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**“HOSTILE ENVIRONMENT” CHARGES
AND THE ABA/AALS
ACCREDITATION/MEMBERSHIP
IMBROGLIO, POST-MODERNISM’S “NO
COUNTRY FOR OLD MEN”*: WHY DEFAMED
LAW PROFESSORS SHOULD “NOT GO
GENTLE INTO THAT GOOD NIGHT”****

David A. Elder

Regents Professor of Law***

INTRODUCTION

With time the fury has subsided but the feelings from Chase’s own twenty-first century version of 1984 remain vivid – the shock and humiliation of being portrayed by the ABA and AALS¹ as one of the group of male faculty creating a “pervasive hostile environment”² is an experience I would wish on no one.

* WILLIAM BUTLER YEATS, *Sailing to Byzantium*, in *THE TOWER* (1928), reprinted in *THE TOP 500 POEMS* 855 (William Harmon ed., Columbia Univ. Press 1992).

** DYLAN THOMAS, *Do Not Go Gentle into That Good Night*, in *BOTTEGHE OSCURE* (1951), reprinted in *THE TOP 500 POEMS* 1050 (William Harmon ed., Columbia Univ. Press 1992).

*** This article is dedicated to my esteemed friend and colleague, the late Edward Cage Brewer, III.

¹ See *infra* text accompanying notes 41-45.

² *Id.* Hereinafter, as a shortened form, the author will refer to the two sets of charges (when not separately analyzed) using this phrase.

How did this wretched scenario come about? During the prior almost quarter century, Chase law school³ had gone through an evolutionary metamorphosis with vigorous, occasionally contentious, but usually civil debates about myriad issues centering on the definition of self and the appropriate mix of faculty responsibilities in the teaching/scholarship/service triad.⁴ Needless to say, these encounters left some faculty with a history of perceived grievances.⁵ Added to this was Chase's *true* political diversity – a wide range of viewpoints from conservative to liberal-left, with a median somewhat left-of-center and conservatives in a discrete (but arguably noisy)⁶ and dwindling minority. Of course, there is nothing unique about the latter. Recent definitive studies⁷ have demonstrated convincingly that law faculties are overwhelmingly liberal-left in political orientation.

Why then the “pervasive hostile environment” charges? Maybe it's a male thing. Maybe it's conservative academics' tactics in an academic milieu (I'm talking about legal education as a whole) philosophically heavily stacked against them. Maybe it's that modern conservatives are actually true classic liberals, with a strong belief in the “marketplace of ideas” and free and robust debate about controversies, including such potentially volatile quagmires as the nature of the commitment to “diversity,” affirmative action in faculty hiring and other venues, and the extent to which this process has become highly

³ For a history of Chase and its namesake, abolitionist lawyer, Ohio Governor, U. S. Senator, Secretary of the Treasury under Lincoln, and Chief Justice of the Supreme Court Salmon P. Chase, see *A Symposium on Salmon P. Chase and the Chase Court: Perspectives in Law and History*, 21 N. KY. L. REV. 1 (1993).

⁴ The then current version of this debate was discussed in Salmon P. Chase College of Law, Northern Kentucky University Self-Study Report (Jan. 31, 2003) [hereinafter Chase Self Study]. See *infra* text accompanying note 117.

⁵ See *infra* text accompanying notes 104, 117.

⁶ The author's observation is that Chase faculty hired roughly over the last decade largely reflect the demographics of recent studies. See *infra* text accompanying note 690.

⁷ See *infra* text accompanying note 690.

politicized—at Chase and elsewhere.⁸ Of course, these discussions *should* occur, indeed, *must* occur. Otherwise, the liberal-left will continue to clone themselves in post-modern knee-jerk orthodoxy.⁹ But therein lies the *rub*. The mere fact that such discussions take place—including, legitimate criticism of the background and qualifications of faculty candidates—*annoys and offends* people.¹⁰ Colleagues remember, often quite vividly, that other colleagues disparaged their preferred candidate or candidates as mediocre or less qualified than another brought to campus or not invited at all. In this respect, Chase’s naiveté may have been its undoing. Based on questionnaire responses, the Chase Self-Study fairly, accurately, and honestly synthesized the concerns raised by a “very few faculty” about “politics” in the hiring process.¹¹ Clearly, in retrospect, this was *decidedly unwise*.

The joint site evaluation team seems to have come loaded for grizzly¹² with preconceived notions¹³ about “environmental”

⁸ As to Chase, see *infra* note 117. On the situation generally, see *infra* notes 9, 19-20, 32-36, 49, 62, 67, 72, 75, 99, 109, 117, 690, 720, and 728. Compare the attitude of openness and inclusion of opposing points of view by the NAS and the exclusion thereof by the AALS discussed in notes 690, 709.

⁹ See *infra* text accompanying notes 20, 62, 99, 117, 690, 720, 728.

¹⁰ The late Chief Justice Rehnquist wrote a unanimous opinion for the Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), rejecting, on First Amendment grounds, an attempt to circumvent *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), by using the intentional infliction-“outrage” tort. Maybe he was just a fan of the political cartoon, as has been suggested. Geoffrey R. Stone, *The Hustler: Justice Rehnquist and “the Freedom of Speech, or of the Press,”* in THE REHNQUIST LEGACY 21-25 (Craig M. Bradley ed., 2006). Equally likely, he foresaw the speech-controlling havoc that could be wrought by partisan *apparatchiks* infusing the “community mores” and “extreme and outrageous conduct” criteria in the RESTATEMENT (SECOND) OF TORTS § 46 (1965), with its politically and ideologically motivated conceptions of offensive speech. Chief Justice Rehnquist may have been prescient. Note that *Falwell* has been regularly cited in striking down speech codes. See David A. Elder, *The Law of Defamation, the First Amendment, and Justice William H. Rehnquist’s Impressive Legacy in Endeavoring to “Hold the Balance True”: A Partial Reply to Professor Geoffrey R. Stone* (unpublished manuscript, on file with author).

¹¹ See *infra* text accompanying notes 43, 117.

¹² Oops! *Mea maxima culpa*, as we were taught as altar boys. Word choices with “violent” imagery are evidence supportive of a “pervasive hostile

issues at Chase. Its stunning “fact”-gathering methodology about women faculty being “silenced” demonstrates this unequivocally.¹⁴ And, so the team gathered its “facts” and strung together a list of anecdotes denuded of source, context, motivation and time frame.¹⁵ Of course, the team composed of the ABA Accreditation Committee and the AALS Executive Committee, then had the necessary *ammunition* – so-called “evidence”¹⁶ – that would have been laughed at in a court of law (had any of the defamed male faculty decided to sue) and which was later repudiated as without basis or exaggerated by the *entire* Chase faculty.¹⁷ Ultimately, Chase was left alone, its ABA accreditation and AALS membership tattered but intact. Why? “Progress”¹⁸ had been shown by Chase’s responses in dealing with its “pervasive hostile environment” “problem”!

environment!” See *infra* note 101. On the post-modern loss of a sense of humor, see *infra* note 67.

¹³ See *infra* text accompanying notes 20, 22, 690, 719-38.

¹⁴ See *infra* text accompanying notes 719-39.

¹⁵ See *infra* text accompanying notes 643-44. The calculated exclusion of such factors allowed the site evaluators maximum discretion to manipulate information and orchestrate conclusions consistent with their political agenda. In gathering anecdotal evidence, the site evaluators made *no* attempt to provide context – such as, for example, whether an “offensive” statement or tone of voice was possibly a reaction or response to a like-toned statement or conduct of a member on the other side of the political divide deemed rude, reprehensible or possibly illegal (invidious reverse discrimination, perhaps). Note, for example that *neither* site evaluators (nor the AALS and ABA in adopting their “facts,” see *infra* text accompanying notes 37-120) provide any *time frame* for the alleged offensive occurrences. The absence of such temporal limitation enables the site evaluators to transform occasional incivility over a period of a quarter century (plus the “historic grievances” discussed hereinafter, see *infra* text accompanying note 104) into superficially more damning evidence (see *infra* text accompanying notes 37-120) of a “pervasive hostile environment.” Of course, such fabrication (see *infra* text accompanying note 563) or damning enhancement (see *infra* text accompanying notes 630-53) is compelling evidence of constitutional malice.

¹⁶ See *infra* text accompanying notes 37-120.

¹⁷ See *infra* text accompanying notes 96-104.

¹⁸ See *infra* text accompanying notes 109-16. On this ratification/republication as evidence of constitutional malice, see *infra* text accompanying notes 568-74.

Anecdotal evidence from the literature and colleagues at other law schools suggests that Chase is like many other schools. The faculty coexists, usually quite civilly, with very occasional exceptions. But, yet, the post-modernist perversity¹⁹ of the “pervasive hostile environment” charges was used to target, and, I would suggest, to “*silence*”²⁰ senior white male faculty²¹ at

¹⁹ Cf. *infra* text accompanying notes 20, 32-36, 49, 62, 67, 72, 75, 99, 109, 117, 690, 720, 728. A recent study has demonstrated that what the *Wall Street Journal* calls the “diversity nightmare” has the not surprising downside of engendering corrosiveness within superficially diverse communities: “Diverse communities may be yeasty and even creative, but *trust, altruism, and community cooperation fail*. [Harvard don Robert Putnam] calls it ‘bunkering down.’” Daniel Henninger, *The Death of Diversity*, WALL ST. J., Aug. 16, 2007, A10.

²⁰ See *supra* text accompanying notes 8-11 and *infra* text accompanying notes 22-36, 61, 99. Silencing the uncommitted and questioning is a natural and necessary corollary of “diversity ideologies,” who are not “willing to persuade the public of diversity’s merits, preferring to turn ‘diversity’ into a political and legal hammer to compel compliance.” See Henninger, *supra*, at A10. See also David E. Barnhizer, *A Chilling of Discourse*, 50 ST. LOUIS U. L.J. 361, 367-68 (2006) (“Cloaked in its claim of representing a higher social morality because of its deconstructive critique of the biases inherent within existing social order, multiculturalism is a device to limit the power of those who have traditionally possessed it. Those in power, who are the object of critique, are seen as responsible for having *previously silenced* the interests represented by the *multicultural perspective* . . . *It doesn’t even matter if the group or persons being attacked, ‘chilled,’ or condemned were historical oppressors. The real issue is whether they are obstacles or competitors for power.* The mantra of multiculturalism is ‘all’s fair in love and war.’”); *id.* at 411 (concluding, “with bare irony, that an intended result of this conscious strategy [of the chilling of discourse] is *the recreation of a ‘hostile environment’ for speakers who might wish to engage in forms of speech that offend or challenge the agendas or preferred cultural characteristics of a political collective*”) (emphasis added); DAVID E. BERNSTEIN, YOU CAN’T SAY THAT! 51 (2003) [hereinafter BERNSTEIN, YOU CAN’T SAY THAT!] (“Anyone taking action to oppose the current orthodoxy on antidiscrimination principles is at risk of *being silenced* by the powers that be.”) (emphasis added); *id.* at 155 (“Punishing expression because it *creates offense* has *absurd and totalitarian implications* . . . amply demonstrated on university campuses that have prohibited their faculties and students from *offending each other in politically incorrect ways* . . . more generally, campus *intolerance of any speech deemed offensive* to designated victim groups has led to serious miscarriages of justice, as campus activists groups use speech codes to *suppress dissent* from politically correct orthodoxy.”) (emphasis added).

²¹ I use this phrase because this was the group targeted. It has no other independent significance.

Chase. The ABA/AALS joint site evaluation team became witting and willing sanctioners of politically incorrect speech,²² with the “evidence” coming from historic grievances²³ between and among senior faculty. And the ABA and AALS *got away with it*, as did their faculty “sources.” *This time*. In sum, the ABA/AALS imposed a one-sided, subjective, arbitrarily applied “civility” code on Chase faculty internal communications and found them wanting. Those of us targeted doubt that we were unique²⁴ in this respect. But, given the secrecy and lack of transparency of both entities,²⁵ there is currently no method by which such flagrant abuses of power can be discovered, critiqued and publicly disclosed.

Fortunately, for this article and for this author, open records requests²⁶ resulted in disclosure of the mountain of public record information that presents the factual substratum of this article. Maybe an occasional vigorously pursued defamation suit is the answer to the abuses Chase faculty encountered. Maybe defamation litigation and judgments against sources, site evaluation team embers, ABA Accreditation Team and Council members, AALS Executive Committee members (and ABA and AALS participants’ home institutions since such encouraged public service would arguably be viewed as within scope of employment), and the ABA and AALS will lead to re-

²² See *infra* text accompanying notes 54-68, 690. For the author’s criticism of political correctness in the media context see David A. Elder, *A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charges*, 11 VAND. J. ENT. & TECH. L. 99 (2008) [hereinafter Elder, *Duke Lacrosse Fabricated Rape Charges*].

²³ See *infra* text accompanying notes 104, 117.

²⁴ See *infra* text accompanying notes 706.

²⁵ The ABA and AALS are notorious for their confidentiality obsessions. See *infra* text accompanying notes 694-96.

²⁶ All documents cited herein related to the 2003-2004 accreditation/membership process were released to me pursuant to an open records request pursuant to Kentucky statute. See KY. REV. STAT. ANN. §§ 61.870-884 (2008). Other documents related to the extension of the ABA’s status as federal accrediting authority were released pursuant to a FOIA request by my colleague, Professor (and former Dean) Henry L. Stephens, who graciously provided me copies. The factual conclusions and opinions made herein were drawn exclusively from these publicly available documents.

examination, maybe even reformation (“hope springs eternal . . .”) of a politicized process that allows “pervasive hostile environment” charges to be founded on evidentiary quicksand.²⁷ Tort liability and its prospect may tend to make future participants more cautious. And, that would be all to the good. That is the *raison d’être* for this article. In the following sections I sketch out the prevailing doctrine on issues likely to confront prospective litigants and conclude that in accreditation scenarios paralleling the 2003-2004 Chase nightmare there may be legitimate grounds for defamation litigation and that those individuals participating—by lending their names and reputations at any step or level—in such an institutionally reckless process²⁸ may be quite vulnerable.²⁹

I have no doubt that Chase’s debilitating experience was not unique. I also have no doubt that “environmental” “civility” codes via the ABA/AALS site team evaluations “rubber-stamped” on appeal will be greatly fostered by new Standard 212.³⁰ Others have testified to the ABA and AALS’s heavy-handed (if not blackmailing)³¹ use of diversity in admissions and hiring. The extraordinarily aggressive form of diversity/affirmative action found in new Standard 212 will

²⁷ See *infra* text accompanying notes 558-761. Note that all those participating in the “creation and/or publication” of a libel may be held liable even absent specific factual allegations against individual defendants. *Pisani v. Staten Island Univ. Hosp.*, 440 F. Supp. 2d 168, 178-79 (E.D.N.Y. 2006). Note further that once plaintiff has demonstrated proof of fault such as constitutional malice as to defendant’s original reporter-defamer within scope of employment, plaintiff need *not* show independent evidence of constitutional malice as to other of defendant’s reporters as to their reuse of or republication of such matter. *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 762-64, 766 (Mass. 2007).

²⁸ See *infra* text accompanying notes 558-761.

²⁹ See *infra* text accompanying notes 121-761.

³⁰ See *infra* text accompanying notes 718-36. For the full text of Standard 212 and its Interpretations, see AM. BAR ASSOC., 2007-2008 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 16-17 (2007-2008) [hereinafter 2007-2008 STANDARDS].

³¹ See *infra* text accompanying notes 686, 697, 704.

undoubtedly give the *apparatchiks*³² running the ABA and AALS processes almost unchallengeable authority to dictate speech (if not thought) controls on schools with obstreperous segments of faculty unwilling to toe the aggressive diversity/affirmative action ABA/AALS party line. Does anyone really *doubt* this will happen? Read the new text of 212(b): “*Consistent with sound educational policy* [of course, this gives the *apparatchiks* plenty of wiggle room to coerce compliance with their limited, auto-didactic ideas of what is “sound”] and the Standards, a law school *shall demonstrate by concrete action a commitment* to having a *faculty . . . diverse* with respect to *gender, race and ethnicity*.”³³ As the (il)logic goes, how can a law school *ever* evidence its “commitment” via

³² See *infra* text accompanying notes 687-90. For critique of new Standard 212 by a leading conservative constitutional scholar, see David E. Bernstein, *Affirmative Blackmail*, WALL ST. J., Feb. 11, 2006, at A9 [hereinafter Bernstein *Affirmative Blackmail*], who correctly concludes that only a politically correct, pro-diversity interpretation will be accorded status as “sound legal education policy.” Citing the three-fold higher rate of law school attrition/bar failure rate of blacks under existing diversity policies, he suggests that some law schools might legitimately decide that “dooming a huge percentage” of African-American students to failure is contrary to sound educational policy and might wish to focus on recruitment-retention to implement their “‘diversity’ efforts.” Of course, that would not be permissible under the “interpretations” to Standard 212. *Id.* For discussions of the ABA’s flagrant abuse of George Mason University School of Law, see Gail Heriot, *The ABA’s ‘Diversity’ Diktat*, WALL ST. J., April 28, 2008, http://online.wsj.com/article/SB120934372123648583.html?mod=opinion_main_commentaries (detailing the “diversity wringer” through which George Mason was put by the ABA, including forcing it to back off its strong opposition to “significant preferential treatment” via threats to revoke its accreditation, and its final reapproval *six years* later together with an indication that its next and imminent inspection would include “particular attention” to its diversity efforts).

³³ See 2007-2008 STANDARDS, *supra* note 30; see also Posting of David Bernstein to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_02_12-2006_02_18.shtml (Feb. 18, 2006, 14:59 EST) (opining that with the explicit *written* authority of new 212, accreditation officials “will now do so even more vigorously” and require law schools “to ignore any legal or ethical objections they may have to such policies”). Indeed, the comments of Dean Steven R. Smith on behalf of the ABA before the U.S. Commission on Civil Rights repeatedly emphasized the core requirement of Standard 212 and its Interpretations that “law schools must demonstrate *commitment* to diversity.” U.S. COMM’N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 101-05, 116-17, 119-20 (2007) [hereinafter AFFIRMATIVE ACTION REPORT].

“concrete action” when its senior white male faculty (or a segment thereof) create or foster a “pervasive hostile environment,” however loosely defined by complaining faculty and the ABA/AALS. I would suggest that few law schools could escape such charges if like-minded site evaluation teams³⁴ engage in anecdotal, unexamined “evidence”-gathering “labors”³⁵ in cahoots with a small segment of the faculty intent on a power grab to silence and/or punish the opposition.³⁶

THE ABA/AALS ACCREDITATION AND MEMBERSHIP PROCESSES – A CASE STUDY

Following a 2003 joint site evaluation by the ABA and AALS,³⁷ Chase was provided an opportunity to tender additional information before the meeting of the ABA Accreditation Committee³⁸ and the AALS Executive Committee.³⁹ Chase responded in considerable detail.⁴⁰ Yet, despite its responses, the reports were stunningly and devastatingly defamatory⁴¹ of

³⁴ See *infra* text accompanying notes 37-120.

³⁵ See *infra* text accompanying notes 37-120, 558-758.

³⁶ See Barnhizer, *supra* note 20, at 392-93 (“The [multiculturalist] culture is one in which one group is granted the moral and even legal authority to determine the nature of what others are allowed to say without suffering disapprobation, disgrace, or discharge.”) (emphasis added).

³⁷ The site evaluation took place on April 6-9, 2003. Letter from John A. Sebert, Consultant on Legal Educ., Am. Bar Assoc., to Dr. James C. Votruba, President, N. Ky. Univ. and Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law 1-2 (Aug. 5, 2003) (on file with author) [hereinafter Letter to Votruba, Aug. 5, 2003].

³⁸ *Id.* at 1.

³⁹ Letter from Carl C. Monk, Executive Dir., Assoc. of Am. Law Sch. to Dr. James C. Votruba, President, N. Ky. Univ. and Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law 1 (Aug. 19, 2003) (on file with author) [hereinafter Letter to Votruba, Aug. 19, 2003].

⁴⁰ Letter from Dr. James C. Votruba, President, N. Ky. Univ. and Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law to Carl C. Monk, Executive Dir., Assoc. of Am. Law Sch. (Sept. 17, 2003) (on file with author) [hereinafter Letter to Monk, Sept. 17, 2003].

⁴¹ See *infra* text accompanying notes 121-224.

the male faculty, or, at least, of the senior male faculty.⁴² Specifically, the ABA action letter asked for a follow-up by September 15, 2004, “providing additional information to allow the Committee to make a determination with respect to the School’s compliance” with the standards and requested, “specifically . . . information concerning the School’s efforts to address the *atmosphere of intimidation and hostility toward faculty members who are female or persons of color.*”⁴³ The

⁴² See *infra* text accompanying notes 225-290.

⁴³ Letter from John A. Sebert, Consultant on Legal Educ., Am. Bar Assoc. to Dr. James C. Votruba, President, N. Ky. Univ. and Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law 11-12 (Dec. 16, 2003) (on file with author) [hereinafter Letter to Votruba, Dec. 16, 2003]. Note that the action letter makes it clear that the “atmosphere” was a found “*fact*.” Information was requested *only* regarding “efforts to address” the atmosphere problem. *Id.* at 12. The basis for the “persons of color” aspect of the “atmosphere of intimidation and hostility” is unclear. It appears to be a probable knee-jerk carry-over from the preceding septennial evaluation in 1996-97. See AM. BAR ASSOC., REPORT ON NORTHERN KENTUCKY UNIVERSITY, SALMON P. CHASE COLLEGE OF LAW: APRIL 6-9, 2003, at 2, 4 (2003) [hereinafter ABA REPORT] (“There were *still* concerns expressed about the environment for women and faculty of color.”). The law school was *absolved of further reporting requirements* on this issue in late 1997. *Id.* at 5. It is also possible this “passing reference” was a product of the fact that it occurred “in the midst of a discussion on gender, and all minority members, except for one new faculty member, were women.” Letter from Gerard A. St. Amand, Dean, Salmon P. Chase Coll. of Law, Gail Wells, Provost, N. Ky. Univ. and James C. Votruba, President, N. Ky. Univ. to John A. Sebert, Consultant on Legal Educ., Am. Bar Assoc. tab 2, p.4 (Sept. 9, 2004) (on file with author) [hereinafter Letter to Sebert, Sept. 9, 2004]. For a further discussion of the “persons of color” aspect, see *infra* note 62. See also ASSOC. OF AM. LAW SCH., AALS REPORT ON NORTHERN KENTUCKY UNIVERSITY SALMON P. CHASE COLLEGE OF LAW: APRIL 6-9, 2003, at 8 (2003) (on file with author) [hereinafter AALS REPORT] (noting the faculty “did not express unanimous support for an emphasis in minority hiring”). Chase’s reply noted that it was “difficult to respond completely and effectively... when the Report does not provide greater specificity.” Letter from Dr. James C. Votruba, President, N. Ky. Univ. and Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law to John A. Sebert, Consultant on Legal Educ., Am. Bar Assoc. III-9 (Sept. 2, 2003) [hereinafter Letter to Sebert, Sept. 2, 2003]. The law school reported at length. *Id.* at III-10 to III-12. The *true* basis for the “pervasive hostile environment” charges may have been the comment in the site evaluation report that a “very few faculty” had criticized the faculty recruitment process as based on the perception of undue emphasis on racial and gender diversity. ABA REPORT, *supra*, at 26. In its response to the site evaluation report, Chase attempted, ultimately unavailingly, to turn this into a positive statement – that the “overwhelming majority” put “strong emphasis on” diversity and this “should create a very positive, welcoming, and encouraging environment” for women

AALS similarly noted a matter of “serious concern”⁴⁴ – causing doubts as to “whether [the] school compli[ed] with the obligations of membership” – and requested a “progress report” by August 19, 2004 about a “*pervasive hostile atmosphere towards women*” and “the steps that the Law School and University are taking to deal with and eliminate this *hostile atmosphere* so as to maintain conditions conducive to the faculty’s effective discharge of its teaching and scholarly responsibilities.”⁴⁵

Apart from the dubiety of the “sources” relied upon, which will be discussed below,⁴⁶ the methodology of the ABA and AALS in drawing their conclusions also evidenced their highly suspect nature. The ABA Accreditation Committee’s letter first referenced in supposed “Fact (23)” a “*perception*” the school was “an exclusive and non-supportive environment for women and minorities.”⁴⁷ It then noted as a *fact* “efforts by some male

and minorities in the Chase community. Letter to Sebert, Sept. 2, 2003, *supra* at III-11. See also Letter to Monk, Sept. 17, 2003, *supra* note 40, at 12. For a further discussion of the racist component thereof, see *infra* the text accompanying note 62.

⁴⁴ Letter from Carl C. Monk, Executive Dir., Assoc. of Am. Law Sch., to Dr. James C. Votruba, President, N. Ky. Univ. and Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law 2 (Dec. 10, 2003) (on file with author) (emphasis added) [hereinafter Letter to Votruba, Dec. 10, 2003].

⁴⁵ *Id.*

⁴⁶ See *infra* text accompanying notes 601-17.

⁴⁷ Letter to Votruba, Dec. 16, 2003, *supra* note 44, at 5. This was discussed in the context of notorious “Fact 23’s” substantially and misleadingly misstatement of the chronology of recent faculty departures. See *infra* text accompanying notes 84-85, 583-84, 632-33. The Accreditation Committee made this “perception” finding in the context of discussing the site evaluation team’s report of a “combination of reasons advanced” for the misstated departures. Letter to Votruba, Dec. 16, 2003, *supra* note 44, at 5. Actually, the “combination of reasons advanced” was rather more ambiguous and nuanced. The site evaluation report gave the following rationale: “. . . including possibly the level of faculty salaries and other compensation, the lack of intellectual exchange among faculty members, and the presence of an environment for women and minority group members . . . that was not inclusive and supportive.” ABA REPORT, *supra* note 43, at 26 (emphases added). Note that the “possibly” introduced the whole list of factors. A possibility is quite different from a factual finding of a “perception.” Note also the subtle transformation of “not inclusive” to “exclusive” – transforming a condition indicating possible

faculty at intimidation of female colleagues . . .”⁴⁸ It then found (somewhat incomprehensibly)⁴⁹ that “women do not believe

nonfeasance to one suggesting possible active *misfeasance*. Lastly, note that there is no specific reference to *the* departing minority faculty member as suggesting any such environmental concerns as a precipitating cause or that she otherwise felt excluded. Compare the quite different interpretation of the facts in the AALS report. See *infra* note 66.

⁴⁸ Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 5 (adopting the site team report). The summary in the site evaluation report concluded with a very mild statement noting that “(c)oncerns were expressed about the environment for women and faculty of color.” ABA REPORT, *supra* note 43, at 70 (emphasis added). See also *id.* at 2. The other underlying supposed bases for this concern were the following:

One of the more troubling *findings* . . . was the *widely held perception* that women on the faculty are *not treated with due respect* by some male colleagues. There were *notorious instances reported* of male faculty yelling at women colleagues or otherwise engaging in conduct that was *designed to silence or intimidate*. It *appears* that *race may also be a factor* in some of the behavior. There seemed to be additional indications that women faculty do not find the atmosphere at the law school to be *welcoming and supportive*, or that women are equal participants in the mission of the law school. The dean . . . has been aware of this problem and is credited by the faculty with exploring possibilities to remedy the problem, though those efforts appear to not have been successful at the time of the site visit.

Id. at 27 (emphases added). Somewhat at odds with this is the same report’s statement “some senior faculty” indicated the “the atmosphere . . . and the level of collegiality had *improved in recent years*, especially since” the arrival of the new dean. *Id.* at 26 (emphasis added).

⁴⁹ Stephens Letter to National Advisory Committee on Institutional Quality and Integrity, U.S. Dept. of Education, Aug. 23, 2006, at 3 [hereinafter Stephens Letter, Aug. 23, 2006] (concluding that “welcoming atmosphere, whatever that might mean” was outside ABA standards and interpretations, never defined by the team, and “beyond definition”). This “welcoming” criterion is a wonderfully open-ended example of what one noted author has termed the “dangerous consequences” for free expression of antidiscrimination law – such is “almost infinitely malleable” and has “no clear definitional boundaries.” BERNSTEIN, YOU CAN’T SAY THAT!, *supra* note 20, at 160. Ultimately, “[a]lmost any economic behavior, and much other behavior, can be defined as discrimination.” *Id.* See also WALTER BENN MICHAELS, THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY 91 (2006) (“Identified with the commitment to diversity, left-wing politics is here transformed into a *code of*

that the atmosphere at the School to be welcoming.”⁵⁰ The report supported its findings in part by an important misstatement⁵¹ – the “belief” of the *President and Dean* that “the concern is *primarily* with *one* faculty member” – and noted the Chase response to the effect that “a number of measures have been implemented recently in order to chastise *the* offending faculty member and be more supportive of faculty.”⁵² This is the sum total of the salient “*factual*” findings for its “Conclusions.”⁵³

In its “Conclusions” the ABA Accreditation Committee found

manners, a way of talking and acting designed not to produce radical change but to ensure that no one is offended.”) (emphases added). As a torts teacher, “welcoming” and similar amorphous standards such as “offensiveness” remind me of the common law’s early rejection of the suggestion that a negligent defendant be held liable *only* if he or she failed to act “bonafide to the best of his judgment.” Chief Judge Tindal in poignant language disparaged such an individualized subjective standard “as *variable as the length of the foot* of each individual . . .” *Vaughn v. Menlove*, (1837) 132 Eng. Rep. 490, 493 (C.P.) (emphasis added). On the ambiguity issue, compare the court’s repudiation of the University of Michigan speech code because terms like “stigmatize” and “victimize” were not “self-defining” and hence ambiguous and comprehensible only “with reference to some exogenous value system:” “What one individual might find victimizing or stigmatizing, another individual might not.” *Doe v. University of Michigan*, 721 F. Supp. 852, 867 (E.D. Mich. 1989). A commentator has suggested that such terms are no less vague than Title VII terms such as “unwelcome,” “hostile,” “intimidating,” “severe” and “pervasive,” which have not been found similarly unconstitutional. JON B. GOULD, *SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION* 10, 124-48 (2005). Compare the Supreme Court’s pointed analysis rejecting Title VII as a “general civility code” and reaffirming that Title VII imposes high standards of *objective* offensiveness/hostility as interpreted by a *reasonable person* and that such standards mandated both “[c]ommon sense” and an “appropriate sensitivity to social context.” See *infra* note 645. The Court must have had the *apparatchiks* involved in and operating the ABA/AALS accreditation/membership processes in mind.

⁵⁰ Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 5. For a discussion of this exceedingly amorphous, if not indefinable concept, see *infra* text accompanying notes 668-70.

⁵¹ Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 5. See *infra* text accompanying note 86.

⁵² Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 5 (emphases added).

⁵³ *Id.* at 5, 11-12.

there was no factual basis for a required response under then Standard 210, although such does “merit close attention and continuing review.”⁵⁴ Standard 210 mandated that the School “foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ground of race” or “sex.”⁵⁵ The ABA Accreditation Committee then became obtuse, if not unintelligible. It cited to Standard 401 and concluded it had “insufficient evidence” to determine Chase’s compliance therewith, in that the law school “has *not adequately reviewed the classroom performance* of its faculty in order to ensure an atmosphere in which students and faculty may voice opinions and exchange ideas.”⁵⁶ In its “(a)ction (r)equested” section it asked for “additional information” to allow the committee to make a compliance determination as to Standard 401 in two respects: (1) “steps taken” by Chase “to assess and enhance the quality of instruction and teaching effectiveness”; (2) “efforts to address the atmosphere of intimidation and hostility toward faculty members who are female or persons of color.”⁵⁷ Clearly, (1) was based on then 401(b), requiring law schools to “taken reasonable steps to ensure” faculty “teaching effectiveness.”⁵⁸ The basis for (2) in Standard 401 is a mystery. 401(a) mandated

⁵⁴ *Id.* at 11.

⁵⁵ AM. BAR ASSOC., 2003-2004 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 33 (2003-2004) [hereinafter 2003-2004 STANDARDS]. The present version is found in Standard 211 and substitutes “gender” for “sex” and makes other modest changes not relevant to this article. See 2007-2008 STANDARDS, *supra* note 30, at 15.

⁵⁶ Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 11 (emphases added). The action letter cited Fact No. 21 as to faculty classroom effectiveness, *i.e.*, too much lecturing and a “fail(ure) to engage students beyond a superficial level,” *id.* at 5, Fact No. 22, dealing with a lack of a formal mentoring system, *id.*, and Fact No. 23. *Id.* at 5. Other than the “findings” discussed *supra* in text accompanying notes 47-48, 51, the only other discussion in “Fact 23” was the percentages of women and minority group members as regular faculty, contract faculty and adjunct faculty. Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 5.

⁵⁷ Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 11-12.

⁵⁸ 2003-04 STANDARDS, *supra* note 55, at 33.

only *qualifications* a law school faculty must *possess*.⁵⁹ However, the italicized language *supra* hints at “ensur(ing) an atmosphere” in the classroom where “faculty may voice opinions and exchange ideas” with students. Apparently, by some “penumbras, formed by emanations”⁶⁰ from Standard 401, occasional incivility (denominated “intimidation and hostility”) has so psychically damaged women and minority faculty that they cannot share ideas with students! Of course, they pointed to no factual basis for such, and there was none. The mere suggestion should have (but did not) precipitate mass hilarity.

In other words, having found no factual basis for *discrimination* on the ground of either race or sex, the ABA attempted to infuse Standard 401 (apparently the “teaching effectiveness” aspect thereof) with content based on supposed Fact 23. Despite its concession as to Standard 210, the ABA was attempting to backdoor regulation of the Chase faculty as to “atmosphere” and “environment” not based in any even arguable violation of state or federal law by slippery linkage to “teaching effectiveness.” This raises substantial questions as to whether the Accreditation Committee acted *ultra vires*⁶¹ and reflects the type of strained, manipulative interpretation of canons of statutory instruction that would deserve a failing grade if engaged in by a law student. Nonetheless, the ABA

⁵⁹ *Id.* (“A law school faculty shall have a faculty that possesses a high degree of competence, as demonstrated by its education, classroom teaching, ability, experience in teaching or practice, and scholarly research and writing.”). The ABA subsequently collapsed (a) and (b) into a single provision. See 2007-2008 STANDARDS, *supra* note 33, at 30.

⁶⁰ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁶¹ See Memorandum from David A. Elder to President James C. Votruba and Dean Gerard St. Amand (Jan. 23, 2004) (unpublished internal memorandum on file with author). Also, see the Stephens Letter, Aug. 23, 2006, *supra* note 49, at 3-4, relying in part thereon, to the National Advisory Committee on Institutional Quality and Integrity, U.S. Department of Education, which stated that: “[T]he ABA imposes requirements on law schools that are not only extraneous to the process of ‘assuring the quality of legal education’ but are totally unrelated (and, at times, contrary) to the Standards. These *ultra vires* requirements, which, in the case of Chase, attempted to regulate the content of speech between and among faculty members, decidedly discourage the type of open and frank dialogue that should occur in an educational setting.” *Ultra vires* acts by the ABA, at least, are well documented. See *infra* the text accompanying notes 685-747.

Accreditation Committee relied exclusively thereon in coming to its extraordinary leap in the “action requested” section regarding “the School’s efforts to redress the *atmosphere of intimidation and hostility* toward faculty members who are *female or persons of color*.”⁶²

The AALS letter similarly engaged in sophomoric reasoning. Initially, it identified as a *fact* “the hostile environment that

⁶² Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 12 (emphases added); see also *supra* text accompanying note 43. The absence of *any* cited evidence as to the “persons of color” conclusion suggests strongly that the ABA Accreditation Committee bought into and applied a variation on the all-white-males-are-presumptive racists claptrap that pervades much of the American academic world today. For a recent example, see the discussion of FIRE’s (Foundation of Individual Rights in Education) outing of the indoctrination policies until recently used by the University of Delaware residential housing office. Columnist Walter Williams summarizes the policy succinctly: “[I]f you’re white, you’re a racist.” Under this policy, by its own terms, a “non-racist” is a “non-term . . . created by whites to deny responsibility for systemic racism . . .” Walter Williams, *University Nonsense: ‘If You’re White, You’re Racist*, SUNDAY ENQUIRER, Nov. 11, 2007, at E8. See also RICHARD BERNSTEIN, DICTATORSHIP OF VIRTUE 130 (1994) (“[W]hite male’ becomes synonymous with the hunger for power, with imperialism, with ruthless capitalist exploitation, while all others belong to the camp of the meek and the beautiful.”); MICHAELS, *supra* note 49, at 11, 7 (Noting liberals’ preeminent perspective on conservatives – “what American liberals want is for conservatives to be racists” — and then posing a question: “Why, in a world where most of us are not racist (where on the humanities faculties [and law?] at our universities, *we might more plausibly say not that racism is rare but that it is extinct*), do we take so much pleasure in reading attacks on racism?”); GOULD, *supra* note 49, at 6 (suggesting that “hate speech” (racist, anti-ethic and homophobic speech) regulation has triumphed as a matter of “mass constitutionalism” whatever its status as a matter of formal constitutional law, “quietly surpass[ing] the wildest dreams of its opponents to become an accepted norm in American society”); *id.* at 41 (“Hate speech regulation, not only lives, it has triumphed.”). The ridiculousness and invidiousness of political correctness has been exposed vividly in the criticism of Senator Hillary Clinton for her Dr. Martin Luther King/President Lyndon B. Johnson comparison. See Charles Krauthammer, *Black Dreams, White Liberals*, WASH. POST, Jan. 18, 2008, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011702239.html> (answering the question as to the source of the “racial offense,” whether “studied” or sincere, by saying: “[f]rom a *decades-long campaign of enforced political correctness* by an alliance of white liberals and the black civil rights establishment *intended to delegitimize and marginalize as racist any criticism of their post-civil rights-era agenda*”) (emphasis added). In light of the above, a charge of racism is so “inherently improbable” that the publishing of such is itself substantial evidence of constitutional malice. See *infra* text accompanying notes 618-26.

exists at the law school,”⁶³ later also identified as a *fact* the “pervasive hostile atmosphere towards women,”⁶⁴ and then required a progress report outlining the *steps taken* “to deal with and eliminate this hostile atmosphere.”⁶⁵ It, however, identified *no factual basis* for its conclusion.⁶⁶ While damning

⁶³ Letter to Votruba, Dec. 10, 2003, *supra* note 44, at 2.

⁶⁴ *Id.*

⁶⁵ *Id.* This was a “serious concern” putting Chase’s compliance with membership obligations and requirements in doubt. *Id.*

⁶⁶ *Id.* The introduction to the site evaluation report had concluded there were “indications that the actions of a *minority* of male faculty *may* be creating a *pervasive negative environment for the women* on the faculty.” Letter to Votruba, Aug. 19, 2003, *supra* note 39, AALS REPORT, *supra* note 43, at 1 (emphases added). While noting the “continuing challenge in recruiting minorities to the faculty, the report then cited the following as the basis for its qualified “may” above: “[T]he team was even more troubled by *reports* of a *pervasive hostile atmosphere towards women* among a *small but apparently intimidating number* of male faculty.” *Id.* at 8 (emphases added). It cited one woman faculty member as saying she “regularly stays away from faculty gatherings” to avoid these male faculty members and did not lunch with the site evaluation team for this purported avoidance reason. The report cited “[o]ther incidents of bullying behavior” – with *no* specifics or time frame given – related to the site evaluation team. The report noted that “everyone on the faculty seemed to be aware of the problem, although some downplayed its effect” and stated the dean was “well-aware of the situation but has yet to come up with a solution or even an approach.” *Id.* at 8-9. The report then jumped from its introductory “may” to the following: “Because the number of women faculty is small the effect of *the hostile atmosphere*, even by a small number of the men, can be particularly damaging. This is especially true considering the number of women junior and contract faculty.” *Id.* at 9 (emphasis added). There was also a quoted comment to the effect that it was “difficult to work at the institution and participate in the life of the law school while being under such pressure.” *Id.* at 9. Importantly, the site evaluation report admitted that the minority woman faculty member leaving at the end of the year “*did not specifically mention the intimidation as a factor . . .*” *Id.* (emphasis added). The report explained that “it was commented” – apparently not by the departing colleague – that the successor school’s environment was “more conducive to scholarship.” *Id.* This was the *only* factor mentioned. The report then ended the paragraph with a bit of boot-strapping hyperbole: “With new women joining the faculty in the Fall, the problem may become more severe and detrimental to the entire institution.” *Id.* Somewhat inconsistently, the report also noted that 47.7% of the student body were women, *id.* at 8, and that eight of the eleven administrative positions denominated as “Associate,” “Assistant,” or “Director” and the Associate Dean, a tenured faculty member, were women. Among the professional librarians, four of the six were women. The director was a male.

the entire male faculty, it conceded the “hostility” came from “only a small number of male faculty” but then added that it “appears to be very intimidating to those affected.”⁶⁷ The report referred to Dean St. Amand’s earlier response that incivility had occurred on *both* sides of the sexual divide and then stated as a *fact* that Dean St. Amand “is aware of this [hostile environment] issue and sees it as a problem.”⁶⁸

There are several problems with the AALS’s analysis. The report seemed to substantially mischaracterize Dean St. Amand’s earlier response,⁶⁹ which should lead the disinterested reader to question its overall conclusions.⁷⁰ The report did not disagree with and appeared to *concede* that incivility existed and occurred *across sex lines* at the School.⁷¹ However, to bolster its factual finding that equal opportunity incivility nonetheless

Id. at 9. Compare the ABA REPORT’s analysis of the same issue, *supra* notes 47-48.

⁶⁷ Letter to Votruba, Dec. 10, 2003, *supra* note 44, at 2. The perils of allowing women as a group to self-define what constitutes harassment has been discussed by Professor Barnhisser: “[G]ranting a self-interested group the power to label anything said by another as harassment is an unwise delegation of authority.” Whether through codes or not mandating that those making charges “provide specific proof and justifications,” it then becomes “inevitable that there will be a dearth of fully honest discourse . . . By definition, such [political] speech contains strong elements of advocacy and propaganda.” Barnhisser, *supra* note 20, at 408. This has also led to a situation where “[e]ven a sense of humor seems endangered.” ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 164 (2007) (citing the protest a Harvard law professor generated when he quoted Justice Robert H. Jackson quoting Lord Byron’s lines about Julia – “who, swearing she would never consent, consented”).

⁶⁸ Letter to Votruba, Dec. 10, 2003, *supra* note 44, at 2. *See also* text accompanying notes 69, 71, 80-82, 87, 90, 108, 585, 726.

⁶⁹ *See infra* discussion supported by text accompanying note 631.

⁷⁰ On credibility issues and the knowing or reckless disregard of falsity issue, see *infra* text accompanying note 636. *See also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (“Credibility determinations, the weighing of evidence, the drawing of legitimate inferences from the facts are jury functions . . .”).

⁷¹ Letter to Votruba, Dec. 10, 2003, *supra* note 44, at 2 (quoting the Dean that he had observed “this negative [hostile/intimidating] behavior directed at male *and* female colleagues . . .”) (emphasis added).

constituted a “pervasive hostile environment” or “atmosphere,” the Executive Committee stated that such uncivil “negative behavior” “appears to be very intimidating to those affected” and that Dean St. Amand “recognizes that women may find the behavior more troubling and chilling.”⁷² Of course, the AALS’s methodology appeared to stereotype women as especially vulnerable to “negative behavior” and adopted some version of an arbitrary, subjective standard⁷³ in assessing such “negative behavior.” Indeed, it would appear that the oh-so-politically correct AALS⁷⁴ adopted different standards for male and women

⁷² *Id.* The “more troubling and chilling” reference appears to be based on the unfortunate statement in the initial Chase responses to the site evaluation report. In the context of discussing incivility “directed at male and female colleagues alike,” the response said: “We recognize, however, that different people will respond differently to the behavior described in the Report and that women may find the behavior more troubling and chilling. Every member of the community, however, is affected in some way. This warrants continuing all efforts to improve the professional interaction among all faculty colleagues of the Chase community with particular sensitivity to the impact on women.” Letter to Monk, Sept. 17, 2003, *supra* note 40, at 18; Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9 (adding after “women,” the phrase, “and other distinct groups”). This tendency toward overt solicitousness, if not obsequiousness, in the face of perceived offense is a natural concomitant of the political correctness dominating American universities. See *infra* text accompanying note 690. As one author has stated, “[i]ndeed, apologizing for something you didn’t do to people to whom you didn’t do it (in fact, to people to whom it wasn’t done) is something of a growth industry.” MICHAELS, *supra* note 49, at 122.

⁷³ See *supra* text accompanying notes 49-50, 67.

⁷⁴ Probably the best example is the AALS policy on non-discrimination based on sexual orientation and its mandate that potential employers abide by the school’s nondiscrimination laws. Universities are put between the proverbial rock and a hard place because of the possibility of forfeiture of federal funds if the military, which does so discriminate, is barred from equal access recruiting at law schools. Accordingly, the AALS requires member schools to take steps to ameliorate the negative impact of such recruitment. See *infra* note 697. Compare the much milder equal opportunity of employment provisions as to recruiters found in the ABA Standards both then, 2003-2004 STANDARDS, *supra* note 55, at 19-20 (then Standard 210(e)), and now. 2007-2008 Standards, *supra* note 30, at 15-16 (now Standard 211 (d)). This “ameliorating” requirement was a major focus during the Chase site evaluation, in the Executive Committee Action Letter. See Letter to Votruba, Dec. 10, 2003, *supra* note 44, at 3-4 (finding Chase’s “efforts at amelioration” “unclear” and providing a very detailed critique). Note that the Supreme Court rejected resoundingly and *unanimously* the suggestion that the federal government’s

faculty for assessing “negative behavior,” stereotyped the general vulnerability of women, and gave either women as a group or those at Chase the right to self-define what constitute “negative behavior” – breathtaking conclusions which would be viewed as misogynistic if engaged in by a male Chase (or other) faculty member.⁷⁵

The purported basis cited for the AALS conclusions as to “hostile atmosphere” is section 6-8(a), *i.e.*, that a member School “shall maintain conditions conducive to the faculty’s effective discharge of its teaching and scholarly responsibilities.”⁷⁶ The report pregnantly omits any reference to

university-wide forfeiture policy violated First Amendment rights of schools opposing discrimination based on sexual orientation. *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 51-70 (2006). The Court made it clear that law schools “*remain free* under the [Solomon] statute *to express whatever views they may have* on the military’s Congressionally mandated employment policy . . .” *Id.* at 60 (emphasis added). See generally the symposium on the latter caveat, *Don’t Ask, Don’t Tell: Military Recruitment and Legal Education Accepting the Court’s Invitation*, 57 J. LEGAL EDUC. 159 (2007). One article, by James G. Leipold entitled *Law School Strategies for Amelioration and Protest: What Law Schools Can Do* includes detailed appendices on an “Amelioration Best Practices Survey” and “Most Frequently Reported Faculty and Staff Led Practices” and “Most Frequently Student Led Practices.” *Id.* at 172-86. What seems ineluctably clear from the Court’s caveat is that the AALS, to which nondiscrimination based on sexual orientation is a core value, will henceforth ever more aggressively *mandate* “ameliorative” efforts as a condition of receiving and retaining AALS membership, transforming thereby the “remain free” caveat into an *affirmative obligation* – and without batting an eye at the conundrum of *coerced freedom*!

⁷⁵ This is one of the influences of radical feminists. See the discussion of “feminist overkill” in STUART TAYLOR, JR. & K.C. JOHNSON, *UNTIL PROVEN GUILTY: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* 371 (2007) (noting how radical feminists become “culture figures” and how “readily does the academic world lap up absurd theories casting men (particularly white men) as demons . . .”). For a critique of the media’s politically correct complicity in causing harm to innocent Duke lacrosse players, see Elder, *Duke Lacrosse Fabricated Rape Charges*, *supra* note 22. Compare the RESTATEMENT (SECOND) OF TORTS § 574 (1977) rule and decisions rejecting on equal protection grounds the unidirectional common law doctrine that *only* women have a slander per se claims for imputations of unchastity. See DAVID A. ELDER, *DEFAMATION: A LAWYER’S GUIDE* § 1.17 (2003 & Supp. 2008) [hereinafter ELDER, *DEFAMATION*].

⁷⁶ Letter to Votruba, Dec. 10, 2003, *supra* note 44, at 2. The letter adopted the language verbatim in the AALS *Handbook*. ASSOC. OF AM. LAW SCH., 2003 HANDBOOK § 6.8(a), at 36 [hereinafter 2003 AALS HANDBOOK]. The same

Section 6-4 as a basis for “serious concern.” Section 6-4(a) requires that member Schools “shall provide equality of opportunity in legal education for all persons, including faculty . . . with respect to *hiring, continuation, promotion and tenure* . . . *without discrimination or segregation*” on the grounds of “race,” “color,” or “sex.” Section 6-4(c) also requires that a member school “shall seek to have a faculty . . . *diverse with respect to race, color and sex.*”⁷⁷ In other words, *no factual basis existed* for a finding of violation of 6-4(a) or 6-4(c). In sum, the AALS infused “hostile atmosphere” into and made it a nebulous manipulable component of an open-ended standard on “faculty development” dealing with “conditions conducive to the faculty’s effective discharge of its teaching and scholarly responsibilities” under section 6-8 (a).

It should be noted that both the Accreditation Committee

provision is now in the 2008 *Handbook*. ASSOC. OF AM. LAW SCH., 2008 HANDBOOK § 6.6(a), at 35 [hereinafter 2008 AALS HANDBOOK]. The AALS apparently adopted a conclusive presumption of impact on the education Chase provides: “As you know, this *can and will have* a very negative impact on the School’s ability to *effectively educate* and is clearly unacceptable.” *Id.* (emphases added). No evidence has been adduced to support such a negative impact. Indeed, the AALS does not even purport to link its “conditions conducive” criticism to its direct criticism of Chase teaching! *Cf. id.* at 2-3. Apparently, the occasional incivility occurred largely in interactions between colleagues in *public* settings such as faculty and committee meetings, making any such causal connection exceedingly difficult, if not impossible, to show. The AALS seems to have tacitly dropped the “conditions conducive” impact as to scholarship. Maybe (again, “hope springs eternal!”) it was discomfited (although discomfiture by the political correct seems to be a rare commodity indeed) by the anomaly in this respect between the presumptive corollary to scholarship and its earlier *very complimentary* stance on the faculty’s enhanced scholarship. *Id.* at 1. See also AALS REPORT, *supra* note 43, at 1-2, and ABA REPORT, *supra* note 43, at 69 (finding “a greater emphasis on and commitment to scholarship”); *id.* at 2 (parallel conclusion). Of course, the temptation found in this broad AALS interpretation is that it can be manipulated into meaning *whatever* the AALS Executive Committee deems *ideologically appropriate or politically expedient*.

⁷⁷ The present by-laws include such in section 6-3(a) and 6-3(c). 2008 AALS HANDBOOK, *supra* note 76, at 34. Indeed, the AALS action letter cited Chase’s “progress” in “moving to address its *diversity* issues.” Letter to Votruba, Dec. 10, 2003, *supra* note 44, at 1 (emphasis added). It did list as a matter of “serious concern” on which a “progress report” was requested the “relatively small” percentage of minority students, while noting the special recruitment efforts taken by Chase. *Id.* at 3.

and the Executive Committee had before them *detailed refutations* of the “hostile environment” charges, despite the difficulty Chase noted in responding “completely and effectively” in the absence of *any specifics* as to the underlying charges.⁷⁸ These responses delineated in detail factual specifics demonstrating unequivocally that women faculty members had a “major and influential voice” in leadership at Chase and the “dominant consensus” that women faculty members were “highly valued and respected” educational leaders and colleagues.⁷⁹ The responses also quoted the Dean (a person treated as having great credibility in both reports)⁸⁰ as observing that such incivility⁸¹ was “*directed at male and female*

⁷⁸ Letter to Monk, Sept. 17, 2003, *supra* note 40, at 16-18; Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9.

⁷⁹ Letter to Monk, Sept. 17, 2003, *supra* note 40, at 17-18; Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9.

⁸⁰ See *supra* note 48; Letter to Votruba, Dec. 16, 2003, *supra* note 43, at 8 (noting that the Chase administration was “highly professional”); ABA Report, *supra* note 43, at 2, 69 (citing “widespread support” for the Dean); *id.* at 27 (finding an “impressive” commitment by the Dean to gender and racial diversity goals); *id.* at 26 (noting “some senior faculty” viewed atmosphere and collegiality as improving in recent years under the present dean); Letter to Carl C. Monk, Executive Dir., Assoc. of Am. Law Sch. to Dr. James C. Votruba, President, N. Ky. Univ. and Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law tab. 1, p. 2 (Aug. 6, 2004) (noting that the Dean had led a discussion of civility during the last faculty meeting of Spring 2003 and the first faculty meeting of Fall 2003, and concluding that it is “likely the unanimous view” that civility among faculty colleagues had improved during the prior academic year) [hereinafter, Letter to Monk, Aug. 6, 2004]; Salmon P. Chase College of Law, Work Climate Assessment, June 29, 2004, at 4-7 [hereinafter Work Climate Assessment]. Many interviews indicated that the civility had substantially improved under the current Dean. *Id.*; see also *supra* text accompanying note 48 and *infra* text accompanying notes 82, 117, 363, 517. The above would also appear to exclude Dean St. Amand from the group of senior male faculty charged with creating or fostering the “pervasive hostile environment.” See *infra* notes 263, 517.

⁸¹ Letter to Monk, Sept. 17, 2003, *supra* note 40, at 17 (“There indeed have been instances of *faculty members* being other than professionally pleasant with one another.”) (emphasis added); Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9 (adding, in an addendum: “In some of the instances, the communications could have been characterized as ‘yelling’ at colleagues.”).

*colleagues alike.*⁸² Lastly and most importantly, the Chase response cited to the *concession* by the site evaluation team in its exit interview that “the concern is *primarily* with *one* male faculty member.”⁸³

Chase’s response to the ABA’s Action Letter noted three very significant errors. First, as noted above, the “atmosphere of intimidation and hostility” indictment occurred in the overall context of proffered possible explanations as to why two non-tenured assistant professors had left in two 2002 and two more were departing at the end of the 2003 academic year. However, the true facts were quite different. Only two (one male, one minority female) persons had left since 2002. Neither had been on the job market but had been “actively and aggressively recruited” and hired by a then top fifty school in the metropolitan area.⁸⁴ Of “particular significance” in this respect

⁸² Letter to Monk, Sept. 17, 2003, *supra* note 40, at 18 (emphasis added); Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9 (emphasis added). One Chase faculty member stated it more strongly: “Put more bluntly, male, female, and minority faculty members alike were perpetrators of an environment that, at that time, was not only intimidating and hostile, but down right toxic.” Letter from the late Edward C. Brewer, III, to National Advisory Comm. on Institutional Quality and Integrity, U.S. Dep’t of Educ. 3 (Aug. 25, 2006) [hereinafter Brewer Letter, Aug. 25, 2006]. Also, hereinafter the latter entity and its reapproval process will be referred to as “NACIQI.” As my colleague noted, both before the site visit and subsequently, Chase has engaged in a “healing” process, “both of our earlier woes” and the extensive damage wrought by the site evaluation process. Brewer Letter, Aug. 25, 2006, *supra* at 3. Others had noted at the time of the visit that the environment was improving. See *supra* text accompanying notes 48, 80 and *infra* text accompanying notes 117, 363, 517. The ABA/AALS process made that healing demonstrably more difficult.

⁸³ Letter to Monk, Sept. 17, 2003, *supra* note 40, at 17 (emphases added); Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9 (same) (emphases added). This concession was conveniently dramatically misstated. See *infra* text accompanying note 86.

⁸⁴ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab. 2, p. 1. How this error occurred is unclear. The ABA Report had indicated that two faculty were leaving at the end of the 2002-03 year and that two others had departed since 2000. ABA REPORT, *supra* note 44, at 26. Indeed, the site evaluation team noted during its visit Chase’s impressive successes in recruiting new faculty and “emphasized” such “include[d] the increased risk” of being cherry-picked by other schools. Letter to Monk, Sept. 17, 2003, *supra* note 40, at 8-9; Letter to Sebert, Sept. 2, 2003, *supra* note 43, at II-7. Both letters noted that all four non-tenured members had moved during the period to law schools “with high

was the fact that the AALS site visit report specifically admitted that the departing female faculty member, a minority, had made *no mention* of any such concerns.⁸⁵ Second, the response noted the Action Letter's misstatement as to the Dean and University administration's "belief" that the environmental issue was "primarily" with one faculty member. In fact, Chase had reiterated an *admission by the joint site evaluation team* during the "out-brief" with the Chase Dean, President and Provost.⁸⁶ Third, Chase made a parallel vigorous response to the AALS Action Letter's statement that the Dean was "aware of this [pervasive hostile environment towards women]" issue and sees it as a problem." The concern the Dean was actually aware of was "occasional faculty interactions" without the "expected degree of civility" and the "concern by some women that some of this interaction may have been" gender-related.⁸⁷

national standard or attractive specialty programs" in the colleague's particular field and that "[p]ersonal family circumstances" may have made such "desirable, and was clearly pivotal" in one situation. Letter to Monk, Sept. 17, 2003, *supra* note 40, at 8-9; Letter to Sebert, Sept. 2, 2003, *supra* note 43, at II-7. The 2004 response provided even more detail. As to the other two leaving since 1999, one left to head "one of the premier" Intellectual Property Programs in the country and the other, a female, left to be nearer family after a divorce. Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab. 2, p. 1. This had been made clear in the Chase Self-Study, which had noted that the "only non-retention of faculty members since the last sabbatical inspection has been as a result of faculty leaving to teach at other schools." Chase Self-Study, *supra* note 4, at 3-6.

⁸⁵ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab. 2, p. 1. This had been admitted in the AALS site evaluation report. See *supra* note 66. The response noted that eight of the ten faculty members hired since 1999 were *still* at the law school. Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab. 2, p. 1. Also see the parallel comments in Letter to Monk, Sept. 17, 2003, *supra* note 40, at 8-9. The report then detailed the means by which Chase recognized and implemented its commitment to "*creating a supportive and stimulating environment*" for non-tenured faculty. Letter to Monk, Sept. 17, 2003, *supra* note 40, at 8-10 (emphases added); Letter to Sebert, Sept. 2, 2003, *supra* note 43, at II-7 (emphases added).

⁸⁶ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab. 2, pp. 1-2; Letter to Monk, Sept. 17, 2003, *supra* note 40, at 17; Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9. See *supra* text accompanying notes 51-52 and 83 and *infra* text accompanying notes 260, 647-53.

⁸⁷ Letter from Gerard St. Amand, Dean, Salmon P. Chase Coll. of Law, Gail Wells, Provost, N. Ky. Univ., and James C. Votruba, President, N. Ky. Univ. to Carl C. Monk, Exec. Dir., Assoc. of Am. Law Sch. tab. 1, p. 1 (Aug. 6, 2004) (on

Chase's other responses to the ABA and the AALS Executive Committee Action Letters were nearly identical in content and tone. The lack of specifics in the letters made any assessment of the "very serious" "characterization" and "conclusion" exceptionally difficult.⁸⁸ Nonetheless, the reports delineated in extensive detail the "enormous effort"⁸⁹ made to respond to the issues raised. The report repeated the Dean's earlier view that "occasional incivility" across sexual lines had occurred but "did not rise to the level" suggested in the letters.⁹⁰ However, Chase stated in reply that the letters made it clear that "*actionable conduct*" had been imputed to the *male faculty*. This necessitated that the law school and university investigate the charges and discover the details in order to take "appropriate personnel action" against offenders under existing university policy.⁹¹ An elaborate multi-step process ensued. The Dean first

file with author) [hereinafter Letter to Monk, Aug. 6, 2004]; Letter to Monk, Sept. 17, 2003, *supra* note 40, at 18 ("The Dean is aware that *some* women perceive *some unpleasant communications* from a male colleague have been directed at them because they are female and that some women have indicated they felt intimidated by these interactions.") (emphases added); Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9 (containing identical language).

⁸⁸ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, p. 2; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, p. 1. Also see the parallel comments in Letter to Monk, Sept. 17, 2003, *supra* note 40, at 17.

⁸⁹ Letter to Sebert, Sept. 9, 2004, *supra* note 43, at 1; Letter to Monk, *supra* note 87, Aug. 6, 2004, at 1.

⁹⁰ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 2. Such instances, "although infrequent," "continued to be addressed on-the-spot, if possible," and were observable by others, and always dealt with in private between the faculty member and dean. *Id.* And see the parallel comments in Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 1; Letter to Monk, Sept. 17, 2003, *supra* note 40, at 18 (noting that faculty members who engage in the misbehavior are "admonished immediately" and publicly and that the Dean "has used and continues to use the full force of personnel authority to address all matters" relative to faculty conduct and performance); Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9 (containing identical language). *See also supra* text accompanying notes 69, 71, and *infra* text accompanying note 726.

⁹¹ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, p. 2 (emphasis added); Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, p. 2 (emphasis added). The law school noted the "pervasive hostile environment" charge "reflects a legal term indicating actionable conduct." Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, p. 2. This is powerful evidence by the male faculty

met with the faculty to share the Action Letter concerns and request from faculty “private initial written observations” and recommendations as to how to proceed. The Dean then met with women faculty, both individually and as a group, and with male faculty members, to “help better define the nature of any concerns and to obtain greater detail regarding any offending conduct.” These failed to provide the requisite specificity to determine whether actionable conduct had occurred.⁹² The Dean then requested that the Provost, a woman career academic,⁹³ also meet with women faculty members. The same result eventuated – *no specific details supporting any actionable conduct* were presented.⁹⁴

The Dean next asked the Provost to “inquire more formally” into possible improprieties through an objective outside party, who would assess the conduct of the entire law school operation, including the Dean.⁹⁵ Ultimately, the Provost contracted with the regionally most prestigious dispute resolution center,⁹⁶ which persuaded the university to reorient its focus to a “climate assessment” rather than identification of offenders, if any,

members’ superiors that the male faculty was viewed as *collectively* charged with “actionable conduct.” On the “group defamation”/“of and concerning” issue, see *infra* text accompanying notes 225-90. For a brief discussion of university policies see *infra* text accompanying note 105.

⁹² Letter to Sebert, 9 Sept. 2004, *supra* note 43, tab 2, at 2-3; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab. 1, at 2.

⁹³ Letter to Sebert, 9 Sept. 2004, *supra* note 43, at 3; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 2. The Provost had previously been Dean of Arts and Sciences, department chair, and a math professor. *Id.*

⁹⁴ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 3. The discussions by the Dean and Provost did not provide specifics as to any actionable conduct but were “somewhat helpful in gaining a sense of *feelings* by *some* women regarding a *lack of civility* in interactions among *some* faculty members . . .” *Id.* (emphases added); see also Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 2-3 (same).

⁹⁵ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 3; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 3.

⁹⁶ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 3; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 3.

engaged in actionable conduct.⁹⁷ During the three-month assessment that ensued, the center conducted time-consuming one-on-one interviews, focus groups and provided private opportunities for written responses. Almost all faculty, administration and staff participated⁹⁸ in this grueling, expensive process,⁹⁹ providing “a much greater opportunity for reliable feedback” than the three-day site evaluation visit.¹⁰⁰

The Center’s findings were not surprising. Both men *and* women faculty were “frustrated” by the reports and “strongly disagreed” with their conclusions. Other men and women faculty suggested the conclusions were “overstated.”¹⁰¹ No

⁹⁷ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 3-4. The center “recommended instead that it conduct a climate assessment designed to gain a better understanding of the overall environment and general causes for any negative climate, and that it then propose courses of action designed to move the law school forward in the most effective manner.” *Id.*; see also Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 3 (same).

⁹⁸ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 4; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab. 1, at 4. The head of the center and its communications consultant were assisted by a Faculty Advisory Committee appointed by the Dean consisting of four faculty members, half tenured, half non-tenured. Two members were women, one of whom is an African-American. Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 4; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 3.

⁹⁹ Stephens Letter, Aug. 23, 2006, *supra* note 49, at 3 (concluding that the Accreditation Committee mandated “herculean and costly measures to evaluate issues of ‘atmosphere’” outside ABA Standards and that these “ultra vires actions” cost over \$20,000, “not to mention the countless hours of angst-filled discussions and deliberations necessary to comply with the Accreditation Committee’s nebulous and amorphous dictates”).

¹⁰⁰ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 4; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 4.

¹⁰¹ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 4; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 4; Work Climate Assessment, *supra* note 80, at 3. The report did cite “communication styles of a few people” that impeded “an open and trusting communication climate” — especially during faculty meetings. Behaviors identified include: “interruptions, monopolizing the conversation, repeating positions or points, rambling comments, sarcasm, loud volume, combative language, personal attacks, verbal put-downs, invasion of space that can feel physically threatening, language choice that reflects violent images, and slang terms that display disdain for behavior or thought processes that are not stereotypically masculine.” Work Climate Assessment,

faculty member supported the ABA/AALS reports' damning conclusions of "pervasive hostile environment." Indeed, the center's report specifically concluded that there was "*no support* for the existence of a *pervasive hostile environment* for women"¹⁰² and also specifically rejected race as *totally irrelevant* to the issue of climate in the Chase workplace.¹⁰³ The center developed at length the conclusion that perspectives on climate issues were "influenced heavily" by historic grievances which remained vivid for some faculty vis-à-vis colleagues in the tier of faculty with over a decade of service.¹⁰⁴

Furthermore, the Chase response emphasized that during at least the eight year period including the last sabbatical inspection "*no complaint of any kind*" had been filed under

supra note 80, at 7. Again, as with the site evaluation report, see *supra* text accompanying note 15, no time frame, context, etc., was provided.

¹⁰² Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 4 (emphases supplied); Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 4 (same); Work Climate Assessment, *supra* note 80, at 3. The center did "find support – from both men and women – for the conclusion that there have been and continue to be aspects of the communication environment that are difficult for women and for some men." *Id.*

¹⁰³ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 4; Work Climate Assessment, *supra* note 80, at 3. As no reference to race was contained in the AALS Action letter, no discussion of such occurred in the Chase response. On the manufactured bases for the racism charge, see *supra* the text accompanying notes 43, 62.

¹⁰⁴ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 4-5 (noting the center's finding "that some men and women had difficulty with the communication environment and welcomed the opportunity to discuss the matter"); Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 4 (same). See also Work Climate Assessment, *supra* note 80, at 2, 4-6, 11. However, such generational perspectives "*differ markedly*" with *new hires* reporting "good satisfaction." *Id.* (emphasis added). Some historical examples cited were compensation equity issues based on sex (this no longer has a basis in fact but "still contributes to a negative perception" of the workplace for some faculty); hiring questions involving a "sexist lens" (this has not occurred recently but also "contributes to a negative perception" of the workplace environment for some faculty); "polarizing disagreements" on issues such as hiring and curriculum have been "especially contentious at times"; "personal division among some faculty and entrenched positions on important issues" (such were caused by the absence of collaborative communication processes). *Id.* On the impact of the "good satisfaction" of younger faculty on issues of "group defamation"/"of and concerning," see *infra* text accompanying notes 277-83.

time-honored university grievance procedures available to victims of those contributing to or creating a hostile environment directed at people of color or women.¹⁰⁵ Of course,

¹⁰⁵ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 5 (emphases added); Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 4 (emphases supplied) (regarding “hostile environment” against women). As to any “pervasive sexual harassment,” see NORTHERN KENTUCKY UNIVERSITY, FACULTY POLICIES AND PROCEDURES HANDBOOK IX, *Sexual Harassment/Gender Discrimination* 101-105 (1994). Under the formal hearing procedure, “[a]vailable sanctions include, but are not limited to, reprimand, suspension without pay and termination of employment.” The University has no parallel policy on racial discrimination. *Id.* It has a general equal opportunity/affirmative action policy, stating that it “will not engage in or tolerate discrimination against individuals in any of its programs and activities on the bases of race, color, religion, gender, national origin, age, sexual orientation, disability, or veteran’s status.” The policy likewise states that, where mandated by law, the University “will take affirmative action in support of equal employment opportunity and to foster an intellectual and social atmosphere that reflects the broad range of human diversity.” *Id.*, XI, *Equal Employment Opportunity, Affirmative Action, and Nepotism*, 108 (emphasis added). Presumably, a case of illegal racial discrimination would constitute a ground for termination for cause specified in University policy, implementing KY. REV. STAT. § 164.360(3) (2006), permitting termination of a faculty member for “incompetency, neglect of or refusal to perform his [or her] duty, [or for] immoral conduct.” *Id.*, *supra*, FACULTY POLICIES AND PROCEDURES HANDBOOK, *Termination For Cause*, 57-60. An exchange of e-mails with the university’s general counsel confirms that this is also her interpretation of university policy and procedures.

The reason for the absence of any such faculty complaint is apparent to any reader of the policy — the sexual harassment policy is limited to “unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal, physical, or non-physical conduct of a *sexual nature* when submission to such conduct is a basis for employment or academic decision, *or such conduct unreasonably affects* an individual’s status and well-being by creating an intimidating, hostile, or offensive work or academic environment.” *Id.*, *Sexual Harassment/Gender Discrimination*, B.1, at 101. Clearly, *nothing* in the policy covers the allegations at issue at Chase, as none of them were of a “sexual nature”! Note that NKU’s policy is consistent with the consensus of federal law, which views Title VII “hostile environment” laws as primarily “[r]estricting sexuality,” *not* mere sex discrimination. GOULD, *supra* note 49, at 145-47 (citing two leading commentators and noting that the EEOC’s criterion “premises liability on ‘conduct of a sexual nature’”). Note also that instances of “workplace bullying” — “subtle, persistent and often nondiscriminatory harassment of co-workers” — is not “necessarily illegal,” unlike sexual or racial harassment. Such cases are actionable only under general tort law. See Cari Tuna, *Lawyers and Employers Take the Fight to Workplace Bullies*, WALL ST. J., B6, Aug. 4, 2008. Use of such actionability language (“pervasive hostile environment”) wholly at

this was either known to or supremely obvious to the site evaluation team (from the absence of information anyone had so filed) or otherwise easily knowable if the assessor had asked this highly relevant, if not pivotal question.¹⁰⁶ Indeed, the absence of complaints was an extraordinarily glaring anomaly that should have made the site evaluation team, the ABA Accreditation Committee and the AALS Executive Committee exceedingly cautious. Unfortunately, it didn't. In addition, the Chase reply reaffirmed the "major and leading role" played by women at Chase demonstrating "enormous influence" and their continued performance at "very high levels" – such superlative performance is "typically associated" with a "supportive environment" in which women faculty are "highly valued and respected."¹⁰⁷

In sum, the Chase response *persuasively refuted* any

odds with the legal consensus on point itself is compelling evidence of constitutional malice. See *infra* text accompanying notes 630-53.

¹⁰⁶ On purposeful avoidance of truth as evidence of constitutional malice, see *infra* text accompanying notes 741-47.

¹⁰⁷ Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 5-6, and attached "Extract From Initial Law School Responses"; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 4-5, and attached "Facts From Initial Law School Response." The responses gave great detail as to the faculty and administrative positions held by women and noted that compensation paid during the Dean's tenure "demonstrates clear recognition of their high level of achievement" and that every request for a summer fellowship or sabbatical had likewise been approved during this same period. Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 5; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 5. The Chase responses also suggested the glaring anomaly represented by the hostile environment claims, in that such "gender concerns" had *never* been raised by staff, administration or the student body and further noted the "significant presence" of women in the three most important student organizations – Law Review, Moot Court Board and Student Bar Association. Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 5-6; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 5. The report listed in detail the high level administrative positions held by women and parallel leadership roles by women student leaders. Letter to Sebert, Sept. 9, 2004, *supra* note 43, tab 2, at 5-6, and "Extract from Initial Law School Response"; Letter to Monk, Aug. 6, 2004, *supra* note 87, tab 1, at 4-5. See also the admissions in the site evaluation report as to the extensive involvement of women in important administrative positions; *supra* note 66. Noteworthy, the occasional incivility some women faculty members denominated "bullying" was viewed by a less politicized staff as *mere discourtesy*. Workplace Climate Assessment, *supra* note 80, at 5.

suggestion that anything other than very occasional low level equal opportunity incivility over a seven year period had occurred – the position taken and defended (somewhat less emphatically) in Chase’s initial response to the site evaluation reports.¹⁰⁸ In the face of these refutatory facts any fair-minded individual or entity would have issued a correction, retraction or apology for republishing such defamatory aspersions of the male faculty. But the ABA Accreditation Committee and the AALS Executive Committee dance to different drummers and operate in a political realm where evidence, logic, fairness, humaneness and common sense are apparently largely deemed secondary, if not irrelevant, or antithetical to the perceived greater good.¹⁰⁹

The Accreditation Committee’s continued approval letter at least noted Chase’s “strong disagreement” with the Committee’s “concerns” and synthesized the actions taken at Chase to “redress any *possible* discrimination or *persistent incivility*.”¹¹⁰ Note the dramatic shift in characterization, itself an admission against interest.¹¹¹ The letter noted specifically the center’s “no support” finding as to “pervasive hostile environment” for

¹⁰⁸ See Letter to Monk, 17 Sept. 2003, *supra* note 40, at 17-18 and *supra* note 87; Letter to Sebert, Sept. 2, 2003, *supra* note 43, at III-9 and *supra* note 87. See also *supra* text accompanying notes 66, 90.

¹⁰⁹ See *supra* text accompanying notes 37-108 and *infra* text accompanying notes 110-20, 558-758. Of course, such left-liberal hypocrisy should surprise no one. For a wonderful critique of the attempted “high-tech lynching” of Justice Clarence Thomas and the left-liberal and complicit media attempt to distinguish and defend the much more egregious conduct imputed to former President Bill Clinton, see Jeanie Suk, *Coming of Age With Clarence*, WALL ST. J., Oct. 12, 2007, at A16 (“In reality, partisan politics was likely more determinative than substantive views about sex and power.”); see also *infra* note 720.

¹¹⁰ Attachment to Letter from John A. Sebert, Consultant on Legal Education to the ABA to President James C. Votruba and Dean Gerard A. St. Amand 1 (Dec. 9, 2004) (on file with author) (emphases added) [hereinafter Letter to Votruba, Dec. 9, 2004]. Even here the letter’s characterization clearly hinted at a *concession* by Chase of the underlying verity of the charges: “Although, the School’s response indicates *strong disagreement* with the Committee’s concerns about the lack of a supportive environment for women and minority faculty it reports several actions taken to redress *any possible discrimination or persistent collegial incivility*.” *Id.* (emphases added).

¹¹¹ On proving constitutional malice by making statements in the face of known, contradictory information, see *infra* text accompanying notes 568-605.

minorities or women, and that no charges had been filed by any complainant during the preceding eight years.¹¹² Stunningly, and inconsistently, however, it then in its “[c]onclusions” “noted the *progress made*”¹¹³ in responding to the Committee’s prior action – an indirect but unequivocal reaffirmation of the *merits* of the earlier accusations. Similarly, the AALS Executive Committee letter initially noted its request for a report on “a *hostile environment that exists at the law school.*”¹¹⁴ The next paragraph shifted to a recharacterization of its earlier continued membership conclusion as a “*perception that a hostile environment may exist at the law school.*”¹¹⁵ It then briefly referenced in a partial sentence some of the investigative steps taken (but not the compelling *refutatory* evidence) and continued Chase’s membership in light of Chase’s “*progress in addressing its concerns regarding hostile environment.*”¹¹⁶ Again, this is an equally stunning and damning ratification of the initial charges’ validity.

In conclusion, Chase’s dealings with the AALS Executive Committee and ABA Accreditation Committee are evocative of a scene from *Red Corner*, a thriller starring Richard Gere released

¹¹² Letter to Votruba, Dec. 9, 2004, *supra* note 110, at 1. On the University’s policies and procedures, see *supra* text accompanying note 105.

¹¹³ Letter to Votruba, Dec. 9, 2004, *supra* note 110, at 2 (emphasis added).

¹¹⁴ Letter from Carl C. Monk, Executive Director, AALS, to President James C. Votruba, Provost Gail Wells, and Dean Gerard A. St. Amand, Jan. 11, 2005, at 1 (emphases added) (on file with the author).

¹¹⁵ *Id.* (emphases added).

¹¹⁶ *Id.* at 1-2 (emphases added). Note the parallel to the Duke Lacrosse “witch hunt” and the op-ed by David Brooks in which he did a *mea culpa* and said that, in light of greater access to the facts, “*simple decency* requires that we return to that scandal, if only to *correct the vicious slurs*” uttered by millions, including himself. If a rape occurred, such couldn’t be explained by “a culture of depravity” or “sweeping sociological theories.” With regret, he noted how “mighty social causes” had “spun off a series of narrow prejudices among the privileged class” and ended with a comment about “*the saddest part . . . not the rush to judgment at the start, but the unwillingness by so many to face the truth now that the more complicated reality has emerged.*” David Brooks, Op-Ed., *The Duke Witch Hunt*, N.Y. TIMES, May 28, 2006, sec. 4, at 11. For a discussion of the Duke Lacrosse scenario, see Elder, *Duke Lacrosse Fabricated Rape Charges*, *supra* note 22.

in 1997. The Gere character is a businessman set-up for a gruesome murder in the People's Republic of China. When he first meets with his appointed Chinese lawyer (who later evolves as heroine-protector), she tries to persuade him to plead guilty to save himself from expedited execution within a week of conviction by a bullet to his head (with the cost thereof billed to his family). She informs him that the public member-people assisters on the tribunal would be "offended by your unrepentant attitude" – "in our country moral education of criminals is of great importance . . . leniency is granted to those who confess . . . severity is required for those who stubbornly insist on their innocence." The parallels are obvious, as illustrated by the Chase experience. Analysis of and determination of substratal truth of "pervasive hostile environment" charges is a troublesome impediment secondary to other ABA/AALS agenda. Those daring to discuss and debate the issues of "politics" and multiculturalism in the hiring process and the life of the law school generally need to be punished and reeducated,¹¹⁷ and must bear the financial costs

¹¹⁷ Clearly, candor in a self-study can be harmful to a law school and to individual reputation. The Chase Self-Study Committee requested faculty to fill out a detailed questionnaire, including several questions related to faculty hiring. After holding several brown-bags, the committee then synthesized the results:

Although the issue was not so hotly disputed as similar issues have been at the last sabbatical inspection, questions have been raised about whether the [faculty appointments] committee has included a political element in its decisions in more recent years. Opinions . . . ranged from the assertion that this is so, through assertions that this is so in all law schools and that it has always been so at the College of Law, to denials that there is any truth to the assertion. The concern has been expressed that the conversation about the 'political' factor has sometimes been carried out without genuine dialogue or meaningful engagement among the parties of opposing views. Some view the perceived 'political' factor as a broader, vigorous debate over the weights to be given various indicia of success and potential for contribution to the College of Law. Coming to some resolution on such matters remains one of the most pressing challenges facing the faculty with discussions about that in the preliminary stages.

The Self-Study recommended that the faculty "continue its dialogue and, to the extent possible, come to some resolution of any remaining differences" related

thereof (the center's assessment). Those *daring* to confront or contradict the ABA/AALS version of the "facts" are apparently deemed morally delinquent and to be further appropriately punished – witness *supra* the damning reaffirmation of the "pervasive hostile environment" charges.

Luckily, however, the "execution" was only partial – Chase's willingness to hire the center to do an assessment managed to placate¹¹⁸ the accreditation/membership guru-gods. Accreditation and membership were continued and Chase was only assessed the direct and indirect costs of its moral re-education – the direct financial costs of the center's "assessment," the huge loss of productive time and energy by those participating in the "assessment" or responding to the unsubstantiated charges, and the debilitating psychic and

to the appointments process. Chase Self-Study, *supra* note 4, at 3-6 to 3-7. It cross-referenced the discussions on diversity and environment. The latter is particularly revealing. Again, based on responses to the detailed questionnaire, the Self-Study synthesized in detail faculty introspection on its relationships. Dean St. Amand was given credit for leading Chase faculty "beyond maintaining the peace," even if he had not precipitated "a more comfortable coming-together among ourselves." Most faculty members viewed the problems as "both quantitatively and qualitatively different" from those in 1995-96 and that more senior level faculty had "better dealings among themselves" than in the past. A significant number of younger colleagues with diverse backgrounds had "contributed to greater openness in dialogue." Many faculty believed "our continuing efforts to enhance the diversity" of the faculty would bring "additional, significant changes" both in relationships and discourse, "all for the better." The Self-Study honed in on its core conclusion: "Recognizing that homogeneity and one-mindedness among a law-school faculty are neither realistic nor desirable goals, the College of Law needs to get a better sense of what is properly regarded as normalcy in the ferment of differing perspectives and strongly-held views. Certainly this seems possible . . . since faculty relations are probably no worse, and anecdotal evidence suggests that they may be better, than at many law schools." The Self-Study ended by denominating improved relationships as a "critically important goal" and that any recent doubts over the last year "seem to be giving way to renewed efforts." *Id.* at 3-29 to 3-30. What is particularly noteworthy, is that this *fair-minded, detailed, documented, intellectually honest and thoughtful synthesis* gave no indication whatsoever that *any* respondent had identified *any* "hostile environment" based on sex and/or race as a component of the environment issue. In the face thereof, an *objective* reader or site team member reading this should have and would have been given huge pause before giving credence to or otherwise finding a "pervasive hostile environment."

¹¹⁸ Stephens Letter, Aug. 23, 2003, *supra* note 49, at 3-4.

reputational harm to those targeted without justification¹¹⁹ and to and within the Chase community generally.¹²⁰

CHARGES OF “HOSTILE ENVIRONMENT” AS DEFAMATORY

In light of the severe penalties imposable by educational institutions for such egregious misconduct,¹²¹ the potential for civil liability,¹²² possible professional sanction¹²³ by the bar, and

¹¹⁹ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 5 (denominating the “pervasive hostile environment” charges as “extraordinarily virulent assertions”) On the defamatory nature of the charges, see *infra* the text accompanying notes 121-224.

¹²⁰ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 7 (noting that the harm to the law school and many faculty relationships was “profound”).

¹²¹ See *supra* text accompanying note 105.

¹²² See *infra* note 219 regarding the intentional infliction “outrage” and statutory claims often available in such scenarios. See also Jean C. Love, *Discriminatory Speech and Intentional Infliction of Mental Distress*, 47 WASH. & LEE L. REV. 123 (1990). For an analysis of privacy-intrusion upon seclusion claims in sexual and racial harassment cases, see DAVID A. ELDER, *PRIVACY TORTS* § 1:23 (2002 & 2008 Supp.) [hereinafter ELDER, *PRIVACY*].

¹²³ It is conceivable that some states may broadly construe their disciplinary codes to impose professional discipline upon a law professor found to have engaged in creating a “pervasive hostile environment.” See generally the materials in MORTIMER D. SCHWARTZ ET AL., *PROBLEMS IN LEGAL ETHICS* 234-260 (8th ed. 2007) (chapter entitled “Bias in (and Out of) the Courtroom”) (citing studies, legal literature and some cases); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE* § 8.4-2(e)(i) (2007-2008) (presenting the substantial First Amendment issues raised by any such code provisions in a section entitled “Racist, Sexist, and Politically Incorrect Speech”). While jurisdictions following Model Rule 8.4 (d) and comment 3 may limit discriminatory “words or conduct” violations to client representational contexts “prejudicial to the administration of justice,” see MODEL RULES OF PROF’L CONDUCT R. 8.4(d) and cmt. 3 (2002), it is possible other jurisdictions may interpret their rules more broadly. For instance, Ohio has modified its rule to prohibit discriminatory “conduct” by a member of the bar when he or she is “engage[d] in a professional capacity.” The rule has neither a specific representational nor “prejudicial to the administration of justice” qualification, although comment 3 does reference confidential client communications and “legitimate advocacy” where such proscribed conduct is “relevant to” a proceeding where the advocacy occurs. OHIO RULES OF PROF’L RESPONSIBILITY § 8.4(g) and cmt. 3 (2007). It is not at all clear that actions or

the extraordinary societal opprobrium,¹²⁴ if not ostracism that such charges entail, it is difficult to imagine any modern court concluding that a law professor is *not* defamed by “pervasive hostile environment” charges imputed to him or her. Traditional defamation law bears this out compellingly. When initially conveyed as slander, such imputations affecting one’s profession or office¹²⁵ are not mere “[d]isparagement[s] of a

conduct related to the law professoriate, whether in dealing with colleagues, staff, or students, including charges of “pervasive hostile environment” would not be covered by § 8.4(g). However, even if no discipline can be imposed, this does not render the rules irrelevant in determining whether such charges are defamatory of law professors. Clearly, they are strong evidence of behavior deemed antithetical to the status of law professors as law professors-role models. See Association of American Law Schools 2008 Handbook, AALS Statements of Good Practices, at 95 (“[S]exual harassment, or discriminatory conduct involving colleagues . . . on the basis of race, color [and] sex . . . is unacceptable.”) (emphases added). Note that the reference in the same section as to treatment of colleagues “with civility and respect” is aspirational, a “should” “responsibility.” *Id.* The AALS also views compliance with the rules of the professional code of the state(s) to which the faculty member belongs as a “should,” “[a]t minimum.” It also views “conduct warranting discipline as a lawyer” as a matter that “should be . . . of serious concern” to his law school and university. *Id.* at 96.

¹²⁴ See *supra* text accompanying notes 121-23 and see *infra* text accompanying notes 125-75. See also David Brooks, *Heinous ‘Racism’ Slur Against Reagan, GOP Should be Refuted for Good*, ENQUIRER, Nov. 12, 2007, at B7 (concluding that this “slur” was “one of the most heinous charges imaginable” “concocted for partisan reasons: to flatter the prejudices of the other side, to demonize the other and to simplify a complicated reality into a political nursery tale”) (emphases added); TOM BROKAW, BOOM!: VOICES OF THE SIXTIES, 324-25 (2007) (quoting historian Dr. Shelby Steele to the effect that “white America is being conned into believing it is a racist society,” citing terrorization through racial stigmatization and quoting him as concluding that, “[t]he worst thing that can happen to a white person is to be labeled as a racist”); RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 19 (2008) (“[P]laying the race card is mean-spirited. Racism is a serious charge – it ruins careers and destroys reputations. When warranted, it should. But when trumped up, the charge of racism is a particularly vicious slander.”); Dorothy Rabinowitz, *The Michael Nifong Scandal*, WALL ST. J., Jan. 11, 2007, at 15A (discussing the Duke Lacrosse team lynching in the context of the “sanctified status” of “accusations of racism” which has “ensured their transformation into weapons of unequalled power” with the prosecutor assured of the rightness of his “crusade”: “Who but enemies of good would object?”) (emphasis added). Sound familiar?

¹²⁵ RESTATEMENT (SECOND) OF TORTS § 573, cmt. e (1977). See ELDER, DEFAMATION, *supra* note 75, § 1:15.

general character, equally discreditable to all.”¹²⁶ They involve “particular qual[it]ies” “peculiarly valuable” in the plaintiff’s business or profession and statements “particularly disparaging”¹²⁷ of individuals engaged in the professoriate. Whatever may be said about other academics, the law professoriate is in some sense quite unique in its impact – it and individual faculty exemplars serve pivotal societal roles: by preparing students to become members of the bar and serve as future judges and civic-political leaders; acting as scholar-critics in engaging the law and challenging its rules and substratal suppositions and policies; providing enormous service to the public through involvement in bar and professional activities and myriad other service capacities; collectively evidencing weighty involvement in university affairs and in self-governance within law schools; most fundamentally, acting as role models for students. Fairness, non-discrimination and equality of treatment are threshold, *sine qua nons* for fulfilling these myriad tasks. Participation in creating, facilitating and/or condoning a “pervasive hostile environment” is the bald antithesis of these functions.

The general rule¹²⁸ as to defamatory aspersions of profession or office treats such statements in written or other permanent form as libelous per se.¹²⁹ Law professors combine, almost by definition, two “learned professions”¹³⁰ – law and teaching.¹³¹

¹²⁶ RESTATEMENT (SECOND) OF TORTS § 573, cmt. e (1977).

¹²⁷ *Id.* For example, a statement initially spoken (and later recorded in accreditation documents) portraying a dean as having made intentional misrepresentations to the ABA Accreditation Committee was actionable. *Avins v. White*, 627 F.2d 637, 641, 644-46 (3d Cir. 1980).

¹²⁸ RESTATEMENT (SECOND) OF TORTS, § 569, cmt. e (1977).

¹²⁹ Since libel is actionable per se, *i.e.*, no special damages are required under the strong majority rule. *Id.* cmts. b, c.

¹³⁰ *Id.* § 573, cmt. b (1977).

¹³¹ *Id.* Professor Lidsky has demonstrated convincingly how devastating a defamatory statement about a law professor can be. Noting that few among us has a “truly national reputation,” she correctly notes that a law professor will value his or her reputation most among colleagues and students and second-most within the “national legal academic community.” Lidsky, *Defamation, Reputation, and the Myth of Community*, 1 WASH. L. REV. 1, 42 (1996). Of course, it is within just these settings that the damage from “pervasive hostile

Accordingly, a charge of “pervasive hostile environment” to a law professor is not the same as disparaging any academic as a drunk.¹³² It is more akin, to use the *Restatement (Second) of Torts* other illustrations, charges of drunkenness or “other moral misconduct” to a member of the clergy,¹³³ portraying an attorney as “ignorant and unqualified to practice law,”¹³⁴ or stating that a doctor initiates “improper advances” to patients.¹³⁵ Indeed, the rules as to libel are considerably broader than slander per se¹³⁶ – for libel it suffices that an imputation is made of “*any misconduct whatever* in the conduct of the other’s calling.”¹³⁷

Dubious case law has suggested that “most”¹³⁸ decisions have

environment” charges will be most damning and harmful. The charges at issue here received substantial exposure within ABA/AALS accreditation/membership circles and were widely discussed *within the Chase faculty and administration* and with a limited number of University administrators and responded to as a matter of necessity. It is unclear to what extent students became aware of the charges and what harm to individual faculty members’ reputations occurred within this highly important constituency. On the separate issue of individual Chase faculty members’ identifiability as among those so depicted, *see infra* text accompanying notes 225-290.

¹³² RESTATEMENT (SECOND) OF TORTS § 573, cmt. c, illus. 3. By contrast, portraying a physician as a drunkard is actionable per se. *Id.* at cmt. c.

¹³³ *Id.* at cmt. c.

¹³⁴ *Id.* at cmt. c, illus. 4.

¹³⁵ *Id.* at cmt. e.

¹³⁶ *Id.* at § 569, cmt. e (noting, however, that it was both libelous and slanderous per se to “attribute to the other *conduct or characteristics incompatible with the proper conduct of his lawful trade or profession or with the proper discharge of his duties as a public officer*”) (emphases added). On the issue of law professors as public officials for First Amendment purposes, *see infra* text accompanying notes 487-94.

¹³⁷ RESTATEMENT (SECOND) OF TORTS § 569, cmt. e (concluding that an accusation or charge of “a single act of misconduct” may be libelous although it might not suffice for slander per se and that the libelous per se rule may apply to those no longer so engaged and to non-incumbents in public office) (emphasis added).

¹³⁸ Ward v. Zelikovsky, 643A.2d 972, 980, 982, 985 (N.J. 1994). But compare to this more defensible conclusion in Kimura v. Superior Court, 281

rejected charges of religious bigotry, racism, or sex discrimination or harassment as hugely offensive¹³⁹ but non-defamatory mere “name-calling”¹⁴⁰ harmless¹⁴¹ to reputation. This gross overstatement ignores the large number of decisions that have allowed libel and slander per se claims to proceed in a variety of contexts involving “charges laden with factual content”¹⁴² provable as false. For example, in *MacElree v. Philadelphia Newspapers*, the Pennsylvania Supreme Court held that a newspaper’s republication of a purported charge – portraying plaintiff-county attorney as “electioneering” and “the David Duke of Chester County running for office”¹⁴³ by attacking historically black Lincoln University¹⁴⁴ – was not mere name-calling or hyperbole.¹⁴⁵ It was actionable defamation reasonably interpretable as charging plaintiff as “acting in a racist manner”¹⁴⁶ in abuse of his official power and authority¹⁴⁷ “to

Cal. Rptr. 691, 699 (Cal. Ct. App. 1991) (The cases involving “racist or comparable charges were too few to designate “majority” and “minority” views.).

¹³⁹ In *Ward* the “they hate Jews” statements were “extremely repulsive and hateful and undoubtedly caused [plaintiffs] great embarrassment.” *Ward*, 643 A.2d at 985. The court noted the “regrettable rudeness in our society today” with “[s]ocial and public discourse . . . marked by incivility and boorishness.” Yet, attitudes toward judicial evaluation of expression had been transformed into a “determination that the best way to combat bias and prejudice is through the exchange of ideas and speech, not through lawsuits.” *Id.*; see also *Stevens v. Tillman*, 855 F.2d 394, 401 (7th Cir. 1988); RESTATEMENT (SECOND) OF TORTS § 566, cmt. e (1977) (“A certain amount of vulgar name calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more.”).

¹⁴⁰ *Ward*, 643 A.2d at 978.

¹⁴¹ *Id.*

¹⁴² *Cianci v. New Times Publ’g*, 639 F.2d 54, 64 (2d Cir. 1980). On the opinion-fact issue discussed therein, see *infra* text supported by notes 175-224.

¹⁴³ 674 A.2d 1050, 1052 (Pa. 1996).

¹⁴⁴ *Id.* at 1052-53.

¹⁴⁵ *Id.* at 1053-55 (The statement was “more than a simple accusation of racism.”).

¹⁴⁶ *Id.* at 1055.

further racism and his own political aspirations . . . a charge of misconduct in office”¹⁴⁸ – statements that “clearly could have caused [reputational] harm” to plaintiff.¹⁴⁹

Other public person libel cases have involved accusations that a state senator made a series of racist statements,¹⁵⁰ that a congressman opposed a judicial candidate (and was lobbying his state caucus) because he was Jewish,¹⁵¹ and that a prominent

¹⁴⁷ *Id.* at 1053-54. See also *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 751, 754-63 (Mass. 2007) (upholding a large libel verdict – \$2.01 million dollars – where a setting judge was portrayed as having told a teenaged rape victim “to get over it” – such portrayed plaintiff as “indifferent, and even callous” to crime victims generally and as “especially demeaning” to the particular victim).

¹⁴⁸ *MacElree*, 674 A.2d at 1054. The court cited *Sweeney v. Phila. Record*, 126 F.2d 53, 54 (3d. Cir. 1942), as standing for the proposition that accusing a public official with a misdemeanor or crime in his official capacity was libelous per se. *MacElree*, 674 A.2d at 1054. The court appeared to accept plaintiff MacElree’s argument that he was portrayed as “abusing his prosecutorial office by harassing a black college to ingratiate himself with the white voters in Chester County.” *Id.* at 1053. More specifically, he was charged with violating his official oath and “committing state and federal offenses.” *Id.* (emphasis added). See also *id.* at 1055-56 (Cappy, J., concurring).

¹⁴⁹ *Id.* at 1055.

¹⁵⁰ *Schermerhorn v. Rosenberg*, 426 N.Y.S.2d. 274, 278-85 (N.Y. App. Div. 1980). This case persuasively demonstrates the devastation that can result from specific accusations of racism. The charges resulted in a “vitriolic campaign” to censure plaintiff, ultimately defeated, the first ever in New York history. *Id.* at 279. Furthermore, there was overwhelming evidence of ostracism by senate colleagues, threats directed toward him, and an assault on his daughter. Police had to provide protection to plaintiff and his family. *Id.* at 282. See also *Arber v. Stahlin*, 170 N.W.2d 45, 46-49 (Mich. 1969) (upholding claims by political party operatives charging them with illegal activities such as bribery and “intimidation, misrepresentation, threats of physical violence, anti-Semitism, anti-Negro sentiment, violation of the American tradition of honesty, decency and fair play, and Fascist, immoral and reprehensible conduct”); *Rambo v. Cohen*, 587 N.E.2d 140, 149, n.19 (Ind. Ct. App. 1992) (distinguishing the case before it from *Schermerhorn* on the “nature and extent of the publications and the audience, and the circumstances surrounding the remarks” as “critical” factors).

¹⁵¹ [I]n a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great numbers and still are *greatly offended by the narrow-minded injustice of the bigots* who see individuals only en masse and condemn them merely because their ancestors were of a certain race or they themselves are of a certain religion. Those who hate

scientist's *voluntary* sterilization proposals were "tried out" in Nazi Germany via experimentation "on Jews and defectives."¹⁵² Two additional libel cases involved portrayals of non-public person businessmen in largely African-American neighborhoods as "appear[ing] to be a bigot"¹⁵³ and as using a racial epithet.¹⁵⁴ One involved a detailed publicly disseminated specification of attempted anti-Semitic threats or intimidation.¹⁵⁵ Another involved an accusation of racism by a black developer against a

intolerance are prone to regard the persons who *believe in and practices acts of intolerance* with aversion and contempt.

Sweeney v. Schenectady Union Pub. Co., 122 F.2d 288, 289-90 (2nd Cir. 1941) (Chase, J., and Learned Hand, J.) (emphases added), *aff'd without opinion by an equally divided court*, 316 U.S. 642 (1942) (Justice Jackson did not participate). The court made specific reference to Hitler and the linkage many might make between the two. It should be noted that this *Sweeney* case was the only one of numerous published and unpublished decisions finding the statements actionable. *Ward v. Zelkovsky*, 623 A.2d 285, 296, n.4 (N.J. Super. Ct., App. Div. 1993) (Skillman, J., dissenting).

Later courts have sometimes emphasized that cases like *Sweeney* involved charges during war time and equated to a charge of sympathizing with Hitler's Germany. *Rambo*, 587 N.E.2d. 140, 149 (Ind. Ct. App. 1992). Though still "as morally reprehensible," the impact of a charge of anti-Semitism would "bear little resemblance" "to war-time defamation." *Id.* Compare to this the very vague charge that plaintiff-clergyman's address "fomented religious hatred and bigotry." The court asked rhetorically, "[w]hose hatred, whose religious bigotry?" and noted the letter gave no answer. The court refused to find the charge libelous, despite conceding discussions of religion "often do excite religious hatred and bigotry." The court emphasized that the letter had been sent to the recipient-store manager as part of an implicit boycott threat and would be unlikely to be otherwise published, making any damage to plaintiff's reputation unlikely. *Rutherford v. Dougherty*, 91 F.2d 707, 708 (3rd Cir. 1937).

¹⁵² *Shockley v. Cox Enterprises*, 10 Med. L. Rptr. 1222, 1223 (N.D. Ga. 1983) (rejecting the argument such was protected opinion or "mere name-calling").

¹⁵³ *Afro-American Publ'g v. Jaffe*, 366 F.2d 649, 653-55, 659 (D.C. Cir. 1966) (characterization by defendant of plaintiff as portraying his African-American customers as ignorant and of low intelligence). The court rejected the argument the defamation was opinionative – it was libelous when "cast in the form of an opinion, belief, insinuation or question." *Id.* at 655.

¹⁵⁴ *Schrottman v. Barnicle*, 437 N.E.2d 205, 214-15 (Mass. 1982).

¹⁵⁵ *Quigley v. Rosenthal*, 43 F. Supp. 3d 1163, 1178-80 (D. Colo. 1999).

university professor who opposed him in public hearings.¹⁵⁶

A larger number of cases have usually involved more limited dissemination, often comments disparaging plaintiff in an employment setting or parallel context. Thus, it has been held defamatory per se to charge a teacher with sexually harassing another teacher,¹⁵⁷ a public service provider with sexually harassing or abusing its clients,¹⁵⁸ a prison warden with sexually harassing a subordinate,¹⁵⁹ an employee with racial discrimination and being terminated for such,¹⁶⁰ a police chief

¹⁵⁶ *Fleming v. Rose*, 275 S.E.2d 632 (1981). Later, an award was upheld for plaintiff in *Gazette Inc. v. Harris*, 325 S.E.2d 713, 746 (Va. 1985) (“[Defendant] abandoned all judgment and reason in composing and publishing the advertisement . . . he accused [plaintiff] of racial prejudice without possessing any objective basis for the charge.”). See also *Chonich v. Wayne County Cmty. Coll.*, 874 F.2d 359, 361-64 (6th Cir. 1989) (upholding defamation claims by administrator faculty members against a black woman-secretary of a junior college board of trustees (and against the board based on agency principles) where she included plaintiffs within a group targeted as systematically eliminating jobs held predominantly by women and blacks — the letter found a “striking appearance of racism and sexism”). See also *Pezhman v. City of New York*, 812 N.Y.S.2d 14, 17-18 (N.Y. App. Div. 2006) (holding that a charge of racism was one of several statements held actionable per se and not opinionative). Compare to this the critique of *Lester v. Powers*, *infra* text accompanying notes 197-209.

¹⁵⁷ *Wilcoxon v. Red Clay Consol. Sch. Dist. Bd.*, 437 F. Supp. 2d 235, 247-48 (D. Del. 2006) (finding that such defamatory statements allegedly made in retribution for plaintiff’s complaints of co-defendant’s excessive absenteeism were actionable; the court rejected defendants’ suggestion that such claims should be expeditiously dismissed “to avoid a chilling effect on sexual harassment claims”).

¹⁵⁸ *Alianza Dominicana v. Luna*, 645 N.Y.S.2d 28, 29-30 (N.Y. App. Div. 1996) (finding that the statements were made by defendant via cable to the same ethnic group plaintiff-corporation served). Note that defendant stated the charges were either unconfirmed or based on “rumor in the streets.” *Id.* at 30.

¹⁵⁹ *Williams v. Garraghty*, 455 S.E.2d 209, 212-15 (Va. 1995).

¹⁶⁰ *Gardner v. Honest Weight Food Co-op*, 96 F. Supp. 2d 154, 161-62 (N.D.N.Y. 1996) (holding this to be slanderous per se); see also *Goodwin v. Kennedy*, 552 S.E.2d 319, 323-24 (S.C. Ct. App. 2001) (involving a defendant-African-American activist who directed the epithet “house nigger” on two occasions in a limited dissemination context at plaintiff, an African-American assistant high school principal in charge of discipline; the court found the statements slanderous per se as reflecting on his integrity in fairly disciplining students regardless of race and in imputing “racism and bias” to him in making disciplinary decisions); *Sheridan v. Carter*, 851 N.Y.S.2d 248, 250-52 (N.Y. App.

or a police officer with racial discrimination,¹⁶¹ an employer with anti-Semitism, making frequent anti-Semitic jokes, and “constantly persecuting” a sales agent,¹⁶² a museum supervisor with making anti-Semitic statements to volunteers,¹⁶³ an employee as displaying a statuette of a black man dangling from

Div. 2008) (finding that written statements plaintiff-employers were racists who economically exploited and physically and verbally abused an employee were actionable per se). Compare this with the well-reasoned *Goodwin* decision *Moore v. P.W. Publ'g Co.*, 209 N.E.2d 412, 413-16 (Ohio 1965), where the court held that a newsworthy report of a gubernatorial depiction of plaintiff-license plate registrar-party activist as an “Uncle Tom” was not libelous per se, rejecting the jury’s contrary finding as a matter of law. The court held that the epithet could not be “commonly understood” to have a disparaging meaning outside “the comparatively recent militant civil rights movement” and disregarded the views of “highly regarded” African-American witnesses. *Id.* at 415-16. The decision’s “common usage” formula has been strongly criticized as “the last refuge of a formalist court seeking to avoid giving weight to the values of a community it considers disreputable . . . simply engaging in willful blindness.” Lidsky, *supra* note 131, at 27.

¹⁶¹ *Scott v. Cooper*, 640 N.Y.S.2d 248, 249-50 (N.Y. App. Div. 1996) (deeming four charges to be “assertions of objective fact,” one of which was a charge of racial discrimination); *Rivera v. Greenberg*, 663 N.Y.S.2d 628, 629 (N.Y. App. Div. 1997) (holding a statement that plaintiff police officer was a “racist cop who must be arrested” to be defamatory). For more cases involving public declamations, see *Lanier v. Higgins*, 623 S.W.2d 914, 915-16 (Ky. Ct. App. 1981) (rejecting absolute privilege and upholding a claim by a police officer against a chief of police for a television portrayal as “perhaps the worst racist” among Louisville police and who had done more to foment [sic] distrust and unrest” between police and the black community than any other officer); *Tucker v. Kilgore*, 388 S.W.2d 112, 114, 116 (Ky. 1964) (finding a handbill portrayal by a civil rights activist of plaintiff-patrolman as a “professional moocher, who strikes you for 50¢ or a dollar every time he meets you on the streets” to be actionable per se); *Freedom Newspapers of Texas v. Cantu*, 126 S.W.3d 185, 190-95 (Tex. App. 2003) (holding that misstatements at a campaign debate portraying plaintiff-sheriff-candidate as saying “No Anglo could ever be elected sheriff” of the county were libelous as portraying plaintiff as the “racist” candidate and later sheriff), *rev'd on other grounds*, 168 S.W.3d 847 (Tex. 2005).

¹⁶² *Tech Plus, Inc. v. Ansell*, 793 N.E.2d 1256, 1266-67 (Mass. App. Ct. 2003) (holding that statements imputing “concrete (albeit unspecified) actions” under circumstances evidencing a “calculated effort” to interfere with plaintiffs’ business interests were “assertions of fact” rather than opinion).

¹⁶³ *Herlihy v. Metropolitan Museum of Art*, 633 N.Y.S.2d 106, 113 (App. Div. 1995).

a white noose,¹⁶⁴ and a bus dispatcher as reflecting “racist attitudes” and threatening to fire Mexican legal residents.¹⁶⁵ Another decision rejected opinion and/or mere “name-calling” protection where a lawyer-labor negotiator was charged with “bigotry” and a “reprehensible racial slur”¹⁶⁶ based totally on false substratal facts.¹⁶⁷

Defendants cannot absolutely insulate libelous charges of discrimination (*e.g.*, “perceive[d]” sexual harassment) as “inherently subjective” and in the “eye of the beholder” where the supporting factual statements are themselves defamatory.¹⁶⁸ Such factual charges are matters that jurors are regularly asked to resolve in myriad anti-discrimination contexts.¹⁶⁹ In these fact-intensive settings an allegedly discriminatory state of mind is not protected opinion and is indistinguishable from mens rea in a criminal setting.¹⁷⁰ The cases also emphasize that a non-discriminatory ability to interact with customers or patrons (and law students and colleagues!) of different sexes and sexual orientation and religious, racial and ethnic groups in the workplace¹⁷¹ or other public setting¹⁷² is an essential requisite¹⁷³ to

¹⁶⁴ *Como v. Riley*, 731 N.Y.S.2d 731 (N.Y. App. Div. 2001) (heading of the email at issue was “Racism”).

¹⁶⁵ *City of Brownsville v. Pena*, 716 S.W.2d 677, 679-82 (Tex. App. 1986) (finding the statement of a city official published in the media to be libelous per se).

¹⁶⁶ *O’Neil v. Peckskill Faculty Ass’n*, 507 N.Y.S.2d 173, 176-81 (N.Y. App. Div. 1986) (regarding press release published in newspaper).

¹⁶⁷ *Id.* at 180-81 (removing it from the status of “classic” opinion); *see also* *Smith v. IMG Worldwide, Inc.*, 437 F. Supp. 2d 297, 307-08 (E.D. Pa. 2006) (portraying a sports agent as playing the “race card” was actionable per se because it would adversely affect his relationships with club owners).

¹⁶⁸ *Williams v. Garraghty*, 455 S.E.2d 209, 215 (Va. 1995).

¹⁶⁹ *Tech Plus, Inc. v. Ansell*, 793 N.E.2d 1256, 1265 (Mass. App. Ct. 2003).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (holding charges that plaintiff-company and agent were anti-Semitic, told anti-Semitic jokes, and were “constantly persecuting” co-defendant for his heritage were actionable and not opinionative since they were “uttered after [co-defendant] had time for thought, and were ‘deliberately intended’ to convey a serious charge of discrimination” against plaintiffs); *Herlihy v. Metro. Museum of Art*, 633 N.Y.S.2d 106, 113 (N.Y. App. Div. 1995) (holding that charges of

success in one's trade, profession or office¹⁷⁴ and not "merely a general reflection" on an individual's personal qualities and character.¹⁷⁵

The cases on the mere "name-calling" or opinion side of the divide are wholly distinguishable from the actionable defamation cases analyzed above. A leading mere "name-calling" case, *Ward v. Zelikosky*,¹⁷⁶ involved an angry unsolicited harangue at a condominium owners' meeting in which defendant ranted that plaintiff-condo-owners "hate Jews" in a context unrelated to their prior statements.¹⁷⁷ After analyzing the context, content and verifiability of the statements,¹⁷⁸ the court concluded that such "bald accusations of

"gross and brazen anti-Semitism" were actionable per se since plaintiff had "regular and substantial interaction" with volunteers, many of whom were Jewish).

¹⁷² *Herlihy*, 633 N.Y.S.2d at 113 (regarding accusations dealing with Museum patrons).

¹⁷³ *Id.* See also *Tech Plus*, 793 N.E.2d at 1266-67.

¹⁷⁴ *Herlihy*, 633 N.Y.S.2d at 113 (involving a "matter of significance and importance to [plaintiff's] profession"); *Tech Plus*, 793 N.E.2d at 1266-67; see also *O'Neil v. Peckskill Faculty Ass'n*, 507 N.Y.S.2d 173, 178-81 (N.Y. App. Div. 1986) (holding that statements portraying plaintiff-lawyer as engaged in "bigotry" and making a "reprehensible racial slur" involved "an attack on his personal and professional character" in his status as a labor negotiator). Compare to this the defamatory impact of being falsely portrayed as a person who would make false or fraudulent sexual harassment claims. *Thompson v. Orange Lake Country Club, Inc.*, 224 F. Supp. 2d 1368, 1381-82 (M.D. Fla. 2002) (Such would be "conduct incompatible with the proper exercise of [plaintiff's] new employment duties.").

¹⁷⁵ *Herlihy*, 633 N.Y.S.2d at 113.

¹⁷⁶ 643 A.2d 972 (N.J. 1994).

¹⁷⁷ *Id.* at 975-76, 980.

¹⁷⁸ *Id.* at 978-80, 982-84. The court quoted and followed section 566: "A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more . . . particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult." *Id.* at 979 (quoting RESTATEMENT (SECOND) OF TORTS § 566, cmt. e (1977)).

bigotry,” *sans* any specific allegations of fact, were “mere personal invective.”¹⁷⁹ The court took pains to note that an imputation of bigotry could be actionable if in a factual setting involving *specific* allegations subject to objective verification of truth or falsity – and proffered several examples.¹⁸⁰ The *Ward* court primarily relied on a Seventh Circuit decision, *Stevens v.*

¹⁷⁹ *Ward*, 643 A.2d at 981. The statements were made together with “bitch,” exemplifying “vulgar but non-actionable name-calling . . . incapable of objective truth and falsity.” *Id.* at 982. The court distinguished *libel* cases involving media defendants (including *Milkovich*, see *infra* text accompanying notes 210-17) as “considerably different,” as such involve, unlike slander, “a *measure of thought* . . . [and] *level of deliberation*” which influences the perception of the intended reasonable reader or audience. *Id.* at 978 (quoting RESTATEMENT (SECOND) OF TORTS § 566, cmt. e (1977)) (emphases added). The court also found no implied but undisclosed factual underlay. The court narrowly, if not perversely, construed the facts. As Justice Stein said in his concurrence, the majority “err[ed] grievously” in its application of the law. *Id.* at 986 (Stein, J., concurring). Defendant was a highly respected and influential member of the association. He also prefaced his statements with “I know her” and “I know these people.” Collectively, these “strongly implied” that defendant relied on *undisclosed* factual information, with “devastating” “defamatory potential.” *Id.* at 986-87. In ignoring these factual implications the court “usurp[ed]” the jury’s role. *Id.* at 987.

¹⁸⁰ Whether an accusation of bigotry is actionable depends on whether the statement appeared to be *supported by reasonably specific facts* that are *capable of objective proof of truth or falsity*. The statement might explicitly refer to those specific facts or be made in such manner or under such circumstances as would fairly lead a reasonable listener to conclude that he or she had knowledge of specific facts supporting the conclusory accusation. For example, a claim of bigotry could include claims that the selected person had *engaged in specific acts* such as making racist [sexist?] statements, failing to associate with or act with courtesy toward people of a particular race [sex?], *denying another employment or advancement because of race [sex?] or religion*, or posting signs that carried a racist [sexist?] message.

Ward, 643 A.2d at 983-84 (emphases added). The court rejected the appellate division’s thoughtful expansion of slander per se categories, see 623 A.2d 285, 288-93 (N.J. Super. Ct. App. Div. 1993), “caution[ed] against further expansion” of the “highly-criticized” categories, *Ward*, 643 A.2d at 984-85, and stated that the above factual examples would be, as would also the epithets at issue in *Ward*, slander non per se, and require proof of special damages. *Id.* No such were found. *Id.* at 985.

Tillman,¹⁸¹ for its “mere personal invective”¹⁸² conclusion. In *Stevens* a defendant black opponent of plaintiff-white school principal and her policies characterized plaintiff as a “racist.”¹⁸³ Plaintiff responded in kind, calling defendant a “racist” and her supporters “bigots.”¹⁸⁴ Judge Easterbrook viewed the defendant’s charges, *devoid of any implied specific underlay*,¹⁸⁵

¹⁸¹ 855 F.2d 394 (7th Cir. 1988).

¹⁸² *Ward*, 643 A.2d at 981 (characterizing *Stevens*). *Stevens* was followed in a case involving statements to both a borough president superior and media defendants portraying plaintiff’s purported mishandling of a scenario involving defendant as “disrespectful racial insensitivity.” *Covino v. Hagemann*, 627 N.Y.S.2d 894, 895-99 (N.Y. Gen. Term 1995). Of course, this statement is much more ambiguous and much less damaging than “racist.” The court noted that a factual scenario might be viewed as insensitive by one group but viewed as “non-controversial and socially acceptable” to another. The court could not “give its imprimatur” to one or the other. *Id.* at 897. Stunningly, the court went out of its way to find that *Calore v. Powell-Savory Corp.*, 251 N.Y.S.2d 732, 733 (N.Y. App. Div. 1964), was no longer controlling, given the changed “temper of the times.” *Covino*, 627 N.Y.S.2d at 897 n. 2. Although the facts are not stated, the *Calore* court concluded that statements charging plaintiff union with racial discrimination against its members was libelous per se “[i]n view of the temper at the time and the current of contemporary public opinion . . .” *Calore*, 251 N.Y.S.2d at 733. It is difficult to imagine an accusation modernly more damning of a labor union or a conclusion (*Covino*) less justifiable.

¹⁸³ *Stevens*, 855 F.2d at 400-02.

¹⁸⁴ *Id.* at 402.

¹⁸⁵ *Id.* at 401. Judge Easterbrook made it clear that a statement by defendant that plaintiff “made numbers of very racist statements, so many that I would use all of my time to explain to you some of the statements that were made” – could have been viewed differently: “Plaintiff either did or did not make repugnant statements; defendant said that she did, yet offered no examples. One is entitled to wonder how such an assertion can be ‘opinion.’” *Id.* He went on to note that plaintiff relied solely on “racist” as a “body blow” “attack on fitness and integrity,” and “[c]uriously,” did not claim that the jury should be allowed to delve into whether defendant’s invective “implied to listeners that [plaintiff] made the kind of statements that all ears find repellent.” *Id.* The court gave an example of such an actionable implied factual statement: “[Plaintiff] made to me statements similar to those that Gov. Ross Barnett made while standing in the schoolhouse door, and she holds the same views about black people that Barnett did.” *Id.* The latter would be a factual statement and “could be quite wrong.” *Id.* Note that the court upheld \$1 in nominal damages for a recklessly false statement of fact that teachers feared plaintiff and that she would retaliate by dismissing them if they complained. *Id.* at 396-97, 405-06.

as involving an historic term¹⁸⁶ “watered down by overuse” and “common coin in political discourse”¹⁸⁷ – “a verbal slap in the face” that deprived it of its earlier “decidedly opprobrious meaning.”¹⁸⁸

The *Ward* decision¹⁸⁹ also relied in substantial part on a federal case from New Jersey in support of its conclusion, *Cibenko v. Worth Publishers*.¹⁹⁰ In that case defendant had published a photo of plaintiff, a white port authority police officer, prodding a black man with a nightstick to prevent him from nodding off. The portrayal was in a chapter (“Deviance”) in a college sociology text in a subchapter entitled “Selecting the Criminals.” The caption under the photo stated that the social class of the individual “seems to be the most significant determinant” in arrest, conviction and penalty. It then ended with a query whether the officer would “be likely to do the same if the ‘offender’ were a well-dressed, middle-aged white person.”¹⁹¹ The court applied the *Restatement (Second) of Torts* section 566 rule,¹⁹² which absolved defendant of liability for *any* opinion unless it implied undisclosed defamatory substratal facts.¹⁹³ In the book’s “sociological context” defendant’s caption

¹⁸⁶ *Id.* at 402 (“Formerly a ‘racist’ was a believer in the superiority of one’s own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races.”).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Ward*, 643 A.2d at 980-82.

¹⁹⁰ 510 F. Supp. 761 (D.N.J. 1981).

¹⁹¹ *Id.* at 763-64.

¹⁹² *Id.* at 765-66 (quoting RESTATEMENT (SECOND) OF TORTS § 566 (1977)).

¹⁹³ RESTATEMENT (SECOND) OF TORTS § 566 and cmts. b, c (1977). For a brutally critical analysis of the section 566 approach ultimately adopted, see Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976). Professor Hill found section 566 “potentially disruptive,” *id.* at 1227, and suggested that a comment “only weakly supported by stated or indicated fact may in some circumstances be reasonably understood as resting additionally, if not primarily, upon a substratum of fact not available to the reader,” although defendant might be on “safe ground” if it is clear he or she “leaves no room for possible confusion” regarding the underlying factual basis. *Id.* at 1233. In his conclusion, Professor Hill, reflecting the “fair comment”

posed a “rhetorical question,” based on disclosed facts – an editorial opinion protected by the First Amendment.¹⁹⁴

Vary the *Cibenko* facts to the law school setting. A much milder form of a Professor Kingsfield tries to engage a student (a white female or black female or male) in a serious but civil Socratic dialogue in a first year Torts class. The student appears to be shell-shocked or panic-stricken. A student catches the moment on a cell phone. The photo later appears in the introduction to *How to Succeed in Law School*, a book published by a major commercial publisher, together with the caption: “Would this professor have traumatized this student in this demeaning way if (s)he had been a white male?” The professor is stunned, mortified and furious. After all, he does volunteer work for the local ACLU on a variety of constitutional and civil rights topics and has a strong reputation as a liberal-left scholar in academic circles. He gets affidavits signed by all class members and the student identified. They unanimously offer to testify he has a sterling reputation for courteousness, respectfulness and supportiveness of students generally and with a theretofore unquestioned reputation for non-discrimination and even-handedness. Further, the student admits that (s)he froze, as it was the first time (s)he had been called on in the first year. The professor soon learns he has become an untouchable – he is “asked” to “strongly reconsider” a visitorship at a prestigious school in light of “angry concerns expressed by student leaders” at the school to be visited in response to the photo and caption.

What legal remedies does the professor have to recompense him for reputational and other damages? *None* under *Cibenko*

tradition, stated: “But there remains the danger . . . that *comment excessively extravagant in relation to the stated or indicated facts* may be perceived as resting upon additional fact and as implying the existence of such additional fact – with *consequent loss of the privilege*.” *Id.* at 1245 (emphases added).

¹⁹⁴ *Cibenko*, 510 F. Supp. at 765-66. The court applied the same analysis to plaintiff's false light privacy claim. *Id.* at 766-67. The court's defamatory content analysis is tainted by its confusing and confused analysis linking the lack of identification (by name) in this “educational context” to a failure to meet the “of and concerning” requirement. *Id.* at 764-65. Of course, this is in error. Use of plaintiff's picture is an accepted way of proving “of and concerning.” ELDER, DEFAMATION, *supra* note 75, § 1:30, at 1-139.

and *Restatement (Second) of Torts* section 566.¹⁹⁵ *Incroyable*. Why this unconscionable result? Section 566 expressly provides for absolute protection for “[a] simple expression of opinion based on disclosed or assumed nondefamatory facts . . . *no matter how unjustified and unreasonable* the opinion may be or how derogatory it is.”¹⁹⁶ Of course, this refusal to assess the

¹⁹⁵ RESTATEMENT (SECOND) OF TORTS § 566 and cmts. b, c (1977). Also, see the parallel result in *Raible v. Newsweek*, 341 F. Supp. 804, 805-09 (W.D. Pa. 1972), where plaintiff’s picture was arbitrarily used with a lengthy article on angry white Americans. Plaintiff claimed he was portrayed as a “bigot,” a view the court conceded was a reasonable interpretation. The court found the imputation of racial bigotry not libelous under the name-calling rule. *Id.* at 808-09. The court’s overall holding is tainted in two ways. The court relied in part on a type of garbled group libel interpretation (“more than half of the people in the United States” would be “bigots”). Of course, use of plaintiff’s picture takes him out of the group libel doctrine. See ELDER, DEFAMATION, *supra* note 75, § 1:30, at 1-139, and *supra* note 194. The second anomaly is that the court upheld plaintiff’s privacy claim, apparently one for false light, because of questions of lack of consent. *Id.* at 809-10. The court did not explain how something materially false and “highly offensive” to the reasonable person is actionable as false light but immune under libel law.

¹⁹⁶ RESTATEMENT (SECOND) OF TORTS § 566, cmt. c (1977). Although admitting that opinionative expressions were actionable at common law, *id.*, cmt. a, and that the Court’s opinion jurisprudence “involved public communications on matters of public concern,” *id.*, cmt. c, the drafters came to the following stunning conclusion: “Although it is thus possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to *all* expressions of opinion of the first, or pure type.” *Id.* (emphasis added). The drafters make their total constitutionalization of pure opinion clear by providing an illustration about a libel by one neighbor about another, portraying him as an alcoholic. *Id.*, illus. 4. Other cases also espouse a First-Amendment-based opinion in settings that clearly do not involve matters of public concern. *Rybas v. Wapner*, 457 A.2d 108, 110 (Pa. Super. Ct. 1983) (“[T]o restrict too severely the right to express such opinion, no matter how annoying or disagreeable, would be dangerous curtailment of a First Amendment right. Individuals should be able to express their views about the prejudices of others without the chilling effect of a possible law suit in defamation”) (letter to opposing counsel during settlement negotiations); *Sall v. Barber*, 782 P.2d 1216, 1218 (Colo. Ct. App. 1989) (stating, in dicta, that the opinion rule applied regardless of status and “whether the issue is of public or only private concern”). For general discussion of the RESTATEMENT (SECOND) OF TORTS § 566 overly broad miscalculation of the impact of *Gertz*, see *infra* text accompanying notes 210-17, 522, 532-57. The Supreme Court *specifically rejected* this total constitutionalization approach to opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), limiting its provability-as-factually-false requirement to matters of *public concern* and a media defendant. *Id.* at 15-16, 19-21. The Court built on its conclusion that all

legitimacy of the opinionative conclusion or its good faith may precipitate hugely damaging, demagogic and fabricated results, as evidenced by the above hypothetical.

For a parallel highly questionable illustration, examine the unconscionable scenario condoned in *Lester v. Powers*,¹⁹⁷ involving a psychology professor denied tenure possibly due¹⁹⁸ to a solicited graduate's assessment. According to the record, defendant, a psychology major, had plaintiff for a course in abnormal psychology at a time she was seriously struggling with her emergent lesbian identity. One class session dealt with the legitimacy of classifying homosexuality as a "disorder" when a gay or lesbian is conflicted but not when he or she is not unhappy. Defendant perceived plaintiff as homophobic. The court conceded an "objective observer" may not have found the class discourse "hostile toward homosexuality" and quoted another student's unequivocal statement to that effect and that the class was "in no way unusual" for so controversial a topic.¹⁹⁹ Yet, in defendant's letter she excoriated plaintiff, despite having never made a formal complaint, never discussing her perceptions with him,²⁰⁰ after conceding he was "entirely knowledgeable and competent," and that she had gotten "valuable assistance" from him on an occasion or two. She then proffered a purported, expertise-based zinger as a former member of the college's committee on sexual harassment: "[A] student should not ever be made to feel uncomfortable or intimidated in her/his learning on account of gender or sexual orientation, and I sadly feel this was definitely the case for

plaintiffs have the burden of proving falsity in matters of public concern as to media defendants. *Philadelphia Newspaper v. Hepps*, 475 U.S. 767, 775-79 (1986).

¹⁹⁷ 596 A.2d 65 (Me. 1991).

¹⁹⁸ *Id.* at 67. The faculty tenure committee reconsidered its prior decision and recommended tenure after reading plaintiff's "lengthy criticism and refutation" of defendant's letter. *Id.* But note that the college president's affidavit said his contrary recommendation would have been the same without defendant's missive. *Id.* at n.3.

¹⁹⁹ *Id.* at 66.

²⁰⁰ She did make an immediate complaint to an assistant dean and repeated her charge later with some students, faculty and members of the college administration. *Id.* at 66-67.

me.”²⁰¹ She supported her “strong opinions”²⁰² by stating she knew of “others who still feel intimidated, much as I have and for the same reasons” but who had not supplied tenure input.²⁰³ She “hasten[ed] to say that this is only my impression, *totally unsubstantiated in fact* – but that is my perception.”²⁰⁴

The court applied a “totality of circumstances”²⁰⁵ approach and held that under state common law²⁰⁶ no liability could be imposed for her “subjective evaluation [plaintiff] was homophobic, and that his manner was offensive, insensitive, and occasionally intimidating”²⁰⁷ In the court’s view these were not statements of fact but personal, subjective impressions given in a tenure context.²⁰⁸ In other words, a student could

²⁰¹ *Id.* at 67

²⁰² *Id.* at 71.

²⁰³ *Id.* at 67.

²⁰⁴ *Id.* at 71 (emphasis added). The court identified this as probative of the subjective, opinionative nature of her statements. *Id.*

²⁰⁵ *Id.* at n.9. Although noting that the “specific” holding of *Ollman v. Evans*, 750 F.2d 970, 978-84 (D.C. Cir. 1984), had been repudiated by *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), *Ollman*’s “totality of circumstances” analysis constituted a “learned and extensive” analysis of the opinion-fact distinction. *Lester*, 596 A.2d at 71, n.9.

²⁰⁶ *Lester*, 596 A.2d at 71.

²⁰⁷ *Id.* Compare *Avins v. White*, 627 F.2d 637, 642-43 (3rd Cir. 1980) (applying section 566, the court held that statements about the intellectual atmosphere at the law school – “academic ennui,” absence of “intellectual spark” – were subjective pure opinion (and otherwise nondefamatory of plaintiff-dean) based on disclosed facts and “more closely approximate a critic’s review of an *institution* rather than a *particular individual*”) (emphases added).

²⁰⁸ *Lester*, 596 A.2d at 71. As an alternative ground, the court then analyzed both the facts in the letter and whether others were implied and found that under section 600’s adoption of *St. Amant v. Thompson*’s “serious doubts” standard, see *supra* the discussion in notes 563-64, it was insufficient that “some of [her] factual premises were objectively false, or even that no reasonable person could have believed them to be true” *Lester*, 596 A.2d at 71. This evidence did not support knowing or reckless disregard of falsity. *Id.* The court also rejected any inference from her destruction of her notes as “unsupported speculation.” *Id.* at 71-72. Of course, a court not weighted down by section 600’s unjustifiably onerous burden could have found such lack of

malign and disparage without *any* substantiating data and without *any* requirement of *proportionality* between objective reality, other student-attendees' collective contrary conclusions, and the graduate's own defamatory statements. Of course, a state may reach such an unconscionable and one-sided balancing of competing interests. It is worthy of note that the court *conceded* the aspersions of homophobia "tended to injure [plaintiff's] reputation."²⁰⁹ Section 566 appears to countenance and condone such approach. Could an ABA/AALS accreditation/membership site evaluation team republish a parallel faculty source charge or add its own conclusion of "hostile environment" based on such subjective source perceptions with impunity? The mere suggestion boggles the mind.

In any event, it is extraordinarily doubtful the First Amendment *requires* such a result. In *Milkovich v. Lorain Journal Co.*²¹⁰ the Supreme Court rejected the "artificial dichotomy"²¹¹ between fact and opinion and the "wholesale defamation exemption"²¹² thought to have emanated from *Gertz v. Robert Welch, Inc.*'s infamously imperious dictum.²¹³ The

reasonable belief sufficient to forfeit protection therefor. See *infra* the discussion in the text supported by notes 532-49 and 555-57.

²⁰⁹ *Lester*, 596 A.2d at 69.

²¹⁰ 497 U.S. 1 (1990).

²¹¹ *Id.* at 19.

²¹² *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). The Court specifically rejected the *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) "totality of circumstances" test under which the particular language and the statement's verifiability were "trumped" by the statement's "general context" and "broader context." *Id.* at 9, 19. For a detailed analysis of *Milkovich* and a strong critique of *Ollman*, see generally ELDER, DEFAMATION, *supra* note 75, at §§ 8:3-8:23.

²¹³ In what became the most influential dicta in the Court's libel jurisprudence, the Court stated: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscious of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." 418 U.S. 323, 339 (1974). The RESTATEMENT (SECOND) OF TORTS § 566, cmt. c (1977), drafters *conceded* the above was dicta. See also Hill, *supra* note 193, at 1239 (Defamatory opinion was "not remotely in issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem."). The

Court found, consistent with section 566,²¹⁴ that a bald statement of opinion – “In my opinion John Jones is a liar” – implied scienter of facts leading to the conclusion Jones prevaricated.²¹⁵ The Court added a pregnant and extraordinarily important (but largely ignored) clarification to section 566’s “*no matter how unjustified and unreasonable*”²¹⁶ protection for opinion: “Even if the speaker states the facts upon which he bases his opinion, if those facts are either [1] incorrect or [2] incomplete, or [3] if his *assessment* of them is *erroneous*, the statement may still imply a false statement of fact.”²¹⁷

Court in *Milkovich* held that the language quoted was mere repetition of the Holmesian “marketplace of ideas.” *Milkovich*, 497 U.S. at 18.

²¹⁴ RESTATEMENT (SECOND) OF TORTS § 566, cmts. b, c (1977).

²¹⁵ *Milkovich*, 497 U.S. at 18 (“Simply couching such statements in terms of opinion does not dispel these implications; and the statement, ‘In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar.’”). If the reader substitutes “racist” for “liar,” itself a term charged with emotional (and often political) content, see ELDER, DEFAMATION, *supra* note 75, at § 8:29, it is difficult to rationally conclude that such a bold statement is somehow measurably less factual (in the sense of implying known underlying facts) for First Amendment purposes. See also *infra* note 280.

²¹⁶ RESTATEMENT (SECOND) OF TORTS § 566, cmt. c (1977) (emphasis supplied). See also *supra* the discussion supported by notes 190-204.

²¹⁷ *Milkovich*, 497 U.S. at 18-19 (brackets and emphases added) (emphases supplied). Under a *Milkovich* analysis were not plaintiff-Lester’s classroom actions and demeanor, viewed by defendant as “offensive, insensitive, and occasional intimidating,” “an articulation of an objectively verifiable event” verifiable by other witness-participants in plaintiff’s class and determinable by a reasonable fact-finder in libel litigation based on “a core of objective evidence?” *Milkovich*, 497 U.S. at 21-22. The *Lester* case involved a “four corners” scenario, a single classroom session and the participants therein, comparable to the witnesses in *Milkovich*, where the jury could make a factual determination based on comparison of testimony in the two proceedings, one quasi-judicial, one judicial. *Id.* at 21-22. Clearly, there were subjective “signals” in *Lester*, but the *Milkovich* article was likewise replete with such. As Justice Brennan said in dissent, the reader was “*signaled repeatedly*” that the author was “*guilty of jumping to conclusions*” based on factual premises. *Id.* at 33-35 (Brennan, J., with Marshall, J., joining dissenting) (emphases added). So was Powers — and she was *there* and representing in her letter that she spoke for “*others who still feel uncomfortable*.” *Lester*, 596 A.2d at 67 (emphasis added). The *Lester* court should have allowed the plaintiff to proceed to trial and let the jury determine the real truth — whether plaintiff was a homophobic intimidator or the defamatory letter by Powers was “much ado about nothing” or very little.

In sum, there is no First Amendment basis post-*Milkovich* for according absolutely protected status to statements framed as opinion but portraying a psychology professor depicted as a homophobe or a law professor as a racist or sexual harasser (the “pervasive hostile environment” charges discussed previously) merely because the so-called “facts” relied on are stated or otherwise assumed. Courts may and should look at the *correctness* of the facts stated, what was *omitted* and, equally importantly, whether the *assessment* of those disclosed was in error.²¹⁸ Moreover, purveyors of “pervasive hostile environment” charges will find little solace in other cases finding charges of religious bigotry and racism nonactionable. A few of the mere “name-calling” cases do not *bar* liability – they merely treat the charge as actionable only on proof of special damages.²¹⁹ Other decisions involved bombastic and angry

²¹⁸ Compare, for example, *Goodwin v. Kennedy*, 552 S.E.2d 319, 324-26 (S.C. Ct. App. 2001), where the court quoted the *Milkovich* analysis in the text at length and rejected defendant-African-American activist’s attempt to characterize a racial imputation – that, as an assistant principal in charge of discipline, plaintiff-African-American was the “house nigger” – as opinionative and mere name-calling. On the other hand, *In re Green*, 11 P.3d 1078, 1083-87 (Colo. 2000), the court rejected sanctions against an attorney for charging a judge with being a “racist and bigot” based on disclosed, uncontested facts. The court cited *only* section 566 and cases based thereon and surprisingly made *no* reference to *Milkovich* and the aspect of the opinion discussed in text above. Note further that the court accorded the charges absolute opinionative status despite noting that the hearing board had found *no evidence* of “any bias or prejudice” by the judge. *Id.* at 1087. While consistent with section 566’s open-ended, highly media-oriented view, such is not mandated by *Milkovich* or First Amendment concerns.

²¹⁹ See *Ward v. Zelikosky*, 643 A.2d 972 (N.J. 1994); see also *Rambo v. Cohen*, 587 N.E.2d 140, 148-49 (Ind. Ct. App. 1992); *McRedmond v. Sutton Place Restaurant*, 851 N.Y.S.2d 478, 480 (N.Y. App. Div. 2008) (finding that an allegation that petitioner made anti-Jewish remarks in his restaurant was actionable only upon proof of special damages). As per the general rule, emotional and physical injuries did not suffice. *Rambo*, 587 N.E.2d at 149. In addition, some of the non-slander per se cases involve racial epithets directed by defendant at plaintiff. See, e.g., *Bradshaw v. Swagerty*, 563 P.2d 511, 513-14 (Kan. Ct. App. 1977) (holding that a “general verbal insult” was not slanderous per se and no special damages were pled). But see, e.g., *Gomez v. Hug*, 645 P.2d 916, 922-23 (Kan. Ct. App. 1982) (same but upholding an intentional infliction-“outrage” claim); see also *Ledsinger v. Burmeister*, 318 N.W.2d 558, 561-64 (Mich. Ct. App. 1982) (finding racial epithets not slanderous but upholding claims for intentional infliction-“outrage,” state civil rights act violation, and public accommodation law violations – which included a criminal penalty and

commentary in political campaigns,²²⁰ or a radical lawyer's parallel perspectives on plaintiff-opponent and the legal system in a racist society²²¹ – all contained numerous “giant flag[s]”²²²

treble damages – and spousal loss of consortium). Note that in analyzing mere “name-calling” cases, courts seem to confuse or commingle interchangeably epithets directed *at* plaintiff and epithets imputed *to* plaintiff. These are quite different scenarios – the difference between being the *victim* of and the alleged *perpetrator* of racism. For example, the court in *Ledsinger* upheld an intentional infliction-“outrage” claim and rejected the “name-calling” rule. It decided the matter before it involved “slurs in the course of a discriminatory act” that generate a “strong public outcry” against “blatant expressions of racial inferiority.” *Id.* at 562.

²²⁰ *Vail v. Plain Dealer Publ'g Co.*, 649 N.E.2d 182, 184-86 (Ohio 1995) (involving a defendant disparaging plaintiff in the “Forum” section in a column captioned “Commentary” as involved in “gay-bashing,” “neo-numbskull tactics,” “anti-homosexual dislike,” fostering “homophobia” and “hate-mongering,” and being a “bigot”); *Condit v. Clermont County Review*, 675 N.E.2d 475, 476-79 (Ohio Ct. App. 1996) (Biting, biased statements made in editorial opinions about plaintiff-public figure during political campaigns – plaintiff and his candidate-son’s “fascism . . . bears that characteristic bond of malcontents through the ages: anti-Semitism. When they lose their struggles, they blame the Jews,” with plaintiff quoted as denying being anti-Semitic – were protected under *Vail*’s “totality of the circumstances” test.). Note that the *Vail* court adopted a post-*Milkovich* greater-protection-than-First Amendment standard under the Ohio Constitution, reinstating the open-ended multi-factor test expressly repudiated in *Milkovich*. See ELDER, DEFAMATION § 8:23, *supra* note 75, at 8-68 to 8-70. A strong concurrence suggested that there was no justification whatsoever for this preferential approach in light of the restrictive (responsibility-for-“abuse”) language of the Ohio Constitution. *Vail*, 649 N.E.2d at 187-88 (Pfeiffer, J., concurring). Note further that in *Vail*, the court found the commentary at issue distinguishable from charges of “punishable criminal or disciplinary conduct.” *Id.* at 186 (emphasis added).

²²¹ *Goetz v. Kunstler*, 625 N.Y.S.2d 447, 450-53 (N.Y. Sup. Ct. 1995). In describing plaintiff Goetz, defendant-author’s opponent in litigation based on Goetz’s subway shooting of four blacks, one of whom was Kunstler’s client, defendant Kunstler referred to plaintiff’s “venomous feelings against blacks” and “a hatred toward blacks.” The statements were in an autobiographical book in a chapter, “Defending Blacks in a Racist Country,” containing extensive provocative testimony evidencing the author’s “biased point of view.” *Id.* at 449. The discussion of the opinion doctrine (under the First Amendment and New York’s broader post-*Milkovich* rule) was technically dicta in light of statements plaintiff made, which the court viewed as *true*. *Id.* at 452-53; see also *Kimura v. Superior Court*, 281 Cal. Rptr. 691, 700-01 (Cal. App. 1991), *rev. denied and ordered not published*, 502 U.S. 1059 (1992) (An angry and very emotional letter written to a university community portraying plaintiff’s cancellation of an event as “extremely racist,” “a growing campus view” by “enlightened” members

strongly suggesting non-factuality. Another decision complained of “metaphoric choice of words” in letters to the editor that were no more than rhetorical hyperbole.²²³ Lastly, a couple of cases involved limited dissemination contexts where the intended audience was a “critical factor” in determining whether the usage was capable of defamatory meaning.²²⁴

IDENTIFICATION OF THE PLAINTIFF/THE “OF AND CONCERNING” REQUIREMENT

Under the common law black letter rule plaintiff has the burden of proving²²⁵ the defamatory matter was published “of

of the college community, and evidencing an “incredible level of bigotry,” could not be viewed by “any reasonable reader” as “a reasoned factual accusation.”).

²²² *Goetz*, 625 N.Y.S.2d at 452.

²²³ *Sall v. Barber*, 782 P.2d 1216, 1217-19 (Colo. Ct. App. 1989) (Defendant’s letter to the editor on the opinion page in the “Your View” column referred to an article involving one Rodriguez, referenced him as a “gentleman,” and said the West had no place for “bigots” like plaintiff, who “ought to take up residence” with neighbors like “other coyotes and skunks.”).

²²⁴ *Rybas v. Wapner*, 457 A.2d 108, 110-11 (Pa. Super. Ct. 1983) (The litigation centered on correspondence between plaintiff-landlord’s and co-defendant-lessee’s attorneys during negotiations in which defendant suggested settlement would require plaintiff “to make some gesture of good faith” “to demonstrate that he is not as anti-Semitic as he appears to be.”). The court distinguished another libel case in part based on “the large public audience” of the editorial therein. *Id.* at 111. The court did not reach the judicial proceedings absolute privilege issue. *Id.* Modernly, that would be a defensible basis for absolute privilege. See ELDER, DEFAMATION § 2:9, *supra* note 75, at 2-60-2-61. See also *Rambo v. Cohen*, 587 N.E.2d 140, 147-49 (Ind. Ct. App. 1992) (In light of the limited audience – two other parties “intimately involved” with plaintiff’s vacation controversy – the court found no basis for concluding defendant’s “angry remarks” could impede plaintiff’s relationships with them.). But see *Steadman v. Sinclair*, 636 N.Y.S.2d 325, 326 (N.Y. App. Div. 1996). In *Steadman v. Sinclair*, vague statements to an employer’s general manager which complained of plaintiff’s “racism in relation to his employment,” and the hope that the recipient would remedy such “ongoing injustices,” were held opinion. The court viewed the libel claim as orchestrated by the employer and upheld a counterclaim for retaliation against the defamation plaintiffs as aider/abettors under state law. *Id.*

²²⁵ See ELDER, DEFAMATION § 1:30, *supra* note 75, at 134-44. A couple of states have applied a “clear and convincing” standard. *Id.* at 1-135, n. 3.

and concerning” her or him. However, an individual plaintiff need not be named specifically²²⁶ – it generally suffices that those who know plaintiff “reasonably connect” plaintiff with the defamation based on the totality of the circumstances of which recipients are aware.²²⁷ The “of and concerning” requirement will not be a problem as to a defamed law school – by definition, it and any university of which it is a subdivision will be specifically named and identified in the report at issue. However, that does not end the matter. The spectre of libels of government²²⁸ and the Supreme Court’s ambiguous

Although Justice Stewart once referenced “of and concerning” as subject to a “convincingly clear” evidentiary burden, *see* *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., concurring), there is no other basis in First Amendment jurisprudence for such a burden. The well-documented preponderance standard generally applies. In a more recent case, the Court approved a preponderance standard for the “defamatory toward the plaintiff” element. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989) (leaving expressly open the burden of proof as to falsity in a public plaintiff defamation case). *See generally* David A. Elder, *Small Town Police Forces, Other Governmental Entities and the Misapplication of the First Amendment to the Small Group Defamation Theory – A Plea for Fundamental Fairness for Mayberry*, 6 U. PA. J. CONST. L. 881, 886 n.31 (2004) [hereinafter Elder, *Small Town*].

²²⁶ ELDER § 1:30, *supra* note 75, at 1-135-36; *see also* RESTATEMENT (SECOND) OF TORTS § 564 cmt. b (1977).

²²⁷ ELDER § 1:30, *supra* note 75, at 137-38 (noting the “great volume” of precedent on point); *see* RESTATEMENT (SECOND) OF TORTS § 564 cmt. b (1977) (“[I]t is enough that there is such a description of or reference to him that *those who hear or read reasonably understand the plaintiff to be the person intended*.” Indeed, extrinsic evidence may demonstrate that “a statement refers to a particular individual although the language used appears to defame nobody.” Furthermore, it suffices that “*any recipient* of the communication reasonably so understands it” as directed at plaintiff. However, if application is dependent on such extrinsic evidence, it must be shown that “some person” who saw or read it was familiar with the circumstances and reasonably believed that it referred to the plaintiff.”) (emphases added); *see also infra* text accompanying notes 234, 280-83, 288.

²²⁸ In *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964), the Court found a second deficiency in Alabama libel law under the facts before it -- that the Alabama courts had unconstitutionally endeavored to “sidestep this [libel on government] obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.” The Court expressly relied on and quoted from an Illinois case, *City of Chicago v. Tribune*

jurisprudence²²⁹ thereon may provide an absolute First

Co., to the effect that “no court of last resort in this country has upheld, or even suggested that prosecutions for libel on government have any place in the American system of jurisprudence.” *New York Times*, 376 U.S. at 291 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)). Despite the grand and evocative language, the second holding of the Court is quite narrow. The Court found the impermissible “transmuting” of governmental into personal defamation based on what the author has denominated “‘captain-of-the ship’ vicarious responsibility,” Elder, *Small Town*, *supra* note 225, at 890-91, a claim of personal application based “solely on the unsupported assumption that, because of his official position” he was implicated. *New York Times*, 376 U.S. at 289-90.

²²⁹ *New York Times*, 376 U.S. at 292 (“Raising as it does the possibility that a *good-faith critic of government* will be penalized for his criticism, the proposition . . . strikes at the very center of the constitutionally protected area of free expression.”) (emphasis added); see also *id.* at 292, n.30. Later, in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573-74 (1968), a public employee speech case, the Court indicated that the Board, if it sued as *libel plaintiff*, would be subject to the *New York Times* standard. Most recently and importantly, in *City of Long Beach v. Bozek*, 459 U.S. 1095 (1983), the Court raised serious doubts about the absolutist nature of the “impersonal criticism of government” co-holding of *New York Times*, at least in the malicious prosecution setting, by remanding the case, 645 P.2d 137 (Cal. 1982), to the California Supreme Court for determination of whether its barring of proceedings brought by a city against a plaintiff on previously unsuccessful police misconduct litigation was “based upon federal or state constitutional grounds, or both.” 459 U.S. at 1095. On remand, the California Supreme Court held that the petition clause of the California Constitution was a separate and independent basis for its holding. *City of Long Beach v. Bozek*, 661 P.2d 1072, 73 (Cal. 1983). This deprived the United States Supreme Court of jurisdiction. See generally Elder, *Small Town*, *supra* note 225, at 904-06. Note that shortly thereafter, the Court *rejected* a First-Amendment-based *absolute* privilege in Petition Clause cases in favor of a *New York Times qualified* privilege as to public plaintiffs. *McDonald v. Smith*, 472 U.S. 479 (1985). The commentators have given a somewhat mixed reaction to the absolutism argument. Compare Elder, *Small Town*, *supra* note 225, at 908 n.191, with *id.* at 910-11 n.215. RESTATEMENT (SECOND) OF TORTS § 561, caveat and cmt. d (1977), took no position on the absolutist doctrine as to municipal corporations in light of the limited case law supporting that position. By contrast, Great Britain has adopted an absolute bar to suits by municipal corporations and other superior governmental entities under British common law. *Derbyshire County Council v. Time Newspapers Ltd.* [1993] A.C. 534, 359-40, 547, 549 (H.L.) (citing *New York Times* and *City of Chicago*, and relying on the otherwise “inhibiting effect on freedom of speech”). The House of Lords specifically noted, however, that individual officers of the governmental entity could sue: “If the *individual reputation* of any of these is wrongly impaired by the publication *any of these* can himself bring proceedings for defamation.” *Id.* at 550 (emphases added).

Amendment immunity to the AALS, ABA, their minions and sources as to suits by *public* universities under the consensus view of lower court precedent.²³⁰ By contrast, private universities may sue if they can otherwise meet common law and constitutional requirements.²³¹

The “of and concerning” requisite may pose a problem, however, for individual faculty members who believe they have been defamed, as, almost invariably, neither the ABA nor AALS names names – they do their considerable damage to reputation in supposedly generic fashion.²³² Occasionally, a person will be identifiable by position²³³ or context²³⁴ as the particular person

²³⁰ Elder, *Small Group*, *supra* note 225, at 907-911 (Under this “established consensus of the somewhat limited precedent” “[a]ll manner of governmental entities – an agency of the federal government, the state or a state entity, municipal corporations of all sizes, local boards, governmental subdivisions, quasi-governmental entities with specialized function” – are barred from suing. Moreover, the prohibition applies to all types of criticism of government, “even as to a government entity acting in a proprietary capacity and even where its critic is a competitor.”). The privilege is not limited to media critics – indeed, a significant number of the cases have involved non-media defamation defendants. *Id.* at 908 n.190.

²³¹ See text accompanying notes 121-758.

²³² Compare *infra* the discussion of insider sources in the text supported by notes 606-17. Since no specific sources were identified and no details were provided in the site evaluation report or action letters, it is unknown whether specific insider sources named names or otherwise identified alleged “pervasive hostile environment” perpetrators. However, if slander litigation is filed against such sources in a parallel situation elsewhere, sources could be named as “Jane” or “John” Does with the sources later identified, together with any identifying data they may have provided, via traditional discovery mechanisms.

²³³ *Baker v. Warner*, 231 U.S. 588, 591 (1913) (implied as to claim by a district attorney); see also *Henry v. Collins*, 380 U.S. 356, 357 (1965), *rev’d on other grounds*, *Henry v. Pearson*, 158 So. 2d 695, 699 (Miss. 1963) (finding that two libels identified plaintiffs specifically by name but that the third identified them by position, county attorney for a particular county and the “my town” chief of police); *Keohane v. Stewart*, 882 P.2d 1293, 1300 n.10 (Colo. 1994) (holding that, although the libel did not refer to plaintiff-judge in a particular trial by name, the trial evidence demonstrated that the letter at issue was “widely understood” as making reference to plaintiff); *Cole v. Commonwealth*, 300 S.W. 907, 911 (Ky. 1927) (affirming that, in a criminal libel context, the “conduct of particular trials courts are not impersonal” and holding that a particular unnamed “judge” charged with a “legal lynching” in the making was defamed); *Neal v. Huntington Publ’g Co.*, 223 S.E.2d 792, 796 (W. Va. 1976) (finding that libel was “rather pointedly similar” in attacking the county sheriff,

disparaged. More commonly, the unnamed plaintiff law professor will sue under the consensus decisions²³⁵ (as to all-inclusive depictions) authorizing suit via the small group defamation route – either as a member of the faculty as a whole or a subset thereof (for example, the male faculty or the senior male faculty).²³⁶ What constitutes a “small group” is not entirely clear. The *Restatement (Second) of Torts*,²³⁷ following the numerical configuration of the leading case,²³⁸ has adopted a “de

an “ascertainable” individual, in the county where defendant-libeller was located).

²³⁴ The Court seems to have tacitly approved this doctrine in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), involving suit by a private person over two groups of telecasts – one concerning his arrest and a second group of thirteen over an extended period (twelve days). None of the latter explicitly identified plaintiff. *Id.* at 33-34. Justice Brennan’s plurality opinion synthesized and implicitly approved the trial court’s instruction – “a reasonable listener would conclude that the defamatory statement referred to petitioner” *Id.* at 39. The trial court left the “of and concerning” issue to the jury in the face of defendant’s argument that plaintiff had not proffered any witness evidence to link him to the second group of broadcasts. *Id.* Under the “reasonable listener”/“surrounding circumstances” criteria adopted by the common law, plaintiff was reasonably identifiable as the city’s only distributor of nudist magazines then pursuing an injunctive remedy in federal court against law enforcement raids. *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 744 (E.D. Pa. 1968) (“The law is clear ‘A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him.’”) (quoting *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 182 A.2d 751 (Pa. 1962)) (citation omitted). Note that *Rosenblatt v. Baer* did not deal with or question this “broader” common law approach, which would have evaluated “the totality of the circumstances” at time of publication, the common law’s “prevailing view” then and at present. Elder, *Small Town*, *supra* note 225, at 896-97. Indeed, the Court seems to have tacitly adopted this view in *Rosenbloom v. Metromedia, Inc.*

²³⁵ See ELDER, DEFAMATION § 1:32, *supra* note 75; see also Elder, *Small Town*, *supra* note 225, at 914-21 (noting that the “consensus view” rejects the seditious libel/“powerlessness of government” doctrine in the small group defamation setting and listing cases).

²³⁶ See *infra* text accompanying notes 257-65, 277-79.

²³⁷ RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977) (“[T]he cases . . . usually have involved members of 25 or fewer,” but it is “not possible to set definite limits as to the size of the group”) (emphases added).

²³⁸ *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316-17 (S.D.N.Y. 1952) (finding the defamation applied to “most” of the disparaged group). Note, however, that

facto maximum” or “consistent rule of thumb”²³⁹ of twenty-five. The author has elsewhere criticized this “mechanistic approach” as resulting in wholly “artificial and arbitrary”²⁴⁰ distinctions. A “decidedly . . . minority view”²⁴¹ has achieved fairer and more defensible results by focusing on the “intensity of suspicion,”²⁴²

defendant cannot rely on the large group defamation defense where specific members therein are identified. *Pratt v. Nelson*, 164 P.3d 366, 381-83 (Utah 2007) (“[I]f a party generally refers to a group of people that happens to include 400 individuals, then the group defamation rule may have application; but to the extent that a party identifies people in that group by their individual names, the group defamation rule no longer applies.”).

²³⁹ *Alexis v. Williams*, 77 F. Supp. 2d 35, 41, 44 (D.D.C. 1999). Under this “rule” no individual in a law enforcement street crimes unit of 46 charged with targeting minorities could sue. *Bujol v. Ward*, 778 So. 2d 1175, 1178 (La. Ct. App. 2001) (noting also that the charge was not all-inclusive). Likewise, no member of a group of 29 high school teachers tainted by charges of sexual misconduct with students could sue. *O’Brien v. Williamson Daily News*, 735 F. Supp. 218, 222-23 (E.D. Ky. 1990).

²⁴⁰ Elder, *Small Town*, *supra* note 225, at 924; ELDER, DEFAMATION § 1.32, *supra* note 75, at 154, n. 36. The author stated that denying all 29 school teachers a claim – see *supra* note 239 – while allowing suit by the twenty two branch churches in *Church of Scientology v. Siegelman*, 481 F. Supp. 866, 867 (S.D.N.Y. 1979), “creates an essentially arbitrary, indefensibly rigid, and mindless distinction.” *Id.*; see also *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 826 (Okla. 1984) (The cases’ refusal to specifically define a “precise numerical dividing line . . . demonstrates the weakness of slavish reliance . . . upon numbers alone.”). Even the *Restatement of Torts*, has admitted that it is impossible to set “definite limits.” RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977); see also *supra* note 237.

²⁴¹ Elder, *Small Town*, *supra* note 225, at 924.

²⁴² *Fawcett Publ’ns, Inc. v. Morris*, 377 P.2d 42, 51-52 (Okla. 1962) (All-inclusive amphetamine abuse imputed to an Oklahoma University team of 60-70 players permitted a claim by an alternate squad fullback who had participated in nine of eleven games – plaintiff would be recognizable to those who followed the team and individual contributions thereto.); see also *Excellus Health Plan, Inc. v. Tran*, 287 F. Supp. 2d 167, 170-71 (W.D.N.Y. 2003) (The “intensity of suspicion” test was met as to the president, medical director and individual physicians within the group where “Promedicus,” “Promedicus physicians” and “Promedicus” “leadership” and “executives” were defamed.); *Brady v. Ottawa Newspapers, Inc.*, 445 N.Y.S.2d 786, 792-95 (N.Y. App. Div. 1981); *McCullough*, 676 P.2d at 835-37 (reaffirming *Fawcett* and adopting the analysis of *Brady*); *Pratt*, 164 P.3d at 382-83 nn.112 & 114 (dicta strongly approving *Fawcett*). The commentators have generally approved of the test. LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 57-58 (1978) (suggesting

applying a complex of factors.

that *Fawcett*, *supra*, might become “a landmark in the American law”); DAN B. DOBBS, *THE LAW OF TORTS* 1137 (2000); RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4.71 (2nd ed. 2007). But compare the criticism of this test in Joseph H. King, Jr., *Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups*, 35 WAKE FOREST L. REV. 343, 364-72, 381-86 (2000) (concluding that the multi-factor approaches “produce an unacceptable level of uncertainty”), and *Algarin v. Town of Wallkill*, 421 F.3d 137, 139-40 (2d Cir. 2005), where the court distinguished *Brady* in the § 1983 “stigma-plus” setting as involving an all-inclusive defamation. In this case the court found lack of “of and concerning” where the statements were not about the “entire” police department or “most” officers but where “most” were portrayed as dedicated and the criticism was directed at the police chief. *Id.*

Brady involved the most detailed analysis of the factors to be weighed in protecting First Amendment values of “impersonal discussion[] of matters of public concern” without barring suits based on “an arbitrary size limitation where real injury is present.” *Brady*, 445 N.Y.S.2d at 793. *Brady* analyzed the “intensity of suspicion” test in *Fawcett*, indicating that size must be weighed against the “definiteness in number,” “composition of the group,” and its “degree of organization.” *Id.* These factors were not exclusive, however, in light of the major differences in groups. *Id.* In applying this “flexible approach,” the court found that the size of the group, fifty-three unindicted police officers charged as aider-abettors of the eighteen indicted, was “not significant” in comparison to the Restatement (Second) of Torts 25 standard in the context of the “public perception” of the group’s size – “an important factor in focusing on the degree of suspicion attributed to individual members . . . irrespective of the actual size of the group.” *Brady*, 445 N.Y.S.2d at 794. In addition, in light of the “nature and specificity” of the criminal charge with its “compelling logic,” the enhanced group size did not so “dilute the harm” as to deny it legal protection in defamation. *Id.* The court then found that the group of fifty-three enjoyed a “high degree of organization” – employment at a particular place and time as a “group entity independent” of the accusations themselves. *Id.* Moreover, the group’s membership was “definite” with a set number which had “remained constant” and “easily discernable” at the time of publication, with restricted admission and elevated visibility (via badges and uniforms) during the “intense scrutiny” caused by the corruption scandal. *Id.* Lastly, the court looked at both the group’s “prominence” and that of individuals therein. *Id.* “Prominence” had to be assessed in the locus of publication-distribution of the defamation and in the particular context of the charge’s content. The “prominence” factor was “intensified by public scrutiny” by the defendant, which called for additional indictments, including the seven-year-after final editorial, which resuscitated and refocused the public’s attention on the plaintiff class. Indeed, this “compulsive repetition” suggested that defendant had scienter of information which negated any argument that the corruption charge was “an inexact generalization.” *Id.* at 794-95. As to the particular officer, the record was very limited, but the court found the aiding-abetting comments “capable of personal application.” *Id.* at 795.

The consensus view of the small group defamation precedent makes *no* distinction based on whether the small group is employed by a private entity or a subdivision of government.²⁴³ However, a recent Virginia decision, *Dean v. Dearing*,²⁴⁴ involving a panoply of crimes imputed to a small town police department of five to eight persons by the mayor,²⁴⁵ has suggested that a general imputation defaming a small governmental group “constitutes libel of government, for which there is *no* cause of action in American jurisprudence.”²⁴⁶ While this may be the law in Virginia, it is aberrational, a minority of one,²⁴⁷ and not mandated by the First Amendment. *Dean* relied

²⁴³ RESTATEMENT (SECOND) OF TORTS § 564A and cmts. b-d (1977).

²⁴⁴ 561 S.E.2d 686 (Va. 2002). For a laudatory treatment of *Dean*, see SMOLLA, *supra* note 242, at §§ 4.69, 4.76.

²⁴⁵ *Dean*, 561 S.E.2d at 688 (“From February through November 1999, Dearing accused the police department of intimidating witnesses, stealing property, harassment, misappropriation of money, and improperly disposing of drug and gun evidence. These statements were published in newspapers serving the Elkton community.”). The trial court conceded how the charges of corruption and specific illegality would be perceived locally: “[T]he . . . force has only five to eight officers and many of the citizens of Elkton would unquestionably understand that some or all of the alleged defamatory remarks to apply to plaintiff.” *Dean v. Town of Elkton*, 54 Va. Cir. 518, 524 (Va. Cir. Ct. 2001).

²⁴⁶ *Dean*, 561 S.E.2d at 689 (emphasis added). The court allowed such plaintiffs to show “of and concerning” by adducing proof either of specific implication of the plaintiff-small group member *or* of each member thereof. *Id.* What exactly the court contemplated is ambiguous. The court made it clear that third party extrinsic evidence could *not* be “based solely upon a plaintiff’s membership in the referenced group . . .” *Id.* 689-90 (emphases added). The court upheld the trial court’s demurrer since plaintiff’s pleading contained no indication how the statements “reference [plaintiff] specifically or could be understood to do so” other than as a member of the disparaged police force. *Id.* at 688-90.

²⁴⁷ *Dean* was recently quoted with approval in *Cox Texas Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 431 (Tex. App. 2007). However, that case is distinguishable. It was a close analogue to *New York Times*, as the court recognized, and involved an attempt to show “of and concerning” based “solely” on plaintiff’s supervision of those named specifically. *Id.* Compare *Weymouth Twp. Bd. of Educ. v. Wolf*, 429 A.2d 431, 433 (N.J. Super. Ct., Law Div. 1981) (rejecting an action by the board as entity but affirming the right of “individual members of a governmental unit” to sue); *Scott v. McCain*, 250 S.E.2d 118, 120 (S.C. 1978) (holding that a single member of a defamed school district board of

erroneously on exceedingly broad language in *Rosenblatt v. Baer*,²⁴⁸ but ignored that case's very narrow holding²⁴⁹ and

trustees had a libel claim under *New York Times*); *De Hoyos v. Thornton*, 18 N.Y.S.2d 121, 122-23 (N.Y. App. Div. 1940) (determining that references to "our village affairs" and "our officials" would lead local readers to "clearly and quite reasonably understand" who the "dictated to by gangsters" individuals were); *Carter v. King*, 94 S.E. 4, 6 (N.C. 1917) ("It was as harmful to libel and slander the plaintiff collectively as one of the eleven jurors as it would have been to have libeled him individually."); *Palmerlee v. Nottage*, 138 N.W. 312, 313 (Minn. 1912) (The court followed *Wofford* as to a claim by an individual member of a defamed board of commissioners.); *Reilly v. Curtiss*, 84 A. 199, 199-200 (N.J. 1912) (A misconduct charge against a board as an entity "*necessarily points the finger of condemnation at every member thereof*, though none are named, and *every member . . . may maintain an action therefore.*") (emphases added); *Weston v. Commercial Adver. Ass'n*, 77 N.E. 660, 661-62 (N.Y. 1906) (A libel charging a particular borough's coroner's office with extorting money to stop unnecessary autopsy procedures sufficed to inculcate a doctor working for one of the coroners in the office.); *Bornmann v. Star Co.*, 66 N.E. 723, 724 (N.Y. 1903) (Plaintiff had standing as one of a defamed group of twelve physicians at a specific public hospital.); *Schomberg v. Walker*, 64 P. 290 (Cal. 1901) (finding that the libel referred to the entire board of trustees and that plaintiff was one of three members who participated in the subject matter of the article); *Wofford v. Meeks*, 30 So. 625, 626, 628 (Ala. 1901) (holding that plaintiff-county commissioner was one of the "Third Partyites" that the libel referred to – plaintiff was "so affected and particularized" as to support a finding of personal allusion); *Welch v. Tribune Publ'g Co.*, 47 N.W. 562, 563, 565 (Mich. 1890) (allowing a member of a criminal trial jury to sue); *Byers v. Martin*, 2 Colo. 605 (1875) (same); RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977) ("Thus the statement that '[t]hat jury was bribed' may reasonably be understood to mean that each of the twelve jurymen has accepted a bribe."). *See also supra* the English case law in note 229. For a more detailed analysis, see Elder, *Small Town*, *supra* note 225, at 919-21. But no liability was imposable where no particular jury was identifiable and *all* jurors in the *county* were disparaged. *See Berry v. Safer*, 293 F. Supp. 2d 694 (S.D. Miss. 2003); *Gales v. CBS Broadcasting, Inc.*, 269 F. Supp. 2d 772, 781-83 (S.D. Miss. 2003), *aff'd*, 34 Media L. Rep. 1353 (5th Cir. 2005). Compare to this the large governmental group defamation cases where a claim has been rejected. *See Elder, Small Town*, *supra* note 225, at 918-19; Elder, Defamation § 1.31, *supra* note 75. The pre- and post- *New York Times* cases indicate the courts have been "exceptionally sensitive to free expression concerns" in the group defamation context. Elder, *Small Town*, *supra* note 225, at 918.

²⁴⁸ *Dean*, 561 S.E.2d at 689. The court concluded that *Rosenblatt* refuted the view – as an impermissible libel on government – that a jury be allowed to find "of and concerning" where the libel "cast suspicion indiscriminately on the small number of persons who composed the former management group, whether or not it found the imputation of misconduct was specifically made of and concerning [the plaintiff]." *Id.* (quoting *Rosenblatt*, 383 U.S. at 79-80). For a detailed critique see Elder, *Small Town*, *supra* note 225, at 928-43.

²⁴⁹ *Dean* “inexplicably ignored” *Rosenblatt*’s clear indication that its circumscription of the small group defamation doctrine would be *inapplicable* as to *explicit* charges that the governmental group or entity as an entirety was corrupt. Elder, *Small Town*, *supra* note 225, at 930-32. The *Dean* court also ignored the *Rosenblatt* corollary of the latter principle: that the explicit imputation as to the group might also be sufficient evidence where the imputation was directed specifically at each and every member in the small group or entity. *Id.* In addition, *Dean* also ignored the “very specific defect” that is the narrow holding of this “extraordinarily” modest incursion on the small group defamation doctrine. *Id.* Specifically, the Court in *Rosenblatt* rejected the “too broad” jury discretion given by the trial court — that it was enough that plaintiff demonstrated that the libel “*could have been*” “directed” at him “as one of a small group.” *Rosenblatt*, 383 U.S. at 82 n.6. This discretion bestowed by the “could have been” language was *Rosenblatt*’s “true *raison d’être*.” Elder, *Small Town*, *supra* note 225, at 931.

Dean also ignored *Rosenblatt*’s reply in the “doubly implicit setting” therein — the latter refers to the Court’s concern that there was “no clearly actionable *statement*,” and that plaintiff had provided no extrinsic evidence in support of a libelous meaning. *Rosenblatt*, 383 U.S. at 79 (emphasis added). The Court in *Rosenblatt* then engaged in “inextricable linkage” of defamatory content with the “entirely separate” plaintiff element of “of and concerning” the plaintiff. Elder, *Small Town*, *supra* note 225, at 896. Thus, the Court was concerned the jury was permitted to find both libel *and* “of and concerning” from the challenged imputation, which “on its face [was] only an impersonal discussion of government activity.” *Rosenblatt*, 383 U.S. at 82. See the detailed analysis in Elder, *Small Town*, *supra* note 225, at 896-901, to the contention that the jury instruction allowed a finding for plaintiff “only if it found that the libel was aimed at [him] or if it found the libel aimed at [him] along with a few others.” *Rosenblatt*, 383 U.S. at 82 n.6. The Court responded that this small group defamation instruction “might not be objectionable,” as “we do not mean to suggest that the fact that *more than one person is libeled* by a statement is a *defense* to suit by a member of the group.” *Id.* (emphases added). However, the Court declined to “read the charge as being so limited” in light of the “could have been” defect. *Id.* The “implicit assumption” is that the Court would *not* bar the imposition of liability in favor of a member or members of a small group where this “could have” defect is absent. Elder, *Small Town*, *supra* note 225, at 900-01 and n.136. The author has suggested that the “exceedingly modest” or “breath-takingly innocuous” modifications necessitated by *Rosenblatt* to eliminate this constitutional defect would have “little or no impact” in small group defamation litigation. *Id.* at 901.

As indicated hereinafter, strong argument can be made for a fully inclusive defamation of the entire group of all male faculty, *see infra* text accompanying notes 257-65, or a subset of senior male faculty, *see infra* text accompanying notes 277-79. Assuming, however, that the “some” or “small” number scenario applies, the *Rosenblatt* analysis above is less unambiguous. *See* Elder, *Small Town*, *supra* note 225, at 900, n.134 (suggesting *Rosenblatt*’s very narrow holding may have been limited to “*less than all* of the group” scenarios).

other strong intimations²⁵⁰ in the Court's jurisprudence to the

Nonetheless, the overall logic of the author's analysis of *Rosenblatt* seems to apply. *Rosenblatt* does not apply at all in scenarios involving explicit charges such as "pervasive hostile environment." The taint directed at individual plaintiffs could be bolstered by extrinsic evidence by viewers or hearers that plaintiff was one of those at whom the charge was *specifically directed*. The true narrow holding was the "could have been" language in the trial court jury instruction, which itself was likely precipitated by plaintiff-Rosenblatt's strategic alternative argument -- that as the "man in charge" of the district's financial affairs he was the one at whom charges of speculation were directed. His options were thus "maximized and the ambiguity of the implication taken into account" by the "could have been" qualification "that decimated the instruction." Elder, *Small Town*, *supra* note 225, at 900 n.134. In sum, the crucial constitutional defect was the "could have been" phrasing. If changed to "directed at or to" plaintiff as a member of the "some" or "small number," no First Amendment issue could be raised. Dicta interpreting *Rosenblatt* in one decision, *Scelfo v. Rutgers Univ.*, 282 A.2d 445, 448 (N.J. Super. Ct. Law Div. 1971), as reflecting an "established point of law" in the "one or some of a small group" setting, overly broadly interprets *Rosenblatt* and misinterprets the common law on point. As to the latter, see *infra* text accompanying notes 266-276.

²⁵⁰ In *New York Times* the Court cited positively the "fair comment" case of *Ponder v. Cobb*, 126 S.E.2d 67, 80 (N.C. 1962), as an exemplar of the constitutionalization of that common law minority view. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 n.20 (1964). Later, the Court compared and contrasted its "'bare fact'-of-'official position' libel-of-government analysis," see *supra* notes 228, 247, with *Ponder*, which involved correspondence with the Governor that expressly imputed misconduct in a particular voting precinct. *New York Times*, 376 U.S. at 289-91. Note that the state court had *upheld* a claim by the election registrar and two election judges, *Ponder*, 126 S.E.2d. at 68-82, "unnamed but identifiable individuals known to or eminently knowable by the townspeople . . ." Elder, *Small Town*, *supra* note 225, at 891. It needs to be emphasized that *New York Times* clearly reaffirmed that testimony of witnesses could be relied on to prove the "of and concerning" requirement even where the defamation had not made even an "oblique reference" to plaintiff by office or name -- the only limitation was that such testimony could not be used where it *relied exclusively* on what the author has called the "captain of the ship" approach. *New York Times*, 376 U.S. at 289-91 (comparing *Ponder*). However, the Court did not *require* such in small group defamation cases. Any such conclusion would fly in the face of *Ponder*. Elder, *Small Town*, *supra* note 225, at 892.

In *New York Times* the Court also cited and relied on a second "fair comment" case, *Bailey v. Charleston Mail Ass'n.*, 27 S.E.2d 837, 838-44 (W. Va. 1943), where the state court had no problem with a conclusion of "of and concerning" in a case that involved a charge of scandalous corruption and/or neglect of office concerning purchase of a bridge. Although the editorial identified "state officials," "state administration," the "Neely Administration," and the "Neely Deal," the unnamed plaintiff, who was both state road

effect that the common law small group defamation rule²⁵¹ remains alive and well. By stark contrast, in *Garrison v. Louisiana*,²⁵² the Court's criminal defamation decision issued a few months after *New York Times*, the Court applied the latter to inclusive group disparagement of the eight member criminal district court bench – no specific judge was defamed.²⁵³ No member of the Court referenced a small group defamation/libel of government concern.²⁵⁴ As seems inarguable, a suit by a member of a small defamed governmental group is a "far wilderness cry"²⁵⁵ from the specter of government using its "vast resources to intimidate and silence its citizen-critics."²⁵⁶

commissioner and on the state road commission (and had in such capacities purchased the bridge in controversy), was accorded a libel claim subject to the "fair comment" privilege. See Elder, *Small Town*, *supra* note 225, at 892. Lastly, the Court later unequivocally applied the *New York Times* qualified privilege in a public employee speech case in the context of criticism of a school board and its unidentified members: "It is therefore perfectly clear that, were appellant [Pickering] a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in *New York Times*." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) (emphasis added).

²⁵¹ See *supra* text accompanying notes 235-40, 243, 247-50 and *infra* text accompanying notes 252-56.

²⁵² 379 U.S. 64 (1964).

²⁵³ *Id.* at 65-66, n.2 and 75-79. That the Court viewed *Garrison* as involving a collectively defamed small government group was later confirmed by its characterizations in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 273 (1971) (*Garrison* involved criminal defamation for defaming "a group of state court judges."), and *Pickering*, 391 U.S. at 574 (*Garrison* involved comments by the parish prosecutor "about the judges before whom he regularly appeared."). That *Garrison* and *New York Times* were not viewed as in conflict is further evidenced by the fact that a strongly anti-defamation liability Justice, Justice Brennan, wrote *both* opinions. Elder, *Small Town*, *supra* note 225, at 893 n.90.

²⁵⁴ *Garrison*, 379 U.S. at 75-79; *id.* at 79-80 (Black, J., concurring); *id.* at 80-83 (Douglas, J., concurring). This was in the face of the attorney general's characterization of the case at the state level as impugning "the integrity of the entire judiciary of the State." *State v. Garrison*, 154 So. 2d 400, 406 (La. 1963) (emphasis added).

²⁵⁵ Elder, *Small Town*, *supra* note 225, at 941.

²⁵⁶ *Id.* at 909-10, 941 (The author notes that the seditious libel analogy is "compelling, perhaps irrefutable" in the context of a governmental body suing

The defamatory “pervasive hostile environment” charges²⁵⁷ appear to have implicated, and tainted by definition, the entire male faculty at Chase – a group of approximately twenty.²⁵⁸ Moreover, the disparaging condemnation could reasonably be viewed by a finder of fact as an all-inclusive condemnation²⁵⁹ – neither the ambiguous reference by the ABA action letter to the misstated “belief” (of the President and Dean) it was “primarily” concerned with a single faculty member²⁶⁰ nor the AALS action letter’s reference to “some” or a “small number” of male faculty²⁶¹ would preclude a reasonable fact finder²⁶² from

in libel or bringing a criminal prosecution for libel of government.). *See also* Johnson City v. Cowles Commc’ns, Inc., 477 S.W.2d 750, 754 (Tenn. 1972) (The court opined that nothing would be “more destructive” of democratic traditions than to authorize “a corrupt government to stifle all opposition by free use of the public treasury to silence critics.”); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 919 F. Supp. 756, 760 (D.N.J. 1996) (The court suggested that otherwise the government could utilize “its potentially vast resources to chill speech in any number of contexts.”).

²⁵⁷ *See supra* text supported by notes 121-224.

²⁵⁸ Computing numbers is not without its difficulties, at Chase or elsewhere. Presumably, adjunct faculty would be excluded, as they are not involved in faculty self-governance functions and would not normally or reasonably be interpretable as part of the targeted group. Less clear are renewable contract faculty, who do teach but are usually less directly involved (if at all) in faculty governance. At Chase these professional colleagues attend faculty meetings and serve on faculty committees. As the result of ABA-AALS coercion exerted during the 2003 accreditation/membership process, the two non-tenure track faculty colleagues involved in Chase’s clinical/externship process were accorded faculty voting rights (except as to tenure-track personnel determinations and procedures) at the end of the process. Letter to Votruba, Dec. 9, 2004, *supra* note 110, at 2. Chase’s legal writing faculty are among a small minority nationally who have tenured faculty positions and are fully involved in the self-governance of the law school. For purposes of group defamation definitional purposes, the author suggests that those in full-time non-tenure track but continuing contract teaching positions should be treated as faculty members and the law should not apply the 7/10th less-than-full personage Dred Scottian absurdity dictated by ABA/AALS rules in defining faculty-student ratios. *See, e.g.* 2007-2008 STANDARDS, *supra* note 30, at 30-31 (Interpretation 402-1(A) (ii), (iii)). *See infra* note 704.

²⁵⁹ *See supra* text accompanying notes 43-45.

²⁶⁰ *See supra* text accompanying notes 51-52.

²⁶¹ *See supra* text accompanying notes 48, 67.

concluding that *all* twenty male faculty were defamed.²⁶³ This would be particularly true as to the implication that those not participants in “creating” the purported environment had tacitly ratified, condoned, or acquiesced in its continued existence.²⁶⁴ Such complicit behavior would equally inculpate male (and arguably women) faculty in passive-aggressive unprofessionalism.²⁶⁵

Assuming, unreasonably in the author’s view, that the defamation could not be reasonably interpreted as all-inclusive

²⁶² The Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), reaffirmed the jury’s function in the provable-as-factually false setting, emphasizing that the “dispositive question . . . then becomes whether a *reasonable factfinder*” could find an implied assertion of perjury.” *Id.* at 21; *see also supra* text accompanying notes 210-224. The Court replied in the affirmative, holding that a “core of objective evidence” supported a finding that such was “sufficiently factual.” *Milkovich*, 497 U.S. at 21. As to the Chase scenario, *see supra* text accompanying notes 91-105.

²⁶³ *See supra* text accompanying note 217. Note that the university viewed this as tainting the *collective male faculty* with “actionable conduct” and sought to identify the *particular members* thereof who had engaged in such. *See supra* text accompanying notes 91-105. This is substantial additional evidence to support the all-inclusive nature of the group taint. This group may be reduced by at least one, as the site evaluation team, the ABA Accreditation Committee, and the Executive Committee collectively appear to have absolved then Dean St. Amand of any involvement in the tainted group. *See supra* notes 48, 80, 82, 117, and *infra* text accompanying notes 363, 517.

²⁶⁴ *See King, supra* note 242, at 387, where the author concludes that where the defamatory statement does not explicitly define “what proportion of the group was contemplated,” then the plaintiff must prove, “based on the *words and context*, the *proportion* he contends was *implied* in the statement was a reasonable interpretation.” He provides as one example a statement describing “a *failure of all members to take affirmative acts as dictated by their responsibilities*. . . . Or, when a defamatory aspect of a statement *relates to a shared* characteristic that must have, *by its nature, affected all*” *Id.* at 387 n.235 (emphases added).

²⁶⁵ If non-participants truly believe that a “pervasive hostile environment” has been “created” by male or some male colleagues, passivity and nonfeasance until a septennial site evaluation team arrives on campus clearly violate the university’s strong policy of *non-toleration* of discrimination, and further violate the fiduciary duty of trust and protection each colleague owes to her or his other colleagues and to the group as a whole. *See supra* text accompanying note 105. This is particularly true of tenured colleagues. As a corollary, a baseless charge is the antithesis of such fiduciary status, defamatory and cowardly (at least where the source is unidentified).

of the Chase male faculty, additional problems would arise. Under the better rule²⁶⁶ of the divided cases,²⁶⁷ the small group defamation rule and its collective taint is not limited to all-inclusive disparagement.²⁶⁸ It suffices that a “high degree of suspicion”²⁶⁹ is cast via enumeration of a “considerable portion”²⁷⁰ or “some”²⁷¹ in the group. A jury is permitted to view

²⁶⁶ ELDER, DEFAMATION § 1:33, *supra* note 75, at 155 (“well-reasoned and persuasive”); RESTATEMENT (SECOND) OF TORTS § 564A cmt. c (1977); ELDREDGE, *supra* note 242, at 61-64; SMOLLA, *supra* note 242, § 4:70, at 4-115. The Prosser hornbook has approved the rule and suggested that “most courts today would probably take into account the circumstances and decide each case on the basis of the *magnitude of the suspicion cast on each person in the group*. If plaintiff’s standing with others could reasonably be affected – a *jury question* – by the likelihood of the applicability of the defamatory conduct to the plaintiff, then it is actionable.” W. PAGE KEETON ET. AL., PROSSER AND KEETON ON TORTS 784-85 (5th ed. 1984); see also *Arcand v. Evening Call Publ’g. Co.*, 567 F.2d 1163, 1165 (1st Cir. 1977) (following section 564A cmt. c); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 768, n.185 (1942).

²⁶⁷ *Arcand*, 567 F.2d at 1165 (noting the absence of agreement in the non-fully inclusive context).

²⁶⁸ See *infra* text accompanying notes 269-76.

²⁶⁹ RESTATEMENT (SECOND) OF TORTS § 564A cmt. c (1977).

²⁷⁰ *Arcand*, 567 F.2d at 1165; see also *O’Brien v. Williamson Daily News*, 735 F. Supp. 218, 223 (E.D. Ky. 1990) (In an illustration the court noted that disparaging “some” of a group of high school English teachers engaged in affairs with students would entitle each teacher to sue.); *Hardy v. Williamson*, 12 S.E. 874, 875-76 (Ga. 1891) (Imputing collusion to a group of eleven engineers or “some of them” provided plaintiff-engineer-member of the group with a defamation claim.); *Cushman v. Day*, 602 P.2d 327, 332 (Or. Ct. App. 1979) (The court declared that a “significant portion” or “majority” would be sufficient.). This less-than-all criterion may be met by defaming a single person in a small group. See, e.g., *Perrilloux v. Batiste*, 357 So. 2d 841, 843 (La. Ct. App. 1978) (The court said it sufficed that plaintiff was one of a “small group” of women in the courtroom at the time the charge of adultery was made.). Alternatively, the allegation that defendant was looking directly at plaintiff sufficed to present a jury issue as to whether “some or all” of the attendees viewed it as defaming her. *Id.*

²⁷¹ RESTATEMENT (SECOND) OF TORTS § 564A cmt. c (1977) (“Some of A’s children are thieves” permits a conclusion that “each member of the group [is] defamed by the suspicion attached to him by the accusation.”). In *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 315-16 (S.D.N.Y. 1952), following *Restatement of Torts* section 564, cmt. c, which provided that a reference to “some particular

such as “a blanket slur reaching all.”²⁷² If the segment at Chase consisted only of a single male faculty member, the available precedent would not support²⁷³ a finding of “of and concerning.”

member of B’s household” as a murderer defamed *each* household member, the court upheld a claim by each member of a group of a department store’s nine models where “some” of them were portrayed “as call girls.” The court noted that it was “difficult to perceive a legalistic distinction” between the statements “some” of the nine models and “most” of the twenty-five salesmen portrayed as “fairies.” *Id.* at 316 n.1. “An imputation of gross immortality to *some of a small group casts suspicion upon all*, where no attempt is made to exclude the innocent.” *Id.* at 315-16 (emphasis added). One commentator has suggested, contrary to the precedent, that there would be liability in the less-than-all situation *only* where a statistical majority is defamed. King, *supra* note 242, at 343, 347, 378, 380-81, 386-88, 394. He predominantly relies knee-jerkedly on the probability/preponderance of evidence requirement in civil actions. *Id.* Of course, Professor King’s analysis would deny liability where defendant imputes criminality to one or the other of two parties. But see the famous case to the contrary. *Forbes v. Johnson*, 50 Ky. (11 B. Mon.) 48, 50-51 (1850) (emphasizing the extraordinary unfairness of any other result: “[T]he wilful libeler might shield himself from responsibility by making his charges in the alternative against two, though in fact the mischief to each would be substantially the same as if he had charged both jointly or each separately.”). Note that *Forbes* was cited in support of the section 564A, comment c rule. 5 RESTATEMENT (SECOND) OF TORTS APP. VOL. 5, 360 (1981). And, of course, the same justice and fairness concerns would apply if the defamation were one of three. For example, a reference for a job applicant for a position with a corporate or city controller tells the prospective employer that plaintiff was “one of only three who could have embezzled millions from the company – we could never prove which one did it.” See *Montgomery Ward & Co. v. Blakely*, 25 So. 2d 585 (Miss. 1946); see also *Montgomery Ward & Co. v. Harland*, 38 So. 2d 771 (Miss. 1949) (affirming judgments based on *Forbes* in a one-of-three setting). What employer faced with such a charge would not weigh such heavily, if not proscriptively, in making a selection from among other applicants with *no* taint of illegality? Assume for the sake of argument that the ABA at some point provides details of accreditation and reaccreditation decisions together with any concerns it may have for non-compliance with Standards. Assume further that law school X is criticized on the following ground: “A substantial group of male (or white faculty), although a statistical minority, have created a pervasive hostile environment for women (or persons of color) faculty.” Would anyone seriously deny that this would taint *all* male (or *white*) faculty and measurably impair their lateral or upward mobility, if not render them virtual untouchables?

²⁷² *Arcand*, 567 F.2d at 1165.

²⁷³ *Id.* at 1164-65 (citing section 564A cmt. c, illus. 4 rejecting “of and concerning” where only a single person in a group of twenty-five was denominated an automobile thief); see also *Grimes v. Swank Magazine*, 15 Media L. Rep. 1231, 1233-34 (Cal. Ct. App. 1988) (The court cited and followed *Arcand* as one of two grounds barring a claim where only two police officers in a

Whether “some” or a “small number” of male faculty” at Chase²⁷⁴ would suffice is not altogether clear. For example, persuasive precedent has upheld a claim where “a number of”²⁷⁵ a group of thirteen township commissioners was the identified segment. The court wisely thought any other result would be “irrational, as well as unconscionable.”²⁷⁶

In the Chase scenario (or parallel situations elsewhere) the group defamed (for example, the male faculty) may be subdividable further still into smaller subsets. Other factors and circumstances may also suggest to readers or hearers of the letters’ content that an identifiable subset of the male faculty was targeted. In other words, a reasonable fact-finder may find there is a “reasonable presumption of personal allusion.”²⁷⁷ One potential problem arises as to smaller group subsets. A line of media dissemination cases bars a subset spin-off unless the subset has *some basis* in the defamatory text itself.²⁷⁸ That may

group of twenty-one were implicated in sexual misconduct while on duty.); *Chapman v. Byrd*, 475 S.E.2d 734, 737-38 (N.C. Ct. App. 1996) (depicting “someone” of nine business operators or employees as HIV positive did not defame all nine) (emphasis supplied).

²⁷⁴ See *supra* text accompanying notes 48, 67, 261.

²⁷⁵ *Farrell v. Triangle Publ’ns., Inc.*, 159 A.2d 734, 736-39 (Pa. 1960). The article at issue indicated that the investigators for the district attorney would question all thirteen of the commissioners, which intimated that none was “above suspicion of knowledge, guilty or otherwise” of the collectively charged misconduct. *Id.* at 739. The court held that a “substantial number” of its readership, particularly those in the libel-plaintiff’s township, would know of his position as commissioner. *Id.* at 738. Moreover, it was certainly reasonable that other such readers were “impelled by the scandalous nature of the charges” to find out who the commissioners were, resulting almost inevitably in plaintiff being tied to the scandal. *Id.* at 738-39. As the author has said elsewhere, the court adopted “an eminently sound, common sense approach.” Elder, *Small Town*, *supra* note 225, at 923 n.314; see also *Ball v. White*, 143 N.W.2d 188, 189-90 (Mich. Ct. App. 1966) (finding a letter that stated that “someone” or “some” of five employees had stolen from a patron during contract work at her home was libelous of *all* five employees working thereat).

²⁷⁶ *Farrell*, 159 A.2d at 737; see also *supra* text accompanying note 271.

²⁷⁷ *Price v. Viking Press, Inc.*, 625 F. Supp. 641, 646 (D. Minn. 1985).

²⁷⁸ *Weatherhead v. Globe Int’l, Inc.*, 832 F.2d 1226, 1228-29 (10th Cir. 1987) (finding no basis for a subset of the large group of dog “death camps” in the article’s text); see also *Barger v. Playboy Enter., Inc.*, 564 F. Supp. 1151, 1153-55

not pose an insuperable barrier, however. This basis in text need not be explicit. It may be implicit, particularly given the limited dissemination environment to those involved in legal education. For example, given the inherent unlikelihood of junior, non-tenured male faculty risking a much sought after position/career by creating or participating in a “pervasive hostile environment,”²⁷⁹ it seems highly likely that any reasonable reader in the accreditation-membership context would ordinarily look to and include only the senior, tenured male faculty in such imputed defamatory conduct.

Even if no such subset is available, the general rule²⁸⁰ allows

(N.D. Cal. 1983) (finding no basis in the text for either a geographic delimitation or “esoteric meaning” of “bride” under any “reasonable reading” of the text, which applied to all Hell’s Angels “brides” and “mommas”); *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481, 484 (D. Mass. 1980) (holding that the text of an article disparaging a newspaper as one “by paranoids for paranoids” provided no “reasonable basis to focus” on the subset of editors as the “likelier targets of a greater criticism” of a newspaper “by virtue of their greater authority”).

²⁷⁹ See *supra* text accompanying notes 18-26. On the impact of the evidence that junior faculty members were satisfied with their experiences at Chase and the impact on the “of and concerning” issue, see *supra* text supporting note 104. More specifically, the center report concluded that the concern expressed by some – that the ABA/AALS actions letters criticized the “entire male faculty” – was *not* the view of “most of the male faculty,” who did not view the criticism as “directed at them.” Work Climate Assessment, *supra* note 80, at 3. It can be inferred from the overall context that this included the entire group of male junior faculty. *Id.* Of course, this general satisfaction by junior faculty members, together with the “most” comment, would be highly probative evidence – in the context of intra-faculty discussions – as to which senior male faculty were targeted by the “pervasive hostile environment” charge. See *infra* text accompanying notes 280-83.

²⁸⁰ Of course, even in large group settings, a particular faculty member may be able to demonstrate that “particular circumstances” indicated that the libel “referred solely or especially to himself.” *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952); see also RESTATEMENT (SECOND) OF TORTS § 564A(b) (1977) (A claim can be made in the large group setting where “the circumstances of publication reasonably gave rise to the conclusion that there is particular reference to the member.”). This is amplified in comment d: “[T]here may be *circumstances that are known to the readers or hearers and which give the words such a personal application to the individual that he may be defamed as effectively as if he alone were named.*” *Id.* at cmt. d (emphases added). The illustration given – “All lawyers are shysters” – might be defamatory in a context where plaintiff was the only attorney present and “the context or the previous conversation indicates that the speaker is making personal reference to

him.” *Id.* Likewise, a newspaper that defames radio repairmen as engaging in a telephone solicitation “racket” was reasonably understood by readers as alluding to plaintiff where he was the sole repairmen who did such solicitation. *Id.* at illus. 5. The latter illustration was based on *Marr v. Putnam*, 246 P.2d 509, 519-21 (Ore. 1952). This is a particularized example of the general rule which does not require that plaintiff be identified by name but only that there is such “a description of or reference . . . that those who *hear or read reasonably understand the plaintiff to be the person intended.*” RESTATEMENT (SECOND) OF TORTS § 564 cmt. b (1977) (emphasis added). Evidence of extrinsic circumstances may be adduced as long as someone familiar with such “reasonably believed” that the defamation referred to plaintiff. *Id.* An extensive amount of precedent liberally applies this rule. See ELDER, DEFAMATION § 1:30, *supra* note 75, at 1-140-1-143. The cases generally permit introduction of evidence by plaintiff and third parties to show the basis for the nexus. *Id.* at 1-140-1-141, n.25. See *supra* text accompanying note 234.

Kentucky law would allow suit under the consensus rule discussed herein. The leading Kentucky case is *E. W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700, 702 (Ky. Ct. App. 1978), in which two articles portrayed an incident involving two pre-teens, one of them plaintiff. Neither identified plaintiff by name but the second one, which resulted in litigation, said the other boy died because he was “savagely beaten into insensibility.” The court found such libelous per se and the “of and concerning” element met because plaintiff’s “*friends and acquaintances . . . familiar with the incident were certain to recognize [plaintiff] as the unnamed perpetrator of the offense.*” *Id.* (emphases added); see also *Louisville Times Co. v. Emrich*, 66 S.W.2d 73, 75 (Ky. 1933) (Plaintiff-husband was identified where a photo was shown that depicted his home as the location of a fire caused by contraband whiskey.). For a campus scenario, see *Weinstein v. Bullick*, 827 F. Supp. 1193, 1199-1202 (E.D. Pa. 1993), where the court found the section 564 rule met where adduced evidence supported a conclusion plaintiff was identified by people on campus as the person defendants said had fabricated rape charges. The court focused on the *smallness and intimacy* of a college environment and held that it was not material to the “of and concerning” issue that the identifying listener group was circumscribed by the college community. *Id.* at 1199. The court correctly distinguished *Garvey v. Dickinson College*, 761 F. Supp. 1175, 1187-89 (M.D. Pa. 1991), a libel claim based on defendant’s letter of reference for another faculty member (not plaintiff) in which plaintiff was not identified. The court found no basis for “of and concerning” because there was “no logical reason” for the off-campus recipient to investigate and find out plaintiff’s identity. *Id.* at 1189. It distinguished the scenario where both faculty members applied for the same position, in which case plaintiff’s status as the “hostile junior colleague” would be “a matter of concern” and would be discovered. *Id.* at 1189. Interestingly, the term “hostile,” defined as involved in “some quarrelsome activity or an expression of antagonistic views toward others,” was viewed by the court as defamatory of an academic and *not* protected opinion, as implying a statement of substratal fact. *Id.* at 1188-89 and n.24 (dicta). On the opinion issue, see *supra* text accompanying note 215. On the issue of “pervasive hostile environment” as defamatory, see *supra* text accompanying notes 121-224.

liability to be imposed if faculty colleagues reading or hearing about the charges would view them as directed at a particular faculty member or members. For example, there is evidence in the center report that junior faculty (a decade or less) did not view themselves as involved in the historic grievances among senior (over a decade) faculty.²⁸¹ A reasonable corollary thereof is that junior male faculty did not view the “pervasive hostile environment” charges as directed at them and would view them, as would female junior faculty and many others, as targeting senior male faculty.²⁸² Other factors may be important also. Colleagues may view some male colleagues as sufficiently politically correct (ardently feminist and multicultural) in perceived viewpoint and conduct as to be outside the swathe of a “pervasive hostile environment” charge. Moreover, exchanges in public meetings may provide a strong factual backdrop for viewing specific individuals as within the “some”/“small number” of male faculty targeted. A plethora of precedent²⁸³

²⁸¹ See *supra* text accompanying notes 104, 279.

²⁸² See *id.*

²⁸³ See *supra* text supported by note 280; see also *Hansen v. Stoll*, 636 P.2d 1236, 1241 (Ariz. Ct. App. 1981) (The court held that two unnamed of the seven federal drug agents participating in a specific incident met the “of and concerning” requirement as to those within the law enforcement division familiar with the particular incident.). The court rejected any suggestion that every reader or the reasonable or ordinary viewer or reader would find such nexus — it sufficed that such a conclusion was “reasonable under the circumstances.” *Id.* The court upheld a jury finding that the libels were “sufficiently specific” under a group libel instruction. *Id.* And see the situation where three participating officers in a shoot-out were held to be “ascertainable persons” targeted by defendant, not “run-of-the-mill members of a large group.” *Mullins v. Brando*, 91 Cal. Rptr. 796, 802 (Cal. Ct. App. 1970). The court analogized these officers to the “unidentified but identifiable” officers who engaged in the alleged illegalities in *New York Times*. *Id.* at 801; see also *Davis v. Copelan*, 452 S.E.2d 194, 202 (Ga. Ct. App. 1994) (The court upheld an “of and concerning” finding as to plaintiffs, discharged public employees, in the context of a libel to fellow employees. Plaintiffs were the part of a group of twenty-nine employees discharged as “criminals or suspected criminals.” Although plaintiffs were not identified by name, fellow employee-readers all knew plaintiffs and the context and circumstances of their termination.); *DeBlasio v. N. Shore Univ. Hosp.*, 624 N.Y.S.2d 263, 264 (N.Y. App. Div. 1995) (The court upheld a claim based on defendant’s press release which disparaged personnel participating in a specific cancer treatment program as overdosing patients with radiation. The court affirmed plaintiff’s argument he was one of a “handful” of doctors at the hospital using this particular therapy and that

would support liability under the “of and concerning” rule in the internal faculty dissemination context.

In sum, faculty sources, site team members, and the AALS and ABA and their minions have no absolute privilege²⁸⁴ to defame faculty members by disparaging the faculty as a whole or an identifiable subset or individual members thereof. The small group defamation rule may provide standing to individual members of smaller faculties or to subsets thereof.²⁸⁵ The progressive and defensible²⁸⁶ “intensity of suspicion”²⁸⁷ rule may provide parallel standing to larger-than-twenty-five faculties or subsets thereof, at least in some jurisdictions. In almost all jurisdictions, victims of defamation may sue where specific circumstances point to a particular individual or individuals or an identifiable smaller group.²⁸⁸ What seems indubitably clear is that Virginia’s *Dean v. Dearing*²⁸⁹ rule is

readers would have reasonably connected his firing as linked to the libel under “well settled” doctrine.); *Cushman v. Edgar*, 605 P.2d 1210, 1213 (Or. Ct. App. 1980) (The group of police charged with particular misconduct at a picketing location had a cause of action against defendant-labor official.); *Cushman v. Day*, 602 P.2d 327, 332 (Or. Ct. App. 1979) (same).

²⁸⁴ The author has repeatedly noted the Court’s strong antipathy to an absolute immunity for either or media defendants. See Elder, *Small Town*, *supra* note 225, at 932-38; David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock’s Attempts to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 613-27 (2007) [hereinafter Elder, *Media Jabberwock*]. Such absolutism mandates “a total sacrifice of the competing value” protected by defamation law -- that is, reputation, *Gertz v. Welch, Inc.*, 418 U.S. 323, 341 (1974), which together with freedom of expression, is deemed by the Court to be “equally compelling.” *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976). The Court has repeatedly affirmed that the knowing or reckless falsity standard is “an extremely powerful antidote” to the inducement of self-censorship of expression, *Gertz*, 418 U.S. at 342, and that it has “regularly found [absolute immunity] . . . an intenable construction of the First Amendment.” *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

²⁸⁵ See *supra* text accompanying notes 235-56, 266-79.

²⁸⁶ See ELDER, DEFAMATION § 1:32, *supra* note 75, at 1-153-1-154; see also SMOLLA, *supra* note 242, at § 4:71.

²⁸⁷ See *supra* text accompanying notes 241-42.

²⁸⁸ See *supra* text accompanying notes 226-27, 234, 280-83.

²⁸⁹ See *supra* text accompanying notes 244-56.

unlikely to provide insulation beyond Virginia's borders. As the author has said elsewhere, "[i]t boggles the mind and makes the First Amendment look like Dickens's proverbial ass to protect the fabricator who does incalculable injury by the consciously predetermined ploy of winking, blinking, and nodding but naming no names when all but the clueless know or can easily find out who are targeted. Only in the never-never-world of First Amendment jurisprudence would such warped logic even be contemplated."²⁹⁰

²⁹⁰ See Elder, *Small Town*, *supra* note 225, at 941. Equally mind-boggling would be the "artificial line-drawing" required by any dichotomy between Dean's purportedly absolute protection of small governmental groups or entities from those in the non-governmental or private sector:

The individual trustees of a public university could not sue while those of a private university could. The lawyers in a small city law office could not sue, but the members of a candidate for attorney general's law firm could. A small group of public high school teachers accused of improprieties with students could not sue, but, on the same allegations, the English faculty at a private high school could.

Id. at 941-42 (footnotes omitted). And, it is not clear whether Dean's impact would be limited to governmental entities, like a police force, composed of individuals constituting public officials under the consensus rule. Would Dean also apply to all members of a public law school or university faculty in a particular department, most, if not all of whom would likely not qualify as public officials under the Court's jurisprudence? On the public official issue, see *infra* text accompanying notes 474-75, 487-94, 517. If Dean were to be applied to groups of public employees – not public officials – in any identifiable small group, Dean's absolute immunity for defendant would take a quantum constitutional leap from Gertz's negligence minimum to First Amendment absolutism, a result "achieved by slyly disparaging a small government entity or group but not naming names. It boggles the mind." Elder, *Small Town*, *supra* note 225, at 943. Dean's "potentially open-ended abuse of reputation" by this "calculatedly devious ruse" is "unconscionable" and for which "[n]o support exists in the jurisprudence of the Court, lower court precedent, fundamental fairness, public policy, or common sense" *Id.* Also see the powerful opinion in *Saenz v. Playboy Enter., Inc.*, 841 F.2d 1309, 1314 (7th Cir. 1988), where the court convincingly rejected the First Amendment-based argument that liability could be imposed only where defendant expressly and specifically defamed plaintiff and that libel could never be implied from defamation of government. The court noted that implied libels could be equally "clear and perhaps damaging" because of their indefinite quality and that such a rule would permit "the spectre of heinous abuse by crafty and mischievous authors whose subtle art of insinuation is honed for destruction." *Id.* The court noted that *Rosenblatt* specifically authorized and contemplated such implied libels and that defendants could not claim the right to "without impediment of law,

CONSENT

As the cases have recognized, consent is one of the “oldest and most widely recognized”²⁹¹ defenses to defamation, based in the fundamental principle²⁹² of *volenti non fit injuria*.²⁹³ The traditional view is that consent is an absolute defense²⁹⁴ to (or more logically negates the existence of)²⁹⁵ the particular tort. This approach has generally been extended, somewhat knee-jerkedly, to the “intentional” tort²⁹⁶ of defamation. Accordingly,

trammel a public official by ‘surreptitious and insidious implication’ under the pretension of governmental critique.” *Id.* at 1317. To deny an implied libel claim in such circumstances would “open Pandora’s box from which countless evils may spring.” “A legal fiction denying . . . clearly discernible, though not explicit charges, exposes public officials to baseless accusations and public mistrust while promoting an undisciplined brand of journalism [or accreditation-membership evaluation] both unproductive to society and . . . unprotected by constitutional considerations.” *Id.*

²⁹¹ *Royer v. Steinberg*, 153 Cal. Rptr. 499, 503 (Cal. Ct. App. 1979).

²⁹² *Smith v. Holley*, 827 S.W.2d 433, 437-38 n.3 (Tex. Ct. App. 1992); SMOLLA, *supra* note 242, at § 8-4.

²⁹³ *Smith*, 827 S.W.2d at 437-38 and n.3; *see also* *Brockman v. Detroit Diesel Allison Div. of Gen. Motors Corp.*, 366 N.E.2d 1201, 1204 (Ind. Ct. App. 1977) (“[T]hat to which a person assents is not in law an injury.”); FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 5:17 138 (2nd ed. 1986). It has been suggested that assumption of risk is the proper rubric where plaintiff remains unclear what will be said but has “reason to believe” it may be defamatory. *Smith*, 827 S.W.2d at 437-38 and n.3; SMOLLA, *supra* note 242, § 8-4.3-4. Where plaintiff herself or himself makes a publication to a third party, the absolute consent defense normally applies. *Merritt v. Detroit Mem’l Hosp.*, 265 N.W.2d 124, 127 (Mich. Ct. App. 1978); *Royer*, 153 Cal. Rptr. at 503 (Disclosure of a confidential letter “solely through the action and effort” of plaintiff was absolutely privileged.). *See generally* ELDER, DEFAMATION § 1:20, *supra* note 75, at 1-104-1-105.

²⁹⁴ RESTATEMENT (SECOND) OF TORTS § 583 and cmt. f (1977); *see also* *Cox v. Nasche*, 70 F.3d 1030, 1031-32 (9th Cir. 1995); *Royer*, 153 Cal. Rptr. at 503-04 (Cal. Ct. App. 1979); *Eitler v. St. Joseph Reg’l Med. Ctr.*, 789 N.E.2d 497, 500 (Ind. Ct. App. 2003); *Williams v. Sch. Dist. of Springfield R-12*, 447 S.W.2d 256, 268-69 (Mo. 1969); *Lee v. Paulsen*, 539 P.2d 1079, 1080-82 (Ore. 1975); *Smith*, 827 S.W.2d at 436-41 (Tex. Ct. App. 1992).

²⁹⁵ *Smith*, 827 S.W.2d at 437-38 and n.3.

²⁹⁶ *McQuirk v. Donnelley*, 189 F.3d 797, 796-98 (9th Cir. 1999); *Eitler*, 789 N.E.2d at 502.

common law malice²⁹⁷ and constitutional malice²⁹⁸ do not forfeit the consent defense. Most of the cases supportive of consent as an absolute defense have presented courts with “entrapment”²⁹⁹ type scenarios or largely equivalent situations,³⁰⁰ where the

²⁹⁷ RESTATEMENT (SECOND) OF TORTS § 583 cmt. f (1977) (Consent is unaffected “by the ill will or personal hostility of the publisher or by any improper purpose . . . unless the consent is to its publication for a particular purpose, in which case the publication for any other purpose is not within the scope of the consent.”); *see also Cox*, 70 F.3d at 1031-32; *Royer*, 153 Cal. Rptr. at 504; *Williams*, 447 S.W.2d at 268-69.

²⁹⁸ *Royer*, 153 Cal. Rptr. at 504 (Reckless disregard of falsity does not forfeit consent – such reflects “a misunderstanding of the law.”); *Johnson v. City of Buckner*, 610 S.W.2d 406, 408, 411-12 (Mo. Ct. App. 1980). Clearly, neither does mere falsity forfeit consent as an absolute privilege. *Merritt*, 265 N.W.2d at 125, 127; *Farrington v. Bureau of Nat’l Affairs, Inc.*, 596 A.2d 58, 59 (D.C. 1991) (restricting the absolute defense of consent to true matter would render consent irrelevant since truth was already an absolute defense).

²⁹⁹ *Beck v. Tribert*, 711 A.2d 951, 959-60 (N.J. Super. Ct. App. Div. 1998) (involving a plaintiff who used two friends in the guise of “provocative decoy” for the purpose of fomenting litigation); *see also LeBreton v. Weiss*, 680 N.Y.S.2d 532, 533 (N.Y. App. Div. 1998) (involving plaintiff who employed friends to solicit defamatory comments from defendant-former landlord using the subterfuge they were prospective landlords); *Lee v. Paulsen*, 539 P.2d 1079, 1080, 1082 (Ore. 1975) (Although this is the “reason behind the rule,” it was “not essential” that a plaintiff in a “particular case have that subjective intent.”); *Peterson v. Mountain States Tel. & Tel. Co.*, 349 F.2d 934, 935-36, 938 (9th Cir. 1965) (In dicta, the court found that plaintiff’s union agent “invited and sought” the libel via its request for written reasons for the purpose of litigation filed shortly thereafter.); *Mick v. American Dental Ass’n*, 139 A.2d 570, 577 (N.J. Super. Ct. App. Div. 1958) (Plaintiff used a professional colleague as a “professional decoy” to solicit defendant’s “candid expression.”); *Louisville Times Co. v. Lancaster*, 133 S.W. 1155, 1156-58 (Ky. 1911) (Plaintiff requested and received a retraction which identified him clearly for the first time as a society figure implicated in theft in an earlier article. The court held that it was error to deny an instruction to the effect that plaintiff “‘assumed all responsibility’” for the publication.); HARPER § 5.17, *supra* note 293, at 140 (characterizing *Louisville Times* as “something akin to entrapment”); *Weatherston v. Hawkins*, 99 Eng. Rep. 1001, 1002 (1786) (finding that the letter to plaintiff’s brother-in-law after repeated solicitations which resulted in a libel filed the same day was a case of “entrap[ing]” the defendant).

³⁰⁰ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d, illus. 2 (1977) (“A, a school teacher, is summarily discharged by the school board. He demands that the reason for his dismissal be made public. B, president of the board, publishes the reason. A has consented to the publication though it turns out to be defamatory.”); *see also Turano v. Bd. of Educ. of Island Trees Union Free Sch. Dist. No. 26*, 434 F. Supp. 1063, 1065-69 (E.D.N.Y. 1977) (holding that the

courts see a necessity of “preventing a party from inviting or inducing indiscretion and thereby laying the foundation for his [her] own pecuniary gain.”³⁰¹ In such cases “reasons of justice”³⁰² argue persuasively against liability and in favor of an unqualified consent defense.

A large number of the consent cases³⁰³ involve scenarios where a non-renewed,³⁰⁴ terminated,³⁰⁵ about to be

doctrine of consent applied where plaintiff-teacher “invited,” “procured” and “instigated” a disclosure in public of reasons for termination and denial of tenure “through persistent badgering”).

³⁰¹ *Royer*, 153 Cal. Rptr. at 504 (“The facts and circumstances of the instant case bear testimony to the wisdom of that rule.”); *see also* *Lee v. Paulsen*, 539 P.2d 1079, 1080, 1082 (Ore. 1975) (The policy reason behind the rule was “to prevent a plaintiff from ‘setting up’ a lawsuit.”); HARPER § 5.17, *supra* note 293, at 140 (“The privilege . . . is based on the unwillingness of the courts to let the plaintiff ‘lay the foundation of a law suit for his own pecuniary gain.’”) (citation omitted).

³⁰² DOBBS, *supra* note 242, at 1156; *see also* *Mick*, 139 A.2d at 577 (Allowing suit after plaintiff used a “provocative decoy” to invite a libel would be “offensive to an elementary sense of justice.”).

³⁰³ Some of the cases cited in favor of the section 583 absolute consent rule, *see* RESTATEMENT (SECOND) OF TORTS, APP. VOL. 5 496-97 (1981), involve expressed or requested consent to publication to plaintiff’s agent and rest on the quite separate ground that such involved no publication. *See, e.g.*, *Mims v. Metro. Life Ins. Co.*, 200 F.2d 800, 801-02 (5th Cir. 1952); *Brockman v. Detroit Diesel Allison Div. of Gen. Motors Corp.*, 366 N.E.2d 1201, 1203-05 (Ind. Ct. App. 1977) (alternative holding); *Taylor v. McDaniels*, 281 P. 967, 971-73 (Okla. 1929). The better and more defensible rule is that such is publication and that defendant must look to privilege or consent for protection. *See* ELDER, DEFAMATION § 1:15, *supra* note 75; RESTATEMENT (SECOND) OF TORTS § 577 cmt. e (1977).

³⁰⁴ Several of the cases involve non-renewed teachers or academic administrators who request and receive specific reasons for non-renewal. *Royer*, 153 Cal. Rptr. at 501-04 (Plaintiff’s public “challenge” released to the press for defendant-school trustees to identify their sources and disclose their evidence constituted consent to a detailed reply in the official school newspaper.); *see also* *Christensen v. Marvin*, 539 P.2d 1082, 1083-84 (Ore. 1975) (Plaintiff requested and received reasons for non-renewal at a school board meeting; she also had prior knowledge of a very negative evaluation by the superintendent. Collectively, they gave her “reason to believe” the reasons disclosed would be defamatory.); *Lee*, 539 P.2d at 1080 (Ore. 1975) (Plaintiff’s attorney requested that reasons given earlier in a private letter be stated publicly at a board hearing – the board complied.); *Williams v. Sch. Dist. of Springfield R-12*, 447 S.W.2d 256, 268-69 (Mo. 1969) (Defendant’s response to plaintiff’s

terminated³⁰⁶ or disciplined employee,³⁰⁷ or former employee

requests for reasons for non-renewal were “invited or instigated” by her and impliedly consented to.).

³⁰⁵ *Mandelbatt v. Perelman*, 683 F. Supp. 379, 383-84 (S.D.N.Y. 1988) (Notifications as to alleged misconduct required under the termination provisions of a consulting agreement were impliedly consented to.); *Turano v. Bd. of Educ. of Island Trees Union Free Sch. Dist.* No. 26, 434 F. Supp. 1063, 1065-69 (S.D.N.Y. 1977) (As part of an attempt to make plaintiff’s termination-non-tenure a “cause célèbre,” the school board was “provoked” into giving reasons at a public meeting.); *Johnson v. City of Buckner*, 610 S.W.2d 406, 408, 411-12 (Mo. Ct. App. 1980) (A police officer terminated by the city board of aldermen consented to defamation under the “reason to know” standard where he requested that the reasons therefore be given; the consent extended to subsequent media publication where plaintiff was aware of the presence of a stranger, later identified as a reporter, but where plaintiff imposed no conditions on the publication of the reasons at the time thereof.); *Rouch v. Cont’l Airlines, Inc.*, 70 S.W.3d 170, 172-75 (Tex. Ct. App. 2001) (Applying the submits-to-investigation criterion, the court held that plaintiff consented to a full employment record review and anything relevant thereto where she filed a grievance under the employer’s procedure and sought reinstatement.).

³⁰⁶ *Charles v. State Dep’t of Children and Families Dist. Nine*, 914 So. 2d 1, 2-4 (Fla. Dist. Ct. App. 2005) (The court applied the “invited defamation defense” where plaintiff repeatedly requested disclosure of dismissal reasons at a mandated private meeting in the presence of supervisory and management officials, citing the policy of encouraging employer frankness in providing a rationale for termination decisions.); *see also* *Merritt v. Detroit Mem’l Hosp.*, 265 N.W.2d 124, 125, 127 (Mich. Ct. App. 1978) (The consent defense extended to informal meetings with management personnel where plaintiff made no objection to the presence of union representatives.).

³⁰⁷ *McDermott v. Hughley*, 561 A.2d 1038, 1045-46 (Md. 1989) (A fact question existed as to whether plaintiff’s written or implied consent in fact was given to defendant-psychologist’s report to plaintiff’s supervisor – this was to be determined by whether plaintiff had “reason to know” or “anticipate” the report would be defamatory.). The case of *Borden, Inc. v. Wallace*, 570 S.W.2d 445 (Tex. Civ. App. 1978), is ambiguous as to whether consent is absolute or qualified. Initially, the court held that statements by defendant-employer’s personnel director to a polygraph operator hired to assess plaintiff-employee’s honesty were conditionally privileged and not abused by malice. *Id.* at 447-48. The court then assessed the issue of consent and said that plaintiff “consented” when “offered” the polygraph opportunity and “must have known” such a test could not be made without disclosure of the charges. *Id.* Accordingly, he “consented” to the disclosure of suspected dishonesty. *Id.* at 448. However, the court then stated that it found “no malice” in the telling and “no evil motive in complying with [plaintiff’s] consent or wish.” *Id.* Up to this point, consent seems to be qualified by a malice qualification. *Id.* However, the court then added: “In addition to the fact of no evidence [of malice], it is held that one may

seeking a reference³⁰⁸ has asked for a specification of reasons or

not recover the damage caused by a publication *invited* by him.” *Id.* The latter throw-in suggests an absolute privilege. However, since the court had previously found no malice as to either conditional privilege or to consent limited by malice, the “invited” language should be viewed as dicta. And see the parallel scenario and parallel ambiguity where a trucker, knowing of his poor stature with defendant rental agency, asked his employer’s dispatcher to check with defendant’s agent as to whether he could use its rental truck. *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334, 336-37 (Tex. Civ. App. 1979). Citing *Borden*, the court applied an “invited or consented”-“no recovery” rule, concluding plaintiff “certainly could have expected” the defamatory response. *Id.* at 337. Later, however, the court characterized the disclosure to the dispatcher as privileged but forfeited by “actual malice.” *Id.* at 339. Note that statements made to two other truckers and to a customer plaintiff worked for were not, however, invited or consented to. *Id.* at 337.

Note that the *McDermott* court also held that the administrative status conference at which the report was given was not quasi-judicial in nature in light of the factors used to assess the judicial proceedings privilege: “There was no legally cognizable tribunal administering the proceeding; there was no public hearing adversary in nature; no compellable witnesses were sworn or cross-examined; no reviewable opinion or analysis was generated; and, most significantly, [plaintiff] did not have the opportunity to present his side of the story.” *McDermott*, 561 A.2d at 1045. For other decisions rejecting absolute privilege for a purported judicial proceeding, see *infra* text accompanying note 531.

³⁰⁸ *Eitler v. St. Joseph Reg’l Med. Ctr.*, 789 N.E.2d 497, 510 (Ind. Ct. App. 2003) (Although plaintiff had voluntarily departed from defendant, she had “reason to know” she might be defamed based on her prior very negative relationship with the evaluating supervisor.) (express release of liability); see also *Cox v. Nasche*, 70 F.3d 1030, 1031-32 (9th Cir. 1995) (The court applied consent as an absolute defense, relying on *Smith*, *infra*, where plaintiff had signed a release/written waiver of liability form and where he had previously left employment because of his “poor working relationship” with co-defendant – the court cited the sensitive nature of plaintiff’s employment, aviation safety inspector with the FAA, as suggesting particular importance for the “free flow of information.”); *Litman v. Mass. Mut. Life Ins. Co.*, 739 F.2d 1549, 1560 (11th Cir. 1984) (A terminated life insurance agent who authorized a prospective employer to contact his former employer as to any positive or negative information “invited and consented” to such defamation.); *Patane v. Broadmoor Hotel, Inc.*, 708 P.2d 473, 474-76 (Colo. Ct. App. 1985) (An employment counselor’s conversations with plaintiff’s supervisor after her firing and pursuant to plaintiff’s written consent were absolutely privileged.); *Burdett v. Hines*, 87 So. 470, 471 (Miss. 1921) (A fired employee “got what he asked for” through the reference request and release); *Baker v. Bhajan*, 871 P.2d 374, 376-78 (N.M. 1994) (The court found that plaintiff’s broadly written consent/waiver to a state police-employer to contact defendant-former employer barred any defamation liability, noting the “sensitive” nature of the job and “compelling

a reference under circumstances where the potential (or lurking) plaintiff either “knows the exact language of the publication”³⁰⁹ or “has reason to know that it may be defamatory.”³¹⁰ In such scenarios it may well be thought legitimate that he or she “takes the risk” of its defamatory character and consents to the publication thereof.³¹¹ Even in such scenarios courts have not always given consent an unqualified effect,³¹² sanguine about the

policy considerations” supported full disclosure; while the record suggests that plaintiff had had problems with his employer – for example, he had quit after being denied a raise, this was not emphasized in the opinion.); *Smith v. Holley*, 827 S.W.2d 433, 435, 440 (Tex. Ct. App. 1992) (In issuing a written waiver/release, plaintiff had knowledge the former supervisors had unfavorable views as to her fitness.); *King v. Waring*, 170 Eng. Rep. 721, 722 (1804) (Where a terminated employee “procured” a prospective employer to get a letter from the former lawyer not with “a fair view of inquiring a character” but “upon which to ground” a libel action, no action for libel would be.). *But see* *Woodfield v. Providence Hosp.*, 779 A.2d 933, 935-39 (D.C. 2001) (In this case it is unclear whether plaintiff had “reason to know” under comment d that her release of a former employer to talk with her prospective employer would be defamatory. The court did not resolve the qualified versus absolute consent issue, finding in any event an absence of malice.).

³⁰⁹ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977). This was easily met where plaintiff or plaintiff’s lawyer had earlier received a letter listing reasons and later asked that they be published in a public setting. *See* *Lee v. Paulsen*, 539 P.2d 1080, 1081 (Ore. 1975). Some of the cases involved terminated employees using a grievance procedure provided by a collective bargaining agreement. *See, e.g.*, *Brockman v. Detroit Diesel Allison Div. of Gen. Motors Corp.*, 366 N.E.2d 1201, 1204-05 (Ind. Ct. App. 1977) (The alternative ground was lack of publication based on disclosure to plaintiff’s agent – that is, the union representative.). *See supra* note 303.

³¹⁰ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977) (However, it is “not necessary that the other *know* that the matter to the publication of which he consents is defamatory in character.”) (emphasis added). The “reason to know” threshold is a factual question. *See, e.g.*, *Exxon Corp. v. Shoene*, 508 A.2d 142, 146-47 (Md. Ct. Spec. App. 1986) (In light of a prior series of conversations about financial shortages without any imputation of misappropriation, plaintiff’s invitation to defendant’s agent to discuss the “problem” was not reasonably interpretable as knowing the statement would be defamatory – consequently, no consent was shown.).

³¹¹ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977).

³¹² *Dellorusso v. Monteiro*, 714 N.E.2d 362, 363-65 (Mass. App. Ct. 1999) (Adopting the “better view” of consent as a qualified privilege, the court applied the “honest findings” analysis to two communications on plaintiff’s behalf by the Department of Personnel Administration as to why she was not hired – the

economic duress or compulsion³¹³ that may be present in such situations and reflecting a calculated unwillingness to authorize knowing or reckless falsity.³¹⁴ However, where no such “reason

second, at least, was one were she had “reason to know” the reasons were defamatory. However, the court applied the submission-of-conduct-to-investigation rule and found a qualified privilege.); *see also* LeBaron v. Minn. Bd. of Pub. Def., 499 N.W.2d 39, 40, 42-43 (Minn. Ct. App. 1993) (A terminated public defender’s complaint to the state public defender alleging that his employer had summarily terminated him and was unfit did not evidence uncontradicted consent to the employer’s detailed response thereto despite its foreseeability; the court did accord defendant a compulsion by law defense in light of statutory mandates.); HARPER § 5:17, *supra* note 293, at 139 (Even in such cases – *e.g.*, a consent to inquiry to a previous employer who has discharged him or her – it is “hardly self-evident that plaintiff has expressed a willingness to be lied about.”); *id.* at 140 (“[A]t least some courts have been unwilling to allow the defendant to exploit plaintiff’s consent or invitation by maliciously publishing known falsehoods about him.”); Christopher v. Akin, 101 N.E. 971, 972 (Mass. 1913) (Defendant-employer’s disclosure at plaintiff’s request of his reasons for a diminished pay envelope in the presence of co-workers was “invited” and was not actionable because defendant had a good faith belief in its truth and was protecting his interest as employer.); Luzenberg v. O’Malley, 41 So. 41, 42, 44 (La. 1906) (Plaintiff’s demand for specification of the statement plaintiff was unfit for city attorney for “reasons too numerous to mention” did not constitute a request or consent to utter “malicious falsehoods.”); Beeler v. Jackson, 2 A. 916, 917-18 (Md. 1886) (Where an employer was asked to specify reasons within the presence of other discharged employees and the hearing of other employees, defendant’s good faith, non-malicious response was privileged.); Hopwood v. Thorn, 137 Eng. Rep. 522, 527-31 (1849) (A letter sent to plaintiff’s representative by defendant, a third party-libeler’s representative, as part of an investigation requested by plaintiff, was privileged absent “express malice.”).

³¹³ DOBBS, *supra* note 242, at 1156.

³¹⁴ *Id.* For example, in *Jerolamon v. Fairleigh Dickinson Univ.*, 488 A.2d 1064, 1067-68 (N.J. Super. Ct. App. Div. 1985), the court rejected the suggestion that plaintiff’s request for an investigation into allegedly fabricated reports made by defendants should bar the action. The court rejected the argument on two alternate grounds. *Id.* at 1067. One was evidence of publication *prior* to plaintiff’s request. *Id.* The second was only of public policy:

[W]hen one prepares a report knowing it contains fabricated and false information and files it knowing that in the course of business it is available to others, such person cannot complain, particularly after refusing to withdraw the report, that the defamed person insisted upon recourse to a higher official or appellate process to obtain correction or suppression of the report. Any other conclusion would

to know” is present, the Restatement (Second) of Torts³¹⁵ and several well-reasoned decisions³¹⁶ take the view that “one who agrees to submit his conduct to investigation knowing that its results will be published, [only] consents to the publication of the honest findings of the investigators”³¹⁷ – a type of qualified privilege³¹⁸ of consent.

Some of the submission-of-conduct-to-investigation cases

leave such persons at their peril never knowing when the defamatory report would be published to their detriment.

Id. at 1068 (emphases added).

³¹⁵ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977). The “honest findings” limitation with its rejection of absolutism is wholly inconsistent with a basic corollary of consent: “The consent is . . . confined to conduct that the plaintiff *knows* the other is engaging in with *the intent of invading the plaintiff’s interests.*” RESTATEMENT (SECOND) OF TORTS § 892A(1), cmt. a (1979) (emphases supplied); *see also id.*, § 892A(2), cmt. c (emphasizing that “effective” consent must be to “the *particular conduct* . . . or to substantially the same conduct” at issue) (emphasis added).

³¹⁶ *See infra* text accompanying note 364; *see also* Mandelblatt v. Perelman, 683 F. Supp. 379, 384 (S.D.N.Y. 1988). Citing comment d’s “honestly held” language, the court interpreted a consultancy agreement’s “good faith opinion” language as consenting only to good faith procedures. *Id.* This “good faith” standard applied to defamatory statements published to the corporate board during the meeting to determine whether to void the consultancy. *Id.* The court also rejected implied consent as to statements made at an earlier board meeting concerning potential for cause termination, finding that the “the rubric of consent” did not apply – defendant’s privilege was only qualified. *Id.* The court correctly concluded that *Hollowell v. Career Decisions, Inc.*, 298 N.W.2d 915 (Mich. Ct. App. 1980), was not controlling as New York law and that its implied consent aspect was dicta in light of the court’s finding of non-abused conditional privilege. *Mandelblatt*, 683 F. Supp. at 384 and n.2.

³¹⁷ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977) (emphases added). One court has defined “honest findings”/“honest belief” thusly: “An honest belief presupposes a *modicum of effort to verify* the facts, if ‘verification is practical and the matter is sufficiently weighty to call for safeguards against error.’” Dellorusso v. Monteiro, 714 N.E.2d 362, 365 (Mass. App. Ct. 1999) (quoting Mendez v. M.S. Walker, Inc., 528 N.E.2d 891, 893 (Mass. App. Ct. 1988)) (emphasis added). Note that this approach seems to define “honest” in terms of a negligence standard. Compare to this the different standards for abuse of a common law qualified privilege. *See infra* text accompanying notes 534-49.

³¹⁸ *See infra* text accompanying notes 319-62, 530, 534-49.

involve persons covered by collective bargaining contracts.³¹⁹ Arguably, in some such cases the enhanced stability of employment, together with federal labor policy, might justify unqualified consent as a matter of employment policy. For example, where a union member negotiated for and received a new position in a probationary status, one of several so negotiated, unqualified implied consent might be viewed as a fair and reasonable corollary of his or her fallback and protected status if the new position did not work out.³²⁰ Absent such, it is

³¹⁹ See, e.g., *Hellisen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341, 342-43, 345 (Mo. 1963) (The court equivocally applied a doctrine of consensual absolutism to a warning notification to the union pursuant to a collective bargaining agreement.). However, the court noted no factual argument had been made of “any *abuse* by defendant of the circumstances of consent, if that can be an issue.” *Id.* at 347. It also pregnantly noted that it did not have a scenario where defendant has “*obviously taken advantage of the situation to abuse and vilify the plaintiff, outside the ‘exigencies’ of the situation.*” *Id.* (emphases added). And compare *Pulliam v. Bond*, 406 S.W.2d 635, 641-43 (Mo. 1966) (The court applied only a qualified privilege to plaintiff’s consensual submission to discipline as a member of a railroad carmen’s lodge-union.). But see *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274, 280-83 (Ky. Ct. App. 1979) (finding that the collective bargaining arrangement was the exclusive remedy and that as a “virtually concurrent” corollary, federal labor law provided an absolute privilege). It was *only* in the latter context that the court discussed *Joftes v. Kaufman*, see *infra* note 360, and the issue of implied consent. *Louisville*, 586 S.W.2d at 282-83; see also *infra* note 321.

³²⁰ *Louisville*, 586 S.W.2d at 283 (Having gained several positions under the collective bargaining agreement and federal labor law, plaintiff “cannot accept the benefits and then claim inapplicability of the provisions he does not like.”). In a later Kentucky case, *Louisville* was cited and followed. *Caslin v. Gen. Elec. Co.*, 608 S.W.2d 69, 70 (Ky. Ct. App. 1980). The court in *Caslin* decided the matter on statute of limitations grounds, so the rest of its discussion is ambiguous dicta. *Id.* The court first said that plaintiff-attorney’s long-term employment evidenced that he knew periodical performance appraisal was a “condition of his employment.” *Id.* at 70. Such intra-company communications were, in the court’s view, “necessary to its functioning and, therefore, do not incur a liability to appellant.” *Id.* The court’s ambiguous dicta intimated that implied consensual absolutism barred the claim. The court then noted, “[i]n addition,” that the facts were covered by qualified privilege. *Id.* Next, the court cited and applied *Louisville*, even absent a collective bargaining contract — the “same rule” applied. *Id.* at 71. The *Caslin* court failed to note that the case relied on preeminently reflected federal labor policy and then misconstrued it as a qualified privilege unabused by malice. *Id.* In sum, *Caslin* has hit little precedential persuasiveness as an implied consensual absolutism case as to employee evaluations — in Kentucky or elsewhere. On the impact of federal labor policy, see *infra* text accompanying notes 321, 332, 351, 360, 381.

much less clear that all employees at will,³²¹ medical residents,³²² non-tenured faculty members³²³ or even church employees³²⁴ should be held to have unqualifiedly consented to *knowingly or recklessly false* employment evaluations. Although the dramatic “slippery slope”³²⁵ argument has been posed in such situations, a compelling argument has been made that such unqualified consent would leave a law firm associate

³²¹ *Farrington v. Bureau of Nat’l Affairs*, 596 A.2d 58, 59-60 (D.C. 1991). The court held that an absolute consent privilege applied to unfavorable workplace evaluation of a probationary employee required by a collective bargaining agreement to which plaintiff was a party. *Id.* *Farrington’s* absolutism status is very dubious. *See infra*; *see also infra* notes 327, 358. *Compare* *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 878-81 (D.C. 1998) (declining to find implied consent to defamation in the case of a law firm associate absent a contract or “some affirmative act of consent”). The *Wallace* court distinguished *Farrington*, *supra*, as “explicitly predicated” on a collective bargaining contract under which plaintiff conceded he had assented to the publication. *Id.* By contrast, plaintiff-Wallace denied any such consent and was an at will employee, making *Farrington* “different . . . in critical respects.” *Wallace*, 715 A.2d at 880. *Joftes v. Kaufman*, *see supra* note 360, was distinguished on parallel grounds. *Wallace*, 715 A.2d. at 880 n.13. The court distinguished *Kraft v. Alanson White Psychiatric Found.*, *see infra* note 360, as involving a contract between plaintiff and defendant. *Kraft* could be “profitably compared” with *Greenya v. George Washington University*, *see infra* note 382, where, absent such a contract, an educational constitution enjoyed only a qualified privilege. *Wallace*, 715 A.2d at 880-81 n.13.

³²² *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1073-74 (8th Cir. 1996) (A medical resident seeking board certification impliedly consented to intra-faculty discussions of her performance – the court referenced a booklet plaintiff received which discussed the need for “adequate, on-going evaluation.”).

³²³ *See infra* the discussion in *Baker v. Lafayette College* in text supported by notes 330-52. *Compare infra* the discussion of *Lester v. Powers* in text supported by note 353.

³²⁴ *Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914, 928-29 (W.D. Wis. 2002) (The court refused to find implied consent to a church’s dissemination of defamatory information to the church board of directors. The by-laws defendants relied on had not been made part of plaintiff’s “call” or incorporated expressly into his “Diploma of Vocation,” the document by which plaintiff accepted his “call.”).

³²⁵ *Wallace*, 715 A.2d at 879 (rejecting the argument made with “considerable force” that an associate attorney impliedly consented to *all* evaluations and should not be allowed to sue for defamation “simply because she disagrees with the employer’s appraisal”).

(or teacher or professor!) remediless against knowingly or recklessly false³²⁶ highly condemnatory charges such as embezzlement or molestation of a clerical employee's child³²⁷ (or "pervasive hostile environment" charges!) – an unconscionable scenario that flies in the face of a wholly adequate and long established tradition³²⁸ of qualified privilege in employment settings.³²⁹

In *Baker v. Lafayette College*,³³⁰ the leading decision

³²⁶ *Id.*

³²⁷ *Id.* at 879-80, 880 n.12. The court noted that it was "not obvious" that the employer in *Farrington* would have won had the disparagement been of such nature rather than the tepid defamatory statements therein, *i.e.*, that plaintiff was "careless and inaccurate" and his performance "unsatisfactory." *Id.* at 880 n.12.

³²⁸ *Id.* at 879 (citing an "extensive line" of local precedent). Of course, as the court noted, qualified privilege recognizes "the important of role of free and open intracompany communications and legitimate . . . management needs . . . communicated in good faith." *Id.* at 789 n.8 (quoting *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 262 (Ind. 1994)).

³²⁹ *Id.* at 879. This absolute privilege has been "explicitly rejected" by legal commentators and courts. Furthermore, it was implicitly rejected by courts adopting only a qualified privilege. *Id.* at 879-80, 880 n.10; *see infra* notes 343, 351, 358-62, 381-82. On the qualified privilege available to employers as to internal controversies, investigations and evaluations, *see* ELDER, DEFAMATION, *supra* note 75, § 2:23.

³³⁰ *Baker v. Lafayette Coll.*, 504 A.2d 247 (Pa. Super. Ct. 1986), *aff'd on other grounds*, 532 A.2d 399 (Pa. 1987). *Baker* was followed in *Bloch v. Temple Univ.*, 939 F. Supp. 387, 397 (E. D. Pa. 1996). In *Bloch*, the only defamation at issue involved defendant's republication before a faculty senate personnel committee of defamatory statements previously made during the earlier stages of the tenure process. *Id.* Other parts of the opinion made it clear that the faculty process followed denial of tenure by the board of trustees. This fact and the fact that a similarly contentious proceeding with denial of tenure at the council of deans level had resulted in a negotiated deferral with the new provost until the following year, *id.* at 390-92, makes it clear that plaintiff had at least "reason to know" of the defamatory matter when he sought review by the faculty senate. This is a much different scenario than *Baker*. The *Baker* Superior Court opinion was also followed in perfunctory fashion by the Third Circuit in a case involving defamation of a school nurse by her public employer supervisors. *McGreevy v. Stroup*, 413 F.3d 359, 371 (3d Cir. 2005). The court did not discuss the Pennsylvania Supreme Court's resolution on other grounds. *See infra* text accompanying note 337. Additionally, another opinion applied the consent defense as a two-sentence alternative rationale in a defamation case involving a substitute teacher during the pendency of *Baker's* appeal. *Sobel v. Wingard*, 531

adopting consensual absolutism in the university or college context, the two-member majority tried to fudge the “reason to know” versus “agrees to submit his conduct to evaluation” distinction in *rejecting* the “honest findings” limitation as inconsistent with the defense of consent.³³¹ The appellate court took an unjustified, egregiously cynical view of the academic hiring, promotion and tenure process (and, apparently, of employment generally since plaintiff was a non-reviewed contract employee) in concluding that faculty members *as a class* have a “reason to know” evaluations may be defamatory and “should not be heard to complain.”³³² The court ignored, of course, the more limited definition of “reason to know”³³³ prevailing generally in torts³³⁴ and adopted a generalized form

A.2d 520, 522 (Pa. Super. Ct. 1987). A later decision involving a university hospital employer quoted *Sobel's* abbreviated discussion of *Baker*. It then ambiguously cited the “narrow scope” of absolute privilege but also noted the “strong argument” for an absolute privilege (whether based partly on consent is unclear). It ultimately resolved the issue on the ground of conditional privilege. *See Miketic v. Baron*, 675 A.2d 324, 328-31 (Pa. Super. Ct. 1996).

³³¹ *Baker*, 504 A.2d at 250.

³³² *Id.* (“The person who agrees to submit his work to criticism or evaluation assumes the risk that the criticism may be unfavorable.”). The majority predominantly relied on *DeLuca v. Reader*, 323 A.2d 309 (Pa. Super. Ct. 1974). The court acknowledged that *DeLuca* is “commonly cited” as espousing an absolute consent privilege based in federal labor law policy favoring private handling of management-labor disputes. However, *DeLuca* could also be “fairly read” as “holding that where an employment contract mandates that certain written notices or statements be disseminated to interested persons involved in evaluating an employee’s record for the purposes of retention, promotion, discharge or discipline, an employee who is a party to the contract has consented to the publication of such statements, making them absolutely privileged.” *Baker*, 504 A.2d at 249.

³³³ *See supra* text accompanying notes 293, 308, 312; *infra* text accompanying notes 340-52.

³³⁴ RESTATEMENT (SECOND) OF TORTS § 12 (1965). “Reason to know” denotes the fact that “the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.” *Id.* The quite different term “should know” refers to the fact that this same person would “use reasonable diligence to *ascertain* the existence or non-existence of the fact in question” in performing his or her legal obligations. *Id.* cmt. a (emphasis added).

of assumption of risk that would subsume *all employees* and a host of others³³⁵ within its compass. Other courts have disagreed – employees, by the mere fact of being hired, do not have “reason to know” they will be defamed in employment evaluations.³³⁶

The *Baker* decision should be viewed with caution on a number of grounds. The Supreme Court of Pennsylvania affirmed on grounds other than consent.³³⁷ Maybe the court was motivated in part by the scathing and incisive analysis by the dissenter below, President Judge Spaeth.³³⁸ In his view the majority ignored both the facts and “settled law.”³³⁹ He rejected any suggestion that plaintiff had “reason to know” he might be *defamed in future evaluations* at the time of *hiring*.³⁴⁰ The record strongly contradicted any such finding.³⁴¹ Moreover, at

³³⁵ Compare the assumption of risk analysis that the Supreme Court has primarily relied on in distinguishing public persons in public concern cases from private persons in public concern cases and particularly its narrow interpretation thereof in cases involving mere participation in legal proceedings – without more, this does not suffice for “vortex” or “limited” public figure status. See *infra* text accompanying note 505. Of course, only the *qualified* constitutional privilege available in *New York Times* applies in such public person cases. See ELDER, DEFAMATION, *supra* note 75, § 5:7. Note that the Court has repeatedly *rejected* generalized voluntariness/course of conduct as sufficient for public figuredom for First Amendment purposes. *Id.* at 5-62 to 5-65; *id.* at § 5:12.

³³⁶ See *supra* text supported by note 329; *infra* text supported by notes 340-49, 351, 358, 364, 381-82.

³³⁷ *Baker v. Lafayette Coll.*, 532 A.2d 399, 402-03 (Pa. 1987) (non-defamatory and/or opinion).

³³⁸ *Baker v. Lafayette Coll.*, 504 A.2d 247, 257-73 (Pa. Super. Ct. 1986) (Spaeth, P.J., dissenting).

³³⁹ *Id.* at 257, 267.

³⁴⁰ *Id.* at 268 n.8.

³⁴¹ *Id.* The practical ramifications of any other conclusion (and of the majority perspective) are mind-boggling. Imagine the implications: new faculty hires are on notice that they should expect, indeed have *reason to know*, that they may be defamed! Such an assumption is contrary to the ethos of American law schools, and, I would suggest, its prevailing customs, traditions and accreditation standards. See *supra* text accompanying notes 56-60, 76-77, 85 (detailing measures showing Chase’s commitment to “creating a supportive and stimulating environment” for non-tenured faculty); see also AM. BAR ASS’N,

the time plaintiff initiated the appeal, he had been denied access to the “lengthy and very negative”³⁴² departmental chair’s evaluations and to the even more damning (because enshrouded with impartiality) outside evaluations.³⁴³ In other words, plaintiff lacked “reason to know” they might be defamatory.³⁴⁴ In addition, the majority’s purported inconsistency between absolute consent and the “honest findings” language in comment 1 ignored the self-evident fact that comment 1 envisioned *two differing scenarios*:³⁴⁵ consent with “reason to know” with its traditional rationale disallowing consent to invite, procure or subsidize a lawsuit;³⁴⁶ consent without such “reason to know” but when the consenter submits his or her conduct to investigation with knowledge that evaluative

2008-2009 STANDARDS FOR APPROVAL OF LAW SCHOOLS, standards 402(a)(3), 404(a)(1), (2), (3), 405(a), (b), *available at* <http://www.abanet.org/legaled/standards/standards.html> (last visited Mar. 22, 2009); AM. BAR ASS’N, 2007-2008 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 30, 33 (2007), *available at* <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/2007-08%20Standards%20book.pdf> (last visited Mar. 22, 2009); AALS Sections 6-1(a)(b)(i)-(iv), 6-2(a), 6-4(a), (c), 6-5(a)-(c), 6-6(a)-(e), 6-8(a)(ii), 6-9, 6-10(a), (b); Ass’n of American Association 2008 Handbook, at 34-37. I would suggest the national norm is constructive (largely gentle) collegiality, not the intellectually dishonest scenario that appears to have prevailed in *Baker* at Lafayette College. *See infra* text accompanying notes 343, 349.

³⁴² *Baker*, 504 A.2d at 259 (Spaeth, P.J., dissenting).

³⁴³ *Id.* at 266-67. President Judge Spaeth would have accorded both such conditionally privileged status. *Id.* at 267 n.5, 272-73. However, he found substantial evidence of abuse – a knowing, reckless or negligent disregard of falsity. *Id.* at 272-73. Compare *supra* text accompanying note 317. Note that only a probable minority still follows a negligence-based forfeiture standard in qualified privilege cases. *See infra* text accompanying notes 532-49. For a brief critical discussion, *see id.*

³⁴⁴ *Baker*, 504 A.2d at 259-60, 262, 264, 268, 268 n.7, 270-71 (Spaeth, P.J., dissenting).

³⁴⁵ *Id.* at 269.

³⁴⁶ *Id.* (“[T]he basis, or rationale, of the principle that consent to publication of a defamatory statement will preclude recovery for defamation is that one may not, *knowing or having reason to know* that a statement is defamatory, *at the same time consent to the publication and seek damages because of the publication.*”) (emphases added).

statements may be published.³⁴⁷ In the latter setting the “honest findings” limitation applied.³⁴⁸ The record contained pervasive evidence that a jury could find violated that criterion.³⁴⁹ Lastly, the extensive precedent analyzed, both from Pennsylvania and elsewhere, either involved “reason to know” scenarios,³⁵⁰ a qualified consent privilege,³⁵¹ or were otherwise questionable.³⁵²

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 258-65; *id.* at 268-69 (summarizing the record); *id.* at 272-73 (summarizing evidence of abuse of a common law privilege).

³⁵⁰ *Baker*, 504 A.2d at 269-71.

³⁵¹ Judge Spaeth correctly found *DeLuca*, see *supra* note 332, the major decision relied on by the majority, inapposite for several reasons. First, as the majority conceded, it could be read as applying the consent defense solely in its factual context to foster federal labor law policies. Second, it involved a “reason to know” situation. Third, its emphasis on the letter therein not being “unusually published” and its absence-of-malice conclusion evidenced that *DeLuca*, whatever it said about absolute privilege, applied *qualified* principle concepts. *Baker v. Lafayette Coll.*, 504 A.2d 247, 270-71 (Pa. Super. Ct. 1986) (Spaeth, P.J., dissenting). The judge’s discussion of the “unusually published” aspect would appear to be in error. That discussion occurred in the context of determining the scope of coverage of the collective bargaining contract and the persons to be notified. See *DeLuca v. Reader* 323 A.2d 309, 312 (Pa. Super. Ct. 1974). However, Judge Spaeth appears correct about the case otherwise being a qualified privilege case, not an absolute privilege consent case. See *id.* at 313. Judge Spaeth similarly viewed *Dominguez v. Babcock*, involving a defamation action by a departmental head against departmental faculty, as a qualified privilege case. 696 P.2d 338 (Colo. Ct. App. 1984). Although a fact issue on the consent issue existed, summary judgment was upheld based on lack of evidence of abuse of qualified privilege. The court of appeals framed factual dispute was whether plaintiff’s request was an “honest inquiry or investigation” to determine “the existence, source, content or meaning” of a defamation under the RESTATEMENT (SECOND) OF TORTS § 584 (1977) or was an investigation for the purpose of inviting, defamation to “decoy” the publisher into litigation, to which the absolute defense would apply. *Dominguez*, 696 P.2d at 341-42; *Baker*, 504 A.2d at 271-72 (Spaeth, P.J., dissenting). The Colorado Supreme Court later affirmed the court of appeals holding that even if no consent existed, defendants had not been shown to have abused their common law privilege by knowing or reckless falsity. *Dominguez v. Babcock*, 727 P.2d 362, 363, 365-67 (Colo. 1986). However, the Supreme Court properly reframed the issue of consent, noting that the absolute defense rule of section 583 and comment d, illustration 2, applied in cases of requested publication of reasons for dismissal. It then held that a question of fact existed as to whether a request for *substantiation* of charges of use of state property for personal use was limited thereto or extended

In sum, the horrific mistreatment of Professor Baker evidenced by President Judge Spaeth's extended discussion of the record compellingly demonstrates the need for the "honest findings" limitation in non-"reason to know" cases.

Another leading decision declined to apply the consent doctrine based on a faculty member's submission to the promotion, tenure process, noting that absolute privilege is strictly limited to situations where "unconstrained speech is of the highest importance."³⁵³ A parallel decision, *Tacka v. Georgetown University*,³⁵⁴ took a decidedly skeptical view of the unqualified consent argument in the tenure context. While the argument of implied consensual absolutism based on

to other defamatory items in the defamatory response. *Id.* at 365. It also held that an issue of fact still existed as to whether "such a request constituted consent" to the memorandum. The court had earlier quoted the section 892(1) definition of "consent" as "willingness in fact for conduct to occur." There may have also been a related issue of whether this was more a request for "accountability . . . or retraction" – words used in plaintiff's written reply to the original letter. *Id.* at 364-65. Lastly, the court concluded that defendants' response contained not only requested *substantiation* for its earlier memo but *additional allegations*. Consent applied "only to the extent of the consent." *Id.* at 365.

³⁵² The majority's reliance on *Gengler v. Phelps* was also deemed unpersuasive. 589 P.2d 1056 (N.M. 1978) Judge Spaeth noted that it was unclear whether plaintiff therein – in expressly consenting to the contact in an employment application – actually knew what type of reference she was authorizing her discharging employer to provide to a prospective employer, but that the conclusion "clearly" was "based on public policy." "In the business and professional world, public policy necessitates the disclosure of an employee's prior services when inquiry is made with the consent of the employee." *Baker*, 504 A.2d at 272 (Spaeth, P.J., dissenting) (quoting *Gengler*, 589 P.2d at 1058). Judge Spaeth correctly suggests this non-specific generality in adopting an absolute consent/immunity "should not be taken literally," as it would *annihilate* the absolute/qualified privilege dichotomy: "[A]n employer may well have a privilege to make statements about an employee's prior services, but this privilege is not absolute; it is qualified, and as such, may be lost if abused." *Baker*, 504 A.2d at 272.

³⁵³ *Lester v. Powers*, 596 A.2d 65, 69, 69 n.6 (Me. 1991).

³⁵⁴ *Tacka, v. Georgetown Univ.*, 193 F. Supp. 2d 43, 50-54 (D.D.C. 2001). In a short footnote the court noted that the District of Columbia did not recognize the absolute privilege based on the intra-corporate non-publication doctrine. *Id.* at 49 n.2. For a strong critique of this indefensible legal fiction (a corporation communicating with itself through employees with a need to know does not "publish" to a third party), see ELDER, DEFAMATION, *supra* note 75, § 1:21.

contractual incorporation of the university's faculty handbook was "superficially compelling,"³⁵⁵ the court rejected such and required an *explicit affirmative act*³⁵⁶ before it gave due credence to unqualified consent, abjuring any arguable "absolute license"³⁵⁷ to publish defamatory statement absent such. Where consent was implicit (even though based in contract) and a "serious charge" such as plagiarism was made,³⁵⁸ defendant-university's privilege was qualified, not absolute.³⁵⁹

Even where implicit consensual absolutism has been adopted or not rejected in the academic context, the courts have

³⁵⁵ *Tacka*, 193 F. Supp. 2d at 51.

³⁵⁶ *Id.* at 52. The court noted that defendant's claim of absolute privilege would have been "much stronger" had plaintiff been suing for libel regarding publication to the University's Research Integrity Committee, which he had specifically requested but the University had refused. *Id.* (citing the illustration of a request for reasons by a dismissed teacher line of precedent); *see infra* text accompanying notes 359, 362.

³⁵⁷ *Tacka*, 193 F. Supp. 2d at 52; *see also* *Marsh v. Hollander*, 339 F. Supp. 2d 1, 12-13 (D.D.C. 2004) (interpreting District of Columbia precedent, including *Tacka*, as deviating from traditional absolutism in consent cases and adopting a "more nuanced" view under the "Wallace paradigm" but finding the latter inapplicable in a case involving a non-employer-employee case based on a formal agreement for resolving accounting issues between partners dissolving a partnership).

³⁵⁸ *Tacka*, 193 F. Supp. 2d at 52. The court interpreted *Wallace v. Skadden, Arps*, as so limiting *Farrington v. Bureau of Nat'l. Affairs*. *See* discussions *supra* notes 321, 327. *Farrington's* so-called "absolute" privilege "carried little sting" since the alleged defamation was "trivial." *Tacka*, 193 F. Supp. 2d at 51. *Wallace* gave an "alternative reading" of *Farrington* and its progeny, *i.e.*, a view "more akin to a qualified privilege . . ." *Id.* The court noted that *Wallace* had given both *Kraft v. Alanson White Psychiatric Found.* and *Joftes v. Kaufman* narrow constructions as qualified in nature. *Tacka*, 193 F. Supp. 2d at 51-52; *see* cases cited *infra* note 360. The court noted that the District of Columbia had refrained from resolving the *Wallace* versus *Farrington* controversy, rendering the issue "unclear." *Id.* at 51 n.7.

³⁵⁹ *Tacka*, 193 F. Supp. 2d at 52-53. This qualified privilege was lost where defendant published "outside normal channels," the publication was "otherwise excessive," or published with "malicious intent." *Id.* The "outside normal channels" referred to circumvention of the alleged exclusive jurisdiction of the Research Integrity Committee as to plagiarism charges. *Id.* at 53, 53 n.9; *see infra* text accompanying note 362. A parallel claim arose as to abuse of the University's common interest qualified privilege, together with other allegations of excessive publication and malice. *Tacka*, 193 F. Supp. 2d at 53-54.

generally strictly limited its application. It would be limited to “communications essential” to the evaluative process and strictly limited to those with a “shared collegial responsibility.”³⁶⁰ It was held not to apply to communications among university administrators outside the formal evaluative process required by the incorporated handbook³⁶¹ or even to

³⁶⁰ *Kraft v. Alanson White Psychiatric Found.*, 498 A.2d 1145, 1148-50 (D.C. 1985) (applying absolute consent to plaintiff’s contractual submission to evaluation by the institute’s faculty – the terms of the contract were found in the institute’s bulletin). The court’s analysis is defective. It relied almost exclusively on *Joftes v. Kaufman*, 324 F. Supp. 660 (D.D.C. 1971), a collective bargaining scenario later characterized as a “critical” difference, *see supra* note 321, and also interpreted *Joftes* as an absolute consent case. *Kraft*, 498 A.2d at 1149-50. A close analysis demonstrates that this interpretation is in error. Although *Joftes* terms itself an absolute consent case, several factors render that conclusion highly dubious. 324 F. Supp. at 663. The court followed its initial motive-is-irrelevant reference with a lengthy discussion of malice, finding any evidence thereof “exceedingly thin.” *Id.* at 662, 662 n.1. The court also relied on the comment “honest findings” language in the original RESTATEMENT OF TORTS §583 cmt. d (1938) in concluding that plaintiff had consented to written dismissal reasons via his membership in the staff association. *Joftes*, 324 F. Supp. at 663. Lastly, and most importantly, *Joftes*’ emphasis seems to have been based on the requirements of federal labor law, with the court concluding that allowing suit where a collective bargaining grievance process existed would be “subversive” of such processes. *Id.* at 663-64. It distinguished on this ground *Linn v. United Plant Guard Workers* which adopted the qualified *New York Times* rule in the context of an organizing campaign where no remedy was provided under federal labor law. *Linn*, 383 U.S. 53 (1966). A later federal case interpreted both *Kraft* and *Joftes* as qualified privilege cases post-Wallace. *Tacka*, 193 F. Supp. 2d at 51-52. Note that an even later federal decision, citing District of Columbia precedent, suggested collective bargaining contexts evidence a “stronger inference of consent.” *Marsh*, 339 F. Supp. 2d at 12-13; *see also* *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W. 2d 274, 281-83 (Ky. Ct. App. 1979) (*see* discussion *supra* note 320). Although it has been suggested the *Joftes* court’s no “excessive publication” analysis also suggested a qualified privilege, this would appear wrong. That discussion occurred in the context of the boundaries of the consent given under the collective bargaining contract. *See supra* text accompanying note 351.

³⁶¹ *Baker v. Lafayette Coll.*, 504 A.2d 247, 250-51 (Pa. Super. Ct. 1986). The court affirmed the trial court’s conclusion that a memo from the department chair to the provost regarding plaintiff’s performance was only conditionally privileged since it was not a formal assessment required by the faculty handbook. The court relied “primarily” on the absence of defamatory content. *Id.* at 251; *id.* at 267 n.5 (Spaeth, P.J., dissenting). The court also held that factual issues were presented as to a third count, involving statements of an outside evaluator. Although such evaluations were expressly contemplated by the handbook where issues of “special competence” were at issue, it was unclear

communications to departmental tenured faculty or within the otherwise normal and appropriate university hierarchy where a specific, exclusive investigative and decision-making process was circumvented.³⁶²

In light of the above, there appears to be little justification for a claim that either Chase's participation or that of individual faculty constituted *unqualified* consent by *individual* faculty members to the anonymous source defamation incorporated into the site evaluation and subsequent ABA and AALS reports. Given the overall improving environment at Chase,³⁶³ there was no "reason to know" or "anticipate"³⁶⁴ these gross defamations.

whether they were within the plaintiff's scope of consent under the facts. The evaluation took place *after* a decision not to reappoint had been made. Accordingly, the report was not a published for collegiate use in making the reappointment decision. Furthermore, plaintiff alleged that he and the provost had agreed that he would not appeal if no further performance evaluations were done. This raised a question as to whether this subsequent arrangement revoked any earlier implied consent based on the handbook. *Id.* at 251. Compare Presiding Judge Spaeth's view — both evaluations were qualifiedly privileged. *Id.* at 267 n.5 (Spaeth, P.J., dissenting).

³⁶² *Tacka*, 193 F. Supp. 2d at 52, 52 n.8 (Even if District of Columbia law adopted implied consensual absolutism, a question of fact existed as to whether defendant had demonstrated compliance therewith, *i.e.*, whether either the faculty tenure review committee or university administration had a "legitimate interest" in getting and assessing an outside evaluator's evaluation of "untested allegations" of plagiarism, rather than only "substantiated complaints" *after* the Research Integrity Committee, the entity with "legitimate interest" as to "untested allegations," had done its work.).

³⁶³ See *supra* notes 48, 80, 82, 117; *infra* text accompanying note 517.

³⁶⁴ *Teichner v. Bellan*, 181 N.Y.S.2d 842, 846 (N.Y. App. Div. 1959) (Plaintiff-physician who referred a bill for collection had "no reason to anticipate" the dunning letter would precipitate a defamatory response — absent such a "reason to anticipate," plaintiff did not impliedly assume such risk of defamation. Only a qualified privilege defensible by malice applied.); see also *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336, 340 (Tex. App. 2004) (Permission to do a story about a physical injury to plaintiff-son at defendant's athletic arena gave it no "reason to believe" defendant would accuse the son of vandalism.); *Nelson v. Whitten*, 272 F. 135, 136 (E.D.N.Y. 1921) (A request for a reference from an employer to a prospective employer did not, without more, "invite defendant to make public anything false and defamatory."); HARPER, *supra* note 293, § 5.17, at 137 (2nd ed. 1986) ("[O]f course, if the plaintiff had no reason to suppose that any publication that he invites would be defamatory, he is not barred from recovery.").

Indeed, they were shockingly unforeseen in light of the absence of any reference to such concerns in the detailed questionnaires answered, during the multiple brown bags antecedent to the adoption of the self-study, or during the voting approval of the final version. Was there nonetheless absolute consent under the agrees-to-submit-his (or her) -conduct-to-investigation line of cases? Doubtful . . . in the extreme. As indicated above, the academic setting cases seem to narrowly limit it to formal promotion/tenure evaluations and hierarchical determinations *within* the university hierarchy.³⁶⁵ External processes *outside* those strictly envisioned by the university handbook would likely be accorded at most, only a qualified privilege.³⁶⁶

On superficial glance several lines of cases might seem to support a broader implied consensual absolutism. All are eminently distinguishable, however. Commentators have occasionally cited³⁶⁷ intra-church disciplinary cases.³⁶⁸ However, the latter are inextricably if not exclusively based on First Amendment Establishment Clause considerations.³⁶⁹ No

³⁶⁵ See *supra* text accompanying notes 360-62.

³⁶⁶ See *supra* text accompanying notes 328-29, 358-62; *infra* text accompanying notes 380-82.

³⁶⁷ DOBBS, *supra* note 242, at 1156-57; HARPER, *supra* note 293, § 5:17, n.2, at 136 (Supp. 2006).

³⁶⁸ *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 935-38 (Mass. 2002) (noting that the First Amendment prohibition against court review of internal church disciplinary processes against an Episcopal priest would be rendered “meaningless” if defamation proceedings were allowed); *O’Connor v. Diocese of Honolulu*, 885 P.2d 361, 362-71 (Haw. 1994) (applying the “ecclesiastical abstention” doctrine to excommunication of plaintiff-lay person-editor of an alternative Catholic newspaper). Even in such a context, the absolute constitutional protection would be inapplicable to publications “outside that context.” *Hiles*, 773 N.E.2d. at 937 n.12.

³⁶⁹ *Id.* But compare *Remington v. Congdon*, 19 Mass. (2 Pick.) 310, 313-16 (1824), cited in support of section 583, illus. 3, see RESTATEMENT (SECOND) OF TORTS (1981), where the court adopted only a qualified principle as to plaintiff’s express and voluntary submission to church discipline — evidence of lack of probable cause, that the charge was a pretense, or that it was maliciously motivated would have forfeited the privilege, if shown. *Remington*, 19 Mass. at 315. For a modern case, see *Hester v. Barnett*, 723 S.W.2d 544, 559-60 (Mo. Ct. App. 1987) (Church members, as a matter of contract, “presumptively consented to religiously motivated discipline practiced in good faith,” *i.e.*, not for “intention to injure” plaintiffs. The only exception was where the

comparable parallel First Amendment freedom of expression concerns compellingly warrants judicial abstention for cases outside the church arena.³⁷⁰ A couple of other decisions involve the particular plaintiff's membership in and submission to discipline by a membership³⁷¹ or licensing association³⁷² with

defamation was purely a matter of religious belief, where the First Amendment would bar liability.). For other cases involving a qualified privilege as to church disciplinary matters, see ELDER, DEFAMATION, *supra* note 75, § 2:24, at 173, 173 nn.79-80. On the First Amendment issues, see *id.* § 4:7.

³⁷⁰ Note that the Supreme Court has used a type of assumption of risk analysis only for purposes of determining whether the qualified First Amendment *New York Times* doctrine or lower *Gertz* standard should apply and has declined to find it met where plaintiff's participation was compelled or coerced, as in the case of mere involvement in legal proceedings. See *supra* note 335; *infra* text accompanying note 505.

³⁷¹ *Rosenberg v. Am. Bowling Cong.*, 589 F. Supp. 547, 551-52 (M.D. Fla. 1984) (holding that as part of plaintiff's membership in defendant organization, he specifically agreed to be bound by discipline in accordance with its rules and notification to the local bowling association, the particular libel complained of). This defense was deemed "absolute" but specifically relied on § 583 cmt. d, illus. 3. See *infra* text accompanying note 372. The "absolute" consent defense was one of *three* alternative holdings — truth and qualified privilege were the others. *Rosenberg*, 589 F. Supp. at 551-52. The true crux of the case may well be Florida's "long established rule" giving membership organizations sole authority over membership determinations and refusal to allow such to be second-guessed under the "guise" of a libel suit. *Id.* at 550-52.

³⁷² RESTATEMENT (SECOND) OF TORTS §583 cmt. d, illus. 3 (1977) ("A, a horse trainer, holds a license granted by the B Racing Association, a rule of which empowers the stewards of the club to suspend licenses, to inquire into and deal with matters concerning racing, and to publish the result in a racing magazine. The stewards, upon a *fair and honest investigation* of a particular race, publish their findings in the racing magazine, stating that the horse that A trained had been drugged and that A's license has been withdrawn. A has *consented* to the publication.") (emphases added). This illustration is based on *Chapman v. Lord Ellesmere*, [1932] 2 K.B. 431. See RESTATEMENT (SECOND) OF TORTS App. Vol. 5 496 (1981). Clearly, the publication of the Jockey Club's determination — which plaintiff consented to as trainer — was treated as one of *qualified* privilege. *Chapman*, [1932] K.B. at 450-52 (Hanworth, M.R.) (The privilege was limited by a requirement that the tribunal have "acted bonafide and honestly intending" that its publication reflect its decision — there was no showing of malice.); *id.* at 473-74 (Romer, L.J.) (rejecting *volenti non fit injuria*, the judge accorded defendants a qualified privilege based on plaintiff-trainer's assent to use of the Racing Calendar to inform the racing public; no malice was demonstrated in light of counsel's concession of plaintiff's counsel he was not questioning defendant's "honesty or honour"). One judge applied *volenti non*

the concomitant publicity attendant thereto. However, these cases appear to only support the “honest findings”³⁷³ rule of the Restatement (Second) of Torts. In any event, these precedents are wholly inapposite as to individual faculty members who have no direct contractual or licensing relationship to the ABA and AALS.³⁷⁴ Lastly, an exceptionally dubious federal decision³⁷⁵ found disproportionately broad implied consent by plaintiff-developers who sought approvals by a public agency and board. They were held to have impliedly consented “by virtue of their public application.”³⁷⁶

fit injuria and a qualified privilege in light of the parties’ choice of the Racing Calendar as the informative medium. *Id.* at 463-69 (Slessor, L.J.). Although an absence of malice was found, this was at the end of the judge’s privilege discussion. *Id.* at 469.

³⁷³ See *supra* text accompanying notes 315-18, 338-52, 364, 371-72.

³⁷⁴ Neither the law school’s relationships with the ABA and AALS – a necessity in the modern era, see *infra* text accompanying notes 685-93 – or an individual faculty member’s ABA or AALS membership or section participation bears *any* resemblance to the submission to disciplinary rules/policies scenarios involved in the *Rosenberg* and *Chapman* scenarios. *Supra* notes 371-72. Compare the cases involving bar complaints involving attorneys, where courts have generally applied the absolute judicial proceedings privilege in light of the quasi-judicial nature of the proceeding and the panoply of protections accorded. See *infra* text accompanying note 531.

³⁷⁵ *Walters v. Linhof*, 559 F. Supp. 1231, 1233 (D. Colo. 1983).

³⁷⁶ *Id.* at 1237. The dubious breadth of this case is well-illustrated by the interpretation of a leading commentator, who cites *Walters* as a “typical modern consent situation[]” involving “plaintiff’s instigation of or participation in investigations, hearings, or other proceedings in which findings, results, or commentary will be published” SMOLLA, *supra* note 242, § 8-4.4. The *Walters* decision is poorly reasoned on a number of grounds. First, based on the limited facts stated, it is not at all clear that the court’s conclusion – plaintiffs’ “participation” in the proceeding to rezone was “significant enough” to make them public figures – is defensible. See *infra* text accompanying note 505; cases cited in ELDER, DEFAMATION, *supra* note 75, § 5.15 (5-108 in particular) (on mere involvement in a legal proceeding). Second, the court seems to broadly treat invited comments by a county land use department to plaintiffs’ rezoning request as statements absolutely privileged as part of a proceeding quasi-judicial in nature. *Walters*, 559 F. Supp. at 1237. Little in the record suggests that these proceedings meet the requirements for absolutely privileged *witness* statements submitted in quasi-judicial proceedings. See *supra* notes 307, 374; *infra* text accompanying note 531; ELDER, DEFAMATION, *supra* note 75, §§ 2:5, 2:8. In any event, there is no justification for extending

In sum, compelling public policy considerations weigh heavily against a finding of implied consensual absolutism by individual faculty members defamed in the ABA/AALS accreditation renewal/membership evaluation context. The traditional cryptic rationale for *volenti not fit injuria* – i.e., that the consent scenario is “outside the usual rationale”³⁷⁷ for balancing interests in absolute versus qualified privilege because plaintiff “invites”³⁷⁸ the defamation – simply doesn’t apply. Not only does a faculty member not “invite” such defamation, as the abuse of Chase male faculty amply and aptly evidences, he or she has “no effective control”³⁷⁹ over such, a *sine qua non* for

such to a letter to the editor! *See id.* Indeed, the court confuses *participation in* and *commentary on* such proceedings – “[T]o hold otherwise would ‘chill’ First Amendment rights to express an opinion and publicly comment on . . .” such proceedings. *Walters*, 559 F. Supp. at 1237. Third, the court’s first three holdings – that the statements were not defamatory, and were absolutely privileged and qualifiedly privileged, *id.* at 1235-37 – likely render its fourth purported ground of non-liability, i.e., consent, dicta. Fourth, even if not dicta but a fourth alternative holding, the court’s perfunctory analysis is not persuasive. It is difficult to find *true* implied consent via comments and participation by the public solicited by public agencies *after* plaintiffs had applied for rezoning. Even if plaintiffs’ participation included more than mere participation in a legal proceeding, any “invited public comment” should (at most) go to their status as vortex public persons. *See infra* text accompanying note 505. To find “consent is constructive by virtue of [plaintiffs’] . . . application” alone has mind-boggling potential: every participant in any legal or other public proceeding or public meeting which *might* “invite public comment” or response (or maybe even reportage) would deprive the participant of *any* protection for injury to reputation even though the First Amendment would treat them as (at most) public figures. *See Walters*, 559 F. Supp. at 1237. And, of course, if “consented” to, any media republisher would be likewise privileged. RESTATEMENT (SECOND) OF TORTS § 612(1), § 612 cmts. a, d (1977); ELDER, DEFAMATION, *supra* note 75, § 2:29; *see also infra* text supported by note 414.

³⁷⁷ Lee v. Paulsen, 539 P.2d 1079, 1080 (Or. 1975) (quoting 1 HARPER AND JAMES, THE LAW OF TORTS § 5:17, 400 (1956); HARPER, *supra* note 293, § 5:17, at 139.

³⁷⁸ *See supra* text accompanying notes 291-302.

³⁷⁹ Van-Go Transp. Co. v. New York City Bd. of Educ., 971 F. Supp. 90, 164 (E.D.N.Y. 1997). In this case the court found no implied consent where plaintiff-corporate contractors were required to submit (under pains of being barred from competing and subjected to criminal prosecution) to entry of unsubstantiated claims of bribery into the city’s Vendex system, which then became available to all city agencies. Plaintiff had no opportunity to refuse.

Van-Go, 971 F. Supp. at 95-97, 101-04. In applying the “compelled self-publication” rule, the court eloquently said a contractor’s interest in competing for contracts with government “does not strip [it] . . . of all right any more than it can cloak irrational, arbitrary, or malicious governmental action with total immunity.” *Id.* at 104. On “compelled self-publication” generally, see ELDER, DEFAMATION, *supra* note 75, § 1:25. Even in “reason to know” situations, the consent may not be truly voluntary. See, e.g., *Wallace v. Skadden, Arps*, 715 A.2d 873, 881, 881 n.15 (D.C. 1998) (regarding the “emphatic allegations” of the lawyer-associate as to the employer’s argument that she “affirmatively consented” to statements claimed to be libelous). In *Wallace*, the lawyer-associate was directed to a “‘follow-up’ review” without notice until entering the room, where she was then “confronted with a *fait accompli*” and feared immediate termination. Then, and only then, did she ask for other evaluations by attorneys she had worked with — and later reduced such to writing “*after learning that she was being railroaded by a sham evaluation.*” *Id.* at 881-82 n.15. Plaintiff alleged that this “tremendous duress” resulted in these “defensive, not free or voluntary” requests. Under such circumstances, “[t]o say that [plaintiff] consented to the evaluation is like saying that a woman who asks her rapist to put on a condom, consents to the rape. [Plaintiff], like the woman being raped, did the only thing she could to lessen the bad effects of a devastating event about which she had no choice.” *Id.* The court did not resolve the “she only got what she asked for” consent defense or the voluntariness issue, as at least two scenarios did not fall through the employee evaluation request scenario — the tendered statement a client had demanded plaintiff’s withdrawal from its affairs and deactivation of her access key, which portrayed her to co-employees as having engaged in “immoral or disgraceful” conduct. *Id.* at 881-82, 882 n.16; see also RESTATEMENT (SECOND) OF TORTS § 892B(3) (1979) (“Consent is not effective if it is given under duress.”). The comments define duress as “*constraint of another’s will by which he is compelled to give consent when he is not in reality willing to do so.*” *Id.* cmt. j (emphases added). The comments do not endeavor to define in detail the categories of duress covered, while indicating that the cases to date involve types of duress “quite drastic in their nature and that clearly and immediately amount to an overpowering of the will.” *Id.* The comments make it clear that the exemplars cited were not the outer limits. It was not even clear that an “ordinary firmness”/“reasonable person test” applies: “Age, sex, mental capacity, *the relation of the parties and antecedent circumstances* all may be significant.” *Id.* (emphases added).

Note that even if the school or its dean may be deemed to have somehow voluntarily consented to some version of consent to defamation, it is not at all clear that such consent would apply to any and all subalterns — any inference of consent by them would be a legal fiction. Compare the discussion in Brief on Behalf of the Am. Ass’n of Law Schs.; The Am. Council on Educ.; and The Council on Postsecondary Accreditation as *Amici Curiae* at 40, *Avins v. White*, 627 F.2d 637 (3d Cir. 1980) (No. 79-1747-8) [hereinafter *Am. Ass’n of Law Schs. Brief*] (noting “interesting questions” as to consent of “staff members,” which were not before the court, as the founding dean had invited the evaluation). The question of true and voluntary consent in the context of the ABA raises additional questions even as to a school seeking initial accreditation or

effective “consent.”³⁸⁰ Moreover, any other result would

continued accreditation. As the Supreme Court has suggested in its libel jurisprudence, mere participants in legal proceedings are not vortex or limited purpose public figures – whether as criminal defendants (*Wolson v. Reader's Digest Ass'n*), an initiating participant in a divorce proceeding, a proceeding in which the state exerts *monopoly* power (*Time, Inc. v. Firestone*), or as civil litigants (*Gertz v. Robert Welch, Inc.*). See *infra* note 505. The scenario involving a law school seeking initial or continuing accreditation from the ABA, a prerequisite to institutional viability because of its near monopoly power over access to the bar exam, see *infra* text accompanying notes 686, 693, 702, is little more than indirect governmental coercion of extraordinary severity. Indeed, this is quite different from the voluntary licensing associations envisioned by RESTATEMENT (SECOND) OF TORTS § 583, illus. 3. In most such applicant scenarios, the applicant has other options. Not so, however, where the ABA acts with the delegated monopoly power granted by states to control access to the bar exam. See *infra* text accompanying notes 686, 693, 702. Compare the thoughtful analysis in Plaintiff's Response to Amici Briefs at 7-8, *Avins v. White*, 627 F.2d 637 (3d Cir. 1979) (No. 79-1747-8) (After noting that local states had delegated to the American Bar Association “the administrative function of licensing,” the brief reasoned: “[D]ealings with licensing agencies, like dealings with government generally, are not based on individual ‘consent.’ A person *no more voluntarily ‘agrees’* to obtain a license and undergo tests, examinations, or investigations necessary for the issuance of the same, than he voluntarily ‘agrees’ to pay taxes, appear in court to defend his conduct, when sued, or do anything else required by government. *By its very nature, government operates in all its branches on the individual by force.* The failure to obey government carries with it sanctions. It has been long recognized that where a government agency requires a license or similar action to do business, *compliance is made under duress.* . . . The concept of *duress* is the very antithesis of consent.”) (emphases added) (citations omitted).

³⁸⁰ DOBBS, *supra* note 242, at 1156 (noting the “elements of economic compulsion” in consent to employer reference cases and suggesting consent should not apply to knowing or reckless falsehood). See also RESTATEMENT (SECOND) OF TORTS § 583 cmt. b (1977) (citing to and incorporating section 892, it notes that “consent maybe ineffective” in cases of duress or fraud); *id.* § 892(1) (“Consent is *willingness in fact* for conduct to occur.”) (emphasis added); *id.* cmt. b; *id.* § 892A(2) (“To be effective, consent must be . . . (b) to the particular conduct, or to substantially the same conduct.”); *id.* cmt. c. Compare the cases upholding “explicit and unambiguous” releases against contrary-to-public-policy attacks. *Smith v. Holley*, 827 S.W.2d 433, 438 (Tex. App. 1992) (adopting the “universally held” view that intentional torts, even though involving criminal acts, may be consented to in certain circumstances); *Eitler v. St. Joseph Reg'l Med. Ctr.*, 789 N.E.2d 497, 500-02 (Ind. Ct. App. 2003). See also *supra* text accompanying note 308. One judge in *Eitler* disagreed as to the majority's application of absolute privilege in the face of a statute which protected employers providing references not “known to be false.” *Eitler*, 789 N.E.2d at 503-04 (Sullivan, J., concurring in result); compare *Woodfield v. Providence Hosp.*, 779 A.2d 933, 937 n.1 (D.C. 2001) (finding no “unenforceable and

circumvent the overwhelming preference for qualified privilege in the employment setting,³⁸¹ including the school or academic setting,³⁸² ignore the Court's powerful antipathy toward First Amendment absolutism³⁸³ in public concern cases, and foster an environment in which "absolute power corrupts absolutely,"³⁸⁴ with both the ABA and AALS left to wield their largely uncontrolled awesome³⁸⁵ power with little concern for the harm

unconscionable adhesion contract" since plaintiff had not attempted to fulfill either of the doctrine's requirements — terms "unreasonably favorable to defendant" or an "egregious" scenario involving "an absence of meaningful choice"), *with* *McQuirk v. Donnelly*, 189 F. 3d 793, 796-98 (9th Cir. 1999) (rejecting section 583, the court invalidated a contractual release of liability for defamation, denominated an intentional tort under California law, under the view that a controlling statute "invariably invalidated" total release of future liability of intentional tortfeasors).

³⁸¹ See, e.g., *Merritt v. Detroit Mem'l Hosp.*, 265 N.W.2d 124, 125-28 (Mich. Ct. App. 1978) (The absolute privilege of consent applied to the presence of union representatives during grievance proceedings; but only a qualified privilege applied to employer management personnel present at the same meetings.).

³⁸² *Lester v. Powers*, 596 A.2d 65, 69-72 (Me. 1991) (After rejecting consent based on submission to the tenure process, the court found that defendant-former student's solicited, voluntary participation by letter in the tenure process was qualifiedly privileged and had not been forfeited by either the "made solely" from common law malice or knowing or reckless disregard of falsity abuse alternatives.); *Gautschi v. Maisel*, 565 A.2d 1009, 1010-12 (Me. 1989) (A professor involved in the tenure decision-making process had a qualified privilege under section 596 unless he made defamatory statements "outside normal channels" or with knowing or reckless falsity — neither was shown.); *Greenya v. George Washington Univ.*, 512 F.2d 556, 563 (D.C. Cir. 1975) (applying the "well accepted" qualified privilege applicable to evaluation of faculty members as to matters "pertinent to the functioning of the educational institution"); see also *Ranous v. Hughes*, 141 N.W.2d 251, 257-60 (Wis. 1966) (finding school board defendant-director of board of education not within the "higher echelons" of executive officers entitled to absolute privilege and only qualifiedly privileged). On the majority rule extending only a qualified privilege to disseminations by lower level government executives, see ELDER, DEFAMATION, *supra* note 75, § 2:28.

³⁸³ See Elder, *Media Jabberwock*, *supra* note 284, at 613-27.

³⁸⁴ Lord Acton, THE OXFORD DICTIONARY OF QUOTATIONS 1 (Rev. 4th ed. 1996).

³⁸⁵ See *infra* text accompanying notes 685-713.

they may cause to reputation – which the Court has denominated a “basic concern”³⁸⁶ in society. If, indeed, any implied consent occurred, it was only to “*honest findings*” based on “a *fair and honest investigation*”³⁸⁷ and report – which *no*

³⁸⁶ *Herbert v. Lando*, 441 U.S. 153, 169 (1979). *See also* *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (Reputation is “at the root of any decent system of ordered liberty,” “a basic of our constitutional system.”); *id.* at 92 (Stewart, J., concurring) (Redressing damage to reputation reflects the “basic concept of the essential dignity and worth” of all persons.). The latter quote has been oft-repeated. *See* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-42 (1974). Later, the Court treated reputation and free expression values as “equally compelling need[s]” *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976). The common law has long reflected this attitude. Judge Cardozo once stated that reputation is a “plant of tender growth” whose “bloom, once lost, is not easily restored.” *Karlin v. Culkin*, 162 N.E. 487 (N.Y. 1928).

³⁸⁷ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d, illus. 3 (1977) (emphasis added). The issue of section 583 implied consent was extensively briefed in the case of *Avins v. White*, 627 F.2d 637 (3d Cir. 1980). For other discussions of *Avins*, *see supra* text accompanying notes 207, 379; *infra* text accompanying notes 483, 511-17. The court discussed issues of invited criticism and consent in two footnotes. In the first discussion it cited the amicus curiae briefs and their two-fold emphases – that no question had been raised as to the “honesty and regularity” of the procedures used *and* that the “very nature” of accreditation was to invite critical opinion. The court opined in dicta that such might be “persuasive and fully consistent” with state law, citing employer-employee *qualified* privilege precedent. *Avins*, 627 F.2d at 644 n.1 (dicta). The word *consent* was never used. A discussion of consent as an absolute defense occurred in footnote 3. This discussion occurred in the context of whether plaintiff consented to defamation by defendant in the presence of a third party-supporter of the law school. The court cited section 583 (misnumbered as “503”) and noted that amici asserted that plaintiff “prompted the discussion” and consequently impliedly consented to assume the risk that “any admitted act on his part might be the basis of any highly unfavorable comment.” Furthermore, his silence after the incident evidenced consent. The court found “considerable merit” but declined to reach the issue for the first time in the appeal setting. *Id.* at 645-46 n.3 (dicta).

Note the ABA amicus curiae brief had specifically argued for application of the common law “agrees to submit his conduct to investigation”/consent to “honest findings” rule. Brief on Behalf of the Am. Bar Ass’n as Amicus Curiae at 7, *Avins v. White*, No. 79-1747 (3d Cir. Nov. 23, 1979); *id.* at 25-26, 34. Extensive reliance thereon was also made in the parallel brief by the American Association of Law Schools. Am. Ass’n of Law Schs. Brief at 5, *Avins v. White*, No. 1747 (3d Cir. 1979) (Damage liability against an Accreditation committee member “requires convincing proof of a dishonest and malicious departure from regular accreditation procedures.”); *id.* at 31-35 (In an extensive analysis

reader objectively analyzing the ABA/AALS record vis-à-vis Chase could find met under the circumstances.³⁸⁸

TRUTH, ACCURACY AND REPUBLISHER LIABILITY

The consensus traditional common law rule³⁸⁹ imposes liability on republishers of libel³⁹⁰ or slander³⁹¹ even where the

of section 583, cmt. d and illus. 3, the brief found consent *only* under circumstances where the applicant “would naturally and reasonably expect an honest administration of the accreditation process – defining the limits of his consent” as a report made “honestly and objectively.”); *id.* at 35 (Consent was limited to “an inquiry and report honestly conducted and honestly arrived at.”); *id.* at 36 (Consent was applied, “however unfavorable,” to publications where the inquiry was “honest carried out.”); *id.* at 38 (Consent was applied to “investigations honestly conducted.”); *id.* at 49 (In discussing a mixture of consent, common law qualified privilege and constitutional privilege, the brief claimed defendant was exempt from damage liability for “statements made honestly and honestly believed by him to be true.”); *id.* at 50 (“[T]he law . . . requires only that the process be honestly conducted and the evaluation be honestly expressed.”); *id.* at 51 (In its conclusion, the brief stated plaintiff “consented to a full and free discussion” with no liability as to adverse statements “honestly made” about him.); *id.* (No liability existed as to investigations and reports “honestly conducted and honestly related.”). The brief’s repeated uses of *honest* reflects both the cmt. d/illus. 3 scenario and an overlap with qualified and constitutional principle. Indeed, the brief argued that defendant was immune as to a defamatory statement “made *honestly* and *not recklessly*.” *Id.* at 48. In a detailed discussion (just preliminary to its section 583 analysis) of the implied consent basis for both the qualified and constitutional privileges, the brief made an important and wholly defensible admission as to the meaning and extent of consent: “It would *not be plausible* to think, however, that one would assume or consent to the risk of *knowing, dishonest attack, nor would license for knowing or reckless falsehood serve decision making essential to a common enterprise*.” *Id.* at 30-31 (emphases added). On the varying meanings, of “honest,” see *supra* note 317; *infra* text supported by notes 532-49 (delving into the fault grounds for forfeiture of qualified privilege).

³⁸⁸ See *supra* text accompanying notes 558-758.

³⁸⁹ See generally ELDER, DEFAMATION, *supra* note 75, § 2:4, at 2-21. For a detailed analysis of the republisher liability rule and media defendants’ varied and dubious attempts at circumvention, see generally Elder, *Media Jabberwock*, *supra* note 284.

³⁹⁰ RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (1977) (The same liability applies to “one who merely circulates, distributes or hands on a libel already so published.”); Elder, *Media Jabberwock*, *supra* note 284, at 273-77.

source is identified³⁹² and the republisher disclaims any belief in the defamation's truth.³⁹³ As a corollary, the republisher-defamer cannot fulfill the affirmative burden of proving³⁹⁴ substantial truth,³⁹⁵ an absolute defense³⁹⁶ called "justification"³⁹⁷ under the common law, by attributing the republished defamation to the third person source³⁹⁸ or by demonstrating a mistaken, honest belief in the truth³⁹⁹ thereof. As courts have often impliedly or expressly noted, "[t]ale bearers are as bad as tale makers."⁴⁰⁰ Thus, as a modern court has said,

³⁹¹ RESTATEMENT (SECOND) OF TORTS § 578 cmts. c, d (1977) (This is true whether or not the source's statement would be slanderous per se.).

³⁹² RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (1977).

³⁹³ RESTATEMENT (SECOND) OF TORTS § 578 cmt. d (1977).

³⁹⁴ RESTATEMENT (SECOND) OF TORTS § 581 cmt. b (1977).

³⁹⁵ RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977) (The law does not require defendant to demonstrate "the literal truth of the precise statement made" — "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance" under a preponderance of evidence standard.).

³⁹⁶ RESTATEMENT (SECOND) OF TORTS § 581A cmts. a, d, h (1977) (noting, however, that several jurisdictions adopt common law malice limitations on the truth defense). The latter minority view would seem to be consistent with First Amendment doctrine in the "purely private" context. *See infra* text accompanying notes 522-25; ELDER, DEFAMATION, *supra* note 75, § 2:3, at 2-17, 2-18; *id.*, § 6:11, at 6-67 to 6-74.

³⁹⁷ ELDREDGE, *supra* note 242, at 323.

³⁹⁸ RESTATEMENT (SECOND) OF TORTS § 581A cmt. e (1977) ("[I]t is not enough for the person who repeats it to show that the statement was made by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established."); *Fortenbaugh v. N.J. Press, Inc.*, 722 A.2d 568, 571, 575-76 (N.J. App. Div. 1999) ("The truth defense would excuse too much if a defendant could be immunized by the fact that its defamatory statement was first uttered by someone else [A] defendant cannot escape responsibility just because the alleged defamation was first uttered by another, perhaps an unreliable gossip.").

³⁹⁹ RESTATEMENT (SECOND) OF TORTS § 581A cmt. h (1977).

⁴⁰⁰ *See, e.g., Vanover v. Wells*, 94 S.W.2d 999, 1000 (Ky. Ct. App. 1936). This quote originated with Richard Brinkley Sheridan, *The School for Scandal*, I. i (1777). *See THE OXFORD DICTIONARY OF QUOTATIONS* 506 (3rd ed. 1979).

what defendant “was or was not told is not what stung [T]he issue for purposes of assessing truth is whether the substance of the allegation was true, not whether defendants heard the pertinent information from someone else.”⁴⁰¹

The Supreme Court has repeatedly suggested that underlying or substratal truth is necessitated by but not sufficient⁴⁰² as a defense in cases of public interest at least where published by the media.⁴⁰³ This is compellingly evidenced by the Court’s decision in *Masson v. New Yorker Magazine*,⁴⁰⁴ where the Court relied on and incorporated the common law’s “historical understanding”⁴⁰⁵ of the truth defense in delineating First Amendment standards for plaintiff’s requisite proof of material falsity.⁴⁰⁶ Under the Court’s undoubtedly correct restatement of the common law, defendant is not liable for any alteration that “effects no material change in meaning, including any meaning conveyed by the manner or fact of expression . . . the speaker suffers no injury to reputation that is compensable as a defamation.”⁴⁰⁷

Unfortunately, a small minority of dubious decisions have ignored this unchallenged historical meaning and found truth in mere accurate reportage, both in the media and non-media setting.⁴⁰⁸ This has led to “mind-bogglingly unfair”⁴⁰⁹ and

⁴⁰¹ *Lopez v. Univision Commc’ns, Inc.*, 45 F. Supp. 2d 348, 359 (S.D.N.Y. 1999). See also ELDER, DEFAMATION, *supra* note 75, § 2:4, at 2-21 (emphasizing that the truth defense “focuses on the *substratal or underlying truth* of the defamatory matter repeated, *not the accuracy* of its repetition”) (emphases added).

⁴⁰² See Elder, *Media Jabberwock*, *supra* note 284, at 600.

⁴⁰³ *Id.* On the media-non-media dichotomy’s indefensibility, see *infra* text accompanying notes 426, 483-85.

⁴⁰⁴ *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991).

⁴⁰⁵ *Id.* at 517.

⁴⁰⁶ *Id.* at 513-18, 521-25.

⁴⁰⁷ *Id.* at 516.

⁴⁰⁸ For extensive critique, see Elder, *Media Jabberwock*, *supra* note 284, at 728-755.

⁴⁰⁹ ELDER, DEFAMATION, *supra* note 75, § 2:24, at 2-24, n.16.

outrageous conclusions. For example, a modern case⁴¹⁰ applied a truth defense to defendant's employees' republication of a sexual harassment charge because a single complainant had indeed *charged* sexual harassment⁴¹¹ – it was later held unsubstantiated in an unemployment benefits proceeding.⁴¹² Of course, this approach gave defendants the equivalent of an absolute privilege to defame and rendered totally irrelevant any questions of substratal truth or falsity, qualified privilege, and whether any such privilege was defeated or abused by the republishers.⁴¹³ And, defendant could have republished it to the media and any media defendant would likewise have been immune.⁴¹⁴ As the author has said elsewhere, this radically unconscionable result – “accuracy-pseudo-truth” – finds no basis in “common sense, the common law, the needs of the media, or the First Amendment.”⁴¹⁵

For an equally “wonderfully unfair exemplar of media-generated reformulated pseudo-truth”⁴¹⁶ one need only look at two decisions involving UPI's libelous portrayal of plaintiff-businessman as the mobster-“Godfather”⁴¹⁷ of Hawaii's underworld. The state supreme court had found that an issue of constitutional malice⁴¹⁸ was raised by defendant's originator-sources – a dubious local newspaper republishing largely anonymous hearsay.⁴¹⁹ The case then moved to federal

⁴¹⁰ *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149 (Kan. 2000).

⁴¹¹ *Id.* at 1169.

⁴¹² *Id.* at 1155-56.

⁴¹³ Elder, *Media Jabberwock*, *supra* note 284, at 729.

⁴¹⁴ *Id.* at 729-30; *see supra* text supported by note 376; *see also* RESTATEMENT (SECOND) OF TORTS § 612(1)(a) (1977).

⁴¹⁵ Elder, *Media Jabberwock*, *supra* note 284, at 730; ELDER, DEFAMATION, *supra* note 75, § 2:4, at 2-24, 2-25.

⁴¹⁶ Elder, *Media Jabberwock*, *supra* note 284, at 730.

⁴¹⁷ *Mehau v. Gannett Pac. Corp.*, 658 P.2d 312 (Haw. 1983); *In re United Press Int'l.*, 106 B.R. 323 (D.D.C. 1989).

⁴¹⁸ *Mehau*, 658 P.2d at 322.

⁴¹⁹ *Id.*

bankruptcy court where the court, despite the state court opinion (to which it gave law of the case deference),⁴²⁰ magically found that defendant need only prove *accurate reportage* of third party statements and that plaintiff could not meet his First Amendment burden of proving “falsity.”⁴²¹ Of course, this “bizarre conclusion”⁴²² effectively provided defendant an *absolute immunity* for knowing or recklessly false statements⁴²³ as to the concededly false and defamatory⁴²⁴ statements!

In light of the difficulties for free expression posed by republisher liability, the common law early developed a special privilege for “fair report”⁴²⁵ by both media and non-media defendants⁴²⁶ based on tripartite policies – “public supervisory,”

⁴²⁰ *In re United Press*, 106 B.R. at 326-27.

⁴²¹ *Id.* at 327-28, 331. The court misinterpreted *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), which involved *substratal truth* and the plaintiff's burden of proving *substratal falsity* in public concern cases, at least as to media defendants. See Elder, *Media Jabberwock*, *supra* note 284, at 731, 731 n.1220.

⁴²² Elder, *Media Jabberwock*, *supra* note 284, at 731.

⁴²³ *Id.*

⁴²⁴ *In re United Press*, 106 B.R. at 327 (The court was “perfectly willing” to make these concessions.). Other recent decisions have been willing to grant similarly broad protection to ongoing non-public government investigations or reports, thus bypassing all “fair report” and “neutral reportage” policies and limitations. As the author has said, protecting such “accuracy-pseudo-truth” “at all levels of government effectively atomizes the law of libel,” “ignores the Supreme Court’s careful weighing of competing interests, causes horrific damage to reputation, and corrupts public discourse.” Elder, *Media Jabberwock*, *supra* note 284, at 743. Indeed, there are no limitations that would deter media defendants (or others!) “from meeting the voracious appetite for sensationalism by tapping governmental troughs for reportage of any and all kinds of tentative, preliminary, suspect, uncorroborated or speculative accusations and/or investigations, which in some cases are no doubt released for malevolent, unprofessional or retributory reasons.” *Id.* at 743-44.

⁴²⁵ See generally ELDER, THE FAIR REPORT PRIVILEGE (1988) [hereinafter, ELDER, FAIR REPORT]; ELDER, DEFAMATION, *supra* note 75, §§ 3:1-3:26. Under “fair report” substratal falsity is generally irrelevant and the legal focus is on defendant’s facial fairness and accuracy. ELDER, FAIR REPORT, *supra* § 1:0, at 4-5; ELDER, DEFAMATION, *supra* note 75, § 3:18.

⁴²⁶ ELDER, FAIR REPORT, *supra* note 425, § 1:19A, B; ELDER, DEFAMATION, *supra* note 75, § 3:15.

“agency,” and “informational.”⁴²⁷ The overwhelming view⁴²⁸ of the precedent *rejects* “fair report” as to non-open-to-the-public reports, acts and proceedings. Indeed, for compelling reasons of public policy,⁴²⁹ *Restatement (Second) of Torts* section 611 has reflected this view in comment h,⁴³⁰ which expressly states that “statements made by police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged . . .”⁴³¹ This information does not have the required “dignity and authoritative weight” of “official”⁴³² proceedings and does not involve the “official agency action”⁴³³ warranting an exception to republisher liability. As the leading case holds, “[o]nly reports of *official* statements or records *made or released* by a public agency . . .” justify “fair report” protection – “[s]tatements made *by lower-level employees that do not reflect official agency action* cannot support the privilege.”⁴³⁴

⁴²⁷ ELDER, FAIR REPORT, *supra* note 425, § 1:00, at 3-4.

⁴²⁸ Elder, *Media Jabberwock*, *supra* note 284, at 786-87.

⁴²⁹ *Id.* at 756-802.

⁴³⁰ RESTATEMENT (SECOND) OF TORTS § 611 cmt. h (1977).

⁴³¹ *Id.*

⁴³² *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88-89 (D.C. 1980) (“Mere inaccurate business records of some sort, even if the [police] hot line log could gain that status, will not suffice to create an official record . . . [T]he log represents little more than an informal arrangement between the police and the media, a joint venture, which consists of nothing more sanctified than unofficial statements of police regarding a crime.”).

⁴³³ *Bufalino v. Associated Press*, 692 F.2d 266, 272 (2d Cir. 1982).

⁴³⁴ *Id.* (second and third emphases added); *see also* *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 536-37 n.14 (7th Cir. 1982) (The court stated that a “secret police file” did not constitute a “report of a public proceeding” and its repetition by a law enforcement officer or public official did not enhance its status to a “public proceeding.”); *Thomas v. Tel. Publ’g Co.*, 929 A.2d 993, 1011-12 (N.H. 2007) (“Documents authored by police officers do not become ‘official’ or matters of public record simply because they may be located in the police department. . . . They become ‘official’ when they bear adequate indicia of being ‘official’ or are actually in the public record.”) (relying on ELDER, FAIR REPORT, *supra* note 425); *Lewis v. Newschannel 5 Network, L.P.*, 238 S.W.3d 270, 284-

Under this view any suggestion that verbal statements made to site evaluation team members by public university faculty members should receive “fair report” status by accurate republication would appear (and should be considered) laughable. However, a radical minority view⁴³⁵ largely found in an exceptionally dubious interpretation of California’s statutory privilege⁴³⁶ and the Third Circuit’s equally dubious decision in *Medico v. Time* and its progeny,⁴³⁷ might arguably be cited by ABA/AALS republishers in support of exemption for accurate reportage. In *Medico* the court predicted, erroneously it would seem,⁴³⁸ that Pennsylvania would accord “fair report” to tentative conclusions preliminary in nature of summaries in FBI investigatory criminal files.⁴³⁹ Clearly and concededly, the “agency” (the defendant reporting as surrogate what is available to us all)⁴⁴⁰ rationale was inapplicable in such a scenario.⁴⁴¹ The court deprecated its significance therein.⁴⁴² The Third Circuit was thus compelled to rely on the “public supervisory” (“heightened” since the file reflected upon a corrupt

87 (Tenn. Ct. App. 2007) (holding that reported accounts of anonymous sources not speaking for the record and low level police officers did “not reflect official agency action” and did not have “sufficient ‘authoritative weight’” to be considered part of an official proceeding) (relying on ELDER, DEFAMATION, *supra* note 75).

⁴³⁵ Elder, *Media Jabberwock*, *supra* note 284, at 761-771, 780-88, 794-98.

⁴³⁶ *Id.* at 780-86.

⁴³⁷ 643 F.2d 134, 139 (3d Cir. 1981). See Elder, *Media Jabberwock*, *supra* note 284, at 758-71, 774-784.

⁴³⁸ See Elder, *Media Jabberwock*, *supra* note 284, at 757-61, 769-73, 788, 798-802.

⁴³⁹ *Medico*, 643 F.2d at 139, 141, 146.

⁴⁴⁰ *Id.* at 140-41 (“[O]ne who reports what happens in a *public, official proceeding* acts as an *agent* for persons who had a *right to attend*, and informs them of what they might have seen for themselves.”) (emphases added). On the pivotal nature of the available-to-the-public requirement-agency rationale, see Elder, *Media Jabberwock*, *supra* note 284, at 756-802, 827-29.

⁴⁴¹ *Medico*, 643 F.2d at 140-41 & n.23.

⁴⁴² *Id.* at 140-42.

Congressman's fitness for office)⁴⁴³ and its "overlapping informational" ("especially relevant" since information on the Mafia was difficult to otherwise gather and report)⁴⁴⁴ rationales. In light of the huge number of governmental files accumulated by governments at all levels, the potential for abuse by federal and state employees (including educators!) of the *Medico* approach is self-evident, indeed extravagantly so.⁴⁴⁵

Fortunately, most circuits and the overwhelming majority of the cases⁴⁴⁶ reject *Medico* and the "boundaryless nature of the marauding predator"⁴⁴⁷ it has let loose on the land. For compelling reasons *Medico* has not been and is unlikely to be widely followed. Indeed, it has been excoriated by a later decision in the Third Circuit,⁴⁴⁸ which viewed it as wholly at odds with precedent and out of sync with the policies underlying "fair report."⁴⁴⁹ Moreover, *Medico's* prediction as to "fair

⁴⁴³ *Id.* at 141 (Such reports "often have the equally salutary effect of fostering among those who enforce the laws 'the sense of public responsibility'" via, for example "help[ing] ensure impartial enforcement of the laws.").

⁴⁴⁴ *Id.* at 142.

⁴⁴⁵ See ELDER, FAIR REPORT, *supra* note 425, § 1:10, at 91 ("[A]n impetus to unprofessional disclosure of non-public information regardless of the factual truth or reliability of the information contained therein is an unfortunate but clear lesson emanating from [Medico's] fair report conclusion and seems to run afoul of fundamental values – that is, the presumption of innocence and the quasi-constitutional interest in reputation – and run counter to cherished democratic ideals.").

⁴⁴⁶ Elder, *Media Jabberwock*, *supra* note 284, at 786-87.

⁴⁴⁷ *Id.* at 794.

⁴⁴⁸ *Schiavone Constr. v. Time*, 847 F.2d 1069, 1086 n.26 (3d Cir. 1988).

⁴⁴⁹ *Id.* The court stated *Medico* was "not in harmony with the mainstream of the common law." *Id.* (citing HARPER ET AL., *supra* note 293). This scathing analysis is worth quoting in detail: "These are, in fact, precisely the circumstances in which it would ordinarily be thought that the dissemination of falsehoods should not be privileged. There is *nothing* about the fact that a wiretapped criminal has lied about a honest person in a telephone conversation or that a detective or a Congressional investigator or similar minor functionary has erroneously (or maliciously) defamed someone in an unpublished memorandum that gives rise to such a public need for the reporting of these events (with the underlying defamation uncorrected) as to outweigh an innocent victim's interest in the protection of his reputation. Apart from an

report” would likely not withstand scrutiny as viable under Pennsylvania law.⁴⁵⁰ The unconscionable results engendered by *Medico* are compellingly evidenced by contrast with *Wynn v. Smith*,⁴⁵¹ a recent decision rejecting *Medico* and limiting “fair report” to official acts, documents and proceedings “accessible to the public.”⁴⁵² The court rejected “fair report” as to a confidential Scotland Yard report which designated plaintiff as “a front man for the Genovese family.”⁴⁵³ Extending “fair report” to such “substandard and unsubstantiated”⁴⁵⁴ unofficial information would “directly conflict” with redress contemplated by defamation law, “undermine the basis” for “fair report,”⁴⁵⁵ and protect the “spread of common innuendo.”⁴⁵⁶

A second purported exception to republisher liability, the “neutral reportage” doctrine manufactured by Chief Judge Kaufman in *Edwards v. National Audubon Society*,⁴⁵⁷ is likewise inapplicable for multiple reasons. This privilege has

independent public interest in the reporting of these other events, which is nonexistent, the publication of the imputation is at most an ordinary republication of the defamation. The normal liability of republishers . . . should not be evaded by the potentially spurious pretense that what is being reported is not the defamatory imputation itself, but instead an ‘official action or proceeding.’ Neither an ordinary wiretap nor the composition of a routine working memorandum is an event of sufficient moment to qualify as such an ‘action or proceeding’ for purposes of the fair report privilege.” HARPER ET AL., *supra* note 293, § 5:24, at 206-07 n.33 (emphases added).

⁴⁵⁰ See *supra* note 438.

⁴⁵¹ *Wynn v. Smith*, 16 P.3d 424 (Nev. 2001).

⁴⁵² *Id.* at 429-30 (“[F]air report . . . is premised on the theory that members of the public have a manifest interest in observing and being made aware of public proceedings and actions.”).

⁴⁵³ *Id.* at 426-27, 429-31.

⁴⁵⁴ *Id.* at 430.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* (emphasis added).

⁴⁵⁷ *Edwards v. Nat’l Audubon Soc’y*, 556 F.2d. 113 (2d Cir. 1977), *cert. denied sub. nom.*, *Edwards v. N.Y. Times Co.*, 434 U.S. 1002 (1977).

been applied almost exclusively in the media setting.⁴⁵⁸ The “precedent” relied on in *Edwards* was either misused or highly dubious,⁴⁵⁹ a type of intellectual quicksand.⁴⁶⁰ The great majority of courts have rejected it,⁴⁶¹ including a recent compelling analysis in a Pennsylvania Supreme Court case, *Norton v. Glenn*,⁴⁶² which found no First Amendment basis for such a “sweeping” “blanket immunity”⁴⁶³ and the “radical notion”⁴⁶⁴ that media reportage of newsworthy comments by a public official about other public officials should receive absolute protection. The court relied heavily on the fact that the “minimal” burden of abstaining from constitutional malice had been repeatedly affirmed by the Supreme Court.⁴⁶⁵ Lastly, almost none of the requirements of “neutral reportage”⁴⁶⁶ could be met in most site evaluation contexts – most potential

⁴⁵⁸ Elder, *Media Jabberwock*, *supra* note 284, at 643 n.657. Assuming *arguendo* “neutral reportage” has some legitimacy in the context of media dissemination of lies as conduit and thus allowing the *public* to analyze the competitor points of view, there is little justification for reportage of such lies in the quite different context of accreditability-membership assessments, where the site evaluation team and reviewing authorities are supposedly engaged in a reciprocal search for truth. Reliance on “neutral reportage” of lies or “calculated falsehoods,” *see infra* text accompanying notes 558-758, would make a travesty of the fact-finding process and run afoul, at least as to the ABA, of its responsibilities to engage in *responsible* fact-finding. *See infra* text accompanying notes 718-47.

⁴⁵⁹ *Id.* at 640-55.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 684-723.

⁴⁶² *Norton v. Glen*, 860 A.2d 48 (Pa. 2004), *cert. denied*, 544 U.S. 956 (2005). *See generally* Elder, *Media Jabberwock*, *supra* note 284, at 553.

⁴⁶³ *Norton*, 860 A.2d at 56-57.

⁴⁶⁴ *Id.* at 53.

⁴⁶⁵ *Id.* at 57 (explaining that the Court “would not so sharply tilt the balance against . . . reputation . . . so as to jettison” the constitutional malice standard in favor of protecting the “neutral reportage doctrine”).

⁴⁶⁶ *See* Elder, *Media Jabberwock*, for a detailed discussion, *supra* note 284, at 655-684.

plaintiffs would not be public figures,⁴⁶⁷ it is at least doubtful whether the sources quoted would meet the “responsible, prominent”⁴⁶⁸ requirement, it is equally doubtful that “pervasive hostile environment” charges like the one at Chase involve “raging”⁴⁶⁹ controversies, and the accounts by the ABA/AALS republishers were “neither accurate and disinterested.”⁴⁷⁰ Indeed, there was no right of the defamed parties (or a representative segment thereof)⁴⁷¹ to respond and defendants

⁴⁶⁷ *Id.* at 657-664 (noting that the “overwhelming consensus” limits “neutral reportage” to public persons and only a “small but dubious and unpersuasive” minority perspective extends it to private individual-public concern scenarios).

⁴⁶⁸ Elder, *Media Jabberwock*, *supra* note 284, at 664-65. Note that the two adjectives are cumulative, not alternative, and that most courts have restrictively limited the doctrine to such cumulative settings. An “exceedingly modest” group has segregated the two and allowed protection as to a “prominent” individual, often determined by applying the public official and public figure criteria. *Id.* at 665-72. The author has noted (assuming *arguendo* the “responsible” limitation has some merit) a host of largely unanswered questions posed by this aspect of the limitation. *Id.* at 671-72. In the context of accreditation-membership evaluations, an internal source attempt to externalize and enhance petty grievances and commonplace controversies into matters to be included in the site evaluation report should be viewed, per se, as a suspect and *irresponsible* source. Compare this to the cautionary comments of Deans Matasar and Dessem regarding this potential for abuse of the accreditation-membership process, *infra* note 723.

⁴⁶⁹ See *supra* text accompanying notes 363-64. On the “raging” controversy issue, see Elder, *Media Jabberwock*, *supra* note 284, at 680-84.

⁴⁷⁰ See *infra* text accompanying notes 558-747; *Connaughton v. Harte-Hanks Commc'ns*, 842 F.2d 825, 847 (6th Cir. 1988).

⁴⁷¹ This is a “neutral reportage” requirement under the general rule. See Elder, *Media Jabberwock*, *supra* note 284, at 677-680. This response was and is meant to be included in the *initial* defamatory statement or article, *not* in a *later institutional response*. While the later responses by Chase were vigorous and highly professional, see *supra* text accompanying note 108 and *infra* text accompanying note 592, such responses are fundamentally different from publication in the original defamatory publication, which affords a type of due process to the defamed and may help neutralize the damning nature of the statement. Indeed, in other case scenarios (unlike Chase), the institutional response may take an ameliorative or placatory stance totally at odds with the identified or identifiable party or parties’ interest(s) and position(s). It is not inconceivable that a school under the accreditation-membership blunderbuss would offer up a sacrificial lamb or two for reputation-slaughter. This is particularly true as to the ABA, with its near total monopoly in determining

“espoused or concurred”⁴⁷² in the charges. The ABA/AALS republishers were the quintessential opposites of the “exemplar of fair and dispassionate reporting”⁴⁷³ required by “neutral reportage.”

FAULT AND FALSITY

As is well-known, the famous *New York Times v. Sullivan*⁴⁷⁴ standard was later extended from public officials to public figures⁴⁷⁵ (including candidates for public office).⁴⁷⁶ Then, after a brief flirtation applying *New York Times* to *all* matters of general or public interest,⁴⁷⁷ the Court returned to a largely⁴⁷⁸ status-based approach in *Gertz v. Robert Welch, Inc.*⁴⁷⁹ In *Gertz* the Court held that private persons may sue for compensatory damages under a minimal fault-negligence⁴⁸⁰ standard. Presumed and punitive damages are available only if the *New York Times* standard⁴⁸¹ is met. Although not entirely

which laws schools’ graduates can sit for the bar and receive federal loans. See *infra* text accompanying notes 686 and 693 for more on the coercion issue.

⁴⁷² *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 69-70 (2d Cir. 1980).

⁴⁷³ *Edwards*, 556 F.2d at 120.

⁴⁷⁴ *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964) (adopting a knowing or reckless disregard of falsity requirement by evidence of “convincing clarity” as to matters relevant to a public official’s fitness for office). See ELDER, DEFAMATION, *supra* note 75, §§ 7:1 to :25, for a detailed analysis of the constitutional malice standard.

⁴⁷⁵ See ELDER, DEFAMATION, *supra* note 75, §§ 5:6 to :7.

⁴⁷⁶ *Id.* § 5:3.

⁴⁷⁷ *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) (plurality opinion).

⁴⁷⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* and its progeny apply only in public concern cases, not in the “purely private” scenario. See *infra* notes 534-42.

⁴⁷⁹ *Gertz*, 418 U.S. at 338-39, 342-50 (1974). See ELDER, DEFAMATION, *supra* note 75, §§ 6:1 to :2, 6:4 to :5, for a detailed analysis.

⁴⁸⁰ *Gertz*, 418 U.S. at 338-39, 346-50.

⁴⁸¹ *Id.* at 349-50. See ELDER, DEFAMATION, *supra* note 75, §§ 9:4 to 9:5.

clear,⁴⁸² the courts generally (and appropriately) reject any distinction between media and non-media defendants, both as to public⁴⁸³ and private plaintiffs⁴⁸⁴ in cases involving a matter of public concern.⁴⁸⁵

⁴⁸² Compare *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 771-1 (1984) (White, J., concurring). “[T]he Court has rejected [the media-nonmedia dichotomy] at every turn . . . [I]t makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation.” Compare *id.* at 783-84 (Brennan, J., dissenting) (noting that six Court members agreed that in the defamation context “the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities”) with *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 779 n.4 (1986) (reserving judgment on cases involving nonmedia defendants), and *Milkovich v. Lorain Journal*, 497 U.S. 1, 20 n.6 (1990) (same). See also *infra* text accompanying notes 483-84.

⁴⁸³ See ELDER, DEFAMATION, *supra* note 75, § 7:4, at 7-78 to -79 & n.8 (describing that lower court decisions “steadfastly” reject such a dichotomy and apply *New York Times* to a “wide variety” of non-media party defendants); RESTATEMENT (SECOND) OF TORTS § 580B cmt. h (1977) (noting that there is no reason to limit the protection to public statements and deny it to private ones). Chief Justice Burger opined for the Court that it had “never decided the question” of extending *New York Times* to the “individual” setting. *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 n.16 (1979). However, this “ill-considered and historically inaccurate footnote aside,” is inconsistent with *New York Times*, which itself extended co-equal protection to the co-defendant clergymen. ELDER, DEFAMATION, *supra* note 75, § 7:4, at 7-77. See *infra* the text accompanying notes 511-16. See also *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (extending *New York Times* in a Petition Clause setting to non-media libel of a nominee for U.S. attorney, and treating the Petition Clause as from the “same cloth” as other clauses involving free expression); *Avins v. White*, 627 F.2d 637, 649 (3d Cir. 1980) (extending *New York Times* to the ABA’s consultant on legal education in the context of an accreditation controversy). The Third Circuit cited the need for an avoidance of self-censorship impeding the “efficacy and integrity” of the accreditation process and the “significant social importance” of accreditation of academic institutions. *Avins*, 627 F.2d at 649. Any other result would create an “anomalous” and “dangerous disequilibrium” and induce parties to precipitously give them extended publication rather than present them in a more limited environment for response and disavowal. *Id.*

⁴⁸⁴ ELDER, DEFAMATION, *supra* note 75, § 6:3 (calling the Court’s decisions on the media-nonmedia issue in the private person setting “quite confusing and erratic”).

⁴⁸⁵ See *supra* text accompanying notes 482-84.

Status determinations as to individuals in the law school setting require an initial threshold distinction based on the public (governmental) or private nature⁴⁸⁶ of the institution. Faculty members of private law schools will normally not be confronted with the public official designation⁴⁸⁷ issue. As to

⁴⁸⁶ Private universities or law schools may sue for defamation. *See supra* the general discussion accompanying notes 125-37; ELDER, DEFAMATION, *supra* note 75, § 1:5 (non-profit corporations); RESTATEMENT (SECOND) OF TORTS § 561(2) (An action is available as to a non-profit corporation which “depends upon financial support from the public, and the matter tends to interfere with its activities by prejudicing it in public estimation.”). For a discussion of profit-making corporations, see ELDER, DEFAMATION, *supra* note 75, § 1:4, at 1-14 to -17 (citing illustrative cases to the effect that a defamed plaintiff had “engaged in or acquiesced in illegal conduct, or . . . flouted public sentiment and community values, or . . . its operating license has been put in jeopardy, or . . . that company morale has been bad and employees have desired to quit their jobs, or . . . that it has mistreated employees, or . . . that it has engaged in ethnic discrimination . . .”). *See also* RESTATEMENT (SECOND) OF TORTS § 561 (1977) (concluding that statements are defamatory that in any way “tend to prejudice it in the conduct of its business or to deter others from dealing with it”). Some well-known major university corporate entities (Harvard, Yale, Stanford, Chicago, Columbia, for example) may be “all purpose” public figures that qualify as household names or celebrities. *See* ELDER, DEFAMATION, *supra* note 75, § 5:6, at 5-54-55 (listing examples). Only a couple of libel cases analyzing status have involved colleges or universities. One case, *Ithaca College v. Yale Daily News Pub. Co.*, is dubious as to a national audience rather than the town where it is located or its general environs. *Ithaca College v. Yale Daily News Pub. Co.*, 433 N.Y.S.2d 530, 533-34 (Sup. Ct. 1980), *aff’d* 445 N.Y.S.2d 621 (App. Div. 1981). *See* ELDER, DEFAMATION, *supra* note 75, § 5:6, at 5-55 and n. 46. *See also* *University of South v. Berkley Pub. Corp.*, 392 F. Supp. 32, 33 (S.D.N.Y. 1974) (holding plaintiff to be a public figure as to confusion with Southern University). Other private law schools may have such public figure status as to the recipient audience of the libel in the accreditation/membership setting. For a discussion of the significant precedent involving such “a more limited audience-directed and/or location-limited setting,” *see* ELDER, DEFAMATION, *supra* note 75, §5:6, at 5-55-57.

⁴⁸⁷ It is possible that occasional faculty members at private law schools may be independent-contractor recipients of government funding with sufficient trappings of government to meet the public official criteria. *See* *Hatfill v. New York Times*, 488 F.Supp.2d 522, 525-28 (E.D. Va. 2007), *aff’d on other grounds*, 2008 U.S. App. LEXIS 14901 (4th Cir. 2008) (holding that plaintiff did not have to have a “formal government position” but that he “continued to perform government functions” – i.e., he was in “a position of public trust” in light of its “highly sensitive nature . . . and importance to national defense” – as a government contractor after departing from government employ). *Compare* *Arctic Co., Ltd. v. Loudon Times Mirror*, 624 F.2d 518, 521-22 (4th Cir. 1980) (conceding that some independent contractors might be public officials but

public university law school faculty members, public official status requires a determination of whether the publicly-paid employee fulfills either the “substantial responsibility”⁴⁸⁸ or “independent interest”⁴⁸⁹ tests set out by the Court in

holding that a consultant-scientific-factfinder to a county water authority did not so qualify).

⁴⁸⁸ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (extending the category of “those responsible for government operations... at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs”). In two other cases the Court rejected the suggestion that mere governmental linkage or government employment suffices for public official status. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 351 (1974) (rejecting cryptically the argument that attorneys as officers of court are “de facto” public officials as distorting the “plain meaning” of the category “beyond all recognition”); *Hutchinson v. Proxmire*, 443 U.S. 111, 119, n. 8 (1979) (reasoning that, although the court had not elucidated “precise boundaries,” the status did not encompass “all public employees”).

⁴⁸⁹ *Rosenblatt*, 383 U.S. at 86 (holding that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) also applied where “a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. . . .”) This test is *not* met “merely because a statement defamatory of some person in government employ catches the public interest; that conclusion would virtually disregard society’s interest in protecting reputation.” *Id.*, n.13. Under the “independent interest” criterion a government-paycheck recipient’s position must “invite public scrutiny and discussion of the person holding it, *entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.*” *Id.* (emphasis added). For a detailed analysis of the *Rosenblatt* criteria and their impact, see David A. Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria – A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579 (1984) [hereinafter Elder, *Public Officialdom*]. See also ELDER, DEFAMATION, *supra* note 75, § 5:1. Occasional cases have ignored footnote 13 and come up with bizarre results. The best example is a public educator-high school wrestling coach case, where the court found *Rosenblatt*’s “independent interest” test met based in large part on the numerous withdrawals from plaintiff’s classes resulting from adverse publicity generated by the media. *Johnson v. Corinthian Television Corp.*, 583 P.2d. 1101, 1103 (Okla. 1978). See Elder, *Public Officialdom*, *supra*, at 666-69. Compare the recent exceptionally thoughtful and eloquent exegesis of the *Rosenblatt* criteria in rejecting public official status in the case of a high school teacher-coach of the women’s basketball team. *O’Connor v. Burningham*, 165 P.3d 1214, 1218-20 (Utah 2007) (holding that the public official denomination was “limited to those persons whose scope of responsibilities are likely to influence matters of public policy in

Rosenblatt v. Baer, assuming, as seems likely, such “pervasive hostile environment” charges have the requisite nexus or germaneness to the faculty member’s fitness mandated by *New York Times*.⁴⁹⁰ The status decisions as to public educators are in

the *civil*, as distinguished from, the *cultural, educational, or sports realms*. The ‘apparent importance’ of a position in government sufficient to propel a government employee into a public official status has *nothing to do with the breadth or depth of the passion or degree of interest that the government official might ignite* in a segment of the public. Nor is celebrity, for good or ill, of the government employee particularly relevant. Rather, it is *the nature of the government responsibility* that guides our public official inquiry. The public official roster is *comprised exclusively of individuals in whom the authority to make policy affecting life, liberty, or property has been vested*. Likewise, *only those issues that have such bearing on civil life as to fairly touch on matters that in the eyes of law concern life, liberty, or property* may be traced to the actions of a public official. So viewed, high school athletics can claim no ‘apparent importance’. The policies and actions of any high school athletic team *do not affect in any material way the civic affairs of a community – the affairs most citizens would understand to be the real work of government.*”) (emphases added).

⁴⁹⁰ Elder, *Public Officialdom*, *supra* note 489, at 648 (The case precedent “overwhelmingly follows the broad-gauged and almost all-encompassing” standards suggestion by Court precedent.); ELDER, DEFAMATION, *supra* note 75, at § 5-37. The nexus precedent has included allegations of sexual harassment by a public official. *Pierce v. St. Vrain Valley School Dist. Re – 1J*, 944 P.2d 646 (Colo. Ct. App. 1997), *rev’d on other grounds*, 981 P.2d 600 (1999); *Vassallo v. Bell*, 534 A.2d 724, 731-33 (N.J. Super. Ct. App. Div. 1987); *Van Dyke v. KUTV*, 663 P.2d 52, 56 (Utah 1983) (same); *Johnson v. Robbinsdale Indep. Sch. Dist. No. 281*, 827 F. Supp. 1439, 1441-43 (D. Minn. 1993) (allegations of racism and incompetence to a public school principal). *See also* *Waterson v. Cleveland State Univ.* 639 N.E.2d 1236, 1238-39 (Ohio Ct. App. 1994) (allegations of homophobic and racist behavior). The same has been applied to stereotyped misogynistic comments. *Simonson v. United Press Intern.*, 500 F. Supp. 1261, 1267-68 (E.D. Wis. 1980), *aff’d*, 654 F.2d 478 (7th Cir. 1981) (A judge made a statement to the effect women provoke sexual assault by the way they dress.). For a detailed listing see ELDER, DEFAMATION, *supra* note 75, § 5-37-41. *Compare* *Lassiter v. Lassiter*, 456 F. Supp. 2d 876, 880 (E.D.Ky. 2006) (The court held that charges of spousal abuse and adultery with a student involved an action by a private person plaintiff against a private person defendant on “a matter that is not of public interest.” The court made this finding as to a self-published autobiographical book by a law professor defendant directed at her former husband, also a public university law professor. The court described the book as “primarily of an inspirational and religious nature” and applied Kentucky common law, holding that the charges of domestic violence were true and the charge of adultery opinionative in nature under Kentucky common law.), *aff’d*, 280 Fed. Appx. 503 (6th Cir. 2008).

significant conflict.⁴⁹¹ The better (and majority) view as to teacher-educators generally⁴⁹² and the better view as to lower

⁴⁹¹ ELDER, DEFAMATION, *supra* note 75, § 5:1, at 5-17-19, nn.113-115; *id.* at 5-22 nn.135-37; *id.* at 5-27-28 nn.183-86.

⁴⁹² The leading case for private status of a public school teacher is *Franklin v. Benevolent and Protective Order of Elks*, Lodge No. 1108, 159 Cal. Rptr. 131, 135-36 (Cal. Ct. App. 1979), where the court held that plaintiff-public high school teacher was not a public official as to a book controversy generated by defendant. The court found plaintiff to be a private individual under *New York Times-Rosenblatt*: “Implicit in the [Court’s] reasoning is the concept of a freedom of the *governed* to question the *governor*, of those who are influenced by the operation of government to criticize those who *control* the conduct of government. The governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical. Far too much so . . . to justify a qualifiedly privileged assault upon . . . reputation.” *Id.* at 136. The Court rejected any assumption of risk argument, seeing in such a rule “a real and intolerable danger to the freedom of intellect and of expression which the teacher must have to teach effectively.” *Id.* See also *Dec v. Auburn Enlarged Sch. Dist.*, 672 N.Y.S.2d 591, 593 (N.Y. App. Div. 1998) (A high school teacher-coach publicly chastized as having been forced to resign because of alleged improper sexual misconduct with female students was not a public official.); *Goodwin v. Kennedy*, 552 S.E.2d 319, 326-27 (S.C. Ct. App. 2001) (An African-American assistant principal portrayed as a “house nigger” by an African-American activist was not a public official.). And, most importantly, the Ohio Supreme Court rejected public official status in the case of a well-known high school wrestling coach, holding that any other result “would unduly exaggerate” that classification “beyond its original intentment.” *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1195-96 (Ohio 1984). In a vigorous dissent from denial of certiorari, Justices Brennan and Marshall discussed the issue at length, relying in major part on the equal protection decisions allowing states to exclude aliens from public school teaching positions. 474 U.S. 953, 957-59 (1985) (Brennan, J., with Marshall, J., dissenting).

The cases are very mixed as to principals. See ELDER, DEFAMATION, *supra* note 75, § 5.1, at 5-17-5-18, n.114, 5-21-5-22, nn. 135-137, with *id.* at 5-28, nn. 184-85. For an example of a non-public official (private plaintiff) case involving a public high school principal, see *Ellerbee v. Mills*, 422 S.E.2d 539, 540 (Ga. 1992) (In a suit against a former teacher the court adopted the “better view” and found that “[p]rincipals, in general, are removed from the general conduct of government, and are not the policymakers at the level intended by the *New York Times* designation of public official.”) Compare the concurrence. *Id.* at 541-42 (Fletcher, J., concurring). See also *Beeching v. Levee*, 764 N.E.2d 669, 676-79 (Ind. Ct. App. 2002) (After an extensive listing of the cases on both sides, the court followed *Ellerbee*, noting that principals were at least two employment steps below elected board members and the matter involved an “internal work-place dispute.”); *E. Canton Educ. Ass’n. v. McIntosh*, 709 N.E.2d 468, 474-75 (Ohio 1999) (The court adopted the “better view” and found plaintiff-high school principal not to be a public official, reaffirming its earlier

level public university educators specifically⁴⁹³ finds they are

decision distinguishing a superintendent-public official from a wrestling coach-high school teacher.). *But see* Williams v. Detroit Bd. of Educ., 523 F. Supp. 2d 602, 608-10 (E.D. Mich. 2007) (noting the substantial disagreement of the cases on the public official status issue as to high school principals and opting for such status, curiously relying on Justice Brennan's dissenting opinion from denial of certiorari in *Milkovich*, 473 N.E.2d 1191).

Of course, a state *may* impose *New York Times* under its state constitution. *See* Campbell v. Robinson, 955 S.W.2d 609, 611-12 (Tenn. Ct. App. 1997) (Following the leading Tennessee case which involved treating a social worker as a public official, the court found a public school teacher so qualified – the teacher exercised a “public function” and was “an authority figure and a government representative” whose “actions affect the taxpayers” in the state.). It should be noted that Tennessee precedent finds its state constitution broader than its First Amendment counterpart. *Id.* (quoting Press, Inc. v. Verran, 569 S.W.2d. 435, 441 (Tenn. 1978)). However, such precedent ignores the impact of its responsibility-for-abuse qualification, which many states have interpreted as not justifying greater-than-*Gertz* protection. *See infra* notes 519, 549.

⁴⁹³ Grossman v. Smart, 807 F. Supp. 1404, 1408 (C.D. Ill. 1992) (holding that an assistant professor of law had no “decision-making responsibility” prior to or subsequent to his hiring); Fortenbaugh v. New Jersey Press, 722 A.2d 568, 576-76 (N.J. Super. Ct. App. Div. 1999) (Noting that the cases on both sides of the college professor as public official or public figure are mixed, the court concluded that the determination in particular litigation is “fact-sensitive, turning on the particular duties and status” of the particular academic before the court.); Lassiter v. Lassiter, 456 F. Supp. 2d 876, 880 (E.D. Ky. 2006) (The court rejected the suggestion plaintiff, a tenured full professor at a public university law school, was a public official.), *aff'd*, 280 Fed. Appx. 503 (6th Cir. 2008). In Foote v. Sarafyan, 432 So.2d 877, 878-80 (La. Ct. App. 1983), an assistant professor of mathematics and the chair-associate professor, were determined to be private plaintiffs in a suit by a fellow department member as to internal charges also made to and republished in the university newspaper. The court's perfunctory conclusion appears correct but was based on a conclusion that *Hutchinson v. Proxmire*, *see infra* text accompanying notes 499-500, had held that the plaintiff therein, a state university adjunct and director of research at a state institution, was not a public official. The Court did *not* reach this issue. *See supra* note 488. The court of appeals in *Hutchinson* had declined to resolve this issue, treating *Hutchinson* as a public figure. 579 F.2d 1027, 1039 n.14 (7th Cir. 1978). The district court had held him to be a public official on the ground he held an “important public position” as research director at a state hospital and was viewed as a “responsible public official” by federal agencies which had underwritten his research endeavors. 431 F. Supp. 1311, 1327-28 (W.D. Wis. 1977). The latter opinion was followed in a “false light” decision involving the director of the children's division of a state psychiatric hospital and associate professor of clinical psychiatry at a stated university medical school. Rinsley v. Brandt, 446 F. Supp. 850, 856 (D. Kan. 1977). *But see* Abdelsayed v. Narumanchi, 668 A.2d 378, 380 (Conn. App. Ct.

“not in that class of higher level decision-making employees”⁴⁹⁴ accorded public official status.

The Supreme Court has unequivocally approved two versions of public figuredom – “all purpose” or “general”⁴⁹⁵ and “vortex” or “limited purpose”⁴⁹⁶ – and ambiguously provided tepid dicta support for a third, indefensible class – the “involuntary”⁴⁹⁷

1995) (Without further discussion the court applied its public official status designation for public school teachers to litigation between accounting professors at a state university concerning charges of plagiarism made within the department and to the vice-president for academic affairs and university president.); *Gallman v. Carnes*, 497 S.W.2d 47, 48-50 (Ark. 1973) (The court held, with little analysis, that newspaper publication of charges by tenured faculty about a law faculty member-assistant dean involved a public official and a “matter of public or general concern” under *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971)). Of course, the latter subject matter approach negates any requirement for a reasoned application of the *Rosenblatt* criteria and renders *Gallman* highly dubious as precedent.

⁴⁹⁴ *Staheli v. Smith*, 548 So.2d 1299, 1304 (Mass. 1989) (Plaintiff was a non-tenured associate professor of geology.). *But see* *Grossman v. Smart*, 807 F. Supp. 1404, 1408 (C.D. Ill. 1992) (holding that a professor of agricultural law and chair of the search committee that recommended a co-plaintiff’s hiring was a public official, as was a vice chancellor for research and for the graduate college who was the hearing officer in an administrative grievance procedure – public official status was based on the discretionary “authority vested in these high level positions . . .”) Compare cases involving academics with higher rank and decision-making authority and responsibilities. *Hicks v. Stone*, 425 So.2d 807, 813 (La. Ct. App. 1982) (A dean of the college of education at a state university was a public official “or at least a public figure” as to his “involvement with the university” and a limited dissemination by the president to the university board of supervisors); *Baxter v. Doe*, 868 So.2d 958, 960-61 (La. Ct. App. 2004) (A public university’s vice-president for external affairs was a public official.) (construction of an insurance contract). *See also* ELDER, DEFAMATION, *supra* note 75, § 5.1, at 5:17 and nn.104-05 for cases involving superintendents of a junior college district or county or city school system, who are generally held to be public officials. The professor-chair as public official aspect of *Grossman* seems highly questionable. In my Chase experience, which I think is typical, chairs have largely ministerial and administrative duties with little influence on the hiring process beyond that of individual faculty members.

⁴⁹⁵ *See* ELDER, DEFAMATION, *supra* note 75, § 5:6.

⁴⁹⁶ *See* ELDER, DEFAMATION, *supra* note 75, §§ 5:7, 5:9–5:27.

⁴⁹⁷ *Id.*, § 5:8, at 5:71-74 (The author suggests that this “dubious” and “extinct” concept category (under the majority view) has been “expressly or implicitly rejected” in a significant number of cases that are equivalent to or indistinguishable from those supporting this category and that the “most

public figure. Moreover, the Court has unequivocally rejected any suggestion that *mere involvement* in professional activities of public concern suffices to meet “vortex” status.⁴⁹⁸ Thus, in *Hutchinson v. Proxmire*,⁴⁹⁹ the Court treated plaintiff research scientist-grant recipient-state university adjunct professor as a private individual under *Gertz* despite the fact that he had been published extensively in trade and academic journals. His “activities and public profile are much like those of countless members of his profession” whose academic writings are read by “a relatively small category” of interested scientists or academics.⁵⁰⁰ A number of cases⁵⁰¹ have followed the Court’s

compelling argument” against said status is “the absence of any principled criteria” for distinguishing the minority perspective adopting involuntary public figuredom from other private figure status cases – indeed, this status is an attempt to “substantially reintroduce and rejuvenate” *Rosenbloom* and its public interest approach “under an only slightly less open-ended and amorphous” “involuntary” public figure classification.). Also, see the overlapping lines of similarly indefensible cases focusing on plaintiffs’ “centrality” or overall “course of conduct” as sufficient for vortex-limited public figuredom. See ELDER, DEFAMATION, *supra* note 75, § 5:12. For the discussion in the Duke Lacrosse context, see David A. Elder, *A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charges*, 11 VAND. J. ENT. & TECH L. 99, 104-18 (2008).

⁴⁹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974) (Plaintiff was “long active” in professional and community activities (including in a leadership capacity) and the author of an extensive number of publications. Although “well known in some circles, he had achieved no general fame or notoriety in the community” under the “all purpose” test; similarly, he played a “*minimal role*” in the legal proceeding discussed and his involvement “related *solely*” to client representation.) (emphases added); *Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979) (interpreting *Gertz*, 418 U.S. 323).

⁴⁹⁹ 443 U.S. 111 (1979).

⁵⁰⁰ *Id.* at 114-115, 134-36 (1979). Any media access came after the defamation and was not that “regular and continuing access” that public figuredom contemplates. *Id.* at 135-36. Of course, scientists, like others, may become actively involved in a public controversy and become public persons with respect thereto. See, e.g., *McBride v. Merrill Dow and Pharm.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (Plaintiff acknowledged expert became a public figure by “entirely voluntary” testimony he gave in an FDA hearing on the “heated public controversy” over Bendectin.). For other examples, see ELDER, DEFAMATION, *supra* note 75, 5:16, at p. 5-128-129.

⁵⁰¹ *Beeching v. Levee*, 764 N.E.2d 669, 679 (Ind. Ct. App. 2002) (Plaintiff-principal was neither an “all purpose” nor was she a “limited purpose” public

figure as to an internal dispute of which the public was unaware.); *E. Canton Educ. Ass'n. v. McIntosh*, 709 N.E.2d 468, 475 (Ohio 1999) (Plaintiff high school principal was neither an "all purpose" nor "limited purpose" public figure as to the well-publicized controversy regarding his termination.); *Kumaran v. Brotman*, 617 N.E.2d 191, 201 (Ill. App. Ct. 1993) (The court rejected as "sweep[ing] too broadly" the view that publicly paid school teachers "hold highly responsible positions in the community" and are public figures.); *McCutcheon v. Moran*, 425 N.E.2d 1130, 1133 (Ill. App. Ct. 1981) (A teacher-principal was not a public figure based on her status as such.); *Ellerbee v. Mills*, 422 S.E.2d 539, 541 (Ga. 1992) (Although not distinguishing categories of public figures, the court rejected public figure status as to a public high school principal.); *Id.* at 542-43 (Fletcher, J., concurring) (Plaintiff was not a public figure despite his leadership positions in professional and curriculum organizations, public speeches in educational and business settings, consultancies and advisory positions in the educational area.). Although not clear, the latter court's analysis seems to have been directed at the "all purpose" version. *See id.* at 540, n.2 (noting the possibility of principals becoming public figures by "thrusting themselves into a controversy"). *See also* *Lassiter v. Lassiter*, 456 F. Supp. 2d 876, 880 (E.D. Ky. 2006) (A tenured full professor at a public university law school was not a public figure.), *aff'd*, 280 Fed. Appx. 503 (6th Cir. 2008); *Sewell v. Trib Publ'ns, Ind.*, 622 S.E.2d 919, 922-24 (Ga. Ct. App. 2005) (holding that a state university assistant professor who purportedly made anti-American statements in class and denied a right of reply was not a limited purpose public figure as to media defamation generated therefrom); *Cantrill v. The Herald Co.*, 1992 U.S. Dist. LEXIS 760, 1, 16 (N.D.N.Y. 1992) (Plaintiff college debate coach and director of forensic programs was a private person despite his admissions that he had a national reputation in debate circles and had "influenced the outcome" of the controversy regarding debate recruiting — the defamatory issue before the court. The court found plaintiff's "greatest stature in this regard" had "involuntarily resulted" from the defamatory article.); *Byers v. Southeastern Newspapers Newspaper Corp.*, 288 S.E.2d 698, 701 (Ga. Ct. App. 1982) (The court distinguished the dean who had become a "limited purpose" public figure (*see infra* note 516) from state university faculty generally: ". . . [A] professor, unless he or she chooses otherwise, can generally remain out of the public eye and concern himself or herself with matters more directly related to academia."); *Franklin v. Benevolent and Protective Order of Elks, Lodge No. 1108*, 159 Cal. Rptr. 131, 137-41 (Cal. Ct. App. 1979) (The court held that plaintiff's later involvement in a book controversy generated by defendant did not make plaintiff a "limited purpose" public figure who "voluntarily and actively sought . . . to influence the resolution" of a matter of public concern. After ordering several copies of the book, her only participation in the defendant-generated controversy was that mandated by local regulations or to reply to media inquiries.); *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1193-95 (Ohio 1984) (holding that a high school wrestling coach was not a "vortex" public figure as to the controversy generated by the aftermath of a melee at a wrestling match and his testimony before a state athletic administrative hearing and a court proceeding, as he "never thrust himself to the forefront of that controversy in order to influence its decision"). Justices Brennan and Marshall dissented from denial of certiorari and

jurisprudence and denied public figure status where plaintiff teacher or college or university academic was, like Hutchinson, “dragged unwillingly”⁵⁰² into the public eye.

A trio of well-analyzed public figure decisions have involved law school faculty members. In one, *Grossman v. Smart*, the court held that the mere voluntary act of application for a law faculty position did not constitute a “voluntary thrust(ing)” into the controversy defendant’s attack on his integrity generated.⁵⁰³ The court also rejected “involuntary” public figure status based on defendant’s filing of a formal grievance,⁵⁰⁴ following the Supreme Court’s refusal to find public figure status based on mere involvement in a legal proceeding.⁵⁰⁵ To allow such to

emphasized that the court below had applied public figure criteria in an “exceptionally narrow way.” 474 U.S. 953, 954 (1985) (Brennan, J., with Marshall, J., dissenting). The dissenters opined that the court below had limited itself to two “rigid, technical standards” and emphasized that public figuredom “necessarily must, encompass the major figures around which a controversy rages” – including plaintiff-coach who was accused of having “incited the fracas.” *Id.* at 962-64.

⁵⁰² *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 166 (1979).

⁵⁰³ 807 F. Supp. 1404, 1409 (C.D. Ill. 1992). Defendant argued that but for plaintiff’s alleged intentional dishonesty, which defendant analogized to criminal misconduct, the controversy would not have occurred. The court rejected this, finding defendant had not adduced any undisputed facts that evidenced plaintiff “voluntarily thrust himself into the forefront of this public policy in order to influence the resolution of the issues involved.” *Id.*

⁵⁰⁴ *Id.* at 1409-10.

⁵⁰⁵ *Id.* The Court has repeatedly rejected public figure status based on mere involvement in legal proceedings. *Wolston*, 443 U.S. at 167-69 (holding that a citation for criminal contempt did not per se render plaintiff a public figure as to comment thereon – such would revitalize *Rosenbloom* and “create an ‘open season’ for all who sought to defame persons convicted of a crime”); *id.* at 167 (noting that in *Gertz* plaintiff-attorney’s limited involvement in civil litigation related exclusively to representing his client); *Time Inc. v. Firestone*, 424 U.S. 448, 454-57, nn.3, 8, (1976) (The court stated that Plaintiff’s “cause célèbre” divorce did not involve a public controversy and was not a matter of free choice despite several press conferences plaintiff held to “satisfy inquiring reporters” – such “should have had no effect” on the underlying dispute’s merits and the Court rejected any suggestion “any such purpose was intended.” In addition, there was no evidence plaintiff tried to use these press interactions “as a vehicle by which to thrust herself to the forefront at some underlying controversy in order to influence its outcome.”). See also *Fleming v. Moore*, 275 S.E.2d 632, 634, 637 (Va. 1981) (holding that an assistant professor of humanities who

fulfill defendant's burden⁵⁰⁶ of showing an "identifiable particular public controversy" *prior* to the defamation⁵⁰⁷ would "render meaningless"⁵⁰⁸ the Court's concerns about defendants' publicity bootstrapping involuntary participants into public figuredom.⁵⁰⁹ By contrast, another court correctly held that a former associate professor teaching civil procedure at a state university law school was a public figure in the context of state and federal litigation where he made both faculty and students aware of his complaints of mistreatment, drafted a press release after filing his claims, discussed the complaints during class (and put them on reserve in the library), and published an article thereon in the student newspaper.⁵¹⁰

made two voluntary appearances in planning proceedings to protect his interest in his private residence was not a public figure). For a discussion of the issues raised by the Duke lacrosse case, see David A. Elder, *A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charges*, 11 VAND. J. ENT. & TECH L. 99, 104-18 (2008).

⁵⁰⁶ *Grossman*, 807 F. Supp. at 1410. See also *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (noting that respondent's identification of "concern about general public expenditure" was insufficient — such was "shared by most and relates to most public expenditures" and that if allowed, such would ensnare anyone and everyone who was either a beneficiary or recipient of extensive public research grants).

⁵⁰⁷ *Grossman*, 807 F. Supp. at 1410.

⁵⁰⁸ *Id.* (stating that the plaintiff's job application "hardly brings [him] into publicity or controversy").

⁵⁰⁹ See *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("[C]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."); *Wolston*, 443 U.S. at 167-68 ("A libel defendant must show more than mere newsworthiness to justify . . . the demanding burden" of *New York Times*). See ELDER, DEFAMATION, *supra* note 75, § 5:9.

⁵¹⁰ *Blum v. State*, 680 N.Y.S.2d. 355, 357 (N.Y. App. Div. 1998). By contrast, where a participant in legal proceedings, see *Wolston*, *supra* note 502, makes responsive replies to press inquiries, the cases generally do not view such as sufficient to make the respondent a "vortex" or "limited purpose" public figure. See *supra* note 75; ELDER, DEFAMATION, § 5:9, at 5-76; *id.*, § 5:15, at 5-110-1-111. Furthermore, a participant's measured and proportionate response to accusations of a criminal nature may be viewed as no more than a "right of reply" even where the accused is attempting to mold and influence the particular controversy into which he is thrust, as long as the plaintiffs' "primary motive" was to defend their good names. See *Foretich v. Capital Cities/ABC*, 37

A third case, *Avins v. White*,⁵¹¹ directly involved defamation in the context of an ABA accreditation controversy involving a private law school seeking provisional accreditation. The Third Circuit rejected any suggestion plaintiff, the former dean, was an “all purpose” public figure. Although “well known in legal academic circles,” he did not have the requisite “fame and notoriety in the public eye”⁵¹² required for such status. However, the court did determine that plaintiff was a “vortex” public figure⁵¹³ involved in “a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.”⁵¹⁴ The court cited the law school’s status as the only one in the state, its impact on admissions to the bar within and without Delaware, and the mass meetings and publicity by the press and the state bar generated by the school and its accreditation difficulties.⁵¹⁵ In addition, the former dean’s involvement in “spear-head(ing)” the school’s pursuit of

F. 3d 1541, 1563 (4th Cir. 1994); *Wells v. Liddy*, 186 F. 3d 505, 540 (4th Cir. 1999) (The court applied the “attempts self-help” rule of *Foretich* with “equal strength” to the involuntary public figure setting.). For a discussion in the Duke lacrosse setting, see Elder, *Duke Lacrosse Fabricated Rape Charges*, *supra* note 505, at 104-18.

⁵¹¹ 627 F.2d 637 (3d Cir. 1980). See Robert P. Simons, *Avins v. White, Defamation in the Accreditation Process*, 8 J.C. & U.L. 268 (1981-82).

⁵¹² *Avins*, 627 F.2d. at 647. This is consistent with the precedent generally. See ELDER, DEFAMATION, *supra* note 75, at 5-58-59. See *Milkovich v. News Herald*, 473 N.E.2d 1191, 1195 (Ohio 1984) (demonstrating that an admired, easily identifiable, nationally recognized wrestling coach did not “occupy a position of persuasive power and influence”); *Moss v. Stockard*, 580 A.2d 1011, 1033 (D.C. Ct. App. 1990) (contending that, like Gertz, plaintiff part-time basketball coach had become “well known within some circles, [but] [s]he had received no general fame or notoriety in the community”); *E. Canton Educ. Ass’n v. McIntosh*, 709 N.E.2d 468, 475 (Ohio 1999) (holding that a local high school principal was not an “all purpose” public figure). Compare *Luper v. Black Dispatch Publ’g Co.*, 675 P.2d 1028, 1030-31 (Okla. Ct. App. 1983) (holding that plaintiff public school teacher was a public figure, apparently of the “all purpose” variety, based on her status as a “well-known” civil rights activist, author and radio show host).

⁵¹³ *Avins*, 627 F.2d at 647-49.

⁵¹⁴ *Id.* at 647-48 (quoting *Waldbaum v. Fairchild Publ’ns*, 627 F.2d 1287, 1296 (D.C. Cir. 1980)).

⁵¹⁵ *Avins*, 627 F.2d at 647-48.

accreditation, involvement in “every facet” of the accreditation fight, and his “affirmative and aggressive role” in the accreditation struggle met the voluntary injection requirement.⁵¹⁶

⁵¹⁶ *Id.* at 648 (Unlike the plaintiffs in *Firestone*, *Hutchinson* and *Wolston* – see *supra* the text supported by notes 498-502, 505-09 – plaintiff was “not involuntarily dragged into a controversy not of his own making” and was a public figure for the “limited purpose” of the accreditation struggle.). For other limited dissemination or environment “vortex” public figure-educators examples, see *Johnson v. Board of Junior Coll. Dist.* #508, 334 N.E.2d 442, 443-44, 447 and n.1 (Ill. App. Ct. 1975) (The case involved litigation against the board, certain officers thereof, the junior college and certain faculty colleagues. Plaintiffs, former professors, were held to be “limited purpose” “public figures” within the particular junior college where they formerly taught and where the defamatory publication had been disseminated since they had become “actively engaged” in an intracollegiate controversy arising from student charges that they had declined to adopt African-American authored books in violation of a departmental agreement. The conclusion was limited to the particular circumstances therein and did not mean they were (merely as public employees) public figures “either in the school community or in the local community served by the school.”); *Thornton v. Kaplan*, 937 F. Supp. 1441, 1444-45, 1459 (D. Colo. 1996) (This case involved libel litigation against the accounting departmental chair, chair of the promotion and tenure committee and the chair of the same committee at the school of business level. Plaintiff “injected himself” into a hiring controversy at a public university concerning a candidate not hired for allegedly religious reasons and due to statements made about gays and women. As a result of his involvement, plaintiff claimed he was portrayed by the departmental chair to the school of business committee chair as a “racist” and “sexist” and a “divisive influence” within the department. The court also hinted that the controversy and its “divisive effect” intra-departmentally were privileged communications based in defendants’ duties to communicate with the university trustees as to plaintiff’s tenure decision.). The *Thornton* decision overstates the case for public figuredom. A faculty member of whatever political persuasion who objects to discrimination against religious or political conservatives (or against atheists or political leftists) is acting in a wholly professional manner, fulfilling a responsibility all professors should (in theory but not in fact) applaud and support – a duty that may be mandated by constitutional considerations as to state schools and/or federal and state antidiscrimination laws. Given the near stranglehold of the liberal-left over hiring, which is particularly true at law schools, see *infra* text accompanying note 690, bestowal of public figure status on those conscientiously objecting – usually conservatives trying to get a fair shake for conservatives – provides a further boot-strapping barrier by those already in control against those trying to unravel this near monopoly.

Faculty may also be public figures by voluntary injection into other more public activities outside the limited confines of the campus which precipitate press attention. See *El Paso Times v. Trexler*, 447 S.W.2d 403, 404-05 (Tex.

In light of the above analysis, it is exceedingly doubtful that any of the male Chase faculty members (or comparable faculty pilloried in an accreditation-membership context elsewhere) would have been subject to the *New York Times* standard as public persons. Educators (even senior, tenured ones) toiling in the vineyards of legal education do not normally have the policy, decision-making authority warranting public official status under *Rosenblatt*. The only one who might have so qualified, the Chase law school dean, was clearly absolved of the taint and implicitly excluded from the class.⁵¹⁷ None of the faculty would have been “all purpose” public figures. A couple of former deans would, like Avins, likely be well-known in local, state and national legal circles but that would not have sufficed. Under the facts in the public record, it is doubtful any male Chase faculty members would have been “vortex” public figures. Specifically, there is no evidence of an identifiable preexistent “particular public controversy” into which such faculty members had purportedly injected themselves.

Accordingly, for First Amendment purposes, Chase

1969) (involving plaintiff, a university professor, who led an antiwar protest in a public plaza, which resulted in widespread condemnation and published letters to defendant, which defended plaintiff's right to protest); *Faltas v. State Newspaper*, 928 F. Supp. 637, 640-43, 645-46 (D.S.C. 1996) (This case involved plaintiff, resident at a state university medical school, who became a “limited purpose” public figure when she published an “op-ed” piece on scientific studies on homosexuality and the appropriateness of placing restrictions on their rights in the public interest, which resulted in numerous published newspaper responses and several other public appearances of plaintiff in the media. The court rejected plaintiff's argument that her actions were involuntary and not a matter of “social controversy” but mere fulfillment of her public responsibilities. The court found such a distinction would “eviscerate the First Amendment protections” – she had engaged in “a voluntary entry into a volatile debate.”); *Byers v. Southeastern Newspapers Corp., Inc.*, 288 S.E.2d 698, 701-02 (Ga. Ct. App. 1982) (Plaintiff, dean of a state college, was a “limited purpose” public figure as to his attempts to “thrust himself into the vortex” of a controversy over abolishing his position – although initially pulled into this controversy, his actions were “an attempt to influence others and . . . invited attention and comment.”); *Torgerson v. Minneapolis Star*, 7 Med. L. Rptr. 1805, 1806-07 (Minn. Dist. Ct. 1981) (Plaintiff, who became dean of a new and criticized unaccredited law school, became a “limited purpose” public figure, if not from the beginning of his tenure, at least when he “injected himself into the law school controversy . . .”).

⁵¹⁷ See *supra* text accompanying notes 80, 263.

plaintiffs⁵¹⁸ (and like colleagues elsewhere in most jurisdictions)⁵¹⁹ would have been entitled to pursue libel litigation under the *Gertz*-minimal fault negligence standard for compensatory damages.⁵²⁰ In the context of “pervasive hostile environment” charges a claim could be arguably made that such charges were matters of public concern⁵²¹ and not purely private matters under *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁵²² If so, in addition to minimal fault, a public concern

⁵¹⁸ Kentucky has adopted the *Gertz*-simple negligence standard. See ELDER, DEFAMATION, *supra* note 75, § 6:2, at 6-7 – 6-8 and n.17. See also DAVID A. ELDER: KENTUCKY TORT LAW: DEFAMATION AND THE RIGHT OF PRIVACY § 2:11 (1983).

⁵¹⁹ Courts have overwhelming adopted the *Gertz*-minimal fault standard. See ELDER, DEFAMATION, *supra* note 75, § 6:2. Many have cited the “abuse” qualification on freedoms of expression, “open courts” provisions and/or the specific protection of character in the state constitutions as strongly auguring against a higher-than-*Gertz* standard. *Id.* at pp. 6-14 – 6-16. A very small minority has adopted a *Rosenbloom-New York Times* approach in public concern cases regardless of status. *Id.* § 6:9. New York has adopted a “gross irresponsibility” standard in such cases. See *id.* § 6:10.

⁵²⁰ On the impact of common law privileges in enhancing plaintiffs’ burdens, see *infra* notes 528-49.

⁵²¹ *Grossman v. Smart*, 807 F. Supp. 1404, 1411 (C.D. Ill. 1992) (finding that although a “difficult and close question,” defendant’s extensive dissemination of plaintiff’s law school transcript as an appendix to other matter charging racial discrimination gave it a “nexus” to University hiring policies and procedures, making it a matter of “public concern”). Also, see the nexus-to-public official status cases, *supra* note 490. *But cf.* *Staheli v. Smith*, 548 So.2d 1299, 1304-05 (Miss. 1989) (finding that tenure and raise decisions in a very confidential environment-employment setting were not matters of public concern – the court applied *Dun & Bradstreet* in determining the “legitimate public interest” issue for public figure status); *Beeching v. Levee*, 764 N.E.2d 669, 679-80 (Ind. Ct. App. 2002) (assessing both the public official and alternative public interest standard adopted under the Indiana *New York Times-Rosenbloom* minority view, see *supra*, note 519, and emphasizing that the dispute involved an “internal workplace dispute” – impugning plaintiff as a “liar” who was not trustworthy – which had not impacted education at the school and was unknown outside the school). See also the discussion of *Lassiter v. Lassiter*, *supra* note 490.

⁵²² 472 U.S. 749 (1985). The Court clarified the confusion generated by *Gertz* and held that the speech before it, unlike in *Gertz*, which dealt with “a matter of undoubted public concern,” *id.* at 756, 757 (Powell, J.), involved matter of “purely private concern,” *id.* at 759, a dissemination of a credit report disparaging plaintiff’s corporate business reputation (i.e. imputing bankruptcy)

finding would mean that plaintiff would have the burden of proving falsity⁵²³ (including that the matter was provable as

to five recipients. *Id.* at 751. This information involved “no threat to the free and robust debate of public issues,” “no potential interference with a meaningful dialogue of ideas concerning self-government,” and “no threat of liability causing a reaction of self-censorship by the press.” *Id.* at 760 (quoting *Harley-Davidson Motorsports v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)). Applying the “content, form and context” test adopted in the public employee speech context in *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), Justice Powell held that the matter involved commercial matter that was limited by contract, not republishable, with dissemination limited to parties with a common interest in the published matter. *Dun & Bradstreet*, 472 U.S. at 762. Accordingly, *Gertz*’s restrictions did not apply and presumed and punitive damages were permissible under state law standards. *Id.* at 760. Two other Court members concurred in the judgment, viewing the matter as one of “essentially private concern.” *Id.* at 764 (Burger, C. J., concurring); *id.* at 767 (White, J., concurring). *Dun & Bradstreet*’s broader implications would appear to allow strict liability, the retention of the truth defense (with a disallowance of plaintiff’s burden of proving falsity) and the minority view limiting it to benevolent motives, and imposition of liability for what would otherwise be opinionative statements. See ELDER, DEFAMATION, *supra* note 75, § 6:11, at 6-70 – 6-72. Courts may, and some have adopted *Gertz* as a matter of state law. See, e.g., ELDER, DEFAMATION, *supra* note 75, § 6:11, at 6-70 – 6-71, n.23 (citing cases adopting *Gertz*’s fault requirement in the purely private arena); *id.* at 6-71, n.24 (citing cases imposing a burden of falsity on plaintiffs in purely private cases). Note that a crucial facet of *Dun & Bradstreet* may have been its limited dissemination. As Justice Brennan said, “this particular expression could not contribute to public welfare because the public does not receive it.” *Dun & Bradstreet*, 472 U.S. at 786 (Brennan, J., dissenting). Arguably, *Dun & Bradstreet*’s logic and test may dictate different results in limited dissemination speech involving public sector and private sector (private university and private law school) employees. As Judge Selya cautioned in a leading case, the *Connick* criteria involved public employees terminated for critical commentary: “Public employee cases typically involve speech on matters relating to public sector jobs, and criticism of the workings of government is at the core of conduct protected by the First Amendment . . . Statements that implicate issues outside the public sector may require more rigorous analysis.” *Levinsky’s, Inc. v. Wal-Mart Stores*, 127 F.3d 122, 132 (1st Cir. 1997) (discussing the criteria to be assessed on remand in context of alleged defamation of a local competitor by a national retailer).

⁵²³ *Phila. Newspapers v. Hepps*, 475 U.S. 767 (1986) (stating all plaintiffs, public or private, had the burden of proving falsity to “ensure that true speech on matters of public concern is not deterred”). The Court took no position on non-media defendants. *Id.* at 779, n.4. See the discussion in ELDER, DEFAMATION, *supra* note 75, § 4:4, at 4-14 – 4-15; see *supra* text accompanying notes 482-85. As the Court implied in *Dun & Bradstreet*, the First Amendment does not mandate such a plaintiff-imposed burden of falsity in the purely

factually false under the Court's reformulated opinion rule)⁵²⁴ and that punitive and presumed damages would be barred absent compliance with *New York Times*.⁵²⁵

That does not end a potential plaintiff's inquiry, however. Plaintiff may not wish to proceed (or may not be able to secure representation) unless punitive damages are available⁵²⁶ or there are otherwise substantial enough compensatory damages⁵²⁷ to justify litigation. Consequently, plaintiff's First Amendment burdens as a private person may not, as a practical or legal matter, be the *only* considerations in considering litigation. This is particularly true in the non-media context at issue here, where common law privileges may provide, in contrast to the media setting,⁵²⁸ additional or more expansive protection than that mandated by the First Amendment.⁵²⁹

With respect to the latter, the different legal relationships in the accreditation context should be noted: faculty or other inside sources and site evaluation team member(s); site evaluation team members among themselves; site evaluation teams member(s) reporting to the Accreditation Committee of the Council of Legal Education and the Executive Committee of the AALS; communications by the latter among themselves and to the University and/or law school as an approved and

private context. See ELDER, DEFAMATION, *supra* note 75 at 4-13, n.4. See *supra* text accompanying note 522.

⁵²⁴ See *supra* note 196.

⁵²⁵ See *supra* text accompanying note 481.

⁵²⁶ See MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS, 307-08 (7th ed. 2005) (noting that most libel cases are litigated under the *New York Times* standard for "fairly obvious reasons" – one was that private plaintiffs would otherwise give up punitive and presumed damages).

⁵²⁷ *Id.* at 308 (noting that negligence-based liability is of "minor importance" in media cases except in business litigation where business losses are "likely to be large enough to be worth litigating over").

⁵²⁸ Post-*Gertz*, the cases have generally rejected a proposed common law public interest privilege for the media. See ELDER, DEFAMATION, *supra* note 75, § 6:2, at 6-19 – 6-20 and n.85. A very few jurisdictions apparently allow such additional protection to the media. *Id.*

⁵²⁹ See *supra* text accompanying notes 474-516.

accredited institution seeking continued accreditation or as a law school seeking initial ABA accreditation, or as an AALS member law school seeking continued membership status or as a law school seeking initial AALS membership. The author will assume, as seems highly probable,⁵³⁰ that each of these relationships is qualifiedly or conditionally privileged. By contrast, there would appear to be little justification or support for a claim to absolute privilege. Given the nature of the accreditation/membership evaluation process, there would be little basis in precedent for viewing this process as quasi-judicial and entitled to absolute immunity.⁵³¹

⁵³⁰ See RESTATEMENT (SECOND) OF TORTS §§ 594-96 (1977) (discussing protection of the publisher's interest privilege, protection of interest of recipient or a third person privilege, and common interest privilege). See also *Avins v. White*, 627 F.2d 637, 644-46 (3d Cir. 1980) (finding a potential common law "common interest" privilege existed for a communication between defendant-inspector-agent of the Accreditation Committee and publication to a strong supporter of the law school seeking accreditation – a fact issue existed as to excessive publication). On qualified privileges generally see ELDER, DEFAMATION, *supra* note 75, §§ 2:23 – 2:25; cf. *Craig v. M&O Agencies, Inc.*, 496 F.3d 1047, 1061 (9th Cir. 2007) ("[S]tatements made during sexual harassment investigations are generally conditionally privileged.").

⁵³¹ See ELDER, DEFAMATION, *supra* note 75, § 2:5. To permit absolute immunity "sans sufficient safeguards to protect defamation victims 'would provide a vehicle for silent and effective character assassination.'" *Id.* at 2-39 (quoting *Toker v. Pollak*, 376 N.E.2d 163, 169 (N.Y. 1978) (finding a mayor's committee on the judiciary was only protected by a qualified privilege)). Note by contrast, that the overwhelming majority view accords formal bar complaints, which provide extensive procedural protections, absolutely privileged status, both at the state or local level. For example, were an aggrieved faculty member to file a bar grievance against a participant or participants in the ABA/AALS processes, these would be absolutely privileged if the very liberal nexus/relevance standards were met. *Id.* ELDER, DEFAMATION, *supra* note 75, § 2:5, at 2-39-42. See also *supra* note 374. Note also that then Judge Alito refused to extend the absolute judicial proceedings privilege to a private university's grievance procedure which had few of the accepted indicia of a judicial proceeding. *Overall v. University of Pa.*, 412 F.2d 492, 496-98 (3d Cir. 2005) (Alito, J.) (The court used a "public"-"private" dichotomy and suggested that governmental hearings "typically involve basic procedural safeguards that may be lacking in private proceedings" – in the case before the court, for example, there might be no sworn testimony, the faculty lacked authority to make binding determinations, and no transcript was made, a matter of "particular relevance" in defamation litigation. That the faculty members applied legal principles to the facts before them was *not* enough to make the proceeding quasi-judicial in nature.). However, note the very dubious minority view in *Reichardt v. Flynn*, 823 A.2d 566, 574-75 (Md. 2003) (according an

Accordingly, common law privilege will provide *additional protection* in jurisdictions adopting a forfeiture of qualified/conditional privilege more exacting than that the minimal fault – usually negligence – standard constitutionally mandated by *Gertz*.⁵³² Undoubtedly, prior to *Gertz* the strong majoritarian view was forfeiture by absence of reasonable

absolute privilege to parents and students for allegedly defamatory and fabricated charges of sexual abuse, discrimination and harassment against plaintiff-public school teacher made to the principal and several other school officials) and the powerful dissent, *id.* at 579-80 (Cathell, J., dissenting) (“Why should parents and their children be permitted to purposefully ruin the lives of others by maliciously communicating defamatory statements as is alleged here?”). Also, see the equally indefensible decision in *Hartman v. Keri*, 883 N.E.2d 774, 777-79 (Ind. 2008), where the court granted absolute privilege to student complaints made and investigated under the university’s sexual harassment procedure. The court acknowledged that no “formal apparatus” was provided thereunder, but rejected focus on the “particular process” and emphasized “the recognition of the institution’s interest in assuring a proper educational environment.” *Id.* at 778. In implementing this interest, “anything less than an absolute privilege could chill some legitimate complaints for fear of retaliatory litigation.” *Id.* The court cited expansive Indiana statutes providing extensive authority of universities to “prevent unlawful or objectionable acts” of students, faculty and employees “wherever the conduct might occur,” including dismissal. *Id.* at 778 (quoting Ind. Code Ann. §§ 21-39-2-2 to -3 (West 2008)). Accordingly, educational institutions were allowed to “construct their own disciplinary institutions in a way that protects the needs of the participants and also serves the educational goals of the institution.” Although “lack[ing] the trappings of a traditional court proceeding,” the procedure at issue was “orderly and reasonably fair,” mandated “appropriate discipline” for those making knowingly false or malicious complaints and promised “reasonable efforts” to remedy damage to reputation. *Id.* at 778-79. The court found that any complaint plaintiff-academic had was with the university, not those making the harassment complaints! The author has said elsewhere, “Imagine what is being authorized – dismissal without a formal hearing in a non-adversarial process without the opportunity to cross-examine witnesses or subpoena or compel testimony. The majority said such policies are ‘common place’. Indeed, they are. Anyone familiar with the rush to judgment in the Duke lacrosse case (with Duke’s complicit faculty being hugely important) (*see supra* note 22)) . . . should view cases like *Reichardt* and *Hartman* with considerable concern. An analysis of the facts suggests that a good faith privilege or some other version of qualified privilege would have reached a parallel” result, “without however, leaving other plaintiff academics at peril in cases of complainant abuse.” ELDER, DEFAMATION, *supra* note 75 at 59 (2008 Supp.).

⁵³² See *supra* text accompanying notes 480, 518-19.

grounds or probable cause for belief in truth.⁵³³ In response to *Gertz* the *Restatement (Second) of Torts* heavy-handedly⁵³⁴ adopted a very broad interpretation of the Court's First Amendment jurisprudence and concluded that the above common law forfeiture standard had been subsumed in plaintiff's First Amendment minimal fault burden⁵³⁵ in *every* defamation case, media or non-media, matters of public concern or purely private concern.⁵³⁶ Of course, this went a quantum leap beyond the *Gertz* holding.⁵³⁷ Although the *Restatement (Second) of Torts* appended some tepid qualifying caveats about the states' post-*Gertz*⁵³⁸ need to reassess and readjust grounds

⁵³³ ELDER, DEFAMATION, *supra* note 75, § 2:33, at 2-218 – 2-220; RESTATEMENT (SECOND) OF TORTS § 580B, cmt. 1 (1977) (conceding that the common law standard allowed liability if defendant lacked “reasonable grounds to believe in its truth”). *See also id.* Special Note On Conditional Privileges And The Constitutional Requirement of Fault, immediately preceding § 593 (noting that this position was taken in the original Restatement of Torts but that a “substantial minority” had required knowing or reckless disregard of falsity).

⁵³⁴ *See* ELDER, DEFAMATION, *supra* note 75, § 2:33, at 2-218 to 2-221 (criticizing this “radical preemption” of the common law).

⁵³⁵ RESTATEMENT (SECOND) OF TORTS § 580B cmts. c, e, f, l (1977). In cmt. l this was made clear – if absence of such reasonable grounds equated to negligence, *Gertz*-required fault “automatically would amount to an abuse of a conditional privilege and therefor render it invalid.” *Id.*, at cmt. l. *See also infra* the citations in note 538.

⁵³⁶ RESTATEMENT (SECOND) OF TORTS § 580B cmts. e, f, j, l (1977). It did somewhat grudgingly concede that *Gertz* “involved a matter of public or general interest” (and that the lower courts had so decided, applying *New York Times* for that reason) and that “[s]ome possibility exists” that the Court would limit *Gertz*'s negligence to “public or general interest” matters and might exclude from a negligence requirement such matters as “private gossip” or matters which would be actionable under the *Restatement (Second) of Torts* section 652D private embarrassing facts tort if true but which are shown to be false. RESTATEMENT (SECOND) OF TORTS § 580B, cmt. f (1977). On the public disclosure of private facts tort, see ELDER, PRIVACY, *supra* note 122, ch. 3.

⁵³⁷ *See supra* text accompanying note 536.

⁵³⁸ RESTATEMENT (SECOND) OF TORTS § 593, cmt. c (1977). Comment c of *Restatement* section 593 states that *Gertz*'s per se rejection of strict liability in favor of negligence renders “mere negligence” no longer sufficient for forfeiture of conditional privilege and necessitates a knowing or reckless disregard standard. The comment goes on to define a “significant consequence” of this development – courts “will now find it *necessary to reassess the circumstances*

for forfeiture, it nonetheless baldly, boldly and dramatically upped the ante for *all* plaintiffs confronted by common law privilege issues – in section 600 it adopted *New York Times*-styled minimum of reckless disregard of falsity⁵³⁹ but probably without its clear and convincing evidence requirement.⁵⁴⁰

Less than a decade later *Dun & Bradstreet*⁵⁴¹ rendered this grandiose *Restatement (Second) of Torts* interpretation wholly invalid. Thus, post-*Dun & Bradstreet* a huge amount of the common law remains intact and non-constitutionalized – *i.e.*, probably *all* matters that are deemed purely private.⁵⁴² Furthermore, in those jurisdictions not adopting greater-than-First Amendment standards under state constitutions – the great majority⁵⁴³ – states would be and are free to retain a forfeiture-by-lack-of-reasonable grounds/probable cause standard.⁵⁴⁴ Unfortunately, a significant number (and what

under which it is appropriate to grant a conditional privilege.” *Id.* “If a proper adjustment of the conflicting interests of the parties indicates that a publisher should be held liable for failure to use due care to determine the truth of the communication before publishing it, a conditional privilege is *not needed and should not now be held to apply.*” *Id.* The conditional privilege *should be confined to a situation* where the court feels that it is *appropriate to hold* the publisher liable only in case he knew of the falsity or acted in reckless disregard of it.” *Id.* Also, see the repetitions of the latter in the *Restatement*. *Id.* § 594, cmt. b, § 595, cmt. b, § 596, cmt. b, § 597, cmt. b, § 598, cmt. b, § 598A, cmt. b, § 599, cmt. d.

⁵³⁹ RESTATEMENT (SECOND) OF TORTS § 600, cmts. a, b (1977). See also its incorporation in other discussions of common law privilege: § 593, cmt. c, § 594, cmt. b, § 595, cmt. b, § 596, cmt. b, § 597, cmt. b, § 598, cmt. b, § 598A, cmt. b, § 599, cmt. d. The drafters made it clear that this “same” “standard” applied to public official and public figures. *Id.*, § 600, cmt. b (1977).

⁵⁴⁰ Although the *Restatement (Second)* does not expressly adopt the *New York Times* elevated evidentiary standard, a few courts have unthinkingly done so in cases of abuse of conditional privilege. ELDER, DEFAMATION, *supra* note 75, § 2:31, at 2-208 – 2-209 and n.7 (criticizing these “dubious cases” adopting the heightened standard “without providing any justification for such a significant modification of the common law”).

⁵⁴¹ See *supra* text accompanying note 522.

⁵⁴² See *supra* text accompanying notes 522-23.

⁵⁴³ See *supra* text accompanying notes 518-19.

⁵⁴⁴ See ELDER, DEFAMATION, *supra* note 75, § 2:33, at 2-218 to 2-223.

appears to be a clear majoritarian trend) have adopted section 600 or *New York Times* mechanically without *any* discussion of the *Restatement (Second) of Torts* erroneous prognosis based on *Gertz* and while ignoring or unaware of its qualifying caveats.⁵⁴⁵ This presents a huge problem to and unconscionable barrier for⁵⁴⁶ all defamation plaintiffs – the almost impenetrable barrier of *New York Times*.⁵⁴⁷ Indeed, the latter may become the sole focus, since the other forms of abuse/forfeiture may fail to meet the minimal fault-falsity requirements under *Gertz*.⁵⁴⁸ Fortunately, a substantial number of jurisdictions disagree and retain the old majority forfeiture under the lack of reasonable grounds/probable cause criterion.⁵⁴⁹

⁵⁴⁵ *Id.* at 2-222 to 2-223.

⁵⁴⁶ *Id.* at 2-223. Section 600's "ill-considered, poorly reasoned perspective runs afoul of the spirit of the decisions interpreting state constitutional provisions as evidencing a preference for, if not mandating, a post-*Gertz* rule intruding less severely on the fundamental private interest in reputation." *Id.* Moreover, the section 600 rule is "perverse" and its "illogic and endemic unfairness" palpable: "Proof of fault that will suffice for compensatory damages in a *private person-public interest* First Amendment-controlled cases is *legally insufficient* . . . to overcome a privilege in the *purely private* setting that encompasses most of the arena of common law privilege." *Id.*

⁵⁴⁷ RUSSELL L. WEAVER ET AL., *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION, AND FREE SPEECH* 246 (2006) (finding that *New York Times* has "effectively stifled" civil defamation actions by public persons and most private persons, providing "little protection for reputation" and "a remarkable platform" for free expression); Elder, *Media Jabberwock*, *supra* note 284, at 614-16, nn.450-62; FRANKLIN ET AL., *supra* note 526, at 364 (noting that "[i]n the aggregate . . . libel liability is not a financial burden on media" and concluding that over the period 1980-2003 such liability constituted only 0.0004 percent of all media combined revenues).

⁵⁴⁸ Note that abuse standards under the common law – such as improper motive and excessive publication – have been held not to meet *Gertz*'s minimal fault standard and might impermissibly authorize strict liability. See *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 975 (Utah 1981); *Carney v. Santa Cruz Women Against Rape*, 271 Cal. Rptr. 30, 34 (Ct. App. 1990).

⁵⁴⁹ ELDER, *DEFAMATION*, *supra* note 75, § 2:33, at 2-219 to 2-220, n. 6. For a particularly thoughtful opinion, see the Pennsylvania Supreme Court's recent decision, *American Future v. Better Business Bureau*, 923 A.2d 389, 395-98 (Pa. 2007), where the court specifically repudiated the section 600 knowing or reckless disregard criteria as to forfeiture of a qualified privilege in the case of a private person defamed as to a matter of public concern. *American Future*, 923 A.2d at 395-98. Referencing reputation's "elevated position" under the

In sum, the fault standard applicable in potential litigation against the ABA or AALS, their agents on the Accreditation Committee and the Executive Committee, and their site team members and/or their sources can be synthesized in the following way. Public universities and/or their law schools will in all likelihood be barred by the impersonal criticism of government/seditious libel precedent.⁵⁵⁰ A private university or law school will usually, although not invariably, be a public figure.⁵⁵¹ Mere faculty members at public law schools will only rarely be deemed public officials.⁵⁵² Occasionally, faculty members at public universities, private universities or proprietary law schools may be public figures, either generally (an exceptional rarity)⁵⁵³ or as to a “particular public controversy” if the faculty member can be shown to have “thrust” himself or herself into the “vortex” thereof.⁵⁵⁴ In a significant number of jurisdictions, plaintiffs will nonetheless encounter a *New York Times* equivalent burden of fault-regarding-falsity under state common law⁵⁵⁵ – an unconscionable result, if not a travesty, wholly at odds with most states’ plaintiff-protective state constitutions.⁵⁵⁶ However, a significant number (a probable minority) of jurisdictions will treat private plaintiff-public concern faculty member litigants

Pennsylvania constitution (on the “highest plane” with life, liberty and property) and the court’s prior decisions rejecting “more extensive” protection than that mandated by the First Amendment, the court held that the First Amendment-*Gertz*-required negligence-regarding-falsity standard rendered a negligence-based-forfeiture standard for conditional privileges “superfluous in the present era.” *Id.* Adopting section 600 would violate the court’s strongly held position to “highly prioritize reputational interests so as to preclude any departure from the level of fault expressly required by the First Amendment . . .” *Id.*

⁵⁵⁰ See *supra* text accompanying notes 228-30.

⁵⁵¹ See *supra* text accompanying note 486.

⁵⁵² See *supra* text accompanying notes 487-94.

⁵⁵³ See *supra* text accompanying notes 495, 498, 501, 513.

⁵⁵⁴ See *supra* text accompanying notes 496, 498-511, 513-16.

⁵⁵⁵ See *supra* text accompanying notes 528-49.

⁵⁵⁶ See *supra* text accompanying notes 518-19, 543, 546.

more justifiably as facing only a *Gertz* equivalent forfeiture standard as to state qualified or conditional privileges.⁵⁵⁷

CONSTITUTIONAL MALICE – KNOWING OR RECKLESS DISREGARD OF FALSITY

As stated above, most plaintiffs, even private ones, will likely seek punitive damages, making the *New York Times* standard pivotal in libel litigation.⁵⁵⁸ Even where it does not apply, knee-jerk applications of forfeiture of common law privilege⁵⁵⁹ will dictate that this standard be met – probably without the clear and convincing evidence requisite⁵⁶⁰ – in most states as a matter of state common law. This necessitates a discussion of what constitutional malice⁵⁶¹ means and how it is proved – questions that plagued the Court in its early decisions.⁵⁶² Ultimately, in *St. Amant v. Thompson*, the Court tried to put the issue to rest and provided broad, general criteria. Good faith claims by defendants will likely not be persuasive where “a story is fabricated,” is the product of [defendant’s] imagination,” or is founded “wholly on an unverified anonymous telephone call.”⁵⁶³ In addition, defendant will be unlikely to win when his published statements are “so inherently improbable that only a reckless man would have put them in circulation,” or where there are “obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”⁵⁶⁴ Most of the decisions⁵⁶⁵ allow

⁵⁵⁷ See *supra* text accompanying note 549.

⁵⁵⁸ See *supra* text accompanying notes 526-27.

⁵⁵⁹ See *supra* text accompanying notes 528-49, 555-56.

⁵⁶⁰ See *supra* text accompany note 540.

⁵⁶¹ See ELDER, DEFAMATION, *supra* note 75, ch. 7 (containing a detailed analysis).

⁵⁶² See Elder, *Media Jabberwock*, *supra* note 284, at 559-62.

⁵⁶³ 390 U.S. 727, 732 (1968).

⁵⁶⁴ *Id.*

⁵⁶⁵ See ELDER, DEFAMATION, *supra* note 75, § 7:1, at 7:3-7-4.

a libel plaintiff to provide a “well-constructed collage,”⁵⁶⁶ allowing plaintiff to introduce a variety of forms of evidence – one court has called it a “grab bag of circumstantial evidence”⁵⁶⁷ – to meet plaintiff’s burden. Under this approach, individual male Chase faculty could have made a compelling showing of constitutional malice.

As the author tells students (and the occasional libel lawyer he consults with), the most important and highly probative source of evidence of knowing or reckless disregard of falsity⁵⁶⁸ is the refutatory, contradicting or qualifying information defendant knew of or had in its possession at the time of publication. As a voluminous amount of precedent⁵⁶⁹ shows, defendant “cannot feign ignorance or profess good faith”⁵⁷⁰ in the face of “clear indications”⁵⁷¹ questioning the verity of defamatory statements or otherwise “contradict[ing] information known to”⁵⁷² defendant. Defendant’s refusal to give credit to such information is not a scenario of the negligence-is-

⁵⁶⁶ *Id.* at 7:1, at 7-3.

⁵⁶⁷ *Robertson v. McCloskey*, 666 F. Supp. 241, 250 (D.D.C. 1987). *See also* *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1304 (D.C. Cir. 1996) (Plaintiff is “entitled to an aggregate consideration of all these claims . . .”); *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1510 (D.C. Cir. 1996) (same); *Rosenbloom v. Metromedia*, 403 U.S. 29, 55 (1971) (finding that none of the proofs, “considered either *singly or cumulatively*,” met the *New York Times* standard) (emphasis added); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688-89 (affirming, based on a detailed analysis of the “entire record,” that, in reviewing constitutional malice findings, “the reviewing court must consider the factual record in full”).

⁵⁶⁸ On proving constitutional malice in general, see ELDER, DEFAMATION, *supra* note 75, ch. 7.

⁵⁶⁹ *Id.*, § 7:12, at 108-118.

⁵⁷⁰ *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982).

⁵⁷¹ *Id.*

⁵⁷² *Id.* For a very critical analysis of a notorious article of the *New York Times* attempting to resuscitate the prosecutor’s case against the Duke lacrosse accused, see Elder, *Duke Lacrosse Fabricated Rape Charges*, *supra* note 22, at 152-78.

never enough rule,⁵⁷³ a mere failure to investigate, but provides an inference of constitutional malice from contradictory “hard evidence”⁵⁷⁴ in defendant’s possession.

At the time of the issuance of the site team’s report and the initial action letters by the ABA and AALS, all participants had the following information before them: a lengthy introspective self-study,⁵⁷⁵ discussed at length in brown bag lunches and during a faculty meeting,⁵⁷⁶ based in significant part on lengthy questionnaires providing faculty numerous opportunities to vent but which disclosed no evidence of “pervasive hostile environment”⁵⁷⁷ and which demonstrated that environmental civility issues were improving;⁵⁷⁸ no evidence of violation of non-discrimination standards;⁵⁷⁹ reliance on a tenuous link (if not quantum leap) between purported “pervasive hostile environment” and faculty “effectiveness”⁵⁸⁰ but *sans any supporting evidence* of a causal link to diminished effectiveness in fact⁵⁸¹ and *contradicted* by evidence of women faculty’s high level performance, visibility and remuneration;⁵⁸² a site evaluation concession that a departing Chase minority woman faculty member had not mentioned “pervasive hostile environment”⁵⁸³ and that she was equally or more likely attracted by the compensation, benefits, scholarly environment

⁵⁷³ See Elder, *Media Jabberwock*, *supra* note 284, at 615-66. For a detailed analysis of the cases, see ELDER, DEFAMATION, *supra* note 75, at § 7:2, at 7-14 – 7-22.

⁵⁷⁴ *Murray v. Bailey*, 613 F. Supp. 241, 250 (D.D.C. 1987).

⁵⁷⁵ See *supra* text accompanying notes 4, 11, 117.

⁵⁷⁶ See *supra* text accompanying note 117.

⁵⁷⁷ *Id.*

⁵⁷⁸ See *supra* text accompanying notes 48, 80, 82, 117, 363, 517.

⁵⁷⁹ See *supra* text accompanying notes 54-55, 77, 105, 117.

⁵⁸⁰ See *supra* text accompanying notes 56-62, 76-77.

⁵⁸¹ *Id.*

⁵⁸² See *supra* text accompanying notes 66, 79, 107.

⁵⁸³ See *supra* text accompanying notes 47, 66, 85.

and reputation of another much higher ranked school;⁵⁸⁴ Dean St. Amand's unequivocal reiterations of his view as administrator-supervisor that any incivility did *not* relate to sex or race⁵⁸⁵ (the defining instance in which his otherwise high credibility was ignored);⁵⁸⁶ the absence of any showing that either women students⁵⁸⁷ or staff⁵⁸⁸ had ever made any claims or allegations of "pervasive hostile environment;" the complete absence of any evidence by the ABA to support its "of color"⁵⁸⁹ gratuitous imputation of racism reference (and that the AALS – *based on the same data* – made *no* such reference at all);⁵⁹⁰ the site team's admission that its concerns were "primarily" with one individual.⁵⁹¹

Even stronger refutatory evidence was added in Chase's vigorous, well-documented and professional responses⁵⁹² to the ABA and AALS action letters. In the interim a multi-step process – the Dean meeting separately with men and women

⁵⁸⁴ See *supra* text accompanying notes 47, 66, 84-85.

⁵⁸⁵ See *supra* text accompanying notes 80-82, 87, 90, 108.

⁵⁸⁶ See *supra* text accompanying note 80.

⁵⁸⁷ See *supra* text accompanying note 107.

⁵⁸⁸ *Id.*

⁵⁸⁹ See *supra* text accompanying notes 43, 57, 62, 103.

⁵⁹⁰ See *supra* text accompanying notes 62-68. The absence of *any* cited supporting corroboration suggests that the ABA had *no basis* for such, i.e., that it was, in essence, a fabrication. See *supra* text accompanying notes 43, 57, 62-68, 103; see also *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 746 (Va. 1985) (holding that defendant black developer's charge against a white faculty member "without possessing *any objective basis*" and his imputation of a "sham" motive to oppress blacks who might live in the proposed community were major indicators of reckless disregard of falsity) (emphasis added); *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 762 (Mass. 2007) (concluding that jury could have logically found that the reporter "knowingly invented" one statement and had no sources for others – the jury could reasonably have determined the reporter made the stories up "out of whole cloth, in order to create a more compelling story").

⁵⁹¹ See *supra* text accompanying notes 51-52, 83, 86.

⁵⁹² See *supra* text accompanying notes 41-108. The dramatic contrast with the shoddy work done by the ABA and AALS is noteworthy.

faculty, the Provost meeting with women faculty, the center meeting with all faculty, administrators and staff – had confirmed what was evident at the outset. *No* faculty member supported or attempted to defend the “hostile environment” charges.⁵⁹³ *All* found them either unfounded or exaggerated.⁵⁹⁴ An incisive analysis in the center’s report strongly suggested that whatever incivility existed was limited to senior faculty, involved lingering historic grievances, and that younger (ten year and under faculty) perspectives “differ[ed] markedly.”⁵⁹⁵ Regardless of sex, younger faculty thought the atmosphere was good.⁵⁹⁶ Additionally, the center concluded that some or many of the historically polarizing issues had dissipated by the time of the site team visit.⁵⁹⁷ Lastly, and importantly, the report concluded that *no* faculty member had made a complaint of *any kind*⁵⁹⁸ through or before the university’s long-standing investigative-disciplinary process⁵⁹⁹ providing redress for “pervasive hostile environment” charges.

The ABA response cited much of the refutatory evidence.⁶⁰⁰ The AALS referenced some of the steps taken but *not* the *evidence* adduced.⁶⁰¹ Both recharacterized the original charges⁶⁰² (themselves damning admissions) but then reaffirmed the original “pervasive hostile environment” charges’ validity.⁶⁰³ In sum, this case was a veritable treasure trove of evidence in defendants’ possession evidencing reckless

⁵⁹³ See *supra* text accompanying notes 91-104.

⁵⁹⁴ See *supra* text accompanying notes 101-04.

⁵⁹⁵ See *supra* text accompanying note 104.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ See *supra* text accompanying notes 105-06.

⁵⁹⁹ See *supra* text accompanying note 105.

⁶⁰⁰ See *supra* text accompanying note 112.

⁶⁰¹ See *supra* text accompanying note 116.

⁶⁰² See *supra* text accompanying notes 110-11, 114-15.

⁶⁰³ See *supra* text accompanying notes 113, 116.

disregard of falsity, almost a “smoking gun” for defamation liability. A correction, retraction or even oblique apology? *No, nay, never, no more*, in the words of the Irish ballad!⁶⁰⁴ That is not the nature of the process, one of many defects that clamor from the rooftop for a finding of institutional recklessness⁶⁰⁵ in investigating and reporting on “pervasive hostile environment” charges.

Although no specific sources for the site evaluation team’s “factual” conclusions are identified or identifiable, there is some public record evidence of subjective “serious doubts” under *St. Amant*’s major proof-of-reckless-disregard-of-falsity criterion, i.e., “where there are *obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*”⁶⁰⁶ The following is clear from the center’s report⁶⁰⁷ (and, to some extent, from the Chase Self-Study,⁶⁰⁸ presumably carefully read and studied by each of the site evaluation team members) and must have been obvious to site team members interviewing Chase faculty: any grievances disclosed were historic and generational in nature, limited to senior faculty. The junior (ten years and under) faculty consensus was one of good satisfaction with their Chase experience.⁶⁰⁹ In fact, the team acknowledged that the one departing faculty member, a minority woman, had made *no* mention of “pervasive hostile environment” and that others had provided other wholly legitimate reasons, the compensation/benefits package and scholarly community at her new, higher ranked institution, as the reasons for her departure.⁶¹⁰ The site evaluation team also knew that no

⁶⁰⁴ *The Wild Rover*, in FOLKSONGS & BALLADS POPULAR IN IRELAND 48 (1979).

⁶⁰⁵ See *infra* text accompanying note 739.

⁶⁰⁶ *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (emphases added).

⁶⁰⁷ See *supra* text accompanying note 104.

⁶⁰⁸ See *supra* text accompanying note 117 (noting the impact of younger colleagues in enhancing dialogue).

⁶⁰⁹ See *supra* text accompanying notes 104, 279, 281-82.

⁶¹⁰ See *supra* text accompanying notes 47, 66, 84-85.

“pervasive hostile environment” charges had been filed.⁶¹¹ In sum, “red flags” were rippling at hurricane force indicating that any family dysfunctionality at Chase was limited to senior siblings. Only those purposefully avoiding⁶¹² (or selectively “fact”-gathering)⁶¹³ could have failed to disclose this. What the site evaluation team was left with were sources akin to an embittered ex-spouse⁶¹⁴ or sister-in-law⁶¹⁵ or bitter contestants in an intra-labor dispute,⁶¹⁶ parallel analogues where source

⁶¹¹ See *supra* text accompanying notes 54-55, 61, 77. This can also be inferred from the absence of any reference thereto in the site evaluation report. Given the vacuum-like proclivity to suck-up any “evidence” of “pervasive hostile environment,” any suggestion such a charge would have not had been brought to the team’s attention and prominently featured by it in its report is dauntingly frivolous.

⁶¹² See *infra* text accompanying notes 742-47.

⁶¹³ See *infra* text accompanying notes 718-47.

⁶¹⁴ *Burns v. McGraw–Hill Broad. Co.*, 659 P.2d 1351, 1362 (Colo. 1983).

⁶¹⁵ *Stevens v. Sun Publ’g Co.*, 240 S.E.2d 812, 814-15 (S.C. 1978) (involving a reporter for defendant was warned the suspect source’s facts were “biased, unreliable and untrue”); see also *Erickson v. Jones St. Publishers*, 629 S.E.2d 653, 670-71 (S.C. 2006). In *Erickson v. Jones Street Publishers*, a failure to investigate the charges of a suspect sole source, an “admittedly ‘incensed’ person” – a grandparent directly involved in a parental custody dispute involving plaintiff-guardian ad litem – by contacting plaintiff, the attorneys in the case, or even consulting the decree – sufficed for constitutional malice. For example, if read, the decree would have “called into question or refuted” the source charges. *Id.*

⁶¹⁶ *Lyons v. New Mass Media, Inc.*, 453 N.E.2d 451, 546-57 (Mass. 1983); see also *Fisher v. Larsen*, 188 Cal. Rptr. 216, 224-26 (Ct. App. 1982), *disapproved on other grounds by* *Reader’s Digest Ass’n v. Superior Court*, 690 P.2d 610, 619, n. 11 (Cal. 1984) (finding constitutional malice where defendant relied solely (after plaintiff’s denial) on a *known hostile source*). The court also referenced defendants’ “stated motive to present a more vigorous . . . ‘hard-biting’[] campaign.” *Fisher*, 188 Cal. Rptr. 224. The defendants were a campaign opponent and campaign workers. *Id.* The parallels in a fractious, politically divided faculty are obvious. See *supra* text accompanying notes 104, 117; see also *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 759-60 (Mass. 2007) (upholding a substantial verdict of \$2.01 million where defendants’ primary sources were members of a district attorney’s office who had a deliberate policy of “fir[ing] a shot across the [plaintiff’s] bow” – plaintiff was a judge as to whom sources in the district attorney’s office had “publicly declared their animosity”).

reliance has been found to be sufficient for constitutional malice.⁶¹⁷

The Court's *St. Amant* criteria also stated that a defendant will be unlikely to prevail where defendants are "so inherently improbable that only a reckless man would put them in circulation."⁶¹⁸ As the author has indicated elsewhere, this criterion is a tough row to hoe.⁶¹⁹ Although few defamatory statements suffice under the latter to meet the *New York Times* standard, the courts have regularly sustained defendant's knowledge of the statement's harm as at least a factor, sometimes a substantial factor,⁶²⁰ in finding reckless disregard

⁶¹⁷ For a detailed analysis of the suspect source cases, see ELDER, DEFAMATION, *supra* note 75, § 7:2, at 7-36 to -42.

⁶¹⁸ *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

⁶¹⁹ ELDER, DEFAMATION, *supra* note 75, § 7:24, at 164-65.

⁶²⁰ *Id.* at 162-64. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 157 (1967) (Harlan, J., plurality opinion) (citing as a factor that defendant "recognized the need for a thorough investigation . . ." of the "serious charges" at issue but "proceeded on its reckless course with full knowledge of the harm . . ." likely to result); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 691 (1989) (giving substantial significance to the "highly improbable" nature of defendant's "most serious charge" – i.e., that plaintiff-candidate for judge intended to confront the incumbent with tapes to blackmail him into resigning). Compare other analogical cases giving substantial weight to the "inherent improbability" criteria where the facts of record strongly contradicted the legitimacy of the charges. See *Khawar v. Globe Int'l*, 965 P.2d 696, 710-12 (Cal. 1998) (finding plaintiff's depiction as the true assassin of RFK, charges "likely to have a devastating effect" on individual reputation, were "inherently incredible accusations" in light of the conviction, affirmation and continued confinement of Sirhan Sirhan – the failure of defendant to investigate in light of such was an instance where defendant "purposefully avoided the truth"); *Savitsky v. Shenandoah Valley Publ'g Corp.*, 566 A.2d 901, 904 (Pa. Super. Ct. 1989) (holding allegations by defendant-newspaper that an union officer-candidate campaigned in a company helicopter in a coal dominated area "came close to 'willfully blinding' themselves" to falsity); *Chonich v. Wayne County Cmty. Coll.*, 874 F.2d 359, 361-64 (6th Cir. 1989) (upholding a claim against a board secretary of a junior college – and the college under agency principles – for making "no effort to eliminate" plaintiffs, administrator-faculty members, from a group charge of racial and sex discrimination, the court emphasized that defendant made no effort either to investigate or remedy the charges, "*the effect of which she had every opportunity to know* would bring about *serious adverse effects . . .*" on plaintiffs' jobs) (emphases added); *King v. Globe Newspaper Co.*, 512 N.E.2d 241, 251 (Mass. 1987) (finding that an experienced reporter met the "inherent improbability" rule where he reported that plaintiff-Governor

of falsity. If ever a charge against a law professor should so qualify, a charge of “pervasive hostile environment” should – *nothing* could be more devastating to professional reputation.⁶²¹ Additional factors herein justify treating defendants’ non-compliance with the “so inherently improbable” criterion as a major indicator of constitutional malice. The senior male tenured faculty implicated⁶²² were individually and collectively long-term academics who had survived and prospered at a politically correct, ardently pro-diversity university⁶²³ in a “zero

intervened and harassed a judge in a recent rape case despite the reporter’s acknowledgment he had never heard of such in thirty-five years of reportage); *Nash v. Keene Publ’g Corp.*, 498 A.2d 348, 355 (N.H. 1985) (reporting by defendant of charges that plaintiff-police office had “zeroed” five cruisers); *Hunt v. Liberty Lobby*, 720 F.2d 631, 646 (11th Cir. 1983) (Defendant’s portrayal of the CIA as endeavoring to hide its role in the JFK assassination by conceding plaintiff’s involvement therein met the “inherent improbability” standard.); *Di Lorenzo v. New York News, Inc.*, 81 A.D.2d 844 (N.Y. App. Div. 1981) (regarding defendant’s erroneous citation of plaintiff’s criminal convictions in the context of discussing plaintiff’s serious and legitimate candidacy as a political candidate); *Weaver v. Pryor Jeffersonian*, 569 P.2d 967, 974 (Okla. 1977) (publishing of multiple criminal allegations against a sheriff by defendant). Indeed, the ABA has been recently sued for libel in a case where the damaging nature of the libelous statement was itself probative evidence of constitutional malice. *Sprague v. Am. Bar Ass’n*, 31 Med. L. Rptr. 2217, 2222 (E.D. Pa. 2003) (holding that the author’s admission – “that it would take time, and might even be impossible . . .” to come up with a charge against a lawyer more condemnable and defamatory than “fixer” – constituted awareness of “the extent of reputational harm” and was relevant evidence of constitutional malice). Again, the parallels are obvious.

⁶²¹ See *supra* text accompanying notes 121-224, 620; see also *supra* notes 43, 62 (as to the racism charge).

⁶²² See *supra* text accompanying notes 225-90.

⁶²³ See the public debate precipitated by the ad for a new dean that incorporated heavy-handed, repetitive politically correct language requiring candidates to have a “demonstrated commitment to diversity” for a law deanship at a university “aggressively seek[ing] to enhance its diversity.” The ad led to a local political debate. Compare Kevin Murphy, *Murphy’s Law: NKU Discriminates Against Opinions*, RECORDER, Jan. 7, 1999, at A4, and David A. Elder, *Fear of ‘Racist’ Tag Numbs NKU Debate*, RECORDER, Feb. 11, 1999, with President James C. Votruba’s response in Debra Ann Vance, *Ad Raises Hackles at NKU*, KY. POST, Monday, Feb. 22, 1999, at 1K.

tolerance” world⁶²⁴ with careers and reputations intact⁶²⁵ – until the 2003-04 debacle. And the joint site evaluation team and the Accreditation Committee and Executive Committee *knew* this.⁶²⁶ In the face of these facts, the imputed “pervasive hostile environment” charges were highly problematic, if not downright silly. In addition, the site evaluation team *acknowledged* that its concern was “primarily” with *one* faculty member.⁶²⁷ Only in the never-never-world of ABA/AALS could a site team not see the innate unlikelihood of even a politically incorrect Super-hero single-handedly creating a “pervasive hostile environment.”⁶²⁸ But, alas legal logic is not a requirement for law students,⁶²⁹ or, apparently, for site team members.

A significant number of reported constitutional malice decisions involve inferences drawn from defendant’s distorted accounts.⁶³⁰ A trio of scenarios in the Chase site evaluation report involved misstatements or mischaracterizations that may so qualify. One was defendant AALS’s substantial mischaracterization of Dean St. Amand’s *awareness* of an existing “pervasive hostile environment.”⁶³¹ A second involved defendant’s misstatements concerning the number and timing

⁶²⁴ See the discussion and illustrations in Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 310-11 (1996); BERNSTEIN, YOU CAN’T SAY THAT!, *supra* note 20, at 23-24, 39.

⁶²⁵ The record is clear that *no* formal charges had made against any male faculty member at least during the eight year period including and subsequent to the last sabbatical. *See supra* text accompanying notes 105-06, 621-24.

⁶²⁶ *Id.*

⁶²⁷ *See supra* text accompanying notes 51-52, 83, 86; *infra* text accompanying notes 650-51.

⁶²⁸ *Id.*

⁶²⁹ Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. PITT. L. REV. 1 (2007).

⁶³⁰ ELDER, DEFAMATION, *supra* note 75, § 7:13. See generally the thoughtful remarks of Dean Richard Matasar about the very common disconnect between site evaluation reports and the Accreditation Committee Report; *infra* note 695.

⁶³¹ *See supra* text accompanying note 68-70.

of imminent and recent departures of junior Chase faculty.⁶³² As the “pervasive hostile environment” charges arose in the context of faculty teaching effectiveness standards,⁶³³ this misinformation was of considerable importance. A third centered on defendant’s gross mischaracterization of the “primarily” attributable to one faculty member statement.⁶³⁴ These distortions *could* be viewed as sloppy reportage or merely incompetent or negligent⁶³⁵ extrapolation. However, a jury could also interpret them as involving knowing or reckless information in light of the information *available to and read by* defendants.⁶³⁶

Two other scenarios fall into another distortion category, i.e., where defendant knowingly or recklessly misconstrues evidence “to make it seem more convincing or condemnatory”⁶³⁷ or calculatedly adopts “the most potential damaging alternative” construction of an ambiguous statement.⁶³⁸ In the case of the ABA⁶³⁹ and AALS⁶⁴⁰ both action letters took measurably more

⁶³² See *supra* text accompanying notes 84-85.

⁶³³ See *supra* text accompanying notes 56-62, 76-77.

⁶³⁴ See *supra* text accompanying notes 51-52, 83, 86.

⁶³⁵ ELDER, DEFAMATION, *supra* note 75, § 7:2, at 7-14-7-22 (analyzing in detail the negligence-is-never enough precedent).

⁶³⁶ See *supra* text accompanying notes 568-574. See also *George v. Iskon of California*, 262 Cal. Rptr. 217, 251 (Ct. App. 1989), *review denied and ordered not to be officially published* (1989), *judgment vacated on other grounds*, 499 U.S. 914 (1991) (“We have difficulty believing the error in chronology resulted from mere mistake or inadvertence. Generally speaking, the trier of fact may reject testimony, even if contradicted, where the witness’s demeanor, bias, or a combination of circumstances lead the jury to conclude it is untrustworthy Here, [the drafter] had every reason to offer a ‘revisionist history’ of the facts precipitating publication of the religious organizations’ “[o]fficial [p]osition.”). For citations to other cases dealing with jury issues of assessing witness credibility see *supra* note 70 and see ELDER, DEFAMATION, *supra* note 75, § 7:2, at 7-33 – 7-35.

⁶³⁷ *Westmoreland v. CBS, Inc.*, 584 F. Supp. 1170, 1174 (S.D.N.Y. 1984).

⁶³⁸ *Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir. 1981).

⁶³⁹ See *supra* text accompanying notes 43, 48-52.

⁶⁴⁰ Compare *supra* text accompanying notes 44-45, 63-65 with notes 48, 66 and text accompanying notes 51-52.

ambivalent and ambiguous site team evaluation reports and/or factual findings and then drew therefrom unequivocal factual conclusions of “pervasive hostile environment.” Transforming such equivocal statements into unqualified charges has been held strong evidence of constitutional malice.⁶⁴¹ Two other calculated defamatory enhancement/magnification issues arose as to the “pervasive hostile environment” charge. First, the site team’s loose collection of non-specific epithets and purported facts,⁶⁴² which have no time frame⁶⁴³ (a factor that, in and of itself may be hugely significant),⁶⁴⁴ hardly justified use of a *loaded legal term* such as “pervasive hostile environment,”⁶⁴⁵ a

⁶⁴¹ Akins v. Altus Newspapers, Inc., 609 P.2d 1263, 1266 (Okla. 1977) (regarding a reporter’s transformation of a *conditional hypothesis* – i.e., that an investigation should be made to see if a “kidnapping at gunpoint” had happened – into a statement that police officer-plaintiff “allegedly kidnapped a youth at gunpoint, evidenced constitutional malice). *See also* Mehau v. Gannett Pacific Corp., 658 P.2d 312, 325 (Haw. 1983) (finding that in early statements defendant unequivocally stated plaintiff was the local “Godfather,” while, in later accounts, he stated he could not draw such a conclusion one way or the other); Robertson v. McCloskey, 666 F. Supp. 241, 251 (D.D.C. 1987) (holding that the “marked contrast” between “*unqualified* assertions” in a defamatory letter and defendant’s deposition “*equivocation*” was evidence of constitutional malice) (emphases added); Sprague v. Walter, 516 A.2d 706, 722-27 (Pa. Super. Ct. 1986), *aff’d*, 543 A.2d 1078 (1988) (finding that defendant’s deletions of “hearsay” and resituating “allegedly” were interpretable as not merely innocuous or negligent charges).

⁶⁴² *See supra* text accompanying notes 48, 66.

⁶⁴³ *Id.*

⁶⁴⁴ *See supra* text accompanying note 15.

⁶⁴⁵ Indeed, the “evidence” gathered in support of the “pervasive hostile environment” charge was and is far afield from what either the university (*see supra* text accompanying note 105) or the Supreme Court view as an illegal hostile environment in the workplace. *See, e.g.*, Oncale v. Sundowner Off-shore Services, Inc., 523 U.S. 75, 81-82 (1998) (rejecting *unanimously* the suggestion that Title VII was “a *general civility code* for the American workplace”). The *Oncale* court went on to write that:

[T]he statute does not reach *genuine but innocuous* differences in the way men and women *routinely interact* with members of the same sex and of the opposite sex. The prohibition of harassment on basis of sex *requires neither asexuality nor androgyny in the workplace*; it forbids only behavior so *objectively offensive* as to alter the ‘conditions’

term infused with highly damning and pejorative content.⁶⁴⁶ Second, the site team's tentative conclusions (magnified by the Accreditation Committee⁶⁴⁷ and Executive Committee)⁶⁴⁸ were made despite the site team's on-site *admission*⁶⁴⁹ during the exit interview that its concerns related "primarily"⁶⁵⁰ to a *single* faculty member – a breath-taking, incomprehensible, politically correct leap in (il)logic.⁶⁵¹ Significant, indeed, powerful, case law would support allowing a jury to determine whether such significantly damning qualitative enhancements warranted a

of the victim's employment. 'Conduct that is *not so severe or pervasive enough* to create an *objectively hostile or abusive work environment* – an environment that a *reasonable person* would find hostile or abusive – is beyond Title VII's purview . . . we have always regarded *that requirement* as *crucial*, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory 'conditions of employment' . . . *Common sense*, and an *appropriate sensitivity to social context*, will enable courts and juries to distinguish between *simple teasing or roughhousing* among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find *severely hostile or abusive*.

Id. (citation omitted) (emphases added). See also BERNSTEIN, YOU CAN'T SAY THAT!, *supra* note 20, at 24-25 (noting that *Oncale* represents the Court's recognition that it had "opened a veritable Pandora's box of litigation" and a conscious attempt to curtail what had become "an implicit, but nonetheless *chilling, nationwide workplace speech code that banned any speech that could offend women*") (emphases added). Note also the consensus view of commentators and the EEOC that "hostile environment" is primarily limited to matters *sexual* in nature. See *supra* note 105.

⁶⁴⁶ The law school and university treated these charges as imputing "actionable conduct." See *supra* text accompanying notes 91-106.

⁶⁴⁷ See *supra* references in note 639.

⁶⁴⁸ See *supra* references in note 640.

⁶⁴⁹ See *supra* text accompanying note 83.

⁶⁵⁰ *Id.*

⁶⁵¹ See *supra* text accompanying notes 7-23, 27, 30-36, 41-120, and text accompanying notes 558-758.

finding of constitutional malice.⁶⁵² Specifically, almost eerily, on target is a recent case involving defendant-attorney's transformation of plaintiff's termination for yelling in front of co-employees into pervasive sexual harassment.⁶⁵³

Reflecting the Supreme Court's position,⁶⁵⁴ the cases uniformly hold that common law malice does not *suffice* to prove,⁶⁵⁵ but is *supportive* admissible evidence⁶⁵⁶ of, constitutional malice. Why? Common law malice helps explain why defendant ignored "the most rudimentary precautions,"⁶⁵⁷ indicates why defendant was "not in the least concerned . . . with

⁶⁵² Warford v. Lexington Herald-Leader, 789 S.W.2d 758, 772-73 (Ky. 1990) (involving a defendant who had magnified amorphous statements by an athlete-source into an express charge that plaintiff-recruiter-coach had "offered him money"); Stickney v. Chester County Communications, Ltd., 522 A.2d 66, 69 (Pa. Super. Ct. 1987) (finding that defendant enhanced an official source's accidental version of an injury plaintiff caused into an intentionally precipitated incident); Westmoreland v. CBS, Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) ("[I]f in the editing process [defendant] distorts statements of witnesses so that they seem to say more than in fact was said, or if it falsely overstates a witness' basis for his accusation, such might raise issues of actual malice even if the basic charge was made with an adequate basis of support.") (dicta); Rebozo v. Washington Post Co., 637 F.2d 375, 382 (5th Cir. 1981) (Defendant adopted the most damning interpretation of a factual controversy as to when he had knowledge that certain stock he sold was stolen rather than merely missing.); Vasquez v. O'Brien, 445 N.Y.S.2d 305, 307 (App. Div. 1981) (Defendant impliedly imputed personal economic motivation to plaintiff-police chief's request to tow operators to provide free services.); Catalano v. Pechous, 419 N.E.2d 350, 360 (Ill. 1980) (Defendant inferred corruption rather than political motivation from the way in which a city contract was awarded.); Fopay v. Noveroske, 334 N.E.2d 79, 90-91 (Ill. Ct. App. 1975) (Defendant transformed plaintiff's questionable judgment into illegal conduct.); Mahnke v. Northwest Publications, Inc., 160 N.W. 3d 1, 11 (Minn. 1968) (Defendant adopted "the most controversial view possible" of a charge of police misconduct despite a warning the episode in question was based exclusively on a major misunderstanding.).

⁶⁵³ Ricciardi v. Weber, 795 A.2d 914, 920 (N.J. Super. App. Div. 2002) (Defendant-attorney deceived the press to enhance his settlement prospects.).

⁶⁵⁴ Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 663-68, 688, 692-93 (1989).

⁶⁵⁵ ELDER, DEFAMATION, *supra* note 75, § 7:3, at 7-64-7-69.

⁶⁵⁶ *Id.* at 7-69-7-77.

⁶⁵⁷ Fopay v. Noveroske, 334 N.E.2d 79, 91 (Ill. Ct. App. 1975).

the true facts,”⁶⁵⁸ evidences “a state of mind highly conducive to reckless disregard of falsity,”⁶⁵⁹ suggests defendant had already determined to effectuate its preconceived objective “regardless of how much evidence developed and regardless of whether or not [a source’s] story was credible upon ultimate reflection,”⁶⁶⁰ demonstrates why defendant engaged in “a stretching of standards,”⁶⁶¹ and illuminates why all in defendant’s chain of command “treated the question of truth or falsity as a matter of total indifference.”⁶⁶²

Substantial evidence from two senior Chase faculty members (who are *not* mere “disgruntled constituents”⁶⁶³ of the ABA) suggests that the 2003 on-site evaluation process at Chase was of a “highly political and politicized character”⁶⁶⁴ with the intent

⁶⁵⁸ *Arber v. Stahlin*, 170 N.W.2d 45, 48 (Mich. 1969).

⁶⁵⁹ *Stokes v. C.B.S., Inc.*, 25 F.Supp.3d 992, 1003 (D. Minn. 1998); *Cochran v. Indianapolis Newspapers*, 372 N.E.2d 1211, 1220 (Ind. Ct. App. 1978).

⁶⁶⁰ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 684 (1989).

⁶⁶¹ *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 158 (1967) (Harlan, J.).

⁶⁶² *Widener v. Pacific Gas & Electric Co.*, 142 Cal. Rptr. 304, 315 (Ct. App. 1977), *disapproved on other grounds*, *McCoy v. Hearst Corp.*, 727 P.2d 711, 719, n. 9 (Cal. 1986).

⁶⁶³ American Bar Association, Council of Legal Education and Admission to the Bar, Transcript of NACIQI Proceedings, at 88 (comment of William Rakes, Chair of the Council, describing the letters in opposition to the ABA’s reapproval as accrediting authority in the following fashion: “Some of them just from disgruntled constituents, but some of them with issues that we felt that needed to be addressed”) [hereinafter NACIQI Transcript].

⁶⁶⁴ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 6. *See supra* text accompanying notes 19, 20, 22, 24 and *infra* text accompanying notes 714-47. The ABA’s highly political character replicates its politicization in ranking appellate federal judges. *See* James Lindgren, *Examining The American Bar Association’s Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17. J.L. & POL. 1, 28-29 (2001) (finding “extraordinarily large political differences in the outcomes of the evaluative processes” in comparing Bush I and Clinton nominees). Note that parallel concerns were raised over three decades ago by the former and founding dean of Delaware Law School (now Widener University School of Law) in his defamation lawsuit against James White. For a discussion of *Avins v. White*, 627 F.2d 637 (3rd Cir. 1980), *see supra* text accompanying notes 511-16. The law school was created as a haven for conservative scholars, had a traditional philosophy, and was overseen

to sanction purportedly offensive speech among faculty members⁶⁶⁵ in pursuit of ABA/AALS preconceived agendas.⁶⁶⁶

by a conservative board of trustees. See this note, *infra*. In the briefs on appeal plaintiff-appellee Avins made serious allegations relating to ABA concerns about the prevailing philosophy at DLS and whether the intellectual environment thereat was acceptable. Instances of inquiries to faculty members about DLS's political orientation were cited, as were statements made by site evaluation team members of a highly political partisan nature (including pro-George McGovern sentiments) and a demand that a student who penned a letter in the student newspaper critical of the ABA accreditation process be expelled. Appellee's Brief at 8-9, 15, 19, 23, 35, 42, Avins v. White, 627 F.2d 637 (3d Cir. 1980) (No. 79-1747-8) (citing transcript and exhibits). This scenario was also noted in an amicus curiae brief filed (again with citations to the trial transcript) on behalf of the Young Americans for Freedom, Inc., citing the liberal-left tilt of colleges and law schools and concluding that "the only hope to have any conservative law professors is the creation of law schools . . . specifically designed as havens for conservatives." Amicus Curiae Brief of Young Americans for Freedom, Inc., at 2-7, Avins v. White, 627 F.2d 637 (3d Cir. 1980) (No. 79-1747-8). See also the ABA's abuse of George Mason University School of Law. See *supra* text accompanying notes 32, 103; see also *infra* text accompanying notes 686, 701, 703.

That some inappropriate inquiry into the political environment at DLS likely occurred seems clear. See Reply Brief for Appellee-Cross-Appellant at 6, Avins v. White, 627 F.2d 637 (3d Cir. 1980) (Nos. 79-1747 & 79-1748), where the brief tries to distinguish the testimony of a major witness and differentiate a major cited case: "[T]he alleged probing by White was *far less pernicious* than the *political overtones*" in the referenced case. *Id.* The case was *Kapiloff v. Dunn*, 343 A.2d 251, 270 (Md. Ct. Spec. App. 1975) (finding that recklessness in its constitutional meaning is "concerned primarily" with knowing or reckless disregard of falsity, "not with [the defendant's] animosity toward the person defamed . . ."). The Third Circuit did not deal with the issue of political motivation, which was directed both at abuse of a common law privilege and any First Amendment-*New York Times* privilege that may have existed. The court found that plaintiff was a public figure, subsumed issues of conditional privilege into the constitutional matrix, held that an issue of reckless disregard of falsity existed, and remanded for retrial on this issue. Avins v. White, 627 F.2d 637, 644-50 (3rd Cir. 1980). In any event, *Dunn* is *not inconsistent* with the view of the Supreme Court and a broad consensus of precedent – common law malice such as animosity is not sufficient for, but is supportive evidence of, constitutional malice. See *supra* text accompanying notes 654-62; see also *infra* text accompanying notes 674-84.

⁶⁶⁵ Stephens Letter of Aug. 23, 2006, *supra* note 49, at 1 ("These *ultra vires* requirements . . . attempted to regulate the content of speech and dialogue between and among faculty members," thereby "directly discouraging the type of open and frank dialogue that should occur in an educational setting."). That such is a pivotal tactic of "political correctness" or the "thought police" in law schools and their universities is undeniable: "The [critical terms] all seek to

Substantial evidence bears this out. The site evaluation report itself involved a manipulative use of irrelevant and illegal standards⁶⁶⁷ – together with the creation of a new “common law”⁶⁶⁸ “welcoming”⁶⁶⁹ standard – in an *ultra vires* exercise⁶⁷⁰

criticize a process in which political groups attempt to *trump, shame, or intimidate others into remaining silent, or speaking only in language the collectives have determined as acceptable*. That many of the newly emergent political collectives seek to gain power through control of language is undeniable.” Barnhizer, *supra* note 20, at 391. See also *supra* text accompanying notes 7-20, 22, 24, 34-36, 43, 49, 61-62, 67, 72, 74-75, 109, 117-20; *infra* text accompanying notes 669, 690, 704-06, 708, 718-47.

⁶⁶⁶ Stephens Letter of Aug. 23, 2006, *supra* note 49, at 1. See also *supra* note 13.

⁶⁶⁷ Stephens Letter of Aug. 23, 2006, *supra* note 49, at 1-2. The “atmosphere of intimidation and hostility” standard “clearly violate[s]” 34 C.F.R. § 602.18 IB), as the Accreditation Committee was basing its accreditation-contingent decision on an unpublished standard. See also *supra* text accompanying notes 55-62, 76-77; *infra* notes 668-70.

⁶⁶⁸ Submission of Thomas M. Cooley Law School to Nat’l Advisory Comm. on Institutional Quality and Integrity, at 9 (Aug. 23, 2006) (defining “common law” as the “ad hoc collective memory” of Accreditation Committee and Council members and staff as to past determinations regarding other schools, noting that it is not transcribed or disseminated and that requests for information about “common law” in summary or redacted form without identifying information were routinely rejected based on “a blanket confidentiality policy,” and citing the “most pernicious” illustration of the “de facto LSAT cut-off score” enforced by both); Supplemental Submission of Thomas M. Cooley Law School to Nat’l Advisory Comm. on Institutional Quality and Integrity, at 6-7 (Mar. 8, 2006) (citing Council’s non-receptiveness to the idea of publishing redacted summaries, the Committee and Council’s “disregard [of] the plain meaning” of Standards, Interpretation and Rules of Procedure when they “lead to a result that they do not wish to reach,” and referencing examples of later changes by the Council to incorporate prior informal interpretations); Letter from Gary Palm to Nat’l Advisory Comm. on Institutional Quality and Integrity (Aug. 24, 2005) (stating that the Accreditation Committee had “repeatedly disregarded the clear language and intent” of Accreditation Standards “by adopting its” *own* “interpretations” – a “power grab” that “eviscerates the meaning of clear Standards” and modified the long time Standards-changing process in favor of unpublished, secret and binding “secret ‘interpretations’” developed solely by the Accreditation Committee in violation of the 34 C.F.R. 602.23 requirement that Standards be “written” and “available to the public” and made without notice to law schools or their faculties, state supreme courts, ABA members, the Department of Education as accreditation-granting authority, or the Department of Justice, which was party to the consent decree signed by the ABA dealing with the ABA’s accreditation policies and practices); *id.* at 7 (citing his seven-year experience as an Accreditation Committee member, Palm noted that

of pure political power in flagrant disregard of the rights and reputations⁶⁷¹ of Chase and its male (or at least senior male) faculty. In addition, the questions asked and methodology used in investigating the allegation of “silencing” evidenced a selective search for reinforcing (while ignoring, not seeking, and refusing to cite or use contradictory) evidence⁶⁷² in support of this pre-set idea. Lastly, the composition of the site evaluation team itself raised important questions about the intentions and

the individual committee member “serving as the ‘laboring oar’ too often bec[ame] the real decision-maker” – the alternative to the proposed “common law” “solution” to the “too time-consuming” review responsibility should be better funding and more staff or relinquishment of its accreditation functions). For further discussions of the “common law” issue see *infra* text accompanying notes 694-95, 697, 704, 721.

⁶⁶⁹ Stephens Letter, Aug. 23, 2006, *supra* note 49, at 2. See also *supra* text accompanying notes 49-50. The extraordinary danger of a “welcoming” standard is beautifully evidenced by a leading law school’s recent reaction to remarks *perceived* by some students as ethnically insulting: “The truth that seems to matter is the fact that the students felt bad.” The law school went into

damage control mode. After all, it ha[d] worked so hard to bring together a diverse student body and to convey a *feeling of welcome* to everyone . . . But this is madness! Our question should not be about what we can do to make you comfortable or how we can make your life pleasant again . . . We owe our students respect, but part of that respect is the recognition that they are adults who are spending many thousands of dollars and hours of study trying to acquire the critical thinking and fortitude that will enable them to serve clients and to stand up to adversaries who are only too ready to shake their nerve . . .

Ann Althouse, *A Word Too Far*, N.Y. TIMES, Mar. 3, 2007 at A27 (emphasis added). See also Barnhizer, *supra* note 20, at 406 (noting that charges of sexism, racism, etc., are made for power-shifting purposes with the burden of proof on the attackee and that, where unavailable, attackers resort to charges of “insensitivity” to undermine “disfavored” persons).

⁶⁷⁰ Stephens Letter, Aug. 23, 2006, *supra* note 49, at 1, 3-4 (asking the NACIQI to assess whether the “once venerable watchdog” ABA “has allowed its processes to be subverted by a cadre of law faculty who desire to rewrite the Standards through their subjective interpretation” during the site evaluation process). See *supra* text accompanying notes 54-77.

⁶⁷¹ See *supra* text accompanying notes 121-224.

⁶⁷² See *infra* text accompanying notes 718-47.

bias of at least some members⁶⁷³ of the site evaluation team.

The law is clear. A defendant's common law malice, broadly defined – hostility,⁶⁷⁴ retaliatory motive,⁶⁷⁵ political

⁶⁷³ See *infra* text accompanying note 685.

⁶⁷⁴ Kentucky Kingdom Amusement v. Belo Kentucky, 179 S.W.3d 785, 791 (Ky. 2005) (“[T]he general make-up and presentation of the story exhibited hostility” toward plaintiff); Chonich v. Wayne County Cmty. Coll., 874 F.2d 359, 361-64 (6th Cir. 1989) (applying a knowing or reckless disregard standard to a qualified privilege asserted by the secretary of the board of trustees as to her charge of racial and sex discrimination against plaintiff white males; the court found that prior litigation evidencing “bad blood” and “previous bitter controversy” was relevant to the abuse of privilege issue); Newson v. Henry, 443 So.2d 817, 823 (Miss. 1983) (finding that an “intention to harm” plaintiff for failure to help defendant secure federal reemployment was evidenced by defendant’s statements, “I’ve got him now,” “I tore him up”); Moore v. Bailey, 628 S.W.2d 431, 434 (Tenn. Ct. App. 1981) (citing two factors in support of constitutional malice: defendant’s “history” of “unjustified hostility” to plaintiff and his accumulation of “*every bit of information obtainable*” derogatory of plaintiff and persistent repetition to all comers) (emphasis added). Compare *supra* the text accompanying notes 15, 48 and 66. See also Echtenkamp v. Loudon County Public Schools, 263 F. Supp. 2d 1043, 1062 (E.D. Va. 2003). Note that this hostility need *not* be directed at plaintiff specifically. It may be directed at plaintiff’s profession. See Hinerman v. Daily Gazette Co., Inc., 423 S.E.2d 560, 577 (W. Va. 1992) (citing the “strong animus” of the publisher “toward lawyers in general” and the fact that he “regularly wrote” editorials criticizing lawyers and the profession). Or it may be indirectly reflected in a bitter, competitive rivalry between defendant and a competitor for market share. Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 665, n.6, 666-68, 684, 689-90 & n.36 (1989). See also Renner v. Donsbach, 749 F. Supp. 987, 988-89, 992-93 (W.D. Mo. 1990); Miller v. Argus Publ’g Co., 490 P.2d 101, 111 (Wash. 1971); *infra* text accompanying note 678.

⁶⁷⁵ Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 186, 190 (2d Cir. 2000) (ill will by defendant publisher demonstrating defendant was “imposing in-kind retribution”); Sprague v. Walter, 656 A.2d 890, 907-08 (Pa. Super. Ct. 1995) (finding defendant aware of its reporter’s “numerous threats of harm” to plaintiff’s reputation); Batson v. Shiflett, 602 A.2d 1191, 1215 (Md. 1992) (evidence defendant wanted to “punish,” “nail” and “get” plaintiff “highly relevant”); Ball v. E.W. Scripps Co., 801 S.W.2d 684, 686-88 (Ky. 1990) (evidence of defendant’s intent to “get” plaintiff-prosecutor and a grudge against him); Herron v. King Broad. Co., 776 P.2d 98, 100, 107 (Wash. 1989) (evidence a reporter said he would “get” or “fix” plaintiff-prosecutor’s underling for refusal to answer questions); Dalton v. Meister, 188 N.W.2d 494, 496, 499-500 (Wis. 1971) (evidence defendant engaged in a retaliatory “persistent course of conduct” to “get” plaintiff); Indianapolis Newspapers, Inc. v. Fields, 259 N.E.2d 651, 663-64 (Ind. 1970) (evidence of a reported motive to “get even” with plaintiff-former sheriff, *i.e.*, “(p)olitically, I’ll kill him”). A parallel rule applies to abuse of a qualified privilege. See Echtenkamp v. Loudon County Pub. Sch., 263

partisanship,⁶⁷⁶ participation in a plan to injure,⁶⁷⁷ coercive

F.Supp.2d 1043, 1062 (E.D. Va. 2003) (finding strong evidence of malice where evidence showed a “general pattern of retaliation” and that a particular defendant “created an atmosphere which encouraged the collection of false and defamatory statements that could be used as evidence against plaintiff”) (emphasis added); *Pezhman v. City of New York*, 812 N.Y.S.2d 14, 18 (N.Y. App. Div. 2006) (holding that evidence of a “campaign of harassment conducted in retaliation” for a complaint about the teaching fellows program was evidence of publication “solely by ill will”).

⁶⁷⁶ *Norris v. Bangor Pub. Co.*, 53 F. Supp. 2d 495, 506-07 (D. Me. 1999) (One of two factors cited in support of constitutional malice was defendant’s motive in writing, characterized as “at least as political as . . . journalistic”); *Renner v. Donsbach*, 749 F. Supp. 987, 988-89, 992-93 (W.D. Mo. 1990) (Defendant’s perception they were “at war” with plaintiff-doctor as embodiment of the “medical establishment” and with others sharing his point of view on “health freedom” issues could support a jury finding they “repeated whatever negative they heard about plaintiff in the most derogatory light possible without checking the accuracy of the facts or the inferences that they were drawing from the facts.”) (emphasis added); *Ball*, 801 S.W.2d at 686 (referencing another article, “derogatory but hardly defamatory,” as evidence of constitutional malice by inference from “the heavy handed way” in which it was written); *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 660, 663-68, 675-76, 684 (1989) (The court cited defendant’s support for plaintiff’s opponent, the incumbent, as relevant evidence of constitutional malice. An editor’s earlier and non-actionable editorial “can be read to [have] set the stage” for the defamatory article, evidencing that the editor had already predetermined to publish a source’s charges, “regardless of how the evidence developed and regardless of whether [the source]’s story was credible upon ultimate reflection.”); *Weaver v. Pryor Jeffersonian*, 569 P.2d 967, 973-74 (Okla. 1977) (citing as part of the “totality of all circumstances” plaintiff-candidate’s “strained relationship” with newspaper defendants, the individual officers of which were linked by marriage to plaintiff’s opponent); *Sprouse v. Clay Comm’n, Inc.*, 211 S.E.2d 674, 680-81 (W. Va. 1975) (Evidence defendant “foreswore its role as an impartial reporter of facts and joined with political partisans in an overall plan or scheme to discredit” plaintiff-candidate was relevant in determining “willful disregard of the truth” as to “grossly exaggerated” and defamatory headlines not supported by a story’s facts: “[O]nce an overall plan or scheme to injure has been established, an unreasonable deviation between headlines” and the story is evidence of constitutional malice.) (emphasis added); *Miller v. Argus Publ’g Co.*, 490 P.2d 101, 111 (Wash. 1971) (Defendant relied on a free lancer who was an “active political opponent of candidates and causes” using plaintiff, who operated a public relations-advertising business of which defendant was inferentially aware. In addition, defendant-newspaper itself also had supported “candidates and causes directly opposed” to those using plaintiff – such “indicate[] an atmosphere infected with a disposition to ignore known falsehoods or serious doubts as to the truth . . .”).

intent or purpose,⁶⁷⁸ motive to suppress information or intimidate a critic of defendant or its agenda,⁶⁷⁹ a preconceived

⁶⁷⁷ *Sprouse*, 211 S.E.2d at 680-81; *see supra* text accompanying note 676; *Arber v. Stahlin*, 170 N.W.2d 45, 48-49 (Mich. 1969) (Evidence of a political support agreement between media co-defendants and a state senator to gather “potentially damaging information” to precipitate ouster of a prominent politician with a defamatory “end product,” including charges of anti-black and anti-Semitic sentiment, persuasively evidenced that defendants “were not in the least concerned . . . with the true facts” as to plaintiff’s involvement in the oustee’s campaign.).

⁶⁷⁸ *Ricciardi v. Weber*, 795 A.2d 914, 925 (N.J. Super. App. Div. 2002) (referencing defendant-attorney’s filing of complaints in a sexual harassment case without investigations of the allegations therein and encouraging his client to be interviewed by the press in order to “promote swift settlement negotiations” with the insurance company); *Posadas v. City of Reno*, 851 P.2d 438, 443 (Nev. 1993) (citing evidence that plaintiff was not in favor with co-defendant-employers and that its intention was to compel his resignation as a police officer); *Renner v. Donsbach*, 749 F. Supp. 987, 993 (W.D. Mo. 1990) (citing evidence of a co-defendant’s plan to destroy plaintiff-opponent’s creditworthiness and finding that the jury could find reckless disregard of truth if it decided co-defendant’s “*mental attitude about plaintiff* was that *anything goes to silence his criticism regardless of its truth*”) (emphasis added); *O’Neil v. Peekskill Faculty Ass’n.*, 507 N.Y.S.2d 173, 179 (N.Y. App. Div. 1986) (Use of statements about plaintiff-lawyer, acting as chief negotiator for a school district on a labor contract – “reprehensible racial slur” and “bigotry” – to gain a negotiating advantage “buttress[ed]” a conclusion of reckless disregard of falsity.); *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1221 (Ind. Ct. App. 1978) (Threats of publicity through powerful media friends present at an interview to coerce testimony was supportive evidence.). The same is true of common law malice in the conditional privilege context. *See Chrabaszcz v. Johnson Sch. Comm.*, 474 F. Supp. 2d 298, 318-19 (D.R.I. 2007) (Statements by a school superintendent to a school teacher – “if you fight me on this, I’ll bury you” – met the “primary motivating force” requirement for ill will.).

⁶⁷⁹ *Lewis v. Oliver*, 873 P.2d 668, 675-76 (Ariz. Ct. App. 1993) (Defendant-airline president’s “pattern of defaming and intimidating” critics of defendant’s airline was evidence of reckless disregard of falsity – evidence of an attempt to “crush the government inspector” (plaintiff) uncovering public safety violations was “an act of malicious revenge.”); *George v. Int’l Soc’y for Krishna Consciousness of California*, 262 Cal. Rptr. 217, 230, 251-52 (Cal. Ct. App. 1989) (The court cited defendant’s conceded “official position” to “discourage (the plaintiffs-alleged child abusers) from speaking out” against them (religious organizations and officers) as evidence of reckless disregard of falsity.), *rev. denied and ordered not to be officially published* (1989), *vacated on other grounds*, 499 U.S. 914 (1991); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 746 (Va. 1985) (A black developer’s charge of racial prejudice against plaintiff-university professor in an ad in the campus newspaper where plaintiff was a faculty member supported an inference of defendant’s “motive . . . to intimidate

plan to discredit plaintiff,⁶⁸⁰ a preconceived slant or viewpoint⁶⁸¹ – individually and collectively provides “a motive for defaming someone or explain apparently illogical leaps to unsupported conclusions.”⁶⁸² In other words, they provide evidence of bad faith and a predisposition toward falsity⁶⁸³ or help prove why

[plaintiff] in order to eliminate the voice of a leading opponent” of defendant’s proposed development.); *Widener v. Pac. Gas & Elec. Co.*, 142 Cal. Rptr. 304, 312, 315 (Cal. Ct. App. 1978) (Defendant’s “motive to suppress [an anti-nuclear film] so overwhelmed its attention that all of its agents . . . treated the question of truth or falsity as a matter of total indifference.”).

⁶⁸⁰ *Currier v. Western Newspapers, Inc.*, 855 P.2d 1351, 1355 (Ariz. 1993) (regarding evidence of ill will in defendant-journalist’s intention “to build his reputation as a journalist by destroying” a transit authority founded by co-plaintiff); *Barber v. Perdue*, 390 S.E.2d 234, 237 (Ga. Ct. App. 1989) (regarding defendant’s letter to local politicians to discredit plaintiff-candidate “in the heat of a political campaign”); *McHale v. Lake Charles Am. Press*, 390 So.2d 556, 563-64 (La. Ct. App. 1980) (Defendant’s “preconceived plan to discredit” plaintiff-attorney was reflected in its presentation of only one side of a story, suggesting defendant had “obdurately made up its mind [plaintiff] was a bad man and he ought to be exposed and put down.”); *Goldwater v. Ginzburg*, 414 F.2d 324, 337, 342 (2d Cir. 1969) (Evidence of a “predetermined and preconceived plan to malign [plaintiffs] character” was substantial evidence of reckless disregard of falsity.).

⁶⁸¹ *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 1004-05 (D. Minn. 1998) (The court cited the “highly slanted perspective” of the reports, including ambushing tactics and “distorting visual and editorial techniques” as supportive evidence of constitutional malice.); *Ball v. E. W. Scripps Co.*, 801 S.W.2d 684, 686-87 (citing evidence that defendant noted “good case” in his notes as to criminal cases supporting his thesis of plaintiff as an incompetent prosecutor, selectively interviewed persons hostile to plaintiff, calculatedly chose to not interview those who would refute his thesis, and used a fraudulent statistical analysis with an adjoining county despite knowing the comparison was deceptive because of the way certain criminal offenses were handled); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538-39 (7th Cir. 1982) (A magazine editor’s preconceived story line on a police officer being railroaded for murder, reliance on an author with “a known and unreasonable propensity” to label people as Communists, and the fact that “virtually no effort [was made] to check the validity” of resulting defamatory statements warranted a finding of “utter disregard” of truth or falsity.).

⁶⁸² *Sharon v. Time, Inc.*, 599 F. Supp. 538, 584 (S.D.N.Y. 1984) (stating that a jury could decide a reporter viewed plaintiff as “a symbol of the mysticism, fascism and radicalism” he believed was enveloping Israel).

⁶⁸³ *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1221-22 (Ind. Ct. App. 1978).

defendant disseminated a libel in the face of its own conclusion of likely falsity.⁶⁸⁴

Evidence made available under federal FOIA requests and a survey of the critical literature suggests a number of other avenues of inquiry for potential evidence of common law malice. Such malice may be evidenced by the very nature of the incestuous and symbiotic relationship⁶⁸⁵ between the ABA and AALS and the enormously coercive power⁶⁸⁶ they exercise,

⁶⁸⁴ Indianapolis Newspapers, Inc. v. Field, 259 N.E.2d 651, 663-64 (Ind. 1970).

⁶⁸⁵ See, e.g., Brewer Letter, Aug. 25, 2006, *supra* note 82, at 6-7 (stating that this relationship, as evidenced by the fact that three of the five ABA members were future or former AALS deputy directors, “appears to have compromised the ABA’s independence”) (see *supra* text accompanying note 673); Matthew D. Staver & Anita L. Staver, *Lifting the Veil: An Exposé on the American Bar Association’s Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1, 58 (2003) (concluding that the ABA’s standards and enforcement thereof are “concerted activity” with the AALS and others in violation of federal antitrust law); Jon M. Garon, *Take Back the Night: Why An Association of Regional Law Schools Will Return Core Values to Legal Education and Provide An Alternative to Tiered Rankings*, 38 U. TOL. L. REV. 517, 522 (2007) (“AALS shares its sabbatical inspection process for member institutions, further blurring the distinction between accreditation visits and ‘voluntary’ inspections far beyond separation. The inspection team discussions for accreditation cannot effectively separate out those topics unique to AALS, and the significant overlap in membership between AALS and the ABA destroys any independence one organization has from the other.”); see also *infra* notes 688, 691, 693, 704.

⁶⁸⁶ Letter from Stephen Balch, President, Nat’l Ass’n of Scholars & Gail Heriot, Chair, NAS Section on Law to Robin Greathouse, Accreditation and State Liaison, U. S. Dep’t of Educ., at 3 (Aug. 25, 2006) (on file with author). In opposing the ABA’s reapproval based on new Standard 212, the letter referenced the Charleston School of Law’s recent denial of provisionally accredited status “in significant part” because of its inability to “satisfy” the ABA on diversity issues and the dean’s response: “Whatever we have to do, [to win accreditation], we’ll do it.” *Id.* The school has since received provisional accreditation. The letter also cited a recent law review article in which Professor David Barnhizer explained his decision not to apply for a deanship because of “the degree to which the culture of soft repression had reached inside” the accreditation processes of the ABA and AALS. *Id.* at 3-4, quoting at length from Barnhizer, *supra* note 20, at 369-70. See also Staver, *supra* note 685, at 84 (noting that disaccreditation threats have “no teeth” but are taken “very seriously” and that denial of accreditation to new schools may have “catastrophic consequences”); Bernstein, *Affirmative Blackmail*, *supra* note 32, at A9 (discussing new ABA Standard 212 and concluding that the ABA has just mandated law schools to violate legal prohibitions on preferences, and noting

individually and jointly, to create an environment in which an inbred,⁶⁸⁷ self-perpetuating⁶⁸⁸ cadre of law deans and faculty are

that the ABA will claim it is not attempting to coerce law schools into violating the law or conscience: “But in the past, *ABA accreditation officials have bullied law schools* into precisely that position, *even in the absence of written authority* backing their demands”) (emphases added); AFFIRMATIVE ACTION REPORT, *supra* note 33, at 124 (noting that post-*Grutter* ABA accreditation personnel have been abusing their accreditation power to “blackmail” schools via probation and disaccreditation threats if they do not lower admissions criteria for African-Americans even if such students are not viewed as qualified by the schools in question, citing “several sources” (unnamed) at law schools); *id.* at 180-84 (statement of commissioner Gail I. Heriot, joined by Chair Gerald A. Reynolds, detailing the extended abuse of George Mason University School of Law over several years via action letters in which it “seemed clear that the [Accreditation] [C]ommittee members agreed with the site evaluation team that *no amount of outreach would be enough unless it produced the racial results that they favored*”) (emphasis added); NACIQI Transcript, *supra* note 663, at 179-80 (comments of Associate Dean Michael L. Coyne, Massachusetts School of Law, that the ABA “has misused the absolute power” given it to “coerce and cajole” law schools to “accept its dictates” and resulting “accreditation blockade”; this “guild behavior” and “politics of exclusion disproportionately impact people of color and the less affluent”); *id.* at 197 (statement by Professor John Nussbaumer, Dean of Cooley’s Oakland University branch campus, that the ABA accreditation process’s “constantly moving target[s]” on bar passage and student attrition resulted in threatened probation and precipitated a raising of required LSATs and a concomitant 50% cut in African-American enrollment). *See also infra* notes 689, 693, 697, 704.

⁶⁸⁷ E-mail from Gary Palm, Professor Emeritus of Law, Univ. of Chi. Law Sch., to Robin Greathouse, Accreditation and State Liason, U. S. Dep’t of Educ. 2 (Aug. 25, 2006, 8:34 CST) (on file with author) (citing, in attachment to e-mail, the U.S. Dept. of Justice finding of “capture” of the accreditation process by a faculty-dean “guild” of accredited law schools, noting recent progress, and hoping new leadership will “finally totally eliminate” this feature) [hereinafter Palm E-mail, Aug. 25, 2006]; Thomas M. Cooley Law School, Application for Renewed Recognition of the American Bar Association, Council of the Section of Legal Education and Admissions to the Bar, Supplemental Submission, 10-12 (Mar. 8, 2006) (on file with author) (discussing in detail a memo of the post-consent decree committee looking into whether many restrictions in the consent decree should be shelved, including a recommendation to change the deans and law faculty membership on Council, the Accreditation Committee and Standards Review Committee to give them a controlling majority on all three; concluding that these recommendations, if adopted would enhance law school dean-faculty control over accreditation and revive the antitrust violations which precipitated the initial litigation); *id.* at 15 (referencing the Council’s “insular and self-perpetuating membership [which] makes diversity of thought . . . almost impossible,” as illustrated by the dearth of innovation compared to other fields); Letter from Alex Scherr, President, Clinical Legal Educ. Ass’n, to Robin Greathouse, Accreditation and State Liason, U. S. Dep’t of Educ. at 3-4 (Aug. 23,

allowed to impose an elitist view⁶⁸⁹ and liberal-left orthodoxy⁶⁹⁰

2005) (on file with author). A reaccreditation supporter noted as “a particular concern” the recent recomposition of the Accreditation Committee in a manner as to not include a clinician and that deans and former deans “continue to comprise the largest group” – “an ill-advised action” that violated the antitrust decree purpose of “lessening [] decanal influence in . . . accreditation.” *Id.*; *Accrediting Barry; Our Position: The Law-School Accreditation Process May Require the Right Dean*, ORLANDO SENTINEL, Dec. 8, 2001, at A24. The ABA accreditation process was “arbitrary, inconsistent and cloaked in secrecy,” necessitating the hiring of an ABA insider “who can play the game.” *Id.*; Tom Stabile, *ABA Still in Charge*, NAT’L JURIST, April 2001, at 15 (quoting Robert D’Agostino of Atlanta’s John Marshall Law School, opining that he resigned because the school’s accreditation required a dean with “much better ABA credentials”); American Bar Association, Accreditation Policy Task Force (Feb. 9, 2007) at 11-12, available at <http://www.abanet.org/legaled/AC%20Task%20Force/AC%20Task%20Force%20February%202007%20Transcript.doc> (referencing comments by Dean Jon Garon noting that, despite the Department of Justice’s endeavors to get more non-deans/faculty members involved, such participation “remains regrettably trivial” and largely “without training, experience or time meaningfully [to] influence the overwhelming number of deans, former deans or future deans, who are essential to the operation of the accreditation process”) [hereinafter Policy Task Force]; AALS EXECUTIVE COMM. AND ABA ACCREDITATION TASK FORCE OPEN FORUM, Jan. 5, 2007, at 60-61 (comment by Dean Richard Matasar that accreditation is “a method by which too few people have participated and too many people have participated too much”) [hereinafter TASK FORCE OPEN FORUM]. See also *infra* note 689.

⁶⁸⁸ See *supra* text accompanying notes 685 and 687 and *infra* text accompanying note 689. See also John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN’S J. LEGAL COMMENT. 269, 282 (2001) (granting “respect of a sort” to cartel leaders, largely a group of deans and post deans who control the accreditation process, for their employment of “classic cartel strategies” to guarantee their governmental protective status is unchallenged); Garon, *supra* note 685, at 523 (concluding accreditation is controlled by “a relatively small core group of self-selected volunteers who devote themselves to legal accreditation”).

⁶⁸⁹ Policy Task Force, *supra* note 687, at 12-13 (comments of Dean Jon Garon, noting that site inspection team participants are generally filled with “experienced law school deans and faculty, typically from elite law schools, who have been socialized to apply the standards in a cautious manner” and “serv[ing] double duty” by including an AALS inspector, with a concomitant result that the structure “necessarily emphasizes faculty status and scholarship”); NACIQI Transcript, *supra* note 663, at 198 (comments by Professor and Dean John Nussbaumer that any school that “really cares about innovation and about serving underrepresented nontraditional students of all colors faces a very high risk venture” vis-à-vis the ABA). See also John

Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 179 (2006) (concluding "unsubstantiated reliance" on LSAT and unwritten de facto cut-off scores required by the ABA accreditation process reflect the "elitist perspective" of law schools represented on the Council, most of which have a small number of African-American students); John Nussbaumer, *The Disturbing Correlation Between ABA Accreditation Review and Declining African-American Law School Enrollment*, 80 ST. JOHN'S L. REV. 991, 993-94, 996-97, 1003 (2006) (a more detailed review of impact on African-American enrollment of accreditation review by the ABA); George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J. L. & PUB. POL'Y 637, 662 (2003) (finding that accreditation negatively impacts blacks' entry into the legal profession disproportionately and "maintains a wealthy, white, intellectual elite"). In response to criticism of the ABA's vague and inconsistent standards on bar passage rates, the ABA has proposed brightline standards. These have been sharply criticized. See Leigh Jones, *ABA Moves to Tighten Bar Passage Standards: New Brightline Rule is Blasted by Law Deans, Who Predict 'Chaos,'* NAT'L L. J., July 9, 2007, at 4.

⁶⁹⁰ Barnhizer, *supra* note 20, at 372 (discussing "survivor" behavior" within law schools and how the culture of "soft suppression" has driven disputes underground with substantial "subterranean muttering"). David E. Barnhizer writes in his article, *A Chilling of Discourse*, that:

Value disputes on such things as hiring policies, tenure and promotion standards, what comprises legitimate scholarship, and the extent to which we allow political orientations to influence teaching have been forced 'underground' as a matter of survival for faculty who elect not to incur the wrath of the now dominant groups. This is further heightened by the fact that hiring over the past ten to fifteen years has concentrated on people with superficially diverse characteristics but homogenous politics, agendas, and value systems. The result is that *a critical mass of ideologically committed faculty has been created that works together. . . to inhibit changes to their emergent hegemony.*

Id. (emphasis added). He goes on to note that:

[T]he *vast majority* of law faculty members now share the same values, agendas, and politics. Not only are people *perceived by these interests as direct opponents* condemned by labels and slogans, *so is anyone seen as disloyal*. This intolerance aimed at those considered disloyal to the movement exists because those who share the collective's identity characteristics but challenge its analysis of issues and solutions are greater threats.

Id. at 400 (emphasis added); *see also id.* at 403 (“[W]e are in a period when real discourse is virtually absent. This situation may be beyond the point of no return because the faculties of law schools and universities have been successful in adopting hiring practices that have selected people who ‘collegially’ share their political values.”). Finally, Barnhizer writes that:

The tragic aspect of the strategies of political collectives is that they *depend on demonizing opponents*. It is characteristic of such ‘rage-based’ work that the rejection, vilification, and demonization of the ‘other’ (most often the white male power structure that appears to be considered the source of all evil in the world) are at the core of the critique. This reinforces a collective’s own sense of solidarity, and isolates and intimidates those who might offer a different perspective. Once this is accomplished, *the isolated constituency* that has been blamed for the behavior of its historical antecedents *offers an easily identifiable target*. The strategy offers a useful way to organize a collective’s constituents who are eager to assign blame and accountability and who are *willing to engage in unfair and unbalanced accusations and condemnation*. *In a ‘culture war’ anything goes. . . . Careless, vindictive, and strategic indictments of speech as sexist, racist, or homophobic . . . are very effective means to consolidate a collective movement’s political power through attack and intimidation.*

Id. at 405-06 (emphasis added); *see also id.* at 376 (“*Ideology, passion, rage, and the correctness of shaping conditions into whatever politically constructed version of reality a particular collective desires have replaced actual discourse*. That will inevitably happen in a politicized system. *Honesty and evidence are obstacles to a political outcome.*”) (emphasis added); John S. Baker, *Seeking Competition in Law School Accreditation*, 11 TEX. REV. L. & POL. 385, 387 (2007) (concluding that the ABA is “an ideological organization forcing its ideology into the standards on accreditation”); TAYLOR & JOHNSON, *supra* note 75, at 105-06 (noting that some Duke professors said privately they remained quiet because they were “afraid to cross the activists – black and female activists especially – lest they be smeared with charges of racism, classism, homophobia, or right-wingism,” and citing the example of the professor who was the first to “break with the academic herd” and pilloried as a racist by the head of the women’s studies program in the student newspaper); Eric M. Jensen, *Legal Education’s “Learned Society,”* ACAD. QUESTIONS, 46, 50 (Spring 2001) (“[T]he goal of diversity has nothing to do with real diversity, with the airing of different viewpoints. Quite the contrary. The AALS’s conception of ‘diversity’ – focusing on race, gender, and sexual orientation – *ensures the institutionalization of decidedly leftist political views.*”) (emphasis added); Charles Fried, *‘Diversity’: From Left to Far Left*, WASH. POST, Jan. 3, 2000, at A19 (Discussing the AALS Conference focus on “Diversity,” Professor Fried disparaged AALS’s limited definition as not including “diversity of ideas or points of view, unless your idea of diversity is the full gamut of opinions from left to far left,” and concluded its

“fortress mentality” embarrassed the AALS organizers, “discredit[ed] themselves and condemn[ed] their voices to irrelevance.”); Andrea Billups, *Law Professors Argue Group Excludes Conservative Views*, WASH. TIMES, Jan. 6, 2000, at A3 (quoting Jim Lindgren, in an article on the same AALS meeting, criticizing the AALS as “conflat[ing] race and gender diversity for viewpoint diversity” and quoting Professor George W. Dent, Jr., as excoriating AALS’s partisanship for pettily not allowing conservative legal organizations like the National Association of Scholars to share space at the AALS conference as “particularly disturbing because of its role in accrediting law schools, a role it exploits to promote . . . politically partisan positions”).

Of course, the AALS reflects and enforces the liberal-left viewpoint dominating college and university campuses generally. No one *seriously* disputes this. See John Tierney, *Republicans Outnumbered in Academia, Studies Find*, N.Y. TIMES, Nov. 18, 2004, at 1 (citing a 19-1 dollar differential in giving to the Kerry campaign at Harvard and University of California system campuses and quoting President Stephen H. Balch, president of the National Association of Scholars: “Our colleges have become less marketplaces of ideas then churches in which you have to be a true believer to get a seat in the pews . . .”); Alan Wolfe, *Defending Ph.D.’s*, N.Y. TIMES, Sept. 10, 2006 (reviewing MICHAEL BÉRUBÉ, *WHAT’S LIBERAL ABOUT THE LIBERAL ARTS: CLASSROOM POLITICS AND ‘BIAS’ IN HIGHER EDUCATION* (2006) and noting that “[l]eft-wing domination of academia is so obvious a fact” that Bérubé makes no attempt to deny it); TAYLOR & JOHNSON, *supra* note 75, at 116, 397 (quoting a Duke Conservative Union statistical survey counting 142 Democrats and 8 Republicans on Duke University’s humanities faculty); MICHAELS, *supra* note 49, at 72 (noting that, both in and outside the classroom environment, “universities are like research and development laboratories for producing new ways to insist that discrimination . . . is our fundamental problem.”); *id.* at 16-17 (viewing the diversity obsession as “at best a distraction and at worst an essentially reactionary position,” the author portrays American universities as “propaganda machines that might as well have been designed to ensure that the class structure of American society remains unchallenged”). But see Naomi Schaefer Riley, *Taste - de Gustibus: The Ivory Tower Leans Left, But Why?*, WALL ST. J., Feb. 29, 2008, at W11. The author notes that liberal domination of American university faculties is a “settled question.” *Id.* The author then analyzes a forthcoming study’s “surprising discoveries” as to why, *i.e.*, that it’s based on “differ[ent] personality traits.” *Id.* The author criticizes the study in part for its “claim, built into the statistical model itself, that someone who places more importance on raising a family would shy away from academia” – she suggests such complaints and claims are “symptoms of a certain kind of self-indulgence that comes from living in the ivory tower.” *Id.*

The same orthodoxy is true of law schools. See Adam Liptake, *If the Law is a Ass, the Law Professor is a Donkey*, N.Y. TIMES, Aug. 28, 2005, at 44 (citing a forthcoming Georgetown Law Journal article and quoting Northwestern University law school Dean David E. Van Zandt as saying that “[a]cademics tend to be more to the left side of the continuum” and that it’s “a little worse in law school”). For the full article, see John O. McGinnis et al., *The Patterns and*

across the broad sweep of legal education,⁶⁹¹ including but not limited to issues of perceived “pervasive hostile environment.”⁶⁹² This joint monopolistic and pervasive control⁶⁹³ over almost all aspects of legal education operates

Implications of Political Contributions by Elite Law School Faculty, GEO. L.J. 1167, 1171, 1179 (2005) (analyzing data at the twenty-one leading American law schools and concluding in part that politically involved female law professors are even more overwhelmingly pro-Democratic than males, with ninety-five percent donating on an exclusive or predominant basis to Democrats). Indeed, the intolerance on the left doesn’t “square with the moral vanity of the progressive stereotypes” in terms of openness, tolerance, and respectfulness of political difference. Citing statistics concerning attitudes toward Clinton-Gore and Bush-Cheney, Professor Arthur C. Brooks eviscerates the stereotype of liberal openness: “The *very essence of intolerance* is to *dehumanize* the people with whom you disagree by asserting that they are *not just wrong, but wicked*.” Arthur C. Brooks, *Liberal Hatemongers*, WALL ST. J., Jan. 17, 2008, at A16 (emphases added).

⁶⁹¹ See, for example, the position in the Letter from Saul Levmore, President, American Law Deans Ass’n, to Robin Greathouse, Accreditation and State Liason, U. S. Dep’t of Educ., Mar. 8, 2006, at 1-6 (opposing the reapproval of the ABA unless its accreditation requirements “improperly intrude on institutional autonomy in seeking to dictate terms and conditions of employment” “extrinsic to educational quality” as to tenure and security of employment are modified); Letter from David A. Logan, Dean, Roger Williams Univ. Ralph R. Papitto Sch. of Law, to Robin Greathouse, Accreditation and State Liason, U. S. Dep’t of Educ. 1-2 (Aug. 18, 2006) (Supporting ABA reaccreditation, Dean Logan expressed a “primary concern” about the ABA’s “unfortunate inclination toward guild-like behavior” that had “actually accelerated in recent years, at a time when many expected the ABA to approach accreditation in light of both the letter and spirit” of the antitrust issues raised a decade earlier.). In a later letter requesting deferred action in light of an ABA Task Force formed to look into accreditation, ALDA said the ABA “appears to be increasingly alone among recognized accrediting commissions in imposing requirements specifically including, but not limited to, terms and conditions of employment that are not relevant to the maintenance of a quality educational program, intrude on institutional autonomy and add unnecessary cost to the student and the public.” NACIQI ALDA Supplemental Comment, Aug. 25, 2006, at 1-2. See also TASK FORCE OPEN FORUM, *supra* note 687, at 25-31 (amplifying comments of Dean Van Zandt on behalf of the Board of Directors of ALDA). Unfortunately, a recent task force has treated the “conditions of employment” as too well ensconced, indeed an untouchable. Policy Task Force, *supra* note 687.

⁶⁹² See *supra* text accompanying notes 37-120.

⁶⁹³ See *supra* text accompanying notes 685-92. See also NACIQI Transcript, *supra* note 663, at 108 (regarding comments of Dr. Pruitt about the ABA accreditation required for taking the bar exam, giving the ABA “a powerful

largely in secret,⁶⁹⁴ without transparency⁶⁹⁵ and without

monopoly to totally control within your profession . . .”); Bernstein, *Affirmative Blackmail*, *supra* note 32, at A9 (Noting that since only graduates of ABA-approved schools can take the bar in the overwhelming majority of states, the ABA has “a legal monopoly on accreditation standards.”); Paul L. Caron and Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1522 (2004) (noting that the AALS, “[l]ike any good cartel . . . has vigorously resisted” the rankings by *U.S. News & World Report*); Staver, *supra* note 685, at 6-7, 33, 36-49 (detailing Barry University of Orlando School of Law’s battle with the ABA, which arbitrarily refused provisional accreditation based solely on the basis of potential competition with an unopened new state law school and its reversal of that decision under enormous political pressure, including threats made by legislation to remove the law school-approved-by-the-ABA mandate for admission to the Florida bar); Elson, *supra* note 688, at 271, 279 (concluding the cartel’s “lynch-pin” is the requirement of ABA accreditation by forty-five states); Baker, *supra* note 690, at 387 (“The ABA, operating under the benefit of the antitrust exception for state entities, has been able to suppress competition in accreditation nationwide. If it were not acting under the umbrella of state supreme courts, this cartel would be called what it is.”); Avins v. White, 627 F.2d 637, 640 (3rd Cir. 1980) (concluding that ABA accreditation is “critical” since graduates of unaccredited law schools in most states cannot take the bar exam). *See also supra* text accompanying note 686.

⁶⁹⁴ Whittier College Letter, Aug. 18, 2005, at 2 (noting that the ABA Council and Accreditation Committee meet in secret, do not publish their interpretations of Standards in any form, even redacted, that both and their officers meet “formally and informally” with the Consultant but do not publish his statements to them in any form, that they do not meet without the Consultant and do not grant an institution a right of reply to the Consultant’s advice, and that its processes and standards “accord no reasonable mechanism” to be informed of application of ABA standards to other law schools); NACIQI Transcript, *supra* note 663, at 198 (detailing comments by Professor Dean John Nussbaumer of Thomas M. Cooley Law School that the ABA had disclosed *that day* “unpublished common law” “secret standards” about bar passing percentage requirements that Cooley had *unsuccessfully requested for a decade*); Staver, *supra* note 685, at 45 and n.260 (noting that the ABA has “always attempted to shield” its accreditation determinations behind “a cloud of secrecy” and the reluctance of schools to release accreditation data for fear of antagonizing the ABA); *id.* at 79 (suggesting that the ABA’s “veiled attempt” to keep accreditation documents of law schools from being disclosed may be motivated by a desire “to keep their arbitrary decision-making process private”); Editorial, *ABA Is Micromanaging Our Position: ABA Demands Further Point Out the Need For It to Adopt Consistent Standards*, ORLANDO SENTINEL, Aug. 8, 2001, at A10 (citing the “hidden nature” of ABA accreditation and the newspaper’s need to rely on state open records law). *See also infra* text accompanying note 695.

accountability,⁶⁹⁶ and gives them largely unfettered ability to

⁶⁹⁵ NACIQI Southern New England School of Law Letter 2 (Dec. 19, 2005) (“We believe that the rules/standards are not clear or evenly applied”); Letter from Gary H. Palm to Nat’l Advisory Comm. on Institutional Quality and Integrity 8 (Aug. 24, 2005) (recommending that DOE bar “development of ‘common law’ absent full and complete public transparency and due process procedures”); TASK FORCE OPEN FORUM, *supra* note 687, at 25 (comments of Dean Van Zandt, on behalf of the Board of Directors of ALDA, concluding that confidentiality requirements as to particular schools does not mandate that law schools generally “be kept in the dark about the way the [Accreditation] [C]ommittee has interpreted the standards in the past”); *id.* at 45-46 (comments of Tom Perez, citing the “very different view of the world on the issue of transparency” in the public health sector, where all documents were available); *id.* at 60 (very thoughtful comments by Dean Richard Matasar noting that site evaluation reports “get written in a tone that sees one way” and the Accreditation Committee report “comes back as if it is a completely different law school that was looked at There must be a black box into which the report has been put and a very different set of standards applied to it. We need to know more about what goes on, not on the site visit . . . transparent and read by the entire community, but by the thinking processes that went into deciding what issues were real issues and which were not”) (emphases added); *id.* at 70-71 (comment by Dean Leonard Strickman that, to the extent that there has to be common law, “everybody ought to know about it. It shouldn’t be a surprise”). A recent task force report to the ABA Section of Legal Education and Admissions to the Bar has *conceded* transparency issues, *acknowledged* complaints of “varying applications” of Standards “under circumstances in which schools have legitimate difficulty in knowing what is expected,” and noted that some claimed “common law” (sometimes denominated “secret law”) “increases the risk of arbitrary and capricious application.” The task force defended use of “common law” but conceded that such was “developed and applied during closed session deliberations” of the Accreditation Committee and via “confidential” action letters to law schools. The task force found *no* U.S. Department of Education regulation or other binding rule *mandating* the confidentiality currently required. One of the defects of such confidentiality is that such may result in accreditation sanctions unknown to and not intended by the Standards Review Committee and/or the Council – *i.e.*, that the latter “may not have voted to condone if it had foreseen its use” The task force recommended “greater transparency by disclosing as much information as is legally permissible,” with transparency and openness being the “default position.” Policy Task Force, *supra* note 687, at 9-11. The task force conceded inconsistency in action letters and site evaluations and that “[s]ubstantial improvement” was “likely to be difficult” without a section staff member’s presence on each team “to record more consistently the conclusions reached and the bases on which actions are taken.” It made specific recommendations to this effect. *Id.* at 10-11. *See also infra* text accompanying note 704.

⁶⁹⁶ *See supra* text accompanying notes 694-95. *See also* Vernellia R. Randall Letter, Mar. 8, 2006 (claiming that the Council violated 34 C.F.R. 602.23(c)(3) by failing to review complaints against it – *i.e.*, that accreditation

abuse non-elitist schools⁶⁹⁷ and individual faculty.⁶⁹⁸ The result

standards had a discriminatory impact on African-Americans – in a “timely, fair, and equitable manner”); NACIQI Cooley Submission, *supra* note 668, at 14 (opining that the Council “does not respond [to] or summarily rejects” all complaints directed at it, the Accreditation Committee or its staff); NACIQI Supplemental Submission of Cooley, *supra* note 668, at 15 (citing the Council’s “almost complete lack of accountability for its decisions”).

⁶⁹⁷ Palm E-mail, Aug. 25, 2006, *supra* note 687 (noting from his seven years on the Accreditation Committee that it has provided unequal treatment in applying standards to “elite schools and non-elite schools,” citing specific use of bar passage data); Southern New England Letter, *supra* note 695, at 2 (observing that the ABA’s changes in position left the school “trying to hit a moving target” with the school unable to rely on ABA critiques – the school’s experience was that the ABA is “at times, unfair and . . . its actions . . . arbitrary and capricious”); Center for Equal Opportunity Letter (Mar. 7, 2006) (on file with author) (noting that it had received complaints of ABA coercion of law schools to engage in discriminatory practices and preferences based on race, ethnicity and sex); Cooley Submission Aug. 23, 2005, at 14 (concluding that it can require as long as five years “to hit the moving target of compliance” and that the Accreditation Committee and Council “feel free to change [such] at will according to their confidential ‘common law’ as the process unfolds”); Supplemental Submission of Cooley, Mar. 8, 2006, at 15 (remarking that the “climate of intimidation and fear” was particularly true of those “not part of the upper-crust elite and those that serve historically disenfranchised communities”); Barnhizer, *supra* note 20, at 369-70 (citing intimidating use of ABA/AALS accreditation standards revolving around insufficient faculty diversity and insufficiently condemnatory law school postings (with a recommended substitute) concerning the military’s “Don’t Ask, Don’t Tell” approach as “little more than thinly veiled threats to an institution’s accreditation” – an “abuse of power” directed at a “vulnerable” school that the accrediting bodies “would never have attempted against a more powerful institution higher up in the pecking order”); *supra* note 74 (regarding the “amelioration” policy); Saul Levmore, *The 2006 Federalist Society National Lawyers Convention on “Limited Government”: Professional Responsibility: ABA Accreditation Standards for Law Schools: Uncapturing Law School Regulation*, 11 TEX. REV. L. & POL. 391, 393-94 (2007) (stating that the ABA’s “overall product is a regulatory code that is long, *subjective*, open to constant lobbying, and *capable of disparate and strategic interpretation*,” and that by contrast with other professions, only law schools are “constantly burdening central their administrations with regulations. This fact suggests a *bureaucracy out of control*, instituted by well-meaning people but bogged down by interest groups . . .”) (emphases added); Myriam Marquez, Editorial, *In Barry-FAMU Flap, ABA Plays Divide and Conquer*, ORLANDO SENTINEL, Dec. 16, 2001, at G3 (Citing “down-and-dirty politics” and arbitrary ABA policies, the column noted the to-be-opened public law school at historically African-American FAMU and how the ABA was “pit[ting] Barry, with its large number of Hispanics, against African-Americans.”).

is a “climate of intimidation and fear,”⁶⁹⁹ with few among the two-thirds⁷⁰⁰ or so of schools on regular report/in non-compliance as to one or more ABA Standards daring to speak out for fear of being “branded as a school with a bad attitude”⁷⁰¹ – a stigma that might result in devastating consequences, economic⁷⁰² and otherwise.⁷⁰³

⁶⁹⁸ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 7 (noting that the ABA/AALS accreditation experience was “no better than surreal” for many Chase faculty). *See also* text accompanying notes 1-120.

⁶⁹⁹ Supplemental Submission of Cooley, Mar. 8, 2006, at 15. *See also* Tom Stabile, *ABA Still in Charge*, April 2001, at 15 (quoting ABA critic Palm Gary that “[s]chools and individuals who have challenged the ABA or the council and its processes are treated adversely”); Elson, *supra* note 688, at 282 (noting the cartel’s successful strategy in neutralizing “meaningful dissent” in the ABA and the Section of Legal Education); Heriot, *supra* note 32, at 1-3 (detailing the ABA’s six years of abuse of George Mason University School of Law, a school with a somewhat conservative bent, because of its initial opposition to preferential admissions and its low number of African-Americans despite especially diligent outreach efforts).

⁷⁰⁰ Cooley Submission, *supra* note 668, at 14. *See also* Staver, *supra* note 685, at 79-84 (doing a brief analysis of several law schools under the ABA gun, including several with top quartile ranking); Scott Powers, *Barry Isn’t Alone in ABA Clash - Two Other State Law Schools Have Ongoing Fights With the American Bar Association*, ORLANDO SENTINEL, Aug. 7, 2001, at A1 (quoting John Sebert that such non-compliance findings are “very typical” but that accreditation is almost never forfeited).

⁷⁰¹ Supplemental Submission of Cooley, *supra* note 668, at 15 (noting that, to counter this “atmosphere of intimidation,” Cooley requested that the third-party comment period be reopened and law schools be allowed to submit comments confidentially “without fear of retaliation”); Heriot, *supra* note 32, at 1-3 (detailing the “diversity wringer” the ABA put George Mason University School of Law through – *see supra* 32 – and calling for a new process “to get the ABA out of the diversity business”).

⁷⁰² American Civil Rights Institute Letter, Mar. 7, 2006, at 2 (on file with author) (declaring that the mere threat of accreditation forfeiture “requires absolute adherence” and “forces them to break the law or become defunct” and that “[t]his coercion is unconscionable”). *See also* text accompanying notes 686, 693, 699, 701.

⁷⁰³ Letter of Whittier College, Aug. 18, 2005 (discussing the ABA’s practice of publishing an institution’s placement on probation without specifying the standard purportedly violated or the nature thereof – in essence, “a damning general message about the quality” of the school’s law program); *W. State Univ. of S. Cal. v. Am. Bar*, 301 F. Supp. 2d 1129, 1138 (C.D. Cal. 2004) (Discussing the

In sum, the ABA and the AALS are viewed by many as largely seeing themselves as above the law⁷⁰⁴ – a view that is born out,

“balance . . . of hardship,” the court found that “loss of reputation and good will resulting from the loss of accreditation could be very damaging to a law school.”). Indeed, a creative libel lawyer could make a compelling case for constitutional malice where the ABA’s non-specificity results in such a “damning general message” as to law school quality but where the only real defect is in non-compliance with the ABA’s highly politicized diversity dictates. For a detailed and illuminating analysis of Whittier’s arbitrary and capricious mistreatment by the ABA in applying its then extremely nebulous accreditation standard for bar passage, see Neil H. Cogan, *Freedom, Fairness, & Diversity, A Dean’s Memory* (Whittier Law School 2008). Compare this to the ABA’s flagrant abuse of George Mason University School of Law. See *supra* text accompanying notes 32, 686, 699, 701. Note that George Mason is ranked 38th (tied with three others) in a 2009 ranking. See *America’s Best Graduate Schools*, U.S. NEWS & WORLD REP. 46 (2009 ed.).

⁷⁰⁴ Palm E-mail, Aug. 25, 2006, *supra* note 687, at 3-4 (noting the ABA agreed to payment of a fine regarding allegations of “on-going violations” of the consent decree and federal antitrust laws, posing questions as to whether the ABA can be trusted as accrediting authority, and recommending that reapproval should be postponed until the ABA “shows that it has changed and will obey the law”); *id.* at 4-5 (citing the Accreditation Committee’s adoption of “common law” not published in accordance with Department of Education regulation 601.18 – never disseminated to the public, law schools and law faculty for comments and never approved by the Council for the House of Delegates; noting the ABA’s “shocking and most surprising” *denial* of use or enforcement of “common law” and citing the long-used standard for looking at first time takers in assessing bar passage rates – a standard adopted in writing *only* in 2005); Akin Gump Haner & Feld, LLP, *Submission By Whittier College*, July 21, 2005, at 30-31 (noting that, “in addition to the factual errors and evidentiary distortions underlying the Committee’s findings, certain procedural irregularities undermine the Committee’s ultimate determination of non-compliance”); Letter from Gary H. Palm to NACIQI 6 (Aug. 24, 2005) (concluding that the Accreditation Committee’s “secret ‘common law’ . . . may well be illegal” under the antitrust consent decree); Staver, *supra* note 685, at 5, 19-35, 49-74 (concluding that the ABA’s delegation to the Council to issue binding decisions is “an ultra vires act” proscribed by both the ABA Constitution and the laws of the state of incorporation, noting its “checkered history of flouting the law,” and making a strong case for ABA’s violation of federal antitrust law); Policy Task Force, *supra* note 687, at 12 (explaining, in a comment of Dean Jon Garon, that the inspection teams engaged in “[f]urther bending” of the rules by “reinforcing an unwritten common law”); TASK FORCE OPEN FORUM, *supra* note 687, at 26 (noting, in a comment by Dean Van Zandt, speaking on behalf of the Board of Directors of ALDA, that “there remain many areas where there is an unannounced common law” followed by the Accreditation Committee, citing specific Standard 405(c), which “seemed to vary over time and across schools,” and Standard 606 as to “an unstated range” of library book minimum for a new school to get accreditation); *id.* at 32-35

(noting, in comments of President Paulette Williams of CLEA, that interpretation of Standard 405(c) dealing with clinical faculty lacked “sufficient transparency” due to a “concern” “common law applied interpretations have been developed and applied without public comment and discussion,” with the possible effect of “altering the plain language” of Interpretations of Standards and citing recent examples); Lisa A. Kloppenberg Letter of Aug. 17, 2006, at 1 (reporting that a reaccreditation supporter noted that ABA training efforts provided “invaluable information and opportunities” for discussing, among other topics, “the ‘common law’ that develops” around the Standards); Letter of Alex Scherr, Aug. 23, 2005, at 3 (observing that a supporter noted “a particular risk” of the ABA applying “informal, unstated rules” outside the notice/comment process, citing the “common law” three year contract standard to meet the “reasonably similar” to tenure requirement under Standard 405(c), and noting that only this year did it go through the notice/comment procedure); NACIQI Transcript, *supra* note 663, at 86 (posing a question by Dr. Larry DeNardis as to “why is it that one of the nation’s preeminent professional bodies, one that prepares practitioners of the law, has such a difficult time complying with government regulations and policies . . . ?”); *id.* at 92-93 (“vent[ing] some frustration” about the “long outstanding list of issues, which should be easily resolved and . . . incorporated into your practices, your operating procedures, long ago”); *id.* at 107-08 (“echo[ing],” in comments by Dr. George A. Pruitt, Dr. DeNardis’s “frustration” about the ABA’s “continuous . . . casualness with which it treats compliance with minutiae and detail and other things that the rest of us have to live with, and that is disturbing”); *id.* at 171-72 (concerns of Roger Clegg, President and General Counsel of the Center for Equal Opportunity, as to whether racial, ethnic and gender discrimination is “being forced on law schools” via the accreditation process, whether law schools are “being coerced into breaking the law with the imprimatur of the Federal government,” and interpreting ABA Standard 211 [now 212] as only construable as “trying to push law schools into weighing race and ethnicity and sex to get their student and faculty numbers right”); *id.* at 185-90 (suggesting that if new 211 [now 212], the ABA’s “new more aggressive diversity policy,” does not deviate from past practice, it is an *admission* that it had *not* been complying with its published standards); *id.* at 209-13 (comments regarding “terms and conditions of employment” issues and ABA actions that Dean David Van Zandt of Northwestern University and Vice-President of the American Law Deans Association viewed as “[r]emarkabl[e]” in light of the ABA consent decree, focusing specifically on the seventh-tenths rule imposed as to clinicians and legal writing professors, a “partial person” rule discredited by *Dred Scott v. Sanford*).

A significant number of other ABA opponents cited revised Standard 212, with its “outcomes” language and disallowance of a state law constitutional defense as an “illegal and onerous policy.” American Civil Rights Institute Letter 1-2 (Mar. 7, 2006). *See also* Letter of Abigail Thernstrom, Vice Chair, United States Commission on Civil Rights 1-4 (Mar. 8, 2006) (letter in individual capacity); Letter of Stephen H. Balch, President, National Association of Scholars 1-6 (Mar. 8, 2006) (noting that the ABA had “long used” its accrediting authority “to pressure law schools to adopt diversity procedures and

as to the ABA and AALS by the Chase experience⁷⁰⁵ (one unlikely to be unique)⁷⁰⁶ and, at least as to the ABA, by a lengthy history of skirting around the law⁷⁰⁷ and, as to both, by deviation from basic tenets of fundamental fairness⁷⁰⁸ and common

policies they would not have otherwise adopted in exercise of “their best academic judgment” and providing a detailed legal critique of new Standard 212 as “contrary to law”); Bernstein, *Affirmative Blackmail*, *supra* note 32, at A9 (excoriating the ABA for interpreting *Grutter v. Bollinger* in its interpretation to new Standard 212 as transforming a permissive *may* into a mandatory *must*, which, if passed (it did), “will only embolden the accreditation bureaucracy, composed mainly of far-left law professors, to demand explicit racial preferences and implicit racial quotas – all in brazen defiance of the law”); Posting of David Bernstein to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_02_12-2006_02_18.shtml (Feb. 18, 2006, 14:59 EST) (concluding that new Standard 212’s ABA supporters’ claim that it merely *continues* what ABA accreditation personnel had been doing all along *without written authority* constitutes an *admission of prior illegal conduct* in interpreting the earlier “efforts”-focused standard); Posting of David Bernstein to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_08_13-2006_08_19.shtml (Aug. 17, 2006, 15:28 EST) (detailing the “startling confession” via “fact admission” that the ABA had been acting in “gross violation” of Department of Education requirements concerning “published standards”); AFFIRMATIVE ACTION REPORT, *supra* note 33, at 87, 101 (detailing the stunning concessions of Dean Steven R. Smith that Standard 212 “makes explicit the long-standing practice” of the Council as to diversity of faculty and staff (although not expressly covered under its predecessor) and that the revised Standard and Interpretations “do not compose significant new requirements”).

⁷⁰⁵ See text accompanying notes 37-120.

⁷⁰⁶ Stephens Letter of Aug. 23, 2006, *supra* note 49, at 4 (“[O]ne wonders just how many” other institutions are “similarly victimized” since such information is never made public.); Brewer Letter, Aug. 25, 2006, *supra* note 82, at 7 (citing literature supporting the conclusion he was not the first to have “a close encounter with the AALS’s political side,” “apparently . . . not a new phenomenon”).

⁷⁰⁷ See *supra* text supported by notes 685-88, 691, 693-97, 702 and 704.

⁷⁰⁸ See *supra* text accompanying notes 558-747; Cogan, *supra* note 703, at 1, 5-9 (detailing how the ABA “trench[ed] upon basic fairness” in failing to provide *any notice* to Whittier Law School as to what constituted compliance with its bar passage criterion under Standard 301(a) despite the law school’s repeated efforts and in then imposing a short two year deadline for compliance therewith, despite the absence of any guidance; providing a fascinating account of Whittier Law School’s extraordinarily courageous leadership in challenging this arbitrariness before NACIQI, ultimately resulting in the Secretary of Education finding the ABA in flagrant violation of federal regulations in this respect, with the net result that the ABA issued a new, more flexible rule in

civility and professionalism.⁷⁰⁹ This is a milieu in which “hostile environment” charges self-cultivate like mushrooms in cured manure and then receive sanction and legitimacy by processes that are little more than Jim Crow-like crypto-“courts”⁷¹⁰ of

Interpretation 301-6 and Whittier’s resultant removal from probationary status); Jensen, *supra* note 690, at 52-58 (detailing a shameless AALS charge of racism against editors of the Journal of Legal Education without according them procedural fairness: “The whole thing was a rush to judgment on the part of AALS officials. The kneejerk reaction was to apologize abjectly to a self-proclaimed victim . . .”); W. State Univ. of S. Cal. v. Am. Bar, 301 F.Supp. 2d 1129, 1137-39 (C.D. Cal. 2004) (granting a preliminary injunction based on common law due process violations, including violations of the ABA’s own rules, “potentially unreasonable interpretations” of its rules, and failure to inform plaintiffs of the “fluid rules definitions, guiding Defendant,” which precluded plaintiffs’ “right to a fair and effective appeal”: “The public’s interest in prompt, fair and accurate accrediting information is not served if the accrediting agency does not observe a school’s due process rights during the accreditation process”); Staver, *supra* note 685, at 61-69, 74-76, 85-90 (detailing the flagrant abuse of Barry University of Orlando School of Law before finally reversing its decision under enormous pressure (*see supra* note 693), the jerking around and arbitrary application of Standards compared to similarly situated schools, and its conclusions that the ABA’s process is “arbitrary and lacking in predictability”); Tom Stabile, *ABA Still in Charge*, NAT’L JURIST, April 2001, at 15 (quoting Robert D’Agostino of Atlanta’s John Marshall Law School that the school’s bar pass rate was found unacceptable by the Accreditation Committee but ignoring the fact it was “higher than any other provisionally accredited school”); Barnhizer, *supra* note 20, at 410 (“Nor do members of the academic collectives feel themselves constrained by rules of reciprocity, fairness, and balance. The intimidation is intended to be one-sided.”); Posting of David Bernstein, Aug. 17, 2006, *supra* note 704 (concluding that due process standards were violated where the ABA had a “‘published’ version” of ABA standards pursuant to Department of Education regulations and “another version applied informally and without written authority” by accreditation personnel). *But see* Thomas M. Cooley Law Sch. v. Am. Bar Ass’n, 459 F.3d 705 (6th Cir., 2006) (finding that the ABA, as a private organization performing “a quasi-governmental function,” met common law due process standards in sanctioning Cooley for “blatant and intentional” noncompliance with ABA Standards in its opening of branch campuses without prior approval).

⁷⁰⁹ *See supra* text accompanying notes 558-747; Jensen, *supra* note 690, at 47-52, 58 (detailing AALS’s differing treatment of other legal organizations at its annual meeting and then suggesting the positive step of “trying to appear fair” and opening its meetings to other allied organization without regard to viewpoint).

⁷¹⁰ *See supra* text accompanying notes 7-23, 30-120 and text accompanying notes 558-760. But compare the statement of Mr. William Rakes, the chair of the Section of Legal Education and Admission to the Bar, that the ABA

political correctness⁷¹¹ – but without either the thin veneer of due process⁷¹² or the ardent segregationists’ confrontational frankness in *publicly* declaring and endeavoring to impose *their* radical agenda.⁷¹³

Some aspects of institutional recklessness have been discussed *supra* – abuse/manipulation of standards;⁷¹⁴ “perceptions” or “reports” magnified into “fact”;⁷¹⁵ “primarily” a

accreditation process is “honest and fair.” NACIQI Transcript, *supra* note 663, at 35; *id.* at 122-24 (comments of Dean Nancy Rogers that the process is “rigorous,” the standards are “important,” and the Council process “predictable” “as far as is practicable in accreditation standards”; *id.* at 143-44 (comments of Dean Mary Daly that in her experience site evaluation teams have “the very best intentions and an extraordinarily broad-based knowledge” of legal education and apply the standards “fairly, evenly, consistently within the institution and across institutions”); *id.* at 158 (comments by Dean Kent Syverud that his recent experiences with accreditation at two schools indicated that the process was “careful and thorough and honest”).

⁷¹¹ See *supra* text supported by notes 7-23, 30-120 and the text accompanying notes 558-760.

⁷¹² See *infra* note 760 for a discussion of the white primary “state action” cases. See also *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (Rejecting “calculated falsehood” as protected by the First Amendment, the Court stated that “[a]t the time the First Amendment was adopted, as today, there were those *unscrupulous enough and skillful enough* to use the deliberate or reckless falsehood as *an effective political tool to unseat the public servant* or even topple an administration.”), citing David Reisman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085, 1088-1111 (1942) (discussing the use of libel by Nazi Germany to undermine and eliminate its opponents and critics). See also *infra* text accompanying note 713.

⁷¹³ For an excellent example see Justice Hugo Black’s famous characterization of libel plaintiffs’ attempts to squelch “outside ‘agitators’” criticism of segregation through libel litigation under the plaintiff-protective rules of state common law. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 294 (1964) (Black, J., with Douglas, J., joining, concurring). See also *supra* text accompanying note 712. On the frankness issue, the author is reminded of Mao Zedong’s comment to Nixon during his February 1972 visit to China: “I like to deal with rightists. They say what they really think – *not like the leftists, who say one thing and mean another.*” John Lewis Gaddis, *Great Leap Forward*, N.Y. TIMES, Feb. 25, 2007, at 14 (reviewing MARGARET MACMILLAN, *NIXON AND MAO: THE WEEK THAT CHANGED THE WORLD* (2007)) (emphasis added).

⁷¹⁴ See *supra* text accompanying notes 37-120.

⁷¹⁵ See *supra* text accompanying notes 47-48, 66.

single faculty member transformed into a “pervasive” “hostile environment”;⁷¹⁶ bias and preconceptions fatally tainting the process.⁷¹⁷ A detailed, critical analysis of the on-site “fact”-gathering “process” and the uncritical and manipulated fruits thereof has been dealt with in detail by two Chase colleagues as to the ABA.⁷¹⁸ In strong and provocative language they point out the endemic problems in the “fact”-gathering process and its “rubber-stamp[ing]”⁷¹⁹ by the Accreditation Committee: gross deficiencies in the “fact”-gathering process virtually guaranteeing that the information gathered on “pervasive hostile environment” would be inaccurate;⁷²⁰ the absence of any

⁷¹⁶ See *supra* text accompanying notes 51-52, 83, 86, 591, 627-29, 650-51.

⁷¹⁷ See *supra* text accompanying notes 1-120, 575-716 and *infra* text accompanying notes 718-747.

⁷¹⁸ The critiques were directed specifically at the ABA because it was up for an extension of its law school accreditation/approval function. See Stephens Letter, Aug. 23, 2006, *supra* note 49; Brewer Letter, Aug. 25, 2006, *supra* note 82. This in no way suggests the AALS process was any different or more defensible. It wasn't. If anything, it was and is even more highly political. See *supra* text accompanying notes 63-120. See particularly the text accompanying note 74.

⁷¹⁹ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 5.

⁷²⁰ *Id.* at 4-6; Stephens Letter, Aug. 23, 2006, *supra* note 49, at 2-4; see also *infra* text accompanying notes 722-36. What one law professor recently said about her law school's reaction to a professor allegedly using insulting ethnic remarks applies, *a fortiori*, to an accrediting or membership body charging male faculty with creating a “hostile environment”: “You might think that a law school [and the ABA and AALS! – the author's addition, not Professor Althouse's] would want to *teach scrupulous procedure*, including a *passion for the search for the truth* and the *need to find the facts before devising the remedy*.” Ann Althouse, *A Word Too Far*, N.Y. TIMES, Mar. 3, 2007, at A15 (emphases added). Related to this is the criticism of the mistreatment of University of Texas law professor Lino Graglia, a spirited critic of affirmative action. He was confronted with “a heated campaign of moral censure and public humiliation from his chancellor, his president, his dean, his law school colleagues, and 5,000 students, whipped into an irrational frenzy by a campus speech by the Reverend Jesse Jackson.” Although tenure (and the First Amendment) “protected” him from dismissal, his dean promised sympathetic consideration to any transfer requests from his mandatory class in constitutional law despite finding an absence of racial bias throughout Professor Graglia's three decade plus career at Texas. As the author concluded, pillorying this mistreatment, “students were rewarded for their unfounded fears, and Professor Graglia punished at the same moment that he was declared innocent.”

standard-based requirement of effective review⁷²¹ (or actual exercise in fact) to reasonably ensure that accurate information was, indeed, gathered.⁷²² The net result was a perfunctorily

Bradford P. Wilson, Point of View, *Politicizing Academic Freedom, Vulgarizing Scholarly Discourse*, CHRON. OF HIGHER EDUC., Dec. 19, 1997, at A52. See also Katherine Mangan, *AAUP Protects U. of Tulsa's Suspension of Professor in Murky Grading Dispute*, CHRON. OF HIGHER EDUC., April 20, 2007, available at <http://chronicle.com/daily/2007/04/2007042007n.htm> (discussing a law professor's suspension, expulsion from university grounds, directive not to talk to faculty or students, and quoting a tenured colleague: "The thing that's so stunning to us is that the administration imposed a sanction without a hearing . . . The effect is to make every – even tenured faculty – feel vulnerable. *We're law faculty for heavens sake. We believe in due process.*") (emphasis added); TAYLOR & JOHNSON, *supra* note 75, at 117 (Citing the failure of the Duke faculty to defend "procedural regularity," the "rush to judgment" by a significant group thereof, and the refusal to budge even after a "mountain of evidence" proved them wrong, the authors conclude: "Academic ideals *used to include dispassionate analysis of evidence and respect for due process. No more . . .*") (emphases added). One ardent, former insider ABA critic attributes errors, insufficient budget and overuse of law school volunteers, as leading to "favoritism, bias and mistakes." More funding is required to "assure consistency and fairness." Palm E-mail, Aug. 25, 2006, *supra* note 687, at 1.

⁷²¹ Stephens Letter, Aug. 23, 2006, *supra* note 49, at 3 (noting that the Accreditation Committee "simply accepted" allegations "presented as facts" of the site team, "warped" standards by requiring Chase to meet a "welcoming" criterion, and failed to show that it had "effective controls" against inconsistency in applying standards in violation of 34 C.F.R. § 602.18(A)); Brewer Letter, Aug. 25, 2006, *supra* note 82, at 2-6. *But see* Palm E-mail, Aug. 25, 2006, *supra* note 687, at 5-6 (The author stated that "[t]he Accreditation Committee makes all accreditation rules and only a handful are reviewed by the Council. There is almost no monitoring of the . . . Committee[s] processes or decisions. Even Enron had more oversight by its Board of Directors . . . [T]he Accreditation Committee is a power unto itself without meaningful supervision by Council"); NACIQI Letter of Whittier College, Aug. 18, 2005, at 2 (concluding, after citing other problems, that: "The ABA's standards and procedures do not assure consistency in application of the standards among and between law schools in different states. Through these and other failures, there is no effective control against inconsistent application by the ABA of its standards; no assurance that the ABA bases its decisions on published standards; and no barrier against applications and decisions on the basis of error, bias, prejudice, favoritism and cronyism."). This is particularly true where the Accreditation Committee's decision often bears little resemblance in critical particulars to the site team evaluation report. See *supra* note 695 (detailing comments of Dean Richard Matasar).

⁷²² Stephens Letter, Aug. 26, 2006, *supra* note 49, at 3-4. "Whims, peculiar sensitivities and personal agendas" of individuals on the site team "were allowed to become tools to thwart" Chase's status as an accredited school. *Id.* When

adopted and affirmed site evaluation report arising from what one colleague termed “some of the most monumentally incompetent approaches”⁷²³ to “fact”-gathering he had witnessed in three decades since starting law school – an experience that he viewed as “one [of] the most blatantly political and politicized” he “ha[d] ever suffered through.”⁷²⁴

My colleague’s views are summarized eloquently in the following lengthy excerpt:

Simply put, the [Accreditation] Committee and the site team do not have or do not use an ‘effective

Chase demonstrated the “dichotomy and disconnect” between the team’s “concern” and published ABA standards, the Accreditation Committee acquiesced in the team’s “concern,” “lack[ing] the temerity to rein in” its on-site team. *Id.*; Brewer Letter, Aug. 25, 2006, *supra* note 82, at 2-6; *see also infra* the detailed discussion in text accompanying notes 723-34. Both letters focused on 34 C.F.R. § 602.17(c) (mandating “at least one on-site review . . . during which it obtains sufficient evidence to determine if the institution or program complies with the agency’s standards”) and 34 C.F.R. § 602.18(c) (requiring the agency to have “a reasonable basis for determining that the information the agency relies on for making accrediting decisions is accurate”).

⁷²³ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 5. *But see* TASK FORCE OPEN FORUM, *supra* note 689, at 59-60 (containing very thoughtful critical comments by Dean Richard Matasar about the “great variations” in attitudes of site-evaluation team members with some believing that their responsibilities mandate a “what’s wrong with the school” focus: “Why would that be? Site visits should not be a method by which *every faculty fight is refought for the benefit of strangers, and it becomes that on many site visits.*”) (emphases added). Compare to this the parallel sage and thoughtful comments of R. Lawrence Dessem, *The ABA/AALS Sabbatical Site Inspection: Strangers in a Strange Land*, 37 U. TOL. L. REV. 37, 47 (2005) (noting that faculty members, among others, may endeavor to utilize the ABA/AALS site visit “to *further personal goals that have little or nothing*” to do with accreditation/membership issues and concluding: “*While there are personnel issues and tensions present in all law schools, most of these involve matters that are best resolved within the law school and don’t rise to the level of facts to be included in the site team’s report.*”) (emphases added).

⁷²⁴ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 6-7 (citing 34 C.F.R. § 602.13(c), (c)(2) – that “any joint use of personnel . . . by an agency and a related, associated or affiliated trade organization or membership organization” is required not to “compromise the independence . . . of the accreditation process” – and posing a “conflicts of interest” issue, and asking whether “the AALS’ politics as it infects an ABA site evaluation should govern or influence” law school accreditation).

mechanism' for evaluation and do not gather 'sufficient information' about anything by entering into an investigation with pre-conceived notions about an institution and its faculty members;⁷²⁵ by failing to consider whether initial allegations are part of a broader problem;⁷²⁶ by failing to ask even the most basic of questions about the problems they purport to be concerned about;⁷²⁷ by using coded language in the questions that they do ask that amounts to little more than Newspeak;⁷²⁸ by ignoring obvious openings and leads provided during questioning by an investigator about serious, broader problems within an institution;⁷²⁹ and then by using an action letter to address the preconceptions with which they began the

⁷²⁵ *Id.* at 5.

⁷²⁶ *Id.* at 4-5 (Despite having pre-site evaluation information suggesting "problems within the Chase community that affected faculty members generally," the site evaluation team and Accreditation Committee purposefully "limited their inquiry and their interest to the environment for women and minorities."). See also *supra* text accompanying notes 68-69, 71, 90.

⁷²⁷ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 4-5 ("I had hoped that the fact that I was a male . . . might, if nothing more, have sparked some curiosity as to the scope of any problems of 'silencing,' as the team member understood that concept. But the team member did not ask any followup questions about my statements, and in particular did not ask any questions about who silenced whom, or whether both male, female, and minority faculty members engaged in the unacceptable behavior."); *id.* at 6 (concluding that the site evaluation process of the ABA demonstrates that it is "unworthy of continued recognition as an accrediting agency").

⁷²⁸ *Id.* at 4-5. "[T]he team member asked me whether I believed that members of the Chase faculty 'ha[d] been silenced?' Responding to the obvious post-modern code in which this question was phrased, I responded by telling her that I did not believe (as I do not) that people are 'silenced' by others, but that they choose to be silent in response to conditions that they find unacceptable. She frowned and began writing furiously on her pad, so I continued. . . . I went on to explain that many faculty members frequently engaged in unacceptable conduct or communications towards others, and that I myself had frequently been on the receiving end of such. Where there was no point in responding to the unacceptable behavior, I would make the decision to be silent." *Id.*

⁷²⁹ *Id.* at 4-5.

investigation.⁷³⁰ The [Accreditation] Committee does not use ‘reasonable measures’ to ascertain that the information provided by a site team is accurate where the ABA fails to regulate⁷³¹ and the [Accreditation] Committee either fails to prescribe or to review the investigative techniques used by a site team,⁷³² where it fails to uncover deficiencies of the magnitude and pervasiveness⁷³³ found in the 2003 investigation at Chase; and where it fails to employ the heightened level of due diligence that would be called for before making sure extraordinarily virulent assertions as were made against Chase and members of its faculty.⁷³⁴

As the above analysis discloses (assuming the scenario involving my colleague was typical and he opines that it likely was),⁷³⁵ a narrowly focused investigation occurred with pre-set objectives and the only information wanted or sought was to fulfill and implement these pre-set objectives. All other information – including information that would have undermined or refuted the thesis was not sought, was ignored

⁷³⁰ *Id.* at 5.

⁷³¹ *Id.*

⁷³² *Id.* at 5; see also Stephens Letter, Aug. 23, 2006, *supra* note 49, discussed *supra* in the text accompanied by notes 721-22.

⁷³³ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 5. See *supra* the text accompanied by notes 37-120 and the discussion of the Stephens Letter, Aug. 23, 2006, *supra* note 49, in the text supported by notes 721-22.

⁷³⁴ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 4-5 (citing his experience as “illustrative of the extraordinary failures” in the site-team’s inquiries and stating that no inquiry as to “unacceptable behavior . . . endemic to the environment at Chase” was made to him and he was “not aware that any such inquiry was made of any faculty member”); see also the discussion in the Stephens Letter, Aug. 23, 2006, *supra* note 49, in text supported by notes 721-22.

⁷³⁵ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 5, 7; see also Stephens Letter, Aug. 23, 2006, *supra* note 49, at 4 (wondering, in light of the fact that ABA accreditation information is “never made available to the public by the ABA,” “just how many law schools have been similarly victimized”).

when proffered, and was not included in the report.⁷³⁶ Several conclusions veritably leap off the page. First, the selective focus demonstrates the pre-set politically partisan objectives of the ABA and AALS that is compelling evidence of common law malice and highly probative of constitutional malice,⁷³⁷ as were the deviations from “professional standards”⁷³⁸ of both the “fact”-gathering and ABA review processes.⁷³⁹ Second, omission of such refutatory evidence gives the ensuing report a calculatedly one-sided, self-fulfilling and deceptive quality. Indeed, it bears out the adage – “not to tell the whole truth was in effect to lie.”⁷⁴⁰ Third, the site evaluator’s failure to pursue and use “the most obvious available sources of possible

⁷³⁶ Brewer Letter, Aug. 25, 2006, *supra* note 82, at 4-5. His statement about “endemic” “unacceptable behavior” was “patently inconsistent” with the site team’s report and Accreditation Committee’s factual findings and would have prompted “any reasonable site team member, to *further inquiry about the environment in general, for all faculty members*” – in addition, they had information before them prior to the visit (that is, the Chase Self-Study report) as to such problems “that *affected faculty members generally*.” *Id.* (emphases added). For further discussions of the environment generally prevailing at Chase, see *supra* the text accompanying notes 19, 68, 71-72, 81-83, 87, 90, 101-02 and 108.

⁷³⁷ See *supra* text accompanying notes 654-703.

⁷³⁸ The Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 663-68 (1989), found evidence of deviation from “professional standards” to be admissible, supportive evidence on the constitutional malice issue. See *supra* text accompanying notes 654-56.

⁷³⁹ See *supra* text accompanying notes 37-120. Compare also the strong critique of the *New York Times* standard and its emphasis on individual culpability, rather than corporate risk-taking (via emphasis on the profit margin, cost-cutting measures, poor training, etc.), which “operate[s] perversely to absolutely immunize *and thus to encourage and reward unacceptable choices* at the corporate [ABA? AALS?] level. Such an incentive . . . would be deeply tragic.” Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L.REV. 887, 928-29 (2005) (emphasis added).

⁷⁴⁰ *O’Brien v. Papa Gino’s of America, Inc.*, 780 F.2d 1067, 1073 (1st Cir. 1986). This reflects the view cited by the Court that a partial truth publisher may be “[all] ‘the more successful when he baits the hook with truth.’” *Harte-Hanks Commc’ns*, 491 U.S. at 691 n.37.

corroboration or refutation”⁷⁴¹ likewise strongly evidenced constitutional malice.

The scenario described above raises strong parallels to *Harte-Hanks Communications, Inc. v. Connaughton*,⁷⁴² where the Court found constitutional malice in a case involving defendants that refused to interview a possible witness who could verify or refute a suspect source⁷⁴³ and further refused to review tapes with parallel potential already in its possession.⁷⁴⁴ The latter refusal could have been “motivated by a concern that [the tapes] would raise additional doubts” as to the source.⁷⁴⁵ Both such determinations, as in the Chase scenario above, may have been viewed by a fact-finder as resulting from a “deliberate decision not to acquire knowledge of facts that might confirm the probable falsity”⁷⁴⁶ of the source’s accusations – this was not a failure to investigate but “*purposeful avoidance of the truth*.”⁷⁴⁷

⁷⁴¹ Kuhn v. Tribune-Republican Publ’g. Co., 637 P.2d 315, 319 (Colo. 1981). These failures are “materially different” from a reporter’s determination not to contact plaintiff or to ignore plaintiff’s denials. Sharon v. Time, Inc., 599 F. Supp. 538, 585 (S.D.N.Y. 1984).

⁷⁴² 491 U.S. 657 (1989).

⁷⁴³ *Id.* at 682, 690-93. In light of defendant’s commitment of major resources to investigating a source’s claims, it was “utterly bewildering” that no one talked to the one witness, the source’s sister, “most likely to confirm” her statements. *Id.* at 682. However, if defendant had “serious doubts” but was “committed to running the story,” defendant had good cause not to interview the witness – her denial “would quickly put an end to the story.” *Id.*

⁷⁴⁴ *Id.* at 682-84, 690-93; *see also* Ball v. E.W. Scripps Co., 801 S.W.2d 684, 687 (citing evidence brought to defendants’ offices to demonstrate a major source’s unreliability, which defendants refused to review).

⁷⁴⁵ *Harte-Hanks Commc’ns*, 491 U.S. at 684.

⁷⁴⁶ *Id.* at 692.

⁷⁴⁷ *Id.* (emphases added). For a case strongly paralleling the Chase tragedy, *see Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 1003-04 (D. Minn. 1998). In *Stokes*, a police officer-codefendant evidenced reckless disregard of truth where he “dismissed plausible alternative theories, failed to ask pivotal questions of key figures, declined to pursue promising leads, and ignored potentially exculpatory evidence.” *Id.* The media co-defendant’s failure to ask its officer-source “critical questions” concerning his investigation “demonstrates that they might well have been afraid of what the answers would be.” *Id.*

CONCLUSION

The available information involving the Chase experience compellingly evidences a plethora of evidence of constitutional malice that would have allowed a jury to find favorably for individual male faculty member plaintiffs. *A fortiori*, the lesser included standard of negligence⁷⁴⁸ would have been met if Chase plaintiffs were deemed private individuals,⁷⁴⁹ decided to limit themselves to seeking compensatory damages,⁷⁵⁰ and the forfeiture standard for qualified privilege remained the common law majority view,⁷⁵¹ now the post-*Restatement (Second)* section 600 minority view.⁷⁵² The First Amendment⁷⁵³ and many, if not most states, would have authorized general compensatory damages without plaintiffs being required to prove reputational injury.⁷⁵⁴ Proof of *New York Times* constitutional malice would have allowed plaintiffs to seek both presumed and punitive damages;⁷⁵⁵ proof of common law malice would have fulfilled any state law addendum for punitive damages.⁷⁵⁶

⁷⁴⁸ *Khawar v. Globe Int'l, Inc.*, 965 P.2d 696, 712 (Cal. 1998) (noting that a finding of constitutional malice is “usually, perhaps invariably” also sufficient for negligence); *see generally* ELDER, DEFAMATION, *supra* note 76, ch. 6.

⁷⁴⁹ *See supra* text accompanying notes 474-525.

⁷⁵⁰ *See supra* text accompanying notes 520, 525, 527.

⁷⁵¹ *See supra* text accompanying notes 533, 544.

⁷⁵² *See supra* text accompanying notes 534-49.

⁷⁵³ *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976) (The foregoing of damages to reputation by plaintiff did not “transform the action into something other than an action for defamation as that term is meant in *Gertz*.”); *see also* *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 223 (Iowa 1998) (“Simply put, the Federal Constitution does not bar recovery for a defamation action based solely on emotional distress damages.”).

⁷⁵⁴ ELDER, DEFAMATION, *supra* note 75, § 9:2, at 9-12-9-16.

⁷⁵⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974); *see also* ELDER, DEFAMATION, *supra* note 75, §§ 9:4-9:5.

⁷⁵⁶ ELDER, DEFAMATION, *supra* note 75, § 9:6. It is doubtful any such exists in Kentucky. A restrictive tort reform statutory definition of “malice” was struck down under the Kentucky constitutional “jural rights” doctrine. *See Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). Note that a minority of jurisdictions bar

Maybe, in retrospect, individual male Chase faculty should have, in the words of the bewigged statue, “[s]ue[d] the bastards.” Maybe the specter of another large libel settlement or judgment⁷⁵⁷ would have precipitated the ABA to review its processes and adopt standards and procedures ensuring a modicum of fairness and balance. Maybe in the future other faculty charged arbitrarily with creating a “pervasive hostile environment” will sue – and the ABA-AALS arbitrary and political goose-step on this issue will be shown for what it is, an essentially lawless⁷⁵⁸ process.

The reader may rightly ask, is this all “much ado about nothing”? A ranting white male fearful of losing his supposed “hegemony”? A unique, aberrational situation? Of course, no one really knows the depth and extent of the depredations of the ABA and its incestuous paramour, the AALS. As indicated above, they are exceedingly careful to keep their misfeasance and malfeasance largely away from public scrutiny and the checking function of public review. Perhaps, defamation litigation and liability will provide a limited remedy helping to

punitive damages *in toto*. ELDER, DEFAMATION, *supra* note 75, § 9:6, at 9-34 to 9-35.

⁷⁵⁷ Sprague v. ABA, 31 Media L. Rep. (BNA) 2217, 2219-24 (E.D. Pa. 2003) (finding a submissible case of constitutional malice in a case where an article in defendant's journal portrayed plaintiff-prominent attorney as a “lawyer-cum-fixer” – the article dealt with “perceived escalation of political tensions” between the district attorney's office and the African-American community and the “key players” representing those most involved); *see also* Sprague v. ABA, 276 F. Supp. 2d 365 (E.D. Pa. 2003) (discussing damage issues). The case later settled for an undisclosed amount (described by plaintiff's counsel as a “damned good settlement”), and publication of a public apology, together with plaintiff's biography. Verdict and Settlement Summary, Sprague v. ABA, 2003 WL 22998373, at 1 (E.D. Pa. Nov. 20, 2003). Mr. Sprague also successfully sued for libel in another context in *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. Ct. 1995) (upholding a judgment of \$24 million). The case then settled for a non-publicized amount while the losing media defendants were seeking certiorari. FRANKLIN ET AL., *supra* note 526, at 364. Mr. Sprague has been extremely successful in protecting the rights of other public persons. See Elder, *Media Jabberwock*, *supra* note 284, at 627-40, for an extensive discussion of his very commendable efforts in helping render a death knell to “neutral reportage” in *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004). As to the latter, see *supra* text accompanying notes 457-73.

⁷⁵⁸ See *supra* text accompanying notes 558-747.

ensure at least some level of public accountability – and, hopefully, make participants more cautious, and, *more accepting of difference* – political, that is – for reasons of self-preservation, if for no other.

Journalist-author-First Amendment scholar Anthony Lewis has written provocatively about the First Amendment *horrors* of a bill passed by the House in 2003, the International Studies in Higher Education Act, and the problems posed for university-federal aid recipients under a proposed federal advisory board with the duty to “study, monitor, appraise, and evaluate” university programs to ensure *diverse perspectives* in foreign language and other area studies based in concerns about anti-U.S. bias in Middle Eastern studies programs.⁷⁵⁹ Shocking, right? *Even horrific* (and the author would agree). But, as the above sketch of the ABA-AALS joined-at-the-hip joint venture (environmental civility code, speech code, call it what you will) compellingly evidences, it appears that American legal education has, at least as to the ABA, a hugely powerful accreditation apparatus of largely uncontrolled (if not uncontrollable) authority, a de facto government actor⁷⁶⁰ that

⁷⁵⁹ LEWIS, *supra* note 67, at 164-65.

⁷⁶⁰ Some scholars have suggested that “state action” may be involved where the Department of Education “essentially confers” disaccreditation authority on the ABA with concomitant federal funding cut-offs, based on failure to afford “preferential treatment” to minority students. NAS Letter, Mar. 8, 2006, at 5; Posting of David Bernstein to The Volokh Conspiracy, *supra* note 704. Professor Bernstein cited an email comment referring to *Marsh v. Alabama*, 326 U.S. 501, 502-10 (1946) (holding that a company town was a state actor subject to religious liberty strictures of the First Amendment); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (holding that the primary by the county Jaybird Party constituted “state action” under the Fifteenth Amendment, since it was “an integral process, indeed the only effective part” that determined county governance); *id.* at 473-76 (Frankfurter, J.) (emphasizing that county officials joined with white voters “with elaborate formality” to “subvert” county primaries); *id.* at 484 (Clark, J., concurring) (noting a state structuring its election machinery to delegate to a political organization “uncontested choice” of public officials bestows “those attributes of government which draw the Constitution’s safeguards into play”). In such cases the ABA/licensing/“controls the gate” to the profession rationale is a direct parallel. Professor Bernstein concluded that “what really clinches it for me is that if the ABA were to prevail and be ruled a private actor, then states could easily elude constitutional restrictions simply by delegating public authority to private groups and then having them engage in conduct (e.g. – speech restrictions, racial discrimination, etc.) that would be unconstitutional if the state did it directly.” See also Posting

has self-endowed itself with thought and expression controls (at least in the realm of intra-faculty interactions, if not beyond) in implementation of a no-holds-barred politically correct, liberal-left agenda. And, it's likely to only get worse. But, does anyone care? "That is the congestion. Consumption be done about it? Of cough. Of cough."⁷⁶¹

of David Bernstein to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_08_13-2006_08_19.shtml (Aug. 17, 2006, 3:28 EST) (citing the ABA's status as "quasi-state actor" subject to due process restrictions). The monopoly linkage between ABA accreditation and the States has been expressly conceded in litigation. See Amicus Curiae Brief of the American Association of Law Schools, at 2, *Avins v. White*, No. 79-1747 (3rd Cir. 1979) ("In this country the importance of accreditation is emphasized by the circumstance that, under orders of the State Supreme Courts or by legislation, *virtually all the states condition eligibility to sit for the bar examination on graduation from a law school accredited by the American Bar Association.*"). Cf. *Hawkins v. N.C. Dental Soc'y*, 355 F.2d 718, 720-24 (4th Cir. 1966) (holding that a professional membership society that was "clearly authorized . . . to influence, if not to control, state functions" was a state actor for Fourteenth Amendment Equal Protection Clause purposes) (relying on the white primary line of precedents).

⁷⁶¹ I learned this bit of doggerel by rote in high school in the mid-60's. I have been unable to trace its origin.