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# GOVERNMENT INTERFERENCE WITH LAW SCHOOL CLINICS AND ACCESS TO JUSTICE: WHEN IS THERE A LEGAL REMEDY?

*Peter A. Joy*<sup>†</sup>

## INTRODUCTION

Government interference with law school clinics resulting in the denial of low-income people's access to justice is not new. Recent events remind us that it is unlikely to fade away. Just last year, a law school clinic representing clients against the interests of a large poultry company spurred some legislators to introduce a budget amendment to withhold funds from the University of Maryland unless its law school disclosed information about its clients and how clinical programs at other law schools operate.<sup>1</sup> In Louisiana, the state legislature considered a bill to bar law school clinics that receive public funds, including private universities such as Tulane, from

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<sup>1</sup> The Maryland Senate approved proposed budget amendments to Senate Bill 140 that would have withheld up to \$750,000 of the appropriations to the University System Maryland until the University of Maryland School of Law submitted a report on individual cases litigated by its Environmental Law Clinic, including information on the Clinic's clients and expenditures, and the University System submitted a second report on law school clinics in other states, describing the criteria used to select cases and funding sources for the clinical programs. S.B. 140, 428th Gen. Assemb., Reg. Sess. (Md. 2011), <http://mlis.state.md.us/2011rs2010rs/bills/sb/sb0140fsb0140t.pdf>; see also Leslie A. Gordon, *Taking Their Pains to the Clinic: Legislators Punish Law School Clinics for Suing Community Businesses*, 96 A.B.A.J. 20 (2010) (describing the pressure and opposition law school clinics face when representing clients who are unpopular with legislatures, alumni, and local businessmen); Karen Sloan, *Independence of Maryland Law School Clinic Is Challenged by Lawmakers*, NAT'L L.J., Mar. 29, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447072923> (describing the attempt by Maryland legislature to require law school clinic to turn over confidential client information); David F. Fahrenthold, *Legislature Eyes U-Md. Law Clinic After Suit Against Chicken Farm*, WASH. POST., Mar. 28, 2010, at C4 (describing Maryland legislative efforts to withhold funding for the University of Maryland's environmental law clinic); Ian Urbina, *School Law Clinics Face Backlash*, N.Y. TIMES, Apr. 4, 2010, at A12 (describing the Maryland legislature's attempt to cut law clinic funding if client information is not provided).

suing companies or government entities unless the legislature specifically approved each lawsuit.<sup>2</sup>

In both instances, the state legislators sought to restrict how the law schools could educate their students, and, in Louisiana, whether certain clients and legal claims could have legal representation by law school clinics. These proposals prompted many, including the American Bar Association (ABA),<sup>3</sup> over 450 law professors,<sup>4</sup> and fifty deans,<sup>5</sup> to object to one or both of the proposals.<sup>6</sup> The president of the ABA criticized the proposed Maryland legislation as “an intrusion on the attorney-client relationship,”<sup>7</sup> and the Louisiana legislation as “[d]epriving the poorest citizens of these vital [legal] services.”<sup>8</sup>

Both legislative efforts failed,<sup>9</sup> but would there have been legal recourse if either had passed? One may think that such governmental intrusions into educational programs trigger academic freedom claims and possibly other legal rights. But when it comes to academic freedom, the individual faculty member tends to conflate the norm of academic freedom on university campuses regulating relationships between the individual faculty member and administrators with legal rights. This may lead the typical professor to believe that the First

<sup>2</sup> Louisiana State Senator Robert Adley, R-Benton, introduced S.B. 549, which would have denied \$45 million in yearly funds to Tulane University unless Tulane curtailed the work of its Environmental Law Clinic. S.B. 549, 2010 Leg., Reg. Sess. (La. 2010), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=690665>; see also S.B. 140, *supra* note 1; Gordon, *supra* note 1; Urbina, *supra* note 1.

<sup>3</sup> *Statement of ABA President Lamm Re: Proposed Legislation Affecting Funding for University of Maryland School of Law*, ABA NOW (April 1, 2010), <http://www.abanow.org/2010/04/statement-of-aba-president-lamm-re-proposed-legislation-affecting-funding-for-university-of-maryland-school-of-law/> [hereinafter *ABA Maryland Clinic Statement*]; *Statement of ABA President Lamm Re: Louisiana Senate Bill 549 to Restrict Law School Clinical Activities*, ABA NOW (May 12, 2010), <http://www.abanow.org/2010/05/statement-of-aba-president-lamm-re-louisiana-senate-bill-549-to-restrict-law-school-clinic-activities/> [hereinafter *ABA Louisiana Clinic Statement*].

<sup>4</sup> Petition from Law School Faculty and Deans to the Honorable Members of the Maryland General Assembly, available at [http://www.law.umaryland.edu/about/features/enviroclinic/documents/Faculty\\_deans.pdf](http://www.law.umaryland.edu/about/features/enviroclinic/documents/Faculty_deans.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> Some of the other letters protesting the proposed Maryland legislation came from the Association of American Law Schools, American Association of University Professors, Clinical Legal Education Association, Maryland legal services providers, and the Society of American Law Teachers. Expressions of Support, UNIV. OF MD. SCH. OF LAW, <http://www.law.umaryland.edu/about/features/enviroclinic/support.html> (last visited Feb. 25, 2011).

<sup>7</sup> *ABA Maryland Clinic Statement*, *supra* note 3.

<sup>8</sup> *ABA Louisiana Clinic Statement*, *supra* note 3.

<sup>9</sup> See Gordon, *supra* note 1. Although the original budget amendment in Maryland failed, the Maryland House of Delegates adopted a House Budget Amendment that did not withhold funding but does require the School of Law to report on Environmental Law Clinic cases over the past two years by listing each case and non-privileged expenditures. Maryland House Budget Amendment, [http://www.law.umaryland.edu/about/features/enviroclinic/house\\_amendment.html](http://www.law.umaryland.edu/about/features/enviroclinic/house_amendment.html) [hereinafter *House Budget Amendment*] (last visited Feb. 25, 2011).

Amendment provides robust protection for academic freedom, when this belief does not necessarily translate into reality in the courts.

For example, the Maryland legislature did pass an alternative budget amendment that does not withhold funds, but does require the University of Maryland School of Law to report on its environmental law clinic cases over the past two years by listing each case and non-privileged expenditures.<sup>10</sup> The chair of the House Appropriations Committee said that the law school had received the message, “We’ll be watching.”<sup>11</sup> One of the state senators who opposed the government interference characterized the legislative action as “better than it was, but it’s still a pretty big abridgement of academic freedom.”<sup>12</sup> He added that the language was a threat: “If you guys are getting involved in issues that we don’t like, or you’re bothering people that we do like, we want you to shut up.”<sup>13</sup>

Dean Phoebe Haddon of the University of Maryland School of Law addressed the government’s interference by sounding a similar theme that the government also interfered with how the clinics do their educational work. She said, “There is a specter of intimidation that could affect how the clinics choose clients or accept cases.”<sup>14</sup> The former director of the University of Maryland’s Environmental Law Clinic, Rena Steinzor, added: “It’s not acceptable, because it is an effort to chill and intimidate us for taking cases that cause trouble in Annapolis.”<sup>15</sup>

Yet, the University of Maryland is not taking legal action to challenge this requirement, and it is unlikely that it will. First, there does not appear to be a cognizable legal claim that would prevent the legislature from accessing non-privileged, non-confidential client information.<sup>16</sup> Second, there is the practical matter that the state

<sup>10</sup> House Budget Amendment, *supra* note 9.

<sup>11</sup> Nicholas Sohr, *State Delegate to UMd. Law Clinic: “We’ll Be Watching,”* THE DAILY RECORD (Apr. 7, 2010), <http://thedailyrecord.com/eyeonannapolis/2010/04/07/state-senator-to-umd-law-clinic-well-be-watching>.

<sup>12</sup> Fahrenthold, *supra* note 1 (quoting Sen. Brian E. Frosh).

<sup>13</sup> *Id.*

<sup>14</sup> *Into the Fire: State Legislators Fuel a Heated Debate on Clinical Legal Education*, IN PRACTICE (The Clinical Law Program at the Univ. of Md. Sch. of Law, Balt., Md.), Spring 2010, at 3, available at <http://www.law.umaryland.edu/programs/clinic/documents/ClinicSpring2010.pdf>.

<sup>15</sup> Fahrenthold, *supra* note 1.

<sup>16</sup> Although the budget amendment refers only to non-privileged expenditures, the law school has an ethical duty not to disclose any confidential information. MARYLAND RULES OF LAWYER PROF’L CONDUCT R. 1.6 cmt. 3 (2007) (“The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Maryland Lawyers’ Rules of Professional Conduct or other law.”). Attorney-client privilege is grounded in the rules of evidence and is more limited than the ethical duty of confidentiality. Privileged communications are those between the lawyer and

legislature funds the university. Even if the university could prevail on this matter, university administrators may decide that the threat of future funding cuts is too great a risk when weighed against the burden of the reporting requirement.<sup>17</sup>

As the Maryland situation illustrates, government interference with law school clinical programs is both real and complicated. While there is a growing body of scholarship examining interference in clinical programs from a variety of perspectives,<sup>18</sup> scholars have paid little attention to the idea that government interference may result in the denial of legal rights to clinical faculty, law schools, and universities, as well as threatening access to justice for the clinic clients—individuals and communities otherwise unable to afford legal representation.

This Article analyzes government interference in clinical programs and suggests some legal remedies that may be available to challenge this interference. Part I begins with a brief explanation of clinical legal education methodology and the role law school clinics play in providing access to justice for tens of thousands clients each year. Part II provides an analysis of academic freedom, both as a norm on university campuses and as a legal principle. Part III analyzes instances of government interference, with an emphasis on those governmental actions that triggered legal actions seeking remedies. Finally, I conclude with lessons learned about the types of remedies most available when the government interferes in clinical programs.

## I. CLINICAL LEGAL EDUCATION AND ACCESS TO JUSTICE

Law school clinical programs teach law students by providing legal assistance to poor and other marginalized clients. Under the

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client made for the purpose of rendering legal assistance or advice. *See id.*; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

<sup>17</sup> It is beyond the scope of this article to analyze the extent to which a state legislature may control a university's or law school's educational policy, such as the types of programs to offer, through funding decisions. As briefly discussed in Part III, this may vary depending on how the university governance is organized by the state constitution. *See infra* notes 56–58 and accompanying text. Elizabeth Schneider explores this issue to some extent, and concludes that it is not clear. Elizabeth M. Schneider, *Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom*, 11 J.C. & U.L. 179, 194–95 n.85 (1984).

<sup>18</sup> *E.g.*, Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235 (1999) (examining the implications of a Louisiana Supreme Court amendment limiting clients law students can represent); Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971 (2003) (examining the ethical considerations raised by interference in law school clinics); Schneider, *supra* note 17.

supervision of faculty, law students interview clients and witnesses, analyze client problems, provide legal advice, negotiate with lawyers for opposing parties, conduct legal research, prepare legal documents and pleadings, perform transactional work, and represent clients before administrative agencies, courts, and other tribunals.

A law school clinic is both a law office and a classroom, and a clinic client's legal problems, including the client's legal claims and defenses, become the teaching materials that faculty use to instruct law students in the lawyering skills and professional values they need to become effective, ethical lawyers. In many ways, a law school clinic is the laboratory where students learn how to apply the analytical thinking and legal theory they learned in the classroom to solve client problems.<sup>19</sup>

Today, there are clinical programs of some form in every ABA-approved law school.<sup>20</sup> In addition to educating law students, the clinical programs also provide access to justice for clients in need of legal representation. A recent national survey found that students in law school clinics provide more than 2.4 million hours of free legal services to more than 120,000 clients in a wide variety of cases each year.<sup>21</sup> Law students represent children, the elderly, domestic-violence survivors, disabled veterans, families facing home foreclosures, nonprofit organizations, small businesses, and others.<sup>22</sup> Clients with civil legal matters would not otherwise have access to legal assistance, and the state would have to pay for the defense of

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<sup>19</sup> A special task force of the ABA identified law school clinics as especially well-equipped to teach law students the lawyering skills and professional values they must develop to be effective lawyers. See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 46 (Robert MacCrate ed., Student Ed. 1992) [hereinafter THE MACCRATE REPORT] (describing law school clinics as providing training and experience to students on poverty law issues).

<sup>20</sup> The ABA Standards for Approval of Law Schools state that “[a] law school shall offer substantial opportunities for: . . . live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence . . . .” STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(b)(1) (2010–2011) [hereinafter ABA STANDARDS]. Law schools comply with ABA Standards by having either an in-house clinical program, where full-time faculty primarily supervise students, or an externship program, where lawyers or judges who are not full-time faculty primarily supervise students, or both internal and external clinical programs. Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 405 (1994).

<sup>21</sup> DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, REPORT OF THE 2007-2008 SURVEY 19–20, available at <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>.

<sup>22</sup> Robert R. Kuehn & Peter A. Joy, “Kneecapping” *Academic Freedom*, 96 ACADEME 8, 9 (Nov./Dec. 2010).

indigent clients facing criminal charges if clinic representation was not available to them.<sup>23</sup>

By providing needed legal representation to individuals and groups who would otherwise not have legal representation in civil matters, law school clinics serve a critical role in making access to the courts, and therefore access to justice, available to tens of thousands clients each year.<sup>24</sup> This access to the courts and the opportunity to participate in legal processes has been called “a right that protects all other rights.”<sup>25</sup>

Some have also argued that the clinic clients and cases become the teaching materials that clinical faculty use with law students, in the same way that classroom faculty use textbooks.<sup>26</sup> But unlike faculty teaching and students learning in the classroom, clinic client representation sometimes involves students and faculty who represent individuals and community groups in matters involving powerful interests. As the Maryland and Louisiana legislative actions demonstrate, sometimes the powerful interests employ strategies and tactics aimed at eliminating the legal representation of their opponents by law school clinics. Not only does such governmental interference threaten access to the courts for clinic clients, but the interference also seeks to control educational decisions about the types of cases selected for teaching students. Inevitably, government interference in such decisions raises academic freedom concerns.

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<sup>23</sup> *Id.*

<sup>24</sup> SANTACROCE & KUEHN, *supra* note 21, at 19–20.

<sup>25</sup> Deborah L. Rhode, *Professionalism in Law Schools*, 27 FLA. ST. U. L. REV. 193, 199 (1999).

<sup>26</sup> For example, Elizabeth M. Schneider has argued:

Selection of individual cases to handle and methods of handling those cases, like the selection of casebooks and classroom teaching approaches, lies at the very heart of the educational function of clinical programs. So long as the decisions made by a clinical teacher reasonably serve that educational function, a judgment that only the law school faculty is capable of making, these decisions should be protected by academic freedom.

Schneider, *supra* note 17, at 190. The Association of American Law Schools (AALS) has advanced the position that clinical teachers “have a First Amendment right to select cases as their course materials for their clinics.” *Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court’s Student Practice Rule*, 4 CLINICAL L. REV. 539, 557 (1998). Another commentator argues that while faculty teaching clinical courses make a number of educational judgments about their classes, including the types of cases appropriate for their students’ education, the choice of cases for litigation does not deserve the same degree of academic freedom as scholarship. J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315, 335–36 (1993).

## II. ACADEMIC FREEDOM AS A NORM AND LEGAL RIGHT

Academic freedom on university campuses regulating relationships between the individual faculty member and administrators is much more developed as a norm than it is as a legal right that courts protect. Academic freedom first emerged as a principle within academia in the United States when the American Association of University Professors (AAUP) issued its *Declaration of Principles on Academic Freedom and Academic Tenure in 1915*.<sup>27</sup> The 1915 Declaration announced that academic freedom for faculty consisted of “freedom of inquiry, and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”<sup>28</sup>

In a later 1940 statement, the AAUP expressed the norm that academic freedom guarantees professors “freedom in the classroom in discussing their subject” provided they do not “introduce into their teaching controversial matter which has no relation to their subject.”<sup>29</sup> Matthew Finkin and Robert Post explain that this norm of academic freedom for each teacher is necessary because “students cannot learn how to exercise a mature independence of mind unless their instructors are themselves free to model independent thought in the classroom.”<sup>30</sup>

As a constitutional concept, academic freedom is ill-defined and illusive.<sup>31</sup> First, it is not enumerated as a freedom or right in the First

<sup>27</sup> DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), in AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 291–301 app. 1 (10th. ed. 2006). Walter Metzger has written an informative article explaining the development of the academic profession and academic freedom in the United States. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988). Metzger explains how the committee that drafted the 1915 Declaration was greatly influenced by the concept of academic freedom in Germany, which, by the late nineteenth century, meant freedom in learning, teaching, and academic self-government. *Id.* at 1269–70. The recognition of academic freedom and the need for autonomy in academic affairs goes back further to medieval times. *See, e.g.*, RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 5–6 (1955) (stating that universities in the Middle Ages were centers of power and prestige, self-governing, and protected by authorities). In the United States, the founding of Harvard, Princeton, William and Mary, and Yale continued in the tradition of independent, self-governing universities. *Id.* at 120, 124.

<sup>28</sup> DECLARATION OF PRINCIPLES, *supra* note 27, at 292.

<sup>29</sup> 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, in AM. ASSN OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 3–11 (10th. ed. 2006). AAUP and the Association of American Colleges and Universities jointly drafted the 1940 Statement and 1970 Interpretive Comments. *Id.* at 3.

<sup>30</sup> MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 81 (2009).

<sup>31</sup> *See, e.g.*, Metzger, *supra* note 27, at 1289 (“A sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it.”).



Amendment or anywhere else in the Constitution. Second, whatever constitutional protection there may be for academic freedom, it is solely against state action—that is, the action of some governmental actor.<sup>32</sup> This means that unless a governmental actor has the ability to intrude in the affairs of a private university, there is no protection. Third, the extent of academic freedom for an individual faculty member is unclear,<sup>33</sup> especially in light of the Supreme Court's decision in *Garcetti v. Ceballos*.<sup>34</sup>

In *Garcetti*, the Court held that the First Amendment only protects a public employee's speech when the employee speaks as a citizen.<sup>35</sup> The Court expressly left open the question of whether its holding "would apply in the same manner to a case involving speech related to scholarship or teaching."<sup>36</sup>

While the *Garcetti* Court appeared to signal that faculty teaching and scholarship were different than public employee speech and entitled to greater First Amendment protection, the circuit courts have not been so generous. Some recent cases illustrate this point.

In the Seventh Circuit case of *Renken v. Gregory*,<sup>37</sup> Kevin Renken, a tenured engineering professor at the University of Wisconsin-Milwaukee, refused to sign a proposal letter from the University in connection with a National Science Foundation (NSF) grant awarded to him and other professors, claiming that the University's terms did not comply with NSF regulations.<sup>38</sup> Renken also complained to

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<sup>32</sup> There is a distinction between the constitutional limitations on universities that are public and those that are private. A private university is not limited by the First Amendment unless it can be established that the university is exercising power as a state actor. See J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 300 (1989); JAMES A. RAPP, EDUCATION LAW § 3.05 (6)(a) (2010).

<sup>33</sup> While the United States Supreme Court has called academic freedom "a special concern of the First Amendment," *Keyshian v. Board of Regents*, 385 U.S. 589, 603 (1967), what this means in terms of rights and remedies is unclear, especially in disputes between a faculty member and her university. Peter Byrne maintains that the First Amendment gives university administrators "extensive control over curricular judgments so long as they do not penalize a professor solely for his political viewpoint." Byrne, *supra* note 32, at 301–02. Conversely, David Rabban argues that the Supreme Court's recognition of institutional academic freedom for the university "does not support the additional conclusion that the Court has rejected a constitutional right of individual professors to academic freedom against trustees, administrators, and faculty peers." David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 280 (1990). Michael Olivas interprets the cases as protecting professors from outside interference, such as from grand juries and others, but providing only "limited protection to professors' intramural speech or classroom activities against institutional interests." Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1837 (1993).

<sup>34</sup> 547 U.S. 410 (2006).

<sup>35</sup> *Id.* at 423.

<sup>36</sup> *Id.* at 425.

<sup>37</sup> 541 F.3d 769 (7th Cir. 2008).

<sup>38</sup> *Id.* at 771–73.

university officials, including the Secretary of the University's Board of Regents.<sup>39</sup> When the university was unable to reach a resolution with Renken, it returned the grant money and reduced his pay.<sup>40</sup> Renken brought a First Amendment claim, alleging that University retaliated against him for his complaints, and the district court granted the University's motion for summary judgment.<sup>41</sup> The Seventh Circuit affirmed the decision after determining that applying for grants was part of Renken's teaching duties, but that Renken's speech was not protected by the First Amendment because he "made his complaints regarding the University's use of NSF funds pursuant to his official duties as a University professor."<sup>42</sup>

In two other cases, the Ninth and Third Circuits ruled against tenured professors who asserted that their First Amendment rights had been violated.<sup>43</sup> While both circuits ruled in favor of the universities, in each instance the court left open the question of whether there is some category of First Amendment protection for faculty at public universities acting in their official capacity.

In *Hong v. Grant*,<sup>44</sup> the district court granted summary judgment for the defendants because the professor's speech was in connection with his official duties as a faculty member and thus was not entitled to First Amendment protection against alleged retaliation by the university.<sup>45</sup> The Ninth Circuit affirmed the lower court's decision, but on the ground that the defendants were entitled to sovereign immunity.<sup>46</sup> In dicta, the Ninth Circuit noted that *Garcetti* was unclear whether professors have "a *First Amendment* right to comment on faculty administrative matters without retaliation."<sup>47</sup>

In *Gorum v. Sessoms*,<sup>48</sup> Wendell Gorum, a tenured professor and chair of the Mass Communications Department at Delaware State University, was dismissed for changing grades in violation of the collective bargaining agreement.<sup>49</sup> Gorum filed suit alleging that he was dismissed in retaliation for expressing his views in three instances: objecting to the selection of Allen Sessoms as university

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<sup>39</sup> *Id.* at 772.

<sup>40</sup> *Id.* at 773.

<sup>41</sup> *Id.* Renken filed suit under 42 U.S.C § 1983. *Id.*

<sup>42</sup> *Id.* at 775.

<sup>43</sup> *Hong v. Grant*, 2010 U.S. App. LEXIS 23504, (9th Cir. Nov. 12, 2010); *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).

<sup>44</sup> 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff'd*, 2010 U.S. App. LEXIS 23504 (9th Cir. Nov. 12, 2010).

<sup>45</sup> *Id.* at 1166–70.

<sup>46</sup> *Hong*, 2010 U.S. App. LEXIS 23504, at \*4.

<sup>47</sup> *Id.*

<sup>48</sup> 561 F.3d 179 (3rd Cir. 2009).

<sup>49</sup> *Id.* at 182–83.

president; assisting a student athlete in challenging a university disciplinary action; and rescinding an invitation to Sessoms to speak at a fraternity event where Gorum served as chair of the event's speakers committee.<sup>50</sup> The district court granted summary judgment to the defendants,<sup>51</sup> and the Third Circuit affirmed the district court's reasoning that Gorum was speaking as part of his official duties and that his actions "were not 'speech related to scholarship or teaching,' and because we believe that such determination here does not 'imperil First Amendment protection of academic freedom in public colleges and universities.'"<sup>52</sup>

As these three post-*Garcetti* cases illustrate, protection from the courts for individual faculty claims of academic freedom is uncertain. While this is instructive for all faculty at public universities, as a practical matter it would only become important for law school faculty teaching clinical courses should law school or university administrators interfere with how the faculty teach their courses. When it comes to government interference in clinical programs, individual clinical faculty who have the support of their institutions may find some protection if their university, or law school if free standing, asserts institutional academic freedom, which is a more developed constitutional concept. Indeed, some commentators point out that some courts "have indicated that constitutional academic freedom is an institutional right, not necessarily an individual right."<sup>53</sup>

Institutional academic freedom is typically understood by the courts to mean that the university can set its own academic policies such as who may teach, what may be taught, how material shall be taught, and who may be admitted to study.<sup>54</sup> This has resulted in

<sup>50</sup> *Id.* at 183–84.

<sup>51</sup> *Id.* at 184.

<sup>52</sup> *Id.* at 186 (internal citation omitted) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (Souter, J. dissenting)).

<sup>53</sup> Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 145 (2009). Tepper and White cite to several circuit cases, but note that in *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987), the Supreme Court "suggest[ed], in a religious freedom case, that academic freedom allows instructors to teach material consistent with their professional judgment." Tepper & White, *supra*, at 145 n.130.

<sup>54</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) ("It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail [sic] 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.") (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)). Justice Frankfurter identified these four freedoms of a university—academic autonomy in deciding who may teach, what is taught, how it is taught, and who may be admitted to study—from a statement by South African scholars who argued that such freedoms were necessary for "a university to provide that atmosphere which is most conducive

judicial deference to institutional academic decisions, and the Supreme Court has said judges “may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”<sup>55</sup>

Because courts typically defer to universities for their educational decisions, they may be more responsive to university challenges of government intrusion into the university’s ability to decide what may be taught, such as what type of clinical program it chooses to have. In addition, a state may have delegated authority concerning university educational decisions to an authority outside of the control of the state’s legislature.

For example, the California Supreme Court has determined that the Regents of the University of California “have full power and authority, and it is their duty, to prescribe the nature and extent of the courses to be given, and to determine the question of what students shall be required to pursue them.”<sup>56</sup> The California Constitution provides, however, that this authority is “subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university.”<sup>57</sup>

The Michigan Court of Appeals confirmed that the Regents of the University of Michigan have control of all internal operations, and legislative attempts to condition appropriations on matters “solely within the exclusive authority of the [Regents],” such as “determin[ing] the number of out-of-state student enrollments, . . . set[ting] the fees to be charged such students,

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to speculation, experiment and creation.” *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (quoting The Open Univ. in S. Afr. 10–12 statement of a conference of senior scholars from the Univ. of Cape Town and the Univ. of Witwatersrand).

<sup>55</sup> *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). In *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990), the Court rejected a university’s claim that its academic-freedom rights created a privilege against discovery of peer evaluations of faculty candidates relevant to race and sex discrimination charges. In reaching its decision, the Court noted that the discovery request was content neutral and did not implicate academic decisions. *Id.* at 198–99. The Court explained that it was not eroding institutional academic freedom as recognized by *Ewing*, and “[n]othing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking.” *Id.* at 199.

<sup>56</sup> *Hamilton v. Regents of Univ. of Cal.*, 28 P.2d 355, 355 (Cal. 1934).

<sup>57</sup> CAL. CONST., art. IX, § 9(a). The California Supreme Court cited an earlier version of this provision in *Hamilton*, 28 P.2d at 355 (“The Constitution of the State of California (art 9, § 9) reposes in the Regents of the University of California full powers of organization and government of the university, ‘subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds.’” (quoting CAL. CONST., art. IX, § 9(a))).

and . . . prescrib[ing] the minimum number of classroom hours to be taught by the faculty are matters ” violated the Michigan Constitution.<sup>58</sup>

Even if a state has insulated public universities from legislative or other governmental interference into internal matters, the overall budget allocations still remain in the hands of the state legislatures. This leaves the question of how far the protections of academic freedom reach when the government seeks to interfere in academic programs, such as the threatened legislation in Maryland and Louisiana against law school clinical programs. If academic freedom does not provide protection, are there any other legal bases for a remedy?

### III. GOVERNMENT INTERFERENCE WITH CLINICAL PROGRAMS: DENYING ACCESS TO JUSTICE

#### A. *Access to Justice*

Access to the courts is a precondition for justice, and individuals and groups usually must have lawyers to represent them in asserting their rights properly before courts and other tribunals.<sup>59</sup> But rather than let the rule of law operate as it should in administrative proceedings or courtrooms, the examples from Maryland and Louisiana illustrate how powerful interests sometimes employ extralegal strategies—strategies that transcend normal legal processes—to obtain desired outcomes.<sup>60</sup> The aim of these and other efforts is to eliminate law school clinic representation for the poor in cases against powerful corporate or governmental interests—essentially de-lawyering the poor and locking them out of the courtroom.

Government attempts to interfere with clinical programs providing access to justice for their clients are not the only types of restrictions on lawyers representing the poor. For example in 1996, the federal appropriation for Legal Services Corporation (LSC) included a

<sup>58</sup> *Regents of the Univ. of Mich. v. Michigan*, 208 N.W.2d 871, 882 (Mich. Ct. App. 1973), *aff'd in part*, 235 N.W.2d 1 (Mich. 1975) (citing MICH. CONST. art. VIII, § 5).

<sup>59</sup> See, e.g., Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1336 (1964) (arguing that available remedies may be lost without a lawyer to present a client's claim properly).

<sup>60</sup> See, e.g., Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 272–77 (1999) (discussing an application of LoPucki's and Weyrauch's theory of extralegal strategies to explain how business interests and some government officials lobbied the Louisiana Supreme Court to curtail clinical programs by making the Louisiana student practice rule more restrictive); Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1457–62 (2000) (describing various strategies that transcend legal decision makers).

number of restrictions on the types of cases LSC lawyers may handle. Those restrictions include preventing LSC lawyers from participating in class action cases,<sup>61</sup> collecting court-awarded attorney fees,<sup>62</sup> representing incarcerated individuals,<sup>63</sup> or representing various classes of non-citizens, many of whom have legal immigration status.<sup>64</sup> The appropriations bill also sought to prohibit LSC lawyers from representing any client in challenging the validity of state or federal welfare system law.<sup>65</sup>

In *Legal Services Corp. v. Velazquez*,<sup>66</sup> the Supreme Court invalidated the provision that sought to prohibit the LSC lawyers from challenging the validity of state or federal welfare laws.<sup>67</sup> The Court decided that the government-funded legal services program “was designed to facilitate private speech, not to promote a governmental message.”<sup>68</sup> In addition, the Court noted that a LSC attorney, similar to a government-funded public defender, is bound by ethics rules that require the lawyer to exercise independent judgment from government control.<sup>69</sup> Thus, the Court stated that this case was distinguishable from *Rust v. Sullivan*,<sup>70</sup> in which the Court permitted the government to prevent federally funded programs from providing abortion counseling.<sup>71</sup>

The *Velazquez* Court stated that although Congress was not required to fund LSC to represent indigent clients or fund all types of legal representation once it did, Congress could not “insulate its own laws from legitimate judicial challenge.”<sup>72</sup> The Court reasoned that the restriction “threatens severe impairment of the judicial function” because it “sifts out cases presenting constitutional challenges in order to insulate the Government’s laws from judicial inquiry.”<sup>73</sup> The Court found that the law was an impermissible restriction on speech

<sup>61</sup> Omnibus Consol. Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 504(a)(7), 110 Stat. 1321–53 (1996).

<sup>62</sup> *Id.* § 504(a)(13), 110 Stat. at 1321–55.

<sup>63</sup> *Id.* § 504(a)(15), 110 Stat. at 1321–55.

<sup>64</sup> *Id.* § 504(a)(11), 110 Stat. at 1321–54.

<sup>65</sup> *Id.* § 504(a)(16), 110 Stat. at 1321–55–56.

<sup>66</sup> 531 U.S. 533 (2001).

<sup>67</sup> *Id.* at 549.

<sup>68</sup> *Id.* at 542.

<sup>69</sup> *Id.* (noting that LSC lawyers are similar to public defenders in that each operates independently of governmental control).

<sup>70</sup> 500 U.S. 173 (1991).

<sup>71</sup> *Id.* at 203.

<sup>72</sup> *Velazquez*, 531 U.S. at 548.

<sup>73</sup> *Id.* at 546. The Court stated that if the law stood, “[t]he courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority.” *Id.*

and a violation of the First Amendment.<sup>74</sup> In separate litigation, challenges to the other restrictions on equal protection and due process grounds failed.<sup>75</sup>

The 1996 appropriations bill and the *Velazquez* case demonstrate two principles. First, the government may be able to restrict some types of cases or clients that government-funded lawyers can represent. Second, government-imposed restrictions may not impermissibly curtail First Amendment rights by limiting the legal arguments lawyers may present on behalf of clients.

### B. Government Interference in Law School Clinics

Publicized instances of government interference in clinical programs educating students and providing access to justice for clients can be traced back to the 1960s. The expansion of law school clinical programs began in the 1960s,<sup>76</sup> even though clinical legal education has existed in some form nearly as long as there have been university-based law schools in the United States.<sup>77</sup> As law school clinics expanded, the clinical programs began “to represent client[s] . . . with claims that thrust clinical programs into the civil rights, consumer rights, environmental rights, and poverty rights movements.”<sup>78</sup> By representing clients who might not otherwise have lawyers in areas of the law that were in the early stages of development, clinical faculty and students were sometimes advancing client claims that challenged the status quo.

The first publicized governmental interference in a clinical program involved controversial client representation that took place at the University of Mississippi School of Law in 1968.<sup>79</sup> Prompted by complaints from some state legislators and university trustees, the Chancellor directed the law school dean to fire two professors for

<sup>74</sup> *Id.* at 547.

<sup>75</sup> See *Legal Aid Soc’y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998) (rejecting plaintiffs’ equal protection and due process claims for lack of standing), *vacated in part*, 981 F. Supp. 1288 (1997); see also *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 762 n.4 (2d Cir. 1999) (affirming the district court’s rejection of plaintiff’s due process and equal protection claims), *aff’d*, 531 U.S. 533 (2000).

<sup>76</sup> See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Legal Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5–32 (2000) (describing the development of clinical legal education in the United States).

<sup>77</sup> The first types of real-life opportunities for law students to assist with legal problems were legal dispensaries or legal aid bureaus affiliated with law schools in the late 1890s and early 1900s. See John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174 (1930) (describing experimental efforts to engage law students in legal aid work at several law schools); William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 U. ILL. L. REV. 591, 591 (1917) (noting the adoption of legal clinics at several law schools).

<sup>78</sup> Barry, Dubin & Joy, *supra* note 76, at 13.

<sup>79</sup> *Trister v. Univ. of Miss.*, 420 F.2d 499 (5th Cir. 1969).

their participation with clinical law students in a school desegregation case being handled by a local legal services office.<sup>80</sup> The law school dean claimed that the professors violated a university policy that permitted outside employment only if “it does not bring the employee into antagonism with his colleagues, community, or the State of Mississippi.”<sup>81</sup>

The two professors filed suit in federal court alleging that their termination was a denial of equal protection because other faculty were not held to the same standard. The United States Court of Appeals for the Fifth Circuit agreed, and held that the University had unlawfully discriminated against the professors, violating their equal protection and due process rights, because the professors “wished to continue to represent clients who tended to be unpopular.”<sup>82</sup> In response to the loss in the courts, and findings by the American Association of University Professors (AAUP) and the American Association of Law Schools (AALS) that the University’s actions had violated the professors’ academic freedom,<sup>83</sup> the University rescinded its policy on outside employment and offered to reinstate the professors.<sup>84</sup>

While the court vindicated the legal rights of the faculty at the University of Mississippi, it used equal protection and due process—not academic freedom—as the source of the legal right and remedy. Since that first reported case, there have been over thirty additional instances of interference in law school clinical programs.<sup>85</sup> By interference, I mean serious attempts to undermine the work of the clinic, usually in the form of stopping the clinic from undertaking certain types of representation.<sup>86</sup> Most often, the interference has been aimed at preventing law school clinics from representing clients in matters involving corporate and government interests. In each instance, the interference is calculated to chill the actions of clinical faculty and students in their legal representation of clients who otherwise would not be able to have access to the courts.

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<sup>80</sup> *Id.* at 501–02.

<sup>81</sup> *Id.* at 501 n.2.

<sup>82</sup> *Id.* at 504.

<sup>83</sup> THE UNIV. OF MISSISSIPPI, AM. ASS’N U. PROFESSORS BULL. 75, 83–85 (Spring 1970).

<sup>84</sup> *Id.* at 85.

<sup>85</sup> See Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, app. (2011).

<sup>86</sup> Almost every clinical program has experienced some minor interference, such as a disgruntled alumnus of the law school complaining because the clinic is on the opposite side in a case, or a donor to a university who finds the clinic representing a client opposing the donor’s interests. Those instances are so prevalent that most clinical faculty simply expect them, and fortunately most law school deans understand and support their clinical faculty and students when that occurs.



Rather than review all of the publicized instances of interference in law school clinics,<sup>87</sup> I instead focus on instances of government interference, especially those instances in which litigation over the interference ensued. I do so in order to identify limitations on the government and possible legal remedies.

Like the recent effort in Louisiana, there are a number of state legislators and other governmental actors who have interfered with whom the law school clinics represent and what claims they raise. In 1971, not long after the interference in Mississippi, Connecticut Governor Meskill, as well as members of the local bar, complained when the University of Connecticut Law School clinic defended an antiwar protestor.<sup>88</sup> The complaints came with a threat to terminate state funding, and the dean of the law school responded by proposing that clinical faculty be required to seek approval by the dean or a faculty committee before taking on clients.<sup>89</sup> In response, a clinic professor requested and received an ABA advisory ethics opinion that case-by-case prior approval would violate the ethical obligations of the dean and faculty in making these decisions and the clinical faculty members' independent judgment would be impaired.<sup>90</sup> The opinion also stated that the dean and faculty "should seek to avoid establishing guidelines . . . that prohibit acceptance of controversial clients and cases or that prohibit acceptance of cases aligning the legal aid clinic against public officials, governmental agencies or influential members of the community."<sup>91</sup> The law school subsequently abandoned the oversight process.<sup>92</sup>

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<sup>87</sup> Robert Kuehn and Bridget McCormack provide an excellent review of the publicized instances of interference in law school clinical programs. *See generally* Kuehn & McCormack, *supra* note 85.

<sup>88</sup> Schneider, *supra* note 17, at 184.

<sup>89</sup> *Id.*; *see also* Kuehn & Joy, *supra* note 18, at 1977 nn.19 & 20 and accompanying text.

<sup>90</sup> ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1208 (1972), *reprinted in* ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL ETHICS OPINIONS 441 (1975) [hereinafter Informal Op. 1208]. The opinion states that prior approval "makes it likely that the independent judgment of the five clinic lawyers and their loyalty to their clients will be impaired" and would "violate the professional ethics and responsibilities of the dean and of the lawyer-directors of the clinic." *Id.* ABA ethics opinions are not binding on lawyers or courts. ABA Comm. on Ethics & Prof'l Resp., Informal Op. 1420 (1978), *reprinted in* ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL ETHICS OPINIONS 312, 316 (1985) ("Enforcement of legal ethics and disciplinary procedures are local matters securely within the jurisdictional prerogative of each state . . ."). Instead, they serve as guidance and may be a safe harbor or persuasive authority. *See* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 330-37 (2002) (describing the ways in which state courts treat ethics opinions).

<sup>91</sup> Informal Op. 1208.

<sup>92</sup> Kuehn & Joy, *supra* note 18, at 1977.

This ABA ethics opinion is important because it states both that prior case-by-case approval is ethically prohibited and that the legal profession's obligation to make legal assistance available, even to unpopular clients and causes, instructs clinical programs not to adopt policies that prevent representing clients with legal claims against government entities or other powerful interests.<sup>93</sup>

The next incident took place in 1975, when the Arkansas legislature, in response to a University of Arkansas at Fayetteville law professor's participation in a civil rights case, passed an appropriations bill that made it unlawful for law school faculty holding certain positions at the University of Arkansas at Fayetteville to participate "in the handling of any law suit in any of the courts of this State or of the federal courts."<sup>94</sup> The Arkansas Supreme Court found that the restriction was a violation of equal protection because it applied to only certain law faculty members and to only one of the two state law schools.<sup>95</sup> The court did not address the law professors' First Amendment argument that the law was passed to silence a specific professor, concluding that the argument was "entirely speculative" and the court would not inquire into the motives or intent of legislators not expressed in the legislation.<sup>96</sup>

Although the Arkansas appropriations bill was not specifically directed at a law school clinical program, it is instructive of the limits on such legislative actions. Like the interference at the University of Mississippi, legislation or other types of governmental restrictions that target specific law professors or groups of law professors are subject to claims that the actions violate equal protection rights.

In the 1980s, other legislation in Colorado, Idaho, and Iowa, aimed at law school clinics, or that would apply to law school clinical faculty, either failed in committee, passed only one house, or was vetoed by the governor.<sup>97</sup> The only legislation that met with a

<sup>93</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 5 (2010), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) ("Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."). In addition, a lawyer has a professional responsibility to accept a fair share of unpopular matters and indigent or unpopular clients. *Id.* at R. 6.2 cmt. 1. The Preamble to the *ABA Model Rules of Professional Conduct* also states that all lawyers should devote time and resources "to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." *Id.* at pmb1. ¶ 6.

<sup>94</sup> *Atkinson v. Bd. of Trs. of Univ. of Ark.*, 559 S.W.2d 473, 474 (Ark. 1977); see also Schneider, *supra* note 17, at 184 (describing the passage of the appropriations bill provision barring law school faculty from participating in any lawsuit within Arkansas).

<sup>95</sup> *Atkinson*, 559 S.W.2d at 475–77.

<sup>96</sup> *Id.* at 476.

<sup>97</sup> See Kuehn & Joy, *supra* note 18, at 1977–78, 1980.

measure of success was a budget bill that contained language prohibiting the Arizona State University College of Law from representing prisoners in litigation against the state.<sup>98</sup> This was apparently a compromise to an effort to insert a budget rider that would have required the university to cease funding for the law school's clinic.<sup>99</sup> The university did not challenge this restriction, and the clinic has continued to follow the restriction.<sup>100</sup> Whether the restriction would have survived a legal challenge is unresolved.

In another instance of government interference in clinical programs, the governor of Louisiana urged business groups to lobby the elected judges of the Louisiana Supreme Court to make the Louisiana student practice rule more restrictive in reaction to failed efforts to force the Tulane Environmental Law Clinic to drop a lawsuit against a large petrochemical company.<sup>101</sup> In 1999, the Louisiana Supreme Court responded by adopting very low income guidelines for clients to qualify for assistance, requiring 51% of the members of community organizations represented by clinical students to meet the income guidelines, and preventing clinical students from representing any client if the client had been solicited for representation by anyone associated with the clinical program.<sup>102</sup>

Several of the Tulane law clinic's clients, five law professors from Tulane and Loyola Law School in New Orleans, a donor to the Tulane clinic, and a number of law students filed suit in federal court to challenge the restrictions, alleging viewpoint discrimination and violations of equal protection, academic freedom, First Amendment rights of free speech and association, and the right to petition the government for redress of grievances.<sup>103</sup> The district court granted the Louisiana Supreme Court's motion to dismiss all claims, reasoning that "the Louisiana Supreme Court's actions were not illegal or unconstitutional," though they have been influenced by some "nondiscriminatory political motive."<sup>104</sup>

The Fifth Circuit affirmed in *Southern Christian Leadership Conference v. Supreme Court of Louisiana*,<sup>105</sup> emphasizing that the

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<sup>98</sup> *Id.* at 1980.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See Joy, *supra* note 18, at 244–46.

<sup>102</sup> See *id.* at 238–39 (citing LA. SUP. CT. R. XX (1999)).

<sup>103</sup> *S. Christian Leadership Conference v. Sup. Ct. of La.*, 61 F. Supp. 2d 499, 502–03 (E.D. La. 1999), *aff'd*, 252 F.3d 781 (5th Cir. 2001).

<sup>104</sup> *Id.* at 513–14. The district court noted that "in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." *Id.* at 513.

<sup>105</sup> 252 F.3d 781 (5th Cir. 2001).

student-practice rule changes restricted solely the law students—not the clinical faculty, as licensed attorneys—in terms of who they could represent.<sup>106</sup> The Fifth Circuit also distinguished the practice rule restrictions on clinical students from the government’s restrictions on lawyer advocacy in *Velazquez*, and emphasized that the student practice rule “imposes no restrictions on the kind of representations the clinics can engage in or on the arguments that can be made on behalf of a clinic client.”<sup>107</sup> In making this effort to distinguish the types of restrictions, the Fifth Circuit suggests that restrictions on lawyer advocacy in clinical programs would be impermissible.

### C. Louisiana Senate Bill 549

The history of government interference in clinical programs provides a useful framework for considering Louisiana Senate Bill 549, the initiative that would have barred law school clinics that receive public funds from suing companies or government entities unless the legislature specifically approved each lawsuit.<sup>108</sup> Unlike the student-practice rule amendments, which applied only to law students, Senate Bill 549 would have applied to licensed lawyers as well because it sought to regulate their practice of law by restricting the types of legal claims that could be asserted. This type of restriction appears to run afoul of recognized ethical and legal obligations.

The case-by-case approval required for suits against companies and government entities is contrary to ethical rules as stated in the ABA ethics opinion developed after such a restriction was proposed in Connecticut.<sup>109</sup> In addition, review of possible cases by the legislature or anyone else not part of the clinic law office raises serious client confidentiality issues. Another ABA ethics opinion states, “[i]t is difficult to see how the preservation of confidences and secrets of a client can be held inviolate prior to filing an action when the proposed action is described to those outside of the legal services office.”<sup>110</sup> Although a client may give informed consent for revealing such information,<sup>111</sup> it is impermissible to condition legal

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<sup>106</sup> *Id.* at 789 (“The rule only prohibits the non-lawyer student members of the clinics from representing *as attorneys* any party the clinic has so solicited.”).

<sup>107</sup> *Id.* at 792.

<sup>108</sup> *See supra* note 2 and accompanying text.

<sup>109</sup> *See supra* note 88.

<sup>110</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 334 (1974), reprinted in ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL ETHICS OPINIONS 84 (1985).

<sup>111</sup> “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2010). The

representation on a client's consent to disclosure of confidences to others.<sup>112</sup>

Requiring case-by-case approval also would have interfered with the client-attorney relationship, raising separation-of-power concerns. The Louisiana Supreme Court "has exclusive and plenary power to define and regulate all facets of the practice of law, including . . . the client-attorney relationship."<sup>113</sup> Because the legislation sought to regulate the practice of law, the Louisiana Supreme Court would have had to approve the law or acquiesce to it.<sup>114</sup>

In addition, the proposed legislation's restrictions of the types of legal claims that could be brought were similar to the type the Supreme Court found unconstitutional in *Velazquez*.<sup>115</sup> As discussed previously, the Fifth Circuit's decision upholding changes to the Louisiana student-practice rule did so distinguishing the facts before it from those in *Velazquez* and emphasizing that the student-practice rule changes did not seek to limit the First Amendment rights of licensed attorneys in Louisiana.

If Senate Bill 549 had become law, there would have been good grounds to challenge it. Based on the serious ethical and legal concerns such legislation raises, there is reason to believe that the courts would be sympathetic.

#### CONCLUSION

Fortunately, recent legislative efforts to interfere with the educational and service missions of law school clinical programs were not successful. As this review of the history of such efforts demonstrates, there are limits on government interference in clinical programs. Legislation or governmental policies aimed at subsets of faculty may trigger cognizable equal protection claims.<sup>116</sup> Restrictions on clinical faculty, who are licensed lawyers, making decisions about

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Louisiana ethics rules track this language. LA. RULES OF PROF'L CONDUCT R. 1.6(a) (2010) (adopting the Model Rules language verbatim).

<sup>112</sup> See, e.g., State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-210 (1994) (holding that a legal services office may not condition receipt of legal services on client consenting to disclosure of client confidences to the program's non-lawyer director (citing N.H. Bar Ass'n, Comm. on Ethics, Formal Op. 1988-89/13 (1989)), available at [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ri-210.htm?CFID=28280112&CFTOKEN=a73b215d77a4ffa0-D8E5FF3D-1A4B-3375-E478D575415ED438](http://www.michbar.org/opinions/ethics/numbered_opinions/ri-210.htm?CFID=28280112&CFTOKEN=a73b215d77a4ffa0-D8E5FF3D-1A4B-3375-E478D575415ED438)).

<sup>113</sup> Succession of Wallace, 574 So.2d 348, 350 (La. 1991).

<sup>114</sup> "[T]he legislature cannot enact laws defining or regulating the practice of law in any aspect without this court's approval or acquiescence because that power properly belongs to this court and is reserved for it by the constitutional separation of powers." *Id.*

<sup>115</sup> See *supra* text accompanying notes 68-75.

<sup>116</sup> See *supra* text accompanying notes 85, 95-96.

legal theories to pursue on behalf of clients, raise First Amendment concerns.<sup>117</sup> Even restrictions that seek to require case-by-case review of potential clients or types of cases that may be brought trigger ethical concerns,<sup>118</sup> as well as possible separation-of-power issues requiring the approval of a state's highest court.<sup>119</sup>

Although there appear to be remedies for some types of interference, the recent Maryland and Louisiana failed legislative attempts demonstrate that it is preferable to prevent government interference rather than waiting to challenge it in the courts. Not only is this true today, but this was true when law schools and universities successfully blocked similar legislative efforts in other states during the 1980s.<sup>120</sup>

The ABA has been involved in speaking out against such interference,<sup>121</sup> as have other national organizations, and many individuals.<sup>122</sup> The ABA House of Delegates recently passed a resolution that reaffirms the ABA's "support for the ethical independence of law school clinical programs[,] . . . opposes attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses[,] . . . [and resolves] [t]hat the ABA will assist law schools, as appropriate, in preserving the independence of clinical programs and courses."<sup>123</sup>

These efforts are good, but they are not enough. Whenever access to the courts is being threatened, everyone should be concerned. Fairness in the courts requires a meaningful opportunity to be heard, and without legal representation, the right to be heard is often an empty promise.

<sup>117</sup> See *supra* text accompanying notes 72–74.

<sup>118</sup> See *supra* notes 90–93, 109–12 and accompanying text.

<sup>119</sup> See *supra* notes 113–14 and accompanying text.

<sup>120</sup> See *supra* note 97 and accompanying text.

<sup>121</sup> See *supra* text accompanying notes 3, 7–8. The ABA Council on Legal Education and Admissions to the Bar has issued the following statement pledging its support for clinical programs against outside interference:

Improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility. In appropriate ways, the Council shall assist law schools in preserving the independence of law school clinical programs and courses.

ABA STANDARDS, *supra* note 20, at Council Statement 9.

<sup>122</sup> See *supra* text accompanying notes 4–5.

<sup>123</sup> ABA Res. 100A (2011), available at <http://www.abanow.org/2011/01/100a/>.