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LIBERAL BIAS IN THE LEGAL ACADEMY: OVERSTATED AND UNDERVALUED

Michael Vitiello*

I. INTRODUCTION

By many accounts, universities are hotbeds of left-wing radicalism.¹ Often fueled by overreaching administrators, right-wing bloggers and radio talk show hosts rail against the suppression of free speech by the “politically correct” left wing.² Over the past twenty years, numerous and mostly conservative commentators have published books decrying radical professors and their efforts to force their own political vision on their students.³ Most recently, former Communist turned hard-right

* Distinguished Professor and Scholar, Pacific McGeorge School of Law; B.A. Swarthmore, 1969; J.D. University of Pennsylvania, 1974. I want to extend special thanks to a wonderful group of research assistants who ran down obscure footnotes and converted oddball citations into Bluebook form—thanks to Cameron Desmond, Oona Mallett, Alison Terry, Jennifer L. Williams, and to my colleagues Greg Pingree and University of Mississippi Professor Michael Hoffheimer for their helpful input. I also want to single out three left leaning professors who inspired many of the thoughts in this article. My colleague Brian Landsberg and my former colleague Joshua Dressler demonstrate the best traits of liberal law professors. Both in the classroom and in private discussions, they ask hard questions and do not accept superficial answers. Both have helped me repeatedly in casual conversations, at works-in-progress, and in comments on drafts of articles. Finally, I want to dedicate this article to my brother Justin Vitiello, recently retired from Temple University in Philadelphia where he taught in the Italian Department. His politics lean far to the left and yet I doubt that any of his students could claim bias. He was a passionate teacher, committed to his subject matter and to his students. His intensity inspired generations of students to learn from him.


activist David Horowitz has lobbied legislatures to investigate
the left-wing bias in state institutions and to enact a student
bill of rights.4

According to Horowitz, students need protection not only
because professors interject their political views into the class-
room, but also because professors demonstrate an overwhelming
left-wing bias.5 Further, professors have stifled conservative
students from openly discussing their ideas.6 And worse,
Horowitz raises concern that left-wing professors force their
students to share their political views in order to get good
grades.7

Until recently, little attention was focused on the left-wing
leanings of law professors. Even when law professors have
written about the problems of the politically correct, they have
focused primarily on the excesses of undergraduate adminis-
trators and professors.8 More recently, however, the publication of

ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS
FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS (1988); PETER
COLLIER & DAVID HOROWITZ, SURVIVING THE PC UNIVERSITY: THE BEST OF HETERODOXY
(Center for the Study of Popular Culture 1996) (1993); D'SOUZA, supra note 1;
HOROWITZ, supra note 1; KIMBALL, supra note 1; KORS & SILVERGLATE, supra note 1;
BEN SHAPIRO, BRAINWASHED: HOW UNIVERSITIES INDOCTRINATE AMERICA'S YOUTH
(2004).

4 See Students for Academic Freedom, supra note 2 (follow “Horowitz Testimonies
to Legislative Bodies” hyperlink under “Actions Nationwide” section); FrontPage Magazine,
http://www.frontpagemag.com/Articles/Read.aspx?GUID=7C9ADC99-43A8-463F-
BC96-3B46613CCBF (last visited May 16, 2007) (on file with the Mississippi Law
Journal).

5 See HOROWITZ, supra note 1; FrontPage Magazine, supra note 4.

6 See HOROWITZ, supra note 1; FrontPage Magazine, supra note 4; Students for
Academic Freedom, supra note 2.

7 See HOROWITZ, supra note 1; David Horowitz, How to Get an “A” at One Elite
School, FrontPage Magazine (May 11, 2005), http://www.frontpagemag.com/
Articles/Read.aspx?GUID=DE67CA4C-E8E74-4404-934C-26D0A4949513 (on file with the
Mississippi Law Journal).

8 See, e.g., KENNETH LASSON, TREMBLING IN THE IVORY TOWER: EXCESSES IN THE
PURSUIT OF TRUTH AND TENURE 113-90 (2003). Lasson's book is largely a compilation of
three of his law review articles; the article focusing most closely on the problems of the
politically correct is Kenneth Lasson, Political Correctness Askew: Excesses in the Pursuit
of Minds and Manners, 63 TENN. L. REV. 689 (1996), which draws most of its exam-
pies from undergraduate programs.
an empirical study of law professors' affiliations has increased attention on the leftward leanings of law professors.9

After identifying an overwhelming liberal or left-wing bias in the legal academy, McGinnis, Schwartz and Tisdell's article (hereinafter the *Georgetown* study), in effect, hoists the left "on its own petard."10 Nearly two decades ago, as many universities expanded groups qualifying for affirmative action, proponents of affirmative action abandoned its historical remedial purpose and argued instead that it served universities' need for intellectual diversity and the representation of multiple points of view.11 Turning these arguments on the left, the *Georgetown* study points out the absence of intellectual diversity, as demonstrated by the overwhelming number of law professors who contribute to liberal causes and are members of the Democratic

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10 The phrase, meaning "hangman hanged by his own rope," was coined by Shakespeare in *Hamlet* and is based on a not-uncommon occurrence in medieval warfare wherein the engineer who lit the petard, a small bomb used to breach fortification walls and gates, was caught up in the rope used to hoist the bomb over the wall and was blown up by the device. Wikipedia, http://en.wikipedia.org/wiki/Petard (last visited June 14, 2007).

11 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In a split decision, with a narrow majority, the Court determined that a quota-type system as employed by the petitioner was prohibited, but that race could be considered as a factor in the admissions process. While four Justices upheld the quota system as an attempt to remedy prior disadvantages suffered as a result of racial prejudice, four would have denied it as violating Title VI. In Justice Powell's opinion, which gave the fifth vote to the invalidation of the quota program, he compared the quota system with an approach that sought to include race as a "plus" factor but was not used to reserve certain admissions slots for limited racial groups. *Id.* at 317. Of the rationales the petitioner forwarded to consider race in the process, only the one arguing for attaining a diverse student body withstood scrutiny. *Id.* at 311-12. Four Justices upheld using a racial quota in an attempt to remedy prior disadvantages suffered as a result of racial prejudice, but Justice Powell noted that this rationale was premised on the "stigma" attached to the prior prejudice and not an interpretation of the Equal Protection Clause. *Id.* at 295 n.34. See also Grutter v. Bollinger, 539 U.S. 306 (2003) (finding that creating diversity on campus is a compelling interest that can justify the use of a race-conscious admissions process for university admissions and endorsing the view forwarded by Justice Powell in *Bakke*). Prior to *Grutter*, many universities accepted Justice Powell's opinion in *Bakke* as precedent and applied his narrow interpretation that to be constitutional in its approach to race-conscious admissions, they could not look at past stigma, but rather had to be cognizant of individual rights and could justify their approach by basing it on a compelling interest to create diversity on campus, as Justice Powell had asserted.
Party. While the *Georgetown* study is cautious in proposing remedies to liberal bias, others have called for what amounts to affirmative action for a new group of underrepresented voices, essentially Republicans, and especially Republican women.

This article focuses on the assertion that law faculties lean unacceptably to the left. Section II outlines the attack, focusing mostly on Horowitz’s efforts to enact measures aimed at “curing” liberal bias. It also discusses the more recent attention directed at the alleged discrimination against conservatives by law faculties. Section III describes the data that purport to show the hard left leanings of professors generally and law professors specifically. Section IV examines the data more closely. It concedes that law faculties may be further left than the legal profession as a whole, but the data do not support the conclusion that law faculties tilt far to the left. It questions the *Georgetown* study’s methodology that skewed the data. The data largely equate membership in the Democratic Party with liberalism. No one can seriously contend that membership in the Democratic Party is synonymous with liberalism. Further, relying on support for particular issues like abortion rights is

12 McGinnis, Schwartz & Tisdell, supra note 9. See also HOROWITZ, supra note 1, at xxxiii-xxxv.
13 McGinnis, Schwartz & Tisdell, supra note 9, at 1198.
14 Cf. DVD: 2006 Ronald A. Cass, Dean Emeritus, Boston University School of Law, debate with Michael Vitiello, Professor of Law, University of Pacific McGeorge School of Law (University of California at Davis King Hall School of Law 2006) (on file with the author) [hereinafter DVD] (indicating there is a marked effort to maintain a liberal bias in law school faculty and that those whose political views vary from liberal members of the hiring committee are less likely to be hired, and that this bias should be corrected for the betterment of the academy by making sure that conservatives get jobs); McGinnis, Schwartz & Tisdell, supra note 9, at 1203 (discussing the advantages of “ideological diversity program[s]” and programs to make sure there are “substantial numbers of conservatives and Republicans represented at faculty workshops and as visiting faculty members” on law school campuses); id. at 1179 (stating that “while the percentage of politically active female law professors is almost as high as the percentage of politically active male professors, politically active female professors are substantially more Democratic than their male counterparts”).
15 See infra note 146 and accompanying text.
16 See infra notes 123-25, 134-38 and accompanying text. See also McGinnis, Schwartz & Tisdell, supra note 9, at 1172-73. The authors exclude adjunct faculty on the supposition that they do not “wield the same influence” as full-time faculty. Id. at 1180. The authors further indicate that baby-boomer professors are the most liberal and that there appears to be a trend that Post-Baby Boomers are less liberal. Id.
not indicative of a person’s overall political leanings.\textsuperscript{17} Other data suggest that professors are more centrist than the critics contend.\textsuperscript{18} Even conceding that law faculties are left of the political center, Section IV also considers whether law faculties discriminate in hiring practices.\textsuperscript{19} Critics assert without careful analysis that the resulting composition of university and law faculties is a result of discrimination.\textsuperscript{20} However, as developed below, critics offer little evidence of intentional discrimination and make no effort to examine the applicant pool.\textsuperscript{21} Further, this section argues why conservatives may not enter the teaching job market in large numbers.\textsuperscript{22}

Even on the assumption that law faculties tip to the left of the political spectrum, before one can even address remedying the situation, one must ask whether this state of affairs is a problem. Section V examines whether the widely assumed liberal bias of their professors puts conservative students at a disadvantage.\textsuperscript{23} The section examines claims of bias in grading at the undergraduate level and efforts to rebut those claims.\textsuperscript{24} Further, it argues why law students should have even less concern than undergraduates that their views influence their grades.\textsuperscript{25} Finally, that section concludes by arguing that critics, like Horowitz, run the risk of making conservative students into the new class of victims.\textsuperscript{26} As such, they do conservative students a disservice and they leave themselves open to one of their criticisms of politically correct faculties and administrators.\textsuperscript{27}

Absent evidence of harm to our students, one wonders whether the legal academy needs to fix the perceived problem.

\textsuperscript{17} See infra notes 157-61 and accompanying text.
\textsuperscript{18} See infra note 152 and accompanying text.
\textsuperscript{19} See infra notes 163-67 and accompanying text.
\textsuperscript{20} See HOROWITZ, supra note 1; LASION, supra note 8; McGinnis, Schwartz & Tisdell, supra note 9, at 1203 (the article does not state that there is evidence of discrimination, but indicates that there may be tendencies to unconsciously discriminate among a group of like-minded people).
\textsuperscript{21} See infra notes 167-68 and accompanying text.
\textsuperscript{22} See infra notes 186-91 and accompanying text.
\textsuperscript{23} See infra notes 193-95 and accompanying text.
\textsuperscript{24} See infra notes 196-200 and accompanying text.
\textsuperscript{25} See infra notes 204-25 and accompanying text.
\textsuperscript{26} See infra notes 252-60 and accompanying text.
\textsuperscript{27} See infra notes 258-60 and accompanying text.
But, on the assumption that some marginal harm exists, Section VI discusses possible remedies. Horowitz's proposed student bill of rights is fraught with difficulties, especially in the law school setting. Furthermore, some of the proposals smack of affirmative action for Republican women, which is certainly an ironic remedy to emerge from the right wing—the historic foe of affirmative action.

Critics contend that, even apart from adverse effects on students, law professors are an intellectual elite with special influence over the direction of the law. Section VII addresses that concern and concludes that, at best, especially by comparison to the substantial influence of conservative foundations and think-tanks, leftward leaning law professors can hope to have marginal influence on the law.

This article concludes with a warning and a recommendation. Liberals should not underestimate the attack on the academy. Elsewhere, liberals have reacted too slowly to the disciplined message of the right wing; that failure has been costly. A careful empirical study of the applicant pool for law teaching positions was beyond the scope of this article, but such a study should be performed. Liberals ought to be proactive in anticipating the kind of broadside attack that Horowitz launched on undergraduate faculty.

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28 See infra notes 261-66 and accompanying text.
29 See Peter H. Schuck, Leftward Leaning, THE AMERICAN LAWYER (Dec. 1, 2005), available at http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1133258711465 (on file with the Mississippi Law Journal) (stating that the most underrepresented group among top-tier law school professors are white female Republicans, and that the best way to add viewpoint diversity to law school faculty is to increase the number of hires from that group; the author further states that this viewpoint diversity will always run counter to traditional affirmative action hires.)
30 McGinnis, Schwartz & Tisdell, supra note 9, at 1190-98 (indicating that law professors influence the law by signing open letters, writing amicus briefs, working on American Law Institute restatements and in judicial ratings).
31 See infra notes 270-307 and accompanying text.
II. LEFTWARD HO

One can fill a bookshelf with attacks on colleges and universities. The themes are common: left-wing radicals have high-jacked higher education.\(^3\) Relying on a claim of academic freedom, left-wing radicals use their classrooms to proselytize their students and to suppress the speech of dissenters.\(^4\) Many of these books use similar events on college campuses to demonstrate the pervasiveness of politically correct thinking that favors protected groups, including minorities, gays, and women, at the expense of the rights of other students.\(^5\)

For many years, academics could ignore such charges because they had little impact on day-to-day operations of colleges and universities. As with much in our lives, that changed with the events of 9/11. A number of professors made statements sympathetic to the perpetrators and critical of America, at times blaming the United States for the attacks.\(^6\) Such statements provided critics of liberal domination of higher education with powerful evidence of widespread and dangerous radicalism.\(^7\) Most notable has been David Horowitz, once the darling of the left, now a vocal right-wing activist.\(^8\)

Horowitz has gone beyond simply writing about left-wing bias on campuses. He has drafted a student bill of rights and an academic bill of rights, set up a website to advance his cause,

\(^{3}\) See HOROWITZ, supra note 1; D’SOUZA, supra note 1; KIMBALL, supra note 1; KORS & SILVERGLATE, supra note 1.
\(^{4}\) See HOROWITZ, supra note 1; D’SOUZA, supra note 1; KIMBALL, supra note 1; KORS & SILVERGLATE, supra note 1.
\(^{5}\) See HOROWITZ, supra note 1; KORS & SILVERGLATE, supra note 1, at 9-33. Horowitz recounted the story of a student at the University of Pennsylvania who made a comment out of his dorm room window at a group of young black women (calling them water buffalo), which was seen as being politically incorrect. The women were offended, and the university took judicial action against the male student for using a racial epithet, though he had not intended such by the remark, but was merely commenting on the women being loud and shouting as they walked past his dorm room window as he studied. Apparently, water buffalo is a literal translation of the Hebrew slang term behema, which is used to refer to a thoughtless or rowdy person. Id.
\(^{6}\) See HOROWITZ, supra note 1. See also infra note 62.
\(^{7}\) See HOROWITZ, supra note 1.
and lobbied legislatures to conduct hearings into left leaning bias on college campuses.\textsuperscript{39}

The Academic Bill of Rights and the Student Bill of Rights have superficial appeal. For example, they call for such unobjectionable statements like the following bullet items in the Academic Bill of Rights:

1. All faculty shall be hired, fired, promoted and granted tenure on the basis of their competence and appropriate knowledge in the field of their expertise . . . . No faculty shall be hired or fired or denied promotion or tenure on the basis of his or her political or religious beliefs.

2. No faculty member will be excluded from tenure, search and hiring committees on the basis of their political or religious beliefs.

3. Students will be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study, not on the basis of their political or religious beliefs.\textsuperscript{40}

The Student Bill of Rights contains similar high sounding language. For example, it states that:

Academic freedom consists in protecting the intellectual independence by professors, researchers and students in the pursuit of knowledge and the expression of ideas from interference by legislators or authorities within the institution itself. This means that no political, ideological or religious orthodoxy will be imposed on professors, researchers and students through

\textsuperscript{39} See Students for Academic Freedom, \textit{supra} note 2 (follow the “Academic Bill of Rights” hyperlink and the “Student Bill of Rights” hyperlink) (last visited May 16, 2007) [hereinafter Academic Bill of Rights and Student Bill of Rights].

\textsuperscript{40} Academic Bill of Rights, \textit{supra} note 39. \textit{See also}, Students for Academic Freedom, \textit{supra} note 2 (follow the “National and State Legislation Texts” hyperlink) (last visited May 16, 2007). There is an effort to have all states or universities enact such a bill of rights to protect “intellectual diversity” on campuses nationwide. \textit{Id.} (follow the “Contribute and Sustain the Campaign” hyperlink) (last visited May 16, 2007). While the goals indicated in the language of the Academic Bill of Rights appear innocuous and nonpartisan, its contribution letter says that the organization is “challenging the political harassment of conservative and religious students in the classroom, and the general abuse of the university for political agendas including professional ‘teach-ins’ that provide one-sided lessons about war and peace.” \textit{Id.}
the hiring or tenure or termination process, or through the grading system or through the control of the classroom or any other administrative means. Nor shall legislatures impose any such orthodoxy through their control of the university budget.\footnote{Student Bill of Rights, supra note 39.}

Despite such high sounding principles, Horowitz seems to have violated some of his own ideals. While he has lobbied legislatures to pass his bills of rights,\footnote{Students for Academic Freedom, supra note 2 (follow the “National and State Legislation Texts” hyperlink) (last visited May 16, 2007).} he has also urged them to conduct hearings into liberal bias on state supported campuses.\footnote{David Horowitz & Eli Lehrer, Political Bias in the Administrations and Faculties of 32 Elite Colleges and Universities, \textit{FRONTPAGE MAGAZINE} (on file with author) [hereinafter Horowitz & Lehrer]. “[A] remedy for this problematic situation [of liberal bias among academic faculties] would be for universities and state legislatures to adopt an Academic Bill of Rights stressing the importance of intellectual diversity to the goal of academic freedom, and making this goal an integral part of educational policy.” Id.} Many academics believe that these charged hearings are intended to intimidate faculty members.\footnote{John Gravois, \textit{Professor Sues David Horowitz Over Use of Photo}, THE CHRONICLE OF HIGHER EDUCATION (May 26, 2006), available at http://www.chronicle.com/daily/2006/05/2006051205n.htm. Professor Gravois argued that Horowitz attempted to intimidate academics who criticized the Bush administration. \textit{See also} Jennifer Jacobson, \textit{Tilting at Academe}, THE CHRONICLE OF HIGHER EDUCATION (March 24, 2006), available at http://www.chronicle.com/weekly/v52/i29/29a02501.htm [hereinafter Academe] (stating that many legislators and academics also believe the hearings to be a waste of time and money).}

One does not have to look far for proof that Horowitz and his supporters are not interested in neutral principles of academic freedom. His efforts are part of a larger attack on campus liberals. They are part of a concerted effort to compel teaching of conservative ideas, almost certainly ideas like intelligent design and theories opposing global warming,\footnote{Cf. Academic Bill of Rights, supra note 39. Within the Academic Freedom section, the Practice subsection provides the following:}

4. Curricula and reading lists in the humanities and social sciences should reflect the uncertainty and unsettled character of all human knowledge in these areas by providing students with dissenting sources and viewpoints where appropriate.

5. Exposing students to the spectrum of significant scholarly viewpoints on subjects examined in their courses is a major responsibility of the faculty. Faculty will not use their courses for the purpose of political, ideological, religious or anti-religious indoctrination.
conservative faculty,\textsuperscript{46} and playing into the fear of conservative students that they are unfairly graded because of their conservative views.\textsuperscript{47}

Right-wing critics rely on anecdotal evidence to prove left-wing bias on college campuses. They recycle the same examples of politically correct behavior by professors and administrators, often silencing conservative students.\textsuperscript{48} But, they also rely on empirical data to support their claims of overwhelming left-wing bias on campuses.\textsuperscript{49}

While the right-wing critique of colleges and universities has developed over the past twenty years, law schools have remained largely on the sideline. Most of the events that fueled

\textit{Id.}

When taken together these two practical standards would require the teaching of intelligent design, because not teaching it would be an example of “anti-religious indoctrination”; teaching theories opposing global warming may also be required as providing a “dissenting source[] [or] viewpoint[]” where we do not, as humans, have a settled account. \textit{Id.}

\textsuperscript{46} See \textsc{Horowitz, supra} note 1, at xxxiii-xli (arguing that, based on the idea of group polarization, hiring a representative faculty of both liberals and conservatives is appropriate to remedy extremism on academic faculties, but that the lack of conservatives on faculty hiring committees make this an impracticability).

\textsuperscript{47} \textsc{See, e.g.}, \textsc{Academe, supra} note 44 (stating that approximately fifty college students complained of political discrimination in the classroom, prompting a conservative Pennsylvania state lawmaker to call for hearings about political bias on college campuses); Posting of David Horowitz to FPM blog, \url{http://www.frontpagemag.com/blog/Read.aspx?GUID=4BED8421-7F6E-4761-A296-E64B98921594} (June 19, 2003, 08:55 EST) (last visited Mar. 3, 2007) (recounting the story of an ROTC student who went to his Vietnam War class at Bowling Green University in his uniform and was repeatedly chastised by his professor for being a part of the “America[n]... imperialist monster” and was then given a failing grade at the end of the course).

\textsuperscript{48} \textsc{See, e.g.}, \textsc{Rick Moran, Enjoying the Academic Freedom to Be an Idiot} (July 20, 2006), \url{http://www.frontpagemag.com/Articles/Printable.aspx?GUID=3F2E29FE-871E-4233-9A3C-433912F6D70F}; \textsc{John Gravois, Wisconsin Provost Will ‘Review’ Teaching of Instructor Who Calls the 9/11 Attacks an ‘Inside Job,’ THE CHRONICLE OF HIGHER EDUCATION} (July 3, 2006), available at \url{http://chronicle.com/daily/2006/07/2006070303n.htm}; \textsc{Stanley Fish, Conspiracy Theories 101, N.Y. TIMES} (July 23, 2006), available at \url{http://www.nytimes.com/2006/07/23/opinion/23fish.html?ex=1311307200&en=eb67d7b666d8ae71&ei=5090&partner=rssuserland&emc=rss}; \textsc{Piper Fogg, U. of New Hampshire Defends Free-Speech Rights of Professor Who Blames Government for 9/11, THE CHRONICLE OF HIGHER EDUCATION} (Aug. 30, 2006), available at \url{http://chronicle.com/daily/2006/08/2006083005n.htm} (all discussing one lecturer at the University of Wisconsin at Madison who contended that the falling of the twin towers on 9/11 was actually a conspiracy by the federal government to incite war with Iraq and Arabs). \textsc{See also} \textsc{Lasson, supra note 8; Horowitz, supra note 1}.

\textsuperscript{49} \textsc{See, e.g.}, \textsc{McGinnis, Schwartz & Tisdell, supra} note 9; \textsc{Horowitz & Lehrer, supra} note 43.
claims of suppression of ideas took place in undergraduate programs.\textsuperscript{50} Few of the most notorious radical professors are law professors.\textsuperscript{51}

More recently, conservatives have started to focus more closely on the leftward tilt of law schools as well. The right wing now includes the \textit{Georgetown} study as more evidence of the left-wing bias of American education.\textsuperscript{52} As a result, the media has paid more attention to law professors’ left leanings.\textsuperscript{53}

The net effect of these efforts and the literature proclaiming a left-wing bias on campuses is an increasing perception of discrimination by liberals against conservatives and of a suppression of conservative ideas. Such discrimination flies in the face of liberal ideals. Before conceding these charges, however, one ought to look closely at the charges against the left. The next section examines the data to access whether it supports some of the more extreme claims.

III. DESCRIBING THE DATA

Several reviewers provided “advance praise” for Horowitz’s \textit{The Professors}. Three are worth quoting at this juncture. A trustee for the State University of New York praised \textit{The Professors} as “a comprehensive and persuasive survey of the contemporary university.” She stated further that:

It demonstrates beyond reasonable doubt that political extremists like Professor Ward Churchill\textsuperscript{54} are a common and influen-

\textsuperscript{50} See, e.g., \textit{Lasson}, supra note 8, at 113-90. Even with a law professor as an author, the majority of the examples of correct conduct in the academy in his book was from undergraduate schools, with only a small minority of the anecdotal evidence coming from law schools. \textit{Id.} at 197-245.

\textsuperscript{51} See, e.g., \textit{Horowitz}, supra note 1 (only five of the professors profiled are law professors: Regina Austin, at 26; Derrick Bell, at 56; David Cole, at 96; Bernardine Dohrn, at 125; and Mari Matsuda, at 277).

\textsuperscript{52} See \textit{DiscovertheNetworks}, http://www.discoverthenetworks.org/ (follow the “academia” hyperlink) (last visited May 16, 2007) (on file with the \textit{Mississippi Law Journal}) (citing the assertion from the \textit{Georgetown} article that, of politically active law school professors, 81% donated to Democratic campaigns while only 15% donated to Republicans as an indication of leftist politicization of institutions of higher learning).

\textsuperscript{53} See, e.g., Schuck, supra note 29.

\textsuperscript{54} Ward Churchill is a Professor of Ethnic Studies at Colorado University who gave a controversial speech about 9/11 that has been understood to mean that he blames America for being attacked. He also published political statements to that effect in a
tial presence on college and university faculties in the United States. David Horowitz’s book should be read by every college administrator and every scholar who is concerned about the abuse of the university classrooms and the debasement of academic standards by faculty activists.55

Another suggests that “anti-American attitudes and professorial abuses of students . . . have metastasized throughout academia.”56 A third finds that The Professors provides “documentation that will be hard to refute,” and that it shows “the betrayal of our young people by professors who are defiantly unethical and contemptuous of academic standards.”57

Obviously, those are serious charges. The book consists of short biographies of the 101 professors whom Horowitz and his collaborators labeled “the most dangerous academics in America.”58 Others have refuted some of the specific allegations in the book.59 In some instances, Horowitz had to admit that he could not prove episodes that he reported in The Professors.60 Some of the professors seem to have made the list because Horowitz disagrees with their ideas, especially their position on the war in Iraq and their support for the Palestinian cause.61 In other cases, The Professors recounts genuinely disturbing information.62


55 HOROWITZ, supra note 1, at i.
56 Id. at ii.
57 Id.
58 Id. at iii. (subtitled “The 101 Most Dangerous Academics in America” and including biographies of 101 professors).
59 See Academe, supra note 44.
60 See id. (during the Pennsylvania hearings Horowitz had to admit that he did not have evidence to substantiate two of his prior allegations against faculty members).
61 See, e.g., HOROWITZ, supra note 1 (Professor Laurie Brand, at 74; Professor Lisa Anderson, at 6; Professor Gil Anidjar, at 9; Professor Juan Cole, at 100; Professor Robert Dunkley, at 128; Professor Mark Ensalaco, at 146, among others).
62 No doubt, most Americans, including academics, would find Professor Ward Churchill’s claim that 9/11 victims were “little Eichmanns” deeply troubling. See HOROWITZ, supra note 1, at vii, xvi-xvii (Churchill wrote after the 9/11 attacks that the horrors of that day were “Americans’ just deserts” and was a case of “chickens coming home to roost.” Id. at xvi-xvii. This statement coincides with a common theme in his writing: “America was like Hitler Germany, a nation dedicated to the extermination of minorities; its capitalist economic machine starving poor people all over the world all the time. Therefore, the ‘civilians’ who comprised what Churchill referred to as its
One could argue that *The Professors* unfairly excerpts statements out of context and otherwise distorts the work of some of the targeted professors. But even assuming that Horowitz has identified some radical extremists who are inappropriately protected by tenure, I am troubled by the leaps in logic that Horowitz and others on the right make from his observations and empirical studies that they rely on.

*The Professors* makes a broad indictment of academia. It argues that the 101 profiled professors are representative of faculties generally. It overcomes the obvious problem with a highly selective, unrepre-sentative sample with two arguments. The first is its reliance on “The Law of Group Polarization” to argue “America’s institutions of higher learning have become a haven for extremists.” That is, radicals have taken over positions of power and prestige in academia and use that influence

‘technical core’—the inhabitants of the World Trade Center—were little Eichmanns, cogs in a machine that churned out mass murder.” Id. See also id. at 234-37 (chapter on Professor Leonard Jeffries, recounting his virulent anti-Semitism; interestingly, the liberal university where Jeffries worked did remove him as chair of his department). Despite instances of offensive conduct by radical leftists, the authors made no effort to examine the many instances of intellectual oppression at conservative institutions. One does not have to look far to find such examples; for example, there is a suppression of modest disagreement with fundamentalist religious tenets at some schools. See Thomas Bartlett, 5 Departures on Patrick Henry Faculty Pose Question: Are Christianity and Liberal Arts Contradictory Missions?, THE CHRONICLE OF HIGHER EDUCATION (May 12, 2006), available at http://chronicle.com/daily/2006/05/2006051202n.htm. Conservatives also fail to acknowledge the systematic purging of leftists during the Red Scare of the 1950s. For a brief discussion, see JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 217-38 (2006) (describing conservatives’ efforts to compel University of California professors to take a loyalty oath). It is the only systematic effort that I am aware of where one’s politics led to dismissal.

For example, *The Professors*, no doubt begun before the dramatic disaffection with the war in Iraq, criticizes Professor David Cole for many positions that Americans now share. An early opponent of the war, Cole used his course on National Security and Civil Liberties to raise questions about “the respective roles of Congress, the president, and the courts in times of emergency; ‘the targeting of foreign nationals; and ‘preventive detention, surveillance standards, enemy combatants, military tribunals, the role of international tribunals, and regulation of speech and association.” HOROWITZ, supra note 1, at 96. Even if those positions were unpopular when Horowitz and his researchers began their project, anyone reading a newspaper today recognizes that a majority of Americans and many courts now agree with Cole.

HOROWITZ, supra note 1, at xxx-xxxii.

Id. at xxxiii (“the ‘law of group polarization,’ ... holds that if a room is filled with like-minded people, the center of the room will move towards the extreme.”)
to close the door to conservatives. The second and far more troubling argument is its reliance on studies that have found that Democrats outnumber Republicans among reporting faculty. The Professors conflates membership in the Democratic Party, liberalism, and extremism.

Horowitz's audience may be predominately conservatives, evidenced by the fact that Regnery published The Professors. By comparison, readers may be more inclined to credit the Georgetown study. Its authors are not conservative activists like Horowitz, and the Georgetown Law Journal is not associated with conservative causes as is Regnery. Further, its authors seem to eschew radical solutions for the overrepresentation of liberals in the legal academy. While the authors of the Georgetown study almost certainly were not targeting a conservative audience, Horowitz and conservative bloggers and writers use the study as more evidence of the liberal bias of our academic institutions.

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67 Id. at xxxi.
68 Id. at xxxiii.
69 See HOROWITZ, supra note 1. For example, it states, “the last few decades mark the first time in their history that America’s institutions of higher learning have become a haven for extremists.” Id. at xxxiii. Horowitz then explains that conclusion: “A primary cause of this development is the overwhelming prevalence of leftists (and ‘liberals’) on academic faculties along with the corresponding absence of other, critical, perspectives.” Id. While Horowitz continues to argue that faculties hold views left of the political spectrum, he fails to clearly acknowledge that the studies he relies on demonstrate only that Democratic faculty members far outnumber Republican faculty members. Id. at xxxiii-xxxiv. After several pages, the attentive reader realizes that he has equated being a Democrat with being an extremist.
70 On its website, Regnery Publishing indicates that its sixty-year history is based on “publishing serious works . . . establishing and sustaining the postwar conservative intellectual movement in America.” History of Regnery, http://www.regnery.com/about.html (last visited May 17, 2007) (on file with the Mississippi Law Journal).
71 McGinnis, Schwartz & Tisdell, supra note 9, at 1167 n.1.
72 Id. at 1198.
The Georgetown study explains the importance of its focus on law faculties because law professors, especially at elite schools, are the “gatekeepers and . . . theorists” of America’s “aristocrats.”\(^74\) The authors suggest that law professors use their influence to move the judiciary to the left on important social issues.\(^75\) The study attempted to gauge the political views of law professors by analyzing “eleven years of political campaign contributions of law professors at the top twenty-one schools as defined by the U.S. News & World Report 2002 survey.”\(^76\)

The conclusions of the study are not especially surprising. The study defined “politically active’ law professors” as those making a “federal campaign contribution of $200 or more in individual years between 1992 and 2002.”\(^77\) By that definition, roughly thirty percent of the faculty at the top twenty-one law schools were politically active.\(^78\) An overwhelming majority (eighty-one percent) contributed to the Democratic Party, with only fifteen percent contributing wholly or mostly to the Republican Party.\(^79\) In addition, the study found that party affiliation also seemed to predict the way in which professors expressed themselves on important legal issues, like President Clinton’s impeachment.\(^80\)

The authors focused on full-time faculty only, excluding, for example, adjuncts and retired professors. They justified exclusion of adjuncts because they “do not wield the same influence as full-time professors.”\(^81\) They excluded retired professors because many “do less teaching and writing than their active counterparts” and because the authors “wanted to look at the current ideological composition of law school faculties.”\(^82\)

\(^{74}\) McGinnis, Schwartz & Tisdell, supra note 9, at 1168 (almost 200 years ago, Alexis de Tocqueville wrote that lawyers are American “aristocrats,” and that a law professors’ role is to sustain that aristocracy).

\(^{75}\) Id. at 1168-69.

\(^{76}\) Id. at 1169.

\(^{77}\) Id.

\(^{78}\) Id. at 1170.

\(^{79}\) Id.

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id. at 1173.
Focusing on contributions made the data more accurate than reliance on party affiliation alone.\textsuperscript{83} According to the authors, knowing the recipients of professors’ contributions enabled them “to make at least tentative judgments about the type of Republicans and Democrats contributing law professors tend to support.”\textsuperscript{84}

The authors of the \textit{Georgetown} study examined their data by examining trends among subcategories. Thus, they considered gender, minority status, age, and subject areas. They concluded that women were more likely to donate to Democrats than were men, but minority professors’ donation patterns were the same as professors’ overall patterns.\textsuperscript{85} Apparently, one’s teaching area did not predict a different pattern either.\textsuperscript{86} One finding of interest, not highlighted in the study, is that Post-Baby Boomers “show a less pronounced Democratic affiliation that is statistically significant.”\textsuperscript{87}

By examining the candidates to whom professors gave money and by relying on ratings from the Americans for Democratic Action and the American Conservative Union, the authors attempted to capture the ideological positions of law professors. The study concluded that “active Democratic law professors tend to give to candidates on the more ideologically liberal side of the Democratic spectrum while politically active Republicans are mixed between ideological conservatives and moderates.”\textsuperscript{88}

As developed in more detail below, the study’s findings do not demonstrate intentional viewpoint discrimination.\textsuperscript{89} In addition, even if the findings are valid, critics must point to some

\textsuperscript{83} \textit{Id.} at 1174.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} at 1180.
\textsuperscript{86} \textit{Id.} at 1182.
\textsuperscript{87} \textit{Id.} at 1180. The authors downplay the finding’s significance because fewer of the younger cohorts are politically active. The authors do acknowledge that “this bit of data, if it does end up reflecting a trend, could be a harbinger of change.” \textit{Id.} As developed below, critics of left leaning professors frequently argue that Vietnam-era radicals dominate our universities. Entirely consistent with that view is data suggesting that younger professors are less radical. That reality has significant policy implications, including (even if one were to concede some interest in having more conservative professors) whether the problem is self-correcting. \textit{See infra} note 126.
\textsuperscript{88} McGinnis, Schwartz & Tisdell, \textit{supra} note 9, at 1185.
\textsuperscript{89} \textit{See infra} note 162 and accompanying text.
harm that results from the predominance of liberals on law faculties. Here, the study identifies a few problems arising from the current composition of law faculties.

The study suggests that professors’ involvement in public issues, measured by their willingness to sign joint public statements of issues of public concern, demonstrates that they are motivated by political persuasion. Meanwhile, while signing letters, for example, opposing the impeachment of former President Clinton, professors have attempted to misrepresent their involvement by claiming it to be “an objective expression of apolitical expertise.”

The authors argue further that law professors are “in the business of creating a new stock of legal ideas.” By comparison to practicing lawyers, professors should “contribute a distinctively independent perspective that would command particular attention and persuasive force.” While acknowledging that measuring the extent to which professors’ ideology influences their output, the authors give anecdotal evidence that professors’ liberal bias effects law reform. Specifically, they file more left leaning amicus briefs and advance similar positions in law reform groups like the American Law Institute. They also cite one instance where a professor’s writings have had a marked effect on the development of the law. Some credit Catherine MacKinnon’s work on sexual harassment as “largely responsible for creating this area of the law.”

The study also argues that professors’ views have other more subtle influences on the law. The authors acknowledge that many elites influence judges’ views; but “the academy exercises influence on constitutional law . . . through its assessment and reassessment of the reputations of members of the judiciary.” That is the result of two factors: one, that professors form their views of justices based on ideology and, two, that

90 See McGinnis, Schwartz & Tisdell, supra note 9. at 1193.
91 Id. at 1191.
92 Id. at 1193.
93 Id.
94 Id. at 1193-94.
95 Id. at 1194-95.
96 Id. at 1195.
97 Id. at 1196.
judges care about their reputations. Justices, at least at the margin, are likely to alter their jurisprudence towards the left to appeal to liberal professors.

The contentions that liberal bias among academics has influenced public policy are difficult to prove. The authors attempted to show more concrete injury as well. In a section of the study that must please critics of the diversity rationale for affirmative action, the authors use those arguments to focus on the cost of liberal bias. As the authors point out, “[t]he viewpoint diversity rationale for race-conscious admissions policies posits that certain underrepresented minorities need to be given greater representation to make sure that all students benefit from exposure to a wide variety of viewpoints.” The authors eschew both arguments on either side of the affirmative action debate and in favor of affirmative action for conservatives as a remedy for the lack of viewpoint diversity.

The authors rely on Justice O'Connor's discussion of viewpoint diversity in Grutter v. Bollinger and some of the amici curiae briefs submitted (no doubt by liberal left leaning law professors and deans) in Grutter to make their case. Thus, Just-

98 Id.
99 Id. at 1197.
100 Id. at 1198.
101 Id. Not all commentators have been as judicious as the authors of the Georgetown study. See, e.g., David Horowitz, The Campus Blacklist, FrontPage Magazine (April 18, 2003), http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=7357 (on file with the Mississippi Law Journal) (encouraging students to “use the language that the left has deployed so effectively on behalf of its own agenda[,]” stating “[t]here is a lack of ‘intellectual diversity’ on college faculties and in academic classrooms,” and finding that the conservative viewpoint is ‘under-represented’ in the curriculum and on its reading lists. The university should be an ‘inclusive’ and intellectually ‘diverse’ community.”); Anne Neal, Intellectual Diversity Endangered (Nov. 7, 2003), http://www.cfif.org/htdocs/freedomline/current/guest_commentary/student_right_to_learn.htm (on file with the Mississippi Law Journal) (stating that university trustees should “insist that their institutions offer broad-based survey courses . . . conduct intellectual diversity reviews and . . . make the results public,” and that hiring, firing and tenure decisions be monitored regularly for instances of political discrimination); Posting to Spartacus Blog, http://spartacusblogs.com/spartacus/liberal_academic_bias/index.html (Feb. 15, 2004, 15:53 EST) (suggesting “that the same approach taken in the past to remedy racial and gender discrimination in employment (commonly known as ‘affirmative action’) would be appropriate with regard to political ideology as well”).
103 McGinnis, Schwartz & Tisdell, supra note 9, at 1199 n.113 (citing the amicus briefs of the deans at Georgetown University Law Center, Duke Law School, University
tice O'Connor found the benefits of affirmative action to be "important and laudable" because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." 104

In effect, the authors argue that political affiliation is more indicative of viewpoint diversity than racial and ethnic diversity and, therefore, at least as important as racial and ethnic diversity if Grutter's laudable goals are genuine. 105 The authors argue that political affiliation is about espousing a viewpoint while race and ethnicity are only proxies for different viewpoints. 106 In effect, the presence of African-American students does not guarantee that they will advance any particular positions; having Republicans in class increases the chances that they will argue for "lower levels of government spending, less market regulation, and lower and less progressive taxes . . . [and in opposition to] abortion, affirmative action based on race, and a strict separation between church and state." 107

They also attempt to rebut the argument that liberal professors can serve as proxies for conservatives because they can adopt conservative positions for the sake of class argument. 108 Their rejoinder is straightforward: one can make the same argument to the claim that we need minority students and professors to represent diverse points of view. 109 Either professors can take on different voices or they cannot; but the argument runs parallel whether the issue is to justify having more minority professors and students or more conservatives. 110

Whatever role students may play in assuring vital classroom discussion, the presence of conservative students is not a sufficient antidote to the need for conservative voices in law


104 Id. at 1199 (quoting Grutter, 539 U.S. at 330).
105 McGinnis, Schwartz & Tisdell, supra note 9, at 1199-1200.
106 Id.
107 Id. at 1200.
108 Id. at 1201.
109 Id.
110 Id.
school, argue the authors. That is so because “[f]aculties set law school curricula and determine what should be taught in each class.” They speak more in class than their students do, and they determine who is invited to campus to give lectures and participate in workshops.

The authors contend that the presence of conservative faculty would benefit liberal professors as well. For example, sharing their work with conservative faculty should sharpen their arguments, making them less insular and increasing their influence outside of the academy. Furthermore, they contend that the increased conservative faculty voice might also result in more objective, less result-oriented scholarship because of the regular exchange of ideas between conservative and liberal colleagues.

The Georgetown study makes no claim of intentional discrimination and recognizes that the disparity is likely the result of many factors, including “conservatives’ relative enthusiasm for market society.” At the same time, a greater number of conservatives would result in less viewpoint discrimination in hiring.

While the authors did not focus on harm to students, they imply that students suffer from a lack of conservative role mod-

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111 Id.
112 Id.
113 Id.
114 Id. at 1202.
115 Id.
116 Id.
117 Id. at 1203.
118 Id. The authors also use other arguments used by affirmative action supporters to advance the hiring of more conservatives:

“[J]ust as those who favor viewpoint diversity for affirmative action argue that it can be pursued without taking unqualified students, it would seem that hiring conservative professors can be accomplished without hiring unqualified professors. Perhaps schools would find that as a proportion of law teachers, there are fewer qualified conservatives than there are qualified law students of different ethnic and racial backgrounds as a proportion of potential law students, but that can hardly be settled unless law schools committed to diversity undertake a rigorous program of outreach. This would include at the very least a program of trying to assure that there are substantial numbers of conservatives and Republicans represented at faculty workshops and as visiting faculty members.”

Id.
els. For example, in explaining their decision to exclude adjunct professors from their study, they state that “such teachers do not wield the same influence as full-time professors.” Others have argued more forcefully that conservative students experience alienation because of so few conservative voices on campus and are at a disadvantage because the lack of mentors leads to fewer career opportunities.

IV. SKewing THE DATA

Over the past thirty years, I have taught at five law schools. Anecdotally, the claim that law faculties are far left of center does not compute. No doubt, in general, law faculties may be more liberal than lawyers generally, but Horowitz and his followers’ claims are wildly overblown. And while the Georgetown study is a much more scholarly and balanced view, it overstates the extent to which law faculties tilt to the left. Closer examination of the authors’ methodology suggests ways in which the data are skewed.

The most obvious decision that skewed their data was the exclusion of adjunct and emeriti professors. Furthermore, they did not attempt to distinguish between clinical and research professors. As the authors themselves recognize, their study shows that law professors are more left leaning than the rest of the population generally and Americans with similar in-

119 Id. at 1201.
120 Id. at 1172-73.
121 See, e.g., HOROWITZ, supra note 1; Cathy Young, The Impact of Academic Bias: Professors Do Lean to the Left—But Are Students Listening? (March 8, 2007), http://www.reason.com/news/show/119026.html (on file with the Mississippi Law Journal) (“If a student doesn’t subscribe to the campus orthodoxy, the likely effect is . . . to alienate her from intellectual life.”); Horowitz & Lehrer, supra note 43 (finding that the “the impression that conservative values and ideas aren’t welcome on campus is driven home daily to students until it becomes second nature . . . students . . . will conceal[] what they actually think in order to protect their academic standing”).
122 See, e.g., Horowitz & Lehrer, supra note 43 (noting that the “lack of conservative professors . . . serves to reduce the ability of . . . conservative students to pursue graduate study even when they want to. Nearly all distinguished doctoral programs rely on matching students with professors who have compatible interests.”); DVD, supra note 14 (arguing that the “politics, prejudices and biases” of law school faculty do have an impact on students and their careers).
123 McGinnis, Schwartz & Tisdell, supra note 9, at 1172-73.
124 Id. at 1173.
Adjuncts, drawn from the larger profession, are likely to be more conservative than their full-time colleagues. That has certainly been my experience at several law schools. I have not found any systematic data on adjunct professors, but I suspect that Pacific McGeorge School of Law is typical of other law schools. Among our adjuncts are several Republican-appointed judges, district attorneys, lawyers for the conservative Pacific Legal Foundation, victims' rights advocates and members of the California Attorney General's office. Inclusion of emeriti would also likely show law faculties to be less radical than portrayed in the study. If, as critics like Horowitz point out, the swing to the left occurred when radicals from the 1960s entered teaching, emeriti would have come of age in the 1950s and early 1960s and would have been less radical than their junior colleagues. The exclusion of adjuncts may especially have a significant skewing effect because of the large number of adjuncts who teach at most law schools, often outnumbering full-time faculty.

As noted above, the study excluded adjuncts because they "do not wield the same influence as full-time professors." The authors cite no authority for that proposition; and while I have no doubt that students are most heavily influenced by their full-time professors, especially their 1L professors, the decision to exclude them ignores their relevance. Adjuncts are not as likely to publish as are full-time professors and, therefore, are not likely to have a great role in the world of legal scholarship. But insofar as the concern about the absence of conservatives on law

125 Id. at 1178.

HOROWITZ, supra note 1, at ix (stating that many anti-war radicals in the Vietnam era "stayed in school to avoid the military draft and earned Ph.Ds, taking their political activism with them when they became tenured-track professors").

126 See, e.g., Faculty, Columbia Law School, http://www.law.columbia.edu/Faculty/full_time_fac (last visited Apr. 5, 2007) (listing 78 full time faculty and 171 adjunct faculty); Faculty, University of Pennsylvania Law School, http://www.law.upenn.edu/cfl/faculty/ (last visited Apr. 5, 2007) (listing 54 full time faculty and 81 adjunct faculty); Faculty Profiles, Duke Law School, http://www.law.duke.edu/fac/index (last visited Apr. 5, 2007) (listing 51 full time faculty and 94 adjunct faculty); Faculty Profiles, New York University Law School, http://its.law.nyu.edu/faculty/profiles/ (last visited Apr. 5, 2007) (listing 105 full time faculty and 110 adjunct faculty).

127 McGinnis, Schwartz & Tisdell, supra note 9, at 1172-73.
faculties is the need to expose students to a wide variety of views, exclusion of adjuncts is not warranted. Insofar as the concern is the lack of mentors for conservative students, again, the exclusion of adjuncts also portrays the academy inaccurately. The presence of a more conservative group of faculty may address some of the claimed problems with the liberal bias of full-time faculty. Notably, a conservative student unable to find a mentor among full-time professors surely can seek out an adjunct, someone who might be an excellent role model with real standing in the local legal community.\textsuperscript{129}

The failure to distinguish between clinical and research professors also tends to raise questions about the study’s conclusions. Almost certainly, clinical professors are more left leaning than are research professors.\textsuperscript{130} But they also teach fewer students\textsuperscript{131} and are less likely to publish than are research professors.\textsuperscript{132} As a result, inclusion of clinicians in the

\textsuperscript{129} The authors do not specifically mention the lack of mentors for conservative students as a problem, but it is implied in their insistence that faculty diversity is more important given the significant influence professors have on students. \textit{Id.} at 1201.

\textsuperscript{130} Historically, in-house clinical programs developed as part of a social justice agenda. Many clinical professors came from the ranks of legal services and other predominately liberal organizations. \textit{See, e.g.,} Kimberly E. O’Leary, \textit{Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics,} 11 \textit{CLINICAL L. REV.} 335 (2005). \textit{See also} Juliet M. Brodie, \textit{Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda,} 20 \textit{WASH. U. J.L. & POLY} 201, 262 (2006) ("The social history of clinical education in the United States is inextricably bound with the history of lawyering for social justice . . . ."); Robert D. Dinerstein, \textit{Client-Centered Counseling: Reappraisal and Refinement,} 32 \textit{ARIZ. L. REV.} 501, 518-19 (1990) ("Modern clinical legal education developed in the crucible of the political activism of the 1960’s and early 1970’s. Many of the proponents of the client-centered approach were former legal services or public interest lawyers who entered academia as clinical law teachers."); Minna J. Kotkin, \textit{The Violence Against Women Act Project: Teaching a New Generation of Public Interest Lawyers,} 4 \textit{J.L. & POLY} 435, 447-48 (1996) (stating that "lawyers staffing these programs were largely drawn from the legal service and public interest community. . . . [I]n-house clinicians generally replicated the service models with which they were accustomed, and designed programs along the lines of their own experiences.").


\textsuperscript{132} \textit{See} Dinerstein, \textit{supra} note 130, at 521 n.94 (stating that the "substantial time and other pressures" on clinicians "militate[s] against production of scholarship"). \textit{See also} Nina W. Tarr, \textit{Current Issues in Clinical Legal Education,} 31 \textit{HOW. L.J.} 31, 41
study overstates the leftward tilt of law faculties generally. Research professors are more likely than are clinicians to influence students because they teach larger classes. And if the concern is the influence of academics’ scholarship, clinicians have less influence than research professors.

The authors also downplay a significant trend that they found in their data. If critics are correct that the tilt to the left is a result of the influx of 1960s radicals into the academy, one would have predicted that younger professors would be less likely to be leftists. Not surprisingly, the Georgetown study found that to be the case: “Politically active Post-Baby Boomers show a less pronounced Democratic affiliation that is statistically significant.” That finding undercuts claims of discrimination by liberal faculty against conservatives, as well as any demand for remedial measures to correct an imbalance; in fact, the imbalance may correct itself. Despite arguing that their methodology allowed generalizations about faculties as a whole, the authors were surprisingly less confident about their generational finding. That is so because politically active Post-Baby Boomers “make up a much smaller proportion of their cohort than do politically active professors in other cohorts.”

Yet another concern about the study’s methodology is its focus on only the top twenty law schools. The authors cite an unpublished decade-old study of the top 100 law schools leading to similar findings that about 80% of law professors were Democrats and only 13% were Republicans. A contemporary (stating that some institutions have clinical instructors with “uncertain one-year contracts, no meaningful relationship to, participation in, or responsibilities within the institution”).

133 McGinnis, Schwartz & Tisdell, supra note 9, at 1193-95.
134 Id. at 1180.
135 See HOROWITZ, supra note 1, at xxxv-xxxvi (stating that there is “considerable reason to believe” that the increase in the ratio of liberals to conservatives on college faculties is a result of political discrimination); see also DVD, supra note 14.
136 McGinnis, Schwartz & Tisdell, supra note 9, at 1199-1200.
137 Id. at 1171.
138 Id. at 1180.
139 Because of a tie between two schools, the study collected data for twenty-one schools. Id. at 1172.
140 Id. at 1186.
study of all American law schools might yield results that are less heavily skewed. In recent years, religious institutions have opened law schools with avowedly conservative missions. Other religious institutions, including Brigham Young, Notre Dame, Baylor and Pepperdine, have distinct missions that have tended to favor more conservative faculty. While state schools cannot discriminate based on point of view, religious and other private institutions can and sometimes do. Among secular institutions, George Mason has received ample support from the conservative Olin Foundation and has made its

141 See, e.g., About Regent Law, Regent University School of Law, http://www.regent.edu/acad/schlaw/admissions/abouthome.cfm (last visited Apr. 6, 2007) ("The mission of Regent Law School is to bring to bear the will of our Creator, Almighty God, upon legal education and the legal profession."); About STU Law, St. Thomas University School of Law, http://www.stu.edu/about-stu-law-section-353.html (last visited Apr. 6, 2007) ("St. Thomas University is an urban, student-centered, Catholic university with rich cultural and international diversity, dedicated to educating leaders who contribute to the economic and cultural vitality of the regions they serve."); Mission Statement, Ave Maria School of Law, http://www.avemaria.law/prospective/philosophy/phil1.cfm (last visited Apr. 6, 2007) ("Inspired by Pope John Paul II's encyclical Fides et Ratio, Ave Maria School of Law offers a distinctive legal education—an education characterized by the harmony of faith and reason."); Our Mission, Liberty University School of Law, http://www.liberty.edu/academics/law/index.cfm?PID=3813 (last visited Apr. 6, 2007) ("Liberty University School of Law exists to equip future leaders in law with a superior legal education in fidelity to the Christian faith expressed through the Holy Scriptures.").

142 See Mission and History, Notre Dame Law School, http://law.nd.edu/prospective_students/academics/mission.html (last visited Apr. 6, 2007) ("[Q]uestions that will always have a central place here include the relationship between law and morality, the distribution of power between the state and other social institutions, and the importance of identifying universal norms of justice and exploring the approaches of diverse cultures in implementing those norms."); Mission Statement, Pepperdine University, http://law.pepperdine.edu/welcome/mission.html (last visited June 11, 2007) ("The school’s Christian emphasis leads to a special concern for imbuing students with the highest principles of professional, ethical, and moral responsibility. An effort is made to call together a faculty, staff, and student body who wishes to share this experience of quality legal education in a value-centered context."); Mission Statement, Baylor Law School, http://law.baylor.edu/HTML_site/MissionStatement.html (last visited June 11, 2007) ("As a member of the Baylor University community, the School of Law shares in the University’s mission to education men and women by integrating academic excellence and Christian commitment within a caring community."); Mission Statement, Brigham Young University, http://uniconm.byu.edu/president/missionstatement.aspx (last visited June 11, 2007) ("All students at BYU should be taught the truths of the gospel of Jesus Christ. Any education is inadequate which does not emphasize that His is the only name given under heaven whereby mankind can be saved.").

reputation as an institution with a strong conservative law and economics bias.144 Some conservative institutions may already be practicing overt viewpoint discrimination, which is, in effect, a form of affirmative action for conservatives.

More fundamentally, studies like the Georgetown study find little more than disparity between Democrats and Republicans on law or university faculties. Even if the disparity is significant, it does not establish that law faculties are far to the left of the political center. Critics are too quick to associate party affiliation with radicalism.145 Some studies, relying on self-reporting of one’s political orientation, have found that professors are more centrist than extreme in their views.146 Further, recent election results demonstrate the wide array of views within the Democratic party, from Blue Dog Democrats in states like Montana,147 to socially conservative blue collar Democrats, many of whom oppose abortion rights,148 and to deeply religious African-Americans who oppose much of the liberal social agenda

Apr. 6, 2007 (on file with the Mississippi Law Journal) (listing grants from a number of conservative groups, including the John M. Olin Foundation, Inc.).

144 See Ronald Roach, Unlikely Partners in Philanthropy, BLACK ISSUES IN HIGHER EDUCATION (Aug. 31, 2001), available at http://findarticles.com/p/articles/mi_m0DXK/is_14_18/ai_78537580 (on file with the Mississippi Law Journal); see also The University of Chicago Law School, Politics and Advocacy: Challenging Conventions, http://www.law.uchicago.edu/alumnirecord/politics-advocacy.html (last visited Apr. 6, 2007) (on file with the Mississippi Law Journal) (One alumnus challenged the university’s conservative reputation saying her experience was quite different.)

145 See supra note 69 and accompanying text. See also HOROWITZ, supra note 1, at xxxiii-xxxiv.

146 JENNIFER A. LINDHOLM, KATALIN SZÉLENYI, SYLVIA HURTADO & WILLIAM S. KORN, THE AMERICAN COLLEGE TEACHER: NATIONAL NORMS FOR THE 2004-2005 HERI FACULTY SURVEY 44 (2005) (indicating that 29.2% of professors characterized themselves as “middle of the road,” while only 7.9% characterized themselves as “far left”).


Despite a generally held view that the parties have drifted further left (the Democrats) and right (the Republicans) from the center,\footnote{See JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES 5-7 (2006) “Both parties have used hardball tactics that have polarized Washington . . . . Democrats have been waging a daily war in Washington against the GOP as unrelenting and nearly as virulent as that of their counterparts on the other side of the aisle . . . . Once they arrive, House leaders on both sides go to extraordinary lengths to reinforce the partisan divide . . . .” Id.} a careful study of opinion data rebutted the view that Democrats had moved away from the center.\footnote{See JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION & THE EROSION OF AMERICAN DEMOCRACY 28-29 (2005) “Democrat activists . . . have moved back to the center in recent years even as Republican activists have strayed sharply from it . . . . In contrast with the common view, partisan polarization in Congress has not been caused by Republicans moving right and Democrats moving left in equal proportion. To the contrary, the rightward shift of the GOP is the main cause of polarization.” Id.} It did find that the recent Republican congressional majority and the Bush administration were ruling far to the right of center.\footnote{See id. at 28, 34. “The Republican Party in Congress is far more conservative than it was even a quarter century ago . . . . What was once the right wing of the party is now its moderate center. What was once its left flank is all but gone. And what remains is a new, hard-edged conservatism that almost completely defines the goals, operations, and identity of the contemporary Republican Party.” Id.} Those data suggest that on substantive issues, Democratic professors may not be far from the views of fellow Americans.

The Georgetown study did not effectively rebut that conclusion. The authors did contend that party affiliation measures real differences in attitudes. For example, they “have distinctive differences in views on areas such as minority rights and affirmative action, environmental protection, and social spend-
ing. Divisions on these issues consistently track party affiliation.”\textsuperscript{154} But the cited data suggest a significant overlap between Democrats and Republicans: for example, 64% of Democrats and 34% of Republicans favor a public health insurance plan.\textsuperscript{155} Even more interesting are Republican views on abortion: while the authors suggest a similar disparity between Democrats and Republicans, other studies found that as many as 70% of Republicans favored abortion rights.\textsuperscript{156}

Indeed, abortion rights are emblematic of how difficult it is to stereotype one’s views based on party affiliation. Republicans had a majority on the \textit{Roe} Court, with one Republican and one Democrat dissenting.\textsuperscript{157} Since the 1980s, Republican presidents have consistently appointed Justices with an eye towards overruling \textit{Roe}.\textsuperscript{158} Despite those efforts, Republican Justices have kept it intact.\textsuperscript{159} Indeed, many Libertarians, who often vote for Republican candidates, nonetheless favor abortion rights.\textsuperscript{160} The Republican Party thus includes social conservatives and economic conservatives, with many of the latter favoring individual rights inconsistent with the party platform.\textsuperscript{161} As this

\begin{itemize}
\item \textsuperscript{154} McGinnis, Schwartz & Tisdell, \textit{supra} note 9, at 1189.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} Dale Wilcox, New National Poll: 73 Percent of GOP Supports Choice, May 12, 2004, http://www.religiousconsultation.org/News_Tracker/73_percent_GOP_supports_choice.htm (on file with the \textit{Mississippi Law Journal}). “[T]he Republican Pro-Choice Coalition changed its name to the Republican Majority for Choice to reaffirm the reality that 73% of Republicans believe that the right to choose should be a woman’s decision, not the government’s.” \textit{Id.}
\item \textsuperscript{158} \textit{See} \textit{Roe} v. \textit{Wade}, Wikipedia, http://en.wikipedia.org/wiki/Roe_v._Wade (last visited Apr. 8, 2007) (describing, in particular, the efforts of President Reagan to overturn \textit{Roe} through appointees).
\item \textsuperscript{160} \textit{See} The Pulse: Pro-choice versus pro-life versus . . . , LP NEWS (July 1998), available at http://www.lp.org/lpn/9807-pulse.html (on file with the \textit{Mississippi Law Journal}) (indicating that a plurality of libertarians hold “a firm pro-choice position”).
\item \textsuperscript{161} \textit{See} The Pew Research Center, Survey: Beyond Red vs. Blue (May 10, 2005), http://people-press.org/reports/pdf/242.pdf, at 6, 22 (on file with the \textit{Mississippi Law Journal}) (indicating that Republicans with a strongly pro-business stance “are distinguished from other Republican-leaning groups by their relative lack of intensity with
brief discussion suggests, a careful study of bias should use more sensitive data than party affiliation.

Even conceeding that law faculties are more liberal than lawyers at large, one does not need to concede that faculties discriminate against candidates based on their point of view. The authors of the Georgetown study do not contend that their data show viewpoint discrimination; others, like Horowitz, have done so. But as conservatives have long argued, the absence of a particular group—typically minorities or women—in a workplace does not prove discrimination. At a minimum, those contending discrimination should have to demonstrate either that qualified candidates were in the applicant pool and were passed over to create an inference of discrimination, or that schools discriminated against particular candidates because of their political views.

Those claiming that law faculties discriminate do not offer any empirical support, other than to point to the dominance of Democrats on academic faculties. Occasionally, critics offer

respect to individual or social moral beliefs,” and “[t]hey are more libertarian than other Republican-oriented groups”).

162 McGinnis, Schwartz & Tidell, supra note 9, at 1203 (“Our data, of course, do not show discrimination, and undoubtedly many factors, such as conservatives’ relative enthusiasm for market society, contribute to the gross ideological imbalance.”).

163 See HOROWITZ, supra note 1, at xxxv-xxxvi (stating that there is “considerable reason to believe” that the increase in the ratio of liberals to conservatives on college faculties is a result of political discrimination); Posting to Spartacus Blog, http://spartacus.blogs.com/spartacus/liberal_academic_bias/index.html (Feb. 15, 2004, 15:53 EST) (on file with the Mississippi Law Journal) (stating that the statistics show widespread discrimination based on ideological beliefs).


166 The complainant must show that the constitutionally protected conduct was a substantial or motivating factor in the school’s adverse employment decision. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

167 See HOROWITZ, supra note 1, at xxxiii-xxxiv (stating that the ratio of faculty members holding views to the left of the political spectrum over those holding conservative views, “strongly suggests” the “systematic exclusion” of the latter). See also Schuck, supra note 29;
anecdotal evidence of discrimination. Such claims are impossible to access without the facts of individual cases. As discussed below, those on both sides of the debate about viewpoint discrimination would benefit from empirical research, at a minimum, into who is in the applicant pool. The Association of American Law Schools has a registry of applicants interested in teaching positions. That data may allow researchers to determine who is in the applicant pool and who is hired. Less certain is how one could measure the political views of candidates.

A cursory glance at resumes in the AALS directory suggests that a hiring committee bent on discriminating based on point of view would have a difficult time doing so without extending personal interviews. In a distinctly non-scientific study, I examined fifty randomly selected resumes from the most recent AALS directory. I reviewed the resumes with two questions in mind: would I be confident in predicting the candidate’s political perspective based solely on material in the resume and

What can be done to make professors practice what they preach on diversity? Alas, no easy remedy exists. The tenure system and the lack of mandatory retirement will project existing faculty bias far into the future. Moreover, the elite schools recruit new law teachers mainly from the top ranks of their recent graduates, whose own predominately left-liberal views are fortified by their professors."

Id.

For example, one critic contends that Justice Scalia’s former law clerks need not apply for law faculty positions. See DVD, supra note 14 (stating that former clerks of Justice Scalia or Justice Thomas have “a lot more difficult time getting hired”). Ironically, the Bush administration has made headlines for their discriminatory hiring practices at the Justice Department. See Eric Lipton, Officials Describe Politically Charged Justice Dept., S.F. CHRONICLE (May 12, 2007), at A4, available at http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/05/12/MNGIMPQ1251.DTL (on file with the Mississippi Law Journal). Elsewhere, critics have suggested that the Federalist Society has had undue influence in securing prestigious clerkships for young conservatives. See EDWARD P. LAZARUS, CLOSED CHAMBERS 264 (1998). “The Federalist Society was enormously effective . . . . Membership quickly became a prerequisite for law students seeking clerkships with many Reagan judicial appointees as well as for employment in the upper ranks of the Justice Department and White House.” Id. See also Amy Bach, Movin’ on Up with the Federalist Society, THE NATION (Oct. 1, 2001), available at http://www.thenation.com/doc/20011001/bach (stating that some judges seek out Federalists: “Judge Michael Luttig on the Court of Appeals for the Fourth Circuit, for example, hires only students with membership in the Federalist Society or comparable credentials on their resumes”). Perhaps, conservatives have gone on the offensive, accusing liberals of discriminatory hiring because of their own experience in attempting to enforce doctrinal conformity.
would I vote to extend an interview to the candidate whose resume I reviewed.

Were I bent on selecting candidates based on political point of view, I would be hard pressed to do so. Virtually none of the resumes included definitive evidence of the candidate's political perspective. In one instance, the candidate's choice of a recognizable left-wing law professor as a reference was suggestive. In addition, the candidate listed published works, available for scrutiny (if I had time and inclination to make the decision based on viewpoint).\footnote{At least at the early stages, a hiring sub-committee reviewing hundreds of resumes has little time to go beyond the AALS form resume. Some hiring committees do routinely review the scholarship of all the people whom they interview. I am not aware how widespread that practice is. E-mail from Joshua Dressler, Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University, to author (May 23, 2007, 15:43 CST) (on file with the Mississippi Law Journal) [hereinafter Dressler E-mail].} In another, a candidate worked for the American Civil Liberties Union. In two instances, candidates worked for judges with national reputations. In one instance, the candidate listed other information that seemed to cancel out any inferences of political perspective. For example, the candidate worked for liberal criminal justice agencies, but also had an economics background and a fellowship sponsored by a conservative foundation. In a few instances, one might infer political perspective from the firm for which the candidate worked. But inferring point of view from association with a law firm is a risky business; one needs to ask whether the candidate was naive about the firm's reputation; was she simply trying to get the best experience possible; or did he want to learn how the other side thinks?

Depending on how desperate one felt in weeding through resumes to single out conservatives or liberals, one might make some gross generalizations: are minority candidates more likely to be politically liberal? Can one infer political persuasion from course preferences; thus, can one infer that a person interested in teaching human rights law is more liberal than a candidate who wants to teach business associations? If so, a law school might have difficulty both discriminating based on political perspective and finding capable faculty to teach all of the tradi-
tional courses. Can one infer political perspective from state residence? None of the resumes hinted at the candidate’s religion unless one inferred that students attending Catholic law schools are also Catholic, not an especially accurate measure.\textsuperscript{170} But determining a candidate’s religion is a far cry from determining her politics in many cases.

My efforts to find evidence of political perspective based on the paper trail felt like a waste of time. I doubt that many search committee members engage in that kind of discrimination.\textsuperscript{171} They must sort through a thousand or so resumes from the AALS in addition to many more direct solicitations. My experience on search committees suggests that committee members make selections based on several criteria having nothing to do with political perspectives. One is dictated by teaching needs of the school. Hence, an intellectual property candidate from a conservative firm is more likely to get an interview than a member of the ACLU with no interest in property law. A second criterion is evidence of scholarly potential, most importantly whether the candidate has written already,\textsuperscript{172} and where the candidate published the articles. The third criterion is the candidate’s academic record; a fourth is the candidate’s work history. A committee’s consideration of gender and race may tip the scale towards the left.\textsuperscript{173}

\textsuperscript{170} One might try to infer religious affiliation from the candidate’s ethnic background. As my own case proves, that can be a risky business. My Italian ancestors were Protestants. When I first entered the teaching market in 1976, I had reasonable success in getting interviews with Catholic law schools, but little success in getting interviews with Baptist schools. I never asked my colleagues at Loyola New Orleans, where I first taught, whether they were surprised and disappointed when they learned that I am not Catholic.

\textsuperscript{171} At least at law schools where I have taught, deans have attempted to balance the hiring committee. At McGeorge, the committee usually includes a representative sample of the faculty, including faculty with different political perspectives.

\textsuperscript{172} At McGeorge, the hiring committee reads a candidate’s scholarship only after we have decided to invite the candidate to campus. Other schools read the scholarship of all candidates whom they agree to interview at the annual Association of American Law Schools’ hiring conference. Still other schools read all of the candidate’s scholarship before making a decision whether to interview the candidate. Dressler E-mail, supra note 169.

\textsuperscript{173} Paul L. Caron & Rafael Gely, What Law Schools Can Learn from Billy Beane and the Oakland Athletics, 82 TEX. L. REV. 1483, 1450 (citing research stating that of the findings relating to those new professors who are considered successful law school professors, “the most-cited group is 12% female and 28% minority, while the control group
Any real opportunity to discriminate based on political perspective comes once a candidate is on campus. Even then, so many other criteria factor into hiring decisions. Probably the most important are whether the candidate impresses faculty as articulate, capable of teaching effectively, and as a potential colleague. As discussed in more detail below, if, as some literature now suggests, many conservatives score high as authoritarian on personality indices, personality, rather than political perspective, may be more relevant to the rejection of a candidate than her politics.

This discussion of hiring practices hardly proves the absence of discrimination. But it suggests the lengths to which law professors would have to go to discriminate based on political perspective. Given the number of factors relevant to hiring that have nothing to do with political perspective, the discussion does suggest that whatever effect point of view has is marginal.

As developed below, because conservatives may bring pressure to increase their numbers on law faculties, liberals ought to be prepared to rebut the broad claims of their most extreme advocates. The debate about liberal bias would benefit from a carefully designed empirical study of the applicant pool to determine whether law schools are in fact discriminating against conservatives.

Given the absence of that data currently, one can only speculate whether the applicant pool includes a large number of highly qualified conservatives who are passed over for teaching positions. Also, we lack good empirical data showing whether liberal students outperform their conservative counterparts on standardized tests like the SAT and LSAT. Some evidence dealing with psychological differences between liberals and conservatives suggests that liberals should outperform their conservative classmates.

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is 50% female and 16% minority.” These results suggest that minorities are more successful and women less successful.).

174 See infra notes 177-81 and accompanying text.

175 See infra notes 179-83 and accompanying text.
The benchmark of success in law school is the ability to make subtle distinctions and to argue alternative positions.\textsuperscript{176} That is, a successful student is one who can see both sides of a legal issue. Recent empirical studies suggest that liberals are more adept than are conservatives at recognizing both sides of an argument.\textsuperscript{177} For example, New York University Professor John Jost and his co-authors found that conservatives and liberals demonstrate psychological differences.\textsuperscript{178} Conservatives show a “heightened psychological need to manage uncertainty and threat.”\textsuperscript{179} As summarized in a subsequent paper, Jost contends that “conservatives are, on average, more rigid and closed-minded than liberals.”\textsuperscript{180} Extensive data from eighty-eight studies, compiled over forty-four years from different countries, demonstrates “a clear tendency for conservatives to score higher on measures of dogmatism, intolerance of ambiguity, needs for order, structure, and closure and to be lower in openness to experience and integrative complexity than moderates and liberals.”\textsuperscript{181} Jost’s findings suggest that liberals ought to outperform

\textsuperscript{176} RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (1999) (Most law school exams are a means of testing a student’s ability to find the issues that are raised by the facts and to deal with the facts in the context of varying rules or statutory interpretations that could be applied to that factual scenario. Often this requires making arguments for one interpretation and against another, which may turn on a small factual matter.).

\textsuperscript{177} JOHN W. DEAN, CONSERVATIVES WITHOUT CONSCIENCE 27-31 (2006) (discussing social conservatives as being authoritarians, the author indicates that conservatives are unable to recognize the illogical, inconsistent, and contradictory nature of their beliefs and attributes this lack of recognition to authoritarians’ underlying psychological nature); John T. Jost, The End of the End of Ideology, 61 AMERICAN PSYCHOLOGIST 651, 661 (2006); John T. Jost, Jack Glaser, Arie W. Kruglanski & Frank J. Sulloway, Political Conservatism as Motivated Social Cognition, 129 PSYCHOLOGICAL BULLETIN 339 (2003); Transcript of interview between Neil Cavuto and Rush Limbaugh on “Your World” (Feb. 9, 2006), http://www.foxnews.com/story/0,2933,184342,00.html (on file with the Mississippi Law Journal) (decrying the move to the center in favor of passionate extremism).

\textsuperscript{178} Jost, Glaser, Kruglanski & Sulloway, supra note 177 (explaining that the research employed a “meta-analysis” that identified psychological variables that were correlated, positively and negatively, with political conservatism. The studies were conducted on a series of eighty-eight samples conducted over forty-four years that involved 22,818 individual cases in twelve countries.).

\textsuperscript{179} DEAN, supra note 177, at 30 (citing Dr. John Jost, “Media FAQ’s: Answers by John Jost”) (Provided to the author by Dr. Jost).

\textsuperscript{180} Jost, supra note 177, at 661.

\textsuperscript{181} Id. at 661-62. See also id. at 662 (concluding that “much evidence . . . [supports the] . . . rigidity-of-the-right hypothesis . . . and contradicts persistent claims that liberals and conservatives are equally rigid and dogmatic”).
their conservative colleagues in law school. If so, one would expect that more liberals would outperform more conservative classmates in law school and would be over-represented on law faculties.

In addition to whether liberals outperform conservatives academically, the Jost findings have other implications about hiring. The fact that conservatives are more dogmatic, intolerant of ambiguity, rigid and closed-minded than liberals are may explain why fewer of them are hired than their more open-minded, flexible colleagues. As argued above, many factors influence hiring decisions that have little to do with political perspective. Some, like Horowitz, argue that liberals want to hire liberals because they think alike and so are discriminating based on point of view. But the failure to hire a conservative may result from far more benign considerations. Imagine two candidates, one, inflexible and closed-minded, and another, tolerant of ambiguity and, presumably, of others’ ideas. One might choose the latter candidate without regard to her political perspective.

Further, the Jost data suggest yet another reason why many conservatives may not choose to enter the applicant pool. Ideally, law professors should not use their classrooms to indoctrinate, as Horowitz and others have argued. The benchmark of a law professor is the ability to induce discussion focusing on

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182 See HOROWITZ, supra note 1, at xxxvi-xli.
183 Imagine, for a moment, that a hiring committee was considering Antonin Scalia for a teaching position. Committee members might be impressed with his intellect and his credentials, but might raise questions about his temperament. Apart from the contents of his views, would they want him as a colleague? If stories circulated about his performance on the Court are accurate, he has lost support for his views because of his personally demeaning attacks on his colleagues. For example, according to some sources, he lost the support of Justice Kennedy in the abortion cases because of his sharp personal attack on Justice O’Connor. JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 199 (2007) (“Scalia managed to alienate even his ideological sympathizers. His contemptuous attacks on the pragmatic jurisprudence of Justice O’Connor—he said of one of her abortion opinions that it ‘cannot be taken seriously’—clearly took its toll . . . . Some scholars have argued that Scalia’s relentless personal attacks on O’Connor and Kennedy dissuaded them from overturning Roe v. Wade.”).
184 See HOROWITZ, supra note 1, at xxvi-xxx.
both sides of the legal issue. That kind of exchange is not as enjoyable for a person who is doctrinaire, intolerant of ambiguity, or rigid in her thinking.

Other factors may explain the absence of conservatives in the applicant pool. Some have suggested that conservatives are more interested in financial success than are liberals. At a minimum, the operation of the market may explain why more liberals than conservatives enter the teaching market. Motivated to do “good,” many liberals choose lower paying public interest jobs than do conservatives. As a result, liberals can make the transition to teaching without experiencing a financial shock. Conservatives, who tend to value the free market

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186 Imagine how difficult it would be for Rush Limbaugh to teach in law school. See David Folkenflik, Building Bipartisanship? Not Limbaugh’s Problem, NPR, Crossing the Divide (Jan. 25, 2007), http://www.npr.org/templates/story/story.php?storyId=7018083 (on file with the Mississippi Law Journal) (stating that Limbaugh has no interest in forging compromise and that he prefers heated debate and “trying to persuade people to agree with [him]”).

187 Cf. The Pew Research Center, GOP Makes Gains Among the Working Class, While Democrats Hold On to the Union Vote (Aug. 2, 2005), http://people-press.org/commentary/display.php?AnalysisID=114 (on file with the Mississippi Law Journal) (indicating that “the more income a person has, the more likely he or she is to be a Republican, and the less income a person has, the more likely he or she is to be a Democrat”).

188 See Posting of Stephen Bainbridge to http://www.stephenbainbridge.com/punditry/comments/an_oldie_but_a_goodie_bias_against_conservatives_in_law_school_hiring/ (Aug. 25, 2005) (on file with the Mississippi Law Journal) (citing a statement by George Lakoff, a linguistics professor at University of California, Berkeley) (“The disparity in [academic] hiring . . . [is because] [u]nlikely conservatives, [liberals] believe in working for the public good and social justice.”). Cf. Philip E. Crewson, Public-Service Motivation: Building Empirical Evidence of Incidence and Effect, 7 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH & THEORY 499, 500 (1997) (“[P]ublic employees have a greater interest in altruistic or ideological goals such as helping others or doing something worthwhile for society and less interest in monetary rewards than do their private-sector counterparts.” Assuming that there are more liberals employed in the public sector, it would follow that liberals are more likely to be motivated by altruism than are conservatives.)

189 Inside Higher Ed, Faculty Salaries Up 3.8% (March 12, 2007), http://www.insidehighered.com/news/2007/03/12/cup (on file with the Mississippi Law Journal) (Median salary of Professor of Law ($121,301), Associate Professor of Law ($91,509), Assistant Professor of Law ($78,294)). The median salary of public interest lawyers varies from $36,000 for an entry-level Civil Legal Services Attorney to $75,000 for a local prosecuting attorney with eleven to fifteen years of experience. Press Release, NALP, NALP Publishes New Report on Salaries for Public Sector and Public Interest Attorneys (Sept. 1, 2006), http://www.nalp.org/press/details.php?id=63 (on file
more than do liberals,\textsuperscript{190} may not be able to give up the higher paying job that they favor.\textsuperscript{191}

I doubt that law faculties tilt nearly as far as critics suggest. Even a serious study like the *Georgetown* study does not prove a significant tilt to the left. Further, even if a tilt exists, the leftward tilt of law faculties does not prove a bias against conservatives, for example, in hiring decisions. The next section explores whether whatever leftward tilt is present in law school has a cost.

**V. NO HARM, NO FOUL**

If I were convinced that my conservative students are harmed because of liberal bias, I would change sides in the ongoing debate about liberal bias. This section explores why conservative students cannot claim that they are at a disadvantage because of any liberal bias of their professors and why the claims by conservative critics may harm conservative students. Indeed, conservatives have often criticized liberals for fostering the view that women and minorities are victims.\textsuperscript{192} The overblown rhetoric of Horowitz and his fellow travelers may have that effect on conservative students.

Right-wing critics have claimed that left-wing professors punish conservative students for their views and that, unless students tow the left-wing line, they receive lower grades.\textsuperscript{193}

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\textsuperscript{190} McGinnis, Schwartz & Tisdell, supra note 9, at 1203.

\textsuperscript{191} See id. at 1203-04 (ignoring this factor).

\textsuperscript{192} Michel Feher, *Empowerment Hazards: Affirmative Action, Recovery Psychology, and Identity Politics*, 55 REPRESENTATIONS 84, 87 (1996) ("Until as recently as the early 1990s, the Right was very keen to stigmatize what it called the 'victim talk' of its opponents, that is, the self-fashioning of certain groups as society's helpless victims. Primarily associated with the grievances of women and minorities, such a discourse was denounced by its conservative critics as a blatant betrayal of the famously self-reliant American ethos. However, since . . . 1992, many conservative ideologues have seemed less interested in condemning 'victim talk' than in co-opting it . . . . Right-wing leaders thus endeavor to claim the 'benefits' of victimization for their own constituencies.").

\textsuperscript{193} See Anne D. Neal, Academic Bias, By the Numbers, FrontPage Magazine (Jan. 20, 2006), http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=20967 (on file with the *Mississippi Law Journal*). The median salary for a first-year associate at a firm with more than 500 attorneys is $125,000; for an eighth-year associate, it is $181,500. Press Release, NALP, Entry-Level Lawyer Salaries Remarkably Stable (Aug. 8, 2005), http://www.nalp.org/press/details.php?id=56 (on file with the *Mississippi Law Journal*).
Those claims seem to be based on students’ self evaluation,\textsuperscript{194} obviously not a very reliable measurement of bias. In addition, critics can cite remarkably few complaints of grading bias.\textsuperscript{195} A recent report rebuts the claim that conservative students are at a disadvantage.

Three co-authors, including lead author Markus Kemmelmeier, a University of Nevada-Reno sociologist, studied top students’ politics and grades in the undergraduate setting.\textsuperscript{196} The authors found that students tend to choose areas of study based on their politics; for example, liberal students interested in social justice are more likely than their conservative peers to take courses in sociology. Conservative students were more likely to take courses in business and economics.\textsuperscript{197} In disciplines attracting liberal students, the authors found no correlation between the grade received and the students’ politics.\textsuperscript{198} In courses attracting more conservative students, conservative students had a slight, but statistically significant, advantage in grades received.\textsuperscript{199}

The authors cautioned against a left-wing attack on professors for conservative bias. Instead, they argued that the gap was small and offered other, more innocuous explanations of the

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\textsuperscript{194} See Jennifer Jacobsen, Pennsylvania Lawmakers Form Panel to Investigate Claims of Political Bias in College Classrooms, THE CHRONICLE OF HIGHER EDUCATION (July 7, 2005), available at http://chronicle.com/temp/email2.php?id=8SpvrwRYkjkCvxnwfsCkXxqn4wNC6XE (on file with the Mississippi Law Journal) (indicating that only about fifty students made complaints to the legislator and that these complaints were the impetus for the hearings).

\textsuperscript{195} See id. (stating that the legislator received fifty complaints from among the thousands of students served by the Pennsylvania State System of Higher Education).

\textsuperscript{196} Markus Kemmelmeier, Cherry Danielson, & Jay Basten, What’s in a Grade? Academic Success and Political Orientation, 31 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1386, 1390 (2005) (The study uses “data from a 4-year longitudinal study [to examine] [3,890] students’ academic success as a function of conservatism while controlling for a range of predictors of academic success.”).

\textsuperscript{197} Id. at 1391.

\textsuperscript{198} Id. at 1392.

\textsuperscript{199} Id. at 1393.
fact that liberal students received lower grades in those courses.\textsuperscript{200}

The Kemmelmeier study involved undergraduate disciplines. There, unlike in law school, grading is not anonymous. As a result, a professor knows whose paper or exam she is grading. Bent on consciously or unconsciously punishing her students for political perspectives, she is able to do so. Apparently, that simply does not happen, at least not in the aggregate.\textsuperscript{201} And while some instances of bias may exist, I have already discussed different personality traits of liberals and conservatives: given the rigidity of conservative thinkers, if bias takes place, one would expect conservative professors to be more likely to be biased, unconsciously at least, against liberal students.

While Horowitz and others rail against liberal bias against conservative students and colleagues, they ignore proven instances of intolerance, especially at religious institutions. For example, until recently, some schools, like Bob Jones University, employed strict behavioral codes disallowing interracial dating.\textsuperscript{202} Elsewhere, reports have surfaced about discipline against faculty for what seem like minor doctrinal disagreements with strict religious codes of their universities.\textsuperscript{203} There, punishment is meted out not for misconduct, but legitimate intellectual differences.

Law professors have little opportunity to discriminate based on their students' point of view. Law schools require that

\textsuperscript{200} Id. at 1395 (stating that person-environment fit indicates that certain people with certain perspectives fare better in certain academic fields; conservative students may be more likely to aspire to enter conservative job fields and thus be more driven in their school work in those fields; they may feel more at ease with these classes and materials and be more intrinsically engaged).

\textsuperscript{201} Id. at 1396-97 (acknowledging that bias could happen in individual cases).


\textsuperscript{203} For example, after an incident at Patrick Henry Christian College in which the university president forced a professor to change his speech regarding St. Augustine, nine professors agreed that if one was unfairly reprimanded or dismissed, the other eight would fight that action. Thomas Bartlett, 5 Departures on Patrick Henry Faculty Pose Question: Are Christianity and Liberal Arts Contradictory Missions?, THE CHRONICLE OF HIGHER EDUCATION (May 12, 2006), available at http://chronicle.com/daily/2006/05/2006051202n.htm (on file with the Mississippi Law Journal).
professors grade exams anonymously.\textsuperscript{204} Even apart from anonymous grading, the structure of most law school examinations limits the likelihood that professors are grading students based on their political perspectives. The typical law school examination does not ask, “Defend the Supreme Court’s decisions from Roe\textsuperscript{205} through Casey,”\textsuperscript{206} or, “Critique the Supreme Court’s recent Fourth Amendment case law,” questions that might require students to take a political position contrary to their own.\textsuperscript{207} Most law school questions present students with factual hypotheticals with a call of the question that forces them to analyze the facts in light of prevailing precedent. Analyzing the questions does not call upon the students to take a particular political stance, but instead requires students to be familiar with the case law and to be able to analyze it in light of a new set of facts.

Many courses may lend themselves to political debates. Constitutional Law, Criminal Procedure, Torts and Criminal Law readily come to mind. In fact, a professor bent on teaching any particular course from a political perspective may be able to do so. For example, one might be able to infuse even a course like Civil Procedure with politics.\textsuperscript{208} Despite that, testing in a

\textsuperscript{204} “ATTICUS FALCON,” ESQ., PLANET LAW SCHOOL: WHAT YOU NEED TO KNOW BEFORE YOU GO . . . BUT DIDN’T KNOW TO ASK 131 (Fine Print Press 2003) (indicating that almost all law schools use a blind grading system). Some students believe that anonymous grading is not, in fact, anonymous. Frustrated with that kind of cynicism when I began teaching, I have come to accept it as a fact of law school life. I do point out to my students that those who believe that we know whose exams we are grading requires them to believe two things about law professors: one is that law school faculties are willing to engage in massive fraud; two is that the average law professor is so motivated to “get” students that she risks violating school policies protecting student anonymity.


\textsuperscript{207} Arguably, my hypothetical questions would test the students’ abilities to see competing legal arguments.

way that favors liberals over conservatives or vice versa is less likely to occur because of the typical method of testing.

Imagine, for example, the typical final exam in Civil Procedure which includes a question about subject matter jurisdiction. Thus, the fact pattern may involve a plaintiff incorporated in New Jersey and Pennsylvania, with its principal place of business in New Jersey, filing an action in federal court in New Jersey against a defendant incorporated in Pennsylvania, with its principal place of business in Pennsylvania. After a counterclaim, the original plaintiff may seek to join as a third party defendant a partnership with partners in Pennsylvania and New Jersey, while other parties of various states of citizenship attempt to intervene in the action. The call of the question typically asks the students whether the court has subject matter jurisdiction over the various claims and parties. A competent answer must analyze a variety of questions about existing law, including whether the particular jurisdiction follows the majority rule dealing with parties incorporated in multiple districts, or the minority rule (whereby a court considers the corporation of a citizen of the state where the action is filed), whether the various additional claims arise out of the same transaction or occurrence, and whether the would-be intervenor’s rights may be impaired if it does not have the right to intervene. Furthermore, competent answers would need to explore whether the various parties can invoke supplemental jurisdiction under 28 U.S.C. §1367(a) and whether supplemental jurisdiction is improper under 28 U.S.C. §1367(b).

A student who spent time inserting politics into the question would almost certainly be wasting her time. The typical examination asks the students to analyze the question under prevailing law. A student does not improve the answer by distal as the Federal Rules of Civil Procedure were first advanced by conservative business interests and were only enacted after populists took up the call for simplified procedural rules. Id. at 28-31; David Marcus, Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction, 48 WM. & MARY L. REV. 1247, 1292-95 (2007).

209 RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 167-72 (2d ed. 2006).
211 FED. R. CIV. P. 13(a).
212 FED. R. CIV. P. 24.
cussing whether supplemental jurisdiction is an appropriate use of federal judicial resources or an unwarranted intrusion into state prerogative.\(^{213}\)

Less typically, professors ask policy oriented questions. Thus, one might envision an exam that does invite a discussion of policies of federalism and efficiency in the use of diversity and supplemental jurisdiction. But even there, I find it inconceivable that a professor cares where a student comes out on her conclusion if she understands some of the underlying tensions between federalism and efficiency.\(^{214}\)

The basic method of testing is the same whether the course is more or less emotionally charged. Thus, a typical Criminal Procedure exam follows very much the same pattern as does the Civil Procedure exam. Here is a typical Criminal Procedure question:

Federal agents lawfully arrested Defendant and took him into custody. There, they gave him his *Miranda* warnings. He first signed the waiver form but then requested counsel. The agents then asked him for his age, birth date and place of birth, address, height, and Social Security number. He responded to all of those questions. (S 1). In addition, they requested a hair sample and indicated that if he did not provide one voluntarily, they would get a court order. He agreed to allow the agents to take a hair sample at a local hospital. The agents accompanied him to the hospital. While awaiting a

\(^{213}\) I should clarify that point. If the call of the question is whether the court has subject matter jurisdiction over the claims and parties, a good answer may discuss efficiency if it supports how a court ought to read the statute. Efficiency, after all, is one of the policies that supports supplemental jurisdiction. But to go further to endorse or criticize supplemental jurisdiction because the student thinks that federalism concerns are implicated seems quite far afield. A student might raise questions about the constitutionality of supplemental jurisdiction; but given the lack of meaningful judicial support, such a discussion would be of marginal importance at best.

\(^{214}\) Imagine a question that asks, "Comment on §1367." A good answer would raise policy considerations, notably efficiency and the utility of allowing a federal judge to decide the federal question part of a case, and federalism concerns, notably that a federal court hears a state law claim with no independent basis of Article III power and does so today only because of the Supreme Court's abandonment of its original and narrow interpretation of pendent claim jurisdiction. *See* United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), *overruling* Hurn v. Oursler, 289 U.S. 238 (1933). I doubt that any professor would grade a student's answer based on whether the student endorsed a particular view of the merits, i.e., that a professor would give a higher grade to a student who concluded that §1367 violated the Constitution.
medical technician to take and label the sample, Defendant began to talk about the crime, (S 2), at which point, the agents requested that he sign another waiver. He did so. After offering a few more details about his crime (S 3), he requested a lawyer and fell silent. The agents sat in silence for awhile. Defendant began talking again and made a full confession. (S 4).

The call of the question requires the students to address the admissibility of the various statements. The analysis requires a thorough understanding of several major Supreme Court cases, including Edwards v. Arizona,215 Miranda v. Arizona,216 Oregon v. Bradshaw,217 Oregon v. Elstad,218 and Missouri v. Seibert.219 An attempt to insert one's political views into the answer would be distracting and would waste time.

On occasion, a professor might ask a policy question or one focusing on the jurisprudence of a particular justice. For example, Joshua Dressler used the following exam questions as a small part of his final exam:

A. Take one United States Supreme Court case considered in this class this semester with which you disagree and:

1. Explain what the case holds and the Court's rationale for its holding.

2. Explain why you believe the Court was wrong. Your answer should also indicate how you would have decided the precise issue before the Court, and why you believe your result is preferable.220

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220 The cited question was one of three questions and was allocated only thirty minutes. Dressler includes a more traditional fact pattern that is the most common heavily weighted part of my exams. He adds that, on some exams, “I have quoted a paragraph from a law review article and sought their comment on the topic. Of course, I guess those who fear liberals might believe that this would skew in favor of those who give the ‘right’ (i.e., liberal) answer, but I really don’t think it does with me. But, nobody who is cynical would believe that.” E-mail from Joshua Dressler, Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University, to author (Jan. 7,
While Dressler’s short essay questions may invite a political harangue, successful students must demonstrate thorough familiarity with the cases and their holdings. Furthermore, the questions invite precise analysis, not just political broadside. In addition to these policy oriented questions, Dressler includes traditional questions as well.\footnote{Insofar as these questions invite answers based on politics, defining “liberal” and “conservative” views in Criminal Procedure is a tricky business. Many libertarians, conservative on economic issues, are interested in restraining the exercise of state and federal power and may side with liberals on Fourth, Fifth and Sixth Amendment issues. In an e-mail exchange, Dressler made a similar point: “One of the ‘lessons’ I offer on Day 1 of the class each semester is for them to realize that justices rarely can be labeled simplistically as ‘liberal’ or ‘conservative’ or even ‘pro-defendant’ or ‘pro-law enforcement,’ but rather that justices will have a more or less sophisticated view of constitutional interpretation and/or a reading of particular constitutional provisions.” See Dressler E-mail II, \textit{supra} note 220.}

Some students complain that classroom discussions have little to do with what professors test on their exams.\footnote{\textit{FALCON}, \textit{supra} note 204, at 115.} If that is the case, it may be because a professor spends too much time discussing students’ perspectives.\footnote{Vitiello, \textit{supra} note 185, at 995-1004.} In fact, many critics of the Socratic Method and law school generally urge that law professors allow their students to voice their personal opinions without the professor seriously challenging those views.\footnote{See \textit{id.} (Many argue that the Socratic Method causes moral numbing and the possibility of loss of moral bearings in students when they are forced to take positions opposite their own beliefs.).} And yet, when it comes time to write final exams, professors almost certainly fall back on traditional, and appropriate, testing methods that focus on issue spotting and analysis, not on advocating for a political position.\footnote{See \textit{FALCON}, \textit{supra} note 204, at 107 (indicating that, among professors who teach the same subject matter, there is substantial overlap regarding what material is tested).}

Critics of liberal bias can point to no empirical evidence to support their conclusion that conservative students are punished because of their political views. Further, anonymous grading and the typical exam format severely limit the possibility of using political perspective as a measure of academic success. No doubt, some conservative students contend that their
political perspective resulted in their poor performance. But both liberal and conservative law students who perform poorly may explain away their performance by looking for excuses.

The authors of the *Georgetown* study suggest that the absence of conservative faculty may harm conservative students because students lack mentors. Even on the assumption that students are more conservative than their professors, the *Georgetown* study indicates that most faculties include some conservative members. They are, after all, merely demonstrating under-representation at most of the elite schools, not the absence of conservatives. As a result, most faculties will include some conservatives to whom conservative students may flock if they feel that they can receive mentoring only from conservative professors. In addition, by excluding adjuncts, the *Georgetown* study excludes a large pool of likely conservative mentors and often an especially impressive group. Accomplished practitioners and judges serving as adjuncts can do more than write glowing letters of recommendation for their

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226 See *Academe*, supra note 44 (“Of the 50 complaints that [the initiating legislator] received, [his opposition] says the majority are anonymous and come from the Web site of Students for Academic Freedom...”).

227 Paul A. Trout, *Shame on You, THE CHRONICLE REVIEW*, November 3, 2006 (arguing that when students are shamed or embarrassed by their professor either because of the grade received or a statement in class, the student will react by “try[ing] to shame his shamer”). See also *FALCON*, supra note 204, at 115.

228 Cf. McGinnis, Schwartz & Tisdell, supra note 9, at 1201, (stating that faculty diversity is even more important than student diversity because they set the curricula and bring opportunities of academic growth to campus to benefit the students, as well as provide connections for students in their clerkships). The authors thus provide examples of how the faculty can affect the opportunities open to students at a given law school. *Id.*

229 Cf. *id.* at 1180 (indicating that Post-Baby Boomers tend to be more conservative than Baby Boomers, thus implying that law professors, many from the Baby Boomer generation, are more liberal than their Post-Baby Boomer students. *Contra* UCSC Institutional Research (2003), http://planning.ucsc.edu/irps/Enrollmnt/FRESH02/CIRP2002%20Alternate.pdf (on file with the *Mississippi Law Journal*) (In comparing data collected every four years since 1986, the research showed that nationally, and at UC Santa Cruz, students have “moved towards increasingly liberal social attitudes,” except for the continued legalization of abortion. The other measures included the legalization of marijuana, abolishment of the death penalty and the prohibition of homosexuality.).

230 McGinnis, Schwartz & Tisdell, supra note 9, at 1170, 1177 (stating that while the contributions are mostly Democratic, 15% are Republican).

231 *Id.* at 1177 (“At Yale—arguably the nation’s leading law school—over 40% of all professors made political contributions... with the ratio of Democratic to Republican donors being approximately twenty to one.”).
students; they can hire them.\textsuperscript{232} The Georgetown study also found that younger faculty tended to be more conservative than their older colleagues.\textsuperscript{233} Almost certainly, students seek out younger faculty of all political stripes more readily than they seek out older faculty. Furthermore, the absence of mentors for conservative students assumes that liberal professors are unwilling to mentor conservative students. That is a highly questionable assumption. In fact, if, as an increasing body of empirical data suggest, liberals are more accepting and open-minded than are conservatives, conservative students ought to be able to find mentors without difficulty.\textsuperscript{234}

Insofar as liberal professors demonstrate their bias in the classroom,\textsuperscript{235} one wonders whether that leads to any identifiable harm. As Judge Posner has observed, students may simply turn off their professors' ideas if the students disagree with them.\textsuperscript{236}

\textsuperscript{232} Among the adjunct professors at University of the Pacific McGeorge School of Law are successful private practitioners, deputy district attorneys and attorneys general, general counsel for the Pacific Legal Foundation and for the California Department of Education, judges, associate justices, administrative judges, Deputy Executive Director of the California State Bar, and Supreme Court Justice Kennedy. University of the Pacific McGeorge School of Law, Academics, Faculty, \url{http://www.mcgeorge.edu/x186.xml} (last visited Nov. 1, 2007).

\textsuperscript{233} McGinnis, Schwartz & Tisdell, supra note 9, at 1180.

\textsuperscript{234} By contrast to undergraduate schools where student-faculty ratios allow a good deal of interaction between students and their professors, law schools often have high ratios. In addition, first year classes are often large. Further, 1L students, often intimidated by their professors, do not seek out their professors as readily as undergraduates do. As a result, many law students do not seek out or develop mentors among their professors.

\textsuperscript{235} Some critics, like Horowitz, make that claim. See HOROWITZ, supra note 1, at xlvii (stating that "many conservative students ... are singled out today" and activist professors have become "adversaries" of conservative students); see also FALCON, supra note 204, at 44 (stating that liberal and conservative faculty sometimes use the classroom to espouse their own political views). The claims are at best anecdotal, and at least in law school where the Socratic Method is still used widely, professors have less opportunity to indoctrinate their students. For a study regarding the use of the Socratic Method in law school, see Steven I. Friedland, \textit{How We Teach: A Survey of Teaching Techniques in American Law Schools}, 20 \textit{Seattle U. L. Rev.} 1, 28 (1996) (discussing the results of a survey in which 97% of the professors who responded indicated that they "used the Socratic method at least some of the time in first year classes.

\textsuperscript{236} See Liptak, supra note 73 (quoting Judge Richard A. Posner) ("I don't think the liberal bias of law school faculties has much impact on the students ... Law students are careerists, and for them law school is career preparation, not Sunday chapel"); Jennifer Jacobson, \textit{Students May Tune Out Professors of Opposing Political Views, Scholars Tell Pennsylvania Panel}, \textit{The Chronicle of Higher Education} (Mar. 23, 2006), available at \url{http://chronicle.com/daily/2006/03/2006032302n.htm} (on file with the Mississippi
I doubt that many professors spend much time in their classrooms simply spouting or letting students spout their political views without forcing that those views be substantiated. Further, as I have argued elsewhere, most of what ought to go on in class focuses not on personal opinion but on court holdings, analysis and policy.237

Perhaps conservative students feel aggrieved because they are forced to argue liberal positions in their classes. Some critics of traditional legal education have argued that students become morally numbed and cynical because of legal education. As one commentator has written:

[Students] learn to suppress their feelings and come to care less about others. They learn that their value systems are irrelevant. “[T]he underlying highest value taught, even if implicitly, is the ability to come up with convincing reasons in support of any argument, whether one personally agrees with them or not, and to defend those reasons with cogent and convincing logic, on behalf of anybody”—a process that may lead to a moral neutering of the students.238

On this view, the effect of having too many liberal professors is not just that students might shift to the left but that conservative students will experience moral numbing.

Elsewhere, I have argued that this kind of challenge to one’s ideas is a necessary and positive element of a legal education.239 Law students are adults and part of the psychological development from their teens to their twenties is the abandonment of simplistic views of the world.240 As uncomfortable as students may find the challenge, forcing students to understand competing legal arguments is essential to the successful practice

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237 Vitiello, supra note 185, at 1000-03.
239 Vitiello, supra note 185, at 995-1002.
of law. An effective advocate must be able to anticipate and rebut her opponent's arguments or she will constantly be blindsided by her opponent.\textsuperscript{241} Professor Jeffrey Rosen's recent book on the Supreme Court includes the following discussion of Chief Justice Roberts' views:

As an advocate, Roberts prided himself for having represented both sides of an issue—liberals and conservatives, government and industry—and this increased his belief in the importance of a bipartisan vision of law. "I do think it's extremely valuable for people to be on both sides . . . . It does give you a perspective that you just can't get any other way, in terms of what the concerns of the other side really are. And it also gives you an added credibility, and that's very, very important."\textsuperscript{242}

The lesson is clear: students ought to applaud professors for challenging their views, rather than complaining about not having their own views given sufficient weight.\textsuperscript{243}

If law school faculties show an unacceptable tilt to the left, conservative students can vote with their feet as well. As mentioned above, some schools have a distinct conservative bias in their hiring of faculty. Some of those schools are highly ranked.\textsuperscript{244} Were there large numbers of highly qualified conservative students disgruntled with the liberal bias of their law professors, presumably the market would have solved the problem: conservative students would apply to schools with more conservative faculties, raising the credential levels of those schools, resulting in increased rankings of those schools in national ranking systems like the \textit{U.S. News & World Report} rank-

\textsuperscript{241} Vitiello, supra note 185, at 998-99.
\textsuperscript{242} ROSEN, supra note 183, at 230.
\textsuperscript{243} Of course, this is precisely why many liberal professors challenge their liberal students as well.
ing of law schools.\textsuperscript{245} Little evidence exists that conservatives with high credentials are flocking to elite conservative schools.\textsuperscript{246} While conservatives are usually enthusiastic about the free market, they seem blind to the fact that conservative consumers of legal education have plenty of choices. Instead, they seem to assume that some artificial correction be imposed, in Horowitz's case, by state legislatures or Congress.\textsuperscript{247} The authors of the \textit{Georgetown} study are more judicious and avoid arguing in favor of affirmative action for conservative faculty,\textsuperscript{248} but still suggest greater outreach to expand the pool of conservative faculty.\textsuperscript{249}

To date, data suggest that conservative students are almost as satisfied with their law school experience as are other students.\textsuperscript{250} But critics like Horowitz and, to a lesser extent, the authors of the \textit{Georgetown} study, run the risk that their claims will harm conservative students. Inviting conservative students to believe that law schools are dominated by a liberal bias that silences conservative voices does all of us a disservice. The criticism is unfair to conscientious liberals who take seriously our obligation to educate all of our students. It is also unfair to conservative students.

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\item \textsuperscript{245} \textit{U.S. News & World Report} considers credentials of incoming students as a major factor in its ranking of American law schools. \textit{America's Best Graduate Schools}, supra note 244 at 16, 45.
\item \textsuperscript{246} According to a 2006 study by the Law School Admission Council, only 2.7\% of self-identified politically conservative students indicated that their affiliation with this group played an important role in their decision to attend their current law school. See Law School Admission Council, The Climate in Law Schools for GLBT Persons: Results from a Survey of Law Students (April 2006) available at http://www.lsac.org/pdfs/2006-2007/GLBT-Climate-Survey.pdf, at 8 [hereinafter LSAC STUDY].
\item \textsuperscript{247} See Academic Bill of Rights and Student Bill of Rights, supra note 39 and accompanying text.
\item \textsuperscript{248} McGinnis, Schwartz & Tisdell, supra note 9, at 1198, 1203.
\item \textsuperscript{249} \textit{Id.} at 1203.
\item \textsuperscript{250} LSAC STUDY, supra note 246, at 10 (stating that results of a survey indicate "an overall high degree of satisfaction with law school and with individuals' choices of which law schools to attend . . . . "). Respondents described their law schools as "fairly hospitable" to all groups, although the perceived climate for conservative students was slightly less hospitable than for liberal students. \textit{Id.} at 9. Further, 4.6\% of conservatives reported experiencing discrimination compared to 3.3\% of liberal students. \textit{Id.} Presumably, these statistics show that conservatives are slightly less satisfied with their law school experience.
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For some time, conservatives have accused liberals of making minorities and women into victims.\textsuperscript{251} In the area of race, it holds that society, including black leaders and white liberals, has advanced a variety of myths about the oppression of African-Americans.\textsuperscript{252} “Victimology” focuses on the role of society in causing poor performance among African-Americans.\textsuperscript{253} The effect has been the perpetuation of poor performance, for example, by African-American students. On this view, African-American students “do so poorly in school decade after decade not because of racism, funding, class parental education, etc., but because of a virus of Anti-intellectualism that infects the black community.”\textsuperscript{254} “Victimology” is a “major obstacle[] to black advancement.”\textsuperscript{255} It prevents the “victims” from accepting responsibility for their own success and allows them to blame others for their performance.\textsuperscript{256}

Conservatives make similar claims about liberal-feminists. For example, in \textit{Who Stole Feminism: How Women Have Betrayed Women}, Christina Hoff Sommers characterized one branch of feminism as “gender-feminists,” who blame men for their lack of opportunities. Sommers contends that gender-


\textsuperscript{252} See McWhorter, supra note 251, at 8-25 (describing and rebutting seven “outright myths or vast exaggerations and distortions, born . . . through the prism of Victimology”).

\textsuperscript{253} See id. at 1-49.

\textsuperscript{254} Id. at 83.


\textsuperscript{256} Graglia, supra note 255 at 942.
feminists “disempower” themselves, the antithesis of what feminism is about.\textsuperscript{257}

Horowitz and other conservatives routinely criticize liberals for making minorities and women into victims.\textsuperscript{258} And yet they stoke the fears of conservative students that they are the victims of their liberal professors.\textsuperscript{259} Certainly, there is more than a touch of irony in this state of affairs. Perhaps the extravagant claims by right-wing critics that liberal professors are biased against them have already resulted in some of the greater dissatisfaction felt by conservative students than their more liberal counterparts.\textsuperscript{260}

\textsuperscript{257} See Hoff Sommers, supra note 251, at 16 (stating that American feminism is currently dominated by “gender feminists” who “seek to persuade the public that American women are not the free creatures we think we are” and that “our society is best described as a patriarchy, a ‘male hegemony,’ . . . in which the dominant gender works to keep women cowering and submissive”). Sommers, whose ideas run contrary to the views of many liberal feminists, works for a conservative/libertarian think tank. Christina Hoff Sommers, Wikipedia, http://en.wikipedia.org/wiki/Christina_Hoff_Sommers (last visited June 1, 2007) (on file with the Mississippi Law Journal). Additionally, many of her books have been subsidized in part by conservative groups. Id.

\textsuperscript{258} See Horowitz, supra note 1, at 372 (“[T]he source of the radicals’ power was their willingness to deploy the weapon of victimhood to stigmatize and silence their intellectual opposition.”); Feher, supra note 192 and accompanying text; Network for Enlightened Women (NEW), http://www.enlightenedwomen.org/home.htm (last visited June 1, 2007). NEW is a conservative women’s organization that challenges “radical” liberal feminist ideals and claims that such groups promote victimization of women. See Kathleen Bracken, Secretary of NEW, Teaching Intellectual Tyranny, The Cavalier Daily (Mar. 14, 2007), available at http://www.cavalierdaily.com/CVArticle.asp?ID=29632&pid=1560 (“According to the radical feminist thought supported in women and gender studies, I am unknowingly a victim of a patriarchal society and completely misled by societal norms.”); see also Hoff Sommers, supra note 251, at 134 (“A befuddled liberalism has proved to be fertile soil for the growth of an intolerant gender feminism.”).

\textsuperscript{259} See Horowitz, supra note 1, at xxvii (“[Teachers] must not seek the arbitrary imposition of personal opinions and prejudices on students, enforced through the power of the grading process and the authority of the institutions they represent.”). Horowitz goes on to claim that the “lack of professionalism” by liberal activist professors has a negative impact on students. Id. at xlv. He also states that “many conservative students . . . are singled out today,” and activist professors have become “adversaries” of conservative students. Id. at xlvi.

\textsuperscript{260} LSAC Study, supra note 246, at 9 (stating that the perceived climate at law schools for conservative students was slightly less hospitable than for liberal students, and that a higher percentage of conservatives reported experiencing discrimination than did liberals). Some of this dissatisfaction may be due, in part, to the relaxed admission standards for wealthy, often conservative, “legacy children.” See Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and
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\item \textit{Id.} at 83.
\item \textsc{Lino A. Graglia}, \textit{Do Racial Preferences Cause Rather than Remedy the Black Academic-Performance Gap?}, 80 \textsc{Tex. L. Rev.} 933, 944 (2002) (reviewing \textsc{John H. McWhorter}, \textit{Losing the Race: Self-Sabotage in Black America} (2000)).
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258 See HORIZON, supra note 1, at 372 (“[T]he source of the radicals’ power was their willingness to deploy the weapon of victimhood to stigmatize and silence their intellectual opposition.”); Feher, supra note 192 and accompanying text; Network for Enlightened Women (NEW), http://www.enlightenedwomen.org/home.htm (last visited June 1, 2007). NEW is a conservative women’s organization that challenges “radical” liberal feminist ideals and claims that such groups promote victimization of women. See Kathleen Bracken, Secretary of NEW, Teaching Intellectual Tyranny, THE CAVALIER DAILY (Mar. 14, 2007), available at http://www.cavalierdaily.com/CVArticle.asp?ID=29632&pid=1560 (“According to the radical feminist thought supported in women and gender studies, I am unknowingly a victim of a patriarchal society and completely misled by societal norms.”); see also HOFF SOMMERS, supra note 251, at 134 (“A befuddled liberalism has proved to be fertile soil for the growth of an intolerant gender feminism.”).

259 See HORIZON, supra note 1, at xxvii (“[Teachers] must not seek the arbitrary imposition of personal opinions and prejudices on students, enforced through the power of the grading process and the authority of the institutions they represent.”). Horowitz goes on to claim that the “lack of professionalism” by liberal activist professors has a negative impact on students. Id. at xlv. He also states that “many conservative students... are singled out today,” and activist professors have become “adversaries” of conservative students. Id. at xlvii.

260 LSAC STUDY, supra note 246, at 9 (stating that the perceived climate at law schools for conservative students was slightly less hospitable than for liberal students, and that a higher percentage of conservatives reported experiencing discrimination than did liberals). Some of this dissatisfaction may be due, in part, to the relaxed admission standards for wealthy, often conservative, “legacy children.” See JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND
Absent some showing of harm to conservative students, we ought to be quite dubious about altering current hiring practices.\textsuperscript{261} Apart from the odd spectacle of conservatives advocating for something akin to affirmative action for conservatives, one can imagine odd scenarios playing out in hiring. Which conservative points of view must a faculty consider in hiring? Given that a faculty may have many liberals who share some values of individual freedom with libertarians, should that school hire only social and religious conservatives to give the requisite balance? In assessing hiring needs, should a school canvass the faculty views on issues of the day to determine if a sufficiently broad spectrum of views is present to allow diverse points of view? Thus, if a faculty finds too many anti-war liberals on the faculty, it would press to hire some pro-war advocates? Or should it simply seek to achieve balance among the major political parties? What happens if a faculty hires a candidate to fill one of its conservative seats, but the candidate then switches party affiliation before or after promotion?

One can easily imagine other problems that might arise. Should a law school be compelled to hire a Christian fundamentalist who thinks that homosexuality is an abomination? What if that is a primary focus of her scholarship, a point of view harmful to the school’s reputation and hurtful to members of the student body? Should a southern law school be compelled to hire a scholar who thinks that \textit{Brown v. Board of Education}\textsuperscript{262} was wrongly decided, even if that school is trying to overcome a reputation and history of racial discrimination?

One commentator has suggested that Republican women are the least represented group on law faculties.\textsuperscript{263} Many Re-

\textsuperscript{261} To their credit, the authors of the \textit{Georgetown} study do not advocate radical solutions; no doubt they are sensitive to the claim that they would be advocating affirmative action for conservatives. Instead, their recommendations are relatively modest. McGinnis, Schwartz & Tisdell, \textit{supra} note 9, at 1203 (suggesting instead that law schools try to “assure that there are substantial numbers of conservatives and Republicans represented at faculty workshops and as visiting faculty members”).

\textsuperscript{262} \textit{347 U.S. 483} (1954).

\textsuperscript{263} See McGinnis, Schwartz & Tisdell, \textit{supra} note 9, at 1179 (“[P]olitically active female professors are substantially more Democratic than their male counterparts.”).
publican women, as many Republican men,\textsuperscript{264} come from wealthy families and may have been the beneficiaries of affirmative action already in the form of legacy admissions at prestigious schools.\textsuperscript{265} Surely, making them the special target of hiring does not make a compelling case.\textsuperscript{266} Going down the road towards correcting the under-representation of conservatives seems a poor step to take.

As argued above, I do not believe that conservative critics have made their case. As a result, I do not think that we need to start struggling with the remedy to an overblown problem, one that may be moderating over time anyway.\textsuperscript{267} That is especially true because conservative students cannot seriously contend that they are the victims of liberal bias.

\textsuperscript{264} George W. Bush, for example, gained admission to Yale although he was a “mediocre student” with a verbal SAT score that placed him at the bottom 10\% of the freshman class. \textsc{Karabel}, supra note 260, at 344-45 (suggesting that his admission was due to the wealth, prestige and connections of his family).

\textsuperscript{265} See \textsc{Karabel}, supra note 260, at 629-30 n.149 (relying on figures provided by the Office of Institutional Research at Yale) (“George W. Bush was not alone in receiving preference in 1964; the admission rate that year for legacy applicants was 47 percent compared to 27 percent for nonlegacy applicants.”). According to a recent study by the Pew Research Center, “the more income a person has, the more likely he or she is to be a Republican, and the less income a person has, the more likely he or she is to be a Democrat.” The Pew Research Center, GOP Makes Gains Among the Working Class, While Democrats Hold On to the Union Vote (Aug. 2, 2005), http://people-press.org/commentary/display.php3?AnalysisID=114 (on file with the \textit{Mississippi Law Journal}) (based on an analysis of 129 surveys with more than 200,000 respondents conducted since 1992).

\textsuperscript{266} In upholding the constitutionality of race-conscious admissions in universities, the Court in \textit{Grutter v. Bollinger} discussed the importance of looking to the background of students in the admissions decisions. 539 U.S. 306, 338 (2003). Historical inequality, as well as modern-day racial discrimination, leads to fewer educational opportunities for many minority students. As the Court stated: “By virtue of our Nation’s struggle with racial inequality, such students are less likely to be admitted in meaningful numbers on criteria that ignore those experiences.” \textit{Id.} “[It] remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.” \textit{Id.} at 346 (Ginsburg, J., concurring). Wealthy Republicans certainly cannot claim such disadvantage. See also \textit{DeFunis v. Odegaard}, 416 U.S. 312, 331 (1974) (Douglas, dissenting) (stating that law schools should consider economic disadvantage in the admissions process).

\textsuperscript{267} McGinnis, Schwartz & Tisdell, supra note 9, at 1180 (indicating that Baby-Boomers are more liberal than younger faculty, and that this “yields some possible indications of future changes in the ideological composition of the legal academy.”).
VI. THE UNDUE INFLUENCE OF LIBERAL PROFESSORS

The authors of the *Georgetown* study did not rest their case on harm to students. Instead, they suggested that law schools should increase intellectual diversity, in part, because of the influence that law professors have on the development of the law. For example, they argued that law professors are “in the business of creating a new stock of legal ideas.” Unlike practicing lawyers, professors should “contribute a distinctively independent perspective that would command particular attention and persuasive force.”

The study also argues that professors’ views have other more subtle influences on the law. For example, they contend that “the academy exercises influence on constitutional law . . . through its assessment and reassessment of the reputations of members of the judiciary.” That is the result of two factors; one, that professors form their views of Justices based on ideology and two, that judges care about their reputations. Justices may alter their jurisprudence towards the left to appeal to liberal professors. Because of professors’ special role in influencing the law, the argument goes, conservatives deserve to have their voices heard as well.

The occasional law professor may influence the direction of the law. The authors of the *Georgetown* study cite Catherine MacKinnon’s work on sexual harassment as “largely responsible

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268 Id. at 1193.
269 Id. Not surprisingly, the authors do not have empirical evidence to measure the influence that law professors have on the development of the law. Such data would be hard to produce. They do give anecdotal evidence that professors’ liberal bias effects law reform. For example, liberal professors file more left leaning amicus briefs and advance similar positions in law reform groups like the American Law Institute. Id. at 1193-95.
270 Id. at 1196.
271 Id.
272 Id. at 1197-98.
273 See DVD, supra note 14 (stating that liberal law faculties will “influence a generation of lawyers,” thus greatly impacting society). Dean Cass further contends that liberal bias is a “danger” and a “problem” that needs to be eliminated. Id. According to the authors of the *Georgetown* study, society would benefit from ideological diversity at law schools. McGinnis, Schwartz & Tisdell, supra note 9, at 1194, 1202 (“[M]ultiple conflicting perspectives provide . . . society with a public good—the vetting of both sides of an important legal issue from its most sophisticated academic theorists . . . Ideological diversity might also improve a law school’s contribution to public discourse—one of the principal public goods that law schools provide to society at large.”).
for creating this area of the law.” Laurence Tribe’s string of victories before the Supreme Court suggests a high level of respect for his work. No doubt, other examples exist.

But the idea that left leaning academics have a major impact on the development of the law (one that is so skewed that it is in need of an artificial correction) seems odd. Several factors suggest that legal academics have little overall influence on the direction of the law.

One recent study found that judges cite academic scholarship far less than they did in the past. Some critics suggest that the reason is both the style and content of that scholarship. Others contend that law schools stopped hiring experienced lawyers and have hired inexperienced lawyers with advanced degrees, who do research in increasingly esoteric areas having no utility to practicing lawyers. Highly theoretical

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274 McGinnis, Schwartz & Tisdell, supra note 9, at 1195.
276 A number of scholars have acknowledged the influence of Professor Anthony Amsterdam’s work. See, e.g., WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 208 (2006) ("Following the example of Anthony Amsterdam in the pre-Furman era, defense attorneys have transformed our understanding of the modern system of capital punishment, identifying fundamental problems with the way it operates.").
277 Trends in Federal Judicial Citations and Law Review Articles, Roundtable Discussion: Court of Appeals for the Second Circuit, Benjamin N. Cardozo School of Law (Mar. 8, 2007), available at http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf, at 1. For example, in the 1970s, federal courts cited the Harvard Law Review 4,410 times; in the 1990s, the number of citations dropped by more than half, to 1,956; so far this decade it has only been cited 937 times. Id at 6.
278 LASSON, supra note 8, at 29-30 (quoting Yale law professor Fred Rodell) ("There are two things wrong with ... legal writing: ‘One is its style. The other is its content.’").
279 See Roundtable Discussion, supra note 277, at 1 (“Judges and commentators have noted a change in law review scholarship over the past decades. They contend that articles have become increasingly theoretical, branching outside of the traditional legal boundaries, and as a result are increasingly irrelevant for the practical work of arguing and deciding cases.”); Kennon M. Sheldon & Lawrence S. Krieger, Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory, 884 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 882, 883 (May 4, 2007) ("Law schools traditionally emphasize theoretical scholarship and the teaching of legal theory, and many hire and reward faculty primarily based on scholarly potential and production.")
scholarship may influence tenure decisions, but is not likely to assist judges.\textsuperscript{280}

Other trends have lessened the influence of academic lawyers. In \textit{Punishment and Democracy: Three Strikes and You're Out in California}, the authors lament the loss of influence of academic lawyers. According to the authors, “[P]art of the problem is that most academic lawyers are not much interested in criminal justice policy processes. Most of the problem is that there is no demand for what experts have to offer, which is information about the implications and consequences of policy choices.”\textsuperscript{282} They trace the problem to the public’s loss of confidence in government and the academy, part of the populism of the 1970s.\textsuperscript{283}

Indeed, both the left and the right have attacked experts. Postmodern theory has challenged the interpretation of texts by established experts—the elite—while elevating the individual’s interpretation of texts above the views of those experts.\textsuperscript{284} But more importantly, politicians, mostly on the right, have made

\begin{itemize}
  \item \textsuperscript{280} See \textsc{Lasson}, \textit{supra} note 8, at 30 (“Nowadays the goal of publication is much less to find answers than to avoid perishing in pursuit of promotion and tenure.”). Lasson discusses how promotion and tenure standards focus on articles published in law reviews rather than briefs, practice manuals, casebooks, or treatises. \textit{Id} at 45. See also \textsc{Sheldon} \& \textsc{Krieger}, \textit{supra} note 279, at 883 (stating that law schools overvalue theoretical scholarship).
  \item \textsuperscript{281} See Roundtable Discussion, \textit{supra} note 277, at 1 (noting that theoretical scholarship has become an “increasingly irrelevant tool for the practical work of arguing and deciding cases”).
  \item \textsuperscript{282} \textsc{Franklin E. Zimring}, \textsc{Gordon Hawkins} \& \textsc{Sam Kamin}, \textit{Punishment and Democracy: Three Strikes and You're Out in California} 13 (2001).
  \item \textsuperscript{283} \textit{Id.} at 14-15.
  \item \textsuperscript{284} For a widely embraced, interdisciplinary discussion of the core aspirations and limitations of postmodernism, see \textsc{Richard Rorty}, \textit{Contingency, Irony, and Solidarity} 27-28 (1989) (discussing how creating “one’s mind is to create one’s own language, rather than to let the length of one’s mind be set by the language other human beings have left behind”). For discussions of postmodern legal theory, see, e.g., Allan C. Hutchinson, \textit{Identity Crisis: The Politics of Interpretation}, 26 \textsc{New Eng. L. Rev.} 1173, 1184-1185 (1992) (asserting that “[p]ostmodernism is a flat rejection of universal knowledge and an outright denial of essential truths”); Dennis M. Patterson, \textit{Law’s Pragmatism: Law as Practice and Narrative}, 76 \textsc{Va. L. Rev.} 937, 937-939 (1990) (suggesting that “[t]he demise of foundationalism in twentieth century philosophical thought is largely reflected in the questions philosophers now ask. In epistemology, for example, debate has shifted from questions regarding the indubitable grounds for knowledge to an attempt to specify the conditions under which one can rightly claim to have knowledge.”).
\end{itemize}
liberal judges a central theme of their politics, dating back to Richard Nixon, and finding ample support in recent elections.

The right wing, including the Bush administration and former majority whip Tom Delay, has elevated the distrust of experts to a new level. For example, until overwhelming evidence emerged in 2006 and 2007, the right wing routinely cited a few contrarian scientists who contended that global warming was not primarily a result of human activity. The right wing’s support for intelligent design suggests a similar disdain for hard science.

As the authors of the Georgetown study point out, law professors are active in law reform organizations, like the American Bar Association and the American Law Institute. No

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285 See BookRags, America 1970-1979: Law and Justice, http://www.bookrags.com/history/america-1970s-law-and-justice/ (last visited June 4, 2007) (on file with the Mississippi Law Journal) (“In his 1968 campaign,[] Nixon told Americans that the Supreme Court had overstepped its constitutional role . . . . He pledged to appoint Supreme Court justices who would reverse the liberal decisions of the Warren Court. Nixon’s appointments did move the Supreme Court in a more conservative direction.”); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 330 (2005) (“Nixon deliberately used Supreme Court nominations as part of his law and order campaign against the Warren Court and decided that he wanted ‘young conservative nominees’ . . . .”). During his presidency, Nixon felt “persecuted by the East Coast Establishment, which loomed over American life and included the liberal intelligentsia at the universities and in think tanks; [and] the representatives of the big newspapers and network newscasts . . . . ” He believed that, “as a Republican and conservative . . . he was governing in a media and political atmosphere that was intrinsically hostile to him.” HALPERIN & HARRIS, supra note 32, at 31. One former protégé of Karl Rove stated that the Republican Party “became a populist party under President Nixon because of . . . . the resentment [toward] those elites.” Id. at 32. Vice President Spiro T. Agnew questioned “the values and legitimacy of the Establishment media generally—not only the three networks but also the elite newspapers and national newswEEKLIES that collectively set the agenda for how a president was covered.” Id.

286 See AlterNet, Nan Aron, Judicial Disappointments (Feb. 18, 2004), http://www.alternet.org/story/17879 (on file with the Mississippi Law Journal) (discussing President Bush’s “campaign to stack the courts” and his “inedible mark on the federal judiciary”); Elizabeth Drew, Power Grab, N.Y. REVIEW OF BOOKS (June 22, 2006), available at http://www.nybooks.com/articles/19092 (on file with the Mississippi Law Journal) (“[T]he Bush administration, like previous administrations, has tried to appoint judges compatible with the President’s views. But Bush has been strikingly successful at putting extreme conservatives on the bench . . . .”).


288 See id. at 182-84.

289 McGinnis, Schwartz & Tisdell, supra note 9, at 1194-95.
doubt, the ABA and ALI do influence the direction of the law. But those organizations are open to lawyers of all political stripes, and no one can seriously contend that they are captives of left leaning academics.

Whatever influence left leaning law professors may have comes about haphazardly. That is, liberal law professors are not an especially well-organized group, with a single-minded agenda. By comparison, conservative groups have shown much greater acumen and discipline in advancing conservative ideology. The Federalist Society has had far more influence than has any liberal organization. Its members influence the selection of law clerks by prominent conservative justices and judges. Its members were active behind the scenes in assisting the lawyers in Paula Jones' suit against (and setting the perjury trap for) President Clinton.

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290 The American Law Institute, About the American Law Institute, http://www.ali.org/doc/thisIsALI.pdf (last visited June 4, 2007) (on file with the Mississippi Law Journal) ("The [ALI] . . . engages in intensive examination and analysis of legal areas thought to need reform. This type of study generally culminates in a work product containing extensive recommendations or proposals for change in the law . . . . The American Law Institute-American Bar Association Committee on Continuing Professional Education (ALIABA) produces books, periodicals, and audiovisual materials covering most areas of practice and offers courses of study and programs of instruction throughout the country . . . .

291 Members of the American Law Institute are "selected on the basis of professional achievement and demonstrated interest in the improvement of the law." The American Law Institute, Membership Overview, http://www.ali.org/ (last visited June 4, 2007) (on file with the Mississippi Law Journal). The ALI has a "respected reputation for thoughtful and impartial analysis and it aims to assure that its membership reflects both the quality and the diverse character of a rapidly changing profession." Id.

292 See HALPERIN & HARRIS, supra note 32, at 22-23, 28 ("The Bush campaign and the Republican Party [in the 2004 defeat of John Kerry] simply were better organized than the Democrats . . . . Republicans had thick and frequently updated research books, clip files, video archives, and real-time tracking of new data, as well as a full appreciation of the value of such tools . . . . Republicans understood the new environment of presidential politics more keenly than did the Democrats, and were far better positioned to benefit from it."). The authors further indicate that "liberals have no system that comes close to [the Republican's] tribal cohesion and in putting as many oars in the water as possible to row in tandem." Id. at 299. See also HACKER & PIERSON, supra note 152.

293 See LAZARUS, supra note 168 and accompanying text; Bach, supra note 168 and accompanying text.

294 See JOE CONASON & GENE LYONS, THE HUNTING OF THE PRESIDENT: THE TEN YEAR CAMPAIGN TO DESTROY BILL AND HILLARY CLINTON 126-27, 261-62 (St. Martin's Press 2000) (discussing the various connections between the Jones camp and prominent members of the Federalist Society); DAVID BROCK, BLINDED BY THE RIGHT: THE
tions like the John M. Olin Foundation are generous donors to conservative causes, including law schools. Indeed, liberal foundations cannot match the wealth and, as a result, influence of conservative foundations.

The Georgetown study authors also argue that liberal law professors influence the way in which legal debates are framed. Similarly, former Boston University Dean Cass argued that liberal law professors write the case books and get to frame the issues in their classes. No doubt, law professors must make choices about which texts to select and can pick ones that lean more towards their own perspective of the law. We must also frame questions, consciously and unconsciously directing the focus of a class. But to conclude that this gives law professors meaningful power in shaping the law is contradicted by reality. No matter how left leaning, professors cannot ignore relevant modern Supreme Court case law and, other than extreme conservatives, few can deny that this is one of the most conservative Courts in modern history. Thus, even if liberal

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CONSCIENCE OF AN EX-CONSERVATIVE 331 (2002) ("The Federalist Society of right-wing lawyers . . . had been at the heart of the anti-Clinton conspiracy . . . .").

295 The John M. Olin Foundation has given large sums of money to promote conservative programs at prestigious colleges and universities. Some of the major donees include conservative law schools such as George Mason and the University of Virginia, as well as conservative groups such as the Federalist Society and The Heritage Foundation. Media Transparency, John M. Olin Foundation, Inc. Grant Recipients, http://www.mediatransparency.org/recipientsoffunder.php?funderID=7 (last visited June 5, 2007).

296 See HALPERIN & HARRIS, supra note 32, at 38-39 (stating that the institutional elements of the conservative movement have grown substantially larger over the past forty years, while the liberal group power has shrunk). According to the authors, the top strategists of the current Republican administration "encourage[] the spending of outside groups," and a "well-cultivated infrastructure . . . mean[s] that there always [are] rich people . . . willing to lend a hand." Id at 322. See also HACKER & PIERSON, supra note 152, at 9, 144 (stating that the Republican Party in particular has "grown much more . . . adept at targeting their resources to maintain partisan unity and power . . . . Today, the GOP holds a two-to-one advantage in corporate donations.").

297 McGinnis, Schwartz & Tisdell, supra note 9, at 1190, 1193-05, 1201 (stating that liberal law school faculties generate innovative legal ideas, "color . . . public expressions of expertise—such as academic 'rating' of judges," influence legal reform, and "generate new legal frameworks." Further stating that faculties "set law school curricula[,] . . . determine what should be taught in class[,]" and arrange "workshops, symposia and other engagements, which themselves generate policy discussions on campus . . . ").

298 DVD, supra note 14.

299 See A Newly Conservative Supreme Court (NPR broadcast Oct. 2, 2006), available at http://www.npr.org/templates/story/story.php?storyId=6180004 (on file with the Mis-
law professors are more inclined to argue that the Supreme Court should protect individual liberty and not property rights, they cannot ignore cases like *Lucas v. South Carolina Coastal Council* and other modern property rights cases.

For many of us in the academy, the idea of liberal law professors routinely shaping the law is fanciful. Law school changes students; but almost certainly, some students become more conservative, while others become more liberal, as they are forced to think more deeply about their ideas. That is a normal part of growing up. Law students are adults, less likely to be swayed by their professors. Furthermore, few of us believe that appeasing law professors influences Supreme Court Justices’ views. Some Justices, like Justice Scalia, seem to enjoy confounding liberals; others, like Justice Kennedy, lost their opportunity for eternal gratitude of liberals by voting in favor of President Bush in *Bush v. Gore*. At best, the idea that liberal law professors are influencing the direction

*sissippi Law Journal* (discussing the new conservative direction of the Supreme Court after the addition of Justices Samuel Alito and John Roberts). It is possible that “we will look back . . . and say the conservatives finally got the Supreme Court they’d been trying to get for twenty years.” *Id.* (quoting Tom Goldstein, teacher at Stanford and Harvard Law Schools).


303 See Vitiello, *supra* note 185, at 996; Daicoff, *supra* note 240.

304 See Liptak, *supra* note 73 (quoting Judge Richard A. Posner) (“I don’t think the liberal bias of law school faculties has much impact on the students . . . Law students are careerists, and for them law school is career preparation, not Sunday chapel.”).

305 The authors of the *Georgetown* study argue that law professors “can influence the current course of the law” through their assessment of Justices. McGinnis, Schwartz & Tisdell, *supra* note 9, at 1196-97. They state that “Justices are likely to alter their jurisprudence, at least at the margins, toward what they would expect members of the legal academy to prefer.” *Id.*


307 531 U.S. 98 (2000). Mark Tushnet’s *A Court Divided* undercuts the theory that Justices become more liberal while on the Court as a way of assuring their popularity. Tushnet suggests that Justices reflect the politics of the presidents that appointed them far more than generally recognized. *TUSHNET*, *supra* note 285, at 319-45.
of the law is flattering; but, as argued below, it may also be dangerous.

VII. SOME THOUGHTS BY WAY OF A CONCLUSION

In thirty years of teaching law, I can think of no instance in which a colleague has been sanctioned for conservative political views. Across the country, conservative faculty routinely express themselves without being denied or losing tenure. No where can I find evidence that left leaning professors have run off conservative faculty. That is, conservatives seem quite free to voice their views without fear of reprisals. Although infrequent, the same cannot be said of some conservative religious schools where they might as well post LIBERALS NEED NOT APPLY signs above their doors. And yet many conservative writers have spread a myth about the liberal bias rampant on campus and are attempting to create a new class of victims among students and prospective faculty members.

Elsewhere, where it matters, conservatives have used the same tactic to undercut the credibility of the national media. Routinely decrying the liberal media, right-wing talk show hosts, Fox News, and others have put the main stream media on the defensive. According to some commentators, the con-

308 In the closest instance of politically correct thinking, in one instance a visiting professor used an inappropriate reference to African-Americans. The administration did respond by instituting remedial measures, including some diversity training for the student body and faculty the next semester.

309 See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994). Critics of the left leaning bias of the academy urge the hiring of more conservatives; they do not contend that law faculties do not include conservatives. Nor do they cite examples where conservatives have been fired or denied tenure of promotion because of their views. See McGinnis, Schwartz & Tisdell, supra note 9.

310 In modern history, during the McCarthy era, some left-wing professors did lose their jobs because of their political views. See Lisa Petrillo, Faculty Members See Bill as 'Grave Threat' to Freedom, UNION TRIBUNE (April 20, 2005), available at http://www.signonsandiego.com/news/education/20050420-9999-7m20commies.html (on file with the Mississippi Law Journal) (stating that "500 college professors nationwide . . . lost their jobs during the McCarthy era, many of them blacklisted for years afterward"). I can think of no similar systematic attempts to purge conservatives from our campuses.

311 Some argue that complaints of liberal bias have "spooked" the media, causing editors and reporters to "lean the other way, thus ensuring that news about politics carries a conservative bias." HALPERIN & HARRIS, supra note 32, at 42. Liberals believe
certed efforts of the Republican National Committee and “new media” representatives like Matt Drudge and Rush Limbaugh led to John Kerry’s defeat in 2004.\footnote{HALPERIN & HARRIS, supra note 32, at 4, 28-29.} According to David Brock, a convert from the right-wing cause, liberal reporters work hard at achieving fairness. Conservative members of the media, seeing themselves as oppressed by liberals and in the service of a higher cause, have less regard for standards of fairness.\footnote{See BROCK, supra note 294, at 21-22 (describing the “conservative movement” as a “well-financed, tightly run political machine intensely devoted to enacting a rigid ideological orthodoxy”). Brock further states that “[i]n twelve years of right-wing journalism, my work had never been fact-checked.” Id. at 295. The conservative media, which marketed itself as “objective journalism,” justified its ideological bias and less-than-accurate reporting as a legitimate response to the perceived liberal biases of the media. Id. at 27.}

The authors of the Georgetown study do not make radical recommendations for reforming the composition of law faculties. But that has not stopped radical right-wing critics of the academy from citing the report as more proof of the prejudice against them.\footnote{See discussion supra Section II.}

I draw a few lessons from the attack on undergraduate institutions. One is that liberal professors ought to be sure that we do not stifle conservative students from expressing their views if we invite liberal students to express their views.\footnote{As I have argued elsewhere, soliciting students’ views is overrated. Instead, we ought to be forcing students to articulate rules, to understand the policies that drive those rules, and to apply the rules before we worry about students’ views of the law. See supra notes 235-43 and accompanying text.} Furthermore, we ought to be sure that we challenge superficial thinking of all of our students, not to avoid claims of bias, but because challenging our students’ views is essential to our mission.\footnote{Vitiello, supra note 185, at 997.}

A second lesson is that data are important. For example, countering claims of bias by showing the lack of harm to stu-
dents based on their political views is powerful. Empirical research was beyond the scope of this article. But a few areas of research come to mind: one is the need for a careful study of students' grades in law school, comparing credentials and political persuasion to determine whether any bias exists. As I argued above, I doubt it. More importantly, claims of bias against conservatives will pale if a thorough study of the applicant pool (and the credentials of the candidates) demonstrates that it is not filled with large numbers of highly qualified conservative candidates who are passed over because of their views. Additional research might include the political views of adjunct faculty as well.

Armed with good data, liberals ought to take the offensive. We ought to be proud of the virtues of liberalism, including its openness to ideas and the premium it places on liberty. We should not be embarrassed that liberals may be over-represented on law faculties—as has become increasingly clear:

[M]any administrators, faculty members, and students discussed the actual conditions of academic freedom on the public campuses and the procedures that were already in place to deal with intimidation, bias, and infringement of students' rights. These witnesses were most effective in demonstrating the lack of problems concerning academic freedom and the effectiveness of existing institutional procedures. Testifying that academic freedom was well protected were 24 of 28 Pennsylvania students, 24 of 29 Pennsylvania faculty members, and all 8 of the administrators, including the presidents of Pitt, Temple, and Millersville ....

James Bergquist, Co-chair, Academic Freedom Committee, American Association of University Professors (AAUP), The Saga of HR 177: Pennsylvania’s Encounter with the “Academic Bill of Rights,” http://www.aaup.org/AAUP/GR/ABOR/Resources/Saga177.htm (last visited June 5, 2007) (on file with the Mississippi Law Journal). See also Testimony of Winifred Ann Frolick, graduate student at Duquesne University, http://www.freedexchangeoncampus.org/index.php?option=com_docman&task=doc_download&gid=35&Itemid=25 (last visited June 5, 2007) (Testimony before the Pennsylvania House Committee on Student Academic Freedom in a hearing concerning H.R. 177, 2005 Leg., 177th Sess. (Pa. 2005) (“I've had plenty of professors whose political beliefs were different from my own—sometimes drastically different. At no point was I ever penalized for having beliefs differing from that of my professors .... Generally it was my 'difficult' professors, the ones who were most 'controversial' [from whom] I learned the most since they made me dissect every part of my beliefs and learn to defend them .... Political bias in my experience just isn't a problem in Pennsylvania's schools....”).

317 See supra Section IV, pages 539-43 and accompanying notes.
318 See supra Section IV, pages 537-39.
319 See supra Section IV, pages 527-29 and notes 123, 127-28.
“As a general rule, liberals are more open-minded in their pursuit of creativity, novelty, and diversity . . .” than are conservatives.\textsuperscript{321}

\textsuperscript{321} Jost, supra note 177, at 664.