

SAFS Newsletter

Society for Academic Freedom and Scholarship

Maintaining freedom in teaching, research and scholarship
Maintaining standards of excellence in academic decisions about students and faculty

Number 36

www.safs.ca

January, 2004

FREE SPEECH AT U OF T

A. Upholding The Principles Of Free Speech

*Robert Birgeneau
University of Toronto*

The University of Toronto made a decision on Friday, Nov. 21 that is based on fundamental principles of free speech. The decision has prompted some controversy and I want to elaborate on the reasons behind our actions to ensure that the community understands the issues at hand.

A recognized student club, Al-Awda, requested the use of a room on campus to hold a public conference Nov. 22 and 23 titled the Toronto Palestinian Solidarity Conference. It came to the University's attention that, in order to attend the conference, all participants were required to agree to a Basis of Unity, as follows:

1. We support the Palestinian right of return. It is non-negotiable.
2. A two state solution is not a viable or acceptable option for the Palestinian people.
3. Israel is a racist apartheid state.
4. Our activism is imbued with an anti-colonial feminist practice.
5. We support the right of the Palestinian people to resist Israeli and colonialism (sic) by any means of their choosing.
6. Actions that we organize at this conference will be developed under the framework of respecting a diversity of tactics.

Requiring attendees to agree to the Basis of Unity excluded persons with dissenting views and was thus in violation of the University's Policy on Recognition of Student Groups, which, among other things, confirms that "the essential value of the University

must remain that of preservation of freedom of enquiry and association." It is also important that all recognized campus groups adhere to the requirements of the Ontario Human Rights Code.

The University was prepared to continue the Al-Awda's booking of space if the group agreed to remove the requirement for participants to sign the Basis of Unity. The public conference could have proceeded if the group had been willing to allow freedom of expression, consistent with the University's Statement on Freedom of Speech. The student group had indicated that the Basis of Unity was required in order to provide a safe environment for discussion. The University does not accept that open discussion of the issues would have created an unsafe environment and had offered assistance in providing security and in preventing disruption at the event. We did so with the

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Published by the **Society for Academic Freedom and Scholarship**, a society open to all (whether in a university or not) who accept the principles of freedom in teaching, research and scholarship and maintaining standards of excellence in decisions concerning students and faculty.

ISSN 1704-5436

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expectation that all members of the University community, when pursuing freedom of expression, would do so in a manner that respects the rights of others.

Al-Awda declined to remove the requirement for participants to sign the Basis of Unity and effectively precluded the conference from taking place.

It is important that our community understand that the decision to deny this student group use of University facilities unless it permitted other views to be expressed was not, in any way, a decision that the group would not be allowed to express its views in accordance with University policies. The ability to examine and comment on issues of the day is central to the mission of the University.

As the university's Statement on Freedom of Speech indicates, "the essential purpose of the University is to engage in the pursuit of truth, the advancement of learning and the dissemination of knowledge. To achieve this purpose, all members of the University must have as a prerequisite freedom of speech and expression, which means the right to examine, question, investigate, speculate, and comment on any issue without reference to prescribed doctrine, as well as the right to criticize the University and society at large...The existence of an institution where unorthodox ideas, alternative modes of thinking and living, and radical prescriptions for social ills can be debated contributes immensely to social and political change and the advancement of human rights both inside and outside the University.

"Often this debate may generate controversy and disputes among members of the University and of the wider community. In such cases, the University's

primary obligation is to protect the free speech of all involved. The University must allow the fullest range of debate. It should not limit that debate by preordaining conclusions, or punishing or inhibiting the reasonable exercise of free speech."

This and all universities are unique in society in guarding the principles of free expression that have been won over the centuries in the face of numerous attempts to thwart them. There is a far greater risk to our society when these tenets are denied or made subservient to doctrine and intolerance.

It is my hope that all members of the university community will work together in sustaining our tradition of tolerance, understanding and respect.

Statement by U of T President Birgeneau, November 24, 2003.

B. Pro-Palestinian Conference Held At University Of Toronto

A contentious pro-Palestinian student conference went ahead calmly Sunday, a week after the University of Toronto cancelled it over concerns those with dissenting views were being excluded.

About 60 students, many draped in the traditional black-and-white keffiyeh scarf, showed up to attend a daylong workshop series aimed at planning pro-Palestinian events over the next six months.

Three uniformed Toronto police officers stood conspicuously in the meeting room, but there wasn't so much as a flag-waving in protest late Sunday morning as participants filed in.

School officials had initially banned the conference after learning the Al-Awda student group required participants to agree to a strongly-worded "basis of unity" pact.

"Some of the basis of unity tenets are not in accordance with university policy because they exclude different views," university spokeswoman Jane Stirling said Sunday.

The pact called Israel a "racist, apartheid state," rejected a two-state solution to the Palestinian-Israeli conflict and supported the right of Palestinians to

"resist Israeli apartheid and colonialism by the means of their choosing." The event was allowed to proceed Sunday after conference organizers met university officials and worked out a compromise to allow dissenting observers. Student leader Hazem Jamjoum opened the meeting with a practised address, saying organizers never meant to exclude those with differing views. He also rejected accusations that organizers condoned violence.

"We actually didn't mean to provoke anyone," said Mr. Jamjoum.

"Here we're talking about the right [to resist], let's keep that clear. Nobody's condoning the killing of civilians." However, his speech failed to sway some observers who questioned the conference's guiding basis of unity document.

"It seems to justify anything, including attacks on civilians," said Simon Lightstone, a member of the Jewish campus group Hillel.

"The issue is not just about organizing a conference, it's about human rights."

B'nai Brith Canada, a Jewish advocacy group, issued a release Friday blasting the conference and the university's decision to allow it to proceed.

But ultimately, most who turned out to the event were supportive of the students' rights to push on with the workshops.

The prevailing calm contrasted the turmoil that has erupted at other Canadian campuses as they struggle to address this deeply emotional issue.

Notably, Montreal's Concordia University was rocked by wild protests in September 2002 ahead of scheduled remarks by former Israeli prime minister Benjamin Netanyahu.

The protesters occupied a campus building, clashed with police and broke windows. Mr. Netanyahu was never in the building, and his speech was cancelled because of security concerns.

The protests made international headlines and touched off months of tensions between Jewish and pro-Palestinian groups on campus.

Published in the *Globe and Mail*, November 30, 2003.

ANNUAL GENERAL MEETING

May 8, 2004

Advanced Notice

SAFS Annual General Meeting will be held at the University of Western Ontario on *May 8, 2004*. Details of the program and keynote speaker will be provided later. Suggestions for presentations, panel discussion, symposia, and the like are encouraged. Members wishing to participate as speakers at the AGM should contact the President.

Please mark this date on your calendar, and we hope to see you at the meeting in May.

C. Hatred On Campus

John Furedy
University of Toronto

My view of the pro-Palestinian group Al-Awda is at least as negative as that of York University professor and letter writer Eric Lawson's. However, I think he is mistaken in condemning the University of Toronto's reversal of its earlier refusal to allow this group to hold a conference on campus. As an institution, a university's primary commitment is the search for truth, and this commitment requires that as long as they are open to criticism, all views are entitled to consideration. In other words, the academic community (students and faculty, and the organizations that represent them) should control the form, but not the content, of the discussion.

When in March, 2003, York University president Lorna Marsden ensured that Daniel Pipes would be heard on campus, she was following this principle. In contrast, York's Federation of Students and its Faculty Association advocated preventing Dr. Pipes from being heard on the grounds that he had a "racist agenda." I hope that as individuals, both students and faculty understand the content/form distinction, and deal with positions they consider not only mistaken but immoral by censuring rather than trying to censor them.

Letter to the Editor, *National Post*, December 3, 2003.
John Furedy is a SAFS member. □

STATEMENT OF ACADEMIC FREEDOM, UWO

1. The essential functions of a university are the pursuit, creation and dissemination of knowledge through Research and other scholarly and creative activities, and by Teaching. Academic Freedom is essential to these functions and ensures the right of Members to teach, investigate and speculate, and/or to create or perform works of art, without deference to prescribed doctrine. Furthermore, universities are communities in which the right to criticize all aspects of society is valued and respected. These rights are to be understood as central to the protection of the public interest and the pursuit of truth.

2. Academic Freedom specifically entails, but is not necessarily limited to, the right to:

- 1) conduct Research and to publish the results thereof in media, and according to a schedule, deemed appropriate by the Member(s) concerned, subject to the provisions of any contract with a third party that imposes a delay on the publication of the Member's Research. Any contractual arrangement concerning Research shall comply with standards of research conduct that membership in a professional body may impose on that Member, with the Articles Intellectual Property and Academic Responsibilities, with relevant federal and provincial statutes, and with regulations and policies promulgated by Senate or the Board of Governors which are not in conflict with this Collective Agreement, for the protection of researchers, human subjects, the health and safety of the public, and the welfare of laboratory animals;
 - 2) teach and discuss;
 - 3) select, acquire, disseminate or use documents in the exercise of the Member's professional responsibilities;
 - 4) criticize the Employer, the Association or any corporate, political, public or private institution; and
 - 5) create or perform works of art;
- all without deference to prescribed doctrine.

3. The Employer and the Association agree to uphold and protect the principles of Academic Freedom as specified herein and not to infringe upon or abridge them.

4. The exercise of Academic Freedom, as described in this Article, shall not cause the imposition of any penalty or reprisal on a Member by the Employer or the Association. Neither shall the Employer or the Association countenance the restraint of Academic Freedom or the imposition, arising from its exercise, of

any penalties or reprisals upon Members by any person, institution, agency or corporation with whom the Employer or the Association does business, or by any donor to the University or the Association, or from any source within the University.

5. The credibility of the principles of Academic Freedom depends upon a collective commitment to exercise these principles in a manner consistent with the scholarly obligation to base research and teaching on an honest and ethical search for knowledge.

6. Academic Freedom does not require neutrality on the part of a Member nor does it preclude commitment on the part of a Member. Rather, Academic Freedom makes such commitment possible. Academic Freedom also carries the responsibility to respect the rights and freedoms of others. In particular, Members are expected to recognize the right of other members of the academic community - faculty, staff and students - to express their opinions. Academic Freedom does not confer legal immunity or legal defence by the Employer in respect of positions that may be taken but which are not specifically sanctioned by the Employer, nor does it diminish the obligation of Members to meet their responsibilities to the Employer.

7. Members shall not purport to speak on behalf of the Employer or the Association unless specifically authorized to do so. A statement of affiliation with, or position in the University, or of qualifications relevant thereto, shall not be construed as an attempt to speak on behalf of the Employer. A statement of Membership or position in the Association shall not be construed as an attempt to speak on behalf of the Association.

8. The Parties endorse and subscribe to the statement defining Academic Freedom in the context of libraries and expressing the responsibility of libraries to uphold Academic Freedom, given originally as the Canadian Library Association's Statement on Intellectual Freedom.

From the Collective Agreement between University Administration and University of Western Ontario Faculty Association.

We ask SAFS members to send us copies of the statements of Academic Freedom prepared by their University and/or Faculty Association. We would like to post these on our web site and publish them in subsequent issues of the *Newsletter*. □

MORE ON ANTI-ISRAEL BOYCOTT: UNIVERSITY HEADS TO FORM PANEL TO FIGHT ACADEMIC BOYCOTT

*Anshel Pfeffer
Haaretz Correspondent*

Israeli academics will set up a new forum to fight the international academic boycott of Israel, the heads of the country's universities decided at a meeting Thursday with Minister for Diaspora Affairs Natan Sharansky.

At the meeting, the university presidents warned that the boycott, though still sporadic, was steadily worsening. Professor Joshua Jortner of the National Academy of Sciences and Humanities reported that some members of Norway's national academy had urged treating Israel "like Germany of the 1930s."

Hebrew University Professor Menachem Magidor suggested setting up an organization to which academics could report any instances of the boycott that they encountered, and which would then coordinate responses to the boycott. He also suggested setting up a non-governmental body under whose auspices Israeli academics would present Israel's case through lectures at overseas universities.

The other participants agreed, with the caveat that the lecturers must be seen as representing Israel, rather than defending government policy.

The presidents also proposed trying to mobilize Israelis studying overseas in this effort.

The international boycott has been publicly supported by a handful of left-wing Israeli academics, including Dr. Ilan Pappé of Haifa University and Professor Tanya Reinhardt of Hebrew University. The presidents of these universities, Yehuda Hayuth and Magidor, noted that donors had pressured them to take steps against Israeli boycott supporters, and some had even halted their donations on the grounds that they were unwilling to pay the salaries of people who call for boycotting Israeli academe.

Nevertheless, both presidents said, they refused to infringe on academic freedom by taking any action against these professors.

Published online vancouverindy.com, November 27, 2003. □

DIVERSITY AT U OF T

A. Celebrating Sexual Diversity

*Robert J. Birgeneau
University of Toronto*

Last Spring I attended an event celebrating the fifth anniversary of the Sexual Diversity Studies Program based at University College. On that occasion, most of the speeches and comments were typical of such celebratory affairs and appropriately so. However, something occurred during the reception that caused me to think more deeply about the impact of such a program as SDS on our University. An alumnus who had attended the University of Toronto some thirty years ago engaged me in conversation. He remarked that the entire event would have been unthinkable when he was a student at the University. For him, "coming out" at the University of Toronto thirty years ago was impossible, whereas he thought that now it would be impossible for him not to do so.

In light of his comments, I began to think of my own commitment to the civil rights movement in the 1960s and how the public's perception of racial minorities had changed in the intervening years. This raised the natural question of how much our campus had changed in our collective attitudes towards persons of different sexual orientations, especially in light of the recent national debate over same-sex marriages. Would a lesbian, gay, bisexual, transgendered, or queer (LGBTQ) student entering the University of Toronto this fall feel as comfortable 'out' as heterosexuals are about themselves?

I believe that in several respects the University of Toronto has made great progress. Apart from the existence of the SDS program itself, which fulfils an academic need identified by faculty and students, the University has developed helpful and supportive policies and offices - including one devoted to LGBTQ issues. If anything is needed now, it is to move beyond the institutional level of acceptance to broaden awareness and to celebrate sexual diversity on our campuses in much the same way that we celebrate our remarkable ethnic and cultural diversity.

The University of Toronto is about diversity in all of its dimensions. This is, and will continue to be, a major source of its strength. The University is a major centre in Canada for knowledge and creativity. By creating a community of people with varied backgrounds, we

provide an ideal setting for education and for academic breakthroughs that can enhance the quality of life for all of our citizens.

American academic Richard Florida has coined the term "creative class" to describe a class that ranges from scientists to workers in information technology to artists and writers who through their interactions create new ideas, new technologies and new creative content. He has rated the economic success of American cities based on their abilities to appeal to this new class and use their presence to their advantage. In Florida's words, "talented people seek an environment open to differences. Many highly creative people, regardless of ethnic background or sexual orientation, grew up feeling like outsiders, different in some way from most of their schoolmates. When they are sizing up a new company and community, acceptance of diversity and of gays in particular is a sign that reads 'non-standard people welcome here.'" The cities that rate highest on Florida's creativity rankings are all places that foster creativity, and respect individuality and diversity as well as merit. Inevitably, they have thriving LGBTQ communities. The City of Toronto and the University of Toronto are, and must continue to be, similarly welcoming environments.

I believe that as an institution of higher education, we have an obligation to show leadership in areas where the general public may lag behind. This was the case during the era of civil rights, and it is the case today as we address issues of gender and sexuality. We cannot let controversy or inflexible opinions deter us from raising awareness and promoting understanding. Our campus must be an inclusive and welcoming community, and it must be so in full awareness of our religiously pluralistic environment. We can have diversity within diversity by being respectful of each other. At the same time, we can learn much more about what it is to be human by understanding humanity in all of its rich variety. In the process we can become an even greater university.

Indeed, the University of Toronto has been a social leader on these questions: witness the recent national debate on same-sex marriages. The University's institutional position on the matter has largely been defined because of actions taken over the past ten years as we have extended employee benefits to same-sex couples in the same way that they are available to common-law partners. In 1991, the University voluntarily added health coverage and the tuition

waiver programs to same-sex partners, and in 1994/95, extended the equivalent of survivor benefits to surviving same-sex partners. Initially these benefits had to come from outside of the Pension Plan because of government pension plan restrictions that were not amended until 2000. Clearly, the University of Toronto was out in front of government in its recognition of these basic principles. Today many people on campus believe that society should both cherish and solemnize long-term, committed loving relationships between two people, whether of the same or the opposite sex. Of course, not everyone in the University community shares this position - it is in the very nature of any university worthy of the name that it would be home to dissenting views.

The University of Toronto in almost all respects is a very civil place. Nevertheless, there has been an uneven acceptance of alternative sexual orientations across, and within, our three campuses. We have had incidents of homophobia, more persistent in some areas of the university than in others. Though our policies offer protection against discrimination and attempt to engender acceptance and understanding, we need to educate our community continually to the advantages of inclusiveness while at the same time condemning any acts of exclusion. Admittedly, social change is difficult and complex; but, no individuals associated with our University should feel that they are any less than full members of our community. We, as a community of students and teachers and staff, must set a precedent for the rest of society by recognizing - and celebrating - our diversity as one of our greatest strengths.

October 20, 2003.

URL: <http://www.utoronto.ca/president/index.html>

B. Celebrating Diversity?

*Leo Zakuta
University of Toronto*

President Robert Birgeneau's article on celebrating diversity in the University of Toronto *Bulletin* involved more rhetoric than reason. (Celebrating Sexual Minorities, Oct. 20). There is no reason to celebrate diversity or to deplore it. It is of no value in itself. It is obviously useful in such matters as policing and politics. But would professional football and basketball teams be stronger if women and more

whites were added? Would medical research be improved if fewer Jews and Chinese were in that field?

But these are merely specific instances. To understand the issue of diversity, we must see it in its broader context. Immigrant and new ethnic groups enter societies in different places and move along varying paths. For instance, most concentrate in certain residential areas and occupations. In time, they begin to disperse both residentially and occupationally and move to new educational levels. The groups travel in various directions and at different speeds. Women too left the home and moved into the lower ranks of white collar work and later to more varied and higher occupational levels.

The paths of all of these groups were often blocked by those defending homogeneity of sex, race, religion, ethnicity or the like. (The universities were no exception, especially in some of the most "prized" professional faculties.) These institutions injured not only those whom they kept out, but also themselves by placing homogeneity above ability. The struggle to remove those barriers has been long and difficult, but now instead of having a free flow of talent, new barriers have been erected.

The new barriers choose diversity above qualification. When special avenues are opened to those with lesser qualifications, doors are inevitably closed to some with superior ones since places are always limited. That's why diversity no more warrants celebration than homogeneity, awful as it was. Talent is what merits celebration.

Nevertheless, diversity can be welcome - when it occurs naturally. Examples such as the Chinese and the Jews show how feeble is the argument that affirmative action is needed "to correct historic injustices." The recent profusion of these groups in the universities and the professions owes nothing whatever to "affirmative action;" it owes everything to the dismantling of the barriers which blocked their path. That's why it's welcome. The old liberals sought to remove those barriers; the new liberals have erected new ones.

Letter to Editor, *U of T Bulletin*, November 24, 2003.

Leo Zakuta, Professor Emeritus, Sociology, University of Toronto, is a SAFS member.

C. Diversity Of Opinion Should Be Encouraged

*Noel McFerran
John M. Kelly Library
University of St. Michael's College*

In his commentary Celebrating Sexual Minorities President Robert Birgeneau asks how comfortable LGBTQ students feel at the University of Toronto in comparison with heterosexual students (*Forum*, Oct. 20). Perhaps he might better ask how comfortable certain other minorities feel at the University of Toronto.

Proponents of traditional marriage and of abstinence outside of marriage are consistently attacked, belittled and ostracized on campus. They are called "bigots," "homophobes" and even "racists." They are condemned merely for espousing their belief (often religiously held belief) that the sexual act should occur only within marriage between a man and a woman. President Birgeneau describes such people as having "inflexible opinions" and "dissenting views." Such words make these people wonder whether they have to sit at the back of the bus or perhaps even whether they're allowed on the bus at all.

If President Birgeneau really believed in diversity, he would encourage a variety of opinions and views on this issue. But he doesn't believe in diversity; he thinks everybody should agree with him.

Letter to the *U of T Bulletin*, November 3, 2003. □

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**MORE ON U.S. SUPREME COURT
AFFIRMATIVE ACTION DECISION:
STILL UNCONSTITUTIONAL**

Peter Kirsanow

It's a new academic year. Millions of applications will soon be flowing into college admissions offices.

As in previous years, administrators will comb through applicant files separating those who make the grade from those who don't. This year reviewers will have a powerful new tool at their disposal - Supreme Court license to discriminate on the basis of race.

Sure, many schools were doing it long before *Grutter*. Now, however, the Court has provided not just a green light but guidance, however scrambled, as to how to discriminate lawfully.

Over the summer colleges consulted with legal counsel to craft admissions policies that would comply with *Grutter*. Michigan, the school at the center of the preference debate, recently rolled out its new undergraduate-admissions policy. UM revised the undergrad-admissions program that the Court held unlawful to more closely track the law-school program upheld by the Court. Yet its new policy reveals that Michigan hasn't critically evaluated *Grutter's* implications. Indeed, the new policy evinces the kind of hubris displayed by a teacher's pet who lazily ignores homework instructions believing that, just as in the past, he'll get a passing grade nonetheless.

There are several infirmities with the new policy, not the least of which is contained in the instructions to admissions officers on how to consider an applicant's race and ethnicity. The policy states that "the University will continue to seek a *critical mass* of students from these underrepresented groups . . . (i.e., black, Hispanic, native American)." (*Emphasis added.*) The problem is that Michigan is seeking that which its own admissions people cannot find. And that exposes UM to litigation under the strict scrutiny analysis.

Consider: Racial classifications must survive "strict scrutiny" to pass constitutional muster. Strict scrutiny requires two things: that a classification further a compelling state interest and be narrowly tailored to serve that interest. The *Grutter* Court found that the educational benefits flowing from a diverse student

body qualify as a compelling state interest. But the *Gratz* Court struck down Michigan's undergrad admissions program because it awarded 20 points to applicants from underrepresented groups. The Court found such a system violated the narrow tailoring prong of strict scrutiny. The Court upheld the law school's admissions program because it conducts a "holistic, individualized review" of applicant files to reach a "critical mass" of underrepresented minorities rather than assign raw point values to minority applicants.

So just what is Michigan's critical mass of minorities? A review of the trial-court testimony of the individuals charged with formulating and implementing UM Law's admissions program shows that, well, they know it when they see it.

Dennis Shields, who, as director of admissions, helped design UM Law's admissions program in 1991, testified that he couldn't say just what percentage of minorities constitutes a critical mass. He acknowledged that 5 percent was probably not enough; 10 percent might be enough, but he didn't know for sure because it depended on the assessment of others in the law school.

Erica Munzel replaced Shields in 1998. She testified that critical mass isn't a number or percentage, nor is it a range of numbers or percentages. Rather, critical mass means "meaningful numbers" of minorities - enough that they'll contribute in the classroom and won't feel isolated. Munzel asserted that she asks law-school professors for feedback to determine if a critical mass has been reached and if it hasn't, the dean will let her know.

Okay. So let's see what the professors and the dean had to say about critical mass.

Despite Munzel's contention that critical mass isn't a number or percentage, those to whom she defers have different ideas (especially when pressed on cross-examination). Kent Syverud (now dean of Vanderbilt Law School) testified that a class that's 7 percent black represents a critical mass of blacks, although even 5 percent may work in some settings. In fact, 1-3 (blacks/minorities) per class could, in theory, get the job done.

To be sure, Syverud agrees with Munzel that critical mass means "meaningful numbers" but on cross he

was more specific about what that means: A law-school class that's 16 percent black, over 5 percent Hispanic, 1 percent native American, almost 5 percent Asian, 2 percent foreign, and 69 percent white could have "meaningful numbers."

The testimony of professor Richard Lempert who chaired the faculty committee that authored the admissions policy was also at odds with Munzel's contention that critical mass isn't a range of percentages. On direct Lempert maintained that critical mass wasn't a range of percentages. But on cross he noted that the benefits of critical mass are associated with classes in which the percentage of black, Hispanic, and Native-American students ranges between 11-17 percent of the overall student population.

Dean Jeffrey Lehman (now president of Cornell) doubted that 5 percent constitutes a critical mass but opined that a school can begin to get "benefits" at 10 percent.

Associate professor Frank Wu of Howard Law School was much more precise. He conceded on cross that a minority population of 14.5 percent could constitute a critical mass.

Despite these inconsistencies, Michigan's hierarchy all agreed that critical mass was the point at which there were enough minorities that they'd be comfortable participating in class without feeling as if they were spokesmen for their respective races. This is quite understandable. After all, who would want the burden of presenting the Hispanic stance on the Heisenberg uncertainty principle? Or the Native-American perspective on gradient derivatives? Or even the black position on Gilgamesh? And imagine the clash of cultures regarding the value of π .

Perhaps the best description of critical mass was provided by Dean Lehman:

You know when you have a critical mass when you see the kind - it is connected to context. And in a given context, *sense a critical mass when you have - what we might think of as a kind of break-through movements in the class, break-through conversations where people say I heard something new today that shook a preconception of mine. Or I heard a perspective that I might not have had any preconceptions at all, but I learned something different.* I learned a different perspective on a legal problem or a legal issue that

now going forward I am going to incorporate into my tool kit so that I can try now to see the world through now the eyes of a different classmate in a different way. (*Emphasis added.*)

In other words, it's the point at which shouts of "Eureka!" can be heard throughout campus.

This neatly illustrates the absurdity of the critical-mass rationale. Especially illuminating is Lehman's reference to "context." Lehman's analysis may arguably apply to classes in law, political science, history, sociology, and the like; blacks might have a different take than whites on, say, the residual effects of black codes on black-literacy levels post-Reconstruction. But the curricula of elite schools consist of much more than traditional liberal-arts disciplines. Racially inspired Eureka! moments are rare enough in American-history classes. Their occurrence in oceanography, statistics, organic chemistry, or electrical-engineering classes would be nothing less than miraculous.

It should be noted that, notwithstanding Lehman's definition of critical mass, many preferences proponents contend that one of the objectives of a diverse student body is to demonstrate that there isn't a Native-American or Hispanic viewpoint on a given subject. But this is a straw man, and also presumes that only the social sciences are taught in college. Where are all of these benighted souls who actually think there's a black viewpoint on the speed of light?

Moreover, as former Yale Law School student Jonathan Kay observes, one of the unintended consequences of the use of preferences to produce a "critical mass" of minorities is that it sometimes yields a result completely opposite of the one Lehman describes. Writing in the June 2003 issue of *Commentary*, Kay notes that the purported benefits of diversity rarely emerged: "Whites became increasingly reluctant to offer any comment that might be interpreted as threatening to blacks, while classroom comments by black students on any race-charged issue would almost always go unchallenged. Among my white peers, there was a feeling that sentiments expressed by black students had to be treated as correct *for blacks*, and therefore immune from refutation. In general, most students were terrified at being accused of racism; and when a subject connected to race came up, they either uttered platitudes or kept their mouths shut." It should be noted that Kay does not argue that "diversity" *per se* causes this phenomenon; rather, the

means by which the critical mass is achieved (i.e., lowering of standards and the stigma associated therewith) can produce perverse results.

While the testimony of Michigan's witnesses suggests the definition of critical mass is, to say the least, nebulous, the trial court found that in practice Michigan's critical mass has been much more precise, i.e., a quota. Michigan's 1992 draft admissions policy explicitly set 11-17 percent minorities as a goal. Law-school documents as far back as the 1970s set 10-12 percent as the desired number. And the testimony of Shields, Lempert, and Lehman all suggest the percentage hovers around 10-12 percent. In fact, since implementation of the critical-mass policy, minority enrollment has, just coincidentally, never fallen below 11 percent. The dilemma inherent in Michigan's critical-mass formulation is that if it consistently yields a 10-12 percent minority population, it's a *de facto* quota; but if it's as imprecise as Lehman's description, it's not narrowly tailored and may even demonstrate that the policy hasn't been enacted in good faith - especially when the admissions officer keeps running back to the dean to see if they've gotten "enough" minorities (again, a quota). Either way, it's unconstitutional.

Numerous other questions remain in Michigan's policy. For example, it's unclear whether the policy will be periodically reviewed or sunsetted as suggested by the Court. It's also unclear what weight race will be given in the evaluation process. And there's no evidence that the educational benefits allegedly derived in the lawschool context are transferable to the undergraduate experience. All of these things suggest that even aside from the questions regarding the mystical critical mass, Michigan may be courting litigation on a number of fronts.

Guest comment, *National Review Online*, September 30, 2003.

Peter Kirsanow is a member of the U.S. Commission on Civil Rights. □

BEQUEST TO SAFS

Please consider remembering the Society in your will. Even small bequests can help us greatly in carrying on SAFS' work. In most cases, a bequest does not require rewriting your entire will, but can be done simply by adding a codicil. So please do give this some thought.

Thank you.

Clive Seligman, President.

TEXAS UNIVERSITY SHUTS DOWN BAKE SALE

Southern Methodist University shut down a bake sale Wednesday in which cookies were offered for sale at different prices, depending on the buyer's race or gender.

The sale was organized by the Young Conservatives of Texas, who said it was intended as a protest of affirmative action.

A sign said white males had to pay \$1 for a cookie. The price was 75 cents for white women, 50 cents for Hispanics and 25 cents for blacks.

Members of the conservative group said they meant no offense and were only trying to protest the use of race or gender as a factor in college admissions.

Similar sales have been held by College Republican chapters at colleges in at least five other states since February.

A black student filed a complaint with SMU, saying the sale was offensive. SMU officials said they halted the event after 45 minutes because it created a potentially unsafe situation.

"This was not an issue about free speech," Tim Moore, director of the SMU student center, said in a story for Thursday's edition of *The Dallas Morning News*. "It was really an issue where we had a hostile environment being created."

The sale drew a crowd outside the student center and several students engaged in a shouting match, Moore said.

David C. Rushing, 23, a law student and chairman of Young Conservatives of Texas at SMU and for the state, said the event didn't get out of hand. At most, a dozen students gathered around the table of cookies and Rice Krispies treats, he said.

"We copied what's been done at multiple campuses around the country to illustrate our opinion of affirmative action and how we think it's unfair," he said.

Matt Houston, a 19-year-old sophomore, called the group's price list offensive.

"My reaction was disgust because of the ignorance of some SMU students," said Houston, who is black. "They were arguing that affirmative action was solely based on race. It's not based on race. It's based on bringing a diverse community to a certain organization."

The group sold three cookies during its protest, raising \$1.50.

In June, the U.S. Supreme Court ruled universities could use race as a factor in admissions under limited conditions. In Texas, universities had been banned from using race as a factor under a 1996 decision by a lower court.

Associated Press, September 24, 2003. □

NOMINATIONS FOR SAFS BOARD OF DIRECTORS

2003-2004

The Nominations Committee consisted of Clive Seligman (President), Doreen Kimura (Past-President), and Chris Furedy (York University) and Natalie Allen (UWO) as two SAFS members not currently on the Board.

The eight nominated current Directors are: **Grant Brown, Andrew Irvine, Tom Flanagan, Steve Lupker, John Mueller, Clive Seligman, Harvey Shulman and Peter Sudefeld.**

Any member of SAFS may nominate individuals for election as Director. These nominations must be received at the SAFS Office by April 15, 2004. Each member nomination shall contain the following information: (1) the signature of the person nominating and the signatures of two (2) seconders; (ii) the full name and address of the person nominated; (iii) a statement of the status and attributes of the person nominated, showing each person's qualifications to be a director; (iv) a written consent signed by the person nominated agreeing to be nominated for election and serve, if elected.

For your information, none of the current board resigned in the past year.

UPDATE ON CANADA RESEARCH CHAIRS: HUMAN RIGHTS COMPLAINT

The eight university professors who initiated a human rights complaint against Industry Canada over discrimination in the Canada Research Chairs Program regretfully report that mediation by the Canadian Human Rights Commission to resolve the complaint has failed.

The complaints, filed by eight faculty members from universities across Canada, point to the very small allocation of the 2,000 chairs to people from groups protected by human rights legislation. For example, the latest figures on the Canada Research Chairs web site show that 1,035 Chairs have been awarded to date; of these only 175 (17%) have been awarded to women. Complete data are not available for any other equity-seeking group.

Industry Canada is responsible for the design and implementation of the \$900 million program. The complainants hope that the complaint process will result in the kinds of changes that will make the hiring of the Chairs transparent and fair in all cases, and will avoid secretive, single-candidate searches.

The complainants also challenge the small allocation to the humanities and social sciences, disciplines which involve the majority of Canadian students and professors.

Although mediation has failed, the eight complainants will continue to pursue the issues with the Human Rights Commission. They feel strongly that federal government programs should be in conformity with Canadian law and the international agreements that Canada has signed to protect individuals from discrimination.

The eight faculty members who filed complaints are:

Marjorie Griffin Cohen (Simon Fraser University)
Louise Forsyth (Emerita University of Saskatchewan)
Glenis Joyce (University of Saskatchewan)
Audrey Kobayashi (Queen's University)
Shree Mulay (McGill University)
Michele Ollivier (University of Ottawa)
Susan Prentice (University of Manitoba)
Wendy Robbins (University of New Brunswick)

The human rights complaint has been endorsed unanimously by the CAUT Council, which represents

unionized faculty all across Canada.

Distributed by PAR-L, November 9, 2003. More information is available on the PARL Web site at: <http://www.unb.ca/PAR-L/CRCcomplaint.htm>. □

ANOTHER SAFS RESPONSE TO INTERAGENCY ADVISORY PANEL ON RESEARCH ETHICS (PRE)

November 28, 2003

Dear Committee Members:

We are a national organization dedicated to academic freedom and scholarship (<http://www.safs.ca>). We are writing in response to a call for comment, as per <http://pre.ethics.gc.ca/english/publicparticipation/callforcomments/consultationmemo.cfm>. Our mandate is somewhat different from most of those addressed on your cover memo, for example, they are all involved in administering the TCPS [Tri Council Policy Statement] whereas we are not, but we think our perspective does address a missing element in the proposed plan.

As we understand it, PRE has initiated this "call for comments on a proposal for a TCPS Implementation Feedback Framework (TIFF)," to gain information on how the TCPS is implemented by Research Ethics Boards (REB) in Agency-funded institutions. We are pleased to see this effort, in principle, but we are also disappointed with the absence of some specific assessments that could and should be made with regard to the implementation of the TCPS.

We have consistently expressed our serious concerns about the continued expansion of regulations and bureaucracy surrounding the implementation of the TCPS. By all appearances, TIFF will further compound the bureaucracy. We find any increased bureaucracy troublesome given the lack of demonstrated effectiveness of the TCPS as it already exists. Changes in the research ethics review system in the past decade have greatly increased the burdens on individual researchers and on local university administrations and budgets. However, as we have noted in other consultations, there has been no documented benefit from all these regulations, and

very likely no actual benefit, in terms of the genuine protection of research participants. We salute PRE's "evidence-based approach," but we request that it also be extended to this particular aspect of REBs as well.

It is now clear that scholarship has been constrained by the TCPS regulations. Unfortunately, it is also clear that there has been little concern for the apparent ineffectiveness of the constraints. This cost-benefit problem is especially apparent in the Social Sciences and Humanities (SSH), where, among other things, local REBs struggle to enact variants of regulations specifically tailored for medical research and practice (e.g., the concept of "Good Clinical Practices" currently under discussion). We have provided more detailed comments on these to the PRE Social Sciences And Humanities Research Ethics Special Working Committee (<http://www.safs.ca/issuescases/ethics.html>), and will not repeat those here, focusing instead on the proposed TIFF.

The TIFF, as it is described (document by the PRE Task Group on Implementation, dated Summer, 2003), seems directed to what might be described as the "activity level" of REBs. That is, TIFF as proposed yields a policy-oriented analysis that provides a description of what REBs do, while saying nothing about the actual effectiveness of the review process. Once again, however, it is this latter component, and this component alone, that can justify constraints on scholarship, and the further usurpation of local resources in the generation of annual TIFF reports and visits. The research community's acceptance of the TCPS would surely be enhanced if there were actual evidence of effectiveness for the constraints. Furthermore, public trust would certainly be increased if the regulations were clearly shown to produce actual benefits to the public (as opposed to merely providing a *raison d'etre* for the regulators). In fact, it is hard to think of a constituency that would not be happy to have actual evidence of improved public safety.

The TCPS is supposed to "advance the protection of human participants." It is now time to provide evidence-based assessment of improvements in this regard. Annual reports that detail the number of REBs and the number of projects reviewed, for example, may or may not be of value, but in no sense do they demonstrate that experimental participants are the least bit safer as a result of the sacrifices to the freedom of inquiry that present regulations require.

Let us also note that, with regard to the evidence to be collected by TIFF, it is of concern that all of the annual report measures mentioned are to be provided by the REB and institution, with no input from the scholars. In the absence of such input it is hard to see how the envisaged "learning loops" between REBs, researchers, and others can possibly develop. We also find it difficult to understand how this approach is consistent with the claim that this process "aims at engaging a process based on collaboration, consultation, partnering and mutual respect of roles and responsibilities."

Finally, although TIFF aspires to apply to "all disciplines," whenever examples are mentioned in the TIFF proposal they continue to come from applied medical research, typically "clinical trials." The presumptions that the TCPS should continue to "grow" (i.e., expand) and that all research is efficiently covered by one set of regulations (i.e., medical research), require thought and critical analysis that probably extend beyond what the TIFF, as described, can achieve. Nonetheless, with some further thought here at the outset, TIFF might at least begin to provide some actual evidence on just which of the specific regulations do (or do not) improve public safety. This is an opportunity that should not be missed.

Sincerely,

John Mueller, PhD, University of Calgary
 Steve Lupker, PhD, University of Western Ontario
 Members of SAFS Board of Directors. □

REBs AND THE FOREST INDUSTRY

Clive Seligman
SAFS President

Ian Scott and Cheryl Wilson (2003) investigated the Research Ethics Boards (REBs) of medical schools across Canada. They found that different REBs required dramatically different numbers of copies of the research ethics protocol to be submitted for approval.

For example, REBs in Newfoundland and Labrador required 11 copies of the ethics application, Manitoba 15, and British Columbia 20. The correlation between the number of copies requested and the longitude of

the location of the faculty of medicine was statistically significant (0.75). Interestingly, there was also a statistically significant correlation (0.65) found between the number of copies requested by the REBs and the "annual cut of trees for each province that has a medical school."

The results apparently startled the authors who speculated that the findings "may point to a tacit or not-so-tacit agreement between the forestry industry and REBs. Is it the job of ethics boards to create demand for paper to support the forest industry? These authors would suggest not. Such an association must stop, and we would suggest that any and all communication between REBs and the forest industry cease." Politically astute to the dangers involved in their subversive report, the authors conclude their article with the hope "that by uncovering this startling break of ethical behaviour that they will not suffer any delays or undue rejections by REBs in the future."

On the assumption that this report is not simply pulp fiction, SAFS agrees with the authors that the REBs are barking up the wrong tree. Accordingly SAFS will set up a new, investigative branch to follow this clear-cut violation of ethics by the REBs.

Reference:

Scott, I., & Wilson, C. (2003). Understanding the number of copies of ethics applications required by faculties of medicine. *Canadian Medical Association Journal*, 169, 1297. □

THE SHELDON -- IT'S BAAACK

John Leo

Many readers with far too much time on their hands have written in and asked: Whatever happened to this column's annual Sheldon award? Well, it's back. As all Sheldon fans know, the prize goes to the university president who does the most to look the other way when free speech is under assault on campus. The Sheldon is a statuette that looks something like the Oscar, except that the Oscar shows a man with no face looking straight ahead, whereas the Sheldon shows a man with no spine looking the other way. It is named for Sheldon Hackney, former president of the University of Pennsylvania and a modern legend in looking the other way. After minority students in 1993

stole the entire press run of a campus newspaper, Hackney refused to discipline the thieves. But the guard who pursued them was reprimanded, a nice touch.

Emulating Hackney is like setting out to be the new Babe Ruth, but many try. A strong contender this year is William Cibes Jr., chancellor of the Connecticut State University system. One professor, fed up with one-sided seminars and guest lectures at CSU, asked the university to endorse airing a full range of views in these programs. Cibes said no, on the grounds that such a statement could justly be seen as "invading academic freedom." He is believed to be the first college administrator to oppose intellectual diversity as a threat to academic freedom. More recently, when the newspaper at Hampton University in Virginia was about to run an article on health violations at the cafeteria, acting university president JoAnn Haysbert asked for space on Page 1 to give her side. The editors put her article on Page 3, so she seized all copies of the issue, which was then reprinted with her piece on Page 1. Haysbert may be a bonehead, but she is ineligible for the Sheldon, which requires looking the other way, not making off with a whole press run yourself.

A furor erupted at the University of Nevada — Las Vegas when the student newspaper ran an abrasive Columbus Day article celebrating Columbus and rejecting both Indian cultures and the multicultural notion that all cultures are somehow equal. Nearly all copies of the paper were stolen, and the author of the article, Alexander Marriott, was fired from the staff of the paper on a charge of plagiarism, since discredited. No word yet from UNLV president Carol Harter, who is believed to be busy looking the other way.

Also emerging from the pack of Sheldon contenders is Warren Baker, president of California Polytechnic State University — San Luis Obispo. A number of black students were offended when a white student at the Multicultural Center attempted to post a flier advertising a speech by black writer Mason Weaver, author of *It's OK to Leave the Plantation*, an argument that dependence on government harms black Americans. The student, Steven Hinkle, offered to discuss the flier but was met by threats to call police.

The Cal Poly judicial affairs office found Hinkle guilty of "disruption of a campus event," although five of the seven complainants said the meeting had not yet started and all seven said Hinkle entered quietly and

conducted himself civilly when challenged. So the "disruption" seemed to be in the minds of the complainants: They were offended by the content of the flier. The Foundation for Individual Rights in Education (FIRE) entered the case, sending two letters to President Baker explaining his legal and moral obligation to the First Amendment and academic freedom. No dice. He refused to act.

Gerald Turner, president of Southern Methodist University, has made one of the strongest bids for the Sheldon by allowing subordinates to shut down a student bake sale that mocked the unfairness of race and gender preferences: Identical cookies were offered at different prices for whites, minorities, and women. The director of the student center said the issue wasn't free speech but "a hostile environment being created that was potentially volatile."

Campus satire about affirmative action is greeted in much the same way that jokes about Allah are welcomed by the Taliban. Hostile-environment charges are a traditional campus way of saying "I am offended, so silence those who disagree with me." And if violence is threatened, says University of California — Los Angeles law Prof. Eugene Volokh, a university should respond "by protecting the speakers against the would-be thugs, rather than by shutting up the speakers and letting the thugs win." President Turner, however, declined to intervene, letting the censors win.

The presidents of SMU and Cal Poly are clearly way ahead of their Sheldon-seeking rivals. Since there is little difference between them, the Sheldon judges are awarding two trophies this year.

Congratulations to Gerald Turner and Warren Baker, Sheldon laureates of 2003.

Universal Press Syndicate, November 3, 2003. □

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The editor welcomes short articles, case studies, news items, comments, readings, local chapter news, etc. Longer items are preferred on a 3.5" (MS-DOS) disk in Word Perfect or Word 95, or by e-mail attachment.

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