



ADVANCE SHEET – March 28, 2025

President's Letter

In the past, I have made a practice of not using this column for my comments on current events. The Bar Library is not a political organization, and those interested in my political comments can usually read them in the *Baltimore Sun*. I am making an exception for what appears below, because it did not appear in the *Sun* but a publication called *Law and Liberty* and because it is of unusual interest both to universities and their law schools and to lawyers also. As always, we are willing to publish responses of reasonable length.

George W. Liebmann



Reception In Honor Of The Honorable Joseph H. H. Kaplan and The Honorable James F. Schneider

The Board of Directors and staff of the Library Company of the Baltimore Bar would like to invite all of you to join us on Thursday, April 3 at 5:00 P.M., in the Main Reading Room of the Bar Library, for a reception honoring two true legends of the Baltimore legal community, the late Honorable Joseph H. H. Kaplan and the late Honorable James F. Schneider. The wine and cheese reception will include remarks from friends and family. It will be a time for remembering two amazing careers, but more importantly two amazing individuals.

Judge Joseph H. H. Kaplan joined the Board of Directors of the Library Company of the

Baltimore Bar in 1977 serving until 1995. He served in the capacity of Board President from 1979 until 1983. Judge James F. Schneider also joined the Board in 1977 serving until 1993 when he was succeeded to the Board by his wife Magistrate Susan M. Marzetta in 1993. Magistrate Marzetta would serve until 2006, when she was replaced by none other than Judge James F. Schneider. He would serve until his untimely death. Judge Schneider is the author of the *Untold Tales Of the Baltimore Bar Library: On The Occasion Of Its 175th Anniversary*.

There are no details listed here concerning the judicial careers of these two men which everyone pretty much knows. In their stead, we suggest:

The Best Judge You Never Heard Of – Joseph H. H. Kaplan by the Honorable Paul W. Grimm appearing in *Judicature*, which is published by the Bolch Judicial Institute, Duke Law School (March 2014). Reproduced in the Bar Library's Advance Sheet (July 24, 2020) it is available online at www.barlib.org under Information-Newsletter.

The "Interview Of The Honorable James F. Schneider" conducted on September 11, 2012, by his good friend and one time member of the Bar Library Board of Directors, the then State Archivist Dr. Edward C. Papenfuse. The following is a link to that interview: <https://www.mdd.uscourts.gov/oral-histories>

Place: Mitchell Courthouse – 100 North Calvert Street – Main Reading Room of the Bar Library (Room 618, Mitchell Courthouse).

Time: 5:00 P.M., Thursday, April 3, 2025.

R.S.V.P.: If you would like to attend telephone the Library at 410-727-0280 or reply by e-mail to jwbennett@barlib.org.

Shackles On A Free Society

George W. Liebmann

March 18, 2025

The action of the Trump administration in suspending several hundred million dollars in aid to Columbia University and in threatening a half-dozen other leading universities with similar treatment has aroused indignation among liberal-minded persons, but few have noted what made this outrage legally possible.

I did not attend Columbia, but I have some attachments to it. My mother held a graduate degree from there, and my father was an archivist and faculty member who linked hands with his colleagues to prevent the School of International Affairs from being vandalized during the 1968 disturbances. He had limited sympathy with the demonstrators, but none with their methods, and was quoted as suggesting that they would have done better to demonstrate outside a federal building—a good suggestion for our time also.

The ostensible basis for the Trump administration's actions is

Columbia's alleged failure to sufficiently punish antisemitic speech by some of its students. The administration's statements have been imprecise about what is objected to, citing "violence and harassment" without identifying specific acts. Protest language about Israel's conduct in Gaza seems to be lumped in with antisemitism, as is advocacy of a "one-state solution" or other questioning of the status quo. This was also the ground on which the University of Southern California denied speaking rights to a Palestinian valedictorian after pressure from those disagreeing with her views, a classic example of what the free speech scholar Harry Kalven decried as "the heckler's veto."

Liberals, including Jewish liberals, regard the Trump administration's action with outrage, but they have failed to identify its cause and cure. If they looked harder, they would find that the power of a president to withhold federal funds over perceived civil rights violations exists only thanks to righteous progressive lobbying.

Fund-withholding provisions were included in the Civil Rights Act of 1964 as a means of discouraging racial segregation in Southern schools. Latitudinarian judges extended the prohibition of discrimination to include creation of so-called "hostile environments," the telling of off-color jokes, criticism of particular women or racial minorities, and other matters which in a free society are regulated by manners, not laws.

In the case of *Grove City College v. Bell*, the Supreme Court held in 1984 with only Justices Brennan and Marshall dissenting, that the 1964 Civil Rights Act, whose legislative history was exhaustively discussed by Justice Byron White, did not justify the withholding of funds from entire institutions, but only from the portions of them alleged to be discriminating. In 1987, Congress, urged on by Sen. Edward Kennedy, enacted the so-called Civil Rights Restoration Act, which allowed all of an institution's federal funds to be withheld, including loans made available to students. Though colleges have a theoretical right to appeal fund withholding decisions to the courts, the high stakes have caused college administrations to automatically accede to federal demands, including not only those in formal regulations but those in so-called "Dear Colleague" letters. Senator Kennedy was no moderate when it came to politicizing the courts, most notoriously in his inflammatory opening statement in opposition to the nomination of Robert Bork.

There can be no doubt that most colleges capitulated too readily to the left in their willingness to coerce nonconformist students and professors, but centralized government coercion from the right is at least equally to be feared.

The 1987 Act was vetoed by President Reagan, who decried "the over-expansion of government power over private organization decision-

making.”

The Democratic Congress nonetheless overrode his veto, with all 52 Democratic Senators, along with 21 Republicans, and 240 of 250 Democratic House members, voting to override. Their assumption was that only politically correct persons would thereafter occupy the presidency. Not for them was the warning of Justices Frankfurter, Robert Jackson, and Owen Roberts in *Screws v. United States*, a 1946 civil rights case that “evil men are not given power; they take it over from better men to whom it had been entrusted.” They didn’t imagine that one day their civil rights power would be wielded in ways they would not personally endorse.

Such power, though perhaps well-intentioned, allows the federal government to strangle institutions that don’t fall in line with its vision of social order. It erodes the functional autonomy of essential institutions to make their own rules and pursue their own mission, especially given the expansive understanding of civil rights that took hold in the 1970s and 80s. It often undercuts academic freedom and standards, adds to administrative bloat, and restricts the rights of students and faculty.

During the Obama and Biden administrations, the threat of institution-wide fund withholding was used to induce numerous colleges to deny students accused of sexual wrongdoing rights of cross-examination and other elements of due process. Dozens of court cases, brought by students, rather than intimidated college administrators, condemned these efforts.

In the current instance, the Columbia administration has predictably been negotiating with Washington the terms on which it will surrender the free speech rights of its students and faculty. There can be no doubt that most colleges capitulated too readily to the left in their willingness to coerce nonconformist students and professors, but centralized government coercion from the right is at least equally to be feared.

There is yet no sign of repentance by the “liberal” law professors who supported the “Restoration Act” in defiance of the principle that “what goes around, comes around.” Perhaps the Supreme Court, which in the Obamacare case, *NFIB v. Sebelius*, has begun to curb the federal conditional spending power may rescue the universities if any of them are brave enough to appeal. The *Sebelius* case makes impermissible the imposition of new conditions on aid that institutions have already accepted; the government’s adding of political speech to prohibitions of discrimination transgresses this standard.

If the Supreme Court does not repudiate political coercion, recourse must be had to Congress, which should be asked to repeal the 1987 Act and otherwise restrict fund-withholding sanctions to reasonable limits. While

they're at it, Congress could also usefully dispose of the Civil Rights Attorneys' Fees Act, whose one-way fee shifting against colleges and school districts has deprived them of effective disciplinary powers and has prevented the adoption of selective drug testing of their increasingly spaced-out students, a demand-side approach to the drug war that is likely to be more effective than unleashing the American military upon the Mexican drug cartels. The statute assesses fees against defendants even when the plaintiffs are only partially successful, while not allowing colleges and school districts to recover the costs of defending frivolous cases. Former Stanford President Gerhard Casper has eloquently pointed out the consequences of that statute in his memoir: a shower of lawsuits and demands for settlement from persons who are dismissed, disciplined, or not promoted, and huge defense costs even in pro se cases.

Unfortunately, we live in an era when "liberals" are wedded to the national state, and too many "conservatives," to quote the late independent historian John Lukacs, "hate liberals more than they love liberty." It will be a while before American universities recover the four freedoms asserted by South African academics protesting against apartheid: "freedom to determine on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." The culture wars in academia can only be mitigated by the colleges' own constituencies, as is beginning to happen. Federal creation of synthetic martyrs is not the cure.



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Spring – What Can I Say

In this world there are few things if any that even the most positive of people cannot find at least something negative to say about. That is: with the exception of Spring. Go ahead – I dare you. Spring is a great deal like one on my other favorite things: children. It is innocent and pure, bursting with the potential for so much that is good. Walks in the park, trips to the beach, flowers blooming, new life everywhere, a constant reminder of the glories of youth: of Spring. Enjoy it. As it envelopes you, hug it right on back. Tight, but not too hard: remember Spring is just a kid.

Now, continuing with our Rogers and Hammerstein theme, “A few my favorite things,” how about that Baltimore Bar Library. Although at 185 years old it might be closer to its second childhood than its first, it still nevertheless maintains something that would have to be described as a youthful swagger. Filled with potential, possessing much to offer to those that could benefit from it, the Library needs just one thing and that is for all of you to notice it. It truly is something to behold, and all I ask is that you take even a little look. Believe me, that is all it is going to take.

I look forward to seeing you soon.

Joe Bennett

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