

CONFIDENTIAL

To: Wendy White, esq.  
General Counsel, University of Pennsylvania

From: Daniel B. Rodriguez  
Northwestern University Pritzker School of Law<sup>1</sup>

Date: August 3, 2021

Re: **Investigation of the April 27, 2021 complaint against Professor Amy Wax,  
University of Pennsylvania Carey School of Law**

I. Background

On June 3, 2021, Dean Ted Ruger reached out to me by email and then by phone to ask me for advice about a possible investigation of a faculty member. He identified the faculty member as Prof. Amy Wax and he disclosed that she was the subject of a written complaint filed with the university in late April by a group of Penn Law alumni. As I recall, he did not describe the details of this complaint, but he did mention, without elaborating, that there was an internal process at the University of Pennsylvania (which I will frequently refer to as “Penn” as shorthand) for considering complaints against members of the faculty. Dean Ruger said he was inclined to secure an external investigator, preferably someone with a substantial academic and administrative background, and with no ties to Penn’s law school or to the parties involved. He asked whether I

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<sup>1</sup> University position listed for identification purposes only. This is the work product of me working solely in an individual capacity and is not connected in any way with Northwestern University or its agents.

have any advice about suitable investigators and also asked whether I might be willing myself to undertake this assignment. He made clear that the appointment, if any, would be made by the university, through the general counsel's office. I said I would think more about this.

A few days afterward, I reached back out to Dean Ruger and said I would consider doing an investigation, if the details could be worked out. He subsequently set up an appointment for me to meet, via zoom, with Wendy White, the General Counsel of Penn.

A brief digression to describe my background and qualifications for this assignment. I have been a full-time law teacher since 1988. I graduated from Harvard Law School in 1987, served as a judicial law clerk for the federal appellate court, and then was appointed to a tenure-track position at the University of California, Berkeley (then Boalt Hall) School of Law. I was awarded tenure in 1994 and served as a faculty member at Berkeley for ten years. In 1998, I was appointed the dean of the school of law at the University of San Diego. I served in that capacity for seven years, and, in 2007, resigned from USD to join the faculty at the University of Texas School of Law in Austin, Texas. I was appointed to the Minerva House Drysdale Regents Chair at Texas and served on the faculty until the end of 2011. I was appointed dean of the Northwestern University School of Law in January 2012 and served as dean until July 2018, a total of six-and-a-half years. Since that time, I have served as the Harold Washington Professor at Northwestern.

In addition to these full-time academic appointments, I have been a semester-long visiting professor at (in reverse chronological order) the law schools of Harvard, Stanford, Columbia, USC,

and Virginia. I have served in a number of professional leadership capacities, including as the president of the Association of American Law Schools (AALS), a member (for a total of six years) of the executive committee of AALS, as a member and then chair of the AALS Deans' Steering Committee, the chair of the American Bar Association (ABA) Center for Innovation, a member of the ABA's commission on the Future of Legal Services, a member of the board of directors of the American Bar Foundation (current), and a member of the council of the American Law Institute (ALI).

In connection with my work with the AALS and ABA, I have served on a number of committees on law school accreditation (including several times as a chair), committees which function as mechanisms of investigation of these law schools and their programs. I have also been tasked with doing special investigations of law schools, in circumstances where the law school has faced some specific troubles and also where there has been a significant change in the functional operations of the school. These investigations, as with this investigation of the Wax complaint, have been factually intensive and often complicated. On occasion, they have involved sensitive matters involving specific faculty members and senior administrators. I have written reports which have, I hope and believe, aided the schools and the relevant accreditation agencies in their evaluations.

With respect to any concerns about neutrality and bias, I should also mention that I do not now nor have I ever had any formal associations with Penn or its law school. I have visited the law school perhaps four- or five-times total over a three-decade period, to attend conferences, give academic presentations on my scholarly work and, in one instance two years ago, to consult with Dean Ruger

and various administrators on a proposed initiative on professionalism. Dean Ruger and I overlapped for a number of years as deans of our respective law schools, and we interacted in a few capacities in connection with our professional work. I have long admired Penn Law School and have relished my friendships with several current and former Penn Law faculty members, but that is the extent of my involvement with the law school and its community.

I have had no connections with Prof. Amy Wax prior to this investigation. I recall we have met one or two times in the past in group settings, as part of conversations with several faculty members when I was deeply involved with AALS. I do not recall any correspondence -- again, prior to this investigation -- between the two of us. Also, because we work in very different academic areas, I do not recall reading any of her scholarly books and articles and other public commentary, at least not until I was appointed by Penn as an investigator.

Lastly, I have no connections with any of the alumni with whom I spoke as part of this investigation, including the named complainants. Moreover, I asked each of them detailed questions about their professional employment after graduation and there were no organizations of which they were a part that I had ever been a part.

Returning to the timeline of this investigation, I met by Zoom with Ms. Wendy White on June 11. We discussed the details of my appointment as investigator and also the scope of the investigation. This discussion was continued by email in the following days, and we were able to reach a complete meeting of the minds about what was entailed and expected by me in this investigation.

Between mid-June and now, we have connected a few times by email and telephone on specific matters of process related to the investigation. We have not discussed any of the faculty allegations and the evidence I have been collecting and considering. Indeed, I have discussed with no one any of the substance of this complaint and have prepared this report without any advice, commentary, review, or intervention of any sort by anyone.

## II. Range and Scope of Outreach

The April 27 complaint against Prof. Wax was signed by eight Penn Law alumni, spanning a range of years of attendance. I reached out directly to these alumni to speak with them about the complaint. I was ultimately able to have Zoom or phone conversations with each of them. I also asked for their help in pointing me to alumni who would, in their judgment, have direct knowledge about any of the allegations in the complaint. Despite a misstep by one of the alums who apparently posted a note on social media, without my permission or knowledge, asking on my behalf to contact me with information about Professor Wax, it was made clear by me to all of the individuals whom I contacted, including the named complainants and others, that this investigation had as its intended scope only those allegations raised in the complaint. This was not a general and unlimited exploration of conduct and commentary by Professor Wax. Nor was it to be an inquiry into the merits or demerits of Professor Wax's suitability to continue as a tenured member of the faculty. Rather, the scope of my investigation was limited to the allegations contained in the complaint, along with surrounding context that might shed light on these allegations and their effect on certain individuals within the Penn Law community. On this last part, where I describe in this report some episodes and statements that are not specifically mentioned in the April complaint, I do so in order to provide what I believe is appropriate context for understanding the

credibility of the information received and the connection between instances of Professor Wax's conduct in and outside the classroom and the allegations made by these complainants and other relevant witnesses.

Just by way of explaining the organization of this report, the reader will note that I do not undertake to describe Professor Wax's career at Penn Law, nor to elaborate on her accomplishments or her academic and professional work and service in any way. These matters are by and large on the public record, and I do not have anything unique to contribute to a full assessment of her longstanding work at Penn's law school. It suffices for this report's purposes to observe simply that all of the episodes described in the complaint happened during the time in which she was a full-time faculty member at Penn Law.

### III. Alumni Contacts and other Sources of Information

In the course of this investigation, I spoke to twenty-six alums. Only one of these individuals expressly asked to remain anonymous. All the rest spoke to me without any restrictions on their identification. I will identify them, along with their class year, when I am describing the episodes in question and their surrounding context. Several other individuals not among this group of twenty-six reached out to me to discuss Prof. Wax. However, after some preliminary discussions, typically by email, it became clear to one or both of us they had no information that was relevant specifically to this complaint and so we did not speak after all. Of course, it is possible that there are others who have relevant information, but this report was prepared after I had spoken to

everyone with whom I had scheduled a call and, moreover, after much due diligence in following leads and seeking information where it was available.<sup>2</sup>

Finally, there are a couple episodes which reference information which is widely, if not publicly, available, such as, for instance, a recording of a video or podcast. I have reviewed this information myself and it, too, is available for anyone to review if and insofar as it is relevant to Penn's full consideration of this complaint.

#### IV. Professor Wax's Participation in the Investigation

Soon after commencing this investigation, I reached out by email to Prof. Amy Wax. I introduced myself, described the reasons for my message, and proposed that we have a preliminary call or Zoom meeting during which I would spell out the details and proposed structure of this investigation and schedule a future time during which I could interview her. She expressed to me a reluctance to meet, although she did propose a possible time to connect (asking me for the assurance that it would be recorded and that she could be accompanied by a witness, both reasonable requests which I quickly agreed to). Later, I reached out to her to follow up on my request in the hopes of connecting. By that point she indicated that she was not willing to participate further in this investigation, including connecting by Zoom or phone for an interview

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<sup>2</sup> In just a few instances, there is written evidence that is relevant to some allegations in the complaint. Where so, I will recount them specifically. I have this written information in my files and could furnish any or all of it upon request.

or answering questions sent by email. She did provide me with this statement which I promised I would include in this report without any change:

“I have committed no misconduct and have done nothing wrong. The complaint is entirely baseless and meritless. I am an outstanding teacher, one of the few law professors to have won a university-wide Lindback prize.”

(Wax email on 6/15/21)

There were other email contacts between me and Prof. Wax during this period of investigation, but none that bears on the merits and so I will not recount them here. Nor will I relay communications that were made among Prof. Wax, myself and Ms. Wendy White in the Penn General Counsel office. Ms. White is free to furnish these emails and has my permission to do so.

#### V. Sources of Information and Matters of Anonymity

Because an issue has arisen between the investigator, the general counsel of Penn and the respondent, regarding anonymity and the fairness of the process, I want to spell out exactly my position on collecting and reporting information from individuals whom I have contacted.

The named complaints describe several episodes in the complaint, which episodes were not witnessed by the complainants themselves. Rather, they were, they tell me, relayed to them by others with whom they spoke. Where complainants did not have direct information about an episode, I asked them to refer me to the individuals who did have direct information so I could speak to them in order to corroborate the accounts in the complaint. It is my position and the

position of Penn’s general counsel that episodes described by individuals who remain completely anonymous -- and by “completely” I mean that their identify has not been disclosed to me (and certainly also not to the respondent, as I understand it) -- cannot form the basis of allegations that ought to be considered further by the university as part of a full and fair investigation into faculty misconduct. Such anonymous allegations do not, in my opinion, accord with basic principles of fairness and due process and cannot be assessed by me as investigator or by others for credibility and context.<sup>3</sup>

However, there are allegations that are described in the April complaint anonymously, but further investigation has revealed the sources of these allegations. Therefore, I have been able to speak to these willing individuals and they understand that their identity could be disclosed in a report to the university and possibly also to the respondent. I believe without equivocation that information that comes through such a process – first described in a complaint anonymously and then sourced during the course of the investigation – is legitimately reported and accords with standards of fundamental fairness.

## VI. Investigation of the Allegations

### A. Issue framing

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<sup>3</sup> I make this claim without any claimed expertise about the standards of fair process followed by the University of Pennsylvania. Nor am I making a constitutional argument about what due process requires as a formal legal matter. However, I believe my understanding of what is or is not fair process to be widely shared and not controversial.

The essential argument of the complaints, as described at p.2 of the Wax complaint [“Complaint”] is that Prof. Wax’s “derogatory remarks harm students both inside and outside of the classroom.” The five clusters of allegations described in the Complaint, at pps. 2-7, are offered in support of this argument. In this investigation, my inquiry was into 1) whether she made the remarks alleged in the Complaint, 2) whether a fair observer could view the remarks as “derogatory,” and 3) whether and to extent students were harmed by Professor Wax’s remarks.<sup>4</sup>

Because the second part of the inquiry will frame the first and to some extent the third, let me take a moment to reflect on the term “derogatory.” The Oxford English dictionary defines the term as: “Having the effect of lowering in honour or estimation; depreciatory, disparaging, disrespectful, lowering.”<sup>5</sup> Webster’s New World dictionary also uses “disparaging” as part of its definition, and adds: “detracting from the character or standing of something.”<sup>6</sup> To this investigator, derogatory has a fairly common and well understood meaning. I would add only that a remark can be disparaging for many reasons, not necessarily tied to any identifiable quality, characteristic or membership in a class (e.g., race, gender, religion, sexual orientation) that is generally protected by civil rights laws. I mention this only to emphasize that while some of the discussion that follows will focus on reports by alumni about Professor Wax’s views on matters of race and ethnicity (and, to a lesser extent, nationality and sexual orientation), concluding that certain remarks are

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<sup>4</sup> I will say reiterate here the point that I was not tasked with determining whether such “harm,” if any, gives rise to a violation of any university policies. That is for the university to decide in accordance with their procedures and rules.

<sup>5</sup> <https://www.oed.com/view/Entry/50663?redirectedFrom=derogatory#eid>

<sup>6</sup> <https://www.merriam-webster.com/dictionary/derogatory>

disparaging or “lowering” does not require that one come to view her remarks as disparaging because of any preconceived beliefs on her part about, say, racial inferiority, superiority, or anything cognate to these issues.

One further wrinkle: A few alums mentioned the phrase “hate speech” to describe remarks that Professor Wax allegedly made inside or outside the classroom, including in speeches, articles, books, and other public fora, and also in some more private settings. I am not inclined to go down the road of examining whether or to what extent any of Professor Wax’s comments would fairly be regarded as hate speech. Such a category has important legal connotations; moreover, it raises matters of particular controversy among scholars, pundits, and the general public. Therefore, I do not explore in this report whether any of Professor Wax’s remarks would meet the definition of so-called hate speech. My inquiry is limited to the question of whether and to what extent her remarks were derogatory and the consequences of these derogatory remarks.

By any fair reading, this complaint is not made in isolation, that is, without regard to Professor Wax’s public and well-known (at Penn Law and elsewhere) reputation and revealed views on controversial legal and social topics. Wax has had an active and impactful career as a prominent scholar and public intellectual for many years, including during her long career at Penn Law. By any measure, some of her expressed views about American culture and society, including matters of inequality, have been provocative and influential. While she is not unique in this respect, and the great traditions of academic life give a very wide berth to faculty members to express their opinions on difficult subjects and in ways that will occasionally cut against the grain of a broad

consensus of viewpoint, let us stipulate that Wax's views are notably controversial. Without blurring the line between my factual assessment and the evaluation of the merits of the complaint, I believe it is worth underscoring, by way of the larger context of this investigation and report, the point that her academic freedom accords her wide latitude to express views and opinions even where such views can become painful to those who have very different views and, further, whose lives and experiences as members of groups and as individuals are fairly seen as the subject of some of her focus and her rhetoric. The question to me as a neutral investigator is not whether I or others view Professor Wax's expressions in various fora as objectionable in some ambient sense, but whether they can be credibly depicted as derogatory and harmful, as this complaint alleges.

The content and surrounding context of various episodes inside and outside the classroom will hopefully illuminate these matters. I will spell them out in detail, along with reflections of specific alums with whom I spoke during this investigation.

## B. The Complaint's Allegations

### 1. Episode involving two book panels during 2009-10 school year

In 2009, Amy Wax authored a book, *Race, Wrongs, and Remedies: Group Justice in the 21<sup>st</sup> Century*. As part of the tradition at Penn Law, Prof. Wax was given the opportunity to organize a panel on her book, and she did so, inviting a few guests to join her in a discussion open to the faculty and students at the law school (perhaps also to the general public, although I am not sure

about that). Several alums described this event as engaging and cordial, despite their displeasure with the claims made in the book. Others described the event as mainly polemical and seriously unbalanced, both in the representation of panelists and in the engagement with questions from the audience. More specifically, two alums noted that faculty were given priority in asking questions of Prof. Wax and the other panelists, and so student views, that is, views of students who objected to the thesis of the book, were not adequately ventilated. Without any recording of this event or a survey of participants, I cannot reach a conclusion whether and to what extent these concerns were warranted.

Following this panel, a group of unhappy students, mainly organized under the aegis of the Black Law Students Association [BLSA], went to the then-dean of students, and at least one other faculty member, proposing that there be a follow-up panel, one that they hoped would give students a better opportunity to engage with Prof. Wax's arguments in her new book. My understanding from more than one interviewee was that Wax was amenable to this idea, and asked only that that the concerned students meet with her over lunch to discuss with her their disagreements and to develop a constructive plan for organizing a second panel. From this lunch, and perhaps other surrounding discussions, Prof. Wax and the students settled on a gameplan for this second panel.<sup>7</sup>

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<sup>7</sup> A quick digression: One alum, [REDACTED] who attended this lunch, told me that Prof. Wax gave the students an opportunity to go around the table and explain how her book had impacted them. They "spoke from their lived experience." According to [REDACTED], Prof. Wax responded by insisting that these were "just anecdotes." She went on, said [REDACTED] that Black students don't perform well as do white students because they are less well prepared and this because of affirmative action. [REDACTED] recalls Wax sharing an anecdote of her husband, a doctor, noting that two Black doctors with whom he worked were "lazy" and had "played the race card." I would have liked to hear a rebuttal to this story by Prof. Wax but that was not possible. Despite the absence of a rebuttal, I find the report credible.

The second panel proceeded as planned. Two alums I spoke to recalled being especially appalled by the comments of John Derbyshire (who is referenced in the Complaint at p.2). Derbyshire, I will note for the record, has long been an extremely controversial commentator on issues of race and racial justice. However, because no one suggested that Prof. Wax had endorsed his views, in print or at the panel – indeed, one alum remarked that Derbyshire’s comments made Wax’s positions look reasonable – there is nothing to me credible about the allegation in the complaint that, as I read it, ties Derbyshire’s views on matters of race to Professor Wax’s views. On the very specific allegation regarding Derbyshire and Wax, there is little more here, in my opinion, than a claim of guilt by association.

Reflecting upon the observations by alums from this time period about the two book panels, I reach the conclusion that there is nothing here that specifically supports the complainants’ allegations that Prof. Wax make derogatory comments at these two events. Under any plausible account of academic freedom, Prof. Wax is surely within her rights to write a book with a very controversial thesis. Moreover, and to be fair, the complainants do not argue that Prof. Wax should be sanctioned because of arguments presented in her book. As to the discussion at the two events, I learned of no remarks specifically described that I could conclude were derogatory; nor can I draw from the fact that this panel contained individuals who expressed views that many (most?) of the attendees found objectionable or disparaging a conclusion that Professor Wax engaged in any harm-causing conduct.

However, there are three other episodes relevant to the context of these panels which, to me, are more problematic, and deserve some airing in this report. One specifically referenced in the

complaint is a remark Professor Wax is alleged to have made, that is that “You can have two plants that grow under the same conditions, and one will just grow higher than the other.” [REDACTED]

[REDACTED] recalled this statement, made in Prof. Wax’s faculty office.

I find this recollection credible. But is it derogatory? Candidly, I find this a hard question to answer. Taken in isolation, it does seem to support a rough biological deterministic view on race, one that could be associated with eugenics and other truly troubling views on racial equality. Such views, in my opinion, cause harm; they are, on my reading, well outside the mainstream of public and scholarly opinion and there is a long history of such views causing harm to individuals of minority group status. However, there is no context provided here other than this stray remark. Prof. Wax might have been making a more nuanced and limited point; maybe she did, but Ms. [REDACTED] heard only this comment in isolation and found it derogatory taken on its own terms. We simply do not know. What I can say is the overall contours of Professor Wax’s scholarship on group difference and equality principles does not, on my best reading, support the assertion that she views Black individuals as biologically inferior to Whites. This is relevant only in that it suggests that the most squalid and traumatizing conclusion one might draw from this “plant” comment may not square with what she intended to say and actually said. A more in-depth investigation would benefit greatly from a specific explanation by Prof. Wax. But, in the absence of any such explanation, I am inclined to give Wax the benefit of the doubt. Therefore, I cannot conclude that this statement was derogatory under the clear definition of that term.

A second episode raises related concerns about disparaging comments and student harm. Although this is not referenced specifically in the complaint, it is relevant to me because it arises in the

context of the book panels which have been described in the complaint. (I leave it to the reader of this report to determine whether it falls inside and outside the scope of a proper investigation, but I believe it falls, if only slightly, on the inside.) At a reception following the second panel, a group of students were together with Prof. Wax discussing, in what was described as a fairly intense manner, the book and its arguments. ██████████ said that she commented in this setting that the panelists' arguments were deeply worrisome and that based upon her experience as both a Yale student and someone who had been involved in admissions at Yale, that the main problem lay in discriminatory practices in testing and other mechanisms which, she suggested, was limiting minority access. Wax replied in this account that these were mere anecdotes and not based on true data. ██████████ said he responded that she had "lived the data." Finally, Prof. Wax observed that ██████████ had "only got to Yale because of affirmative action," and therefore her lived experience "didn't mean anything." This story was verified by another alum, ██████████ who was standing next to ██████████ at the time of this conversation.

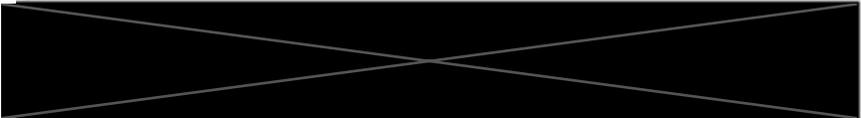
I conclude that this comment was made as reported by these two students, that it was derogatory and, further, caused harm to the then-student, ██████████. She recounted this story with great sadness, at one point crying. She said she felt "awful" at the time, experiencing from Prof. Wax "not the same level of respect" as her White student colleagues. It caused her to be "disappointed in myself" and, she believes, has impacted her self-esteem, during and after her time at Penn. Whether Prof. Wax was motivated to be disparaging and "lowering" (recalling the OED definition of derogatory), I could not say. And perhaps her judgment was meant to be mechanically descriptive about ██████████'s admission to Yale, rather than pejorative. In my view, however, a reasonably sophisticated faculty member such as Prof. Wax would surely know

that this remark would be cutting and personally demeaning. She must have known that one of the likely results is that [REDACTED] would be offended and maybe even ashamed. To me, this reaches to the level of disparagement, albeit confined to a small group of students who overheard these comments.

One final bit of context related to the panel. As with the anecdote just reported, this fact found does not relate to the panel specifically, but is introduced here to provide some context around the allegations that Prof. Wax's comments were derogatory and caused harm. At approximately the time in which the book had appeared and the panels were being put together, Prof. Wax engaged in a dialogue with a member (I believe the president, but I cannot be sure of that) of BLSA. His name is [REDACTED], of the class of 2010. The information relevant to this paragraph was furnished in the form of an email to Mr. [REDACTED] by Prof. Wax. It reads as follows:

See Attached

Wed, Apr 28, 2010 at 12:07 PM



As long as we're passing around emails, I received a response from Amy Wax to my challenge to her book a couple weeks ago. I have been debating ever since whether it would be appropriate to forward it to you. It seems that question has been answered.

I was shocked by her response. I do not think a campaign to get this woman removed from the faculty of Penn Law would be inappropriate. Certainly no conscientious student should ever attend one of her classes again. She says, "If blacks really and sincerely wanted to be equal, . . ." Translation? Well, you can fill in the blanks.



Here's the email:

From: [awax@law.upenn.edu](mailto:awax@law.upenn.edu)  
To: [Redacted]  
Date: Tue, 13 Apr 2010 13:29:31 -0400  
Subject: RE: "should" vs. "can"



Thanks for the message. I disagree with pretty much everything you say. If blacks really and sincerely wanted to be equal, they would make a lot of changes in their own conduct and communities, and those changes would do vastly more good than anything else, and take them a very long way towards where they want to go.

Urging them to make the necessary changes is not an "external solution," and outsiders (including people like me) have full moral authority to make these recommendations. Finally, very few people grow up with privilege and silver spoons, and people from modest backgrounds (like myself) routinely live upstanding, constructive lives.

I would suggest you read the entire book, though.

Sincerely,

Amy L. Wax  
Robert Mundheim Professor of Law  
University of Pennsylvania Law School  
3400 Chestnut St.  
Philadelphia, Pennsylvania 19104  
215-898-5638  
[awax@law.upenn.edu](mailto:awax@law.upenn.edu)

As with the “two plants” comment discussed above, there is no surrounding context here other than the two emails. I am left to surmise that the exchange grew out of unspecified objections made by [REDACTED] to Prof. Wax’s book. Still and all, I view these remarks as derogatory. The claim that racial equality is something that Black Americans must in some sense earn is quite disparaging, and I will say stunningly so. For sure it would be useful to have some more context by Prof. Wax about what she might have meant by this statement, lest it be misconstrued, but lacking any of that, I find it hard to read this comment as anything other than derogatory.

To be sure, I do not know how widely shared was this email. It appears to be sent to a number of BLSA members, and it was mentioned to me by one of the complainants (who wished to remain anonymous for the purpose of this report). It may be that this was kept to a very limited number of individuals and so whatever insult was felt by the [REDACTED] and the few other recipients was confined in scope. I cannot know the answer to this question from the interviews in this investigation. This consideration goes to the question of how much harm was caused here. I address this matter more thoroughly in the “Conclusions” section of this report.

## **2. Public statements regarding Black student competence in a recorded interview**

Reference is made on p.3 of the Complaint to a recorded exchange on the topic of Black student achievement at Penn Law School. An interview with Professor Glenn Loury of Brown University in the fall of 2017 was posted on his podcast site and was also made available via YouTube, where it remains today. This hour-long interview spanned a number of topics, one of which was affirmative action in higher education. As part of a give-and-take with the interviewer about the

qualifications of minority students, Professor Wax noted what she called an “inconvenient fact” declaring that she didn’t “think that [she] had ever seen a Black student graduate in the top quarter of the class [at Penn Law school] and “rarely in the top half.” She recalled that “only one or two students” had finished in the top half of her required first year class (presumably Civil Procedure). Complainants note that Dean Ruger had written to the Penn Law community that Professor Wax’s statements were erroneous, further adding that she would not have access to any reliable information that would support such a claim.

As I read the complaint, there are two separate arguments made here. The first is that these statements about Black achievement were derogatory, suggesting that Black students are, as a group, less qualified than non-Black students, less qualified in the sense that they do not perform as well academically. This statement could conceivably cause harm to Black students by insisting that these students do not measure up to their White peers. However, these arguments about affirmative action are ubiquitous in the public debate; Professor Wax is certainly entitled to her view that students’ academic achievement is differently distributed across racial and ethnic lines, and while expressing these views in a public forum such as this videocast could well be viewed as at least insensitive, it is, to me, problematic to describe as derogatory an effort to depict comparative group achievement in the context of a debate about affirmative action.

There is a second argument in the complaint, however. It is said that Professor Wax was disparaging Black student success on the basis of false facts. Alternatively, the complaint suggests that Professor Wax has looked at students’ grades, a violation of Penn Law policy according to the dean, in order to support her assertion about Black achievement. In so doing, Black students could

conclude that grading is not anonymous and, further, that they could not expect to be treated fairly by Professor Wax in their classes.

This is a more complicated claim. The students' fear is not irrational, given the apparent ease with which Prof. Wax shared in a public video interview her opinion that Black students could not compete effectively with non-Black students for high grades. (She doubled down on this claim by responding to a question that the Law Review had a diversity mandate, a claim refuted by Dean Ruger). However, without more, there is no basis to believe that Prof. Wax has in fact been discriminating against Black students in grading their exams.<sup>8</sup> I can credit at most only the narrower claim that Black students (and perhaps other non-White students) face anxiety in her classes because they fear that she will not give them a fair shake. Again, in the absence of evidence that Prof. Wax been able and willing to breach the anonymity of final exams – and there is zero evidence that she has – this anxiety seems largely unwarranted. Therefore, while the complaint raises an issue that was worth looking into – presumably first by the dean, in investigating what basis, if any, Prof. Wax had for her assertion about historic Black student performance, and then by this investigator – it does not, in my view, support in a meaningful way the allegation that her remarks were derogatory and caused harm.

### **3. Statements in class**

The investigation into Prof. Wax's remarks in class over a number of years proved difficult, insofar as recollections were often inexact and occasionally impressionistic. Some interviewees

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<sup>8</sup> The complaint stops short of making this accusation. In any event, I did not undertake any investigation of discrimination in grading.

described the context around these remarks, while others just mentioned one or another remark in isolation. In the case of the latter, it is difficult, without surrounding context, to reach a clear conclusion about whether the remark was derogatory, whether by intention or by effect, or insensitive, or actually appropriate to the situation. That said, I did my best to explore with the interviewee the particulars of their recollection and the surrounding context. This, again, was undertaken without the benefit of Prof. Wax's response (assuming that she would have any recollection of these statements from many years ago).

*a) Comments in Civil Procedure, Fall 2007*

██████████ recounted a number of comments by Prof. Wax during this semester. I preface this account by noting that ██████████ said that she came into the class knowing what Prof. Wax had written about up until that time on issues involving race and thus she was “immediately concerned about the tone of her views about race.” (██████████ is a 1<sup>st</sup> generation, mixed race student). In class, ██████████ recalls Prof. Wax saying something to the effect that people of color needed to stop acting entitled to remedies, to stop getting pregnant, to get better jobs, and to be more focused on reciprocity, that is, they need to give back. It wasn't clear from this interview whether these comments were made in one fell swoop or had occurred at different times during the semester. She noted that these comments were “not out of the blue,” and therefore were connected in some fashion to materials being discussed in class. Yet they “tended to come up.” As a consequence of these comments, ██████████ reports that she suffered great stress, stopping sleeping, forgetting to eat, and hallucinating. She took two weeks off of class, which she attributed to Prof. Wax's in-class comments.

Related to ██████████'s experience overall, but not contemporaneous with the 2007 Civ Pro class, she recalls that a year later she asked Prof. Wax for a letter of recommendation for an international internship and that Prof. Wax asked to see her transcripts. She felt that this was unusual and decided to “find someone else.”

*b) Comments in Civil Procedure, Fall 2009*

██████████ said that there was in this class a “pattern of homophobia.” She said that there were “commonplace behaviors” and several references to LGBTQ lifestyles, gay marriage, child-raising, etc. However, when pressed, she did not provide specific comments in class on these themes. She said she did not recall the exact language used by Prof. Wax, but still remember that her comments evinced homophobia and made students uncomfortable.<sup>9</sup>

*c) Comments in Civil Procedure, Fall 2010*

██████████ recalled Prof. Wax, in discussing a case from the 19<sup>th</sup> century, saying the term used in the case, “negro,” in a way that ██████████ viewed as “snide

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<sup>9</sup> On the matter of homophobic comments generally, I had a lengthy interview with one of the complainants, ██████████. He described what he felt at the time was an extensive pattern of homophobic conduct, manifested in many statements in the law school and outside. As ██████████ had never taken a course with Prof. Wax, he could not give testimony on any specific in-class comments; and his depiction of her attitudes with respect to LGBTQ individuals was drawn mainly from her public statements.

and smug.” She then got up and left the class, going to the office of one of Prof. Wax’s colleague and expressing her dismay at the episode.

One day in class, as these two alums recall, Prof. Wax asked in an “antagonistic way” a Black student to remove headphones (which were around his neck) and his hoody, remarking that this “paraphernalia” was inappropriate for the class. Both alums recalled viewing this remark as racially tinged. Mr. [REDACTED] (who is White) thought that Prof. Wax had used “coded words” and that her manifest intention was to be badgering. Neither of these interviewees recalled any further comments by Prof. Wax to this student at the time, even though he “respectfully pushed back.” Both [REDACTED] and [REDACTED] believed that this comment affected the tenor of the class in a negative way, impacting especially the Black students in this class. “I can only imagine,” remarked [REDACTED] during my interview, “what it’s like to be a student of color in her class.”

*d) Comments in Civil Procedure, Fall 2014 (as recounted by [REDACTED] :*

In describing a case from the 50s or 60s that involved a Black eyewitness, [REDACTED] recalls Prof. Wax saying “he was a black man” in a way that was distasteful. “She spat it out of her mouth.” On another occasion in that same semester, a Black student raised his hand and Prof. Wax, as [REDACTED] recalls, called on this student by the name of the Black litigant in the case and, seeing her mistake, laughed. From these episodes, and other episodes she did not recount in detail, [REDACTED] [REDACTED] said that she was “crestfallen” and filled with “sadness.” Feeling that she was “face-to-

face with an out and out racist” she felt very distracted, upset, and couldn’t study. She felt “powerless” and “tired” and believed that her grade suffered as a result.

*e) Comments in Civil Procedure, Fall 2016*

████████████████████, a straight White student (as she volunteered to me), noted a number of comments she recalled Prof. Wax making during the semester. One was to the effect that gay couples are not fit to raise children. I pressed her on the exact quote, but she could not recall it precisely. She did express concerns about Prof. Wax’s reputation for racism, bigotry, and homophobia, which I report here not for the truth of the matter asserted but, instead, to provide some context for ██████████’s comments about Prof. Wax given what she believed that Prof. Wax believed. ██████████ said that Prof. Wax would repeatedly mispronounce students’ names, remarking that this was “good enough for government work.” When questioned, ██████████ could not say whether she did this more often with students of color.<sup>10</sup>

Further, ██████████ said that the manner in which she taught certain cases was problematic and disparaging of individuals of certain racial and ethnic backgrounds. However, she could not provide me with specifics. She had a hazy recollection of how Prof. Wax framed the issues in

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<sup>10</sup> I will note in this context that one alum, ██████████ recalled this comment Prof. Wax made in her Fall 2010 Civil Procedure course: “I am not going to bother trying to get all the names straight.” She did not say that this was said in reference to students of color, but instead her impression was that this was relevant to what she thought were foreign-sounding names. Another alum, ██████████, who was a student in her Fall 2009 Civil Procedure course, said that Prof. Wax had difficulty remembering names. She also said that she called disproportionately on students with Indian and Asian names.

*Martin v. Wilks*, a case involving Black firefighters but, again, she could not recall specifics so it is impossible to evaluate whether there was or was not anything disparaging. [REDACTED] came back a couple times to her basic point which is that she felt “extreme discomfort” in this class and felt that there was “no space for political debate.”

f) *Comments in Civil Procedure, Fall 2017*

[REDACTED] recalls that Prof. Wax made a statement about Mexican men being more likely to assault women. According to [REDACTED], Wax added that this is an accurate stereotype in the same way as “Germans are punctual.” She couldn’t recall the exact statement, but was confident in her recollection that the statement was in essence this. On another occasion, calling on a female student with a hyphenated last name, she asked “are your parents hippies?” To [REDACTED] [REDACTED], Prof. Wax was “prolific with her bigotry.” However, she recounted no further statements in class to support this claim, but rather pointed to various statements in the media, including comments at or around that time about Dr. Blasey Ford and the Brett Kavanaugh confirmation hearings.

**4. Xenophobic statements in social settings**

There are two specific allegations mentioned here. Some alums offered other anecdotes about remarks Professor Wax had made in settings that could be viewed as social, but I did not further interrogate these individuals about these remarks, as they neither were surfaced specifically in the complaint, nor did they, in view, provide any illuminating context to the remarks referenced.

The story at p.3 of the Complaint, regarding a remark Professor Wax made about Hispanic people and her neighborhood, was verified to my satisfaction by a conversation with [REDACTED]. [REDACTED] indicated that he was a guest at Wax's house in April of 2018, as part of a group of students enrolled in her "Conservative Legal Thought" seminar. Professor Wax is alleged to have said "We wouldn't want to live somewhere where people are loud. But Hispanic people don't seem to mind that." I did not read the complaint to [REDACTED] (although I cannot know whether he had seen it otherwise). He did recount the remark by Professor Wax in almost verbatim terms, qualifying it only by saying it was "words to that effect." He recalled this remark clearly, as he explained, because it was so jarring and inappropriate. No one, he said, responded in the moment to the remark; nor was there any further comment in that same or a similar vein by Professor Wax – either at that gathering or at any other time he heard.

The second allegation about an inappropriate comment concerned a remark Prof. Wax made in a meeting of her Civil Procedure students for whom she was serving as a faculty advisor. This account was verified by [REDACTED]. He said it happened in the fall semester. His account was just as described in the complaint at p.4, where she is alleged to have said when an American student said his name, "Oh finally, an American" and added "it's a good thing, trust me." I found the story, which he described in more detail than in the complaint, credible. As I was not able to hear from Prof. Wax anything that would explain the context of this remark, I can only conclude that the remark was gratuitously xenophobic. She drew a contrast between American students and others, although [REDACTED] noted that the majority of the students who introduced themselves before the Caucasian student, including [REDACTED] himself, were in fact Americans, albeit

Americans with diverse ethnic backgrounds (Indian American and Pakistani American, as he recalled).

Both of these remarks described in the complaint and verified by credible witnesses were xenophobic in the ordinary meaning of that term. Perhaps they reveal a pattern of such comments in non-class settings, although these were the only ones recounted in the complaint and I will not speculate further about any such pattern. [REDACTED] and [REDACTED] were both taken aback by these comments and had fresh recollections of them even some time later. While there is nothing really to excuse these comments, which I would describe as offensive, in addition to xenophobic. their impact would be mitigated somewhat by the fact that they were confined to a small group and, in the case of the remark concerning Hispanics, in her home. I ultimately leave to the Penn administration the question of how seriously to treat these remarks.

##### **5. . Conversations with law journal editors, unspecified in the complaint**

There is an allegation made here with regard to interactions between Professor Wax and editors of one of the student-edited law journals. The episode is recounted in what is advertised as a verbatim quotation from one of the editors of that journal during the time period mentioned. I was not able to verify this statement with anyone with whom I spoke. Nor in speaking with others who worked on this journal during the time period mentioned did I come away with any information that would suggest anything inappropriate on Prof. Wax's part in her work as an author with the journal editors.

There is mention in the complaint of various threats to editors but, again, I was not able to verify any such threats in my conversations with individuals who came forward or to whom I reached out with a request to speak about this episode.

6. **Impact of Professor Wax’s statements on students’ post-graduate professional opportunities**

This section of the complaint mixes together, and not always in a clear way, various allegations about Professor Wax’s conduct in connection with professional opportunities for students. I say “conduct” because, unlike the other allegations, the focus of some of these episodes concern not specific derogatory comments she made, but actual behavior with respect to students. I will do my best to disentangle these complaints in order to reach conclusions based upon my best assessment of the facts.

The allegation on p.4 describes the dilemma apparently felt by students who had to spend a considerable amount of time in law firm interviews discussing Professor Wax and her views. One alum, [REDACTED] recounted in some detail his experienced with employers who insisted on discussing Prof. Wax. He mentioned that Wax’s name came up in approximately “30-40 of 50 interviews.” And, in 10% of these meetings, Wax was the bulk of what discussed, according to [REDACTED]. In one interview with a Philadelphia-based employer, [REDACTED] said that the managing partner went on a tirade about Wax and the unfair treatment she had been suffering. “I don’t think you measure up,” [REDACTED] recalled this partner as commenting, and “we will consider you only if you submit your high school and college transcripts.”

I credit only to a limited extent the alum's description of his experience. Frankly, I find the thirty to forty figure not credible. In any event, I cannot tie in any responsible ways this student's experience to Prof. Wax's comments or other behavior. She is not responsible for the obsession employers or others outside of the Penn Law community may have with her and her reputation for controversial comments. Presumably, some employers decry her views while others (as ) notes) embrace them. This harm to students' professional prospects, if any, is simply too indirect and remote to be a basis for concluding that her specific remarks were disparaging and therefore caused students' harm.

A second, and to me more concerning, allegation, is that Prof. Wax has behaved in ways that have interfered with students' professional opportunities. While it is not entirely clear what this entails from the complainants' perspective, it would seem that the allegation is that she treats students of color worse than majority race students. I did my best to explore this part of the complaint, given how serious an allegation it is. I came away with little evidence to support the allegation.

Prof. Wax has frequently served on the Law School's clerkship committee. In this role, she has presumably helped assist Penn Law students with preparing themselves to apply for judicial clerkships and assisting students with securing clerkships. The dean appoints faculty members to this committee and I have to believe that Penn Law deans therefore believe that Prof. Wax is a constructive member of this committee. No one came forward with any allegations that she was damaging to students' clerkship prospects; no one alleged that she was not a good, fair advocate

for all law students, including students of color; and no one presented any statement or behavior that suggested bad behavior by her in the clerkship process. One story relayed in the complaint, but not verified satisfactorily to me, is that she declined to meet with a minority student to discuss clerkships. An alumnus volunteered to me that Prof. Wax was generally reluctant to meet in person with *any* students about clerkship applications but, for whatever reason, preferred to handle these contacts by other means, such as email. In sum, I found no credible evidence that Professor Wax treated students differently in the clerkship (or in any other professional employment context) based upon their backgrounds, racial or otherwise. Nor did I learn anything to suggest that she behaved in her role on the clerkship committee in any way other than professionally and ably.

#### **7. Threatening email to students**

The last allegation made in this complaint was that Prof. Wax was frequently targeting students of color and students who did share her political beliefs, witness an intimidating email sent on October 7, 2020. This email was sent to a group of students who had held leadership positions in the Penn Law chapter of the National Lawyers Guild. Talking to two of the students who had received this email, [REDACTED] and [REDACTED], both from the class of 2021, it was clear that the email was exactly as rendered in the complaint and, further, was sent to these and other students who had nothing to do with the episode that incurred the ire of Professor Wax. Why she sent this note to these students in particular was unclear from my interviews with [REDACTED] and [REDACTED]. I cannot verify the complainants' account that this email was sent to students or color and/or children of immigrants for any particular reason; indeed, I could not verify the identify of the rest of the students, nor their backgrounds.

In all, this exchange reflects what would seem to be a misunderstanding about what exactly had happened with respect to the taping of this class. The two alums I spoke to were adamant that they had no particular role in taping the class and that they had no intention to distribute the tape of the class to anyone. To be sure, the student recipients of this email could well fear that there would be retribution if the tape were so distributed, but there was no further action beyond the blunt email; moreover, Dean Ruger responded promptly to the students that Prof. Wax's email was "inappropriate and inaccurate" and said that he communicated that same message to Prof. Wax. I did not see anything there beyond an unfortunate email exchange.<sup>11</sup>

## VII. Conclusions

Keeping in mind my limited role in assembling this factual report, I offer these conclusions for whatever they are worth to administrative decisionmakers at Penn in evaluating this complaint:

First, as to process, this investigation mainly involved gathering information from named individuals, principally in the form of oral recollections, and assessing the credibility of individuals who came forward to share their stories. No one was under oath and the only

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<sup>11</sup> One current Penn law student who I spoke to, but wished to remain anonymous, volunteered to me his view that Prof. Wax could reasonably be concerned about the possible misuse of this class tape. He said that the NLG student group had a reputation for reviewing the video of the "Conservative Legal Thought" class in order to determine who was in the class. This student, who was a student in this course during the term in question, said that NLG members would doxx these students, or at least communicate within the community their identify in order to cause them trouble. I could not verify this story, and did not pursue it further. I just note it here by way of some context in understanding why Prof. Wax might have gone to the bother of sending these students an email of this sort.

questioning was done by me. And of course this was a self-selected group, consisting of the named complainants and also individuals who volunteered to furnish information that they presumably viewed as supportive of the allegations raised in the complaint.<sup>12</sup> I did my best to assess credibility by focusing on the specifics of the alum's recollections, probing these statements and stories, noting discrepancies so that the affiants (which I am using here in the loose sense) would have an opportunity to clarify or correct, and examining these recollections in light of others who might have been witness to the statements made. Where I have put statements in quotation marks, I conclude that these statements were credible and were based in fact.

Second, and relatedly, this investigation was seriously hobbled by Prof. Wax's decision to decline to respond to any of the allegations, despite given the opportunity to do so. Without hearing her side of the story, I could rely only on the statements recounted by the student and my common sense and experience in assessing credibility. If this complaint proceeds further in any form or fashion, I strongly urge the university to make every appropriate effort to encourage Prof. Wax to participate and to contribute her perspectives and insights. A decisionmaker in possession of a more complete record will necessarily have a greater ability than did I to offer a fuller account.

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<sup>12</sup> That said, a handful of alums, having learned about this complaint somewhere, did reach out *sua sponte* to me to express their support for Prof. Wax and their belief that she was being unjustly accused of bad behavior.

Third, it was clear to me that a number of individuals, and especially alums of color, felt that they were harmed by Prof. Wax's derogatory remarks. And yet the question remains: Was the measure and magnitude of this harm inflicted on these individuals by virtue of Prof. Wax's comments meaningful and significant in the way described in the complaint? This is a subjective question in important respects, and on that level impossible to answer with any special expertise on my part, at least under the circumstances of this investigation. However, there is an analogy at the ready in law and that is the reasonable person standard. Even though I have not been asked, nor do I venture, conclusions in this report on whether any university rules have been violated, I will use this reasonable person standard as an analogy to endeavor to reach some conclusions about whether these statements were in fact derogatory and harm-causing:

- a) The comments made publicly in the Loury interview described above could be read by a reasonable person as derogatory and demeaning. The assertion that Black students have performed substantially less well than White students and therefore are less qualified to be law students at Penn Law is a startling statement. But is it necessarily derogatory? From one perspective, its sting to the Black listener may be beside the point. One might say this: There are hard truths in the world, and legal educators are often in the position of revealing these truths, leaving to others to interrogate the statements and perhaps provide context that situates these truths in other circumstances. So, for example, if I say that "Black law graduates perform less well than do White students historically on the bar exam" that is an accurate statement on the evidence, even if a painful one to hear. However, as to the specific statements in the Loury interview, it appears from what Dean Ruger has indicated in a statement shared with the Law School community that Prof. Wax's statement is factually incorrect. Moreover, she would have known that her

statement lacked any factual basis, given that she did not and could not have access to student grade point averages, Black and non-Black, over the period of time which was her focus. So, even if she believed it true, it was made irresponsibly in that she would know that she had insufficient evidence to support it and thereby to make a public statement of this sort. After all, a reasonable person making such a statement could understand how it would be perceived, identically to how a reasonable person would hear such a statement, and that is as derogatory. In other words, the absence of a credible factual basis for making this remark adds merit to the claim that it is a disparaging statement can could be credibly viewed as such. And that the remarks were hurtful and deeply felt is reflected in the large amount of attention and even activism surrounding this episode in the 2017-18 academic year and even beyond;

- b) The comments made in and around the two 2009-10 panels on Professor Wax's book do not rise in my opinion to the level of harmful conduct, as alleged in the complaint. Other than the claims made in the book itself, which several interviewees described as baseless, unwarranted, bigoted, etc., there are no specific remarks that anyone pointed to that support the complainants' argument that she made derogatory statements in and around these panels, statements that caused harm. The comment about "two plants" referenced above is hard to evaluate without any particular context. It could be associated with biological determinism, but I am not ready to draw that connection, especially without seeing anything in Professor Wax's writings and other reported comments that would suggest a belief of hers in racial inferiority of Black Americans or anything similar. I do find troubling the two statements revealed by separate alums and noted above – the

statement about [REDACTED] being admitted to Yale solely because of affirmative action and the email that suggests that racial equality of Black Americans is something that must be earned. I would suggest that a reasonable person would find these statements disparaging and perhaps harmful. However, it is not clear to me whether these statements received a wider airing other than the small circle of individuals who heard the [REDACTED] remark. The same can be said of the Wax email to the group of BLSA members. Note that Prof. Wax intended it for just one individual, someone with whom she was corresponding on matters specific to the arguments in her book. It was then forwarded to others, presumably without her permission. Even concluding, as I do, that the statements in the email are derogatory, I cannot conclude that the statement caused harm, without knowing more about both the surrounding context of that particular conversation and also about how widely known was this unfortunate remark;

- c) Alum interviewees provided to me credible descriptions of myriad comments made by Prof. Wax in classes across a wide expanse of time. If only one or two comments of the sort described had been made, a reasonable observer might chalk this up to moments of insensitivity, redressable perhaps by raising the issue with Prof. Wax and hoping that she would be more careful in the future, or, if she felt the statement was necessary to make a particular pedagogical point, then at least she could become aware of how it was being heard. However, there is here a pattern of comments, revealed by a large number of former students, including a critical mass of alums of color, suggesting that she had an unfortunate habit of making derogatory comments in class. While no alum I spoke with accused her of making statements that would be viewed by a reasonable observer as

blatantly racist; rather, they viewed her comments as containing “coded language” and “dog whistles.” Without any opportunity to hear from Prof. Wax about what she intended with respect to these specific comments and perhaps other comments of this type, I can only reach the conclusion that there were more than a few remarks in class that could fairly be interpreted as derogatory and disparaging. Moreover, more than a few alums expressed their view that these derogatory statements were harmful to them, injuring their self-esteem, raising questions about their qualifications, and causing pain and stress;

- d) As to the comments outside of class involving Hispanics and foreigners, I do credit the statements of [REDACTED] and [REDACTED] that Prof. Wax did make both of these remarks, one at her home and other at the law school. And I would agree that these statements are xenophobic, the second in the strict meaning of that term (“fear or hatred of strangers or foreigners”) and the first in the more colloquial sense. To connect this to the first set of allegations in the complaint, these statements are derogatory and, at least to Latinx individuals and foreign (or those with foreign sounding names), I could well imagine that it would cause harm, as would any comparably insulting remark;

Are there any countervailing considerations? I have not heard any explanation by Prof. Wax, but I suppose she might have said that the statement involving Hispanic residents is her opinion based upon her experience. I suppose I am not alone in being dubious of that explanation, but I will acknowledge that not everyone shares my opinion. Another, and perhaps more plausible, countervailing consideration is that this remark was made in a very limited social setting, with only non-Hispanic students, and so there is no

special reason to believe that this story was widely disseminated and so in ways that would cause pain and harm to Hispanic students and alums who find it objectionable. I express no endorsement of private racist remarks of course, but simply note that the limited ambit of the remark cuts against the larger complaint that this episode reveals derogatory comments that have a palpable harm on affected students in the Penn Law community. This could not be said as easily of the second remark, this made to a group of at least a dozen first-year students, at the law school, and with an edge that certainly suggests an unfavorable view of foreign students, or at least consternation (“finally”) at which she saw as a disproportionately large number of apparently foreign students in her class.

I conclude that Professor Wax has made a number of comments in class and a few outside of class which could reasonably be viewed as derogatory and harmful. It is easier for me to reach the conclusion as to the negative character of the remarks than it is to reach a conclusion about the magnitude of the harm, for the impact of these statements on individuals while they were students will be differently felt. Moreover, some comments from many years ago may erode somewhat over time. Some of the statements are more derogatory than others, and the most heinous of these statements have likely been carried forward from class to class as part of the lore of Prof. Wax and her highly unpopular views on certain subjects. I must leave to others the question of whether and to what extent it makes a difference for the purposes of assessing the merits of this complaint whether some of the harm experienced by students and alums were not experienced in the moment, but rather by those heard about these statements second hand, perhaps in the press or in the blogosphere, and often much later when they were uttered. For what

it is worth, many of my conversations with alumni began with their saying that they were well aware of Professor Wax's reputation before they began at Penn Law. Others in this decisionmaking process will assess whether this indirect harm, assisted by way of a sort of contagion, with Amy Wax stories transmitted across Penn Law community members and across time, is a legitimate basis for redress.

I will also note that it is difficult to disentangle remarks made by Professor Wax in classes and around Penn Law proper and commentary in public sources, including her many books, articles, op-eds, recordings of presentations, etc. Many alums I interviewed brought up her public statements; a few mentioned that much of the harm they experienced came from what they viewed as derogatory statements in these contexts. In particular, the widely disseminated report of her interview with Glenn Loury, a 2017 op-ed she co-authored in a local Philadelphia newspaper (which, too, was aired widely over social and other media), and a 2020 speech she gave on immigration and American culture, were mentioned by alums as troubling and even traumatic. Some said to me that the harm from these statements was compounded by the fact that the administration at Penn Law had not taken concrete steps to deal with what they viewed as inappropriate conduct and speech, despite many years of students agitating for action. While a few of the more recent alums noted and appreciated Dean Ruger's decision to remove Professor Wax from mandatory courses and also to make what they thought were positive statements decrying some of Wax's views, they felt burned by the neglect of Penn Law for years prior. And they also worried that the steps taken in the last three years would not be permanent and so future students would remain at risk, if a new dean took a different stance and if her penchant for derogatory comments persisted.

For the purposes of this complaint, what is salient about Professor Wax’s public commentary, in scholarship, interviews, and elsewhere, is that the many alums with whom I spoke (who insisted that their views were widely shared by many other alums) indicated that she brought her views, and the assumptions and the belief system upon which these views rested, into her teaching and her interactions with students. Some of these views concerned racial equality and the reasons for the discrepancies in performance and achievement by Black students and lawyers. Others concerned perspectives on LGBTQ equality, especially as it pertains to marriage and child-raising, and some were expressions of opinions about immigrants and immigration and the erosion of certain White European cultural values. Few alums I interviewed suggested that she was acting outside of her rights and prerogatives as a teacher-scholar to express these controversial views (although, to be sure, a couple alums were of the opinion that some of these statements met the definition of “hate speech”). The concerns in the complaint and reinforced in interviews were that her statements were disparaging of certain individuals by virtue of their status and such disparagement caused concrete harms.

Ultimately, I found it difficult to separate the consternation with the expressed views themselves and the way these views affected her treatment of students. One alum colorfully described her affect and behavior as essentially “weaponizing” her views and turning them against students of color, foreign students from certain countries, and LGBTQ students. I could not find sufficient evidence to support this strong claim. There was certainly no evidence from these interviews to suggest that she graded minority students differently, denied them access to professional opportunities over which she had some modicum of control, or singled them out for special

ridicule or disparagement. Rather, I came away with the impression that it was the content and shape of her very controversial views on matters of race, culture, remedial justice, and related matters, and her fearlessness in communicating these views as an influential scholar and public intellectual that was deeply troubling to many alums. One vivid comment was related to me by  who said that because of her widely known views about norms prevalent in communities of color, he decided that would simply not engage mentally in her Civil Procedure course. He asked himself “how do you minimize your affliction?,” and his choice was to simply check out. For many of the alums of color with whom I spoke, the harm was, at least in part, in knowing that their teacher and a tenured member of the faculty of the law school they were attending believed what she believed about matters of racial equality, the scope of remedies for racial inequality and subordination, and the rights of LGBTQ individuals in modern American society. Moreover, these beliefs were close to the surface, in her public statements and writings, in interviews, and occasionally in class. The emphasis of these comments was on the experience, which several described as traumatic and others described as irritating, of being a student in close proximity to a faculty member who they were confident had negative priors about them as students, believing them to be less academically capable and, as members of a racial class of African Americans and Latinx individuals, of a group who had certain cultural deficits of which she has written and spoken about frequently. Without question, Professor Wax’s views on these and related subjects were hard to hear. And for some struggling to find their place in an elite, majority White institution, the frequent expression of these views in many fora was positively harmful.

A few alums stressed to me that this harm has persisted well beyond graduation. An alum from the class of '12 ██████████ said “it is so many years later, and she still f\*\*ks with my head.” Another, ██████████ said that the harm could best be described as “a low-level ambient stress over long periods of time” and is damaging “not just from a lawyer’s perspective, but a public health perspective.” This is just to suggest that some alums felt strongly that Professor Wax’s statements inflicted continuing harm, this due in no small measure to, as I interpreted these recollections, the fact that some of these expressions are reiterated, if not repeated exactly, as Professor Wax continues her work as a law professor and public intellectual with a high public profile.

Let me conclude this report with some final observations on harm and harm causing, hopefully relevant to the reader’s evaluation of the complaint and its merits. At various junctures of this report, I have stressed the point that no alum has offered credible evidence that Prof. Wax has discriminated against certain students, with respect to their identity as students of color, immigrants, or LGBTQ status, or on any other basis. There have been no verifiable allegations of discrimination in grading, nor in her assistance or hindrance to any students in professional opportunities. What needs to be unpacked, therefore, is whether and to what extent students can be said to be harmed as a result of statements, public and private, as such, that is, irrespective of any discriminatory or disparate treatment at the hands of Professor Wax. The matter of harm-causing speech is a very large one, one that has been explored in a rapidly expanding scholarly literature and is appropriate to empirical debate and analysis.<sup>13</sup> I cannot do justice to this subject

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<sup>13</sup> See, e.g., C. Edwin Baker, Harm, Liberty, and Free Speech, 70 S. Cal. L. Rev. 979 (1996); Frederick Schauer, The Phenomenology of Speech and Harm, 103 Ethics 635 (1993).

here certainly. Nonetheless, I will offer these thoughts as an investigator and a long-time academic, for whatever they are worth:

In my opinion, students can experience harm as a result of disparaging statements, especially where those statements go to their abilities and qualifications. The stress of law school impacts first-year students in palpable ways; we can stipulate that these stressors are unusually impactful on students of color who disproportionately question whether they belong and whether they will be able to prosper and to compete with White students who may have had some special advantages. We now know enough to know that the so-called “imposter syndrome” is a real thing,<sup>14</sup> even though we might not know its magnitude and impact in the setting of law school. Disparaging comments about minority student ability can reinforce feelings of inadequacy; and this impact is quite separate from the specific harm caused by manifest discrimination in treatment. On this point, several alums with whom I spoke reported stress and experiencing particular feelings of inadequacy as a result of their professor believing, as these then-students perceived it, them to be less capable of success as Penn law student as a lawyer. Somewhat relatedly, LGBTQ and immigrant alums experienced comments by Professor Wax to the effect that they were less valuable contributors to contemporary American culture and society and, in the case of same-sex couples, less well suited to raising children, as especially demoralizing, this irrespective of any mistreatment or discrimination inside or outside of class.

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<sup>14</sup> There is a wide literature on the subject. See, e.g., Dena M. Brevata, et al, Prevalence, Predictors, and Treatment of Imposter Syndrome: a Systematic Review, 35 J. Gen. Intern Med. 1252 (April 2020). On law specifically, see <https://www.lawyersweekly.com.au/biglaw/29861-understanding-imposter-syndrome-in-law>.

I raise this issue simply to say that there are different forms of harm, and to the extent that the complaint raises harms that emerge from the expressions themselves, apart from any conduct that would be separately problematic (and most assuredly a violation of federal and state law, to say nothing of university policy) if supported here by credible evidence, I can conclude that this harm is something tangible and not merely speculative.

One other point that bears on this complaint: I dug deeply in my investigation into statements allegedly made in Prof. Wax's 1L Civil Procedure course, even though class statements were a relatively small part in the complaint, at least measured by words on the page. I did so not because I was determined to find evidence of misbehavior, but rather for this overriding reason: Derogatory statements in a large class setting carry a special valence because these statements reach the ears of a sizeable group of students, students who are peers and colleagues of those to whom the statements are directed or, more commonly, those who are members of certain groups (by race, sexual orientation, nationality, etc) who are referenced in these comments. To oversimplify a bit, derogatory statements in a class setting can become especially harmful in that they impact both the member of the group who is covered by the remark and also those who are in the group that is not. As Professor Rebecca Tushnet puts it, "[d]isparaging speech is usually harmful because it triggers negative emotions in the audience, causing other people to treat the victim differently."<sup>15</sup> The esteem of a group member is lowered as another is raised, this wholly apart from any intention of the speaker to accomplish such a result. For this reason, publicly

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<sup>15</sup> See Rebecca Tushnet, More than a Feeling: Emotion and the First Amendment, 127 Harv. L. Rev. 2392, 2392 (2014).

derogatory statements, I would humbly suggest, risk damage that is distinct from privately derogatory statements, because of the impact of all members of the community who are in earshot or eyesight of the remarks. That is why I was especially dogged in learning about classroom statements.

My remit has been to examine the allegations in the April complaint as presented and to determine whether there are any facts which support these allegations. I have indicated in this report where I think there are such facts and where factual support remains lacking. It is the challenge for those evaluating this complaint to determine whether it has merit under relevant Penn rules to determine whether such behavior, documented to the best of my ability in this report, and subject to the limitations herein described, deserves more scrutiny and warrants any sanctions.