Connor's opinion in *Waters*. The case involves disputed statements made by a public hospital nurse (Cheryl Churchill) to another nurse (Melanie Perkins-Graham), resulting in Ms. Churchill's dismissal, on the ground that her critical comments dissuaded Ms. Perkins-Graham from transferring to Ms. Churchill's department:

To be protected, the speech [of a government employee] must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick [v. Myers]* 75 L Ed 2d 708], quoting *Pickering* . . .

The dispute is over how the factual basis for applying the test--what the speech was, in what tone it was delivered, what the listener's reactions were . . . --is to be determined. Should the court apply the *Connick* test to the speech as the government employer found it to be, or should the jury determine the facts for itself? . . .

[E]mployers . . . often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility . . . If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the accused . . . Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by the courts . . .

On the other hand, we do not believe that the court must apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions . . . It may be unreasonable, for example, . . . for an employer to act on extremely weak evidence when strong evidence is clearly available.

#### Practice Implications>

[] The Supreme Court remanded Ms. Churchill's case to determine whether she was "actually fired not because of the disruptive things she said to Perkins-Graham, but because of [other] nondisruptive statements" she may have made on other matters of public concern. Lower courts in the *Jeffries* case will have to resolve similar issues, including whether Mr. Jeffries was removed as Chair of the Black Studies Department at The City College of New York [CCNY] because of a pattern of improprieties as a professor and administrator, or because he gave an anti-Semitic, but otherwise "nondisruptive" off-campus speech. The

former remains difficult for CCNY to prove, given its failure to challenge Mr. Jeffries' misbehavior as it occurred.

[ ] It should be stressed to Faculty members--especially academic administrators--that at least five Justices in the *Jeffries* case thought the holding in *Waters* was applicable to the public college and university setting. This outcome highlights a point we've made before: too many academics have dangerously inflated notions about the scope of academic freedom.

Those with the most entrenched views should consider another observation from Justice O'Connor, perhaps the least ambiguous in her *Waters* opinion:

The key to First Amendment analysis of government employment decisions . . . is this: The government's interest in achieving its goals as . . . efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the public is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate . . .

#### 94.79 RACE RELATIONS/AFFIRMATIVE ACTION

##### **Race-based scholarships declared unconstitutional**

Nearly a year ago we reported on a decision of a federal district court in Maryland, upholding the constitutionality of a University of Maryland at College Park [UMCP] scholarship program open only to African-American students (*Podberesky v. Kirwan*, JFM-90-1685, D. MD.), (*Synfax Weekly Report*, November 22, 1993, 93.158, p. 157).

Last Thursday a unanimous three-judge panel of the United States Court of Appeals for the Fourth Circuit reversed the district court decision, and held that the University of Maryland at College Park had not provided sufficient evidence of the present effects of past discrimination to justify the program, and that the program was not narrowly tailored to serve its stated objectives (October 27, 1994, No. 93.2585).

The Fourth Circuit opinion, as well as the holding last month in *Hopwood et. al. v. The State of Texas*, (*Synfax Weekly Report*, September 5, 1994, 94.64, p. 263), threaten many of the affirmative action programs developed at colleges and universities across the country. Both merit careful reading by college administrators.

What follows are pertinent excerpts from the Fourth Circuit

opinion:

[Facts of the case]

Daniel Podberesky challenges the University of Maryland's Banneker scholarship program, which is a merit-based program for which only African-American students are eligible...Podberesky is Hispanic, he was therefore ineligible for consideration under the Banneker Program, although he met the academic and all other requirements for consideration...

In [an] earlier decision, we remanded the case because the district court had not made a specific finding on whether there was sufficient present effect of the University's past discrimination against African-Americans so as to justify the maintenance of the race-based restriction in the Banneker scholarship program...The district allowed additional discovery to take place, after which cross motions for summary judgment were filed...

The University claimed that four present effects of past discrimination exist at the University: (1) the University has a poor reputation within the African American community; (2) African-Americans are under-represented in the student population; (3) African-American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African-American students...The district court reasoned that if a strong evidentiary basis existed to support any of the four present effects articulated by the University, the Banneker program would be justified. The district court then found that there was a strong evidentiary basis to support the existence of each of those present effects...

The district court also found that the Banneker Program was narrowly tailored to remedy those four present effects of past discrimination which it found at the University...The district court then granted the University's summary judgment motion and denied Podberesky's summary judgment motion. This appeal followed.

[Strict scrutiny for racial classifications]

Because it chose the Banneker Program, which excludes all races from consideration but one, as a remedial measure for its past discrimination against African-Americans, the University stands before us burdened with a presumption that its choice cannot be sustained. As we have said before,

"Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting

judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion) (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.)). The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race...While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome... [citing *Maryland Troopers Ass'n v. Evans* 993 F.2d 1072, 1076. See *Synfax Weekly Report* June 7, 1993, 93.106, p. 100]...

**[A strong basis for remedial action is required]**

We have established a two-step analysis for determining whether a particular race-conscious remedial measure can be sustained under the Constitution: (1) the proponent of the measure must demonstrate a "strong basis in evidence for its conclusion that remedial action [is] necessary;" and (2) the remedial measure must be narrowly tailored to meet the remedial goal...*Maryland Troopers*... The purpose of our earlier remand in this case was to allow the district court to determine whether the University could prove that there were present effects of past discrimination which warranted such race conscious remedial action...

Turning to the present effects articulated by the University, we disagree with the district court that the first effect, a poor reputation in the African-American community, and the fourth effect, a climate on campus that is perceived as being racially hostile, are sufficient, standing alone, to justify the single-race Banneker Program. As the district court's opinion makes clear, any poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students. There is no doubt that many Maryland residents, as well as some citizens in other states, know of the University's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people with access to history books, there will be programs such as this one. Our decisions do not permit such a result...

The hostile-climate effect proffered by the University suffers from another flaw, however. The main support for the University's assertion that the campus climate is hostile to African-American students is contained in a survey of student

attitudes and reported results of student focus groups...The district court appears to have found the connection between the University's previous discriminatory acts and the present attitudes obvious, but we have not so found it. The frequency and regularity of the incidents, as well as the claimed instances of backlash to remedial measures, do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination, which the district court implicitly held.

Podberesky argues that the claimed hostility does not have its genesis in the University's discriminatory acts of the past. He points to several northern universities that suffer from comparable racial problems. The district court rejected this argument for the reason that it found that most northern universities had experienced *de facto* segregation, and it held that racial hostility on the northern universities' campuses was the present effect of those universities past *de facto*, *de jure*, discrimination...

The district court's analysis cannot be sustained at this point. When we begin by assuming that every predominantly white college or university discriminated in the past, whether or not true, we are no longer talking about the kind of discrimination for which a race-conscious remedy may be prescribed. Instead, we are confronting societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy at the University of Maryland...

**[Statistical data disputed]**

We next turn to the two effects that rely on statistical data: underrepresentation of African-American students at the University and low retention and graduation rates for African-American students...

[W]e find that the district court erred in granting the University's motion for summary judgment. As to the low retention and graduation rates, there is dispute in the evidence about why African-American students leave the University of Maryland in greater numbers than other students...

As to the underrepresentation, our decisions and those of the Supreme Court have made clear that the selection of the correct reference pool is critical... The district court must first determine as a matter of law whether it is appropriate to apply a pool consisting of the local population or whether another pool made up of people with special qualifications is appropriate...The district court rejected a pool which consisted of all graduating high school seniors because that pool "does not take into account even flexible admission

requirements..." Thus, the district court correctly determined the legal issue of whether the appropriate pool was the general population or a smaller qualification specific pool. The district court erred, however, in its attempt to resolve the factual dispute about what are the effective minimum admissions criteria...The factual disputes...are not inconsequential and could only have been resolved only at trial...

**[Maryland's program not narrowly tailored]**

We next turn to the denial of Podberesky's motion for summary judgment...Even if we assumed that the University had demonstrated that African-Americans were underrepresented at the University and that the higher attrition rate was related to past discrimination, we could not uphold the Banneker program. It is not narrowly tailored to remedy the underrepresentation and attrition problems...

It is difficult to determine whether the Banneker scholarship program is narrowly tailored to remedy the present effects of past discrimination when the proof of present effects is so weak...In determining whether the Banneker Program is narrowly tailored to accomplish its stated objective, we may consider possible race-neutral alternatives and whether the program actually furthers a different objective from the one it is claimed to remedy...

[In determining the reference pool] the district court failed to account for statistics regarding the percentage of otherwise eligible African-American high school graduates who either (1) choose not to go to any college; (2) choose to apply only to out-of-state colleges; (3) choose to postpone application to a four-year institution for reasons relating to economics or otherwise, such as spending a year or so in a community college to save money; or (4) voluntarily limited their applications to Maryland's predominantly African-American institutions...[for reasons that might be] economic, academic, geographic, or cultural...

We will not speculate as to what extent these variables might reduce the size of the reference pool, since no definitive information regarding these types of statistics is in the record. We can say with certainty, however, that the failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny...

In...practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-race based disparities... This the district court simply has not done. The result is no more than a collection of arbitrary figures upon which it held UMCP may rely in it's own efforts to

recruit African-Americans usually facially racial classifications...

We are...of the opinion that, as analyzed by the district court, the program more resembles outright racial balancing than a tailored remedy program. As such, it is not narrowly tailored to remedy past discrimination. In fact, it is not tailored at all...

[Furthermore]...the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem. Thus the University's choice of a race-exclusive merit scholarship program as a remedy cannot be sustained.

#### Practice implication>

- [] It's difficult to predict, but we don't think the Supreme Court will take this case. Too many critical issues have been disguised by demonstrably flawed statistical arguments.

For example, the low retention of African-American students at the University of Maryland is not necessarily indicative of past or present discrimination. Across town, at predominantly black Howard University, six out of ten entering students dropped out in 1990 (see "Repositioning Howard University," November 29, 1990 *Washington Post* p. A22)--presumably for reasons unrelated to any pattern or practice of discrimination against African-Americans.

The University of Maryland has to correlate low retention of African-American students with a hostile racial environment--*generated by a history of past discrimination*. We don't think that task can be accomplished with intellectual honesty.

It may be true, for example, that a hostile racial climate exists at Maryland and many other universities. It's misleading, however, to try to account for that climate without considering the rise of black nationalism, and the appearance of speakers and writers with blatantly anti-white and anti-Semitic messages. Tensions on college campuses may also reflect racial tensions in high schools, including racially motivated slurs and violence directed toward whites (see our interview with Judith Lynne Hanna, author of *Disruptive School Behavior* in the April 1991 issue of *Synthesis: Law and Policy in Higher Education*, p. 166).

These sensitive issues haven't been a part of the present debate, which seems rooted in the ideologies of the 1970s. But we have to consider them, if we're serious about trying to

create a lasting multi-racial society.

- [ ] Many metaphors can be used to further discussion about the wisdom of racial preferences. We suggest a comparison to chemotherapy. The "medicine" may be necessary in carefully managed, limited doses. But it can also kill the patient, if too strong a dose is applied.

One of the greatest dangers of racial preferences--identified by the Court of Appeals in this case--is the tendency to institutionalize a legacy of victimization as a component of group identity. The history of this century is full of examples--from Germans in the 1930s to Serbs in the 1990s--of those who have used that legacy to bring needless suffering to others, and ultimately themselves.

- [ ] The issue of racial preferences is also implicated by much of the current reaction to Herrnstein and Murray's *The Bell Curve*. Many observers make convincing arguments that the concept of race is an illusion, at least from a biological perspective (see Steven A. Holmes "You're Smart if You Know what Race You Are," *New York Times* October 23, 1994, p. E5). Others contend that racial classifications based on small fractions of "black blood" are demeaning and insulting (Carl Rowan "That Powerful 'Black Blood,'" *Baltimore Sun* October 28, 1994, p. 19A). Yet these are precisely the kinds of classifications colleges would use *and perpetuate* if students from the "wrong race" sought to apply for restricted-race scholarships.

- [ ] Many of the goals associated with race-specific scholarships could be accomplished by other means, such as providing scholarship assistance to economically disadvantaged graduates of inner-city high schools, without regard to race. Nonetheless, some college administrators choose to reject those alternatives, because race-specific scholarships are symbols of their commitment to African-American students.

The symbolism of race-specific scholarships, however, will do more harm than good if it discourages the formation of coalitions in a multi-ethnic society. Even now many middle class and ethnic whites--and increasing numbers of Asians and Latinos--see traditional affirmative action programs as a way for an Anglo-Saxon elite (some with children who gained admission to prestigious colleges through alumni preferences) to placate African-Americans at the expense of other groups and classes. It's hard to imagine a more volatile and dangerous attitude--reflected, perhaps, by the fact that a respected survey of voter attitudes (conducted regularly since 1987) has just found for the first time that a majority of white Americans agree with the statement that "we have gone too far in pushing equal rights in this country" (Norman



Ornsten, "Angry Voters," *Fortune*, October 17, 1994, p. 144).

Ideologues, inattentive to the importance of politics, may ignore the significance of that finding. Others, like Henry Louis Gates, will be attentive to the long-term implications. "Black America," he told an audience at Harvard two years ago, "needs allies more than it needs absolutism."

[ ] A Banneker scholar recipient at Maryland, disappointed with the Court of Appeals decision, told the campus newspaper that "what I don't understand about the ruling is why it is at debate at all."

That's an understandable perspective, but it doesn't do justice to the complexity of the issues. One of the reasons the district court's opinion was impressive was the judge's awareness of the dangers associated with the use of group preferences, even though he approved using them as a temporary remedy for past discrimination.

We're not serving our students well if we create the impression that arguments over race-specific scholarships are part of the war between good and evil. This is an issue where more, not less debate is essential. Liberals--remembering our criticism of Rush Limbaugh's tendency to demonize his opponents--need to recognize that honest and reasonable people will differ.

