Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 87 | Issue 3 Article 2

7-1-2012

# Governing Badly: Theory and Practice of Bad Ideas in College Decision Making

Michael A. Olivas
*University of Houston - Main*, molivas@central.uh.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Education Law Commons

Recommended Citation
Olivas, Michael A. (2012) "Governing Badly: Theory and Practice of Bad Ideas in College Decision Making," *Indiana Law Journal*: Vol. 87: Iss. 3, Article 2.
Available at: http://www.repository.law.indiana.edu/ilj/vol87/iss3/2

This Lecture is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

# The Jerome Hall Lecture

# Governing Badly: Theory and Practice of Bad Ideas in College Decision Making†

MICHAEL A. OLIVAS*

I. LEGACY OR ALUMNI PREFERENCE ADMISSIONS ..... 955
II. LINKING STATE COLLEGE APPROPRIATIONS TO TEST SCORES ..... 959
III. PROGRAM DISCONTINUANCE ..... 965
IV. PLAYING IMMIGRATION COP ..... 973
CONCLUSION ..... 974

There is remarkably little literature, of either a theoretical or qualitative bent, on institutional failures or the policy failures that lead to bad decision making. With over 3500 colleges and universities, observers can find many examples of bad decisions, from falsifying data, to fraud, to bad personal behavior of leaders.[1] Any organizational sector with so many actors and moving parts will inevitably reveal perfidy and human failure. Today, I begin a longer project to identify such decision making and to more systematically categorize these failures. There is, of course, much literature on maximizing decision making where *not* understanding college metaphors results in bad choices. Thus, the inverse of James March's garbage can model, Victor Baldridge's political-power model, James Millett's scholarly-community model, and the many other such theoretical bases would lead to bad decision making.[2] Ignoring Mazmanian and Sabatier's implementation

---

† Copyright © 2012 Michael A. Olivas.

* William B. Bates Distinguished Chair in Law and Director, Institute for Higher Education Law and Governance, University of Houston Law Center. This study was presented at the Indiana University Maurer School of Law in January, 2011, as the 2011 Jerome Hall Lecture. I appreciate the invitation of Dean Lauren K. Robel to give the Hall Lecture and the exceptional work of the *Indiana Law Journal* editorial staff who improved the Lecture to publishable form. University of Houston Law Library Associate Director Mon Yin Lung also provided detailed research assistance, for which I am grateful.

1. *See, e.g.*, Martha Neil, *Villanova Says Inaccurate LSAT and GPA Data Were 'Knowingly Reported' to the ABA in Prior Years*, A.B.A. J. (Feb. 4, 2011, 6:52 PM), http://www.abajournal.com/news/article/new_villanova_law_dean. There have been so many cases of colleges fraudulently inducing applicants to apply for money and deceiving them, that the Federal Trade Commission has a regular website to report such practices ("Scholarship Scams") and to "prevent fraudulent, deceptive and unfair business practices." *Scholarship Scams*, FTC.GOV, http://www.ftc.gov/bcp/edu/microsites/scholarship/index.shtml. In Virginia, a jury found a college guilty of fraud and breach of contract in the closing of a program. Mason Adams, *Nursing Students Awarded Damages*, ROANOKE TIMES, July 1, 2011, at A1.

2. *See generally* ACADEMIC GOVERNANCE: RESEARCH ON INSTITUTIONAL POLITICS AND DECISION MAKING (J. Victor Baldridge ed., 1971); JOHN D. MILLETT, THE ACADEMIC COMMUNITY: AN ESSAY ON ORGANIZATION (1962); Michael D. Cohen, James G. March & Johan P. Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1 (1972).

theory,[3] Canon and Johnson's compliance theory,[4] Cobb and Elder's agenda-building theory,[5] and other political science theories will likely lead to ineffective structural inculcation of policy decisions of any meaningful fashion. That poor policy making is not the subject of more scholarly theoretical work is likely due to scholars trying to make sense of what actually works and what theories advance our understanding of higher education organizations, rather than examining the criteria associated with failure. It is unsurprising, therefore, that so little theory focuses upon bad theory and ineffective implementation per se, even if doing so might have considerable explanatory power. Recently, Indiana Supreme Court Chief Justice Randall T. Shepard, only partially tongue-in-cheek, wrote about "Big, Dumb Trends" affecting state courts and provocative developments, such as inexorable demographic trends.[6] And David H. Freedman, in his popular text, *Wrong: Why Experts Keep Failing Us—And How to Know When Not to Trust Them*,[7] examines many dubious forms of professional expertise and even makes provocative, Letterman-like lists. (As just one example, done right, whistle-blowers are a useful irritant and corrective to the system.)[8]

There is a small applied literature on bad college decision making, one that largely consists of case studies of failure. The best example of this genre is the qualitative study by Jerrold Footlick. Footlick is a reporter who wrote *Truth and Consequences: How Colleges and Universities Meet Public Crises*,[9] a book that

---

3. DANIEL A. MAZMANIAN & PAUL A. SABATIER, IMPLEMENTATION AND PUBLIC POLICY (1983); *see also* LADISLAV CERYCH & PAUL A. SABATIER, GREAT EXPECTATIONS AND MIXED PERFORMANCE: THE IMPLEMENTATION OF EUROPEAN HIGHER EDUCATION REFORMS IN EUROPE (1986).

4. BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (2d ed. 1999).

5. ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (2d ed. 1983); Roger W. Cobb, Jennie-Keith Ross & Mark H. Ross, *Agenda Building as a Comparative Political Process*, 70 AM. POL. SCI. REV. 126 (1976).

6. Randall T. Shepard, *Four Big, Dumb Trends Affecting State Courts*, 43 IND. L. REV. 533 (2010).

7. DAVID H. FREEDMAN, WRONG: WHY EXPERTS KEEP FAILING US—AND HOW TO KNOW WHEN NOT TO TRUST THEM (2010).

8. There is substantial literature on the efficacy and promotion of whistle-blowing to reveal corruption and wrongdoing. *See, e.g.*, MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL & LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES (1992); Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1 (1985). After the 2002 enactment of Sarbanes-Oxley (SOX), Pub. L. No. 107-204, 116 Stat. 745 (2002), federal law codified whistle-blowing in an attempt to reduce corruption in corporate financial reporting. *See* Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757 (2007). There is a national office to coordinate the dozens of various applicable federal statutes across many departments and agencies. *See Office of the Whistleblower Protection Program*, U.S. DEP'T OF LABOR, http://www.whistleblowers.gov.

9. JERROLD K. FOOTLICK, TRUTH AND CONSEQUENCES: HOW COLLEGES AND UNIVERSITIES MEET PUBLIC CRISES (1997). Another genre of college media failure is the single-case study of a given disaster, such as an authoritative book about the Duke lacrosse scandal, written by several different observers. INSTITUTIONAL FAILURES: DUKE LACROSSE,

includes nine chapters devoted to higher education institutions' failures to communicate with the media about scandals or major disasters. Such case studies run from the University of Utah's embarrassing treatment of "cold fusion" and The Ohio State University's firing of truculent football coach Woody Hayes, to a court case at the University of Georgia (Jan Kemp's firing over her whistle-blowing on academic practices in an athletics support program) and the campus judicial system on trial at the University of Pennsylvania (hate speech and the "water buffalo" matter).[10] Of course, not all of the case studies—all of them interesting topics in their own right—were about failures of governance. But some were clear failures, such as the case of President James Holderman of the University of South Carolina who actually served jail time for fraud. Footlick notes allegations that Holderman, despite considerable information on his inappropriate spending and sexual habits, was not reined in by the University's trustees. A former governor accused the board of being "blinded through political drunkenness."[11] To Footlick, all the cases were examples of how badly higher education interacts with the press and other media.

Mining another vein of bad decision making, law researchers Richard Delgado and Jean Stefancic examined a series of legal decisions that they consider to be "serious moral errors," "embarrassingly inhumane decisions," and "moral abominations."[12] Such cases include now-discredited decisions in racial matters, Indian law, Chinese immigration, Japanese internment, women's suffrage, forced sterilization, and gay rights. Most are older cases, now eclipsed by different community norms, cultural times, and societal assumptions (although the gay rights case is from 1986, only four years before the article was written). They defined the cases concisely:

> The concept of "serious moral error" is, of course, impossible to define and perhaps ultimately incoherent. We use the term in three limited senses. A decision will be said to embrace serious moral error if (1) it lacks nuance to an embarrassing degree; (2) it is broadly or universally condemned by subsequent generations, somewhat akin to being overruled; (3) its assumptions, *e.g.*, about women, are roundly refuted by later experiences. Judges will always hand down decisions that will seem offensive to some. We reserve the term "serious moral error" for those shocking cases that virtually everyone later condemns.[13]

Delgado and Stefancic's intriguing take on bad judicial decision making is instructive, as their criteria are straightforward, and they examine the cases through parsing and showing alternative results. Several of their picks were nineteenth-century racial blunders, such as those affecting blacks (*Dred Scott*[14] and *Plessy v. Ferguson*[15]), Native Americans (*Johnson v. M'Intosh*, where Chief Justice

---

UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM (Howard M. Wasserman ed., 2011).

10. FOOTLICK, *supra* note 9, at ch. 2, ch. 3, ch. 8, ch. 9.

11. *Id.* at 99.

12. Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1929–30 (1991).

13. *Id*. at 1930 n.2 (internal citations omitted).

14. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

15. 163 U.S. 537 (1896).

John Marshall characterized Indians as "fierce savages, whose [chief] occupation was war"[16]), and Chinese (immigration restrictions cases such as *Chae Chan Ping v. U.S.*[17]), but they also chose to examine a twentieth-century case involving Japanese (internment cases, such as *Korematsu v. U.S* [18]). Another nineteenth-century case, *Bradwell v. Illinois*,[19] allowed Illinois to bar law graduate Myra Bradwell from practicing law because she was a woman and because the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[20] Delgado and Stefancic's twentieth-century choices included the 1927 forced-sterilization case of *Buck v. Bell*[21] and the more recent 1986 case, *Bowers v. Hardwick*, that upheld Georgia's sodomy statute,[22] which was already notorious by the time Delgado and Stefancic wrote their 1990 article. By then, retired Justice Lewis Powell already showed remorse and recanted his decision to uphold the decision.[23]

Clearly, we can learn from bad decision making, and indeed, we do on a regular basis when we evaluate actions and policies. There is a weak theoretical basis for understanding such errors: it is a soft science at best, one that is largely anecdotal. It may also be true that the actual implementation of policy clears up or rounds the corners off excesses. I regret that my stab at this issue may not advance the "theory boulder" very far up the hill, as it is a first attempt, but I do propose some theoretical considerations at the end of this project.

My own candidates for bad college policy making include cases where I believe decision makers disregarded good sense, did not consider the full range of alternatives, and made avoidable bad choices. In a footnote, Delgado and Stefancic characterize the range of mistakes to include lesser technical errors ("failing to reflect carefully on precedent") or ones of prudence (for example, "exercising bad business judgment in a contract matter").[24] Unfortunately, as the regental, administrative, or agency decisions made on a daily basis in higher education are not recorded or published in a search engine, relatively little "academic common law" accretes over time, correcting errors or overturning bad decisions. As in the case of the zen riddle about trees falling silently in the forest, the only incidents that exist do so in the public imagination through the news media or through litigation as part of a communications feedback loop.

---

16. 21 U.S. (8 Wheat.) 543, 590 (1823).

17. 130 U.S. 581 (1889).

18. 323 U.S. 214 (1944).

19. 83 U.S. (16 Wall.) 130 (1872). For an excellent review of the long struggle for women's suffrage and the fitness to practice law, see Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1364–75 (1995).

20. *Bradwell*, 83 U.S. (16 Wall.) at 141.

21. 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.").

22. 478 U.S. 186 (1986). *Bowers* was overturned by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

23. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3 (former Justice Powell admitting he "probably made a mistake" in *Bowers*).

24. Delgado & Stefancic, *supra* note 12, at 1930 n.7.

In the next Part, I propose four examples of bad policy making and speculate why each is bad. Of course, none is the policy equivalent of *Dred Scott* or *Korematsu*, but I hope readers agree that each is a bad idea by the criteria I pose. In my final Part, I ruminate on the criteria, anticipate objections, and suggest areas for future scrutiny.

## I. LEGACY OR ALUMNI PREFERENCE ADMISSIONS

Despite substantially changed demographics and conditions, many public colleges continue to employ a criterion that is unearned by the applicant, is unrelated to the applicant's merits, is highly correlated with wealth, and is almost a perfect proxy for race: legacy credit. Legacy credit, also called "alumni privilege," is a seemingly innocuous entry in the admissions laundry list employed by many colleges, but I believe that it has no proper place in public college admissions criteria.[25] My reasoning includes four interrelated points: (1) the practice is fundamentally unfair, as it does not incorporate merit or achievement, but rather advantage; (2) the practice is particularly unfair in those jurisdictions not legally allowed to practice affirmative action in the admissions practice; (3) legacy admissions might arguably be acceptable and appropriate for private independent institutions, but even in this nonpublic sector, colleges should use them cautiously; and (4) legacy practices, where they might arguably be appropriate, should reward parental attendance, but should not be extended further, either horizontally (siblings) or vertically (grandparents).

First, the practice itself is unfair. If your parents attended college, you already have been conveyed several clear advantages. It means the applicant comes from a well-educated family and, therefore, already has inherited many economic, educational, and other psycho-social benefits. Alumni parents—even in schools without formal legacy practices—often are also able to convey a benefit by personally contacting admissions officials to inform them of their child's interest in attending their alma mater. Thus, the benefit is conveyed even in a nonpreferential world. And make no mistake, it is preferential. A February 5, 1999 *Chronicle of Higher Education* story revealed that Texas A&M University (TAMU) admitted two to three thousand legacy students in 1996 to 1997, and it quoted TAMU officials as indicating that for two hundred students, alumni preference was the "deciding factor."[26] That number was more than the number of African Americans

---

25. *See* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard D. Kahlenberg ed., 2010); Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375 (2006); Steve D. Shadowen, Sozi P. Tulante & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51 (2009); Scott Jaschik, *Legacy of Bias*, INSIDE HIGHER ED (Sept. 22, 2010), http://www.insidehighered.com/news/2010/09/22/legacy.

26. Kenneth Ma, *Texas Bill Would Bar Admissions Preferences for Alumni Relatives*, CHRON. HIGHER EDUC., Feb. 5, 1999, at A38.

who enrolled as freshmen at TAMU that year.[27] Data from TAMU show that in 2000, 201 such legacy students were admitted, primarily on plus points.[28]

I am certainly not saying that all other criteria are meritorious or show the true abilities of applicants. After all, family income also clearly correlates with standardized exam performance; and access to Advanced Placement courses, honors courses, calculus, Latin, and other advantageous curricular opportunities also parallel wealth through high school location, or where one lives and the relative wealth of a neighborhood. But legacy credit simply piles on, without any achievement by the applicant. Moreover, unlike racial affirmative action, which is predominantly a proxy for redressing disadvantage, alumni or legacy admissions are an attribute of privilege and advantage.

Second, this practice is particularly unfair in states such as California or Washington, where the use of race is proscribed, or in states where a misguided Fifth Circuit court opinion restricts colleges' ability to use race as a factor in admissions, notwithstanding *Bakke*.[29] Many opponents to affirmative action have persuaded the courts and public opinion that any use of race is unfair. Where are these opponents now, with this proxy for white advantage? That TAMU would use it is particularly pernicious, given the institution's longstanding practices of excluding women and people of color. TAMU has not provided recent racial data, but my discussions with TAMU admissions officials suggest that virtually all such admits were Anglo, as would be expected.[30] The University of Michigan (UM) admissions cases revealed its use of this device as well.[31] After *Grutter v. Bollinger*,[32] TAMU refused to implement the case's holdings or to use race in admission, but left its legacy program in place until it was embarrassed into abandoning the practice.[33] To make matters worse, some schools, including TAMU, extended this privilege to Aggie brothers and sisters, not just parents. Even if public universities choose to use alumni points, they should restrict legacy admissions points to children of graduates. If, as I have argued, parental preference is bad enough, sibling privilege is even more attenuated and even poorer public policy.

Third, it is true, as some legacy supporters say, that courts have upheld the practice. I acknowledge that courts have done so—and recently. The dreadful

---

27. *Id.*

28. *Id.*

29. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The *Bakke* decision was upheld by *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003).

30. I had extensive discussions with TAMU admissions and legal staff and faculty during a series of interviews I conducted on October 14–15, 2010. In order to gain their confidence, I promised anonymity to the persons with whom I discussed these issues.

31. Gratz v. Bollinger, 539 U.S. 244 (2003) (finding alumni preference acceptable).

32. 539 U.S. 306 (2003).

33. "At Texas A&M, one of its most important traditions is what we call the Myth of Merit: that the academic environment, and especially admissions decisions, are based solely on an individual's merit. Unfortunately, A&M's use of merit as a lodestar is inconsistent and hypocritical, and must be re-evaluated." John Brittain, Michael Olivas & Rodney Ellis, *Now, Aggies Need to Take the Next Step*, HOUS. CHRON., Jan. 11, 2004, *available at* http://www.chron.com/opinion/outlook/article/Now-Aggies-need-to-take-the-next-step-1474239.php.

*Hopwood v. Texas*[34] opinion appeared to allow the practice, as did one of the UM admissions cases.[35] In the former, the *Hopwood* panel decision reads, "A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni."[36] And in a related ruling, U.S. District Judge Patrick Duggan held that with regard to UM alumni privileges, "there is no overall discriminatory impact."[37]

However, both courts are wrong, in my judgment. *Hopwood* was wrong in several respects, and the U.S. Supreme Court ultimately repudiated its holding with regard to race in *Grutter*, even if it did not affect legacy practices. Judge Duggan did not analyze the race of the UM legacy students and discounted them, even though the legacy points figured in more admissions to UM in most years than did their affirmative action practice. The best (and most cynical) insight into this phenomenon came, predictably, from the late Justice Blackmun, who said in *Bakke*, "[Colleges] have given conceded preferences up to a point to those possessed of athletic skill, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful."[38] But even if courts were correct, and this practice was allowable, I raise the question of whether, as a matter of public policy, it should be. I, of course, answer in the negative. Private schools, without any constitutional restrictions, may do so. Public schools should not.[39]

Fourth, minority admissions officials, and even minority legislators, have told me that, in time, the legacy situation will work out so that black and Chicano parents (in Texas, in this instance) can eventually pass this privilege on to their children now coming of age. I believe this eventuality is chimerical and will simply never come true. Juxtapose the numbers of white alumni parents whose children apply to college with those few minorities who are in a position to pass it on. Indeed, in Texas, the graduation data suggest that in selective public colleges, the arc of such admissions will never improve to the point where alumni privilege produces points for a substantial number of minority students.[40]

---

34. 78 F.3d 932 (5th Cir. 1996).

35. Gratz v. Bollinger, 135 F. Supp. 2d 790, 801–02 (E.D. Mich. 2001).

36. Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir. 1996).

37. 135 F. Supp. 2d at 801–02. There has been an outpouring of scholarship on these cases and issues, but among the most careful readings of the cases before the U.S. Supreme Court is the work by William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173 (2001).

38. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 404 (1978).

39. While private schools are not prohibited by the Constitution from using alumni preferences, a number, do, even in elite private elementary schools. *See, e.g.*, Jenny Anderson, *She's Warm, Easy to Talk to, and a Source of Terror for Private-School Parents*, N.Y. TIMES, Dec. 19, 2011, at A23 (story of NYC Dalton School admissions, including alumni preferences); *see also* John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993) (noting that use of alumni preferences is widespread at elite private colleges).

40. TAMU data show that all minority enrollments at the College Station campus are under their percentage in the state population, and in the high school percentages; white

In *Hopwood*, the panel judges allowed alumni privilege, which they termed the applicant's "relationship to school alumni"; they also concluded that a college could consider "whether an applicant's parents attended college" (a first-generation preference).[41] In the context of law schools, consider these two criteria: one rewards applicants fortunate enough to have parents who were allowed to attend the law school, and one rewards applicants whose parents did *not* attend college. When implemented at public schools, the former criterion excludes substantial numbers of African Americans, Mexican Americans, and Asians. At the University of Houston, which became a public institution in 1963,[42] the first black law student did not graduate until 1970,[43] and fewer than one dozen Mexican Americans graduated before 1972.[44] Even as recently as 1971, the first-year class at the University of Texas Law School (UTLS) did not include a single black student.[45] Children of early 1970s UTLS minority graduates, if born while their parents attended law school, would now be eligible for the alumni preference, but they would be in competition with the thousands of white applicants who could and would also invoke the privilege. While it is true that the latter criterion (first-generation preferences) would more likely favor minority children whose parents were denied admission or were unable to attend college, many uneducated white parents would likewise transmit this "advantage." A Texas Coordinating Board study group reviewing alternative admissions criteria determined that there were no good proxies for race.[46] Deracinating the racial criterion simply cannot work.

Of course, there is a trickle of minority alumni at states' elite public colleges, but it is just that, a trickle, not the river we should have expected based on most

---

students are overrepresented in the campus enrollment. *See* TEXAS A&M UNIVERSITY, VISION 2020 METRICS PRESENTATION: 2010 UPDATE 51 (2010) [hereinafter 2010 TAMU REPORT] (providing a graph, titled *Minority Populations and High School Percentages*, which was compiled using data from the Texas Education Agency (TEA) and Census Bureau 2009), *available at* http://www.tamu.edu/customers/oisp/reports/vision-2020-progress-2010.pdf. Additonally, in school year 2010-11, white students have declined to 1,538,409, or 31.2% of the total in the state's public K–12 institutions. *See* TEX. EDUC. AGENCY, ENROLLMENT IN TEXAS PUBLIC SCHOOLS, 2010–11, at 8 tbl.4 (2011), *available at* http://www.tea.state.tx.us/acctres/enroll_index.html.

41. *Hopwood*, 78 F.3d at 946.

42. UHLC data and enrollment history were provided by Leah R. Gross, Director of Annual Giving and Alumni Relations, Office of External Affairs, University of Houston Law Center, May 20, 2011.

43. *Id.*

44. *Id.*

45. Hopwood v. Texas, 861 F. Supp. 551, 558 (W.D. Tex. 1994). For a critical legal history of the University of Texas's racial admissions, see Thomas D. Russell, *"Keep Negroes Out of Most Classes Where There Are a Large Number of Girls": The Unseen Power of the Ku Klux Klan and Standardized Testing at The University of Texas, 1899-1999* (Univ. of Denver Legal Studies Research Paper No. 10-14), *available at* http://papers.ssrn.com/sol3/papers. cfm?abstract_id=1583606.

46. TEXAS HIGHER EDUCATION COORDINATING BOARD, REPORT ON THE EFFECTS OF THE HOPWOOD DECISION ON MINORITY APPLICATIONS, OFFERS, AND ENROLLMENTS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS 12–13 (1998), *available at* http://www.thecb.state.tx.us/reports/PDF/0016.PDF.

states' public K–12 school enrollment data.[47] The four out of 100 points TAMU awards may not seem like a big matter, but if it is not, should not the presumption be that TAMU and other public colleges do not need them? When TAMU admits nearly 11,000 students each year, and between 2000 and 3000 students have the extra four points accorded alumni legacies (out of the 100 total possible points),[48] can it be a small matter? I urge faculty at institutions with these practices to rise up and insist they be stopped.

These cases, and many others I could have analyzed, show that the distribution of scarce benefits remains a contentious issue, one that divides American society along tectonic plates of race, class, ethnicity, and gender, among other dimensions. Like immigration cases that define who we are as a polity or as a people, so too do admissions cases define us as a nation.[49] Inasmuch as higher education is the great engine of upward mobility in our society, how we constitute our student bodies is an important consideration. Unfortunately, due to historical racism and unequal educational opportunity, race remains a fugue in postsecondary education to this day. Therefore, understanding the admissions process and the practices that form its common law is an important key to understanding our country's complex racial history.

## II. LINKING STATE COLLEGE APPROPRIATIONS TO TEST SCORES

In an understandable attempt to improve the quality of public schools over the last twenty years, legislatures enacted plans to tie tax revenues to school district performance, such as conditioning state aid upon student test scores, teacher certification, or other markers. For example, Texas enacted a "career ladder"

---

47. TAMU is 80% white in a state where whites are less than 35% of the population in high school. *See supra* note 40 and accompanying text.

48. TAMU officials explained that the "Aggie Points" were four points of the 100 points required for a perfect score. I had extensive discussions with TAMU admissions and legal staff and faculty during a series of interviews I conducted on October 14–15, 2010. In order to gain their confidence, I promised anonymity to the persons with whom I discussed these issues. *See also* Ma, *supra* note 26 (acknowledging that as much as one third of the freshman class received legacy points, including 200 who were admitted by virtue of the four points).

49. MARIA PABON LOPEZ & GERARDO R. LOPEZ, PERSISTENT INEQUALITY: CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS (2010); VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA (2005); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997); Victor C. Romero, *Noncitizen Students and Immigration Policy Post-9/11*, 17 GEO. IMMIGR. L.J. 357 (2003). In a particularly troubling development, even some prestigious elementary schools have long-established legacy admissions, which in some instances can swamp the availability of admissions slots available to the public. Jenny Anderson, *Elite Schools Rethink Saving Seat for Little Sister,* N.Y. TIMES, Sept. 6, 2011, at A1 ("Of those 62 spots at Trinity, one of New York's most competitive schools, 33 were taken first by qualified siblings of Trinity students. An additional 11 went to children of alumni, who also get a leg up in the process, and one more belongs to the child of a staff member. That left 17 spaces for families with no ties to Trinity, giving those without connections a 2.4 percent shot at the prize.").

program in the 1980s, promising pay raises for certain teacher behaviors; another statute created "master teacher" certification, which was never funded and was very unpopular with teachers who both distrusted the program's requirements and were skeptical the state would back the program financing.[50] There have even been privately funded efforts, such as those instituted by the Milken Family Foundation, which award grants to teachers whose students score well on state-required exams. Of course, the charter school movement has also tied resources in some instances to student performance in the special programs.[51]

States have also linked increased funding to the performance of their colleges. For instance, performance-funding criteria award additional resources to colleges in Colorado that graduate minority students, while public institutions in other states receive additional formula aid for students who attain their degrees within five years.[52] At the margins, such formulae may stimulate colleges to improve their performance, although they can backfire if a college takes fewer at-risk students and reduces access overall by skimming off only less-needy prospects. Alternatively, institutions can "game" such statutes and regulations by exploiting loopholes, creating new casks for old behavior, or seeking exemptions. In a 1986 study,[53] for instance, I found that colleges were largely ignoring changes in immigrant student policy following a U.S. Supreme Court decision that rendered the practices illegal or obsolete.[54] Like my nephews who rake my yard badly so I will send them away, colleges can drag their feet rather than implement legal or policy mandates. Institutional foot-dragging likely sabotages many more top-down requirements than is generally acknowledged. Department chairs can outwait deans, who can outlast provosts, and so on. And not many cases, statutes, or regulations come with effective enforcement mechanisms or implementation tools.

However, sometimes mandates, especially those that control funds or have funding mechanisms, require institutional attention. In Ohio, there was an interesting and dreadful funding proposal that originated in the state's coordinating board, the Ohio Board of Regents (OBR), which assists the legislature in coordinating public college-funding formulae.[55] In 1996, the OBR proposed a plan

---

50. *See generally* Lynn M. Cornett, *Trends and Emerging Issues in Career Ladder Plans*, EDUC. LEADERSHIP, Nov. 1985, at 6, *available at* http://12.4.125.3/ASCD/pdf/journals/ed_lead/el_198511_cornett.pdf; JANE ARNOLD LINCOVE, SW. EDUC. DEV. LAB., DESIGNING TEACHER INCENTIVE PAY: LESSONS FROM TEXAS (2010), *available at* www.sedl.org/blueprint/files/lincove_blueprintforum_pres.pdf.

51. DARREL DRURY & JUSTIN BAER, THE AMERICAN PUBLIC SCHOOL TEACHER: PAST, PRESENT, AND FUTURE (2011); CHRISTOPHER A. LUBIENSKI & PETER C. WEITZEL, THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS (2010).

52. A Colorado statute enumerates the statewide expectations and goals for higher education. COLO. REV. STAT. ANN. § 23-1-104 (West 2003). Several of these were repealed soon after, but most of the provisions remain law in 2011. *See, e.g.*, 2004 Colo. Sess. Laws 723 (section 15 repeals §§ 1.5 and 2).

53. Michael A. Olivas, Plyler v. Doe*,* Toll v. Moreno*, and Postsecondary Admissions: Undocumented Adults and "Enduring Disability,"* 15 J.L. & EDUC. 19 (1986).

54. *Id.* at 23–29, 41–42, 54 nn.312–13 (reviewing Texas practices and a Texas Attorney General Opinion on undocumented college residency).

55. Laurel-Ann Dooley, *Making the Grade: Ohio Regents Tie State Law School Subsidies to Scholastic Achievements of Incoming Students*, A.B.A. J., Dec. 1996, at 36.

that was intended to tie a portion of annual state funding to the state's five public law schools to the two quantifiable measures used by those schools to admit students: their students grade point averages (GPAs) and Law School Admission Test (LSAT) scores.[56]

The OBR plan, which was to take effect in 2000, would have provided state subsidies in a two-step fashion. In the first tier, schools would get funding for all Ohio students who fell above the set point of a median GPA (3.25) and median LSAT score (sixty-fifth percentile); for the second phase, the schools would receive additional funds for each Ohio-resident student with a 3.5 GPA and eightieth percentile LSAT score ("second capped tier"). In addition, the schools would get a subsidy for ten percent of any state students, irrespective of their scores. This complex formula, with additional and reduced nonresident provisions, was predicted to equate to 124 fewer first-tier subsidies (at $4,625 per full-time resident student) at Cleveland State, as one example.[57] The Ohio State University and University of Cincinnati law schools would likely have gained under the plan, while Akron, Toledo, and Cleveland State likely would have lost resources relative to the then-existing plans.[58]

Deans of the three northern law schools, faced with the prospect of substantially reduced funding, loudly protested, as did officials at the Law School Admissions Council (LSAC), which devises and administers the LSAT. The LSAC executive director, for example, opined that the funding plan was "a terrible misuse" of the LSAT, which is intended only as an admissions tool, predicting likely success in the first year of law school.[59] "My objection is really as strong as I can make it," he said.[60]

Misuse of the LSAT in the admissions process is itself a major problem, as the test is a mild predictor of law school first-year grades, even when combined with GPA for undergraduates.[61] It has been my own experience in serving on admissions committees for many years, and after reading thousands of law school and graduate applications, that there is an institutional overreliance on standardized test scores. Particularly troubling is the common law school practice of combining LSAT scores and GPAs into a weighted-index score, and then using the test score again as a criterion in making the decision, in effect counting a score twice. Such practices simply give test scores a weight they cannot bear, especially in psychometric terms. I have written about this (too) extensively, so I spare readers here the details, but one important point is worth noting: in educational circles, we accord too much

---

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* (quoting Philip Shelton).
61. *See, e.g.*, Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41 (2006); William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001).

deference to standardized tests, imbuing them with near cult-like reverence and significance.[62]

In a subsequent ruling, the Fifth Circuit upheld the application of the *Grutter* principles but was dismissive of the Texas "Top Ten Percent Plan," which had no racial criteria but also minimized the usual test scores for rank in high school class:

> Mindful of the time frame of this case, we cannot say that under the circumstances before us UT breached its obligation to undertake a "serious, good faith consideration" before resorting to race-conscious measures; yet we speak with caution. In this dynamic environment, our conclusions should not be taken to mean that UT is immune from its obligation to recalibrate its dual systems of admissions as needed, and we cannot bless the university's race-conscious admissions program in perpetuity. Rather, much like judicial approval of a state's redistricting of voter districts, it is good only until the next census count—it is more a process than a fixed structure that we review. The University's formal and informal review processes will confront the stark fact that the Top Ten Percent Law, although soon to be restricted to 75% of the incoming class, increasingly places at risk the use of race in admissions. In 1998, those admitted under the Top Ten Percent Law accounted for 41% of the Texas residents in the freshman class, while in 2008, top ten percent students comprised 81% of enrolled Texan freshmen. This trajectory evidences a risk of eroding the necessity of using race to achieve critical mass with accents that may, if persisted in, increasingly present as an effort to meet quantitative goals drawn from the demographics of race and a defiance of the now-demanded focus upon individuals when considering race.
>
> A university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity.[63]

However, using test scores and GPAs to determine state appropriations is just a poor idea. Not only would such legislative funds drive the admissions process, rather than the schools, but it would mean that the law schools would be seduced

---

62. For other takes on the efficacy and psychometrics of the LSAT, see William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004). For opinions regarding the misuses of the LSAT, see Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993); William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1 (2000); Michael A. Olivas, Brown *and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391 (2005); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997); Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993 (1999); Michael A. Olivas, *Law School Admissions After* Grutter*: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16 (2005). Readers are advised to provide their own pillows.

63. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 246–47 (5th Cir. 2011).

into weighting these two criteria even more than they currently do. Just as the inclusion of such numbers in ranking schemes (such as *U.S. News & World Report*'s) leads the tail to wag the dog, so would Ohio public law schools choose their student bodies on numbers instead of the many criteria available to the schools, such as essays, life experiences, work records, letters of reference, and the dozens of other markers included in the typical application package.[64]

If legislators want to condition funds, I believe better public-policy ends are advanced by employing exit criteria, such as graduation rates, rather than entrance indices, although such measures occasion other problems. If higher education's value is transformative, there need to be many avenues to admission and fewer limitations upon the raw materials—students. If a legislature wishes to cap the total number of hours a student can take without graduating, or limit how long they can matriculate, or even use special funds to expand or restrict professional school spaces (such as precious spots in medical, dental, veterinary, or pharmacy schools), then thoughtful plans and financial formulae to do so are welcome. And using reasonable restrictions on nonresidents, while usually a bad idea, is at least grounded in reasonable public policies to favor state residents or domiciliaries. But the colleges need exclusive jurisdiction and discretion over the admissions process, especially in postbaccalaureate programs such as professional schools and graduate schools.

Are there better ways for states to improve their professional school funding systems? Yes, including several that are difficult to undertake. First, formulae should be reviewed for their efficiency and efficacy; this includes fully funding the fiscal programs in place. I have examined many states that have reasonable and detailed formulae for funding professional schools, even including such complex schemes as professional libraries, which are not fully funded, so that each year is catch-up. In addition, compacts, consortia, and "rental" space arrangements between certain high-prestige professional programs in one state and other states that arrange contracts or consortia should be regularly reviewed. For instance, some states lease spaces in high-demand/low-supply programs, such as optometry and pharmacy schools in other states.[65] The University of Houston, for example, holds open and available a number of places in its pharmacy and optometry schools for residents of other states that do not have such programs.[66] Baylor College of Medicine in Houston, a private institution, is paid a subsidy for each Texas resident

---

64. *See, e.g.*, Anne M. Richard, *Law Schools*, *in* THE COLLEGE ADMISSIONS OFFICER'S GUIDE 453 (Barbara Lauren ed., 2008).

65. As one example, the Western Interstate Commission for Higher Education maintains a regional Professional Student Exchange Program that arranged the consortial exchanges and enrollment policies. *See* W. INTERSTATE COMM'N FOR HIGHER EDUC., STUDENT EXCHANGE PROGRAMS: STATISTICAL REPORT: ACADEMIC YEAR 2010–11 (2011), *available at* http://www.wiche.edu/info/publications/statReport1011.pdf.

66. The Atlanta-based Southern Regional Education Board (SREB) coordinates a multi-state regional consortium, the Regional Contract Program (RCP), which is a tuition exchange program offered to students in the various health professions. *See Regional Contract Program*, S. REGIONAL EDUC. BOARD, http://home.sreb.org/acm/rcp/rcp.aspx.

medical student it enrolls;[67] in New York, Cornell's veterinary school and School for Industrial and Labor Relations (ILR) have similar arrangements as "statutory colleges," although the host institution is a private, Ivy League university.[68] An interesting court case arose at Alfred University, when several students were dismissed for disciplinary infractions, yet students in the state-sponsored ceramics engineering program were given more due process than were other students in the private college, due to New York State's contracting of their places.[69]

If it were done carefully and with input from the institutions, plans to expand or contract enrollments could be undertaken in reasonable fashion, especially if there were long term planning, not just year-to-year fluctuations. And while it is difficult to do well, programs could be closed or eliminated. There are cases that show how it can be done successfully (such as *Moore v. Board of Regents*, where the State University of New York (SUNY) Regents closed doctoral programs in English and history at SUNY-Albany),[70] and likewise, ones where the institution acted badly or ineptly, such as *Behrend v. State of Ohio*,[71] where Ohio University (OU) closed its School of Architecture, but did so in such a fitful and poor fashion that even OU students won a judgment for losses due to their wasted time. Of course, it is easier to move a graveyard than it is to close a program, but in many respects it is institutionally preferable to giving thin gruel to existing programs, causing them to go gaunt.

As a postscript on law school appropriations, the OBR conducted additional research, including testimony from Ohio law deans, and withdrew the proposal before it was to be implemented in 2000.[72] But a stake needs to be driven through the heart of extramural or legislative uses for standardized exams. In early 2007, the Commissioner of the Texas Coordinating Board, the statewide higher education

---

67. Unlike most private institutions that charge all students the same tuition, Baylor College of Medicine, while a private institution, differentiates between Texas residents and nonresidents for tuition purposes, and receives a subsidy from the state in order to provide these contract services. In 2010–11, the resident medical school tuition (exclusive of fees and other costs) was $6550; nonresidents were charged $19,650. *See Direct Educational Expenses 2010–2011*, BAYLOR C. OF MED., http://www.bcm.edu/financialaid/index.cfm?pmid=7448#texas.

68. The State of New York contracts with several of the private Cornell University programs to reconstitute them as less-expensive options for state residents. As an example, an English major or physics major in the private ("Endowed Ithaca") Arts and Sciences unit would pay $41,325 annually for tuition in 2010–11, as would a nonresident even in the contract colleges (Agriculture and Life Sciences; Human Ecology; Industrial and Labor Relations), but a New York resident in the same contract colleges would pay only $25,185 annually for tuition. *See Tuition Rates and Fees*, CORNELL UNIV., http://www.dfa.cornell.edu/treasurer/bursar/studentsparents/tuition/index.cfm#CP_JUMP_175485.

69. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

70. 378 N.E.2d 1022 (N.Y. 1978).

71. 379 N.E.2d 617 (Ohio Ct. App. 1977).

72. At an Ohio Board of Regents meeting on March 23, 2000, the Board agreed to refer to staff a study "to explore alternative funding mechanisms for law school subsidies that do not rely exclusively on student enrollments." *See* Ohio Board of Regents Meeting Minutes 3 (Mar. 23, 2000), *available at* regents.ohio.gov/board_meetings/bdmeet/apr00/min032300.pdf.

agency, suggested in all seriousness that the LSAT or the Graduate Record Examination (GRE) be used as required exit exams for graduating seniors in fields where there are no existing Educational Testing Service instruments.[73] This rush to enact measurable learning outcomes will inevitably lead to poor choices of measurement tools, and this increased reliance upon standardized testing regimes will hardly provide the assurances that its proponents seem to desire. It will likely lead to increased stratification, poor institutional behaviors, and other detrimental consequences such as has happened in the K–12 sector, where high-stakes testing has shown itself to be a chimerical search for quality and accountability.[74]

## III. PROGRAM DISCONTINUANCE

I have never heard a reasoned discussion of faculty tenure take place where the words "faculty deadwood" were not spoken. This term, like other code words, disguises more than it reveals. After thirty years in the academy, I am not unmindful to the fact that some few colleagues do not carry their weight, or have lost their effectiveness in their duties, but I would observe that these are a small and almost irreducible number, surely in contrast to those many who dedicate their lives to the professoriate and who spend (too) many hours in their classrooms, offices, labs, and libraries. Should faculty not perform their duties, there are several means of removing them, ranging from informal "pushouts" all the way to more formal tenure revocation firings or post-tenure provisions. In my own experience as a faculty member, program chair, and associate dean, I have participated in the whole range of such activities, trying to make even the most difficult cases as humane as possible.[75]

---

73. The following discussion took place during a 2008 board meeting:

> Dr. Raymund Paredes said the problem with [a single measure of excellence] is you can measure a threshold of competence, but you cannot measure what part of that the university is responsible for. He suggested that there be an effort to align the SAT and other exams, such as the GRE, LSAT, and so forth. There are enough common data elements so that learning outcomes can be measured. Not all graduates would necessarily need to take the exams, but one could take a sample size to measure learning outcomes at a given institution. Some private companies are already beginning to do that.

Texas Higher Education Coordinating Board March 6, 2008 Meeting Minutes, *in* Texas Higher Education Coordinating Board, Joint Meeting of the Academic Excellence and Research Committee and the Participation and Success Committee (Apr. 23, 2008), *available at* http://www.thecb.state.tx.us/events/committeemeetings/AER/2008_04/Agenda.pdf.

74. *See generally* R. MURRAY THOMAS, HIGH STAKES TESTING: COPING WITH COLLATERAL DAMAGE (2005).

75. I confess that even I have not always been entirely truthful or forthcoming when asked about some troubling colleagues who were under consideration elsewhere. I am particularly remorseful about one incident, where I glossed over one schnook's difficulty as a colleague and his poor work habits when I was called by a search committee at another school. In a technical sense, I did not lie, but I concede that I offered no elaborations upon his poor record as a colleague. Judging by how many times I have been burned by others' lack of candor when the situation was reversed, I will have many colleagues in purgatory

The American Association of University Professors (AAUP) has promulgated extensive guiding principles and detailed guidelines for dismissing faculty, from denying tenure to removing tenured faculty. To remove faculty with tenure, the AAUP allows removal for such extreme cause as certain medical reasons, faculty malfeasance, or moral turpitude, as well as removal not for cause but for such intervening acts as bona fide institutional financial exigencies and authentic program discontinuances. But in my view, program discontinuance (or in AAUP's infelicitous but thorough terminology, "Discontinuance of Program or Department Not Mandated by Financial Exigency")[76] is a prime example of bad governance. In bona fide financial exigency proceedings, all the books are opened and a massive institutional bankruptcy procedure is undertaken with faculty involvement and shared governance. Everyone understands that there is a widespread problem, akin to that of a bankruptcy, and realizes that sacrifices will have to be made, even if it means eliminating programs and faculty. Poorly done, you have *American Association of University Professors v. Bloomfield College*,[77] where the judge found there to be no true exigency, but only a crude plan to eliminate faculty as a transparent and cynical ploy that did not even save money. Done right in a collaborative and professional way, however, as in *Krotkoff v. Goucher College*,[78] courts will likely ratify such a practice. In *Krotkoff*, the Goucher College faculty and administrators made the difficult decision to terminate a tenured German literature faculty member (one of several) in favor of another tenured faculty member who could teach both German and French language courses. In this instance, and in other non-*Bloomfield* types of cases, judges have upheld such decisions, especially when the decisions are made with faculty participation.[79] In *Krotkoff*, the judge noted, "[t]he necessity for revising Goucher's curriculum was undisputed. A faculty committee accepted elimination of the classics department and reduction of the German section of the modern language department as reasonable responses to this need."[80]

And the entire college need not be in financial trouble to trigger cutbacks, as the AAUP program discontinuance policies indicate. In *Scheuer v. Creighton University*, the Creighton School of Pharmacy experienced financial distress due to reductions in federal health funds, while the rest of the University remained relatively healthy.[81] The court thus held that Scheuer, a tenured School of Pharmacy faculty member, could be dismissed under the theory that financial exigency need not be necessary in the entire institution for its principles to apply—as long as there was due process available and institutional bona fides. I could quibble with elements of *Scheuer*, where the trial record raised serious questions about the cycle and ebb and flow of funds. I could more easily live with a result that in a comprehensive institution the entire enterprise need not be in a death rattle

---

with me when we all die.

76. AM. ASSOC. OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE (2009), *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm#b7.

77. 322 A.2d 846 (N.J. Super. Ct. Ch. Div. 1974).

78. 585 F.2d 675 (4th Cir. 1978).

79. *Id.* at 682.

80. *Id.*

81. 260 N.W.2d 595 (Neb. 1977).

before exigency or program discontinuance procedures are employed. However, I would require that the faculty be involved in the decision making, that it be *bona fide*, and the books be open to genuine and searching examination. I understand and appreciate that Professor Matthew Finkin[82] and the AAUP would require more, and that the judges were circular in their reasoning:

> The Nebraska Supreme Court's reasoning is contrary to the purpose as well as the history of academic tenure. Inasmuch as every institution has centers of "loss" as well as centers of "profit," the Nebraska court would give essentially unfettered discretion to university administrators to select tenured faculty from among loss centers and terminate them on grounds of a "financial exigency," while nevertheless continuing to operate the deficit-incurring program in a financially sound institution. Given the uncertainties of external financial support, enrollment, and programmatic popularity, relatively few faculty could rest secure in the knowledge that their currently self-sustaining schools or programs will always continue to be self-sustaining. Thus, the potential chilling effect on the exercise of academic freedom occasioned by the court's approach is significant.[83]

I also confess that *Browzin v. Catholic University of America*[84] flabbergasts me each time I teach it in my Higher Education Law class. *Browzin*, along with *Spuler v. Pickar*[85]—the University of Houston case I will consider next—are the nadir of program discontinuance and financial reasons for dismissing or not tenuring faculty. In my own value system, I consider these two cases to be the *Dred Scott* equivalents of faculty dismissals. At Catholic University of America's (CUA) large School of Engineering and Architecture, Professor Browzin began teaching in the fields of structures, soil mechanics, and hydrology in 1962. I am advised by engineering professor friends that these are traditional bread-and-butter courses in many civil or mechanical engineering departments. After the traditional probationary period, by the 1969–70 academic year, Browzin had received tenure, but was notified that his appointment would not be renewed after 1970 due to a financial retrenchment and reorganization in the School of Engineering and Architecture. He sued for reinstatement.

At the time of this case, the AAUP principles did not contain a separate provision for program discontinuance, such as became necessary after *Browzin*. Unfortunately for Professor Browzin, the AAUP program discontinuance provisions in force in 1970 were incorporated into the financial exigency regulation, which provided enough wiggle room that Judge Skelly Wright held for CUA. The regulation then in force read:

---

82. *See* Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119 (1980). I thank Professor Finkin for reviewing this section. We do not agree entirely, but it is a much better draft for his assistance.

83. *Id.* at 1141.

84. 527 F.2d 843 (D.C. Cir. 1975).

85. No. H-88-1243, 1990 WL 357791 (S.D. Tex. Mar. 15, 1990), *aff'd*, 958 F.2d 103 (5th Cir. 1992).

> Where termination of appointment is based upon financial exigency, or bona fide discontinuance of a program or department of instruction, Regulation 5 [dealing with dismissals for cause] will not apply . . . . In every case of financial exigency or discontinuance of a program or department of instruction, the faculty member concerned will be given notice as soon as possible, and never less than 12 months' notice, or in lieu thereof he will be given severance salary for 12 months. Before terminating an appointment because of the abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions. If an appointment is terminated before the end of the period of appointment, because of financial exigency, or because of the discontinuance of a program of instruction, the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it.[86]

Given this conflation of "financial exigency" and "abandonment of a program of instruction" (program discontinuance), it was held that CUA's only obligation was to consider Browzin should a "suitable position" become available within two years. In part, this situation arose because Browzin's lawyer stipulated at an earlier point in trial that he was to be terminated due to "program discontinuance," even though there was no actual "program" from which he was being "discontinued." There was no degree, no major, and no minor in hydrology; his course load was a regular load of courses, none of which were revised or taken off the books.

Here is where the judge was snookered. Judge Wright took CUA at its word that it undertook a "detailed review" and that no suitable position was available. Yet within eighteen months of Browzin's ousting, the Department of Civil Engineering hired another faculty member who went on to teach two courses in water resources (Hydrology and Hydraulics) and a new course in Planning. Planning! Remember, Browzin had taught Structures, Soil Mechanics, and Hydrology. When he offered to take on another course in Structure Design, Browzin was told that other faculty members were teaching it, including one who had joined the engineering faculty in 1960, two years before Browzin. Judge Wright notes that the emphasis on planning would likely attract new students and additional external funds for research. He concluded, "Clearly, [this planning emphasis] was a program significantly different from what Browzin had been teaching . . . ."[87] He also noted some vague admonitions from an accrediting report that referred to the need for planning.[88] Let us review what happened in this sleight of hand: the new guy would teach Browzin's courses, plus a course on planning. A single course had become a "program," one of a professor's four-course teaching load. Browzin was hired in 1962, taught basic courses as he was required, received tenure due to his overall teaching and scholarship record, and was dismissed seven years later as an anachronism.

---

86. 1968 Recommended Institutional Regulations on Academic Freedom and Tenure, 54 AAUP BULL. 448, 449 (1968) (cited in *Browzin*, 527 F.2d at 845).

87. *Browzin*, 527 F.2d at 851.

88. *Id.* at 848–50.

The could-have/should-have list here is a book chapter by itself. How could a person teaching basic courses for which he had been recently hired become obsolete? How is the need for one new course the undertaking of an entire new program? How could the new person who was to teach three of Browzin's four courses not be a replacement, triggering the "suitable position" requirement? How could Browzin become "obsolete" within seven years of being hired? Why didn't CUA just make the next hire one that included planning as a field, if it is one or was one at that time? If it had been a discrete field of study, why not send Browzin to the University of Maryland, Howard, George Mason, George Washington, or Georgetown to sit in and audit a planning course so that he could teach it himself? How can one course or even a new emphasis trigger such a reaction? Where is the searching and detailed review that coughs up one-quarter of a recently tenured professor's load? How could a trial judge and a distinguished appellate judge get this so wrong? How could the CUA faculty be so asleep at the switch?

Surely the institution begins with the presumption that it is acting in good faith and the opportunity to show that it was searching and thorough in its program review. Doing so virtually assures a college of meeting AAUP standards and passing judicial scrutiny, should there be a suit. But buried in this sad decision is the evidence that a person's career at CUA ended because of a one-course revision. After the decision, the AAUP, which entered an amicus brief in this case on behalf of Professor Browzin, rewrote its policy to give additional procedural safeguards to the program discontinuance process and to separate it from its parent—that is, financial exigency.[89] That AAUP brief, written by then-AAUP counsel, Matthew Finkin (who went on to a distinguished career as a labor lawyer and law professor), does not reveal that he ended up serving as counsel for Professor Browzin, by leave of the court, as his trial counsel no longer represented him at the appellate stages.[90] By the time the case ripened, it had been stipulated that a genuine exigency occurred, and the trial court accepted these representations by the university; the circuit court also accepted them. In fact, the AAUP brief not only made clear that these representations were unclear, but that even if they had been clear and openly determined, Catholic University made no good faith effort to relocate Browzin elsewhere within the university and improperly placed the burden of proof upon him to prove they had not done so.[91] Boxed in by this strategy, he was released by

---

89. Discussion and correspondence with Matthew Finkin, Director, Program in Comparative Labor and Employment Law & Policy, University of Illinois College of Law (June 26, 2011); *see also The Association and the Courts*, ACADEME, May–June 1989, at 31, 32.

90. Discussion and correspondence with Matthew Finkin, Director, Program in Comparative Labor and Employment Law & Policy, University of Illinois College of Law (June 26, 2011).

91. In *Browzin*, the D.C. Circuit stated the following:

> Before trial the parties stipulated that Dr. Browzin was a highly qualified professor in the field of civil engineering, that he was a tenured professor, and that Catholic University was faced with a *bona fide* financial exigency at the time the termination occurred. They also stipulated that the standards which were to govern the case were to be found in the 1968 Recommended Institutional Regulations on Academic Freedom and Tenure, propounded by the

Catholic University and never taught again. Browzin joined the Site Safety Branch of the United States Nuclear Regulatory Commission (NRC), Washington, D.C., as a researcher, and he served as a widely published scientist with the United States NRC in the Office of Nuclear Regulatory Research, Division of Engineering Technology. He died in September 1989 in Montgomery, Maryland.[92]

Another similar example of an institution behaving poorly is my own University of Houston (UH), as exemplified by *Spuler v. Pickar*,[93] a 1992 case where UH denied tenure to German Department faculty member Richard Spuler because of "financial circumstances" in the department.[94] The UH German Department, like many, was suffering stagnant enrollments; in contrast, the Spanish Department, which was growing and replacing vacancies in predominantly Latino Houston. This enrollment situation was given as the reason for not granting tenure to Spuler.[95] But UH had hired Spuler only five years earlier, and, in any event, cutbacks in the department's funds were entirely administrative. That is, administrators in the college determined which program areas would receive more funding and which would receive less funding. My own discussions with UH senior and college officials at the time revealed that Professor Spuler earned approximately $29,000 for nine months in a college with a budget greater than $60 million and at a university with a budget greater than $200 million in 1992. In addition, a more-senior tenured faculty member left at the same time, but the department chair determined that the replacement priority was for a German literature professor:

> [T]wo months after Spuler departed, the University advertised nationally for a German professor. The University explained that Spuler was a linguistics expert and taught elementary courses, while the professor who resigned was a professor of German literature. Although the basic language acquisition courses could be taught by any German Department faculty member, specialized knowledge—which Spuler lacked—was needed to teach the literature classes.[96]

The Fifth Circuit accepted this "tradeoff." Following a jury trial in federal court, the jury found in favor of Spuler, concluding that he was deprived of substantive due process and that the defendants, in their individual capacities, breached his contractual rights:

---

> American Association of University Professors (AAUP). Tr. at 6. It was, in effect, a stipulation that the 1968 Regulations had been adopted as part of the contract between Browzin and the University, an adoption entirely consistent with the Statutes of the University and the University's previous responses to AAUP actions.

527 F.2d at 845 (emphasis in original).

92. His obituary appeared in *The Baltimore Sun*. Obituary Search Results, BALTIMORE SUN, http://www.legacy.com/obituaries/baltimoresun/ssdi-search.aspx?daterange=99999&lastname=Browzin&countryid=1&stateid=24&affiliateid=all.

93. 958 F.2d 103 (5th Cir. 1992).

94. *Id.* at 107–08.

95. *Id.* at 107.

96. *Id.* at 105.

> Plaintiff responds that he was hired in a tenure tract [sic] position; his qualifications met and even exceeded the requirements for eligibility for tenure; and he was denied tenure eligibility despite his qualifications based on financial limitations of the institution at the time. Plaintiff urges that he had a reasonable expectation based on the representations in the faculty handbook that he would be genuinely considered for tenure. Instead, despite the positive recommendations of the faculty tenure committee, plaintiff was barred from tenure because of the negative recommendations of his department chairperson and the dean of the college due to financial considerations. Consequently, the tenure review was a sham, in violation of his reasonable expectation of tenured employment.[97]

The magistrate judge found him to have been "eminently qualified to be a tenured faculty member at the University of Houston by virtue of his academic achievements, teaching ability, and service to the university community" but held that employment at the University of Houston was at-will and based solely on probationary year-to-year contract appointments.

Crucially, the judge held that the UH Handbook language

> does not guarantee the promotion to tenured status following a probationary period; it merely describes the minimum conditions for consideration for that position. Moreover, there is no evidence that the University violated the time limitations for the probationary period and the mandatory review for tenure time set forth in the faculty handbook. (In other words, e.g., [sic] the probationary time limitations include 'year six of the seven-year probationary period.') Similarly, plaintiff received timely notice of nonrenewal of his contract as required by the faculty handbook. While this Court concludes that plaintiff met the requirements for promotion and tenure listed in the faculty handbook, as noted, tenure is not automatic. The employee remains an at[-]will employee and the University is entitled to exercise complete discretion to deny tenure despite plaintiff's compliance with the requirements of the faculty handbook.[98]

Magistrate Brown directed a verdict that overturned the jury verdict:

> [E]ven assuming that these standards and criteria for promotion and tenure constituted a basis for a reasonable expectation for tenure for a qualifying employee, the denial of tenure based on financial limitations and declining enrollment in the Department of German was a reasonable decision. Plaintiff has failed to demonstrate that tenure was denied on any other basis apart from those reasons. The budget restrictions at the time demonstrated a genuine need to limit the budget of the German Department for both the short and long-term. The decision to terminate the only Assistant Professor in the department

---

97. Spuler v. Pickar, CIV. A. No. H-88-1243, 1990 WL 357791, at *1 (S.D. Tex. Mar. 15, 1990).

98. *Id.* at *2 (citations omitted).

> was a reasonable decision. The Chairperson and Dean made this hard decision with as much courtesy and consideration as possible under the circumstances.[99]

The Fifth Circuit agreed with the judgment notwithstanding the verdict and denied Spuler's appeal; after a request for an en banc hearing was denied in May 1992, he ran out of steam and money and accepted his lawyer's advice not to appeal further.[100] For several years, until 1999, he taught German and directed German cultural programs at the Houston Goethe Center, a German language and cultural center, which closed several years later; in 2011, he is a senior lecturer in German at Rice University.

Spuler embodies shades of Browzin, who "lacked" the expertise to teach Planning.[101] Spuler was hired five years earlier and taught the subject matter and course load UH needed him to teach. Yet when UH made its financial decision, Spuler was not redeployed to teach literature simply because he had not taught it at UH; he had taught several literature courses earlier. UH did not even exhibit CUA's effort to gin up a program discontinuance. At Goucher College, Krotkoff wanted to be redeployed to a vacancy in economics, an area where she was certainly not qualified to teach, while evidence shows that Spuler was clearly qualified and experienced to teach literature, and taught the language classes that his department had assigned him teach.

But UH committed an even graver sin by inviting Spuler to apply for tenure in his fifth year and thus enabling his portfolio to advance to the university-wide promotion and tenure committee. While it is true that UH standards do not require untenured faculty to be given the reasons for the denial of tenure, there must be a point at which the college is estopped from asserting financial reasons, especially when no institutional determinations of financial exigency or program discontinuance are in evidence. As bad as was CUA's revocation of Browzin's tenured status after a Potemkin program review, UH's dismissal of Spuler is in some respects morally worse, because UH led Spuler to believe that his tenure case would turn on his merits. One died by fire, another by ice, yet both suffered not for cause, but for enrollment fluctuations and poor administrative planning. In large and comprehensive multiversities, no single faculty member should be reconstituted as a program or a casualty of short-term enrollment fluctuations. If there were such fluctuations, institutions should not hire faculty only to dismiss them within the decade. Universities are built upon a series of cross subsidizations, and budgets should not be balanced upon the backs of such faculty. And, at the least, decisions to terminate persons should be made before they enter the tenure chute, rather than tantalizing them by placing the fruit so close to their fingers only to remove it.

---

99. *Id.*

100. *Spuler*, 958 F.2d 103, *reh'g denied*, No. 90-2408, 1992 U.S. App. LEXIS 11286 (5th Cir. May 15, 1992); discussions with David T. Lopez and Richard Spuler (Apr. 2010) (on file with author).

101. *Spuler*, 958 F.2d at 105.

## IV. PLAYING IMMIGRATION COP

Imagine that a United States embassy is overrun and its employees are taken hostage. Further, all of this takes place on television, and our government is unsuccessful in rescuing embassy employees. Things are bad and at a diplomatic and military standoff. Feelings run high against this country. As it turns out, many students from this country are international students at U.S. colleges and universities. At a public university in my home state, New Mexico, state college trustees passed the following resolution:

> Any student whose home government holds or permits the holding of U.S. citizens hostage will be denied subsequent enrollment to New Mexico State University until the hostages are released unharmed. The effective date of this motion is July 15, 1980.[102]

Of course, I couldn't make this kind of stuff up, for I cannot, even on a bad day, imagine how a group of smart people, savvy enough to be appointed to an important board, can act so badly. To be sure, when national security is threatened at home or abroad, as in this case thirty-plus years ago, even reasonable people have vengeful fantasies or think the worst of all people who originated from that country. If truth is war's first casualty, surely reasoned judgment deriving from nativist instincts is its second. Moreover, in the singular case of Iran, it was widely remembered that Iranian students in Iran and in the United States were openly opposed to the Shah's regime, and many paid with their lives for this opposition. When the Shah's regime was overthrown, and the embassy eventually occupied Iran, it was students who led the action.[103] Thus, anger at Iranian students was not surprising, even if misplaced.

The United States government responded by requiring all nonimmigrant Iranian students (predominantly those on F-1, or student, visas) to report to the Immigration and Naturalization Service (INS) or be deported. In *Narenji v. Civiletti*, this administrative roundup was upheld as lawful.[104] As it turned out, very few of the students were out of status. But immigration is an exclusive concern of the federal government, and states, including state colleges, may not enact their own immigration or diplomatic policies, under the doctrine of preemption. Thus, the court saw through the New Mexico State University regent policy, guised in fiscal (the Iranian students at the college would renege on their tuition and fee bills) and safety concerns (they were worried that physical harm might befall these students on campus). The judge properly rejected these transparent claims and invalidated the trustee policy.

Following the heinous September 11, 2001 attacks in the United States, there has been a rush to single out international students, as several of the terrorists had

---

102. Tayyari v. N.M. State Univ., 495 F. Supp. 1365, 1368 (D.N.M. 1980).

103. *See, e.g.*, Mehdi Bozorgmehr & Georges Sabagh, *High Status Immigrants: A Statistical Profile of Iranians in the United States*, 21 IRANIAN STUD., no. 3–4, 1988 at 5, 9–13 (noting that in 1974–75, Iranians grew to be the largest number of international students in the United States).

104. Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979).

been students in U.S. flight schools or in the country on student visas.[105] For example, after several years of allowing undocumented college students to establish in-state residency in the City University of New York (CUNY), this policy was overturned following the attacks.[106] Just the summer before, Texas enacted legislation that allowed the undocumented to attend college as residents, while California and other states did so as well, after 9/11.[107] Although many colleges turned over international student files to the FBI and other federal agencies, a number of colleges refused to do so without warrants or subpoenas. The USA PATRIOT Act, the omnibus legislation governing immigration and terrorism, includes a number of provisions that turned up the heat on colleges enrolling international students and on the students themselves. Many students withdrew and returned to their home countries until things were restored to some semblance of order.[108]

Just as in earlier times, when the British Empire would not let the laws of Tobago rule their interests at sea, so the U.S. government could not allow New Mexico State University to have its own foreign policy. In a certain sense, given the strong feeling occasioned by Iran in 1980 and the Taliban and Al Qaeda following September 11, 2001, what is remarkable is not how many colleges behaved so badly, but how few did so.

## CONCLUSION

Paraphrasing Delgado and Stefancic's principles—"serious moral error" includes cases that "lack[] nuance to an embarrassing degree," are "broadly or universally condemned by subsequent generations," and whose "assumptions . . . are roundly refuted by later experiences."[109] They consider the matters they discussed as "monstrous, anomalous—a moral abomination."[110] The examples I discussed are not necessarily of this high order and did not happen long ago, or long enough ago to have gained the kind of disapproval or infamy their cases had gained. Indeed, colleges won the financial exigency and program discontinuance cases. I chose these cases because, in my view, the colleges or decision makers

---

105. *See, e.g.*, Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 457–63 (2004); Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 99 (2008).

106. *See* S.B. 7784, 225th Leg., 2001 Reg. Sess. (N.Y. 2002).

107. Kevin J. Dougherty, H. Kenny Nienhusser & Blanca E. Vega, *Undocumented Immigrants and State Higher Education Policy: The Politics of In-State Tuition Eligibility in Texas and Arizona*, 34 REV. HIGH. EDUC. 123, 124 (2010); Stella M. Flores, *The First State Dream Act: In-State Resident Tuition and Immigration in Texas*, 32 EDUC. EVALUATION & POL'Y ANALYSIS 435, 436 (2010); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1764 (2009).

108. *See generally* Michael A. Olivas, *What the "War on Terror" Has Meant for U.S. Colleges and Universities*, *in* DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE 249, 255–58 (Ronald G. Ehrenberg & Charlotte V. Kuh eds., 2009).

109. Delgado & Stefancic, *supra* note 12, at 1929–30 & 1930 n.2 (citations omitted).

110. *Id.* at 1930.

(including faculty who played a role in these matters) all acted badly, even if legally. By the criteria I am developing here, it does not have to be illegal to be bad decision making or poor moral choices.

I would argue that each of the cases I examine is a confluence of bad judgment, poor research, and failure to discern the larger harm to the higher education polity. The Ohio Board of Regents funding formula was so badly developed that it was never actually put into place; relatively few public schools employ alumni/legacy admissions because they are so unfair and because admissions criteria are under more widespread scrutiny; most colleges weather cash flow or enrollment fluctuations better than did Catholic University or the University of Houston in the *Browzin* or *Spuler* instances; and most colleges do not want to play like they are the immigration police.

I believe that there are many such cases out in the ether, and I urge scholars and whistle-blowers to track, publicize, and study them. While there are promising theoretical approaches to understanding organizational failure,[111] there is much more work to be done in this regard. In this Article, I tracked several possible models that could be used to implement policies and suggested that variations on them might be useful to understand poor policy making—the failure to implement, to communicate, and so on. In addition, I employed a quasi-legal standard of abject moral failure, as suggested by legal scholars Delgado and Stefancic, to explain legal decisions that had become widely known as embarrassing over time.[112] This comparison, while instructive, is not fully theoretical and in some ways not a good parallel, given the basic differences between judicial decision making and higher education policy making.

Kathryn Schulz, in her book *Being Wrong: Adventures in the Margin of Error*, makes the best case for using errors as correctives to the system, although in her view, it is essential that actions be regularly examined and corrected in a cybernetic fashion. She notes:

> In our collective imagination, error is associated not just with shame and stupidity but also with ignorance, indolence, psychopathology, and moral degeneracy. This set of associations was nicely summed up by the Italian cognitive scientist Massimo Piattelli-Palmarini, who noted that we err because of (among other things) "inattention, distraction, lack of interest, poor preparation, genuine stupidity, timidity, braggadocio, emotional imbalance, . . . ideological, racial, social, or chauvinistic prejudices, as well as aggressive or prevaricatory instincts." In this rather despairing view—and it is the common one—

---

111. After my Indiana Lecture and during the revising process for publication, several very interesting and provocative pieces came to my attention. *See* MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011); HOWARD WAINER, UNEDUCATED GUESSES: USING EVIDENCE TO UNCOVER MISGUIDED EDUCATION POLICIES (2011); Thomas Bartlett, *Social Scientists Explore Ways to Save Us from Our Own Decisions,* CHRON. HIGHER EDUC., June 12, 2011, *available at* http://chronicle.com/article/Why-We-Make-Bad-Decisions-and/127882.

112. Delgado & Stefancic, *supra* note 12, at 1930 n.2 ("We reserve the term 'serious moral error' for those shocking cases that virtually everyone later condemns.").

> our errors are evidence of our gravest social, intellectual, and moral failings.
>
> Of all the things we are wrong about, this idea of error might well top the list. It is our meta-mistake: we are wrong about what it means to be wrong. Far from being a sign of intellectual inferiority, the capacity to err is crucial to human cognition. Far from being a moral flaw, it is inextricable from some of our most humane and honorable qualities: empathy, optimism, imagination, conviction, and courage. And far from being a mark of indifference or intolerance, wrongness is a vital part of how we learn and . . . . amend our views about the world.
>
> Given this centrality to our intellectual and emotional development, error shouldn't be an embarrassment, [sic] and cannot be an aberration. . . . As Benjamin Franklin observed in the quote that heads this book, wrongness is a window into normal human nature—into our imaginative minds, our boundless faculties, our extravagant souls. This book is staked on the soundness of that observation: that however disorienting, difficult, or humbling our mistakes might be, it is ultimately wrongness, not rightness, that can teach us who we are.[113]

In her vexing book, *Stupidity*, Avital Ronell sets out a general theory of why people act stupidly. Because I am not fully fluent in or conversant with the foreign language of postmodern, I struggled more than should be necessary to understand this provocative and densely packed book. In trying to explain the work of the early twentieth-century German philosopher Robert Musil, Ronell explains:

> What Musil has marked with great clarity and necessity is the general infiltration of stupidity, the need for a double valuation (there is, without fail, good and bad, slow- and fast-tracked stupidity), the way it mimes values such as talent, progress, hope—indeed, the way stupidity has pervaded our highest values—and his example for this actuality is a Nietzschean one. He shows how the incontestable virtue of loyalty easily succumbs to the stupidity of the we, gathering the They into an obedience school on collective parade. Finally the we cannot be relegated simply to the other shore but falls on me in my own singularity, at least occasionally, with determined regularity. I am hit by the They of which I am at times a part. I am not spared my own stupidity, that of the They, when I join the we. Stupidity in the end is linked to the finity of knowing. In order to name the limit of knowing, Musil resorts to the mark of the we: "Occasionally we are all stupid". Because our "knowledge and ability are incomplete, we are forced in every field to judge prematurely". While this observation offers the mood and cadence of a "happy ending" for Musil's troubling topic—we are all in this together, we are forced by the very nature of finitude: stupidity is what we share, the share of existence in which we take part—it is built on the abyss of judgment. Stupidity, which, Musil writes, falls due to each of us *occasionally*, rests on the wobbly scale of a premature judgment. But is it not possible that judgment is

113. KATHRYN SCHULZ, BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR 5–6 (2010).

> constitutively premature, always ahead of the justice it might have rendered?[114]

*Occasionally, we are all stupid.* I certainly have felt this way, more often than I would like to admit. Once, when asked by a *Chronicle of Higher Education* writer what I thought of legacies, I said something smart-assed like demography would cure those as well. As if. Just as actors cannot tell in advance that the movie they are filming will turn out to be just dreadful, so we all make decisions we later come to regret, usually through employing better data, better strategic reasoning, better collegial means, and higher moral principles, grounded in better and more transparent governance. Legal scholar Jules Lobel asks even more fundamental questions, such as how one knows victory, especially in longstanding civil rights struggles. In *Success Without Victory*, he writes:

> Those who view justice not as a mere norm but as a turbulent river, "a fighting challenge, a restless drive," are continually operating on the fault line between current reality and human aspiration, between what is and what ought to be. Success in navigating the river requires maintaining the tension between reality and aspiration, between what is and what ought to be, between our reach and our grasp. It requires not getting stuck on either bank of the river, neither the muddy bank of reality nor the high cliffs of our dreams.
>
> I am still not sure whether our efforts were successes or failures. They were successful if they inspire others to struggle, to resist injustice together, and to eschew the easier, more "successful" path. They will be successful if they help others, as they helped me, to understand the meaning of our lives as more than winning or losing.[115]

Even so, this preliminary inquiry revealed some reasons why good people do bad things as college trustees or policy makers. I hope that this early attempt will attract others to the field and that we will better examine, catalog, and understand bad governance. Doing so will surely enhance our ability to understand good governance and higher education policy making. Most of us learn from our mistakes, and professional decision makers are no different. I admire the ambition of Peter Hall, whose excellent work *Great Planning Disasters* helped me think through this project. In his 1980 work, he noted, "I do not want to seem to promise more than this book can deliver. There will be no grand overarching model which will explain all previous disasters and guarantee how to avoid new ones. The object is to begin an explanation, not to end one."[116] I hereby adopt this modest viewpoint and hope to begin an explanation.

---

114. AVITAL RONELL, STUPIDITY 93 (2002) (emphasis in original) (citations omitted) (quoting ROBERT MUSIL, *On Stupidity*, *in* PRECISION AND SOUL: ESSAYS AND ADDRESSES 268, 286 (Burton Pike & David S. Luft eds. & trans., The Univ. Chi. Press 1990) (1978)).

115. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 9 (2003) (citations omitted).

116. PETER HALL, GREAT PLANNING DISASTERS 12 (1980).