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ARTICLE: The Assessment Mandates in the ABA Accreditation Standards and Their Impact on Individual Academic Freedom Rights

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Text

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Introduction

In 2014, the American Bar Association (ABA) enacted new Standards for the Accreditation of Law Schools (Standards) focusing on outcomes assessment, which require a change in law schools' traditional pedagogy. This change is a seismic shift, requiring formative assessment throughout the curriculum, a major step away from law schools' traditional reliance on the Socratic Method with one high stakes, summative final exam.

Law faculty and legal scholars have resisted this change for various reasons, including: the perceived importance of high stakes assessment in preparation for the bar exam; the reality that there is no "second chance" in a courtroom; and the belief (whether accurate or not) that higher order skills taught in law school, especially critical thinking, are not subject to assessment. These, and other reasons, are often couched in terms of academic freedom ¹ and have stirred up many questions. For example, have other faculty members complained of infringement on their academic freedom rights caused by the assessment movement? ² Is there legal precedent to such claims?

¹ See, e.g., Mary A. Lynch, An Evaluation of Ten Concerns About Using Outcomes in Legal Education, [38 Wm. Mitchell L. Rev. 976, 990-995 \(2012\)](#); see also Susan Hanley Duncan, The New Accreditation Standards Are Coming to Law School Near You - What You Need to Know About Learning Outcomes & Assessment, 16 Legal Writing: J. Legal Writing Inst. 605, 609 (2010); Steven I. Friedland, Outcomes and the Ownership Conception of Law School Courses, [38 Wm. Mitchell L. Rev. 947, 964-965 \(2012\)](#) ("The imposition of learning outcomes does not impact either the spirit or letter of academic freedom, ... the subject of academic freedom will more likely be used as an obstacle or shield to resist change.").

² The American Association of University Professors claims that the issue has not received much attention. Mandated Assessment of Educational Outcomes: A Report of Committee C on College and University Teaching, Research, and Publication, Academe (A.A.U.P., Washington D.C.), Jul.-Aug. 1991, at 49, 49-54 ("The direct implications of mandated assessment for academic freedom and tenure have not yet become a centerpiece of public discussion."). But see Michael Stein et al., Market Forces and the College Classroom: Losing Sovereignty, 4 AAUP J. Acad. Freedom no. 1, 2013, at 8 (noting that "an aspect of academic freedom - the sovereignty of the classroom - is being lost, or at least compromised"); Jordan J. Titus, Pedagogy on Trial: When Academic Freedom and Education Consumerism Collide, 38 J.C. & U.L. 107, 164 (2011) ("These are

[*254] This Article seeks to answer these questions by exploring one discrete, narrow issue within the academic freedom quandary: whether the new assessment mandates in the ABA's Standards, when implemented by an institution, violate law faculty members' academic freedom rights involving classroom speech, specifically teaching methods.³ In order to explore this issue, this Article looks at the definition of academic freedom. Next, it delves into the new ABA Standards and the interpretations and guidance memos associated therewith. With the foundation laid, the Article will then analyze whether the new Standards, as implemented by law schools, violate law faculty members' academic freedom rights. The Article concludes by proposing methods by which to ensure that a violation does not happen.

I. Background

A. The Origins of Academic Freedom

Academic freedom symbolizes the unique place that university faculty⁴ occupy in the West. However, its definition is far from clear; its origin is somewhat murky, and its scope and parameters are less than exact. Academic freedom has been discussed for centuries, dating back to Plato's [*255] discourse on the utopian society of the academic community.⁵ If asked, most individuals would come up with a similar definition for academic freedom - a right of individual faculty members to teach, speak, and research on any subject, including controversial subjects, free from external pressure or influence. However, such a simple definition belies the true roots and complexities of academic freedom. Many would be surprised to know that there is disagreement as to whether there is such a right at all, where it comes from, and if it does exist, to whom it belongs.

1. The American Association of University Professors

The first clear enunciation of academic freedom rights for faculty at American institutions arose in the 1915 and 1940 statements by the American Association of University Professors (AAUP). The 1915 Declaration of Principles of Academic Freedom and Academic Tenure provided that "academic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of

dangerous times for the professoriate. If faculty do not resist external demands and administrative monitoring, their residual freedom to define the curriculum, decide pedagogical strategies, and determine standards of student achievement will be eviscerated."); but cf. Timothy Reese Cain, NILOA Occasional Paper 22, Assessment and Academic Freedom: In Concert, not Conflict, 4 (Nov. 2014), <http://www.learningoutcomesassessment.org/documents/OccasionalPaper22.pdf>. Cain concedes that "outcomes assessment can be undertaken in ways that violate faculty rights and negate their legitimate control of the college curriculum," but rejects "the idea that learning outcomes assessment inherently tramples academic freedom." Id. at 4-5. Cain also outlines the arguments made by other authors, who claim that assessment violates academic freedom. Id. at 10-11.

³ This Article does not explore the impact of assessment mandates on an institution's academic freedom rights, nor does this Article explore the violation of other individual academic freedom rights relating to research or extramural speech but deals specifically with classroom teaching methods and speech. See Denise S. Smith & Michael A. Katz, Academic Freedom in the Age of Assessment and Accountability, *22 Midwest L.J.* 1, 4 (2008) (noting that in addition to the two dimensions of academic freedom: individual and institutional, the rights can be separately categorized as "(1) the academic rights of the institution versus the government's rights; (2) the academic rights of the individual versus the government's rights; and (3) the academic rights of the individual versus the academic institution's rights") (citations omitted). This Article deals solely with the latter dimension.

⁴ This Article is limited to the discussion of university faculty, specifically law school faculty, and does not address the academic freedom rights of teachers generally.

⁵ This Article does not explore the various permutations and origins of the right of academic freedom, including state constitutional law, contract law, and statutory law, nor the viability of a faculty member's claim of violation of such rights in a court proceeding. For a comprehensive study of the origins and history of academic freedom, see Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U. L. 791 (2010). See also Philip Lee, *Academic Freedom at American Universities: Constitutional Rights, Professional Norms, and Contractual Duties* (2015), for a thorough discussion of the various sources of academic freedom and the issues surrounding each.

extra-mural utterance and action." ⁶ It reiterated this position stating that "it is, in short, not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession." ⁷

In 1940, the AAUP, along with the Association of American Colleges, drafted the 1940 Statement of Principles on Academic Freedom and Tenure. ⁸ The 1940 Statement addressed a gap in the 1915 Declaration of Principles: faculty speech critical of the institution, its policies, or its governing bodies, finding that such speech was included in the profession's understanding of academic freedom. ⁹ The 1940 Statement clarified that "academic freedom ... applies to both teaching and research ... [and that academic freedom] carries with it duties correlative with rights." ¹⁰ The [*256] 1940 Statement also recognized limits to academic freedom for religious or "other aims" of the institution, which "should be clearly stated in writing at the time of the [faculty] appointment." ¹¹

Almost all American institutions of higher education endorse the 1940 Statement, typically incorporating it into faculty handbooks and employment contracts. ¹² Even if not explicitly adopted by such institutions, the 1940 Statement is often seen as "widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent administrators and governing boards." ¹³

Courts have cited the 1940 Statement as persuasive authority in tenure and academic freedom decisions. ¹⁴ In 1971, the United States Supreme Court in *Tilton v. Richardson*, referenced the AAUP's 1940 Statement, specifically characterizing the institution at issue as existing in an "atmosphere of academic freedom," because, in part, it subscribed to the 1940 Statement. ¹⁵ Although courts reference the origins of academic freedom in the 1940 Statement, courts also have rooted academic freedom in the First Amendment.

2. The First Amendment

In *Sweezy v. State of New Hampshire*, the Court in a Plurality Opinion recognized for the first time academic freedom involving a faculty member. ¹⁶ The Court noted that the faculty member had "liberties in the areas of

⁶ The American Association of University Professors, AAUP's 1915 Declaration of Principles 1 (1915), http://www.aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf.

⁷ *Id.* at 10.

⁸ Protecting an Independent Faculty Voice: Academic Freedom after *Garcetti v. Ceballos*, *Academe* (AAUP, Washington, D.C.), Nov.-Dec. 2009, at 67, 70 [hereinafter AAUP Article], <https://www.aaup.org/file/Protecting-Independent-Voice.pdf>.

⁹ *Id.*

¹⁰ 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretative Comments, AAUP Bull., Jun. 1974, at 13, 14 [hereinafter AAUP Bulletin], <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> ("Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.").

¹¹ *Id.*

¹² AAUP Article, *supra* note 8, at 70.

¹³ *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975).

¹⁴ See, e.g., *Vega v. Miller*, 273 F.3d 460, 476 (2d Cir. 2001); *Urofsky v. Gilmore*, 216 F.3d 401, 411 (4th Cir. 2000); *Browzin*, 527 U.S. at 848 n.8.

¹⁵ *Tilton v. Richardson*, 403 U.S. 672, 681 (1971).

¹⁶ *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957).

academic freedom ... in which government should be extremely reticent to tread." ¹⁷ In sweeping language, the Court reiterated that it could not "conceive of any circumstance wherein a state interest would justify infringement of rights in these fields." ¹⁸ However, more well-known are the statements in Justice Frankfurter's Concurrence, in which he referenced "'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.'" ¹⁹ A decade later, in *Keyishian* [*257] v. Board of Regents of Univ. of State of N.Y., a Majority of the Court, for the first time, noted the First Amendment underpinnings of academic freedom, finding it a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." ²⁰

The Court's recognition of an academic freedom right confused to whom the right belongs: the institution ²¹ or the faculty member. ²² Arguably, the four rights identified in *Sweezy's* Concurrence equate with a university, not an individual faculty member, and later opinions by the Court both reinforced and contradicted this finding. ²³ Lower courts have only blurred that distinction. For example, the Fourth Circuit in *Urofsky v. Gilmore*, stated "to the extent that the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." ²⁴

In addition to inconsistent treatment by the courts to whom the right belongs, locating the right in the First Amendment further complicates the issues. First, it limits the rights of faculty at private institutions, who may be foreclosed from asserting the right due to a lack of state action. ²⁵ [*258] Second, the rights of faculty at public institutions may be restricted under *Garcetti v. Ceballos* in which the Supreme Court held that speech by public employees made pursuant to their official duties was not protected by the First Amendment. ²⁶ Third, and specifically focusing on assessment, questions exist as to whether mandated assessments in the classroom should be considered speech or even expressive conduct for First Amendment purposes or whether the assessments could be considered non-expressive conduct. ²⁷ Finally, and perhaps most importantly, and of concern to all

¹⁷ [Id. at 250.](#)

¹⁸ [Id. at 251.](#)

¹⁹ [Id. at 263](#) (quoting University of Cape Town and University of the Witwatersrand, *The Open Universities in South Africa* (Johannesburg: Witwatersrand U. Press, 1957), 10-12); see also White, *supra* note 5, at 810 ("Justice Frankfurter's concurrence in *Sweezy* remains to this day the fullest treatment ever accorded the principle of academic freedom in a Supreme Court case, and its quadripartite delineation of 'the four essential freedoms' at the core of the principle is almost invariably the starting point for analysis when faculty members invoke their right to academic freedom.").

²⁰ [Keyishian v. Bd. of Regents of Univ. of the State of N.Y., 385 U.S. 589, 602 \(1967\)](#); see also J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L.J. 251, 298 (1989)* (noting that *Sweezy* and *Keyishian* "exhaust the Supreme Court's development of a university faculty member's right of academic freedom").

²¹ This Article does not address an institution's right to assert a claim of academic freedom against an accreditor for imposing assessment mandates.

²² See White, *supra* note 5, at 822 ("Nothing has introduced more confusion into the case law than the schism between one line of cases describing academic freedom as a right possessed by individual faculty members and another line recognizing academic freedom as a right possessed by and exercised only in the name of the faculty member's employing institution.").

²³ See [Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 \(1978\)](#) (noting that academic freedom is a "special concern of the First Amendment" with regard to a university's right to decide who to teach); [Grutter v. Bollinger, 539 U.S. 306, 328 \(2003\)](#) (firmly deferring to the institution's educational judgment).

faculty, "what the courts give, they may take away, ... academic freedom may be left in a weaker position than it was before it became a concern of the law." ²⁸

3. Individual Faculty Members' Academic Freedom Rights

The inability to delineate to whom the right belongs: faculty, as expressed by the AAUP, or institutions, as expressed by Sweezy, is still a matter of debate, and an important one, as these two freedoms are inconsistent, if not in direct conflict. ²⁹ In earlier case law it was a distinction without a difference, as an external force was exerting pressure on the faculty member, like in Sweezy. ³⁰ However, as time passed, the pressures came from within educational institutions, and the conflict was framed between the individual professor and her employing institution. ³¹ To date, the Supreme Court has not addressed such a situation. ³²

[*259] Regardless of one's position on the origin of academic freedom, it is clear that courts have recognized, and will likely continue to recognize, a faculty member's academic freedom rights whether under custom, the First Amendment, or even contract law. ³³ Even when recognized, most agree that there is a limit on an individual's right to academic freedom. ³⁴ Succinctly stated, "academic freedom does not mean academic license." ³⁵

Individual academic freedom can include faculty's research, teaching, and extramural speech. ³⁶ Relevant to this Article, the focus is on an individual faculty member's classroom activities, including two different categories, which can "cast a pall of orthodoxy over the classroom:" ³⁷ classroom speech and teaching methods. ³⁸

Regarding classroom speech, academic freedom can protect a faculty member's speech, which could include course content, ³⁹ as well as a faculty member's criticism of the institution and its policies. ⁴⁰ As to criticism, faculty members' rights appear strong. ⁴¹ However, courts have [*260] been willing to restrict classroom speech when it does not further a pedagogical purpose and does not implicate matters of public concern. ⁴² As to content,

²⁴ [Urofsky v. Gilmore, 216 F.3d 401, 411 \(4th Cir. 2000\)](#); see also White, *supra* note 5, at 834 (noting that Urofsky is "an exemplar of contemporary judicial hostility to claims by faculty members for special exemption from expectations of behavior that apply to other state employees and other community members").

²⁵ See White, *supra* note 5, for a thorough discussion of these issues. Even if a faculty member or an institution wanted to bring an action against an accreditor, the First Amendment state action requirement may limit their action. See, e.g., Hiwassee [Coll., Inc. v. The Southern Assoc. of Coll. and Sch., 531 F.3d 1333, 1335 \(11th Cir. 2008\)](#) (compiling cases which found that accrediting agencies were not state actors); [Transport Careers, Inc. v. Nat'l Home Study Council, 646 F. Supp. 1474, 1478 \(N.D. Ind. 1986\)](#) (holding that association's accreditation function did not constitute state action).

²⁶ [Garcetti v. Ceballos, 547 U.S. 410 \(2006\)](#) (holding that no First Amendment rights existed for public officials speaking pursuant to their official duties but explicitly noting that the opinion did not decide the issue involving the academic freedom rights of faculty members employed by public institutions).

²⁷ See [Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47 \(2006\)](#) (noting that the Solomon Amendment's requirement of providing access to military recruiters did not violate law schools' First Amendment rights because it involved conduct, not speech).

²⁸ Byrne, *supra* note 20, at 291-292 n.150 (citing Robert K. Carr, Academic Freedom, the American Association of University Professors, and the United States Supreme Court, AAUP Bull., Mar. 1959, at 5, 19-20 (1959)).

²⁹ [Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 \(1985\)](#).

³⁰ See White, *supra* note 5, at 827 ("Pragmatically, the need to distinguish between the two strands has never been pressing because the Supreme Court has never decided an academic freedom case in which institutions and faculty members were not aligned. In every case, it mattered little to the outcome whether the particular 'freedom' asserted - to teach, to admit students, to conduct research - protected faculty members or institutions, because faculty and institution occupied common ground in

the Third Circuit has stated, "a public university professor does not have a First Amendment right to decide what will be taught in the classroom."⁴³

As opposed to classroom speech, which may or may not serve a pedagogical purpose, it is without a doubt that classroom assessment activities go to the heart of what and how a faculty member teaches. Does the faculty member exclusively use the Socratic Method and have one exam at the end of the semester? If an institution adopts a policy, in order to comply with the new ABA Standards, and that policy requires all faculty to provide multiple formative assessments throughout a semester, essentially foreclosing the faculty's choice to use only one summative final exam, does that implicate a faculty member's academic freedom rights? Lower courts have addressed that question, albeit rarely⁴⁴ and inconsistently.⁴⁵

Most courts hold that a faculty member's choice of teaching methods does not implicate an academic freedom right,⁴⁶ or if it does, an institution's right trumps the individual faculty member's right.⁴⁷ For [*261] example, in *Johnson-Kurek v. Abu-Absi*, the Sixth Circuit found that a professor was required to explain course requirements to students.⁴⁸ The court held,

While the First Amendment may protect [the professor's] right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.⁴⁹

In *Hetrick v. Johnson*, the Sixth Circuit reiterated its deference to institutions in actions by faculty, vowing that it is not the place of courts to interfere with daily school operations.⁵⁰ Specifically, the Sixth Circuit found that a public university did not violate a non-tenured professor's academic freedom rights when it chose not to renew her contract for "displeasure with her "pedagogical attitudes."⁵¹ The court stated,

seeking to repel what Professor Areen and other scholars have called "external challenges' to academic freedom - challenges mounted by agencies and instrumentalities beyond campus boundaries.").

³¹ See *id.* at 822 ("In the last thirty years, by contrast, almost all academic freedom cases have arisen in the context of "internal university disputes rather than threats from outside the university," and therein lies the most profound source of doctrinal complexity in the case law: when a faculty member alleges that his academic freedom is abridged because of a decision made by the institution's own officials - a decision, for example, to deny tenure, or change a grade, or command that certain books be removed from a course syllabus - then individual and institutional prerogatives collide and the outcome of the case can hinge on which variant of academic freedom the court adopts.").

³² *Id.* at 827.

³³ See *Lee*, *supra* note 5 (arguing that the best legal protections of an individual's academic freedom rights as asserted against his employer is rooted in contract law).

³⁴ See James D. Gordon III, *Individual and Institutional Academic Freedom at Religious Colleges and Universities*, 30 *J.C. & U.L.* 1, 7 (2003) (arguing that a higher education institution's mission is to educate students and advance knowledge and that the individual faculty member's academic freedom exists within the context of his institution's mission, which, in turn, places limits on individual academic freedom).

³⁵ [*Kay v. Bd. of Higher Educ. of N.Y.*, 18 *N.Y.S.2d* 821, 829 \(*N.Y. Sup. Ct.* 1940\).](#)

³⁶ AAUP Bulletin, *supra* note 10; see also *White*, *supra* note 5, at 820 ("When faculty members are told what to teach, how to teach, or where their research interests should be confined, we are closest to the nub of academic freedom.").

³⁷ [*Keyishian v. Bd. of Regents of Univ. of the State of N.Y.*, 385 *U.S.* 589, 603 \(1967\).](#)

whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students ... it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.⁵²

[*262] Additionally, in *Wirsing v. Bd. of Regents of Univ. of Colo.*, a district court found that an institution could require a faculty member to use a standardized teacher evaluation form, which went against the faculty member's theory of education because "the evaluation forms represent a University policy and procedure unrelated to course content that in no way interferes with [the professor's] academic freedom."⁵³ Stated concisely, the court found that "academic freedom is not license for activity at variance with job-related procedures and requirements."⁵⁴

Regarding a faculty member's evaluation of students and grading activities, courts defer to an institution's policies.⁵⁵ In *Parate v. Isibor*, the Sixth Circuit, recognizing that the assignment of a grade by a faculty member was a symbolic communicative act, the court held that the institution could not force the faculty member to assign a grade, but could change the grade after it had been assigned by the faculty member.⁵⁶

Many Circuits, including the First,⁵⁷ Second,⁵⁸ Third,⁵⁹ Fifth,⁶⁰ Seventh,⁶¹ and Eleventh,⁶² have come to the same conclusion that, as [*263] between faculty and their institution regarding teaching and grade distribution policies, the institution prevails.⁶³

In finding in favor of the institution when it comes to grading and teaching methods in the classroom, the courts generally rely on academic abstention.⁶⁴ Academic abstention is defined as "the traditional refusal of courts to extend common law rules of liability to colleges where doing so would interfere with the college administration's good faith performance of its core functions,"⁶⁵ and is rooted in the Supreme Court's decision in *Gutter v. Bollinger*.⁶⁶ Basically, "federal judges should not be ersatz [*264] deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom."⁶⁷

³⁸ [Carley v. Ariz. Bd. of Regents, 737 P.2d 1099, 1101-1102 \(Ariz. Ct. App. 1987\)](#) (distinguishing cases involving speech content at issue from cases involving classroom teaching techniques).

³⁹ See White, *supra* note 5, at 791-792, who cites to the Higher Education Opportunity Act, [20 U.S.C. § 1015b](#), which is the only federal legislation that mentions an individual academic freedom right. The purpose of the act, which addresses costs and transparency of course materials, "supports the academic freedom of faculty members to select high quality course materials for students." [20 U.S.C. § 1015b](#) (2012).

⁴⁰ AAUP Article, *supra* note 8, at 70.

⁴¹ *Id.* at 7; see, e.g., [Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 594 \(6th Cir. 2005\)](#) ("There are limits on the extent to which a university may require a professor to endorse actively the university's decisions about pedagogy and grading."); [Wirsing v. Board of Regents of Univ. of Colo., 739 F. Supp. 551, 554 \(D. Colo. 1990\)](#) (noting that a faculty member can openly criticize her institution's mandatory teacher evaluation form and the institution's policy requiring its use). But see [Clark v. Holmes, 474 F.2d 928, 931 \(7th Cir. 1972\)](#) (finding that a faculty member's classroom criticisms of the administration and the faculty was not protected by the First Amendment).

⁴² [Keen v. Penson, 970 F.2d 252, 257 \(7th Cir. 1992\)](#) (finding that the United States Court of Appeals "recognized the supremacy of the academic institution in matters of curriculum content."); see also [Bonnell v. Lorenzo, 241 F.3d 800, 820 \(6th Cir. 2001\)](#) (noting that the institution had the right to control classroom speech when it was not germane to course content).

⁴³ [Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 \(3d Cir. 1998\)](#).

⁴⁴ [Cooper v. Ross, 472 F. Supp. 802, 813 \(E.D. Ark. 1979\)](#) ("Case law considering the extent to which the First Amendment and academic freedom protect a teacher's choice of teaching methodology is surprisingly sparse and the results are not entirely consistent.") (citations omitted).

B. Assessment Mandates in Accreditation Standards

When the ABA decided to change its accreditation Standards, it chose to do so based upon reliable evidence, like lawyers and educational researchers often do. But, why did the ABA decide to "mandate" these changes in accreditation? ⁶⁸ In order to aptly answer this question, a brief review of the history and purpose of accreditation is necessary and the specific Standards adopted by the ABA.

1. Accreditation Generally

Accreditation of American universities began in the nineteenth century ⁶⁹ and has evolved into the current structure of accreditation among six regional accreditors of higher education institutions, ⁷⁰ as well as [*265] accreditors of faith-based institutions, accreditors of specialized programs, like the ABA for law schools, and career-related accreditors. ⁷¹

Institutions may be accredited by multiple accreditors. ⁷² Institutions with affiliated law schools fall into this category because regional accreditors look at all units of an institution, law schools being one such unit of a larger institution. ⁷³ Thus, law schools that are part of a larger institution are reviewed by their larger institution's regional accreditor. ⁷⁴ In addition, law schools are also accredited by the ABA. Of prime importance to this Article, all of the regional accreditors require outcomes [*266] assessment in their standards. ⁷⁵ Suffice it to say, accreditation and assessment are "inevitable partners." ⁷⁶

So, what does this mean for law schools? Ultimately, two things: first, law schools, to the extent that they are not already involved, will likely become more involved in the regional accreditation process, which requires outcomes assessment. Second, law schools will be required to comply with the ABA accreditation Standards, discussed below, which have been influenced by the outcomes assessment focus in the regional accreditors' standards.

⁴⁵ See White, *supra* note 5, at 827-830 (compiling lower court cases and their inconsistent treatment); see also Richard Fossey & Joseph C. Beckham, *University Authority over Teaching Activities: Institutional Regulation may Override a Faculty Member's Academic Freedom*, 228 West's Educ. L. Rep. 1, 1, 2 (2008) (stating "lower federal courts have defined the faculty member's academic freedom rights narrowly in relationship to teaching activities" and that these courts have "generally granted higher education institutions a great deal of latitude, particularly when the institution seeks to regulate a faculty member's teaching activities.").

⁴⁶ See, e.g., [Dambrot v. Central Mich. Univ.](#), 55 F.3d 1177, 1190 (6th Cir. 1995) ("An instructor's choice of teaching methods does not rise to the level of protected expression.") (citations omitted).

⁴⁷ See, e.g., [Carley v. Ariz. Bd. of Regents](#), 737 P.2d 1099, 1103 (Ariz. App. 1987) ("The University concluded that he was not an effective teacher. It was apparently their professional opinion that his methodology was not successful. Academic freedom is not a doctrine to insulate a teacher from evaluation by the institution that employs him."); [Riggin v. Bd. of Tr. of Ball State Univ.](#), 489 N.E.2d 616, 630 (Ind. Ct. App. 1986) ("Governing bodies of colleges, universities and other schools acting through their deans, department heads, and duly constituted faculty committees, have a right to develop curriculum, determine course content and impose methods of instruction. A teacher is obligated to comply with their directions in this regard."); [Millikan v. Bd. of Dir.](#), 611 P.2d 414, 417 (Wash. 1980) (teachers sought to team-teach a history course according to their own plan, which was "unconventional but professionally recognized methods designed to teach the students to think" but the court held that the "board's requirement that [teachers] teach history classes in a conventional manner contrary to their own preferred teaching philosophy is not violative of their rights.").

⁴⁸ [Johnson-Kurek v. Abu-Absi](#), 423 F.3d 590, 595 (6th Cir. 2005). See also Fossey & Beckham, *supra* note 45, at 6, for a full discussion of the Johnson-Kurek case, finding that the case "is in harmony with other federal court decisions limiting a faculty member's right to academic freedom in his or her teaching activities." Fossey and Beckham divide the lower court cases into three categories: grading and curricular decisions, evaluation of faculty members, and classroom speech. *Id.* at 7. Fossey and Beckham state that Johnson-Kurek found that "while a faculty member's right to express ideas about pedagogy may be protected, the institution may determine what is appropriate pedagogy in meeting the needs of students." *Id.* at 11.

⁴⁹ [Johnson-Kurek](#), 423 F.3d at 595.

2. The American Bar Association

The ABA adopted the first Standards for Legal Education in 1921.⁷⁷ Over the course of the past century, the Council amended the Standards numerous times.⁷⁸ For the purposes of this Article, the most dramatic amendments to the Standards occurred in 2014, when the Standards were amended to adopt an outcomes assessment approach to accreditation.⁷⁹ This change was prompted by the ABA's appointment of a Special Committee on Output Measures in 2007, which was charged with determining if the accreditation process should involve output measures and if so, how it could be done.⁸⁰

[*267] The Special Committee released its comprehensive Report in 2008, wherein it recommended that the ABA Standards should be revised to incorporate outcomes measures, which would align with the practices of regional accreditors and accreditors of professional schools, and which was consistent with best practices in higher education and in legal education.⁸¹

* Following the issuance of the Committee's Report, the Council charged the Standards Review Committee with reviewing the Standards in light of the Committee's recommendations and with making recommendations to the Council.⁸² The Council appointed a Student Learning Outcomes Subcommittee.⁸³ The Subcommittee provided guiding principles for a shift to outcomes assessment in the Standards.⁸⁴ The principles provided that:

* The process of identifying, assessing and improving outcomes is more important than ensuring that every student achieve each outcome. * Different types of faculty - doctrinal, clinical, legal writing and others - play important roles in identifying and assessing learning. * Faculty should have the central role in identifying, assessing and improving learning outcomes. * Outcomes will differ based upon law school missions. * Although the traditional legal curriculum, which purports to teach students to "think like a lawyer," will remain at the center of law schools' J.D. programs, schools should measure how successful their students are in mastering that skill and in bridging the gap between it and other lawyering skills. * Focusing on outcomes should serve as a catalyst for law schools to be intentional in curriculum development. * The focus on outcomes should shift the emphasis from what is being taught

⁵⁰ [Hetrick v. Johnson, 480 F.2d 705 \(6th Cir. 1973\).](#)

⁵¹ [Id. at 708.](#)

⁵² [Id. at 709.](#) Although the holding was specific to a non-tenured professor, it does not appear that that fact was outcome determinative.

⁵³ [Wirsing v. Bd. of Regents of Univ. of Colo., 739 F. Supp. 551, 554 \(D. Colo. 1990\).](#)

⁵⁴ [Id. at 553](#) (citations omitted).

⁵⁵ See, e.g., [Brown v. Armenti, 247 F.3d 69, 75 \(3d Cir. 2001\)](#) ("Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is taught. We therefore conclude that a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures."); see also [Wozniak v. Conry, 236 F.3d 888 \(7th Cir. 2001\)](#). The Seventh Circuit labeled a "rebel" faculty member's refusal to follow the institution's grading curve "insubordination." [Id. at 890-891](#). The court stated,

no person has a fundamental right to teach undergraduate engineering classes without following the university's grading rules. Quite the contrary, both a university and its students have powerful interests in comparability of grades across sections, for grades are a university's stock in trade and class rank may be vital to a student's future. By insisting on a right to grade as he pleases, [the faculty member] devalues his students' right to grades that accurately reflect their achievements.

[Id. at 891.](#)

⁵⁶ [Parate v. Isibor, 868 F.2d 821, 828 \(6th Cir. 1989\)](#) ("The professor's evaluation of her students and assignment of their grades is central to the professor's teaching method.").

to what is being learned by the students. ⁸⁵ Starting in 2008, and after many revisions, the revised Standards were adopted in 2014, finally bringing law school accreditation in step with [*268] accreditation in other disciplines and higher education generally. ⁸⁶ The Standards that directly address outcomes assessment are Standards 301, 302, 314, 315, and 404, and are hereinafter labelled "assessment mandates." ⁸⁷

Learning outcomes are the foundation of assessment practice, and the new Standards reflect their importance. Standard 301, entitled "Objectives of Program of Legal Education" was amended to provide that "[a] law school shall establish and publish learning outcomes" ⁸⁸ Standard 302, a completely new Standard, provides the required learning outcomes that all law schools must have. ⁸⁹ Although seemingly a bold move, this Standard did not truly break new ground as it is merely a restatement of former Standard 302, which provided what areas a law student must receive "substantial instruction" in: the same general categories listed in the new Standard 302. ⁹⁰

Standards 301 and 302 do not directly impact a faculty member's teaching activities. Standard 301 addresses institutional learning outcomes; therefore, it does not directly impact a faculty member's course content or speech. Likewise, the corollary to Standard 301, Standard 302 proposes the minimum learning outcomes that a school should adopt, again only addressing institutional learning outcomes. Standard 302, which merely [*269] recasts former Standard 302, has not been heretofore challenged by individual faculty members. Therefore, it is unlikely that its recast in learning outcomes language could be said to have an impact where one was not alleged before. Furthermore, the ABA has tempered the language in Standard 302, by providing in Interpretation 302-2 that a law school has the ability to add any learning outcomes that are "pertinent to its program of legal education." ⁹¹

The ABA Guidance Memo, released in June 2015, addressed Standard 301 specifically, providing that "learning outcomes for individual courses must be published in the course syllabi." ⁹² This assessment mandate requires faculty to have syllabi and to list learning outcomes on the syllabi, and arguably impacts a faculty member's speech regarding course content as well as educational philosophy.

⁵⁷ See, e.g., [Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 425-426 \(1st Cir. 1986\)](#) ("Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standard to a broader, more average population is a policy decision which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision.").

⁵⁸ [Vega v. Miller, 273 F.3d 460, 467-468 \(2d Cir. 2001\)](#).

⁵⁹ [Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 \(3d Cir. 1998\)](#); [Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 \(3d Cir. 1990\)](#) ("No court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policies or dictates.").

⁶⁰ [Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 \(5th Cir. 1982\)](#). The court held that a faculty member's claim that refusal to assign a grade constituted a "teaching method" was unfounded as the institution did not require the faculty member to review the student's work but just told to give her a passing grade. *Id.* The court stated "while academic freedom is well recognized, its perimeters are ill-defined and the case law defining it is inconsistent. Its roots have been found in the first amendment insofar as it protects against infringements on a teacher's freedom concerning classroom content and method." *Id.* (citations omitted).

⁶¹ [Clark v. Holmes, 474 F.2d 928, 931 \(7th Cir. 1972\)](#) ("We do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution.").

⁶² [Bishop v. Aronov, 926 F.2d 1066, 1074 \(11th Cir. 1991\)](#) ("As a place of schooling with a teaching mission, we consider a University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time.").

⁶³ However, not all courts are so restrictive. See, e.g., [Dube v. State Univ. of N.Y., 900 F.2d 587, 598 \(2d Cir. 1990\)](#) ("Assuming the [institution] retaliated against [the faculty member] based on the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable.").

Standard 314 is also a completely new standard and requires law schools to engage in formative and summative assessment to provide evidence of student learning and requires schools to provide feedback to students.⁹³ Standard 315 requires that, in addition to the formative and summative assessment of student learning, a law school is required to assess its assessment, by reviewing its own assessment activities to evaluate student learning and progression on the learning outcomes.⁹⁴

The major focus from the academy to date has been on the outcomes Standards 301, 302, 314, and 315.⁹⁵ However, the lesser-mentioned Standard 404 also addresses faculty responsibility for assessment of student learning. Specifically, Standard 404 states, in pertinent part:

(a) A law school shall adopt, publish, and adhere to written policies with respect to full-time faculty members' responsibilities. The [*270] policies shall require that the full-time faculty, as a collective body, fulfill these core responsibilities:

(1) Teaching, preparing for classes, being available for student consultation about those classes, assessing student performance in those classes, and remaining current in the subjects being taught;

(2) Participating in academic advising, creating an atmosphere in which students and faculty may voice opinions and exchange ideas, and assessing student learning at the law school;⁹⁶

Arguably, Standards 314 and 404 could be not be more explicit nor have a more direct impact on faculty teaching methods in the classroom.

In August 2014, following the adoption of the standards, the ABA released a transition memo, stating that it would be looking for four things in its review of schools under the new Standards: (1) faculty engagement in creating learning outcomes; (2) how the curriculum encompasses the outcomes and the integration of teaching and

⁶⁴ See Byrne, *supra* note 20, at 323, for a full discussion of academic abstention. Byrne notes that "it would be inappropriate to describe academic abstention as a doctrine, because courts have never developed a consistent or thorough body of rationales or followed a uniform group of leading cases." *Id.* at 323; see also Jeff Todd, *State University v. State Government: Applying Academic Freedom to Curriculum, Pedagogy, & Assessment*, 33 J.C. & U.L. 387, 402 (2007) (stating that "the constitutional right of institutional academic freedom appears to be collateral descendent of the common law notion of academic abstention"); White, *supra* note 5, at 817-818 ("Judicial deference to academic decision making has a downside as well: by discouraging courts from examining in detail what faculty members actually do, judicial deference fosters a jurisprudence "lacking in consistency" and in which courts and litigants are encouraged to "invoke the doctrine [of academic freedom] in circumstances where it arguably has no application.").

⁶⁵ See Byrne, *supra* note 20, at 323; see also Cain, *supra* note 2, at 7-8. Cain argued that the AAUP's 1966 Statement on Government of Colleges and Universities, which provides that "the faculty has primary responsibility for such fundamental areas as curriculum, subject matter, and methods of instruction" can be interpreted to provide "faculty with control over assessment activities through their primary responsibility for determining and enacting the curriculum, although not necessarily full control over whether learning outcomes assessment will take place." *Id.*

⁶⁶ [*Grutter v. Bollinger*, 539 U.S. 306, 328 \(2003\)](#) ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."); see also [*Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 \(1985\)](#) ("When judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgment.").

⁶⁷ [*Bishop v. Aronov*, 926 F.2d 1066, 1075 \(11th Cir. 1991\)](#) ("We do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University."); see also [*Nat'l Labor Relations Bd. v. Yeshiva Univ.*, 444 U.S. 672, 698 \(1980\)](#) (Brennan, J., dissenting) ("The University always retains the ultimate decision-making authority ... and the administration gives weight and import to the faculty's collective judgment as it chooses and deems consistent with its own perception of the institution's needs and objectives."); [*Hong v. Grant*, 516 F. Supp. 2d 1158, 1169-1170 \(C.D. Cal. 2007\)](#) ("Such expansive constitutionalization would require endless judicial supervision of the decisions university administrators must make on a daily basis to ensure the efficient and effective management of their institution. Federal courts are ill-equipped to oversee these purely institutional decisions absent a significant federal interest.").

assessment of the outcomes in the curriculum; (3) how and when students receive feedback, regarding their progression on the outcomes; and (4) efforts to gather information on student learning and to use the information.⁹⁷

With the assessment mandates firmly in place, law schools and their individual faculty members are now faced with the implementation of outcomes assessment, a seismic shift in legal education pedagogy. This shift has prompted many questions. For example, doesn't academic freedom protect faculty members' ability to choose what and how they teach in the classroom? And if so, doesn't that fly in the face of the new Standards, which require learning outcomes in all syllabi and formative assessments in the classroom?

Although specific cases have not clearly addressed this issue, scholars have been outspoken, taking both sides of the issue generally. Some claim that accreditation presents "a serious challenge to academic freedom and to the educational goals such freedom is intended to support."⁹⁸ While others [*271] claim that "our system of accreditation is grounded in and depends upon academic freedom" and that accreditation and academic freedom have a "reciprocal relationship."⁹⁹ Some hypothesize that,

there is no doubt that a question related to regional and state accreditation, necessary for the awarding of degrees with value to the students and a school's stakeholders, would receive full support from the courts. Similarly, in today's climate of accountability, it is just as important for an institution to set guidelines requiring assessment of student learning and to seek the approval and endorsement of external professional accrediting bodies¹⁰⁰ as necessary for an institution's survival.¹⁰¹

Lastly, the AAUP, the guardian of individual academic freedom rights, does not see a conflict between accreditation (and the assessment mandates therein) and individual academic freedom rights.¹⁰²

II. Analysis

⁶⁸ This Article does not address other assessment mandates, such as those of regional accreditors or even institutional review, by deans in yearend reviews or PRT committees.

⁶⁹ Judith S. Eaton, U.S. Accreditation: Meeting the Challenges of Accountability and Student Achievement, 5 *Evaluation in Higher Educ.* 1, 3 (2011), [https://www.chea.org/userfiles/CHEAkry224/EHE5-1 U%20S%20 Accreditation Meeting the Challenges of Accountability and Student Achievement-Judith S%20 Eaton.pdf](https://www.chea.org/userfiles/CHEAkry224/EHE5-1%20S%20Accreditation%20Meeting%20the%20Challenges%20of%20Accountability%20and%20Student%20Achievement-Judith%20Eaton.pdf); see also Judith Areen, Accreditation Reconsidered, *96 Iowa L. Rev.* 1471 (2011) (detailing a history of the evolution of the accreditation process in the United States).

⁷⁰ Areen, *supra* note 69, at 1478 n.37. The six regional accreditors have seven accrediting commissions, which include: the Commission of Institutions of Higher Education of the New England Association of Schools and Colleges; the Middle States Commission on Higher Education of the Middle States Association of Colleges and Schools; the Southern Association of Colleges and Schools Commission on Colleges; the Higher Learning Commission of the North Central Association of Colleges and Universities; the Northwest Commission on Colleges and Universities; the Northwest Commission on Colleges and Universities' Accrediting Commission for Community and Junior Colleges; and the Western Association of Schools and Colleges. *Id.* The United States Department of Education defines accrediting agencies as "organizations (or bodies) that establish operating standards for educational or professional institutions and programs, determine the extent to which standards are met, and publicly announce their findings." U.S. Dep't of Educ., FAQs About Accreditation, The Database of Accredited Postsecondary Institutions and Programs, <https://ope.ed.gov/accreditation/FAQAccr.aspx> (last visited April 9, 2017) [hereinafter FAQs About Accreditation]; see also U.S. Dep't of Educ., The Database of Accredited Postsecondary Institutions and Programs, <http://ope.ed.gov/accreditation> (last visited April 9, 2017) (providing another definition of accrediting agencies as "private educational associations of regional or national scope, [which] develop evaluation criteria and conduct peer evaluations to assess whether or not those criteria are met").

⁷¹ Areen, *supra* note 69, at 1479. The United States Department of Education, however, only identifies two types of accrediting agencies: institutional and specialized or programmatic. FAQs About Accreditation, *supra* note 70. "Institutional accreditation normally applies to an entire institution, indicating that each of an institution's parts is contributing to the achievement of the institution's objectives, although not necessarily all at the same level of quality." *Id.* Whereas,

Having surveyed the law on individual academic freedom rights regarding the choice of teaching methods, and identified the ABA Standards that impact faculty members' academic freedom rights, the issue becomes: do these Standards, when implemented by an institution, actually violate a faculty member's academic freedom rights? ¹⁰³

In any academic freedom analysis, it is important to note that, as employees of an institution, faculty members have certain job responsibilities. Academic freedom is not a release from all job-related [*272] responsibilities. To that end, law faculty members have always been required to engage in certain job responsibilities. For example, in most doctrinal classes, faculty members are required to provide a final grade and at least one examination as part of their job responsibilities. ¹⁰⁴ However, the question remains, are the new ABA Standards and the implementation of the same different than other job responsibilities that faculty members have always been required to complete? And if so, do these Standards, when implemented by a law school, violate a faculty member's academic freedom rights? This Article will analyze several potential violations and provide recommendations to institutions and faculty to guide them in their future adoption of assessment mandates.

A. Mandated Assessments and the Violation of Academic Freedom

As a starting point, it is acknowledged that the ABA Standards impact academic freedom rights involving classroom speech (i.e., content) and teaching methods. But, does that impact rise to the level of a violation? A claim of a violation could occur in several ways: (1) a faculty member forced to include learning outcomes in her syllabus as required by the ABA; (2) a faculty member forced to provide more than one summative exam, requiring some type of formative assessment in the middle of the semester to meet Standards 314 and 404; (3) a faculty member forced to give a standardized test in her course to help the administration gather data for its institutional assessment plan under Standard 315; and/or (4) a faculty member being penalized for openly criticizing assessment and her school's

specialized accreditation normally applies to the evaluation of programs, departments, or schools which usually are parts of a total collegiate or other postsecondary institution Most of the specialized accrediting agencies review units within a postsecondary institution which is accredited by one of the regional accrediting commissions. However, certain of the specialized accrediting agencies accredit professional schools Thus, a "specialized" or "programmatic" accrediting agency may also function in the capacity of an "institutional" accrediting agency.

Id.

⁷² See Eaton, *supra* note 69, at 4.

⁷³ Judith Welch Wegner, *The Accreditation Context and the Law School Mission*, in *Building on Best Practices: Transforming Legal Education in a Changing World* 3, 3 (Deborah Maranville et al. eds., 2015).

⁷⁴ Id.

⁷⁵ Staci Provezis, NILOA Occasional Paper No. 6, *Regional Accreditation and Student Learning Outcomes: Mapping the Territory*, 7 (Oct. 2010), <http://www.learningoutcomesassessment.org/documents/Provezis.pdf> (compiling the standards of the regional accreditors and noting that the regional accreditors "share similar expectations for student learning outcomes assessment"). However, regional accreditors do not mandate specific outcomes or the types of assessment activities. Cain, *supra* note 2, at 9.

⁷⁶ Provezis, *supra* note 75, at 4; see also Cain, *supra* note 2, at 8-9 (noting that "meeting accreditation requirements remains the strongest driver of assessment efforts in American higher education," which has created a tension between "assessment for accountability and assessment for improvement").

⁷⁷ ABA Sec. of Legal Educ. and Admissions to the Bar, 2015-2016 Standards and Rules of Procedure for Approval of Law Schools, at v (2015) [hereinafter ABA Standards]. In 1952, the United States Department of Education recognized the Council of the Section of Legal Education and Admissions to the Bar of the ABA (Council) as the accrediting body for J.D. programs. Id.

⁷⁸ Susan Hanley Duncan, *The New Accreditation Standards are Coming to a Law School New You - What You Need to Know About Learning Outcomes & Assessment*, 16 *Legal Writing: J. Legal Writing Inst.* 605, 606-607 n.8 (2010) (also explaining the steps in the amendment process of the Standards). Along with the Standards, the Council has promulgated Interpretations to provide guidance on the individual Standards and Rules of Procedure and to outline the process of accreditation. ABA Standards, *supra* note 77.

assessment activities and mandatory assessment in the classroom. Numerous other scenarios could play out. As more and more law schools begin to implement the ABA standards, they are requiring more mid-term assessments and adopting more assessment policies, so these scenarios are more than mere hypotheticals.

1. Mandated Learning Outcomes in Syllabi

The 2015 Guidance Memo requires a faculty member to have a syllabus and to include learning outcomes in the syllabus,¹⁰⁵ touching on course content as well as faculty speech. Institutions are likely to adopt policies to meet this requirement, and courts would be reluctant to find [*273] such policies to be a violation of a faculty member's academic freedom rights.

First, a policy requiring a syllabus with learning outcomes would not violate a faculty member's academic freedom rights concerning course content as it is doubtful that such policy would dictate the specific language of the course-level learning outcomes. At most, it could be envisioned that a policy might direct that the course-level learning outcomes be aligned with the institutional learning outcomes.¹⁰⁶

If the policy requires the outcomes to be aligned with the institutional or programmatic outcomes, a faculty member's course content would be impacted to some extent. However, it would be minor. As noted by the ABA, the institutional and programmatic outcomes are to be adopted with faculty input.¹⁰⁷ Therefore, faculty would have had a voice in the creation of the institutional learning outcomes, such that when required to align their course-level learning outcomes in their syllabi, they would be working with language that they had already adopted. Additionally, the institutional and programmatic outcomes are likely written in broad language and do not address specific doctrinal content, at least no more so than traditional course descriptions, to which faculty have adhered without noted complaint.¹⁰⁸ Lastly, not every institutional learning outcome must be assessed in every course.¹⁰⁹

⁷⁹ See ABA Standards, *supra* note 77, at vi-vii.

⁸⁰ American Bar Association, Managing Director's Guidance Memo, Standards 301, 302, 314 and 315, June 2015, at 3, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf [hereinafter ABA Memo].

⁸¹ ABA Sec. of Legal Educ. and Admission to the Bar, Report of the Outcome Measures Committee, 1 (2008), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.authcheckdam.pdf; see also ABA Memo, *supra* note 80, at 3.

⁸² ABA Memo, *supra* note 80, at 3.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ ABA Standards, *supra* note 77; Areen, *supra* note 69, at 1490 (noting that because the ABA did not at that time focus on quality improvement, it was out of line with other accreditors in higher education). Areen also noted the failure of ABA accreditation to consider a school's mission, which has been remedied by the 2014 Standards. *Id.* at 1491.

⁸⁷ The Standards include other mentions of assessment; however, such standards do not truly impact the assessment activities of a school or its faculty and thus, are not characterized as "assessment mandates" as that term is used in this Article. See, e.g., ABA Standards, *supra* note 77, at 11 ("Before each site evaluation visit the law school shall prepare a self-study comprised of (a) a completed site evaluation questionnaire, (b) a statement of the law school's mission and of its educational objectives in support

Therefore, there would not be pressure on a faculty member to incorporate all of the institutional learning outcomes if she does not find them relevant to her specific course. Based on any of these reasons, and regardless of the exact language of the policy, such a mandate would not address content directly and therefore, could not be found to violate a faculty member's academic freedom.

Second, such a mandate requires faculty members to communicate to their students learning outcomes, which in and of itself, requires faculty members to communicate a specific educational philosophy, that of outcomes assessment. It requires faculty members, at least implicitly, to convey a certain message, with which they may not agree. As noted in *Johnson-Kurek*, there are limits on the extent to which a law school could require a faculty member to endorse an institutional or ABA policy.¹¹⁰ And, like in *Johnson-Kurek*, although the school could not force faculty members to endorse such a pedagogical philosophy, it could still require [*274] them to include learning outcomes in their syllabi.¹¹¹ By merely requiring faculty members to have a syllabus and to insert learning outcomes on it would potentially be seen as non-expressive conduct,¹¹² as opposed to compelled speech.

Additionally, adoption of a syllabus with learning outcomes is arguably a teaching method. Generally speaking, faculty members are more restricted in their teaching methods than their speech. This result is in large part due to courts' unwillingness to address such issues, claiming academic abstention and to favor an institution's academic freedom rights over a faculty member's rights.¹¹³ Therefore, there would likely be no violation of a faculty member's academic freedom rights.

2. Mandated Assessments

As to teaching methods specifically, in implementing Standards 314 and 404, an institution could impact a faculty member's academic freedom rights.¹¹⁴ An institution could require mid-term assessments and/or multiple

of that mission, (c) an assessment of the educational quality of the law school's program, (d) an assessment of the school's continuing efforts to improve educational quality, (e) an evaluation of the school's effectiveness in achieving its stated educational objectives, and (f) a description of the strengths and weaknesses of the law school's program of legal education.").

⁸⁸ ABA Standards, *supra* note 77, at 15 ("(a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession. (b) A law school shall establish and publish learning outcomes designed to achieve these objectives.").

⁸⁹ *Id.* ("A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.").

⁹⁰ ABA Sec. of Legal Educ. and Admissions to the Bar, 2012-2013 Standards and Rules of Procedure for Approval of Law Schools, at 19 (2012).

⁹¹ *Id.* ("A law school may also identify any additional learning outcomes pertinent to its program of legal education.").

⁹² See ABA Memo, *supra* note 80, at 4.

⁹³ ABA Standards, *supra* note 77, at 23 ("A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students."). Interpretation 314-1 states, Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student's education that provide meaningful feedback to improve student learning. Summative assessment methods

formative assessments in courses. Law schools around the country are adopting such policies, often as an unwritten policy or custom. However, whether a mandate in this regard would violate an academic freedom right is somewhat unclear, considering the inconsistent treatment by courts on teaching methods generally.

Similar to the analysis of requiring a faculty member to have a syllabus, if the mandate merely requires faculty to create and to administer mid-term assessments, it would be non-expressive conduct, not speech, and therefore, likely not violative of any academic freedom rights. Additionally, as noted above, such a mandate would likely be upheld because of academic abstention and the deference to an institution's academic freedom rights over that of the individual. Furthermore, to the extent that such a policy was adopted by the faculty, the faculty would have had a voice in its adoption. Therefore, their complaints regarding its implementation would be weakened.

3. Standardized Assessments

In addition to requiring multiple assessments in courses, institutions may require faculty to participate in institutional assessment under Standard 315, by administering a standardized assessment tool in their individual courses. Like the standardized student evaluation forms in Wirsing,¹¹⁵ requiring a faculty member to provide a standardized tool [*275] would likely not violate academic freedom. However, there is a distinction between the use of a standardized student evaluation form, which has little to no connection to course content as in Wirsing,¹¹⁶ and a standardized assessment tool, which to be valid and reliable, would have to address course content. Obviously, students should not be assessed on materials that they have not learned.

are measurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning.

Id.

⁹⁴ Id. ("The dean and the faculty of a law school shall conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.").

⁹⁵ See ABA Memo, *supra* note 80.

⁹⁶ ABA Standards, *supra* note 77, at 28 (emphasis added).

⁹⁷ ABA Sec. of Legal Educ. and Admissions to the Bar, Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools 1, 2 (2014) [hereinafter ABA Rules], http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocument/s/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf.

⁹⁸ William W. Pendleton, The Freedom to Teach, 88 *New Directions in Higher Educ.* 11, 18 (1994). Pendleton states that the assessment movement is a result of "well-intentioned but intellectually poorly informed people acting through bureaucratic structures to achieve high-sounding goals." Id.; see also Michael W. Ledoux et al., The Erosion of Academic Freedom, 88 *Educ. Horizons* 249, 252 (2010) ("Accrediting agencies can deprive institutions, faculty, and students of academic freedom by attacking the individual's self-identity. Such pressure may presume to improve curriculum development and conceptual frameworks, but it can also harbor hidden personal and political agendas.").

⁹⁹ Sandra E. Elman, Academic Freedom and Regional Accreditation: Guarantors of Quality in the Academy, 88 *New Directions in Higher Educ.* 89, 90 (1994).

¹⁰⁰ See Denise S. Smith & Michael A. Katz, Academic Freedom in the Age of Assessment and Accountability, *22 Midwest L.J.* 1, 19 (2008).

¹⁰¹ *Id. at 28*. Smith and Katz argue that "the institutions decisions to institute comprehensive assessment programs or to seek and maintain professional accreditations should be considered necessary for the optimal organization and maintenance of the institution and free from academic freedom infringement claims by faculty." Id. They also note that

when administered fairly amongst the faculty, justified in its application and fruitful in its results, assessment and maintenance of professional accreditations are necessary for the survival of institutions and should be considered a vital part of the professor's

Regardless of its relation to course content, if the standardized assessment is created by the administration, merely requiring the faculty member to administer it in class time would be conduct, not compelled speech (or course content), and would likely be found to be non-expressive conduct. Therefore, like mandating assessments generally, mandating the use of a specific assessment tool is unlikely to violate a faculty member's academic freedom.

4. Criticism of Assessment and Assessment Policies

Concluding that faculty members may be limited in their refusal to participate in their institution's assessment mandates does not foreclose or eviscerate the individual right of academic freedom. A faculty member who disagrees with outcomes assessment generally and the language in the syllabi, mandated assessments, or standardized assessments specifically, would be able to openly criticize the same without fear of repercussion and with full protection of academic freedom. As noted in *Wirsing*, a faculty member has the right to openly criticize faculty policy in her classroom.¹¹⁷ Here, her rights would likely be at their strongest.¹¹⁸

B. Recommendations for the Adoption of Assessment Mandates

Just because it is unlikely that faculty members would succeed in claiming violation of their academic freedom rights regarding their teaching activities and speech does not mean that institutions and faculty members should not do all in their power to protect those rights. Although the ABA has only recently addressed assessment, it has long shown respect for and restraint in the field of academic freedom in relation to faculty and their teaching.¹¹⁹ As noted by the AAUP "any assessment scheme must provide certain protections for the role of the faculty and for the institutional mission as agreed upon by the faculty, administration, and [*276] governing board, and endorsed by the regional accrediting agency."¹²⁰ When enacting policy to comply with the ABA assessment mandates,

duties and not an attack on academic freedom. On the contrary, making the academic institution effective, capable and respected only serves to promote and preserve academic freedom.

Id.

¹⁰² *Id. at 23* ("It is therefore reasonable to conclude that the AAUP recognizes the responsibility of faculty to participate in reasonable accreditation and assessment efforts without academic freedom being an issue.").

¹⁰³ This analysis is strictly limited to a faculty member's classroom activities associated with teaching and does not address a faculty member's research or extra-mural speech (although neither are likely impacted by the new ABA Standards).

¹⁰⁴ See ABA Standards, *supra* note 77, at 29. ABA Interpretation 405-5 provides that "if the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule." *Id.* This Interpretation merely acknowledges that requiring one to adhere to a schedule is not a violation of academic freedom. However, this says nothing as to the requirement of having an examination in the first place. Interestingly, this Interpretation also notes the dual responsibility of the dean and the faculty for policy decisions.

¹⁰⁵ ABA Memo, *supra* note 80, at 4.

¹⁰⁶ For a discussion on the alignment of learning outcomes, see Lori E. Shaw & Victoria L. VanZandt, *Student Learning Outcomes and Law School Assessment: A Practical Guide to Measuring Institutional Effectiveness* 14-16 (2014).

¹⁰⁷ See ABA Memo, *supra* note 80, at 3.

institutions and faculty should follow the lead of their primary accreditor, the ABA, and ensure that individual academic freedom rights are protected. Specifically, they should follow the ABA's lead and adopt faculty-driven assessment policies, avoid standardized assessments, support innovation and experimentation, and educate all interested parties.

1. The ABA's Protections of Academic Freedom

The ABA has placed restraints on its own mandates to ensure individual academic freedom rights are protected. Several Standards address it in a passing manner, while Standard 405 is more direct. For example, Standard 201 recognizes the shared responsibility of the dean and the faculty "for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, ... and academic standards."¹²¹ With this Standard, the ABA recognizes that methods of instruction are a shared responsibility by the administration and the faculty. Therefore, a mandate requiring mid-term assessments (one or multiple) should likely come from a collective faculty decision, not an administrative fiat.

Similarly, the ABA Interpretations of the Standards show respect for and protection of academic freedom rights. For example, such Interpretations recognize the importance of the individualized identity of institutions. To that end, Interpretation 302-2 notes that schools can identify their own learning outcomes and does not mandate specific course or curriculum content.

Additionally, Interpretation 314-2 clarifies that Standard 314 does not require "multiple assessment methods in any particular course."¹²² The Interpretation notes that schools are not required to use any specific assessment activities and recognizes such activities are likely to vary from school to school.¹²³ Here, the ABA is acknowledging the individuality of schools and their assessment activities. Similarly, Interpretation 315-1, which provides examples of assessment tools that schools can use for institutional assessment, does not require law schools to adopt any particular assessment method and again notes that such activities are likely [*277] to vary from school to school.¹²⁴ Here again, the ABA notes the individuality of schools and their assessment activities.

¹⁰⁸ Shaw & VanZandt, *supra* note 106, at 14 ("The identification of outcomes poses no threat to the professor's academic freedom. No one is dictating course content. (Course descriptions are far more directive than institutional outcomes in that regard.)").

¹⁰⁹ See *id.* at 78.

¹¹⁰ [*Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 594 \(6th Cir. 2005\)](#).

¹¹¹ [*Id.* at 595](#).

¹¹² [*Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47 \(2006\)](#).

¹¹³ See, e.g., [*Johnson-Kurek*, 423 F.3d at 595](#).

¹¹⁴ This section does not address the content of such assessments, which is addressed *infra* Section II.B.3

¹¹⁵ See *supra* notes 53-54 and accompanying text.

¹¹⁶ [*Wirsing v. Bd. of Regents of Univ. of Colo.*, 739 F. Supp. 551, 554 \(D. Colo. 1990\)](#).

¹¹⁷ *Id.*

¹¹⁸ AAUP Article, *supra* note 8, at 67. For the most part, it appears that academic freedom would protect a faculty member speaking out against assessment on a philosophical basis, as it would be seen to further a pedagogical purpose and be a matter of public concern.

¹¹⁹ See Cain, *supra* note 2, at 11 ("If external requirements are too narrow or prescriptive, institutional autonomy and academic freedom are in danger.").

¹²⁰ Mandated Assessment of Educational Outcomes, *supra* note 2, at 55.

Unlike these statements by the ABA, Standard 405, Professional Environment, is more direct in its protection of individual academic freedom rights.¹²⁵ Standard 405 provides that "[a] law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory."¹²⁶ Appendix 1 is the text of the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure.¹²⁷ As noted earlier, this Statement recognizes that "academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights."¹²⁸ Also in this Appendix, in providing for transparency, the ABA states that if an institution places any limits on individual academic freedom, such limits should be explicitly set forth "in writing at the time of the appointment."¹²⁹ Therefore, the ABA can be said to fully recognize, appreciate, and protect individual academic freedom rights.¹³⁰

2. Adopt Faculty-Driven Assessment Policies

Institutions should recognize the primary role that faculty play in pedagogical decisions generally and assessment policies specifically.¹³¹ In addition to being endorsed by the ABA, this statement is echoed by the AAUP, noting that "the faculty should have primary responsibility for establishing the criteria for assessment and the methods for implementing it."¹³² Faculty should be involved in every aspect of the assessment process - in creating the institutional learning outcomes, participating in curriculum mapping, engaging in institutional as well as course-level assessment activities, analyzing assessment data, and using the assessment data to improve student learning at the institutional level, as well as at the course level.

[*278] If faculty members are hired, in part, for their teaching, should they not be able to decide how to assess student work product in their courses and adopt assessments that align with their own educational philosophy? The answer seems simple, and if institutions agree that faculty members are hired in part for their teaching, then they must acknowledge that collaboration with faculty members in the shared governance of the institution is necessary. "Governance - providing faculty participation in institutional decision making - merits the protection of academic

¹²¹ ABA Standards, *supra* note 77, at 9 (Standard 201. Law School Governance).

¹²² *Id.* at 23 ("A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.").

¹²³ *Id.*

¹²⁴ *Id.* at 24 ("The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods.").

¹²⁵ *Id.* at 29.

¹²⁶ *Id.*

¹²⁷ *Id.* at 189.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ The ABA's protections of academic freedom are similar to other accreditors. See Ellen M. Babbitt et al., "Shared" Governance? New Pressure Points in the Faculty/Institutional Relationship, 41 J.C. & U.L. 93, 98 (2015) ("Accreditation standards, while newly responsive to assessment, have long sought to protect academic freedom. Each regional accrediting body has adopted standards on academic freedom.").

¹³¹ See ABA Memo, *supra* note 80, at 3.

¹³² Mandated Assessment of Educational Outcomes, *supra* note 2, at 55.

freedom because faculty possess the expertise necessary to make informed decisions about curricula and to evaluate students and peers based on that knowledge." ¹³³

As a corollary to an institution's responsibility to collaborate with faculty, faculty members have a responsibility to collaborate in the process, as part of their responsibilities of shared governance. Faculty members need to comprehend that shared governance is a right as well as a responsibility, which requires faculty members to take part in planning and curriculum, as well as assessment activities. "Assessment rightly conducted ... asks faculty to work together as colleagues to assess student work fairly by criteria respected in the field, and to share their knowledge of student strengths and weaknesses, in order to improve curriculum, pedagogy, and other factors that affect learning." ¹³⁴ The ABA 2014 Transition Memo envisions this collaboration and expects faculty engagement in creating learning outcomes and arguably would expect faculty engagement in the assessment process as a whole. ¹³⁵

Faculty members should not sit back and take no part in the assessment dialogue and then assert a violation of their academic freedom rights when assessment policies are implemented. In order to work effectively, faculty members need to realize that "academic freedom becomes the right and obligation to participate in academic self-government." ¹³⁶ Additionally, "the historic position of faculties in higher education sufficiently guarantees the continuing primacy of the faculty in the assessment process. If, the argument runs, faculty members develop and administer the assessment instruments, and these are used primarily for pedagogic self-improvement, then what can the objection be?" ¹³⁷ Faculty members should become team players in the assessment process to reach the overall goal of all educators - to improve student learning. Ultimately, [*279] assessment is here to stay for the time being. Faculty members are best served by putting their energy and expertise into improving their students' learning, which is the goal of all educators, instead of resisting the implementation of assessment policies. Their time is better spent "in determining how student assessment may be accomplished, but not whether it will happen." ¹³⁸

To document the parties' collaboration and responsibilities, all assessment policies, and specifically any assessment mandates, should be incorporated into an institution's policy manual. Furthermore, as endorsed by the ABA, to squelch any potential claims of academic freedom violations, any assessment mandates, which could be argued to limit academic freedom, should be placed in the appointment contracts for new hires. Therefore, from day one, a faculty member would be cognizant of her institution's assessment policies and mandates.

By making faculty partners in the institution's assessment policies, there will hopefully be fewer challenges in its implementation. Optimistically, this collaboration would result in a culture of assessment within the institution - where all are engaged in the improvement of student learning.

3. Support Innovation and Experimentation

In addition to recognizing faculty's primary role in assessment, administrators should make allowances for faculty experimentation and potential mishaps when implementing assessment mandates. Just as the ABA notes the learning curve regarding outcomes assessment by providing allowances for schools' "efforts" in the 2014 Transition

¹³³ Sheila Slaughter, "Dirty Little Cases": Academic Freedom, Governance, and Professionalism, 88 *New Directions in Higher Education* 59 (1994).

¹³⁴ Lynch, *supra* note 1, at 993.

¹³⁵ ABA Rules, *supra* note 97, at 2.

¹³⁶ Ernst Benjamin & Donald R. Wagner, Editors' Notes in *Academic Freedom: An Everyday Concern*, 88 *New Directions in Higher Education* 1, 6 (1994) (citations omitted).

¹³⁷ *Mandated Assessment of Educational Outcomes*, *supra* note 2, at 54.

¹³⁸ Babbitt et al., *supra* note 130, at 103.

Memo, ¹³⁹ institutions should provide the same allowance for a faculty member's efforts to comply with assessment mandates. Faculty members should feel the freedom and security to experiment with new teaching pedagogies and assessment techniques.

To the extent a faculty member experiments with innovative pedagogies, he or she should not be penalized for trying to follow the school's assessment mandates. We must all remember that formative assessment is relatively new in the history of legal education, which has a long tradition of summative assessment. It will take time as faculty learn and become more comfortable with implementing their own style of formative assessment. And, that is what it should be, an individualized assessment practice - assessment that conforms with the individual faculty member's teaching style and educational philosophy.

Additionally, in implementing assessment mandates, there should be respect for all that faculty already do, which includes their scholarship and [*280] service to the institution, the bar, the legal profession, and the community. Institutions should exercise restraint in their assessment policies, recognizing what is a reasonable expectation of already busy faculty. "Unrealistic or overly ambiguous assessment expectations can work to the detriment of caring, creative, and effective law teachers. Although not a direct attack on academic freedom, identifying and articulating objectives to be assessed will be time consuming for faculty unaccustomed" to such activities. ¹⁴⁰ Imposing a requirement that all faculty have a syllabus with learning outcomes is not onerous. Nor would be the requirement of at least one formative assessment. But, overly aggressive assessment mandates can do more harm than good. The key is adopting reasonable assessment mandates that can be implemented by faculty. As faculty become more accustomed to outcomes assessment, policies can be altered, if needed. However, it is better to start slow, which gives the policies, as well as faculty implementing them, a chance to succeed.

4. Avoid Standardized Assessment

In line with the ABA directives in the Interpretations, disavowing mandated assessment tools, institutions should not mandate the use of standardized assessments. Faculty members should have the choice of the assessment tools used in their classes. To the extent the administration wants to use standardized assessments, as previously noted, they would likely be able to require a faculty member to proctor a standardized assessment, but cannot require the faculty member to grade or comment on the same.

In addition, who is to say that standardized assessments are the best tools available? Legal education has been dominated by two standardized assessments, the LSAT and the bar examination. Faculty members have often questioned the validity and reliability of such measures. Therefore, why would we want to incorporate more of the same? As recommended by the AAUP, "the assessment process should employ methods adequate to the complexity and variety of student learning experiences, rather than rely on any single method of assessment." ¹⁴¹ Relying on faculty-driven assessment policies in lieu of administrative fiats with mandated tools better supports a collaborative culture of assessment.

5. Educate All on Assessment and Academic Freedom

10. Upon undertaking assessment mandates, education is paramount - for all parties. In order to minimize challenges and resistance by faculty, institutions should "engage in a dialogue with faculty before a serious [*281] dispute arises about faculty roles in accreditation, assessment, [and] non-traditional educational offerings" ¹⁴²

First, faculty need programming explaining the ABA assessment mandates specifically and generally - their goals, purposes, and even the mechanics. Fear is a large part of resistance. Showing faculty how to engage in assessment, which provides the greatest rewards in student learning without overworking faculty, is crucial.

¹³⁹ ABA Rules, supra note 97, at 2.

¹⁴⁰ Lynch, supra note 1, at 994.

¹⁴¹ Mandated Assessment of Educational Outcomes, supra note 2, at 55.

¹⁴² Babbitt et al., supra note 130, at 114.

"Evidence from workshop evaluations reveals that some reluctant participants have developed newfound enthusiasm for student assessment at the classroom and institutional levels" ¹⁴³ Creating learning communities to share experiences can lead to greater support. In addition, to support faculty, institutions can provide internal training and workshops and fund faculty attendance at teaching conferences.

Additionally, educating faculty on what academic freedom is, as well as its parameters, is paramount. Faculty development is needed to define academic freedom and what and who it protects and to aid faculty in realizing that "academic freedom is not the freedom to do whatever you want with your students." ¹⁴⁴ For institutions, it is important to note that limits are imposed on what can be required of faculty. Although courts are favorable to institutional authority and often exercise academic abstention, institutions should remain dedicated to working with their faculty, not against them.

Conclusion

Law schools and their faculty need to come to terms with the new assessment mandates in the ABA Standards. Institutions will likely adopt policies to implement the ABA assessment mandates in the Standards. Such policies will likely impact faculty members' teaching activities, which in turn, will likely impact their academic freedom rights. This may prompt faculty to challenge the same on the basis of academic freedom. As shown, such challenges are not likely to succeed.

Regardless of the potential success or failure of such challenges, in adopting assessment policies, institutions should provide safeguards to protect academic freedom by working with and not against faculty in the assessment process. Such collaboration is at the core of the ABA Standards. Likewise, faculty should face these assessment policies in a spirit of collaboration, not contempt. If mandated assessment policies emerge, all parties should be reminded that "the purpose of mandated assessment is the improvement of teaching and learning in an atmosphere [*282] of constructive cooperation." ¹⁴⁵ Shared governance is the key to this new legal education landscape, and like academic freedom itself, it presents opportunities for rights with correlative responsibilities for all.

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¹⁴³ Jeffrey Steedle, On the Foundations of Standardized Assessment of College Outcomes and Estimating Value Added, in *Accountability in American Higher Education* 17 (Kevin Carey & Mark Schneider eds., 2010).

¹⁴⁴ Lynch, *supra* note 1, at 993.

¹⁴⁵ Mandated Assessment of Educational Outcomes, *supra* note 2, at 54.